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**THE LONG SHADOW OF CONSTITUENT POWER:  
AN HISTORICAL CRITIQUE**

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**Abstract:**

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*According to the theory of constituent power, only the people can legitimately create constitutional orders. Emmanuel Sieyès and Carl Schmitt's conception of the theory hold that this power is unmediated: its democratic purpose and procedure mean that legal devices cannot constrain its exercise. However, responding to concerns about the power's use by authoritarian regimes to legitimate anti-democratic constitutional amendments, constitutional theorists have recently sought to devise ways to legally limit the power's potential. This paper maintains that the theory and the critiques thereof are incomplete because they do not consider social and political factors – distinct from procedural concerns – relevant to how people perceive the legitimacy of constitutional regimes.*

*This paper advances three arguments. First, that Sieyès and Schmitt's conception confers legitimacy and unlimited potential on procedurally correct exercises of the constituent power. Secondly, that this connection between procedure and legitimacy is not demonstrated by historical instances of revolutionary constitution-making. Finally, that revolutionary exercises of the power tend to destroy the democratic basis on which it is premised. The paper concludes by urging constitutional theorists to carefully examine contextual factors during instances of constitution-making and to distance the theory of constituent power from revolutionary instances of constitution-making.*

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**Keywords:** Constituent power; Emmanuel Sieyès; Carl Schmitt; procedural democratic legitimacy; social contract theory.

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## ***I Introduction***

### ***A The Problem of Constituent Power***

Inherent in the theory of constituent power is the idea that a constitutional order acquires its legitimacy from the people's decision to create that order; without that decision, the order is illegitimate.<sup>1</sup> Constituent power (the *pouvoir constituant*) is the power to legitimately make constitutional law, granting, defining and regulating the resultant institutions' powers.<sup>2</sup> Because it creates constitutional law, the power must be extra-legal, extant beyond the realm of law and bound neither by its own laws nor by any thereby-constituted institutions (the "constituted authorities", collectively the *autorité constituée*) – any adherence is merely voluntary.<sup>3</sup> The *pouvoir constituant* is sometimes described, therefore, as an "unmediated [political] will", giving "type and form [to the nation's] political existence".<sup>4</sup>

Emmanuel Sieyès's classic exposition of the *pouvoir constituant* admits only two limitations, both inherent in its nature. First, deriving from natural law, it must be exercised consistently with it.<sup>5</sup> Secondly, because – following Rousseau's conception of the "general will" – the power is directed towards the making of "general" (that is, constitutional) law, those wielding it (the "constituent authority", or *autorité constituante*) do not validly exercise the power if they enact "particular laws" – law regulating private

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1 Carl Schmitt *Verfassungslehre* (Duncker and Humblot, Munich, 1928) (translated ed: Jeffrey Seitzer (translator) Carl Schmitt *Constitutional Theory* (Duke University Press, Durham (NC), 2008)) at 125, 130–131 and 132.

2 Emmanuel Joseph Sieyès "Qu'est-ce qu'est le tiers état?" (1789) (translated ed: Michael Sonenscher (translator) "What is the third estate?" in *Sieyès: Political Writings* (Hackett, Indianapolis, 2003) 92 at 135 and 136.

3 At 136–137.

4 Schmitt, above n 1, at 125, 130–131 and 132.

5 Sieyès, above n 2, at 136.

conduct.<sup>6</sup> Conversely, Carl Schmitt is more absolute in his assertion that the *pouvoir constituant* is legally unlimited.<sup>7</sup>

Yet, despite its apparently limitless potential to alter constitutional orders, scholars have spilt much ink in recent years worrying about how the power might be limited. These efforts are responses to the increasing trend of governments to use constitutional amendment procedures to alter fundamental aspects of their countries' constitutions.<sup>8</sup> This trend, labelled variously as “constitutional dismemberment”,<sup>9</sup> “abusive constitutionalism”,<sup>10</sup> or “unconstitutional constitutional amendment”,<sup>11</sup> generally involves governments amending constitutions via referendums or legislative processes, which, though formally according with constitutional requirements, significantly alter the constitution vis-à-vis its pre-amendment

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6 William E Scheuerman “Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt” (1997) 10 CJLJ 141 at 149–150. See also Joel Colón-Ríos’s interpretation of Jean-Jacques Rousseau *Du Contrat Social ou Principes du droit politique* (Marc Michel Rev, Amsterdam, 1762) (translated ed: GDH Cole (translator) and JH Brumfitt and John C Hall (eds) *The Social Contract and the Discourses* (rev ed, Alfred A Knopf, New York, 1993) in Joel I Colón-Ríos “Rousseau, Theorist of Constituent Power” (2016) 36 OJLS 885 at 891 and 894.

7 Schmitt, above n 1, at 80–81, 126–127 and 132. See also Scheuerman, above n 6, at 149.

8 See for example Yaniv Roznai “We the Limited People” (discussion paper for NYU Global Fellows Forum, 10 March 2015); Andreas Kalyvas “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12 Constellations 223; Mark Tushnet “Peasants with pitchforks, and toilers with Twitter” (2015) 13 ICON 639; and Richard Albert “Constitutional Amendment and Dismemberment” (2018) 43 Yale J Int’l L (forthcoming).

9 See Albert, above n 8.

10 See Oran Doyle “Constitutional Transitions, Abusive Constitutionalism and Conventional Constraint” (2017) 73 NJCL 67.

11 See Joel Colón-Ríos “Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America” (2013) 44 VUWLR 521; and Rosalind Dixon and David Landau “Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment” (2015) 13 ICON 606.

counterpart.<sup>12</sup> Such amendments are examples of delegated constituent power – the ability of the *autorité constituée* to amend the constitution.<sup>13</sup>

The current concern with government abuse of amendment procedures, combined with the revolutionary origins and development of the theory of constituent power, point to the theory being focused on the legitimacy of new constitutional orders. The theory can be viewed as a juridical tool or yardstick to measure the legitimacy of constitutional change, helping provide a legal justification for the authority of new, post-revolutionary constitutional orders. Constitutional theorists are concerned with the question of when the *pouvoir constituant* is validly exercised so as to create a legitimate constitutional order. In this conception, legitimacy is bound to procedural validity. It follows that, if its exercise is legitimate, the *autorité constituante*'s potential is unlimited. If so, it may establish any constitutional order it sees fit. Thus, juridically speaking, the question of legitimacy is intimately related to that of capacity.

Whilst the *autorité constituée* is juridically restricted by the existing constitutional order, the *autorité constituante* is juridically unlimited in scope, capable of altering or destroying the constitutional order in any way. Because of the *pouvoir constituant*'s pro-democratic connotations and its association with counter-authoritarian revolutions, few scholars have seriously questioned its democratic omnipotence.<sup>14</sup> It is perhaps time to reconsider the under-explored place of an unfettered *pouvoir constituant* in democratic constitutionalism.

This paper examines the question of limitation through the lens of legitimacy. Limitation (or the lack thereof) depends on the power's exercise fulfilling several procedural requirements that, if met, confer the juridically-

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12 See the examples provided in Dixon and Landau, above n 11, on the constitutional reforms undertaken by the Fidesz Party in Hungary to weaken the checks on their power and on the efforts of the Justice and Development Party in Turkey to transform the country into a presidential republic.

13 Tushnet, above n 8, at 645–648.

14 Notable exceptions being Roznai, above n 8; Kalyvas, above n 8; and Tushnet, above n 8.

unassailable status of sovereignty on the *autorité constituante*'s acts. This status endows the resulting constitutional order with legitimacy. Sieyès and Schmitt equate legitimacy with procedural democratic legitimacy; however, we shall see that legitimacy may follow from non-procedural sources. I, however, define legitimacy in the consequentialist, values-blind sense: that the people accept the constitutional order as the governing framework (for whatever reason that might be).

As is apparent from my position, Sieyès and Schmitt's position ignores important *factual* matters, whose presence may alter the legitimacy of the exercise and thus the apparent juridical omnipotence of the *autorité constituante*. This paper thus asks whether the *pouvoir constituant* (defined simply as the power to create, alter or destroy constitutional orders) might be pragmatically limited. At the heart of this paper lies the argument that procedural legitimacy, upon which the rest of the theory of constituent power rests, has no analogue in reality. This is because there are salient factual matters – ignored by constitutional theorists – that impact upon the power's exercise. Consequently, we might reasonably question the procedural legitimacy focus of the current literature.

The argument is advanced through three historical and contemporary examples of constitutional revolution. I ask whether the practice of the *pouvoir constituant* confirms that it is, indeed, unlimited. This paper demonstrates that the theory of constituent power is incomplete in the absence of a serious consideration of the social aspect of the power. For this purpose, I offer an alternative lens through which to view the exercise of the *pouvoir constituant*. When assessing the question of legitimacy in part III, this paper demonstrates that a legitimate exercise of the *pouvoir constituant* depends not on procedural legitimacy, but on social considerations. Thus, it will explore the power's exercise through a political history lens, examining the interactions and relationships between the governors and the governed and the ideas and events that influenced constitutional structures. The examples demonstrate how constituent power works at the practical level.



## *B Structure of this Paper*

This paper proceeds in three parts. Part II sets out Sieyès and Schmitt's conception of the *pouvoir constituant*, arguing that their theory premises the unlimited potential of the power's exercise on adherence to procedural requirements, underlain by democratic and social contract theories. I argue that, without adherence to those procedural rigors, Sieyès and Schmitt would regard an exercise of the *pouvoir constituant* to be a pretended one. Part II concludes with a framework by which the theory of constituent power is compared to its practice.

Part III undertakes this comparison. It compares the theory to three instances of constitution-making: Magna Carta 1215, the French Revolution and the current Venezuelan constitutional crisis. Each section briefly contextualises the example and then proceeds to analyse the theory of constituent power through the lens of that example. Each section concludes with a summary of what the example demonstrates about how constituent power functions in practice.

Finally, part IV compares the *pouvoir constituant*'s practice across the examples to provide a holistic picture of the power's exercise in practice, compared with its theory. This paper concludes that the purely legalistic model of the *pouvoir constituant* fails to account for political and social aspects that permeate the practice of constitution-making. Moreover, this paper observes that the theory can only function as envisaged where all sections of society engage in the process in good faith; revolutionary exercises of constituent power risk the resulting constitutional orders reflecting the balance of political and physical power rather than the people's democratic will – a far cry from the democratic principles underlying it.

## ***II Constituent Power in Theory***

In this part, I argue that Sieyès and Schmitt's conceptions of the *pouvoir constituant* should be viewed as conferring unlimited power on the procedurally correct exercise of constitutive power. One can draw a line between the procedural requirements they specify and the unlimited power

they attribute to the *pouvoir constituant*, via the concept of legitimacy. This argument may be summarised by the following hypothetical syllogism:

- (1) If an exercise of the *pouvoir constituant* is correct, then its exercise is legitimate.
- (2) If the exercise is legitimate, then it is unlimited.
- (3) Therefore, if an exercise of the *pouvoir constituant* is correct, then it is unlimited.

In other words, the correct exercise of the *pouvoir constituant* is unlimited *because* its exercise is legitimate.

The following sections demonstrate that legitimacy forms the nexus of this logical construction for two reasons. First, a correct exercise of the *pouvoir constituant* is legitimate because the democratic principles inherent in Sieyès and Schmitt's conception assume that constitutional orders are only validly constituted if done with the people's consent. Secondly, a legitimate exercise of the *pouvoir constituant* is legally unlimited because of the sovereign nature the theorists attribute to the power. The power's sovereign nature follows from the idea that, per democratic theory, the people's will is supreme, as well as from the need to invest the people with the normative authority to constitute the state. Thus, legitimacy rests upon the twin pillars of democracy and sovereignty. Section A examines Sieyès and Schmitt's conception of the *pouvoir constituant*'s correct exercise. Section B argues that Sieyès and Schmitt's procedural requirements indicate that a correct exercise is legitimate because it conforms to democratic norms. Section C argues that a legitimate exercise is unlimited because that legitimacy reflects the *autorité constituante*'s sovereignty. Finally, section D summarises the arguments and provides the paradigm for part III.

#### A *How is Constituent Power "Correctly" Exercised?*

This section examines what constitutes a "correct" exercise of the *pouvoir constituant*. We are here concerned with distinguishing between a true act of the *autorité constituante* and a usurpation, or pretended exercise, of that power. In the discussion that follows, four factors are considered:

first, who may exercise the power; secondly, under what circumstances it may be exercised; and thirdly, by what means it may be exercised.

