Constituent Power: A Genealogy

Adam Lindsay

Thesis submitted to the University of Nottingham
for the degree of Doctor of Philosophy

May 2017

Abstract

That 'the people' is a representative claim is accepted by many democratic theorists. Many of these same theorists take constituent power to be the capacity of the rightful bearers of this title to express this claim and found a constitution. Accordingly, constituent power is understood as the 'other' of constituted power, a radical and self-legitimating collective will that is outside or beyond the law. Some suggest that this relationship is 'paradoxical', and so the appropriate task of constitutional theory is to conceive the appropriate democratic relation between the voluntarist constituent power and the constitutional form that it inaugurates. Though this has become a pivotal instrument for political and legal theorists engaging with constitutionalism, constituent power is cast too constrictively.

I argue that constituent power is not a capacity but is itself a political claim. Understood as a political claim, the concept of constituent power can be arranged in various ways. I will show how constituent power as claim within an argument can, by leaning upon a conceptual framework that draws upon the philosophical truth-function of origins and biblical Genesis, shore up, undercut or bracket out appeals to political power and authority. In addition, I show how, when conceptualised in a variety of ways, arguments employing constituent power assist in limiting and defining the identity of political collectives, and legitimising the sorts of political action in which they might engage, deepening the understanding of the normative commitments involved in what it means to invoke the name of 'the people'.

To show this, I adopt a genealogical perspective, while drawing insights from Michael Freeden's approach of conceptual morphology. In doing so, I place emphasis

upon *particular* articulations over a *general* theory of the constituent power. By asking not what constituent power 'is', but what it 'does', I consider how various formulations of constituent power assist in organising political life through the relation between collective subjects, political origins and the symbolic order of law. This entails tracking various articulations of constituent power within arguments on authority during the English Civil War, and especially in the work of Thomas Hobbes, various practices of constitution-writing in America and France, through to its voluntarist reading in the work of Carl Schmitt, and the way in which this has been received by Antonio Negri. Far from the contemporary understanding of constituent power as a radically democratic concept, I argue that constituent power has an ambiguous history, enmeshed with political absolutism and imperialist European constitutionalism. In the final chapter, I step back from examining individual articulations of constituent power, and I examine Hannah Arendt's contribution to the politics of founding. Arendt understood constituent power as a 'stock phrase' that serves as shorthand in political thinking, one that conceptualises founding within the strictures of European sovereignty. This illuminates further how constituent power works as a political claim, though one that also patterns our unconsciously political thinking, and organises our political practices within certain parameters.

* * *

Acknowledgements

Creations are invariably joint enterprises. Part of this thesis intends to examine how we make sense of these joint enterprises by attributing to them names that control their effects and meaning. The proper name of an author is another of these tropes. Yet this thesis is the work of the many who have contributed, and to whom I am greatly indebted. I cannot adequately repay that debt; I can only address it through some wholly inadequate words to those that have supported, inspired, and criticised the ideas that follow.

Foremost, I must thank my supervisors, Ben Holland and Mark Wenman, who made the process intellectually fulfilling and (usually) enjoyable. Mark demonstrated support and encouragement throughout, and, agonistic in spirit, carefully challenged my writing, while welcoming challenges to his own. Ben took over primary supervision for the final year, and provided immeasurable support getting the work over the line. From the first supervision to the final draft he has been patient supervisor, and a detailed and thoughtful reader. There is more history in this thesis than I had originally intended; I owe that to Ben's insights, recommendations, and perseverance as I wrestled with the language of Hobbes and Sieyès. His hesitancy over 'pretentious' or 'clever' language constantly encouraged me to question the significance of what I wrote. Most of that language has since been ~~excribed~~ written out, and the thesis is better for it.

Thanks should, of course, be extended to the Economic and Social Research Council for believing it was within their remit to fund a proposal that originally began 'In a short paper by Jacques Derrida…', and to everyone within the School of

Politics and International Relations, for providing a friendly yet intellectually challenging environment to learn, research and teach. Particular thanks to Michael Freeden, Lucy Sargisson and David Stevens, each of whom were generous with their time and comments in annual reviews. Michael's suggestion, at the start of the undertaking, to read chapter three of his recently published book helped crystallise what were some of the some of the more inchoate ideas at the time. Lucy's encouragement as an undergraduate convinced me to pursue political theory as a vocation, whilst her comment after my final annual review were the perfect reassurance at the pivotal point in the process. I wish her the best in retirement. I would also like to thank Samantha Ashenden, who took the time to comment with care on a Master's thesis that explored some of these early ideas, and for her guidance with my original proposal.

I do not forget the administrative staff, without whom a school cannot run as effectively. Especially, to Gail Evans, Carole Yates, Veronica Blake, Sarah Matthews and Alice Lill. Thanks also to the friends and colleagues who read, listened, discussed, challenged and humoured the ideas I've had: Ibi Ahmed, Yared Akarapattananukul, Filippo Boni, Tony Burns, Jing Cheng, Steven Fielding, Annabelle de Heus, Jamie Jordan, Gulshan Khan, Hemi Mistry, Hamish Reid, Frances Ryan, Dishil Shrimankar, Marie Staniforth, Dominic Steinmeir, and Fanni Toth. Many others have helped in less tangible ways.

Personal thanks go to my family, who have put up with the excuse 'sorry, I'm writing' for long enough. Particularly to my dad, Stephen Lindsay, who has supported my pursuit of a PhD in every way he could from the beginning. Finally, to Lianne, who has endured me, and this thesis, more than anyone else. This thesis is dedicated to the memory of my grandfather and earliest intellectual inspiration, Robert Holmes, who passed away on 16th January 2017.

* * *

Contents

Abstract 3
Acknowledgements 5

Introduction 9
The Paradox of Constitutionalism 17
A Genealogy of Constituent Power 25
Thesis Outline 32
1: "Pretenders of a Vile and Unmanly Disposition":
An Emergence of Constituent Power 35
i: "*Constituens major est constituto*": On Johannes Althusius 38
ii: Authorship in the English Civil War 50
iii: On the Fountain-Power of the Constituents 55
iv: Thomas Hobbes and the Institution of the Commonwealth 61
Conclusion 74
2: "They are the Sign – the People are the Thing Signified":
An Anglo-American Constituent Power 77
i: Constituent Power after the Glorious Revolution 81
ii: Colonial America 87
iii: E Pluribus Unum 97
i: 'We, The States': An Anti-Federalist Constituent Power 99
ii: 'We, The People': The Federalist Papers 104
Conclusion 112
3: "Its Will is Always Legal, it is the Law Itself":
Sieyès, the Nation and the Constituent Power 115
i: Political Representation of the Ancien Régime 119
ii: The Nation, Sovereignty and the Constituent Power 124
iii: Representing the Nation 132
iv: The Constituent Power Reconsidered 142
Conclusion 148

4: Carl Schmitt: Constituent Power's Ghostly Existence 151
i: Constituent Power in German Constitutional Theory 155
ii: A Genealogy of Dictatorship 158
iii: The Constitutional Theory of Constituent Power 167
i: From Sieyès to Schmitt, via Spinoza 170
ii: Constituent Power and Reflexive Political Unity 175
iv: The Katechon: The Political Theology of Constituent Power 181
Conclusion 191
5: In Search of Divine Violence:
Potentiality of Constituent Power in 'Laboratory Italy' 194
i: The Crisis of Constituent Power 196
ii: Constituent Power as Political Ontology 202
iii: Constituent Power, Temporality and Living Labour 212
iv: Destituent Power: An Investigation Suspended 218
Conclusion 229
6: Arendt's Riddle of Foundation, or:
"How to restart time within an inexorable time continuum" 234
i: Arendt's Critique of Constituent Power 238
ii: The Problem of the Absolute 248
iii: Of Relative Absolutes 255
iv: Beyond the Paradox of Constitutionalism 261
Conclusion 273
Conclusion 276
Constituent Imagination 278
Constituent Sovereignty 285

Bibliography 291

Introduction

'If one were to see how these things develop naturally from the beginning [archē], one would, in this case as in others, get the best view of them.'

- Aristotle [1]

'It is so difficult to find the beginning. Or, better: it is difficult to begin at the beginning. And not try to go further back.'

- Ludwig Wittgenstein [2]

'Such "origins" never stop repeating themselves'

- Jacques Rancière [3]

Beginnings are notorious things. They are important not only because they refer to a hallowed past,[4] but because they serve as anchor points for the meaning of our political vocabulary and, often, the organisation of political authority.[5] Jacques Derrida recognises this relation between origins and authority in his analysis of the archive which, in recalling the Greek *archē*, gestures toward *commencement* and *commandment*.[6] Not only does *archē* contain a dual meaning of origin and law, but the archive tells the story of the origin *of* law. In Ancient Greece, the *arkheion* served

[1] Aristotle, *The Politics*, trans. C. D. C Reeves (Indianapolis, IN: Hackett, 1998), 1252a.24-25. Citations of Aristotle employ the standard Bekker pagination throughout.

[2] Ludwig Wittgenstein, *On Certainty*, ed. G. E. M. Anscombe and G. H. Wright (Oxford: Blackwell, 1969), §471.

[3] Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis, MN: University of Minnesota Press, 1999), 50.

[4] See, for example, Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge: Cambridge University Press, 2003), 1-7.

[5] For Alexander Kojève, origins serve to produce a particular mode of authority, namely the 'authority of the Father'. Alexandre Kojève, *The Notion of Authority (A Brief Presentation)*, trans. Hager Weslati (London: Verso, 2014), 26.

[6] Jacques Derrida, *Archive Fever: A Freudian Impression*, trans. Eric Prenowitz (Chicago: Chicago University Press, 1996), 1.

as the address of the highest magistrates who, in accordance with their publicly recognised authority, stored the official documents of the city. These magistrates, the *archons,* were not only the guardians of the documents but were also accorded hermeneutic competences over their meaning. The particular form of authority possessed by the *archons* was twofold: in holding authority both externally over the political community (in the upholding of law) and internally over public interpretation of the archive (in what should be read, how and by whom), the establishment of the archive was 'at one and the same time, the establishment of state power and authority'.[7]

Derrida's depiction of the archive attests to the political significance of a community's relation to its origins. As Michael Freeden has argued, origins connote a particularly superhuman activity of boundary setting in the commencement of political time itself.[8] Recourse to temporal finality—covering not only termination, but also initiation—offers up a distinctive means of controlling trajectories of political life by conceptualising the delimitation of thought-practices within finite parameters through its unprecedented 'trumping capability'.[9] When thinking politically, beginnings serve as axioms that require no prior justification, for in appropriating the *logos* of God, they are 'the political act of constitution-making *par excellence'.* Put otherwise, through the employment of origins as argumentative tools within political discourse one invokes a persuasive device that cannot be overruled, or, at very least, it is highly difficult to do so, for it relies upon the assumption that no antecedent speech-act is possible.[10] Freeden's point is less one of the temporal sequencing of origin claims, and more readily one about the imitation and capturing of a metaphysical political time of divinity that serves as a regulative element within political thought through the expression of what he refers to as 'the *ex nihilo* role of the Political'.[11] Such an appeal within political discourse to the metaphysical impulse of origins is an *arrogative* strategy insofar as it claims that divine authority unduly,

[7] Carolyn Steedman, *Dust* (Manchester: Manchester University Press, 2001), 1.

[8] Michael Freeden, *The Political Theory of Political Thinking: The Anatomy of a Practice* (Oxford: Oxford University Press, 2013), 94.

[9] Ibid., 95.

[10] Ibid., 96.

[11] Ibid., 96-97.

though this strategy is nevertheless one required in order to contain argument, curtail inconclusiveness, and make collective life possible.[12]

Freeden's insight regarding the arrogative use of origins within political thinking serves as the point of departure for reading the genealogy of constituent power, for within constitutional thought the constituent power is the political actor who bears the capacity to found the constitutional order, and, in doing so, possesses higher authority over it. I write this genealogy with an eye toward a particular approach to constitutional theorising. Though constituent power has become a pivotal instrument within the toolkit of political and legal theorists engaged in constitutionalism, the concept has been cast too constrictively, associated with accounts of voluntarism and 'the Political'.[13] Though this theoretical lens is capable of motivating critical enquiry into the constitutional structures and democratic participation, it does so from a vantage point that neglects the plurality of ways in which constituent power can and has been expressed in order to shore up, undercut or bracket out claims to political authority. The core contention advanced in this thesis is that constituent power is not a 'capacity', or physical power to found a constitution, but a political claim. As a claim, constituent power is a tool within arguments through which the user intends to secure authority, one that might be put to work for ends other than constitution-writing. When understood as a claim,

[12] The connection between identity and boundary-setting is well established, though it is more commonly related to *spatial* boundaries. See Chris Rumford, "Theorizing Boarder," *European Journal of Social Theory* 9, no. 2 (2006). In contemporary democratic theory, see especially the boundary problem. Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Borders," *Political Theory* 36, no. 1 (2008); Arash Abizadeh, "The Demos and its Kin: Nationalism, Democracy and the Boundary Problem," *American Political Science Review* 106, no. 4 (2012); Sofia Näsström, "What Globalization Overshadows," *Political Theory* 31, no. 6 (2003); Bernard Yack, "Popular Sovereignty and Nationalism," *Political Theory* 29, no. 4 (2001).

[13] An exemplary, though not exhaustive, list of those theorising constituent power in this manner include Andrew Arato, *Post-Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016); Joel I. Colón-Ríos, *Weak Constitutionalism: Constituent Power and the Question of Democratic Legitimacy* (New York: Routledge, 2012); Jason Frank, *Constituent Moments: Enacting the People in Post-Revolutionary America* (Durham, NC: Duke University Press, 2010); Andreas Kalyvas, "Constituent Power," *Political Concepts: A Critical Lexicon* 3, no. 1 (2013); Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007); James Muldoon, "Arendt's Revolutionary Constitutionalism: Between Constituent Power and Constitutional Form," *Constellations* 23, no. 4 (2016); Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, ed. Maurizia Boscaglia (Minneapolis, MN: University of Minnesota Press, 1999); Illan rua Wall, *Constituent Power and Human Rights: Without Model or Warrant* (London: Routledge, 2012); Mark Wenman, *Agonistic Democracy: Constituent Power in the Era of Globalisation* (Cambridge: Cambridge University Press, 2013).

constituent power serves as a fulcrum that fleshes out the various normative commitments attached to collective identities, such as 'the people'. Claims to constituent power, I will argue, substantiate a normative imaginary that defines who possesses authority, the sorts of political action that are legitimised by that authority, as well as the ends to which those actions should be directed.

My approach is captured by Freeden's phrase 'the political theory of political thinking'.[14] Our contemporary political vocabulary from sovereignty to nationhood and peoplehood contain strong 'fictional' components that assist in streamlining political thinking and imagining political communities.[15] Within democratic thinking this often takes the form of what Kevin Olson calls 'folk foundationalism', a misplaced assumption that at the very bottom of politics is an entrenched, independent, self-legitimating community that can stake a political claim unambiguously.[16] Voluntarist accounts of constituent power are a variation on this 'folk foundationalist' imaginary. Though imaginaries do not 'exist' materially, they form the basis of collective worlds through practices of representation.[17] My principal aim within this thesis is not to reveal the fiction in order to dispel the myth, but to shed light upon how these fictions are constructed, operate and captivate subjects. Constituent power serves as one tool among many that contribute to the rich, layered thought-practices that comprise and pattern this sort of political thinking. My contention is that close analysis of this single tool may shed some vital light upon the way in which the variety of its uses within political and constitutional discourse is capable of controlling trajectories of political life, organising the self-understanding of collective subjecthood, and shaping political agency. One important example of these shifting claims is encapsulated in a subtle redescription of constituent power, where it is modified to diminish its use as a status ascribed to a particular individual

[14] Freeden, *Political Theory of Political Thinking*, 2.

[15] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1983); Margaret Canovan, *The People* (Cambridge: Polity, 2005), 6-9; Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (London: Norton, 1989); Peter Gratton, *The State of Sovereignty: Lessons from the Political Fictions of Modernity* (Albany, NY: SUNY Press, 2012).

[16] Kevin Olson, *Imagined Sovereignties: The Power of the People and Other Myths of the Modern Age* (Cambridge: Cambridge University Press, 2016), 7.

[17] See especially Cornelius Castoriadis, *The Imaginary Institution of Society*, trans. Kathleen Blamey (Cambridge: Polity, 1987), 127.

or group—in the sense that the Nation *is* the constituent power—in favour of accounting for it as a capacity of that group—the Nation *has* constituent power—producing important changes to how the concept operates.[18] In order to capture the variety of these movements, a wide-angle lens is required. By examining the history of the concept genealogically, I place emphasis upon *particular* articulations over a *general* theory of constituent power that captures how these claims assist in organising political life in specific ways.

Such an approach is necessary for the history of constituent power is often written as a relatively unchanging revolutionary counter-tradition of modernity. Those who write these histories do so by leaning upon the same technique of arrogation in order to cleanse the concept of its reactionary elements, and to advance a particular normative agenda. 'The constituent power', Andreas Kalyvas tells us, 'is the truth of modern democracy'. It is so because 'the birth of the modern doctrine of popular sovereignty coincides with the conceptual advent of constituent power'.[19] That constituent power is the *truth* of democracy is not only because it resides at the origin of the modern political community—insofar as it is the power that establishes any particular democratic community—but because democracy is found at the conceptual origin of constituent power.[20]

What is interesting about Kalyvas's depiction is not the affirmation that constituent power is the power that creates the constitution, but rather the

[18] This may lead to ambiguity when discussing the concept, and so when referring to it generically, I use the term 'constituent power' without the definite article. Only when discussing particular articulations where the definite article is necessary will I employ it. Though not wholly adequate, this choice is primarily taken due to the prevalence of 'constituent power' over 'the constituent power' within the contemporary literature, though additionally I choose to do so because the depiction of constituent power as a status is occasionally accompanied by the indefinite rather than definite article, 'a constituent power'. When discussing constituent power generically, I do not intend to present it as a capacity, nor should it be read in this way.

[19] Kalyvas, "Constituent Power," 1.

[20] Similar, though less epistemologically intense, sentiments are expressed by Ernst-Wolfgang Böckenförde, Antonio Negri, and Markus Patberg. Böckenförde, for example, argues that 'in is origin and content, the concept of the constituent power is a democratic and revolutionary one that has a place only within the context of a *democratic* constitutional theory'. Ernst-Wolfgang Böckenförde, "The Constituent Power of the People: A Liminal Concept of Constitutional Law [1986]," in *Constitutional and Political Theory*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2017), 171. Patberg forecloses constituent power as an 'inclusive founding process among free and equals', for 'its origin in the revolutionary tradition' assures that it is 'by definition a democratic notion'. See Markus Patberg, "Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment," *Constellations* (2016, EarlyView). See also Negri, *Insurgencies*, 1.

implication that its historically first articulation was a democratic one should have metaphysical priority over the meaning of the concept. The disposition that truth inhabits the origin is a common one, though it also engenders a philosophy of history that only gets off the ground by employing the strategy of arrogation, and in doing so establishing an ontological privilege of the concept's first instance. It is this that allows Kalyvas to associate constituent power with a certain mode of democratic agency, and claim that the truth of constituent power is 'misappropriated, domesticated, neutralised, or belittled' when absorbed into the antidemocratic constituted order.[21]

Kalyvas has fleshed out the content of this ontologically privileged first-instance by locating the origin of the concept in George Lawson's distinction between *majestas realis* and *majestas personalis,* according to which real sovereignty, possessed by the community, is superior to the personal sovereignty of the constituted monarch.[22] To my knowledge, this argument was first presented by Julian Franklin, who suggested that Lawson's distinction, analogous to that of 'constituent' and 'ordinary' power, was introduced as a general challenge to the royalist opposition.[23] Pasquale Pasquino has since argued the distinction was introduced as a more precise challenge to Hobbesian absolute sovereignty. Though this is conceptually proximate to Sieyès' distinction between constituent and constituted powers, he qualifies that he does not believe Lawson could have directly inspired later theorists of constituent power.[24] These threads crystallise in Kalyvas's argument, stretched in order to leverage it against the conventional understanding of sovereignty in democratic thought. He argues that that constituent power represents 'an alternative definition'

[21] Kalyvas, "Constituent Power," 10.

[22] George Lawson, *Politica Sacra et Civilis, or, A Model of Civil and Ecclesiastical Government*, ed. Condren Condren (Cambridge: Cambridge University Press, 1992), esp. 57-76.

[23] Julian F. Franklin, *John Locke and the Theory of Sovereignty* (Cambridge: Cambridge University Press, 1978), 64-69. Those that have since adopted this origin story include, Andreas Kalyvas, "Popular Sovereignty, Democracy and the Constituent Power," *Constellations* 12, no. 2 (2005); Colón-Ríos, *Weak Constitutionalism*, 80-84; Richard S. Kay, "Constituent Authority," *American Journal of Comparative Law* 59(2011): 717; Martin Loughlin, "Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 40-41.

[24] Pasquale Pasquino, "The Constitutional Republicanism of Emmanuel Sieyès," in *The Invention of the Modern Republic*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1994), 112-13.

of political power, significantly different from the paradigm of sovereignty-as-command.[25] Lawson's argument is put to work in order to structure a conceptual bifurcation of political power—command versus constituent—from which follows a series of nested oppositions between closure and openness, repression and productivity, and ordinary and extraordinary modes of acting, which 'free [constituent power] from the flaws and excesses of the other'.[26] By bracketing out the ostensibly negative aspects of political power, Kalyvas presents a normatively one-sided image of constituent power held in place through recourse to a historical narrative in which George Lawson's opposition to Hobbes opens a new trajectory of political action which runs parallel to sovereignty-as-command through the history of modern Western thought.

My intention in this thesis is not to engage substantially with the claim that Lawson 'invented' constituent power. Rather, in reading Kalyvas's history of constituent power in this way, I am attempting to put pressure upon a particular philosophy of history that leans upon what Friedrich Nietzsche called a 'metaphysical aftershoot…that makes us believe that what stands at the beginning of all things is also what is most valuable and essential'.[27] There are strong and weak formulations of this principle. The epistemologically intense formulation supposes that there is a point in time where the 'origin', complete with an 'inviolable identity', can be discovered.[28] The archival fever with which one pursues such a moment presumes that, beneath the sediment of misappropriation and disfiguration, an archaeological investigation will reveal 'the origin [that] speaks by itself. The *arkhē* [that] appears in the nude'.[29] In witnessing this 'bare *arkhē',* one is able to write off with 'confidence' those deviations in meaning that do not measure up to the expression of the concept in its first instance. The epistemologically weaker version utilises the origin only as discursive strategy in the knowledge that origin stories

[25] Kalyvas, "Popular Sovereignty," 225.
[26] Ibid.
[27] Friedrich Nietzsche, *Human, All Too Human: A Book for Free Spirits*, ed. Richard Schacht, trans. R. J. Hollingdale (Cambridge: Cambridge University Press, 1986), 302.
[28] Michel Foucault, "Nietzsche, Genealogy, History," in *The Foucault Reader*, ed. Paul Rabinow (London: Penguin, 1986), 79.
[29] Derrida, *Archive Fever*, 92.

possess the conceptual weight of a bare *archē*. This exploitation cements the relationship between a word and concept by employing a privileged origin as a means of 'decontesting' the meaning of that political concept by ruling out alternatives and capturing it for a particular political programme.[30] Whether Kalyvas is engaged in the former or the latter of these enterprises is not, ultimately, significant for they each produce equivalent effects. The historical narrative naturalises the understanding of constituent power within certain parameters, namely as a form of concrete political action that is antithetical not only to sovereignty-as-command, by also to the symbolic order of law, insofar as it is a norm-creating power to establish a new constitutional form.

Among post-structuralist inspired radical- and agonistic-democrats, a common-sense has built up around this account of constituent power as a dynamic, open-ended power that manifests either in the potential of a decentralised multitude, or a mode of insurgent citizenship.[31] Accordingly, constituent power has come to fill the space of what Sheldon Wolin described as a 'fugitive' mode of democracy that is not institutionalised, but is exemplified by the moment where 'the political is remembered and recreated'.[32] The critical purchase of the concept during recent years is as a means of addressing issues of the political failures of democratic government and the widening gap between citizens and political institutions.[33] In this

[30] On the idea of 'decontestation', see Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Clarendon, 1996), 75-77.

[31] As the potentiality of a multitude, see, for example, George Cicceriello-Maher, "Constituent Moments, Constitutional Processes: Social Movements and the New Latin American Left," *Latin American Perspectives* 40, no. 3 (2013); Filippo del Lucchese, "Spinoza and Constituent Power," *Contemporary Political Theory* 15, no. 2 (2016); Filippo del Lucchese, "Machiavelli and the Constituent Power: The Revolutionary Foundation of Modern Political Thought," *European Journal of Political Theory* 16, no. 1 (2017); Kalyvas, "Constituent Power."; Negri, *Insurgencies*; Paolo Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*, trans. Isabella Bertoletti, James Casciato, and Andrea Casson (Los Angeles, CA: Semiotext(e), 2004); Wall, *Constituent Power and Human Rights*. On insurgent citizenship, see Emilios Christodoulidis, "Against Substitution: The Constitutional Thinking of Dissensus," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007); Frank, *Constituent Moments*; Kalyvas, "Popular Sovereignty."; Paul Muldoon and Andrew Schaap, "Aboriginal Sovereignty and the Politics of Reconciliation: The Constituent Power of the Aboriginal Embassy in Australia," *Environment and Planning D: Society and Space* 30, no. 3 (2012); Mikael Spång, *Constituent Power and Constitutional Order: Above, Within and Beside the Constitution* (Basingstoke: Palgrave Macmillan, 2014); Wenman, *Agonistic Democracy*.

[32] Sheldon Wolin, "Fugitive Democracy," *Constellations* 1, no. 1 (1994): 23.

[33] Within the study of the European Union, this gap takes the form of the notorious 'democratic deficit', to which constituent power has proved a responsive tool. See Jürgen Habermas,

light, it is unsurprising the concept has become a useful one among constitutional theorists who, though wishing to temper the radical democratic accounts of the constituent power, endeavour to conceptualise the appropriate relationship between citizens and the institutional exercise of political power.[34] Many of these theorists, in spite of their important differences with radical- and agonistic-democrats, organise their thinking of constituent power narrowly around the same conceptual schema, according to which constituent power is conceived as an expansive concrete action antithetical to law.[35] This has, for some, implied a tension between the generative and expansive constituent power of the people, and its relation to constitutional form. Examining this allows me to demonstrate the limitations of contemporary theorising of constituent power.

THE PARADOX OF CONSTITUTIONALISM

Modern constitutionalism is often said to be paradoxical.[36] Constitution-making is not exclusively an issue of political organisation, but also a question of the identity 'we' as a people wish to claim as our own and to project outwardly, through the act of constitution-making. Accordingly, democratic constitutionalism is seen to be circular in its foundational moment. Whilst constituent power is posited as the legitimate source of any constitutional order, that extra-constitutional author—the people—gains its identity from the constitutional boundaries that it puts in place through the activity of constitution-making. Though necessarily presupposed as an actor outside of the law, the constituent power only establishes its identity through the constitution itself. This now-famous circularity was recognised by Hans Kelsen in his post-war *General Theory of Law and State,* and subsequently developed in

The Crisis of the European Union: A Response, trans. Ciaran Cronin (Cambridge: Polity, 2012); Markus Patberg, "Supranational Constitutional Politics and the Method of Rational Reconstruction," *Philosophy and Social Criticism* 40, no. 6 (2014); Neil Walker, "Post-Constituent Constitutionalism? The Case of the European Union," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007).

[34] See, for example, the authors within the edited volume Loughlin and Walker, *Paradox of Constitutionalism*; Colón-Ríos, *Weak Constitutionalism*.

[35] Others have explicitly *distanced* their constitutional theories from constituent power precisely due to this 'arbitrary character' of a 'pure politics' that emerges 'where the law ends'. Bruce Ackerman, *We The People, Vol.2: Transformations* (Cambridge, MA: Belknapp Press, 2000), 11.

[36] Loughlin and Walker, *Paradox of Constitutionalism*, 1-4; Arato, *Post-Sovereign Constitution Making*, 1.

distinctive directions by Hannah Arendt and Jacques Derrida.[37] Conceiving of constituent power in this way, however, leads us into a second element of the difficulty, that which Martin Loughlin and Neil Walker call the 'paradox of constitutionalism'. They posit that:

> Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the consent of the people and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms…The power [the people] possess, it would appear, can only be exercised through constitutional forms already established.[38]

The strictly 'paradoxical' condition of this problem is less clear than they perhaps intend, for there should be nothing paradoxical about the exercise of political power through institutional channels. I have sought to develop in these opening pages two particular accounts of theorising constituent power that, when brought together, manifest in this paradox of constitutionalism. On the one hand, the theoretical lens through which constituent power is viewed presents an image of political power that is at once expansive, uncompromising and open-ended; an omnipotent form of concrete action. On the other hand, the problem of retroactive authorisation that undergirds constituent power, if it is to carry the necessary weight of legitimacy, indicates that constituent power can only operate effectively within a political sphere where it can be expressed appropriately by tempering that omnipotent quality. That is, in its strongest formulation the paradox of constituent power evokes a pressing tension between the generative and expansive constituent power of the people, and the necessity for that power to manifest only in limited or partial forms if it is to offer up a viable and legitimate constitutional form. The paradox of constitutionalism, then, appears not at all dissimilar to the distinction in scholastic thought between *potentia dei absoluta et ordinata,* that is, between God's absolute power *in abstracto,* amounting to a description of those possible actions God could have chosen but did

[37] Hans Kelsen, *General Theory of Law & State* (Cambridge, MA: Harvard University Press, 1949), 260-61; Hannah Arendt, *On Revolution* (Harmondsworth: Penguin, 1963), 161-65, 90-94; Jacques Derrida, "Declarations of Independence," *New Political Science* 7, no. 1 (1986).

[38] Loughlin and Walker, *Paradox of Constitutionalism*, 1.

not in fact choose, and those acts actually willed by God that remained in keeping with the preordained orders of nature and grace.[39]

Accordingly, the appropriate response to the problem has been to conceive of how constituent power survives within—or also, as Schmitt points out, alongside—the constitution. Unlike the explanatory distinction between *potentia dei absoluta et ordinata,* which sought to square God's omnipotence with his limited activity in the world, conferring upon constituent power its appropriate constitutional dues has, among its various theorists, entailed the enlargement or restriction of the absolute quality of constituent power. Loughlin and Walker present a typology of four competing formulations through which constituent power can be related to constitutional form.[40]

The first, employed by constitutional theorists from the liberal and contractualist traditions, proposes that the role of constituent power is one that in founding a new constitutional form through an appointed constituent assembly confers legitimacy and authority upon the newly established constitutional regime, at which point it is rendered obsolete, so immediately gives way to the rule of law.[41] Second, the 'co-originality thesis', as exemplified in the work of Jürgen Habermas, posits that democracy and constitutional rights are coeval, and so mutually enabling conditions. That is to say, an act of *democratic* founding necessarily presupposes a commitment among those democratic actors to quasi-transcendental normative

[39] For a brief overview of the scholastic debates around *potentia dei absoluta et ordinata,* see Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (London: Continuum, 2005). On the distinction with specific reference to constituent power in the work of Carl Schmitt, see Mika Ojakangas, "*Potentia Absoluta et Potentia Ordinata Dei:* On the Theological Origins of Carl Schmitt's Theory of Constitution," *Continental Philosophy Review* 45, no. 4 (2012).

[40] Loughlin and Walker, *Paradox of Constitutionalism*, 6-7.

[41] David Dyzenhaus, "The Politics of the Question of Constituent Power," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007); Lior Barshack, "Constituent Power as Body: Outline of a Constitutional Theology," *University of Toronto Law Journal* 56, no. 3 (2006). John Rawls presents a similar model, through which the Supreme Court, as the exemplar of public reason, takes on the functions of constituent power, transforming the paradox of constitutionalism into a less cutting counter-majoritarian difficulty. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 231-340.

standards of equality, inclusiveness and liberality. These principles serve as normative guides that ensure constituent power remains within the law.[42]

The third, the 'radical potential thesis', celebrated by radical democrats like Antonio Negri, defends the complete separation and priority of constituent power over constituted power, and so any effort to stabilise the constitutional order necessarily implies an execrable containment of the creative potential of the multitude.[43] The fourth, labelled the 'irresolutionist' thesis, conceives of constituent power as an irreducible supplement that cannot be subsumed into the constitutional order, though cannot survive outside of it—due to the peculiar retroactive foundation of constituent power. Rather, as demonstrated in the work of agonistic democrats like Jason Frank and Bonnie Honig, constituent power takes the form of an insurgent mode of being-within-and-against the constitutional form, in which constituent power relates to constituted powers through an agonistic, open-ended struggle between politicisation and depoliticisation.[44]

Each perspective conceives of the role played by constituent power in constitutional politics in a crucially different way, yet, despite the sharp political differences, a particular conceptual framework remains in place. Liberal constitutionalists and radical democrats alike appreciate the antagonistic relation between constituent and constituted powers. In each instance, it is accepted that the latter captures and constrains the former in order to preserve or police politics; they

[42] Jürgen Habermas, *Between Facts and Norms*, ed. William Rehg (Cambridge, MA: MIT Press, 1996), 132-68; Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?," *Political Theory* 29, no. 6 (2001). For recent explicit reconstructions of constituent power along Habermasian lines, see Rainer Nickel, "Private and Public Autonomy Revisited: Habermas' Concept of Co-originality in Times of Globalization and the Militant Security State " in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007); Patberg, "Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment."; Christopher F. Zurn, "The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy," *Legal Theory* 16, no. 3 (2010).

[43] See especially Negri, *Insurgencies*.

[44] See Frank, *Constituent Moments*; Bonnie Honig, "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," *American Political Science Review* 85, no. 1 (1991); Bonnie Honig, "Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy"," *Political Theory* 29, no. 6 (2001). Loughlin's recent 'relationalist' perspective resides here, where constituent power circulates in a 'dialectic of right' between the sovereign general will, and the personal, constituted body of sovereignty. Martin Loughlin, "The Concept of Constituent Power," *European Journal of Political Theory* 13, no. 1 (2014): 229. For an incisive critique of this mode of thinking about constituent power—or what he labels constituent power as augmentation—see Wenman, *Agonistic Democracy*.

differ only in their normative disposition toward this containment. To pursue this conceptual framework delimits the understanding of constituent power to a binary interplay between politics and law. Such a conceptual framework hypostasises constituent power, rendering it either as a substantive modality of political action, or as an 'authentic' manifestation of 'the Political', complete with its innovative or unruly characteristics. In each case, constituent power is taken to be an account of the ontological essence of the activity of politics recovered from the depoliticising elements of modernity.[45] Conversely, constituted power is cast as the surety of the symbolic order of law capable of stabilising the political arena by tempering, taming or eliminating constituent power after the founding moment.

This account of constituent power is most apparent in Negri, from whom the 'all-powerful and expansive, unlimited and unfinalized' process of constituent power is to refuse all attempts to be constitutionalised unless it is to be effaced.[46] It is curious, however, that David Dyzenhaus considers constituent power in exactly these same terms, only reversing their normative bearing. For him, the very unruliness associated with constituent power is unable to put forward the requisite 'justified' or rational claims to political authority and so cannot account for the ongoing 'project' of constitutionalism.[47] Though less apparent, Habermas's co-originality thesis remains organised in an equivalent way, for it requires constituent participants to recognise that they are 'in the same boat' as their forebears. This mode of imputation recognises that actors are engaged in the same project throughout history, and so the unbridled voluntarism of constituent power is tempered through a higher-order rational commitment to the rule of law, so whilst appreciating they are capable of acting unconditionally, they are ethically obliged to act within the rule of law.[48]

[45] For Nancy, this is characterised by the 'withdrawal' of the political into the legal. Jean-Luc Nancy, *Being Singular Plural*, trans. Robert D. Richardson and Anne E. O'Byrne (Stanford, CA: Stanford University Press, 2000), 47. See also Philippe Lacoue-Labarthe and Jean-Luc Nancy, *Retreating the Political* (London: Routledge, 1997); Claude Lefort, *Democracy and Political Theory*, trans. D. Macey (Cambridge: Cambridge University Press, 1988); Chantal Mouffe, *The Return of the Political* (London: Verso, 1993).

[46] Negri, *Insurgencies*, 13.

[47] David Dyzenhaus, "Constitutionalism in an Old Key: Legality and Constituent Power," *Global Constitutionalism* 1, no. 2 (2012): 256.

[48] Habermas, "Constitutional Democracy," 775.

Even those who have sought to overcome the paradox of constitutionalism have done so by retaining the same conceptual schema. This is illustrated in Andrew Arato's recent efforts to develop a paradigm of 'post-sovereign' constitution-making. Constituent power is 'de-dramatize[d]' by 'conceive[ing] democratic, legal revision as the model for the very creation of the constitution', though this activity nevertheless organises itself around the familiar temporal clustering of constituted power, stability and continuity in order to temper the unruly constituent power.[49] In effect, whilst withdrawing from the vocabulary of constituent power, Arato employs an entrenched form of Habermasian co-originality through which legally prescribed roundtable constitution-writing guarantees inclusivity and transparency.[50] Stability ensured by legal continuity is necessary so long as the activity of constituent power is perceived through a voluntarist lens.

What I am hoping to draw attention to is the narrow form through which constituent power is understood in current constitutional theory. There are at least four problems that I take to be associated with this lens through which we view constituent power and the paradox of constitutionalism.[51] This lens naturalises constituent power as a capacity, and occludes the variegated understandings of constituent power as a political claim, its varying intensities, and the contextual normative commitments that shed light upon the constitution of political life broadly conceived.

First, constituent power is conceived in a near exclusively voluntarist style. Whilst conceiving of the people as a practical enactment is instructive insofar as it assists in making sense of vernacular appeals to peoplehood, voluntarism pushes this a step further, severing the connection with the reciprocity of those appeals. As White and Ypi note, this 'over-politicises' the question of peoplehood insofar as one 'becomes insensitive to the manner in which claims are advanced in the public

[49] Arato, *Post-Sovereign Constitution Making*, 91.
[50] Ibid., 107-57.
[51] Whether these are the cause or effect of the paradox of constitutionalism is an answer that will become clearer through the argument of the thesis.

sphere'.[52] This point is not just a normatively problematic one, however, but of analytical or explanatory significance. A voluntarist lens seems to conceive of constituent power as a particularly unruly 'force', rather than a reflexive claim that requires acceptance, and so cannot conceive adequately of the *style* of such claim-making. It serves to recognise that there have been departures from this way of theorising though they have turned to the other extreme, through which constituent power serves as a regulative principle of validity or an Archimedean point that allows 'us', as political philosophers, to assess from critical distance the internal function of constitutional decision-making.[53] Accordingly, the people play no role beyond serving as a conceptual reference point for good political judgement. By constructing the people in this fashion the crucial component of identity-formation is either bracketed out, treated as settled or marginalised to the extent that it cannot account for those popular activities that wish to raise those claims again.[54]

Second, the perspective from which the paradox of constitutionalism emerges frames constituent power as a particular form of democratic engagement. Whether expressed as a people, a nation, a multitude, a crowd or a 'demos in the square',[55] the agent who exhibits constituent power is a collective one who, due to their 'authentic', self-legitimating character, may enact constituent power unambiguously. Constituent

[52] Jonathan White and Lea Ypi, "The Politics of Peoplehood," *Political Theory* (2015, OnlineFirst): 9.

[53] See, for example Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2013), 285-92; Mark Tushnet, "Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power," *International Journal of Constitutional Law* 13, no. 3 (2015). Pettit's suggestion that his endorsement of constituent power is a 'surprising point of continuity with Negri and Kalyvas' is misplaced, for though he imports the vocabulary, he employs it exclusively as a regulative principle and not as a voluntarist enactment. Systems theorists consider constituent power similarly. See Christopher Thornhill, "Contemporary Constitutionalism and the Dialectic of Constituent Power," *Global Constitutionalism* 1, no. 3 (2012); Christopher Thornhill, "A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013).

[54] On the insufficiencies of turning to abstract normative standards to deal with the deficiencies of 'contestation-based' accounts of peoplehood, see White and Ypi, "The Politics of Peoplehood," 3-8.

[55] Douzinas's 'demos in the square' seeks to negotiate between the thick statist identity ascribed to the people and the Nation, and the Multitude, which effaces locality and specificity. Douzinas's construction is attentive to the plurality of demands within contemporary political contexts, but also one capable of addressing the particulars generated in local political issues. Whilst his position is both insightful and important, its focus is also upon the agents of constituent power, and not the modality of constituent power, which remains unchanged. Costas Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe* (London: Polity, 2013), 155-75.

power is bracketed to an authentic, and unproblematic voice of a democratic people.[56] Even when constituent power is understood as an activity of equivocal claim-making, as it is in the work of Jason Frank, those claims are enacted by the excluded masses in order to enlarge the constituted name of the people. For Frank, the people is a political claim, constituent power is understood as an authentic democratic capacity of the excluded to present those claims.[57] What is unaddressed is how constituent power is itself a representative claim, with a diverse range of possible formulae, and one that expands the justifications and normative commitments of the political collective to which it is attributed. Part of my argument will be that representation goes deeper that a contestation over claims to peoplehood, but encompasses claims to constituent power. When constituent power is naturalised as it is in the paradox of constitutionalism, theorists lose sight of this.

Third, this reduces the perception of constituent power to a binary dilemma of an open exploration of 'the Political' against a restrictive legal order. Reducing constituent power to an expression of 'the Political' seems particularly unhelpful for its use as an analytic tool, for it flattens out the terrain upon which claims over peoplehood are made. I take note here of Lois McNay's (perhaps overreaching) contention that accounts of the Political are 'socially-weightless mode[s] of thought'. McNay has suggested that this social-weightlessness removes political theorising from 'the actual practices and dynamics of everyday life', mistreating these activities by elevating them to quasi-metaphysical abstractions that are no longer capable of responding to everyday events effectively.[58] More seriously, when limited to this particular lens, the conceptual formation of constituent power lacks the explanatory

[56] I take Hans Lindahl to be an anomaly among theorists of constituent power. Though he understands constituent power is always a representative claim, he takes it to be equivalent in legal phenomenology to 'the people'. Hans Lindahl, "Constituent Power and Reflexive Identity: Toward an Ontology of Collective Selfhood," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 18.

[57] Frank, *Constituent Moments*, 7-9.

[58] Lois McNay, *The Misguided Search For The Political* (Cambridge: Polity, 2014), 4.

power to respond effectively to contemporary political events,[59] an issue addressed when constituent power is understood as a claim to be accepted, and not a capacity.

The fourth is a deeper version of the third problem, insofar as this a lens is non-exhaustive. Whilst contemporary theorists may very well take a position on the paradox of constitutionalism, it is less apparent where the contribution of thinkers such as Hannah Arendt, Carl Schmitt or Emmanuel Sieyès fit within this overarching perspective. They each fit uncomfortably within the four accounts of constituent power presented by Loughlin and Walker. James Muldoon has suggested that an alternative would be to present additional categories, suggesting that Hannah Arendt could be readily incorporated through the establishment of an additional fifth category, the 'co-presence thesis', whereby 'the constituent power of political participation is institutionalized in the form of constituent institutions'.[60] This strategy is particularly problematic because it engages in what Quentin Skinner has called 'the mythology of prolepsis'[61] It imputes the paradox of constitutionalism back into these thinkers as if this was the 'perennial question' of constituent power, though is inattentive to whether conceptual moves were available to thinkers at particular times. Moreover, by working them into this schematic, the alternative visions of politics that are constructed through their claims to constituent power are diminished, transformed, or lost altogether.

A Genealogy of Constituent Power

If this thesis is to address the issues within the currently theoretical framework of constituent power, an alternative bearing is required. When writing of his method, James Tully draws a distinction between 'political' and 'public philosophy'. Whilst the former adopts a perspective that transcends democratic activity, his public philosophy understands the theorist to move within the same relations of normativity and power as the citizen. In affirming this position inhabited by the public

[59] See, for example Michael Hardt and Antonio Negri, "Arabs are Democracy's New Pioneers," *The Guardian*, 24 February 2011. This example is dealt with in greater detail in Chapter 6.

[60] Muldoon, "Arendt's Revolutionary Constitutionalism," 10, fn.3.

[61] Quentin Skinner, "Meaning and Interpretation in the History of Ideas," *History and Theory* 8, no. 1 (1969): 22-30.

philosopher, Tully asserts that one should take an appropriately reflexive perspective upon our engagement in political thought, one that 'begins by questioning whether the inherited language of description and reflection are adequate to the task'.[62] The purpose of public philosophy is to survey the languages and practices of freedom and governance in order to reveal both the limits and the possibilities afforded by our political vocabularies, with an eye toward rethinking our current civic practices. I have sought to demonstrate that the current means of accounting for constituent power is inadequate. In keeping with Tully's approach, this thesis engages in a genealogical method in order to examine how the language of constituent power services political claim-making.

Such a historical investigation of a concept is a productive tool for a critical political philosophy precisely because it 'enables participants to free themselves from the horizons of the practice', and to see their activities as 'one *form* of practice and one *form* of problematisation that can be critically compared with others'.[63] Tully's is a Wittgenstein-inspired point that endeavours to draw attention to the contingent nature of our political language, one that appreciates that language is meaningful only within language-games, and that we need not be held captive by the picture any one of those games provide.[64] This begins from the premise that concepts are made meaningful in their usage through language. It is only in their conventional (and of course, as Skinner has demonstrated, their unconventional) usage by individuals that words retain their meaning or attain fresh ones. If a word is the referent of a concept, the meaning attributed to a word is derived from the cluster within which a concept is situated, those clusters themselves derived from historically transferred traditions of discourse. This encourages a movement beyond the treatment of concepts as 'unit-ideas' that remain relatively unchanged across time,[65] in order to unpack more effectively the contextual usage of the concept of constituent power. Such is the first

[62] James Tully, *Public Philosophy in a New Key, Vol. 1: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008), 19.

[63] Ibid., 31.

[64] Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Chichester: Wiley-Blackwell, 2009), §23.

[65] On 'unit-ideas', see Arthur O. Lovejoy, *The Great Chain of Being* (Cambridge, MA: Harvard University Press, 1936).

step in relativizing and contextualising our thoughts and practice with the intention of making available the conceptual alternatives that allow us to think and act differently.

One could employ a number of approaches to pursue this study. Both Cambridge School hermeneutics and *Begriffsgeschichte* offer valuable insights. The Cambridge School is helpful insofar as it places the text in the frame within which it was forged, so to avoid imposing anachronistic concerns upon it.[66] Koselleck's *Begriffsgeschichte* offers a valuable emphasis upon the study of conceptual development across time. Koselleck recognises the distinction between words and concepts: a conceptual history cannot be accounted for exclusively through 'semasiological' analysis that traces the changing meaning of a word, nor can 'onomasiology' suffice, which traces the numerous linguistic attributions to a single concept over time. Rather, an alternation between the two is required in order to 'break free of the naïve circular movement from word to thing and back'.[67] This is a pertinent response to Antonio Negri's objection that an exclusively lexical archaeology insufficiently captures the meaning of constituent power. Though his concern is well placed, it does not mean we must move 'beyond words' toward a 'hermeneutic that…can grasp the life' of the concept, for this risks the problem of anachronism.[68]

There is no reason to 'choose' between genealogy and these other techniques, for I take genealogy to be characterised by a particular orientation towards history that can draw upon these insights. Gilles Deleuze writes that Foucault's genealogy is a sort of 'atonal logic' that allows him to 'remain mobile, skimming along in a

[66] See especially Quentin Skinner's methodological writings from the 1960s and '70s, collected in Quentin Skinner, *Visions of Politics, Vol. 1: Regarding Method* (Cambridge: Cambridge University Press, 2002). As the closing retrospective indicates, Skinner has come to appreciate the value of genealogy, as well as the compatibility with his own approach.

[67] Reinhardt Koselleck, *Futures Past: On the Semantics of Historical Time* (New York: Columbia University Press, 2004), 87. See also Reinhardt Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, trans. Todd Samuel Presner (Stanford, CA: Stanford University Press, 2002); Reinhardt Koselleck, "Introduction and Preface to the *Geschichtliche Grundbegriffe*," *Contributions to the History of Concepts* 6, no. 1 (2011); Melvin Richter, *The History of Political and Social Concepts: A Critical Introduction* (Oxford: Oxford University Press, 1995).

[68] Negri, *Insurgencies*, 35.

diagonal line that allows him to read what could not be apprehended before'.[69] I interpret this not in terms of what has been called the 'untimeliness' of his controversial style of reading history against the grain.[70] The 'mobility' of the Foucauldian approach is found in his scepticism toward a tendency within the history of ideas to treat fields of discourse as either original or regular.[71] A Foucauldian approach shifts the weight from the drawing of a chronological intellectual history of constituent power to discerning distinctive articulations of the concept and the rules and power relations that govern its articulation.[72] That is not to exclude the drawing of a chronological history, but to place the weight of analysis upon discerning distinctive articulations, forgoing the intellectual desire to trace constituent power back to the unity of an original *archē*.

In doing so, I engage in what Foucault took to be the central objective of genealogy, namely, an attempt to denaturalise our taken-for-granted knowledge of an object, revealing its contingent foundations, and exploring alternatives. The contemporary understanding of constituent power that contrasts 'the Political' with a restrictive legal order is indicative of such a naturalisation. By interrogating the contingent foundations of this conceptualisation of constituent power, my intention is to denaturalise the perception that constituent power is itself a form of power. My intention is to deepen Andrew Arato's insight that the strongly voluntarist form of constituent power associated with constituent power is a consequence of Carl Schmitt's populist interpretation of Sieyès.[73] Jason Frank has similarly recognised that the Schmittian insistence upon the normatively unbounded purity of a constituent decision has 'obscured for democratic theorists how constituent power was conceptualised and practiced in eighteenth-century America', and, I might add,

[69] Gilles Deleuze, *Foucault*, trans. Sean Hand (London: Continuum, 1999), 3-5.

[70] Samuel A. Chambers, *Untimely Politics* (Edinburgh: Edinburgh University Press, 2003), 98-126.

[71] Michel Foucault, *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith (London: Routledge, 1989), 141. One should be wary of mapping these accounts of history on to Skinner and Koselleck, each of whom are more attentive to the dangers of falsely constructing what Foucault calls a 'discursive unity'.

[72] It is this, moreover, that prevents Foucault's genealogy from succumbing to a genetic fallacy. On genealogy and the genetic fallacy, see Colin Koopman, *Genealogy as Critique: Michel Foucault and the Problems of Modernity* (Bloomington, IN: Indiana University Press, 2013), 58-129.

[73] Arato, *Post-Sovereign Constitution Making*, 5.

elsewhere.[74] Though I am less certain than both Frank and Arato that they have sufficiently removed themselves from theorising constituent power in a voluntarist fashion, their insight that by accepting in principle this Schmittian formulation the concept is foreclosed within a particular range of political options is a considerable, if underdeveloped, one. As I extend this line of reasoning further, I will argue that constituent power is a particular tool of argument that assists in limiting and defining the identity of political collectives, and legitimising the sorts of political action in which they might engage.

The aim of my enquiry moves less toward a 'theory' of constituent power, and more toward what Foucault would label an 'analytics' of constituent power.[75] This approach conceives of 'theory as a toolkit' in order to 'build little by little a strategic knowledge'.[76] To do so is not an attempt to describe what constituent power *is*, but more readily to discern what these iterations of constituent power *do,* and how they operate.[77] There is an important point of difference with Foucauldian genealogy at this point. Foucault was concerned with how individual subjectivities were formed through the internalisation of external forms of power, such as discipline. I am less concerned with bringing to light the contingent relations of power that lead to the production of political subjectivities, and more concerned with how constituent power, as a type of discourse, served as a means of constructing normative practices by organising the political imaginaries of collective agents.[78] Consequently, this approach supplements genealogy with insights Foucault's earlier work on

[74] Jason Frank, *Publius and Political Imagination* (Lanham: Rowman & Littlefield, 2013), 33.

[75] Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge:*, trans. Robert Hurley (New York: Pantheon, 1998).

[76] Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*, trans. Colin Gordon (New York: Pantheon, 1980), 145.

[77] With regards to how this is to be conducted, there is often thought to be a question of whether, in the course of analysis, one should pursue a commitment to the study of 'great minds' or politics as a vernacular discourse. In devising an 'analytics' of constituent power the orientation toward distinctive articulations is able to bypass this debate, for what is primary is the morphology that contributes to the analytics, rather that the individual or groups who express it. Consequently, the thesis moves between the studies of individual thinkers and 'vernacular' discourses in order to construct the genealogy.

[78] On the limitations of Foucault's genealogy for interrogating normative practices, see Olson, *Imagined Sovereignties*, 39-53.

archaeology. Some recognise a methodological 'break' between these approaches.[79] I take this to be mistaken. Genealogy is an expansion of the archaeological method, for whilst archaeology investigates the discursive rules that govern what is be said, when and by whom, genealogy accounts for the power formations through which those rules emerge and, the political subjectivities that are produced between those 'techniques of power' and 'regimes of truth'. Genealogy is an extension of- and not a contrast to archaeology.[80] The emphasis upon the archaeological elements of genealogy is intended to address the deficit that follows from the peripheral role of collective imaginaries in Foucault's later work.[81]

This is deepened further by employing Michael Freeden's insight with regards to the morphology of political concepts.[82] Though Freeden is best known for his work on ideology, I do not suppose that constituent power operates anything like a complex 'ideology' but rather, like nationalism, serves as an 'ideational phenomenon that displays variegated conceptual configurations…reflecting the ever greater complexities of its broader host containers'.[83] Morphology refers to the internal structure of political concepts, as well as the rules that govern their meaning. Internally complex and contested political concepts are composed of component features, some of which we may consider ineliminable, others contingent or quasi-contingent. Though none are *logically* necessary features of a concept, those 'ineliminable' features are those that form some minimal element of meaning within conventional usage. More significantly, no concept can be reduced only to those

[79] Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, ed. F Lawrence (Cambridge: Polity, 1987), 248-53; Axel Honneth, "Foucault et Adorno," *Critique* 49, no. 471-72 (1986).

[80] Foucault gestures to this in the closing pages of *The Archaeology of Knowledge*, 208. On the complementary quality of these approaches, see Arnold Davidson, "Archaeology, Genealogy, Ethics," in *Foucault: A Critical Reader*, ed. David Couzens Hoy (Oxford: Blackwell, 1986); Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1983); Koopman, *Genealogy as Critique*.

[81] My approach to genealogy has much in common with Olson, *Imagined Sovereignties*, 39-54.

[82] See especially Freeden, *Ideologies and Political Theory*, 60-67. William Connolly uses the term 'cluster concept' to express a similarly complex political concept. See William E. Connolly, *The Terms of Political Discourse* (Lexington, MA: Heath, 1974), 14.

[83] Michael Freeden, "Is Nationalism a Distinct Ideology?," *Political Studies* 46, no. 4 (1998): 465.

ineliminable features, nor should those ineliminable features be considered a conceptual 'core'.[84]

This implies three additional points: first, there are certain conventional constraints in place about the range of meanings that might be attributed to a complex and contested concept. Second, the meaning of a concept is discernible through the internal configuration of component concepts. This is not only whether components are allocated ineliminable or contingent status, but also how and where they are positioned. Like modular furniture, the same features of a concept may be reorganised and resituated in order to attribute a very different meaning to the concept. As Freeden notes, the 'key lies in the relation of the units to one another, in their positioning vis-à-vis the centre, and in the way units are made to interlock and support each other'.[85] Third, these concepts are situated within discursive constellations which vary across time and space. Concepts change as a result of both inter- and intra-discursive contestation, which together operate to reconfigure the discursive constellations within which a concept is located, giving rise to new conceptual formations, as well as novel morphological landscapes. The task at hand is to decipher within each articulation the conceptual morphology of constituent power, to ask what internal features are plugged in and unplugged, how they are arranged within the concept of constituent power, and where constituent power is located within the broader discursive constellation, with implications for who claims over constituent power shape the normative world.

I began this introduction with a note on the role origins play within the organisation of our political thinking. This point is pertinent, for constituent power orients our perspective to the foundation of a political community. In analysing constituent power in a morphological fashion, I argue that that the concept internally comprises particular figurations of the political use of origins that lean upon the philosophical frame of truth, purity, and biblical Genesis. This technique allows me to shed critical light upon the limits of contemporary theorising of constituent power,

[84] Freeden, *Ideologies and Political Theory*, 62-64.
[85] Ibid., 87.

in order to conceive of it as a strategic style of claim making. In varying the styling of the 'originality' of constituent power, the symbolic order of law is related to political power and collective identity in distinctly different ways. This produces a range of strategic vocabularies of collective self-foundation that, though conferring authority upon the author of the political community, do so with a variety of different consequences. This allows one to consider the way in which discursive appeals to origins—and their metaphysical truth function—operate to enable and disable political claims, or to locate and dislocate political identities.

THESIS OUTLINE

In this thesis, I argue that constituent power is best understood not as a capacity for constitution-making, but as a political claim that constructs an imagined political world that serves as the partisan justification for a leap into political action. My wager is that in doing so I might shed light upon that which has been occluded in contemporary research, namely, how the plurality of ways of *thinking about* constituent power draws up, arranges, and places limitations—in short, constitutes—political worlds.

This argument is constructed across six chapters. In the first chapter, I trace the emergence of constituent power as a political claim over the authority to constituted the monarch. I show how emerged from scholasticism, particularly in the Holy Roman Empire, and was later picked up by Scottish Presbyterians during the English Civil War. This account of constituent power serves as a crucial foil for a central argument in Thomas Hobbes' *Leviathan*. Hobbes is useful for two reason: first, I show that Hobbes specifically intervened into these debates over constituent power, challenging the received view that constituent power emerged as a challenge to Hobbesian absolutism. Second, and more importantly, Hobbes revealed how constituent power worked as a world-making fiction. For Hobbes, constituent power was an ornamental description that embellished an act of force with a series of normative commitments that, for in Presbyterian arguments, excited men into seditious acts. Hobbes readily harnessed these debates for his own political project

because he recognised how central imagination was in maintaining the fictional attribution of political responsibility that allowed the state itself to exist. Crucially, even as a fiction, constituent power had material effects.

In chapters two and three, I trace the use of arguments employing constituent power in the American and French Revolutions. In particular, I demonstrate how adopting the language of constituent power was bound up with a shift in the collective self-understanding of the French or American people, which aided their respective revolutionary causes. Chapter two focuses on the style of argument in colonial America, where a populist form of constituent power proved useful in developing claims for the freedom and autonomy of the colonies against British rule. In adopting this vocabulary, political concerns shifted from political localism to questions of peoplehood, and from the language of proprietary constitutionalism to European-style modern constitutionalism. Chapter three examines how constituent power was developed in a French context, particularly by Emmanuel Sieyès. I show how his account of constituent power was part of a moderate constitutional theory that understood the identity of the nation through representation and the allocation of duties according to competence. Sieyès retained an essentially Hobbesian account of political organisation, though he subtly revised the key tenets, supplementing his constituent power with a national imagery that imagines individuals within a social dynamic actively contributing to the life of the nation.

Sieyès' account of constituent power serves as an important counterpoint for the argument developed in Chapter four, examining Schmitt's particular appropriation of Sieyès. Schmitt's appropriation of constituent power was achieved by reading a mystically inflected Spinozan political theology into Sieyès. In doing so, Schmitt began to revise constituent power and attached it with far greater prominence to the depiction of a voluntarist, extra-legal capacity. Schmitt understood constituent power to be attached to a dramatically enacted eschatological worldview, drawn from the Catholic imagery of the *katechon.* This is not a radically democratic constituent power, but a means of withholding the depoliticising tendencies of the technical neutral State.

Chapter five draws out the interpretation developed by Antonio Negri. I build upon his reading of Spinoza in order to demonstrate how he employed this work in order to naturalise constituent power as a form of labour power. Despite this change, the underlying proposition remains that this is a claim about power—and not a power itself. This continues to present an imagined form of politics, one that that is radically opposed to all forms of closure. This leans upon the *creative* power of Genesis, rather than Genesis as a temporal boundary. Nevertheless, I demonstrate how the aesthetic elements of Negri's constituent power do not challenge sovereignty in the way in which he intended it, but are absorbed into civil society within the democratic State.

In the final chapter, I take a step back in order to account for how these claims over constituent power invariably construct political worlds within the confines of sovereignty broadly conceived. I do so through the work of Hannah Arendt, who understood constituent power to be a 'stock phrase' that stifled the creativity of thinking. I show how, for Arendt, constituent power was bound up with thinking about politics in accordance with a temporality drawn from political theology. It was this that bound constituent power to what she took to be sovereign politics. Nevertheless, she believed that alternatives were possible, and I show that Arendt's arguments over political founding involved a critical redescription of the term 'absolute'. Though her account of founding sought to dismantle the commonplace temporalisations we attribute to our political vocabulary, this also allows us to get a handle upon the conceptual make-up of constituent power, as well as the limitations of the world-making capabilities of constituent power within political argument.

In short, I argue that constituent power is a political claim that inaugurates political imaginaries, though it does so within parameter. Claims over constituent power supplement the names of political collectives with the necessary normative ornamentation to establish why the name of 'the people' or 'the nation' bears weight. The normative meaning ascribed to 'the people' is neither natural nor self-evident; it is constructed through laying claim to constituent power.

* * *

1: "Pretenders of a Vile and Unmanly Disposition": An Emergence of Constituent Power

Foucault's warning to genealogists against the pursuit of origins should be heeded. One searches futilely for an 'origin' of constituent power. Consequently, within this chapter I do not enquiry into an original and decisive *archē*, but identify how threads appear not in order to constitute an *ursprung,* but an *entstehung*, an 'emergence', or 'moment of arising'.[1] With such an emergence one does not begin *ab ovo,* but is thrown into the midst of the action. I choose this approach not because I intend to capture the cause of the thing-in-itself, but to emphasise that particular strands accumulate towards a tentative articulation of constituent power, and the political logic that this invokes. This emergence, I will argue, crystallises in the work of Thomas Hobbes, who presented it as an aspect of the imagination that can be harnessed to ensure the existence of the state. On the way to this moment of arising, alternatives are explored from the Holy Roman Empire and Presbyterian covenanter theology. Doing so allows me to ask questions about the relationship between accounts of political origins, the symbolic order of Law, and the collective subject of the people in order to interrogate how they may have conceived these relationships differently. In the course of this argument, I demonstrate how threads are drawn eclectically, from modifications of Aristotelian accounts of causation, the ecclesiastical corporatism of conciliar theory, the Roman property law distinction between right and exercise, and the Bodinian distinction between sovereignty and government, as well as the drift of the concept from the context of German Imperial

[1] Foucault, "Nietzsche, Genealogy, History," 148.

constitutionalism to the conjectural history of state of nature theorising in Britain. These ideas contribute to particular styles of conceiving a critical distinction: in claiming the power to constitute, it was their status as constituents that logically placed the people above the king: *'constituens major est constituto'*. What remains key is the semantic connection between the 'author' and their 'authority'. In drawing upon the vocabulary of 'the power to constitute', the constituent people were bound to the constituted order, whether that was the king or the law.

To my knowledge, only Murray Forsyth has presented a compelling case for Hobbes as a theorist of constituent power. The central contention of Forsyth's paper suggested that a decisive shift in the conceptualisation of the covenant between *De Cive* and *Leviathan* reveals 'the kernel of the idea of the people as the constituent power' in the form of a 'self-transformatory' contract.[2] Whilst Forsyth insightfully illustrates this claim, it operates on an essentially analogical level by tracing the conceptual continuity of the act of founding between Hobbes and Emmanuel Sieyès. This chapter avoids drawing an analogy that reads constituent power into his social contract theory, but rather enquires into how Hobbes meaningfully intervenes in debates around the constitution of the monarch by Presbyterian theologians in the early years of the English civil war. In the work of Samuel Rutherford, this is modelled in a form of covenanting that distinguishes the institution of the office of the Monarch as an act of God from the constitution of the person of that office, an act of the people. I argue that it is this distinction that, in chapter 18 of *Leviathan,* Hobbes critically reformulates. By writing out the act of 'constitution' from Rutherford's position, Hobbes' covenant contains an unvoiced constituent power characterised by firm juridical limitations, whereby the collective identity of the people is made possible only through the fictional person of the state.

By making this argument, I intend to take aim at a particular practice of conceptualising the origins of constituent power. Though I disagree with Martin Loughlin's identification of Leveller thought as the 'first clear articulation of

[2] Murray Forsyth, "Thomas Hobbes and the Constituent Power of the People," *Political Studies* 29, no. 2 (1981): 191-2.

constituent power',[3] I am concerned more with the theoretical apparatus that is organised by Andreas Kalyvas' identification of George Lawson's *Politica* as both a reply to Hobbes and the inauguration of constituent power as a distinctive lineage of theorising political power.[4] As I show, Lawson's account of political power as a usufruct is prefigured in both European and English contexts, and it is this that Thomas Hobbes challenged. By distinguishing Thomas Hobbes' distinctive articulation of this concept, my intention is not to inaugurate an alternative *archē* of constituent power in Hobbes, but rather to employ Hobbes in a negative or evasive way to unsettle this origin-story that aligns constituent power with the authentic experience of the political in favour of the methodologically pluralist approach of morphological analysis.

This chapter accounts primarily for usage of the concept and vocabulary of constituent power in 17th century Europe, as well as the way in which it was used to arrogate political authority in the name of the people. The chapter is divided into four parts. Part I examines the constitutional theory of Johannes Althusius. Whilst arguing that Althusius is not a 'radical' resistance theorist that some have suggested, I demonstrate that his work is a moderate defence of Aristotelian politics of the good life, in which he seeks to conceptualise an account of indivisible sovereignty sensitive to the estate structure of the Holy Roman Empire. Drawing upon Conciliar and Monarchomach thought, though with a specifically constitutionalist inflection, Althusius is pressed to defend the assertion that 'the constituent is above that which is constituted'. Nevertheless, I demonstrate that constituent power does not play a significant role in his thought: there is always a constitutional safety-net in place to protect the stability of the political realm. The point that I hope to make is that a key thinker on constituent power, and important influence upon certain Scottish Presbyterians, presented a rather moderate image of constituent power.

[3] See Loughlin, "Constituent Power Subverted," 47. I take the Levellers to present an argument for natural rights that are retained among individuals pooling their sovereignty, rather than a distinction between constituent and constituted.

[4] Kalyvas, "Popular Sovereignty."

Parts II and III turn to the arguments over monarchical supremacy during the English Civil War. After a brief demonstration of the *mise-en-scene* that connects authority to authorship in the work of Henry Parker, I draw out the influence of Althusius on the writing of the Presbyterian Samuel Rutherford. I demonstrate the intellectual distortion Althusius' account of constituent power undergoes in the transposition from the Empire to Britain, and its incorporation into Presbyterian thought. As Rutherford develops this idea, he replaces the constitutional safety-net with a religious one. His constituent power defends the maxim that 'the constituent is above the constituted' through a distinction between the divine institution of the office of the King, and the people's constitution of the person of the king, which in turn presents two people with two sources of authority. This provides the groundwork for part IV, where I demonstrate how Hobbes intervened into debates about constituent power by reworking Rutherford's distinction between 'institution' and 'constitution'. In *Leviathan,* Hobbes understood constituent power not to be a real power, but a world-making fiction that could be harnessed for his own ends. Utilising the imagination in this way was essential for Hobbes, for the state itself existed only in the imagination of men, and continued to exist only so long as they continue to buy into that fiction.

I: "*CONSTITUENS MAJOR EST CONSTITUTO*": ON JOHANNES ALTHUSIUS

Daniel Elazar writes, in his introduction to Johannes Althusius's *Politica,* that constituent power was an 'Althusian concept'.[5] The idea that the organic body of the commonwealth constitutes government played an important role in Althusius's political thought. These ideas were not Althusius's alone, however, for he drew upon a much longer intellectual heritage that had been recently expressed in the resistance theory of the French Monarchomachs.[6] Within this section, my intention is to draw out how he employed these ideas in service to his constitutional theory. In particular,

[5] Daniel J. Elazar, "Althusius' Grand Design for a Federal Commonwealth," in *Politica*, ed. Frederick S. Carney (Indianapolis, IN: Liberty Fund, 1995), xlii.

[6] For a sensitive examination of constituent power in Monarchomach thought, see Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford: Oxford University Press, 2016), 142-49.

his work was by no means the blueprint for rebellion that the French Monarchomach's texts had been, for he was no defender of resistance theory.[7] Though in 1604 he secured an offer to become the Syndic of Emden in East Friesland, which, following a revolt nine years earlier, had become a semi-autonomous city, the argument of *Politica* had been shaped in much a different context.

The genre of the *politica* dominated German legal thinking from 1580 to 1620, reflecting the specific constitutional experiences of the Empire. Given the diffuse loci of political authority, the German writers of the *politica* genre had to be far more cautious than their English and French counterparts about the actual location of sovereignty. Despite their differences,[8] the texts of the *politica* genre were to provide an *ars conservandi* in times perceived to be of crisis; government was seen to be a technical prerequisite for the good life, and so the main issue was to detail how to suppress internal conflict for the sake of the common good.[9]

This purpose was made quite clear in the opening page of *Politica,* where Althusius employed the Aristotelian account of causation, typical of Scholasticism at the time, to account for the foundations of political society.[10] For Aristotle, to possess 'unqualified scientific knowledge of a thing' was to possess knowledge of its cause, for such an enquiry grasps the 'why' of an object.[11] According to Aristotle, the cause of a thing may be categorised under one of four brackets. The material cause is the

[7] Robert von Friedeburg, "From Collective Representation to the Right to Individual Defence: James Steuart's *Ius Populi Vindicatum* and the Use of Johannes Althusius' *Politica* in Restoration Scotland," *History of European Ideas* 24, no. 1 (1998): 20; Andrew Pettegree, *Emden and the Dutch Revolt* (Oxford: Oxford University Press, 1992); Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge: Cambridge University Press, 2001), 59. Compare Illan rua Wall, "Notes on the Theology of Constituent Power," Critical Legal Thinking, http://criticallegalthinking.com/2013/06/20/notes-on-the-theology-of-constituent-power/. Wall runs the two together, treating Althusius as a resistance theorist.

[8] For example, the other great text of the *politica* genre, Henning Arnisaeus' *Doctrina Politica* was an ardent defence of monarchical absolutism. See Henning Arninsaeus, *Doctrina Politica in Genuinam Methodum, quae est Aristotelis, Reducta* (Frankfurt: Johannis Thiemen, 1606).

[9] See especially Robert von Friedeburg, *Luther's Legacy: The Thirty Years War and the Modern Notion of 'State' in the Empire, 1530s to 1790s* (Cambridge: Cambridge University Press, 2016), esp. 170-77.

[10] On the resurrection of Aristotle's four causes in the late Medieval period, see Edward Grant, *The Foundations of Modern Science in the Middle Ages: Their Religious, Institutional and Intellectual Contexts* (Cambridge: Cambridge University Press, 1997), 54-69.

[11] Aristotle, "Posterior Analytics," in *The Basic Works of Aristotle*, ed. Richard McKeon (New York: Random House, 1941), 71b.9-10; Aristotle, "Physics," in *The Basic Works of Aristotle*, ed. Richard McKeon (New York: Random House, 1941), 194b.20.

'thing out of which' the object is produced, for example the bronze material from which a statue is sculpted; the efficient cause is the primary source through which the effect is produced, namely the sculptor himself; the formal cause is 'a definition of the essence'—such as the shape of the statue that is abstractly known prior to its material construction; whilst the final cause is the 'end for the sake of which a thing is done'.[12] Politics was, according to Althusius, the 'art of associating [*consociandi*] men for the purpose of establishing, cultivating and conserving social life among them'. To this practice of politics, he designated the name 'symbiotics'.[13] Its *efficient* cause was 'agreement among communicating citizens'. The *formal* cause was the 'association brought about by…communicating one with another'. The *material* cause was 'the aggregate of precepts for communicating', whilst the most crucial *final* cause was the 'conservation of a human society that aims at a life in which you can worship God quietly and without error'.[14] Those symbiotes, in associating, 'communicate among themselves for whatever is appropriate for a comfortable life of soul and body'.[15] This was necessary, as God distributes natural aptitudes unevenly among men, and so sharing through communication proves most valuable in furthering the political community.[16] Political symbiosis not only enabled the community to exist but ensured that it flourished through associational living, communicating and sharing 'for the common advantage of the symbiotes individually and collectively'.[17]

Althusius was a follower of the method of Petrus Ramus, a French logician killed in the St. Bartholomew's Day Massacre. The most distinctive element of the

[12] Aristotle, "Metaphysics," 1013a.24-35; Aristotle, "Physics," 194b.24-36.

[13] Johannes Althusius, *Politica, Methodically Set Forth and Illustrated with Sacred and Profane Examples*, trans. Frederick S. Carney (Indianapolis, IN: Liberty Fund, 1995), 17. A note on the text is necessary. The original Latin editions of *Politica,* published in 1603 and 1614, are each over 1000 pages in length. The only translations available in English are abridged version first published in 1932 by Carl Friedrich, and 1964 by Fredrick S. Carney. The Liberty Fund edition that I rely upon is a modified version of the Carney translation. Whilst Althusius' Ramist logical method lends itself to an abridged form better than most, much of what has been excised from the abridged edition are theological and scriptural arguments and evidence. The inevitable product of this is the presentation of Althusius as a far more secular thinker than he, in fact, was. This is both important and curious, for Carl Friedrich's introduction to the 1932 edition appreciates Althusius as 'the political theorist of Calvinism par excellence'. See Carl Joachim Friedrich, "Introduction," in *Politica Methodice Digesta of Johannes Althusius* (Cambridge: Harvard University Press, 1932), xvii.

[14] Althusius, *Politica*, 24.

[15] Ibid., 18.

[16] Ibid., 23.

[17] Ibid., 19.

Ramist method, adapted from Aristotle's *Posterior Analytics*, approached a subject matter by systematically classifying its branches, descending from the most general statement to the various divisions, and finally to the specific case, methodically covering the subject as a whole. As Freire has shown, it was the use of the metatheoretical directives of Ramist logic that spilled over into Althusius's way of conceptualising the political community, for it was composed of myriad corporatist associations, each self-sufficient, but each symbiotically associated with all others, in what Ossewaarde has labelled 'sphere sovereignty'.[18] Althusius began by separating the 'simple and private' associations of the family and the collegium, from the 'mixed and public' associations of the city, province and commonwealth, before examining each of the subdivisions in turn.[19] These associations formed an integral part of an art of living together. Both natural, familial associations and public administrative associations, with their final cause being the preservation of symbiotic life, were 'rightly attributed to politics'.[20]

As a good Calvinist, Althusius rejected the notion that there may be an absolute worldly authority. Worldly authority is always circumscribed, relative to the symbiotic community, and always, ultimately, inferior to that authority held by God. In keeping with the vocation of that association, each sphere contained its own source of authority, with multiple overlapping associations accounting for the relativity of worldly authority.[21] Such overlapping associations formed inclusive political orders, such as cities and provinces,[22] that served as *personae representata,* which legally act and 'take the place of a person when legitimately convoked and congregated'.[23] At the highest level, the universal association of the commonwealth comprised the cities and provinces that made up the minor public associations. The commonwealth recognised no earthly superior to itself. That Althusius suggested this was essential,

[18] Lucas G. Freire, "The Dawn of the State-System as a Concept: Althusius, Pufendorf and Leibniz on the Holy Roman Empire," in *52nd ISA Annual Convention* (Montréal 2011), 24-8; M. R. R. Ossewaarde, "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *Monist* 90 (2007). The binary tree detailing the structure of and relations between associations are sketched out in a schematic by Althusius. See *Politica*, lviii-lix.

[19] Althusius, *Politica*, 27.

[20] Ibid., 32.

[21] Ossewaarde, "Althusius and the Concept of Sphere Sovereignty."

[22] Althusius, *Politica*, 39.

[23] Ibid., 40.

for despite the claim to the contrary, he did not seek to challenge the Bodinian notion of indivisible sovereignty.[24] Althusius was unequivocal on this point when suggesting that 'this power of the realm…is always one power and never many'. To establish two superior entities in one *imperium* would be contradictory, for '*imperium* and obedience cannot be mingled'.[25] Althusius' point of disagreement with Bodin, far from being about the divisibility of sovereignty, was rather to identify the proprietor of sovereignty differently. As Tuck recognises, Bodin had been the 'first' to insist on the importance of the distinction between *summum imperium* and *administratio*.[26] Sovereignty was the property of the impersonal State, from which offices were to be 'borrowed'.[27] Bodin distanced himself from an account of sovereignty as *seigneurial* government, where the sovereign was *dominus* of the state capable of acting arbitrarily. By extension, lawful government did not entail a relation in terms of master and slave, but conceived of the relation between sovereign authority and officer in terms of a 'commercial transaction' between an owner and borrower, through which lawful government could be squared with an indivisible sovereign.[28] Unlike Bodin, Althusius proposed that 'ownership of a realm belongs to the people, and the administration of it to the king'.[29] Sovereignty was held in the *jus symbioticum*, though it nevertheless retained an indivisible form, in contrast to the republican ideal of a mixed constitution. Perhaps more decisively, however, this use

[24] For example, Elazar, "Althusius' Grand Design for a Federal Commonwealth," xli-xlii; Henk E. S. Woldring, "The Constitutional State in the Political Philosophy of Johannes Althusius," *European Journal of Law and Economics* 5 (1998): 125; Alain de Benoist, "The First Federalist: Johannes Althusius," *Telos* 118 (2000): 45. This claim is part of a wider literature on Althusius that treats him as 'the first federalist', who anticipated the thought of the American Founding Fathers. In addition to those listed above see also Thomas O. Hueglin, *Early Modern Concepts for a Modern World: Althusius on Community and Federalism* (Waterloo, ON: Wilfrid Laurier University Press, 1999); Thomas O. Hueglin, "Johannes Althusius: Medieval Constitutionalist or Modern Federalist?," *Publius* Fall 1979 (1979); Bettina Koch, "Johannes Althusius: between Secular Federalism and the Religious State," in *The Ashgate Research Companion to Federalism*, ed. Ann Ward and Lee Ward (Farnham: Ashgate, 2009).

[25] Althusius, *Politica*, 71.

[26] Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016). This critical insight has attracted some important attention in recent years. Kinch Hoeksta, "Early Modern Absolutism and Constitutionalism," *Cardozo Law Review* 34(2013); Daniel Lee, ""Office is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government," *Political Theory* 41, no. 3 (2013).

[27] Lee, "Office is a Thing Borrowed," 427.

[28] Ibid., 421. See also Jean Bodin, *The Six Bookes of a Commonweale*, trans. Richard Knolles (London 1606), 282.

[29] Althusius, *Politica*, 66.

of Roman property law to identify the people as the authentic *dominus* of sovereignty, a conclusion Althusius took from the Monarchomach writings, did not turn to the other extreme to defend a right to resistance.[30] Rather, Althusius employed the synthesis in order to account for a unitary sovereignty appropriate to the estate structure of the Holy Roman Empire.

The clarity of this position has been obscured by the usage of the phrase *duplex majestas* by Althusius,[31] and later jurists of the Empire, Christoph Besold and Johannes Limnaeus,[32] too readily translated as 'dual sovereignty'. Through the threefold distinction between the people, the supreme magistrate and the council of secondary administrators, named the ephors, *duplex majestas* operationalised, rather than contested, the notion of unitary sovereignty. Consistent with his symbiotic view of politics, Althusius was sure that 'the people' are only comprehensible as such through their associations and the corollary *jus symbioticum*. Without their *jus symbioticum*—that which legally bound them into a public association—assembled men were nothing more than a 'crowd', 'gathering', 'assemblage', or 'multitude'.[33] Whilst the people had the power of establishing this right of the realm, this only ever belonged to 'all members joined together [through communication] and to the entire associated body of the realm'.[34] 'Communication', however, was not limited to secular communication of Aristotelian politics alone, for the central purpose of temporal

[30] For example, see ibid., 104. On this circumscribed use of Monarchomachism, Harro Höpfl and Martyn Thompson, "The History of Contract as a Motif in Political Thought," *The American Historical Review* 84, no. 4 (1979): 231. Höpfl and Thompson frame this as a specifically contractual language, though one distinct from the later Hobbesian-Lockean contract. There is good reason, as Carl Friedrich notes, to see contract as a 'distinctly minor' aspect of Althusius' thought. Friedrich, "Introduction," lxxxvii. I concur with Daniel Lee's convincing argument that rather than contract, it is the law of guardianship that Althusius takes from Monarchomachism, see Lee, *Popular Sovereignty*, 234-35. See also Stephanus Junius Brutus, *Vindiciae, contra Tyrannos: or, Concerning the legitimate power of a prince over the people, and of the people over a prince*, ed. George Garnett (Cambridge: Cambridge University Press, 1994), 74-5. On the connection between Monarchomachism and Roman Law, see Ralph Giesey, "The Monarchomach Triumvirs: Hotman, Beza and Mornay," *Bibliothèque d'Humanisme et Renaissance* 32, no. 1 (1970): 52; Daniel Lee, "Private Law Models for Public Law Concepts: The Roman Law Theory of *Dominium* in the Monarchomach Doctrine of Popular Sovereignty," *Review of Politics* 70, no. 3 (2008); Quentin Skinner, *The Foundations of Modern Political Thought, Vol. 2: The Age of Reformation* (Cambridge Cambridge University Press, 1978), 123-34.

[31] Althusius, *Politica*, 73.

[32] Besold and Limnaeus presented distinctly aristocratic interpretations of *duplex majestas,* which distinguishes them from Althusius. On Besold and Limnaeus, see Lee, *Popular Sovereignty*, 250. One should be careful of equating *duplex majestas* with constituent power, for it could very well be employed for different ends. For such a use, see Loughlin, "The Concept of Constituent Power."

[33] Althusius, *Politica*, 39.

[34] Ibid., 70.

government was found the freedom of conscience to live according to communion.[35] Althusius anchored the locus of authority in the symbiotic universal association by means of communication and communion, organised around both ecclesiastical and secular commitments. The role of ecclesiastical authority was essential; that the right of the realm was held by the universal association diffused the longstanding opposition in Christian Europe between *regnum* and *sacerdotum,* for that right pertained to both the welfare of the soul and care for the body. In this longstanding interplay between spiritual and temporal authority, Althusius placed the governance of both the body and the soul in the universal association, prescribing freedom of conscience to worship without this amounting to the dual allegiances of obedience.

The constitutional structure through which Althusius suggested that the universal association was formed is particularly pertinent to its possession of authority. The association came into being through the communicative structure of political life, which generated the *jus symbioticum,* a law for the purpose of transforming the multitude of people into a *politeuma,* but also assisted them with the means to exist prior to and independent from any higher magistrate, and so the quasi-corporatist universal association is free to act without the constraint of the head-and-body metaphor. The roots of this form of legal reasoning echoed the conciliarist tradition of ecclesiastical constitutionalism. Developing out of the Papal Schism of 1378, which saw Europe divided between the papacies of Avignon and Rome, the underlying constitutional problem brought to the fore concerned supremacy of the pope within the Church. The conciliarist solution to this constitutional problem was profound.[36] At this time, the standard medieval canonist

[35] Ibid., 74.

[36] John Neville Figgis called the Council of Constance 'probably the most revolutionary official document in the history of the world'. John Neville Figgis, *Studies in Political Thought from Gerson to Grotius, 1414–1625* (Cambridge: Cambridge University Press, 1907), 35. The roots of the Conciliarist position are disputed. Figgis, and Skinner each suggest the conciliarists draw upon the secular debates and works of those deemed heretical by the Church, such as Marsilius of Padua and William of Ockham. See Skinner, *Foundations, Vol. 2*, 113-23. Tierney, and Monahan, rather than being a reaction to the canonist view, suppose conciliarism to be an extension of these debate–an amalgam of decretist and decretalist debates. See Arthur P. Monahan, *From Personal Duties Toward Personal Rights: Late Medieval and Early Modern Political Thought, 1300-1600* (Montreal: McGill-Queen's University Press, 1994), 50-121; Brian Tierney, *Foundations of the Conciliar Theory* (Cambridge: Cambridge University Press, 1955).

understanding of papal representation was through a modality of personification; such was a corporation cast in overwhelming anthropomorphic imagery, complete with head-and-body metaphor; the pope headed the universal church embodying the community of the faithful.[37] The conceptual move made by the conciliarist Pierre d'Ailly was to reformulate the medieval corporation theory by invoking a qualification of consent. Consequently, whilst the pope was above the law of which he was creator, he was not above 'divine law or those laws promulgated with divine authority by the universal Church'.[38] This was to separate out two loci of religious authority: the *plenitudo potestatis* of the Pope and the corporatist authority of the universal Church; not only were the two capable of independent action, but the head was no longer superior to the body, so long as that body acted as a whole: *'singulis major, universis minor'*. The eventual resolution of the conciliarists held that the ultimate governing authority was possessed by the general council as the representatives of the community of the faithful, whilst the pope's apparent *plenitudo potestatis* was in effect conceded to him as a matter of 'administrative convenience'.[39] This constitutional structure is clearly apparent in Althusius.[40] Sovereignty was located in the body of the universal association, though this was quite separate from its administration or exercise by the ephors, whose duty it was to guarantee the welfare of the members of the universal association.[41] 'Constituted by the votes of the entire people'—via the councils of the cities and provinces, and the heads of the private associations—the ephors were 'assigned', 'conferred', and 'entrusted' these administrative duties.[42] This was a necessary practice because the universal association itself, logistically, could not manage the administration of these rights,

[37] Monahan, *Personal Duties*, 84; Tierney, *Foundations of the Conciliar Theory*, 91.

[38] Pierre d'Ailly, "Tractatus de materia concilii generalis," in *The Political Thought of Pierre d'Ailly*, ed. Francis Oakley (New Haven, CT: Yale University Press, 1964), 313.

[39] Skinner, *Foundations, Vol. 2*, 116.

[40] On Althusius's employment of conciliar thought, see Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150–1650* (Cambridge: Cambridge University Press, 1982), 71-79; Robert von Friedeburg, "Reformed Monarchomachism and the Genre of the 'Politica' in the Empire: The *Politica* of Johannes Althusius and the Meaning of Hierarchy in its Constitutional and Conceptual Context," *Archivio della Ragion di Stato* 6 (1998).

[41] Althusius, *Politica*, 92.

