Natural rights, constituent power, and the Stain of Constitutionalism

Abstract

The power to make constitutions (the so-called constituent power) is predominantly understood today as a legally unlimited power belonging to the people. This understanding sits uncomfortably with constitutionalism: the idea that public powers are legally limited. Would such a power not leave an indelible blemish on constitutions that are otherwise committed to constitutionalism? This article shows that this problem, which I call the Stain of Constitutionalism, stems from a misapprehension of what constituent power was originally understood to be. Focusing closely on the writings of Emmanuel Joseph Sieyès, Thomas Paine, and the Marquis de Condorcet, I demonstrate that, far from adopting it, these founding fathers of constituent power theory rejected the notion of unlimited constituent power. Instead, they defended a natural rights approach according to which constituent power is legally limited by considerations such as freedom and equality.

Keywords

Constituent power, natural rights, natural law, Emmanuel Joseph Sieyès, Thomas Paine, Marquis de Condorcet

Introduction

Constitutionalism is generally understood as the idea that public powers are legally limited.[1] However, according to a dominant view, constitutions themselves spring from a public power that is not itself legally limited.[2] That power is the constituent power: the power to make constitutions, which is commonly regarded as belonging to the people, who in turn usually delegate it to constituent assemblies. This view has given rise to a problem: how can constitutionalism – the 'antithesis of arbitrary rule'[3] – be founded on a legally unlimited public power? Can constitutions really be created by an *un*constitutionalist power? Or would this amount to an original sin leaving an indelible blemish on constitutions that praise themselves for embracing

[1] See eg Wil Waluchow, 'Constitutionalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2018, Metaphysics Research Lab, Stanford University) <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>.

[2] See eg Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 126–128; Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12 Constellations 223, 226; Gabriel L Negretto, 'Constituent Assemblies in Democratic Regimes: The Problem of a Legally Limited Convention' in Jon Elster and others (eds), *Constituent Assemblies* (Cambridge University Press 2018). See also Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 International Journal of Constitutional Law 101, 102; Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017) 31.

[3] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund 1947) 21.

constitutionalist values such as human rights, democracy, and the rule of law? I will refer to this issue as the Stain of Constitutionalism.[4]

With the global rise of populism,[5] the Stain of Constitutionalism has gained practical urgency as populist invocations of absolute constitution-making powers have become more frequent.[6] For example, in 2017, Nicolás Maduro invoked the people's constituent power for an executive power-grab in Venezuela. Tellingly referring to constituent power as the 'super power',[7] he created a Constituent Assembly with unlimited powers.[8] That Assembly then declared itself superior to all other institutions and usurped the legislative powers from the opposition-led congress.[9]

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[4] See on the tension between constitutionalism and constituent power also Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Maurizia Boscagli tr, University of Minnesota Press 1999) 10–11.

[5] See Thomas M Meyer and Markus Wagner, 'The Rise of Populism in Modern Democracies' in Robert Rohrschneider and Jacques Thomassen (eds), *The Oxford Handbook of Political Representation in Liberal Democracies* (Oxford University Press 2020).

[6] See eg José Ignacio Hernández G, 'Pursuing Constitutional Authoritarianism (Symposium on "Venezuela's 2017 (Authoritarian) National Constituent Assembly")' (*ICONnect*, 1 September 2017) <http://www.iconnectblog.com/2017/09/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblyjose-ignacio-hernandez-g/>.

[7] Mariana Zuniga and Harriet Alexander, 'Venezuela Rocked by Deadly Protests during Controversial Election for "Super Power" Assembly' *The Telegraph* (30 July 2017) <https://www.telegraph.co.uk/news/2017/07/30/venezuela-votes-controversial-election-super-power-assembly/>.

[8] Hernández G, 'Pursuing Constitutional Authoritarianism (Symposium on "Venezuela's 2017 (Authoritarian) National Constituent Assembly")' (n 6) 4.

[9] Joshua Goodman and Fabiola Sanchez, 'New Venezuela Assembly Declares Itself Superior Government Branch' *Chicago Tribune* (8 August 2017) <https://www.chicagotribune.com/nation-world/ct-venezuela-political-assembly-20170808-story.html>.