*I Who may exercise constituent power?*

Both Sieyès and Schmitt agree that only “the nation” may legitimately exercise the *pouvoir constituant*. For Sieyès, “the nation” is “a body of associates living under a common law [and] represented by the same legislature.”<sup>15</sup> For Schmitt, “the nation” is a people, politically aware of their common existence and who are capable of manifesting their common will through a political decision.<sup>16</sup> Importantly, Schmitt’s “nation” has an ethnocentric element not present in Sieyès’s theory: the people’s common existence implies a common ethnicity – a *volk* – that Schmitt (wrongly) inferred from the experience of the French Revolution.<sup>17</sup>

The *pouvoir constituant* is reserved to “the nation”. It is not a valid exercise of the power if the *autorité constituée* purports to exercise it. The *pouvoir constituant*, existing by virtue of natural law can alter or abolish the constitutional order in any way and at any time; the *autorité constituée*, existing because the *autorité constituante* wills to exist through positive law, cannot.<sup>18</sup> The *autorité constituée* is subservient to the constitution and to the *autorité constituante* and cannot alter or abolish the authority from which it derives its being; they can only exercise those powers granted to them by the constitution and must do so within the prescribed bounds.<sup>19</sup> In other words, the act of fundamentally altering the constitution does not fall within the *autorité constituée*’s competence and is thus *ultra vires* and illegitimate.<sup>20</sup>

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15 Sieyès, above n 2, at 97 (emphasis omitted).

16 Schmitt, above n 1, at 101.

17 See Scheuerman, above n 6, at 143–148.

18 Sieyès, above n 2, at 137; and Schmitt, above n 1, at 127.

19 At 134–136.

20 See for example Richard Albert’s distinction between an (*intra vires*) amendment (which aims to adjust or improve a constitution in line with its purpose), which may be carried out in accordance with amending provisions; and a (*ultra vires*) dismemberment (which is an alteration incompatible with the existing constitutional

## 2 *When may the constituent power be exercised?*

Whilst the *pouvoir constituant* remains (even after the act of founding) intact and distinct from the institutions it creates, the power is not envisaged as a power to be exercised whenever the people desire some modicum of change.<sup>21</sup> Rather, it is an extraordinary power for extraordinary times when legal restraints fall away, leaving only the people's "unmediated will". The invocation of the *pouvoir constituant* results in the constitutional order's rupture – Schmitt maintains that it is a *factual* power, exercised within a legal vacuum.<sup>22</sup> Hannah Arendt and Carl Friedrich clarify: constitution-making powers are manifested only in revolutionary actions, not in the progressive development of constitutions.<sup>23</sup>

Kalyvas, meanwhile, argues that the *pouvoir constituant*'s exercise is not determined by reference to prior circumstances, but is exercised only *if* a revolution is successful.<sup>24</sup> This accords with the factual nature of the power – it makes no sense to describe a "failed" exercise of a supreme constitutive power. However, this tells us little about the circumstances under which its exercise will be legitimate. The idea is largely circular: the *pouvoir constituant* has been exercised because it was exercised. Because the power is exercised by the people, we should not rush to dismiss their actions merely because they failed: factors beyond the prospect of success and failure motivate people to overturn constitutional orders.

## 3 *How must the constituent power be exercised?*

It is important to both Sieyès and Schmitt that the nation's decision regarding the structure of its constitutional order be properly ascertained so

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order or vision), which cannot fall within the scope of any amendment provision: Albert, above n 8, at 4.

21 Kalyvas, above n 8, at 225 and 226; and Schmitt, above n 1, at 125–126, 127 and 132.

22 Roznai, above n 8, at 4.

23 Hannah Arendt *On Revolution* (rev ed, Penguin Books, London, 2006) at 136; and Carl J Friedrich *Constitutional Government and Democracy* (4th ed, Blaisdell, Waltham (MA), 1968) at 134.

24 Kalyvas, above n 8, at 233–234. See also Tushnet, above n 8.

that it can be given effect to. To that effect, they both require that the process by which the *pouvoir constituant* is exercised be capable of ascertaining the people's will. However, they differ as to what this requires. Sieyès, following Rousseau's conception of the general will, requires that the people manifest their will directly or indirectly.<sup>25</sup> Practically, this should be done indirectly via representative delegates, owing to the issues inherent in ascertaining the will of each person if the state's population is too numerous or dispersed.<sup>26</sup>

Schmitt, meanwhile, held Sieyès's constituent assembly to be undemocratic because Sieyès's conception conflates the "democratic theory of the constitution-making power of the people" with the "antidemocratic theory of the representation of the people's will".<sup>27</sup> For Schmitt, the *pouvoir constituant* is only validly expressed by "the assembled multitude's declaration of their consent or disapproval, the *acclamation*".<sup>28</sup> Schmitt thus requires that the people express their will via direct democracy, rather than through representatives. Even where a monarch or oligarch makes the decision necessary to activate the *pouvoir constituant*, the *autorité constituante* must appeal to the people's will for the ultimate exercise to be valid.<sup>29</sup>

Implicit in Schmitt's theory, therefore, is a procedural division, separating the exercise of the *pouvoir constituant* into two phases.<sup>30</sup> To initiate an exercise of their constitutive powers, a desire must be manifested for the alteration or abolition of the existing constitutional order (a decision as to the "type and form of the [political unity's] existence"). This decision may be variously manifested along a continuum from political decision (for

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25 On Rousseau, see Rousseau, above n 6, at 200, interpreted in Colón-Ríos, above n 6, at 889, 891 and 194; and Sieyès, above n 2, at 134–135.

26 Sieyès, above n 2, at 134–135.

27 Schmitt, above n 1, at 128.

28 At 131 (emphasis in original).

29 Schmitt, above n 1, at 77. For an aristocratic or oligarchic form of constituent power, see at 129–130 (regarding soviets and Italian fascist councils).

30 See at 130–131.

example a referendum calling for a constituent assembly) to the forceful overthrow of the political and constitutional orders. The second stage follows from the first: the people exercise the *pouvoir constituant* via direct democracy, which serves to rearticulate and reconstitute the constitutional order in the image of the people's decision. Importantly, whilst the initial decision may be made by a monarch or oligarchy (not the people), the *pouvoir constituant* is only legitimately exercised through the direct ascertainment of the nation's will – a referendum is required to determine whether the new constitutional order will be adopted.<sup>31</sup>

### *B Democracy Makes a "Correct" Exercise a Legitimate Act*

This section examines why legitimacy is conditioned upon the fulfilment of Sieyès and Schmitt's procedural requirements, returning to a first principles explanation of procedural legitimacy to determine why Sieyès and Schmitt's theory conditions legitimacy thus. This section considers two principles: first, the democratic elements inherent in the conceptions; and secondly, Locke and Rousseau's social contract theory, upon which Sieyès based his conception of constituent power. As will be shown, a legitimate exercise of the *pouvoir constituant* assumes consistency with its basic principles.

#### *1 Inherent democratic principles*

Much of what Sieyès and Schmitt attribute to the *pouvoir constituant's* exercise implies the inherency of democratic principles. The *raison d'être* of Sieyès's theory is the overcoming of an undemocratic legislative method. His pronouncement against the First and Second estates' (respectively, the nobility's and clergy's) claims to legitimately represent the Third Estate's (the commons') interests makes it clear that his theory centres on the notion that the people's representatives must hold a mandate from their constituents, to be able to speak and legislate on matters affecting their constituents, including matters concerning the constitutional structure of the state.<sup>32</sup> The

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31 At 129 and 131.

32 Sieyès, above n 2, at 102.

first two estates had no mandate, he argued, because their interests diverged so greatly from the latter's that they could not reflect the people's will in their decisions.<sup>33</sup> This segregation of the nobility's interests and privileges from the commons' served Sieyès's purpose of demonstrating that only the Third Estate's deputies should have the right to legislate for the people.<sup>34</sup>

His concern therefore lay in the deputies' abilities to authentically reflect their constituents' interests; those whose privileges and interests run contrary to the general interest cannot speak for those they purport to represent.<sup>35</sup> Sieyès thus demonstrates that self-representation is the only way in which the people may be spoken and legislated for. Combined with his requirement that direct or indirect methods be used to ascertain the general will, Sieyès's insistence on self-representation indicates that he sought to allow the people to determine their constitutional order for themselves.<sup>36</sup> The normative validity of a constitutional order thus depends on its reflection of the general will, ascertained from the people or their representatives.

Schmitt's views on the democratic nature of the *pouvoir constituant* can be summarised more succinctly. As already stated, Schmitt argued that only the direct determination of the people's will renders an exercise of the *pouvoir constituant* legitimate. Moreover, electoral minorities can never bind the majority – the state, being constituted by and for its people, cannot legitimately ignore the majority's will.<sup>37</sup> Schmitt thus holds that only the will of the majority of the people, correctly ascertained, constitutes a legitimate exercise of the *pouvoir constituant*.

Importantly, the idea that the power is exercised by “the nation” necessarily implies that the *autorité constituante* speaks with one legitimate voice – its decision is legitimate and binding on the constitutional order

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33 At 107–108.

34 At 97–98 and 133; and Roznai, above n 8, at 3.

35 See Sieyès, above n 2, at 100.

36 At 134–135.

37 Schmitt, above n 1, at 129.

notwithstanding any dissenting voices.<sup>38</sup> The preference for the majority's opinion over all others is supported by Rousseau's conception of the general will, a precursor to Sieyès's theory. Per Rousseau, the nation's will need not be unanimous to be "general"; rather, it must be "indivisible" in that there are no other competing wills.<sup>39</sup> Inherent in Sieyès's theory, therefore, is the notion that the majority speaks for all the people – the lynchpin of democratic theory. It follows that, in democratic states, the majority's will is legitimate and minorities' wills cannot legitimately bind the majority.

## 2 *Social contract theory*

It is quite apparent that social contract theory heavily influenced Sieyès. For instance, he charts the nation's development in terms very similar to Rousseau.<sup>40</sup> He further refers to the "restoration of rights that were usurped" in order to restore equality to the social contract, again echoing Rousseau's famous pronouncement that "man was born free; and everywhere he is in chains".<sup>41</sup>

For Locke and Rousseau, social contract theory describes how political entities form and how they obtain their normative legitimacy. The formation of constitutional orders is undertaken by a specific process and any legitimate alteration must adhere to those processes.<sup>42</sup> Locke describes how people consensually enter civil society, giving up their liberty to act as they choose and accepting the majority's will.<sup>43</sup> For Rousseau, society's members are,

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38 Arendt critiques Sieyès and Schmitt on this point: see Arendt, above n 23, at 224. See also, Schmitt, above n 1, at 126.

39 Rousseau, above n 6, at 200.

40 Compare Sieyès, above n 2, at 134–135; and Rousseau, above n 6, at 191 and 195.

41 Rousseau, above n 6, at 181.

42 Note that Schmitt, above n 1, at 112–114 maintains that the exercise of the *pouvoir constituant* presupposes the existence of a state, which itself is premised upon the existence of some form of social contract.

43 John Locke "The Second Treatise of Government" in Peter Laslett (ed) *Locke: Two Treatises of Government* (3rd ed, Cambridge University Press, Cambridge (UK), 1988) 267 at §§ 87, 89 and 95–98. See also Rousseau, above n 6, at 195, where Rousseau describes the formation of civil society in similar terms.



collectively, the sovereign and have the power to “direct the state” towards “the common good” according to the “general will”.<sup>44</sup> It is antithetical to the democratic founding of states that the few govern the many.<sup>45</sup> Being founded on the agreement of its members that all should have a say in the form of the state, a genuine expression of the general will entails procedural requirements to ensure this: the ratification of such laws requires that all affected have a say.<sup>46</sup>

It is the social contract (if it exists) that conditions the exercise of the *pouvoir constituant*. If, because of a pre-existing agreement specifying how constitutive powers should be exercised, the people believe that the *pouvoir constituant*'s exercise ought to take place according to those procedural norms, it follows that a non-compliant exercise will not be seen as legitimate. This procedural concept of legitimacy is found in Hobbes's theory. The exercise of sovereign power is made (more) legitimate when exercised through legal institutions – rule by law – that constrain the exercise of power, procedurally restricting its exercise.<sup>47</sup> Though Hobbes applied this conception to the *autorité constituée*, following Locke and Rousseau, it is equally applicable to the *autorité constituante*.

If constitutional orders derive their legitimacy from procedural adherence to a social contract, Locke's right of revolution can be seen as a corollary. That right legitimates the people's ability to overthrow governments and constitutional orders that trample upon rights guaranteed under the social contract – in other words, where *autorités constituées* depart from the law governing them or where constitutional orders are imposed upon peoples in violation of their social contracts.<sup>48</sup> The implication is that the constitution obtains its legitimacy from procedural adherence to the social

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44 Rousseau, above n 6, at 192–193 and 199.