[42] Ibid., 93, 102.

and so 'the people transferred to them the authority and power necessary for the performance of the assignment'.[43]

This is not to suggest that the commonwealth could exist without a head for any length of time; it was purely a matter of utility that there was a single person in place to administer those higher laws. It was the supreme magistrate who executed this role, but to be sure, he was called 'supreme' not because he exercised his own power, but 'that of another, namely, the supreme power of the realm of which he is a minister'.[44] It was through the act of covenanting that the supreme magistrate entered into contractual obligations with the universal association, via the ephors, and through which each was mutually obliged to the other. Nevertheless, given the location and nature of the authority of the universal association, that contract was not 'originary' in any sense; the universal association preceded both the supreme magistrate and the covenant, the source of their *jus symbioticum* being the associative act of communion.

It was the first duty of the ephors to 'constitute' the supreme magistrate, a responsibility conferred upon them by the universal association; it was the second duty that they contain him within the limits and bounds of his office, serving as custodians over those elements of the *jus symbioticum* not delegated to the supreme magistrate.[45] Given this arrangement, the authority of the supreme magistrate was never absolute. He had only so much as 'has been explicitly conceded to him by the associated members or bodies of the realm', who retain ultimate, though not 'absolute', sovereignty.[46] This point is central to understanding the semantic frame in which Althusius located the power to constitute; the *Politica* aimed to devise a stable constitutional structure for the Holy Roman Empire, rather than a doctrine of resistance theory.[47] Althusius proposed the circumscribed authority of the supreme

[43] Ibid., 94.
[44] Ibid., 120.
[45] Ibid., 103.
[46] Ibid., 121.
[47] Ibid., 122.

magistrate on the basis of securing this constitutional structure, providing each city and province the freedom to live the pious life they deem appropriate.[48]

The supreme magistrate's authority was accounted for according to the maxim 'the constitutor is greater than that one constituted';[49] it was recognised that 'this associated body [is] their superior, by which they are constituted, removed, exiled and deprived of authority'.[50] It was key that Althusius recognised the symmetry that along with the capacity of the universal association to constitute, they also held the capacity to deprive the supreme magistrate of authority. Nevertheless, for Althusius, whilst the symmetry to constitute and deprive authority was apparent, the capacity to deprive was not derived *from* the capacity to constitute. Rather, both capacities flow symmetrically from the *jus symbioticum,* though appear to be logically independent from each other.

It is important to recognise that the executor of this capacity remained the collective of ephors, rather than the universal association writ large. However, if the supreme magistrate was delegated only partial authority in their administrative representation of the universal association, it is not immediately clear why the supreme right of the commonwealth—the ability to constitute and deprive authority—was to be held in another group of administrative representatives, the ephors. We might explain this via two distinct modes of representation. Friedeburg remarks that the distinction lies in the difference between the formal representation [*representatio potestatis*] of the supreme magistrate, and the natural representation [*representatio identitatis*] of the ephors.[51] This requires adjustment, for both the supreme magistrate and the ephors are endowed with formal functions of representation. The distinction lies in the aesthetic relation of that representation. In her classic discussion, Hanna Pitkin distinguished between two modes of 'standing for' another: descriptive and symbolic representation. Both are metonymic modes of

[48] Ibid., 75.

[49] Ibid., 63. Or, in the original Latin rendering of the phrase, *'nam constituens major est constituto'*. In this form the semantic connection between 'constitutor' and 'constituent' is clear, via the Latin cognate '*constituens*'. I have chosen to retain the original translation as the status as the creator of the office is more explicitly detailed, though there seems no reason not to treat them as interchangeable in this phrase.

[50] Ibid., 73.

[51] Friedeburg, "Reformed Monarchomachism."

representation, though each configures that metonym differently. Descriptive representation is achieved by virtue of a 'correspondence or connection between them, a resemblance or reflection', whilst the symbolic is representation in the literal sense: re-presentation, or 'to make present something that is *not* in fact present'.[52] This distinction allows us to make better sense of the distinction between the representative functions of the ephors and the supreme magistrate. The supreme magistrate's representative function is to complete the head-and-body metaphor of the corporatist commonwealth. The ephors, by contrast, appear to resemble the people insofar as they are a descriptive representation, drawn from the people. The differ crucially, for in their resemblance to the universal association, the ephors absorb the *jus symbioticum*, whilst the supreme magistrate's authority is always alienable, for the life of the body persists without its head.

The vocabulary of constituent power became the pivot through which Althusius was able to reconcile the indivisibility of sovereignty, the location of sovereignty in the people, and the requirement for an administrative head of the commonwealth. It nevertheless raised a particularly pressing critique, namely the relation between command and obedience. William Barclay, in his *De Regno & Regali Potestate* of 1600, posed the following problem: the power of a guardian or trustee is always greater than that of a ward, and so the King, as trustee of the commonwealth, is greater than the ward, or its equivalent, the people. To suggest that the people are above the king is illogical, for to preside over [*praesse*] and to be subject to [*subjici*] are opposites, which cannot be attributed to the same person at the same time.[53] Althusius' response elegantly pulled together the centrality of the *jus symbioticum* to his argument, for the king is 'over all individuals in order to administer rightly', but he is 'under the united body'.[54] In order to secure the realm, the supreme magistrate can punish the individual law-breaker, but he has no power over the universal association as a whole, for it is by way of the communion of the

[52] Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley, CA: University of California Press, 1967), 61, 92.

[53] William Barclay, *De Regno et Regali Potestate Adverus Buchananum, Brutum, Boucherium, & Religuos Monarchomachus* (Paris: Chavdiere, 1600), 268.

[54] Althusius, *Politica*, 111-12.

universal association that the king's authority is generated. The *jus symbioticum* has the additional function of differentiating the association of the people substantively from the individual person, and so 'the right of the king…is temporal and personal', whilst the 'right of the people…is permanent'. To this effect, 'if the people denies these [administrative duties] to the king, he again becomes…a private person'.[55]

It remains necessary to emphasise the inflection of these remarks, for whilst Althusius repeated this distinction between the constitutor and the constituted throughout the course of the *Politica,* its illocution appears quite different from its usage little more than forty years later. The nature of the genre of *Politica* writing was quite distinct from resistance theory. Whilst Althusius repeatedly cited François Hotman, George Buchanan, and the author of the *Vindiciae*, his usage of these writers was circumscribed. Althusius' principal concern was to provide a Mirror for Princes for the Empire, and insofar as the Monarchomach writers proved to be a useful contrast to Jean Bodin's account of monarchical power, their work provided Althusius with the legal arguments to distribute authority across the empire so as to ensure legal and constitutional stability. This inflection framed the claim *'nam constituens major est constituto'* within the legal vocabulary and framework of German constitutionalism. The power to constitute was a principle of positive law and ultimately a secondary element of his framework for constitutional stability, whilst the communicative structure of the *jus symbioticum* generated the authority and political supremacy of the universal association. The right of constituting and relieving the supreme magistrate of their authority was not held by the people but the ephors, the legal-formal representatives of the universal association. A constitutional safety-net remained in place. To overthrow the tyrannical supreme magistrate would not throw one back into the state of nature, for the welfare of the civil order remained 'embedded in the legal order of the state, not the community of citizens'.[56] The people remained within the broad constitutional structure of the commonwealth

[55] Ibid., 114.

[56] Robert von Friedeburg, "George Buchanan and the German Monarchomachs," in *George Buchanan: Political Thought in Early Modern Britain and Europe*, ed. Caroline Erskine and Roger A. Mason (Farnham: Ashgate, 2012), 150.

that only temporarily lacked a head. Despite these qualifications, Althusius' claim, '*nam constituens major est constituto',* took on a radicalism of its own, reverberating among the more religiously inclined during the early years of the English Civil War, albeit perhaps not as he intended, for across the Channel the constitutional vocabulary 'gave way to a wholly different mode of discourse'; whilst the jurists of the Holy Roman Empire were armed with the tools of constitutional law and Aristotelian political science, the English civil war was waged by humanists, making use of vocabularies of historical rights.[57]

II: AUTHORSHIP IN THE ENGLISH CIVIL WAR

Following the death of Queen Elizabeth I in 1603, her cousin, King James VI of Scotland, was crowned king of England, forging the first personal union of the Scottish and English kingdoms. A significant intellectual who as a child had been tutored by George Buchanan, James defended the doctrine of the divine right of kings, claiming that he, as king, derived his authority from God, to whom he was answerable alone. So far as James was concerned, the ordained king was 'God's *lieutenant*', quite literally the holder of God's authority in His absence.[58] So too, parliament, at least in principle, appeared to repeat James' divine tenancy, for 'kings were visible gods and God an invisible king'.[59] This act of claiming God's lieutenancy as a means through which James could secure, at least in theory, the authority of the realm would ensure his supremacy among men. The people were his subjects, lacking any share of his authority. Even when rebuked by James, parliament maintained the façade of the king's divine tenancy.[60] James I was a king ruling under

[57] Richard Tuck, *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993), 225.

[58] James I, "Speech of James I before Parliament, 21 March 1610," in *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, ed. G. W. Prothero (Oxford: Clarendon press, 1894), 293. This is an allusion to Romans 13, which recognises the monarch to be 'God's minister'. On James' defences of the doctrine of the divine rights of kings, see James I, *Basilikon Doron*, ed. Johann P. Sommerville (London: Felix Kyngston, 1602); James I, *The True Law of Free Monarchy* (London 1642). *Basilikon Dōron,* was written as letter to his son Henry in 1599, and later published in 1602. After Henry died in 1612, the letter was presented to his son Charles.

[59] The speaker, Thomas Richardson, quoted in Wallace Notestein, Frances H. Relf, and Hartley Simpson, *Commons Debates 1621*, vol. II (New Haven, CT: Yale University Press, 1935), 15.

[60] Morgan, *Inventing the People*, 19. The divinity of the king, and the correlate supposition of his two bodies, one corporeal and the other eternal, persisted among some well into the Long

law, and so whilst he may have been disliked, his actions were not such as to generate visceral distrust among his subjects.[61] This was in vital contrast to his son, Charles I, who acceded to the throne in 1625. Charles was the king described in his father's *Basilikon Dōron*. Inaccessible and unaccountable, from 1629 he attempted to govern without parliament. It was from 1634 that Charles, when attempting to raise funds through the ship money rates, faced obstruction.

In what has been described as 'the first intellectually significant political pamphlet of the Long Parliament era',[62] Henry Parker's *The Case of Shipmony* carefully detailed his circumscribed objections to Charles' levy, but so too his argument took broad aim at monarchical prerogative through a conceptual shift in the locus of political authority away from the divinely ordained monarch and toward the divinely ordained 'People'.[63] When turning to the legal foundations of the ship money rate, Parker arranged his disputation in the modern vocabulary of the new humanism of continental Europe, by means of which he was able to undercut monarchical prerogative. 'The king's prerogative', Parker wrote, 'hath only for its ends to maintaine the people's liberty'; he continued that in nature the liberty of the subject is in 'more favour' than the king's prerogative, for 'one is ordained only for the preservation of the other'.[64] It followed that there was no 'naturall prerogative of the Crowne to raise monies without assent, unlesse he first prove that such prerogative bee good and profitable for the people'.[65] In defence of this assertion, Parker recited the Ciceronian maxim, 'the supreame of all human laws is *salus populi*'.[66] The republican principle of *salus populi*—the welfare of the people—had been entwined with the logic of reason of state for much of the previous century, and though it had been deployed in order to defend autocratic and anti-constitutional

Parliament, for it was supposed that the king's legal body remained at Westminster, whilst his 'misled person' marched against them. Morgan, *Inventing the People,* 55.

[61] John Morrill, *Stuart Britain* (Oxford: Oxford University Press, 2000), 28-31.

[62] Michael Mendle, "The Ship Money Case, The Case of Shipmony, and the Development of Henry Parker's Parliamentary Absolutism," *The Historical Journal* 32, no. 3 (1989): 513.

[63] This is by no means to suggest that Parker was the first to locate political authority in the people in an English context, but that he offers up a particularly influential articulation of the concept.

[64] Henry Parker, "The Case of Shipmony Briefly Discoursed," in *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts*, ed. Joyce Lee Malcolm (Indianapolis, IN: Liberty Fund, 1999), 98.

[65] Ibid., 99.

[66] Ibid.

regimes, it had been turned against the princes in the United Provinces and the Republic of Venice.[67] In deploying it in such a way, Parker was able to frame the justification of the ship money rates in terms of the common good, rather than the particular advantage of the king, and thereby to challenge the wider referent of kingly prerogative on grounds of necessity.

Although no reference was made to the people's capacity to 'constitute' the king, through Parker's allusion to the liberty of the subject 'in nature' we are orientated to the union underlying civil government, which he fleshed out in the opening pages of his 1642 *Observations*. Parker's concern was that 'our English Court of late yeares hath drunke too much of this State poyson' that had corrupted the prince's love of mankind.[68] It was the king's duty to obey the principle of *salus populi,* for:

> 'Power is originally inherent in the people…and when by such or such Law of common consent and agreement it is derived into such and such hands, God confirms that Law: and so man is the free and voluntary Author, the Law is the Instrument and God is the establisher of both'.[69]

The people were 'authors' of the law. It was from their authorship that political authority was derived, so enabling the people to place whatever conditions and limitations it pleased upon the King, the *singulis Major*.[70] This moved beyond the constitutionalist argument of Althusius, for in *Politica* the capacity to constitute and disband was circumscribed within the positive law of the commonwealth, whilst the ultimate source of authority was the *jus symbioticum*. For Parker—and, as will become clear, others within the English context—it was the activity of constituting in itself from which political authority flowed. Nevertheless, not unlike Althusius, Parker suggested that 'the King is a servant to the State, and though far greater, and

[67] Tuck, *Philosophy and Government*, 223.
[68] Henry Parker, *Observations upon some of his Majesties late Answers and Expresses* (London: n.p., 1642), 3.
[69] Ibid., 1.
[70] Ibid., 2.

superior than all particulars; yet to the whole collectively taken'.[71] The people, unlike the king, are eternal, 'remaining the same in all ages'.[72]

But Parker then made what appeared on the face of things to be an inconsistent move as he elided the distinction between the people and parliament, for '*vox populi* was ever reverenced as *vox Dei*, and Parliament are infallible, and their acts indisputable to all but parliament'.[73] There are not two, but three voices here: the voice of the people, the voice of God and the voice of parliament. As the creators of the commonwealth, the people occupied the place and function of God, though there is a difficulty involved in assuming that the voice of the people was spoken through the mouth of parliament. This elision seems logically to work within the confines of the *Shipmony* argument, when Parker had yet not fully elaborated the argument of the people as authors of the law, for the core of his argument rested upon the principle of *salus populi* to undercut the king's arbitrary prerogative. The appeal to absolute parliamentary authority followed, for he suggested that parliament was better able to do the public business of *salus populi* than were the private interests of the king. The authentic *dominus* of political authority was not raised. In his *Observations*, however, the elision was less tidy. If authority was vested in the people by virtue of their authorship, it seems not to follow that the voice of parliament be immutable. In the final instance, Parker fell back upon an argument approximate to that of Althusius, for whilst parliament is a representation of the people, it 'is so, equally, and geometrically proportional';[74] its two houses constitute a representative body exactly proportionate to the people, so lifelike that it 'is neither one nor few, it is indeed the State it self'.[75] In practice, this was far from representing the people geometrically, for this synecdochal mechanism of representation concealed the abridgement between the people and a particular subset of the people, namely, a narrow group of gentry able to employ 'the people' in order to raise parliament above

[71] Henry Parker, *Jus Populi, or, a Discourse wherein Clear Satisfaction is Given* (London1644), 25.
[72] Parker, "Shipmony," 111.
[73] Ibid., 117.
[74] Parker, *Observations* 23.
[75] Ibid., 34. On this point, see also Quentin Skinner, "A Genealogy of the Modern State," *Proceedings of the British Academy* 162 (2009): 337-9.

their particular interests.[76] Nevertheless, it remained clear that 'the people' only functioned as an 'all-powerful' claim to the extent that it was able to arrogate the authority attached to the hypothetical act of founding.

Henry Parker's case for the absolutism of parliament was essentially a theoretical gesture, though this conjectural history was a perfectly precedented mode of argument by mid-1640s Stuart England, quickly displacing the 'provincial' and 'unphilosophical' mode of historically orientated political thought encapsulated in Sir Edward Coke's work on the ancient constitution, common law and immemorial custom.[77] The perceived value of the ancient constitution was that, in its 'infinite complexity', it contained the wisdom of many generations, all of whom had tested it by experience, whilst the written law of the continent 'contained no more than the wisdom of one man'.[78] It was this orientation toward immemorial custom that the rights of Englishmen followed. From 1642, however, this approach to political manoeuvring lost out to natural rights modes of theorising on the origins of government.[79] Parker's work allows us to make sense of the conceptual frame in which the arguments over the origin of government were articulated through the

[76] Morgan, *Inventing the People*, 50.

[77] J. P. Sommerville, "History and Theory: The Norman Conquest in Early Stuart Political Thought," *Political Studies* 34 (1986): 249; Quentin Skinner, "History and Ideology in the English Revolution," *The Historical Journal* 8, no. 2 (1965).

[78] J. G. A. Pocock, *The Ancient Constitution and Feudal Law* (Cambridge: Cambridge University Press, 1987), 34.

[79] The work of the Levellers straddles these two styles of argument. Whilst the likes of Lilburne drew upon the historically inflected 'native rights' of 'Englishmen', others, like Overton, appealed to the hypothetically inflected vocabulary of natural rights. See Richard Overton, "An Arrow Against All Tyrant," in *The English Levellers*, ed. Andrew Sharp (Cambridge: Cambridge University Press, 1998), 55; J Lilburne et al., "An Agreement of the People for a firm and present peace upon grounds of common right and freedom," in *The English Levellers*, ed. A Sharp (Cambridge: Cambridge University Press, 1998). For the progressively framed natural law arguments in the Levellers' writings, see R. Gleissner, "The Levellers and Natural Law," *Journal of British Studies* 20(1980); Iain Hampsher-Monk, "The Political Theory of the Levellers: Putney, Property and Professor MacPherson," *Political Studies* 24(1976); David Wootton, "Leveller democracy and the Puritan Revolution," in *The Cambridge History of Political Thought, 1450-1700*, ed. J. H. Burns and Mark Goldie (Cambridge: Cambridge University Press, 1991). For conservatively inflected historico-legal argumentation in the Levellers, see Michael Levy, "Freedom, Property and the Levellers," *Western Political Quarterly* 36(1983); Michel Foucault, *Society Must Be Defended: Lectures at the College de France, 1975–76*, trans. D. Macey (London: Penguin, 2003), 87-111. Rachel Foxley has, more recently endeavoured to reconcile these by suggesting that Lilburne's appeal to historical arguments endeavoured to rhetorically redraw the boundaries of the English nation—a radicalisation of the common-law tradition that helped buttress consent theory arguments. Rachel Foxley, "John Lilburn and the Citizenship of 'Free-born Englishmen'," *The Historical Journal* 47, no. 4 (2004). It goes without saying that the Levellers' thought should not be treated as a coherent set of ideas; on the diversity of Leveller thought, see Roger Howell and David E. Brewster, "Reconsidering the Levellers: The Evidence of the *Moderate*," *Past & Present* 46, no. 68-86 (1970).

construction of a conjectural history. As Skinner notes, though history was no longer held to carry 'prescriptive force', it nevertheless provided the 'essential framework' through which abstract rights-claims could be illustrated concretely.[80]

III: On the Fountain-Power of the Constituents

The specific vocabulary of constituent power entered the debates of the English civil war in 1644, as a number of texts responded to George Buchanan's *De Jure Regni* which, though written some 65 years earlier, had found a fresh audience. [81] The posthumously published *Unlawfulnesse of Subjects Taking up Armes against their Soveraigne* by Dudley Digges was printed in June of that year, whilst in January the deposed bishop John Maxwell published his *Sacro-Sancta Regum Majestas*. It is notable that these works were not the *pièces d'occasion* typical of civil war pamphleteering, but sustained treatises on political authority. Both Maxwell and Digges offer typically absolutist defences of the king against the likes of Parker and other English parliamentarians. In the course of their arguments, they each addressed the political implications of the logical maxim '*quod efficit tale, est magis tale*'; that is, 'the cause of a thing is superior to that thing'.[82] Maxwell recognised the implications of the claim, for that 'the constituent is better and higher in place and dignity than the constituted' inferred a number of 'absurdities', not least that they might 'change the Commissioners', 'repeal their Orders', and 'establish other Lawes contrary and contradictory to theirs'.[83] It was Maxwell's contention that such a maxim required qualification, for such privilege bestowed upon the constituent did

[80] Skinner, "History and Ideology in the English Revolution," 160.

[81] George Buchanan, *A Dialogue on the Law of Kingship among the Scots*, ed. Roger A. Mason and Martin S. Smith (Aldershot: Ashgate, 2004).

[82] John Maxwell, *Sacro-Sancta Regum Majestas, or the Sacred and Royall Prerogative of Christian Kings* (Oxford1644), 127-33; Dudley Digges, *The Unlawfulness of Subjects, Taking Armes against their Soveraigne, in what case soever*. (Oxford1644), 148-53. This phrase appears in Henry Parker's *Observations*, and seems to be a close analogue of Althusius' phrase *'nam constituens est major constitutio'*. Parker, *Observations* 2. Michael Mendle suggests that Parker comes across this phrase through the writings of the Jesuit theologian Francisco Suárez. Michael Mendle, *Henry Parker and the English Civil War: The Political Thought of the Public's Privado* (Cambridge: Cambridge University Press, 1995), 86. Suárez' usage is approximate, though inexact; see, for example, Francisco Suárez, *Selections from Three Works of Francisco Suárez*, trans. Gwladys L. Williams, et al., vol. II (Oxford: Clarendon Press, 1944), 855.

[83] Maxwell, *Sacro-Sancta*, 129.

not hold for such agents who 'operate by donation'.[84] This suggestion appears to play upon the Aristotelian schema of causality employed by Althusius. Maxwell appeared unhappy with this schema, for he suggested that an efficient cause itself could be so either formally or superlatively. If sovereignty was the power over life and death, this was not a power innately in the community, but one given by God. It followed, at least for Maxwell, that 'the people are not the efficient and constituent of a king', but serve as a tool of the superlative efficient cause of God, to whom the power over life and death belongs.[85] It was only under this tenet that the maxim *'quod efficit tale, est magis tale'* held.[86] From this proof, it followed that armed resistance by the subjects was always unlawful.

Maxwell accepted the figure of the constituent was bound causally rather than incidentally to the monarch, and, though authority flowed from this fact, the details of the dispute were about whether the people or God were rightly 'constituents'. A few months after Maxwell's *Sacro-Sancta,* the Scottish Presbyterian pastor Samuel Rutherford offered a response in his work *Lex, Rex*, the 'classic statement' of Covenanter political thought.[87] A great part of this text had been written prior to 1643, though it was only in light of Maxwell's publication that Rutherford found the energy to complete the manuscript. Stylistically, this was a deeply scholastic text, arranged along the lines of affirmation and refutation of a series of questions. Although written by a Presbyterian, the influence of the Salamancan neo-Thomists bears this out.[88] Whilst Rutherford, therefore, has on occasion been grouped together with the English Parliamentarians, such as Parker,[89] the explicitly theological nature of the argument appears to place him within a distinct political genre, in which

[84] Ibid., 131.
[85] Ibid., 132.
[86] Ibid., 131-2.
[87] J. Robertson, *The Scottish Enlightenment and the Militia Issue* (Edinburgh: John Donald, 1985), 57. To my knowledge, among the literature on the constituent power only Joel Colón-Ríos appears to acknowledge the usage by Rutherford and Maxwell. Nevertheless, the references are only in passing, and so they are weak upon both the contextual usage and the analytical implications. The suggestion is little more than that Rutherford was a resistance theorist in the style of Lawson and Locke. See Joel I. Colón-Ríos, "Five Conceptions of Constituent Power," *Law Quarterly Review* 130, no. 2 (2014): esp. 323-25.
[88] John Coffey, *Politics, Religion and the British Revolutions: The Mind of Samuel Rutherford* (Cambridge: Cambridge University Press, 1997), 152.
[89] See, for example, John Sanderson, "Conrad Russell's Ideas," *History of Political Thought* 14, no. 1 (1993).

natural law and scriptural prescription overlap considerably. Tuck has noted this, for whilst natural rights from Grotius onwards supposed a transfer of natural *dominium,* the Presbyterians believed that 'the developed social forms of *dominium* were constituted by God', and so whilst Rutherford came closest of any Presbyterian to the natural law tradition, the power of government was something altogether different from natural *dominium*.[90]

Initially, Rutherford agreed that individuals did not 'have in themselves formally any ray of royalty or magistratical authority',[91] though in order to circumvent Maxwell's suggestion that the people were not the efficient cause of the monarch, Rutherford delineated two movements: though 'magistratical authority' came from God and not the people, he distinguished the 'institution' of the Office, and the 'constitution' of the person of that office.[92] Whilst 'God hath *immediately* by law of nature appointed that there should be a Government', God '*mediately* defined by the dictates of natural light in the community, that there shall be one, or many Rulers to govern the community'.[93] Due to the noetic effects of the Fall, the people could not 'as if…by an act of reason, devise and excogitate such a power'; that must come from God.[94] But if that form of magisterial authority had been instituted by God, the people at least had the faculty to constitute the person of the king in whom that authority was invested. The difference with Maxwell subtle but imperative. For Maxwell, the acts of the people and God were of the same genus of 'constitution', though he considers God's to be causal, and the people's only incidental, so eliding the constituent act of the people entirely. Rutherford's disagreement was that these two parts of a single act are of an ontologically different nature: God's act of divine institution creates temporal authority *ex nihilo;* the people's act of constituting

[90] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 144. This intertwining of natural law and scriptural prescription appears to be a product of his account of the Fall, through which Man's epistemic faculties had been seriously damaged. Scripture was, therefore key to what men, epistemologically speaking, could know through human reason. This account is in keeping with his Calvinist roots, through which adequate knowledge was available only through special revelation. On this point, see Coffey, *Politics, Religion and the British Revolutions*, 153-55.

[91] Samuel Rutherford, *Lex, Rex: The Law and the Prince, a Dispute for the Just Prerogative of the King and People* (London: John Field, 1644), 43.

[92] Ibid., 6, 147.

[93] Ibid., 5. Emphasis in original.

[94] Ibid., 9.

designates that authority. To constitute is to designate the authority of God, but that act is one held completely in the body of the people; God does not partake directly in the act of constitution.[95]

For Rutherford, that 'the constituent is above that which is constituted' applied only to the people.[96] By virtue of their deed of constitution, the people possessed a 'fountaine-power' which remained 'unlimited' in the constituents, though 'bounded' when given to the king. Though the king was given the duty of executing the law, 'the most eminent and fountaine-power…remaineth in the people'.[97] This was crucial, for if the people relinquished all their fountain-power there would be nobody to constitute a new king should the man die. But to be above the constituted raised once more that difficulty that Barclay once levelled at the Monarchomachs: 'In a democracy, the People cannot both command and obey'.[98] On the subject of this paradox, Rutherford returned, perhaps unsurprisingly, to the convincing retort offered by Althusius. Citing Althusius, Rutherford distinguished the people as a multitude of individuals from the people as a universal body politic, repeating the maxim *'singulis major, universis minor'* that had been so integral to conciliarist thought. Whilst the king was superior to any one man, he was nevertheless an 'acidentall, termporarie and mortall…contingencie', and so inferior to the 'eternall' people acting together.[99]

This, however, is far from a straightforward appropriation of the Althusian argument, for it appears to undergo a sort of cross-cultural slippage, although, as Robert Friedeburg recognises, the transposition of thought from the Holy Roman Empire to Britain was often a 'productive intellectual misconception'.[100] What was lacking in the British context was the constitutional structure of estate-based government upon which Althusius had hung his consociationalist theory of political

[95] For a detailed account of this distinction between Maxwell and Rutherford, see John D. Ford, "*Lex, rex iusto posita:* Samuel Rutherford on the Origins of Government," in *Scots and Britons: Scottish Political Thought and the Union of 1603*, ed. Roger A. Mason (Cambridge: Cambridge University Press, 1993), 267-72.

[96] Rutherford, *Lex, Rex*, 339.

[97] Ibid., 148-49.

[98] Ibid., 209.

[99] Ibid., 141-42.

[100] Friedeburg, "Collective Representation," 20.

authority. Althusius could confidently separate the location of sovereignty in the people from the duty of political subjects, for he had recourse to the complex system of legal representation which distinguished the voice of the *jus symbioticum*, held by the ephors, from the individual subjects. This is because, for Althusius, the act of constituting the monarch was not one and the same as the origins of government. If the monarch was deposed, power momentarily reverted back to the ephors. This was a product of the distinction between *majestas personalis* and *majestas realis,* fundamentally distinct from the concept of the king's two bodies that prevailed in England.[101] The turn to Althusius allowed Rutherford the resources to challenge this prevalent doctrine. The suggestion that it was the people, and not the king, who possessed an immortal body was a conscious subversion of the king's legal body.[102] Nevertheless, whilst the Presbyterian Church offered the closest analogue to the estate structure of the Empire, there was no corresponding structure in the wider context of English politics. Once the legally immortal body of the king had been destroyed, the constitutional safety-net of the Empire was absent. In this context, the constituents' fountain-power took on a quite different connotation to the Althusian conception, for it slipped from the framework of constitutional law to the state of nature. Whilst for Althusius the power to constitute was an administrative duty with only secondary significance, the fountain-power of the constituents became the cornerstone of constitutional theory for Rutherford. The risk was that the legal status of the corporate people became less clear, looking dangerously close to a sleight-of-hand.

This apparent blind spot in Rutherford's formulation is perhaps due to its intended purpose. Rutherford was clearly alert to the danger of placing too much emphasis upon the people. One thing remains quite clear in Rutherford's account: to possess 'fountain-power' did not authorise the people to abolish the constitution at

[101] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957), 20.

[102] Rutherford was quite clear that it was this doctrine he addresses, for 'where a kingdom goeth by succession, the politicians say, the man who is king dieth, but the king never dieth, because some other, either by birth or free election succedeth in his room. But I answer,—1. People, by a sort of necessity of nature, succedth to people'. By contrast the monarch is not a natural institution, for 'if man had never fallen in sin, I am not, by any cogent argument, induced to believe…that the king should necessarily have been in the world'. Rutherford, *Lex, Rex*, 142.

will. The decision to constitute was itself a defence of constitutional monarchy, for the people had chosen that individual as a king, and neither some other individual, nor some other form of government. Rutherford was against arbitrary power as such, whether held by the monarch, or, in Parker's case, by parliament. The power to depose the sovereign was not itself arbitrary, but circumscribed by Rutherford's specifically Presbyterian considerations. Although *Lex, Rex* focused almost exclusively upon the horizontal covenant with the king, Rutherford presupposed a vertical covenant with God, the sort made explicit in Monarchomach thought, dramatically altering the term through which the horizontal covenant was to be understood. A nation covenanting with God was placed in the same situation as Israel of the Old Testament, which meant that for a King to command well he was to command in accordance with the true religion.[103] The vertical covenant was of central importance to *Lex, Rex*, providing the basis upon which resistance to monarchical authority could be enacted. It was, at least for Rutherford, the covenant that provided the safety-net that had been lost as constituent power drifted from the Empire to Britain, for the people made present their unity through covenant with God.[104] So too, it was only through their prior covenant with God that a people were capable of committing to a pact with the monarch, and so their obligation to God superseded their obligations to the King.[105] Consequently, clear religious obligations were conjoined with the original secular obligations of the covenant. It was, according to Rutherford, the duty of Charles I, as monarch of a Protestant nation, to act in accordance with the *salus populi,* but also to preserve the Protestant constitution.[106] This 'doubled-barrelled' covenant, with dual tracks of religious obligation and reason of state, fused John Knox's concerns for a true religion with George Buchanan's natural law arguments.[107]

[103] See, for example Brutus, *Vindiciae*, 21-35. Compare Rutherford, *Lex, Rex*, 99.
[104] Rutherford, *Lex, Rex*, 141.
[105] Ibid., 97.
[106] Ibid., 103.
[107] Coffey, *Politics, Religion and the British Revolutions*, 164. For further discussion on the differences between Knox and Buchanan, and their respective influences upon the Scottish Covenanters, see John Coffey, "George Buchanan and the Scottish Covenanters," in *George Buchanan, Political Thought in Early Modern Britain and Europe*, ed. Caroline Erskine and Roger A. Mason (Farnham: Ashgate, 2012); Roger A. Mason, "Covenant and Commonweal: The Language of Politics

In this light, the very usage of constituent power was an account of the joint enterprise entered into by king and people in order to defend the true religion. The constituent's fountain-power bound the people to the king, rather than distinguishing the two. Further, in the instance that they act to depose the king due to his idolatrous deeds, they remain a people under the laws of God. This was not a law that 'stepped in' once the temporal law of the king has been removed; it was a law they were to permanently observe. The problem of dual loci of obedience was here resurrected. Althusius went to great lengths to temper the need for a 'true religion'. 'A schism', Althusius wrote, 'should not be made…merely because of some error, sacramental reason or other cause, provided the foundation of the true religion is retained, and other human opinion is added to it'.[108] The final qualification is key, for whilst hermeneutic 'errors' might arise in the reading of the bible, Althusius was tolerant enough to accept those of other denominations. Rutherford was not.[109] The king's authority is not absolute, though not because the people were above him, but that their duty of obedience to him extended only so far as it coincides with their duty to God.

IV: THOMAS HOBBES AND THE INSTITUTION OF THE COMMONWEALTH

Rutherford's *Lex, Rex* is significant though often overlooked. What Rutherford provides is an adequate context in order to advance the central claim of this chapter, namely that in *Leviathan* is a compelling, though overlooked, account of constituent power. Mónica Brito Vieira's contention that it is 'misleading' to describe Hobbes as a theorist of constituent power is indicative of the tendency to omit Hobbes from the conceptual history of constituent power, for, she argues, his account of representation 'does not work…as a pre-commitment device' that articulates a 'unified constitutive will'.[110] She is certainly right to challenge Murray Forsyth's perspective which, in

in Reformation Scotland," in *Church, Politics and Society: Scotland 1408-1929*, ed. N. MacDougall (Edinburgh: Edinburgh University Press, 1993).

[108] Althusius, *Politica*, 76.

[109] See especially Samuel Rutherford, *A Free Disputation Against Pretended Liberty of Conscience* (London: Andrew Cook, 1649).

[110] Mónica Brito Vieira, *Elements of Representation in Hobbes: Aesthetics, Theatre, Law and Theology in the Construction of Hobbes' Theory of the State* (Leiden: Brill, 2009), 164.

imputing Sieyès' argument back into Hobbes, understands 'the people as constituent power [to] stand in *Leviathan* as a distinct force behind all *constituted* forms of sovereignty'.[111] Brito Vieira's conclusion, however, overreaches, writing out the possibility that Hobbes may very well have developed his own account of constituent power that need not resemble Sieyès' much later formulation. This, I will argue, is not in the form of a 'self-transformatory contract', as Forsyth argues. Rather, constituent power, for Hobbes, was a flight of the imagination that embellished political acts with further normative commitments. It was this that Hobbes harnessed in order to supplement his covenant with the role of imagination that he took to be central in maintaining the fictional attribution of political responsibility that allowed the state itself to exist

Though often unacknowledged, in *Leviathan* Hobbes appeared to respond to the Scottish Covenanters, and to Samuel Rutherford's assertion that the people possess a fountain-power to constitute the King. In chapter 18 of *Leviathan,* while discussing the rights and obligations that followed from the act of 'institution'—a term to which I will return—Hobbes proclaimed:

> 'And whereas some men have pretended for their disobedience to their Soveraign, a new Covenant, made, not with men, but with God; this also is unjust: for there is no Covenant with God but by mediation of some body that representeth Gods person; which none doth but Gods Lieutenant, who hath the Soveraignty under God. But this pretence of Covenant with God is so evident a lye, even in the pretender's own conscience, that it is not onley an act of an unjust, but also a vile and unmanly disposition'. [112]

There was, for Hobbes, only one covenant: a covenant between man and sovereign. It was not only an absurdity to suggest that one might covenant directly with God, but offensive, cowardly, and 'unmanly'. This was directed at the work of the Scottish Covenanters.[113]

[111] Forsyth, "Hobbes and the Constituent Power," 200.
[112] Thomas Hobbes, *Leviathan* (London: Penguin, 1985), 230.
[113] Within the final chapter of *Leviathan,* Hobbes proclaimed that it was the 'Romane and Presbyterian clergy' who were responsible for the 'Darkness in Religion' that provoked civil war.

Hobbes' criticisms in this passage sought to reveal the falsity of the Presbyterians' beliefs, because he saw them to be imaginary construct that invited believers into acts of disobedience. This is felt in the distinction between mediacy and immediacy. The people's covenant with God was an immediate one, according to Rutherford. For Hobbes, there was no such possibility of covenanting immediately with God, and the Scottish Covenanters very well knew this. Such a claim was simply a deceitful means of disobeying the sovereign, contrived from an ill-fitting combination of scripture, the 'vain and erroneous' philosophy of Aristotle, and 'fained, or uncertain history.[114] In placing a law above laws they authorised themselves to disobey in the name of a metapolitical duty, so threatening the very grounding of politics embedded in the nexus of territory, the state, and the figure of the sovereign. They were what Derrida calls 'agents of depoliticisation'.[115]

To posit an immediate contract with God was, for Hobbes, to buy into the false premise that something incorporeal could endure autonomously. Hobbes rejected this, along with the account of scholastic essences from which this conclusion was drawn. The doctrine of separated essences proposed that physical objects emit 'similitudes', which bear the real qualities such as colour or odour that affect the sense organ. These are transported by 'animal spirits' to the brain where they are represented to the intellect.[116] Hobbes's concern was that this 'false philosophy'

Hobbes, *Leviathan,* 706. Hobbes was more explicit on this point elsewhere. In *Six Lessons to the Savillian Professors of the Mathematics*, Hobbes reported that the 'cause of my writing that book [*Leviathan*], was the consideration of what [Presbyterian] ministers before, and in the beginning of the civil war, by their preaching and writing did contribute thereto'. A professor of Divinity as St. Andrews, Rutherford was one of those who 'brought their doctrines against the civil power from their studies in the Universities'. Thomas Hobbes, "Six Lessons to the Savillian Professor of the Mathematics," in *The English Works of Thomas Hobbes, Vol. VII*, ed. William Molesworth (London: Routledge, 1992), 335. Within *Behemoth*, his language was sharper still. Speaking of the 'seditious doctrine of the Presbyterians', he noted that 'to believe in Christ is nothing with them, unless you believe as they bid you. …How we can have peace while this is our religion, I cannot tell'. Thomas Hobbes, *Behemoth, or, The Long Parliament*, ed. Ferdinand Tönnies (Chicago, IL: University of Chicago Press, 1990), 57.

[114] Hobbes, *Leviathan*, 629.

[115] Jacques Derrida, *The Beast & the Sovereign: Volume 1*, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2009), 52.

[116] For a careful reconstruction of Aristotelian sense perception, and Hobbes' critique, see especially Cees Leijenhorst, "Sense and Nonsense about Sense: Hobbes and the Aristotelians on Sense Perception and Imagination," in *The Cambridge Companion to Hobbes's Leviathan*, ed. Patricia Springborg (Cambridge: Cambridge University Press, 2007). For the political implications of this nominalism, see Ben Holland, "Sovereignty as *Dominium*? Reconstructing the Constructivist Roman Law Thesis," *International Studies Quarterly* 54, no. 2 (2010): 460-65.

entailed 'many other absurdities', namely the belief in various of incorporeal essences that were nothing more than labels attached to things that had left 'an Impression in the Imagination'.[117] These impressions were not explained by incorporeal essences, but far more simply by the 'decaying sense' that followed local motion pressing upon the sensory organ.[118]

Hobbes was a nominalist and a materialist, who held that nothing really existed beyond the magnitude and motion of bodies. It was in an extension of this principle that he took the Covenanter position of an immediate contract between 'the people' and God to be a ruse that justified disobedience to the sovereign. One could not contract immediately with God, but only by way of mediation with his earthly lieutenant.[119] That the sovereign was God's lieutenant [*lieu-tenant*] is important, for he was literally God's material stand-in. He was, however, more than a representation—he was a representation by imitation: on the opening page of *Leviathan*, Hobbes wrote, 'Nature' is the 'Art whereby God hath made and governes the World'. It was an art that man could 'imitate' in making an 'Artificial Animal', for 'by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE'.[120] The Leviathan was a copy of God's work. This imitative representation of God not only refuted the Presbyterian claim that God's law might be distinct from the sovereign's command, but also affirmed that the very logic of the sovereign command was premised upon the theistic model. This wholly reconfigured the nature of the covenant. Whilst Rutherford's *Lex, Rex* accounted for two covenants, the first vertical with God, the second horizontal with the monarch, for Hobbes the entire contract was a vertical one. A contract with God was only attainable mediately through the sovereign's earthly command.

This background frames more appropriately a seemingly unimportant choice of vocabulary within the Hobbesian covenant. Hobbes began chapter 18 with the rather uncontentious statement that 'A *Common-wealth* is said to be *Instituted,* when

[117] Hobbes, *Leviathan*, 689-93.
[118] Ibid., 85-88.
[119] See especially Hobbes recognition that law was given to men not directly from God, but mediately through the public person of Moses, who acted 'in God's Name'. Ibid., 220.
[120] Ibid., 81.

a *Multitude* of men do Agree, and *Covenant, every one, with every one,* that whatsoever *Man,* or *Assembly of Men*, shall be given by the major part, the *Right to Present* the Person of them all'.[121] That the creation of the commonwealth was in an act of covenanting was commonplace in English civil war discourse, from Parker and the Parliamentarians, to Rutherford and other Presbyterian. Nevertheless, the careful engagement with Covenanter thought only a few pages later reveals a great deal in this apparently inconsequential turn of phrase. That the commonwealth was *'instituted'* by covenant appears to be both deliberate and integral. The commonwealth was not *constituted*, but *instituted*. It is critical to note that the choice of the term 'institute' was a prominent and fresh addition of *Leviathan*. In the corresponding passage, from chapter VI of *De Cive,* written prior to the publication of *Lex, Rex,* Hobbes did not use the term, but instead chose '*constitutionem'* to describe the nature of the covenant, which was translated in the 1651 English edition as 'constitute'.[122] Semantically, there is little in the distinction, both being derived from the Latin root *statuere*. However, when contrasted with Rutherford's distinction in *Lex, Rex,* the claim takes on a startling new significance. To recall, Rutherford's contention was that the office of the monarch was *instituted* by God, though the person to fill that office was *constituted* by the people. The choice on Hobbes' part to contend that the commonwealth was *instituted* appears to be quite deliberate; the two acts that Rutherford distinguished were one in Hobbes. There was no divine intervention to create the office of the king; all power emanates from the natural capacity of the multitude, and so it was the multitude that *instituted* both the authority and person of the Sovereign.

[121] Ibid., 228.

[122] See Thomas Hobbes, *De Cive: The Latin Version* (Oxford: Oxford University Press, 1983), 144; Thomas Hobbes, *De Cive: The English Version*, ed. Howard Warrender (Oxford: Oxford University Press, 1983), 100. On this basis, I am inclined to take it as an understandable mistranslation of the Latin that renders the term 'instituted' in the prominent Cambridge edition. See Thomas Hobbes, *On The Citizen [De Cive]*, trans. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1998), 85. For the remainder of this paper, I rely upon the Cambridge edition as it is an otherwise excellent translation of the 1642 Latin edition. Similarly, the two terms, institute and constitute, are employed interchangeably within *The Elements of Law*. This suggests that he possibly saw no important distinction between the two at the time of writing. Thomas Hobbes, *Elements of Law Natural and Political: Human Nature and De Corpore Politico*, trans. J. G. A. Gaskin (Oxford: Oxford University Press, 1994), 109.

On one level, there was a superficial sleight-of-hand at play, for his decision to substitute the term 'constitution' for 'institution' allowed Hobbes to circumvent some of the more obvious objections associated with the maxim, 'the constituent is greater than the constituted'. Nevertheless, there is more to the theoretical engagement than linguistic trickery. Though he wrote out the *language* of constituent power, the *concept*—at least as it appears in Rutherford—was retained, though conjoined with the act of institution into a single covenant. This itself provided a conceptualisation of constituent power through which the claim to the title 'constituent' was present, though unvoiced and intentionally equivocal.

To illustrate, it should first be appreciated that the form of the covenant in *Leviathan* underwent a meaningful conceptual shift from the position offered in *Elements of Law* and *De Cive,* written in 1640 and 1641 respectively.[123] In *De Cive,* Hobbes configured the original covenant between a multitude of individuals in such a way that 'each man subjects his *will* to the *will* of a *single* other…in such a way that whatever one *wills* on matters essential to the common peace may be taken as the *will* of all'.[124] This, he called a 'union', 'commonwealth' or '*persona civilis',* for since there was one will it could be taken as one person. Nevertheless, the original location of that will was in the single individual or assembly that represented the multitude. Consequently, 'no single citizen nor all together (*except him whose will stands for the will of all*) are to be regarded as the commonwealth'.[125] It followed from this that 'the commonwealth is contained in the person of the King'.[126] The multitude of individuals were bound by the will of the commonwealth (itself regarded as the single willing sovereign), and live within the commonwealth, but they were not transformed into a unitary will in the act of covenanting. They appeared as a unity

[123] *Elements* was first written in early 1640, though not published until 1650. *De Cive* was originally written in Latin in late 1641. It was first published in Paris in 1642, with two further editions following in 1647, both printed in Amsterdam. An English language version was eventually produced in March 1651, following the relaxation of censorship. The first edition of *Leviathan* followed later that year. For a detailed examination of the publication history of Hobbes' work, see Howard Warrender, "The Publication of Hobbes's Political Philosophy," in *De Cive: The Latin Version*, ed. Howard Warrender (Oxford: Oxford University Press, 1983).

[124] Hobbes, *De Cive*, 72.

[125] Ibid., 73. Emphasis added.

[126] Ibid., 83.

due to the attribution of the single will of the sovereign.[127] The multitude continued to exist within the commonwealth. Accordingly, as Murray Forsyth appreciates, Hobbes 'could not permit the multitude to appoint…one person to whom they would submit their wills, because this would bestow upon the multitude an element of will and unity which his radical antithesis between the one and the many…did not allow'.[128] Under such conditions, the creation of the Commonwealth was a 'surrendering' of power to a single man, rather than an act of collective 'willing' of the constitution.[129]

This is all quite different from the operation of the covenant in *Leviathan,* for the radical differentiation and relationship between the multitude and the commonwealth takes on a different form and significance. Murray Forsyth has recognised that there is an important shift at play between the two text, though he describes *Leviathan's* argument as a 'self-transformatory contract'.[130] I avoid this language for 'self-transformation' implies a transition that imparts too substantive an identity into 'the people'. For Hobbes, there was no 'people', only the person of the state.[131] *Pace* Brito Vieira, however, this does not mean that constituent power is absent.[132] Rather, Hobbes reconfigured the covenant of *Leviathan* in light of Rutherford's argument to present constituent power in an intentionally equivocal form developed through the generative fiction associated with representation. To appreciate this, it serves to unpack his account of personhood. In chapter 16 of *Leviathan* Hobbes wrote that:

> A PERSON, is he whose words or actions are considered, either as his own, or as representing the words or actions of an other man whether Truly or by Fiction'. When they are considered as his owne, then is he called a *Naturall Person*: And

[127] To clarify this crucial point, whilst *De Cive* does contains an account the will of the multitude of individuals unified through representation, the unitary will that represents those individuals is that of the king who speaks and acts for them; they are a unity because they are contained within the commonwealth. What is lacking in *De Cive* is an adequate way of accounting for *how* the attribution of actions from monarch to multitude is to be made.

[128] Forsyth, "Hobbes and the Constituent Power," 194.

[129] Ibid., 195.

[130] Ibid., 199.

[131] See especially Skinner, "A Genealogy of the Modern State," 344.

[132] Brito Vieira, *Elements of Representation*, 164.

> when they are considered as representing the words and actions of an other, then is he a *Feigned* or *Artificiall person*.[133]

Personhood is a question of agency. In particular, it is a juristic device through which Hobbes sought to make sense of how actions are to be attributed to individuals or things. This entailed, for Hobbes, two important distinctions. The first, between 'natural' and 'artificial' persons, and the second, between 'true' and 'fictional' attributions of responsibility through representation. A natural person is one who speaks and acts for oneself, and takes responsibility for those actions. By contrast, artificial persons are those who, when speaking or acting, represent another person or thing. That is to say, while the agent of the act is the artificial person, responsibility for that act is attributed to the individual or thing on behalf of whom the agent acts. This is possible, for '[o]f Persons Artificiall, some have their words and actions *Owned* by those whom they represent'.[134] Here he exploits the polysemy of what it means to 'own', for in 'owning' the persona that is performed by the artificial person, one 'owns up', or takes responsibility for those actions. The distinction is such that the acts of the representative are the property of the represented; whilst the Person is the actor, the owner of the act is the 'author'. They are the 'author' for it is through their 'authority' that the act is committed.[135] In setting up this claim Hobbes subtly modified the direction of causality between 'author' and 'authority'. For Parker, it was from the people's authorship that political authority was derived, and so, in being the 'author' of the law, the people held authority over the King. Hobbes reversed this point: in retaining authority over the representative, the represented continues to 'author' that representative's acts. That is to say, he takes responsibility for those deeds.

Among artificial persons this act of representation may take one of two forms. They represent 'truly' when the individual being represented is capable of owning up to the words or actions of the artificial person, while they represent 'by fiction' when the represented party is mentally or physically incapable of 'owning up' to those

[133] Hobbes, *Leviathan*, 217.
[134] Ibid., 218.
[135] Ibid.

actions. Representation by fiction may be necessary because that which is represented is either inanimate (in the instance of a bridge or hospital), or irrational (in the instance of a child or a madman).[136]

This account of personhood and representation has important implications for both the outcome of the covenant and the understanding of the collective identity that Rutherford labelled 'the people'. In carefully recasting the terms of Rutherford's covenant, Hobbes had demonstrated that the three moments of contracting—the vertical covenant that made the people one before God, the institution of the office of the monarch by God, and the constitution of the person of the office by the people—were, in fact, a single covenant of institution. Accordingly, 'the people' of *Lex,Rex* breached this account of personhood because they formed an inchoate mass without a single will. There was no way of allocating responsibilities to actions except as individuals (i.e. natural persons), prior to the instituting covenant. Hobbes wrote in chapter 16 that:

> A Multitude of men are made *One* Person, when they are by one man, or one Person, Represented…for it is the *Unity* of the Representer, not the unity of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person: And *Unity,* cannot otherwise be understood in Multitude [137]

Only the act of institution between natural persons solved the problem of collective identity. Through this act of institution, two persons were created. The first was the artificial person of the sovereign, the second was the commonwealth, or the person of the state. In covenanting, the multitude were united as a single author in the person of the state.[138] Yet, this person could not speak or act. It therefore required another person, the sovereign, to act on its behalf. As the state could not 'own up' to these acts, it was a representation by fiction.

[136] My interpretation is particularly indebted to David Runciman, "What Kind of Person is Hobbes's State? A Reply to Skinner," *Journal of Political Philosophy* 8, no. 2 (2000): 269; Brito Vieira, *Elements of Representation*, 146-75. See also the introduction to Ben Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities* (Cambridge: Cambridge University Press, 2017).

[137] Hobbes, *Leviathan*, 220.

[138] Ibid., 227.

This is an important modification to the argument of *De Cive*: if in *De Cive* the multitude of individuals party to the covenant were to submit to the single will of the sovereign who embodied the commonwealth, in *Leviathan* Hobbes' position had changed. The multitude of individuals were made one only in the person of the state. Hobbes theory of representation was the tool through which the state exhaustively served as the vessel of collective identity. Forsyth has suggested the covenant gives 'the unity latent in its multiplicity a distinct, appropriate, instituted shape and form'.[139] This seems to undermine the direction in which Hobbes' argument ran. It should be stressed that it was not that the identity was latent, but that there was no collective identity prior to the covenant.

The conceptual disconnection between the two was vital if Hobbes was to adequately diffuse the positions of Rutherford and Parker, each of whom assumed there was, in their respective ways, a body of the people. Hobbes' account of representation undercut both claims, and with it the objection that the sovereign was '*singulis majors, Universis minores*'. Hobbes took it to be 'absurd' that these writers could treat the multitude 'all together', and as individuals as separate entities.[140] By naming that collective 'the people', they conflated the multitude of individuals with the description of a unified subject, a hypostatisation that had no way of adequately attributing actions to the collective. On the other hand, 'if by *all together,* they understand them as one person (which person the Soveraign bears,) then the power of all together, is the same with the Soveraigns power'.[141] The key was the discontinuity between multitude and the state. There was no trace of a collective constituent subject prior to the covenant.[142] The upshot of this was that the pre-political entity that may have laid claim to acting as constituent power—that is, the multitude of individuals—ceased to exist *as a constituent* in order to create the state. In excluding the people as a unified collective within the state of nature, Hobbes presented an objection to Rutherford that held even in the terms of Rutherford's own

[139] Forsyth, "Hobbes and the Constituent Power," 199.
[140] Hobbes, *Leviathan*, 237.
[141] Ibid.
[142] Ibid., 220. See also Quentin Skinner, "Hobbes on Representation," *European Journal of Philosophy* 13, no. 2 (2005): 170.

account of Aristotelian causation. Constitution of the state and dissolution of the multitude are coterminous. Rutherford's 'people' do not precede the contract, and so could not, in any meaningful sense, be considered as 'constituents'.

It would be too hasty to conclude from this that there is no account of constituent power in *Leviathan*. After all, Hobbes was similarly dissatisfied with absolutist theories of political power that took the proper relation between ruler and the people to be one of passive obedience.[143] To this effect, Hobbes retained an unvoiced account of constituent power within his theory of covenanting that sought to mediate between the Presbyterian arguments for a 'joint enterprise' between people and king, without this amounting to passive obedience or the subsumption of civil power within spiritual power. To be sure, however, this was not a material power. Hobbes rejected outright the hierarchy of Aristotelian powers upon which Rutherford's argument was based. For Hobbes, power was an 'accident' (i.e. a motion) of persons, and could not be considered independent of that motion. Though one power may be lesser in skill or magnitude than another, it could not follow that one power held 'right or command over another' without misconstruing the material way in which power was employed.[144] Constituent power, for Hobbes, was not a material power, but rather seems to operate on the register of what Hobbes labelled 'Fancies', those words, like fairies, ghosts and goblins, that are nothing more than nominal labels attached to flights of the imagination.[145] The argument for constituent power in *Lex, Rex* was characteristic of one of the many conjured phantasms of the mind that adorned power (i.e. motion) with additional rights and obligations that would excite men into seditious acts and convince them to betray civil authority in the name of a higher duty. As Douglass recognises, Hobbes argument in *Leviathan* furnished a much longer-held position in his work regarding the centrality of

[143] On Hobbes' dissatisfaction with absolutist theories of power, see Skinner, "A Genealogy of the Modern State," 342.

[144] Hobbes, *Leviathan*, 601. See also Thomas Hobbes, "De Corpore," in *The English Works of Thomas Hobbes of Malmesbury, Vol.1*, ed. William Molesworth (London: John Bohn, 1839), 131-32.

[145] Hobbes, *Leviathan*, 92.

imagination to political realities.[146] Hobbes argument was organised not around excluding constituent power, but harnessing this same imagination toward a different end, namely one that took the Kingdom of God to be nothing else but the Commonwealth itself.[147] To this effect, Hobbes' reformulation of Rutherford's constituent power served as metaphor through which the self-understanding of the imagined collective was organised according to particular rules that shape the behaviour, expectation and understanding of individuals within their political community, whose creation they participated in. [148]

Hobbes account of representation intended to serve this purpose by fundamentally reconfiguring the image to which the label of constituent power could be attributed. Though the individuals who comprised the state hold no authority over the person that was authored—namely the sovereign—the act of institution nevertheless invested them into an ongoing and active authorisation through the person of the state. This was possible only because Hobbes shifted the register from representation as *mimesis*, to representation as *poiesis*.[149] The former supposed the people were a substantive, self-standing entity: representation was needed only to deal with the difficulty of the people meeting together, and so representation sought to reflect the people's will. For Hobbes, representation went far further: it was a generative enterprise. On the one hand, this was simply because the collective identity embedded in the person of the state was generated through representation; it could not exist prior to representation. On the other, this entailed a dynamic and ongoing process through which individuals reflected upon the representation itself, affirming the centrality of individual agency within that representation. As Frank Ankersmit demonstrates, albeit in a different context, it is the distance between a representation and that which is represented that transforms representation into a

[146] Robin Douglass, "The Body Politic "is a Fictitious Body": Hobbes on Imagination and Fiction," *Hobbes Studies* 27, no. 2 (2014). This perspective on imagination dates back at least to *Elements*. See Hobbes, *Elements of Law*, 22.

[147] Hobbes, *Leviathan*, 445.

[148] Though she excludes the possibility of an account of constituent power, Mónica Brito Vieira appreciates this important aspect of Hobbes' covenant. Brito Vieira, *Elements of Representation*, 177. See also Arash Abizadeh, "The Representation of Hobbesian Sovereignty: Leviathan as *Mythology*," in *Hobbes Today: Insights of the 21st Century*, ed. S.A. Lloyd (Cambridge: Cambridge University Press, 2014), 133.

[149] See especially Brito Vieira, *Elements of Representation*, 235-53.

dynamic and creative force.[150] By affirming an aesthetic gap between an object and its representation, the viewer is made a participant in the process of discerning the meaning of that representation. Unlike Parker, for whom parliament was a perfectly mimetic representation of the people—and for whom the people were little more than passive spectators—Hobbes state was a person by fiction that did nothing to mask this fictitious quality. It did not just re-present existing realities, but forged new ones by involving not only the creator of the representation, but, more fundamentally, also the recipients in the complex dynamics of interpretation and meaning-making associated with that aesthetic gap.[151]

This is a qualification upon Forsyth's suggestion that Hobbes' constituent power 'acted once and only once', having no life beyond the founding.[152] The metaphor of constituent power, though difficult to pin down, served as the basis of a political imaginary by impressing upon the mind of the reader of *Leviathan* that they were the authors of the state, and so engaged in a continual joint enterprise of authorisation.[153] This was the dynamic aspect of representation at play, for it did not move simply from represented to representative. Through the person of the state, the individuals identified themselves as co-authors of the sovereign's words and actions. Hobbes was vitally aware of the significance of this sort of symbolic attribution, for, as he wrote in *Behemoth,* 'the power of the mighty hath no foundation except in the opinion and belief of the people'.[154] The state itself exists only in the imagination of men whose individual practices allow responsibility to be attributed from the sovereign to the state, and continues to exist only so long as they continue to buy into that fiction.[155] In short, when understood as a claim over the imagination, constituent power was itself world-making. This is not because the constituents' fountain power was a substantive capacity of a group who bore it and were therefore capable of

[150] Frank R. Ankersmit, "Representational Democracy: An Aesthetic Approach to Conflict and Compromise," *Common Knowledge* 8, no. 1 (2002): 31-37.

[151] Brito Vieira, *Elements of Representation*, 238.

[152] Forsyth, "Hobbes and the Constituent Power," 201.

[153] On the use of metaphor in *Leviathan*, see Arto Tukiainen, "The Commonwealth as a Person in Hobbes's *Leviathan*," *Hobbes Studies* 7, no. 1 (1994): 51-55.

[154] Hobbes, *Behemoth*, 16.

[155] Douglass, "The Body Politic "is a Fictitious Body"." Though he avoids the language of 'imagination', this is similarly the core of Runciman's claim. "What Kind of Person is Hobbes's State?," 273.

creating new constitutions, but because, for Hobbes, it was another of those conjured phantasms of the imagination that assisted in forging the imagery of the political world towards which it is directed. In doing so, it forged the image of the Leviathan and the political obligations that flow from it.

CONCLUSION

The purpose of this chapter has been to account for the emergence of an articulation of constituent power in the 17th Century. During this period, constituent power came to be articulated through the semantic connection between authority and the figure of the author, and especially the connection between two maxims, 'the constituent is above that which is constituted', and 'the king is greater than the individual, but less that the whole'. When acting together, the people could depose the monarch through their concerted authority as constituents. Curiously enough, however, among these formulations constituent power was never allocated to the people immediately. The political power of the people remained essentially mediated by another, usually through some mode of representation, whether the ephors, parliament or the Presbyterian church, each with different concomitant obligations. This, I have argued, was polemically rethought in an acutely juridical, though unvoiced, form in Thomas Hobbes' *Leviathan*. He geared his appropriation of constituent power toward resolving the longstanding tension between *regnal* and *sacerdotal* authority, and the correlated effect of prescribing multiple sources of political obedience for subject. In particular, Hobbes achieved this through a compelling shift in the way in which political representation operated and was associated with constituent power.

For Hobbes, constituent power was a fiction. It was a fiction because it was nothing more than a nominal label that furnished political realities with ornamentation of the imagination, and in so doing provided beliefs and justifications for any number of political ends. Hobbes nevertheless recognised the importance of these fictions, though saw them as legitimate only when channelled to the appropriate political ends. Just as Hobbes sought to reveal the fiction of Presbyterian

and Catholic interpretations of the bible that justified sedition in the name of religious duty, Hobbes demonstrated through the imagery of the Leviathan the need for fictions to secure obedience in the name of personal safety. The same was true of constituent power. Hobbes was not content in simply laying bare these political fictions, but instead sought to harness them toward his own political ends, for he recognised that rational obedience alone was insufficient to ground a political community. This needed to be carefully intertwined with an argument for obedience that played upon the passions.[156] To this effect, he did not omit constituent power but employed it in order to provide an analogous base of passionate obedience.

Prior to Hobbes, constituent power had taken the form of a usufruct, through which political power was transferred from the people to the monarch. Constituent power served as the justification for the recall of that political power. That those justifications were vocalised through representation was not theoretically significant. Insofar as the people were taken to be a self-standing identity, representation supposedly served only to ease the difficulty in the people meeting to make decisions. The qualification 'supposedly' is key, at least for the way Hobbes took constituent power to operate. In assuming this representation was merely mimetic, these writers did not simply get representation wrong. Rather, they intentionally masked the way in which representation worked in order to trick the represented masses into rebellion and bolster the power of parliament or the church. Hobbes, by contrast, did nothing to mask the fiction of representation. Political unity was only possible through representation for the person of the state was only generated through representation. Though he framed this in such a way that undercut the ability for individuals to legally rebel, the aesthetic gap that was engendered by this fiction entailed a reflexive process of interpretation and authorisation that continued to maintain the active role of individuals within the state.

In identifying that constituent power was as a sort of passionate fiction which helps individuals buy into a political reality, Hobbes appreciated that it could be used to secure a particular range of rights and duties, as well as provide individuals the

[156] Noel Malcolm, *Aspects of Hobbes* (Oxford: Oxford University Press, 2002), 229.

terms upon which their collective identity was to be understood. In short, Hobbes provided a way of interpreting constituent power as a political claim that played upon the imagination in order to secure political authority. This was a 'fancy' that could be manipulated to serve whichever end the user desired. In what follows, I will show that constituent power was not a 'capacity' for constitution-writing or deciding the individual who took the seat of monarchy, but precisely this Hobbesian flight of the imagination.

* * *

2: "They are the Sign – the People are the Thing Signified": An Anglo-American Constituent Power

Within this chapter and the next, I trace how constituent power was used as an argumentative device in the American and French Revolutions. Particularly, I demonstrate that adopting the language of constituent power was bound up with a shift in the collective self-understanding of the American or French people in aid of the respective revolutionary causes. The ideas, however, began from different starting points and pulled in different directions. As I demonstrate in this chapter, the use that settled in American vernacular, though contributing a theory of the state, was a populist one, indebted to the style of argument found in Parker and Rutherford. After adopting this vocabulary in America followed shifts from political localism to questions of peoplehood, and from the language of proprietary constitutionalism to European-style modern constitutionalism. In chapter three, I show that in France, and particularly in the work of Emmanuel Sieyès, Hobbes played a more significant role. The employment of constituent power in France shifted the political imaginary from what Kevin Olson has labelled a 'deprived-fraction imaginary' to a 'populist-universalist' one.[1]

Recognising the Hobbesian claim that constituent power is a world-making fiction, in the course of these examinations I show how the particular architecture of constituent power was built, and how these conceptual structures played a part in the construction and adoption of political worlds that aided their respective revolutionary causes. In this chapter, I show that the American revolutionary

[1] Olson, *Imagined Sovereignties*, 55-56.

language of constituent power was one appropriated from Britain. Here, I show how the adoption of this metropolitan language shaped—and sometimes compromised—the search for a collective identity.

It serves to consider one example that is indicative of the way constituent power was used during the American revolutionary period. A first-generation American born to a recent Irish immigrant, Thomas Young, despite his qualification as a physician, was a poor man. Young resented the sorts of impediment to social advancement that entrenched privilege placed upon him and others like him. Combatting those social antagonisms that, local in origin, fed into the American Revolution, Young contributed to two of the most radically democratic constitutions of the revolutionary period: the State Constitution of Pennsylvania, and the Constitution of Vermont. It has been said he did as much to make the events of the 1770s into 'a real revolution, not just a war for independence'.[2] Young was an unmistakable figure in the formation of what came to be called the Vermont Republic, a small self-governing state not admitted into the union until 1791.

On 11th April 1777, during a speech to the people of Vermont, Young drew upon the vocabulary of constituent power to affirm the political rights of the people:

> I esteem the people at large the true proprietors of governmental power. They are the supreme constituent power, and of course their immediate Representatives are the supreme delegate power; and as soon as the delegate power gets too far out of the hands of the constituent power, a tyranny is in some form established.[3]

His usage was notable. The supreme constituent power was the people, though he tied this not to the 'constituted power', nor the king, but the 'delegate power', who were the 'immediate representatives'. Young's speech did not orientate its audience

[2] David Hawke, "Dr. Thomas Young— "Eternal Fisher in Troubled Waters": Notes for a Biography," *New-York Historical Society Quarterly* 54, no. 1 (1970): 6. In addition to Hawke, see Pauline Maier, for what are to my knowledge the only comprehensive examinations of Thomas Young's life and thought. Pauline Maier, "Reason and Revolution: The Radicalism of Dr. Thomas Young," *American Quarterly* 28, no. 2 (1976).

[3] Thomas Young, "To the Inhabitants of Vermont, a Free and Independent State, bounding on the River Connecticut and Lake Champlain," in *History of Vermont, Natural, Civil and Statistical, in Three Parts*, ed. Zadock Thompson (Burlington, VT: Chauncey Goodrich, 1842), 106.

toward an original, immutable foundation; rather, he was concerned with the *immediacy* of congressional representation. By the mid-18th century, the lexicon of constituent power was employed to defend a particular relation of political representation, namely delegation over trusteeship. It was a vocabulary that sought to ensure representatives acted in accordance with the will of their constituents, not their personal judgement.[4] Constituent power was employed not to challenge the authority of the person of the king, or of parliament, but as a subversive strategy to challenge the dominant model of parliamentary representation, taken to be trusteeship.

There are a few passing remarks recognising Thomas Young's use of the term 'constituent power',[5] and others that prematurely attribute to him its invention.[6] What is surprising, however, it the dismissive tone with which his account of constituent power is treated. In a lengthy footnote, Joel Colón-Ríos suggests that Young did not employ the term to refer to the 'unlimited power to create constitutions', but that he referred to the 'general idea that representatives should act according to the will of those they represent'.[7] Importantly, it is relegated to a footnote, acknowledged only in passing, though given no real significance. It is dismissed not only as an overly institutionalised but also a fundamentally incomplete account of constituent power. From a genealogical perspective, this dismissal is inadequate, especially since the delegated relation between constituents and their representative appears to be a common formulation of the concept during the 18th Century in both Britain and America. Its rejection by theorists of constituent power

[4] Three years earlier, the precedence of the distinction was felt in Edmund Burke's now famous speech to his Bristolian constituents, in which he defended the superior judgement of the representative. Edmund Burke, "Speech to the Electors of Bristol, November 3, 1774," in *Selected Works of Edmund Burke, Vol. 4* (Indianapolis, IN: Liberty Fund, 1999). As Mill noted in 1861, his preferred model of trusteeship had long been favoured in Britain. John Stuart Mill, "Considerations on Representative Government," in *On Liberty and Other Essays* (Oxford: Oxford University Press, 1998), 373.

[5] See Colón-Ríos, *Weak Constitutionalism*, 97; Kalyvas, "Constituent Power," 8; Negri, *Insurgencies*, 145.

[6] Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Lanham, MD: Rowman & Littlefield, 2001), 63; Elise Marienstras, "Nous, le Peuple: Les Origines du Nationalisme Americain," (Paris: Gallimard, 1988), 299-301.

[7] Colón-Ríos, *Weak Constitutionalism*, 97, fn.50.

is curious, too, for it is perhaps the most common inheritance in ordinary language usage that attributes powers to 'constituents'.

Within this chapter I argue not only that this account of constituent power cannot be dismissed, but that it offers a significant way in which the American people made sense both of their relationship with Britain prior to the revolution, and their collective identity in the decades afterwards. Through this period constituent power was important to the way the object of 'the people' was contested, reordered and relocated in relation to political institutions. Though this often entailed various 'imagined' or 'fictitious' components, those fictions often carried a polyvocality not captured by Edmund Morgan's treatment of the people as a strategic device appropriated by political elites.[8] This play upon the imagination, however, operated within specific parameters, for when appealing to constituent power to articulate their grievances against Britain, they adopted a language of modern British political discourse, distinct from the informal proprietary constitutionalism through which their domestic contracts and treaties were drawn. I make the case in this chapter that the language of constituent power served as a politically ambivalent tool—one that could be employed for strategic ends to 'free' the colonies from imperial control, though one that did so through a specifically European vocabulary of modern constitutionalism, complete with rules requiring uniform legal vocabularies and unitary political subjects. Constituent power was not a panacea for the political ills of the colonists, but complicit in a larger project of legal imperialism that interpellated the American people into the dominant European constitutional discourse.[9]

To make this argument, I divide the chapter into three sections. The initial two seek to demonstrate how the conceptual architecture of constituent power was taken by American revolutionaries from the language of British constitutionalism. In part I, I demonstrate that the concept of constituent power was a relatively commonly

[8] Morgan, *Inventing the People*, 55-77.

[9] This is not to mistakenly assume that sovereignty was developed *within* Europe before being transferred to the non-European world. Sovereignty of course has a much darker history through which it was constructed in colonial encounter. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 13-31. My point, rather, is that once the terms of sovereignty had been set through colonial encounters that favoured imperialist states, constituent power served as one way through which that language was subsequently adopted in non-European locations.

used political term within the niche of the learned public sphere of 18th century Britain. Part II traces the adoption of this styling of constituent power in colonial America. The adoption was part of an important shift in constitutional language, from proprietary constitutionalism to the formal modern constitutionalism found in Europe. The constitutional changes in Britain ensured that the informal language of proprietary constitutionalism insufficiently address the disputes over British rule of the colonies. The revolutionaries strategically appropriated the language of modern constitutionalism to articulate their grievances. I demonstrate, with particular reference to Thomas Jefferson's *Summary View,* and Alexander Hamilton's *A Farmer Refuted,* how the revolutionaries picked up on the modern ideas of constituent power to challenge the imperial dominion of Britain. In part III, I examine two ways in which constituent power was drawn upon to imagine collective identities of the American people. The ratification debates provide this important contrast between two quite distinctive interpretations of constituent power, and subsequent social imaginaries: the Anti-Federalists, with their focus upon political localism, retained the close connection between constituent power and delegated representation; by contrast, the Federalists anchored the collective identity of 'the people' through recourse to an account of constituent power associated with the founding act. There is good reason, I argue, to think that the enduring significance of *The Federalist Papers*, and the constitution they endorsed, is due to an account of peoplehood highly sensitive to the European constitutional model. I wager that though a language of self-determination, constituent power—being drawn from the vocabulary of British constitutionalism—nevertheless provided a means of achieving self-determination only on another's terms.

I: Constituent Power after the Glorious Revolution

When writing of the genealogy of the state, Quentin Skinner has noted that Hobbes' fictional theory had 'little immediate impact on English political debates'. Though Hobbes soon became an important reference for European commentators on the *jus gentium,* in England, the populist theory of the state, on one hand, and

Filmer's patriachalism, on the other, were more generally accepted sources.[10] This is also true of the way in which constituent power was used in the years following the restoration. Within this section, I briefly demonstrate how the populist account of constituent power, which took there to be a hard separation between the people and the monarch came to conceptualise the appropriate account of representation between the people and parliamentary representatives. In doing so, I challenge Martin Loughlin's claim that the Glorious Revolution amounted to a 'steady attrition in any clear sense of constituent power in British constitutional discourse…which had been replaced by a more aristocratic conviction that governors should act for the benefit' of the people.[11] It did not disappear from constitutional discourse, but the representatives to which it was applied changed.

During the Restoration, challenges to the monarch were framed in the populist language inherited from the parliamentarians and from the *politica* genre. George Lawson's own *Politica Sacra et Civilis* was most exemplary of this. Though a great deal has been attributed to Lawson's originality when theorising constituent power,[12] he was nevertheless implicitly reliant upon this inherited vocabulary. When defending the rights of the people, he notes—in language so similar to Rutherford—that God 'designed immediately' the personal majesty of Saul, before 'the people [who retained real majesty] did concur and follow up that divine designation'. Though the people were 'bound by God to constitute a government…they [were] not bound to this form or that'.[13] In spite of claims to the contrary, Lawson's contribution leaned heavily upon the usufructuary language of monarchomachism, supplemented by the double-barrelled covenant of Rutherford.[14]

[10] Skinner, "A Genealogy of the Modern State," 348.
[11] Loughlin, "Constituent Power Subverted," 43.
[12] For greater detail, see introduction.
[13] Lawson, *Politica Sacra et Civilis*, 47-48. Conal Condren recognises this affinity with Rutherford. *George Lawson's Politica and the English Revolution* (Cambridge: Cambridge University Press, 1989), 58. A.G. Roeber affirms more exactly that *Lex, Rex* 'inspired' Lawson's essay. "Constitutions, Charity and Liberalism by Default: Germany and the Anglo-American Tradition," in *Republicanism and Liberalism in America and the German States, 1750-1850*, ed. Jürgen Heideking and James A. Henrietta (Cambridge: Cambridge University Press, 2004), 79.
[14] Kalyvas, "Popular Sovereignty."

As Skinner notes, the prevalence of the populist language of the state persisted well into the 18th century.[15] Not only was the populist language key to the broad constitutional changes that took place through the Exclusion Crisis and the Glorious Revolution, but the resulting constitutional changes helped reshape the way in which constituent power itself was conceptualised in 18th century Britain. William and Mary acceded to the throne in 1688, following events originally instigated by a union of parliamentarians against King James II. The throne was offered to William and Mary by an unauthorised convention, breaking from existing constitutional procedure.[16] Upon their accession, the English Bill of Rights was signed, severely curtailing the monarch's executive powers. For Loughlin, this bill was a compromise between the Whigs and Tories that intended to erode the most radical elements of constituent power.[17] In curtailing the executive powers of the monarch, the arguments for the removal of a monarch found in Lawson were not required in a mixed constitution.

Loughlin's argument, however, neglects the more general principle that underlies these accounts of constituent power, namely that no representative body was able to alter constitutional procedures without the consent of the whole community.[18] This principle was equally applicable to parliamentary representatives as it was a monarch. In the following decades, the language of constituent power was leveraged to precisely this end in order to challenge those parliamentarian ideals that took it to be the duty of representatives to act only in accordance with the good, and not the will, of those who were represented.

This use of constituent power, modified to identify the appropriate relation between representative and represented, was evident as early as 1702 in a pamphlet by Daniel Defoe, where he traced an analogy between the fountain power of God and the 'original fountain' of the people who 'do not give up all their water' when

[15] Skinner, "A Genealogy of the Modern State," 353.

[16] For details of these 'fudged' constitutional questions, see Loughlin, "Constituent Power Subverted," 41-42.

[17] Ibid., 42.

[18] Julian Franklin recognises this to be the more general implication of these accounts of constituent power. *John Locke and the Theory of Sovereignty*, 124.

'Delegating New Powers for their future Government'.[19] Far more pointedly, when discussing the Treaty of the Union, Defoe maintained that 'the Members of Parliament had *no Right* to alter the Constitution, without the Consent of their *Constituents'*.[20] What Loughlin calls the attrition of constituent power was, rather, a reconfiguration of its relationship, for the constituted object was not the monarch but the parliament. Parliamentary delegates were to act according to the will of the people, for their delegated authority was a usufruct derived from the people's original power. Defoe reinforced this point with a now common phrase: 'that Power which is Original, is superior'.[21]

Debates over the way in which parliamentary representation was to be conducted became common within the niche of the learned public sphere of 18th century Britain. Constituent power was the language fought over by partisans who sought to demarcate representatives' obligations to constituents and the constitution. Many of these discussions took place in the pages of numerous politically diverse London-based magazines and periodicals. The pseudonymous author 'The Craftsman', in a letter to the Tory *Gentleman's Magazine*, objected to the principle that a constituent power could be held in the body of the people. He argued that the legislature, in its capacity to create laws, was a constituent power of its own. To propose that those representatives had a higher obligation to the people was to expose parliament to the 'corrupt influence of the other constituent power' that would destroy the 'free and unbiass'd…constituent power of the legislature'.[22] In this passage, 'the Craftsman' ran together two distinctive areas of competence to marshal constituent power to his ends. He recognised both the power to constitute ordinary law and the power to constitute political office to be constituent powers. In treating them as equivalent, he hoped to reveal the way in which an obligation to pursue the people's will was a fetter upon the ordinary constituent power of the legislature.

[19] Daniel Defoe, *The Original Power of the Collective Body of the People of England, Examined and Asserted* (London, 1702), 9-10.

[20] Daniel Defoe, *The History of the Union of Great Britain* (Edinburgh: Andrew Anderson, 1709), 21-22.

[21] Defoe, *Original Power of the Collective Body*, 9.

[22] The Craftsman, "On The Independency of Parliament," in *The Gentleman's Magazine: Or, Monthly Intelligencer. For the Year 1734, Vol. IV*, ed. Sylvanus Urban (London: F. Jefferies, 1734), 473.

The opposite tendency can be seen in an essay signed 'A devoted friend to the constitution', published in the Whig *London Magazine,* in which it was argued that representatives were duty-bound to express the will of their constituents: the delegates 'employ[ed] that power only to the end for which it was given', and so, it is posited, 'when the delegate power assumes an authority to destroy the primitive constituting power, it cannot be expected that the people will look quietly on'. To preserve their power, delegates 'should not depart out of…the frame that the people when they last settled the legislative order ordained'.[23] The author exhaustively associated constituent power with the people, whose will the delegates were obliged to pursue. Though a formal right of resistance was not marked in this passage, the author did nothing to diminish the likelihood that this would result in dissatisfaction on the part of the constituents that might result in popular rebellion. A year later, the polemicist 'Junius' repeated these sentiments with the assessment that:

> 'The House of Commons are only lnterpreters, whose duty it is to convey the sense of the People faithfully to the Crown. If the interpretation be false, or imperfect, the Constituent Powers are called upon to deliver their own sentiments. Their speech is rude, but intelligible; their gestures fierce, but full of explanation. Perplexed by sophistries, their honest eloquence rises into action'.[24]

The language was perhaps the most radical within the British context, though Junius's application of constituent power was no different from those that preceded him. The constituent power of the people was the language of those partisans who affirmed that representatives were to serve as a conduit for the will of their constituents. Though this account of constituent power developed from the populist theory of the state, it was vastly distinct in important ways. Junius's exclamation put pressure on some of the more important differences. Representation by parliament was not taken to accord to the 'geometric' principles that Henry Parker had affirmed a century earlier. Rather, the artificiality of parliamentary representation was fully

[23] A Devoted Friend to the Constitution, "An Essay on Natural Liberty," in *The London Magazine. Or, Gentleman's Monthly Intelligencer, for the Year 1769. Vol. 38*, ed. W. Pitt (London: R. Baldwin, 1769), 260-61.

[24] Junius, "To the Printer of the Public Advertiser, April 3 1770. [Letter 38]," in *Letters of Junius* (New York: E.Duyckinck, 1821), 197-98.

appreciated. This is exactly what Ankersmit refers to as an 'aesthetic gap' between representative and represented that transforms representation into a dynamic force.[25] Constituent power served as an ideational phenomenon that assisted constituents in making sense of and responding to the aesthetic gap of representation, and in the process reflecting upon who they were, what they collectively desired, and how they wished that to be expressed in parliament.

Though the need for delegation to parliament recognised that the 'rude speech' of constituents required moderation to appear constitutionally acceptable, this was supplemented with the important qualification that if such moderation were to present a 'false' interpretation, power swiftly returned to the people. What that false interpretation comprised required the ongoing participation of individual constituents within the relation of representation. If deemed false, Junius affirmed, constituents might 'deliver their sentiment' through fierce gestures capable of expressing their will more direct, if erratic, way. Constituent power played an important part here, though clarification is necessary to prevent my claim about constituent power being reduced to the naturalised voluntarism of Negri or Kalyvas. Constituent power was not an activity or capacity enacted by the people in the moment their will was no longer 'in sync' with their representatives. Rather, as an ideational phenomenon, constituent power served as a means of understanding *when* the constituents' wills were no longer in sync, and thereby providing a *justification* for concerted action. For Junius, constituent power was not that concerted power itself.

When interpreted in this way, Loughlin's recognition of an 'attrition' of constituent power in British constitutional discourse following the revolution of 1688 seems misplaced. Though this understanding of constituent power has much in common with the ordinary language use that attributes rights to constituents to recall parliamentary representatives, it amounts to a restyling of the fictional components of constituent power, rather than its loss. As I will argue in the remainder of this chapter, this formulation of constituent power, in combination with older claims over the king's representative role, served as an important litmus test for political

[25] Ankersmit, "Representational Democracy," 36.

representation in colonial America, and a critical justification for the eventual revolution. Nevertheless, in doing so, the transposition of this framework from Britain constitutional discourse also seems to have encouraged the founders to stylise their collective political identity in a vocabulary acceptable to this European vocabulary. In short, though constituent power served as a fulcrum upon which the imagined constitutional identity of the American people pivoted, it did so within specific constraints taken from a European context.

II: COLONIAL AMERICA

Across the Atlantic, the conceptualisation of an elastic relation between constituent power and delegate eventually gained traction during the second half of the 18th century. It only did so once revolutionaries adopted the constitutional vocabulary of Britain, which was neither immediate, nor necessarily wilful. I begin by demonstrating the sort of constitutional customs evident in the colonies, and the projections of collective identity that followed. This differed in important ways from the British constitutional language following the Bill of Rights. Political disagreements over the supremacy of the British parliament followed. I show how the revolutionaries framed their grievances in the constitutional language of their opponents, incorporating the concept of constituent power into their lexicon.

Prior to the revolution, the colonies had employed customary constitutional languages that were neither uniform, nor consciously aware of their own foundations, each of which James Tully takes to be defining features of the modern constitutionalism of Britain, especially since the 1689 Bill of Rights, and of the emerging Westphalian state system generally.[26] Since settlement in the first half of the 17th century, the colonies of America had been governed by a variegated practice of proprietary constitutionalism, through which English colonisation saw treaty-

[26] James Tully, *Strange Multiplicities: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 60. See also, Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell University Press, 1947), 1-22.

making authority delegated to private landowners.[27] The practice of proprietary constitutionalism conveyed quasi-sovereign status upon the colonising ventures of the proprietors, who were able to draw upon the wide array of political and legal instruments available in England, together with the practices of indigenous peoples where fitting. This practice was one originally inherited from the metropole, for England itself was at the time a patchwork of regional and subregional legal diversity derived from custom and common law.[28] Proprietary constitutionalism contributed to a culture of legal hybridity in colonies, for whilst proprietors were ultimately beholden to the Crown, their charters were framed minimally, their actions motivated by independent ambition, and typically funded by private money. The results were often unique political experiments where constitutions were cobbled together from a variety of legal sources in order to serve the colonists' particular needs in negotiating treaties with the indigenous peoples.

The most famous of these, *The Fundamental Constitutions of Carolina,* prominent due to the contribution of John Locke, was an 'ungainly' hybridised creature combining Harringtonian civic republican discourse with feudal and common law in order to further the ambition of colonisation.[29] That said, the activities through which colonisation was pursued by the practices in Carolina was not candidly coercive or violent. Desires for colonial self-sufficiency, rather than colonial expansion, ensured that treaties and associations with the local indigenes took precedence. Knowledge of planting and cultivation proved to be useful to the colonists, and so the local indigenous population was identified as an expedient means of addressing the problem most prominent to the lord proprietors, that of resolving their debts to the Crown. The relationship between colonists and indigenes was decidedly ambiguous, though not without an underlying instrumentalist relation

[27] Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry* 26, no. 2 (2001): 338.

[28] David Thomas Konig, "Regionalism in Early American Law," in *The Cambridge History of Law in America, Vol. 1: Early American (1580-1815)*, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 149.

[29] Vicki Hsueh, *Hybrid Constitutions: Challenging Legacies of Law, Privilege and Culture in Colonial America* (Durham, NC: Duke University Press, 2010), 64.

of extraction; the indigenous knowledges, whilst *needed* insofar as they were locally and immediately relevant, were rarely treated with esteem or official praise, what Foucault might call 'subjugated knowledges'.[30] The very nature of proprietary constitutionalism was such that it differed vastly from place to place, giving rise to unique political arrangements. Though the preceding overview cannot do sufficient descriptive justice to the diverse practice, Hsueh's text is particularly adept at drawing attention to the distinct logic of constitutionalism invoked by the *Fundamental Constitutions of Carolina* when contrasted with *The Two Treatises*, an exemplar of Tully's modern constitutionalism.[31]

The widespread practice of proprietary constitutionalism conveys two important points regarding the political structures of the early American colonies. First, colonies were self-governing entities, with their own political and legal customs. So long as their legal systems were not 'repugnant or contrary' to the law of the metropole they were free to innovate as they saw fit.[32] This is crucially distinct from the colonies being self-*administering*, whereby the laws of England would be

[30] Ibid., 71-73. This sort of ambivalent subjugations is most apparent in the *Fundamental Constitutions of Carolina* itself:

> §97: 'But since the natives of that place, who will be concerned in our plantation, are utterly strangers to Christianity, whose idolatry, ignorance, or mistake gives us no right to expel or use them ill; and those who remove from other parts to plant there will unavoidably be of different opinions concerning matters of religion, the liberty whereof they will expect to have allowed them, and it will not be reasonable for us, on this account, to keep them out, that civil peace may be maintained amidst diversity of opinions, and our agreement and compact with all men may be duly and faithfully observed'.