Although they have taken issue with some of these developments, many scholars today accept the view that underpins them: that the constituent power is held by the people and that this power is absolute.[10] Elsewhere, I have referred to this view – which has become dominant in the wake of renewed interest in Carl Schmitt's writings – as the Popular Account of Constituent Power.[11] Among the scholars who have defended this Account is Andreas Kalyvas who views constituent power as the people's revolutionary and exceptional power to posit a new constitutional order independently of any pre-existing legal norms.[12] Kalyvas, whose work has sought to trace the intellectual history of constituent power, contends that '[t]his supreme instituting power attained its full theoretical formulation and conceptual content in the revolutionary writings of Thomas Paine and Emmanuel Sieyès. It erupted on the political scene with the invention of modern constitutionalism' in the American and French Revolutions.[13] Although Kalyvas admits that it sounds 'surprising', he insists that the notion of a revolutionary

[10] See eg David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest Law Review 859, 867; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 108; Jon Elster and others, 'Introduction' in Jon Elster and others (eds), *Constituent Assemblies* (Cambridge University Press 2018) 4; Negretto, 'Constituent Assemblies in Democratic Regimes: The Problem of a Legally Limited Convention' (n 2) 36, 45, 53. Colón-Ríos argues that, at least when it is exercised through a constituent assembly, constituent power is limited by the people's commission: Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press 2020) 263. Some scholars are critical of the concept of constituent power or reject it altogether: see for an overview and a critical account Sergio Verdugo, 'Is It Time to Abandon the Theory of Constituent Power?' (13 July 2022) <https://papers.ssrn.com/abstract=4162160>.

[11] See [reference anonymised] and note 2 above. See also Joel Colón-Ríos, 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia' (2011) 18 Constellations 365; Colón-Ríos, *Constituent Power and the Law* (n 10) 3.

[12] Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (n 2) 226–228.

[13] ibid 226.

and legally unbounded constituent power is not only compatible with the constitutional state, but 'one of the main foundations of modern constitutionalism and public law'.[14]

In this article, I break with this view. What really 'erupted on the political scene' in the late eighteenth century, I argue, was a conception of *limited* constituent power based on natural rights. Contrary to what its relative absence from current debates might suggest, the natural rights tradition of constituent power – as I will call it – was no mere flight of fancy of peripheral figures. Rather, leading thinkers and political actors such as Sieyès, Paine, and the Marquis de Condorcet – the three authors on whom this article will focus – adopted the natural rights tradition and thereby rejected the notion of normless constitution-making. *Pace* Kalyvas, then, the conception of constituent power developed by the founding fathers of constituent power in the eighteenth century was not the now-orthodox one that constituent power is legally absolute. Instead, the original conception is the natural rights tradition's conception of limited constituent power.[15]

According to this conception, constituent power lies at the heart of a broader natural rights framework. A central element of that framework, on which this article will focus, is the protection and optimisation of natural rights – above all freedom and equality – which was taken to be the end for which constitutions are created and which they need to serve to remain

[14] Andreas Kalyvas, 'Constituent Power' in JM Bernstein, Adi M Ophir and Ann Laura Stoler (eds), *Political Concepts: A Critical Lexicon* (Fordham University Press 2018) 107.

[15] This is not to say that there were no other constituent power theories at the time. For example, Jean-Jacques Rousseau's theory is sometimes invoked as a theory that is antithetical to Sieyès's, see eg Colón-Ríos, *Constituent Power and the Law* (n 10) 29–55. While there were certainly differences between these theories, it is worth noting that Rousseau, too, held that the social contract is not allowed to violate natural law: Jean-Jacques Rousseau, *Lettres écrites de la montagne* (Marc Michel Rey 1765) sixième lettre, 296. I am grateful to [anonymised] for this pointer.

constitutions. Although the thinkers I will discuss did not explain how exactly they understand natural rights, we can detect two ideas in their accounts that are familiar to us today. First, they conceptualised natural rights broadly as principles, in the way more recent natural law thinkers understand rights. Natural rights, on this view, are 'requirement[s] of justice'[16] 'commanding that something be realised to the highest degree that is actually and legally possible'.[17] Second, in many of the tradition's accounts, we can detect what would today be called an interest-approach to rights, on which rights are understood to protect the interests of individuals.[18]

On the natural rights tradition, individuals do not abandon their natural rights when entering civil society, nor transfer them to a sovereign. Instead, they retain these rights in society, and it is the government's task to respect them. To use Dan Edelstein's distinction, the natural rights tradition followed what he calls the 'preservation' regime of natural rights. According to this regime, natural rights are not left behind in the state of nature, as the 'abridgment regime' of natural rights would have it, illustrated for example by Thomas Hobbes's approach. Nor are natural rights handed over to a sovereign, as is the case in the 'transfer regime' that we find for instance in John Locke's theory. Rather, natural rights (or at least a majority thereof) are carried over into civil society where their normative salience is preserved.[19]