45 Colón-Ríos, above n 6, at 890.

46 Rousseau, above n 6, at 200; and Colón-Ríos, above n 6, at 894.

47 David Dyzenhaus “The Politics of the Question of Constituent Power” in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism* (Oxford University Press, Oxford, 2007) 129 at 140.

48 Locke, above n 43, at § 222; and Roznai, above n 8, at 6.

contract. Inherent, therefore, in social contract theory, is the assumption that power is legitimate when exercised in procedurally-defined manners. Without this procedural correctness, an exercise is not legitimate.

*C Sovereignty Endows a Legitimate Act with Unlimited Potential*

This section discusses why Sieyès and Schmitt's conception of sovereignty makes legitimate acts of the *pouvoir constituant* unlimited in scope. First, it establishes why Sieyès and Schmitt attach sovereignty to the power's exercise and explains why their theory is superior to alternate theories as to why the correct exercise of the power is unlimited in scope. Secondly, this section establishes what species of sovereignty attaches to the exercise of the *pouvoir constituant*.

*I Why constituent power is sovereign*

Legitimate acts of the *pouvoir constituant* are theoretically sovereign acts because Sieyès and Schmitt designated them thus – they put the people in the place of hitherto-sovereign monarchs.<sup>49</sup> The reduction of the people into a body corporate and the collapsing of their multitudinous opinions into a single “general will” gave the people the status of a corporation sole, equivalent to monarchical authority. This created the fiction that the people, like the monarch, could have a single, ruling will, able to guide the state's constitutional form.<sup>50</sup> Following Sieyès's democratic aims, his goal was clear: provide the people with a normative source of constitutive authority capable of overriding the monarchy's claims to have vested such powers in all three estates co-equally.<sup>51</sup> The people thus co-opted the Crown's sovereign power and reformulated it such that procedurally correct expressions of their will were equivalent to royal edicts.

Schmitt's justification for the people's normatively supreme authority follows from his argument that the nation's *raison d'état* is the protection of

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49 Arendt, above n 23, at 147. See also Schmitt, above n 1, at 102.

50 See for example Arendt, above n 23, at 147.

51 See Sieyès, above n 2, at 102.

its citizens and its territorial integrity (without which, no political decision is possible).<sup>52</sup> Since Schmitt holds the people as equivalent to the state and since the state exists to protect its people, it follows that the political will is sovereign because the people should have all powers necessary to create and define the state that will serve their needs.<sup>53</sup>

In contrast to Sieyès and Schmitt's normative argument that the *pouvoir constituant*, properly exercised, is unlimited in scope, Kalyvas presents a factual argument to that effect. He argues that the power is unlimited because it emerges only in exceptional circumstances: "displacement among [society's] different structural levels, including the legal system" or where the regime is flawed in some way such that the people no longer have a reason to respect, or hold legitimate, its decrees.<sup>54</sup> Paired with his argument that only a successful exercise of the *pouvoir constituant* is a true exercise, Kalyvas's position is that the power's exercise is unlimited because it is the *only* power capable of legitimately exerting its will. In other words, where the legitimacy of the political and legal orders break down, the question of who *ought* to legitimately determine the constitutional order is redundant; the better question is who *can* (democratically) determine it.<sup>55</sup> Taken literally, Kalyvas's hypothesis negates Schmitt's two-step division of the *pouvoir constituant's* exercise: per Kalyvas, it is only exercised at Schmitt's second step and even then, only upon that step's successful completion. However, this argument abstracts the theory further than Sieyès and Schmitt's, ignoring the socio-political factors underlying the latter theorists' arguments as to why the *pouvoir constituant* is claimed as a

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52 See Schmitt, above n 1, at 76.

53 See for example at 76, 77 and 102.

54 Kalyvas, above n 8, at 228–229.

55 See also Tushnet, above n 8, where he argues that the success of unconstitutional constitutional amendments undertaken by the *autorité constituante* largely depends on the extent to which the constitutional revolution is successful (a "*pro tanto* revolution").

justification and the effects this has for the resulting constitutional order's legitimacy.

## 2 *The species of sovereignty concerned*

Schmitt considered the *pouvoir constituant* to be the “highest, legally independent, undervived power”.<sup>56</sup> He imbued the people with this power so that they could create and define a state capable of protecting them. The sovereign is the person or group juridically capable of creating a new constitutional order and of “determin[ing] the constitutional form ... of a community in its entirety”.<sup>57</sup> This juridical power, is exercised, Friedrich explains, by those “capable of wielding the *de facto* residuary power of changing or replacing the constitution of a political order”.<sup>58</sup> Thus, the people's *de facto* power is transformed into the constitutional order's *de jure* power.<sup>59</sup> Factual ability is converted into juridical power.

Whilst “capability” might imply a purely factual assessment of sovereignty, it is important to understand that “capability” does not derogate from the *pouvoir constituant*'s juridical nature. As the foregoing sections demonstrate, for Schmitt, Sieyès and Kalyvas, the *autorité constituante*'s sovereignty is tied to the legitimacy engendered by its correct exercise of the *pouvoir*.<sup>60</sup> Legitimacy can be set in opposition to coercion. To understand why the *pouvoir constituant* is not concerned with coercion, we must distinguish between two species of sovereignty. The first is called *potentia*, or might; the second is called *auctoritas*, or authority.<sup>61</sup>

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56 Kalyvas, above n 8, at 228 (emphasis added).

57 At 226.

58 Friedrich, above n 23, at 138 (emphasis in original).

59 See for example Schmitt's division between the activation of the constituent power and its exercise to create a new constitutional order: above n 30.

60 Schmitt, above n 1, at 125, 130–131 and 132. See generally Kalyvas, above n 8, at 225–230.

61 CH McIlwain *Constitutionalism and the Changing World* (rev ed, Cambridge University Press, Cambridge, 1969) at 26.

*Potentia* correlates with a Hobbesian conception of sovereignty wherein law is a product of power and only those with the power sufficient to make and enforce their dictates can be said to be “sovereign”.<sup>62</sup> Even though the sovereign acquires authority over people consensually and the people have the right to resist the sovereign’s unlawful use of force against their persons, this conception of sovereignty reduces people to objects of power.<sup>63</sup> This conception can be extrapolated into Austin’s command theory of sovereignty. The *pouvoir constituant*, meanwhile, is held by Kalyvas to be a “productive agency” rather than a “repressive force” whose focus lies at the moment of a new constitutional order’s creation; the latter, however, has its focus within an already-established constitutional order.<sup>64</sup> The sovereign under constituent power theory is a bottom-up legislator; under command theory, a top-down ruler.<sup>65</sup> Given these fundamental differences, it is apparent that the *autorité constituante* does not derive its power from its ability to enforce its will.

*Auctoritas*, per Jean Bodin’s conception of sovereignty, better aligns with constituent power theory’s normative values. *Auctoritas* is willing obedience to authority, not compulsion to obey force.<sup>66</sup> A sovereign ruling by *auctoritas* is the “highest *legal* power”, subject to no law beyond natural law.<sup>67</sup> Rule is established because the people believe that the sovereign has a right to their obedience.<sup>68</sup> Even if the sovereign might be factually constrained (McIlwain gives the example of the electorate controlling a

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62 At 63.

63 Dyzenhaus, above n 47, at 138 and 139–140.

64 Kalyvas, above n 8, at 226–227.

65 At 227.

66 Compare McIlwain, above n 61, at 29 and 63.

67 Jean Bodin “On Sovereignty” in Julian H Frankin (ed) *Bodin: On Sovereignty* (Cambridge University Press, Cambridge, 1992) 1 at 21; Roznai, above n 8, at 7; and McIlwain, above n 61, at 29. But see Kalyvas, above n 8, at 224 where he argues that Bodin’s conception of sovereignty as “the highest power of command” confirms Arendt’s criticism that constituent power is based on a divine right and is theoretically omnipotent.

68 McIlwain, above n 61, at 29.

sovereign parliament), this does not derogate from that ruler's sovereignty, provided those under its authority continue to obey its commands.<sup>69</sup> Thus, whilst Bodin's *auctoritas* relies on an already-established constitutional order, its insistence that sovereignty is (nearly) legally unlimited, the fact that factual matters are irrelevant and that sovereignty is based on some popular element of willing obedience, make it a closer analogue to Sieyès and Schmitt's conception than Hobbes's *potentia* conception.

#### D Conclusion: the Theory in Summary

This part has established a connection between the procedural correctness of the *pouvoir constituant's* exercise, the legitimacy of the constitutional order it establishes and its unlimited scope. Principally, these connections are based on normative political theories underlying the theory of constituent power and which therefore precondition its exercise. Being based on democratic principles, the *pouvoir constituant's* correct (and thus legitimate) exercise is premised upon democratic norms. Likewise, democracy provides the normative justification for the people's sovereignty, which was co-opted to provide the power necessary to uphold both those principles and the duty of the state in maintaining its integrity.

Based on the foregoing analysis, we would expect the *theory* of constituent power to follow, in *practice*, the hypothetical syllogism set out at the beginning of this part. However, that hypothesis does not always hold true. In other words, it will not necessarily follow that a correct exercise of the *pouvoir constituant* is unlimited in scope or that a correct exercise is legitimate. The paradigm by which the theory will be assayed in part III may be expressed as the following table. The asterisks indicate the outcome predicted by Sieyès and Schmitt's conceptions.

Exercise	Legitimacy		Capacity	
	Correct	*Legitimate	Illegitimate	*Unlimited
Incorrect	Legitimate	*Illegitimate	Unlimited	*Not Unlimited

69 At 30–31.

### ***III Constituent Power in Practice***

#### ***A Magna Carta***

##### ***1 Setting the Scene***

Magna Carta was a “reactionary armed tax rebellion”, which forced King John to sign a document agreeing to limit his powers and conduct towards his barons.<sup>70</sup> However, the barons’ outwardly fiscal motives obscure the fact that Magna Carta’s genesis lay in baronial discontent with the centralising power structures of the late feudal order. It arose in the context of a power struggle and aimed to set the shifting boundaries between royal and baronial powers. Whereas early feudalism constituted local political and judicial power through personal grants of land, late feudalism was characterised by the centralisation of political and judicial power at the expense of local vassals’ powers.<sup>71</sup> The constitutional structure of England, which had rested on monarchs’ personal relationships with their vassal lords (premised upon adherence to obligations owed between master and servant), was, from the late 12th century, shifting markedly towards the centralised authority of the Crown.<sup>72</sup>

Despite the Charter’s high profile nowadays, its immediate impact was negligible: the king repudiated it almost as soon as he was free of the barons’ forces and the pope annulled it shortly thereafter.<sup>73</sup> However, it lived on in English constitutional politics, being reissued by King John’s successors and used as justification for further baronial revolts and royal counter-revolts until 1297 when King Edward I formalised it as an Act of Parliament.<sup>74</sup>

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70 See Timothy Endicott “Magna Carta 1215: A Glorious Failure” (2016) 11 *Frontiers of Law in China* 204 at 205, 206 and 210.

71 Chris Thornhill *A Sociology of Constitutions* (Cambridge University Press, Cambridge (UK), 2011) at 20–21.

72 At 24 and 51.

73 Endicott, above n 70, at 206.

74 Endicott, above n 70, at 208. See generally ST Ambler “Magna Carta: Its Confirmation at Simon de Monfort’s Parliament of 1265” (2015) 130 *EHR* 801.

## 2 *Was there an “autorité constituante”?*

Some caution should be exercised when assessing the practice of the *pouvoir constituant* in relation to Magna Carta. First, and obviously, the theory and concepts underlying it did not exist in 1215. We must restrain the urge to map newer understandings of constitutionalism onto actors who did not think in that way. Friedrich maintains that the barons did not exercise any form of *pouvoir constituant* because they did not create a constitution: a constitution must divide and effectively restrain government power; this Magna Carta did not.<sup>75</sup> For Friedrich, constitutionalism presupposes the existence of central government and thus national (administrative) unification: constitutionalism did not exist in Europe until states became centralised (or de-feudalised).<sup>76</sup>

However, to hold, as such – that no constitutive process could have occurred under such circumstances – is to limit our view of history.<sup>77</sup> *Contra* Friedrich and Schmitt, we can locate constitutive power in the barons’ attempts to enforce their understandings of the English constitution on the shifting power dynamics of late-feudal England. Jean Bodin provides this contrary position, holding that sovereign monarchs cannot derogate from the laws that give their kingdom “its basic form” – that is, the manner in which public or government power is apportioned.<sup>78</sup> Bodin thus recognises that there are some rules fundamental to the structure of the polity, which set out the terms by which monarchs govern and which thus constrain royal power. Magna Carta is a written example of the principle that vassals retain some degree of power over monarchs by preventing monarchs from non-

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75 Friedrich, above n 23, at 18 and 24.