See "Fundamental Constitutions of Carolina, 1669," in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies How or Heretofore Forming the United States of America, Vol. 5,* ed. F. N. Thorpe (Washington, DC: Government Printing Office, 1909), §97. They are at once treated as naïve, or backward, but nonetheless granted rights to civil liberty; the philosophical arguments used to justify dispossession that Tully identifies within *The Two Treatises* are absent from the *Fundamental Constitutions*. See James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 137-76. This is not to suggest more aggressive colonial strategies were not visible elsewhere in 17th century America, but rather that they were not a *precondition* to colonial politics or constitutionalism at the time.

[31] Others have noted that constituent power was an important component of the modern constitutionalism of *The Two Treatises*. See, for example, Franklin, *John Locke and the Theory of Sovereignty*, 124; Kay, "Constituent Authority."; Julie Mostov, *Power, Process and Popular Sovereignty* (Philadelphia, PA: Temple University Press, 1992); Rawls, *Political Liberalism*, 231. Illan Wall has argued that this entailed the 'withdrawal of the radical' from constituent power. *Constituent Power and Human Rights*, 28. Joel Colón-Ríos is alone in suggesting Locke is not a theorist of constituent power, though his reasoning is misplaced, for he rejects constituent power when styled as resistance theory. *Weak Constitutionalism*, 83.

[32] See "Charter of Maryland, 1632," in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies How or Heretofore Forming the United States of America, Vol. 3*, ed. F. N. Thorpe (Washington, DC: Government Printing Office, 1909), §7.

applied by colonial courts. They were essentially separate political entities, with the caveat that colonial charters had been granted by the monarch, and so it was to the office of the king that individual colonies held allegiance. Governing authority was not concentrated in the metropole, but negotiated between centre and periphery.[33] The metropolis-colony relations prior to the Glorious Revolution were held together by a constitutional arrangement where the colonists paid homage to the King-on-the-throne, and the English parliament was considered one among others in the peripheries. Essential was the capacity for the colonists to 'maintain their identity as English people', and yet guarantee a minimal basis self-government.[34]

On the other hand, the sorts of constitutional experimentation in which colonists were engaged were loosely defined, unconventional practices and hybrid legal assemblages, mirroring the sorts of ancient constitutionalism James Tully identifies.[35] The spatial distance between Britain and its American colonies was rendered temporally during this period. As Europe quickly accelerated toward the model of territorially discrete units at the dawn of the state-system, the colonies retained their irregular constitutional habits.[36] This mottled constitutional language projected collective constitutional identities and brands of politics marked by localism, discretion and flexibility, adapting and responding to the particular needs of the communities at hand.[37] It was a pliable and improvised character of the imagined community that manifested in the colonies. This stood in acute contrast to the politics and peoplehood that crystallised in Britain in the years after the Glorious Revolution, as the Bill of Rights 'transmuted the customary constitution into a constitution of parliamentary command'.[38]

The constitutional change surrounding the Bill of Rights within Britain also had implications for the constitutional habits of the colonies. The Bill of Rights

[33] Jack P. Greene, *Peripheries and Centre: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788*, vol. University of Georgia Press (Athens, 1986), 28-42.

[34] Jack P. Greene, *The Constitutional Origins of the American Revolution* (Cambridge: Cambridge University Press, 2010), 8-14.

[35] Tully, *Strange Multiplicities*, 59.

[36] John Phillip Reid, *Constitutional History of the American Revolution: Authority to Legislate* (University of Wisconsin Press, 1995), 69.

[37] Hsueh, *Hybrid Constitutions*, 67.

[38] Reid, *Constitutional History of the American Revolution*, 70.

elevated the English parliament from one among many who were beholden to the king, to the supreme parliament in which the king sat. When demanding 'no taxation without representation', it was this dramatic constitutional shift that the colonies opposed: proprietary charters had been granted by the king in person, and it was to him that the colonies' allegiance was owed. The British Empire, according to James Wilson, took the form of a composite state in which 'all the different members of the British Empire are distinct states, independent of each other, but connected together under the same sovereign in the right of the same crown'.[39] They had not been party to the Bill of Rights, and had no say in the reconfiguration of political power that came with it. It did not follow that constitutional revision in Britain could be carried over to the American colonies, for the jurisdictions were independent.

By the 1760s, political pamphleteers had begun to exploit the modern vocabulary of constitutionalism when arguing that the colonies were not subjects of parliament. Two examples of this pamphleteering tradition are instructive demonstrations of the way in which the constitutional apparatus of constituent power was employed in its modern constitutional form to make the case for the political autonomy of the American colonies.

Alexander Hamilton wrote, in 1775, a lengthy essay to refute the recent pamphlets by Bishop Samuel Seasbury who, under the pseudonym 'A Westchester Farmer', had challenged the colonial legislatures' rights to oppose the British parliament. The argument itself was a rather typical account of the dispute between Britain and the colonies, though it is significant that he appealed to a conceptual framework based on constituent power in order to challenge the attempted redistribution of authority. Hamilton hoped to refute a seemingly straightforward assertion by Seasbury:

[39] James Wilson, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," in *Collective Works of James Wilson, Vol. 1*, ed. Kermit L. Hall and Mark David Hall (Indianapolis, IN: Liberty Fund, 2007), 30. For a detailed discussion of the composite state in the context of the American Revolution, see Ben Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory," *Journal of International Political Theory* 8, no. 1-2 (2012): esp.61-66.

> [George III] is therefore king of America by act of Parliament; and if we disclaim that authority of Parliament which made him our king, we in fact, reject him from being our king; for we disclaim that authority by which he is a King at all.[40]

Hamilton rejected this outright, for the 'act of parliament is not the *efficient cause* of being the king of America. It is only the *occasion* of it'.[41] It is notable that he drew upon the same vocabulary of causation as the earlier scholastic accounts of constituent power. Hamilton accepted the premise that power is delegated through the act of constituting, but rejected the conclusion that parliament was itself the efficient cause of that power. The efficient cause—the constituents—of both parliament and the king was the people. The office of the king is not dissolved by denying the authority of parliament but only by the people, and so to 'disclaim the authority of a British parliament over us does by no means imply the dereliction of our allegiance to British monarchs'.[42] The contract that made George the King of Britain was separate to that which made him King of America. Seasbury's argument was based upon a flawed syllogism: the British people and the American people, whilst both being 'generically the same', that is, people, were not qualitatively the same. Seasbury's argument rests upon an intentionally equivocal employment of the descriptor 'people' that could elide this key factor.[43] Not only distance, but distinct political cultures ensured the British Americans were different people who could not be represented by the British Parliament. The act of constituting, Hamilton recognised, ensured that 'the representative in this case is bound by every possible tie to consult the advantage of his constituents. […] And should he concur in any flagrant acts of injustice or oppression, he will be within the reach of popular vengeance'.[44] The existence of the House of Commons depended upon the '*intimate connection* of interest between those

[40] Samuel Seasbury, *The Congress Canvassed: or, an Examination into the Conduct of the Delegates, at the Grand Convention, held in Philadelphia, Sept. 1, 1774.* (New York: Richardson and Urquhart, 1775), 54.

[41] Alexander Hamilton, "The Farmer Refuted," in *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge (London: G. P. Putnam's, 1904), 67.

[42] Ibid.

[43] Ibid., 81-84.

[44] Ibid., 70.

members and their constituents'.[45] In offering this argument, Hamilton combined the older scholastic account of monarchical constitution with the elastic relation between constituent and delegate, packaged with the definition of a discrete American people. These claims were woven together to demonstrate that a contract could only be made with a monarch by a parliament that shared an intimate connection with the people's will. Though a legislature comprising the will of the American people may do this, the British parliament could not. It is notable that in the course of this, Hamilton had evoked the name of the American people who could be represented as one within an appropriately organised legislature, a legislature that may efface some of the more pressing differences between the individual colonies.

Thomas Jefferson's *Summary View of the Rights of British America* targeted these two accounts of constitution similarly. *Summary View* was written to give guidance to the members of the Virginia convention, which had been formed after the dissolution of the Virginia House of Burgesses by the British authorities following its protests against the Coercive acts issued after the Boston Tea Party.[46] Within it, Jefferson pursued what had become a common line of argument against Britain, with a number of important modifications. Unlike Hamilton, Jefferson denied the contention that the first colonists took with them charters from their monarchs. Rather, he reminded the convention that 'no circumstance has occurred to distinguish materially the British from the Saxon emigration', for:

> our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right which nature has given to all men of departing from the old country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness.[47]

[45] Ibid., 76.

[46] Joyce Appleby and Terence Ball, "Introduction," in *Thomas Jefferson: Political Writings*, ed. Joyce Appleby and Terence Ball (Cambridge: Cambridge University Press, 1999), xiv.

[47] Thomas Jefferson, "A Summary View of the Rights of British America," in *Political Writings*, ed. Joyce Appleby and Terrence Ball (Cambridge: Cambridge University Press, 1999), 65.

America was conquered 'at the expense of individual…not a shilling was ever issued from the public treasures of his Majesty'.[48] Those ancestors, being 'farmers, not lawyers', were tricked into accepting a 'fictitious principle that all lands belong originally to the king'.[49] In giving up these lands, the settlers contracted with the King, and so long as he continued 'to grant for small sums and reasonable rent; there was no inducement to arrest the error'.[50] The contract was to be upheld so long as it was not breached by the Crown, though this gesture is largely an empty one. Jefferson already recognised the numerous breaches.

Jefferson's vocabulary is notable. In discussing the act for suspending the legislature of New York, Jefferson pointed towards the problem involved when 'one free and independent legislature hereby takes upon itself to suspend the power of another; free and independent as itself; this exhibiting a phœnomenon unknown in nature, the creator and creature of its own power'.[51] Here he stressed the absurdity of the vicious circle of which neither 'common-sense' not 'the common feeling of human nature' could approve.[52] It was not, in fact, a vicious circle proper: the problem was not that of autogenesis. Rather, it was *unnatural* for one legislature to dissolve another, each being the creation of the people. This claim was double-voiced: Jefferson combined the constitutional vocabulary of constituent power, with an adjacent appeal to natural law principles, neither of which were self-supporting alone. Jefferson considered the proper constitutional structure of the Empire to place each legislature horizontal to every other. No institutional body was endowed with the power to constitute or dissolve that which possessed the equivalent power, unless they become 'creator and creature' of that power. It was neither logical nor natural for a legislature, created via the delegation of power from the people, to be superior to a legislature created by those very same means. If the British parliament had the capacity to dissolve the New York legislature, it would not be the parliament themselves, but the delegated act of the British electorate, but, Jefferson asked, 'can

[48] Ibid.
[49] Ibid., 78.
[50] Ibid.
[51] Ibid., 70.
[52] Ibid.

any one reason be assigned why 160,000 electors in the island of Great Britain should give law to four million in the states of America?'[53]

Jefferson offered a conciliatory solution through which the king might uphold his contract with the colonies. The king was, after all, 'no more than the chief officer of the people', though a chief officer of two ostensibly separate people.[54] As head of the two corporate bodies he served as the 'only mediatory power between the several states of the British Empire'.[55] One people could not institutionally assert their power over another. Nevertheless, through the mouthpiece of the King, who comprised both, the people of America might affect the British parliament through the monarch's 'exercise of his negative power, and to prevent the passage of laws by any one legislature of the empire, which might bear injurious on the rights and interests of another'.[56] This move offered a number of intricate uses of the conceptual apparatus of constituent power. There are three elements at play: the king, the English parliament and the various American legislatures, along with both formulations of constituent power: the people constitute parliament, and the people constitute the sovereign head. On the one hand, the legislatures that were constituted by the people of the colonies were the American legislatures that knew the will of their constituents. The British parliament had been constituted by another people and so had no legitimate claim to govern the colonies. In addition, by claiming that the King is the 'chief officer' of the people, Jefferson turned back to the older framing that suggested that the king was constituted by the people.[57]

'How different their language and his practice here!' exclaimed Jefferson.[58] Nevertheless, it is clear that neither Hamilton nor Jefferson employed vocabulary drawn from proprietary constitutionalism to contest the primacy of the British parliament. The vocabulary of the modern British constitution was required for the grievances to be comprehensible. Though there were different constitutional

[53] Ibid.
[54] Ibid., 64.
[55] Ibid., 73.
[56] Ibid.
[57] Ibid., 79.
[58] Ibid., 75-6.

practices in Britain and America, Hamilton and Jefferson each argued that the British were not even applying their own rules to the colonies.

There is a more pressing implication to this, however. Antonio Negri portrays the American Revolution as the apex at which the 'Dionysian' principle of constituent power was incorporated into the logic of state-sovereignty.[59] I have shown a different story: the lexicon of constituent power was by no means antithetical to sovereignty before the revolution. When the revolutionaries drew upon it, they made use of a conceptual toolkit already fundamentally organised by the logic of state-sovereignty, for the power to constitute was meaningful only in relation to the constitution of a constitutional object. The American revolutionaries drew upon the specific constitutional vocabulary of constituent power that was already available to them in order to challenge their political subordination. This was not only an assertion over the right for Americans to govern themselves; equally important was the image or identity of peoplehood it project outwards, as part of a complex process of recognition by other states.[60] The great paradox was that becoming a free and independent people involved 'doing so, at least in part, on someone else's terms'.[61] The form of constituent power drawn upon assisted in interpellating America into a specifically modern European constitutional language that, against the plural hybrid language of proprietary constitutionalism, projected the people of British America as a unified, constitutionally acceptable people. The appeal that the colonies were the free and independent people of America through their status as a constituent power was one that could, eventually, only be reconciled with their status as a treaty-worthy nation, styled after the European powers.

[59] Negri, *Insurgencies*, 187.

[60] As the concept has come to be associated with a practice of insurgent citizenship in recent years, this aspect of the concept, at least in its history, has been largely overlooked. Zoran Oklopcic is one of few who take seriously this outward facing element of constituent power. Zoran Oklopcic, "Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood," *Leiden Journal of International Law* 22(2009); Zoran Oklopcic, "Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans," *Constellations* 19, no. 1 (2012). See also István Hont, "The Permanent Crisis of a Divided Mankind: 'Contemporary Crisis of the Nation State' in Historical Perspective," *Political Studies* 42, no. s1 (1994); Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and practice," *International and Comparative Law Quarterly* 43, no. 2 (1994).

[61] Eliga Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (Cambridge, MA: Harvard University Press, 2012), 2.

III: E PLURIBUS UNUM

Indeed, it appears to me a very doubtful point, even supposing all the colonies of America to be united under one head, whether it would be possible to keep in due order and government so wide and extended an empire…for fire and water are not more heterogeneous than the different colonies in North America.'

- Andrew Burnaby [62]

Burnaby, an English travel writer, explored the colonies from 1759 to 1760. His travelogue was published hastily in 1775 in an effort to contribute to the debates over the future of the colonies. He believed it necessary that America, being 'formed for happiness, but not for empire', remained under the dominion of Britain; the diversity of the colonies meant they could never operate effectively as a single body.[63] Yet, in adopting the language of modern constitutionalism, the American people, in order in appear a treaty-worthy nation, declared themselves precisely that.[64]

The remainder of this chapter examines how the apparatus of constituent power was utilised in the process of devising a constitutionally acceptable imaginary of the American people. 'The people' is a political claim. Whilst this has always been true, such claims had, at least in England, been easier to secure through recourse to historical communities, the ancient constitution and the Norman invasion. Short of referencing the fabulist compacts aboard the Mayflower, no such recourse was possible within America. Innumerable histories of the American founding have since endeavoured to foreclose the equivocal claim to peoplehood by providing a narrative for American civic identity.[65] As Jason Frank has intricately and convincingly

[62] Andrew Burnaby, *Travels Through the Middle Settlements in North American, in the Years 1759 and 1760, with Observations upon the State of the Colonies* (London: T. Payne, 1798), 122.

[63] Ibid., 118.

[64] David Armitage, *The Declaration of Independence: A Global History* (Cambridge, MA: Harvard University Press, 2007), 17.

[65] Angélica Bernal has convincingly demonstrated, through a critical historiography of the American founding, how historical reflection upon elusive origins conditions how we interpret ourselves in the present. "The Concept of Founding" (PhD Thesis, Yale University, 2008), 187-237. For example, since the publication of Carl Becker's *Declaration of Independence* in 1922, the place of John Locke's thought in the American founding has been much contested. The debates have swung back and forth, though there is as much politics as history at play, for what is at stake is the intellectual self-understanding of the American Nation, whether that is Liberal or Republican, as well as internal disputes over the arrangements of that Liberalism. Those who propose Locke's thought played an important formative role in the American Revolution are not themselves internally unified. There are at least three distinct readings of his thought. On the Natural Rights Locke see Carl Lotus Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Harcourt, 1922);

demonstrated, the contestation over the act of speaking in the people's name that characterised the post-revolutionary era was, at least in part, the legacy of an uncertain identity attached to the claim of 'the people.[66] However, whereas Frank takes constituent power to be the capacity of the oppressed and excluded to invoke the name and challenge the identity of the people, I have argued that constituent power needs to be understood differently. Constituent power was a concept in circulation at the time that served as an 'ideational phenomenon' that made sense of a group's identity in relation to political power. In short, constituent power was not a capacity, but itself a political claim that supplemented the representative claims of 'the people'. *How* one understood the political claim of constituent power to be organised was itself decisive to the way a collective identity was imagined.

To demonstrate this point, I examine the debates over the ratification of the constitution. These debates are illustrative of ways in which constituent power was applied differently to imagine a political collective's relation with institutional authority. The Federalists and Anti-Federalists each imagined the political collective differently due to how they related constituent power to law-making. The debates over the ratification leant upon two distinctive understandings of constituent power that led to respective arguments to sign the constitution in the name of 'the states', or 'the people'. The Anti-Federalists affirmed an account of constituent power that emphasised political localism and the conduit style of political representation,

Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994). On the possessive individualist Locke, see Louis Hartz, *The Liberal Tradition in America* (London: Harcourt, 1955). On the Theistic Locke, see Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism and The American Revolution* (Durham, NC: Duke University Press, 1989). Among those who reject the Lockean argument, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967); Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca, NY: Cornell University Press, 1990); J. G. A. Pocock, *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969). Their point is methodological in principle, for the earlier Lockeans relied upon a sort of 'intellectual osmosis' of ideas that were 'in the air'. As Dunn asserts, Locke's *Two Treatises* were little read prior to 1750, by which point the revolutionary consciousness had already taken shape, and so Locke's usage was strategic. John Dunn, "The Politics of Locke in England and American in the Eighteenth Century," in *Political Obligation in its Historical Context* (Cambridge: Cambridge University Press, 1980), 76. For an insightful analysis of the interpretive difficulty of reading the American Founding as cleanly either 'Republican' or 'Liberal', see Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge: Cambridge University Press, 2007), 88-117.

[66] See Frank, *Constituent Moments*.

through which they prioritised the identity of the states. By contrast, the Federalists associated constituent power with the fundamental laws tied to the sacred event of founding by a united people. There is good reason to think that the enduring significance of *The Federalist Papers*, and the constitution they endorsed, is due to an account of peoplehood highly sensitive to the European constitutional model.

i: 'We, The States': An Anti-Federalist Constituent Power

It is common to write out the Anti-Federalists as serious political opponents to the constitution. Despite her striking proximity to a number of their concerns, the Anti-Federalists are largely absent from Hannah Arendt's account of the revolution. Similarly, Negri leverages *The Federalist Papers* in order to reveal the abridgment of the people's constituent power, whilst excluding the Anti-Federalist contribution.[67] By contrast, historians such as Gordon S. Wood include the Anti-Federalists, though only as a point of ridicule, treating them as aging politicians 'without influence [or] social and intellectual confidence'.[68]

Closer to the discussion at hand, Jason Frank sees constituent power lacking in the writings of the Anti-Federalists due to their demand that the constitution was authorised by the signature 'We, the States' rather than 'We, the People'.[69] Others, such as Benjamin Popp-Madsen, have suggested otherwise, only to affirm an account of constituent power in the Anti-Federalists, and its absence in the Federalists.[70] In the clean distinction between Federalists, with their centralisation of political power, and the Anti-Federalists, with their localisation of power, Popp-Madsen draws the conclusion that the Anti-Federalists conceptualised constituent power in all its fullness, openness and positivity, whilst the Federalist suppressed the innovation of the Public. It is insufficient to suggest that one uses the vocabulary of constituent power and the other draws upon the vocabulary of Hobbesian sovereignty, as if these are qualitatively different things. I will show that both Federalists and Anti-

[67] Negri, *Insurgencies*, 175-91.
[68] Wood, *The Creation of the American Republic, 1776–1787*, 484.
[69] Frank, *Publius and Political Imagination*, 27.
[70] Benjamin Popp-Madsen, "Anti-Federalism and the Question of Constituent Power in the American Constitutional Debates," *Ideas in History* 8, no. 1 (2014).

Federalists each offered distinct interpretations of the American collective identity precisely because they arranged constituent power in distinctly different ways.

At stake in the ratification of the constitution was something momentous, for the debates framed the choice proposed to the American people as a choice between two distinctive brands of politics; the rejection of the Anti-Federalist way of politics was, at least for Sheldon Wolin, directly associated with 'the loss of democratic hopes'.[71] It is necessary to preface the discussion of the Anti-federalists by stressing that they were not a unified movement, but a disparate and uncoordinated group of objectors to the constitution. Their title—'Anti-Federalist'—was not one selected by them; Alexander Hamilton adopted the title 'Federalist' as part of a strategy depicting those who came to be called the anti-federalists as reactionary, traditionalistic conservatives. Despite the diversity among the Anti-Federalists, a number of important common themes emerge across their thought. The opposition to the proposed constitution was one that centred on a political localism that continued to be a powerful force in American life for some time.[72]

It was through this localism that a specific orientation towards the relation cast by constituent power developed. John DeWitt urged the electorate to 'be cautious' in their choice, for the new constitution would reduce the power of states to 'those of a City Corporation: the skeleton of it may remain, but its vital principle shall be transferred to the new government'.[73] The enlargement of national government proposed by the constitution was one that could only erode the culture of political participation experienced by the states. The organisation of the polity needed to be sensitive to the dangers of a large republic. Montesquieu's thesis was well-known: 'If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by internal vice'.[74] Small republics were driven to enlarge in order to protect themselves from external threats, though this hastened corruption when the polity became too

[71] Sheldon Wolin, *The Presence of the Past: Essays on the State and Constitution* (Baltimore, ML: Johns Hopkins University Press, 1989), 4.

[72] Saul Cornell, *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788–1828* (Chapel Hill, NC: University of North Carolina Press, 1999), 1.

[73] John DeWitt, *Essay II: October 27, 1787*, The Anti-Federalist Papers and the Constitutional Convention Debates (New York: Mentor, 1986), 198.

[74] Charles de Secondat baron de Montesquieu, *The Spirit of Laws*, trans. Anne M. Colher, Basia C. Miller, and Harold Stone (Cambridge: Cambridge University Press, 1989), 131.

heterogeneous to conduct its internal duties convincingly.[75] A number of Anti-Federalists relied upon the thesis not only to defend their brand of political localism of small, homogenous and consequently virtuous communities, but also to anchor their concerns that large republics required large standing armies that could further damage liberty. Brutus, the pen-name supposedly of the jurist Robert Yates, was among those who wrote most vociferously in defence of the small republic principle. Under the proposed constitution the legislature of the United States was to be 'vested with great and uncontroulable powers' that may be so exercised 'as entirely to annihilate all the state governments, and reduce this country to one single government'.[76] Weighed down by the recent history of conflict with Britain and the 'Country' vision taken from English politics, vast and distant governments were assumed to be destructive of political localism due to the difficulties of representation that followed. [77] Brutus did not deny the necessity of representation, but rather argued it is to be configured in a specific, though familiar, relation:

> Although all laws are derived from the consent of the people, yet the people do not declare their consent by themselves in person, but by representatives, chosen by them, who are supposed to know the minds of their constituents, and to be possessed of integrity to declare this mind.[78]

Brutus invoked the distinction that had become rather commonplace in America, not between constituent and constituted power, but rather, like Thomas Young, those of constituent power and delegate power. There are important temporal and spatial distinctions between these two orientations toward constituent power. The constituent–constituted distinction is one that references the supreme authority of the founding act, a fixed moment in time through which we might direct our energy, and locate the source of political authority. The constituent–delegate opposition

[75] The small republic thesis did not originate with Montesquieu. Nevertheless, he set the terms upon which republicanism was to be discussed in the 18th century by setting the central Machiavellian values of republican liberty and greatness in direct opposition. See Jacob Levy, "Beyond Publius: Montesquieu, Liberal Republicanism and the Small-Republic Thesis," *History of Political Thought* 27, no. 1 (2006): 54.

[76] Brutus, "Letters of Brutus," in *The Federalist, with Letters of Brutus*, ed. Terence Ball (Cambridge: Cambridge University Press, 2003), 442.

[77] Bailyn, *The Ideological Origins of the American Revolution*, 55-94.

[78] Brutus, "Letters of Brutus."

contains no such 'sacred origin', but orients the imagination to the more pragmatic relation within ordinary—as well as extraordinary—law-making. Such a distinctive temporal understanding of constituent power was in place to reinforce the Anti-Federalists' spatial interpretation of political localism, ensuring that delegates were engaged in the everyday life of the community. Each reduced the gap between constituent and delegate, whether that was the spatial distance of representatives from constituents, or the regularity of the constituents' intervention into political representation.[79]

'Despotic government' was the consequence when the delegate power gets too far out of the hands of their constituents.[80] This was the natural effect of distance, for distance fostered disunity, the result of which was the 'constant clashing of opinions', which 'prevents such conclusions as will promote the public good'.[81] In so extensive a republic, it was not enough that disunity congests the machine of government.[82] The great officers of government being so distant from their constituents 'would soon become above the control of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them'.[83] There is an important conceptualisation of proper representation underlying this. Brutus was sure that 'resemblance' was the most pertinent qualification of accurate representation:

> The very term representation, implies, that the person or body chosen for this purpose, should resemble those who appoint them…It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representative. They are the sign – the people are the thing signified.[84]

[79] I therefore disagree with Popp-Madsen's assessment that the Anti-Federalists were principally concerned with the temporality of constituent power, as opposed to the Federalist concern with spatiality, the two are present though organised differently. Popp-Madsen, "Anti-Federalism and the Question of Constituent Power," 33-37.

[80] Brutus, "Letters of Brutus," 445.

[81] Ibid., 444.

[82] As was the case in Publius, *The Federalist, with Letters of 'Brutus'*, ed. Terence Ball (Cambridge: Cambridge University Press, 2003), [Madison/No.10], 43.

[83] Brutus, "Letters of Brutus," 446.

[84] Ibid., 456.

It was not enough that the delegate 'knows the mind' of their constituents. If they were to be the 'sign' of the signified people, their representation was symbolic, though a pictorial symbolism that retained an aesthetic resemblance with that which it represented. They were to be taken from among their constituents, whilst offices were to be rotated so that delegates did not spend too long outside of their constituent community—the root of their deep held distrust of political professionalisation.[85] By contrast, the mechanisms of representation provided by the constitution were, according to Brutus, 'a mere burlesque' that provided 'no security…against corruption and undue influence', and nor did they instil confidence in the 'free people of earth'.[86] The constitution gave representatives the opportunity to pursue their own will ahead of that of their constituents.

A great deal of these papers were coloured by an intense distrust of political elites. Nevertheless, buried beneath this suspicion toward the proposed constitution and its framers was a compelling account of constituent power that requires further exegesis. There was an interplay of three distinct features, which together offered a re-envisioning of constituent power. First, the connection of the constituent power to the delegate power, rather than the constituted power, was integral. This was, admittedly, far less extraordinary than the connection between constituent and constituted power, attached to the deed of founding a polity, but due to limited nature of the practice the subjects were far easier to identify: 'the people' was replaced by a tangible electorate that could be seen to have a connection that that person to whom power was delegated. Second, this was supported by the importance of localism to American political culture that the Anti-Federalists refused to

[85] Akhil Reed Amar, "Anti-Federalists, The Federalist Papers, and the Big Argument for Union," *Harvard Journal of Law & Public Policy* 16, no. 111-118 (1993): 114.

[86] Brutus, "Letters of Brutus," 458. Brutus' writings were more suited to the more middling democrats who appreciated his moderate tone. Others injected their interpretations with class suspicion, rejecting the traditional view that wealth and leisure were essential attributes for fostering a disinterested republican virtue. See for example Centinel, "No.1: To the Freemen of Pennsylvania, October 5, 1787 " in *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York: Mentor, 1986), 229. Not all rejected the role of aristocratic elites. 'Cincinnatus' saw it necessary to emplace proper guarantees to ensure the natural aristocracy would not degenerate into an oppressive elite. The lower house had, in effect, been crippled to allow for the creation of a 'baneful aristocracy…removed from the people'. Cincinnatus, "To James Wilson, Esq., November 22, 1787," in *The Documentary History of the Ratification of the Constitution, Vol. XIV: Commentaries on the Constitution, Public and Private*, ed. John P. Kaminski (Madison, WI: State Historical Society of Wisconsin, 1983), 189.

relinquish easily. The Anti-Federalists were concerned especially with preserving the ability of ordinary citizens to participate in government. Ordinary citizens were not bracketed off as 'constituents', but served also as delegates, and so the rigid dichotomy between constituent and constituted appears more elastic when formulated as constituent and delegate. The delegates were not the opposition to the constituent in the way that monarch or parliament had been, but were seen to arise out of the constituent power, to which they were duty-bound to return. Third, support for the rotation of offices further checked the prior two conditions: rotation prevented the professionalisation of politicians that at once would have enabled greater political participation from 'ordinary' citizens, but also ensured that the relation between constituent power and delegate power remained one measured not by opposition but by resemblance.

It is inappropriate, *pace* Popp-Madsen, to present this as an 'opening' or a 'de-juridifying' of constituent power. Constituent power was still primarily a means of making sense of collective identity in relation to law, though one that projected a particular social imaginary that retained the spirit of colonial localism. The temporalizing and spatialising aspects of imagining of constituent power retained close proximity to 'everyday' political action and common life, in which citizens were thought to retain an ongoing involvement in political society by actively contributing to the collective identity of the state. This was, perhaps best summarised in Patrick Henry's insistence that the constitution should have been signed 'We, the States', rather than 'We, the People'. In 'We, the People', Henry saw something 'pernicious, impolitic, and dangerous'.[87] It envisioned a fabulist social contract that took precedence over the actually existing political communities.

ii: 'We, The People': The Federalist Papers

The Federalist Papers were a vastly different entity. They were the brainchild of Hamilton, who, having read the criticisms of the proposed constitution from the pseudonymous 'Cato' and 'Brutus', launched a measured defence of the planned

[87] Patrick Henry, "Speeches of Patrick Henry (June 5 and 7, 1788)," in *The Anti-Federalist papers and the Convention Debates*, ed. Ralph Ketcham (New York: Mentor, 1886), 199.

national government. In doing so, Hamilton enlisted the assistance of John Jay and James Madison. Together, the three men signed the papers with the single name, 'Publius'. It was not unusual to invoke antiquarian titles to add weight to such tracts. The signature of 'Publius', however, was double-voiced. The name itself was derived from the same root as *populus,* or, 'the people'; the essays endeavoured to speak in their name. But so too, it invoked the Roman consul Publius Valerius, one of the founders of the Roman Republic, and a man recognised by Plutarch as Rome's Solon.[88] The title reveals the 'essential polyphonic quality of the text', through which Hamilton, Madison and Jay merged, able to speak both in the popular voice of the people, and of a Founding Father.[89] Jasinski takes this signature to be the work of an 'unscrupulous demagogue'.[90] This, however, downplays the tone through which the double-voicing constructed a social imaginary in a third, composite, character: the people as constituent power. Here constituent power was associated with the concerted act of founding in the name of a people. Adopting the name Publius was an effort to undercut the Anti-Federalist assertion that the constitution was to be signed 'We, the States'. The composite character of 'Publius' declared the people—and not the states—to be the lawgiver prior to the ratification of the constitution, so decontesting the terms upon which ratification could be pursued, namely as a united people and not disparate states. The equivocal identity of the signatories was resolved through an appeal to the composite character of Publius, for, as Frank summarises, 'the imagination sutures what reason cannot: it establishes the attachments and the provisional boundaries around who comprise the self-legislating people, that "pure

[88] Plutarch, *Plutarch's Lives, Vol. I: Theseus and Romulus, Lycurgus and Numa, Solon and Publicola*, trans. Bernadotte Perrin (Cambridge, MA: Harvard University Press, 1967), 564-75.

[89] James Jasinski, "Heteroglossia, Polyphony, and the Federalist Papers," *Rhetoric Society Quarterly* 27, no. 1 (1997): 34. Michael Warner also recognises the double-voicing through which 'the authors…punningly identified themselves with the public whilst also identifying themselves with the founding of the polity'. Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, MA: Harvard University Press, 1990), 113. Compare this to Furtwangler, who allows the aristocratic voice to dominate, used to 'imply a positive, lofty intention behind this new series'. See Albert Furtwangler, *The Authority of Publius: A Reading of the Federalist Papers* (Ithaca, NY: Cornell University Press, 1982), 51.

[90] Jasinski, "Heteroglossia, Polyphony, and the Federalist Papers," 34.

original fountain of all legitimate authority"'.[91] That boundary is not only the limitation, not the demarcation of an inside and out, but the precise styling of the constituent power as a united people.

The reasons for Hamilton's preference for a single American people over many states had been identified a few years earlier, in a letter to James Duane:

> There is a wide difference between our situation and that of an empire under one simple form of government, distributed into counties, provinces, or districts, which have no Legislatures, but merely magistratical bodies to execute the laws of a common sovereign. Here the danger is that the sovereign will have too much power and oppress the parts of which it is composed. In our case, that of an empire composed of confederated States, each with a government completely organised within itself, having all the means to draw its subjects to a close dependence on itself, the danger is directly the reverse. It is that the common sovereign will not have power sufficient to unite the different members together, and direct the common forces to the interest and happiness of the whole.[92]

The internal structure of empire generated one of two circulations of political power. In the first, power descended from the head to the component parts, whilst in the second power ascended from parts to the head. Each provided a different answer to the question of how 'the people' was to be organised. The United States, Hamilton recognised, required the latter for the core problem was the apportioning of adequate power to the sovereign. This was in plain contrast to the way in which constituent power had been employed to resolve problems of power in the Holy Roman Empire. Althusius' *Politica* had endeavoured to offer a guarantee against an over-allocation of power within the body of the supreme magistrate as a prerequisite of a healthy body politic.[93] Despite the many claims that Althusius was the 'first Federalist', anddeeply influential on the founding fathers, Alexander Hamilton saw something different in

[91] Frank, *Publius and Political Imagination*, 66. Quoting Publius, *Federalist*, [Hamilton/No.22], 106. Frank is right on this count. Where he is wrong is that he does not recognise constituent power to be the tool through which that imagination manifests.

[92] Hamilton, "The Government and the Constitution: A Letter from Hamilton to James Duane. Liberty Pol, September 3, 1780," 217.

[93] See Chapter 1.

their respective projects.[94] The purpose and internal composition of constituent power was, for Hamilton, to be turned on its head. In contrast to Althusius, the problem to be solved was not how to distribute governing power to the peripheries in order to prevent an all-powerful sovereign ruling on issues of conscience, but to effectively unite political power so not to lead to political and legal contradictions between the various parts of the confederacy.

Constituent power assisted in the imagination of a unified people with the intention not of checking, but of enlarging institutional power. The principles of the separation of powers were responsible for resolving the former problem, freeing constituent power of much of the conceptual baggage it had been previously allocated. Though the same 'fountain of authority', the people, was responsible for designating the officers of the three branches of government, it was the branches themselves that were to guarantee against the domination of any one part.[95] The people remained the bedrock of government, and the constitution was to be authored in their name, though with the intention of investing their power within a strong government to unite the distant communities of the United States.

Publius was pressed not to deny the popular expression of the people outright, yet it was necessary, for the sake of effective internal and external governance, that such energy was to be channelled appropriately. The Articles of the Confederation had produced a government that lacked sufficient energy, and so it fell to the Constitutional Convention which 'subsequently change this first foundation, and with it, the superstructure resting upon it'.[96] The first founding had, in a sense, misfired: by lacking energy, it too lacked the means to secure a cohesive national identity. 'Stability in Government', Madison noted, 'is essential to national character'.[97] The character of the people was intimately connected with the energy

[94] It is not at all clear whether Hamilton was familiar with the work of Althusius, or other writers of the German *Politica* genre, though it seems unlikely Hamilton had the *Politica* genre in mind when penning the letter. In the following pages, he cites the Dutch United Provinces as an example of the former, though does not mention the Holy Roman Empire. It is likely that Hamilton had Montesquieu in mind when making this claim, for the examples cited mirror those of *Spirit of Laws*. See Montesquieu, *The Spirit of Laws*, 131.

[95] Publius, *Federalist*, [Madison/No.51], 252.

[96] Ibid., [Madison/No.37], 169.

[97] Ibid., [Madison/No.37], 170.

and stability of government. Moreover, it was for this reason precisely that the people's capacity to check government power needed to be curtailed, for 'an irregular and mutable legislation, is not more an evil in itself, than it is odious to the people'.[98] The separation of powers provided a more stable means of checking that power than the will of the people. Furthermore, if the people, in claiming they were the constituent power and effecting that power over the legislature, endeavoured to dissolve government, they were destabilising their identity as a people, for the vast expanse of America was such that the people were one only through their relation to the central government.

Distrust of distant political institutions, along with the capacity to challenge them, carried distinct pertinence in the post-revolutionary context, and were transmitted into the ratification debates by the Anti-Federalist opponents. For Publius, such suspicion served a purpose when controlled, though it threatened the polity when it became out of hand. It was the task to balance these as appropriate. Publius certainly appeared to have this in mind when he retorted that 'however useful jealousy may be in republics, yet when, like Bile in the natural, it abounds too much in the body politic; the eyes of both become very liable to be deceived by the delusive appearances which that malady casts on surrounding objects.'.[99] The diagnosis Publius offered was, however, double-edged. Publius connected jealousy with bile in such a way that he, in his professional opinion, recommended that it be controlled: its excess was destructive of the body politic when it came to dominate the political arena. He pointed to the need for the civil discord of the people to be limited, for whilst it is a vital element of republican politics it too quickly damaged the energy of government if allowed to get out of hand.[100] But so too, Publius, in an effort to discredit them, pointed to the Anti-Federalists as an exemplar of this practice, who, in allowing their suspicions to get out of hand, did grave damage to the good and necessary work of the constitutional convention. Striking a balance

[98] Ibid.

[99] Ibid., [Jay/No.64], 316.

[100] This is an appeal to the republican principle of a controlled tumult. See Niccolò Machiavelli, *Discourses on Livy*, trans. Julia Conaway Bonadella and Peter Bonadella (Oxford: Oxford University Press, 1997), 27-30. See also del Lucchese, "Machiavelli and the Constituent Power: The Revolutionary Foundation of Modern Political Thought."

between suspicion of and allegiance to the central government was important, because the people's identity as a single body politic was dependent upon the admittedly distant relation to institutionalised politics. To dissolve government, as was their right as the constituent power, was to dissolve the bonds that ensured their identity as a people. It is a take on the Hobbesian rejection of resistance that bound collective identity to institutional representation, though one here deemed consonant with the Republican principles outlined in No.39.[101] The executive, energised by the constituent power, always governed by the principle of *salus populi*. If it did not, those good bonds had already been dissolved. The safety of the people was paramount.[102]

The descriptors 'We, the States', and 'We, the People', as used by the Anti-Federalists and Federalists respectively, fostered acutely different internal conceptualisations of constituent power. These distinctive differences were central to how the collective identities and political life of Americans was imagined, and the collective name with which the constitution was sign was to be styled. Whilst the Anti-Federalists sought to account for constituent power in its relation to the delegation of authority to political representatives in instances of ordinary law-making, with an emphasis upon the material ties between constituent and delegate and feeding into a culture of political localism, the Federalists saw constituent power to be enacted only in the decision over the fundamental law-making of constitution-writing, amendment and abolition by a united people, who, once unified, were better able to energise a central government.

The tension between these two modes of operationalising constituent power are most evident in the *Federalist* No.40, in which Madison suggested that the unauthorised decision at the Constitutional Convention to underwrite the constitution with the name of the people, and not the states, was an enlargement of their right to alter or abolish government—in short, their constituent power. The Convention had only departed from their mandate on one count: 'Instead of reporting a plan requiring the confirmation of *the Legislatures of all the States,* they

[101] Publius, *Federalist*, [Madison/No.39], 181-83.
[102] Ibid., [Hamilton/No.70], 341-42.

have reported a plan which is to be confirmed by the *people*'.[103] Over the following pages, Publius made an impassioned plea to defend this decision. The delegates of the convention recognised that the constitution would be 'of not more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed'.[104] For the constitution to have weight behind it, it could not be authorised by the state legislatures, but had to be accepted by the electorate themselves—the people as the constituent power. In recognising this, the delegates took it upon themselves to proclaim the constitution in the name of the people:

> They must have reflected, in all great changes of established government, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory, the transcendent and precious right of the people to "abolish or alter their governments…"; since it is impossible for the people spontaneously and universally, to move in concert toward their object it is therefore essential, that such changes be instituted by some *informal and unauthorised propositions,* made by some patriotic and respectable citizens or number of citizens.[105]

Three issues were involved in employing constituent power in this passage. First, it was appreciated that state legislatures did not possess the binding power to establish another political institution; that power was permanently the possession of the people. Second, the people could not act institutionally without mediation. The identity of the people was one rendered significant only through a modality of representation that transmuted the multitude of individuals into a meaningful political identity. The delegates of the constitutional convention had to act in the people's name. Yet, third, in order to make such a decision in the people's name, with the explicit intention of enlarging the people's (extraordinary) constituent power, they were forced to renege upon their delegated mandate by the (ordinary) constituent power. In naming the people as those who were to ratify the constitution, they engaged in an 'unauthorised proposition'.

[103] Ibid., [Madison/No.40], 191.
[104] Ibid., [Madison/No.40], 192.
[105] Ibid., [Madison/No.40], 192-3. Emphasis in original.

Jason Frank recognises this as a 'constituent moment', the enactment of a 'felicitous claim to speak in the people's name, even though those claims explicitly break from the authorised procedures or rules for representing popular voice'.[106] In conceptualising constituent power in this way—as a 'moment' that breaks from authorised procedure—he abridges a more important point, namely that the 'felicity' of such an unauthorised claim relied upon how the unauthorised individuals conceptualised constituent power as a justification for that unauthorised proposition, and whether that conceptualisation was accepted by constituents. The problem of the unauthorised proposition reveals the way in which arguments turn upon particular conceptualisations of constituent power. The Anti-Federalist arguments, which placed stress upon the accurate expression of constituent's wills by representatives, were sensitively attuned towards identifying political institutions that overstepped that delegated mandate. Under this understanding of constituent power, there was no 'felicity' to an unauthorised proposition: it was nothing more than a breach of the delegates' duties to their constituents. That the unauthorised proposition appears felicitous under the Federalist account of constituent power only demonstrated the Anti-Federalist's concerns with the language of the constitution. To consider constituent power in the Federalist form was to adopt the vocabulary of European state sovereignty, complete the centrality of 'the people' as a representational trope. It may be going too far to endorse Joshua Miller's assertion that the Federalists 'transformed the body politic into a specter'.[107] Nevertheless, the Federalist adoption of the vocabulary of a unified people established within the American political system an account of constituent power that was more readily open to co-optation or arrogation through unauthorised propositions—felicitous or otherwise.

It would, nevertheless, be too hasty to additionally associate the ratification of the constitution with 'the loss of democratic hopes'. Though the representational trope of peoplehood certainly imagined a constituent subject more readily open to

[106] Jason Frank, "'Unauthorized Propositions': The Federalist Papers and Constituent Power," *diacritics* 37, no. 2-3 (2007): 117.

[107] Joshua Miller, "The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty," *Political Theory* 16, no. 1 (1988): 115.

appropriation, in practice the Federalists' appeal to the people was not an effort to abridge their rights to act as the constituent power. Whilst the Anti-Federalists had believed liberty could only properly flourish in local government and small republics, the Federalists saw within that culture of political localism the dangers of demagoguery and corruption.[108] The argument of violence being done to the people's authentic political identities cut both ways. Moreover, the arguments for federal unity made in *The Federalist* Nos. 4 through 8 suggested the federal government was necessary not to protect citizens from their government, but to prevent war between the states. Crucially, these were among the *Papers* taken most seriously at the time of writing, arguments both Federalists and Anti-Federalists could agree on.[109] For the Anti-Federalists, this at least provided minimal guarantees for localist politics; for the Federalists, the nation that came into being was a respectable one, free to take its place among the European powers of the earth.

CONCLUSION

The purpose of this chapter has been to illustrate that during the 18th century, constituent power was what I have called an 'ideational phenomenon', or a normative representation of good political life and allocation of power that assisted in organising representative claims of collective identity. Nevertheless, this language was one that operated within particular parameters. In particular, constituent power was a concept that, though organised in various ways, was nevertheless complicit in the pressures of producing a *sovereign* collective identity. Though constituent power could be leveraged in aid of claims to self-determination, that self-determination was enjoyed on another's terms. To utilise the language of constituent power was to draw on a language of European constitutionalism, and imagine one's own collective identity in accordance with that language, complete with discrete territorial units, uniform legal vocabularies and unitary political subjects.

[108] Cornell, *The Other Founders*, 72-74.

[109] Publius, *Federalist*, [Jay/Nos.4-5, Hamilton/Nos.6-8], 12-35. See also Amar, "Anti-Federalists, The Federalist Papers, and the Big Argument for Union," 117.

In this chapter, I have sought to demonstrate how a particularly overlooked conceptualisation of constituent power derived from the British learned public sphere—that which bound it to a practice of political delegation—served as a pivot within the constitutional language of the revolutionaries' arguments. This is to recognise that the revolutionaries did not simply contrast their proprietary constitutional language with the modern European vocabulary of constitutionalism, but strategically appropriated the latter to serve the ends of freeing themselves from British rule. Doing so, however, was to style the government in accordance with the language they adopted.

The second half of this chapter examined how, in the ratification debates, actors endeavoured to square this language with particular concerns about political participation and the appropriate organisation of governmental power. When the Federalists argued in favour of a constitution to be ratified in the name of the people, they did so with an eye toward energising central government through the construction of a cohesive organ of power. This is a crucial feature of what James Tully identifies in the regime of Modern Constitutionalism; the 'corporate identity' of the nation is seen as 'necessary to the unity of the modern constitutional association'.[110] In constructing themselves in this image, the Federalists bought into the more troubling aspects of the regime, namely, a Eurocentric account of political life, bound to a 'theory of progress' moving increasingly toward uniformity through techniques of discipline and rationalisation.[111]

This modern constitutionalism, whilst masquerading as universal, was an imperialist practice, abridging the cultural diversity of the older hybrid proprietary constitutional structures.[112] This should also serve as a warning in contemporary politics. Speaking of the political recognition of the Canadian First Nations, Taiaiake Alfred writes: 'In making a claim to sovereignty—even if they don't really mean it—they [the First Nations] are making a choice to accept the state as their model and to allow indigenous political goals to be framed and evaluated according to a statist

[110] Tully, *Strange Multiplicities*, 68.
[111] Ibid., 66.
[112] Ibid., 96.

pattern'.[113] Though this point is well-acknowledged in work on indigenous politics,[114] constituent power should not be seen to escape this relation. Whilst contemporary formulations of constituent power celebrate the limitless, emancipatory potential of the multitude, sensitivity toward the concept's history reveals that constituent power worked much like Alfred's account of sovereignty. For the American colonists, to adopt the constitutional weapons of their opponents was to allow their demands to be framed according to European standards. Underlying this is the point that constituent power should not be understood as a politically neutral language. Constituent power provides a particular—and limited—vantage point that is internal to what James Tully takes to be imperialist strategies of constitutionalism.[115] Even when used strategically, users must be sensitive to the ways in which the justificatory frameworks invoked by constituent power present their political goals and their imagined communities in accordance with patterns taken from European politics.

* * *

[113] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 1999), 57.

[114] See for example Glen Coulthard, *Red Skin, White Mask: Rejecting the Colonial politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014); Paul Nadasdy, "Boundaries among Kin: Sovereignty, the Modern Treaty process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations," *Comparative Studies in Societies and History* 54(2012); Adele Perry, "The Colonial Archive on Trial: Possession, Dispossession, and History in *Delgamuukw v. British Columbia*," in *Archive Stories: Facts, Fictions, and the Writing of History*, ed. Antoinette Burton (Durham, NC: Duke University Press, 2006); Andrew Schaap, "The Absurd Proposition of Aboriginal Sovereignty," in *Law and Agonistic Politics*, ed. Andrew Schaap (Farnham: Ashgate, 2009). Only James Tully has recognised the imperialist qualities of constituent power.

[115] James Tully, "The Imperialism of Modern Constitutionalism," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007). Tully situates this language within the various currents of imperialism in James Tully, "Lineages of Contemporary Imperialism," in *Lineages of Empire: The Historical Roots of British Imperial Thought*, ed. Duncan Kelly (Oxford: Oxford University Press, 2009).

3: "Its Will is Always Legal, it is the Law Itself": Sieyès, the Nation and the Constituent Power

Thrust to the fore of French political society following the publication of *What is the Third Estate?*, Emmanuel Joseph Sieyès 'opened' the French Revolution.[1] It was within this pamphlet that Sieyès described the nation as the constituent power, which he contrasted with the constituted power.[2] He is often, if inaccurately, described as having coined the term.[3] Others, unwilling to commit to such a statement, suggest that the 'first *major* elaboration' is to be found in Sieyes.[4] Whilst it may well have been in circulation prior to the French Revolution, for Colón-Ríos, Sieyès fleshed out the concept in a way no others had, sufficiently to call it his own. Sieyès did for constituent power what Judith Shklar has argued Rousseau did for the General Will: he made it 'ineluctably the property of one man', for though 'he did not invent it…he made its history'.[5] That Sieyès is often taken to have authored both the concept of constituent power and the revolution itself has profound implications. The

[1] See William H. Sewell, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyes and What is the Third Estate?* (Durham, NC: Duke University Press, 1994), 1; Oliver W. Lembcke and Florian Weber, "Introduction to Sieyès's Political Theory," in *Emmanuel Joseph Sieyès: The Essential Political Writings*, ed. Oliver W. Lembcke and Florian Weber (Leiden: Brill, 2014), 1.

[2] Emmanuel J. Sieyès, "What is the Third Estate?," in *Political Writings*, ed. Michael Sonenscher (Indianapolis, IN: Hackett, 2003), 136. The pamphlet was published in January 1789. The distinction was drawn in his *View on the Executive Means,* written some six months earlier, though not published until May 1789. See Emmanuel J. Sieyès, "Views of the Executive Means, which are at the Disposal of the representatives of France," in *Political Writings*, ed. M. Sonenscher (Indianapolis, IN: Hackett, 2003), 34; Michael Sonenscher, "Introduction," in *Political Writings*, ed. Michael Sonenscher (Indianapolis, IN: Hackett, 2003), xxii.

[3] Dyzenhaus, "Constitutionalism in an Old Key," 230; Illan rua Wall, "Notes on an 'Open' Constituent Power," *Law, Culture and the Humanities* 11, no. 3 (2015): 278.

[4] Joel I. Colón-Ríos, "The Legitimacy of the Juridical: Constituent Power, Democracy and the Limits of Constitutional Reform," *Osgood Hall Law Journal* 48(2010): 205.

[5] Judith N. Shklar, "General Will," in *Dictionary of the History of Ideas, Vol. II*, ed. Philip P. Wiener (New York: Charles Scribner, 1973), 276.

historiographical fault lines of the French Revolution were drawn through much of the 20th century along the schism between 'social' and 'political' interpretations of the revolution's origin.[6] In the course of these discussion, Sieyès was used (and inevitably misused)[7] to buttress historiographical conflicts. The consequence has often been to conflate the constitutional theory of Sieyès with at best an anticipation, or at worst a wilful pursuit, of the Terror, effacing the partisanship of the revolution.[8] Though recent historical scholarship has presented more nuanced accounts of Sieyès relation with the revolution,[9] a tendency remains among theorists of constituent power to read his work vicariously through Carl Schmitt.[10]

There are two purposes to this chapter. First, as with the previous chapter, I demonstrate how, in appealing to the language of constituent power, Sieyès evoked a social imaginary that challenged in important ways the existing imaginary of France, namely one composed of provinces united in the body of the king. Second, I show how this imaginary did not employ constituent power in order to celebrate a radically voluntarist characterisation of the nation. Rather, I wish to demonstrate that Sieyès' account of constituent power had quite the opposite intention. His was instead a discourse of moderate parliamentary constitutionalism that sought to articulate the concerns of the Third Estate through political representation in the *États-Généraux*.

[6] For the Marxist approach, see George Lefebvre, *The French Revolution: From its Origins to 1793*, trans. Elizabeth Moss Evanson (London: Routledge, 2001); Albert Soboul, *The French Revolution, 1789–1799: From the Storming of the Bastille to Napoleon*, trans. Alan Forrest and Colin Jones (New York: Random House, 1975). The revisionists are exemplified by Francois Furet, building upon the work of Alfred Cobban. See Francois Furet, *The French Revolution, 1770–1814*, trans. Antonia Nevill (Oxford: Blackwell, 1992); Francois Furet, *Interpreting the French Revolution*, trans. Elborg Forster (Cambridge: Cambridge University Press, 1981); Alfred Cobban, *The Social Interpretation of the French Revolution* (Cambridge: Cambridge University Press, 1963). For analysis of the problems inherent in these historiographical debates, see Michael Sonenscher, "The Cheese and the Rats: Augustin Cochin and the Bicentenary of the French Revolution," *Economy & Society* 19, no. 2 (1990).

[7] See Ramón Máiz, "Nation and Representation: E.J. Sieyès and the Theory of the State of the French Revolution," *Working Paper No.18* University of Barcelona(1990).

[8] Although her later readings offer a subtler characterisation of Sieyès, Arendt was guilty of this when, in *The Origins of Totalitarianism,* she associated the constituent power of the nation with a 'pseudomystical aura of lawless arbitrariness' that eroded the freedom of the people. Hannah Arendt, *The Origins of Totalitarianism*, 2nd ed. (New York: Harcourt, 1967), 231.

[9] For example, Hont, "Permanent Crisis."; Pasquale Pasquino, *Sieyes et l'invention de la constitution en France* (Paris: Odile Jacob, 1998).

[10] Colón-Ríos, *Weak Constitutionalism*, 84-88; Kalyvas, "Popular Sovereignty," 227. More recently, Loughlin's discussion of constituent power avoids the problem of collapsing Sieyès into Schmitt outright by recognising the significance of representation for the former. He nevertheless affirms a more or less voluntaristic character to those representatives. Loughlin, "The Concept of Constituent Power," 228.

Recognising these moderate aspects of constitutionalism in Sieyès' thought will be particularly pertinent to the discussion of Carl Schmitt in the following chapter, and so this chapter serves, at least in part, as the groundwork for the subsequent discussion, where I seek to demonstrate how and why Schmitt turns the doctrine of constituent power on its head.

In this chapter, I account for two ways in which Sieyès intended to constrain rather than unleash political power through his appeal to constituent power. First, the distinction between constituent and constituted powers was specifically intended to temper the plenitude of political authority that had developed around the doctrine of sovereignty. To this effect, I will argue that in Sieyès' constituent power served neither as an institutional organ, nor an alternative though analogous vocabulary of sovereignty. Rather, the distinction drawn by Sieyès between constituent and constituted powers was a constitutional theory that intended to challenge the plenitude of sovereign power in France. Sieyès did so by dividing political power into specific areas of competence, namely constitution-writing and governing, with the specific intention of subverting sovereignty's absolutist character. Second, Sieyès sought to employ representation across both areas of competence as a means of tempering the vitalist image of the popular will. Sieyès' attempt to reconcile representation with constitution-writing was, however, a complex activity, insofar as the modes of representation available to him were effectively juridical, namely contractual relations of property exchange. Sieyès' problem was to square representation with an explicitly pre-legal account of the nation. In developing his account of representation through which the identity of the nation as the constituent power was grounded, he moved away from what may be called a contractual or proprietary account of representation to a labouring account. Whilst a metaphor of economic transaction organised both, the former associated representation with the ownership of what is represented, a right of ownership that was ultimately retained by the represented party. This is seen in accounts of constituent power influenced by Roman property law, in the likes of Althusius, and Rutherford. For Sieyès, representation was cast through the relation that was struck in transaction, and not

the property that was exchanged. This effectively allowed him to reconcile representative union with a pre-legal identity. In doing so, he retained an essentially Hobbesian account of political organisation, though he subtly revises the key tenets, supplementing his constituent power with a national imagery that imagined individuals within a social dynamic of actively contributing to the life of the nation. Though it was channelled into a parliamentary representative form, the organic representation of the nation nevertheless provided a more believable fiction to ground political authority.

My argument is constructed across four sections. Part I contextualises Sieyès by briefly elaborating the systems of political representation that existed within the *ancien régime,* and the sort of imagined community that followed. In particular, I demonstrate how monarchical absolutism served as means of suturing what Kevin Olson has called a 'deprived-fraction imaginary' of a state divided among provinces and social hierarchies. In part II, I build the case that Sieyès' constituent power should be seen as something irreducible to sovereignty. This important if, subtle distinction, is lost in interpretive debates in which Sieyès is read as a theorist either of national or popular sovereignty. Whilst for Carré de Malberg, for instance, argues that Sieyès' employment of constituent power logically entailed a voluntarist popular sovereignty, I argue that this is not the case. This point is developed in part III by substantiating Sieyès' account of the nation through representation. This abstract representation of the nation, I show, is constructed along two axes. The first is through a political-economic account of socialisation through commercial division of labour. The second axis demonstrates how the abstract nation is animated through political representation in the assembly. This is all critical to how Sieyès' nation privileged social freedom by distribution of social burdens. In part IV, I demonstrate how this non-juridical account of representation allows Sieyès to square a representative union with a pre-legal constituent power according to a formula that, *pace* Carré de Malberg, is not 'illogical'. Constituent power provided an imaginary of the nation that entailed active participation in everyday life, though one that largely limits individuals' abilities to participate in activities of governing.

I: POLITICAL REPRESENTATION OF THE *ANCIEN RÉGIME*

'The idea of representation is modern', Rousseau wrote in Book III of *The Social Contract*. It is an 'absurd' system that 'comes to us from feudal government'. Sovereignty, after all, 'cannot be represented', for 'as soon as the Members are elected, [the people] is enslaved'.[11] Keith Baker recognises the irony that, whilst repudiating the *ancien régime*, Sieyès and the revolutionary compatriots fell back upon those practices of representation so explicitly condemned by Jean-Jacques Rousseau.[12] When Sieyès devised his own account of constituent power, he certainly employed a very Hobbesian language of representation, though there is no 'irony' involved in framing a political claim in the dominant language of one's enemies any more than Hobbes' own appeal to the conceptual framework of Samuel Rutherford.

Though Sieyès used representation to leverage a political challenge against the *ancien régime*, he did so by imagining the collective identity of the French people in a distinctively different way. In order to trace this transition, I begin by demonstrating how the imagined collective identity appeared in France prior to the Revolution. This was one that took the various discrete provinces of France to be united only in the physical body of the monarch. This, moreover, abridged some important aspects of Hobbesian representation. Hobbes' account of representation had a quite different life in France when compared to its English reception, in part due to the absence of a French translation of *Leviathan* until 1760.[13] Prior to this, access to his arguments had been through the Latin edition, and Pierre Bayle's entry in the *Dictionnaire Historique et Critique*.[14] In particular, Robin Douglass notes one critical aspect of Hobbesian representation that was misrepresented in French prior to 1760, due to a particularly naturalistic reading of the word 'person', associated with a physical

[11] Jean Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch, trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 114.

[12] Keith Michael Baker, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century* (Cambridge: Cambridge University Press, 1990), 224.

[13] Even this was a heavily truncated one, containing only chapters 1-10 and 17-20, though this includes Hobbes crucial gesture toward the institution of the sovereign. See Malcolm, *Aspects of Hobbes*, 468.

[14] Robin Douglass, *Rousseau and Hobbes: Nature, Free Will and the Passions* (Oxford: Oxford University Press, 2015), 25-33. Pierre Bayle, *Political Writings*, ed. Sally L. Jenkinson (Cambridge: Cambridge University Press, 2000), 79-93.

individual. In Hobbes, a person was associated with the persona adopted and performed in the act of representation; the 'one person' in which the multitude was united was the fictional person of the state, which need not itself be represented by a single individual. Through the naturalistic reading of person in France, it became commonplace to reduce the Hobbesian person, with its various possible ways of being represented, to the individual monarch.[15] Consequently, whilst in Britain sovereignty by the early 18th century had come to be located in the King-in-Parliament, in France it remained in the king.

This use of Hobbesian representation to celebrate monarchical absolutism was employed by Jacques-Benigne Bossuet, a courtier to Louis XIV, who closely repeated the Hobbesian model of representation—though he excluded its covenanting aspects.[16] First, both Hobbes and Bossuet recognised the sovereign as acting as God's lieutenant. For Hobbes, God's Lieutenant 'representeth Gods person', without whom 'there is no Covenant with God';[17] for Bossuet, 'princes act as ministers of God, and his lieutenant on earth'.[18] Second, both Hobbes and Bossuet recognised that the multitude was also represented as a unity through the person of the sovereign. Hobbes' statement that 'it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One',*[19] was mirrored, if not referred to, in Bossuet. Nevertheless, in accordance with the 'naturalistic' reading of personhood, Bossuet jumped from multitude to the person of the monarch without the intermediary institution of the person of the state. He recognised that the prince was considered 'a public personage', through which 'all virtue and excellence are united in God, so the strength of every individual is comprehended in the person of the

[15] Douglass, *Rousseau and Hobbes*, 31.

[16] For the influence of Hobbes on Bossuet, and further discussion on each of these three relations of representation, see Baker, *Inventing the French Revolution*, 224-5. Skalweit recognises that the constitution of the *multitudo* into a State in Bossuet is 'strikingly reminiscent of Hobbes', though remains agnostic regarding the influence of the latter upon the former. He nevertheless adds the qualification that *Leviathan* was well known in the France of Louis XIV. Stephan Skalweit, "Political Thought," in *The New Cambridge Modern History, Volume V: The Ascendancy of France 1648-88*, ed. F. L. Carsten (Cambridge: Cambridge University Press, 1961), 100. For Hobbes's influence in France, see Malcolm, *Aspects of Hobbes*; Quentin Skinner, *Visions of Politics, Vol. 3: Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), 308-23.

[17] Hobbes, *Leviathan*, 230.

[18] Jacques-Benigne Bossuet, *Politics Drawn From the Very Words of Holy Scripture*, trans. Patrick Riley (Cambridge: Cambridge University Press, 1990), 58.

[19] Hobbes, *Leviathan*, 220.

prince'.[20] Instead, the state arose only when the multitude were embodied in the person of the sovereign: 'the whole state is in the person of the prince, [for] in him is found the will of the whole people'.[21]

These careful differences in the styling of representation had substantial implications for the thesis itself, namely with regard to their respective preferences for the covenant as being the product of a social contract in Hobbes, and divine ordination in Bossuet.[22] It was far from a neat correspondence; French subjects were far from being citizens even in the Hobbesian sense. The French account of divine rights as presented by Bossuet in effect ran Hobbes' theory in reverse, beginning with the homogenizing power of the unitary sovereign.[23] The resulting inheritance may have been a Hobbesian representation, though one that diminished, if not outright abridged, the critical role of the constituent power. Unity was imposed upon political subjects from the top-down in order to shape that community into the collective subject that, for Hobbes, should have been created in the founding covenant. Nevertheless, the embodiment of the people in the corporeal body of the king serviced the need to deal with the tension between the centralisation of political power and the introversion and self-interest of each province. According to Alexis de Tocqueville, the French nation of the *ancien régime* was curiously composed. More so than anywhere else in Europe, though the people composing it were 'exactly like each other', this 'homogenous mass' was kept apart, 'divided within itself into a great number of…self-contained units, each of which watched vigilantly over its own interests'.[24] Prior to the revolution, there was a two-hundred-year legacy of strong central administration in Paris, which deployed efficient and obsessive surveillance over the provinces. Though this resulted in legal and administrative uniformity across France, the provinces were concerned to a greater extent only with their own affairs. During the early modern period, France underwent a particular social

[20] Bossuet, *Politics Drawn From the Very Words of Holy Scripture*, 160.
[21] Ibid., 167.
[22] Patrick Riley, "Introduction," in *Politics Drawn from the Very Words of Holy Scripture*, ed. Patrick Riley (Cambridge: Cambridge University Press, 1990), lvii-lxiii.
[23] Hont, "Permanent Crisis," 190.
[24] Alexis de Tocqueville, *The Ancien Régime & the French Revolution*, trans. Hugh Brogan (Manchester: Fontana, 1966), 103.

reorganisation: on the one hand, administrative unification, but on the other social fragmentation, as the provincial structure came to divide the kingdom. This was compounded as the feudal system in France left the nation divided between Estates, particularly from the 16th century onwards, as privileges and tax exemptions were bestowed upon individual members of the nobility.[25]

Toward the end of the 16th century, the component parts of the *États-Généraux* were far less effective at co-operating.[26] For theorists such as Bossuet, monarchical representation played a central role. The proposition that the sovereign represented the people as a unity held a particular pertinence in France, for the particularistic interests of the provinces and Estates could be reconciled in the unified body of the King. The function of the *États-Généraux* was not to represent the nation as a unified entity separate from the King, but as 'a multiplicity of orders and Estates made one only by (and in) the royal presence'.[27] The traditional representation of the *États-Généraux* had long been organised according to two important qualities that sought to maintain this monarchical unity. The emphasis upon the *cahier de doléance* gave estates, communities and corporate bodies the opportunity to raise particular grievances with the crown, whilst the *mandat impératif* limited the powers of the deputies vis-à-vis their communities, through which deputies served in accordance with concretely transmitted preferences just as constituent power would come to be expressed in Britain and America. Together, these mechanisms were key to maintaining the privileged representative function of the unified royal person as the embodiment of the nation. The *cahier* ensured that those estates retained their essentially particularistic interests, whilst the *mandat* ensured that those elected to the *États-Généraux* functioned only as delegates of particular interest, rather than entrusted representatives. Unlike constituent power in Britain, employed to ensure that parliament was checked by the authentic voice of the people, the combination of *mandat* with the *cahier* prevented the *États-Généraux* from raising their own claim to the appropriate representation of the nation as anything more than the accumulation

[25] Soboul, *The French Revolution*, 84-85.
[26] Tocqueville, *The Ancien Régime & the French Revolution*, 88-121.
[27] Baker, *Inventing the French Revolution*, 226.

of particular interests.[28] Moreover, the institution of the *États-Généraux* was rarely used, and never during the reign of Louis XIV, when this representative logic of the sovereign was at its height.[29]

French politics nevertheless wrestled with various alternative means of expressing the nation as a single body with a king's head.[30] Most prominent among these was the retort of the Parisian *parlement*. French *parlements* held no formal legislative powers, serving instead primarily as a judiciary organ. Following the death of Louis XIV, the *parlements* repeatedly challenged the monarch over policy in various efforts to preserve the privileges of the *ancien régime*.[31] As the supreme judicial court of the realm, the *parlement* served a mediatory role, representing the nation to the king, and the king to the nation. First, the *parlement* stood in as the visible image of the king throughout the realm, in both a symbolic and performative sense. Insofar as the symbolic body of the king was indivisible, no distinction between his corporeal body and the magistrate who represented him could be drawn. So too, the plenitude of the sovereign could be expressed mediately by the *parlement*. Conversely, *parlement* represented the people, as it answered to the king in the nation's name. The tension that ensued from such mediation was exemplified in the grand remonstrances of 1755, in which the *parlement* of Paris claimed to be descended from the ancient Frankish assembly of the nation.[32] The *parlement* moved to turn the absolutist logic on its head, contending that whilst the nation was united in the mystical body of the sovereign, the *parlement* stood at the institutional centre, as the court forms an 'august sanctuary' in which '*the king, the state and the law form an inseparable whole*'.[33] It was not that the State was made one through the corporeal body of the King, but that it was one in the physical building of *parlement*. This

[28] Ibid., 227.

[29] Soboul, *The French Revolution*, 77.

[30] For an overview prior to the revolution, see Antoine de Baecque, *The Body Politic: Corporeal Metaphor in Revolutionary France, 1770–1800*, trans. Charlotte Mandell (Stanford, CA: Stanford University Press, 1996), 29-75.

[31] William Doyle, "The Parlements of France and the Breakdown of the Old Regime 1771–1788," *French Historical Studies* 6, no. 4 (1970).

[32] Julian Swann, *Politics and the Parlement of Paris under Louis XV, 1754–1774* (Cambridge: Cambridge University Press, 1995), 131.

[33] Jules Flammermont, *Remontrances du Parlement de Paris au XVIIIe siècle, Vol. II: 1755–1768* (Paris: Imprimerie Nationale, 1895), 34. Translation in Baker, *Inventing the French Revolution*, 230.

dispute between the king and the nobles did little to modify the locus of political representation in pre-revolutionary France, for political power remained essentially in the artificial body of the monarch, which was never separated meaningfully from his corporeal body. The metaphor of the king's two bodies remained pertinent, whilst the fragmentary identity of France without institutional representation remained.

The purpose of this brief overview has been to draw attention to how collective identity had been imagined in France prior to the revolution. This took the form of a fractionary image of provinces and estates that was made one only in the physical body of the monarch, or later in the physical building of *parlement*. A logic of representation with acute similarities to Thomas Hobbes' underpinned both the absolutist accounts of monarchical power and the *parlementaire* efforts to physically embody the state. What is clear, moreover, is that the practice of representation had been more or less severed from the account of constituent power which Hobbesian representation initiated. Instead, representation was conceived according to a descending structure, emanating from God, through the king to the people. It is true, as Olson notes, that the social distinctions between Estates occasionally led to the socially disadvantaged using the name *le peuple* in politicised ways, though this was often contrasted with *les grands*. *Le peuple* was not a universal image, but a 'destitute fraction' of society. Though it may have served as the 'normative fulcrum of a critique of monarchical sovereignty', the disadvantaged could not transform that critique into a concrete alternative.[34] When Sieyès came to utilise the tools of representation to challenge the absolute monarchy, he did so by constructing a universalist image of the nation, which he labelled the constituent power.

II: The Nation, Sovereignty and the Constituent Power

The absolutist concept of the state was under threat long before the calling of the National Assembly in 1789, or Louis XVI's flight to Varennes two years later. Slowly prised open was the space for a new, or at least freshly articulated, discourse

[34] Olson, *Imagined Sovereignties*, 58.

on representation and political authority. It was here that Sieyès presented France with an alternative. The trigger for Sieyès' writing of the pamphlets for which he is most famous was the growing debt within France following the recent support of the United States in war against Britain, and, despite victory, the failure to secure projected commercial prizes.[35] In 1789, Louis XVI convened the *États-Généraux*, in which advisors from the three orders of the *ancien régime* were assembled in order to resolve the problem of French debt. According to Sieyès, the king had neither the right nor the power to order a bankruptcy, whilst the consequences of the *États-Généraux* allowing one would be devastating.[36] The debt belonged to the nation, and not the king, and so it could only effectively be dealt with via the three orders within the *États-Généraux*. Sieyès feared that the vested interests of the first two orders would result in the declaration of the French State as bankrupt, and the eventual reinstatement of the autonomy of the King's ministry, free to spend recklessly public monies once more.[37]

When, in Chapter 5 of *What is the Third Estate?,* Sieyes discussed the solution to what should have been done when calling the *États-Généraux*, he situated the problem of French debt in a wider field of differences over the constitution of France itself. He insists that the only correct way to put an end to differences over the constitution (of which the problem of resolving the French debt was evidently one) was to call not upon the Assembly of Notables, the high-ranking aristocrats, but the nation itself. Likewise, if France lacked a constitution, a new one was to be made, and the nation alone had the right to do this.[38] If the nation was to occupy the space vacated by the monarch, it could do so only by accepting the public debt and taking on a new constitution, for it was only in doing so that it could 'set the seal on its own freedom and power', thereby acquiring the 'overwhelming moral authority in public opinion that ought to be its goal'.[39] The nation had the exclusive right to both draw

[35] Bailey Stone, *Reinterpreting the French Revolution: A Global-Historical Perspective* (Cambridge: Cambridge University Press, 2002), 24-5.

[36] Sieyès, "Views of the Executive Means," 25.

[37] Holland, "Sovereignty as *Dominium?*," 470.

[38] Sieyès, "Third Estate," 133.

[39] Sieyès, "Views of the Executive Means," 31. For a thoroughgoing treatment of Sieyès' engagement with the problem of French debt, see Michael Sonenscher, *Before the Deluge: Public Debt,*

up the constitution, and to amend it. It is here that Sieyès invoked his famous definition of the constituent power, for 'in each of its parts the constitution is not the work of a constituted power, but a constituent power. No type of delegated power can modify the conditions of its delegation'.[40] The nation was that constituent power.

Far less clear is what the nation as the constituent power was and how that constituent power was to be operationalised. This is in part because Sieyès himself presented at least three distinct descriptions of the nation, each of which implied different identities of the nation, but also reconfigured the scope of its agency. First, when accounting for its role as the constituent power, Sieyès described the existence of the nation as 'prior to everything', for it exist within and 'never leaves the state of nature'.[41] Being the 'origin of everything', Sieyès polemically proclaimed, 'its will is always legal. It is the law itself'.[42] Yet, earlier in that same pamphlet, Sieyès provided a second definition, describing the nation as a 'body of associates living under a *common* law, represented by the same *legislature*'.[43] These descriptions contrast a nation as a 'natural' entity with a nation as a 'positive' legal institution. He added a third elsewhere, when he wrote that a nation can also be considered according to a latent contractarian definition, namely as a 'more or less substantial number of isolated individuals seeking to unite'.[44] These descriptions are difficult to square. Interpreters of Sieyès who wish to understand the role of the nation have done so by favouring one definition over another. This is clearest among those that use Sieyès for arguments over national- and popular sovereignty.

Inequality, and the Intellectual Origins of the French Revolution (Princeton, NJ: Princeton University Press, 2007).

[40] Sieyès, "Third Estate," 136.

[41] Ibid., 136-38.

[42] Ibid., 136.

[43] Ibid., 97.

[44] Ibid., 134. Andrew Arato recognises this apparent difficulty, though lists only the first two descriptions of the nation. Arato, *Post-Sovereign Constitution Making*, 19. Claude Klein appreciates a tension, though sees it to be between an unlimited constituent power and the limited capacity of amendment. This accounts for the capacity but not the form of the nation. See Claude Klein, *Théorie et pratique du pouvoir constituant* (Paris: Presses Universitaires de France, 1996), 16-17. Moreover, the amendment procedure to which he refers was adopted in 1791 against Sieyès' wishes. Sieyès preferred the calling of a new constituent convention whenever conflicts required it. This position was expresses a few years earlier in Emmanuel J. Sieyès, *Dire de l'abbé Sieyès, sur la question du Veto royal, à la séance du 7 septembre 1789* (Versailles: Baudoin, 1789).

The French jurist Raymond Carré de Malberg, now nearly a century ago, initiated this debate, contending that both national and popular sovereignty were the product of the French experience. Carré de Malberg identified *national* sovereignty with the allocation of sovereignty to the national body as a whole. No individual organ of the state could assume that supremacy without the express delegation of that responsibility.[45] Sovereignty was lodged in the nation as a whole, unified and personified in the State, an essential status granted by the constitution.[46] Theorists of national sovereignty, on Carré de Malberg 'saccount, employed delegation in order to retain the unity of the nation through the national will expressed by assembly members. Though Carré de Malberg was a supporter of national sovereignty, he nevertheless recognised its central theoretical deficiency, namely that political supremacy derived *from* the constitution could not account for the constitution itself.[47] Popular sovereignty resolved the deficit of national sovereignty by celebrating a *volonté propre*, an unmediated will of the people capable of devising the organ of the constitution.[48] Popular sovereignty was characterised by the inalienable character of political authority that affirmed the *mandat imperatif* over representative's autonomy.

Sieyès, for Carré de Malberg, was most clearly a theorist of popular sovereignty adapted to the constitutional state in all but name. Sieyès theory of constituent power, for Carré de Malberg, only lent support to this, for it tended toward a Rousseauvian-styled collective subject imagined in the state of nature.[49] What is clear, moreover, is

[45] Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat*, vol. II (Paris: Dalloz, 1922), 167-70.

[46] Ibid., 483.

[47] Ibid., 484.

[48] Ibid.

[49] Ibid., 487. This identification of Sieyès' constituent power as a derivative of a Rousseauvian General Will is all too common, though subtle differences persist among them. Arendt suggests that Rousseau's General Will 'became axiomatic for all factions and parties', of which Sieyès was the most prominent. Arendt, *On Revolution*, 156. Arato and Cohen offer a little more nuance, though they suggest that Arendt, like Schmitt before her, write out the Montesquieuvianism of the post-1794 Sieyès, allowing his early Rousseauvianism to dominate. Andrew Arato and Jean L. Cohen, "Banishing Sovereignty? Internal and External Sovereignty in Hannah Arendt," in *Politics in Dark Times: Encounters with Hannah Arendt*, ed. Seyla Benhabib (Cambridge: Cambridge University Press, 2010), 144, fn.20. See also Johnson Kent Wright, "The Idea of a Republican Constitution in Old Régime France," in *Republicanism, A Shared European Heritage, Vol. I: Republicanism and Constitutionalism in Early Modern Europe*, ed. Martin van Gelderen and Quentin Skinner (Cambridge: Cambridge University Press, 2002), 302; Sewell, *Rhetoric of Bourgeois Revolution*, esp. 47. Others are more nuanced in their accounts. Egon Zweig suggests Sieyès presents a 'thoroughly disorientating' political vocabulary, for he uses Montesquieuvian terminology to portray Rousseauvian ideas, though

that in claiming this, Carré de Malberg uses only the 'natural' definition of the nation. The critical characteristic of this association of Sieyès with popular sovereignty has been to stress the absence of any limitation upon the operation of the constituent power.[50] For these interpreters, constituent power was understood to be interchangeable with an unbridled popular sovereignty, and indeed, for Hannah Arendt, the Terror was evidence of this interpretation.[51]

Others, such as István Hont and Pasquale Pasquino, have pushed back on those Rousseauvian readings of Sieyès' nation.[52] In doing so, they have argued that Sieyès's nation was characteristic of what Carré de Malberg called national sovereignty. This was a form of limited sovereignty associated with the indivisible national body that was accounted for through a unified central organ. Though I agree with a great deal of their interpretations, these theorists anchor the political expression of the nation wholly within a positive legal institution, as is accorded in Sieyès' second definition of the nation. The implication of this reading has often been to treat the nation as interchangeable with the Hobbesian Leviathan, thereby transforming constituent power into an organ of sovereignty.[53]

he never fully unties the relation between the two. Egon Zweig, *Die Lehre vom Pouvoir Constituant: Ein Beitrag zum Staatsrecht der Französichen Revolution* (Tübingen: J.C.B. Mohr, 1909), 137. See also Bronislaw Baczko, "The Social Contract of the French: Sieyès and Rousseau," *The Journal of Modern History* 60, no. Supplement: Rethinking French Politics in 1788 (1988); Baker, *Inventing the French Revolution*, 235-38. These readings emphasise how representation sought to temper the unruliness of the constituent. Carré de Malberg notes that such combinations are 'illogical'. *Contribution*, II, 489. Paul Bastid sought to resolve this contradiction by conceiving the constituent power to be constrained by natural law, pulling Sieyès in a Lockean direction. Paul Bastid, *Sieyès et sa Pensée* (Geneva: Slatkin, 1978). In a posthumously published text, Istvan Hont has drawn together Rousseau and Sieyès, though an insightful revisionist reading of Rousseau as a theorist of commercial society not antithetical to Adam Smith. This minimises the distance between the two without conceding Sieyès' ground on representative labour. See István Hont, *Politics in Commercial Society: Jean-Jacques Rousseau and Adam Smith*, ed. Béla Kapossy and Michael Sonenscher (Cambridge, MA: Harvard University Press, 2015), 88-110. One should note Stephanie Frank's reading, for whom Sieyès does not modify Rousseau to accommodate representative government, so much as 'redeploy the Malebranchian *volonté générale* in order to legitimize representative government'. Stephanie Frank, "The General Will Beyond Rousseau: Sieyès' Theological Arguments for the Sovereignty of the Revolutionary National Assembly," *History of European Ideas* 37, no. 3 (2011): 338.

[50] Arendt, *On Revolution*, 161-64; Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Sietzer (Durham, NC: Duke University Press, 2008), 126-28. See chapter 4 and 6 for further details.

[51] Arendt, *On Revolution*, 158.

[52] Hont, "Permanent Crisis."; Pasquino, *Sieyes et l'invention de la constitution en France*; Christine Fauré, "Sieyès, Rousseau et la théorie du contrat," in *Figures de Sieyès*, ed. Pierre-Yves Quiveger (Paris: Publications de la Sorbonne, 2008); Murray Forsyth, *Reason and Revolution: The Political Thought of the Abbé Sieyès* (Leicester: Leicester University Press, 1987); Sonenscher, "Introduction."

[53] Hont, "Permanent Crisis," 203.

More recently, theorists of constituent power, such as Illan Wall, have drawn on a reading by Foucault to read Sieyès' nation differently, not a 'popular' or 'national' sovereign, but as a means of mediating between these two accounts of sovereignty. They have done so to avoid the implications of popular sovereignty associated with a Schmittian groundless will.[54] Foucault has called this a 'self-dialecticalisation' of nationhood.[55] According to this interpretation, the state is divided between form and substance. Whilst its 'substance' is the sociological division of labour through which the nation is capable of existing within the state of nature, it is given 'form' through common law and legislature. Prior to the revolution, the third estate was in practice only a partial nation. It contained the sociological substance of a complete nation, though it lacked the legal architecture.[56] The nation consequently embodied the potentiality of a complete nation. On Foucault's interpretation, the pamphlet argued for the particular—the Third Estate—to become a universal—the nation—through a revolutionary event.[57] According to this reading, the Third Estate is 'a state-in-becoming';[58] 'the claim to this totality…sutures the tear between the revolutionary event and its authorisation'.[59] Constituent power here serves as the tool for the realisation of institutionalised sovereignty, by transferring the inchoate popular sovereignty into an institutionally measured national sovereignty.[60]

These three readings of Sieyès either stand on each side of the dichotomy between national and popular sovereignty, or, on the Foucauldian interpretation, seek to mediate between the two, whilst constituent power is taken to be coterminous with sovereignty. I am cautious about these common conceptualisations of the Nation as 'sovereign', for Sieyès was quite particular in the vocabulary that he employed,[61]

[54] Spång, *Constituent Power and Constitutional Order*, 26-29; Wall, *Constituent Power and Human Rights*, 46-53.

[55] Foucault, *Society Must Be Defended*, 222.

[56] Ibid., 218.

[57] Ibid., 222.

[58] Spång, *Constituent Power and Constitutional Order*, 28.

[59] Wall, *Constituent Power and Human Rights*, 50.

[60] There are, of course, more serious implications to this argument, not least that Foucault reduces Sieyès' theory of constituent power to wilful pursuit of revolution in its most radical form, which elides many of the differences between Sieyès and, for example, the Jacobins.

[61] Sonenscher, "Introduction," ix-x.

rarely utilising the language of 'sovereignty', and almost always employing it critically.[62] In his First Thermidorian Intervention, delivered in July 1975, almost a year after Robespierre's execution, Sieyès proclaimed that the legacy of absolutism in France had 'invested [popular sovereignty] with the whole tradition of pomposity and absolute powers that once served to glorify usurped sovereignty'.[63] Despite this unsettling inheritance, radicals added 'still greater powers', ignorant to the danger that 'however terrible the sovereignty of the great kings had been, the sovereignty of a great people should still surpass it'.[64] Later in his address, he appealed to the 'sensible and useful idea that was introduced in 1788, namely the distinction between constituent and constituted powers', a distinction that was rendered 'impotent' and mistakenly used to 'justify acts of folly'.[65] There was a clear distinction in Sieyès' mind between sovereignty and the constituent power. Sovereignty was characterised by two features, namely its absolute power and the permanent or continual presence of that power within the political arena. When these were attributed to the people immediately, the consequence was a *'ré-totale'*. The plenitude of power lodged in the immediate expression of the popular will was a 'political monster' incompatible with the long-term survival of the state, for it was unable to respond effectively to changes within the 'civil species' of the nation.[66] If that same absolute power was lodged in a representative, one risked placing too much power within an organ capable of expropriating that authority for its own ends.[67] The constituent power was nothing like sovereignty in this respect. In separating constituent from constituted powers, the immense powers granted under sovereignty were dissolved, because the distinction between constituent and constituted powers 'assigns different tasks to

[62] Forsyth, *Reason and Revolution*, 181-82. If not used critically, it was used either ambivalently or in a purely descriptive manner. See also Jacques Guilhaumou, *Sieyès et l'ordre de la langue* (Paris: Klincksieck, 2002), 87.

[63] Emmanuel J. Sieyès, "Sieyès's Views Concerning Several Articles of Sections IV and V of the Draft Constitution [First Thermidorian Intervention]," in *Emmanuel Joseph Sieyès: The Essential Political Writings*, ed. Oliver W. Lembcke and Florian Weber (Leiden: Brill, 2014), 156.

[64] Ibid.

[65] Ibid., 159.

[66] Ibid., 156. On the implicit contrast between '*ré-totale*' and *republique*, see Sonenscher, "Introduction," xxi.