Importantly, the natural rights tradition not only takes *constituted powers* such as the legislative and the executive to be bound by natural rights, but also the *constituent power*. In Sieyès's influential definition, constituent power is the power of a nation (or people) to give

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[16] Ronald Dworkin, 'Taking Rights Seriously' (Duckworth 1977) 'The Model of Rules I', 22.

[17] Robert Alexy, 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 294, 295.

[18] For an overview see Matthew H Kramer, 'Introduction' in Matthew H Kramer, Simmonds Nigel E and Steiner Hillel (eds), *A Debate Over Rights* (Oxford University Press 2000) 1–2.

[19] Dan Edelstein, *On the Spirit of Rights* (The University of Chicago Press 2019) 2. The distinction between the different regimes is not always clear-cut and can be gradual, see ibid 55.

itself a constitution.[20] The constitution here is understood as a formal, written document that rationally organises the constituted powers and that is preceded by a declaration of man's natural rights.[21] In the natural rights tradition, constituent power, much like constituted powers, is seen as a public power, that is, a power serving the public interest of protecting freedom and equality. And like all other public powers, it is thus necessarily constrained by that goal. This is why, in the natural rights tradition, constitution-making shares important similarities with ordinary law-making and with acts of the judiciary and the executive: the role of all these bodies is to elucidate and give effect to individuals' rights.[22] However, constitution-making also differs from acts of constituted bodies in important ways: constitution-making is carried out by representatives other than the ordinary representatives of the people, it has no constitutional limits, and it sets the framework within which the constituted powers act. Perhaps the most distinctive feature of constituent power is that it identifies and elucidates people's natural rights

[20] Emmanuel Joseph Sieyès, *Political Writings* (Michael Sonenscher ed, Hackett Publishing 2003) 'What Is the Third Estate?', 136.

[21] The constitution's written character is implicit in Sieyès's and Condorcet's theories: see eg Emmanuel Joseph Sieyès, *Préliminaire de la Constitution françoise: reconnoissance et exposition raisonnée des droits de l'homme et du citoyen* (1789) 1–2; Christine Fauré, *Des manuscrits de Sieyès: 1773-1799*, vol 1 (Honoré Champion 1999) 534; François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 10 (Firmin Didot frères 1847) 'Sur l'étendue des pouvoirs de l'Assemblée nationale', 27-28. Paine makes it explicit: Thomas Paine, *Collected Writings* (The Library of America 1955) 'Rights of Man', 467-468. See also Guillaume Tusseau, 'The Evolution and Gestalt of the French Constitution' in Armin von Bogdandy, Peter M Huber and Sabrina Ragone (eds), *The Max Planck Handbooks in European Public Law: Volume II: Constitutional Foundations* (Oxford University Press 2023) 116–117.

[22] Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 508, 397–398. See also [reference anonymised] (n 11) 1103, 1115. In addition, constitution-making is similar to ordinary law-making in that constitutions are acts of positive law created by the people's representatives. See on Sieyès: Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 136, 139.

at the most general level. As such, exercises of constituent power are the first and most important step in the determination of rights, which constituted powers are then tasked to make more concrete within their spheres of authority.[23]

In the natural rights tradition, constituent power therefore does not stand outside or before constitutionalism. Rather, it forms part and parcel of the constitutionalist enterprise. As such, for adherents of that tradition, constitutionalism simply has no need to 'seek[] to eliminate constituent power as a category of constitutional thought',[24] as Martin Loughlin recently contended. To put it another way, there is no need to remove the Stain of Constitutionalism, for constitutionalism only looks blemished if we misapprehend what constituent power is. Once we see it in the light of the original, natural rights tradition, there is no longer a Stain that needs washing off.

One of the tradition's key features is that it takes natural rights to remain normatively salient in civil society not only in a moral but also legal sense. This means that, in this tradition, an exercise of constituent power that violates natural rights cannot only be qualified as illegitimate but also as legally invalid or null. As I will show, Sieyès, Paine, and Condorcet did not draw a sharp distinction between moral merit and legal validity, that is, between the law as it should be and the law as it is. This distinction, commonly referred to today as the separation

[23] See on this also the natural law literature on the concept of *determinatio*, eg John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1998) 266–274.