76 At 9 and 11.

77 See at 9 and 11; and Schmitt, above n 1, at 98–99, where Schmitt describes Magna Carta as a contract wherein fealty was given in consideration for a guarantee of rights and thus lacked the characteristics of a constitution.

78 Bodin, above n 67, at 14 and 18.



consensually levying taxes (thus depriving people of their natural right to property).<sup>79</sup>

Moreover, simply because we cannot locate “the people” or “the nation”, it does not follow that there is no *autorité constituante*. Whilst power relations between the state and its people are flat or horizontal in modern states, they were hierarchical and vertical in medieval states. Modern state power interacts directly with the people through social contracts à la Locke and Rousseau. Medieval state power, on the other hand, was premised on personal relationships between grantors and grantees of land.<sup>80</sup> Thus, whilst the king’s tenants-in-chief had legal relationships with both the king and their own mesne lords, a mesne lord had no legal relationship with the king. Thus, we might classify the medieval *autorité constituante* as those of immediately legal inferiority to the person whose legal rights they wished to control.

### 3 *Did procedural correctness determine Magna Carta’s legitimacy?*

The rebel barons’ *autorité constituante* status aside, Magna Carta had legitimacy issues, whether or not it adhered to Sieyès and Schmitt’s procedural rigours. Rising from an act of rebellion against the Crown, Magna Carta would never have been legitimate for the royal faction. For the rebel barons, however, it reflected their concern that John had departed from expected standards of medieval kingship and sought to force the king to behave concordant with these expectations. John’s kingly duties derived, partially, from his coronation oath: he would “rule ... with righteousness ... [and] establish ... right law”.<sup>81</sup> The oath mirrored a fundamental distinction in medieval kingship between “rule by justice and right” and “rule by will and force” – the former was legitimate; the latter was not.<sup>82</sup> A further

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79 At 21.

80 Thornhill, above n 71, at 20–25.

81 Endicott, above n 70, at 208, referring to the coronation oath of William the Conqueror, whose terms were generally replicated by future monarchs.

82 JC Holt *Magna Carta* (2nd ed, Cambridge University Press, Cambridge, 1992) at 93.

expectation lay in the feudal practice of obtaining of baronial consent (via the use of noble councils) where the king sought to raise revenue or enforce the peace.<sup>83</sup> The advisory function of the nobility had a long pedigree in Europe, particularly concerning foreign campaigns – for which monarchs required the support of those whose money and lives would be most imperilled.<sup>84</sup> Over time, vassals began to view their feudal *duty* to provide counsel as their *right* to advise monarchs, a belief reflected in Magna Carta’s stipulation that the “common counsel of the realm” was required to levy taxes.<sup>85</sup>

John’s transgression therefore lay in forcing his subjects to part with their money without their consent or legal mandate, an act from which his subjects expected him to abjure because it was contrary to natural law.<sup>86</sup> As further evidence of these expectations’ provenance, key complaints expressed in Magna Carta, particularly the use of feudal power to raise exorbitant taxes from the barons, were expressed in terms similar to the oaths in King Henry I’s Charter of Liberties.<sup>87</sup> Legitimacy for the barons therefore lay in forcing the king to abide by the oaths that formed the basis of the personal relationship between them.

But this appeal to feudal oaths did not legitimate Magna Carta. King John renounced the Charter as soon as he had escaped his barons’ mail-fisted clutches, whilst the duress the barons placed their king under was sufficient grounds for a papal annulment.<sup>88</sup> Here, we see the battle between two competing sources of legitimacy: the pope, holding the supreme moral authority of Catholic Europe, on one hand; and the barons, with their

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83 At 97; and Endicott, above n 70, at 212, referring to Magna Carta 2015, cls 14 and 61.

84 See Thomas N Bisson “The Military Origins of Medieval Representation” (1966) 71 *The American Historical Review* 1199 at 1202, 1209 and 1214.

85 At 1207; 1203 and 1206.

86 On taxation contrary to natural law, see generally Bodin, above n 67, at 21

87 Endicott, above n 70, at 207.

88 At 206.

insistence that kings should keep their sacred promises, on the other. Initially, the royal faction could claim victory: the Charter's annulment and the excommunication of the rebels morally destroyed any baronial arguments favouring Magna Carta's legitimacy.<sup>89</sup> However, the ensuing baronial rebellion, combined with a French invasion and John's death in 1216 necessitated rapprochement with the rebels – King Henry III reissued the Magna Carta, first in 1216 and again (successfully) in 1217.<sup>90</sup> With both the royal and baronial factions agreeing on the substantive content of the Charter, one might think Magna Carta's legitimacy to be confirmed; but that would be premature.

Whilst Henry generally abided by Magna Carta's authority-limiting terms, neither fining barons nor seizing their property without judicial judgment,<sup>91</sup> it was silent on the crucial issue of enforcement, allowing the king to ignore it if desired.<sup>92</sup> Nevertheless, careless and inconsistent application to disputes reduced Henry's authority – rebellion ensued in 1258 on the pretext that the king had “turn[ed] against the wording of those charters [and] sought gradually to whittle away those liberties.”<sup>93</sup> Because Simon de Monfort's regime, which forcefully took power without the consent of many of the barons, required legitimacy, his council used Magna Carta as a symbol for lawful government (which is how ecclesiastical authorities and minor landholders viewed it) to legitimate their revolt – by aligning their reforms with the charter.<sup>94</sup> The king and Prince Edward purportedly swore (on pain of excommunication) to abide by the Provisions of Oxford, approved by de Monfort's Hilary parliament and containing, *inter alia*,

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89 DA Carpenter *The Minority of Henry III* (University of California Press, Berkeley, 1990) at 12.

90 See generally at 21–25 and 41–45; and Endicott, above n 70, at 208–209.

91 DA Carpenter *The Reign of Henry III* (Hambleton Press, London, 1996) at 79 and 99

92 Carpenter, above n 89, at 3.

93 Ambler, above n 74, at 806.

94 At 803, 806 and 807.

Magna Carta and de Monfort's constitution; the bishops granting permission for their subjects to rise up against them should they violate the Provisions.<sup>95</sup>

For all Magna Carta's legitimating power amongst the commons, it could not prevail over Prince Edward and his barons, who claimed that the rebels had usurped Magna Carta and departed from its view of co-operative government by removing the king.<sup>96</sup> His forces defeated the rebel forces and killed de Monfort at the Battle of Evesham in August 1266, forcing the remaining lords to surrender – the Dictum of Kenilworth enshrined the compromise: baronial surrender for royal adherence to Magna Carta.<sup>97</sup> By 1266, Magna Carta was a common language (if used for contradictory purposes) and was a standard to assess government. It is also apparent, by its royal acceptance to pacify the defeated barons, that it was accepted within English political culture as a legitimate basis for authority. Indeed, its enshrinement in statute by Edward I in 1297 and its continued reissue by monarchs thereafter points to its significance within English political discourse and its symbolic power to achieve legitimacy. Yet, as Endicott points out, its continued reissue evinces its constitutional ineffectiveness: the need for the barons to insist upon, and the monarch to accede to reissue points to a politically expedient restraint, voluntarily undertaken in exchange for loyalty, rather than an effective constitutional constraint on power.<sup>98</sup>

What, then, explains Magna Carta's legitimacy? It cannot be democracy, as modern conceptions thereof did not yet exist; nor can it be the Crown's factual ability to enforce its will, otherwise the royal faction would have delegitimised Magna Carta as a constraint – instead, they relied on it as a source of legitimacy. It seems that the political expediency of reissuing Magna Carta in exchange for loyalty created a political culture, whereby an expectation of consistency developed: monarchs would agree to be bound in

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95 At 809.

96 At 830.

97 At 830.

98 Endicott, above n 70, at 208.

exchange for their subjects' loyalty. It was by this continued interplay between ruler and subjects that (what we would now call) a convention developed. Per Ivor Jennings's test, a convention arises when:<sup>99</sup>

- (1) There is a precedent.
- (2) The actors party to that precedent believe that it binds them; and
- (3) There is a reason for that precedent.

The existence of a precedent is clear: Magna Carta was continually reissued by monarchs until 1453.<sup>100</sup> Furthermore, these reissues evince a belief that Magna Carta bound the "parties" to its terms. It should be noted that this belief in Magna Carta's binding nature need not be a belief that *legal* consequences follow its breach; rather, since conventions operate at the political (not legal) level, the parties need only apprehend *political* consequences of a breach.<sup>101</sup> As the various baronial rebellions premised on royal breaches of Magna Carta indicate, the charter was primarily enforced through the threat of political revolt (albeit by recourse to force). As for the final criteria, it is clear from the foregoing discussion that Magna Carta had as its *raison d'être* the restraint of royal power. We can thus see Magna Carta's legitimacy as deriving from its continued practice by all parties concerned, rather than by the process by which it came into being.

#### 4 *In what manner did the barons exercise "sovereignty"?*

The political questions of Magna Carta lead to the final question regarding the *autorité constituante's* capacity to alter England's constitutional order. Per Sieyès and Schmitt, the *autorité constituante*, exercising its sovereignty as *auctoritas*, has unlimited power to shape the

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99 Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, London, 1959) at 136.

100 See Endicott, above n 70, at 208.

101 On the point about conventions being only enforceable politically, see *Reference re Amendment to the Constitution of Canada* [1981] 1 SCR 753 at 880–881, per Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ, contrasting the legal right of the Sovereign to refuse to assent to legislation duly passed by the legislature with the convention that assent will always be forthcoming. But see Bodin, above n 67, at 14 and 18 as to how Magna Carta could act as a *legal* constraint of royal authority.

constitutional order. The rebel barons in 1215 had, for the briefest of periods, the power to extract any demand they desired from the king: they could (as de Monfort did some 45 years later) have enfeebled royal powers. However, this was based on their armed superiority, not their ability to make John believe that the barons had a right to his obedience. Their ability to compel John's compliance was premised on their power over him – their *potentia*. McIlwain would argue that baronial armed force never amounted to *legal* sovereignty: bank robbers, he maintains, do not exercise sovereignty because they can compel compliance; likewise, baronial coercion could not amount to an exercise of sovereignty, as sovereignty is a legal right.<sup>102</sup> McIlwain's critique notwithstanding, had the barons continued to enjoy martial superiority, they likely could have succeeded in compelling the king to accept and abide by Magna Carta – their capacity to alter the constitutional order would have been (in practical terms) nearly total. Even when the royal and baronial factions reached a grudging accord after the Battle of Evesham, we cannot say that either power exercised their sovereignty by *auctoritas*: the Dictum of Kenilworth was a political accommodation used to end a war, not an acceptance of rights and obligations.

Magna Carta represents a disjuncture between the monarchs' legal, and the barons' factual, sovereignty. Whilst the king enjoyed legal sovereignty, the barons held true power. As de Monfort's coup demonstrates, whoever had the power to enforce their edicts could negate the monarch's legal power. Though none of this diminishes John's and Henry's ongoing *legal* sovereignty during their respective crises, we must inquire whether the extent of the factual constraints placed upon the exercise of their power limited their sovereignty to the point at which it became fictitious.

Here, we encounter McIlwain's argument that Parliament (as an example of a sovereign body) remains sovereign despite the factual constraint represented by elections. Though this might be true as a matter of law – Parliament can pass any law it sees fit notwithstanding the spectre of elections – the factual constraint posed by elections is sufficient to prevent

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102 See McIlwain, above n 61, at 26–29.

members from acting in a manner that forecloses upon their re-election. Whilst the electorate would be fully entitled to restrain members electorally, such a mechanism would not pose a *legal* constraint upon Parliament: for example, it would remain *legally* entitled to legislate to mandate the killing of blue-eyed babies. Similarly, the factual constraint posed by the barons' military force would not be an effective *legal* constraint, capable of preventing the king reasserting his legal right to rule, but that factual constraint might negate the sovereign's desire to act or their subject's willingness to adhere to their edicts. This returns us to the difference between legal and political consequences, embodied in constitutional conventions. Whilst factual constraints cannot prevent sovereigns from exercising their legal rights, it can increase the cost of exercising rights such that it is politically infeasible to do so. Thus, insistence upon legal rights, as the sole determinant of the desirability to act, misses the point: rights are only effective tools if they *can* be exercised. The failure to consider the practical implications of power leaves one with an overly optimistic view of the efficacy of legal rights and of the chance that they will be exercised.