[67] Sieyès, "First Thermidorian Intervention," 157. Though Sieyès is less explicit, he affirms that those with concerns over the concentration of power in representatives are right to be fearful, though insists that bicameralism is not a solution.

different representatives, so that their desired activities together yield the desired outcome'.[68] Absolute power was checked by separating the ordinary activity of administration from the extraordinary activity of constitution-writing.[69] This finer point is one that is often overlooked, as constituent power is reduced, often wholesale, to sovereignty.[70]

Lucia Rubinelli has recently presented a similar challenge, wagering that Sieyès was neither a theorist of popular or national sovereignty, but of the distinct conceptualisation of political authority he called constituent power.[71] Nevertheless, Rubinelli's parsing of the distinction requires amendment, for her contrast opposes constituent power to popular and national sovereignty as a third alternative to the two. Whilst she is right to contrast constituent power with sovereignty as distinct conceptualisations of political authority in Sieyès' vocabulary, she is mistaken in contrasting Sieyès' adoption of constituent power with the debates over *national* and *popular* sovereignty.[72] The debates over the imperative mandate sought to conceive of the appropriate method of operationalising sovereignty, of which the national- and popular- variants were two. Rubinelli's contrast between constituent power, national- and popular sovereignty, however, does not deal with how constituent power was to be operationalised. It is a question that cannot be omitted, and so the debates over whether Sieyès was a theorist of national- or popular-sovereignty remain very much relevant, for though the language of 'sovereignty' may be misplaced, these debates nevertheless shed light on the operationalisation of constituent power. If constituent power is something quite different from sovereignty, it is all the more relevant to understand how and why Sieyès employed representation for its practice.

[68] Ibid., 158.

[69] This distinction is perhaps less clear today than it was to Sieyès, due to the Schmittian association of sovereignty with the decision over the exception, rather than the administration of the rule.

[70] For example, 'as a political definition of the location of sovereignty, Hobbes' 'state' and Sieyès' 'nation' are identical'. Hont, "Permanent Crisis," 203. The index to Sieyès' *Political Writings* is similarly telling. Elsewhere, Hont recognises 'the paucity of Sieyès' use of the term *sovereignty*'. "Permanent Crisis," 196, fn.54. The discussion of the constituent power of the Nation within *Third Estate* is indexed as 'sovereignty', though neither 'sovereign' nor 'sovereignty' are employed by Sieyès within this passage.

[71] Lucia Rubinelli, "How to Think Beyond Sovereignty: On Sieyes and Constituent Power," *European Journal of Political Theory* (2016, OnlineFirst): 4.

[72] Ibid., 2-3.

III: REPRESENTING THE NATION

Carré de Malberg's depiction of Sieyès as a theorist of popular sovereignty is a logical rather than hermeneutic analysis. His conclusion is an extension of organ sovereignty running against its limits.[73] National sovereignty, limited to and enacted through the institutional structure of the Constitution, was incapable of accounting for the constitution's first instance, and so has no answer to the location of the constituent power.[74] For Carré de Malberg, because the constituent power was prior to the constitution, it follows that it resided immediately within the people and not an organ of the state. It was perfectly analogous to the General Will.[75] For Sieyès, a voluntarist General Will was neither a necessary nor ineliminable feature of constitution-writing. My intention is to argue against the persistent claim that Sieyès' nation was 'basically Rousseauean',[76] though this is not because Sieyès effectively demonstrated the nation was reducible to the State. Sieyès sought to negotiate between these two alternatives through his account of constituent power. As I will argue, Sieyès addressed this through a naturalistic, materialist account of representation, through which he is able to separate out the identity of the nation as a unity from the juridical structure of the state in order to reconcile representation with constituent power in a non-contradictory way, insofar as it relied upon a sociological, and not legal, unity.[77] It is this specifically materialist representation that enabled the operation of a pre-legal constituent power.

[73] Organ sovereignty was a concept Carré de Malberg had taken from Imperial German state theory. This referred to the power associated with the highest organ of the state's authority that was capable of executing political decisions. This was closely associated, for Malberg, with the German *Herrschaft*. Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat*, vol. I (Paris 1920), 79. See also, Michel Troper, "The Survival of Sovereignty," in *Sovereignty in Fragments*, ed. Hent Kalmo and Quentin Skinner (Cambridge: Cambridge University Press, 2010), 137.

[74] Carré de Malberg, *Contribution*, II, 484.

[75] Ibid., 487.

[76] Sewell, *Rhetoric of Bourgeois Revolution*, 47.

[77] I am here appealing to a distinction more commonly recognised in the French literature, between the artificial or constructed body of the state [*méchanism social*] and the organic body of society [*organisme social*]. See Sieyès, "Second Thermidorian Intervention," 171, editor's footnote; Pierre Brunet, *Vouloir pour la Nation: Le Concept de Représantation dans la Théorie de l'État* (Rouen: Publications de l'université de Rouen, 2004), 106; de Baecque, *Body Politic*, 103-4; Jacques Guilhaumou, "Sieyès et le non-dit de la *sociologie*: du mot à la chose," *Revue d'Histoire des Sciences Humaines* 15, no. 2 (2006). These belong to different spheres of study, namely constitutional science and sociology respectively. See Pasquino, *Sieyes et l'invention de la constitution en France*, 37.

It first serves to recognise that even the Rousseauvian General Will was troubled by the problem of the first instance. Rousseau wrote in Book II of *The Social Contract* that 'for a nascent people to be capable of appreciating sound maxims of politics…the men would have to be prior to laws what they ought to become by means of law'.[78] Rousseau was deeply concerned here with the problem of bootstrapping the sound decision-making of the people. The general will, after all, was directed toward the good of the community as a whole, and not to the aggregate of all individual preferences. The latter required a civic education of participation in political life guided by good laws, for a 'blind multitude…rarely knows what is good for it'.[79] The good character of the General Will was indebted to the presence of good laws that ultimately underwrote it.[80] There was no unattenuated General Will that precedes the law in Rousseau's *Social Contract,* but only 'the will of all'.[81] This element of Rousseau is significant, if not fatal, for Carré de Malberg's characterisation of Sieyès, for it is far less certain that a people had recourse to such a thing as a General Will prior to the constitution. This is because for Rousseau, the General Will served two functions: it both legislates and through that activity of legislating serves as the political chemistry for civic unification.[82] The ongoing collective activity of law-making produced an inward inertia toward civic unity, itself ensuring an ever more accurate General Will. It is due to the recursion that the tension of the first instance arises, for the temporal relation between the two is fraught.

[78] Rousseau, *Social Contract*, 71.

[79] Ibid., 68.

[80] Though he believed it was akin to 'that of squaring the circle', Rousseau was clearest that he envisions the law above men, and not vice versa, in *The Government of Poland*, trans. Willmoore Kendall (Indianapolis, IN: Hackett, 1985), 3.

[81] Rousseau, *Social Contract*, 60.

[82] That the General Will serves the role of social unification, rather than its product, see James Farr and David Lay Williams, "Introduction," in *The General Will: The Evolution of a Concept*, ed. James Farr and David Lay Williams (Cambridge: Cambridge University Press, 2015); Katrin Flikschuh, "Elusive Unity: The General Will in Hobbes and Kant," *Hobbes Studies* 25, no. 21-42 (2012); Hont, "Permanent Crisis," 188-90. Compare, for example, Simon Critchley, for whom *The Social Contract* must be read backwards in order to break the vicious circle: the call for civil religion precedes the general will, so being the transcendent appeal that is, for him, always necessary. Such transcendent grounding is, moreover a constitutive feature of every democratic community. Simon Critchley, "The Catechism of the Citizen: Politics, Law and Religion in, after, with and against Rousseau," *Continental Philosophy Review* 42(2009).

Sieyès' solution approached the problem laterally, not by resolving the tension but by preventing it from emerging in the first place, by separating the aspects of legislating from social unification. It was not the general will [*volonté générale*], but rather 'general work [*travail général*] [that] is the foundation of society'.[83] When accounting for the character of the nation, Sieyès conceived of society through the conceptual lens of political economy, through which an alternative means of relating subjects to political power was derived. The importance here of physiocracy, namely the thought of Quesnay and Turgot, as well as the Scottish political economist Adam Smith, is striking. Unlike the mercantilist school before them, which equated national wealth with the wealth of the King, the physiocrats identified agricultural labour as the source of wealth, and with it reconceptualised the economic object of the population. For the mercantilists, the population was understood primarily along the axis of sovereign and subject, identified as a productive force from which wealth could be extracted exponentially and added to the Crown's purse. For the physiocrats, the population was coterminous with a set of processes to be managed.[84] The relation between sovereign and population was not one of obedience, but of governance within parameters,[85] while the king, *le Roi pasteur*, was to shepherd, not command.[86] Though physiocracy did not challenge the overarching notion of French sovereignty, Turgot saw that national unity could only be understood through representation of interests of proprietors at a decidedly local level, which could feed up to the concerns of the nation as a whole in the national legislature.[87]

[83] Sieyès 284 AP 2.10 All references to works in the Sieyès archives at the *Archive Nationale*, Paris, are cited in the standard fashion, referring to the carton number (284 AP 2 to 284 AP 5), followed by the dossier number. See also Lembcke and Weber, "Introduction to Sieyès's Political Theory," 10.

[84] Sonenscher, *Before the Deluge: Public Debt, Inequality, and the Intellectual Origins of the French Revolution*, 189-99; T. J. Hochstrasser, "Physiocracy and the politics of *laissez-faire*," in *The Cambridge History of Eighteenth-Century Political Thought*, ed. Mark Goldie and Robert Wokler (Cambridge: Cambridge University Press, 2008). Michel Foucault describes this as a move from the population as a 'juridico-political subject' to a 'technical political object'. *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, trans. Graham Burchell (Basingstoke: Palgrave, 2007), 69-73.

[85] See, for example, Victor Riquetti Mirabeau, Marquis de, *L'Ami des Hommes, ou Traité de la Population, Vol. I* (Avignon1756), 37.

[86] Richard Whatmore, *Republicanism and the French Revolution: An Intellectual History of Jean-Baptiste Say's Political Economy* (Oxford: Oxford University Press, 2000), 61.

[87] Anne Robert Jacques Turgot, Baron de l'Aulne, "A Letter from Monsieur Turgot to Doctor Price on the Constitutions of America," in *Considérations sur l'ordre de Cincinnatus, ou imitation d'un pamphlet anglo-américain*, ed. Honoré Gabriel Riquetti Mirabeau, comte de (London: J.Johnson, 1785).

It was this idea that national unity could derive from the representation of economic interests that was taken up by Sieyès. He clarified his thoughts regarding the physiocrats in a short paper, *Letters to the Economists on their moral and political systems,* written some time before 1775.[88] Though he saw physiocracy as the most advanced school of political economy, and a necessary prelude to his *l'art social*, he was critical that the nature of goods in physiocratic thought was simply too restrictive, limited only to 'exchangeable goods'. Whether exchangeable or not, public or private, appreciable or non-appreciable, all these goods contributed to the wealth of the nation. The physiocrats were impeding the generation of social structures within commercial society precisely by limiting wealth to the goods of landed proprietors.[89] Sieyès proposed an alternative that did not privilege landed production. In agreement with the physiocrats, he affirmed that 'an association is nothing other than a more perfect means of obtaining with greater abundance and greater security, that which everyone desires, namely wealth'.[90] More precisely, these circulating relations of production generated a *'vital force'* through which the economic foundations of society could be discerned.[91]

As he clarified in a much later paper, this was a political economy that sought to extend the Smithian division of labour further than Adam Smith had intended.[92] The division of labour included all aspects of productive society, to the extent that 'if the worker who supplies [an individual] with slippers stopped working, the result would be that she would have to do it herself, and would do it a great deal less well and at a great deal more cost'.[93] In labouring, an individual who fulfilled these duties in lieu of another was a 'representative'.[94] This mode of organic representation is a fundamental indicator of freedom.[95] Sieyès demonstrated this by giving two accounts of liberty. First, a person may be deemed free when she or he can act unhindered.

[88] Sieyès 284 AP 2.10.
[89] Whatmore, *Republicanism and the French Revolution*, 70.
[90] Sieyès 284 AP 2.10, translation in Forsyth, *Reason and Revolution*, 50-51.
[91] Ibid.
[92] Sieyès 284 AP 2.13.
[93] Sieyès 284 AP 4.5, translation in Sonenscher, "Introduction," xxix.
[94] Sieyès 284 AP 2.13, 284 AP 4.5. Sieyès remains consistent on through to 1795 and beyond. See Sieyès, "First Thermidorian Intervention," 154.
[95] Sieyès, "Reasoned Exposition " 122.

Sieyès identified this as 'liberty of independence'. Second, 'liberty of ability' recognised freedom was not an end in itself, but a means for individuals to exercise and employ their power. The act of entrusting others with tasks an individual was unable to complete effectively was an elementary feature of a society in which individuals were able to maximise their ability to act freely.[96] Undertaking those duties oneself placed undue burdens that hindered the capacity for the individual to make those free choices effectively. Sieyès' response was to allow individuals to delegate those burdens to other, thus reducing the distance between oneself and the various institutions, though sharing burdens allowed individuals to utilise their space to enact their choices more effectively.

Social representation was the 'conscious *superstructure*' of an economically productive, free society.[97] In placing social unification in the representative labour of commercial sociability, the Rousseauvian 'social spirit' that gave rise to law was not generated by law but by labour. Law making, then, was a separate, if not entirely distinct order of politics, encapsulated in Sieyès' constitutional science. In effect, Sieyès was a 'socialist' insofar as he accepted Samuel Pufendorf's revision of the Hobbesian state of nature, accepting commercial reciprocity as the real foundation of a common social order. Sieyès' commercial sociability took him in a direction opposed to the sorts of social unity organised around a common object of love, the sort most prevalent in Christian philosophy, in favour of the unity of *gesellschaft* politics.[98] A qualification is necessary, however, for Sieyès endorses at no stage a commercial society that successfully harnesses Rousseauvian *amour propre*. This, rather, was Montesquieu's position, against which Rousseau argued in the *Second*

[96] Sieyès, "Gains of Liberty," 145. It should be stressed that this is not to draw a distinction between positive and negative liberty, but between two variations of negative liberty. Both evacuate the individual of obstacles that inhibit choice, though they do so differently. The former isolates the individual from obligation to others, whilst the later delegates responsibilities to them. They each result in greater space for individual choice, though the latter is more successful on Sieyès' account. The positively framed 'liberty of the ancients' is excluded entirely. I thus disagree with Urbinati's assessment. See Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago, IL: University of Chicago Press, 2006), 146.

[97] Urbinati, *Representative Democracy*, 140.

[98] Hont, "Permanent Crisis," 193 fn.49. On Pufendorf's 'socialism', see István Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, MA: Harvard University Press, 2005), 159-84. For clarification on the confluence of the variety of conception of human association at play in Sieyès' thought, and its relation to representative government, see Sonenscher, "Introduction," x-xv.

Discourse.[99] In the *Essay on Privilege,* Sieyès recognised the potential threat posed by *amour-propre,* which, if allowed to prosper, was gravely detrimental to the unity of even the commercial society.[100] Social unity was understood neither as the particular system of property rights of Montesquieu's commercial society, nor the erection of society around a clear Rousseauvian-style civil religion. Rather, the unity derived from representative labour, though defined by material relations of production, was a more or less abstract one. Sieyès was attentive to the fact that defining the nation in accordance with actually existing attributes built too strong a connection between the nation and its capacity to act as the constituent power.[101] To this effect, unlike earlier theories of constituent power, the styling of representation was not taken to be a proprietary division between possession and ownership.[102] Representative labour, rather, characterised the nation in accordance with his neologism 'adunation'.[103] In keeping with its ecclesiastical origins, it was analogous to the way in which the apostles were united around Christ to form the Church, and yet remained apostles in their own right; adunation was 'to form one single body from many bodies, all equal, and each perceived in its individual vital integrity'.[104] The nation was defined by the relation of multiple individuals, all of whom were equal, though not unified as a single identity. On the one hand, individuals retained liberty of their own, and on the other, the nation was conceived as an abstraction with no central or concrete means of articulating itself. It was a *symbolic* body, exemplifying a legitimacy that

[99] Hont, *Politics in Commercial Society*, 43-7.

[100] Sieyès, "Essay on Privilege," 75.

[101] Michael Sonenscher, "The Nation's Debt and the Birth of the Modern Republic: The French Fiscal Deficit and the Politics of the Revolution of 1789, Part II," *History of Political Thought* 18, no. 2 (1997): 312. See especially Sieyès, "Third Estate," 143.

[102] Sieyès was wary of configuring representation according to the proprietary logic of transfer, for it may produce an 'effect', but no 'obligation'. Sieyès, "Views of the Executive Means," 9-10. This seems to be the critical point of differentiation with Thomas Paine over representation and monarchy. See Thomas Paine, "From Mr Thomas Paine to M. Emmanuel Syeyes. Paris, 8 July 1791," in *Political Writings, Including the Debate between Sieyès and Tom Paine in 1791*, ed. Michael Sonenscher (Indianapolis, IN: Hackett, 2003); Sieyès, "Answer to the Letter of Mr. Paine." Thomas Paine, "Rights of Man," in *Rights of Man & Common Sense*, ed. Michael Foot (London: Everyman, 1994), 139-52. For an analysis of Paine's position in this debate see Christopher Hobson, "Revolution, Representation and the Foundations of Modern Democracy," *European Journal of Political Theory* 7, no. 4 (2008): 456-60. Hobson, however, follows Paine, so fails to appreciate Sieyès' 'strained attempt' to distinguish representation from command. On Sieyès' dealings with Roman property law, see Holland, "Sovereignty as *Dominium*?," 469-74.

[103] Emmanuel J. Sieyès, *Observations sur le Rapport du Comite de Constitution, Concernant la Nouvelle Organisation de la France* (Versailles: Baudouin, 1789), 18. See also Sieyès, 284 AP 4.11.

[104] See de Baecque, *Body Politic*, 97.

transcended temporal form, whilst the National Assembly was the fallible constitutional embodiment alive with temporally bound opinions, contradictions, and divisions.[105] Sieyès was employing the much older distinction, common to scholastic thought, between the immortality of the body politic and the mortality of the individuals who compose it. In allocating constituent power to the former, and constituted power to the later, Sieyès intended to place the abstraction of the nation at a distance from the contagions that might infect the real body of the national assembly. My point is distinct from Sonenscher's, who argues that, in the abstraction of the nation, Sieyès had in mind national sovereignty to be represented through a political institution.[106] This seems to import too much of the language of sovereignty into Sieyès. Sieyès seemed to isolate constituent from constituted power, rather than simply relate them hierarchically. The abstraction of the nation was an additional means through which that isolation could be reinforced and a stable identity to both the nation and the constitution could be achieved.

Though constituent power was formally isolated from constituted, in practice, the means of isolating the abstraction of the nation from the contingencies of individual choices was far from tidy. Because the nation was an abstraction grounded neither in property rights nor a civil religion, it was the task of the constitution to fortify a national whole where commercial society could not. The division of labour required positive, legal representation for the social coherence to permeate the institutions of the state. In his *Reasoned Exposition,* Sieyès clarified—contrary to his characterisation as a theorist of popular sovereignty—that constituent power was not exercised by the abstract nation immediately; rather members of society 'give their confidence to representatives who will assemble only for this purpose without being able to exercise any of the powers they constitute'.[107] To be sure, constituent and constituted powers were sharply divided, and so the representative body of one could never be confused with the representative body of the other. Nevertheless, both

[105] Sieyès 284 AP 3.21
[106] Sonenscher, "The Nation's Debt, II," 315.
[107] Sieyès, "Reasoned Exposition " 127.

required representation, without which the abstract nation could never devise the constitution.

Those who were to represent the nation according to the duties of a constituent power were ordered by a '*pouvoir commettant*' or a 'directive power'.[108] In accordance with his non-proprietary account of representation, those representatives did not hold constituent power, which is coterminous with (and not the property of) the nation. Those representatives ordered by a *pouvoir commettant* were no different to the shoemaker's service as a representative.[109] They served as a 'surrogate' of the nation within the constituent assembly. Whilst this rendered them 'independent of any constitutional form', the nature of the *pouvoir commettant,* through which they were to act in accordance with that directive, ensured that they were not capable of expropriating the plenitude of the nation's will.[110] This did not amount to the delegation of an imperative mandate, however, which Sieyès took to be destructive of the nation's abstract unity. Delegation was 'essentially vicious', because those 'obliged to adhere scrupulously to the commission of those who mandate them' were always at odds with establishing a common will.[111] Such a politics would inevitably return to the estates and provinces of the *ancien régime,* for power would cease to emanate from the whole but have its origins in the respective constituencies. In order to avoid political fragmentation, it followed that 'each deputy represents the whole association'.[112]

His point here was central to how constituent power was to be operationalised, though it comes with a difficult circle to be squared. In accordance with the *pouvoir commettant,* the representatives had not only to represent the community as a whole,

[108] Emmanuel J. Sieyès, *Préliminaire de la Constitution Françoise: Reconnoisance et Exposition Raisonnée des Droit de l'Homme & du Citoyen* (Versailles 1789), 36. The available English versions of *Reasoned Exposition* are taken from a later edition of the pamphlet, first translated in Konrad Engelbert Oelsner, *An Account of the Life of Sieyes, Member of the First National Assembly, and of the Convention* (London: J. Johnson, 1795). Whilst it proposes an additional five articles to the declaration, discussion of the '*pouvoir commettant*' is abridged. For a short discussion of the *pouvoir commettant,* see Pasquale Pasquino, "Emmanuel Sieyès, Benjamin Constant et la Gouvernement des Moderns: Contribution a l'histoire du concept de representation politique," *Revue Française de Science Politique* 37, no. 2 (1987): 225-7.

[109] Sonenscher, "Introduction," xxix.

[110] Sieyès, "Third Estate," 139.

[111] Sieyès, "Views of the Executive Means," 11.

[112] Ibid., 12.

but represent its will. Representing its will required something more than serving as an unaccounted mouthpiece. On the other, the act of knowing the will that was to be represented was far less certain when the decision they were to carry was not delegated to them from particular individual wills. He appeared alert to the issue when talking of the *ancien régime*. He asked 'what does it matter to us how it might be possible to cater for the silence of the people's will if they were unable to make it known by way of representatives of their choice?'.[113] The people's will was absolutely integral to a sound decision-making practice, and one that was lost if there was no mechanism through which the people could vocalise their grievances. His response, however, may well have been a dissatisfying one: 'All that is needed is for the nation to be in a position to speak and for no one to be able to deny that is indeed the nation speaking by way of its representatives'.[114] The representative structures of the *ancien régime* certainly did not provide this, though this was due only to estate representation. All that was ultimately necessary was a sound representative structure that could claim to be the unified voice of the people, the nation as the constituent power provided this. So long as that representation was deemed appropriate, there were an abrupt disinterestedness on Sieyès' behalf regarding the practical, though not hypothetical, source of that will. Whether the will deemed by representatives to the nation's was an accurate depiction of the national will seems less a concern for Sieyès than the ability to articulate it as one, as if it were a unified will of the nation. In the final instance 'any nation which is able to form a common will by means of representatives invested with authenticated powers is able to exercise the full extent of the legislative power'.[115] That it should be the common will of the nation is imperative, though the people's conscious and explicit will, as expressed in doctrines of popular sovereignty, was unimportant. The intricate interplay between the will of the abstract nation, and its representation through the directive powers, was abruptly flattened.

[113] Ibid., 14.
[114] Ibid.
[115] Ibid., 13.

The difficulty, for Sieyès, was devising an appropriate model of representation in the first instance. So long as that was sound, so too was the will that proceeded. These representatives were not alienated from the nation but were an extension of the representative form of general labour. Just as the delegation of cobbling to a shoemaker ensured that an individual receive shoes of a higher quality at a faster rate, politics, too, was a realm governed by competence and not equality.[116] The large political machine was managed by the few active professional politicians for the good of the socioeconomically active, though politically passive, many.[117] Benjamin Constant appreciated this perfectly, noting that the 'representative system is nothing but an organisation by means of which a nation charges a few individuals to do what it cannot or does not wish to do herself'.[118] By entrusting the duty of constitution-writing to professional representatives, Sieyès additionally ensured a constitution that was not the product of the whim of the multitude of politically disinterested individuals who comprised the nation. Michael Sonenscher summarises this clearly, noting that Sieyes envisaged political society as an 'artificial device' whose purpose was 'to prevent the individual capacity for moral choice from becoming entangled in anything extraneous to its own rationality'.[119] Political representation served as the exemplary tool to vocalise the nation's will in such a way that representatives could act in the name of the constituent power whilst allowing the individual citizens of the French nation the arena in which they could live according to their free choice. Though a national will was necessary, its expression was not to come at the cost of individual liberty. Sieyès affirmed this following the Terror. He contended that when constructing the state, the Spartan lawgiver Lycurgus took men to be 'the stones for his building'. For Sieyès, it was 'the stone that is all, the end of all, and the

[116] This is in spite of the projection of a nation of equals within *Third Estate*. Sieyès, of course, was already more than happy to exclude beggars, vagabonds and the nobility from the citizenship. This was part of his conceptualisation of the nation as a division of labour: these groups were simply idlers, and so added not value to the nation. Their exclusion was coterminous with his definition of the nation; the account of political representation within *Reasoned Exposition* asserts two levels of citizenship within the nation seemingly against the rhetoric of political equality in *What is the Third Estate?* See Sieyès, "Reasoned Exposition " 127.

[117] Ibid. See also Urbinati, *Representative Democracy*, 143.

[118] Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 325.

[119] Sonenscher, "Introduction," xviii.

building is at its service'.[120] Likely acting as a stand-in for Robespierre, Lycurgus had everything backwards; he privileged unity over happiness. Unity was insignificant if it did not serve the liberty of the people who were united.

IV: THE CONSTITUENT POWER RECONSIDERED

With this account of representation in place, it is now possible to understand how Sieyès envisaged the constituent power operating. The fine distinction that Sieyès drew between constituent power and sovereignty should be recognised as pivotal. The constituent power was not an organ of sovereignty, as is argued by those who interpret Sieyès as a theorist of national sovereignty, nor was sovereignty a possession to be transferred from constituent power to the office that was constituted, as writers such as Althusius had argued some two centuries earlier. Rather the division between constituent and constituted powers was an alternative constitutional theory to the radical plenitude of the sovereign will. Sieyès was attentive to the hazards of such absolute power, whether in a monarch or a people, though he remained unconvinced that checking those powers with vetoes was sufficient.[121] The distinction between constituent and constituted powers was intended to temper that plenitude not by checking with an equivalent power but by allocating it *only* the task of constitution-writing. The distinction between constituent and constituted powers was one that intended to prevent the ordinary legislature from modifying the constitution, though this was a distinction that cut both ways: the constituent power had no part to play in ordinary law-making. Constituent and constituted powers were allocated particular spaces of competence.[122]

This recharacterisation of the constituent power was necessary, given the demand that the Third Estate address the problem of French debt. The resistance theory formulation of constituent power simply would not have completed this task, because the specific constitutional issue with which Sieyès dealt did not require a

[120] Sieyès 284 AP 5.1, translation in Forsyth, *Reason and Revolution*, 126.

[121] Sieyès, "First Thermidorian Intervention," 155-57.

[122] This is clearest in Sieyès' rejection of the amendment procedure which would complicate the rigid distinction between constituent and constituted powers, in favour of a new constituent assembly. Sieyès, *La question du Veto royal*.

rebellion against concrete grievances (short of the Third Estate's inadequate representation within the *États-Généraux),* but required a means of entry in order to take control of the constitutional issue. The nation was to be conceived as the ultimate lawmaker and only then would it be capable of writing the constitution to address the problem. In spite of interpretations to the contrary, Sieyes did this by employing the vocabulary of constituent power in a way that served a vastly different purpose to the radical definition it receives today. Constituent power was patently not the unvitiated potentiality of a revolutionary nation, but something quite different. The revolution was the fallout of intense competition between State entities. It had been the Jacobins who had wanted to address the root of the problem, dreaming of a world without states.[123] The Sieyèsian constituent power had a far less radical character.

To adequately capture this character, it serves to contrast Sieyès with the contemporary 'paradox of constitutionalism'. I do so for two reasons. First, such a contrast assists in developing the finer points of difference between Sieyès and the contemporary perspective that often employs Sieyès as a ventriloquist for a more radically orientated project. Appreciating these differences is vital in order to lay an appropriate groundwork for the discussion of Carl Schmitt in the next chapter. Second, the contemporary formulation of the constituent power that gives rise to the 'paradox of constitutionalism' is, in part, the legacy of a particular appropriation of Sieyès' thought. When Carré de Malberg characterised Sieyes as a theorist of popular sovereignty, he did so because he saw constituent power as the logical solution to the problem of a constitutional organ adjudicating over its own foundations. The legality of the founding act remains the pivotal problem for the paradox of constitutionalism, though in adopting Carré de Malberg's (or Schmitt's) conjecture that Sieyès endorsed popular sovereignty, theorists associated with the 'paradox of constitutionalism' suppose that constituent power manifests as an unvitiated

[123] Hont, *Jealousy of Trade*, 136.

voluntarism. The problem that follows is how this voluntarism is to be effectively incorporated into sub-constitutional practices of politics.[124]

There are good reasons to think not only that this was not the issue Sieyès was dealing with, but also that such an image effectively has Sieyès backward. There is an important Hobbesian distinction underlying this, namely the contrast between union and concord.[125] For Hobbes, concord entailed a sort of sociability of the Aristotelian tradition reckoned only by 'living creatures irrational' that lacked the conflictual passions of humans. Being 'so free from sedition and war', their togetherness could be a natural concord.[126] It required no formal method to secure its ultimate grounds, though nor, at least in Hobbes' view, was it applicable to human communities.[127] By contrast, union required that men overcome their passions through contractual relations. The decisive characteristic was that men were 'united as one person by a common power', they were made one through representation.[128] Central to this distinction was how the convergence of inclinations was achieved, for whilst the former saw the unity of inclination to be a natural occurrence, the latter took it to be artificial, constructed through representation. It should be perfectly clear that the contemporary categorisation of constituent power as an unvitiated voluntarism characterises political unity according to the principles of concord. In this light, the one way of considering the tension within the paradox of constitutionalism, at least as it is framed by Loughlin and Walker, is a movement from concord to union, through which the 'natural' constituent unity of the nation is debased when replaced by the artificial unity of the institutional body politic.

This conceptualisation of the problem of constituent power was far less apparent in Sieyès, if only because constituent power itself is not considered to be unity by concord. Though quite attentive to the vicious circle of a body that would

[124] Loughlin and Walker, *Paradox of Constitutionalism*, 1-3.

[125] On the distinction between union and concord in Hobbes, and the influence upon Sieyès, see Hont, *Jealousy of Trade*, 129-34; Philip Pettit, *Made with Words: Hobbes on Language, Mind and Politics* (Princeton, NJ: Princeton University Press, 2008), 81; Isaac Nakhimovsky, *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte* (Princeton, NJ: Princeton University Press, 2011).

[126] Hobbes, *Elements of Law*, 105.

[127] As Hont notes, this was a frontal attack on the Aristotelian tradition of politics as a natural condition. Hont, *Jealousy of Trade*, 20.

[128] Hobbes, *Elements of Law*, 107.

'pronounce upon a dispute affecting its own constitution',[129] Sieyès nevertheless understood quite clearly the pitfalls involved in attempting to circumvent the problem of national sovereignty by devolving its functions downward through to the unmediated people. Rousseauvian popular sovereignty entailed an essentially recursive relation, in which the people was to consistently recreate itself in a way that was disruptive to the continuity of the nation and, ultimately, the stability of the nation-state form.[130] It followed that the nation was to be placed above the contingencies of political life; it was only in placing it here he was able to reconcile the constant flux of the community's identity with a stable arena for politics. To do so, Sieyès remained essentially faithful to Hobbes' preference for union when devising his account of the nation. Sieyès, after all, was an attentive reader of Hobbes, displaying a frustration with 'the stupidity of all those pedants who, unable to see the point of what one means, rail against Hobbes'.[131] Irrespective of its absolutist character, the critical feature of Hobbes' state theory (and the feature excluded from earlier French uses), was the indirect, or representative, character of the people's sovereignty, articulated through the state. It was this feature of Hobbesian theory that Sieyès adopted and incorporated into his account of constituent power.

Nevertheless, Sieyès' nation, unlike Hobbes' state, was pre-legal. This much was implicit insofar as it held the duty of constitution-writing, and explicit in its location in the state of nature.[132] That the nation existed as a represented union prior to the Law meant that those forms of representation that associated political power with a legally framed contractual transfer from permanent owner to temporary user were unavailable to him. This is an issue that is masked when one conflates constituent power with legal institutions of sovereignty. Sieyès' account of political economy served to address this lacuna between representation and pre-legal identity, insofar as he could devise an account of representing the nation that was drawn from the materiality of political exchange. To clarify what I take to be a critical point,

[129] Sieyès, "Third Estate," 139.
[130] Sieyès, "Second Thermidorian Intervention," 176-77. See also Sonenscher, "The Nation's Debt, II," 313.
[131] Emmanuel Sieyès 284 AP 2.3. Translation in Sonenscher, "The Nation's Debt, II," 301.
[132] Sieyès, "Third Estate," 138.

contractual transfer saw the title of sovereignty passed from owner to borrower. Though an economic metaphor of exchange is maintained within this, it is ultimately underwritten by the legal contract of property law. By contrast, in anchoring his economic representation in the division of labour, representation is cast through the material relation of the transaction, and not the property being exchanged. Political representation was an extension of this insofar as it was distributed to those professionals recognised as most competent, and ultimately capable of easing the burden of responsibility from non-political individuals. Sieyès was able to write out the legal foundation of representation, whilst retaining representation as such, thus reconciling union with a pre-legal identity. *Pace* Hont, the nation was not a 'political artifact', but very much a 'prepolitical concept'.[133] Like Hobbes, the individual will of the citizens could only be articulated as one through the abstraction of the nation, though that abstraction itself was to be represented concretely. In order to achieve this, the collective will of the nation could only be exercised effectively through a representative system. Like Hobbes' representative system, the constituent decision of the nation was authorship by fiction. Unlike Hobbes, unity was possible prior to the constituent act because that representation was grounded in the self-advancing relations of economic exchange, and not a legal contract. It is this detail that breaks the interpretive standoff between popular- and national sovereignty.

The consequence of this revision has additional importance. By locating the unified abstract nation under natural conditions, prior to a constituent act, but retaining the Hobbesian qualification that an abstract unity must be represented through a concrete authorial fiction, Sieyès provided a more believable imaginary of popular sovereignty than Hobbes. The Sieyèsian nation served as a political imaginary that projects the identity of individuals within a social dynamic of actively contributing to the life of the nation. Moran Mandelbaum has similarly argued that the Sieyèsian nation invests in a social imaginary, though he reads this through a combination of Lacanian psychoanalysis and Foucault's self-dialecticalisation.

[133] Hont, *Jealousy of Trade*, 133. Hont uses the term 'prepolitical' in a Hobbesian manner, which I take to be coterminous with prelegal.

Mandelbaum takes the nation to be a 'phantasmic project' that endeavours to suture its concrete identity with the impossible ideal of a 'congruent society', so establishing a permanent striving of a 'fullness-to-come'.[134] The social imaginary of the nation is provided by the necessary but impossible 'congruent society'. Whilst Sieyès was deeply interested with the connection between the abstract and concrete manifestation of the nation, Mandelbaum misrepresents the styling of that abstraction by placing constituent power back within the vicious circle of law-making: the nation, as constituent power, must 'realise' itself in order to experience itself in its totality, though that totality is one that is expressed only after an impossible social and juridical fulfilment. The constituent power would rise from the constituted. The implication is striking for it suggests Sieyès would have endorsed the need for revolutionary action.[135] This account has Sieyès backward. Mandelbaum is quite right, however, to recognise that Sieyès' discourse was 'not only a theory of legitimacy', but emphasised the nation as a social imaginary.[136] In employing representation, rather than a phantasmic striving, to mediate between abstract and concrete manifestations of the nation, Sieyès conceived of this imaginary differently. It was not a concerted project in search of an impossible fulfilment. Rather, the representative functioning of the nation captures how Sieyès precariously balanced what Kevin Olson refers to as a combination of 'normative universalism and empirical constructivism'.[137] The nation to which Sieyès referred had first to be built if it is to stand as a normative foundation. The projection of a universalism was achieved in part through the 'adunation' that followed from redrawing the administrative cartography of France,[138] though it was the particular styling of a naturalistic representation between artisanal producers that engendered a social imaginary. Sieyes was sure that 'power belongs to the public', and though 'individual wills still lie at its origin and still make up its essential underlying elements…taken

[134] See Moran Mandelbaum, "The Fantasy of Congruency: The Abbé Sieyès and the 'Nation-State' *Problématique* Revisited," *Philosophy and Social Criticism* 42, no. 3 (2016).

[135] When pushed, this implies that Sieyès endorsed the moralised ethnic cleansing of the Terror in search of the congruent society. Mandelbaum, "Fantasy of Congruency", 262, fn.20.

[136] Ibid., 253.

[137] Olson, *Imagined Sovereignties*, 74.

[138] Sieyès, *Observations*.

separately their power would be null. Power resides solely in the whole'.[139] The links fostered through commercial representation conceived of that representation in a performative sense. The nation comprised the representative relations of labour and remains such only so long as those relations continue. Consequently, though the nation was an imagined community, an abstract extension of those relations, it was not the passive extension that was seen in Hobbes, characterised by a state which inactively bears the authority of decision of the person of the sovereign. Though Sieyès channelled political decision-making through abstract and elite mechanisms of representation in order to condition the vitalist image of the will, this was an extension of the performative representation of nationhood. The critical point is that although Sieyès retained the basic Hobbesian depiction of a nation that bears the authority of a decision enacted by a select few, he provided a more believable fiction for this through the social imaginary produced through the performance of the nation.

CONCLUSION

Sieyès may have inadvertently inspired the revolution with his impassioned polemic in defence of the Third Estate, though he seems to have had little interest in stimulating the eventual revolution, at least not in the form it took as a radical and violent break from the *ancien régime*. It is true that Sieyès' conceptualisation of the nation as the constituent power served as an import fulcrum within the discourse of the French Revolution, one that enabled the French people to conceptualise their identity as a nation—that is, a universal entity—in contrast to the composite of provincial identities prevalent within the *ancien régime*. As the constituent power, the nation presented a particular imaginary of political life, one that was held together through the ongoing participation of individuals in social life. As the constituent power, the nation was provided a normative identity when Sieyès ascribed it the task of constitution writing, nevertheless, that normative identity was placed at a distance from the engagement of individual citizens.

[139] Sieyès, "Third Estate," 134.

To this extent, the constituent power of the nation was another fiction, though a fiction readily performed by individuals who contributed to the life of that abstraction nation. Representation had an important role in the construction of this fiction, and the constraint upon political powers that might have followed. I have argued that Sieyès' account of constituent power was, far from being a radical tool employed to instigate the revolution, ultimately a moderate constitutional theory that implicitly sought to distribute and curtail the supreme authority of the nation. It did so through two mechanisms. First, the division between constituent and constituted powers was an alternative doctrine of authority to sovereignty that intended to partition sovereign plenitude in distinct arenas of responsibility. Second, by filtering the popular will, first through an abstract nation and subsequently a concrete though elite political representation, the vitalism attributed to the nation's activities as the constituent power could be further contained. This served the original intention of the pamphlets; taking seriously the issue of French debt, Sieyès saw bankruptcy not to be an option. To succeed, the French nation was to take on the King's debt, not to abandon it and begin anew.

At least prior to the Terror, the separation between the constituent and constituted powers was drawn upon only by 'moderate actors'. It was only a few years later that the polemical language of the nation had been taken in a different direction, placing the civic body outside the law. [140] The Jacobin discourse was wildly opposed to the constitutionalism of Sieyès. The moderates, among whom Sieyès was included, had wanted a 'revolution without a revolution'—a revolution deprived of the political excess of the terror.[141] For Robespierre, Louis XVI could not be judged in accordance with the law. The king was to be thrown to the crowds, who 'do not judge in the same way as the courts of law; they do not hand down sentences, they

[140] Lucien Jaume, "Constituent Power in France: The Revolution and its Consequences," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007). See also Lynn Hunt, "The National Assembly," in *The French Revolution and the Creation of Modern Political Culture, Vol 1: The Political Culture of the Old Regime*, ed. Keith Michael Baker (Oxford: Pergamon Press, 1987).

[141] Maximillien Robespierre, "Extracts from 'Answer to Louvet's Accusation', 5 November 1792," in *Robespierre: Virtue and Terror*, ed. Slavoj Žižek (London: Verso, 2007), 43.

throw thunderbolts'.[142] The constituent capacity of the people was conceived in the precisely divine sense of *vox populi, vox dei*. The judgement of the people was to be executed within the state of nature; it was only in going so that a new world could be created. The Jacobins 'metastasised' the Sieyèsian nation, locating sovereignty in the immediate body of the people and radicalising that sovereignty through their pseudo-divine judgement.[143] In spite of this, it is far more modern a tendency to associate constituent power with political radicalism. The moderate formula of constituent power was not immediately confused with the Terror but survived well into the 19th century in French constitutional discourse.[144] It was in the contribution of constitutional theory in the early 20th century, and the *Staatsrechtslehre* of Carl Schmitt in particular, that constituent power came to take on a radically different meaning.

* * *

[142] Maximillien Robespierre, "On the Trial of the King, 3 December 1792," in *Robespierre: Virtue and Terror*, ed. Slavoj Žižek (London: Verso, 2007), 59.

[143] Keith Michael Baker, "Transformations of Classical Republicanism in Eighteenth Century France," *Journal of Modern History* 73, no. 1 (2001).

[144] It was employed, among others, by Felix Berriat-Saint-Prix, *Théorie du droit constitutionnel français, Esprit des constitutions de 1848 et de 1852 et des sénatus-consultes organiques précédé d'un Essai sur le Pouvoir Constituant et d'un Précis historique des constitutions françaises* (Paris: Videoq fils Aine, 1853), 186; M. F. Laferrière, "Faculté de Droit de Rennes, Cours de droit public et administratif," *Revue de législation et de jurisprudence* 9(1838-1839): 360; Jean Denis Lanjuinais, *Constitutions de la Nation Francaise avec un essai historique et politique sur la charte et un receuil de pièces corrélatives, Vol. 1* (Paris 1819), 184. For a detailed analysis of its nineteenth century use, see especially, Lucia Rubinelli, "Taming Sovereignty: Constituent Power in Nineteenth-Century French Political Thought," *History of European Ideas* (2016, Forthcoming). On Sieyès' own efforts to reintroduce the constituent power through the constitutional jury, see Marco Goldini, "At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of the Constituent Power," *Oxford Journal of Legal Studies* 32, no. 2 (2012); Sieyès, "Second Thermidorian Intervention."

4: Carl Schmitt: Constituent Power's Ghostly Existence

This chapter examines how Carl Schmitt devises an account of constituent power that captures its 'ghostly existence'. This phrase is adopted from a review of Egon Zweig's 1909 book, *Die Lehre vom Pouvoir Constituant*, which, in approaching the concept in a formalistic style, was unable to capture its spectral qualities.[1] This 'ghostly existence' is characterised by the way in which Schmitt interpreted constituent power alongside political theology, and in doing so, reconfigured the structural, temporal and agentic relation between constituent power and the constituted political order. In putting pressure upon this aspect of his argument, I address and reject those accounts that posit a relatively unproblematic inheritance of the Sieyèsian constituent power in Schmitt, to which their difference hangs upon the distinction between identity and representation as two means of accounting for political unity. [2] This captures neither the 'ghostly existence' of constituent power, nor the distinct end to which Schmitt employed it as a critique of the neutral, technical state. To this effect, my morphological approach intends to stress the *dis*continuities with Sieyès in order to emphasise Schmitt's idiosyncratic political work.

[1] Georg Jellinek, "Review of Egon Zweig, Die Lehre vom Pouvoir Constituant," *Archiv für öffentliches Recht* 25 (1909): 392.

[2] For example, Colón-Ríos, *Weak Constitutionalism*, 84-88; Kalyvas, "Popular Sovereignty," esp. 227; Pasquale Pasquino, "Die Lehre vom "Pouvoir Constituant" bei Emmanuel Sieyès und Carl Schmitt," in *Complexio Oppositorum: Über Carl Schmitt*, ed. Helmut Quaritsch (Berlin: Duncker & Humblot, 1988); Spång, *Constituent Power and Constitutional Order*, 76-85. This approach to reading Sieyès and Schmitt is a response to Udo Steiner, who contrasts the constituent power of French constitutionalism, to the decision of German constitutionalism. See Udo Steiner, *Verfassunggebung und verfassunggebende Gewalt des Volkes* (Berlin: Duncker & Humblot, 1966).

In stressing this 'ghostly existence' of the constituent power, I do not intend to develop what Ellen Kennedy calls 'too theological' a reading of Schmitt, which effaces his 'political intentions', even displaying 'apologetic tendencies'.[3] Kennedy seems to have in mind something akin to Hannah Arendt's 'defence' of Martin Heidegger on the same topic: that Heidegger was blinded to the concrete realities of Nazism because he stood in wonder of the metaphysical world.[4] The political context of Schmitt's work—his political conservatism during the Weimar period, his associations with Nazism during the 1930s and his refusal to engage with the Allied programme of denazification after the Second World War—has long preoccupied Schmitt scholarship. Consequently, his name has scholars caught between polemics and apologetics.[5] To read Schmitt does not mean that one must necessarily enter the specific hermeneutic circle that appraises his name. However, one does not adequately escape it by bracketing off that discussion. In his otherwise impressive work on Schmitt, Andreas Kalyvas excavates an account of democratic founding and extraordinary politics in Schmitt by bracketing his discussion of Schmitt's constitutional and legal writings from those he deems 'repulsive'.[6] Kalyvas is, of course, perfectly aware that he is departing from Schmitt's intentions in a way to which Schmitt would unequivocally object. Kalyvas's intention is rather to break

[3] See Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham, NC: Duke University Press, 2004), 178-83. Cf. Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in post-War European Thought* (New Haven, CT: Yale University Press, 2003), 202-06.

[4] See Hannah Arendt, "Heidegger at Eighty," *The New York Review of Books*, 21 October 1971.

[5] Caldwell, for example, effectively demonstrates this preoccupation within the Schmittian renaissance. See Peter C. Caldwell, "Controversies over Carl Schmitt: A Review of Recent Literature," *The Journal of Modern History* 77, no. 2 (2005). Schmitt's name had even then long been considered slanderous within the German intellectual left. Alfons Söllner, "Beyond Carl Schmitt: Political Theory in the Frankfurt School," *Telos* 71 (1987): 81. Theodor Adorno excluded a letter by Walter Benjamin to Schmitt from his posthumous correspondences, aware of the connotations it would carry. The letter was later reproduced in Walter Benjamin, *Gesammelte Schriften, I.1*, ed. Rolf Tiedemann and Hermann Schweppenhäuser (Frankfurt am Main: Suhrkamp, 1991), 887. Numerous critiques address the problematic nature of appropriating Schmitt's work for leftist projects due to his heritage. See Torben Bech Dyrberg, "The Leftist Fascination with Schmitt and the Esoteric Quality of 'the Political'," *Philosophy and Social Criticism* 35, no. 6 (2009); Mark Neocleous, "Friend or Enemy? Reading Schmitt Politically," *Radical Philosophy* 79 (1996); Mark Wenman, "On the Risk and Opportunity in the Mouffean Encounter with Carl Schmitt," *Parallax* 20, no. 2 (2014); Richard Wolin, "The Disoriented Left: A Critique of Left Schmittianism," in *The Frankfurt School Revisited and Other Essays on Politics and Society*, ed. Richard Wolin (London: Routledge, 2006). These concerns are not misplaced, though it becomes problematic when this is established as the *de facto* point of departure in Schmittian scholarship.

[6] Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt and Hannah Arendt* (Cambridge: Cambridge University Press, 2008), 81.

from the hermeneutic impasse that myopically reads into Schmitt's Weimar work his later identity as the Crown Jurist of the Third Reich.[7] Kalyvas does so because he identifies in Schmitt a way out of the institutional exhaustion of democracy in contemporary political theory.[8] Whilst a fruitful strategy to provide an outlet for contemporary democratic practice, it offers only a partial account of constituent power in Schmitt's Weimar writings, and so is insufficient for the sort of morphological approach deployed here.

Instead, I read Schmitt's work as comprising a counterpoint strategy. His work, he recognised in *The Concept of the Political*, is concerned with the 'concrete', which is antithetical to the 'empty and ghostlike abstraction'.[9] The abstract is that which is always out of reach, inaccessible, and so ultimately inconceivable. For Schmitt, only the concrete is graspable. But, as Derrida shows, 'this concretion of the concrete…is always exceeded, overtaken—let us say, haunted—by the abstraction of its spectre'.[10] Schmitt's work captures two distinct temporal experiences: the first, a disinterested spectatorial position, presenting formal analyses of modern politics; the second, an urgent, participatory compression of the temporal continuum, invoking themes of eschatology and mysticism. The arguments shuttle back and forth between two stylistic tonalities in such a pattern that one cannot be bracketed out without significantly distorting the conceptual schema put in place. A careful reading of Schmitt is attentive to this tonal interplay between the concrete and abstract, constitutional theory and political theology, the tangible and the mythical, spectatorial and participatory.[11]

[7] On the historical distortion involved in the presentation of Schmitt as *the* preeminent legal theorist of the Third Reich, see Peter C. Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State," *Cardozo Law Review* 16 (1994).

[8] Andreas Kalyvas, "Who's Afraid of Carl Schmitt?," *Philosophy and Social Criticism* 25, no. 5 (1999): esp. 110-13.

[9] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 30.

[10] Jacques Derrida, *The Politics of Friendship*, trans. George Collins (London: Verso, 1997), 117.

[11] The Dadaist intellectual Hugo Ball recognised this uneasy balancing of concrete and otherworldly in Schmitt's work as early as 1924. See Hugo Ball, "Carl Schmitts Politische Theologie," in *Der Fürst dieser Welt: Carl Schmitt und die Folgen*, ed. Jacob Taubes (Munich: Fink, 1985). This is preferable to the weightier claim that political theology forms an inner *Arcanum* of Schmitt's thought. For example, Heinrich Meier, *The Lessons of Carl Schmitt: Four Chapters on the Distinction between*

This technique of reading allows me to capture what is at stake in the 'ghostly existence' of Schmitt's constituent power. First, the ghostly existence is found in the spectre of political theology that haunts—and occasionally exceeds—his constitutional theory. Second, constituent power occupies a spectral a-legal site that cannot be adequately captured from a perspective internal to the legal system. Third, through Schmitt's argument there is a precise distortion and polemicisation of Sieyès' constituent power, amounting to a movement from a manufactured unity to a vitalist one, albeit one that is irreducible to the Hobbesian dichotomy between union and concord. This argument challenges the position that Schmitt's account of constituent power is a combination of the Hobbesian account of representation with Sieyès' thought on the *pouvoir constituant*.[12] My intention is to demonstrate how Schmitt incrementally revised Sieyès in order to turn constituent power towards a specific mode of voluntarist political power and authority that sought to repoliticise the neutral-technical state that was found in both the Sieyèsian and Hobbesian variations of state theory. In part I, I begin with a brief overview of the reception of constituent power in early 20th century German constitutional theory, before examining the role of constituent power in his genealogy of dictatorship in part II. I argue that Schmitt interpreted the transition from commissarial to sovereign dictatorship as being organised primarily around the decisive *loss* of divine authority through which the capacity to decide took its intensity precisely from the absence of an overarching theological order. This implies that, although analogous, constituent power was not reducible to a theologico-political decision. More importantly, Schmitt employs this to shift the temporal grounds of constituent power away from divine approval or the authority of a creator over their creation, and towards deriving authority from the constituent power's vanguard movement, identified in the risk associated with constituting.

Political Theology and Political Philosophy, trans. Marcus Brainard (Chicago, IL: University of Chicago Press, 2011).

[12] See, for example, Kalyvas, *Politics of the Extraordinary*, 88; Duncan Kelly, "Carl Schmitt's Political Theory of Representation," *Journal of the History of Ideas* 64, no. 1 (2004); Pasquino, "Die Lehre vom "Pouvoir Constituant" bei Emmanuel Sieyès und Carl Schmitt."

The second half of the chapter demonstrates how Schmitt reintroduced a weak political theology, though one that did not amount to a sovereign decision. Instead, this served to accentuate the various levels of opposition between the Political and the legal through which he polemicised Sieyès' constituent power. In part III, I argue that Schmitt did so by projecting Baruch Spinoza's distinction between *natura naturans* and *natura naturata* into Sieyès' constituent power, endowing the distinction between constituent and constituted powers with a mystical rather than legal-formal character. It is through this mystically inflected constituent power that he developed an existentially aware rather than a formalistic account of unity. In part IV, I develop the sort of political imaginary that Schmitt's constituent power instigated. I argue that, rather than an account of sovereignty, constituent power provided what he later went on to call a *katechontic* force. In short, Schmitt's constituent power amounted to an identification of an authentic expression of the political that sought to repoliticise the technical-neutral.

I: Constituent Power in German Constitutional Theory

In 1909, the jurist Egon Zweig published a lengthy text, *Die Lehre vom Pouvoir Constituant*. The genesis of this book was to be found in a curious affinity that Zweig identified between a debate over the origin of constituent power in the aftermath of the French Revolution, and the recent debates in German *Staatsrechtslehre* over the genealogy of human and civil rights. In each instance, the French and American Revolutions served as the battleground for intellectual combat.[13] The latter debate was evidently connected to the work of his colleague Georg Jellinek, whose 1895 book rejected the widely accepted argument that Rousseau was the intellectual progenitor of the French *Déclaration,* in favour of a constitutional heritage in the religious pluralism of the Reformation and American Revolution.[14] Jellinek had taken it upon himself to address the interpretation of basic rights offered by Paul

[13] Zweig, *Die Lehre vom Pouvoir Constituant*, 1-2.

[14] Georg Jellinek, *The Declaration of the Rights of Man and of Citizen: A Contribution to Modern Constitutional History*, trans. Max Farrand (New York: Henry Holt, 1901), esp. 8-12, 59-77. For further detail, see Duncan Kelly, "Revisiting the Rights of Man: Georg Jellinek on Rights and the State," *Law and History Review* 22, no. 3 (2004).

Laband. Laband's positivist position offered a typically anthropomorphic account of the state, assuming that all statutes and ordinances were the expression of a unified 'state's will'.[15] Basic rights were rendered 'norms' of state power, given to the state by itself. These rights, far from establishing the subjective rights of citizens, defined only the limits of administrative authority which secured freedom 'within a certain parameter'.[16] Basic rights were not above the state's will, but a direct expression of that will, which could suspend or limit them. The statute, rather than the basic right, was the constitutional lynchpin.[17] Against this, Jellinek—who combined a Labandian legal positivism with a sociology of law—argued that a legal system without basic rights was fundamentally inconceivable. Whilst those rights were granted by the state to the legal person, that person required recourse to enforce those rights—law necessarily presupposed the legal empowerment of the individual to do so.[18] This led Jellinek into a paradoxical thought that 'the state could be at the same time the highest earthly will, prior to law itself, and also bound to law'; that is, the problem of relating 'will' to 'norm'.[19] His solution had been to separate the factual side of the state's 'real will' from the normative 'legal person'. By supposing an outside to the positivist legal frame, he could further argue that, when viewed legally, the state's will voluntarily submitted to the rule of law.[20]

It was in this debate over the meaning and content of basic rights in German constitutional theory that Zweig identified an elementary repetition of the debates of the French Revolution, namely those about 'where the final source of power of a

[15] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997), 14.

[16] Paul Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1 (Tübingen: H. Laupp, 1876), 150-51. Translated in Caldwell, *Popular Sovereignty*, 31.

[17] Caldwell, *Popular Sovereignty*, 31-33. This mirrored constitutional practice at the time, as in the 1850 Prussian Constitution, where the conditions of basic rights are left to be defined in future by statute law.

[18] Georg Jellinek, *System der Subjektive Öffentlichen Rechte* (Tübingen: J.C.B. Mohr, 1919), 40-41.

[19] Caldwell, *Popular Sovereignty*, 41. This tension remains in German legal scholarship. See Habermas, *Between Facts and Norms*; Habermas, "Constitutional Democracy."

[20] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 1921), 19-21. See also Caldwell, *Popular Sovereignty*, 35; Kelly, "Revisiting the Rights of Man," 518-19; Massimo la Torre, "'*Rechtsstaat*' and Legal Science. The Rise and Fall of the Concept of Subjective Right," *Archiv für Rechts- und Sozialphilosophie* 76 (1990).

public legal order was to be found and from what source it received its validity'.[21] Zweig's intention was to return to the French Revolution once more—to Sieyès' conception of constituent power—in order to address what he took to be the foundational problem of *Staatsrechtslehre*. Zweig's central proposition was that Sieyès inaugurated a 'thoroughly disorienat[ing]' political vocabulary through the use of Montesquieuvian terminology to adapt Rousseauvian political unity to an American representative design.[22] This point was decisive for Zweig, for it shifted the basic element of the constitution from a republican trope of balance to a constitution based upon unity.[23] What followed was, against Jellinek's claim, to precisely connect Rousseau to the work of the French *Déclaration*. Jellinek's point had been that *The Social Contract* stipulated 'the complete transference to the community of all the individual's rights', thus making 'the state masters of the goods of its members'. Civil liberty was simply what remained after the individual took 'his duties as a citizen into account'.[24] By contrast, the *Déclaration* 'would draw dividing lines between the state and the individual'.[25] By looking to constituent power, Zweig found precisely the means to connect political representation with Rousseauvian unity so to affirm these basic rights that had become the blind spot for German constitutional law.[26]

Although the only notable work written by Egon Zweig, it proved influential, particularly upon Carl Schmitt, who found the book's interrogation of constituent

[21] Zweig, *Die Lehre vom Pouvoir Constituant*, 2.

[22] Ibid., 137. This argument was later picked up and developed by Robert Redslob. See Robert Redslob, *Die Staatstheorien der Französischen Nationalversammlung von 1789: Ihre Grundlagen in der Staatslehre der Aufklärungszeit und in den Englischen und Amerikanischen Verfassungsgedanken* (Leipzig: Veit & Comp., 1912), esp.151-72.

[23] Duncan Kelly, "Egon Zweig and the Intellectual History of the Constituent Power," in *Constitutionalism, Legitimacy and Power: Nineteenth-Century Experiences*, ed. Kelly L. Grotke and Markus J. Prutsch (Oxford: Oxford University Press, 2014), 339-40.

[24] Jellinek, *Declaration of the Rights of Man and of Citizen*, 9-10.

[25] Ibid., 11.

[26] Zweig, *Die Lehre vom Pouvoir Constituant*, 124. See also Kelly, "Egon Zweig," 345. By contrast Christoph Möllers is wrong to contend that the concept only took hold in Germany after 1919. See "'We are (afraid of) the People': Constituent Power in German Constitutionalism," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007). This reading runs counter to the Monarchical Principle established in the Prussian Constitution of 1850, for example. See especially Ernst-Wolfgang Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, trans. J. A. Underwood (New York: Berg, 1991), 116-19.

power to be 'extremely valuable'.[27] He was nevertheless critical of its overall portrayal, which was hindered by its treatment of:

> the entire development [of the *pouvoir constituant*] as one going from the material to the formal concept of the constitution; for him the highest achievement of the theory was, "if not a product still a testimony to the epoch of the Enlightenment", which in its rationalistic approach, attempted to construct the state mechanically.[28]

For Schmitt, there was something more to constituent power that could not be adequately captured when rendered via these two practices of representation and rationalism. When situated between these two, Zweig rendered constituent power as a constitutional device, and not something prior to it. Schmitt was not alone in this critique; it was to repeat the sentiment of Jellinek who, in a review of Zweig's work, argued that the approach employed by Zweig had effectively buried the continued presence of constituent power in American and European political life. Zweig's historicist approach could not adequately portray the 'ghostly existence' [*gespenstisches Dasein*] of constituent power.[29]

II: A GENEALOGY OF DICTATORSHIP

When Schmitt first turned to address the concept of constituent power, he did so through his extended examination of emergency powers in the 1921 work *Dictatorship*. The engagement was one Schmitt had begun much earlier, in his 1917 paper *Dictatorship and the State of Siege*.[30] Schmitt's concern in the midst of the First World War was with the apparent withdrawal of the Kaiser from political life, who had instead extended power to military generals. During wartime, Germany had in effect become a 'virtually unassailable…military dictatorship'.[31] This gave rise to an

[27] Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity, 2014), 123.

[28] Ibid. cf. Zweig, *Die Lehre vom Pouvoir Constituant*, 4.

[29] Jellinek, "Review of Egon Zweig, Die Lehre vom Pouvoir Constituant," 391-2. See also Kelly, "Egon Zweig," 349.

[30] Carl Schmitt, "Diktatur und Belagerungszustand. Eine Staatsrechtliche Studie," *Zeitschrift für die gesamte Strafrechtswissenschaft* 38, no. 1 (1917).

[31] Helmut Heiber, *The Weimar Republic*, trans. W. E. Yuill (Oxford: Blackwell, 1993), 3.

important distinction in Schmitt's mind between 'law' [*Gesetz*] and the 'measures' [*Maßnahmen*] that were taken in moments of crisis. By 1921, the political context of Germany has shifted dramatically, providing Schmitt with the opportunity to sharpen the earlier work. *Dictatorship* was written in the context of President Ebert's extensive use of Article 48 of the Weimar constitution, that asserted the right of the president to temporarily suspend fundamental rights in the name of public security.[32] To address this new context, Schmitt wrote a genealogy of dictatorship from Ancient Rome to 1848, devising the historically orientated distinction between the two forms of dictatorship: commissarial and sovereign.

The commissarial form of dictatorship, Schmitt argued, was the 'wise invention of the Roman republic', introduced in order to fill the space of power left by the expulsion of the kings in the 5th century BCE. The transition to a republican form of government required a means of supplementing senatorial power with a 'strong *imperium*' in times of political insecurity. The dictator was the 'extraordinary Roman magistrate' whose *imperium* was not impaired by ordinary veto by the tribunes or right of appeal to the people.[33] In his appointment, the dictator was to dissolve a situation proclaimed an emergency by the senate. He was not bound by law, but was 'a kind of king with absolute power over life and death'.[34] It was, however, a peculiar form of 'absolute power', for although he was restrained by neither norm nor law, the absolute power was limited to the specific state of affairs declared exceptional by the senate. Under no circumstance did the dictator have the

[32] "Die Verfassung des Deutschen Reiches vom 11. August 1919," *Deutsches Reichsgesetzblatt* 1919, no. 152 (1919): 1392-3. Article 48 is translated in full in David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997), 33.
On Ebert's use of Art. 48 against the political insurrections, see Fredrick Mundell Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (Cambridge, MA: Harvard University Press, 1939), esp. chapters 2 and 3. Against the economic crisis, see Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Westport, CT: Greenwood, 1979), 41-43. On the intellectual context of Schmitt's *Dictatorship*, see Duncan Kelly, "Carl Schmitt's Political Theory of Dictatorship," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2016), 221-25.

[33] Schmitt, *Dictatorship*, 1.

[34] Ibid., 2. This might pertain to either internal or external threats.

capacity to change the law, suspend the constitution or make new laws.[35] Schmitt was at pains to identify the functional role of the office in restoring the legal order, which had in the 'literature of the bourgeoisie' been reduced to Bonapartism, associated with a personalistic form of tyrannical rule.[36] His reading of dictatorship was much like Machiavelli's, insofar as Schmitt agreed that recourse to the office of the dictator was precisely what prevented a republic from coming to ruin.[37] Dictatorship was not, as it is often understood today, tyrannical, but 'an instrument to guarantee freedom'.[38]

Despite its discretionary powers, the Roman dictatorship was strictly a constitutionally-bound form of political power, always subordinate to the senate. This was not so in the case of 'sovereign dictatorship'. In contrast to the conservative orientation of the Roman dictator, sovereign dictatorship was prescribed no such limits. The 'entire existing order' was a situation to be resolved by the dictator's actions, for the sovereign dictator did not '*suspend* an existing constitution through a law based on the constitution', but rather sought to 'create conditions in which a constitution…[was] made possible'.[39] The task of sovereign dictatorship was precisely not to restore the previously standing legal order, but to initiate a new one.[40]

What is most interesting about *Dictatorship* is not the distinction between commissarial and sovereign dictatorship, but how Schmitt understood the historical transition from the former to the latter. He explicitly associated the rise of sovereign dictatorship with the transition from the authority of God to the authority of the people. First, it should be pointed out that as he constructed the distinction between the limited commissarial and the unlimited sovereign dictatorships, Schmitt quickly passed over anything that might unsettle the clarity of the opposition. The last century of the Roman republic exhibited a wholly different tradition of dictatorial power, for whilst the early and middle Republics enjoyed a limited dictatorship.

[35] Ibid., 4. Schmitt takes these competencies from Machiavelli. See Machiavelli, *Discourses*, 94-96. See also Claude Nicolet, "Dictatorship in Rome," in *Dictatorship in History and Theory*, ed. Peter Baehr and Melvin Richter (Cambridge: Cambridge University Press, 2004), 265-68.

[36] Schmitt, *Dictatorship*, xxxviii.

[37] Machiavelli, *Discourses*, 96.

[38] Schmitt, *Dictatorship*, 4.

[39] Ibid., 119.

[40] Ibid., 118.

When Sulla revived the institution in 82 BCE, various limitations were abandoned. Sulla was assigned the title of 'Dictator for the making of laws and founding of the republic'. His duties were exactly those that were withheld from the dictators of the early republic.[41] Moreover, it was not beyond question, even before Sulla, that the office of what Claude Nicolet calls a 'constituent dictator' was considered a *possibility*.[42] Titus Livy, in his *History of Rome,* recounted how Scipio the Elder was presented by the people with the opportunity to stand as 'perpetual consul and leader',[43] whilst Cicero, in *De Re Publica*, describes a similar offer presented to Scipio the Younger.[44] Though the reliability of these two works are by no means certain,[45] they each offer a distinct image not of a commissar but something far closer to the sovereign dictator. They were not endowed with a specific duty, but in light of their military victories, vague quasi-monarchical roles to restore the republic.

It is not that Schmitt got the history of dictatorship wrong. He was very much aware of this ambiguity of the Roman concept. He recognised that Sulla and Caesar were 'politically different' to the commissarial dictators, and saw that the 'contradiction between commissary and sovereign dictatorship' was already at play.[46] His assertion that the two were 'still understood as identical in terms of a theory of

[41] Marc de Wilde, "The Dictator's Trust: Regulating and Constraining Emergency powers in the Roman Republic," *History of Political Thought* 33, no. 4 (2012): 556. Theodor Mommsen concluded that there was 'nothing in common' between the Sullan dictatorship and those that preceded it. Theodor Mommsen, *Römisches Staatsrecht, Vol. 2* (Cambridge: Cambridge University Press, 2010), 152. Wilcken recognises a number of affinities, though concedes that the distinguishing competence was the *legibus scribendis et rei publicae constituendae*, which placed him above the constitution. See Ulrich von Wilcken, *Zur Entwicklung der römischen Diktatur* (Berlin: de Gruyter, 1940), 11-12.

[42] Nicolet, "Dictatorship in Rome," 268.

[43] Titus Livy, *A History of Rome, Vol. XI: Books 38–39* (Cambridge, MA: Harvard University Press, 1936), 199.

[44] Cicero, "The Republic," in *The Republic and the Laws* (Oxford: Oxford University Press, 1998), 87. This occurs in 'The Dream of Scipio'. The translator notes that that there is no evidence outside this passage that the role was ever proposed to Scipio.

[45] This cautionary note applies to all work on the Roman dictatorship. All research relies upon late republican and imperial sources, often using late Roman terminology.

[46] Schmitt, *Dictatorship*, 2. The distinction is more pressing than even that. Dictators often proposed laws and altered constitutions in meaningful ways, whilst formal restrictions were not always observed. Abrogation of the constitution was not uncommon even for the 'classic' dictatorship. Informal restraints such as political incentive and religious responsibility, rather than the formality of the constitution, proved crucial tools. See de Wilde, "The Dictator's Trust," 113-35, esp.22; Nomi Claire Lazar, *States of Emergency in Liberal Democracy* (Cambridge: Cambridge University Press, 2009).

the state' is nevertheless unsatisfactory.[47] The conceptual shortcomings are not what is important. That Schmitt wrote out the ambiguities of the Roman dictatorship in favour of a tidy account of subordinate, commissarial dictatorship *is* important. In doing, Tuori argues, Schmitt constructed an 'historically inspired ideal that served as a 'surrogate stage' upon which Schmitt identified the role of the *Reichspräsident* according to Article 48.[48] It is this but also more. These two historically inspired ideal types also served Schmitt in pinpointing a decisive crisis moment in the concept of dictatorship in 18th century France, at which point it underwent a transition from a 'dictatorship of reformations' to a 'dictatorship of revolutions' precisely through the insertion of the *pouvoir constituant*.[49] Schmitt partitions history in order to affirm that the order-creating sovereign dictatorship found its place only through a thesis of secularisation and the rise of a disenchanted world.

For Schmitt, it was only during the enlightenment that dictatorship reached crisis point as Montesquieu's account of the separation of powers directly confronted the deistic metaphysics that saw the lawmaker mirror the image of the creator God.[50] Montesquieuvian 'balance' accounted for political unity achieved through consensus, whilst dictatorship was a prejudicial claim to power that sought to disturb this mutual exchange.[51] For Montesquieuvian republicanism, dictatorship was tantamount to a despotism that saw a single part rise above the reciprocal dialogue that could only threaten the unity of sovereignty. It was against this background that the meaning of 'dictatorship' came to change, no longer associated with the

[47] Schmitt, *Dictatorship*, 2. Even if Sulla was put in place to 'save' Rome from an exceptional situation, accounts of his reign are largely narratives of tyranny. See for example Plutarch, *Plutarch's Lives, Vol. IV: Alcibiades and Coriolanus, Lysander and Sulla*, trans. Bernadotte Perrin (Cambridge, MA: Harvard University Press, 1959), 323-443. For a critique of the thesis that presents the relation between dictatorship and tyranny as a modern phenomenon, see Andreas Kalyvas, "The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator," *Political Theory* 35, no. 4 (2007).

[48] Kaius Tuori, "Schmitt and the Sovereignty of Roman Dictators: From the Actualisation of the Past to the Recycling of Symbols," *History of European Ideas* 42, no. 1 (2016): 105.

[49] Schmitt, *Dictatorship*, xliv.

[50] Ibid., 84.

[51] Ibid., 85-86. Montesquieu recognised the role of the office of dictatorship in the transition from the Roman Republic to Caesarism. See Charles de Secondat baron de Montesquieu, *Considerations on the Causes of the Greatness of the Romans and their Decline* (Indianapolis, IN: Hackett, 1999), 101-12.

constitutionally limited office, but 'an absolute power, overruling all existing authorities'.[52]

The figure of the dictator was soon confronted by another supreme officer, Rousseau's legislator, who, 'outside and prior to the constitution', was a 'wise an eminent person whose *génie* [genius] fixes the machine of the state' by prescribing the basic law that would kick-start the general will.[53] While the dictator disrupted the unity of the popular will, the legislator forged it. The event of legislation was 'a miracle, but a *very humanised one*'.[54]

The relation between the legislator and the dictator proved to be a problematic antithesis, for the former amounted to a powerless right, and the latter a lawless power. It was the *pouvoir constituant*, of which the sovereign dictator was the personal embodiment, that did not succumb to either shortcoming.[55] As the 'non-constituted and never constitutable entity' that created a new constitution, the *pouvoir constituant* initiated without ever becoming a 'sheer power'. Rather, the constitutional authority of the sovereign dictator was taken neither from the existing constitution, nor was it forgotten in the state of nature, but was to be taken from 'the [constitution] that is still to come'.[56] His authority was signified in the radical beginning that he would come to introduce. [57] There is something peculiarly spectral in the framing of this figure. This amounts to a phenomenological movement of the figure from legality to authority. For Alexandre Kojève, 'legality is the *cadaver* of authority'. [58] Whilst both legality and authority can effect change, only an agent with authority can

[52] Schmitt, *Dictatorship*, 96.

[53] Ibid., 109. Schmitt developed this point in *The Crisis of Parliamentary Democracy*, when discussing how 'the people can be brought to recognise and express their own will correctly through the right education'. Dictatorship embodies this 'educational theory' that suspends democracy in the name of 'a true democracy still to be created'. Carl Schmitt, Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, MA: MIT Press, 1988), 28. On the pertinence of Rousseau's paradox to Schmitt's state theory more generally, see also Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (Oxford: Oxford University Press, 2003), 298-307.

[54] Schmitt, *Dictatorship*, 110.

[55] Schmitt was often critical of institutional representation. His endorsement of the sovereign dictator is derived from an alternative, Catholic, logic of representation, the personalistic embodiment of a more perfect form. Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport, CT: Greenwood Press, 1996), 12-16.

[56] Schmitt, *Dictatorship*, 119.

[57] Ibid.

[58] Kojève, *The Notion of Authority (A Brief Presentation)*, 9-11.

do so without it being prescribed legally.[59] For Kojéve, authority is precisely that ghostly essence that cannot be easily grasped by the prevailing legal order. It is 'authority' that allowed the sovereign dictator to undertake his task without any such opposition. Schmitt captured the meaning of this most precisely in his introduction to the 1921 edition, in which he identified the movement of the dictator from the commissary to sovereign form as a transfer 'from the sphere of constitutional law to the political sphere'.[60] The competencies of the sovereign dictator were not, and could not be positively defined, for the office existed wholly as a personal extension of the *pouvoir constituant* and not the constitution. To clarify, for Schmitt 'every dictator is necessarily a commissar'.[61] The distinguishing feature was *how* they came to bear that commission. For the commissarial dictator, it was from a legally inscribed commission from a constitutional order based upon the people's will. The sovereign dictator existed 'only *quoad exercitium* [in relation to what it does]'; the commission was granted directly from the amorphous *pouvoir constituant,* that is, the people's will.[62]

More specifically, the movement of the concept of the dictator from a sphere of constitutional law to a sphere of politics, from a juridically limited to a radically unlimited range of competences was one Schmitt traced through a genealogy of secularisation.[63] It was not, however, the secularisation of *Political Theology,* in which the conceptual transfer entail the transmission of underlying theological structures of power that remain essentially unchallenged.[64] Instead, the transition from commissarial to sovereign dictatorship entails a distinct transformation in the

[59] Cf. Arato, who has argued that Schmitt is *divided* between a 'mythological' constituent power without authority, and 'constituent authority' relying upon institutional legitimation. This is due to a particularly juridico-technical account of authority in Arato's work. *Post-Sovereign Constitution Making*, 30.

[60] Schmitt, *Dictatorship*, xli.

[61] Ibid., xliii.

[62] Ibid., 127.

[63] Ibid., 121.

[64] Schmitt, *The Concept of the Political*, 36-52. Secularisation amounted to a shift in the superstructure, with a retention of the theological base. Hans Blumenberg has stressed that Schmitt cannot sustain the two positions because 'analogies, after all, are precisely not transformations'. Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace (Cambridge, MA: MIT Press, 1983), 92-93. Much later, Schmitt argued political theology only identified the 'structural resemblance between theological and juridical concepts'. Carl Schmitt, *Political Theology II: The Myth of the Closure of any Political Theology*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity, 2008), 148, fn.2.

underlying structure of political power, and the loss of an enchanted world.[65] The centuries preceding the French Revolution were not confronted with the problem of sovereign dictatorship because:

> the absolute monarchy that emerged at that time did not find its legitimation in any consensus of the people; it saw itself as legitimised through God's grace, and it placed itself against the estates – which means, in this context, against the people.[66]

In the 16th and 17th centuries, on Schmitt's account, political power was ordained by God, and not the people.[67] By the time of the French Revolution, a dramatic shift in the locus of political power had taken place. *Dictatorship* told the story of two distinct and opposed forms of political legitimation and the remit of what they come to legitimate: the first, divine right, and the second the people's right.[68] Though equivalent insofar as each existed beyond the juridical realm and could not be diminished by it, God's grace was 'something different' from commission presented by the *pouvoir constituant*. When the represented was 'the people' the commission acquired a wholly new meaning.[69] Though the sovereign dictator was unconditionally dependent upon the *pouvoir constituant,* their mandate was not limited. The power of the *pouvoir constituant* was not the power of a transcendent God, but of this earth, and so when the sovereign dictator was commissioned, it was 'truly a commission, not a refusal to pass it on to earthly representatives'.[70] Power ordained by God was always ultimately limited, because of the irreducible distance between divine and temporal power. By contrast it was only when the *pouvoir constituant* came to replace divine authorisation that the sovereign dictatorship was

[65] I disagree with Arato, who treats the thesis of *Dictatorship* indifferently to *Political Theology,* and to whom the *pouvoir constituant* imitates the divine perfectly. See Arato, *Post-Sovereign Constitution Making*, 271-72. Cf. McCormick's reading of *Dictatorship* as a *critique* of sovereign dictatorship, which Schmitt took to be unwieldly and dangerous in comparison to the conservative function of commissarial dictatorship. "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," *Canadian Journal of Law and Jurisprudence* 10, no. 1 (1997).

[66] Schmitt, *Dictatorship*, 2.

[67] Even when political power was understood to come *from* the people, the people were taken to be a unity before God. Schmitt, *Dictatorship*, 276 n.12.

[68] See Michael Hoelzl and Graham Ward, "Introduction," in *Dictatorship* (Cambridge: Polity, 2014), xx.

[69] Schmitt, *Dictatorship*, 121.

[70] Ibid., 127.

unleashed, precisely because there was no ontological trouble in transferring power from one to the other.[71] The curious feature of Schmitt's argument presented in *Dictatorship,* in contrast to his analogical account in *Political Theology*, is that the radicalism of the sovereign dictator stemmed precisely from the death of God. Political power was irrevocably transformed in this moment, for the dictator's mandate was no longer constrained by divine finality.

This reading of secularisation, moreover, has more specific implications for the competencies of Schmitt constituent power. In particular, the specific framing of authority that Schmitt identified with the *pouvoir constituant* through the constitution that was still to come was an important reconceptualisation of the temporal ground of authority held by the constituent power. Kojève distinguishes four elementary forms of authority, each with a distinct temporal aspect.[72] For contractarian accounts of constituent power, authority was identified with the scholastic proof that the constituent was above that which it constituted, comparable to the authority of a father over his child. Authority was orientated towards the past event of creation that was always 'venerable'.[73] Schmitt's constituent power differed. When he identified the authority of the *pouvoir constituant* with the constitution it will come to institute, Schmitt appealed to the authority of the vanguard, who (for Kojéve) 'saw *further* than the others, because it was he alone who thought out a *project*'.[74] The future itself has no authority except for being a future that 'manifests itself in the guise of a project'.[75] The authority of the leader was bound intimately with the risk the sovereign dictator was willing to bear in pursuit of that project.

Already in *Dictatorship,* Schmitt was engaged in devising a constituent power freed from juridical closure. Sieyès, much like Egon Zweig, had diminished the 'ghostly existence' of constituent power, because it was to be located in the distinction between higher and ordinary law-making, and enmeshed in a formal juridical realm of representation. Schmitt's wager was that constituent power could not be treated as

[71] See Caldwell, *Popular Sovereignty*, 99.

[72] For an elaboration of these elementary types, see Kojève, *The Notion of Authority (A Brief Presentation)*, 13-16. The temporal structure of these elementary types is developed at 48-56.

[73] Ibid., 49.

[74] Ibid., 19.

[75] Ibid., 53.

a formal concept, because it has an intellectual heritage associated with a concrete experience of world-making political power; to treat it formally eroded this. From law to politics, from legality to authority, from a beholden past to an anticipated future, Schmitt conceived of another side to constituent power.

III: THE CONSTITUTIONAL THEORY OF CONSTITUENT POWER

For Schmitt, there were two faces of constituent power. The first was a formal, legal concept, and the second an uncompromising political one. Carl Schmitt's most sustained engagement with constituent power is found in the text some have labelled his magnum opus, *Constitutional Theory*.[76] Across his work, *Schmitt's* account of constituent power did not so much reinforce this conceptual doubling but shield the political from the legal formulation of the concept, devising a radically ungrounded account of constituent power. *Constitutional Theory* itself was not so much an account of constituent power, but a deeply ambitious effort to interpret the Weimar constitution, which on his reading comprised two dominant tendencies of contemporary constitutional thought: the *de*politicising tendencies of liberal parliamentarism, and the *re*politicising elements of concrete political unity. This sort of opposition had recurred in his writings since at least the early 1920s, when he had traced these tendencies to the depoliticised legislative process of parliamentary representation that understood will-formation through a logic of the modern economy.[77]

The overriding theme of *Constitutional Theory* seems to be the effort to address this problematic relation between will-formation and politicisation that ran through

[76] See, for example, William E. Scheuerman, *Carl Schmitt: End of Law* (Lanham, MD: Rowman & Littlefield, 1999), 61. Throughout the English translation of *Constitutional Theory,* Schmitt's designation of *verfassunggebende Gewalt,* is translated as 'constitution-making power'. Whilst this literal translation captures the sense in which Schmitt is concerned with the power that constitutes the constitution, rather than a power that constitutes some other political or non-political entity, the translation has been amended to 'constituent power' for thematic consistency.

[77] Schmitt, *The Crisis of Parliamentary Democracy*, 35. Schmitt characterises this economically mediated popular will as a 'dynamic-dialectic', a term taken from Rudolf Smend, "Die Verschiebung der Konstitutionellen Ordnung durch Verhältniswahl," in *Festgabe für Karl Bergbohm, Vol. 2* (Bonn: A. Marcus & E. Weber, 1919), 278. For an elaboration of this point, see also Kelly, *The State of the Political*, 200-04. The thesis was attacked in an early review, for 'no rational person was so naïve and optimistic as to place any hope at all' in this intellectual centre of parliamentarism that Schmitt constructed. See Richard Thoma, "On The Ideology of Parliamentarism (1925)," in *The Crisis of Parliamentary Democracy*, ed. Kennedy. Ellen (Cambridge, MA: MIT Press, 1988), 78-79.

much of his Weimar work. Schmitt began this by parsing the constitution into political and non-political aspects in the opening page of *Constitutional Theory,* when he distinguished the constitution in the 'absolute sense' from the 'relative' constitution. The absolute constitution may be thought of in two ways: first, as a '*complete condition* of political *unity* and *order*', and, second, as a 'closed *system of norms*' that amounts to a unity, though 'not a concrete existing unity, but instead a reflective, *ideal one*'. In contrast, the relative constitution treats 'specially constituted *statutes*' as a constitution conflates the concept of constitution with that of constitutional law. In this instance, the concept is 'relative', for it is concerned not with 'an entirety, an order and a unity', but rather 'many individual statutory provisions constituted in a particular way'. It is reduced to the *Rechtsstaat*.[78] Schmitt rejected the relative constitution outright, for it could not capture the essence of unity that every constitution presupposed. Its decisive shortcoming was felt insofar as it confuses 'unity' with 'entirety', diverse acts that so happened to form a whole.[79] Relative forms of constitution stipulated the terms of their revision *through* the constitution in what Schmitt called 'qualified alterability', which in fact *reduced* the durability and stability of the constitution precisely because it did not account for political unity substantively.[80]

More pressing, for Schmitt, was the relation between the political and legal formulations of the absolute constitution. The political form conceived of political unity in three ways: the first was the 'concrete collective condition of political unity', in the form of a decision-making authority. The state does not *have* a constitution, but rather 'the state *is* a constitution'.[81] The second was a type of political ordering—a 'concrete type of supremacy and subordination'. The third, a '*dynamic emergence* of political unity' from a process of constant renewal of *'power* and *energy'*, through which the concrete types of supremacy and subordination are related to each other in

[78] Schmitt, *Constitutional Theory*, 59.
[79] Ibid., 69.
[80] Ibid., 69-73. Schmitt's particular target seems to be Jellinek's association of the constitution with the written bill of rights. See for example Jellinek, *Allgemeine Staatslehre*, 515-21.
[81] Schmitt, *Constitutional Theory*, 59-60.

order to maintain that political unity.[82] Dynamic emergence ensured the concrete political unity did not descend into a neutral formalism.

Conversely, the 'legal' styling of the absolute constitution conceived of unity only in a 'unified, closed *system* of higher and ultimate norms'. Whilst this provided an account of unity that was equivalent to the state, and so capable of identifying the sovereign, it was underdetermined, for it could not account for *how* this legal unity arose—the 'political *being*' of the state unity was transformed into that which 'merely functions'.[83]

These two types of constitution were not mutually exclusive, but two sides of the same coin. The underdetermination of the legal constitution stemmed precisely from a failure to appreciate the political aspect. It could not adequately account for the will of the constituent power from which the constitution derives its validity.[84] Or, when paired with his remarks on Zweig's work, which were repeated in *Constitutional Theory,* the *pouvoir constituant* was associated with the 'constitutionally regulated authority of revision', and not the will upon which the constitution was based. Under the legal absolute constitution, constituent power was rendered an organ of the constitution rather than something which stood outside it.[85] Schmitt was interested in how the political aspect of the constitution was to be defined. In the previous chapter of this thesis, this relation has been conceptualised through the Hobbesian distinction between concord and union, where the former amounts to a natural Aristotelian unity, and the latter a modern unity through representation. Schmitt's constituent power cannot be subsumed into either. As I will demonstrate, the partitioning of the political from the legal accounts of the constitution form the elementary groundwork of unity-in-action that is irreducible to either concord or union.

[82] Ibid., 60-61.

[83] Ibid., 62-64. His target here is of course Hans Kelsen's grundnorm*,* which sought to present a constitution 'free…from all alien [i.e., non-legal] elements'. The *grundnorm* is the final norm of a legal system, which must be presupposed, it cannot be enacted. See Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley, CA: University of California Press, 1967).

[84] Schmitt, *Constitutional Theory*, 64.