[24] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 86.

thesis,[25] was foreign to their thinking.[26] This is for two reasons. First, they were representatives of the Physiocratic tradition, which saw morality and legality (terms I use as synonyms for 'moral merit' and 'legal validity', respectively) as interconnected. Physiocracy (literally 'rule of nature'[27]) was characterised *inter alia* by its refusal to 'recognise any ontological, moral, or juridical distinctions between the state of nature and civil society'.[28] Physiocrats instead saw civil society as a gradual and rational progression from the state of nature.[29] Second, they adopted the preservation regime, according to which natural rights are not 'mere' moral values or principles that can be separated from law.[30] For preservationists, morality is not left at the doorstep of society, but rather continues to determine the law. This approach should be familiar to contemporary readers because the modern idea of human rights is based on the preservation regime:[31] human rights are generally not only seen as moral claims on the state. Rather, as the

[25] See generally Torben Spaak and Patricia Mindus, 'Introduction' in Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021) 7.

[26] For a helpful overview of the history of legal positivism in France see Michel Troper, 'The French Tradition of Legal Positivism' in Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021).

[27] TJ Hochstrasser, 'Physiocracy and the Politics of Laissez-Faire' in Mark Goldie and Wokler Robert (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press 2006) 419.

[28] Edelstein, *On the Spirit of Rights* (n 19) 76 (focusing on François Quesnay). See also ibid 98.

[29] [Reference anonymised] (n 11) 1112. See also Edelstein, *On the Spirit of Rights* (n 19) 139, 185–186.

[30] Contrast this with the transfer regime, in which rulers are constrained by '*positive* law', not 'unalienable rights': ibid 59 (emphasis in original).

[31] See ibid 2.

concepts of *jus cogens* and the Responsibility to Protect (R2P) illustrate, their violation can also affect the validity of a state's laws and its authority.[32]

But while the fact *that* they viewed legality and morality as intertwined cannot be questioned without ignoring the intellectual tradition they were a part of, one can still ask *how* they believed an exercise of constituent power that violates natural rights would affect the validity of constitutions created by that power. As we will see, Sieyès, Paine, and Condorcet at times came close to adopting the classic natural law maxim of *lex injusta non est lex*.[33] That is, they sometimes suggested that an unjust constitution is simply not a legally binding constitution. However, at other times, they appeared to distance themselves from this strong position and instead suggested that a law or constitution can still be a law or constitution despite violating natural rights.[34] Even then, however, they implied that there comes a point where they are so unjust that they no longer deserve to be called 'law' or 'constitution'. On this weaker position, which happens to correspond with how many natural law theorists understand the relationship

[32] See for an overview Luke Glanville, 'Sovereignty' in Alex J Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press 2016); Robert Kolb, *Peremptory International Law - Jus Cogens: A General Inventory* (Hart Publishing 2015) 4.

[33] This view dominated one of the most important works of French Enlightenment thought: the *Encyclopédie ou Dictionnaire raisonné des Sciences, des Arts et des Métiers* (1751-1772). See Joshua T Kirby, *Natural Law in the Encyclopédie (1751-1772)* (PhD thesis, University of Manchester 2014) 117–119. See specifically Louis Jaucourt, 'Loi', *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers* (Neufchastel 1765) 643, 644; Louis Jaucourt, 'Loi Civile', *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers* (Neufchastel 1765) 653, 654.

[34] This approach was adopted for example by François Quesnay, a leading Physiocrat: François Quesnay, 'Observations sur le droit naturel des hommes réunis en société' [1765] Journal de l'agriculture, du commerce et des finances 4, 10–11.

between law and morality today,[35] the legality of a constitutional system is a matter of degree: the less a constitution protects natural rights, the less of a claim it has to being called a 'constitution' and to being obeyed.[36] As I will show, it is safe to say that Sieyès, Paine, and Condorcet at least saw morality and legality as being connected in this weaker sense.