##### 5 *What can be learned from Magna Carta?*

First, we must confront the fact that those entitled to exercise the *pouvoir constituant* will not always be "the people" or "the nation". Instead, we must carefully examine the social context to ascertain who is in a position to influence power. The barons – John's tenants-in-chief – were the group in a direct legal relationship with the monarch. This was manifested in a belief, common throughout Europe, that the barons had a right to counsel the king. This belief placed the barons in immediate (subjective) proximity to the *locus* of decision-making (similar to the electorate in modern democracies).

Secondly, Magna Carta's legitimacy turned on political and military considerations, not procedure. Originally a document of contested legitimacy, its eventual acceptance by both factions points to its legitimacy as deriving from its political acceptance and both sides' realisation that its breach entailed political consequences.

Finally, the processes by which Magna Carta became a legitimate feature of English constitutionalism demonstrate that *potentia*, not *auctoritas*, determined its acceptance. The parties were propelled to a negotiated conclusion by the realisation that a “mutually co-operative relationship between the king and kingdom” was more beneficial to the interests of all parties than war.<sup>103</sup> However, this conclusion was still based on military power – both a matter of who held that power and of the threat of its use.

## *B The French Revolution*

### *1 Setting the Scene*

Whilst the storming of the Bastille on 14 July 1789 is the start of the French Revolution’s populist phase, the constitutional revolution began in May when King Louis XVI convened the Estates-General in response to France’s impending financial collapse.<sup>104</sup> The worsening fiscal situation during the 1780s occurred first, due to the lack of representative government, preventing the monarchy from acquiring the requisite support to raise taxes; and secondly, because the *parlements* (France’s quasi-legislative judicial bodies) resisted the imposition of new taxes on the ground that “[t]he right of consent is the right of the Nation.”<sup>105</sup> In this respect, the French Revolution shares its ideological genesis with Bodin’s conceptions of state power and with the rebel barons’ motivations in 1215. The Assembly of Notables’ rejection of the government’s tax proposal and, upon royal appeal, the Parlement of Paris’s (populist) call for its convocation forced Louis to convene the Estates-General.<sup>106</sup>

The Revolution took the familiar, populist, turn when crippling high food prices and massive industrial unemployment, combined with grain riots

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103 See Ambler, above n 74, at 830.

104 Bailey Stone *Reinterpreting the French Revolution: A Global Historical Perspective* (Cambridge University Press, Cambridge, 2002) at 57.

105 At 35.

106 At 53–55.



and the sacking of the king's popular finance minister, Jacques Necker, prompted rioting in Paris and the storming of the Bastille.<sup>107</sup> At the behest of the Estates-General (now called the National Constituent Assembly), the king declined to send soldiers into Paris to restore order, withdrawing them instead.<sup>108</sup> The people concluded that the Crown either could no longer rely on, or was unwilling to use, the army to maintain order: the king "no longer had the power to enforce his will" and had to bow to the popular mandate of the Assembly.<sup>109</sup> In the fifteen years that followed until Napoleon was crowned Emperor of the French, France endured five different constitutional orders: the 1791 constitution, the never-implemented Jacobin constitution of 1793, the Thermidorian and Directory regimes from 1794, and finally the Consulate from 1799 until 1804.

This diversity must make us cautious in analysing the French Revolution and its consequences. There were several constitutional revolutions in the period between 1789 and 1804, all of which can be linked to the initial revolution. However, these various revolutions resulted in unstable constitutional orders, each of which lasted a few years at most. In such circumstances, it becomes difficult to ascertain the existence of concrete constitutional orders, let alone the actors who constituted them or the legitimacy of those orders. The diversity and complexity of these events necessitates a big picture analysis of the period in question, as it is hard to undertake a detailed analysis of each constitutional order.

The first section attempts to discern which phases of the Revolution formally accord with Sieyès and Schmitt's procedural requirements, demonstrating that, though we can locate some aspects of the procedurally correct exercise of the *pouvoir constituant* in each event, only the Jacobin constitution demonstrates complete affinity with Sieyès and Schmitt's procedural requirements. The second section argues that, notwithstanding

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107 At 96–98.

108 William Doyle *The Oxford History of the French Revolution* (2nd ed, Oxford University Press, Oxford, 2002) at 110.

109 At 110–111; and Stone, above n 104, at 103–104.

procedure, political considerations determined the legitimacy of those orders; and the third discusses the lessons that can be taken from the Revolution.

## 2 *Locating procedural correctness*

Applying Sieyès's criteria to the pre-1792 events yields mixed results. Though the Constituent Assembly largely followed Sieyès's Rousseau-inspired model of representative democracy, the final constitution became valid upon royal assent – not consistent with Sieyès's conception of the Assembly as the sole representative of the nation's sovereignty.<sup>110</sup> Schmitt's criteria also indicate a procedurally incorrect exercise. Whilst the popular aspects of 1789 (namely the riots in Paris) formally accord with Schmitt's first step that there be a manifestation of popular desire to alter the constitutional order, the second step is not satisfied. As noted, Schmitt held Sieyès's delegated exercise of the *pouvoir constituant* to be undemocratic because the people's democratic constitution-making right must be ascertained directly.<sup>111</sup> Whilst this element of popular acclamation was present in later instances of constitution-making, it was notably absent from 1789–1791. Furthermore, the Constituent Assembly's was an *autorité constituée*: they had been summoned as the Estates-General and had renamed themselves and appropriated power under their self-proclaimed role as the sovereign people's representatives.<sup>112</sup> The Assembly also continued to exercise the Estates-General's legislative powers simultaneous to its exercise

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110 On the first point, see generally Michael Fitzsimmons "From the Estates General to the National Assembly, May 5–August 4, 1789" in Peter R Campbell (ed) *The Origins of the French Revolution* (Palgrave MacMillan, Basingstoke (UK), 2006) 268; on the second, see Michael P Fitzsimmons "Sovereignty and Constitutional Power" in David Andress (ed) *The Oxford Handbook of the French Revolution* (Oxford University Press, Oxford, 2015) 201 at 206 and 210.

111 Schmitt, above n 1, at 128; and see above, n 27. See also Arendt, above n 23, at 116–117, where she argues that the Constituent Assembly's failure lay in failure to acquire popular input on and ratification for the constitution, whose drafting was, in essence, "a favourite pastime" for the delegates because the exercise held no consequences for them.

112 See Fitzsimmons, above n 110, at 227–278; and Lucien Jaume "Constituent Power in France: The Revolution and its Consequences" in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism* (Oxford University Press, Oxford, 2007) 67 at 70.

of the *pouvoir constituant*.<sup>113</sup> There was thus no distinction between the *autorité constituante* and *constituée*. It is therefore difficult to argue that the events of 1789–1791 represent a procedurally correct exercise of the *pouvoir constituant*.

The events of 1792 follow a similar line. The storming of the Palais des Tuileries and the Legislative Assembly by Parisian radicals – the *sans-culottes* – who sought out those they suspected of trying to undermine the nation was co-opted by the radical Jacobins, who presented their faction as having popular support and legitimacy vis-à-vis the Girondins, who the Jacobins eventually purged.<sup>114</sup> Following this rising, the Legislative Assembly reformed into the National Convention, which declared France to be a Republic.<sup>115</sup>

Although the uprisings that brought about the beginning of republican government were popular manifestations of a desire to alter the constitutional order, the National Convention, created in the insurrection's aftermath to draft a new constitution, was merely a continuation of the old Legislative Assembly, itself a product of the 1791 constitution. Like the Legislative Assembly, the National Convention was an *autorité constituée*, claiming competency to exercise the *pouvoir constituant*. Despite the lack of differentiation between the *constituant* and *constitué*, it is indisputable that the resulting constitution – ratified by popular referendum – would be procedurally correct: the people had manifested a desire for change and had approved it directly.<sup>116</sup> The 1793 constitution was thus the only order during

113 Arendt, above n 23, at 126–127; and Jaume, above n 112, at 70.

114 David Andress “Politics and Insurrection: The Sans-culottes, The ‘Popular Movement’ and the People of Paris” in *The Oxford Handbook of the French Revolution* (Oxford University Press, Oxford, 2015) 401 at 406 and 409–410; Paul R Hanson “From Faction to Revolt” in David Andress (ed) *The Oxford Handbook of the French Revolution* (Oxford University Press, Oxford, 2015) 436 at 439–441; and Doyle, above n 108, at 188–189.

115 Doyle, above n 108, at 193.

116 For the adoption of the constitution by referendum, see generally Philip Dwyer “Napoleon, The Revolution, and The Empire” in David Andress (ed) *The Oxford Handbook of the French Revolution* (Oxford University Press, Oxford, 2015) 573, comparing voter turnout in the Napoleonic referendums to the various referendums

the revolutionary period that formally accorded with both Sieyès and Schmitt's procedural requirements.<sup>117</sup>

The final three constitutional events all lacked the popular mobilisation required by Schmitt in democratic societies and, moreover, the resulting constitutional orders, though relying on referendums, tended to attempt to create their own, top-down, legitimacy.<sup>118</sup> The Thermidorian Reaction of 1794 was a suppression of populist politics and the counter-populist overthrow of the Jacobin faction, marking a retreat from radical revolutionary policies.<sup>119</sup> The shift, perpetuated by middle class deputies, was precipitated by the perceived dangers of populist politics,<sup>120</sup> which, accordingly, necessitated the suppression of the *sans-culottes*.<sup>121</sup> The Thermidorians promulgated unpopular and authoritarian policies, eventually undertaking an internal constitutional shift to become the Directory.<sup>122</sup>

The Consulate, brought to power by the Brumaire Coup, was the response of some of the National Constituent Assembly's original members (Sieyès included) to the chaos, disorder and purgation of political rivals, endemic under the Directory.<sup>123</sup> Finally, the series of referendums that

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conducted during the republican era. Schmitt, above n 1, at 305 also provides figures on French constitutional referendums from 1792–1804.

117 See Schmitt, above n 1, at 134, where he discusses the practice of ratifying constitutions under the Republic, noting that, notwithstanding electoral slights of hand by governments, the referendums were “theoretically” in accordance with the democratic requirements of his theory.

118 Jaume, above n 112, at 75.

119 Laura Mason “Thermidor and the Myth of Rupture” in David Andress (ed) *The Oxford Handbook of the French Revolution* (Oxford University Press, Oxford, 2015) 521 at 523.

120 Jaume, above n 112, at 67.

121 Howard G Brown “The search for stability” in Howard G Brown and Judith A Miller (eds) *Taking Liberties: Problems of a New Order from the French Revolution to Napoleon* (Manchester University Press, Manchester, 2002) 20 at 22–23.

122 Mason, above n 119, at 524.

123 Brown, above n 121, at 24–25, 26, 28; and Martyn Lyons *Napoleon Bonaparte and the Legacy of the French Revolution* (St Martin's Press, New York, 1994) at 29–33 and 42.

resulted in Napoleon's enthronement as Emperor, though appealing to notions of popular sovereignty,<sup>124</sup> were changes to the French constitutional architecture initiated from above by Napoleon himself and guaranteed by the pliant legislature, stacked in his favour.<sup>125</sup>

### 3 *What made the various constitutional orders (il)legitimate?*

This section argues that, notwithstanding the procedural (in)correctness of the various constitutional regimes, it is political concerns, not procedural ones that determined whether the French people perceived the orders as legitimate. This section examines the reasons why each constitutional order was replaced by another. As will be shown, the crises that brought about the new constitutional orders between 1789 and 1794 were precipitated by short-term political issues. The exception is the financial crises of the 1780s that prompted the summonses of the Estates-General in 1789.

The crises of the 1780s resulted from long-term economic mismanagement compounded by the monarchy's inability to raise taxes.<sup>126</sup> Nor were the issues solely political: the king's inability to raise money was a symptom of the constitutional order (particularly the *parlements*) resisting the imposition of more taxes along with popular dissent – manifested in anti-monarchist satire during the 1770s and 1780s that portrayed the king as impotent and decadent – reducing the monarchy's authority.<sup>127</sup> The monarchy thereby lost its constitutional authority. Even if the financial crisis was resolved, constitutional discourse had moved beyond the *status quo ante*, away from the concept of “*l'état, c'est moi*” towards the idea that “[t]he right of consent is the right of the Nation.”<sup>128</sup> In that ideological environment, the theoretical basis of the state's constitution had shifted such that there was a fundamental incompatibility between Louis XVI's absolutist method of rule

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124 Dwyer, above n 116, at 575; and Lyons, above n 123, at 111.