[85] Ibid., 146.

i: From Sieyès to Schmitt, via Spinoza

The inherent difficulty in identifying the ghostly aspect of constituent power stemmed, according to Schmitt, from the juridical language to which his neo-Kantian colleagues were beholden. When the constituent power became visible in such a vocabulary, it had already 'transform[ed] the people as such into an organ of the state'.[86] Repeating Sieyès almost perfectly, Schmitt wrote that the constituent power was the 'unmediated will' that exists 'prior to and above every constitutional procedure'.[87] Juridicism could not capture this. But it was from here on that their differences began to show. I will argue that Schmitt carefully rewrote Sieyès' constituent power by replacing his representative unity with a unity forged in political action. He did so by reintroducing the tools of political theology into his argument, which allowed him further to bracket the political from the juridical. In *Constitutional Theory*, Schmitt was conscious of a significant departure in his thought from the *pouvoir constituant* of Sieyès, though that departure took a different form to that to which Schmitt admitted. He argued that:

> In some of Sieyès' writings, the *pouvoir constituant* appears in its relationship to every *pouvoirs constitués* as a metaphysical analogy to the *natura naturans* and its relationship to the *natura naturata* of Spinoza's theory. It is an inexhaustible source of all forms without taking a form itself…but it is necessary to distinguish the positive theory of the [constituent] power, which inheres in ever constitutional theory, from the aforementioned pantheist metaphysics…[It] is part of the theory of political theology.[88]

The relation that Schmitt wanted to escape was the association of *pouvoir constituant* with a 'pantheist metaphysics', in order to bring to the fore its 'concrete' meaning in the form of a decision over political unity. This is certainly the common way in

[86] Schmitt, *Dictatorship*, 122.
[87] Schmitt, *Constitutional Theory*, 132.
[88] Ibid., 128. He also references the analogy with Spinoza in *Dictatorship,* although does not distinguish the 'metaphysical analogy' from the 'positive theory'. Instead, the analogy is 'systematic and methodical', whilst Spinoza's theory is not a pantheist metaphysics but a 'rationalistic system'. See Schmitt, *Dictatorship*, 123.

which this passage is read.[89] Nevertheless, the passage is more complex that this, particularly because of the absence of Spinoza from Sieyès' theoretical frame of the *pouvoir constituant*.[90] It is evident that Sieyès did not cite, nor did he employ Spinozan terminology in any of his constitutional writings, not least the distinction between *natura naturans* and *natura naturata*. What is clear, however, is that during the 18th century, Spinoza was received in a distinctly different fashion to how he was in Weimar Germany. By the mid-18th century, Spinoza's theory of substance had been closely linked to an alternative rationalist tradition bound up closely with new developments in the science of nature.[91] His work was most thoroughly appreciated as depicting a fundamentally rational order of things, whilst his pantheist arguments were employed by 'religious sceptics'.[92]

Spinoza's work was read quite differently in Weimar Germany. Whilst for centuries he had been read as an 'atheistic materialist', by the 1920s, he was viewed as a non-traditional, mystical, though unequivocally religious philosopher. The groundwork for this rehabilitation dated back to the Pantheism Controversy among German Idealists of the late 1780s, though, as Koekkoek posits, this was configured

[89] Renato Cristi, "Schmitt on Constituent Power and the Monarchical Principle," *Constellations* 18, no. 3 (2011): 358; Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 225-26; Mika Ojakangas, *A Philosophy of Concrete Life: Carl Schmitt and the Political Thought of Modernity* (Bern: Peter Lang, 2006), 136.

[90] To my knowledge, the first work to draw a connection between the two seems to be Georges Pariset's short article from 1906. See Georges Pariset, "Sieyes et Spinoza," *Revue de synthèse historique* 1(1906). Egon Zweig cited this paper with approval, though referenced, along with Descartes, Spinoza's *rationalist* influence upon Sieyès, especially with regards to the programme to redraw France's administrative boundaries. Zweig, *Die Lehre vom Pouvoir Constituant*, 117. If Schmitt was familiar with Pariset's paper, it was likely through Zweig's citation. Pariset's argument relied principally upon the conceptual resemblance between the two, focusing primarily on the connection between law and reason, though not Spinoza's *natura naturans*. Much of the argument is repeated in Daphne Trevor, "Some Sources of the Constitutional Theory of the Abbé Sieyès: Harrington and Spinoza," *Politica* 1, no. 3 (1935). Trevor posited that the similarities arose from a shared intellectual interest in Harrington and a vicarious inheritance through Rousseau and Montesquieu. See also Paul Vernière, *Spinoza et, la pensée française avant la Révolution* (Paris: Presses Universitaires de France, 1954), 684-85. Paul Bastid recognised the affinities between the two but thought it doubtful that Sieyès was influenced by Spinoza. There is no evidence that he had read or cited Spinoza's works, while the ideas that appear in both are rather diffuse and not uncommon at the time. See Bastid, *Sieyès et sa Pensée*, esp. 295.

[91] Pierre-François Moreau, "Spinoza's Reception and Influence," in *The Cambridge Companion to Spinoza*, ed. Don Garrett (Cambridge: Cambridge University Press, 1995), 418-21. Moreau, reliant on Pariset, notes affinities with the work of Sieyès, though they amount only to conceptions of natural rights, and not his account of the *pouvoir constituant*.

[92] Pierre-Yves Quiveger, "Sieyès et Spinoza," in *Figures de Sieyès*, ed. Pierre-Yves Quiveger (Paris: Publications de la Sorbonne, 2008), esp. 136; Urbinati, *Representative Democracy*, 279, n.42. For a distinctive interpretation of Spinoza's reception in the 18th Century, see Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy* (Princeton, NJ: Princeton University Press, 2010).

distinctively by writers of the Weimar era, characterised by a broad tendency to read into Spinoza's rationalism a deeper mystical meaning, of which Schmitt was a key figure.[93] Spinoza's mysticism had come to be understood as a reason that extended beyond itself: a 'transreason' that required a rational base, but one that dissolved in 'the experience of a direct and absolute transcendence'.[94]

That Schmitt's interpretation of Spinoza as a mystical pantheist is unlikely to be how Sieyès would have read him is important, because it illuminates the consequence of an intriguing strategy of apophasis employed by Schmitt. This is the rhetorical device through which one introduces a topic into a discussion only by denying its place within that discussion. Schmitt called upon Spinoza's distinction, only to reject it in favour of a concrete account of constituent power. The apophasis completed two tasks: first, it stressed the concrete over the metaphysical; second, the apophasis itself, the explicit refusal to engage with Spinoza's metaphysical contribution to a thesis of constituent power—which, to my knowledge, was a relation introduced by Schmitt alone—reconfigured the metaphysical grounding of Sieyès' argument. Even when devising a 'concrete' account of constituent power, Schmitt employed apophasis to ensure that a pantheist political theology was retained implicitly.

It was this, moreover, that allowed Schmitt to shift the register of constituent power from a rationalised account of unity to one based upon voluntarism and arbitrariness. Spinoza described the *natura naturans* as 'the attributes of substance that express eternal and infinite essence', whilst the *natura naturata* was 'all that follows from god's nature'.[95] God, for Spinoza, was the infinite being whose essence was coextensive with nature's essence. This followed from his definition of a substance as that which had no cause other than itself. Because all substances have an

[93] Rene Koekkoek, "Carl Schmitt and the Challenge of Spinoza's Pantheism Between the World Wars," *Modern Intellectual History* 11, no. 2 (2014): 339-44.

[94] Christian Janentzky, *Mystik und Rationalismus* (Munich: Duncker & Humblot, 1922), 11-12. Translation in Koekkoek, "Carl Schmitt and the Challenge of Spinoza's Pantheism," 343. Schmitt was familiar with and cited positively Janentzky's work when discussing Spinoza in *Political Romanticism*. See Carl Schmitt, *Political Romanticism*, trans. Guy Oakes (Cambridge, MA: MIT Press, 1986), 56.

[95] Baruch Spinoza, "The Ethics," in *Ethics, Treatise on the Emendation of the Intellect & Selected Letters*, ed. Seymour Feldman (Indianapolis, IN: Cambridge, 1992), 51-52 [Sch.Pr.29, I].

attribute (i.e., that which is perceived by the intellect to constitute the essential quality of a substance), and God, as an infinite being, possessed all attributes,[96] Spinoza concluded that only one substance existed, and that was God.[97] *Natura naturans* was God as the free and immanent cause of all things, captured in the English translation, 'nature naturing', nature in the continual process of creating. *Natura naturata* (or 'nature natured'), describes those attributes of God when predicated into modes. Though all things are part of God, modes are the transient affections of substances, as the intellect is to thought. In short, *natura naturans* was God as a creative force, whilst *natura naturata* was a creation of God, though one nevertheless within him.

In drawing attention to this distinction, Schmitt analogised Spinoza's monistic substance to the Sieyès' constituent power, allowing him to polemicize constituent power's 'infinite, incomprehensible abyss of force'.[98] This does not seem on the face of it too dissimilar to Sieyès' remarks on a nation whose 'will is always legal'.[99] The decisive difference that Schmitt introduced with his appeal to the mystical Spinoza was found in how the relation between constituent and constituted was arranged. For Sieyès, the pre-legal will was profoundly limited by representation.[100] Because, in Spinoza, modes were only ever a transient affection of substances, they were understood to be of a different ontological order to substance and so could not 'travel up' to comprehend the essence of a substance.[101] Spinoza clarified this in his critique of Scotian univocity, for to talk of God possessing a creative intellect or will, he wrote, that creative intellect 'would have to be vastly different from human intellect and will, and could have no point of agreement except the name'.[102] In accordance with the Weimar interpretation, the *natura naturans* was the mystical 'transreason' that exceeds reason.

The *pouvoir constituant*, because of this mystical foundation, could not be captured by the *pouvoir constitué*, nor even the *pouvoir commettant*. This was the

[96] Ibid., 31 [Def.3-6, I].
[97] Ibid., 39 [Pr.14, I].
[98] Schmitt, *Dictatorship*, 123.
[99] Sieyès, "Third Estate," 136.
[100] See chapter 3.
[101] This is why Spinoza requires attributes, and not only substances and essences, because attributes were the fallible human perception of substances.
[102] Spinoza, "Ethics," 45 [Sch.Pr.17, I].

decisive shift in Schmitt's reading, for it allows him to challenge the prerogative of the representative found in Sieyès by reading Sieyès' against the grain. In *Dictatorship,* he rightly recognises that Sieyès' representatives, when ordered by a *pouvoir commettant*, 'should not be messengers delivering an already existing will; rather they have to "shape" it first'. In doing so, a 'peculiar relationship' with the omnipotent constituent power emerged. Schmitt wrote:

> 'Even if the will of the people does not exist in terms of content, but is shaped primarily through representation, the representative's dependence on this will…still subsists. The will can be unclear, in fact it is even the case that *it must be unclear*, if the *pouvoir constituant* is to be truly unconstitutionable'.[103]

Schmitt elevated what for Sieyès was a pragmatic, constitutional question of will-formation to an ontological level. For Sieyès, the lack of clarity due to the nation's abstract character had to be resolved by concrete institutional representation irrespective of the accuracy of that will. This tempered the will of the abstraction of the nation in order to guard against the unbridled will of a *ré-total,* which was incompatible with the long-term survival of the state.

Conversely, by associating constituent power with a mystical transreason, Schmitt celebrated the ontological distance between constituent power and any instituted form of political will, be it *pouvoir constitué* or *pouvoir commettant*. His proclamation that the will of the constituent power 'must be unclear' if it was to be unconstitutionable involved a polemicisation of Sieyès' position, through which the constituent power as *natura naturans* could have no point of agreement with any form of instituted politics as *natura naturata*. Schmitt came to affirm this position even more aggressively in *Constitutional Theory*. He condemned Sieyès' effort to bind 'the anti-democratic account of representation…with the democratic theory of constituent power', which could only 'contradict the theory [of constituent power]'. The result was a 'liberal bourgeois *Rechtsstaat*'.[104] The only consistently democratic position would have been to allow the people to decide immediately, for the

[103] Schmitt, *Dictatorship*, 124. Emphasis added.
[104] Schmitt, *Constitutional Theory*, 128.

constituent power of the people 'cannot be represented without democracy transforming itself into aristocracy'.[105]

This, moreover, points towards a more distinctive difference between Sieyès and Schmitt over the role of representation. Though an innovative one, Sieyès was very much in the mould of a representative democrat who certainly subscribed to a view of deliberation not unlike that one Schmitt rejected in *Crisis of Parliamentary Democracy*. If, for Schmitt, the people's will could never be adequately accounted for via processes of deliberation, Sieyès held the opposite view, for even if deliberation was problematic because of its complication and sluggishness, the drawn-out process made it possible 'to single out from the broader mass' a will to which the general interest would prescribe. The 'single, more powerful movement [that] can be seen to be made up of a multitude of opposing forces',[106] mirrored perfectly that 'dynamic-dialectic' that Schmitt identified, through which the political unity ceases to be political. This is why the Spinozan intervention was necessary, for it allowed Schmitt to devise an account of constituent power that was not disfigured by the depoliticising aspect of parliamentary democracy.

ii: Constituent Power and Reflexive Political Unity

It is here that Schmitt's thesis ran into it a problem. He rejected juridical representation of the constituent power. When this was added to a definition of 'constitution' that amounted to a concrete political unity, a difficulty manifested, for the 'concrete political unity' of the constitution was brought about by a constituent power that amounted to a 'concrete political being'.[107] Schmitt was dealing with a problem analogous to that which Carré de Malberg associated with Sieyès. When describing the constituent power, Schmitt offered the following definition:

[105] Ibid. When Schmitt distinguishes constituent power as a 'concrete' theory, it is not bound to the people in the form of a metaphysical right, but is a factual demonstrate of the subject who constitutes the constitution, and is only made visible in that aspect of constituting the constitution. It is perfectly capable of being held by any number of political subjects.

[106] Sieyès, "Views of the Executive Means," 39-40. For an elaboration of Sieyès' position toward deliberation, see Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 183-92.

[107] Schmitt, *Constitutional Theory*, 125.

> 'The [constituent] power [*verfassunggebende Gewalt*] is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence [*der eigenen politischen Existenz*]. The decision, therefore, defines the existence of the political unity in toto [*im Ganzen*]'.[108]

The constituent power was a will capable of making a decision over *its own* political unity, a unity that was defined by that decision *in toto*. Only a few pages earlier, however, Schmitt had stated that 'the [constituent] power presupposes the people as a politically existing entity'.[109] Though he carefully avoided the designation political 'unity' [*Einheit*] to the constituent power, preferring instead political 'entity' [*Größe*] or 'being' [*Sein*], he nevertheless confirmed that these terms amounted to 'a clear sense [of] a people brought to political consciousness and capable of acting'.[110]

The relation between a political being and a political unity might be considered in a number of ways. The first would be to assume that this was a 'latent' unity that was only realised in the act of constituting the constitution. This seems to be what Schmitt alluded to when he illustrated that, in the French Revolution, 'the fundamental decision rested above all on the French people becoming *conscious* of their character'. To put it differently, the 'French people constituted themselves' by 'becom[ing] conscious of their political unity…but that does not mean that they did not previously exist'.[111] The political unity that the constitution brought into being predated the constitution though the constituent power was not 'conscious' of that unity until the decision. This reading is common among through who interpret Schmitt's account of constituent power through his later associations with Nazism, and so read this process as a politicisation of an ethnic *Volk*.[112] This interpretation is, however, not sound within the context of Schmitt's broader thesis. It posits an essentialist account of that unity through which the founding is understood as a part

[108] Ibid. Cf. Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1989), 75-6.
[109] Schmitt, *Constitutional Theory*, 101.
[110] Ibid.
[111] Ibid., 102.
[112] For example, William E. Scheuerman, "Revolution and Constitutions: Hannah Arendt's Challenge to Carl Schmitt," *Canadian Journal of Law and Jurisprudence* 10, no. 1 (1997): esp.148.

of the *telos* of realisation of that identity. In *Crisis of Parliamentary Democracy,* Schmitt presented a critique of teleological interpretations of identity through his reading of Hegelian and Marxian dictatorships. The underlying problem of any Hegelian system was the presence of the world spirit, which robs the dictatorship of its essence—the decision. Schmitt was concerned that the sublation of contradiction was an immanent movement of history through which the exception could not effect change from outside. If the dictator was the figure who 'interrupts the process of development', there was no place for the dictator in Hegel's philosophy, for the dictator's '*diktat*…[would] be assimilated by the peristalsis of the world spirit'.[113] Hegel could not properly capture the figure of the dictator, precisely because the decision was drawn out as a part of history's underlying movement, rather than an intervention into it. Similarly, latent unity does not capture the identity of the constituent power, for the decision to constitute is not a profound choice but a moment of unfolding, denying the intensity of the political, which is no longer a choice over political unity but the realisation of an already existing one.

An alternative would be to understand the moment of founding as the decision only over a juridical unity by a political unity that is already present and presupposed. This argument is presupposed in Schmitt's distinction between the constitution *qua* political unity, and constitution *qua* written text, which cannot amount to the same thing. But when Schmitt was concerned about the constituent power's decision over its unity, he was referring unequivocally to the former. As such, whilst Schmitt avoided the Derridean problem of inscription, felt in the co-originality of the written text of the constitution and the political unity, he simply rolled this problem back in time, for his equation of the constitution as political unity which necessarily precedes the written text cannot escape the circularity. To suggest otherwise would deny the intensity of the decision, for it would not be a decision over the type and form of their political unity, but only over the laws that govern that unity.

[113] Schmitt, *The Crisis of Parliamentary Democracy*, 56.

Rejecting these accounts assists in bringing to the fore a decisive move that occurs in Schmitt's account when compared with Sieyès, and their specific orientations to will-formation. In the previous chapter, I dealt with the way in which Sieyès sought to overcome this Rousseauvian problem by positing an organic account of the constituent power as a political unity that did not derive from an extraordinary event of the decision, but from the representative whole that followed from the interdependent division of labour. This is approximate to the second variation of the above two arguments: Sieyès separated out the moment of constitution writing from the designation of a political unity, which, because it was organically derived from the division of labour, was never 'decided' upon. The constitution as written text was decided upon by an already present political unity. Schmitt, by contrast, treated this problem differently. He affirmed the difficulty in locating a collective will from a disinterested perspective, whilst channelling that difficulty in order to redouble the political strength of that unity. As Ernesto Laclau characterises it, 'the moment of the decision, the moment of madness, is the jump from the experience of undecidability to a creative act, a *fiat* which requires passage through that experience. …[It] is the moment of the subject'.[114] To clarify this, it might be contrasted with Hans Lindahl's assertion that Schmitt is '[un]able to explain the first person plural stance of a 'We' as a unity in constituent action'.[115] For Lindahl, Schmitt could not account for the status of the 'We' of the community in constituent action precisely because he constructed an untenable distinction between the constituent power as an ambiguous presence, and constituted representation with co-referential identity.[116]

When positing this argument, Lindahl contrasts two forms of identity, *idem*- from *ipse*-identity, where the former refers to 'sameness' insofar as it designates a permanence in time that might manifest either as a numerical identity—as two occurrences of the same thing—or a qualitative identity—an extreme resemblance

[114] Ernesto Laclau, "Deconstruction, Pragmatism, Hegemony," in *Deconstruction and Pragmatism*, ed. Chantal Mouffe (London: Routledge, 1996), 57.
[115] Lindahl, "Constituent Power and Reflexive Identity," 14.
[116] Ibid., 17.

between two things.[117] By contrast *ipse*-identity amounts to 'selfhood', that is, a reflexive identity which does not posit some 'unchanging core' but is figured out through a reflection upon that sameness.[118] *Ipse*-identity is comparable to Heidegger's *Dasein,* which, 'in its Being has a relationship towards that Being', but one that 'in its very Being, that Being is an *issue* for it'.[119] Whilst Lindahl is attentive to the speed with which Schmitt moved into an account of representation as the prerequisite of collective self-rule,[120] what Lindahl calls collective selfhood was already at play in the decision of the constituent power 'over the type and form of its own political existence'.[121] Even if Schmitt did not mobilise this as a procedure for collective self-rule, he nevertheless employed a decision as a reflexive account of collective will-formation, in contrast to Sieyès'. Collective selfhood requires that the members of the groups view themselves as a unity that intends to act collectively, and secondly, that the activity is undertaken *for the sake of the collective*. Collective selfhood is derived from a collective that is both subject and object of the act.[122] The critical point at which Schmitt's account breaks down, on Lindahl's interpretation, is the moment at which 'his theory of constituent power becomes the celebration of an ontology of substance' as the collective self bears concrete attributes.[123]

This critique—that Schmitt ultimately collapsed constituent power into an ontology of substance once within the constituted order—does not negate the fundamentally reflexive character of the decision in the first instance. Lindahl's concern seems to reside in the designation of a constituent power that is granted too concrete an identity prior to acting. This is borne out in Schmitt's comments on the authority of the constituent power in *Dictatorship*. It nevertheless neglects Schmitt's careful language when he distinguished between the *verfassunggebende Gewalt* and

[117] Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago, IL: University of Chicago Press, 1995), 116.

[118] Ibid., 1-3.

[119] Martin Heidegger, *Being and Time*, trans. John MacQuarrie and Edward Robinson (New York: Harper, 1962), 32.

[120] Especially his closing statements on the limited space provided for questionability and responsiveness. Lindahl, "Constituent Power and Reflexive Identity," 21-24.

[121] Schmitt, *Constitutional Theory*, 125.

[122] Lindahl, "Constituent Power and Reflexive Identity," 16; Bert van Roermund, "First-Person Plural Legislature: Political Reflexivity and Representation," *Philosophical Explorations* 6, no. 3 (2003): 242-44.

[123] Lindahl, "Constituent Power and Reflexive Identity," 16.

the *pouvoir constituant*. Whilst the latter was bound up in a 'metaphysical analogy' through which it is allocated additional competencies, the *verfassunggebende Gewalt* was rendered only ever as the activity of constituting the constitution.[124] This careful language is maintained because Schmitt understood the constituent power as a 'will', 'entity' or 'being', but not as a 'unity'. Whilst this vocabulary is ambiguous, he seemed to want to avoid collapsing that activity into a substantive principle. He was clearest when describing the people's constituent power an '*unformed*, nonconstitutional entity'.[125] They were an 'assembled multitude'.[126] Though a contradictory phrase for a scholar appreciative of Hobbes, the term appears to capture exactly this fundamental instability of the constituent power prior to the decision over the constitution. A decisive transformation in the identity of the political unity occurs in the moment of the decision. In this moment, the political unity is defined 'in toto' [*im Ganzen*] because a decision has been made over 'the type and form of *its own* political existence'.

This is the decisive shift from an identity premised upon sameness, to an identity as selfhood. This selfhood is fleeting, apparent only in the moment of the constituent decision, before being abruptly replaced by representative structures of constituted representation, though it affirms the political intensity of Schmitt's constituent power. This, moreover, is the decisive point of difference between Schmitt and Sieyès. Whilst Sieyès intended to negate the implications of the Rousseauvian paradox by denying the moment of political self-constitution through the organic representation of the nation, Schmitt rendered the paradox a fundamental aspect of the people's selfhood. That this is one way in which Loughlin and Walker frame the paradox of constitutionalism is of fundamental importance, for it is in Schmitt's decisionism that constituent power took on this reflexive character. Though it is reflexive, in Schmitt it was not paradoxical, because he seemed to affirm Joseph de Maistre's dictum that 'the people are the sovereign which

[124] Schmitt, *Constitutional Theory*, 128.
[125] Ibid., 279. Emphasis in original.
[126] Ibid., 131.

cannot exercise sovereignty'.[127] The role of the immediate constituent people was not to govern. The reflexive character of their unity affirmed a distinctively *political* unity-in-action, which Schmitt channelled into what he later called a '*katechontic* force'.

IV: THE KATECHON: THE POLITICAL THEOLOGY OF CONSTITUENT POWER

"Woe to he who has no friend, for his enemy will bring him up for trial.
Woe to he who has no enemy, for I shall be his enemy on Judgment Day."

- Carl Schmitt [128]

"The Katechon: it is shortage, it is hunger, misery and powerlessness. It is those who do not govern, it is the people."

- Carl Schmitt [129]

This chapter has so far sought to demonstrate how Schmitt incrementally shifted the grounding of the constituent power from a constitutional theory to an affirmation of the Political over the juridical. This did not, however, amount to a bearer of sovereignty. In the remainder of this chapter, I argue that Schmitt instead channelled constituent power into a distinctive political imaginary associated with the Christian figure of the *katechon*, as a means of redeeming the state from neutralisation. The curious term he employs in the preface of *Constitutional Theory* opens up a way to think through this problem. Schmitt wrote of the 'apocryphal acts of sovereignty' that emerge against the *Rechtsstaat* components of the constitution.[130] This is an act of claiming sovereignty that is both unconventional, and of doubtful authenticity. Andreas Kalyvas has argued that Schmitt's constituent power, as an apocryphal popular sovereign, survived in a 'third moment of democracy' alongside the constitution. Nevertheless, Kalyvas pushes this further than Schmitt would have accepted, describing a moment in which 'the people recover something of their original, concrete physical visibility by circumventing political representation'.

[127] Joseph de Maistre, "Study on Sovereignty," in *The Works of Joseph de Maistre* (London: Allen and Unwin, 1965), 93.

[128] Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945–47* (Berlin: Duncker & Humblot, 2002), 90.

[129] Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951* (Berlin: Duncker & Humblot, 1991), 272.

[130] Schmitt, *Constitutional Theory*, 55.

Although the people did not initiate radically new change, he suggests that they 'guarantee that extraordinary politics will not disappear in a constitutional democracy', so 'points toward Arendt's theory of civil disobedience'.[131] The scope is far more limited than this, in part because what is at stake is not the extent to which the people as the constituent power possesses sovereignty. Instead the persistence of the constituent power 'alongside' the constitution, I argue, is best captured in an interpretation of the *katechon*. This is to suggest that for Schmitt, constituent power served not to partake in governing, but acted as a restraint upon the tendencies of neutralisation inherent in the modern state. This helps further to distinguish Schmitt from Sieyès and Hobbes.

The figure of the *katechon* first appeared in Schmitt's post-Second World War writings. Taken from Paul's oblique second letter to the Thessalonians, the *katechon* represented that which 'withholds' the 'man of lawlessness' [*ánthropos tis anomos*], the earthly Anti-Christ, who would appear as men 'fall away' from the church.[132] In his most minimal formulation, Schmitt described the *katechon* as a force 'which defers the end and suppresses the evil one'.[133] There is little scholarly consensus upon what this ambiguous restraining figure represents in Schmitt's writing. Perhaps, as William Hooker notes, Schmitt did not consider there to be to be a permanent *katechon*, but rather, that this figure was determined by particular historical conditions, and that Schmitt worked through various possible bearers of the title '*katechon*' throughout his work.[134] However Schmitt conceived it, the figure of the

[131] Kalyvas, *Politics of the Extraordinary*, 174-86.

[132] 2 Thessalonians 2:3-8.

[133] Carl Schmitt, "Three Possibilities for a Christian Conception of History," *Telos* 147, no. Summer (2009): 169. See also Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos, 2003), 59-62.

[134] William Hooker, *Carl Schmitt's International Thought: Order and Orientation* (Cambridge: Cambridge University Press, 2009), esp. 51-52. Most attach the *katechon* to single institution, each of which Schmitt may have held at one moment or another. On the *katechon* as an aspect of an imperialistic imaginary of *grossraum,* see Julia Hell, "Katechon: Carl Schmitt's Imperial Theology and the Ruins of the Future," *The Germanic Review*, no. 84 (2009). Duncan Kelly identifies the *katechon* with the State against a system of technical neutrality, whilst Meuter and Palaver offer similar perspectives. See especially Kelly, *The State of the Political*, 161-64; Günter Meuter, *Der Katechon: Zu Carl Schmitts fundamentalischer Kritik der Zeit* (Berlin: Duncker & Humblot, 1994); Wolfgang Palaver, "Hobbes and the *Katéchon:* The Secularization of Sacrificial Christianity," *Contagion: Journal of Violence, Mimesis and Culture* 2 (1995). However, due to the 'mounting problems of the state in modernity', Hooker notes, 'one cannot say…that State=*katechon*'. Hooker, *Schmitt's International Thought,* 52. Matthias Lievens identifies the *katechon* as the people, though since he does not account

katechon was always regarded as the force which could overcome the 'eschatological paralysis' of philosophies of history that reduced politics to a process, by restraining the coming judgement and allowing the temporal world to persist.[135]

Many of his Weimar works captured his wrestling with the depoliticising characteristic of process philosophies. In his post-war diary, *Glossarium*, Schmitt summarised his disposition toward these tendencies of depoliticisation as a 'struggle for the peculiarly Catholic sharpening (against the neutralizers, the aesthetic idlers, against the abortionists, body-burners, and pacifists)'.[136] The two tendencies of modernity that arose together in this movement towards depoliticisation were the rise of the technical-neutral state, and the privatisation of conscience. In his 1923 work *Roman Catholicism and Political Form,* Schmitt identified the former in the 'economic rationalism' in which 'everything runs strictly according to plan—everything is calculable'.[137] Against this he contrasted an 'eminently political…Catholic rationalism' that refused the 'absolutely material' considerations of economic rationality.[138] Catholic rationalism relied upon a 'specific juridical logic' through which one could derive 'the normative guidance of human social life'.[139] This peculiar form of rationality was to give direction to human spirit without exhibiting the 'dark irrationalism of the human soul'. This was distinctly alien to economic rationalism, which drew upon the precision of materiality.[140] With Catholic rationalism came a specifically Catholic account of representation that did not amount to the metonymic mechanisms of political-economic representation. It did not represent through similarity, but by reconciling opposites. Catholic representation was not achieved through a precise equivalence, but through what

for the constituent power he struggles to capture the relation to state form. Matthias Lievens, "Singularity and Repetition in Carl Schmitt's Vision of History," *Journal of the Philosophy of History* 5, no. 1 (2011).

[135] Schmitt, "Christian Conception of History," 169. On the relation between philosophies of history and neutralisation, see Carl Schmitt, "The Age of Neutralizations and Depoliticizations," in *The Concept of the Political*, ed. George Schwab (Chicago, IL: University of Chicago Press, 2007), esp.89.

[136] Schmitt, *Glossarium*, 165. Translation in Meier, *Lessons of Carl Schmitt*, 70. For an examination of this 'catholic sharpening', see Kelly, *The State of the Political*, 161-71.

[137] Schmitt, *Roman Catholicism*, 15.

[138] Ibid., 16.

[139] Ibid., 12.

[140] Ibid., 14.

John Milbank calls a 'heightened *dissimilarity*'. One represents not through similarity, but by 'truly achieving them [the communal telos of Good] in himself'.[141] This is the critical distinction that allowed Schmitt to distinguish the figure of the sovereign dictator from the French National Assembly, for while the former embodied an ethically more perfect form, the latter mirrored by mere similarity. The National Assembly, moreover, was problematically bound up with economic-technical rationality, which vacated the ethical role of the leader-representative. Schmitt treated this economic-technical rationality with both fear and loathing, for it 'warped fantastically' the concept of the rational, reducing it instead to mechanisms of production that might serve 'the satisfaction of arbitrary material needs'. In this most devoutly Catholic work, Schmitt identified economic rationality with the image of the Antichrist itself.[142]

This attitude was further compounded by the triangulation of liberalism, romanticism and the growth of the individualistic bourgeois *Rechtsstaat* that Schmitt identified in *Political Romanticism*.[143] In his preface to the second edition, he spoke of the 'romantic subject', where we encounter a 'certain kind of human being' with a specifically romantic relation to the world.[144] This relation necessarily justified the political status quo by transforming all performances to aesthetics, antithetical to the political. Through this reduction of the world to aesthetics, this romantic subject could 'shift the intellectual centre onto [him]self', making the individual his own

[141] John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Oxford: Wiley Blackwell, 2013), 31. This 'heightened dissimilarity' is not of the same sort as Ankersmit's account of representation discussed in chapter one. For Milbank, Ankersmit embraces a 'naked gulf of alienation' between representative and represented that reduced both to a condition of bare life. It is the 'telos of the good' that, for Milbank, ensures the representative serves as an 'exemplar'. *Beyond Secular Order,* 149-151. Schmitt's use of Catholic representation is at best idiosyncratic, and at worst instrumental, for he combines it with a strong voluntarism each of which invoke distinct ontological relations to God. The former relies upon a Thomist analogy of being that puts forward a communal telos of the Good possessed by the representor. The Scotian univocal ontology presupposes the knowability of the Good, through which a weak voluntarism enters. The figure of the sovereign dictator is a peculiar mixing of these two traits. The implications of the distinction between analogy and univocity of being are developed throughout *Beyond Secular Order*.

[142] Schmitt, *Roman Catholicism*, 15. See also John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997), 87-88; Heinrich Meier, *Carl Schmitt and Leo Straus: The Hidden Dialogue*, trans. J. Harvey Lomas (Chicago, IL: University of Chicago Press, 1995), 47.

[143] Kelly, *The State of the Political*, 168.

[144] Schmitt, *Political Romanticism*, 3.

point of reference. In this society, 'it is left to the private individual to be his own priest'.[145]

These two tendencies of economic rationalisation and the rise of the private individual amounted to the twin pillars of neutralisation and depoliticisation that were constitutive of modern politics, the genesis of which is found, if we follow his reading of *Leviathan*. *The Leviathan in the State Theory of Thomas Hobbes* is a curious text. It was written in 1938, a few years after his exile from the Nazi party. Schmitt claimed in a 1973 letter to Hansjörg Viesel that the work was an 'unnoticed' response to Walter Benjamin's *Origins of the German Tragic Drama,* with whose author he claimed to have been in 'daily contact'.[146] The text singled out 'Spinoza, the liberal Jew' as the individual who exploited the 'barely visible crack' in Hobbes' state theory.[147] It was a work written for an eminent Jewish philosopher, decrying the work of a Jewish philosopher shortly after Schmitt left the Nazi party. It is little surprise that a great deal of ink has been spilt over the book's apparent anti-Semitism.[148] It is nevertheless useful to read this text in a different fashion, focusing instead upon the tension that Hobbes inaugurated.

Leviathan, Schmitt wrote, derived its political strength from the mythical symbolism it invoked, though it constructs a chain of signification that ultimately collapsed under its own weight. Schmitt summarised:

> 'when an author employs an image like that of the leviathan, he enters a domain in which word and language are no mere counters that can be used to

[145] Ibid., 20.

[146] See Horst Bredekamp, "From Walter Benjamin to Carl Schmitt, via Thomas Hobbes," *Critical Inquiry* 25, no. 2 (1999): 259. Benjamin captured the peculiarity of this relationship in a four-word note written in April 1930. It read 'Schmitt / Agreement Hatred Suspicion'. See Walter Benjamin, *Gesammelte Schriften, II.3*, ed. Rolf Tiedemann and Hermann Schweppenhäuser (Frankfurt am Main: Suhrkamp, 1991), 1372. On the affinities between Schmitt and the Frankfurt School, Ellen Kennedy, "Carl Schmitt and the Frankfurt School," *Telos* 71(1987); Samuel Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt," *Diacritics* 22, no. 3/4 (1992); Marc de Wilde, "Meeting Opposites: The Political Theologies of Walter Benjamin and Carl Schmitt," *Philosophy and Rhetoric* 44, no. 4 (2011).

[147] Carl Schmitt, *The Leviathan in The State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, ed. George Schwab, trans. George Schwab and Erna Hilfstein (Chicago, IL: University of Chicago Press, 2008), 57.

[148] For example, Carlo Galli, *Janus's Gaze: Essays on Carl Schmitt*, ed. Adam Sitze, trans. Amanda Minervini (Durham, NC: Duke University Press, 2015), 78-96; Thomas Heerich and Manfred Lauermann, "Der Gegenzats Hobbes-Spinoza bei Carl Schmitt," *Studia Spinozana* 7 (1991); Miguel Vatter, "Schmitt and Strauss as Readers of Hobbes and Spinoza: on the Relation between Political Theology and Liberalism," *CR: The New Centennial Review* 4 (2004).

> calculate worth and purchasing power. …Hobbes used this image because he considered it to be an impressive symbol. He failed to realize, however, that in using this symbol he was conjuring up the invisible forces of an old ambiguous myth'.[149]

The Leviathan could never serve as the *katechon*, for approaching the day of judgement, the Kabbalistic myth goes, the leviathan would become entangled in combat with the behemoth. The fight of the great sea monster against the great land beast resulted in their mutual deaths whilst the Jews, the people with no *nomos*, stood by and watched.[150] That Schmitt identified Spinoza as the individual who brought the Leviathan to its knees is not what is important. The name 'leviathan' invested in the state a religious mystique, but that image 'was inadequate to the system of thought to which it was applied in historical reality and it perished as a result'.[151] The process had begun in the 'barely visible crack' Hobbes had left in his own work.[152]

For Schmitt, Hobbes' Leviathan was a complex of literary symbol that combined three distinct representations of God: the sea-monster of Job 41; the Platonic conception of the *mákros ánthropos* wielding the symbolism of the spiritual and secular realms; and the state as an *automaton*.[153] Hobbes' State was more than just a commonwealth, according to Schmitt. It was a 'mythical totality', a chimera 'composed of god, man, animal and machine'.[154] The mechanical attribute of the Leviathan was what would ultimately undermine the mythical totality, for the mechanisation of the 'huge man' of the state 'absorbed' the personalistic elements of the sovereign into the mechanisation process. Leviathan would become 'nothing other than a 'gigantic mechanism in the service of ensuring the physical protection of

[149] Schmitt, *Leviathan in the State Theory*, 81.

[150] Ibid., 9.

[151] Ibid., 82. This is where Schmitt takes inspiration from Walter Benjamin. Benjamin's critique of theological inspired absolutism in *Trauerspiel* rested upon a dialectical tension between the absolute prince's divine image of the representative of history and his corporeal persona, revealing the *in*decision in the sovereign's hubris. It is this same dialectical tension between divine imagery and a corporeality that cannot bear the weight of the abstraction proposed that appears in Schmitt's reading of *Leviathan*. Walter Benjamin, *The Origin of German Tragic Drama*, trans. John Osbourne (London: Verso, 2009), 69-72.

[152] Schmitt, *Leviathan in the State Theory*, 57.

[153] Ibid., 32.

[154] Ibid., 19. See also Carl Schmitt, "The State as Mechanism in Hobbes and Descartes," in *The Leviathan in the State Theory of Thomas Hobbes*, ed. George Schwab (Chicago, IL: University of Chicago Press, 2008).

the governed'.[155] In doing so, the covenant, the 'spark of reason' that flashes and ensures consensus, came to be something entirely different to the state.[156] It was a rationality absorbed into the mechanism of the machine.

Schmitt was perfectly aware that this identification of 'mechanism' was received quite differently in the seventeenth century compared to the 19th and 20th. Whilst for Hobbes this machine represented a 'highest human creativity', it had, in a post-Weberian world, become an 'inanimate, utilitarian body'.[157] This occurred because, constructing his state theory, Hobbes left open another point of access. Hobbes allowed for a thin pluralism when he inaugurated a distinction between inner and outer faith. This is encapsulated in his account of the miracle.[158] The miracle was 'what the sovereign state authority commands its subject to believe to be a miracle'.[159] However, accepting the sovereign's command was only a *public* duty, whilst 'a private man has alwaies the liberty…to beleeve, or not to beleeve in his heart, those acts that have been given out for Miracles'.[160] So long as a subject retained the basic distinction between what they privately believed, and what they outwardly demonstrated, they did no harm to the state. It was with this that Schmitt took issues, for, on his reading, the unity of religion and politics was 'ruptured' precisely because this account of the miracle introduced an 'agnosticism' that could only result in the emptying out of the content of a public religion.[161] Analogously, if, for Hobbes, constituent power was to provide a flight of the imagination through which individual bought in to fiction of the state, the distinction between public obedience and private belief risked this symbolic enterprise.

This was Schmitt's decisive critique of Hobbes' constituent power. In *The Concept of the Political,* Schmitt praised Hobbes, because he was one of a select few

[155] Schmitt, *Leviathan in the State Theory*, 34-35.
[156] Ibid., 33.
[157] Ibid., 42.
[158] Gabriella Slomp has convincingly argued that work Schmitt expects of the Hobbesian miracle is 'untenable'. "The Liberal Slip of Thomas Hobbes's Authoritarian Pen," *Critical Review of International Social and Political Philosophy* 13, no. 2-3 (2010). I am less interested in the tenability of his argument, but rather the imaginary that it inaugurates.
[159] Schmitt, *Leviathan in the State Theory*, 55.
[160] Hobbes, *Leviathan*, 478.
[161] Schmitt, *Leviathan in the State Theory*, 56.

'genuine political theorists', by virtue of the fact that he presupposed man to be evil.[162] The Hobbes that Schmitt admired was not the 'Hobbes, the social contract theorist' but 'Hobbes, the state of nature theorist'. The two must be separated, for the former necessarily supposed the negation of the latter, and with it the negation of the political itself (or at least the elevation of enmity to the international realm).[163] Hobbes provided too great a space for individual private conscience, and not enough for a collective public will, which was expressed only in the most minimal sense—through the will of the state. Schmitt's perspective in this text stood very close to his earlier critique of the bourgeois *Rechtsstaat*. 'Take a state theory', Schmitt writes, 'in which a state acts as a unity through organs whose operation creates the will of the state'. Such a state theory understood the constituent power as 'an attempt to transform the people as such into an organ of the state'.[164] The people 'can only respond yes or no. They cannot advise, deliberate, or discuss…above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them'.[165] In this formulation, the state could only, in the final instance, fall silent, becoming a technical neutral apparatus. This, for Schmitt, was the definitive blow to Hobbes argument. The transformation of the state into a neutral apparatus was coeval with the denial of a space for collective identity. The account of the miracle emptied the public whilst placing all identity in inner beliefs.

Part of Schmitt's point was that this overly mechanistic approach to thinking about the energy that mobilised the state could not grasp the ghostly political aspect of the constituent power. The most pressing shortcoming was that it instead conceived of the energy of the state as one that inevitably faded into neutralisation and depoliticisation. Schmitt, unlike Hobbes, pushed apart the separation between the will of the constituent power and the apathetic mechanisms of the technical-neutral state. It is therefore necessary to challenge that position that reads Schmitt as

[162] Schmitt, *The Concept of the Political*, 61.

[163] This is Leo Strauss's famous reply to the first draft of *Concept of the Political*. "Notes on Carl Schmitt, *The Concept of the Political*," in *The Concept of the Political*, ed. George Schwab (Chicago, IL: University of Chicago Press, 2007), 105-06.

[164] Schmitt, *Dictatorship*, 122.

[165] Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2004), 89.

a combination of 'Thomas Hobbes's absolutist concept of sovereignty and Emmanuel Sieyès's notion of *le pouvoir constituant*'.[166] There are, of course, a number of ways Schmitt does draw upon their thought in combination,[167] but it is important to recognise also Schmitt's radical overturning of the way in which constituent power operated. The enigmatic notion of the *katechon* seems to be an appropriate tool for understanding the direction in which Schmitt channelled the energy of the constituent power.

When Schmitt distinguished his 'third moment' of democracy, he identified a people who 'persist' as an entity, 'not mediated by previously defined normative systems…or fictions'.[168] This, of course, was untrue. The people were not subject to mediation by a *legal* fiction, and this was certainly the sense in which Schmitt intended this phrase. Nevertheless, across his works, Schmitt carefully constructed another fiction, or political imaginary of his own, one that drew upon the tools of political theology to direct the people as the constituent power to another end, namely, the end of redeeming the political aspects of the state from the impending threat of technical-neutrality.

'"People" is a concept', Schmitt wrote, 'that becomes present only in the *public* sphere'. The two existed together: 'no people without the public and no public without the people'. It was their '*presence*' that initiated the public, a place where representation was impossible. 'The Public' was for Schmitt, 'essential for all political life', though precisely what is missing in his contemporary regimes of constitutional democracy, which favoured secret ballot over the appearance of the public.[169] Secret balloting was evidence only of the complete privatisation of the state and of the public: there was no common will.[170] An 'intensive' democracy required 'government by public opinion' which was impossible through aggregative methods of balloting. Only in the public sphere could the people generate a 'confidence' that preserved the

[166] Kalyvas, *Politics of the Extraordinary*, 88.
[167] See especially Kelly, "Carl Schmitt's Political Theory of Representation."
[168] Schmitt, *Constitutional Theory*, 271.
[169] Ibid., 271-3.
[170] Ibid., 274.

distinctly political form of the state.[171] The people, in short, was a concept that characterised a particularly *political* will-formation within the public sphere.

For Schmitt, it was this that was related to the people's identity as constituent power. The intervention of the people as a third moment of democracy may, as Kalyvas argues, have been an 'apocryphal act of sovereignty', though it was not one directed toward the activity of ruling, but one that endeavoured to redeem the legitimacy of the that act through a politicised public opinion by supplementing the formal legislative procedure with the ornamentation of an essential political decision.[172] In celebrating the intensively political aspects of the people as constituent power, Schmitt understood this 'third moment' of democracy to characterise an intervention that sought to redeem the state. To this effect, constituent power, as both a decision by a political entity over the type and form of their political unity, and a practice of acclamation in the public sphere, was not a process of legislation, or of rule, nor an identification of sovereignty. Constituent power was a point of popular politicisation that was opposed to the form of the bourgeois *Rechtsstaat*. Constituent power was an authentic expression of political vitality that transformed 'the people' into a symbolic resource, and sought to acclaim the personalistic representation of the *Reichspräsident*, against the listless, depoliticising neutrality of the *Rechtsstaat* constitution which served only to fragment the popular will.[173]

The figure of the *katechon* was the theologico-political ornamentation of this imaginary, for the acclamatory practice of constituent power was to 'withhold' the neutralising tendencies of the *Rechtsstaat*, and redeem the authentic political constitution—that is to say, the state. Critically, this is not the same as Kalyvas's point that Schmitt's constituent power 'points toward' Arendt's civil disobedience. For Schmitt, the antagonism was between the constituent power and the tendencies of depoliticisation, whilst the site of contestation was the content and meaning of the

[171] Ibid., 278.
[172] Ibid., 155.
[173] Jeffrey Seitzer and Christopher Thornhill, "An Introduction to Carl Schmitt's *Constitutional Theory:* Issues and Context," in *Constitutional Theory*, ed. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), 40.

state.[174] If the public 'enacted' constituent power it was not one that creates the law, or even, as in Arendt's civil disobedience, sought to reconcile the execution of the law with its spirit. Constituent power served as the pivot within a theologico-political imaginary, through which citizens were to understand their place and their role in relation to the state. Just as the others examined in previous chapters, the particular morphology of constituent power supplemented the claim to a collective political identity by organising the terms and direction of that collective's actions. For Schmitt, the activity of will formation within the public sphere was one guided by an imaginary organised by a constituent power that sought to preserve the state from the depoliticising tendencies of the *Rechtsstaat* form. For Schmitt, the constituent power did not create the law, nor did it govern. If depoliticisation was to be understood as the 'antichrist', the constituent power as a 'Public' was the *katechon* that restrained the coming 'apocalypse' of liberal neutrality and technical progress.

Conclusion

Carl Schmitt's constituent power is particularly interesting because it entailed so innovative a redescription of the concept without breaking from the primary objective of constructing a political imaginary capable of relating state-form to political unity. I have sought to demonstrate this by reading his account against that of Sieyès and Hobbes in order to prise open the differences that are too often minimised or elided. I do not take these to be subtle or minor modifications to the conceptual make-up, but changes that tend toward inverting its meaning. In each instance, Schmitt's argument pushed back against those formulations of constituent power that rendered it part of a process that assists in constructing the politically neutral institution of the modern liberal state. This was captured in the character of a 'ghostly existence' that, for Schmitt, had eluded previous scholars. This ghostly existence was twofold. First, constituent power was to be understood through the priority of the political over the juridical. For Schmitt, previous scholars had this

[174] For an examination of the ontological 'openness' of the political against the closure of the rational-neutral order and depoliticising tendencies of 'progress', see Lievens, "Singularity and Repetition in Carl Schmitt's Vision of History."; Mika Ojakangas, "Philosophy of "Concrete" Life: From Carl Schmitt to Jean-Luc Nancy," *Telos* 132 (2006).

relation backward. In privileging the legal dimension of the constituent power, it was rendered at best an aristocratic account of representation,[175] and at worst, a merely formal concept of constitutional revision.[176] In each instance the *concrete* expression of constituent power was lost. Second, the ghostly existence is found in the political ordering for which Schmitt subtly employed the tools of political theology in order to hold apart the political from the legal, and maintain the priority of the former over the latter. In doing so, Schmitt identified constituent power not with a constitutionally mediated institution, but a fundamentally unconstitutional state of being that remained permanently in excess of any technical-juridical representation. This was in acute contrast to how either Hobbes or Sieyès employed the concept, because both, in binding constituent power to a representative union, explicitly sought to curtail the instability the concept might present.

The decisive movement of Schmitt's constituent power amounts to the identification of the concept with an authentic expression of 'the Political'. Nevertheless, in the course of this 'politicisation', he did not separate constituent power from state-form. Instead, Schmitt geared this towards an interpretation of constituent power as a *katechontic* force that could preserve the absolute constitution of the state by restraining the depoliticising tendencies of the liberal *Rechtsstaat,* through an energising account of the Public. There is a far more troubling aspect to this depiction. The sovereign dictator is the personal embodiment of the unconstitutionable will of the people. This was not a mechanical representation of the constituent power as the Leviathan was, but an eminently theologico-political one. Schmitt's 'Catholic sharpening' of representation ensured the commission of the sovereign dictator was derived from the ethical perfectibility they exhibited. The binding of the people as constituent power to the sovereign dictator was one that could arise entirely separately from the institutions of the state. In concrete terms, and not the mystical language of political theology, the partitioning of constituent

[175] Schmitt, *Constitutional Theory*, 128.
[176] Ibid., 146.

power and sovereign dictator from the neutral *Rechtsstaat* was one that called for a populist project of redeeming the state.[177]

Though Schmitt did not break constituent power from, but directed it toward revitalising a theory of concrete state-form, the separation he inserted between constituent power and the *Rechtsstaat* form provided the tools for others to attempt to break constituent power more radically from constituted power.

* * *

[177] On the connection between political theology and populism, see Arato, *Post-Sovereign Constitution Making*, 269-98; Yannis Stavrakakis, "Religion and Populism in Contemporary Greece," in *Populism and the Mirror of Democracy*, ed. Francisco Panizza (London: Verso, 2005). The explicitly moralising nature of religious claiming has proved prominent in Latin American populism. Carlos de la Torre, *Populist Seduction in Latin America: The Ecuadorian Experience* (Athens, OH: Ohio University Press, 2009), 143.

5: In Search of Divine Violence: Potentiality of Constituent Power in 'Laboratory Italy'

Antonio Negri's long-time collaborator, Michael Hardt, has suggested that the Italian Left represented something entirely anomalous with respect to other European countries, in terms of its size, intensity, creativity, and duration, with a 'laboratory'-like character of political experimentation.[1] This chapter seeks to capture the distinctive account of constituent power developed by Negri in the years after his imprisonment. for his role in the murder of Aldo Moro. In these years, Negri recognised the juridical theory of constituent power to be part of a much deeper expansion of political power in late modernity. At times informed by the autonomist Marxism of Laboratory Italy, Negri's intent was to think beyond the dualism of constituent and constituted power in order to unhook the former from the latter. The upshot of this is a dramatic revision of the grounding of constituent power, in terms both of its conceptual usage and political implications.

For Negri, this supposed the shift of constituent power from a juridical to an ontological question; from a political institution that manifests in a status ascribed to a political subject—that is, the constituent power as the founder of the constitutional order—to a general account of power across social fields—constituent power as *potentia*. To this extent, Negri definitively understands constituent power as a

[1] Michael Hardt, "Laboratory Italy," in *Radical Thought in Italy: A Potential Politics*, ed. Paolo Virno and Michael Hardt (Minneapolis, MN: University of Minnesota Press, 1996), 2. For an overview of the politics of the Italian Left in the years leading up to Negri's arrest, see Timothy S. Murphy, "Books for Burning," in *Books for Burning: Between Civil War and Democracy in 1970s Italy*, ed. Timothy S. Murphy (London: Verso, 2005); Steve Wright, *Storming Heaven: Class Composition and Struggle in Italian Autonomist Marxism* (London: Pluto, 2002); Çigdem Çidam, "A Politics of Love? Antonio Negri on Revolution and Democracy," *Contemporary Political Theory* 12, no. 1 (2013).

particular capacity for action. For Negri this is an attempt to sever the conceptual connections around which uses of constituent power had oscillated, and how constituent power had previously organised political vocabularies, namely through the triadic relation between the self-understanding of collective political subjects, the account of political origins, and the symbolic order of law.

In spite of this, constituent power still serves as a pivot within a particular political imaginary for Negri, one that he sought to naturalise. His treatment of the concept as a capacity for action is both central to the sort of morphology he constructed, as well as an attempt to mask its association with the imagining of a collective identity, by shedding some of the ornamentation in favour of an image of unconditioned power. This imaginary is one that he associated with an open, pluralistic identity of a multitude mobilised by their crude labour power. The constituent power of the multitude, moreover, is one he positioned in radical opposition to the law and constituted power. On his reading, constituted power attempted to capture and channel constituent power, and so an 'authentic' constituent power was not a power to constitute law, but one that resisted it.

More serious to Negri's argument, because he relied upon a comparatively 'thin' account of constituent power as a capacity for action, there are a series of unintended consequences to the account that he constructed. By examining his dialogues with Giorgio Agamben, I argue that Negri's polemic cannot sufficiently oppose constituent power with constituted politics as he hoped, for his understanding of constituent power lapses into forms of activism readily dealt with in civil society of the liberal constitutional state.

I develop this argument in four stages. I begin, in part I, by delineating the 'crisis' of constituent power that emerges during the early 1990s, shown in Jacques Derrida's reading of Walter Benjamin's *Critique of Violence*. This 'crisis' emerged in critical legal studies following the collapse of the Soviet Union and the absence of an alternative to liberal democracy. Theorists were concerned that revolutionary activity could do nothing more than reproduce the injustices of the western legal system. The demonstration of this is significant for two reasons. First, it points towards a

normative shift in the usage of constituted power, which was not used to describe the law-making institution of parliament, but constituted power as a police order. Second, it allows me to identify the limitations of Derrida's interpretation of this crisis, against which Negri and Agamben positioned their claims.

Parts II and III reconstruct Negri's innovative redescription of constituent power. I examine Negri's rethinking of constituent power, which entailed its 'restoration' as an ontology of power, rather than a juridical category. His use of Spinoza, I argue, is of particular importance for two reasons. First, through Spinoza's ontology, Negri identified an alternative tradition of politics that challenged the 'crisis' of constituent power. Second, Negri interpreted Spinoza's ontology in such a way that pulled in a direction quite different from both Schmitt's 'mystical' reading as well as Spinoza's own political writings. Part three examines the temporal structure of this constituent power through Negri's interpretations of Machiavelli and Marx.

In part IV, I examine Giorgio Agamben's dialogue with Negri. For Agamben, the 'crisis' of constituent power is traced back to the Aristotelian distinction between potentiality and actuality. This has implications for the way in which Negri considered constituent power. In particular, for Agamben, the 'Political' conceptualisation of constituent power exemplified by Negri was a sort of political 'theatre' that did not challenge the liberal democratic state, but only added to its legitimacy. I conclude with the more fatal point that Negri's formulation of constituent power is blind to this because he organised constituent power around a binary world-view, and dispositions of 'being-against' constituted politics, that cannot provide the adequate tools to assess the contemporary world.

I: The Crisis of Constituent Power

There is a particular political ontology of Modernity that, on Negri's account, began with Hobbes, continued though Rousseau and Hegel, and manifests in a crisis. This dominant though oppressive tradition, which began with contractualism, channels the possibility of a radical, law-making power into the figure of the

transcendent sovereign.[2] The crisis that, for Negri, this political ontology imposed upon European thought was one that ensured all revolutionary action was lead back into the exploitative figure of the sovereign. To illustrate this crisis, I will briefly examine Walter Benjamin's *Critique of Violence*. Though written in the middle of the Weimar era, the work took on a second life following Jacques Derrida's compelling, if problematic, presentation of the text at the Cardozo Law School in October 1989, a colloquium that inaugurated a turn toward critical legal theorising with continental philosophy.[3] I contrast this with Giorgio Agamben's reply, much of which is shared with Negri. Though I am primarily interested in Negri's account of constituent power, Agamben's reply is used because it is more sustained than Negri's, which is brief and largely conducted through footnotes. The purpose of this discussion is to open up the space through which Negri—and later, Agamben—addressed this crisis.

In *Critique of Violence*, Benjamin warned that any study of violence is difficult, because the dominant schools of legal thinking—natural and positive law—are only ever capable of assessing the question of violence as a means to an end. Such assessment renders the means just by virtue of the end that it brings into being, transforming violence itself into a normatively empty activity.[4] Consequently, Benjamin addressed the way in which law was related to violence. He wrote that 'all violence as a means is either lawmaking or law-preserving'. Violence serves two functions in relation to the law: either it institutes law, or it preserves that instituting act. 'If it lays claim to neither of these predicates', Benjamin warned, 'it forfeits all validity'.[5] Two critical points follow from this statement. First, the distinction that

[2] Negri, *Insurgencies*, 29.

[3] See Jacques Derrida, "Force of Law: The "Mystical Foundation of Authority"," *Cardozo Law Review* 11 (1990). *Insurgencies* was first published in Italian in 1992, at which time Negri was working at *Université Paris-VIII*. The core argument concerning the ontology of political power was first developed in *The Savage Anomaly* a decade earlier. It in *Insurgencies* that this is applied to the field of law. Whilst it is clear that he was familiar with the works of Derrida and Benjamin at the time of writing, it is less clear whether Derrida's *Force of Law* was the specific impetus behind the problematic developed within *Insurgencies*. Negri used the arguments from *Insurgencies* a few years later with specific reference to both texts by Benjamin and Derrida, though it is uncertain whether this was intended at the time of *Insurgencies,* or whether an *ex post facto* association. Michael Hardt and Antonio Negri, *Labour of Dionysus: A Critique of State Form* (Minneapolis, MN: University of Minnesota Press, 1994), 290-95.

[4] Walter Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz (New York: Schocken, 2007), 277-81.

[5] Ibid., 287.

Benjamin inaugurated between the two modes of violence maps on to the distinction between constituent and constituted power in a way that is more than a simple analogy. Law-making violence and constituent power are evidently relatable to the extent that they each identify the instituting moment of law. The proximity is more complex for the relationship between law-preserving violence and constituted power. If constituted power is identified by the writing of ordinary laws—as it was in Sieyès—law-preserving power is not a legislative power—even in a limited form—but a responsive one tasked only with preserving that which has been instituted. As Benjamin's interpretation of law-making and law-preserving violence gained currency by theorists during the 1990s, it was mapped on to the constituent–constituted distinction.[6] The implication of this slip was to alter the meaning attributed to constituted power: not parliament but police order.

If Benjamin's reading put forward a fraught though encompassing opposition between law-making and law-preserving violence, his point was to demonstrate the revolutionary law-making violence was intimately connected with the law-preserving police order, exhibited by the example of the death penalty. The death penalty is not a means of 'preserving' the law, for it is always a disproportionate punishment, and necessarily so. In deciding over life and death, the limit conditions of the legal order are determined, and the violent 'origins of law jut manifestly and fearsomely into existence'.[7] The death penalty is the instance that 'law reaffirms itself' not through preservation, but reestablishment.[8] The example of the death penalty points toward how both law-making and law-preserving violence are always 'implicated in the problematic nature of law itself'.[9] In Derrida's extension of Benjamin's argument, 'that which threatens law [i.e., law-making violence] already

[6] See especially Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998), 39-48.

[7] Benjamin, "Critique of Violence," 286. The decisionism of this stance is relatively clear. For the relationship between Carl Schmitt and Walter Benjamin, see the final section of chapter 4. *Critique of Violence* was written in 1921, the same year as Schmitt published *Dictatorship*. Agamben has recognised Benjamin's deconstructive move here to be a reply to Schmitt's distinction between commissarial and sovereign dictator. The decisionism of *Political Theology* was a 'precise response'. Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 32-40, 52-64.

[8] Benjamin, "Critique of Violence," 286.

[9] Ibid., 287.

belongs to it, to the right to law, to the origin of law'.[10] For Benjamin law-making violence did not establish law as an 'end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power'.[11] So long as the end of law-making violence was the institution of law, violence remained within the 'rotten' co-implication.[12]

The crisis of constituent power, which became a characteristic of 1990s legal and democratic theory, manifested in this revelation that founding inevitably led back into just another 'rotten' legal order.[13] Constituent power had, of course, long been understood this way, for it always gave way to constituted power. Nevertheless, the interpretation that gained currency through Derrida's interpretation of Benjamin became all the more 'rotten' for it was co-implicated not with constituted power-as-legislature, but constituted power-as-police-order.

It is against this background that Antonio Negri and Giorgio Agamben contributed two important critical interventions on the concept of constituent power: Negri's *Insurgencies,* and Agamben's *Homo Sacer*. Neither thinker was satisfied with Derrida's interpretation of Benjamin.[14] Derrida, after all, largely neglected the final third of Benjamin's argument, where Benjamin intended to discover a violence that went unmediated by law.[15] Benjamin located this in what he calls 'divine violence', a 'pure immediate violence that might be able to call a halt to mythic violence'. Divine violence is the force attested to by monotheistic religions, defined not by 'miracles directly performed by God' but the final moment of redemption and judgement. It is a violence antithetical to violence mediated by law in all senses: it destroys law, rather than creates; it brings redemption, rather than guilt and retribution; it strikes rather

[10] Derrida, "Force of Law," 989.
[11] Benjamin, "Critique of Violence," 295.
[12] Ibid., 286.
[13] This concern is of course equally associated with the collapse of the Soviet Union, the proclaimed 'End of History', and the depiction that liberal democracy was the only game in town. See especially Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992). Jacques Derrida continued to deal with this predicament, explicitly examining the relation between law and the 'end of history in *Spectres of Marx: The State of Debt, the Work of Mourning and the New International*, trans. Peggy Kamuf (London: Routledge, 1994). More recently, Mark Wenman has examined the relation between constituent power and the end of history in agonistic democratic theory. See Wenman, *Agonistic Democracy*, esp. 298-304.
[14] Hardt and Negri, *Labors of Dionysus*, 290-95; Agamben, *Homo Sacer*, 39-48.
[15] Benjamin, "Critique of Violence," 293.

than threatens; it is a bloodless violence that 'does not stop short of annihilation', but 'in annihilating it also expiates', for divine violence is pure power over all life for the sake of the living'.[16] It is an unmediated justice in which law is suspended and 'a new historical epoch is founded'.[17]

Derrida ended his interpretation of Benjamin before the solution of divine violence because he saw that divine violence '[did] not lend itself to any human determination, to any knowledge or decidable certainty on our part'.[18] In its very certainty, it escaped all human experience. This argument had a much longer heritage in Derrida's work, and was indicative of his deconstructive strategy that revealed the *'différantial'* structure of *archē*-writing.[19] As Agamben summarised in an early interpretation of Derrida deconstructive approach:

> 'the illusion of a full and originary presence is the illusion of metaphysics, which is embodied in the double structure of the sign…the origin is an *architrace,* which in the absence of an origin establishes the very possibility of appearance and signification'.[20]

There was, for Derrida, no origin or outside to signification, only the meaning inherent in the difference between signs and deferral of meaning to other signs. The argument of *Force of Law* was an attempt to show of law what *Of Grammatology* had shown of signification. For Derrida, it was not possible to think beyond law because law was analogous to signification; there could be no uncontaminated violence, for that was analogous to speech without signification; there could be no law-making violence that did not lapse into law-preserving violence, for such an uncontaminated origin was the illusion of metaphysics.

When Agamben challenged Derrida's reading of Benjamin, he did so by exploiting its analogous structure with signification. As Agamben had written in *Stanzas,* originally published in 1977, though Derrida achieved a 'salutary critique' of

[16] Ibid., 297.
[17] Ibid., 300.
[18] Derrida, "Force of Law," 1033.
[19] See especially Jacques Derrida, *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore, ML: Johns Hopkins University Press, 1997), 27-73.
[20] Giorgio Agamben, *Stanzas: Word and Phantasm in Western Culture*, trans. Ronald L. Martinez (Minneapolis, MN: University of Minnesota Press, 1993), 155-56.

metaphysics, he did not accomplish a 'step-backward-beyond' signification.[21] That is to say, for Agamben, though Derrida's deconstructive strategy innovatively critiqued signification by demonstrating that there could be no one-to-one correspondence between signifier and signified, Derrida could not call into question signification itself because his critique remained internal to the system of signification[22] That Derrida saw no place for divine violence within an account of law—because its certainty escaped human experience—was indicative of his inability to think beyond signification, and therefore beyond the law. Yet, for Agamben, to accept Derrida's stance, and remain within the law was to 'remain inside nihilism'.[23]

In his attempt to move beyond Derrida's interpretation, Agamben put pressure upon Benjamin's final line: 'Divine violence…may be called sovereign violence'.[24] Though one would be tempted to believe that even divine violence reverted again into the law, for Sovereignty too is mediated through theological symbolism, Agamben wants to read this line differently. Whilst sovereign violence inaugurated a state of exception—the instance in which the law is suspended in order to conserve itself—divine violence went a step further: it inaugurated a 'real' state of exception that does not posit or conserve the law, but 'deposes it'.[25]

Both Agamben's and Negri's response to the 'crisis' was to devise a form of political agency that could go unmediated by the law. To do so, for Agamben, involved halting the juridical machine and revealing the central fiction that held it together, by withdrawing from modern life and 'living otherwise' to the law.[26] For

[21] Ibid., 156.

[22] For an excellent comparative reading of Agamben and Derrida to which my interpretation is indebted, see Kevin Attell, *Giorgio Agamben: Beyond the Threshold of Deconstruction* (New York: Fordham University Press, 2015).

[23] Agamben, *Homo Sacer*, 60.

[24] Benjamin, "Critique of Violence," 300.

[25] Agamben, *Homo Sacer*, 65. Agamben seems to have in mind Benjamin's eighth thesis on the philosophy of history, see Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations*, ed. Hannah Arendt (New York: Schocken, 2007), 257.

[26] Agamben, *State of Exception*, 86-87. On 'living otherwise' to the law, see Giorgio Agamben, *The Highest Poverty: Monastic Rule and Form-of-Life*, trans. Adam Kotsko (Stanford, CA: Stanford University Press, 2014); Giorgio Agamben, *The Use of Bodies*, trans. Adam Kotsko (Stanford, CA: Stanford University Press, 2016). Many have (mistakenly) criticised Agamben for turning to messianic abandonment, see Richard Bailey, "Up Against The Wall: Bare Life and Resistance in Australian Immigration Detention," *Law and Critique* 20, no. 2 (2009); Simon Behrman, "Giorgio Agamben in Perspective," *International Socialism* 140 (2013); Robert Sinnenbrink, "From Machenschaft to Biopolitics: A Genealogical Critique of Biopower," *Critical Horizons* 6, no. 1 (2005); Slavoj Žižek, *In*

Negri, devising an alternative form of political agency involved a political ontology not defined by the figure of the transcendent sovereign. This, for Negri, had been Derrida's error. When interpreting Benjamin's 'Judaic notion' of divine violence, he had done so through the 'Judaism of Emmanuel Levinas'. The implication had been to associate divine violence with a mystical transcendence. Negri, however, preferred the 'heretical Judaism of Spinoza', a pantheist Judaism.[27]

I have sought to show the particular conceptual problem that Agamben and Negri each confronted during the 1990s, that took the form of a 'crisis', through which constituent power could provide no alternative to the neoliberal state. Negri thought a new political ontology was required. In the following sections, I reconstruct this ontology, derived principally from his interpretation of Spinoza. Doing so, moreover, allows me to show how Negri's interpretation of Spinoza differed from Schmitt's, and the implications of this for his account of constituent power.

II: Constituent Power as Political Ontology

Negri wished to redeem constituent power, and that redemption involved reconceptualising the political ontology that undergirded it. Doing so would facilitate the movement of constituent power from a category of law-making violence to a category of 'divine violence'.[28] When conceptualised through a political ontology of transcendence, constituent power was read from a perspective internal to the system of legal signification. There were two possible consequences to this. The first, exemplified by Derrida's reading, was to understand constituent power only ever within the legal system it purported to create. The second, which Negri took to be 'extremely paradoxical', understood constituent power as an 'imperative act…rising from nowhere [*tirant du néant*] and organising the hierarchy of powers'.[29] Neither

Defence of Lost Causes (London: Verso, 2007), 337-39. This is in part due to the esoteric mysticism of his early efforts to develop an 'inoperative' praxis. See Giorgio Agamben, *The Coming Community*, trans. Michael Hardt (Minneapolis, MN: University of Minnesota Press, 1993).

[27] Hardt and Negri, *Labors of Dionysus*, 330, fn.8.

[28] Ibid., 294.

[29] Negri, *Insurgencies*, 2. Negri takes this definition from Émile Boutmy, *Études de Droit Constitutionnel: France–Angleterre–États-Unis* (Paris: Plon, 1885), 238.

perspective, on Negri's account, could locate this 'nowhere' because their accounts were plagued by a juridical myopia. This myopia pulled the concept in peculiar directions, at once affirming and denying it, absolutizing and limiting it. The paradox was that though all-powerful, constituent power must be limited by the legal order in order to be comprehensible. It became a 'pale reproduction' that operated 'intermittently within well-defined limits and procedures'.[30]

It was the location of 'nowhere' from which constituent power rose that interested Negri. He was very much aware that this question was not a new one, but similar to that explored by theorists of *Staatsrechtslehre* in Weimar Germany, though, in remaining internal to juridical theory, the Weimar jurists were unable to resolve the dilemma.[31] There were, however, acute differences between Negri and these German jurists. Kelsen, for example, was engaged in the Sisyphean task of establishing the legal first instance in order to close the normative lacuna that renders the symbolic order of Law uncertain. Conversely, for Negri, the need to identify the law as a normatively closed system was itself damaging to constituent power, for it was this that related constituent power, as law-making violence, to the whole juridical order of sovereign power through its co-implication with law-preserving violence.

The point, for Negri, was that 'when [constituent power] gets instituted it ceases to be [constituent power] and thus declares itself as never having been such'.[32] This framing of the problem is particularly polemical. An 'authentic' constituent power had no place within a constituted legal order. By this stage, Negri had already conceived the conceptual morphology of constituent power in a radically innovative

[30] Negri, *Insurgencies*, 2-3. A note should be added, if only to unpack Negri's account of 'crisis'. For Negri, this 'crisis' emerges from the intractable relationship between politics and law, and so is one that political thinkers for centuries—in spite of their efforts—have been unable to think beyond. The thinkers of the French and American revolutions ultimately failed in their tasks to affirm the constituent power of the revolutions. See *Insurgencies,* 141-250. This neglects that they were asking distinctly different questions to each other—and to Negri. Put simply, for Sieyès, constituent power was always to be employed within well-defined limits; it was not thought of as an antagonistic strength that Negri attributes to it. This is where Negri's history goes wrong. The distinctive articulations of constituent power do not arise from a single irreducible crisis that persists within the concept but rather the concept's utilisation for qualitative different ends.

[31] Ibid., 4-8. Negri is concerned with the work of Kelsen, Smend and Schmitt. It should be noted that Negri's account of Weimar legal thought in these pages is a particularly uncharitable one.

[32] Ibid., 22.

way. This hung upon the distinction he introduced: 'the phrase "expression of strength [*potenza*]" can never mean "institution of power [*potere*]"'.[33] For Negri, this amounted to a distinction between power as a creative capacity (*potenza*), and power as a means of domination (*potere*). The opposition between *potenza* and *potere,* which Negri understood to govern all social relations and to which he only applied to the juridical treatment of constituent power, was first developed through a reading of Spinoza in his earlier work *The Savage Anomaly*. This formed the basis of what he took to be a counter-tradition of political theorising that runs from Machiavelli through Spinoza and Marx, against the dominant political ontology of the Hobbesian-Rousseauvian-Hegelian tradition. If identifying the 'nowhere' of constituent power amounted to redeeming constituent power as 'divine' and not 'law-making' violence, it was to be found in the counter tradition embodied most fully by Baruch Spinoza.

Although Negri first wrestled with the idea of a counter-tradition of Modernity in *Political Descartes*,[34] it is in the late 1970s that he would find the ontological grounding that would allow him to expound this tradition. In an interview with Cesare Casarino, he framed his 'return' to Spinoza as a 'need to find conceptual forms that would adequately describe the positive recomposition of power taking place at the time'.[35] For Negri, constituent power was a legal subset of labour power more generally, while constituent power's crisis was analogous to the capitalist exploitation of labour power in modernity, which had been recomposed under post-Fordist production. Consequently, it is important to begin with Negri's workerist foundations, for it was against this background that Negri turned to Spinoza.

In turning to Spinoza, Negri had been inspired, though ultimately dissatisfied with his friend Mario Tronti's effort to rethink Marxist theory and recover the

[33] Ibid. The difficultly of translating the Italian couple *potenza* and *potere*, or Latin *potentia* and *potestas* is well-known. These typically appear as 'power' in English, though Negri's acute and pivotal distinction between the two renders this problematic. Boscaglia's decision in *Insurgencies* to render the former as 'strength' does not settle this problem, for it does not capture the meaning intended. For this reason, the original Italian is added where clarification is necessary.

[34] Antonio Negri, *The Political Descartes: Reason Ideology and the Bourgeois Project*, trans. Matteo Mandarini and Alberto Toscano (London: Verso, 2007), 317-20.

[35] Cesare Casarino and Antonio Negri, *In Praise of the Common: A Conversation on Philosophy and Politics* (Minneapolis, MN: University of Minnesota Press, 2008), 135.

autonomy of the worker's identity. In contrast to the orthodox position through which the identity of the working class was produced and reproduced only through its relation to capital, Tronti wished to demonstrate a fundamental ambivalence of the working class toward capital. 'The working class *does* what it *is',* whilst the Capitalist power 'seeks to use the worker's antagonistic will-to-struggle as a motor of its own development'.[36] The critical difference between the two classes was that 'the capitalist class does not exist independently of political institutions through which…they exercise their political domination', whilst 'quite the opposite is true of the working class'.[37] The labouring activity of the working class would exist irrespective of the presence of capital, though capitalist class necessarily required that activity of labouring if their identity was to be maintained. For Tronti, the worker's labour power was constantly under threat of capture by the capitalist machinery.

Tronti's reversal of Marxist theory reinterpreted the history of capital as the 'history of successive attempts of the capitalist class to emancipate itself from the working class' through the eventual 'withering away of the working class and the untrammelled self-valorization of capital'.[38] The crisis of constituent power appeared analogous to the problem of classical Marxism, in which the identity of the proletariat was structured only in relation to capital. The response to the crisis of constituent power, which Negri developed almost twenty years later, was a juridical analogue to this. Tronti's workerist reversal, which sought to release the identity of the proletariat from capital, was equivalent to Negri's solution to the crisis of constituent power. From these workerist roots, Negri intended to conceptualise constituent power not as the power of constituting a constitution, but a subset of labour power that was ambivalent towards the constituted legal order. Like the working class's labour power, constituent power could subsist without a constituted legal order. Negri's intention, like Tronti's, was to demonstrate that the identity of

[36] Mario Tronti, "The Strategy of Refusal," *Semiotext(e)* 3, no. 3 (1980): 29.
[37] Ibid., 32.
[38] Alberto Toscano, "Chronicles of Insurrection: Tronti, Negri and the Subject of Antagonism," *Cosmos and History* 5, no. 1 (2009): 81.

the political collective who possessed constituent power was independent of any legally constituted political order.

Nevertheless, Negri took issue with the finer points of workerism, for even within workerism 'the structure was always prefigured', and so the definition of 'force', of 'tendency', of 'struggle' were already interpreted 'within a general prefiguration of the system'.[39] Workerism was never able to properly think past the orthodoxy of Marxist theory that rendered class action within a structural teleology derived from Hegel.[40] For Negri, if historical materialism was dialectical at all, it was not a dialectic of mediation and synthesis, but a 'dialectic of antagonism, rupture and opening'.[41] To read Marx in this way was not easy, but required an 'anomalous connection with Spinoza'.[42]

The decisive aspect of Negri's interpretation of Spinoza was found in the privilege ascribed to *potentia* over *potestas*. Though some question whether this distinction was one drawn *by* Spinoza,[43] Negri developed the opposition from a passage in *The Ethics,* where Spinoza appeared to contrast the two: 'God's power [*potentia*] is his very essence', whilst 'whatever we conceive to be within God's power [*potestas*] necessarily exists'.[44] In Negri's interpretation, *potentia* was the substance of power while *potestas* was a mode, that is, the transient affection of the substance of *potentia*. Put simply, *potentia* was the given capacity of producing, while *potestas* was the force directed toward an end for production.

This, on Negri's account, was contrasted for a specific polemical purpose, namely to demonstrate the 'falsity of mistaken conceptions concerning the exercise of [God's immanent] power'.[45] Negri suggested this account of power was rooted in a direct challenge to Spinoza's contemporaries' transcendental opposition between God

[39] Casarino and Negri, *In Praise of the Common*, 136.

[40] Antonio Negri, *Marx Beyond Marx: Lessons on the Grundrisse*, trans. Harry Cleaver, Michael Ryan, and Maurizio Viano (London: Pluto, 1991), 57.

[41] Michael Ryan, *Marxism and Deconstruction: A Critical Articulation* (Baltimore, ML: Johns Hopkins University Press, 1982), 205.

[42] Maurizio Viano, "Translator's Introduction," in *Marx Beyond Marx: Lessons on the Grundrisse*, ed. Jim Fleming (London: Pluto, 1991), xxxvii.

[43] Dorothy H. B. Kwek, "Power and the Multitude: A Spinozist View," *Political Theory* 43, no. 2 (2015): 179, fn.15.

[44] Spinoza, "Ethics," 56 [Pr.34-35, I].

[45] Antonio Negri, *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics*, trans. Michael Hardt (Minneapolis: University of Minnesota Press, 1991), 191.

and Nature. Repudiating the theological account of a divine God acting by will upon a fallen world, Spinoza's polemical *Deus, sive Natura* collapsed the opposition between a transcendent God and a worldly nature, to account for a highly energised nature. Spinoza's immanence took nature to be the unity of substance that is the sum of all finite things, though it is foremost a generative power. The power of nature was expressed through finite things (i.e., modes) by affecting or being affected by other finite things.[46] The human body was neither a privileged point, nor a philosophical *a priori*. It was stripped of its divine telos and rendered a body among others within the rhythmic movement of Nature. Spinoza demonstrated this point in a letter to Henry Oldenburg in which he analogised the movement of bodies to that of blood which, whilst composed of particles, is considered a whole, for in the meeting of particles each 'communicates a portion of its own motion'. Though imperceptible to a viewer, 'all parts are modified by the general nature of blood and are compelled by it to adapt themselves'. This haematic analogy was chosen to demonstrate that all bodies, when surrounded by others, were 'mutually determined' through this coextensive movement of affect and being affected.[47] These bodies, like blood, amounted to a single substance. Spinoza's eighteenth proposition assisted in capturing this point of the analogy, where he argues that 'God is the immanent, not the transitive, cause of all things'.[48] Spinoza delineated two forms of efficient cause. The transitive cause was that in which cause and effect remain distinct as causation passes over from one to the other. This was typical of Cartesian and Hobbesian mechanistic ontologies. Immanent causation, by contrast, was not captured in passing over from cause to effect; the cause effects that which cannot be separated out into an effect but remains fully within the cause. Bodies, and their capacity to affect and be affected, cannot be separated out into wilful individuals, but move as part of a single substance.

[46] Spinoza, "Ethics," 50 [Pr.28, I].

[47] Baruch Spinoza, "Spinoza's Correspondences: Letter XV, Spinoza to Oldenburg," in *On the Improvement of the Understanding, The Ethics and Correspondences*, ed. R. H. M. Eweles (Dover: New York, 1955), 291.

[48] Ibid., 46 [Pr.18, I].

This lays out the terms for the two mobilising concepts of Negri's political ontology, namely *potentia* and the multitude. Within Negri's interpretation of Spinozan immanence, one could not bracket the world into oppositions, for things remain implicated in one another. Necessity is found within freedom, and liberty within security. What, however, remained a 'real antinomy' within this ontology was the opposition between *potentia* and *potestas*:

> *Potestas*... can only mean one thing: *potentia* toward constitution, a reinforcement of meaning that the term [*potestas*] does not represent itself but merely alludes to, since the [*potentia*] of being identifies it and destroys it, poses it and surpasses it, within the real process of constitution. The reinforcement that the concept of [*potestas*] proposes for the concept of [*potentia*] is relative only to the demonstration of the necessity (for power [*potentia*]) to pose itself always against [*potestas*].[49]

That *potestas* was rendered within *potentia* was evident insofar as *potestas* was the transient mode of the substance of *potentia*. For Negri, however, this exposed an antagonistic relationship between the two. As the transient mode of *potentia, potestas* reduced the free and multidirectional flow of power to a single point of constitution. This was not a coexistence of *potestas* within *potentia,* but the negation of *potentia*. Whilst *potentia* was precisely the movement of this unity of substance—the 'constitutive inherence of the single in multiplicity'—*potestas* was the 'subordination of the multiplicity' and so, too, of *potentia*.[50]

For Negri, to accept the reduction of the substance of *potentia* to the mode of *potestas* was to accept the 'bourgeois' interpretation of Spinoza, which reduced Spinozan politics to Hobbesian politics.[51] It was in resisting this conclusion that Negri was able to interpret the power of the multitude in the way in which he did. *Potentia* and *potestas* were to be held apart. In doing so, an expansive striving [*conatus*] of all things was revealed without reducing it to a Hobbesian *conatus*.[52] Unlike Hobbes, for

[49] Negri, *Savage Anomaly*, 192.
[50] Ibid., 190-91.
[51] Ibid., 69-71.
[52] On 'conatus', see Spinoza, "Ethics," 108-09 [Pr.6, III; Sch. Pr.9, III].

whom *conatus* was the fear that drove individuals towards contractual union, the *conatus* of the Spinozan multitude brought the commonwealth into being through the associations that bodies form together.[53] There is no division between pre-political and political life. If the human body was the simultaneous movement of simple finite things, the multitude followed from this logic through striving, which was, for Negri, the decisive 'rupture with the rigid individualism pervasive in seventeenth-century thought'.[54] The multitude was not erected around a fearful contract, nor was it reducible to union as concord. It was instead the ongoing, dynamic passional association that bodies form together, one that could not be reduced to unity of any form. The multitude is always in excess of the commonwealth.

Nevertheless, the antagonism that Negri confronted between *potentia* and *potestas* was one of his own making. The antagonism that was pushed to its limits in *The Savage Anomaly* appears far less troubling in Spinoza's own political writings, where he was attentive to the importance of the State and the role of reason.[55] In Spinoza's thought, the commonwealth played a significant role in the organisation of the multitude. In *Theologico-Political Treatise,* Spinoza did not celebrate the 'capricious mind of the multitude' , as it is in Negri, but 'dispair[ed] of it, for it was governed not by reason but passion alone'.[56] Similarly, in *Political Treatise,* he stipulated that the power of the Commonwealth stemmed from the multitude 'guided, as it were, by one mind'.[57] The Commonwealth was not a fetter upon the multitude, but assisted in mediating the myriad affects that prevented the multitude

[53] Baruch Spinoza, "A Political Treatise," in *A Theologico-Political Treatise and A Political Treatise* (New York: Dover, 1951), 290. Negri himself certainly celebrated this point, but emphasised the abstraction of sovereignty rather than the institutional aspects of the Commonwealth. See Negri, *Savage Anomaly*, 198.

[54] Negri, *Savage Anomaly*, 135.

[55] The tension between Spinoza's rationalist account of liberal political institutions and Negri's emphasis upon the politicisation of an immanent ontology is derived from Negri's interpretation that 'Spinoza's true politics is his metaphysics'. Ibid., 217. This has been examined, among others, by Sandra Field, "Democracy and the Multitude: Spinoza against Negri," *Theoria* 59, no. 131 (2012); Jonathan Havercroft, "The Fickle Multitude: Spinoza and the Problem of Global Democracy," *Constellations* 17, no. 1 (2010); Kwek, "Power and the Multitude."

[56] Baruch Spinoza, *Theological-Political Treatise*, trans. Jonathan Israel (Cambridge: Cambridge University Press, 2007), 210.

[57] Spinoza, "Political Treatise," 301.

from manifesting as 'one mind'.[58] Though the *potentia–potestas* opposition was an organising distinction in Negri's ontology, it seems out of touch with Spinoza's political remarks. This antagonism of Negri's is peculiar because it seems to affirm two contrary tendencies. It first celebrated the democratic potential of desire, with the corollary overcoming of every dialectic, all division, organisation and separation. Yet, in opposition to substance monism, Negri used it to develop a strategy of bracketing that was normative as much as it is conceptual: constituent against constituted, multitude against people, autonomy against heteronomy.

The first of these tendencies is clear if I compare Negri's reading to another. The turn from Spinoza to constituent power is unsurprising, not least because Carl Schmitt too found in Spinoza an outlet to push constituent power beyond its limits. In his all-too-brief engagement with Schmitt, Negri recognised the importance to Schmitt of Spinoza.[59] A comparison is appropriate because their readings pull in different directions.

Negri's depiction of Spinoza's ontology as 'a theory of totality without closure, a constituent power without limitations',[60] drew upon Negri's theoretical engagement with Gilles Deleuze.[61] This 'reading of Spinoza, which developed in France during the 1960s, had profound differences from the dominant Hegelian interpretation, and with Weimar mysticism.[62] For Schmitt, for whom constituent power was analogous to Spinoza's *natura naturans,* an ontology of 'depth immanence' led to an emphasis upon the mystical 'transreason' that lay behind the rational., so inserting a distance between constituent power and any instituted form of political

[58] See Kwek, "Power and the Multitude," esp. 162-72.

[59] Negri, *Insurgencies*, 24, 340 fn.91.

[60] Ibid., 24.

[61] Casarino and Negri, *In Praise of the Common*, 135. For the principle works on Spinoza by Deleuze, see *Expressionism in Philosophy: Spinoza*, trans. Martin Joughin (New York: Zone, 1990); *Spinoza: Practical Philosophy*, trans. Robert Hurley (San Francisco, CA: City Lights, 2001). This is not to say there are not important differences between the approaches of Negri and Deleuze. See especially Susan M. Ruddick, "The Politics of Affect: Spinoza in the Works of Negri and Deleuze," *Theory, Culture & Society* 27, no. 4 (2010). To a lesser extent, Negri demonstrates influences from Pierre Macherey and Alexandre Matheron, Macherey in particular provides the key tool to move past the Hegelian reading in order to present Spinoza as an anti-dialectical thinker. See Pierre Macherey, *Hegel or Spinoza*, trans. Susan M. Ruddick (Minneapolis, MN: University of Minnesota Press, 2011); Alexandre Matheron, *Individu et Communauté chez Spinoza* (Paris: Minuit, 1988).