Studying the natural rights tradition represented by Sieyès, Paine, and Condorcet holds important lessons for us today because its proponents developed their constituent power accounts during a period of great political upheaval and populist discourse that finds some parallels in the present.[37] In that period, their theories pointed out ways of reconciling the protection of fundamental rights with the people's power to determine its own affairs. It is therefore all the more surprising how little attention this tradition has received in contemporary constituent power discourse. Even otherwise illuminating studies on constituent power such as Lucia Rubinelli's have neglected Sieyès's natural rights framework, despite the light it sheds on her own finding that Sieyès resisted viewing constituent power as an unlimited sovereign power.[38] In fact, not only Sieyès's theory, but natural rights and natural law theories more generally have been given short shrift by many constituent power theorists – if they have discussed them at

[35] See eg John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 10–11; Nigel E Simmonds, *Law as a Moral Idea* (Oxford University Press 2007) 52.

[36] This weaker approach was explicitly defended by Paul-Pierre Le Mercier de la Rivière (1719-1801) who influenced Sieyès, Paine, and Condorcet: Paul-Pierre Le Mercier de la Rivière, *L'ordre naturel et essentiel des sociétés politiques* (1767) 59–88. See Éric Gojosso, 'Le Mercier de la Rivière et l'établissement d'une hiérarchie normative: Entre droit naturel et droit positif' (2004) 20 Revue Française d'Histoire des Idées Politiques 61, 286.

[37] See Rebecca Dudley, 'Do You Hear the People Sing? Populist Discourse in the French Revolution' (2016) 33 Sigma: Journal of Political and International Studies 61.

[38] Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020) 50, 55–56.

all.[39] While it is beyond the scope of this article to develop a full-blown defence of the natural rights tradition, I will gesture in the conclusion towards how one could justify the adoption of the tradition in modern-day constitution-making processes.

Finally, a word about methodology. Sieyès, Paine, and Condorcet were neither the first, nor last, nor only ones to conceptualise constituent power by drawing on natural rights or natural law ideas.[40] However, there are three reasons that motivate this article's focus on these three thinkers. First, as noted, all three were Physiocrats and adherents of the preservation regime. Although their theories differed in numerous respects, they were united in their view of natural rights as something that individuals retain in civil society and that is the objective of civil society to protect. Second, Sieyès, Paine, and Condorcet were pivotal figures at a crucial moment in time: constitutionalism's dawn in the American and French Revolutions. Their

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[39] See eg Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (n 10) 80–82; Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52 Connecticut Law Review 1381, 1390–1394; Joel Colón-Ríos, 'Five Conceptions of Constituent Power' (2014) 130 Law Quarterly Review 306 (Colón-Ríos discusses Locke's and Lawson's 'right of resistance' account of constituent power, but explicitly distinguishes it from Sieyès's and Paine's 'popular sovereignty' account); Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (n 2) 229; Martin Loughlin, 'Droit Politique' (2017) 17 Jus Politicum: Revue de Droit Politique 295, 334 (proposing to reformulate 'natural law' as 'droit politique'); but see also Loughlin, *Against Constitutionalism* (n 24) 33–34, 77–79, 87–93. Joel Colón-Ríos's important recent book stands out as a welcome exception: Colón-Ríos, *Constituent Power and the Law* (n 10) 72, 151–160.

[40] See eg Jean Bodin, *The Six Bookes of a Commonweale* (Kenneth Douglas McRae ed, Harvard University Press 1962) Book 1, 108, K; John Locke, *Two Treatises of Government* (Peter Laslett ed, 3rd edn, Cambridge University Press 1988) 362, para 141; Gabriel Bonnot de Mably, *Des droits et des devoirs du citoyen* (Kell 1789); Thomas Jefferson, *Political Writings* (Joice Appleby and Terence Ball eds, Cambridge University Press 2012) 'Letter to Francis W Gilmer', 143, 'Letter to James Madison', 596; Marquis de Lafayette, *Mémoires, correspondance et manuscrits*, vol 4 (II Fournier Ainé 1838) 36; Marquis de Lafayette, *Mémoires, correspondance et manuscrits*, vol 5 (II Fournier Ainé 1838) 445.

influence was not limited to widely read theoretical contributions and pamphlets,[41] but they also contributed practically to the dramatic constitutional shifts that occurred at the time by occupying central political posts.[42] Finally, they were not isolated players but intellectual collaborators.[43] Especially relevant for our purposes is that they all worked together as members of the National Convention's Constitutional Committee to design a republican constitution for France in 1792.[44] The draft they ultimately presented to the Convention – often referred to as the Girondin constitutional project –[45] especially bore the imprint of the Committee's

[41] See eg Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?'; Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (Oxford University Press 2008); and François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 6 (Firmin Didot frères 1847) 'Esquisse d'un tableau historique des progrès de l'esprit humain', 1.