125 Brown, above n 121, at 30; and Lyons, above n 123, at 111 and 117.

126 See Stone, above n 104, at 34 and 35.

127 At 35 and 40.

128 See at 35.

and the consent-based view being pushed by the *parlements*. No matter who held power (save, perhaps, had the king placed loyalists in the *parlements*), the French government might have continued to face fundamental issues in its ability to govern.

The collapse of the 1791 constitutional order, along with the collapse of the Jacobin National Convention in 1794, were precipitated by acute shocks to the socio-political system rather than by inherent flaws in the constitutional order. The forced relocation of the Legislative Assembly and royal family to Paris – the prelude to the insurrection of August 1792 – resulted from popular fear in Paris that those parties would not respect the people’s will in their legislative duties.<sup>129</sup> Since the new constitution had already been enacted, these fears could not have been motivated by a fear that the constitution would not sufficiently represent the general will; rather, it appears as if Parisians sought to ensure that policies enacted by the Legislative Assembly worked in their favour. Likewise, the storming of the Palais des Tuileries by *sans-culottes* was occasioned by fears of Austrian invasion and sentiments that the king, by obstructing legislation aimed at furthering the Revolution, was “responsible for the ongoing political crisis”.<sup>130</sup> The collapse of the 1791 constitutional order was thus not caused by the process by which it came into being; rather, it was caused by populist fears that the government was (at best) unwilling to uphold and protect Parisians’ interests or (at worst) actively undermining the revolutionary order.

The Jacobin constitution of 1793, the only order we identified as being procedurally correct, was never legitimate beyond its partisans – the abolition of the Legislative Assembly prompted provincial rebellions, which aimed to restore the Assembly’s authority.<sup>131</sup> As Hanson observes, the *sans-culottes* tended to dominate Parisian politics, such that it was unclear who truly

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129 Doyle, above n 108, at 122–123.

130 See at 167 and 187; and Andress, above n 114, at 406.

131 Hanson, above n 114, at 436. As to the breadth of the 1793 constitution’s legitimacy, see the suggestion made by Schmitt, above n 1, at 133

exercised sovereignty: the local committees or the National Convention.<sup>132</sup> Moreover, the political climate was so tense that the *sans-culottes*' only reaction to the defection of Girondin-appointed military leaders was to presume that the Girondins themselves harboured malice against the Republic.<sup>133</sup> The Jacobins exploited this political climate, playing off the *sans-culottes*' fears, which were founded, generally, upon military failures, rising food prices and anxieties of fifth columnists.<sup>134</sup>

The Jacobins' regime was not legitimate because of the procedure by which it was created. It was legitimate (for the briefest of periods) because the Jacobins satisfied Parisians' needs and, when they could not do so, were able to effectively scapegoat their political rivals. The importance of blame becomes obvious when one examines the events preceding the 1792 rising. When the Constituent Assembly abolished feudalism and seigneurial rights in August 1789, they aimed to mollify the continuing rural unrest.<sup>135</sup> Importantly, however, this severed legal rights from socio-economic status, creating a uniform national authority whereby the state and its citizens dealt directly with each other, making the state responsible for controlling the people.<sup>136</sup> Consequently, the people looked to the central government, rather than local land-holding nobles, to solve their problems. When those solutions failed, both central government and local lords became scapegoats: the measures to counter food shortages and unemployment did not appease Parisians who, by 1792, had forced the royal family and the Legislative Assembly to relocate from Versailles to Paris, where the people could better subject their decision-making processes to popular pressure.<sup>137</sup>

If the Jacobin regime was legitimate, it was because there was no alternative. Yet, as soon as the Jacobins could no longer satisfy the mob's

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132 Hanson, above n 114, at 438.

133 See at 441.

134 At 436–440; and Andress, above n 114, at 410.

135 Fitzsimmons, above n 110, at 284.

136 Thornhill, above n 71, at 208–209.

137 Doyle, above n 108, at 122–123.

desires or scapegoat their way out of a crisis, it followed that their legitimacy amongst the mob disappeared, allowing the remnants of the Girondins to seize power and overturn the Jacobins' constitutional order in 1794. The fall of the Jacobin's constitutional order lay in political concerns, rather than the inability of that order to sustain the political climate required for successful government, a position evidenced by the link between the people's immediate desires and fears, the Jacobins' factionalism and their use of political scapegoating to ensure their regime's survival. In fact, the existence of factionalism prior to the 1792 insurrection points to the failure of the 1793 constitutional order (whose constitution never came into effect) as lying firmly within the realm of politics.

The Thermidorian/Directory constitutional order failed for similar reasons. Their economic liberalisations, which raised food prices, proved highly unpopular in Paris, triggering rioting and insurrections that the government suppressed with armed force.<sup>138</sup> Provincial instability, repressive and coercive state power, reminiscent of the Terror, and the curtailment of fundamental freedoms made the Directory very unpopular.<sup>139</sup> The government's inability to ensure social and political stability and their purging of opposition deputies destroyed their legitimacy.<sup>140</sup> The Brumaire Coup was an attempt to restore the stability of the politically volatile regime, not a coup against a constitutional regime considered illegitimate because of the manner by which it was constituted.

Equally, the transition to imperial government, which endured until 1814, appears to have been based on the desire for stability after more than a decade of war and revolt. The ability of the Consulate under Napoleon to stabilise France internally and to ward off enemies externally must have been important to the French after the events of the 1790s.<sup>141</sup> Despite leading this

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138 Mason, above n 119, at 523–524.

139 At 524; Brown, above n 121, at 22; and Lyons, above n 123, at 33 and 35.

140 See for example Brown, above n 121, at 22, who argues that the Thermidorians relied on coercive power to legitimate their regime.

141 This is the view held by Lyons, above n 123, at 112; Brown, above n 121, at 30; and Schmitt, above n 1, at 134.



constitutional revolution from above (and therefore being procedurally illegitimate per Schmitt), the Napoleonic constitution was considered legitimate: the success of his referendums (for which turnout was greater than during the Republic) points to a genuine sentiment that Napoleon could provide what the electorate sought.

Even if we hold these referendums as procedurally correct expressions of the *pouvoir constituant*, we must still dispute that the Napoleonic constitutional order was legitimate *because* of the referendums: they were only indicative means of ascertaining a sentiment that held Napoleon to be a legitimate leader because of the stability his regime provided. To put it another way, his regime (based on the foregoing analyses on the Jacobin and Thermidorian orders) would likely have remained popularly stable not because Napoleon *ascertained* that his popularity existed, but because he *was* popular. Popularity (and the political stability that accompanies it) does not exist because people vote it into existence; it exists independently of any juridical manifestation.

#### 4 *What can be learned from the French Revolution?*

Examining the events of the French Revolution through a political lens more clearly sheds light on how the French perceived their governments during the period. What becomes immediately obvious is that the exercise of popular desire for change was directed at political rather than constitutional orders. It is coincidental that each new regime created a new constitutional order. In this final section, I discuss some lessons that can be learned from the practice of constitutive power during the French Revolution.

The first is that the masses are fickle (the *mobile vulgus*). This is not condescension; rather, I do not think that ordinary French people contemplated the constitutional issues at play. As the foregoing analysis suggests, they were more motivated by immediate concerns of survival than about whether the constitutional (as opposed to the political) regime was capable of functioning in the manner they wished. Popular risings against the political establishment are not the same as those against the constitutional order. That said, it is hard to draw the line between a political crisis and one

precipitated by the constitutional order's inability to adequately address fundamental issues. This is particularly true given that political actors operate within the constitutional order itself: their manipulation of the order for their own ends (or politics) is facilitated by the order itself.

Distinction, then, is difficult. One possible method is to distinguish between the actors and the backdrop against which they play out their machinations. Under this distinction, we might ask what the result would be if the political actors ignored their animosities and factionalism (without ignoring their aims) and sought to build consensus (or at least majority support) – in other words, if they removed their inability to compromise. If, notwithstanding the inclusion of good faith in the political process, the system remained dysfunctional – allowing disputes over points of view to derail government – or lacked authority or legitimacy amongst its constituents, we might conclude that the constitutional system itself is at fault.

As a matter of good constitutional policy, one ought not overturn a system that is defective merely because its actors cannot work together – to hold as such would expose every political order to the threat of constant revolution over the tiniest impasse. Rather, one should only attempt constitutional revolution where it is plain that, *no matter who the actors are*, the constitutional system perpetuates a mode of governance that creates opportunities for factions to exacerbate conflict and minimise cooperation with the effect that government cannot properly govern. Seen through this lens, constitutional reform should only be undertaken where the constitutional order, not the political order is causing the trouble.

The majority of the changes in constitutional orders between 1789 and 1804 should thus be seen as being precipitated by a desire to change government – because of immediately proximate political issues and failures – not as being premised on the constitutional order's illegitimacy. Indeed, the legitimacy of constitutional orders, based on the foregoing analysis, depends on the political legitimacy of its proponents. Based on this, it cannot be argued that Sieyès and Schmitt are correct to hold that a procedurally

correct exercise of the *pouvoir constituant* determines a constitutional order's legitimacy.

A more pressing issue follows from the idea of the masses' fickleness: we have yet to identify "the nation" to whose actions Sieyès and Schmitt attribute the *pouvoir constituant*. Writing of the Revolution, Schmitt argued that "the French people constituted themselves" when they "became conscious of their capacity to act politically and provide themselves with a constitution under the presumption of political unity."<sup>142</sup> However, we have reason to doubt this political unity. It was not a unified national polity that stormed the Bastille in 1789, forced the Constituent Assembly and royal family to relocate to Paris in 1792 or which invaded the Palais des Tuileries and forced formation of the Jacobin National Convention. All these populist movements were Parisian in their origin. The fears and desperations of Parisians (not provincial French) prompted the popular action that resulted in the destruction and recreation of the various constitutional orders between 1789 and 1794.<sup>143</sup> As such, it is hard to talk about a "people" in the sense that Sieyès and Schmitt do – the major constitutional events of the early–mid Revolution were largely propelled by a small section of the French people who had privileged access to the *locus* of power.

Thus, geography matters in the exercise of the *pouvoir constituant*: those with the desire and ability to undertake constitutional change must be placed such that they can influence the status quo. Rioting and revolts in the provinces would have been incapable of convincing anyone in Paris to accept changes to the constitutional order; however, the application of pressure at the source of power carries more intensity and, consequently, ability to effect change. It is therefore useless to talk about the will of the people as if it is a blanket uniformly laid across the constitutional landscape, touching all *loci* of power. Such an even distribution achieves little if those in power cannot be convinced, whether by logic or force. Equally, it follows that pressure

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142 Schmitt, above n 1, at 102.

143 These fears and anxieties are described in Stone, above n 104, at 96–98; Doyle, above n 108, at 122–123, 187 and 188–189; Andress, above n 114, at 406 and 409–410; and Hanson, above n 114, at 36 at 440 and 441.

applied solely at the *locus* of power may be sufficient to force change. During the French Revolution, the people's will was thus synonymous with Parisians' will – hardly a democratic method of determining constitutional structure if the will of only a handful of French matter.

### *C The 2017 Venezuelan Constitutional Crisis*

#### *I Setting the Scene*

Venezuela's current crisis largely stems from the country's economic collapse, caused by a combination of falling oil prices, high government spending and economic mismanagement.<sup>144</sup> Whilst oil prices boomed between the late 1990s and early 2010s, the Venezuelan economy (which relies on oil for about 90 per cent of its export value) was likewise prosperous.<sup>145</sup> However, the decline in prices halved export values and the government could no longer afford to import the food its people need, leading to rationing and widespread hunger.<sup>146</sup> Due to currency controls and the increased printing of money, hyperinflation is rampant and the economy has significantly contracted, whilst food can only be purchased on the black market for exorbitant prices.<sup>147</sup>

Against the backdrop of apparent government incompetence, the opposition-controlled legislature consistently opposed President Maduro's legislative proposals to remedy the situation.<sup>148</sup> For its part, the Maduro Government attempted to entrench its power, using the Electoral

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144 Julian Borger "Venezuela's worsening economic crisis – the Guardian briefing" *The Guardian* (online ed, London, 22 June 2016).

145 Editorial "How Chávez and Maduro have impoverished Venezuela" *The Economist* (online ed, London, 6 April 2017).

146 *The Economist*, above n 145; and Borger, above n 144.

147 *The Economist*, above n 145; Borger, above n 144; and Mircely Guanipa and Eyanir China "Venezuela exchange rate fluctuation sparks price surge" (10 August 2017) Reuters <[www.reuters.com](http://www.reuters.com)>.

148 Jonathan Watts and Alicia Hernández "Venezuela opposition allege coup as supreme court seizes power" *The Guardian* (online ed, London, 30 March 2017).