[62] These differences are most clearly developed in Antonio Negri, *Subversive Spinoza: (Un)contemporary Variations*, trans. Timothy S. Murphy (Manchester: Manchester University Press, 2004), 113-17.

will. By contrast, the surface reading of immanence characterising Negri's interpretation reduced this to a single plane of being upon which constituent power exists. Negri proposed that this reconstructed ontology of Spinoza was one that 'destroys even the faintest shadow of transcendentalism, an ontology of experience that refuses every phenomenalism'.[63] The traces of transcendentalism in the Weimar position arose from the mystical 'transreason' that operates as the axiomatic grounding of reason yet remained distant from it. There are two implications. The first pertains to the relation between reason and affect. Negri's development of a flat ontology intended to remove all rationally pre-constituted supposition in order to stress open-ended desire over reason as the ethical telos of constituent power. By contrast, in the Weimar interpretation the depth ontology rendered this on two levels, where reason remains an important aspect of governance but one kept in check but the a-rationality of the decision. When Negri flattened this, he severed the relationality between reason and affect, and the absolute priority of constituent power was affirmed. Negri conceptualised it differently, not as a political entity but a process, through which the institutional constitution of constituent power was not only one possibility among many, but a possibility that instituted a rational order that Negri took to be a corruption of constituent power itself, because rational order was radically removed from an affective expression of constituent power.[64]

The critical effect of this reconstruction of Spinozan ontology relates to the question of sovereignty. If for Schmitt, Spinoza allowed him to devise an account of constituent power that was not disfigured by the depoliticising tendencies of parliamentary representation, this is because the depth ontology allows the recognition of an a-rational limit to the rational order of things; he could hold apart constituent and constituted without the suppression of the latter. Negri's flat ontology dissolves the 'transcendental hypostasis of authority' characteristic of Hobbesian sovereignty that is no less prevalent in Schmitt. What remained was the

[63] Ibid., 115.
[64] Ibid.

'absolute self-government' of the multitude, who 'in their unfolding desire, worked toward the constitution of the common'.[65]

III: CONSTITUENT POWER, TEMPORALITY AND LIVING LABOUR

The Savage Anomaly laid the ontological groundwork for Negri's understanding of constituent power. This understanding was deepened in *Insurgencies,* where Negri was concerned primarily with the temporality of political agency. In this section, I show how Negri connected the 'crisis' of constituent power with wider socio-political dynamics that attempt to control the temporality of life. In *Insurgencies*, the opposition between *potentia* and *potestas* was understood in temporal terms, between free-play and ordering. This is not unlike the Greek distinction between *kairos* and *chronos*. For the Ancient Greeks, the inevitable cycle of birth and death was perceivable as *chronos*, which under the rectilinear conditions of Newtonian time appeared as a linear succession of events measurable by means of technologies of calendars, clocks and timetables.[66] By contrast, *kairos* was as a form of pregnant, transformational time, often depicted through the release of an arrow from a taut bow.[67] In *Insurgencies,* Negri interpreted the various political iterations of the temporal antagonism between *kairos* and *chronos* that played out through Modernity, first with Niccolò Machiavelli, through Harrington, the Federalists, Rousseau and Marx. In each instance, the antagonism was reconfigured, but never ultimately overcome.

When Negri came to narrate Machiavelli's place in this history, he hoped to prise open how the Renaissance republican ethos arise.[68] His target was J.G.A.

[65] Ibid.

[66] Kimberly Hutchings, *Time and World Politics: Thinking the Present* (Manchester: Manchester University Press, 2008), 5.

[67] Antonio Negri, "Kairòs, Alma Venus, Multitudo: Nine Lesson to Myself," in *Time for Revolution* (London: Continuum, 2005), 134.

[68] The Italian interpretivist tradition typically insisted upon the essential continuity between the *The Prince* and *The Discourses*, whilst the dominant Anglo-American perspective had sought to trace substantial divergences between the two to place emphasis upon the latter work. On the Italian tradition, see for example Federico Chabod, *Machiavelli and the Renaissance*, trans. David Moore (London: Bowes & Bowers, 1958); Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell-Smith (London: Lawrence & Wishart, 1971), esp.123-204. For Negri, the anachronism of nationalism ascribed to Machiavelli was due to Gramsci's pre-eminence in Italian political theory. Elsewhere, Negri noted that Althusser's hermeneutic was a tool that allowed him to

Pocock, for whom the republican ethos was constructed and confined *within* the system of mixed government. His 'Machiavellian moment' is an attempt to 'remain morally and politically stable in a stream of irrational events conceived as essentially destructive of all systems of secular stability'.[69] Accordingly, the prototypical republicanism of Machiavelli was interpreted through a constitutionalist structure that protected against the warnings of *The Prince*. The dynamism of *virtù* was placed alongside the balance of government and the role of property in shaping the civic personality, all of which, for Negri, tempered the 'absoluteness' of the constituent principle of *virtù*. In capturing *virtù* within the constitution, it was determined according to measurements of *chronos*.

Negri read what he took to be a 'constituent principle' of *virtù* in a radically different direction to Pocock, one in which it is uncontained by constitutional principles.[70] This relation was constructed through the radically innovative temporal interplay between *virtù* and *fortuna*. When Machiavelli employed this opposition, he made sure to distinguish his interpretation of *fortuna* from those theological interpretations of fortune, for whom human greatness was not to be found in the remit of Man, but was rather willed by God.[71] In diverging from a fatalist philosophy of history, Machiavelli was understood to be on an analogous terrain to Negri's attempts to break from the Hegelian dialectic. Though the dictates of *fortuna* suggested that the future was unknown and unknowable, *virtù* sought to harness the

break this hegemony whilst remaining in the spirit of the critique. See Antonio Negri, "Notes on the Evolution of the Thought of the Later Althusser," in *Postmodern Materialism and the Future of Marxist Theory*, ed. Antonio Callari and David F. Ruccio (Hanover, NH: Weslyan University Press, 1996). See also Louis Althusser, *Machiavelli and Us*, trans. François Matheron (London: Verso, 1999). On the Anglo-American tradition, see especially Pocock, *Machiavellian Moment*. The division between Italian and Anglo-American approaches remains common today, compare John P. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011); Maurizio Viroli, *Redeeming The Prince: The Meaning of Machiavelli's Masterpiece* (Princeton, NJ: Princeton University Press, 2013).

[69] Pocock, *Machiavellian Moment*, viii.

[70] That this should be taken as an engagement with Pocock, see especially *Insurgencies,* 313, 352 fn.97.

[71] Niccolò Machiavelli, *The Prince*, trans. George Bull (London: Penguin, 2004), 105. See for example Augustine, *City of God*, trans. Henry Bettenson (Harmondsworth: Penguin, 1984), 159-61. Machiavelli is no innovator when introducing the role of the will against the play of *fortuna*. It was typical among men of the Florentine Renaissance to revert to the classical Roman duality against the assumptions of Augustinian Christianity. Machiavelli's originality instead lay in the how *virtù* was employed against *fortuna* in pursuit of worldly, rather than other-worldly glory. See Quentin Skinner, *The Foundations of Modern Political Thought, Vol. 1: The Renaissance* (Cambridge: Cambridge University Press, 1978), 95; Russell Price, "The Theme of Gloria in Machiavelli," *Renaissance Quarterly* 30, no. 4 (1977): 629-30.

unpredictability of time through a fundamentally creative act, though that could never fully master the environment.[72]

It serves to take note of Negri's formulation of this problem: 'Fortune is opposed to virtue—the product to the production, the constituted force to the constituent one'.[73] The statement offers up three distinctive oppositions: *fortuna* is bracketed, along with constituted power and a concrete end, against *virtù,* constituent power and a process of production. The bracketing is peculiar, for *fortuna* is the play of chance, not organisation and determinateness, the temporality of the constituted power. The conceptualisation presented was far more expansive than Negri's reading of Machiavelli allowed. Negri's constituted power did not map simply onto organised time, but appeared instead as any temporality that undermines our 'own' rhythm of live.[74] In an essay written whilst imprisoned, Negri identified an aporia between 'time-of-life' and 'time-as-measure'. These two distinctive temporalities of experience expand the duality of *chronos* and *kairos,* for time-of-life was not an event-like rupture of temporality. Instead, it appeared quite like a temporal variant of *potentia* for it was a plural, multidirectional account of time that resisted the 'time-as-measure', which sought to reduce the 'time-of-life' to a discrete, linear articulation.[75] Constituent power was not just the free play of creative activities, but also an autonomistic time-of-life that constituted power attempted to collapse into something manageable.

Negri's distinctions between constituent and constituted power did not comfortably map on to the duality of *virtù* and *fortuna.* The difficulty was due to the tenuous genealogy Negri was attempting to draw. This connected the democratic innovation of Revolution, as both *virtù* and constituent power, to *potentia* and autonomous labour power more generally. He hoped to show that in late Modernity, the capacity of the exploited to revolt through the use of their labour power, which had its heritage in renaissance Italy, but had been diffused through the post-Fordist

[72] Machiavelli, *The Prince*, 105-08.
[73] Negri, *Insurgencies*, 52.
[74] Negri seems to imply precisely this when discussing how Duke Valentino 'seizes "his" time'. Ibid., 44.
[75] Negri, "The Constitution of Time," esp.46-50, 113-19.

division of labour and the economisation of non-economic areas of life. By invoking Machiavelli's, he attempted to politicise that labour power in a way he believed Gramsci had been unable to.[76] Negri wrote:

> Modern Capitalism brings to maturity the concept of constituent power by constructing it as the pervasive force of the entire society, as the continuity of the social power that configures all other powers.[77]

The antagonism between constituent and constituted powers that were fundamentally constitutional to this point took on a new dimension in post-Fordist Capitalism as the juridical, economic and moral practices of and beyond the state were increasingly interwoven.[78] As each aspect of society was subsumed under capitalism, the relation between the social strength of constituent power and capitalist development shifted also.[79] Capitalism, for Negri, managed to transform constituent power into a tool for capitalist accumulation, through which 'constituent power becomes a constituted power, a sort of average level of violence that overdetermines every social relation'.[80] This interpretation was made possible only because Negri understood constituent power not as a title or a political entity, but as a specific form of democratic power possessed by the socialised worker, and one that could be channelled in post-Fordist economies into other areas of life.

This shift was decisive for Negri, because it was only under the modern conditions of capitalism that the creativity of constituent power was 'no longer originary'.[81] There are two aspects to this. First, its creative dimension was suppressed as it was subsumed into the constituted capitalist ideological system; the originality of the constituent time-of-life was transformed into a measured temporality. Second, because constituent power was transformed into a controlled

[76] Negri, *Insurgencies*, 344, fn.66.
[77] Ibid., 251.
[78] See especially Hardt and Negri, *Labors of Dionysus*, 217-61.
[79] The totalising aspects of global capitalism are developed in his Empire trilogy with Michael Hardt. See Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000); *Multitude: War and Democracy in the Age of Empire* (Cambridge, MA: Belknapp Press, 2004); *Commonwealth* (Cambridge, MA: Belknapp Press, 2009). These theses build upon his much earlier works on of post-Fordist capitalism. See Hardt and Negri, *Labors of Dionysus*. Chapters 2-5 were written by Negri alone during the 1970s, long before his association with Hardt.
[80] Negri, *Insurgencies*, 254.
[81] Ibid., 258.

labour power, and dispersed across social and economic fields, it was disassociated from the foundation of a new juridical order. Though transformed into a largely mundane, controlled labour power, the transition to capitalism, on Negri's interpretation, released both the juridical scope of constituent power and unhooked it from an ontology of foundation.[82]

It was through his Spinozan Marx that Negri was about to redirect this radically unconventional account of constituent power. In Marx's theory of alienation and the appropriation of surplus value, there was an elementary repetition of Spinoza, at least on Negri's reading. For Marx, the 'absolutely necessary conditions for capitalist production' were found in the relation that produces the wage-labourer:

> The worker himself constantly produces objective wealth, in the form of capital, an alien power that dominates and exploits him; and the capitalist just as constantly produces labour-power, in the form of a subjective source of wealth which is abstract, exists merely in the physical body of the worker, and is separated from its own means of objectification.[83]

The living labour of the worker was channelled through an apparatus that transforms that labour power into 'objective wealth' just as *potentia* was given a determined expression through *potestas*.

More pointedly, in Spinoza's thought there was a means of rethinking the grounding of Marx's theory of labour in order to displace its Hegelian particularities.[84] For Negri, this was a means to augment Tronti's reversal of Marxist class analysis at an ontological level. *Potentia,* or constituent power, was not only the living-labour of the workers, but also what rendered their attitude towards capital ambivalent. Just as *potestas* is always subordinate to, and reliant upon, *potentia,* the identity of the capitalist manifested within and through the exploitation of the

[82] Negri has affirmed elsewhere that the dialectic between constituent and constituted powers arose only in privileging precisely such an ontology of foundation. Antonio Negri, "Pour une Définition Ontologique de la Multitude," *Multitudes* 2, no. 9 (2002): 47.

[83] Karl Marx, *Capital: A Critique of Political Economy, Vol. 1*, trans. Ben Fowkes (Harmondsworth: Penguin, 1976), 716.

[84] Hardt and Negri, *Labors of Dionysus*, 286. On this point see Ruddick, "The Politics of Affect: Spinoza in the Works of Negri and Deleuze," esp. 25; Michael Ryan, "Epilogue," in *Marx Beyond Marx*, ed. Jim Fleming (London: Pluto, 1991).

worker. This relation was not mirrored: the identity of the working class was not the product of capitalist relations. Negri's concept of 'self-valorisation' is the key to understanding this movement. If valorisation in traditional Marxist theory amounted to the increase in value of capitalist assets through the application of workers' labour, *self*-valorisation is a strategy that sought to reappropriate the time-of-life of the worker and put it to a different use.[85] The political subject of Negri's constituent power, then, seems to possess a closer commonality with E.P. Thompson's self-making of the working class than it did with any sort of juridical theory of constitution.[86]

This provided a radical and distinctive depiction of constituent power. In rewriting constituent power not as a juridical or institutional device but an ontological conception of power, he affirmed the phrase 'the constituent is greater than the constituted'. He nevertheless configured it in an acute and innovative way. By developing constituent power in accordance with Spinozan *potentia,* he rejected the Benjaminian coimplication of constituent and constituted power. Constituted power, as *potestas,* was implicated within constituent power, as a *potentia* directed toward a determinate end of production. That constituent *potentia* was greater than constituted *potestas* was not a hierarchical ordering. *Potentia* is greater because constitution toward *potestas* is only one among many options through which *potentia* can strive. *Potentia* was greater because it was permanently in excess of *potestas*. That *potestas* was a fetter upon *potentia* was demonstrated through the temporal phenomenology of constituent power, which demonstrated the distinctive temporal rhythms attributed to each of constituent and constituted powers.

For Negri, his constituent power was a carefully constructed imaginary for revolutionary action, one than that intended to mobilise constituent power in an explicitly normative sense not only against the state, but what he took to be the constituted order more generally, namely the tools of post-Fordist production, and

[85] Antonio Negri, "Domination and Sabotage: On The Marxist Method of Social Transformation (1977)," in *Books for Burning: Between Civil War and Democracy in 1970s Italy*, ed. Timothy S. Murphy (London: Verso, 2005).

[86] Negri seemed to recognise as much, Hardt and Negri, *Labors of Dionysus*, 288.

more recently, the elusive political machine of 'Empire'. He did so by bracketing constituent power in a polemical form. The relation between constituent and constituted was not a complementary one, nor a means of redeeming the constituted; the identity of the multitude who possess and enact their constituent power were defined by a particular disposition of 'being-against' the constituted. [87] Constituent power was not creation of, but disobedience, resistance and rebellion against, the state.

IV: DESTITUENT POWER: AN INVESTIGATION SUSPENDED

So far, I have sought to develop the internal morphology of Negri's constituent power. This is one that Negri characterised by a radical disposition of resisting the constituted political order, a political order he understood to encompass far more than just the legal institutions of the state. This radical reading of constituent power was one he channelled into revolutionary politics that would not relapse back into constituted power, but constitute another, autonomous, end. In the remainder of this chapter, I bring to light the unintended consequences of Negri's constituent power by employing the work of his occasional interlocutor, Giorgio Agamben. Agamben doubted that Negri's reconceptualisation of constituent power as a variation of labour power could sufficiently resist against the constituted political order. Rather, for Agamben, Negri's constituent power amounted to a theatrical or spectacular aestheticisation of political action that inadvertently legitimised the existing distribution of political power. Demonstrating this requires two moves: first, I show how Agamben's interpretation of Aristotelian potentiality worked to critique Negri's constituent power; second, I show, through *Kingdom and the Glory,* how this critique reveals, in political terms, a politics of resistance that is, for Agamben, absorbed into the public sphere of the liberal state, and cannot hold constituent power apart from constituted power as Negri's hopes.

Agamben's *Homo Sacer* series, which has only recently concluded, presented an archaeological examination of the ontology of Western politics, and devised a praxis

[87] Hardt and Negri, *Empire*, 210-14.

of 'inoperativity' that sought to move beyond the ontology that had been responsible for the biopolitics of modernity.[88] The wager of Agamben's critique was that the 'alternative' political ontology devised by Negri did not escape this ontology of Western politics, which is composed of division and separation. Our language is 'constituted by dividing the factical experience and pushing down to the origin—that is, by excluding—one half of it in order then to rearticulate it to the other by including it as foundation'.[89] Every concept comprises two parts, of which the one is presupposed as the foundation of the other. That foundational element is 'excluded' from the concept, though remains part of it.[90] In his most famous work, *Homo Sacer,* Agamben identified this basic ontological condition in the 'paradox of sovereignty'. Agamben recognised the 'anomic' condition of the law in Schmitt's decisionist sovereign, who, though standing outside the juridical order, nevertheless belonged to it. Law was only made operable through the a-rational decision, which was external to, but constitutive of, the law.[91]

Agamben was certain that this ontology was also the basis for every understanding of constituent power.[92] If the dualism between constituent and constituted powers formed the *archē* of the popular sovereign juridical order, the activity of founding divided these. Constituent power was excluded from the

[88] The final volume, *The Use of Bodies,* was published in Italian in 2014, some 19 years after the first volume.

[89] Agamben, *The Use of Bodies*, 265.

[90] This ontology repeats itself through much of his work. This ontology is first devised in *Language and Death*, through the division between *phōnē* and *logos*. See Giorgio Agamben, *Language and Death: The Place of Negativity*, trans. Karen E. Pinkus and Michael Hardt, vol. University of Minnesota Press (Minneapolis, MN, 2006). In *The Open,* he demonstrates how the 'anthropolitical' perspective of the West is articulated through the separation of human from animal, revealing a central void—an exception—in which bare life of the human cannot be separated from animal life. Giorgio Agamben, *The Open: Man and Animal*, trans. Kevin Attell (Stanford, CA: Stanford University Press, 2004). More pertinent to the examination here is his answer to the question 'What is a People?', in which he identifies the 'biopolitical fracture' that separates the divides the people into two, the People as a whole body, and the people as the excluded, the poor or inferior classes. Here the ontology of the West demands the suppression of the latter in order to celebrate the unity of the People as a political identity. The 'healing' of this fracture culminates in the holocaust. See Giorgio Agamben, *Means Without Ends: Notes on Politics*, trans. Vincenzo Binetti and Cesare Casarino (Minneapolis, MN: University of Minnesota Press, 2000), 29-36. For a closer examination of Agamben's method see William Watkins, *Agamben and Indifference: A Critical Overview* (London: Rowman & Littlefield, 2014). For an elaboration of the relation between the 'ontology of caesura' in language and law see Daniel McLoughlin, "The Politics of Caesura: Giorgio Agamben on Language and the Law," *Law and Critique* 20, no. 2 (2009).

[91] Agamben, *Homo Sacer*, 15; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 7.

[92] Agamben, *Homo Sacer*, 39.

juridical order though it nevertheless 'belongs' to the order through the logic of the inclusive exclusion. The point Agamben developed was entirely in keeping with Benjamin: those of the 'democratico-revolutionary tradition' were short-sighted if they perceived a constituent power that could maintain and preserve itself against every aspect of the constituted order, for:

> 'if constituent power is, as the violence that posits law, certainly more noble than the violence that preserves it, constituent power still possesses no title that can legitimate something other than law-preserving violence, and maintains an ambiguous and ineradicable relation with constituted power.'[93]

Put otherwise, if sovereignty was the anomic decision that produced and reproduced the normative order of law, constituent power was that same anomic decision: constituent power only bore that name by virtue of the thing that it constituted, and so could not give rise to any but a constituted power.

This was because, for Agamben, both sovereignty and constituent power were both contained within a political ontology of the West characterised by potential passing over into actuality. These concepts were intimately intertwined with the Aristotelian categories of *dynamis* and *energeia*. Agamben's preoccupation with this relationship predated the *Homo Sacer* project; it assumed a central role in his thought in the 1980s, during which time, as Kevin Attell notes, it became his 'signal concept'.[94] Agamben's interest, and difficulty, with the term *dynamis* centred upon the difficult sentence that he boldly claimed had been misunderstood by almost all interpreters.[95] In Richard McKeown's translation, this sentence reads: 'A thing is capable of doing something if there will be nothing impossible in its having the

[93] Ibid., 40. Translation modified.

[94] Kevin Attell, "Potentiality, Actuality, Constituent Power," *Diacritics* 39, no. 3 (2009): 37. Agamben first discusses the distinction in *Man Without Content,* first published in 1970, though it is developed more explicitly in the 1987 essay 'On Potentiality'. See Giorgio Agamben, *The Man Without Content*, trans. Georgia Albert (Stanford, CA: Stanford University Press, 1999), 59-67; Giorgio Agamben, *Potentialities: Collected Essays in Philosophy*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1999), 177-84.

[95] His identification that Heidegger was the only person have read this passage correctly is stretched. For example, an alternative reading is presented in Terence Irwin, *Aristotle's First Principles* (Oxford: Oxford University Press, 1988).

actuality of that of which it is said to have the capacity'.[96] This standard, if difficult, translation, for Agamben, amounted to a banal tautology. It said nothing more than 'what is possible is that with respect to which nothing is impossible'.[97]

Aristotle's intention was to criticise the position of the Megarian school, which held that 'a thing "can" act only when it is acting, and when it is not acting it "cannot" act'.[98]. This was a peculiar rendering of ability, for Aristotle, for one ceased to 'have the art' when they ceased to use it, but may very well regain that art simply through activity.[99] The tautological interpretation of the above passage seemed ambivalent to this tension; the corrective that Agamben introduced rendered the sentence: 'A thing is said to be potential if, when the act of which it is said to be potential is realised, there will be nothing impotential'.[100] The awkward final word, 'impotential' was too often understood to mean 'impossibility'. Agamben's intention was rather to identify the relation that Aristotle set up between potentiality [*dynamis*] and impotentiality [*adynamia*]. On Agamben's interpretation of Aristotle, potentiality's relation with actuality—the realisation of potentiality—was preceded by a decision over its own 'privation'.[101] This was potentiality's relation with the potential-not-to-be, a potential that does not take up a relationship with actuality. Read this way, the passage presented an important challenge against the Megarian position: whilst external conditions may determine the possibility of whether or not one might exercise a capability, they did not determine the existence of the capabilities. Potentiality to be was always at the same time a potentiality-not-to-be. This was the crack that the Western metaphysical tradition papered over; by passing over this aspect of 'impotentiality', potentiality and actuality were the two faces of the 'sovereign self-grounding of Being'.[102]

Illan Wall appreciates this point in relation to constituent power, though he seems to misread Agamben's gesture. Wall associates Agamben's argument with the

[96] Aristotle, "Metaphysics," 1047a, 24-26.
[97] Agamben, *Potentialities*, 183.
[98] Aristotle, "Metaphysics," 1046b, 28-30.
[99] Ibid., 1047a, 2-4.
[100] Agamben, *Potentialities*, 183.
[101] Ibid., 182.
[102] Agamben, *Homo Sacer*, 47.

refusal to constitute the collective noun 'the People', through which constituent power passes over into the police order of constituted power.[103] Agamben's intention was broader than this: constitution need not be constitution of an institutionally recognisable signifier, such as the 'the People', but the constitution of potentiality as such. Wall's interpretation reduces Agamben's position to Negri's. Whilst for Negri these 'constituent forces never fully escape the striated space and territorialising apparatus of capture of the State machine', they nevertheless 'continually shatter the constituted world of the state [through] the creativity and innovation of their own free activity'.[104] That constituent power breaks through to make new worlds, by constituting towards other ends, was enough to demonstrate the radicality of *potentia*. This, for Agamben, only mirrored sovereignty: 'that constituent power never exhausts itself in constituted power is not enough: sovereign power can also, as such, maintain itself indefinitely, without ever passing over into actuality'. What was required, instead, was an account of potentiality 'without any relation to Being in the form of actuality'.[105] It is not so much that Agamben recognised in Negri a Megarian tendency, but rather than Negri's account of *potentia* had no way of thinking about potentiality that did not tend toward constitution, be it institutional or otherwise.[106] Negri's 'alternative modernity' thesis, that pitched a subversive political ontology of constituent power against the dominant political ontology of sovereign power, remained within the given relation of *dynamis* to *energeia*. It ran perfectly parallel to sovereignty.

Negri resisted this point in his response to Agamben, proffered in the 2002 Italian reissue of *Insurgencies,* though it only demonstrates that he and Agamben were talking across one another. He wrote, 'for Agamben, constituent power is formally included in constituted power, in sovereignty, in the political tradition of

[103] Wall, *Constituent Power and Human Rights*, 85.
[104] Hardt and Negri, *Labors of Dionysus*, 288.
[105] Agamben, *Homo Sacer*, 47.
[106] Attell, "Potentiality, Actuality, Constituent Power," 46. Alternatively, Jessica Whyte recognises the nature of his critique of Negri, though pushes the working too far, suggesting sovereignty too is able to 'survive its own privation', that is, retreat to impotentiality. See Jessica Whyte, "'I Would Prefer Not To': Giorgio Agamben, Bartleby and the Potentiality of the Law," *Law and Critique* 20, no. 3 (2009): 317. This would leave no place for an alternative to sovereignty. Agamben preserves this space of impotentiality from both sovereignty and constituent power, for it is where Agamben retreats in order to conceptualise an alternative ontology of 'destituent power.

modernity'.[107] For Negri, sovereignty was interchangeable with constituted power, each of which sought to capture and temper constituent power. Agamben did not see it this way: constituted power was to constituent power as law was to the sovereign decision. Sovereign power—unlike constituted, but like constituent, power—was the anomic outside that structures the inside. It was not that constituent power was formally included in sovereignty, but that they were conceptually symmetrical, insofar as they tended toward the 'constitution of potentiality'. This was true of Negri's Spinozan account of constituent power even if it was possible to resist 'constituted power' and organise itself according to the autonomous dictates of self-valorisation. The generative and productive nature of constituent power tended inevitably toward a fundamentally positive account of the constitution of living labour.[108] Constitution may be either the self-valorisation of living labour, or the institution of a sovereign, constituted power. In either instance, potentiality passes over into actuality.

Though this critique of Negri is an established one, the political implications of it have not be adequately drawn out, but left as an ontological critique.[109] In what remains of this chapter, I demonstrate why this ontological critique is important for Negri's politics. The particular problem with this activity of mirroring constituent power in sovereign power is clearer if a detour is taken to Agamben's *The Kingdom and the Glory,* where he examined Schmitt's use of 'acclamation'.

[107] Antonio Negri, *Il Potere Costituente: Saggio sulle alternative del moderno*, 2nd ed. (Rome: Manifestolibri, 2002), 8. Translated in Attell, "Potentiality, Actuality, Constituent Power," 45, fn.20.

[108] Negri has emphasised exactly this at numerous points. See Hardt and Negri, *Multitude: War and Democracy in the Age of Empire*, 356; Negri, *Insurgencies*, 20, 23. Moreover, he has emphasised that fundamental productivity of constituent power amounts to the basic difference between his and Agamben's account of biopolitics. In particular, in an essay written shortly after his release from prison, he characterised his account of constituent power as 'extremely singular force of production of temporality, the reverse of the very sad and naked Heideggerian figure of powerlessness'. Negri, "Kairòs, Alma Venus, Multitudo," 135. This 'powerlessness' is quite typical of his characterisation of Agamben's position. See, for example, Hardt and Negri, *Empire*, 366; Hardt and Negri, *Multitude: War and Democracy in the Age of Empire*, 356; Negri, *Insurgencies*, 20, 23; Antonio Negri, "The Sacred Dilemma of Inoperosity: On Giorgio Agamben's Opus Dei," Critical Legal Thinking, http://criticallegalthinking.com/2012/09/25/the-sacred-dilemma-of-inoperosity-on-giorgio-agambens-opus-dei/.

[109] See Attell, "Potentiality, Actuality, Constituent Power."; Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (New York: SUNY Press, 2013), 104-10. This is perhaps due to the identification of politics *as* ontology in post-structuralism. For a brief depiction of the connection, see Lasse Thomassen, "Lacanian Political Theory: A Reply to Robinson," *British Journal of Politics and International Relations* 6, no. 4 (2004): 559-60. Though I accept this position, the implications must be demonstrated from the perspective of politics, and not ontology.

In this work, Agamben attempted to bring to light two further structures of power, namely, power as 'government and effective management, and power as ceremonial and liturgical reality'.[110] Though constituent power is hardly discussed, Agamben dealt with a political arrangement found in the earliest articulations of constituent power, namely the distinction between sovereignty and government.[111] That he arrived at Schmittian acclamation attests to an 'analogy between the liberal political paradigm that separates kingdom [i.e., sovereignty] from government, and the theological paradigm that distinguishes between *archē* and *dynamis* in God', and with it, the persistence of liturgical and ceremonial aspects embedded within contemporary politics.[112] It was, for Agamben, within these liturgical and ceremonial practices that Negri's constituent power was captured.

Within the genealogy that he sketched, Agamben identified the originary split of political power rooted in the early Christian doctrine of the Trinity, and its distinction between *theologia* and *oikonomia*, introduced in order to prevent monotheism collapsing into polytheism. The unity of a transcendent God contrasted with the threeness of a worldly God; because, within the early Church, the Trinity operated at the level of *oikonomia,* and not ontology, the divine being was not divided.[113] While *theologia* was concerned with what God *is, oikonomia* was concerned with what God *does*. For Agamben, this contrasted the power of God as king against God as governor, reflected in political power.[114] In doing so, Agamben was intervening in the well-known debate between Carl Schmitt and Erik Peterson over the status of political theology, and Peterson's use of the notorious formula, 'the king reigns but does not govern'.[115] In doing so, Agamben did not intend to identify the specific practices of governance, but the currency of power that allowed it to

[110] Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans. Lorenzo Chiesa and Matteo Mandarini (Stanford, CA: Stanford University Press, 2011), xi-xii.

[111] See chapter 1. See also Lee, *Popular Sovereignty*; Tuck, *The Sleeping Sovereign*.

[112] Agamben, *The Kingdom and the Glory*, 73.

[113] Ibid., 53.

[114] Ibid., 139-43. Agamben later clarified that the common distinction between the 'immanent' and 'economic' Trinity was the contribution of 'modern theologians'. This nevertheless retained the 'fracture between ontology and praxis', and consequently, between sovereignty and government. Ibid., 207.

[115] Erik Peterson, "Göttliche Monarchie," *Theologische Quartalschrift* 122, no. 4 (1931): 540.

persist.[116] This currency is 'glory'.[117] Glory is twofold: first the glory of God, unconditional and otherworldly; second, the glory owed to God, the activity of glorification.[118] Through glory, Agamben identified a dialectic that unfolded between kingdom and government; the currency of power oscillated in such a way that 'the Government glorifies the Kingdom, and the Kingdom glorifies Government'[119] There is an element of superficiality to this operation of glory however, for beneath the perpetual dialectic between kingdom and government, 'the centre of the machine is empty, and glory is nothing but the splendour that emanates from this emptiness, the inexhaustible *kabhod* that at once reveals and veils the central vacuity of the machine'.[120] This empty space was the result of the failure to resolve the relation between rule and governance that separated the possession of power from its employment. Glorification was not so much the resolution of the problem, but the theatrics that masked it: 'glory is what must cover with its splendour the unaccountable figure of divine inoperativity'.[121]

To be explicit, the activity of glorification was one that connected the Christian tradition of liturgy with the ostensibly secular activity of public acclamation that, for Schmitt, was the expression of public opinion by a people in the public sphere.[122] According to Peterson's thesis on acclamation, Christian liturgy had its roots in Rome, establishing a central link between law and liturgy. The connection is an important one, for in the Church acclamation was liturgical practice doubles as an articulation of the people's 'consensus', and so, acclamation was at once an articulation of consensus, and a doxology, an activity through which the unity of

[116] The former, Agamben recognised, was dealt with adequately in Foucault's *Security, Territory, Population*. Agamben, *The Kingdom and the Glory*, 277.

[117] Ibid., 208.

[118] Giorgio Agamben, *Nudities*, trans. David Kishik and Stefan Pedatella (Stanford, CA: Stanford University Press, 2009), 101-03. For a concise discussion of Agamben's account of glory, see Watkins, *Agamben and Indifference*, 227-31.

[119] Agamben, *The Kingdom and the Glory*, 211.

[120] Ibid.

[121] Ibid., 163.

[122] For Schmitt on acclamation, see especially the part IV of chapter 4, above. See also Schmitt, *Constitutional Theory*, 131-32.

consensus manifested in a glorification of God.[123] Contemporary political acclamation retains these same qualities, for:

> 'Just as for Peterson the acclamations and liturgical doxologies express the juridical and public character of the Christian people, so for Schmitt the acclamation is the pure and immediate expression of the people as constituent democratic power.'[124]

It is the theological form, if not the content, of glory that persisted across these modes of acclamation, whether in liturgy or public law. These acclamations take a number of forms, 'an exclamation of praise, of triumph (*"Io triumphe!"*), of laudation or of disapproval (*acclamatio adversa*) yelled by a crowd in determinate circumstances'.[125]

One should note the breadth and valence ascribed to these diverse activities, for they are not only celebratory. In particular, *acclamatio adversa,* the acclamation of disapproval, contrasts with the technique of consensus. The liturgical function of acclamation need not appear only in an affirmative sense. *Acclamatio adversa* is perhaps even more important to contemporary politics, where, through public opinion, 'the People' become present within the public sphere.[126] For Agamben, modern democracy was founded not upon the unitary collective subject that manifested through the public sphere, but the aesthetic currency of power. This currency was quite possible without a 'substantive subject-people'. Though he points towards Jürgen Habermas' communicative action, he recognises that the 'subjective glory of the acclaiming people, and the mediatic and object glory of social communication' are but 'two sides of the same glorious apparatus'.[127]

Agamben's point is pertinent to constituent power in both Schmitt and Negri. Against Schmitt, Agamben posited that constituent power could not serve as a *katechon* that would restore the political motor to the empty technical machine of the

[123] Agamben, *The Kingdom and the Glory*, 170. Cf. Erik Peterson, *Heis Theos. Epigraphische, formgeschichtliche und religionsgeschichtliche Untersuchungen* (Göttingen: Vandenhoeck und Ruprecht, 1926), 177-79.

[124] Agamben, *The Kingdom and the Glory*, 171.

[125] Ibid., 169-70.

[126] Ibid., 254-55.

[127] Ibid., 256-8. Compare Seitzer and Thornhill, who note that Schmitt's acclamation should not be collapsed into Habermas's communicative action. Seitzer and Thornhill, "Introduction " 42.

State. All constituent power could achieve through the practice of acclamation was to mask that void, and *project an image* a state that was no longer a technical neutral machine. Against Negri, Agamben's argument was more pointed. That Negri's constituent power rejected the substantive unity of peoplehood was of little consequence, for it nevertheless employed constituent power as an aesthetic currency of glorification. Though Negri's account of constituent power sought to resist the constituted power of the state at every turn, it does so through a conceptualisation of a *potentia* towards constitution. The fundamental motif of this acclamation was not a constituent power towards the constitution of a state machine, as made clear by the activity of *acclamatio adversa,* but the circulation of a glorifying *potentia*. Just as the liberal democratic state provides a space within civil society for protest and dissent within parameters in order to maintain its legitimacy as an open society, *acclamatio adversa* demonstrates that the activity of acclaiming against the state is nevertheless an acclamation captured within what Agamben identified as the doxological practice of glorification.[128]

Agamben's example from Melville's *Bartleby, the Scrivener* clarifies this point. When presented with an order, Bartleby replies, 'I *prefer* not'.[129] Refusal, to acclaim 'I *will* not', is potentiality passing over into actuality in the form of resistance, the 'heroic pathos of negation';[130] but so, too, this activity gives power over to law. Bartleby's expression, 'I *prefer* not', neither consents, nor refuses; it gives nothing over to law, revealing the law for what it is. By contrast, for Agamben, a constituent power that resisted against the state, provided everything necessary for the state to respond. It is the activity of 'being-against' the constituted order, which was so fundamental to Negri's constituent power, that this *potentia* became a political aesthetic that inadvertently celebrated that which it sought to challenge. Essential here was the relation constituent power had developed with the concept of 'the Political', namely, the ontological essence of the activity of politics, which was to be

[128] Agamben, *Potentialities*, 254-56.

[129] Herman Melville, "Bartley, the Scrivener," in *The Complete Shorter Fiction* (London: Everyman, 1997), 30.

[130] Agamben, *Potentialities*, 256.

recovered from the depoliticising elements of life.[131] The revival of constituent power in democratic thought corresponds to the Political turn in political theory more generally. Though constituent power has always been associated with concerted action, in many of the accounts examined, unity was derived from mechanisms of representation and integration that thinkers such as Negri or Jean-Luc Nancy have taken to be a suppression of the political. In Rutherford, this was a transcendent religious obligation, in Hobbes, unity was juridical, in Sieyès, it was economic. In both Schmitt and Negri, constituent power came to be recognised as the expression of the political, which, through both rallies and protests, provided an antidote to the reduction of politics to law or economics. Agamben's wager was that this comes at a great cost. In the preface to *The Kingdom and the Glory,* Agamben wrote:

> the society of the spectacle…is, from this point of view, a society in which power in its 'glorious' aspect becomes indiscernible from *oikonomia* and government. To have completely integrated Glory with *oikonomia* in the acclamative form of consensus is, more specifically, the specific task carried out by contemporary democracies and their *government by consent'*.[132]

The Political turn was not an antidote to depoliticisation, but a spectacle that masks it. Just as Lois McNay associates the Political with a 'socially-weightless mode of thought',[133] Agamben demonstrated that the Political, through the glorifying currency of constituent power, to reveal little more than an aesthetic turn. At stake is no longer the operation of constituent power as a dynamo of the state, but the Debordian spectacle that perpetuates the fiction of power through aesthetic expressions of the Political.[134] This is no trivial claim. For Agamben, constituent

[131] Lacoue-Labarthe and Nancy, *Retreating the Political*, 122-34; Lefort, *Democracy and Political Theory*, 45-56.

[132] *Agamben, The Kingdom and the Glory, xii.*

[133] McNay, *The Misguided Search For The Political*, 4.

[134] Agamben, *The Kingdom and the Glory*, 255-56. Agamben develops the association of contemporary society with the Debordian spectacle in the prologue to *The Use of Bodies,* though he does not connect it with constituent power. Agamben, *The Use of Bodies*, xv-xxi. He deals with *Society of the Spectacle* in greater detail in Agamben, *Means Without End*, 73-89. Jean-Luc Nancy recognises the spectacle as a means of securing the retreat of the Political, through which representation 'triumphs, absorbing entirely both the transcendental and the concrete'. Nancy, *Being Singular Plural*, 49. Agamben's counter is that representation is not necessary. The aesthetic currency of glorification captures even the unmediated acts.

power, even Negri's revolutionary anti-Statist formula, was always implicated in the political regime of modernity. If this is so, Agamben writes, 'access to a different figure of politics cannot take the form of a "constituent power" [*potere costituente*] but rather that of something we can provisionally call "destituent power" [*potenza destituente*]'.[135]

CONCLUSION

In this chapter, I have shown how Antonio Negri reconceptualised constituent power not as a political entity, but as a capacity possessed by individuals. This, however, should not be misread. In the course of his argument, Negri did not 'identify' the true source of constituent power that seemingly arose from 'nowhere', nor do I think that it is useful to understand constituent power as a physical power or capacity. Just as Kevin Olson has written that 'folk foundationalism' is itself a political imaginary that endeavours to naturalise the identity of 'the people' by turning to foundational stories of ethnic or *völkisch* communities,[136] Negri's effort to bind constituent power to *potentia* and labour power was itself an attempt to 'naturalise' constituent power. This naturalisation was another layer that masked how Negri used constituent power as a political claim to authority. By attaching constituent power to his Spinozan *potentia,* Negri inaugurated a political imaginary of his own, one that provided the various normative terms that assisted in defining how a political collective—in Negri, the multitude—should act. In doing so, Negri

[135] Agamben, *The Use of Bodies*, 266. The formulation 'destituent power' is not Agamben's own invention, though he provides the most thorough conceptualisation of the term. It first emerged in the work of the Argentinian *Colectivo Situaciones*, who are inspired primarily by the work of Negri and the Open Marxist John Holloway. Here *poder destituyente* appears as a withdrawal of support for the sovereign order, without need to replace it. See Colectivo Situaciones, *19 & 20: Notes for a New Social Protagonism*, trans. Nate Holdren and Sebastian Touza (Brooklyn, NY: Autonomedia, 2002). For a brief discussion of *Colectivo Situaciones*, see Saul Newman, "What is an Insurrection? Destituent Power and Ontological Anarchy in Agamben and Stirner," *Political Studies* (2016, OnlineFirst): 5. It is worth noting that the concept of constituent power has a far more prominent position in Latin American judicial decision-making than in modern Europe or America. For example, Opinion 138 of the Colombian Supreme Court rendered in 1990. I suspect this predominant institutionalisation of constituent power in Latin America has pressed the need for the linguistic subversion. Agamben most likely takes the term from a bilingual edited volume including contributions from Mario Tronti and Etienne Balibar. See Pierandrea Amato et al., *Pouvoir Destituant/Potere Destituente: Les Révoltes Méropolitaines/Le Revoltes Metropolitane* (Milan: Mimesis, 2008). Agamben's particular innovation is to substitute *potere destituente* for *potenza destituente*.

[136] Olson, *Imagined Sovereignties*, 7.

implicitly extended a number of conceptual movements initiated by Schmitt in order to affirm the radical priority—and by extension, the authority—of constituent power over the constituted legal order.

This took the form of a Spinozan ontology of power that celebrated the open-ended activity of constituting according to a constituent individual's autonomous time-of-life. This was an ontological extension of the activities of autopoeisis that were indebted to the Italian workerist movement. Consequently, for Negri, constituent power was not an exclusively juridical problem but complexly related to economic and social expropriation in later Modernity. Negri not only revised the internal morphology of constituent power by arguing that it was a naturalised physical capacity, but also the internal morphology of constituted power, by arguing that it encompassed all that sought to expropriate that physical capacity for a different end. In doing so, Negri reconceptualised the particular way in which the two were related. This was an antagonistic one, that required the use of constituent power to resist constitution. Constituent power was associated with a character of Being-against constituted power, whether within juridical, economic or social fields. The disposition of 'being-against' is central how constituent power is understood within Loughlin and Walker's 'paradox of constitutionalism', discussed in the introduction. Their paradox involves two 'antagonistic' imperatives, an expansive constituent power, that must be 'divided and constrained' when constituted.[137] This definition is possible only when constituent power is understood as a physical capacity, as it was in Negri. In short, the *paradox* of constitutionalism is in part due to these thinkers having accepted Negri's naturalisation of constituent power as a capacity that, when constituted juridically, is only one among many possibilities, and one that is ultimately oppressive to constituent power itself.

Though this account of constituent power was directed principally towards a political praxis, it also provided a particular analytical lens through which political relations can be interpreted. The 'alternative modernity' thesis that runs through Negri's account of constituent power, pitching Machiavelli, Marx and Spinoza

[137] Loughlin and Walker, *Paradox of Constitutionalism*, 1.

against Hobbes, Rousseau and Hegel, is part of a strategy of bracketing that entitles 'us', as radical democrats and heirs to this tradition of theorising, the right of possession over the concept of constituent power,[138] one that is reinforced by Negri's naturalisation of constituent power as a capacity. It contrasts Dionysus against Apollo, presence against representation, *potentia* against *potestas*, the multitude against the people, plurality against singularity, openness against closure, and time-of-life against time-as-measure. This bracketing has the specific intention of engaging in a polemic that can stimulate, for Negri, a revolutionary praxis, but it nevertheless presents an ultimately deficient analytical lens. The pitfalls of this bracketing were clearest in his descriptions of the various political events of 2011, namely the Arab Spring and the Occupy protest. In a short contribution with Michael Hardt, he claimed that 'Arabs are democracy's new pioneers', engaged in 'new experiments in freedom and democracy' through which 'organised network movements [that] refuse central leadership' have consolidated their demands in 'a new constituent process' that is 'not aimed at a traditional liberal constitution that merely guarantees the division of power' but rather a 'form of democracy adequate to the new forms of expression and needs of the multitude'.[139] Hardt and Negri wrote:

> They fear that the Muslim Brotherhood or some other body will take control of events. What they don't understand is that the multitude is able to organise itself without a centre—that the imposition of a leader or being co-opted by a traditional organisation would undermine its power.

Hardt and Negri's comments were foreshadowed by Foucault's infamous support for the Islamic Revolution in Iran, when he claimed that he 'cannot write the history of the future' but 'would like to grasp *what is happening right now*, because these days

[138] Marx refers to this strategy as 'world historical necromancy'. Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *Collected Works, Vol. 11: 1851–1853* (London: Lawrence & Wishart, 1986), 227. For a more detailed response to Marx's position on the uses of the past for strategic ends, see Mark Neocleous, "Let the Dead Bury Their Dead: Marxism and the Politics of Redemption," *Radical Philosophy* 128 (2004).

[139] Hardt and Negri, "Arabs are Democracy's New Pioneers." Similar sentiments were expressed toward Occupy, see Michael Hardt and Antonio Negri, "The Fight for 'Real Democracy' at the Heart of Occupy Wall Street," *Foreign Affairs*, October 11 2011.

nothing is finished, and the dice are still yet to be rolled'.[140] Foucault was willing to concede the difficulty of taking aim at a moving target, and the uncertainty of his conclusions. Hardt and Negri were far more affirmative in their support. The bracketing that is employed is revealed fully here: the fundamental antithesis between constituent and constituted powers is not a working hypothesis that may adjust to the realities of constituent action. It is not that Hardt and Negri were inattentive to the practices through which constituent power can be captured and utilised by constituted powers, even if their optimism was ultimately misplaced. Rather, the fatal aspect of the analytical lens is demonstrated through the conceptualisation of risk that is confronted by every constituent act, which is controlled through the bracketing strategy. The play of chance is theoretically worked out by a strategy of containment, preservation and avoidance: constituent remains removed from the constituted, and so any corruption that follows is due to the constitution of constituent power; *potentia* remains conceptually and politically intact because the activity has passed over into *potestas*. It is ethically loaded in such a way that *potentia* is 'good' because it is pure, though when it ceases to be 'good' it because it is no longer pure. It is always the result of the intrusion of constituted within the constituent, and not a result of a deficiency in the conceptualisation of constituent power.

This is partly the product of Negri's ultimately failed effort to redeem constituent power from its co-implication with constituted power, one that Agamben anticipated and demonstrated. What seems to undermine the concept of constituent power in Negri's formulation was the attempt to turn it against the state and against constituted power in a wholesale fashion. Constituent power has had through its history a complex relationship with revolutionary political action. Whilst the relation between constituent and constituted power has been refigured and put to different uses in each instance, the connection with constituted power is not one writers had sought to sever. What was clear in the course of the analysis of Negri and Agamben

[140] Michel Foucault, "The Mythical Leader of the Iranian Revolt," in *Foucault and the Iranian Revolution: Gender and the Seduction of Islamism*, ed. Janet Afary and Kevin B. Anderson (Chicago: University of Chicago Press, 2005), 220.

is that constituent power was particularly difficult to free from its semantic opposition with constituted power. For Agamben, self-government must relinquish any claim to constituent power, choosing instead a micro-politics of cultivation that is itself a form of living otherwise to sovereign power. It does not 'resist', but is a means without ends; it is a state of living for the sake of life.[141]

In the final chapter, I do not engage with Agamben's destituent power. Rather, I will examine Hannah Arendt's work on political founding. Arendt did not offer a distinctive account of constituent power, only a critique. This critique, however, is useful for it provides an analytic lens appropriately focused to assess how and why arguments that use constituent power operate within certain conceptual parameters that reinforce a particular brand of politics.

* * *

[141] See Agamben, *The Highest Poverty*; Agamben, *The Use of Bodies*.

6: Arendt's Riddle of Foundation, or: "How to restart time within an inexorable time continuum"

The people rule the American political world as God rules the universe.

- Alexis de Tocqueville [1]

In this final chapter, I examine the Hannah Arendt's contribution to the politics of founding. Though this breaks from chronology, I do so because Arendt did not offer a distinctive account of constituent power. Rather, her argument was a critique of constituent power that connects the concept of constituent power with the temporal experience of politics and of founding. Her argument is one that illuminates how, though diverse formulations are possible, exchanges that employ constituent power operate in relatively fixed parameters, parameters that reinforce an understanding of politics in relation to sovereignty, because they rely upon conceptualisations of action analogised to Genesis. Consequently, there is a tonal shift in this chapter, as my examination of Arendt does not intend to reconstruct an account of constituent power, but to use her work to more precisely understand how employing constituent power as a claim is related to the various thought practices that utilise origins that were examined in the introduction. In short, Arendt's thought provides a platform through which it is possible to recognise the sorts of limitations involved in the political imaginaries constructed through exchanges that

[1] Alexis de Tocqueville, *Democracy in America*, trans. James T. Schleifer, vol. 1 (Indianapolis, IN: Liberty Fund, 2010), 97.

use constituent power to ground the normative commitments of claims to collective political identities.

In the final chapter of *On Revolution*, in which she drew attention to the lost treasures of the revolutionary tradition, Hannah Arendt wrote that 'the spirit of revolution contains two elements which to us seem irreconcilable, and even contradictory'. The experience of founding brings forth an 'exhilarating awareness of the human capacity of beginning', an exhilaration which is tempered through a pressing concern with the 'stability and durability of the new structure'. She continued:

> Perhaps the fact that these two elements, the concern with stability and the spirit of the new, have become opposites in political thought and terminology—the one being identified with conservatism and the other being claimed as the monopoly of progressive liberalism—must be recognised to be among the symptoms of our loss.[2]

It is common to interpret Arendt's argument in *On Revolution* as a meditation upon the 'Social Question', that it was the presence of the poor, driven by the 'needs of their bodies' that led to the failures of the revolution.[3] To do so is to lose sight of a more profound problem addressed in her constitutional theory, namely the way in which 'automatic thought-reactions' structure our capacities of thinking and acting in politics.[4] Arendt wrote that 'clichés, stock phrases, [and] standardized codes of expression and conduct have the socially recognised function of protecting us against…the claim on our thinking attention'.[5] The distinction between 'stability' and 'novelty' is one such 'standardized code of expression' that, for Arendt, alleviated the burden upon our thought, portraying democracy as torn between the moment of

[2] Arendt, *On Revolution*, 222-23.

[3] Ibid., 59-60. For efforts to do so, see Richard Bernstein, *Philosophical Profiles: Essays in a Pragmatic Mode* (Philadelphia: University of Philadelphia Press, 1986); Jean Bethke Elshtain, "Hannah Arendt's French Revolution," *Salmagundi* 84(1989); Jürgen Habermas, "Die Geschichte von den Zwei Revolutionen," *Merkur* 20, no. 218 (1966); Eric Hobsbawm, "On Revolution, by Hannah Arendt," *History and Theory* 4, no. 2 (1965); Hanna Fenichel Pitkin, *The Attack of the Blob: Hannah Arendt's Concept of the Social* (Cambridge: Cambridge University Press, 1998); Sheldon Wolin, "Hannah Arendt: Democracy and the Political," in *Hannah Arendt: Critical Essays*, ed. Lewis P. Hinchman and Sandra K. Hinchman (Albany, NY: State University of New York Press, 1994).

[4] Arendt, *On Revolution*, 223.

[5] Hannah Arendt, *The Life of the Mind, Volume I: Thinking* (London: Harcourt, 1977), 4.

the disruption of rule, and ordinary politics under it.[6] In the previous chapter, it was concluded that Negri's radical use of constituent power ran into fundamental problems when it sought to isolate constituent from constituted power. To overcome this, Agamben gestured toward a politics not organised around these sorts of conceptual bracketing. In this chapter, I extend this perspective through the work of Arendt. I take up Arendt's assertion that to recapture the lost spirit of revolution consisted in 'the attempt at thinking together and combining meaningfully what is presented to us in terms of opposition and contradiction'.[7] In order to do so, I re-examine the political temporality that is evoked in the activity of founding. I develop this with attention to her argument in *The Life of the Mind*, where she revised her position from *On Revolution*. Here she confronted what she calls 'the riddle of foundation', or, 'how to restart time within an inexorable time continuum'.[8] The new emerges within a world that preceded it in time, and so appears to disrupt our received understanding of stability. In the instance of the French Revolution, this tension was augmented by a peculiarly superhuman need to begin political life with a new calendar. This, Arendt recognised, was achieved most readily through appeals to extra-temporal absolutes that, in mimicking divine genesis, undo the human achievement of founding.[9] In this chapter, I argue that Arendt's response was not to repudiate absolutes in politics but instead to offer a critical redescription of them. Rather than a 'resolution' of the riddle, her response is more appropriately framed as a 'disruption' of the commonplace temporalisations we attribute to our political vocabulary. This allowed Arendt to approach the relationship between stability and

[6] This concern is pressing not only for theorist who adopt the contemporary formulation of the distinction between constituent and constituted powers, but more generally for theorists of (radical) democracy. See especially, Ernesto Laclau, "Democracy and the Question of Power," *Constellations* 8, no. 1 (2001): 7; Lefort, *Democracy and Political Theory*; Jacques Rancière, *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (London: Continuum, 2010); Wolin, "Fugitive Democracy." Aletta Norval interrogates this issue with respect to Rancière in "'Writing a Name in the Sky': Rancière, Cavell, and the Possibility of Egalitarian Inscription," *American Political Science Review* 106, no. 4 (2012).

[7] Arendt, *On Revolution*, 224. Others have undertaken this by focusing in upon her council system, though this has amounted only to the way in which the new is to 'survive' within the stable constituted order. This theorises the problem in the key of the paradox of constitutionalism, rather than escaping it. For example, Muldoon, "Arendt's Revolutionary Constitutionalism."

[8] Hannah Arendt, *The Life of the Mind, Volume II: Willing* (London: Harcourt, 1977), 214. For an alternative analysis of the riddle, see Andrew Schaap, *Political Reconciliation* (London: Routledge, 2005), 85.

[9] Arendt, *Willing*, 208.

novelty as compatible rather than antagonistic ideas, and in doing so, reject the division between constituent and constituted powers. This advances two significant positions. First, Arendt's account of revolutionary founding provided a distinctive temporalisation of politics that is quite different from what has been interpreted as a constitutional theory that is merely a 'middle path' between liberal constitutionalism and radical democracy.[10] Second, in revealing this, Arendt's work provides a sort of tool-box that can assist in unpacking the conceptual make-up of constituent power, and with it the paradox of constitutionalism discussed in the introduction.

My argument is built in four parts. In part I, I interrogate Arendt's critique of constituent power in *On Revolution*. I argue that her critique is levelled at Carl Schmitt. With reference to a note in her *Denktagebuch* that relates the concept of the Political to a particular Judeo-Christian creation-myth, I demonstrate that Schmitt's constituent power is, for Arendt, a particular way of appropriating authority through the appeal to a unitary, transmundane absolute, one that, in doing so, conceives of law as sovereign command, that intended to settle the agonistic encounter of politics. It is this phenomenology of law, organised around the transmundane absolute, that encourages us to perceive stability and novelty as irreconcilable categories. In part II, I show how Arendt's sensitivity to the term 'absolute' is overlooked in most literature. I parse three distinctive readings of the Arendtian account of founding, arguing they each take Arendt's ambiguous use of 'absolutes' to refer exclusively to its theologico-political form. This position has important implications for how these theorists understood Arendt to relate politics to law. This is problematic for two reasons: first, this retains the bifurcation between stability and novelty; and second, this lens imports a thin conception of law as command into their argument. Whilst Arendt certainly did employ the term 'absolute' according to this definition, it was by no means exhaustive. Greater sensitivity to her other uses highlights that she did not exclusively consider them tools of political theology. The significance of this is developed in part III, where I argue that her Augustinian reflections on a predicament of beginning anew in Kant's First Critique illuminates the limitations of

[10] Muldoon, "Arendt's Revolutionary Constitutionalism," 596.

a conventional lens through which beginnings are perceived as a rupture in time. By reading Augustine's distinction between *principium* and *initium* against Kant, I demonstrate how Arendt reversed the ontological priority between beginning time and beginning *in* time, through which she built upon a peculiar construction of 'relatively absolute spontaneity'.

I develop this theme in part IV by showing how it applies as a critique of the temporal vocabulary employed by theorists of constituent power, and especially the paradox of constitutionalism. Arendt also leaves open the possibility of considering how temporality weighs upon our actions. By reading her thoughts on the temporality of the thinking ego against her position on the temporality of action, one possibility is that our mental reflections on time disentangle our actions from commonplace assumptions of linear continuity, so disrupting our association of the new with rupture. This strategy of disrupting the temporalities that we associate with political action assists in reconsidering the 'paradoxical' relation between constituent and constituted powers, by challenging the theoretical lens through which a constituent power is made necessary.

I: Arendt's Critique of Constituent Power

No direct reference was made to the work of Carl Schmitt in *On Revolution*, and there are only fleeting references to him in her corpus of work. Apparently appalled by his patronage toward the Nazi party, at no point did Arendt ever feel comfortable to engage substantively with his writings.[11] Nevertheless, the few remarks available do indicate more than a passing familiarity with his thought. In *The Origins of Totalitarianism*, she certainly recognises Schmitt's place among the few 'first-rate talents' in Nazi Germany who were invariably replaced by 'crackpots and fools…lack[ing] in intelligence and creativity' in order to ensure loyalty to the party.[12] In the essay 'What is Freedom?' she reluctantly praised Schmitt's identification of the sovereign as he 'who wills and commands', suggesting he is 'the most able defender

[11] Kalyvas, *Politics of the Extraordinary*, 194.
[12] Arendt, *The Origins of Totalitarianism*, 339.

of the notion of sovereignty' among modern political theorists.[13] Her personal effects, though, contain traces of a more intimate engagement. Her personal library included eight works by Schmitt, including a German copy of *Constitutional Theory*.[14] Though her notation within this text is less involved than the marginalia in her copy of *The Concept of the Political,* one of the few passages of *Constitutional Theory* that she underlined was a discussion of constituent power. What seems to have concerned Arendt within this extract was Schmitt's treatment of constituent power, denoted by a 'will' that was 'the origin of a command'.[15]

Although Schmitt's name goes unreferenced, her most revealing encounter appeared in her *Denktagebuch,* unpublished until 2002, where an entry from April 1951, entitled 'The Judeo-Christian Creation-Myth and the Concept of the Political', recalled in its title Schmitt's most famous text. The problem that she diagnosed '[hung] upon the difficulty in comprehending a specifically human account of plurality'. Though his name is absent, Arendt demonstrated that the political theology that Schmitt endorsed misinterpreted the meaning of biblical genesis. She described how, according to this creation-myth, the specific qualities of Man, being descended *ex uno homine,* from Adam, accounted for the unity of men, and so guaranteed their 'godliness', for God is also one. As one, humankind was able to appropriate God's creative powers for themselves, so long as they did not degenerate from that unity. And so, Arendt wagered in this short note, the vocabulary of Western thought—Sovereignty, the State as the City of Man, and the 'nonsensical concept of the people'—was held together through the *ex uno homine* creation-myth which diminished pluralism in favour of sovereignty in the singular.[16]

The centrality of unity to Schmitt's Weimar thought corresponds closely to the difficulty that Arendt identified in Genesis. It is this telling engagement with

[13] Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Harmondsworth: Penguin, 1968), 296.

[14] Her complete personal library is held at Bard College in New York, much of which has since been digitised, and is now available online at http://blogs.bard.edu/arendtcollection/marginalia/ [last accessed 4 May 2017]. Though it is not possible to discern when she came into possession of *Verfassungslehre,* her copy was a first edition, from 1928. Five editions were published during her lifetime, the second in 1954.

[15] Schmitt, *Verfassungslehre*, 9. Compare Schmitt, *Constitutional Theory*, 64.

[16] Hannah Arendt, *Denktagebuch, 1950 bis 1973: Erster Band*, ed. Ursula Ludz and Ingeborg Nordmann (Munich: Piper, 2002), 70-71.

Schmittian political theology that seems to undergird and organise her reading of political beginnings. Indeed, Arendt's critique of Sieyès, presented in the fourth chapter of *On Revolution,* was heavily inflected with Carl Schmitt's own interpretation of constituent power, as a decisionistic, theologico-political constituent will that inaugurates the sovereign dictator.[17] Nevertheless, as I demonstrate in the following two sections, Arendt's Schmittian appropriation of Sieyès served only as a battleground upon which she could challenge Schmitt on the difficulties entailed in a particular framework of theorising beginnings.[18] Nevertheless, I will show that it insufficient to argue that Arendt's part in this theoretical encounter was to contain the arbitrary constituent will by appealing to the judicial powers of the supreme court,[19] or to rely upon the preceding legal infrastructure of colonial America.[20] This flattens out the way in which Arendt was engaged in a deeper critique of decisionistic political theology. In addressing the concept of constituent power through a reading of Augustine, Arendt developed a thin, non-decisionistic political theology that endeavoured to escape this Judeo-Christian creation-myth, replacing decisionism with a worldly, pluralist account of founding.[21] I demonstrate that Arendt was

[17] Arendt, like Schmitt, diminished the 'antinomic' Sieyès, for whom the nation was one under law, in favour of its presence within the state of nature where it amounted to a tool of political theology. Though he was quoted at length, and in French, her citations of Sieyès are drawn exclusively from the same brief passage in chapter five of *What is the Third Estate?* that were utilised by Schmitt, namely, Sieyès, "Third Estate," 136-38. For comparison, see Arendt, *On Revolution*, 304-05, fn.30, 36, 38; Schmitt, *Constitutional Theory*, 127-28; Schmitt, *Dictatorship*, 123-24; 277, fn.15. There is a growing body of literature that examines the relationship between the scholarship of Arendt and Schmitt. Martin Jay's essay recognises Arendt's uneasy relationship with a loose collective of German political existentialists, among whom Schmitt is included alongside Martin Heidegger, Ernst Jünger, and Alfred Bäumler. Martin Jay, *Permanent Exiles: Essays on the Intellectual Migration from Germany to America* (New York: Columbia University Press, 1985), 240. For more explicit comparisons of their thought with regards to the act of founding, see Andrew Arato, "Forms of Constitution Making and Theories of Democracy," *Cardozo Law Review* 17(1995); Arato and Cohen, "Banishing Sovereignty?."; Kalyvas, *Politics of the Extraordinary*, 194-253; Samuel Moyn, "Hannah Arendt on the Secular," *New German Critique* 35, no. 3 (2008); Wenman, *Agonistic Democracy*, 59-99.

[18] Consequently, those that take her account of the French revolution to be mistaken from a historical perspective seem to misconstrue the activity in which she is engaged. It is not an 'unquestioning' adoption of Schmitt, but rather a critical engagement with what it means to begin. See Lisa Disch, "How could Hannah Arendt glorify the American Revolution and revile the French? Placing *On Revolution* in the historiography of the French and American Revolutions," *European Journal of Political Theory* 10, no. 3 (2011); Scheuerman, "Revolution and Constitutions," 160.

[19] Scheuerman, "Revolution and Constitutions," 161.

[20] Kalyvas, *Politics of the Extraordinary*, 232-53.

[21] On the relation between political theology and decisionism, see Paulina Ochoa Espejo, "Does Political Theology Entail Decisionism?," *Philosophy and Social Criticism* 38, no. 7 (2012). John Wolfe Ackerman has argued that Arendt developed a political theology of 'pluralist encounter', an interpretation that complements my own interpretation. "The Memory of Politics: Hannah Arendt,

engaged in a reflexive analysis that sought not only to develop this alternative political theology, but also examined the styles of politics that were inaugurated by those who relied upon decisionistic solutions. Appreciating that this is the task in which she was engaged is critical if I am going to refute those accounts which propose that she tempers decisionism by recourse the stability of political institutions.

Arendt's wager was that recourse to constituent power styled activities of founding after the Judeo-Christian creation myth, and in the process imported into politics the privilege of unity over plurality by simulating the actions of a divine absolute. This, moreover, altered the meaning of authority, which was connected with the absolute power of God. This can be appreciated first by examining her meditations on the shifting location of authority within Western political thought. The hallmark of authority is rather an 'unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed'.[22] It is for precisely this reason that authority is so curiously elusive and intangible, for it possesses no recourse to a mechanism of enforcement. On her account, the 20th century was marked by the loss of authority, the final stage of a much longer erosion of religion and tradition.[23] In losing the intangible phenomenon of authority, however, the 'general doubt of the modern age also invaded the political realm',[24] with striking ramifications for the political community. Authority, with its foundation in the past, gave an unstable, mortal world 'permanence and durability'. The loss of authority in Modernity was tantamount to the 'loss of the groundwork of the world', throwing humankind into a 'Protean universe'.[25] Authority, for Arendt, was not merely a relation of command, but was intimately connected to the maintenance of the very space in which ordinary political life could be celebrated, and where individuals might step forward to disclose their unique identities.[26]

Carl Schmitt and the Possibility of Encounter," in *Concentrationary Memories: Totalitarian Terror and Cultural Resistance*, ed. Griselda Pollock and Max Silverman (London: I.B. Tauris, 2013).

[22] Hannah Arendt, *On Violence* (London: Harcourt, 1970), 45.

[23] Arendt, *Between Past and Future*, 91-93.

[24] Ibid., 93.

[25] Ibid., 95.

[26] Hannah Arendt, *The Human Condition* (Chicago, IL: University of Chicago Press, 1958), 178-80.

For Arendt, the conventional concept of authority, essentially consisted of two elements: first, the capacity to command due to the intangible obedience that follows; and second, authority's utility in maintaining the political realm. These two sides of authority were clear in the fleeting appearance of authority in Ancient Greece, for although entirely absent in the Pre-Socratics (and emerging both conceptually and linguistically in Rome), the phenomenon of authority with relation to political rule appeared first in Plato's political philosophy, wherein 'he confronted the reality of the *polis* with a utopian rule of reason in the person of the philosopher-kings'.[27] Plato is unequivocal that democracy, in lacking the authority to compel, 'sweeps away' with 'a grandiose gesture' the 'higher principles we laid down when founding our state'.[28] What is sure, however, is that these two qualities of authority are distinguishable: the latter is conceptually necessary to authority, insofar as it guarantees the political life of the polity, whilst the former—the command-obedience relation—serves only as a means of securing the latter.[29]

Arendt provided an alternative. It was in Rome that an account of authority could be found that was at once outside the political realm, but nevertheless profoundly political in its origin. Arendt recognised the Romans' enduring respect for the 'sacredness of founding', the glory of which 'became to the Romans the central, decisive, unrepeatable beginning of their whole history'. It was, on Arendt's account, in this context that the concept of authority first appeared, for the term *auctoritas*—authority—is etymologically tied to both *augere*—to augment—and to *auctor*—author.[30] Authority in Rome was deeply rooted in the initiatory deed of founding. Due to this connection, authority, in contradistinction to power, 'had its roots in the past', and so, once a republic has been founded 'it remains binding for all

[27] Arendt, *Between Past and Future*, 107.

[28] Plato, *The Republic*, trans. Desmond Lee (London: Penguin, 2007), 557e-58b.

[29] This is in contradistinction to Max Weber, for example, who associates authority with the legitimation of precisely such a command-obedience relationship, mapped out in his famous distinction between traditional, charismatic and legal-rational authority. Max Weber, "Politics as a Vocation," in *The Vocation Lectures*, ed. David Owen and Tracy B. Strong (Indianapolis, IN: Hackett, 2004). Arendt's concern was quite different to that of Weber, for she showed only a passing interest in how authority might operate in order to legitimate either strength or violence. Instead, she is concerned with keeping the phenomenological makeup of authority distinct from either power or violence. What remains key for Arendt is the ability of authority to hold open the space for politics.

[30] Arendt, *Between Past and Future*, 120-22.

future generations'. Nevertheless, 'this past was no less present in the actual life of the city', for the author was 'the one who inspired the whole enterprise and whose spirit…is represented in the [city] itself'. Those in authority were endowed with the capacity to augment the founding by refurbishing the community: 'to be engaged in politics meant first and foremost to preserve the founding of the city of Rome.[31]

Arendt's proclivity towards appeals to etymology when grappling with phenomenology was a tendency she took from Heidegger.[32] Whilst one should of course be wary of the surety of the conclusions she draws from such discussions,[33] she employs the technique in order to short-circuit longer and less certain conceptual histories and thereby grapple with what she is more interested in, namely, the 'importance of making distinctions'.[34] The distinction she drew was between authority as command, and authority as *auctoritas*. In the former, authority was located in the body of the individual who could claim to transcend and put an end to the conflictual activity of politics through commandment. By contrast, by locating politics not in a unified body but a foundation, one did not end the tumult of politics but transformed it by recasting it as a concerted activity tied-back [*re-ligare*] to a sacred origin. More critically, these definitions of authority fed into particular

[31] Ibid. Alexandre Kovèje has suggested that a backward facing authority is decidedly conservative. He relies upon the scholastic account as derivative of the ontological proof that effect can never disown its cause. Arendt's argument should not succumb to this critique. The continued modulation of the Roman *auctoritas* is an augmentation, rather than conservation of the founding, even if that augmentation is always and set within the limits of the foundation. Moreover, as discussed in chapter one, the scholastic proof remained vital to resistance theory in early Modernity. Kojève, *The Notion of Authority (A Brief Presentation)*, 48-56.

[32] For a critique of Heidegger's 'etymological essentialism', see Jonathan Barnes, "Heidegger in the Cave," in *Method and Metaphysics: Essays in Ancient Philosophy I* (Oxford: Oxford University Press, 2011), 85-89.

[33] As John Dunn was: 'The taste for political etymology which has dogged her work from the first [was] a sort of intellectual tic'. "Hannah Arendt on Revolution (1964)," in *The Cambridge Mind: Ninety Years of the Cambridge Review, 1879-1969*, ed. Eric Homberger, William Janeway, and Simon Shama (Cape: London, 1970), 158.

[34] Arendt, *Between Past and Future*, 95. This activity of drawing distinctions should be understood as a heuristic that allows us to 'feel' the world, rather than the construction of an ideal type. See Hannah Arendt, *Denktagebuch, 1950 bis 1973: Zweiter Band*, ed. Ursula Ludz and Ingeborg Nordmann (Munich: Piper, 2002), 771. Though valuable, these heuristic distinctions were not only partial conceptual histories but frequently distort actual politics. Alan Keenan suggest that 'Arendt's "augmentation"…presents as a smooth, evolutionary process what is instead a much less stable, even conflictual relationship of freedom to foundation'. See Alan Keenan, "Promise, Promise: The Abyss of Freedom and the Loss of the Political in the Work of Hannah Arendt," *Political Theory* 22, no. 2 (1994): 315. Jason Frank agrees when suggesting 'agonism…is largely written out of Arendt's account of postrevolutionary politics' as her 'neo-Roman theory of augmentation fails to fully account for the fraught and only retrospectively authorised dimension of the democratic claims-making associated with constituent moments'. Frank, *Constituent Moments*, 65-66.

conceptions of the spatial relation between law and politics in Arendt's thought. For Arendt, law served to organise the space for politics, though it did so in a variety of ways. The Greek *nomos* was 'quite literally a wall, without which there…[was] not a city, a political community'.[35] *Nomos* demarcated the political from the non-political, partitioning a space in which politics could occur.[36] In Modernity, the spatialisation of politics was inverted. Whilst still demarcating an inside and outside, law serves the explicit purpose of *securing* the inside from the outside, an ability amplified by the command-authority emanating from the 'power monopoly of the state', itself an imitation of the divine creator who prohibits human actions through commandment.[37] Law serves as commandment in order to preserve the space of politics, though that space is not cleared for an agonal encounter. The unifying tendencies of the modern Hobbesian sovereign state compress the space between men, which, in its most extreme form, 'destroys the essential prerequisite of all freedom which is simply the capacity to motion'.[38] If politics, as it was for Arendt, was equated to freedom as pluralistic and agonal disclosure, law, along with authority-as-command, were placed in opposition, through which they are tasked with reducing that tumultuous encounter to peace.

The Roman *Lex,* on Arendt's account, held an entirely different purpose. It served not as a wall to separate one from another, but sought to forge formal relationships and ties between individuals.[39] To this effect, as it did also in Montesquieu, Law served as a means of forging an alliance or *rapport* that sought to relate things, bringing them face-to-face.[40] The spatial inflection of this was to see *Lex*

[35] Arendt, *The Human Condition*, 63-64. Her conclusion is drawn, it seems, from a fragment of Heraclitus': 'The people should fight for the law as for a wall'.

[36] Ibid., 64. For a closer account of Arendt's *nomos,* see Hans Lindahl, "Give and Take: Arendt and the *Nomos* of Political Community," *Philosophy and Social Criticism* 32, no. 7 (2006).

[37] Arendt, *The Origins of Totalitarianism*, 141; Arendt, *On Revolution*, 189. On Arendt's critique of the law as commandment, see her critique of Thomas Hobbes more generally. Arendt, *The Origins of Totalitarianism*, 139-47.

[38] Arendt, *The Origins of Totalitarianism*, 46.

[39] Arendt, *The Human Condition*, 63, fn.62.

[40] Arendt, *On Revolution*, 188. See also Montesquieu, *The Spirit of Laws*, 8. For further elaboration of the three accounts of law, see her lectures first given in 1953, Hannah Arendt, "The Great Tradition I. Law and Power," *Social Research* 74, no. 3 (2007); Hannah Arendt, "The Great Tradition II. Ruling and Being Ruled," *Social Research* 74, no. 4 (2007). Inevitably, the historical relation between Roman law and modern sovereignty is far more complex than Arendt's partitioning allows. See Holland, "Sovereignty as *Dominium?*."; Lee, *Popular Sovereignty*.

not as the preservation of a space, but the reduction of distance between citizens in order to foster political interaction, with the correlated effect of conceiving of Law as an institution complementary to politics, through the concerted effort to augment the founding act.

It is important to recognise the subsequent connection that Arendt conceived between authority and constituent power. As it initially appears upon this reading, the political authority of the constituent power should be located in its status as founder of the constitution, that is, through the Roman concept of authority-in-founding. Nevertheless, Arendt appears to appreciate that the act of willing alone was simply too fraught with arbitrariness to secure the political authority required to preserve the community beyond the life of the founders, for she was unequivocal in her belief that the distinctively Roman concept of authority-as-founding 'seems to have been entirely lost and forgotten'.[41] Modernity severed the connection with tradition, to the extent that tradition 'could no longer serve as the source of legitimacy and authority', and with it the Roman authority-as-founding was lost.[42] The constituent power consequently could not draw from the authority-as-founding, and instead fell back upon the authority-as-command, anchored in the living body of the sovereign.

The effort to authorise the revolutionary beginning in France was, for Arendt always destined to meet complications due to the legacy of monarchical absolutism. Though she was certain that any revolutionary action could not succeed so long as the authority of the prior political realm remained truly intact, the weight of the past persisted as a resource, and so though not determining the course of events for the French people, surely revealed a vessel that could be more readily filled in lieu of the creation of an entirely new modality of authority.[43] When Sieyès placed the constituent power of the nation above the constituted power, he ensured its location within the state of nature, a location in which it could never leave, and 'can never

[41] Arendt, *Between Past and Future*, 136.

[42] Albrecht Wellmer, "Arendt on Revolution," in *The Cambridge Companion to Hannah Arendt*, ed. Dana Villa (Cambridge: Cambridge University Press, 2000), 224.

[43] Arendt, *On Revolution*, 155.

have too many ways of expressing its will'.[44] Arendt resolved to ask, 'what else did even Sieyès do but simply put the sovereignty of the nation into the place which had been vacated by a sovereign king?'[45] The substitutional problem of locating the nation in the place previously held by the king is particularly notable, because it was, in fact, a tertiary substitution, for 'the Prince had [already] stepped into the pontifical shoes of Pope and bishop' as God's earthly lieutenant.[46] Arendt's vicarious reply to Schmitt came to a head as the politico-theological structure of constituent power was brought to the fore. The nation, becoming an 'absolute power', had 'lost its connection with a power higher than itself'—the nation had 'usurped the traditional place of God'.[47] Constituent power fell back upon a hybrid notion of authority derived from the Christian two swords doctrine which, though initially parsing temporal power and divine authority, soon incorporated princely power under the auspices of the pope.[48] Arendt's narrative certainly flattened the shifting loci of political and religious authority during the early modern period.[49] Nevertheless, whether historically appropriate or not, the distinctions that she drew an insightful heuristic through which the function of constituent power can be assessed. The two conceptualisations of authority operate within distinct fields of commitment: the first,

[44] Sieyès, "Third Estate," 138.

[45] Arendt, *On Revolution*, 156.

[46] Ibid., 155. Quoting Ernst H. Kantorowicz, "Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins," *The Harvard Theological Review* 48, no. 1 (1955): 67.

[47] Arendt, *On Revolution*, 132; Hannah Arendt, *Essays in Understanding, 1930–1954* (New York: Schocken, 1994), 209.

[48] Arendt, *Between Past and Future*, 126-32.

[49] See especially Chapter 1, above. With regards to the Two Swords doctrine specifically, the meaning of the Gospel of Luke was interpreted variously and combatively. The interpretation Arendt refers to is discussed in a letter dating to 1150, from St. Bernard of Clairvaux to Pope Eugenius III, in which he claims 'both swords are Peter's: one is unsheathed at his sign, the other by his own hand, as if often necessary. […] Thus that [temporal] sword was undoubtedly his, but it was not to be drawn by him'. See J. A. Watt, "Spiritual and Temporal Power," in *The Cambridge History of Medieval Political Thought, c.350-1450*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988), 373-4. By contrast, the time of Charlemagne, the two swords referred to monarchical authority against heretics and pagans. Jacques Le Goff, *Medieval Civilization, 400-1500*, trans. Julia Barrow (Oxford: Blackwell, 1988), 273. Nevertheless, the Papal interpretation had gained currency by the 12th Century; John of Salisbury, in his *Policraticus*, appears to draw upon this doctrine when discussing the nature of monarchical authority when he suggests that 'this sword is therefore accepted by the prince from the hand of the Church, although it still does not itself possess the bloody sword entirely. For while it has this sword, yet it is used by the hand of the prince, upon whom is conferred the power of bodily coercion, reserving spiritual authority for the papacy'. John of Salisbury, *Policraticus*, trans. Cary J. Nederman (Cambridge: Cambridge University Press, 1990), 32. Papal authority was nevertheless subsequently challenged through other avenues. For an insightful discussion of the Two Swords, the subsequent challenges, and the spatial politics that follow, see Stuart Elden, *The Birth of Territory* (Chicago: University of Chicago Press, 2013), 157-210.

Roman in origin, an authority attentive to and dependent upon a fragile founding deed; and a second that endeavoured to reinforce that fragile deed with an appeal beyond politics, and ultimately beyond the temporal realm altogether by laying claim to 'absolutes'. Arendt was clear that one reneged upon a commitment to politics by appeals to such an illicit 'absolute'. The illicit quality of an absolute was to be seen in what it posited: it was the imitation of a 'creator-god who creates time along with the universe and who, as legislator remains outside of his creation'.[50] It was Political Theology *ex uno homine*.

The great value in Sieyès' appeal to this secularised absolute was that it was capable of breaking two vicious circles of constitutional founding. The first was the *petitio principii,* the circular people who were both creator and creation of the constitutional order. The nation, existing in the state of nature, preceded any positive form.[51] Second, and more fatefully, the absolutism of the constituent power was capable of bestowing *legality* upon the constitutional order, not because it was temporally prior to the constitutional order, but because it appeared as a 'higher law', transcending the temporal realm of affairs altogether.[52] The absolute, it was supposed, conferred authority upon the founding deed, and so guaranteed the new realm of politics by establishing the nation as the ultimate source of lawfulness by leaning upon divine authorisation. Upon closer inspection, however, it accomplished nothing of the sort; it was politics in 'the given frame of reference in which the legitimacy of rule in general…had always been justified by relating them to an absolute source which itself was not of this world'.[53] In upholding the historical legacy of the absolute, the French Revolution never truly broke from the traditional sanction of religion.

What followed was an entirely Schmittian conjecture, only with a different normative inflection. The appeal to the absolute burdened the successors of the revolution with a decisionistic conception of law—one so easily appropriated by the

[50] Arendt, *Willing*, 208.

[51] Arendt, *On Revolution*, 161. As part of the vicarious debate with German *staatsrechtslehre,* the implicit reference here is to the problem identified by Hans Kelsen. See *General Theory of Law & State*, 260-61.

[52] Arendt, *On Revolution*, 161.

[53] Ibid., 160.

exemplary, charismatic sovereign dictator who could claim 'I am the *pouvoir constituant*'.[54] Arendt's point is more precise in an earlier draft of *On Revolution*, in which she wrote that, when Napoleon came to embody the revolutionary and counter-revolutionary moments, he 'so oddly echo[ed] Louis XIV's *"l'Etat c'est moi"*.[55] The great irony of the revolution found its expression in the reliance upon 'the mundane nature of this absolute' that, despite the profound secularist claims that endeavoured to begin the calendar anew and the enlightenment desires to release men from self-imposed tutelage, fell back upon traditional techniques of religious sanction.[56] The wager of Arendt's claim, was that constituent power had, peculiarly enough, lost is connection with the act of founding. The authority of the constituent power, which had both potential and opportunity to genuinely create anew, found its expression in the traditional appeal to political theology. Whilst the appeal to the sovereign authority of the deified people 'escape[d] the haphazardness' of founding in place of 'the solidity of quiet and order',[57] such stability released the performance of founding to a higher power, and so not only denied the human achievement of founding, but did so by leaning upon a creation myth that substitutes for plurality a unitary conception of the Political. This is the Schmittian, not Sieyèsian, constituent power. Samuel Moyn is, then, quite correct when he suggests that 'it was not religion but the more basic requirement that religion meets' that is retained within revolutionary thinking.[58] For Arendt, as with Schmitt, though not Sieyès, the tool of constituent power was a politico-theological one.

II: The Problem of the Absolute

For Arendt, constituent power was a deeply fraught political tool. It was liberating, but its victory was a pyrrhic one, for the reliance upon an absolute burdened its revolutionary agents with decisionism. Nevertheless, Arendt's reflections of revolutionary beginnings had a deeply ambiguous relation with the

[54] Ibid., 163.
[55] Hannah Arendt, "On Revolution (First Draft)," in *The Hannah Arendt Papers* (Washington, DC: Manuscripts Division, Library of Congress, n.d.), 3.
[56] Arendt, *On Revolution*, 160.
[57] Arendt, *The Human Condition*, 220-22.
[58] Moyn, "Hannah Arendt on the Secular," 76.

term 'absolute'. She was troubled with how absolutes were employed with recourse to God, for power within a political realm attentive to human plurality could never amount to omnipotence.[59] Such omnipotence, as is found in her considerations of sovereignty and totalitarianism, compresses the space between humans, destroying their capacity to act and to begin.[60] Yet, she nevertheless recognised their inevitability in the case of laws by which political communities were founded.[61] Whilst she affirmed that 'the absolute…spells doom for everyone' when it enters the political realm',[62] she celebrated the absolute that was engendered in the *principle,* which would 'save [the beginning] from its inherent arbitrariness'.[63]

Andreas Kalyvas has recently sought to overcome this tension by dismissing Arendt's use of the terms 'altogether new' and 'absolute novelty' as 'misleading expressions'. He instead reads into Arendt his own account of a 'relative beginning'.[64] Whilst his reading is insightful, I am unconvinced that one can write off Arendt's language so straightforwardly. Arendt's choice of words strikes me as more ambiguous; whilst she wished to refute a groundless will, she did not subsume the absolute under this term, but applied it in forms that pulled in different directions. Attentiveness to this is integral to the how Arendt related novelty to stability rather than treating them as countervailing tendencies.

On occasion, she employed the term 'absolute' as a noun, which stood in for authority by appearing as a transmundane object, whilst on others, when for example she wrote of 'absolute novelty', it was employed as an adjective that modified the intensity of the novel act, without burdening it with politico-theological connotations. Between these, there is a third, subtler, use that appeared to commit to the latter whilst engaging the tools of the former, in which the mundane intensity of an 'absolute beginning' is betrayed by appealing to a transmundane or divine absolute. The first use of the term 'absolute' is clearest in her rejection of constituent

[59] Arendt, *On Revolution*, 39.
[60] Arendt, *The Origins of Totalitarianism*, 466.
[61] Arendt, *On Revolution*, 158.
[62] Ibid., 84.
[63] Ibid., 212.
[64] Kalyvas, *Politics of the Extraordinary*, 224. For use of these expressions see Arendt, *On Revolution*, 212, 32.

power noted above.[65] The third, is characterised by a particular temporality, which she referred to as an 'absolute beginning'—that is, a rupture or absolute break from the past.[66] It is a more problematic construction, because it encapsulates this tension between the mundane and transmundane employments of 'absolute'. In utilising 'absolute' as an adjective, it qualified the action in such a way that the absolute appeared to be generated by the act itself. Nevertheless, this appearance was betrayed, for though it did not cite God directly, it nevertheless imitated his capacity to create time itself. In doing so, the French Revolutionaries who employed it destroyed the distinctive temporality of politics as the will overrode the other faculties of the mind, allowing those actors to believe in the unthinkable, that Man born in time could restart it.[67]

Each of these is a clearly articulated account of political arrogation, each controlling the trajectory of politics by appropriating its conclusive authority from an imitation of a Godly capacity to begin.[68] This practice of political arrogation was vital to Arendt's concern for the unwieldy uses of absolutes within politics. They each secure the foundation through the imitation of a transmundane principle allowing secular government to retain the political instruments of Christian political theology.[69] It is important to accurately account for how Arendt employed absolutes, and in the following section I will argue that theologico-political absolutes were not exhaustive of Arendt's thought on the subject. It first serves to examine the consequences that follow when treated *as if they were*. In order to do so, I take three distinctive readings of Arendt's constitutional founding. These are Bonnie Honig's Derridean rereading, Andreas Kalyvas's account of 'relative beginnings' and Mark Wenman's affirmation of constituent power as absolute rupture. What remains intact in each account is an employment of 'absolutes' as tools of political theology. This I take to be a distortion of Arendt's account that diminishes a significant activity in which she was engaged, namely a redescription of the meaning and function of

[65] Arendt, *On Revolution*, 161-65.
[66] Arendt, *Willing*, 208.
[67] Ibid., 108.
[68] Freeden, *Political Theory of Political Thinking*, 95-97.
[69] Arendt, *Willing*, 209-10.

absolutes in politics. In treating absolutes in a politico-theological style, these interpretations each persist in a theorisation of law as a symbolic order that is 'against' politics. They thereby conceptualise the relation between politics and law inadequately. The implication is an inability to consider the categories of novelty and stability as Arendt called for.

In her comparative reading of Arendt's *On Revolution* and Jacques Derrida's *Declarations of Independence,* Bonnie Honig identifies in Arendt an attempt to address the question of how to 'establish lasting foundations without appealing to gods, a foundationalist ground, or an absolute'.[70] In place of an appeal to an extrapolitical source of authority, Honig stresses instead an act of performative writing that is the most exemplary form of being-in-the-world: the 'we hold' of the declaration was the actualisation of freedom in action, one that, on Honig's interpretation of Arendt, 'requires no appeal to a source of authority beyond itself'.[71] Against Arendt's interpretation, Honig contrasts Derrida's, who demonstrated that the 'we' of 'we hold' described a people who would come into being only *through* the declaration. Even Arendt's account of the American Declaration was led back into Sieyès' *petitio principii*, a vicious circle resolved only through the Founding Fathers' appeal to the final signifier of God.[72] Honig's solution is neither to deny nor succumb to the constative appeal to God, but instead calls upon democrats to 'resist' it.[73] In appealing to resistance, Honig sets up the initial intervention into the problem of the absolute. Absolutes, for Honig, are always 'illicit' because they are 'allegedly irresistible' anchors that taint the purity of founding. [74] They are 'irresistible' insofar as they are structural features of founding, and of language more generally. [75] They are only 'allegedly' so because absolutes are themselves reliant upon our own performative consent in appealing to them. Though absolutes cannot be eradicated, it is

[70] Honig, "Declarations of Independence," 98.
[71] Ibid., 101.
[72] Ibid., 104-05; Derrida, "Declarations of Independence," 9-12.
[73] Honig, "Declarations of Independence," 108.
[74] Ibid.
[75] Derrida, "Declarations of Independence," 9. For a fuller elaboration of Derrida's position with regard to speech act theory see especially Jacques Derrida, "Signature Event Context," in *Limited Inc.* (Evanston, IL: Northwestern University Press, 1988).

nevertheless, Honig posits, possible to resist the attempt to 'put law *above* man'. [76] Though she 'resists' the act of putting the law above men, law remains associated with the divine command that nevertheless holds the absolute in its place as a 'law of laws'. This is the heritage of the Derridean strand of Honig's interpretation. Derrida conceived of law as command,[77] whereas Arendt did not. Augmentation, derived from the Roman conception of law as alliance, was an activity of 'adding to the original foundation' through which law and politics appear together as mutually compatible categories.[78] Because Honig imports commandment into the conceptualisation of law, she transforms the way in which law and politics are related, as mutually necessary, but antagonistic constative and performative utterances. The deconstructive move converts augmentation, an activity of 'being-alongside' the law, into resistance, that is, as 'being-against' the law.[79] Stability and novelty are agonistically related in a precarious, open-ended struggle between politicisation and depoliticisation.[80] Though the opposition is transformed into a generative tension of 're-foundation', stability nevertheless remains antithetical to the spirit of the new.

More recent revisionary interpretations of *On Revolution* have challenged Honig's breakthrough reading. Andreas Kalyvas has taken Honig's reading to task, instead arguing that Arendt celebrated the American revolutionaries who were able 'to avoid the language and practices of absolute rupture' that a purely performative politics entails, for they relied upon pre-existing contracts, charters and self-governing public bodies, thus escaping the 'lawlessness and power vacuum that a complete break would have necessarily created'.[81] Through the 'relative' nature of beginning in *On Revolution*, he argues, Arendt's story of the American founding drew its strength from the ability to remain in continuity with the preceding

[76] Honig, "Declarations of Independence," 108.

[77] In addition to those cited above, see especially Derrida, "Force of Law."

[78] Arendt, *Between Past and Future*, 120-24.

[79] Even Arendt's much later discussions of civil disobedience do not amount to a clearly distinguishable activity of being-against the Law, but remains in accordance with the 'spirit of the law'. See Hannah Arendt, *Crises of the Republic* (Harmondsworth: Penguin, 1972), esp. 67.

[80] This conceptualisation of law is developed more thoroughly in Honig's more recent work, see Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009).

[81] Kalyvas, *Politics of the Extraordinary*, 227.

democratic culture of the colonies. While an instance of 'extraordinary politics', no absolute beginning arose, for authority was derived from the legal traditions and institutions that persisted. Though Kalyvas's interpretation offers the critical insight that a thread of temporal continuity remains, he framed this as a legal continuity that is in complete opposition to Carl Schmitt's 'notion of an *ex nihilo* beginning'.[82] There is certainly good reason to think that Arendt was replying to Schmitt, though this need not be so straightforward as a repudiation of absolutes, and the inversion of Schmitt's argument. To suggest this is the case is especially troublesome, for it tempers the way in which Arendt rethought the significance of law. For Kalyvas, the appropriate action is to take guidance from existing laws, and not to throw oneself into the abyss of freedom. A relative beginning ensures that the absolute does not emerge, but only *in this instance,* a position enhanced by his emphasis upon the exceptionally good laws of colonial American. The absolute, as the spectre of a Schmittian conception of commandment, remains conspicuous in its absence, for it is excluded from the particular case though not overcome generally, and so Kalyvas's thesis retains the phenomenological makeup that associates law with stability, and politics with the new, though a new inflected with decisionism. To escape this decisionism, the novelty of politics is subordinated to the law through which it is harnessed and contained.[83] Politics is inscribed within the law precisely because the stabilising function of law is capable of taming the unruliness of politics.

It is against Kalyvas that Mark Wenman has celebrated what Arendt recognises as the 'specific revolutionary pathos of the absolutely new'.[84] Noting Kalyvas's effort to advocate only 'relative beginnings', Wenman has interpreted Arendt's argument instead as an endorsement of a form of action that manifests in the ruptural temporality of radical innovation.[85] On his account, that Arendt kept alive this connection between constituent power and temporal rupture was precisely what separated her thought from her agonistic heirs. Wenman wants to take Honig's

[82] Ibid., 224.

[83] Jason Frank acknowledges and endorses this same interpretation when arguing that in defending an account of 'relative beginnings' its implication is for Arendt to subsume constituent power into the judiciary. Frank, *Constituent Moments*, 57.

[84] Wenman, *Agonistic Democracy*, 37.

[85] Ibid., 65-73.

interpretation without its Derridean gloss. Instead, by placing the stress upon the 'absolute priority' of constituent power as revolutionary rupture he interprets Arendt as 'stress[ing] unequivocally the moment of radical innovation' which he connects with an 'absolute beginning'.[86] Whilst Wenman reads Arendt as opening up an abyss of freedom, he suggests she does so only by radically rupturing the historical time continuum. Though he appreciates the phenomenological importance of the act of founding, the insightful distinction that he sketches between constituent power as revolution and augmentation, along with his preference for the former, urges us to engage in a politics that does not concede to the closure of law. In order to do so he styles this rupture in the form of a messianic break.[87] That is to say, for Wenman theologico-political absolutes are necessary to overcome the law and mobilise the brand of militant cosmopolitanism he demands.

The positions of Wenman, Honig and Kalyvas strike upon crucial elements of Arendt's thought, though I wish to emphasise that in utilising absolutes exclusive as theologico-political tools, they think of the symbolic order of Law in accordance with a particular spatializing phenomenology that Arendt associates with sovereignty, political unity and Genesis. For Arendt, politics, and its tendency toward plurality, cut against this, and so these accounts struggle to get a handle upon a complementary relation between law and politics. Consequently, these writers continue to conceive of novelty and stability against each another. In the process of doing so, the temporal experience of founding is drawn in one of three ways: it is either a continuity with the past (Kalyvas), a radical break from it (Wenman), or an agonistic struggle against the despotic though stabilizing absolute (Honig). Each of these readings lead us back into Sieyès' *petitio principii*, and with it, the paradox of constitutionalism, for the temporal lens through which they approach founding associates Arendt's argument with the same opposition that identifies constituent power's novelty with a political break, and the stability of constituted power with continuity.

[86] Ibid., 68. Others have criticised Arendt for her *failure* to do precisely this. See Miguel Vatter, "Legality and Resistance: Arendt and Negri on Constituent Power," *Kairos* 20, no. 1 (2002).

[87] Wenman, *Agonistic Democracy*, 67.

III: Of Relative Absolutes

The term 'absolute' played a far more multi-faceted role in Arendt's account of constitutional founding than has thus far been acknowledged. In rewriting the meaning of the term 'absolute', it was precisely the common distinction that maps continuity on to stability and associates rupture with radicality, that Arendt reworked. In addition to these theologico-political uses, there is another 'absolute' which conceives of the temporality of founding differently. Here, Arendt established the grounds for a peculiar construction she referred to as 'relatively absolute spontaneity', which she employed to critically rewrite the valence of the term 'absolute' in order to reintegrate it into her political vocabulary by scrambling the terms of temporal experience in modern Western thought that bind novelty to futurity and rupture. This was her characterisation of the absolute as it applied to the establishment of 'principles' in and of politics. Appreciating this aspect of her argument assists in undoing what both Honig and Kalyvas, in their own ways, take to be the despotic moment of the absolute that diminishes politics. This oblique argument can be discerned if one first appreciates that through Arendt's often experimental and eclectic writing the meaning and valence of words such as 'authority', 'foundation' and 'absolute' shift radically. She exploited this strategy of writing as a means of disrupting the commonplace distinctions that the political vocabularies of the 'Western tradition' attribute to absolutes.

As a way into this disruption of our temporal register, Arendt considered Kant's 'embarrassment' in dealing with the problem of bringing something new into a world already in motion. Arendt highlighted a tension that Kant had noted in *Critique of Pure Reason*. The tension involved reflection upon the chain of causation initiated by rising from a chair. In doing so, she quoted Kant, a new series has 'an *absolute* beginning in this event, although as regards time this event is only the continuation of a preceding series'.[88] What was 'so very troublesome', according to Arendt, was the 'notion of an *absolute* beginning, for [according to Kant] "a series

[88] Immanuel Kant, *Critique of Pure Reason*, trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), B478; Arendt, *Willing*, 29.

occurring in the world can have only a relatively first beginning, being always preceded by some other state of things"'.[89] A perplexing tension existed between the act being at once relative and absolute. In rising from a chair, the act can be said to be an 'absolute beginning' insofar as causality is concerned, if not time, for though time does not begin anew, something new is initiated in carrying out the will to stand. Despite this, due to our received relation between causation and temporality, it is not at all straightforward whether such a beginning can be interpreted as an 'absolute beginning'. Kalyvas has interpreted this passage to indicate that Arendt is reproaching Kant's failure to distinguish absolute from relative beginnings, in order to affirm his interpretation of her as a theorist of the latter.[90] This, however, seems to paper over precisely the temporal difficulty at stake, for Arendt does not turn to Kant in order to resolve the problem of willing, but to prise it open. It is certainly the case that humans cannot commence time anew as if they were gods, though it diminishes the thrust of Arendt's account of the will and of action, each with their 'miraculous' qualities,[91] if the beginning is treated as only *relatively* new. Arendt's discussion pointed to something more profound. The taken-for-granted way we perceive the appearance of the new within politics does not so much conflate temporality with causation, but privileges the former over the latter. Our common-sense dictates that the absolutely new is not only unprecedented, but that it attains its unprecedented significance by appearing *ex nihilo*, and so a problem follows: the absolutely new may only emerge as an event unconnected with the past, an activity that, short of an arrogative gesture to the tools of political theology, is beyond the scope of human action. In doing so, the common perception of the absolute also naturalises the phenomenological opposition between novelty and stability, because the absolutely new appears only as a punctuated temporal break that, insofar as it is to be perceived as an absolutely new event, must break from that which existed before.

[89] Arendt, *Willing*, 29; Kant, *Critique of Pure Reason*, B478-79.

[90] Kalyvas, *Politics of the Extraordinary*, 225. Linda Zerilli, by contrast, has more satisfactorily evaluated this passage, though in linking the new to judgement she too explicitly treats it as a relative claim. Linda Zerilli, "Castoriadis, Arendt and the Problem of the New," *Constellations* 9, no. 4 (2002).

[91] Arendt, *Between Past and Future*, 168. Space prohibits evaluating her account of miracles fully. Though the theological imagery is evident, Arendt's intention is to appeal to miracles not as supernatural events but as activities of human making.

Rejecting the absolutely new in favour of a relative beginning does little to address this naturalised opposition. It is, however, possible to identify an attempt on Arendt's behalf to redescribe the temporality and valence of an absolute beginning in order to square this difficulty. In Augustine, she found a distinction between two beginnings, the *principium* of heaven and earth, and the *initium* of humankind, a distinction that pointed to the tension that Kant drew between temporally absolute and relative beginnings.[92] Arendt returned to this distinction often throughout her body of work, and the employment is significant for not only did she consider Augustine the only philosopher who, through this distinction, adequately explained Genesis in a tone sensitive to the human capacities to begin, but in doing so he sufficiently complicated the relation between what we take to be relative and absolute beginnings. Though *principium* amounted to the beginning of the world and time, time only became meaningful through the *initium* of Man, without whom the movement of time was unthinkable. Prior to the creation of humankind, time turned in a 'purposeless way', and so it was for the 'sake of *novitas*… that man was created'.[93] Whilst *principium* may readily have been called the 'absolute' beginning according to the Kantian definition, in that it successfully commenced time, that time was created *in principio* was of only relative consequence, for the new only attained its meaning as a beginning in relation to the *initium* of Man who could conceive of time in a purposeful fashion. The vital point, as Arendt recognised in a footnote to her discussion of natality, was that Augustine's notion of *principium* has a 'much less radical meaning' than the standard translation of the Bible's first verse.[94] This evaluation more appropriately frames the phrase that she often quoted from *City of God* that demonstrated the enormous capacity of humankind to act as beginners: 'that there was a beginning [*initium*], man was created before whom nobody was'.[95]

[92]Arendt, *Willing*, 110.

[93] Hannah Arendt, *Love and Saint Augustine*, ed. Joanna Vecchiarelli Scott and Judith C. Stark (Chicago, IL: University of Chicago Press, 1996), 55. As the editors note, this passage was not in her original doctoral dissertation, but one that Arendt inserted during the 1960s as she translated the text to English.

[94] Arendt, *The Human Condition*, 177, fn.3.

[95] Arendt, *Willing*, 217. See Augustine, *City of God*, 503. See also Arendt, *The Human Condition*, 177; Arendt, *Love and Saint Augustine*, 55. Additionally, this same quote closes all but the first edition of *The Origins of Totalitarianism*, 479.

The capacity to begin did not follow from a humankind created in God's image, or the arrogation of a god-like capacity as a Schmittian decision might, nor did it imply Scotian univocity.[96] Rather, it was with *initium,* and not *principium* that a new event was made intelligible *as a beginning* which, in accordance with her conception of human plurality, could be meaningful only when recognised as one by humans who perceive time by breaking the temporal continuum into tenses.

This clarification is crucial, for it reveals how Arendt's account of natality was geared, in *The Life of the Mind,* towards disrupting our sense of the absolute beginning as it appeared in Kant. The predicament that Kant could not square between an absolute causal beginning and a relative temporal beginning was seemingly dealt with in Arendt's argument by inverting the relation between the two. The creation of time, in Arendt's interpretation of Augustine, was not ontologically superior to the creation of man within time, for the former, *principium,* could only be fully comprehended following the latter, *initium.* That is to say, in Augustine's philosophy, there was an intensity to the human will *vis-à-vis* creation that was not found elsewhere in the philosophical tradition with which Arendt was concerned. Arendt continued that had Kant known of Augustine's philosophy of natality, he might have recognised that 'the freedom of a *relatively* absolute spontaneity is no more embarrassing to human reason than the fact that men are *born'*.[97] At the heart of this claim was a peculiar construction. To say that an act is 'relatively absolute' is contradictory, though it reveals the sort of ontological bracketing she wished to challenge. The grave problem, for Arendt, was that the very hypothesis of the absolute beginning dated back to the biblical doctrine of Genesis in which the beginning was bound to *principium*, and so the vocabulary of the absolute was always interpreted through, and judged against, the standard of *ex nihilo* creation. This, however, necessarily enclosed the absolute within the confines of a divine will. As Kant examined the idea of the absolute beginning, he too rendered it meaningful only by judging it against the principles of Genesis.[98] It was in

[96] Arendt, *Willing*, 135.
[97] Ibid., 110.
[98] Ibid., 29.

Augustine that she found the tools to unhook this commonplace relation. This contradictory construction of the 'relative absolute' in contradistinction to the divine absolute cut to the heart of Arendt's dilemma. The divine absolute was wholly inattentive to the fragile human capacity to begin anew. Not only was it wholly inaccessible to human action short of an arrogative gesture of imitation, but it also framed human activity in a partial or relative manner, so diminishing its reception. [99] In contrast, the 'relative absolute' captured the *human* capacity of beginning 'absolutely'. That is to say, her position did not amount to a repudiation of the absolute, but the recovery of an alternative form of employing them, that is sensitive to human plurality.

This excavation from *Willing* appropriately frames an otherwise difficult comment in *On Revolution,* in which Arendt offered the affirmative statement that the search for an extra political absolute that might break the vicious circle of law-making was 'futile', for 'this absolute lies in the very act of beginning itself'.[100] She related this to the concept of *the principle*, which, she remarked, is the 'solution to the otherwise unsolvable problem of an absolute in the realm of human affairs'.[101] Like the lost Roman *auctoritas,* principles are critical for politics insofar as they establish criteria for normative judgement.[102] In recognising the principle as the absolute that lay in the act of beginning, Arendt drew an elementary distinction not between absolute and relative beginnings, but divine and worldly absolutes that mapped on to the two Augustinian capacities to begin. When understood in this way I am not encouraged, as George Kateb is, to understand the principle as that which 'comes to

[99] On Augustine's own instructive efforts to wrestle with this difficulty see Augustine, *Confessions*, trans. R. S. Pine-Coffin (Harmondsworth: Penguin, 1961), 256-60.

[100] Arendt, *On Revolution*, 204.

[101] Ibid., 213. This is bound closely with her conception of Roman Law, which, being fragile and contingent, some have taken to be a 'relative' conception of law. See Peg Birmingham, *Hannah Arendt & Human Right: The Predicament of Common Responsibility* (Bloomington, IN: Indiana University Press, 2006), 54-62. There is some precedent for this, for Arendt referred to Roman Law as 'relative', though this relativity was another etymological exploitation, namely a capacity to forge relations, rather than a partial or non-binding character. Arendt, *On Revolution*, 188. This description is absent from the corresponding passage in *The Life of the Mind,* where she was more sensitive to the connotations of the term. Arendt, *Willing,* 199-200. The qualities of fragility and contingency, however, all seem to be bound up in the lens through which Arendt reconceived of a human absolute of *initium*.

[102] Arendt, *On Revolution*, 213. Cf. James Muldoon, "Arendtian Principles," *Political Studies* 64, no. s1 (2016).

one from outside and inspires "from without"', for they then appear to us as quasi-transcendental normative standards that derive their binding force from their location outside of the world.[103] Conversely, Lucy Cane's insight that the principle comes into being through cycles of repetition and regeneration, though agreeable, diminishes the 'event-character' Arendt associated with the relatively absolute beginning of *initium*.[104] The temporality projected by *initium* intended to disrupt the contrast between the two. Instead, the principle was closely related to her own interpretation of the concept of *archē*, endowed with a particularly human capacity to begin. Though she recognised this to be typically associated with sovereign rule, Arendt wished to resume the lost etymological connection that split the act of ruling from the act of 'setting in motion'.[105] In recovering this ancient meaning of *archē,* Arendt affirmed the thread of continuity between the act of initiation and the activity of ruling that was inaugurated. Ruling did not separate ruler from ruled by conceiving of the beginning as a temporal break between sovereign and subject, but conceived of the activity of politics under a principle that, coeval with the beginning, 'inspires the deeds that are to follow and remains apparent as long as the activity lasts'.[106] By doing so, Arendt attended to how stability sprang from the beginning,

[103] George Kateb, *Hannah Arendt: Politics, Conscience, Evil* (Lanham, MD: Rowman & Littlefield, 1987), 12. Similarly, Habermasian revisions provide a quasi-transcendental normative standard through which the novelty of founding is tempered. See David Ingram, "Novus Ordo Seclorum: The Trial of (Post)modernity or the Tale of Two Revolutions," in *Hannah Arendt: Twenty Years Later*, ed. Larry May and Jerome Kohn (Cambridge, MA: MIT Press, 1996); Kalyvas, *Politics of the Extraordinary*, 241-53. On the precedent for reading Arendt in this way, see especially Jürgen Habermas, "Hannah Arendt's Communicative Concept of Power," *Social Research* 44, no. 1 (1977); Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Lanham, MD: Rowman & Littlefield, 2000). For a critique of Habermasian interpretations of Arendt, see Dana Villa, "Beyond Good and Evil: Arendt, Nietzsche and the Aestheticization of Political Action," *Political Theory* 20, no. 2 (1992). Margaret Canovan, "A Case of Distorted Communication: A Note on Habermas and Arendt," *Political Theory* 11, no. 1 (1983).

[104] See Lucy Cane, "Hannah Arendt on the Principles of Political Action," *European Journal of Political Theory* 14, no. 1 (2015): 68-71. On the event-character of *initium,* which should not be conflated with a ruptural character, see Arendt, *The Origins of Totalitarianism*, 479; Arendt, *Denktagebuch, 1*, 115. By contrast Näsström recognises the 'absolute' nature of the principle's origin. Sofia Näsström, "The Rights of Have Rights: Democratic, Not Political," *Political Theory* 42, no. 5 (2014).

[105] Arendt, *The Human Condition*, 189.

[106] Arendt, *On Revolution*, 213.

rather than emerging subsequently—in the activity of ruling—to suppress its novelty.[107]

Her spatial phenomenology of law proceeded from this. Through the lens of *principium*, the beginning of law served as a sovereign partitioning device that commenced time and space, with the explicit purposes of securing the inside from the outside and reducing politics to peace. The lens of *initium*, in conceiving of beginnings as activities sensitive to human plurality, conceptualised law differently. Insofar as the beginning is not conceived as a radically punctuated rupture in time and space, but an activity within time that is inaugurated and augmented, the creation of law serves not as a wall to separate one from another, but, in accordance with the Roman *Lex,* sought to secure formal relationships and ties between individuals.[108] This recognised law to be alongside politics; they were complementary tools that augmented the founding act. That is to say, the implication of the temporality associated with the relatively absolute beginning of *initium* was to alter one's perception of their relation to law. Politics was not a disposition of being-against the law, nor did Arendt contrast constituent with constituted power. This conceptual nesting was the legacy of interpreting the absolute beginning as *principium*.

IV: Beyond the Paradox of Constitutionalism

The overlooked, and relatively finely-tuned difference over the temporality Arendt associated with the term absolute is not only thoroughly relevant to her own account of political founding, but also allows us to get a handle upon the phenomenological make-up of the naturalised form of constituent power within the paradox of constitutionalism. Doing so appropriately situates her response to Schmitt's constituent power, where she devised an account of founding that

[107] With reference to *The Human Condition*, Patchen Markell has similarly argued, though in a far more perceptive fashion, that Arendt's use of *archê* was able to disturb the lens through which we associate regularity and continuity with a hierarchical relation of command-obedience, and rupture with subordination, whilst drawing attention to the novelty that occurs whilst following patterns. Patchen Markell, "The Rule of the People: Arendt, *Archê,* and Democracy," *American Political Science Review* 100, no. 1 (2006).

[108] Arendt, *The Human Condition*, 63, fn.62.

reconciled stability with the emergence of the new by disrupting our common-sense temporalisations of these categories.

Recall that Loughlin and Walker's paradox of constitutionalism presents the elementary tension of modern constitutionalism in the relation between the people as constituent power and the constitutional form that they bring into being. The unconditionally generative constituent power of the people must, for it to successfully establish a constitutional regime, be 'divided' and 'constrained' through the instituting act.[109] To frame the problem differently, constitutionalism appears paradoxical for it relates constituted power to the stability associated with legality and continuity, and constituent power with the punctuated novelty of politics. When Loughlin and Walker identified this problem, they presented four possible solutions.[110] Irrespective of the political bearing ascribed to the constituent power under each thesis, the meaning and function of constituent and constituted powers are kept intact. In each instance, it is accepted that the latter captures and constrains the former in order to preserve—or police—politics. What goes unaddressed is the lens through which we are encouraged to view constitutionalism through the narrow scope of such a paradigm.

The excavation of the problem of the absolute presents an elementary perspective as to why this is the case. The conventional interpretation of absolutes as arrogations of divine creation structure our political thought-practices. For Arendt, this involved the association of stability with law and continuity, and novelty with politics, futurity and rupture. This bracketing was, in short, encapsulated in the distinction between constituent and constituted powers. To make use of constituent power was to rely upon these theologico-political absolutes, naturalising this temporal bracketing. By *The Life of the Mind,* Arendt had recognised that the problem of the absolute was not one that could be solved by a refusal to employ them.

[109] Loughlin and Walker, *Paradox of Constitutionalism*, 1.

[110] Ibid., 6. The four theses resolve themselves in the following ways: (1) Within Dyzenhaus's juridical containment, constituent power is a absorbed into the constitutional form in the instance of founding; (2) Habermasian cooriginality constrains the constituent power through a background commitment to quasi-transcendental presuppositions of liberality; (3) Negri's radical potential demonstrate how the creativity of constituent power always exceeds constitutional form; and (4) the irresolutionist thesis, not dissimilar to Honig's interpretation of Arendt, takes constituent and constituted powers to struggle against one another agonistically.

Arendt wagered that absolutes condition our politics irrespective of our explicit appeal to them, insofar as they assist in organising the temporal relations within which our political language operates. So long as the activity of beginning is associated with *principium*, we anticipate that the emergence of the new can only have radically disruptive consequences. When writers such as Kalyvas or Arato seek to displace the absolutist constituent power with legal continuity, they retain this conceptualisation of politics.[111] The stability ensured by legal continuity is necessary so long as the activity of constituent power is conceived through the lens of a theologico-political absolute. The corollary is that the elementary conceptual bracketing of stability-law-continuity against novelty-politics-rupture, remains intact irrespective of an appeal to an absolute. Though this may generate a viable constitutional form, its solution to the paradox of constitutionalism is to invert the bifurcation, through which stability is given preference over novelty in even the first instance.

Arendt did not want to simply reject or resist the absolute when conceiving of the activity of founding. So long as we associate the absolute beginning with temporal rupture—one that is imitative of the divine creation of the world—our vocabulary fosters conceptual bifurcations and 'automatic thought-reactions' that Arendt wished to do away with, bracketing off stability against novelty, by pairing them with continuity and rupture respectively.[112] Practically, moreover, it only allows the radically new to appear in predictable ways, namely, as a break from the past. Arendt's solution, at least by *The Life of the Mind,* was not to endorse 'relative' beginnings, for she would be led back into the problem.

It is the notion of relatively absolute spontaneity that allowed her to reconsider this problem. To demonstrate this, the temporal structure of this activity needs to be clarified. In reading her account of the temporality of the thinking ego against the temporality of action, a 'relatively absolute' beginning within time springs from creative reflection on the past, which allowed Arendt to displace assumptions of

[111] Arato, *Post-Sovereign Constitution Making*; Kalyvas, *Politics of the Extraordinary*.
[112] Arendt, *On Revolution*, 223.

linear continuity that associate the new with rupture. This elaborates the finer points of difference between my interpretation of Arendt and Kalyvas's 'relative beginnings' thesis. My interpretation provides a way out of this paradox of constitutionalism. The tentative elements of this temporality were established in a short parable by Franz Kafka, quoted towards the end of *Thinking*:

> 'He has two antagonists: the first presses him from behind, from the origin. The second blocks the road ahead. He gives battle to both. To be sure, the first supports him in his fight with the second, for he wants to push him forward, and in the same way the second supports him in his fight with the first since he drives him back. …His dream, though, is that some time in an unguarded moment…he will jump out of the fighting line and be promoted, on account of his experience in fighting, to the position of umpire over his antagonists in their fight with each other'.[113]

Kafka's personification of temporality placed He, the subject of the parable, upon a 'battleground' on which the forces of past and future clashed, and against whom He was to give battle if he wished to stand his ground. Interpreting the parable, Arendt argued that the past was not to be seen as a burden or dead weight which one might get rid in their progress into the future, nor was the future neutral. Past and future were each His 'antagonists' who at once confronted and assisted him in his battle against the other.[114] The past weighed upon the present—in the form of memory—forcing Him into the future. But so too, the abyss of freedom that opened in the future drove Him back into the past. Arendt argued that we exist within this fractured middle of 'the Present', remembering the past with either nostalgia or regret, and anticipating the future in hope or fear. To surrender this battle—to sever

[113] Arendt, *Thinking*, 202; Franz Kafka, *The Great Wall of China and Other Short Works*, trans. Malcolm Pasley (London: Penguin, 1991), 105. This parable is first discussed in the introduction to *Between Past and Future*. It is noteworthy that this parable is constructed from various fragments taken from Kafka's diary by his editor, Max Brod. In particular, the desire to become an 'umpire' was originally separate from the temporal parable. In the original, Kafka's He did not in fact act in the conflict between past and future. See Kim Lane Scheppele, "A Constitution Between Past and Future," *William & Mary Law Review* 49, no. 4 (2008): 1391, fn.50. This *bricolage*, however, attests to the emergence of the absolutely new from the past that I discuss with reference to Walter Benjamin below.

[114] Arendt, *Thinking*, 203.

the connection with either the past or future—we, too, sever the connection with rectilinear temporality. This was, for Arendt, to deny the promise of human action within the world throwing men back into the cycles of nature, a temporal condition lacking the possibility of the singular deed that might interrupt the circular movement of biological life.[115]

In truth, the release of human agency to the currents of history and nature, as seen in the French Revolution, never reverted experience back to a cyclical temporality, regardless of Arendt's assertions. The phenomenological experience of time, however, ceased to be located within the broken middle of the present. It was as if the force of the past has won over the force of the future, pushing forwards with little resistance, whilst He becomes a bystander, absolved of responsibility as time marches forward. What is at stake is not the loss of rectilinear time itself as a phenomenological experience, but the significance of *kairos* as a distinct modality of time. Arendt's perception of kairotic time appears to be located within this gap alongside the protagonist of Kafka's parable, for when He stood in the gap, time was not a 'continuum', a flow of uninterrupted succession; 'it [was] broken in the middle'.[116] This is clearest in her modification of Kafka's parable; she dismissed the notion that He might 'jump out of this world altogether', for to do so would be to absolve past and future of their meaning. Rather, for Arendt, the novelty of His actions emerged because He was located between past and future. As the forces of past and future met, his presence caused 'the stream of time to deflect from whatever its original direction'. The ensuing 'third force', having resulted from past and future whose origins were infinite, projected diagonally from a point of origin in the present outward in a direction that was 'infinite'.[117] The modification that Arendt made was significant for two reasons. First, she identifies the location of this mental faculty within the world. This was in explicit contrast to the thinking ego of Christian philosophy, found in the *nunc stans*, which was the thinking equivalent of the unreflexive theologico-political will of constituent power. Instead, for Arendt,

[115] Arendt, *Between Past and Future*, 42-43.
[116] Ibid., 11.
[117] Arendt, *Thinking*, 209.

thinking drew from the past and aimed toward that which was universal and abstract in the 'eternal present', whereas the will 'stretched out into the future' for the creation of a particular project.[118] Second, it was through the 'clash' between the eternal thought and the particular will that the *absolute* condition of human creativity could be affirmed. The diagonal force was a thought process that, building upon the mind's location between past and future, reached out into infinity. The infinite trajectory pointed toward the ontological intensity of thinking, an activity that gives rise to the absolutely new.

This was to largely rethink the striking opposition between the *vita activa* and *vita contemplativa* developed in *The Human Condition*.[119] 'Thought' was a practice that was deeply connected to, and indeed impossible without, 'experience' of the past.[120] Whilst the practice of thinking remained a solitary activity, the two additional faculties of the mind, willing and judging each with their temporal aspects, remained very much responsive to the realm of appearance. Willing, after all, 'prepares the ground on which action can take place'.[121]Although Arendt was unable to complete the three-volume collection, it seems clear that these three faculties were to be kept in correspondence if to prevent what she saw as the perennial problem of the philosophic tradition—the retreat of the thinking ego.[122] This seems to be what she had in mind when she refused that He might 'jump out of this world altogether' by allowing the thinking ego to recoil upon itself. The relation between thought and action, for Arendt, was a recursive one; to be puzzled by the temporality of founding was a perspective that confronts the life of the mind before it confronts the realm of appearance. Paul Ricoeur grasps this reflexive relation in arguing that 'it is *vita contemplativa* which allows *vita activa* to understand itself and to reflect upon its own

[118] Arendt, *Willing*, 35.

[119] Leah Bradshaw goes so far as to suggest her final work is an 'implicit refutation' of much of *The Human Condition*. See *Thinking and Acting: The Political Thought of Hannah Arendt* (Toronto: University of Toronto Press, 1989), 71.

[120] Arendt, *Essays in Understanding, 1930–1954*, 20; Hannah Arendt, "Hannah Arendt on Hannah Arendt," in *Hannah Arendt: The Recovery of the Public World*, ed. Melvyn A. Hill (New York: St. Martin's, 1979), 308.

[121] Arendt, *Willing*, 101.

[122] Arendt, *Thinking*, 69.

temporal condition'[123] The critical activity of thought is one that confronts and is confronted by action within the world via the faculties of willing and judging, and so in spite of efforts to interpret Kafka's parable as a process of intellectual reflection alone,[124] it, too, is pertinent to the manifestation of action in the world.

This interface between thinking and acting can be enlarged if Arendt's reflections upon Walter Benjamin are considered. For Benjamin, the past appeared in the present not as 'homogenous, empty time', but as *jetztzeit*, a moment pregnant with transformative potential, in which the past is received in order to amplify the creativity of action.[125] For Arendt, this utilisation of the past involved a strategy of 'citability', which she distinguishes from 'transmissibility'.[126] While transmissibility was the thread of narrative continuity that tied the past to the present through the authority of tradition, citability made use of what she elsewhere called a 'fragmented past which has lost its certainty for evaluation'. [127] It is to use the past not to serve the task of reconstructing of the cited author's intentions, but to draw eclectically from their work new meanings applicable to the present. In short, it was the manifestation of thinking within the world, by drawing from the past and creating from that past something radically new.[128]

There was a timeliness to this appropriation of Benjamin for, like the loss of tradition in modernity, activities of founding throw us into a correspondingly protean universe.[129] When the founding of a new constitution is necessary—aside from exceptional circumstances, such as Kalyvas's American Revolution—the pre-existing political landscape is rarely capable of providing the requisite legitimacy to secure the founding, for if authority were already intact there would be no need for a

[123] Paul Ricoeur, "Action, Story and History: On Re-reading *The Human Condition*," *Salmagundi* 60 (1983): 62.

[124] Vivian Liska, *When Kafka Says We: Uncommon Communities in German-Jewish Literature* (Bloomington, IN: Indiana University Press, 2009), 211-12.

[125] Benjamin, "Theses on the Philosophy of History," 261.

[126] Hannah Arendt, *Men In Dark Times* (Harmondsworth: Penguin, 1973), 190.

[127] Arendt, *Thinking*, 212.

[128] This practice was exemplified in Walter Benjamin, *The Arcades Project*, ed. Rolf Tiedemann, trans. Howard Eiland and Kevin McLaughlin (Cambridge, MA: Harvard University Press, 1999).

[129] Arendt, *Between Past and Future*, 95.

new constitution.[130] The alternative, the turn to theologico-political absolutes, as I have argued, comes with its own distinctive problems. It is in Benjamin that she recognises a way out of this predicament.

In the instance of founding, it is not enough to replace the security of tradition with what Benhabib calls 'narrativity' to negotiate the problem, for it nevertheless remains within the conceptual frame of a transmissible past that can be utilised unproblematically.[131] Kalyvas appears to have narrativity in mind when he turns to preceding laws to stabilise the founding. For him the narrative of legal continuity secures the grounding of the constitutional beginning between past and future.[132] I suggest Arendt's Benjaminian offering presents a thought-practice that is a little more complex; after all, narrative storytelling was only one aspect of what Arendt did.[133] This, she combined with an experimental writing, or what Hyvönen refers to as 'essayism'.[134] She saw Benjamin as a 'pearl diver who descends to the bottom of the sea, not to excavate the bottom and bring it to light but to pry loose the rich and the strange'.[135] Benjamin's poetic 'citability' entailed the playful combination of past experiences no longer bound to their previous meaning, in order to evoke novel and serendipitous experiences.[136] Raluca Eddon suggests that one would be 'hard-pressed to imagine a more effective neutralisation of the messianic dimension of Benjamin's thought'.[137] This may be so, though it fails to recognise the sophistication of Arendt's move. Arendt read Benjamin against Benjamin in order to disentangle the thought-fragment on poetic thinking from its messianic-revolutionary surroundings. The 'citability' she identified in Benjamin's work is one that is neither bound to authorial intentionality nor a narrative totality. The cited thought-fragment might creatively

[130] Arendt, *On Revolution*, 115.

[131] Seyla Benhabib, "Hannah Arendt and the Redemptive Power of Narratives," *Social Research* 57, no. 1 (1990): 187.

[132] Kalyvas, *Politics of the Extraordinary*, 231.

[133] Steve Buckler, *Hannah Arendt and Political Theory: Challenging the Tradition* (Edinburgh: Edinburgh University Press, 2011), 38; Pitkin, *The Attack of the Blob*, 277-78.

[134] Ari-Elmeri Hyvönen, "Tentative Lessons of Experience: Arendt, Essayism, and 'The Social' Reconsidered," *Political Theory* 42, no. 5 (2014).

[135] Arendt, *Men In Dark Times*, 203.

[136] Ibid., 166. See also Arendt, *Denktagebuch, 2*, 771.

[137] Raluca Eddon, "Arendt, Scholem, Benjamin: Between Revolution and Messianism," *European Journal of Political Theory* 5, no. 3 (2006): 268.

misread the intention behind the cited act, though this is due to the influence of thinking about that thought-fragment, in order to prise open the gap between past and future in order to give birth to a new beginning.

The practice she identified in Benjamin is connected to, and expands upon, her reflections on Kafka. The new is not defined in opposition to the old. By passing judgement upon those thought-fragments recovered from the past, the old is transformed into the radically new through the practice of thinking—the deflection of both tenses into an infinite present. It raises the past to open the present up to the new: 'the genuine picture may be old, but the genuine thought is new. It is of the present'.[138]

There is good reason why we should be wary of this distinction between a transmissible and citable past, because when in *Life of the Mind* she reconsidered the American founding, Arendt recognised that the founding fathers were caught once again in the problem of temporality. She highlighted that they 'renege[d] on the very experience of freedom and novelty' in seeking a justification for their actions 'which will have to show the act as a continuation of preceding events'.[139] The narrative resolution—which Kalyvas endorses through the 'self-limitation', and which he takes to be possible only due to a 'relative beginning' secured by legal continuity[140]—circumvented the problem of the absolute by ensuring all foundation was the re-foundation of a prior political arena, so whilst it never confronted the problem of temporal boundary-setting, it comes at a cost. In doing so, the American founders denied themselves the 'hope of founding a new Rome'; instead they were forced to 'repeat the primeval foundation and found Rome anew'.[141] The subtle distinction drives to the heart of Arendt's position. The problem of the absolute, which manifested most prominently in the thinking of constituent power in her interpretation of Sieyès, was not resolved by the American Revolutionaries. Instead,

[138] Arendt, *Men In Dark Times*, 196. Peg Birmingham describes Arendt's interpretation of this allegory as a means of envisioning the Angel as a 'future-anterior'. This, however, is a grammar that escapes the present. I interpret Arendt's use as a radical redescription of presence through the interface between thinking, judging and willing. Birmingham, *Hannah Arendt & Human Right*, 17-22..

[139] Arendt, *Willing*, 210.

[140] Kalyvas, *Politics of the Extraordinary*, 225.

[141] Arendt, *Willing*, 214-15.

they drew upon the tropes of a 'transmissible' past that came to them unbroken. They refuse to begin absolutely anew only because they continued to perceived the absolutely new beginning in accordance with *principium*. Arendt refused this trope of the Western tradition. While relative beginning of Kalyvas and the American Revolutionaries found Rome anew by re-establishing the old in its image, Arendt's relatively absolute beginning found a new Rome by judging the new against the exemplar. The exemplar is a particular that reveals a generality that cannot be defined otherwise, a generality to strive for without subsuming oneself again within the particular.[142] Citability allows actors to achieve this, by citing the exemplar as a resource, but refusing to subsume their new creation under it. The founding, whilst not a temporal beginning, could claim to be an act of 'absolute novelty' that initiates a new space in the world. It is not simply 'the new as an improved re-statement of the old'.[143]

It is here that a distinctive conceptualisation of political temporality emerges. Unlike process-driven activities, in which time appears to transition imperceptibly between tenses, Arendt's 'gap' that is opened in the present—the infinite diagonal generated when self-consciously located between the weight of past and future—represents a moment of unending possibility. It is here that we might locate this conception of 'relatively absolute spontaneity'. This moment is by no means one that appears *ex nihilo*; it is not an emergence from sheer voluntarism but an absolute generated from an application of the three mental faculties in concert. In presenting this perspective, Arendt reconceptualised absolutes as tools that are not bound to political theology. In response to the Kantian predicament that events of this world can only have 'relatively first beginnings',[144] these parables build upon Arendt's Augustinian claim that men are born, 'newcomers again and again in a world that precedes them in time'.[145] The capacity to begin in a 'relatively absolute' way respects the finitude of humankind, and the limitations upon our worldly capacity to begin.

[142] On this mode of exemplary validity, see Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago, IL: University of Chicago Press, 1982), 76-77, 84-85.
[143] Arendt, *Willing*, 216.
[144] Ibid., 29.
[145] Ibid., 110.

To act otherwise—to begin *as if* that beginning was *ex nihilo*—is to invoke the very Schmittian tools of political theology, and with it, a troubling conception of law as command.[146] This, for Arendt, is what constituent power did.

By contrast, her reformulation of an 'absolute' activity retained the properly temporal experience of politics by experimentally citing from the past those imperfect thought-fragments that might be put to a new and innovative use to prise open an absolutely new beginning. To be sure, the absolutely new is not a straightforward continuation of past events, for the past does not appear to the thinking ego as an unproblematic narration. It is a fragmented past that has lost it certainty. Jacques Taminiaux writes of Arendt's account of time that 'it is the past itself that launches an appeal to the invention of the new…of a future way of inhabiting the world'.[147] This requires clarification, for the past is only meaningful through experience of it. The past is 'launched' into the absolutely new only through the interface of thinking and acting. The characteristically infinite trajectory of thought projects the past toward the initiation of a new act, through which the quality of the absolute is not to be established in its origin, but in its trajectory. By locating the will between past and future, the absolutely new emerges not as a break from the old but what Patchen Markell has called an agent's 'attunement' to the act's character as an irrevocable event.[148] The old is not the context from which the act breaks but the context that provides the tools for its amplification.

In understanding beginnings according to this perception of time, we go some way to addressing the paradox of constitutionalism, for it allows us to consider the will of the founding act differently. In place of the rigid distinction between constituent and constituted power, in which the former appears as an uncompromising willfulness against which all positive law falls silent,[149] the will of Arendt's founding had a reflexive character. By locating the will in the state of nature, Sieyès' constituent power—or Arendt's Schmittian interpretation of it—was

[146] Arendt, *On Revolution*, 163.

[147] Jacques Taminiaux, *The Thracian Maid and the Professional Thinker: Arendt and Heidegger*, trans. Michael Gendre (Albany, NY: SUNY Press, 1997), 217.

[148] Markell, "Rule of the People," 7.

[149] Sieyès, "Third Estate," 138. Sieyès, "Third Estate," 138.

absolved of its temporal bindings. It is not so much its intensity, but the detemporalisation and isolation of Sieyès' constituent power that characterised its willfulness in an uncompromising form. This was precisely the imitative strategy of a theologico-political absolute to which Arendt wanted to draw our attention. Conversely, in Arendt's thought the will was related to the constellation of human freedom, plurality and temporal finitude, and so whilst her reflexive account manifested in a resistance against any attempt to be commanded,[150] it did not do so in an uncompromising manner that would throws out of joint our experience of time. Arendt, rather, was attentive to how the will could reconcile novelty with stability, for it is not only located in time, but aware of that location. In doing so, one reflects upon the situation in order to take responsibility for the chain of events initiated. This is not to say that Arendt's account of the will was self-limiting, but rather that, like *archē,* the new did not appear as a discrete moment but a trajectory that builds upon itself, in concert with law, in order develop stable grounds for politics.

The critical point is that the concept of constituent power was absent from Arendt's normative vocabulary, and with good reason.[151] For Arendt, constituent power was necessarily bound up with an unreflexive modality of action that required the pairing of a constituted power tasked with constraining the absolutely new. It was not enough to devise a relative conception of the will alone in order to escape the dilemmas associated with constituent power. Her solution was to correct the theoretical lens of the absolute through which the need for a constituent power manifested. The paradox was addressed by placing the relation between law and politics within a fundamentally different field of commitments. Consider, for example, the question over the illegality of the founding act, which is an alternative expression of the paradox of constitutionalism. In excluding the conceptual framework of constituent power through her redescription of the absolute, the relation between law and politics was conceived differently, as a mutually enabling,

[150] Arendt, *Willing*, 69. Arendt, *Willing*, 69.

[151] Within her work, all uses of the *pouvoir constituant* are negatively framed as theologico-political tools. The English term 'constituent powers' appears once, to identify the representative relation between constituents and the National Assembly. Arendt, *On Revolution*, 126.

rather than antagonistic pairing. Arendt's relatively absolute beginning was coeval with the spirit of the law engendered by the founding principle. One might say the founding act is already legal, as if it 'anticipates' the law that is inaugurated. Such a conclusion remains internal to the terms of the paradox.[152] Rather, the legality of founding did not trouble Arendt for it already inappropriately conceived of the law as a 'catalogue of prohibitions' that primarily serve to partition the political from the non-political and the legal from the illegal.[153] The Roman-inspired law to which Arendt appealed in *On Revolution* and *The Life of the Mind* did not commit to such spatial, temporal and legal *boundaries*.[154] Like the relatively absolute beginning that occurs within the world, it is ultimately of little consequence that the act of founding occurs 'outside' of the law. What *is* of consequence is that the activity of founding, like the law, serves to connect, rather than to divide.

CONCLUSION

In the introduction to this thesis, I argued that constituent power serves as a tool of political arrogation that leans upon accounts of origins. In the intervening chapters I have sought to show how those arrogations can be put to use to construct collective identities by making certain claims to authority, establishing normative commitments, and providing political imaginaries through which those claims to authority and normative commitments operate. The purpose of this chapter has been step back from examining individual articulations of constituent power, and instead to use Arendt's writing on political founding to understand how constituent power works as what she called a 'stock phrase' or 'standardized code of expression' that could serve as shorthand in the activity of political thinking.[155] I have sought to deepen the understanding of *how* constituent power serves a tool of political

[152] Indeed, it is effectively Habermasian co-originality.

[153] Arendt, *The Human Condition*, 63.

[154] Arendt, *On Revolution*, 188; Arendt, *Willing*, 199-200. Arendt takes some license with Roman Law when drawing such conclusions for she refers only to public law. Boundary setting was a critical aspect of Roman private law. See Mario Scattola, "Die Grenze der Neuzeit: ihr Begriff in der juristischen und politischen Literatur de Antike und Frühmoderne," in *Die Grenze: Begriff und Inszenierung*, ed. Markus Bauer and Thomas Rahn (Berlin Akademie, 1997), 64-65.. Elsewhere she recognises the reverence with which boundaries were held in Roman Law. Arendt, *The Human Condition*, 63.

[155] Arendt, *Thinking*, 4.

arrogation, and show how, for Arendt, the consequences of those arrogations lock those who use constituent power into a particular form of politics, namely, one organised around sovereignty as law as command.

I have done so by interrogating the overlooked, and relatively finely-tuned difference over the temporality that Arendt associated with the term absolute. Her assessment of the problem of the absolutes, I have argued, serves as a valuable analytical lens through which the conceptual make-up of constituent power can be assessed. It has shown how each conception of constituent power examined within this thesis that explicitly relied upon an origin claim drew its arrogative force from the particular temporalisation of politics Arendt associated with politico-theological absolutes, irrespective of whether political theorist overtly used the imagery of political theology. In short, these theorists all analogised constituent power with a conceptualisation of temporality that understood constitution-making to be beginning *in principio*. Moreover, as a diagnostic device, Arendt's argument assists in navigating the contemporary 'paradox of constitutionalism', revealing how the constituent power is engaged in a form of political bracketing that naturalises an opposition between stability and novelty around which our political vocabulary clusters concepts. This has more profound implications for constituent power broadly conceived, for Arendt recognised that this conceptual bracketing characterised a particular conceptualisation of sovereign politics, through which constituent power as an *ex nihilo* beginning instituted a temporal boundary, partitioning the political from the non-political, the legal from the illegal, and the ruler from ruled. All of this required a conceptualisation of political agency arrogated from God.

As a *critique* of constituent power, however, Arendt offered an alternative. She affirmed that humans are temporal creatures who cannot begin as if we were God. The upshot of our being *hominem temporalem* is that time is conceivable only in our presence. The important conclusion that follows is that we are not held captive by the picture of the theologico-political absolute, for, though our whole vocabulary is shot through with temporal aspects, we nevertheless have the capacity to rethink the how

temporality weighs upon our actions. One way in which Arendt achieves this was to understand the absolutely new through the priority of *initium* over *principium*. This relatively absolute modality of founding was not only characterised by a reflexive formulation of the will, but also the political will's relationship with law. In forgoing the aspects of division that were carried over from the account of *principium,* Arendt was able to conceive of law to a different end, namely as a *rapport* that enables and augments the connection between individuals. Once this aspect of her argument is discerned, a distinctive temporalisation of politics emerges that quite distinct from Antonio Negri's belittling depiction of a 'perfectly conservative' model of legal continuity and American exceptionalism that is 'more appropriate to a neophyte than a Heideggerian philosopher'.[156] Arendt's relatively absolute spontaneity may not be a sufficiently 'radical' politics for Negri. Her considerations of the problem of the absolute, however, were specifically directed towards criticising this sort of political desire to achieve untainted radicalism. Whilst she introduced an interpretive apparatus for considering political founding that prised apart the conventional associations of stability with 'conservatism' and novelty with 'radicalism', she also expounded a politics free from division between constituent and constituted power, and the sovereign unfreedom she believed followed.

* * *

[156] Negri, *Insurgencies*, 16-17.

Conclusion

In this thesis, I have advanced one central argument. Constituent power should not be understood as a capacity or physical power, but as a political claim, just as 'the people' is a representative claim. When understood as a political claim, constituent power is a tool within political arguments through which the individual intends to secure a form of political authority for themselves or the group on behalf of whom they speak. As a context-dependent political claim, the concept of constituent power can be composed in numerous ways by varying the internal composition of the concept, and by varying the concept's location among others. In doing so, constituent power, I have argued, serves as a fulcrum within political imaginaries. This means constituent power is not reducible *only* to a claim to authority but also substantiates, among other things, who possesses that authority (insofar as collective agents can be composed in various ways), the sorts of political action that authority can legitimise and the end to which those actions are to be directed.

Two theorists have been particularly important in demonstrating that constituent power should be understood as a claim or justification for the use of power, rather than a description of that power itself: Thomas Hobbes and Hannah Arendt. Their arguments each help to elaborate how constituent power serves as a political claim. Through Thomas Hobbes' veiled engagement with Samuel Rutherford, I showed how, for Hobbes, constituent power was not a material power, but what he called a 'fancy'. It was a flight of the imagination that ornamented that material power with supplementary rights and obligations that, when formulated as it was by Presbyterians, could excite men into sedition. Though Hobbes was a

materialist, he nevertheless appreciated the centrality of imagination to political realities. Constituent power was, for Hobbes, a metaphor through which individuals in an imagined community understood their identity, which was organised according to particular rules that shaped their behaviour, expectations and understandings in relation to the creation in which they participated. Though he intended to reveal the 'fancy' of the Presbyterian constituent power as a fiction, he also harnessed it for his own political project because he recognised that imagination was central in maintaining the fictional attribution of political responsibility that allowed the state itself to exist. Crucially, even as a fiction, constituent power had material effects.

In short, Hobbes provided a perspective through which constituent power could be understood as a political claim that furnished a community with an understanding of their identity, rights and obligations in relation to the state. This, I have tried to illustrate, is characteristic of each subsequent articulation of constituent power examined across the thesis. Even theorists, such as Antonio Negri, who accounted for constituent power as a material power did so by masking the fictional characteristics of the claim by naturalising constituent power through association with labour power. According to the Hobbesian argument, Negri's constituent power was only an attempt to adorn material power (i.e. force) with the necessary normative ornamentation through which he could redeem a revolutionary ethic.

In the final chapter, I showed how, through her interrogation of the temporality of founding, Hannah Arendt understood constituent power to be a 'stock phrase' or 'standardized code of expression' that stifled the creativity of thinking. Though, for Arendt, constituent power was a political claim, just as it was for Hobbes, it was a claim contained within certain parameters. These parameters were what Arendt took to be the defining characteristics of sovereignty: a legal system that partitioned space into an inside and outside, divided ruler from ruled, and employed commandments to reduce the agonistic encounter of politics to peace. This paradigm of politics was derived from the way in which constituent power was a style of claim-making inherited from a temporality associated with Genesis. For Arendt, conceptualising constituent power in accordance with Genesis was precisely

what lent such great weight to the arguments that made use of it. By analogising the activity of beginning in accordance with *principium*—that is, the beginning of time—constituent power relied upon a temporality that was notoriously elusive to human life. For Arendt, this was akin to thinking the unthinkable; the claim was placed beyond the reach of others. This, however came with consequences: in drawing upon an account of political agency arrogated from God, laying claim to constituent power involved an account of temporal boundary-setting that reduced politics to sovereignty. For Arendt, constituent power did not provide the theoretical resources to think beyond this. To conclude, I demonstrate the implications and advantage of thinking of constituent power in this way.

Constituent Imagination

The arguments presented by Hobbes and Arendt have allowed me to get a handle on what it means for constituent power to be understood as a political claim. In turning to temporal finality, demonstrated by thinking and acting as if *in principio,* one is capable of containing discourse within well-defined limits that are constructed through claims to constituent power. In laying claim to these limits, and those claims being accepted (or minimally, not misfiring), one creates a social world complete with constitutive rules, a location of authority, and a space for living. Laying claim to constituent power is a world constituting act even if this is orthogonal to how constituent power is typically understood to constitute social identities. Constituent power is an important tool in the construction of social imaginaries. The extension of this is to recognise that the arrogative employment of constituent power has a close connection with 'fictional' components of popular sovereignty. This does not mean that these fictions are illicit, nor that one should seek to dispel them. My intention throughout this genealogy has been to develop how constituent power is a Hobbesian 'flight of the imagination' that captivates us, providing a textured landscape that helps us buy into these fictions, as well as the implication those fictions have upon the self-understanding of political communities. Constituent power serves as a pivot within the social imaginary of popular sovereignty, which, when arranged

differently, not only produces a range of democratic institutional forms, but vastly different extra-institutional collective identities.

There are particular advantages to interpreting constituent power in this way. Despite the complexity of constituent power and need for contextualisation, theoretical interventions into constituent power often debate the subject in the abstract, as if philosophical resources might gesture toward the procedural construction of a general theory of constituent power, or else employ historical resources to demonstrate that general theory in practice.[1] Instead, I provide a vantage point that is capable of accounting for the diversity of its employment in political thought and practice. Writing of the far broader concept of 'the power of the people', Kevin Olson notes that his genealogical approach is capable of shedding critical light upon 'taken-for-granted ideas', such as 'the uncritical embrace of democracy as a panacea for social and political problems'.[2] Such an insight can and must be extended to constituent power, for nor should it serve as an unquestioned basis for radical politics. My intention, much like Olson's genealogy, has been to achieve some clarity about its nuances in order to differentiate between when it is invoked popularly, and when cynically employed to promote other ends. In many cases, this may very well be democratic, though others reveal an ambiguous history, enmeshed with political absolutism and imperialist European constitutionalism. My intention has not been to bring to light these fictions for the purpose of abandoning the concept wholesale. Retaining the spirit of James Tully's 'public philosophy', discussed in the introduction, I would rather establish a channel between the alternatives of wholesale abandonment and uncritical embrace, through which it is

[1] On the former, consider Barshack, "Constituent Power as Body: Outline of a Constitutional Theology."; Ming-Sung Kuo, "Reconciling Constitutionalism with Power: Towards a Constitutional *Nomos* of Political Ordering," *Ratio Juris* 23, no. 3 (2010). On the latter, see Joel I. Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," *Constellations* 18, no. 3 (2011); Renato Cristi, "The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution," *Cardozo Law Review* 21, no. 5-6 (2000); Dario Azellini, "Constituent Power in Motion: Ten Years of Transformation in Venezuela," *Socialism and Democracy* 24, no. 2 (2010); Saki Bailey and Ugo Mattei, "Social Movements as Constituent Power: The Italian Struggle for the Commons," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013); Sergei Prozorov, "Five Theses on the Aftermath of the Ukrainian Revolution," Critical Legal Thinking, http://criticallegalthinking.com/2014/03/20/five-theses-aftermath-ukrainian-revolution/; Illan rua Wall, "A Different Constituent Power: Agamben and Tunisia," in *New Critical Legal Thinking: Law and the Political*, ed. Matthew Stone, Illan rua Wall, and Costas Douzinas (London: Routledge, 2012).

[2] Olson, *Imagined Sovereignties*, 169.

possible to gain some interpretive clarity over the possibilities and limitations involved in using constituent power.

Though others have endeavoured to contextualise the sorts of claim-making involved with constituent power, the position I have advanced assumes the representative function of language runs deeper. When Jason Frank grapples with what he calls 'constituent moments', he understands this to be a Rancièrian activity of contestation by the excluded and under-authorised over the name of 'the people'.[3] The people are at once represented only through representation, and yet remain in excess of any particular representation.[4] This provokes various enactments and reconstitutions of the collective identity of 'the people'. However, for Frank, though 'the people' is a representative claim, constituent power is only the force through which those claims are made by the excluded and under-authorised. Frank's contextualisation of constituent power in post-revolutionary America is a deeply insightful one, capturing the plurality of ways that 'the people' as a representative claim may be challenged. My interpretation, however, centres upon a different perspective. I have not been concerned with the constituent moments that grapple with the name of the people, but with the moments in which the representation of constituent power itself is the object of challenge.

The differences might be clarified through comparison to Zoran Oklopcic's attentive contextualisation of constituent power across the domains of 'democratic', 'social' and 'national' struggles.[5] He insightfully prises open at least three possible arenas in which constituent power might operate. This captures the important differences between enactments of constituent power that demand political self-determination, in, for example, Catalonia, from those that, for instance, seek to challenge government on economic austerity measures, such as the Spanish *Indignados*. He is similarly attentive to the plurality of ways in which claims can be made *within* each of these domains. Nationalist movements are often more

[3] Frank, *Constituent Moments*, 8.
[4] Ibid., 245.
[5] Zoran Oklopcic, "Three Arenas of Struggle: A Contextual Approach to the Constituent Power of 'The People'," *Global Constitutionalism* 3, no. 2 (2014): 208-22.

successful, though less palatable when they are a dominant rather than subaltern identity.[6] What Oklopcic is less capable of explaining are the differences between, for example, between Catalan and Basque independence movements, which are each of the same genus of subaltern 'nationalist' constituent power within an economically developed state. This is because his contextualisation of constituent power only goes so far, for constituent power is taken to be a 'placeholder' for 'worthy practices' of democratic enactment.[7] Whilst this collective self-enactment is often compromised through the intrusion of external actors, he recognises that constituent power serves as a safeguard, for without it 'the vocabulary of the rule of law may become a ruse that cloaks the exercise of hegemony'.[8] For Oklopcic, no less than Frank, constituent power is both an authentic and substantive power, and, though attentive to contextual determinations, they take constituent power to be the *vehicle for*, and not the *object of* political contestation. These approaches conceal the fact that constituent power itself might very well serve as the cloak for the exercise of hegemony.

By accounting for constituent power as the object of political contestation, I have sought to demonstrate how its internal complexities can produce a diverse range of political worlds when arranged differently, a point left under-theorised when constituent power is associated with a relatively unchanging form of political agency that varies only according to the political actor to which it is ascribed. My intention has been to think beyond this picture that holds us captive because it occludes the subtler ways in which constituent power's use can assist in constituting political worlds—without that amounting to an act of revolution or constitution-writing. This is an important caveat, for making a representative claim over the name 'the people' is itself empty unless the title 'the people' has been ascribed particular normative commitments, rights and duties that flesh out what that title lays claim to. Understanding that constituent power is a political claim that can be organised in various ways allows us to grapple more effectively with the differences between, for example, Basque and Catalan secessionism. Understanding constituent power as a

[6] Ibid., 222-24.
[7] Ibid., 226.
[8] Ibid.

claim assists in identifying the normative commitments of those political collectives, i.e., how, when and where it is appropriate for these groups to engage in political action. This holds for contemporary political movements no less than it does for the American Revolutionaries or for Carl Schmitt's political thoughts.

It serves to consider the examples from the thesis to illustrate the advantages of considering constituent power as a claim. If constituent power is interpreted only as a capacity, all that is apparent from Hobbes' contract is the replacement of constituent power with the rule of the sovereign after the act of institution. What is occluded is a far more expansive account of collective imagination that Hobbes was able to construct through his use of constituent power as a political claim. As Hobbes conjoined the two moments of the contract, he drastically reorganised the religious self-understanding of political collective. In Rutherford, the constitution of the person of the king was secondary, both temporally and normatively, to the initial covenant with God, and so obligation to God superseded that of the monarch. In conjoining the acts of institution and constitution, Hobbes did far more than enact a juridical enclosure of constituent power (as force). The people's obligation to God was only ever mediated through the person of the monarch, who possesses hermeneutic authority over biblical interpretation. Whilst this prevented the tension between *regnal* and *sacerdotal* power emerging, it also structured the political space by demarcating what can be said, and where. What Hobbes appreciated was that the inclusion of constituent power into his argument was the key that ensured the normative structuring of political space could be maintained. The fictional or symbolic power of sovereignty was as essential to *Leviathan* as the physical power of the sovereign. As Arash Abizadeh notes, so long as they are accompanied by the 'appropriate beliefs, desires, or intentions in the people whose movements it is meant to regulate', a line in sand may serve as powerful a deterrent as a brick wall.[9] In Hobbes, constituent power served to organise the social imaginary that made this possible by ensuring individuals bought in to the ongoing authorship by fiction of the state.

[9] Abizadeh, "The Representation of Hobbesian Sovereignty: Leviathan as *Mythology*," 149.

This point is also true of later theorists of constituent power, such as Schmitt and Negri. Even when presented as a capacity, it remains a claim that these theorists sought to mask, and it can be analysed as such. Certainly, it benefits to do so because the connection between constituent power and social imaginaries operates in vastly different ways. Indeed, that it operates differently is the critical point that is lost when interpreting constituent power exclusively as a capacity. In chapters four and five, I showed how Schmitt and Negri each tried to capture what they took to be the elusive 'Political' character of constituent power, a fugitive moment of democratic enactment outside of the juridical confines of constitutionalism, whilst also gesturing to the important dramatic component to these articulations. This reworks the grounding of constituent power and its association with biblical genesis. The 'Political' turn alleviates the connection with genesis as temporal origin, only to shift the weight to the creative power of genesis, in either the form of a decision or celebration of *potentia*. Whether this re-energises the technical-neutral state, as it does in Schmitt, or simply masks the empty place at the bottom of sovereignty, as Agamben supposes, the political world is organised and reconstituted through that *dramatic* quality of democratic enactment that arrogates the creative energy of genesis.

This might be tentatively illustrated with a brief excursion into contemporary American politics. Irrespective of his sincerity, Donald Trump's electoral promises to 'drain the swamp' were supplemented by large rallies that supposedly captured the voice and energy of the heretofore 'silent majority'.[10] Though no less carefully staged than his counterparts',[11] Trump's campaign precisely positioned these energetic crowds against the rhetoric of a corrupt, bureaucratic Washington politics, on the one hand identifying himself as the embodied bearer of this constituent power, and on the other, the *katechon* capable of withholding the 'Antichrist' of bureaucratising neutrality. What is interesting is how these same techniques played out following his

[10] Nicholas Fandos, "Donald Trump Defiantly Rallies a New 'Silent Majority' in a Visit to Arizona," New York Times, https://www.nytimes.com/2015/07/12/us/politics/donald-trump-defiantly-rallies-a-new-silent-majority-in-a-visit-to-arizona.html. Accessed 13 March 2017.

[11] Consider here Jeb Bush's much mocked request for his audience to 'please clap'. The utterance reveals the artificiality of the staging, often masked by the dramatic displays of constituent power at Trump's rallies.

inauguration. Trump filed his candidacy for re-election the day of his inauguration, allowing him to return quickly to the formal campaign trail where he could attempt to recapture the dramatic constituent power of the earlier rallies, although here it was channelled to an additional end, namely, the enactment of a spectacle that maintains the picture of a radical, anti-establishment politics. The point here is that this form of constituent power seems to operate as the collective counterpoint to Weberian charismatic authority. This is not necessarily a spectacle that masks the fictitious foundations of political power. It is the adornment of that fiction with the requisite belief system, direction and organisational structure that demonstrated the constitution of a collective world through which that political power operates and is legitimated. In Schmitt, this was bound to particular eschatological themes through which the fiction was layered with existential gravity and temporal urgency. More generally, that it is performed collectively by the political subjects, much like Sieyès' organic representation, provides a fiction that may be actively bought into.

When understood as a political claim, or a component within an argument, rather than a capacity, constituent power is released from the various dilemmas of self-authorisation, or paradoxes of constitutionalism within which many assume it to be contained. When an agent appeals to constituent power as an argumentative device, it serves as a sort of strategic vocabulary capable of constructing an imagined world *prior to* a concrete action. Political actors can claim to be a people, or a nation, though it is through the use of constituent power that the collective identity is ascribed certain imagined normative commitments, duties and responsibilities that present the fiction in a believable way, and allocate that collective agent authority. This is clearest in Sieyès' *What is the Third Estate?,* though no less apparent in Rutherford or the Federalists. Through the representative division of labour, Sieyès constructed the identity of the nation, the image of a self-sufficient community that existed 'within the state of nature', which provided the normative basis for the argumentative leap to more equitable representation within the Estates-General. The imaginary world that is created through arguments about constituent power serves as

the normative basis for the leap into political action; constituent power is not the leap itself.

CONSTITUENT SOVEREIGNTY

There is a second theme that I have sought to develop, one indebted to Arendt's insights, namely, that the imaginary world constructed when one uses constituent power in an argument is nevertheless subject to limitations. Michael Freeden notes that despite morphological variations in concepts, they nevertheless contain features that are ineliminable in conventional use.[12] This is because concepts such as constituent power serve as shorthand for a large bundle of thought-practices, some of which are unconsciously invoked, while others are necessary for the concept to remain minimally understandable. It is for this reason, that it was unconsciously bound up with a specific temporality derived from Genesis, that Arendt understood constituent power to be a 'stock phrase' that operates within the parameters of sovereign politics.

The current state of theorising constituent power often supposes otherwise. These theorists take constituent power to be a revolutionary counter-tradition of modernity, one radically opposed to sovereignty as command. In either of its two variations, whether in Spinoza[13] or Lawson,[14] this alternative political ontology of power is constructed with the absolutist political thought of Thomas Hobbes as its counterpoint. This opposition serves as a springboard through which two traditions of political power run parallel throughout modernity, one productive, the other repressive, a dichotomy that allows these theorists first to treat constituent power as a relatively unchanging concept across time, and second, to cleanse the constituent power of its more troubling connotations. My excavation into the genealogy of constituent power reveals Thomas Hobbes at a crucial juncture within its history. My wager has been that constituent power did not emerge *against* the work of Thomas Hobbes, but that it was *in* the work of Hobbes that constituent power was used in

[12] Freeden, *Ideologies and Political Theory*, 61-63.
[13] Negri, *Savage Anomaly*.
[14] Kalyvas, "Popular Sovereignty."

such a compelling way as a political fiction that underpinned sovereignty. This insight is significant because it unsettles the received perspective that constituent power appears in European constitutionalism as an opposition to sovereignty-as-command and political absolutism.

For Kalyvas, constituent power provides a productive democratic outlet for political authority because it does not exhaust that authority in the 'instituted reality' of command-sovereignty.[15] Constituent power 'avoids the problem of a total juridification of politics' characteristic of Foucauldian juridico-discursive power, and so shifts the focus to 'more direct and effective forms of political participation' in contrast to command-sovereignty.[16] My genealogy disturbs this image, for Kalyvas misrepresents *how* that externality of constituent power is organised. For Kalyvas, externality is characterised by the relatively stable features of 'heterogeneity', 'productivity', and 'ambivalence' toward the constitutional order it founds.[17] I have sought to demonstrate that the history of constituent power can be characterised by the shifts in styling of 'externality', though an externality that, for Arendt, is indicative of a temporality that limits politics to sovereignty.

The shifting conceptualisation of externality is one that transforms both the meaning and function of constituent power in such critical ways that it cannot be reduced to a historical or conceptual opposition with command-sovereignty. From Hobbes to Sieyès, as well as Sieyès' more conventional interpreters, the externality of constituent power was one understood through various forms of representation. In Hobbes, the externality of the multitude was captured, internalised and represented through the person of the state. The multitude are not ambivalent toward the coming juridical order, but are related to it in sacrificial form that secures the safety of the state. In the work of Sieyès, there is something closer to 'ambivalence' of the constituent power toward the constituted power, though this is perhaps due to the fact that they amount to a division between two distinct institutional competences of constitution-writing and governing. In both cases, constituent power only operated to

[15] Ibid., 224.
[16] Ibid., 230.
[17] Ibid., 225-27.

reinforce what Foucault calls a 'juridico-discursive' representation of power typical of command sovereignty.[18] Rarely among these formulations were the people thought of as participating immediately. On the contrary, the representative stylings of constituent power served the crucial function of separating out the people as a unity from the private individuals subjected to the negative commandment of law.

The 'externality' of constituent power that Kalyvas places so much faith in is indicative of the partitioning that Arendt associates with sovereignty. The externality of constituent power, though framed in various ways, was an imitation of divinity that structured the legal space by dividing ruler from ruled. This point should hold irrespective of the conceptual drift within the language of constituent power during the 20th century, where externality was configured as an expression of the Political. In chapters four and five, I argued that the ends toward which these are directed do not inaugurate an alternative lineage of political power. In the case of the (albeit idiosyncratic) conservative jurist Carl Schmitt, this should come as little surprise, for who constituent power adopted a redemptive role. The externality of constituent power was nevertheless dutifully bound to the instituted political order, where it withheld the neutralising and depoliticising tendencies of modernity. Indeed, for Schmitt, this seems to have had little to do with establishing a space for popular participation in political decision-making; it rather aimed at the recovery of decisionistic qualities of politics against the economic logic of parliamentary democracy, with the ultimate aim of reinscribing the personalistic command of the sovereign dictator. Even in Antonio Negri, the externality of constituent power, configured as a disposition of 'being-against', seems not to provide an alternative, but is often readily absorbed into sovereignty, which carves open spaces in civil society for acclamation and dissent. The important point is that, even in Negri's argument, constituent power was not fully released from that relationship with sovereignty, often taken as a given by those who employ it critically.

My ultimate point is that constituent power is not a 'power', but a complex and powerful political tool that can be used strategically. My aim has been to shed some

[18] Foucault, *The Will to Knowledge*, 82-85.

light upon what that involves. Constituent power is a political claim, though it is a claim within parameters. It can be put to use for some ends, but not others. The limited elasticity of the language means that constituent power may very well be used by citizens to challenge prevailing regimes of authority by presenting fresh claims over how the normative ordering of politics is to be arranged.[19] *Pace* Kalyvas, however, constituent power is not a concept that allows us to think beyond what Arendt took to be the paradigm of sovereign politics. This was part of the excavation of chapter two, in which I argued that though constituent power served as an ostensibly democratic vocabulary, it did so by framing the grievances of the American revolutionaries in the constitutional vocabulary of their opponents. Ultimately, the Federalists afforded their constitution similar qualities. To use constituent power is to frame one's normative claims about the appropriate ordering of politics *within* the vocabulary of sovereignty. This is especially relevant to those who endeavour to show that constituent power is an appropriate vocabulary to articulate, for example, the political grievances of indigenous peoples.[20] It serves to be conscious of the vantage point constituent power provides, conceiving these demands in accordance with a legal culture that may be contrary to the needs of those communities.

I should stress the provisionality of this claim, for this is only one genealogy among many that could be written, one that has drawn largely upon European experiences, and when moving beyond that region, has done so from the perspective of white settler colonisers. Like all genealogies, it is partial. There are, of course, paths not followed. The various anticolonial struggles against Britain and France may provide worthy avenues of exploration that may again unsettle the connection drawn between constituent power and sovereignty. It is possible that the anomalous experience of the Haitian revolution, and the subsequent constitution-writing

[19] The polyvocality of 'the people's' claim to act as constituent power following the EU referendum was indicative of this. Marches in London, as well as the possibility of a second Scottish independence referendum each intended to challenge the normative ordering that privileged the secret ballot as the appropriate means of expressing the collective will of the British people.

[20] Muldoon and Schaap, "Aboriginal Sovereignty and the Politics of Reconciliation: The Constituent Power of the Aboriginal Embassy in Australia."; Alyosha Goldstein, "Colonialism, Constituent Power, and Popular Sovereignty," *Journal of Nineteenth Century Americanists* 2, no. 1 (2014).

process, was one penetrated by the Sieyèsian variation on constituent power, and so deserves a similar contextual interrogation.[21] In the case of Saint-Domingue, the divisive issues of race, nativity, coloniality and slavery provide a far more complex political terrain than that of Europe or America when viewed from the subaltern perspective, and so might well have provided an outlet for novel and hybridising experiments in constituent power and citizenship. Moving in a vastly different direction, the Pan-Europa movement that grew during the interwar period out of the thought of Richard von Coudenhove-Kalergi might too provide a valuable archive through which the contemporary problems of European constituent power may be assessed in order to arbitrate between the various layers of political identity at play. To be sure, neither of these examples are resolutely anti-Westphalian in their respective intonations, but foster deeply ambiguous histories. What is important is how constituent power might play out within those ambiguities.

For now, however, it is enough to recognise that constituent power is yet to be released from that relation with sovereignty. It should not necessarily be vilified for that so long as those who use it expect nothing more. It is a powerful vocabulary for reordering the imagined normative order within sovereignty. Those that need to reconsider whether constituent power it adequate to their task are those radical democrats, such as Negri, who take constituent power as a panacea to cure the illness of sovereignty itself. Though political imagination often turns to ruptural or revolutionary impulses as an outlet against the existing political order, for Arendt this was only another form of founding *in principio* that secures the time and space of politics through a sovereign partition. This was the important message of the final chapter: constituent power serves as a pivot within political thinking that relates revolutionary rupture to the certainty of sovereign closure by drawing upon the tools of temporal originality. If Arendt's contribution is taken seriously, thinking beyond sovereignty does not require us to attribute fresh valences or meanings to constituent power, but to reconsider fundamentally our reflections on time, and to establish new

[21] Some tentative gestures toward this connection include Olson, *Imagined Sovereignties*, 110-66; Wall, *Constituent Power and Human Rights*, 15-27.

avenues through which our social worlds can be created. Thus, it is appropriate to paraphrase Arendt's famous rejection of sovereignty,[22] for if radical democrats wish to be free, it is precisely constituent power they must renounce.

* * *

[22] Arendt, *Between Past and Future*, 165.

Bibliography

Charters, Constitutions, and Declarations

Charter of Maryland, 1632. In *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies How or Heretofore Forming the United States of America, Vol. 3,* edited by F. N. Thorpe. Washington, DC: Government Printing Office, 1909.

Constitution of the Kingdom of Prussia, 1850. In *The Annals of the American Academy of Political and Social Science* 5, sup. 8 (1894): 199-250

Constitution of the United States, 1787. In *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies How or Heretofore Forming the United States of America, Vol. 1,* edited by F. N. Thorpe. Washington, DC: Government Printing Office, 1909.

Die Verfassung des Deutschen Reiches vom 11. August 1919. In *Deutsches Reichsgesetzblatt 1919,* no. 152 (1919): 1383-1418

Fundamental Constitutions of Carolina, 1669. (1909). In *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies How or Heretofore Forming the United States of America, Vol. 5,* edited by F. N. Thorpe. Washington, DC: Government Printing Office, 1909.

The Declaration of Independence as Adopted by Congress, 11 June-4 July 1776. In *The Papers of Thomas Jefferson, Vol.1:1760-1776,* edited by J. P. Boyd. Princeton, NJ: Princeton University Press, 1950.

Texts

'A Devoted Friend to the Constitution'. "An Essay on Natural Liberty." In *The London Magazine. Or, Gentleman's Monthly Intelligencer, for the Year 1769. Vol. 38*, edited by W. Pitt. London: R. Baldwin, 1769.

Abizadeh, Arash. "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Borders." *Political Theory* 36, no. 1 (2008): 37-65.

———. "The Demos and its Kin: Nationalism, Democracy and the Boundary Problem." *American Political Science Review* 106, no. 4 (2012): 867-82.

———. "The Representation of Hobbesian Sovereignty: Leviathan as *Mythology*." In *Hobbes Today: Insights of the 21st Century*, edited by S.A. Lloyd. Cambridge: Cambridge University Press, 2014.

Ackerman, Bruce. *We The People, Vol.2: Transformations*. Cambridge, MA: Belknapp Press, 2000.

Ackerman, John Wolfe. "The Memory of Politics: Hannah Arendt, Carl Schmitt and the Possibility of Encounter." In *Concentrationary Memories: Totalitarian Terror and Cultural Resistance*, edited by Griselda Pollock and Max Silverman, 31-43. London: I.B. Tauris, 2013.

Adams, Willi Paul. *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*. Lanham, MD: Rowman & Littlefield, 2001.

Agamben, Giorgio. *The Coming Community*. Translated by Michael Hardt. Minneapolis, MN: University of Minnesota Press, 1993.

———. *The Highest Poverty: Monastic Rule and Form-of-Life*. Translated by Adam Kotsko. Stanford, CA: Stanford University Press, 2014.

———. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford, CA: Stanford University Press, 1998.

———. *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*. Translated by Lorenzo Chiesa and Matteo Mandarini. Stanford, CA: Stanford University Press, 2011.

———. *Language and Death: The Place of Negativity*. Translated by Karen E. Pinkus and Michael Hardt. Vol. University of Minnesota Press: Minneapolis, MN, 2006.

———. *The Man Without Content*. Translated by Georgia Albert. Stanford, CA: Stanford University Press, 1999.

———. *Means Without Ends: Notes on Politics*. Translated by Vincenzo Binetti and Cesare Casarino. Minneapolis, MN: University of Minnesota Press, 2000.

———. *Nudities*. Translated by David Kishik and Stefan Pedatella. Stanford, CA: Stanford University Press, 2009.

———. *The Open: Man and Animal*. Translated by Kevin Attell. Stanford, CA: Stanford University Press, 2004.

———. *Potentialities: Collected Essays in Philosophy*. Translated by Daniel Heller-Roazen. Stanford, CA: Stanford University Press, 1999.

———. *Stanzas: Word and Phantasm in Western Culture*. Translated by Ronald L. Martinez. Minneapolis, MN: University of Minnesota Press, 1993.

———. *State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press, 2005.

———. *The Use of Bodies*. Translated by Adam Kotsko. Stanford, CA: Stanford University Press, 2016.

Alfred, Taiaiake. *Peace, Power, Righteousness: An Indigenous Manifesto*. Don Mills, ON: Oxford University Press, 1999.

Althusius, Johannes. *Politica, Methodically Set Forth and Illustrated with Sacred and Profane Examples*. Translated by Frederick S. Carney. Indianapolis, IN: Liberty Fund, 1995.

Althusser, Louis. *Machiavelli and Us*. Translated by François Matheron. London: Verso, 1999.

Amar, Akhil Reed. "Anti-Federalists, The Federalist Papers, and the Big Argument for Union." *Harvard Journal of Law & Public Policy* 16, no. 111-118 (1993).

Amato, Pierandrea, Tristana Dini, Paolo Primi, Luca Salza, and Adriano Vinale. *Pouvoir Destituant/Potere Destituente: Les Révoltes Méropolitaines/Le Revoltes Metropolitane*. Milan: Mimesis, 2008.

Anderson, Benedict. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. London: Verso, 1983.

Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press, 2004.

Ankersmit, Frank R. "Representational Democracy: An Aesthetic Approach to Conflict and Compromise." *Common Knowledge* 8, no. 1 (2002): 24-46.

Appleby, Joyce, and Terence Ball. "Introduction." In *Thomas Jefferson: Political Writings*, edited by Joyce Appleby and Terence Ball. Cambridge: Cambridge University Press, 1999.

Arato, Andrew. "Forms of Constitution Making and Theories of Democracy." *Cardozo Law Review* 17 (1995): 191-231.

———. *Post-Sovereign Constitution Making: Learning and Legitimacy*. Oxford: Oxford University Press, 2016.

Arato, Andrew, and Jean L. Cohen. "Banishing Sovereignty? Internal and External Sovereignty in Hannah Arendt." In *Politics in Dark Times: Encounters with Hannah Arendt*, edited by Seyla Benhabib. Cambridge: Cambridge University Press, 2010.

Arendt, Hannah. *Between Past and Future: Eight Exercises in Political Thought*. Harmondsworth: Penguin, 1968.

———. *Crises of the Republic*. Harmondsworth: Penguin, 1972.

———. *Denktagebuch, 1950 bis 1973: Erster Band*. Edited by Ursula Ludz and Ingeborg Nordmann. Munich: Piper, 2002.

———. *Denktagebuch, 1950 bis 1973: Zweiter Band*. Edited by Ursula Ludz and Ingeborg Nordmann. Munich: Piper, 2002.

———. *Essays in Understanding, 1930–1954*. New York: Schocken, 1994.

———. "The Great Tradition I. Law and Power." *Social Research* 74, no. 3 (2007): 713-26.

———. "The Great Tradition II. Ruling and Being Ruled." *Social Research* 74, no. 4 (2007): 941-54.

———. "Hannah Arendt on Hannah Arendt." In *Hannah Arendt: The Recovery of the Public World*, edited by Melvyn A. Hill, 301-39. New York: St. Martin's, 1979.

———. "Heidegger at Eighty." *The New York Review of Books*, 21 October 1971.

———. *The Human Condition*. Chicago, IL: University of Chicago Press, 1958.

———. *Lectures on Kant's Political Philosophy*. Edited by Ronald Beiner. Chicago, IL: University of Chicago Press, 1982.

———. *The Life of the Mind, Volume I: Thinking*. London: Harcourt, 1977.

———. *The Life of the Mind, Volume II: Willing*. London: Harcourt, 1977.

———. *Love and Saint Augustine*. Edited by Joanna Vecchiarelli Scott and Judith C. Stark. Chicago, IL: University of Chicago Press, 1996.

———. *Men In Dark Times*. Harmondsworth: Penguin, 1973.

———. *On Revolution*. Harmondsworth: Penguin, 1963.

———. "On Revolution (First Draft)." In *The Hannah Arendt Papers*. Washington, DC: Manuscripts Division, Library of Congress, n.d.

———. *On Violence*. London: Harcourt, 1970.

———. *The Origins of Totalitarianism*. 2nd ed. New York: Harcourt, 1967.

Aristotle. "Metaphysics." In *The Basic Works of Aristotle*, edited by Richard McKeon, 689-935. New York: Random House, 1941.

———. "Physics." In *The Basic Works of Aristotle*, edited by Richard McKeon, 218-394. New York: Random House, 1941.

———. *The Politics*. Translated by C. D. C Reeves. Indianapolis, IN: Hackett, 1998.

———. "Posterior Analytics." In *The Basic Works of Aristotle*, edited by Richard McKeon, 110-86. New York: Random House, 1941.

Armitage, David. *The Declaration of Independence: A Global History*. Cambridge, MA: Harvard University Press, 2007.

Arninsaeus, Henning. *Doctrina Politica in Genuinam Methodum, quae est Aristotelis, Reducta*. Frankfurt: Johannis Thiemen, 1606.

Attell, Kevin. *Giorgio Agamben: Beyond the Threshold of Deconstruction*. New York: Fordham University Press, 2015.

———. "Potentiality, Actuality, Constituent Power." *Diacritics* 39, no. 3 (2009): 35-53.

Augustine. *City of God*. Translated by Henry Bettenson. Harmondsworth: Penguin, 1984.

———. *Confessions*. Translated by R. S. Pine-Coffin. Harmondsworth: Penguin, 1961.

Azellini, Dario. "Constituent Power in Motion: Ten Years of Transformation in Venezuela." *Socialism and Democracy* 24, no. 2 (2010): 8-31.

Baczko, Bronislaw. "The Social Contract of the French: Sieyès and Rousseau." *The Journal of Modern History* 60, no. Supplement: Rethinking French Politics in 1788 (1988): 98-125.

Bailey, Richard. "Up Against The Wall: Bare Life and Resistance in Australian Immigration Detention." *Law and Critique* 20, no. 2 (2009): 113-32.

Bailey, Saki, and Ugo Mattei. "Social Movements as Constituent Power: The Italian Struggle for the Commons." *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 965-1013.

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge, MA: Harvard University Press, 1967.

Baker, Keith Michael. *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century*. Cambridge: Cambridge University Press, 1990.

———. "Transformations of Classical Republicanism in Eighteenth Century France." *Journal of Modern History* 73, no. 1 (2001): 32-53.

Ball, Hugo. "Carl Schmitts Politische Theologie." In *Der Fürst dieser Welt: Carl Schmitt und die Folgen*, edited by Jacob Taubes, 100-15. Munich: Fink, 1985.

Barclay, William. *De Regno et Regali Potestate Adverus Buchananum, Brutum, Boucherium, & Religuos Monarchomachus*. Paris: Chavdiere, 1600.