Commission to block several opposition legislators from taking their seats,<sup>149</sup> and putting in place stringent barriers to prevent the success of a petition calling for the president's recall.<sup>150</sup> The most constitutionally significant effort has been the formation of a constituent assembly to rewrite the Constitution, ostensibly to "restore order" and to prevent the National Assembly from abusing their powers.<sup>151</sup>

Opposition parties and international observers fear that Maduro will use the constituent assembly to nullify the opposition's parliamentary control and purge his opponents.<sup>152</sup> They also worry that the assembly will postpone local and state elections that the Government is likely to lose, keeping Maduro in power for a potentially indeterminate amount of time.<sup>153</sup> Indeed, this is what happened: the constituent assembly asserted its superiority to the legislature, ordering it not to interfere with its decrees and removing government figures critical of Maduro.<sup>154</sup>

That constituent assembly was elected on 30 July 2017 and is composed entirely of Government loyalists, despite some 75–80 per cent of Venezuelans opposing both Maduro and the assembly.<sup>155</sup> In contrast to his

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149 Christopher Sabatini "Maduro has stopped torturing democracy in Venezuela – by killing it" *The Guardian* (online ed, London, 3 August 2017).

150 Borger, above n 144.

151 Mery Mollogon and Chris Kraul "Venezuela's political crisis deepens as its legislature is essentially dissolved" *Los Angeles Times* (online ed, Los Angeles, 18 August 2017).

152 Sabatini, above n 149.

153 Jennifer L McCoy "Venezuela's controversial new Constituent Assembly, explained" *The Washington Post* (online ed, Washington (DC), 1 August 2017); and Virginia López and Sibylla Brodzinsky "Venezuela to vote amid crisis: all you need to know" *The Guardian* (online ed, London, 25 July 2017).

154 Jorge Rueda and Joshua Goodman "New Venezuela assembly ousts government critic Luisa Ortega as she denounces 'siege' by troops" *The Independent* (online ed, London, 5 August 2017); Mogollon and Kraul, above n 151; and Joshua Goodman and Fabiola Sanchez "New Venezuela Assembly Declares Itself Superior to All Other Branches of Government" *Time* (online ed, New York, 9 August 2017).

155 Sabatini, above n 149; Sibylla Brodzinsky "Venezuela crisis: loyalist assembly inaugurated amid Vatican criticism" *The Guardian* (online ed, London, 4 August 2017); and López and Brodzinsky, above n 153.

predecessor, Hugo Chávez, Maduro did not conduct an initial referendum to determine whether the people desired change.<sup>156</sup> Chávez's 1999 process was careful to involve the people throughout, obtaining their support to call the constituent assembly and to ratify (by a 71 per cent majority) its proposal.<sup>157</sup> That Constitution draws extensively from Sieyès and Schmitt's ideas, declaring that the people retain their sovereignty and allowing them to convene a constituent assembly at any time.<sup>158</sup>

At this stage, it is too early to predict the outcome of this crisis, but it looks apparent that, if the resultant constitutional draft is put to the people (as Maduro claims he will), it will be rejected, absent any manipulation of the votes.<sup>159</sup> If the referendum returns a negative result for Maduro, one can only speculate as to how he might react, given the present violence of security forces.

## 2 *Has the process been correct thus far?*

Given that the Venezuelan constitutional crisis is ongoing and that the National Constituent Assembly has not completed its draft constitution or submitted it for ratification by the people, it is hard to do more than speculate about how our criteria might apply. However, some provisional observations may be made and some counterfactuals may be explored.

The Venezuelan government's efforts to replace the Constitution are inconsistent with Sieyès and Schmitt's conceptions, though perhaps not with the Venezuelan Constitution itself. Whilst the exercise is procedurally correct, insofar as the new constitution will be drafted by a constituent assembly and ratified by a referendum, there was no initial manifestation of popular desire to replace the Constitution – unlike Chávez's call for a

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156 López and Brodzinsky, above n 153; and Vox "The collapse of Venezuela, explained" (25 August 2017) YouTube <[www.youtube.com](http://www.youtube.com)>.

157 Alfredo Ramirez "The Death of Democracy in Venezuela: The Road to Today Pt. II" (22 March 2017) The Huffington Post <[www.huffpost.com](http://www.huffpost.com)>; and Mike Gonzalez "Being Honest About Venezuela" *Jacobin Magazine* (online ed, 8 July 2017).

158 Constitution of the Bolivarian Republic of Venezuela, arts 5 and 347.

159 López and Brodzinsky, above n 153.

constituent assembly in 1999, Maduro did not conduct an initial referendum to confirm Venezuelans' desire for change. Without popular pressure for altering the constitutional order, it cannot be said that these efforts would be a valid exercise of the *pouvoir constituant* per Schmitt.

Despite this lack of popular support, the Supreme Tribunal of Justice held that the Constitution allows the president to call a constituent assembly, without the approval of the National Assembly or the people.<sup>160</sup> In its judgment, the Court distinguished between the *locus* and the invocation of the *pouvoir constituant*, arguing that, read with art 347 (which invests the original power in the people), art 348 describes two methods to convoke a constituent assembly: the first – an exercise of delegated power – allows the government to convoke the assembly; the second – an exercise of original power – allows the people themselves to do so. These powers may be exercised independently; absent direct convocation by the people, the resulting exercise of the *pouvoir constituant* by the people is premised on its initiation by the *autorité constituée*.

Though the language of arts 347 and 348 might support a reading of art 347 that empowers the people whilst art 348 provides a process for the power's exercise, the distinction between *locus* and invocation, combined with a disjunctive reading of art 348, is problematic. First, it ignores the plain language of art 348, which states that initiative to convoke an assembly may emanate from “the President of the Republic ... *and* from 15% of the voters registered with the Civil and Electoral Registry.”<sup>161</sup> Secondly, art 348 appears to envisage situations in which the *autorité constituée* seeks to

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160 See *Sentencia 378/17*, 31 May 2017, available at “Gaceta Oficial” <www.blogspot.com>, translated by GoogleTranslate. At the time of writing, the official website of the TSJ was unavailable.

161 (Emphasis Added). Curiously, whilst art 348 in *Sentencia 378/17*, above n 160, and in “Constitution of the Bolivarian Republic of Venezuela” República Bolivariana de Venezuela Embajada en EE.UU <venezuela-us.org> use the word “and” prior to the requirement for popular approval, the “Constitución de la República Bolivariana de Venezuela” CNE <www.cne.gob.ve> uses “or”. The former version is an English translation made by the Venezuelan Ministry of Communication and Information whilst the latter version is made available by the Venezuelan National Electoral Council. It follows that these arguments are only correct if the “and” versions are accurate reflections of the true state of the law.

convene the *autorité constituante*. If this constitution follows Sieyès and Schmitt's theories, as it implies, it would be conceptually unsound to allow the *autorité constituée* to call, without popular consent, a constituent assembly – it would place the *autorité constituante* at the *constituée*'s disposal. Thirdly, a disjunctive reading of art 348 makes sense only if art 347 and 348 reflect a distinction between *locus* and invocation: an exercise of original constituent power must not be burdened by the need to seek government approval. Unless art 347 contains the original constituent power, no matter whether art 348 is conjunctive or disjunctive, requiring 15 per cent of the population to call a constituent assembly likewise limits the power's exercise. Therefore, to adhere to orthodox understandings of the unmediated nature of the *pouvoir constituant*, art 348 must refer to convocation by the *autorité constituante*.

The issue of the new constitution's legitimacy is likely to be fraught and, appears *prima facie* based on the procedure used. The issue principally revolves around Maduro's lack of popular consent to call the Assembly. Given the intense opposition to the Assembly's convocation, it is apparent that the purported exercise of the *pouvoir constituant* lacks sufficient democratic support to legitimate it. But if the draft constitution were approved by popular vote, would that be sufficient to legitimate it? Here, we arrive at a series of divergent possibilities: first, the draft may be ratified by the people or it might not. If it is, it might be ratified either because of vote tampering or because the significant majority opposed to Maduro's efforts change their mind. If the draft is not ratified, Maduro may either accept that result, allowing the present constitution stand, or reject that result and attempt to enforce the new constitution on the unwilling majority. In the section following, I explore these possibilities and discuss what they tell us about how the process might affect the product's legitimacy.

### 3 *The relationship between procedure, legitimacy and interest*

Victory achieved through electoral fraud would doubtlessly be a procedurally illegitimate way of "ascertaining" the people's will. If fraud is apparent, the new constitutional order is likely to never enjoy legal legitimacy. Indeed, this scenario mirrors that in which the draft fails to be



ratified. When the façade of fraud falls away, it as if the people openly rejected it. This illegitimacy will likely be manifested directly and forcefully by the people and it is quite possible, given the current level of violence evinced by the state, that the state will assert the new constitutional order's legitimacy equally forcefully. The question of legitimacy, hitherto a procedural question, thus becomes intertwined with the ability to maintain control – Maduro's inability to assert the people's sovereignty through *auctoritas* requires him to assert it through *potentia*. If the proposed constitution were legitimised, it would be because no one capable of asserting an alternative remained – such people would have been silenced or would have made accommodations with the regime. Whilst legitimacy would not be acquired per Sieyès and Schmitt's requirements, the result would be the same: there would be no other constitutional order that could claim the mandate of the people. Whilst such an order would be procedurally illegitimate, the lack of viable alternatives, combined with the necessity for the order's detractors to make accommodations with it to survive would produce (however temporarily) the subjective appearance of legitimacy.

However, it is the scenario wherein the draft constitution legitimately wins a majority of votes that is the most intriguing. Except in the case of an absolute landslide victory, there is a risk that the draft's detractors will allege a fraud, with the same result as above. But why is this – can it be attributed to Maduro's procedural incorrectness? This is partially correct; however, I argue that the procedure is a manifestation of underlying issues. To illustrate this, I ask the following questions: is the proposed constitution ever likely to be illegitimate for Maduro's supporters or legitimate for his opposition? If so, under what circumstances might its legitimacy be reversed? The answer to the first, I argue, is that Maduro's supporters (absent a flagrant breach of their interests) are likely to hold as legitimate the proposed constitution regardless of the procedure used; his opposition, on the other hand, is likely to hold the new constitutional order illegitimate because it entrenches the power of factions whose interests conflict with theirs. However, the latter could use the procedural incorrectness to bolster their arguments' strength. We ought not, however, conflate correlation with causation: procedural

impropriety and illegitimacy are both present, but it does not follow that the former causes the latter. An answer to the second question has been supplied, if somewhat speculatively. If, for some reason, Maduro's draft constitution breached his supporters' interests or were to accommodate some of his opposition's, then its legitimacy might change among those groups.

#### 4 *The primacy of interest*

The possibility that positions might vary depending on the proponent's perspective points to an interest-based view of legitimacy: Maduro's adherents support it because they think it will serve their interests better than the status quo whereas his detractors fear that their interests will be harmed. Perhaps constitutional theorists might find this argument too cynical – perhaps they might respond that the opposition's actions are motivated by a preference for democracy (and the primacy of the people's voice) over authoritarian rule. It is true that this interest-based argument is cynical, but the theorists' response betrays similar cynicism: it raises the same question as to the preferences of Maduro's supporters. Put simply, it assumes that support for Maduro is premised on the rejection of, or disregard for democratic values. But this is not the case: imagine if the positions were reversed and the anti-democratic propositions were more amenable to the opposition's interests; would they then be so opposed? Given the current trend in otherwise democratic countries for preferring authoritarian, reactionary leaders, it is hard to maintain that any opposition to an authoritarian leader must necessarily be democratic in its motivations. Indeed, the anxiety that Maduro (rather than an opposition figure) might rule indefinitely evinces a fear that it will be impossible for opposing points of view and interests to gain any traction. This demonstrates that political preference is a key determinant of what is perceived to be acceptable and thus legitimate.

The origins of the crisis shed light on the proposition that political preference informs the legitimacy of constitutional exercises. The economic crisis that has gripped Venezuela under Maduro was largely blamed on his government, whilst his efforts to remedy the crisis focus on allowing him to circumvent the opposition-controlled legislature. Given this apparent

purpose, it is unsurprising that he is facing opposition: his efforts appear to be entirely political in nature – aimed at ensuring he can enact the policies he desires. And in the realm of politics, it is a truism that policies will face opposition based on the political identities of the proponent and detractors. Of course, this invites the same debate on the politics–constitution distinction as was examined regarding the French Revolution. A further comparison with the French Revolution is possible: recall the observation that governments (and thus constitutional orders) tend to fall due to political pressures. In Venezuela, it appears as if Maduro is attempting to replace the constitutional order to prevent politics from being his downfall. If this is true, it would demonstrate the centrality of politics to the perceived legitimacy of constitutional orders.