Barnes, Jonathan. "Heidegger in the Cave." In *Method and Metaphysics: Essays in Ancient Philosophy I*, 77-99. Oxford: Oxford University Press, 2011.

Barshack, Lior. "Constituent Power as Body: Outline of a Constitutional Theology." *University of Toronto Law Journal* 56, no. 3 (2006).

Bastid, Paul. *Sieyès et sa Pensée*. Geneva: Slatkin, 1978.

Bayle, Pierre. *Political Writings*. Edited by Sally L. Jenkinson. Cambridge: Cambridge University Press, 2000.

Becker, Carl Lotus. *The Declaration of Independence: A Study in the History of Political Ideas*. New York: Harcourt, 1922.

Behrman, Simon. "Giorgio Agamben in Perspective." *International Socialism* 140 (2013).

Benhabib, Seyla. "Hannah Arendt and the Redemptive Power of Narratives." *Social Research* 57, no. 1 (1990): 167-96.

———. *The Reluctant Modernism of Hannah Arendt*. Lanham, MD: Rowman & Littlefield, 2000.

Benjamin, Walter. *The Arcades Project*. Translated by Howard Eiland and Kevin McLaughlin. Edited by Rolf Tiedemann. Cambridge, MA: Harvard University Press, 1999.

———. "Critique of Violence." Translated by Edmund Jephcott. In *Reflections: Essays, Aphorisms, Autobiographical Writings*, edited by Peter Demetz, 277-300. New York: Schocken, 2007.

———. *Gesammelte Schriften, I.1*. Edited by Rolf Tiedemann and Hermann Schweppenhäuser. Frankfurt am Main: Suhrkamp, 1991.

———. *Gesammelte Schriften, II.3*. Edited by Rolf Tiedemann and Hermann Schweppenhäuser. Frankfurt am Main: Suhrkamp, 1991.

———. *The Origin of German Tragic Drama*. Translated by John Osbourne. London: Verso, 2009.

———. "Theses on the Philosophy of History." Translated by Harry Zohn. In *Illuminations*, edited by Hannah Arendt, 253-64. New York: Schocken, 2007.

Benoist, Alain de. "The First Federalist: Johannes Althusius." *Telos* 118 (2000): 25-59.

Bernal, Angélica Maria. "The Concept of Founding." PhD Thesis, Yale University, 2008.

Bernstein, Richard. *Philosophical Profiles: Essays in a Pragmatic Mode*. Philadelphia: University of Philadelphia Press, 1986.

Berriat-Saint-Prix, Felix. *Théorie du droit constitutionnel français, Esprit des constitutions de 1848 et de 1852 et des sénatus-consultes organiques précédé d'un Essai sur le Pouvoir Constituant et d'un Précis historique des constitutions françaises*. Paris: Videoq fils Aine, 1853.

Birmingham, Peg. *Hannah Arendt & Human Right: The Predicament of Common Responsibility*. Bloomington, IN: Indiana University Press, 2006.

Blumenberg, Hans. *The Legitimacy of the Modern Age*. Translated by Robert M. Wallace. Cambridge, MA: MIT Press, 1983.

Böckenförde, Ernst-Wolfgang. "The Constituent Power of the People: A Liminal Concept of Constitutional Law [1986]." Translated by Thomas Dunlap. In *Constitutional and Political Theory*, edited by Mirjam Künkler and Tine Stein, 169-85. Oxford: Oxford University Press, 2017.

———. *State, Society and Liberty: Studies in Political Theory and Constitutional Law*. Translated by J. A. Underwood. New York: Berg, 1991.

Bodin, Jean. *The Six Bookes of a Commonweale*. Translated by Richard Knolles. London 1606.

Bossuet, Jacques-Benigne. *Politics Drawn From the Very Words of Holy Scripture*. Translated by Patrick Riley. Cambridge: Cambridge University Press, 1990.

Boutmy, Émile. *Études de Droit Constitutionnel: France–Angleterre–États-Unis*. Paris: Plon, 1885.

Bradshaw, Leah. *Thinking and Acting: The Political Thought of Hannah Arendt*. Toronto: University of Toronto Press, 1989.

Bredekamp, Horst. "From Walter Benjamin to Carl Schmitt, via Thomas Hobbes." *Critical Inquiry* 25, no. 2 (1999): 247-66.

Brito Vieira, Mónica. *Elements of Representation in Hobbes: Aesthetics, Theatre, Law and Theology in the Construction of Hobbes' Theory of the State*. Leiden: Brill, 2009.

Brunet, Pierre. *Vouloir pour la Nation: Le Concept de Représantation dans la Théorie de l'État*. Rouen: Publications de l'université de Rouen, 2004.

Brutus. "Letters of Brutus." In *The Federalist, with Letters of Brutus*, edited by Terence Ball. Cambridge: Cambridge University Press, 2003.

Brutus, Stephanus Junius. *Vindiciae, contra Tyrannos: or, Concerning the legitimate power of a prince over the people, and of the people over a prince*. Edited by George Garnett. Cambridge: Cambridge University Press, 1994.

Buchanan, George. *A Dialogue on the Law of Kingship among the Scots*. Edited by Roger A. Mason and Martin S. Smith. Aldershot: Ashgate, 2004.

Buckler, Steve. *Hannah Arendt and Political Theory: Challenging the Tradition*. Edinburgh: Edinburgh University Press, 2011.

Burke, Edmund. "Speech to the Electors of Bristol, November 3, 1774." In *Selected Works of Edmund Burke, Vol. 4*. Indianapolis, IN: Liberty Fund, 1999.

Burnaby, Andrew. *Travels Through the Middle Settlements in North American, in the Years 1759 and 1760, with Observations upon the State of the Colonies*. London: T. Payne, 1798.

Caldwell, Peter C. "Controversies over Carl Schmitt: A Review of Recent Literature." *The Journal of Modern History* 77, no. 2 (2005): 357-87.

———. "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State." *Cardozo Law Review* 16 (1994): 399-427.

———. *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*. Durham, NC: Duke University Press, 1997.

Cane, Lucy. "Hannah Arendt on the Principles of Political Action." *European Journal of Political Theory* 14, no. 1 (2015): 55-75.

Canovan, Margaret. "A Case of Distorted Communication: A Note on Habermas and Arendt." *Political Theory* 11, no. 1 (1983): 105-16.

———. *The People*. Cambridge: Polity, 2005.

Carré de Malberg, Raymond. *Contribution à la théorie générale de l'Etat*. Vol. II. Paris: Dalloz, 1922.

———. *Contribution à la théorie générale de l'Etat*. Vol. I. Paris 1920.

Casarino, Cesare, and Antonio Negri. *In Praise of the Common: A Conversation on Philosophy and Politics*. Minneapolis, MN: University of Minnesota Press, 2008.

Castoriadis, Cornelius. *The Imaginary Institution of Society*. Translated by Kathleen Blamey. Cambridge: Polity, 1987.

Centinel. "No.1: To the Freemen of Pennsylvania, October 5, 1787 ". In *The Anti-Federalist Papers and the Constitutional Convention Debates*, edited by Ralph Ketcham. New York: Mentor, 1986.

Chabod, Federico. *Machiavelli and the Renaissance*. Translated by David Moore. London: Bowes & Bowers, 1958.

Chambers, Samuel A. *Untimely Politics*. Edinburgh: Edinburgh University Press, 2003.

Christodoulidis, Emilios. "Against Substitution: The Constitutional Thinking of Dissensus." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker. Oxford: Oxford University Press, 2007.

Cicceriello-Maher, George. "Constituent Moments, Constitutional Processes: Social Movements and the New Latin American Left." *Latin American Perspectives* 40, no. 3 (2013): 126-40.

Cicero. "The Republic." Translated by Niall Rudd. In *The Republic and the Laws*. Oxford: Oxford University Press, 1998.

Çidam, Çigdem. "A Politics of Love? Antonio Negri on Revolution and Democracy." *Contemporary Political Theory* 12, no. 1 (2013): 26-45.

Cincinnatus. "To James Wilson, Esq., November 22, 1787." In *The Documentary History of the Ratification of the Constitution, Vol. XIV: Commentaries on the Constitution, Public and Private*, edited by John P. Kaminski. Madison, WI: State Historical Society of Wisconsin, 1983.

Cobban, Alfred. *The Social Interpretation of the French Revolution*. Cambridge: Cambridge University Press, 1963.

Coffey, John. "George Buchanan and the Scottish Covenanters." In *George Buchanan, Political Thought in Early Modern Britain and Europe*, edited by Caroline Erskine and Roger A. Mason, 189-204. Farnham: Ashgate, 2012.

———. *Politics, Religion and the British Revolutions: The Mind of Samuel Rutherford*. Cambridge: Cambridge University Press, 1997.

Colectivo Situaciones. *19 & 20: Notes for a New Social Protagonism*. Translated by Nate Holdren and Sebastian Touza. Brooklyn, NY: Autonomedia, 2002.

Colón-Ríos, Joel I. "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia." *Constellations* 18, no. 3 (2011): 365-88.

———. "Five Conceptions of Constituent Power." *Law Quarterly Review* 130, no. 2 (2014): 306-36.

———. "The Legitimacy of the Juridical: Constituent Power, Democracy and the Limits of Constitutional Reform." *Osgood Hall Law Journal* 48 (2010): 199-245.

———. *Weak Constitutionalism: Constituent Power and the Question of Democratic Legitimacy*. New York: Routledge, 2012.

Condren, Conal. *George Lawson's Politica and the English Revolution*. Cambridge: Cambridge University Press, 1989.

Connolly, William E. *The Terms of Political Discourse*. Lexington, MA: Heath, 1974.

Constant, Benjamin. "The Liberty of the Ancients Compared with that of the Moderns." In *Political Writings*, edited by Biancamaria Fontana. Cambridge: Cambridge University Press, 1988.

Cornell, Saul. *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788–1828*. Chapel Hill, NC: University of North Carolina Press, 1999.

Coulthard, Glen. *Red Skin, White Mask: Rejecting the Colonial politics of Recognition*. Minneapolis, MN: University of Minnesota Press, 2014.

'The Craftsman'. "On The Independency of Parliament." In *The Gentleman's Magazine: Or, Monthly Intelligencer. For the Year 1734, Vol. IV*, edited by Sylvanus Urban. London: F. Jefferies, 1734.

Cristi, Renato. "The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution." *Cardozo Law Review* 21, no. 5-6 (2000): 1749-75.

———. "Schmitt on Constituent Power and the Monarchical Principle." *Constellations* 18, no. 3 (2011): 352-64.

Critchley, Simon. "The Catechism of the Citizen: Politics, Law and Religion in, after, with and against Rousseau." *Continental Philosophy Review* 42 (2009): 5-34.

d'Ailly, Pierre. "Tractatus de materia concilii generalis." In *The Political Thought of Pierre d'Ailly*, edited by Francis Oakley. New Haven, CT: Yale University Press, 1964.

Davidson, Arnold. "Archaeology, Genealogy, Ethics." In *Foucault: A Critical Reader*, edited by David Couzens Hoy, 221-34. Oxford: Blackwell, 1986.

de Baecque, Antoine. *The Body Politic: Corporeal Metaphor in Revolutionary France, 1770–1800*. Translated by Charlotte Mandell. Stanford, CA: Stanford University Press, 1996.

de la Torre, Carlos. *Populist Seduction in Latin America: The Ecuadorian Experience*. Athens, OH: Ohio University Press, 2009.

de Maistre, Joseph. "Study on Sovereignty." In *The Works of Joseph de Maistre*. London: Allen and Unwin, 1965.

de Wilde, Marc. "The Dictator's Trust: Regulating and Constraining Emergency powers in the Roman Republic." *History of Political Thought* 33, no. 4 (2012): 555-77.

———. "Meeting Opposites: The Political Theologies of Walter Benjamin and Carl Schmitt." *Philosophy and Rhetoric* 44, no. 4 (2011): 363-81.

Defoe, Daniel. *The History of the Union of Great Britain*. Edinburgh: Andrew Anderson, 1709.

———. *The Original Power of the Collective Body of the People of England, Examined and Asserted*. London, 1702.

del Lucchese, Filippo. "Machiavelli and the Constituent Power: The Revolutionary Foundation of Modern Political Thought." *European Journal of Political Theory* 16, no. 1 (2017): 3-23.

———. "Spinoza and Constituent Power." *Contemporary Political Theory* 15, no. 2 (2016): 182-204.

Deleuze, Gilles. *Expressionism in Philosophy: Spinoza*. Translated by Martin Joughin. New York: Zone, 1990.

———. *Foucault*. Translated by Sean Hand. London: Continuum, 1999.

———. *Spinoza: Practical Philosophy*. Translated by Robert Hurley. San Francisco, CA: City Lights, 2001.

Derrida, Jacques. *Archive Fever: A Freudian Impression*. Translated by Eric Prenowitz. Chicago: Chicago University Press, 1996.

———. *The Beast & the Sovereign: Volume 1*. Translated by Geoffrey Bennington. Chicago: University of Chicago Press, 2009.

———. "Declarations of Independence." *New Political Science* 7, no. 1 (1986): 7-15.

———. "Force of Law: The "Mystical Foundation of Authority"." *Cardozo Law Review* 11 (1990): 920-1045.

———. *Of Grammatology*. Translated by Gayatri Chakravorty Spivak. Baltimore, ML: Johns Hopkins University Press, 1997.

———. *The Politics of Friendship*. Translated by George Collins. London: Verso, 1997.

———. "Signature Event Context." Translated by Samuel Weber. In *Limited Inc.* Evanston, IL: Northwestern University Press, 1988.

———. *Spectres of Marx: The State of Debt, the Work of Mourning and the New International*. Translated by Peggy Kamuf. London: Routledge, 1994.

DeWitt, John. *Essay II: October 27, 1787*. The Anti-Federalist Papers and the Constitutional Convention Debates. New York: Mentor, 1986.

Digges, Dudley. *The Unlawfulness of Subjects, Taking Armes against their Soveraigne, in what case soever*. Oxford1644.

Disch, Lisa. "How could Hannah Arendt glorify the American Revolution and revile the French? Placing *On Revolution* in the historiography of the French and American Revolutions." *European Journal of Political Theory* 10, no. 3 (2011): 350-71.

Douglass, Robin. "The Body Politic "is a Fictitious Body": Hobbes on Imagination and Fiction." *Hobbes Studies* 27, no. 2 (2014): 126-47.

———. *Rousseau and Hobbes: Nature, Free Will and the Passions*. Oxford: Oxford University Press, 2015.

Douzinas, Costas. *Philosophy and Resistance in the Crisis: Greece and the Future of Europe*. London: Polity, 2013.

Doyle, William. "The Parlements of France and the Breakdown of the Old Regime 1771–1788." *French Historical Studies* 6, no. 4 (1970): 415-58.

Dreyfus, Hubert L., and Paul Rabinow. *Michel Foucault: Beyond Structuralism and Hermeneutics*. Chicago: University of Chicago Press, 1983.

Dunn, John. "Hannah Arendt on Revolution (1964)." In *The Cambridge Mind: Ninety Years of the Cambridge Review, 1879-1969*, edited by Eric Homberger, William Janeway and Simon Shama, 158-61. Cape: London, 1970.

———. "The Politics of Locke in England and American in the Eighteenth Century." In *Political Obligation in its Historical Context*. Cambridge: Cambridge University Press, 1980.

Dworetz, Steven M. *The Unvarnished Doctrine: Locke, Liberalism and The American Revolution*. Durham, NC: Duke University Press, 1989.

Dyrberg, Torben Bech. "The Leftist Fascination with Schmitt and the Esoteric Quality of 'the Political'." *Philosophy and Social Criticism* 35, no. 6 (2009): 649-69.

Dyzenhaus, David. "Constitutionalism in an Old Key: Legality and Constituent Power." *Global Constitutionalism* 1, no. 2 (2012): 229-60.

———. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. Oxford: Oxford University Press, 1997.

———. "The Politics of the Question of Constituent Power." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press, 2007.

Eddon, Raluca. "Arendt, Scholem, Benjamin: Between Revolution and Messianism." *European Journal of Political Theory* 5, no. 3 (2006): 261-79.

Elazar, Daniel J. "Althusius' Grand Design for a Federal Commonwealth." In *Politica*, edited by Frederick S. Carney. Indianapolis, IN: Liberty Fund, 1995.

Elden, Stuart. *The Birth of Territory*. Chicago: University of Chicago Press, 2013.

Elshtain, Jean Bethke. "Hannah Arendt's French Revolution." *Salmagundi* 84 (1989): 47-60.

Fandos, Nicholas. "Donald Trump Defiantly Rallies a New 'Silent Majority' in a Visit to Arizona." New York Times, https://www.nytimes.com/2015/07/12/us/politics/donald-trump-defiantly-rallies-a-new-silent-majority-in-a-visit-to-arizona.html. 11 July 2015.

Farr, James, and David Lay Williams. "Introduction." In *The General Will: The Evolution of a Concept*, edited by James Farr and David Lay Williams. Cambridge: Cambridge University Press, 2015.

Fauré, Christine. "Sieyès, Rousseau et la théorie du contrat." In *Figures de Sieyès*, edited by Pierre-Yves Quiveger. Paris: Publications de la Sorbonne, 2008.

Field, Sandra. "Democracy and the Multitude: Spinoza against Negri." *Theoria* 59, no. 131 (2012): 21-40.

Figgis, John Neville. *Studies in Political Thought from Gerson to Grotius, 1414–1625*. Cambridge: Cambridge University Press, 1907.

Flammermont, Jules. *Remontrances du Parlement de Paris au XVIIIe siècle, Vol. II: 1755–1768*. Paris: Imprimerie Nationale, 1895.

Flikschuh, Katrin. "Elusive Unity: The General Will in Hobbes and Kant." *Hobbes Studies* 25, no. 21-42 (2012).

Ford, John D. "*Lex, rex iusto posita:* Samuel Rutherford on the Origins of Government." In *Scots and Britons: Scottish Political Thought and the Union of*

1603, edited by Roger A. Mason, 262-92. Cambridge: Cambridge University Press, 1993.

Forsyth, Murray. *Reason and Revolution: The Political Thought of the Abbé Sieyès*. Leicester: Leicester University Press, 1987.

———. "Thomas Hobbes and the Constituent Power of the People." *Political Studies* 29, no. 2 (1981): 191-203.

Foucault, Michel. *The Archaeology of Knowledge*. Translated by A. M. Sheridan Smith. London: Routledge, 1989.

———. *The History of Sexuality, Volume 1: The Will to Knowledge:* . Translated by Robert Hurley. New York: Pantheon, 1998.

———. "The Mythical Leader of the Iranian Revolt." In *Foucault and the Iranian Revolution: Gender and the Seduction of Islamism*, edited by Janet Afary and Kevin B. Anderson. Chicago: University of Chicago Press, 2005.

———. "Nietzsche, Genealogy, History." In *The Foucault Reader*, edited by Paul Rabinow, 76-100. London: Penguin, 1986.

———. *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*. Translated by Colin Gordon. New York: Pantheon, 1980.

———. *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*. Translated by Graham Burchell. Basingstoke: Palgrave, 2007.

———. *Society Must Be Defended: Lectures at the College de France, 1975–76*. Translated by D. Macey. London: Penguin, 2003.

Foxley, Rachel. "John Lilburn and the Citizenship of 'Free-born Englishmen'." *The Historical Journal* 47, no. 4 (2004): 849-74.

Frank, Jason. *Constituent Moments: Enacting the People in Post-Revolutionary America*. Durham, NC: Duke University Press, 2010.

———. *Publius and Political Imagination*. Lanham: Rowman & Littlefield, 2013.

———. "'Unauthorized Propositions': The Federalist Papers and Constituent Power." *diacritics* 37, no. 2-3 (2007): 103-20.

Frank, Stephanie. "The General Will Beyond Rousseau: Sieyès' Theological Arguments for the Sovereignty of the Revolutionary National Assembly." *History of European Ideas* 37, no. 3 (2011): 337-43.

Franklin, Julian F. *John Locke and the Theory of Sovereignty*. Cambridge: Cambridge University Press, 1978.

Freeden, Michael. *Ideologies and Political Theory: A Conceptual Approach*. Oxford: Clarendon, 1996.

———. "Is Nationalism a Distinct Ideology?". *Political Studies* 46, no. 4 (1998): 748-65.

———. *The Political Theory of Political Thinking: The Anatomy of a Practice*. Oxford: Oxford University Press, 2013.

Freire, Lucas G. "The Dawn of the State-System as a Concept: Althusius, Pufendorf and Leibniz on the Holy Roman Empire." In *52nd ISA Annual Convention*. Montréal 2011.

Friedeburg, Robert von. "From Collective Representation to the Right to Individual Defence: James Steuart's *Ius Populi Vindicatum* and the Use of Johannes Althusius' *Politica* in Restoration Scotland." *History of European Ideas* 24, no. 1 (1998): 19-42.

———. "George Buchanan and the German Monarchomachs." In *George Buchanan: Political Thought in Early Modern Britain and Europe*, edited by Caroline Erskine and Roger A. Mason. Farnham: Ashgate, 2012.

———. *Luther's Legacy: The Thirty Years War and the Modern Notion of 'State' in the Empire, 1530s to 1790s*. Cambridge: Cambridge University Press, 2016.

———. "Reformed Monarchomachism and the Genre of the 'Politica' in the Empire: The *Politica* of Johannes Althusius and the Meaning of Hierarchy in its Constitutional and Conceptual Context." *Archivio della Ragion di Stato* 6 (1998): 129-53.

Friedrich, Carl Joachim. "Introduction." In *Politica Methodice Digesta of Johannes Althusius*. Cambridge: Harvard University Press, 1932.

Fukuyama, Francis. *The End of History and the Last Man*. New York: Free Press, 1992.

Furet, Francois. *The French Revolution, 1770–1814*. Translated by Antonia Nevill. Oxford: Blackwell, 1992.

———. *Interpreting the French Revolution*. Translated by Elborg Forster. Cambridge: Cambridge University Press, 1981.

Furtwangler, Albert. *The Authority of Publius: A Reading of the Federalist Papers*. Ithaca, NY: Cornell University Press, 1982.

Galli, Carlo. *Janus's Gaze: Essays on Carl Schmitt*. Translated by Amanda Minervini. Edited by Adam Sitze. Durham, NC: Duke University Press, 2015.

Giesey, Ralph. "The Monarchomach Triumvirs: Hotman, Beza and Mornay." *Bibliothèque d'Humanisme et Renaissance* 32, no. 1 (1970): 41-56.

Gleissner, R. "The Levellers and Natural Law." *Journal of British Studies* 20 (1980): 74-89.

Goldini, Marco. "At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of the Constituent Power." *Oxford Journal of Legal Studies* 32, no. 2 (2012): 221-34.

Goldstein, Alyosha. "Colonialism, Constituent Power, and Popular Sovereignty." *Journal of Nineteenth Century Americanists* 2, no. 1 (2014): 148-53.

Gould, Eliga. *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire*. Cambridge, MA: Harvard University Press, 2012.

Gramsci, Antonio. *Selections from the Prison Notebooks*. Edited by Quintin Hoare and Geoffrey Nowell-Smith. London: Lawrence & Wishart, 1971.

Grant, Edward. *The Foundations of Modern Science in the Middle Ages: Their Religious, Institutional and Intellectual Contexts*. Cambridge: Cambridge University Press, 1997.

Gratton, Peter. *The State of Sovereignty: Lessons from the Political Fictions of Modernity*. Albany, NY: SUNY Press, 2012.

Greene, Jack P. *The Constitutional Origins of the American Revolution*. Cambridge: Cambridge University Press, 2010.

———. *Peripheries and Centre: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788*. Vol. University of Georgia Press: Athens, 1986.

Guilhaumou, Jacques. *Sieyès et l'ordre de la langue*. Paris: Klincksieck, 2002.

———. "Sieyès et le non-dit de la *sociologie*: du mot à la chose." *Revue d'Histoire des Sciences Humaines* 15, no. 2 (2006): 117-34.

Habermas, Jürgen. *Between Facts and Norms*. Edited by William Rehg. Cambridge, MA: MIT Press, 1996.

———. "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?". *Political Theory* 29, no. 6 (2001): 766-81.

———. *The Crisis of the European Union: A Response*. Translated by Ciaran Cronin. Cambridge: Polity, 2012.

———. "Die Geschichte von den Zwei Revolutionen." *Merkur* 20, no. 218 (1966): 479-82.

———. "Hannah Arendt's Communicative Concept of Power." *Social Research* 44, no. 1 (1977): 1-24.

———. *The Philosophical Discourse of Modernity: Twelve Lectures*. Edited by F Lawrence. Cambridge: Polity, 1987.

Hamilton, Alexander. "The Farmer Refuted." In *The Works of Alexander Hamilton*, edited by Henry Cabot Lodge. London: G. P. Putnam's, 1904.

———. "The Government and the Constitution: A Letter from Hamilton to James Duane. Liberty Pol, September 3, 1780." In *The Works of Alexander Hamilton*, edited by Henry Cabot Lodge. London: G. P. Putnam's, 1904.

Hampsher-Monk, Iain. "The Political Theory of the Levellers: Putney, Property and Professor MacPherson." *Political Studies* 24 (1976): 397-422.

Hardt, Michael. "Laboratory Italy." In *Radical Thought in Italy: A Potential Politics*, edited by Paolo Virno and Michael Hardt. Minneapolis, MN: University of Minnesota Press, 1996.

Hardt, Michael, and Antonio Negri. "Arabs are Democracy's New Pioneers." *The Guardian*, 24 February 2011.

———. *Commonwealth*. Cambridge, MA: Belknapp Press, 2009.

———. *Empire*. Cambridge, MA: Harvard University Press, 2000.

———. "The Fight for 'Real Democracy' at the Heart of Occupy Wall Street." *Foreign Affairs*, October 11 2011.

———. *Labour of Dionysus: A Critique of State Form*. Minneapolis, MN: University of Minnesota Press, 1994.

———. *Multitude: War and Democracy in the Age of Empire*. Cambridge, MA: Belknapp Press, 2004.

Hartz, Louis. *The Liberal Tradition in America*. London: Harcourt, 1955.

Havercroft, Jonathan. "The Fickle Multitude: Spinoza and the Problem of Global Democracy." *Constellations* 17, no. 1 (2010): 120-36.

Hawke, David. "Dr. Thomas Young— "Eternal Fisher in Troubled Waters": Notes for a Biography." *New-York Historical Society Quarterly* 54, no. 1 (1970): 6-29.

Heerich, Thomas, and Manfred Lauermann. "Der Gegenzats Hobbes-Spinoza bei Carl Schmitt." *Studia Spinozana* 7 (1991): 97-160.

Heiber, Helmut. *The Weimar Republic*. Translated by W. E. Yuill. Oxford: Blackwell, 1993.

Heidegger, Martin. *Being and Time*. Translated by John MacQuarrie and Edward Robinson. New York: Harper, 1962.

Hell, Julia. "Katechon: Carl Schmitt's Imperial Theology and the Ruins of the Future." *The Germanic Review*, no. 84 (2009): 4.

Henry, Patrick. "Speeches of Patrick Henry (June 5 and 7, 1788)." In *The Anti-Federalist papers and the Convention Debates*, edited by Ralph Ketcham. New York: Mentor, 1886.

Hobbes, Thomas. *Behemoth, or, The Long Parliament*. Edited by Ferdinand Tönnies. Chicago, IL: University of Chicago Press, 1990.

———. *De Cive: The English Version*. Edited by Howard Warrender. Oxford: Oxford University Press, 1983.

———. *De Cive: The Latin Version*. Oxford: Oxford University Press, 1983.

———. "De Corpore." In *The English Works of Thomas Hobbes of Malmesbury, Vol.1*, edited by William Molesworth. London: John Bohn, 1839.

———. *Elements of Law Natural and Political: Human Nature and De Corpore Politico*. Translated by J. G. A. Gaskin. Oxford: Oxford University Press, 1994.

———. *Leviathan*. London: Penguin, 1985.

———. *On The Citizen [De Cive]*. Translated by Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press, 1998.

———. "Six Lessons to the Savillian Professor of the Mathematics." In *The English Works of Thomas Hobbes, Vol. VII*, edited by William Molesworth, 181-356. London: Routledge, 1992.

Hobsbawm, Eric. "On Revolution, by Hannah Arendt." *History and Theory* 4, no. 2 (1965): 252-58.

Hobson, Christopher. "Revolution, Representation and the Foundations of Modern Democracy." *European Journal of Political Theory* 7, no. 4 (2008): 449-71.

Hochstrasser, T. J. "Physiocracy and the politics of *laissez-faire*." In *The Cambridge History of Eighteenth-Century Political Thought*, edited by Mark Goldie and Robert Wokler. Cambridge: Cambridge University Press, 2008.

Hoeksta, Kinch. "Early Modern Absolutism and Constitutionalism." *Cardozo Law Review* 34 (2013): 1079-98.

Hoelzl, Michael, and Graham Ward. "Introduction." In *Dictatorship*. Cambridge: Polity, 2014.

Holland, Ben. *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*. Cambridge: Cambridge University Press, 2017.

———. "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory." *Journal of International Political Theory* 8, no. 1-2 (2012): 48-73.

———. "Sovereignty as *Dominium*? Reconstructing the Constructivist Roman Law Thesis." *International Studies Quarterly* 54, no. 2 (2010): 449-80.

Honig, Bonnie. "Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy"." *Political Theory* 29, no. 6 (2001): 792-805.

———. "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic." *American Political Science Review* 85, no. 1 (1991): 97-113.

———. *Emergency Politics: Paradox, Law, Democracy* [in English]. Princeton: Princeton University Press, 2009.

Honneth, Axel. "Foucault et Adorno." *Critique* 49, no. 471-72 (1986).

Hont, István. *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective*. Cambridge, MA: Harvard University Press, 2005.

———. "The Permanent Crisis of a Divided Mankind: 'Contemporary Crisis of the Nation State' in Historical Perspective." *Political Studies* 42, no. s1 (1994): 166-231.

———. *Politics in Commercial Society: Jean-Jacques Rousseau and Adam Smith*. Edited by Béla Kapossy and Michael Sonenscher. Cambridge, MA: Harvard University Press, 2015.

Hooker, William. *Carl Schmitt's International Thought: Order and Orientation*. Cambridge: Cambridge University Press, 2009.

Höpfl, Harro, and Martyn Thompson. "The History of Contract as a Motif in Political Thought." *The American Historical Review* 84, no. 4 (1979): 919-44.

Howell, Roger, and David E. Brewster. "Reconsidering the Levellers: The Evidence of the *Moderate*." *Past & Present* 46, no. 68-86 (1970).

Hsueh, Vicki. *Hybrid Constitutions: Challenging Legacies of Law, Privilege and Culture in Colonial America*. Durham, NC: Duke University Press, 2010.

Hueglin, Thomas O. *Early Modern Concepts for a Modern World: Althusius on Community and Federalism*. Waterloo, ON: Wilfrid Laurier University Press, 1999.

———. "Johannes Althusius: Medieval Constitutionalist or Modern Federalist?". *Publius* Fall 1979 (1979): 9-41.

Hunt, Lynn. "The National Assembly." In *The French Revolution and the Creation of Modern Political Culture, Vol 1: The Political Culture of the Old Regime*, edited by Keith Michael Baker. Oxford: Pergamon Press, 1987.

Hunter, Ian. *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany*. Cambridge: Cambridge University Press, 2001.

Hutchings, Kimberly. *Time and World Politics: Thinking the Present*. Manchester: Manchester University Press, 2008.

Hyvönen, Ari-Elmeri. "Tentative Lessons of Experience: Arendt, Essayism, and 'The Social' Reconsidered." *Political Theory* 42, no. 5 (2014): 569-89.

Ingram, David. "Novus Ordo Seclorum: The Trial of (Post)modernity or the Tale of Two Revolutions." In *Hannah Arendt: Twenty Years Later*, edited by Larry May and Jerome Kohn, 221-50. Cambridge, MA: MIT Press, 1996.

Irwin, Terence. *Aristotle's First Principles*. Oxford: Oxford University Press, 1988.

Israel, Jonathan. *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy*. Princeton, NJ: Princeton University Press, 2010.

James I. *Basilikon Doron*. Edited by Johann P. Sommerville. London: Felix Kyngston, 1602.

———. "Speech of James I before Parliament, 21 March 1610." In *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, edited by G. W. Prothero. Oxford: Clarendon press, 1894.

———. *The True Law of Free Monarchy*. London 1642.

Janentzky, Christian. *Mystik und Rationalismus*. Munich: Duncker & Humblot, 1922.

Jasinski, James. "Heteroglossia, Polyphony, and the Federalist Papers." *Rhetoric Society Quarterly* 27, no. 1 (1997): 23-46.

Jaume, Lucien. "Constituent Power in France: The Revolution and its Consequences." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker. Oxford: Oxford University Press, 2007.

Jay, Martin. *Permanent Exiles: Essays on the Intellectual Migration from Germany to America*. New York: Columbia University Press, 1985.

Jefferson, Thomas. "A Summary View of the Rights of British America." In *Political Writings*, edited by Joyce Appleby and Terrence Ball. Cambridge: Cambridge University Press, 1999.

Jellinek, Georg. *Allgemeine Staatslehre*. Berlin: Springer, 1921.

———. *The Declaration of the Rights of Man and of Citizen: A Contribution to Modern Constitutional History*. Translated by Max Farrand. New York: Henry Holt, 1901.

———. "Review of Egon Zweig, Die Lehre vom Pouvoir Constituant." *Archiv für öffentliches Recht* 25 (1909): 389-92.

———. *System der Subjektive Öffentlichen Rechte*. Tübingen: J.C.B. Mohr, 1919.

Junius. "To the Printer of the Public Advertiser, April 3 1770. [Letter 38]." In *Letters of Junius*, 190-98. New York: E.Duyckinck, 1821.

Kafka, Franz. *The Great Wall of China and Other Short Works*. Translated by Malcolm Pasley. London: Penguin, 1991.

Kalyvas, Andreas. "Constituent Power." *Political Concepts: A Critical Lexicon* 3, no. 1 (2013).

———. *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt and Hannah Arendt*. Cambridge: Cambridge University Press, 2008.

———. "Popular Sovereignty, Democracy and the Constituent Power." *Constellations* 12, no. 2 (2005): 223-44.

———. "The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator." *Political Theory* 35, no. 4 (2007): 412-42.

———. "Who's Afraid of Carl Schmitt?". *Philosophy and Social Criticism* 25, no. 5 (1999): 87-125.

Kalyvas, Andreas, and Ira Katznelson. *Liberal Beginnings: Making a Republic for the Moderns*. Cambridge: Cambridge University Press, 2007.

Kant, Immanuel. *Critique of Pure Reason*. Translated by Paul Guyer and Allen W. Wood. Cambridge: Cambridge University Press, 1998.

Kantorowicz, Ernst H. *The King's Two Bodies: A Study in Mediaeval Political Theology*. Princeton, NJ: Princeton University Press, 1957.

———. "Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins." *The Harvard Theological Review* 48, no. 1 (1955): 65-91.

Kateb, George. *Hannah Arendt: Politics, Conscience, Evil*. Lanham, MD: Rowman & Littlefield, 1987.

Kay, Richard S. "Constituent Authority." *American Journal of Comparative Law* 59 (2011).

Keenan, Alan. "Promise, Promise: The Abyss of Freedom and the Loss of the Political in the Work of Hannah Arendt." *Political Theory* 22, no. 2 (1994): 297-322.

Kelly, Duncan. "Carl Schmitt's Political Theory of Dictatorship." In *The Oxford Handbook of Carl Schmitt*, edited by Jens Meierhenrich and Oliver Simons. Oxford: Oxford University Press, 2016.

———. "Carl Schmitt's Political Theory of Representation." *Journal of the History of Ideas* 64, no. 1 (2004): 113-34.

———. "Egon Zweig and the Intellectual History of the Constituent Power." In *Constitutionalism, Legitimacy and Power: Nineteenth-Century Experiences*, edited by Kelly L. Grotke and Markus J. Prutsch. Oxford: Oxford University Press, 2014.

———. "Revisiting the Rights of Man: Georg Jellinek on Rights and the State." *Law and History Review* 22, no. 3 (2004): 493-529.

———. *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann*. Oxford: Oxford University Press, 2003.

Kelsen, Hans. *General Theory of Law & State*. Cambridge, MA: Harvard University Press, 1949.

———. *Pure Theory of Law*. Translated by Max Knight. Berkeley, CA: University of California Press, 1967.

Kennedy, Ellen. "Carl Schmitt and the Frankfurt School." *Telos* 71 (1987): 37-66.

———. *Constitutional Failure: Carl Schmitt in Weimar*. Durham, NC: Duke University Press, 2004.

Klein, Claude. *Théorie et pratique du pouvoir constituant*. Paris: Presses Universitaires de France, 1996.

Koch, Bettina. "Johannes Althusius: between Secular Federalism and the Religious State." In *The Ashgate Research Companion to Federalism*, edited by Ann Ward and Lee Ward, 75-90. Farnham: Ashgate, 2009.

Koekkoek, Rene. "Carl Schmitt and the Challenge of Spinoza's Pantheism Between the World Wars." *Modern Intellectual History* 11, no. 2 (2014): 333-57.

Kojève, Alexandre. *The Notion of Authority (A Brief Presentation)*. Translated by Hager Weslati. London: Verso, 2014.

Konig, David Thomas. "Regionalism in Early American Law." In *The Cambridge History of Law in America, Vol. 1: Early American (1580-1815)*, edited by Michael Grossberg and Christopher Tomlins. Cambridge: Cambridge University Press, 2008.

Koopman, Colin. *Genealogy as Critique: Michel Foucault and the Problems of Modernity*. Bloomington, IN: Indiana University Press, 2013.

Koselleck, Reinhardt. *Futures Past: On the Semantics of Historical Time*. New York: Columbia University Press, 2004.

———. "Introduction and Preface to the *Geschichtliche Grundbegriffe*." *Contributions to the History of Concepts* 6, no. 1 (2011): 1-37.

———. *The Practice of Conceptual History: Timing History, Spacing Concepts*. Translated by Todd Samuel Presner. Stanford, CA: Stanford University Press, 2002.

Koskenniemi, Martti. "National Self-Determination Today: Problems of Legal Theory and practice." *International and Comparative Law Quarterly* 43, no. 2 (1994): 241-69.

Kramnick, Isaac. *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America*. Ithaca, NY: Cornell University Press, 1990.

Kuo, Ming-Sung. "Reconciling Constitutionalism with Power: Towards a Constitutional *Nomos* of Political Ordering." *Ratio Juris* 23, no. 3 (2010): 390-410.

Kwek, Dorothy H. B. "Power and the Multitude: A Spinozist View." *Political Theory* 43, no. 2 (2015): 155-84.

la Torre, Massimo. "'*Rechtsstaat*' and Legal Science. The Rise and Fall of the Concept of Subjective Right." *Archiv für Rechts- und Sozialphilosophie* 76 (1990): 50-68.

Laband, Paul. *Das Staatsrecht des Deutschen Reiches*. Vol. 1. Tübingen: H. Laupp, 1876.

Laclau, Ernesto. "Deconstruction, Pragmatism, Hegemony." In *Deconstruction and Pragmatism*, edited by Chantal Mouffe. London: Routledge, 1996.

———. "Democracy and the Question of Power." *Constellations* 8, no. 1 (2001): 3-14.

Lacoue-Labarthe, Philippe, and Jean-Luc Nancy. *Retreating the Political*. London: Routledge, 1997.

Laferrière, M. F. "Faculté de Droit de Rennes, Cours de droit public et administratif." *Revue de législation et de jurisprudence* 9 (1838-1839).

Lanjuinais, Jean Denis. *Constitutions de la Nation Francaise avec un essai historique et politique sur la charte et un receuil de pièces corrélatives, Vol. 1*. Paris 1819.

Lawson, George. *Politica Sacra et Civilis, or, A Model of Civil and Ecclesiastical Government*. Edited by Condren Condren. Cambridge: Cambridge University Press, 1992.

Lazar, Nomi Claire. *States of Emergency in Liberal Democracy*. Cambridge: Cambridge University Press, 2009.

Le Goff, Jacques. *Medieval Civilization, 400-1500*. Translated by Julia Barrow. Oxford: Blackwell, 1988.

Lee, Daniel. ""Office is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government." *Political Theory* 41, no. 3 (2013): 409-40.

———. *Popular Sovereignty in Early Modern Constitutional Thought*. Oxford: Oxford University Press, 2016.

———. "Private Law Models for Public Law Concepts: The Roman Law Theory of *Dominium* in the Monarchomach Doctrine of Popular Sovereignty." *Review of Politics* 70, no. 3 (2008): 370-99.

Lefebvre, George. *The French Revolution: From its Origins to 1793*. Translated by Elizabeth Moss Evanson. London: Routledge, 2001.

Lefort, Claude. *Democracy and Political Theory*. Translated by D. Macey. Cambridge: Cambridge University Press, 1988.

Leijenhorst, Cees. "Sense and Nonsense about Sense: Hobbes and the Aristotelians on Sense Perception and Imagination." In *The Cambridge Companion to Hobbes's Leviathan*, edited by Patricia Springborg, 82-109. Cambridge: Cambridge University Press, 2007.

Lembcke, Oliver W., and Florian Weber. "Introduction to Sieyès's Political Theory." In *Emmanuel Joseph Sieyès: The Essential Political Writings*, edited by Oliver W. Lembcke and Florian Weber. Leiden: Brill, 2014.

Levy, Jacob. "Beyond Publius: Montesquieu, Liberal Republicanism and the Small-Republic Thesis." *History of Political Thought* 27, no. 1 (2006): 50-90.

Levy, Michael. "Freedom, Property and the Levellers." *Western Political Quarterly* 36 (1983): 116-33.

Lievens, Matthias. "Singularity and Repetition in Carl Schmitt's Vision of History." *Journal of the Philosophy of History* 5, no. 1 (2011): 105-29.

Lilburne, J, W Walwyn, T Prince, and R Overton. "An Agreement of the People for a firm and present peace upon grounds of common right and freedom." In *The English Levellers*, edited by A Sharp. Cambridge: Cambridge University Press, 1998.

Lindahl, Hans. "Constituent Power and Reflexive Identity: Toward an Ontology of Collective Selfhood." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker. Oxford: Oxford University Press, 2007.

———. "Give and Take: Arendt and the *Nomos* of Political Community." *Philosophy and Social Criticism* 32, no. 7 (2006): 881-901.

Liska, Vivian. *When Kafka Says We: Uncommon Communities in German-Jewish Literature*. Bloomington, IN: Indiana University Press, 2009.

Livy, Titus. *A History of Rome, Vol. XI: Books 38–39*. Cambridge, MA: Harvard University Press, 1936.

Loughlin, Martin. "The Concept of Constituent Power." *European Journal of Political Theory* 13, no. 1 (2014): 218-37.

———. "Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker, 27-48. Oxford: Oxford University Press, 2007.

———. *Foundations of Public Law*. Oxford: Oxford University Press, 2010.

Loughlin, Martin, and Neil Walker. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press, 2007.

Lovejoy, Arthur O. *The Great Chain of Being*. Cambridge, MA: Harvard University Press, 1936.

Macherey, Pierre. *Hegel or Spinoza*. Translated by Susan M. Ruddick. Minneapolis, MN: University of Minnesota Press, 2011.

Machiavelli, Niccolò. *Discourses on Livy*. Translated by Julia Conaway Bonadella and Peter Bonadella. Oxford: Oxford University Press, 1997.

———. *The Prince*. Translated by George Bull. London: Penguin, 2004.

Maier, Pauline. "Reason and Revolution: The Radicalism of Dr. Thomas Young." *American Quarterly* 28, no. 2 (1976): 229-49.

Máiz, Ramón. "Nation and Representation: E.J. Sieyès and the Theory of the State of the French Revolution." *Working Paper No.18* University of Barcelona (1990).

Malcolm, Noel. *Aspects of Hobbes*. Oxford: Oxford University Press, 2002.

Mandelbaum, Moran. "The Fantasy of Congruency: The Abbé Sieyès and the 'Nation-State' *Problématique* Revisited." *Philosophy and Social Criticism* 42, no. 3 (2016): 246-66.

Manin, Bernard. *The Principles of Representative Government*. Cambridge: Cambridge University Press, 1997.

Marienstras, Elise. "Nous, le Peuple: Les Origines du Nationalisme Americain." Paris: Gallimard, 1988.

Markell, Patchen. "The Rule of the People: Arendt, *Archê,* and Democracy." *American Political Science Review* 100, no. 1 (2006): 1-14.

Marx, Karl. *Capital: A Critique of Political Economy, Vol. 1*. Translated by Ben Fowkes. Harmondsworth: Penguin, 1976.

———. "The Eighteenth Brumaire of Louis Bonaparte." In *Collected Works, Vol. 11: 1851–1853*. London: Lawrence & Wishart, 1986.

Mason, Roger A. "Covenant and Commonweal: The Language of Politics in Reformation Scotland." In *Church, Politics and Society: Scotland 1408-1929*, edited by N. MacDougall. Edinburgh: Edinburgh University Press, 1993.

Matheron, Alexandre. *Individu et Communauté chez Spinoza*. Paris: Minuit, 1988.

Maxwell, John. *Sacro-Sancta Regum Majestas, or the Sacred and Royall Prerogative of Christian Kings*. Oxford1644.

McCormick, John P. *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*. Cambridge: Cambridge University Press, 1997.

———. "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers." *Canadian Journal of Law and Jurisprudence* 10, no. 1 (1997): 163-87.

———. *Machiavellian Democracy*. Cambridge: Cambridge University Press, 2011.

McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. Ithaca, NY: Cornell University Press, 1947.

McLoughlin, Daniel. "The Politics of Caesura: Giorgio Agamben on Language and the Law." *Law and Critique* 20, no. 2 (2009): 163-76.

McNay, Lois. *The Misguided Search For The Political*. Cambridge: Polity, 2014.

Meier, Heinrich. *Carl Schmitt and Leo Straus: The Hidden Dialogue*. Translated by J. Harvey Lomas. Chicago, IL: University of Chicago Press, 1995.

———. *The Lessons of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*. Translated by Marcus Brainard. Chicago, IL: University of Chicago Press, 2011.

Melville, Herman. "Bartley, the Scrivener." In *The Complete Shorter Fiction*, 18-51. London: Everyman, 1997.

Mendle, Michael. *Henry Parker and the English Civil War: The Political Thought of the Public's Privado*. Cambridge: Cambridge University Press, 1995.

———. "The Ship Money Case, The Case of Shipmony, and the Development of Henry Parker's Parliamentary Absolutism." *The Historical Journal* 32, no. 3 (1989): 513-36.

Meuter, Günter. *Der Katechon: Zu Carl Schmitts fundamentalischer Kritik der Zeit*. Berlin: Duncker & Humblot, 1994.

Milbank, John. *Beyond Secular Order: The Representation of Being and the Representation of the People*. Oxford: Wiley Blackwell, 2013.

Mill, John Stuart. "Considerations on Representative Government." In *On Liberty and Other Essays*. Oxford: Oxford University Press, 1998.

Miller, Joshua. "The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty." *Political Theory* 16, no. 1 (1988): 99-119.

Mirabeau, Victor Riquetti, Marquis de. *L'Ami des Hommes, ou Traité de la Population, Vol. I*. Avignon1756.

Möllers, Christoph. "'We are (afraid of) the People': Constituent Power in German Constitutionalism." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker, 87-106. Oxford: Oxford University Press, 2007.

Mommsen, Theodor. *Römisches Staatsrecht, Vol. 2*. Cambridge: Cambridge University Press, 2010.

Monahan, Arthur P. *From Personal Duties Toward Personal Rights: Late Medieval and Early Modern Political Thought, 1300-1600*. Montreal: McGill-Queen's University Press, 1994.

Montesquieu, Charles de Secondat baron de. *Considerations on the Causes of the Greatness of the Romans and their Decline*. Indianapolis, IN: Hackett, 1999.

———. *The Spirit of Laws*. Translated by Anne M. Colher, Basia C. Miller and Harold Stone. Cambridge: Cambridge University Press, 1989.

Moreau, Pierre-François. "Spinoza's Reception and Influence." In *The Cambridge Companion to Spinoza*, edited by Don Garrett. Cambridge: Cambridge University Press, 1995.

Morgan, Edmund. *Inventing the People: The Rise of Popular Sovereignty in England and America*. London: Norton, 1989.

Morrill, John. *Stuart Britain*. Oxford: Oxford University Press, 2000.

Mostov, Julie. *Power, Process and Popular Sovereignty*. Philadelphia, PA: Temple University Press, 1992.

Mouffe, Chantal. *The Return of the Political*. London: Verso, 1993.

Moyn, Samuel. "Hannah Arendt on the Secular." *New German Critique* 35, no. 3 (2008): 71-96.

Muldoon, James. "Arendt's Revolutionary Constitutionalism: Between Constituent Power and Constitutional Form." *Constellations* 23, no. 4 (2016): 596-607.

———. "Arendtian Principles." *Political Studies* 64, no. s1 (2016): 121-35.

Muldoon, Paul, and Andrew Schaap. "Aboriginal Sovereignty and the Politics of Reconciliation: The Constituent Power of the Aboriginal Embassy in Australia." *Environment and Planning D: Society and Space* 30, no. 3 (2012): 534-50.

Müller, Jan-Werner. *A Dangerous Mind: Carl Schmitt in post-War European Thought*. New Haven, CT: Yale University Press, 2003.

Murphy, Timothy S. "Books for Burning." In *Books for Burning: Between Civil War and Democracy in 1970s Italy*, edited by Timothy S. Murphy. London: Verso, 2005.

Nadasdy, Paul. "Boundaries among Kin: Sovereignty, the Modern Treaty process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations." *Comparative Studies in Societies and History* 54 (2012): 499-532.

Nakhimovsky, Isaac. *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte*. Princeton, NJ: Princeton University Press, 2011.

Nancy, Jean-Luc. *Being Singular Plural*. Translated by Robert D. Richardson and Anne E. O'Byrne. Stanford, CA: Stanford University Press, 2000.

Näsström, Sofia. "The Rights of Have Rights: Democratic, Not Political." *Political Theory* 42, no. 5 (2014): 543-68.

———. "What Globalization Overshadows." *Political Theory* 31, no. 6 (2003): 808-34.

Negri, Antonio. "The Constitution of Time." Translated by Matteo Madarini. In *Time for Revolution*. London: Continuum, 2005.

———. "Domination and Sabotage: On The Marxist Method of Social Transformation (1977)." In *Books for Burning: Between Civil War and Democracy in 1970s Italy*, edited by Timothy S. Murphy. London: Verso, 2005.

———. *Il Potere Costituente: Saggio sulle alternative del moderno*. 2nd ed. Rome: Manifestolibri, 2002.

———. *Insurgencies: Constituent Power and the Modern State*. Edited by Maurizia Boscaglia. Minneapolis, MN: University of Minnesota Press, 1999.

———. "Kairòs, Alma Venus, Multitudo: Nine Lesson to Myself." Translated by Matteo Mandarini. In *Time for Revolution*. London: Continuum, 2005.

———. *Marx Beyond Marx: Lessons on the Grundrisse*. Translated by Harry Cleaver, Michael Ryan and Maurizio Viano. London: Pluto, 1991.

———. "Notes on the Evolution of the Thought of the Later Althusser." In *Postmodern Materialism and the Future of Marxist Theory*, edited by Antonio Callari and David F. Ruccio. Hanover, NH: Weslyan University Press, 1996.

———. *The Political Descartes: Reason Ideology and the Bourgeois Project*. Translated by Matteo Mandarini and Alberto Toscano. London: Verso, 2007.

———. "Pour une Définition Ontologique de la Multitude." *Multitudes* 2, no. 9 (2002): 36-48.

———. "The Sacred Dilemma of Inoperosity: On Giorgio Agamben's Opus Dei." Critical Legal Thinking, http://criticallegalthinking.com/2012/09/25/the-sacred-dilemma-of-inoperosity-on-giorgio-agambens-opus-dei/. 25 Sept 2012.

———. *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics*. Translated by Michael Hardt. Minneapolis: University of Minnesota Press, 1991.

———. *Subversive Spinoza: (Un)contemporary Variations*. Translated by Timothy S. Murphy. Manchester: Manchester University Press, 2004.

Neocleous, Mark. "Friend or Enemy? Reading Schmitt Politically." *Radical Philosophy* 79 (1996).

———. "Let the Dead Bury Their Dead: Marxism and the Politics of Redemption." *Radical Philosophy* 128 (2004): 23-32.

Newman, Saul. "What is an Insurrection? Destituent Power and Ontological Anarchy in Agamben and Stirner." *Political Studies* (2016, OnlineFirst). doi:10.1177/0032321716654498.

Nickel, Rainer. "Private and Public Autonomy Revisited: Habermas' Concept of Co-originality in Times of Globalization and the Militant Security State ". In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker. Oxford: Oxford University Press, 2007.

Nicolet, Claude. "Dictatorship in Rome." In *Dictatorship in History and Theory*, edited by Peter Baehr and Melvin Richter, 263-78. Cambridge: Cambridge University Press, 2004.

Nietzsche, Friedrich. *Human, All Too Human: A Book for Free Spirits*. Translated by R. J. Hollingdale. Edited by Richard Schacht. Cambridge: Cambridge University Press, 1986.

Norval, Aletta. "'Writing a Name in the Sky': Rancière, Cavell, and the Possibility of Egalitarian Inscription." *American Political Science Review* 106, no. 4 (2012): 810-26.

Notestein, Wallace, Frances H. Relf, and Hartley Simpson. *Commons Debates 1621*. Vol. II. New Haven, CT: Yale University Press, 1935.

Oakley, Francis. *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas*. London: Continuum, 2005.

Ochoa Espejo, Paulina. "Does Political Theology Entail Decisionism?". *Philosophy and Social Criticism* 38, no. 7 (2012): 725-43.

Oelsner, Konrad Engelbert. *An Account of the Life of Sieyes, Member of the First National Assembly, and of the Convention*. London: J. Johnson, 1795.

Ojakangas, Mika. "Philosophy of "Concrete" Life: From Carl Schmitt to Jean-Luc Nancy." *Telos* 132 (2006): 25-45.

———. *A Philosophy of Concrete Life: Carl Schmitt and the Political Thought of Modernity*. Bern: Peter Lang, 2006.

———. "*Potentia Absoluta et Potentia Ordinata Dei:* On the Theological Origins of Carl Schmitt's Theory of Constitution." *Continental Philosophy Review* 45, no. 4 (2012): 505-17.

Oklopcic, Zoran. "Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans." *Constellations* 19, no. 1 (2012): 81-101.

———. "Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood." *Leiden Journal of International Law* 22 (2009): 677-702.

———. "Three Arenas of Struggle: A Contextual Approach to the Constituent Power of 'The People'." *Global Constitutionalism* 3, no. 2 (2014): 200-35.

Olson, Kevin. *Imagined Sovereignties: The Power of the People and Other Myths of the Modern Age*. Cambridge: Cambridge University Press, 2016.

Ossewaarde, M. R. R. "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty." *Monist* 90 (2007): 106-25.

Overton, Richard. "An Arrow Against All Tyrant." In *The English Levellers*, edited by Andrew Sharp. Cambridge: Cambridge University Press, 1998.

Paine, Thomas. "From Mr Thomas Paine to M. Emmanuel Syeyes. Paris, 8 July 1791." In *Political Writings, Including the Debate between Sieyès and Tom Paine in 1791*, edited by Michael Sonenscher, 165-66. Indianapolis, IN: Hackett, 2003.

———. "Rights of Man." In *Rights of Man & Common Sense*, edited by Michael Foot. London: Everyman, 1994.

Palaver, Wolfgang. "Hobbes and the *Katéchon:* The Secularization of Sacrificial Christianity." *Contagion: Journal of Violence, Mimesis and Culture* 2 (1995): 57-74.

Pariset, Georges. "Sieyes et Spinoza." *Revue de synthèse historique* 1 (1906).

Parker, Henry. "The Case of Shipmony Briefly Discoursed." In *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts*, edited by Joyce Lee Malcolm. Indianapolis, IN: Liberty Fund, 1999.

———. *Jus Populi, or, a Discourse wherein Clear Satisfaction is Given*. London1644.

———. *Observations upon some of his Majesties late Answers and Expresses*. London: n.p., 1642.

Pasquino, Pasquale. "The Constitutional Republicanism of Emmanuel Sieyès." In *The Invention of the Modern Republic*, edited by Biancamaria Fontana. Cambridge: Cambridge University Press, 1994.

———. "Die Lehre vom "Pouvoir Constituant" bei Emmanuel Sieyès und Carl Schmitt." In *Complexio Oppositorum: Über Carl Schmitt*, edited by Helmut Quaritsch, 371-85. Berlin: Duncker & Humblot, 1988.

———. "Emmanuel Sieyès, Benjamin Constant et la Gouvernement des Moderns: Contribution a l'histoire du concept de representation politique." *Revue Française de Science Politique* 37, no. 2 (1987): 214-29.

———. *Sieyes et l'invention de la constitution en France*. Paris: Odile Jacob, 1998.

Patberg, Markus. "Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment." *Constellations* (2016, EarlyView). doi:10.1111/1467-8675.12253.

———. "Supranational Constitutional Politics and the Method of Rational Reconstruction." *Philosophy and Social Criticism* 40, no. 6 (2014): 501-21.

Perry, Adele. "The Colonial Archive on Trial: Possession, Dispossession, and History in *Delgamuukw v. British Columbia*." In *Archive Stories: Facts, Fictions, and the Writing of History*, edited by Antoinette Burton. Durham, NC: Duke University Press, 2006.

Peterson, Erik. "Göttliche Monarchie." *Theologische Quartalschrift* 122, no. 4 (1931): 537-64.

———. *Heis Theos. Epigraphische, formgeschichtliche und religionsgeschichtliche Untersuchungen*. Göttingen: Vandenhoeck und Ruprecht, 1926.

Pettegree, Andrew. *Emden and the Dutch Revolt*. Oxford: Oxford University Press, 1992.

Pettit, Philip. *Made with Words: Hobbes on Language, Mind and Politics*. Princeton, NJ: Princeton University Press, 2008.

———. *On The People's Terms: A Republican Theory and Model of Democracy*. Cambridge: Cambridge University Press, 2013.

Pitkin, Hanna Fenichel. *The Attack of the Blob: Hannah Arendt's Concept of the Social*. Cambridge: Cambridge University Press, 1998.

———. *The Concept of Representation*. Berkeley, CA: University of California Press, 1967.

Plato. *The Republic*. Translated by Desmond Lee. London: Penguin, 2007.

Plutarch. *Plutarch's Lives, Vol. I: Theseus and Romulus, Lycurgus and Numa, Solon and Publicola*. Translated by Bernadotte Perrin. Cambridge, MA: Harvard University Press, 1967.

———. *Plutarch's Lives, Vol. IV: Alcibiades and Coriolanus, Lysander and Sulla*. Translated by Bernadotte Perrin. Cambridge, MA: Harvard University Press, 1959.

Pocock, J. G. A. *The Ancient Constitution and Feudal Law*. Cambridge: Cambridge University Press, 1987.

———. *The Machiavellian Moment*. Princeton, NJ: Princeton University Press, 1975.

Popp-Madsen, Benjamin. "Anti-Federalism and the Question of Constituent Power in the American Constitutional Debates." *Ideas in History* 8, no. 1 (2014): 25-46.

Price, Russell. "The Theme of Gloria in Machiavelli." *Renaissance Quarterly* 30, no. 4 (1977): 588-631.

Prozorov, Sergei. "Five Theses on the Aftermath of the Ukrainian Revolution." Critical Legal Thinking, http://criticallegalthinking.com/2014/03/20/five-theses-aftermath-ukrainian-revolution/. 20 March 2014.

Publius [Hamilton, Alexander, Madison, James, and Jay, John]. *The Federalist, with Letters of 'Brutus'*. Edited by Terence Ball. Cambridge: Cambridge University Press, 2003.

Quiveger, Pierre-Yves. "Sieyès et Spinoza." In *Figures de Sieyès*, edited by Pierre-Yves Quiveger, 227-39. Paris: Publications de la Sorbonne, 2008.

Rancière, Jacques. *Disagreement: Politics and Philosophy*. Translated by Julie Rose. Minneapolis, MN: University of Minnesota Press, 1999.

———. *Dissensus: On Politics and Aesthetics*. Translated by Steven Corcoran. London: Continuum, 2010.

Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1996.

Redslob, Robert. *Die Staatstheorien der Französischen Nationalversammlung von 1789: Ihre Grundlagen in der Staatslehre der Aufklärungszeit und in den Englischen und Amerikanischen Verfassungsgedanken*. Leipzig: Veit & Comp., 1912.

Reid, John Phillip. *Constitutional History of the American Revolution: Authority to Legislate*. University of Wisconsin Press, 1995.

Richter, Melvin. *The History of Political and Social Concepts: A Critical Introduction*. Oxford: Oxford University Press, 1995.

Ricoeur, Paul. "Action, Story and History: On Re-reading *The Human Condition*." *Salmagundi* 60 (1983): 60-72.

———. *Oneself as Another*. Translated by Kathleen Blamey. Chicago, IL: University of Chicago Press, 1995.

Riley, Patrick. "Introduction." In *Politics Drawn from the Very Words of Holy Scripture*, edited by Patrick Riley. Cambridge: Cambridge University Press, 1990.

Robertson, J. *The Scottish Enlightenment and the Militia Issue*. Edinburgh: John Donald, 1985.

Robespierre, Maximillien. "Extracts from 'Answer to Louvet's Accusation', 5 November 1792." In *Robespierre: Virtue and Terror*, edited by Slavoj Žižek. London: Verso, 2007.

———. "On the Trial of the King, 3 December 1792." In *Robespierre: Virtue and Terror*, edited by Slavoj Žižek. London: Verso, 2007.

Roeber, A. G. "Constitutions, Charity and Liberalism by Default: Germany and the Anglo-American Tradition." In *Republicanism and Liberalism in America and the German States, 1750-1850*, edited by Jürgen Heideking and James A. Henrietta. Cambridge: Cambridge University Press, 2004.

Rossiter, Clinton. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Westport, CT: Greenwood, 1979.

Rousseau, Jean Jacques. *The Government of Poland*. Translated by Willmoore Kendall. Indianapolis, IN: Hackett, 1985.

———. *The Social Contract and Other Later Political Writings*. Translated by Victor Gourevitch. Edited by Victor Gourevitch. Cambridge: Cambridge University Press, 1997.

Rubinelli, Lucia. "How to Think Beyond Sovereignty: On Sieyes and Constituent Power." *European Journal of Political Theory* (2016, OnlineFirst). doi:10.1177/1474885116642170.

———. "Taming Sovereignty: Constituent Power in Nineteenth-Century French Political Thought." *History of European Ideas* (2016, Forthcoming). doi:10.1080/01916599.2016.1234969.

Ruddick, Susan M. "The Politics of Affect: Spinoza in the Works of Negri and Deleuze." *Theory, Culture & Society* 27, no. 4 (2010): 21-45.

Rumford, Chris. "Theorizing Boarder." *European Journal of Social Theory* 9, no. 2 (2006): 155-69.

Runciman, David. "What Kind of Person is Hobbes's State? A Reply to Skinner." *Journal of Political Philosophy* 8, no. 2 (2000): 268-78.

Rutherford, Samuel. *A Free Disputation Against Pretended Liberty of Conscience*. London: Andrew Cook, 1649.

———. *Lex, Rex: The Law and the Prince, a Dispute for the Just Prerogative of the King and People*. London: John Field, 1644.

Ryan, Michael. "Epilogue." In *Marx Beyond Marx*, edited by Jim Fleming. London: Pluto, 1991.

———. *Marxism and Deconstruction: A Critical Articulation*. Baltimore, ML: Johns Hopkins University Press, 1982.

Salisbury, John of. *Policraticus*. Translated by Cary J. Nederman. Cambridge: Cambridge University Press, 1990.

Sanderson, John. "Conrad Russell's Ideas." *History of Political Thought* 14, no. 1 (1993): 85-102.

Scattola, Mario. "Die Grenze der Neuzeit: ihr Begriff in der juristischen und politischen Literatur de Antike und Frühmoderne." In *Die Grenze: Begriff und Inszenierung*, edited by Markus Bauer and Thomas Rahn, 37-72. Berlin Akademie, 1997.

Schaap, Andrew. "The Absurd Proposition of Aboriginal Sovereignty." In *Law and Agonistic Politics*, edited by Andrew Schaap. Farnham: Ashgate, 2009.

———. *Political Reconciliation*. London: Routledge, 2005.

Scheppele, Kim Lane. "A Constitution Between Past and Future." *William & Mary Law Review* 49, no. 4 (2008): 1377-407.

Scheuerman, William E. *Carl Schmitt: End of Law*. Lanham, MD: Rowman & Littlefield, 1999.

———. "Revolution and Constitutions: Hannah Arendt's Challenge to Carl Schmitt." *Canadian Journal of Law and Jurisprudence* 10, no. 1 (1997): 141-62.

Schmitt, Carl. "The Age of Neutralizations and Depoliticizations." Translated by Matthias Konzen and John P. McCormick. In *The Concept of the Political*, edited by George Schwab. Chicago, IL: University of Chicago Press, 2007.

———. *The Concept of the Political*. Translated by George Schwab. Chicago: University of Chicago Press, 2007.

———. *Constitutional Theory*. Translated by Jeffrey Sietzer. Durham, NC: Duke University Press, 2008.

———. *The Crisis of Parliamentary Democracy*. Translated by Ellen Kennedy. Cambridge, MA: MIT Press, 1988.

———. *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*. Translated by Michael Hoelzl and Graham Ward. Cambridge: Polity, 2014.

———. "Diktatur und Belagerungszustand. Eine Staatsrechtliche Studie." *Zeitschrift für die gesamte Strafrechtswissenschaft* 38, no. 1 (1917): 138-61.

———. *Ex Captivitate Salus: Erfahrungen der Zeit 1945–47*. Berlin: Duncker & Humblot, 2002.

———. *Glossarium: Aufzeichnungen der Jahre 1947–1951*. Berlin: Duncker & Humblot, 1991.

———. *Legality and Legitimacy*. Translated by Jeffrey Seitzer. Durham, NC: Duke University Press, 2004.

———. *The Leviathan in The State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. Translated by George Schwab and Erna Hilfstein. Edited by George Schwab. Chicago, IL: University of Chicago Press, 2008.

———. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Translated by G. L. Ulmen. New York: Telos, 2003.

———. *Political Romanticism*. Translated by Guy Oakes. Cambridge, MA: MIT Press, 1986.

———. *Political Theology II: The Myth of the Closure of any Political Theology*. Translated by Michael Hoelzl and Graham Ward. Cambridge: Polity, 2008.

———. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago: University of Chicago Press, 2005.

———. *Roman Catholicism and Political Form*. Translated by G. L. Ulmen. Westport, CT: Greenwood Press, 1996.

———. "The State as Mechanism in Hobbes and Descartes." Translated by George Schwab and Erna Hilfstein. In *The Leviathan in the State Theory of Thomas Hobbes*, edited by George Schwab. Chicago, IL: University of Chicago Press, 2008.

———. "Three Possibilities for a Christian Conception of History." *Telos* 147, no. Summer (2009): 167-70.

———. *Verfassungslehre*. Berlin: Duncker & Humblot, 1989.

Seasbury, Samuel. *The Congress Canvassed: or, an Examination into the Conduct of the Delegates, at the Grand Convention, held in Philadelphia, Sept. 1, 1774.* . New York: Richardson and Urquhart, 1775.

Seitzer, Jeffrey, and Christopher Thornhill. "An Introduction to Carl Schmitt's *Constitutional Theory:* Issues and Context." In *Constitutional Theory*, edited by Jeffrey Seitzer. Durham, NC: Duke University Press, 2008.

Sewell, William H. *A Rhetoric of Bourgeois Revolution: The Abbé Sieyes and What is the Third Estate?* Durham, NC: Duke University Press, 1994.

Shklar, Judith N. "General Will." In *Dictionary of the History of Ideas, Vol. II*, edited by Philip P. Wiener. New York: Charles Scribner, 1973.

Sieyès, Emmanuel J. *Dire de l'abbé Sieyès, sur la question du Veto royal, à la séance du 7 septembre 1789*. Versailles: Baudoin, 1789.

———. "An Essay on Privilege." In *Political Writings*, edited by M. Sonenscher, 68-91. Indianapolis, IN: Hackett, 2003.

———. "The Explanatory Note of M. Syeyes, in Answer to the Letter of Mr. Paine, and to Several Other Provocations of the Same Sort." In *Political Writings*, edited by M. Sonenscher. Indianapolis, IN: Hackett, 2003.

———. *Observations sur le Rapport du Comite de Constitution, Concernant la Nouvelle Organisation de la France*. Versailles: Baudouin, 1789.

———. "Of the Gains of Liberty in Society and in the Representative System." In *Emmanuel Joseph Sieyès: The Essential Political Writings*, edited by Oliver W. Lembcke and Florian Weber. Leiden: Brill, 2014.

———. "The Opinion of Sieyès Concerning the Tasks and Organization of the Constitutional Jury, Submitted on the Second Thermidor [Second Thermidorian Intervention]." Translated by Felix Koch. In *Emmanuel Joseph Sieyès: The Essential Political Writings*, edited by Oliver W. Lembcke and Florian Weber, 171-85. Leiden: Brill, 2014.

———. *Préliminaire de la Constitution Françoise: Reconnoisance et Exposition Raisonnée des Droit de l'Homme & du Citoyen*. Versailles 1789.

———. "Reasoned Exposition of the Rights of Man and Citizen." Translated by Marc Allan Goldstein. In *Emmanuel Joseph Sieyès: The Essential Political Writings*, edited by Oliver W. Lembcke and Florian Weber, 118-34. Leiden: Brill, 2014.

———. "Sieyès's Views Concerning Several Articles of Sections IV and V of the Draft Constitution [First Thermidorian Intervention]." Translated by Felix Koch. In *Emmanuel Joseph Sieyès: The Essential Political Writings*, edited by Oliver W. Lembcke and Florian Weber, 152-69. Leiden: Brill, 2014.

———. "Views of the Executive Means, which are at the Disposal of the representatives of France." In *Political Writings*, edited by M. Sonenscher, 1-67. Indianapolis, IN: Hackett, 2003.

———. "What is the Third Estate?". In *Political Writings*, edited by Michael Sonenscher, 93-162. Indianapolis, IN: Hackett, 2003.

Sinnenbrink, Robert. "From Machenschaft to Biopolitics: A Genealogical Critique of Biopower." *Critical Horizons* 6, no. 1 (2005): 239-65.

Skalweit, Stephan. "Political Thought." In *The New Cambridge Modern History, Volume V: The Ascendancy of France 1648-88*, edited by F. L. Carsten. Cambridge: Cambridge University Press, 1961.

Skinner, Quentin. *The Foundations of Modern Political Thought, Vol. 1: The Renaissance*. Cambridge: Cambridge University Press, 1978.

———. *The Foundations of Modern Political Thought, Vol. 2: The Age of Reformation*. Cambridge Cambridge University Press, 1978.

———. "A Genealogy of the Modern State." *Proceedings of the British Academy* 162 (2009): 325-70.

———. "History and Ideology in the English Revolution." *The Historical Journal* 8, no. 2 (1965): 151-78.

———. "Hobbes on Representation." *European Journal of Philosophy* 13, no. 2 (2005): 155-84.

———. "Meaning and Interpretation in the History of Ideas." *History and Theory* 8, no. 1 (1969): 3-53.

———. *Visions of Politics, Vol. 1: Regarding Method*. Cambridge: Cambridge University Press, 2002.

———. *Visions of Politics, Vol. 3: Hobbes and Civil Science*. Cambridge: Cambridge University Press, 2002.

Slomp, Gabriella. "The Liberal Slip of Thomas Hobbes's Authoritarian Pen." *Critical Review of International Social and Political Philosophy* 13, no. 2-3 (2010): 357-69.

Smend, Rudolf. "Die Verschiebung der Konstitutionellen Ordnung durch Verhältniswahl." In *Festgabe für Karl Bergbohm, Vol. 2*. Bonn: A. Marcus & E. Weber, 1919.

Smith, Rogers M. *Stories of Peoplehood: The Politics and Morals of Political Membership*. Cambridge: Cambridge University Press, 2003.

Soboul, Albert. *The French Revolution, 1789–1799: From the Storming of the Bastille to Napoleon*. Translated by Alan Forrest and Colin Jones. New York: Random House, 1975.

Söllner, Alfons. "Beyond Carl Schmitt: Political Theory in the Frankfurt School." *Telos* 71 (1987): 81-96.

Sommerville, J. P. "History and Theory: The Norman Conquest in Early Stuart Political Thought." *Political Studies* 34 (1986): 249-61.

Sonenscher, Michael. *Before the Deluge: Public Debt, Inequality, and the Intellectual Origins of the French Revolution*. Princeton, NJ: Princeton University Press, 2007.

———. "The Cheese and the Rats: Augustin Cochin and the Bicentenary of the French Revolution." *Economy & Society* 19, no. 2 (1990): 266-74.

———. "Introduction." In *Political Writings*, edited by Michael Sonenscher. Indianapolis, IN: Hackett, 2003.

———. "The Nation's Debt and the Birth of the Modern Republic: The French Fiscal Deficit and the Politics of the Revolution of 1789, Part II." *History of Political Thought* 18, no. 2 (1997): 267-325.

Spång, Mikael. *Constituent Power and Constitutional Order: Above, Within and Beside the Constitution*. Basingstoke: Palgrave Macmillan, 2014.

Spinoza, Baruch. "The Ethics." Translated by Samuel Shirley. In *Ethics, Treatise on the Emendation of the Intellect & Selected Letters*, edited by Seymour Feldman. Indianapolis, IN: Cambridge, 1992.

———. "A Political Treatise." Translated by R. H. M. Eweles. In *A Theologico-Political Treatise and A Political Treatise*. New York: Dover, 1951.

———. "Spinoza's Correspondences: Letter XV, Spinoza to Oldenburg." In *On the Improvement of the Understanding, The Ethics and Correspondences*, edited by R. H. M. Eweles. Dover: New York, 1955.

———. *Theological-Political Treatise*. Translated by Jonathan Israel. Cambridge: Cambridge University Press, 2007.

Stavrakakis, Yannis. "Religion and Populism in Contemporary Greece." In *Populism and the Mirror of Democracy*, edited by Francisco Panizza. London: Verso, 2005.

Steedman, Carolyn. *Dust*. Manchester: Manchester University Press, 2001.

Steiner, Udo. *Verfassunggebung und verfassunggebende Gewalt des Volkes*. Berlin: Duncker & Humblot, 1966.

Stone, Bailey. *Reinterpreting the French Revolution: A Global-Historical Perspective*. Cambridge: Cambridge University Press, 2002.

Strauss, Leo. "Notes on Carl Schmitt, *The Concept of the Political*." Translated by J. Harvey Lomax. In *The Concept of the Political*, edited by George Schwab. Chicago, IL: University of Chicago Press, 2007.

Suárez, Francisco. *Selections from Three Works of Francisco Suárez*. Translated by Gwladys L. Williams, Ammu Brown, John Waldron and Henry Davis. Vol. II. Oxford: Clarendon Press, 1944.

Swann, Julian. *Politics and the Parlement of Paris under Louis XV, 1754–1774*. Cambridge: Cambridge University Press, 1995.

Taminiaux, Jacques. *The Thracian Maid and the Professional Thinker: Arendt and Heidegger*. Translated by Michael Gendre. Albany, NY: SUNY Press, 1997.

Thoma, Richard. "On The Ideology of Parliamentarism (1925)." Translated by Kennedy. Ellen. In *The Crisis of Parliamentary Democracy*, edited by Kennedy. Ellen. Cambridge, MA: MIT Press, 1988.

Thomassen, Lasse. "Lacanian Political Theory: A Reply to Robinson." *British Journal of Politics and International Relations* 6, no. 4 (2004): 558-61.

Thornhill, Christopher. "Contemporary Constitutionalism and the Dialectic of Constituent Power." *Global Constitutionalism* 1, no. 3 (2012): 369-404.

———. "A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions." *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 551-603.

Tierney, Brian. *Foundations of the Conciliar Theory*. Cambridge: Cambridge University Press, 1955.

———. *Religion, Law, and the Growth of Constitutional Thought, 1150–1650*. Cambridge: Cambridge University Press, 1982.

Tocqueville, Alexis de. *The Ancien Régime & the French Revolution*. Translated by Hugh Brogan. Manchester: Fontana, 1966.

———. *Democracy in America*. Translated by James T. Schleifer. Vol. 1. Indianapolis, IN: Liberty Fund, 2010.

Tomlins, Christopher. "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century." *Law and Social Inquiry* 26, no. 2 (2001): 315-72.

Toscano, Alberto. "Chronicles of Insurrection: Tronti, Negri and the Subject of Antagonism." *Cosmos and History* 5, no. 1 (2009): 76-91.

Trevor, Daphne. "Some Sources of the Constitutional Theory of the Abbé Sieyès: Harrington and Spinoza." *Politica* 1, no. 3 (1935): 325-42.

Tronti, Mario. "The Strategy of Refusal." *Semiotext(e)* 3, no. 3 (1980): 28-35.

Troper, Michel. "The Survival of Sovereignty." In *Sovereignty in Fragments*, edited by Hent Kalmo and Quentin Skinner, 132-50. Cambridge: Cambridge University Press, 2010.

Tuck, Richard. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press, 1979.

———. *Philosophy and Government, 1572–1651*. Cambridge: Cambridge University Press, 1993.

———. *The Sleeping Sovereign: The Invention of Modern Democracy*. Cambridge: Cambridge University Press, 2016.

Tukiainen, Arto. "The Commonwealth as a Person in Hobbes's *Leviathan*." *Hobbes Studies* 7, no. 1 (1994): 44-45.

Tully, James. *An Approach to Political Philosophy: Locke in Contexts* [in English]. Cambridge: Cambridge University Press, 1993.

———. "The Imperialism of Modern Constitutionalism." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker, 315-38. Oxford: Oxford University Press, 2007.

———. "Lineages of Contemporary Imperialism." In *Lineages of Empire: The Historical Roots of British Imperial Thought*, edited by Duncan Kelly, 3-29. Oxford: Oxford University Press, 2009.

———. *Public Philosophy in a New Key, Vol. 1: Democracy and Civic Freedom*. Cambridge: Cambridge University Press, 2008.

———. *Strange Multiplicities: Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press, 1995.

Tuori, Kaius. "Schmitt and the Sovereignty of Roman Dictators: From the Actualisation of the Past to the Recycling of Symbols." *History of European Ideas* 42, no. 1 (2016): 95-106.

Turgot, Anne Robert Jacques, Baron de l'Aulne. "A Letter from Monsieur Turgot to Doctor Price on the Constitutions of America." In *Considérations sur l'ordre de Cincinnatus, ou imitation d'un pamphlet anglo-américain*, edited by Honoré Gabriel Riquetti Mirabeau, comte de. London: J.Johnson, 1785.

Tushnet, Mark. "Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power." *International Journal of Constitutional Law* 13, no. 3 (2015): 639-54.

Urbinati, Nadia. *Representative Democracy: Principles and Genealogy*. Chicago, IL: University of Chicago Press, 2006.

van Roermund, Bert. "First-Person Plural Legislature: Political Reflexivity and Representation." *Philosophical Explorations* 6, no. 3 (2003): 235-52.

Vatter, Miguel. "Legality and Resistance: Arendt and Negri on Constituent Power." *Kairos* 20, no. 1 (2002): 191-230.

———. "Schmitt and Strauss as Readers of Hobbes and Spinoza: on the Relation between Political Theology and Liberalism." *CR: The New Centennial Review* 4 (2004): 161-214.

Vernière, Paul. *Spinoza et, la pensée française avant la Révolution*. Paris: Presses Universitaires de France, 1954.

Viano, Maurizio. "Translator's Introduction." In *Marx Beyond Marx: Lessons on the Grundrisse*, edited by Jim Fleming. London: Pluto, 1991.

Villa, Dana. "Beyond Good and Evil: Arendt, Nietzsche and the Aestheticization of Political Action." *Political Theory* 20, no. 2 (1992): 274-308.

Virno, Paolo. *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*. Translated by Isabella Bertoletti, James Casciato and Andrea Casson. Los Angeles, CA: Semiotext(e), 2004.

Viroli, Maurizio. *Redeeming The Prince: The Meaning of Machiavelli's Masterpiece*. Princeton, NJ: Princeton University Press, 2013.

von Wilcken, Ulrich. *Zur Entwicklung der römischen Diktatur*. Berlin: de Gruyter, 1940.

Walker, Neil. "Post-Constituent Constitutionalism? The Case of the European Union." In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, edited by Martin Loughlin and Neil Walker. Oxford: Oxford University Press, 2007.

Wall, Illan rua. *Constituent Power and Human Rights: Without Model or Warrant*. London: Routledge, 2012.

———. "A Different Constituent Power: Agamben and Tunisia." In *New Critical Legal Thinking: Law and the Political*, edited by Matthew Stone, Illan rua Wall and Costas Douzinas. London: Routledge, 2012.

———. "Notes on an 'Open' Constituent Power." *Law, Culture and the Humanities* 11, no. 3 (2015): 378-92.

———. "Notes on the Theology of Constituent Power." Critical Legal Thinking, http://criticallegalthinking.com/2013/06/20/notes-on-the-theology-of-constituent-power/. 20 June 2013.

Warner, Michael. *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*. Cambridge, MA: Harvard University Press, 1990.

Warrender, Howard. "The Publication of Hobbes's Political Philosophy." In *De Cive: The Latin Version*, edited by Howard Warrender, 1-36. Oxford: Oxford University Press, 1983.

Watkins, Fredrick Mundell. *The Failure of Constitutional Emergency Powers under the German Republic*. Cambridge, MA: Harvard University Press, 1939.

Watkins, William. *Agamben and Indifference: A Critical Overview*. London: Rowman & Littlefield, 2014.

Watt, J. A. "Spiritual and Temporal Power." In *The Cambridge History of Medieval Political Thought, c.350-1450*, edited by J. H. Burns. Cambridge: Cambridge University Press, 1988.

Weber, Max. "Politics as a Vocation." In *The Vocation Lectures*, edited by David Owen and Tracy B. Strong. Indianapolis, IN: Hackett, 2004.

Weber, Samuel. "Taking Exception to Decision: Walter Benjamin and Carl Schmitt." *Diacritics* 22, no. 3/4 (1992): 5-18.

Wellmer, Albrecht. "Arendt on Revolution." In *The Cambridge Companion to Hannah Arendt*, edited by Dana Villa, 220-41. Cambridge: Cambridge University Press, 2000.

Wenman, Mark. *Agonistic Democracy: Constituent Power in the Era of Globalisation*. Cambridge: Cambridge University Press, 2013.

———. "On the Risk and Opportunity in the Mouffean Encounter with Carl Schmitt." *Parallax* 20, no. 2 (2014): 88-99.

Whatmore, Richard. *Republicanism and the French Revolution: An Intellectual History of Jean-Baptiste Say's Political Economy*. Oxford: Oxford University Press, 2000.

White, Jonathan, and Lea Ypi. "The Politics of Peoplehood." *Political Theory* (2015, OnlineFirst). doi:10.1177/0090591715608899.

Whyte, Jessica. *Catastrophe and Redemption: The Political Thought of Giorgio Agamben*. New York: SUNY Press, 2013.

———. "'I Would Prefer Not To': Giorgio Agamben, Bartleby and the Potentiality of the Law." *Law and Critique* 20, no. 3 (2009): 309-24.

Wilson, James. "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament." In *Collective Works of James Wilson, Vol. 1*, edited by Kermit L. Hall and Mark David Hall. Indianapolis, IN: Liberty Fund, 2007.

Wittgenstein, Ludwig. *On Certainty*. Edited by G. E. M. Anscombe and G. H. Wright. Oxford: Blackwell, 1969.

———. *Philosophical Investigations*. Translated by G. E. M. Anscombe. Chichester: Wiley-Blackwell, 2009.

Woldring, Henk E. S. "The Constitutional State in the Political Philosophy of Johannes Althusius." *European Journal of Law and Economics* 5 (1998): 123-32.

Wolin, Richard. "The Disoriented Left: A Critique of Left Schmittianism." In *The Frankfurt School Revisited and Other Essays on Politics and Society*, edited by Richard Wolin. London: Routledge, 2006.

Wolin, Sheldon. "Fugitive Democracy." *Constellations* 1, no. 1 (1994): 11-25.

———. "Hannah Arendt: Democracy and the Political." In *Hannah Arendt: Critical Essays*, edited by Lewis P. Hinchman and Sandra K. Hinchman. Albany, NY: State University of New York Press, 1994.

———. *The Presence of the Past: Essays on the State and Constitution*. Baltimore, ML: Johns Hopkins University Press, 1989.

Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina Press, 1969.

Wootton, David. "Leveller democracy and the Puritan Revolution." In *The Cambridge History of Political Thought, 1450-1700*, edited by J. H. Burns and Mark Goldie, 412-42. Cambridge: Cambridge University Press, 1991.

Wright, Johnson Kent. "The Idea of a Republican Constitution in Old Régime France." In *Republicanism, A Shared European Heritage, Vol. I: Republicanism and Constitutionalism in Early Modern Europe*, edited by Martin van Gelderen and Quentin Skinner. Cambridge: Cambridge University Press, 2002.

Wright, Steve. *Storming Heaven: Class Composition and Struggle in Italian Autonomist Marxism*. London: Pluto, 2002.

Yack, Bernard. "Popular Sovereignty and Nationalism." *Political Theory* 29, no. 4 (2001): 517-36.

Young, Thomas. "To the Inhabitants of Vermont, a Free and Independent State, bounding on the River Connecticut and Lake Champlain." In *History of Vermont, Natural, Civil and Statistical, in Three Parts*, edited by Zadock Thompson, 106. Burlington, VT: Chauncey Goodrich, 1842.

Zerilli, Linda. "Castoriadis, Arendt and the Problem of the New." *Constellations* 9, no. 4 (2002): 540-53.

Žižek, Slavoj. *In Defence of Lost Causes*. London: Verso, 2007.

Zuckert, Michael P. *Natural Rights and the New Republicanism*. Princeton: Princeton University Press, 1994.

Zurn, Christopher F. "The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy." *Legal Theory* 16, no. 3 (2010): 191-227.

Zweig, Egon. *Die Lehre vom Pouvoir Constituant: Ein Beitrag zum Staatsrecht der Französichen Revolution*. Tübingen: J.C.B. Mohr, 1909.