5 *What can be learned from the Venezuelan crisis?*

The Venezuelan crisis presents an interesting example of a purported exercise of the *pouvoir constituant*, premised on an orthodox interpretation of Sieyès and Schmitt’s theories. Yet, as with the previous examples, legitimacy is largely a matter of political preference, not procedure. Whilst procedure can be used to support arguments as to legitimacy, procedure does not underwrite legitimacy: it must derive its source from some other normative consideration of the new order’s desirability.

Furthermore, the Venezuelan example demonstrates the comparative weakness of both the judiciary and the people at constraining state power. The government stacked the judiciary to the point of irrelevance and responded ruthlessly towards mass protests.<sup>162</sup> Given the centrality of an independent judiciary for the maintenance of the rule of law and, particularly in Latin America, for holding certain purported exercises of the *pouvoir constituant* unconstitutional, the facility with which governments can manipulate the courts must point against the judiciary’s efficacy as a restraint on exercises of constitutive power.<sup>163</sup> Additionally, even though judicial

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162 Sabatini, above n 149.

163 For instances of courts, in Latin America and elsewhere, holding attempted constitutional amendments to be unconstitutional, see Colón-Ríos, above n 11; and

opinion can galvanise popular opinion, the judiciary's lack of formal mechanisms through which to enforce their opinions, along with their reliance on the state for their appointments and upkeep, indicate that the judiciary is impotent when constitutional actors lose respect for their rulings.

Likewise, “the people”, whose popular mobilisation was so significant in bringing about Magna Carta and the rise and fall of the various French revolutionary governments, now lack power vis-à-vis the state. Maduro has bound the military to his regime, placing top generals in charge of departments overseeing resource production and distribution, making them a stakeholder in his regime's survival.<sup>164</sup> If we take the opposition to better reflect the *autorité constituante* (or perhaps the general will) of the Venezuelan people, it is apparent that, under conditions such as in Venezuela, there can be no effective manifestation of the political unity's desire as to the form of their polity. This emphasises the stark reality that, during political ruptures, power will often determine the constitutional order. If Maduro's position is dependent on military support, then the question of whose will is reflected in the constitutional order is identical to the question of who has the greatest armed strength. Equally, if the military were to defect from Maduro's cause, he would be left at the mercy of the armed majority, demonstrating that the control of armed force is central to the question of who can command (both utilise and direct) the *pouvoir constituant*.<sup>165</sup> Given, the dizzying might that states can bring to bear against their enemies, it is arguable that the idea that popular mobilisation can overturn a constitutional order in the face of governmental opposition is anachronistic. This reveals an axiomatic proposition, highly applicable to the exercise of the *pouvoir constituant*: those who are willing are not always able, whilst those who are able are not always willing.

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Yaniv Roznai “Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea” (2013) 61 Am J Comp L 675.

164 Brodzinsky, above n 155; and Jonathan Watts “Venezuela on the brink: a journey through a country in crisis” *The Guardian* (online ed, London, 11 October 2016).

165 Given the Venezuelan military's political history, it is entirely possible that this may take place. See Borger, above n 144.

Finally, the crisis shows how governments and leaders (all members of the *autorité constituée*) can manipulate public sentiment and the process. Remember that scholars carefully distinguish between the *constituant* and the *constitué* and that the latter is limited in its ability to alter the constitutional order. The Venezuelan crisis demonstrates the power possessed by political figures to influence the process by which the *pouvoir constituant* is exercised. Although it would be tempting (and it is certainly possible) to dismiss the Venezuelan National Constituent Assembly as an exercise of the delegated constituent power, or of the *pouvoir constitué*, because of Maduro's influence over the process, such a position is problematic. Essentially, that position relies on drawing a line, beyond which the influence of the *autorité constituée* is so significant that the exercise ceases to be one of true constituent power. As we have seen, that line is not easy to draw and ignores the arguments that legitimacy might be obtained by otherwise procedurally incorrect methods. Until the crisis has played out, it is hard to determine whether Maduro's manipulation of the Assembly is an act that transforms any draft constitution from an exercise of the *pouvoir constituant* into an exercise of delegated constituent power or the *pouvoir constitué*. If, somehow (and however unlikely), the draft is legitimated by the people, few will likely care about the manipulation and any distinction it creates as to the quality of the power exercised. This demonstrates the contextual nature of the exercise, which the theory tends to ignore or downplay.

#### ***IV What can be Learned about Constituent Power from its Practice?***

The examples provided demonstrate that an understanding of the *pouvoir constituant* focusing entirely on legal or procedural matters to determine whether an exercise of constitutive power is legitimate (or acceptable to the people) is incomplete. The preceding analyses show that constitutive acts may be legitimate or illegitimate for reasons distinct from the procedure utilised. Equally, the power's scope to enact the desired form will depend less on the ability to convince people that there is an obligation to which they should adhere, than on one's ability to enforce obligations.

This final section pulls these threads together; arguing that the examples demonstrate that adherence to Sieyès and Schmitt's theory is possible only where the people involved adhere to a model of good faith politics. Good faith politics being predicated on some form of social contract, this part concludes that, unless the *pouvoir constituant* is exercised per a social contract, Sieyès and Schmitt's theory undermines the democratic foundations on which it is built because it allows the intrusion of power and compulsion.

If Sieyès and Schmitt premise the *pouvoir constituant*'s legitimacy on a requirement that it be exercised as a democratic power, then its exercise is premised, not only on adherence to procedure, but on the continuation of the social contract. Even where the legal and political orders break down, if the social contract remains intact, the constitutive process can be constrained by the parties' good faith. But if this contract breaks down – if the society enters the state of nature – the *pouvoir constituant* is unmediated. The power is unmediated, legally (because there is no legal order) and practically (though it is still constrained by the ability of groups to enforce their views on others). This is my criticism of the *pouvoir constituant*'s characterisation as a revolutionary power: in such exceptional circumstances as revolutions, the foregoing examples demonstrate that the exercise carries an increased risk that the power will be exercised contrary to the democratic principles upon which its exercise is premised.

Under normal circumstances, where the political and legal orders retain respect and legitimacy, the people have an outlet to be heard and disputes regarding the constitutional order can be mediated by a judiciary. In such cases, constitutional change is likely to proceed slowly, by progressively convincing people that change is desirable. Where change does occur rapidly, the *autorité constituante* will be constrained by the parties' good faith – the power will be limited by what each party can convince the others to accept. Conversely, the power's revolutionary exercise tends towards a Hobbesian state of nature wherein personal, or in-group, interests and relationships (as opposed to broader societal interests) dominate. The absence of a political or legal order to mediate disputes between such groups

allows conflict to proliferate. At the point of legal and political rupture, the state becomes anomic; without the norms embodied in a social contract, proper discourse cannot take place and the power to create constitutional, legal and political orders devolves to those able to command the greatest force.

Whilst good faith characterises interactions under a social contract, self- or in-group interests characterise the (nearly) anomic state of nature. The governing social norm appears to be more Hobbesian than Rousseauian. Rousseau's general will requires cooperation between disparate groups within society, which in turn requires a degree of good faith and trust between them. If factions believe that others harbour malicious intent towards them, it is unlikely that they will be willing to negotiate – to lower one's guard could be fatal. As such, Rousseau's general will, upon which Sieyès and Schmitt's theories rest, is unascertainable in the state of nature. Hobbes's view, meanwhile, is more concordant with our observations: his state of nature is premised on competition and the ability of each group to enforce their will on others – it is a “war of all against all”.

Herein lies my issue with Sieyès and Schmitt's conception of the *pouvoir constituant* as revolutionary: if it is exercised as a revolutionary power, the risk that the power will be exercised contrary to the social contract increases. The absence of a political or legal order to mediate factional self-interest allows conflict to proliferate. Where social order and cohesion break down and where there is no higher authority to mediate disputes, there is a greater risk that *potentia*, not *auctoritas*, will be the basis for the new constitutional order. Furthermore, the exercise of force to coerce compliance is not in the democratic spirit that Sieyès and Schmitt envisage – after all, how is a coerced “choice” a true choice? Even where a referendum is held in accordance with Schmitt's second step, threatening dissenting voters with punishment destroys any pretence of a free and democratic process. The breakdown in the social contract destroys any certainty that the exercise of the *pouvoir constituant* will reflect the matrix described in part II.

The French Revolution provides the clearest example of how factional political interests affected the constitutional order. Not only was power

exercised as *potentia*, it was exercised by factions at the *locus* of power – to the exclusion of more geographically distant factions (such as the counter-revolutionary forces in the Vendée) – and was exercised in response to immediate interests as opposed to questions concerning the constitutional order. In Venezuela too, we see the preponderance of political considerations as influencing legitimacy. Given that the current crisis is largely political in its origins and ongoing practice, the result will largely be determined by which faction is able to enforce its will.

Additionally, comparing Magna Carta with Venezuela demonstrates the subjectivity and ideological nature of the *pouvoir constituant*: one must believe they have a right to wield constitutive power, a belief that will be informed by political ideologies present. The barons regarded themselves as an *autorité constituante* because their centrality to the English state and their immediacy in the feudal hierarchy to the monarch made their interests, and thus voices, paramount. This proximity gave them a belief in their right to be heard by the monarch and the right to influence the state's structure. Conversely, in democratic (or nominally democratic) societies, the people are the subject of the *pouvoir constituant*.

Magna Carta also demonstrates how non-procedural elements can affect a constitutional order's legitimacy. The acceptance of Magna Carta as a constitutional convention coincided with the reestablishment of the social contract between the king and his barons. Whilst Magna Carta's creation and attempted enforcement over the monarch was not procedurally correct, the order it created could be legitimated by the perception that its breach entailed consequences. Similarly, the legitimacy of the French revolutionary constitutions largely stood upon their creator government's ability to appease Parisians' needs and ensure the stability necessary to re-establish a social contract. The procedural incorrectness of most of the constitutional orders appears to have been largely secondary to popular politics and factional violence within Paris. Likewise, in Venezuela, the political machinations of the Maduro Government have likely poisoned the process (and the people's perceptions of the opposing factions) such that no procedural correctness can save the exercise. Furthermore, the highly political nature of the underlying



dispute points towards politics and away from procedure as having a significant impact on the exercise's legitimacy.

The practice of the *pouvoir constituant* can be summarised thus:

- (1) During a revolutionary exercise, absolute legal power (sovereignty) is exercised as *potentia*, not *auctoritas* – a violation of the democratic principles of the theory.
- (2) The revolutionary (as opposed to the progressive) exercise of constituent power risks the destruction of the democratic basis on which the power is premised.
- (3) The power, as exercised by “the people”, is exercised by those proximate to the *locus* of power.
- (4) Immediate concerns, directed at the political order, are more indicative of legitimacy than questions of the constitutional order's procedural legitimacy; and
- (5) Legitimacy is underlain by non-procedural considerations.

## V Conclusion

The theory of constituent power lacks foundation in practice and the insistence that the *pouvoir constituant* cannot be legally restrained obscures the larger picture of how the power is truly exercised. This paper has made three principle arguments: first, Sieyès and Schmitt premise the power's unconstrained nature on its adherence to determinate procedural requirements inherent in its nature. Secondly, even where these procedures are followed, reality does not demonstrate the results they predict; rather, such outcomes may occur for other reasons. Finally, the exercise of the *pouvoir constituant* in revolutionary circumstances negates the theory's democratic presuppositions, subjecting the outcome of the power's exercise to an ochlocratic process or to the rule of the *mobile vulgus*. It therefore follows that the modern literature that seeks to legally restrain the power proceeds from the misapprehension that its practice mirrors the underlying theory. Instead of focusing on legal limitations, theorists should concentrate on ensuring that exercises of the *pouvoir constituant* are consistent with underlying social contracts. To ensure a democratic result, theorists should

distance constituent power from revolutionary constitutive acts, advocate for its peaceful use and take a closer look at purported exercises of the power – examining how power was wielded – before pronouncing upon a new constitutional order’s legitimacy.

Sieyès and Schmitt’s theory risks undermining its democratic foundations. By giving the people the highest legal authority to change constitutional orders, they have given the people the imprimatur to destroy democracy in the name of political preference. This paper demonstrates that the purely juridical understanding of the *pouvoir constituant* inflates the power’s apparent potential. It demonstrates that the power resides where the people believe, or want it to; its potential is illusory – a shadow. Yet small things may cast large shadows and the theory of constituent power has, indeed, cast a long shadow over democratic constitutionalism.

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