[42] They were for example members of the French National Convention from 1792-1795: Assemblée nationale, 'Liste des députés de la Convention nationale, Révolution' <https://www2.assemblee-nationale.fr/sycomore/liste/(legislature)/3/(alpha)/true> 2 (Condorcet, who died in a prison cell in 1794, only served from 1792-1794). Sieyès even served in the French government as member of the Directory and Consulate: Jean-René Suratteau, 'Sieyès Emmanuel Joseph' in Albert Soboul (ed), *Dictionnaire historique de la révolution française* (Presses universitaires de France 1989) 982–986.

[43] On the journals they launched and ran journals together, see eg Christine Fauré, *Des manuscrits de Sieyès: 1773-1799*, vol 1 (Honoré Champion 1999) 445; Keith Baker, 'Politics and Social Science in Eighteenth-Century France: The Société de 1789' in JF Bosher (ed), *French Government and Society 1500–1850: Essays in Memory of Alfred Cobban* (Athlone Press 1973). On the political pamphlets they co-authored, see eg Bernard Vincent, 'Thomas Paine, ou les ambiguïtés de la référence américaine' in Michel Vovelle (ed), *Révolution et République: L'exception française* (Éditions Kimé 1994) 104. On the political associations they co-founded, see eg Mark Olsen, 'Enlightened Nationalism in the Early Revolution: The Nation in the Language of the Société de 1789' (1994) 29 Canadian Journal of History 23, 23.

[44] David Williams, *Condorcet and Modernity* (Cambridge University Press 2004) 268.

[45] See eg Giorgio La Neve, 'Thomas Paine's Influence on the Girondin Constitutional Project of 1793' (2018) 38 Parliaments, Estates and Representation 192.

chairman, Condorcet.[46] But, having been signed by all of them, it can still be read as a joint effort to demonstrate how natural rights constituent power could work in practice.[47]

The article is structured as follows. In the first section, I centre on Sieyès's account and show how he conceptualised constituent power as a power that is pre-determined by individuals' prior decision to enter society for the protection of their natural rights. The second section turns to Paine's theory, according to which the principles of natural rights determine the forms of the constitution, and thus how constituent power is to be exercised. The third section, finally, addresses Condorcet's theory. Informed by an optimistic belief in human perfectibility, Condorcet rejected the notion of absolute constituent power by viewing natural rights as enabling conditions for just law. A conclusion recapitulates the article's main insights and highlights the natural rights tradition's continuing relevance.

Pre-determined constituent power: Emmanuel Joseph Sieyès

Of the three constituent power theorists on whom this article focuses, Emmanuel Joseph Sieyès (1748-1836) is without a doubt the most well-known.[48] Even if he did not himself invent the

[46] Marco Fioravanti, 'From the People to the Constitution: Inventing Democracy during the French Revolution' (2015) 30 Journal of Constitutional History 51, 54.

[47] 'Plan de Constitution présenté à la Convention nationale les 15 et 16 février 1793, l'an II de la République (Constitution girondine)' (2007) <https://mjp.univ-perp.fr/france/co1793pr.htm>. Which is not to say that Sieyès and Paine agreed with all aspects of Condorcet's draft: Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press 2006) 162; Colón-Ríos, *Constituent Power and the Law* (n 10) 97 (footnote 108).

[48] Murray Forsyth, *Reason and Revolution: The Political Thought of the Abbé Sieyes* (Leicester University Press 1987) 3; William H Sewell, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyes and What Is the Third Estate?* (Duke University Press 1994) 2.

distinction between constituent and constituted powers, Sieyès is widely regarded as the founding father of constituent power theory.[49] Considering the prominence of his theory, it is surprising that it is often misinterpreted as a precursor to Schmitt's account on which constituent power operates in a normative vacuum and is thus unconstrained. For instance, Kalyvas claims that Sieyès 'inaugurated the doctrine of national sovereignty' by reducing constituent power to the 'national homogenous and organic subject, "la Nation", understood as a prepolitical community inhabiting a normless state of nature'.[50] To be sure, Sieyès's writings contained statements that made it sound as though he adopted an unbounded conception of constituent power. Perhaps the most-cited statement can be found in *Qu'est-ce que le Tiers état?* (1789) where he claimed: 'However a nation may will, it is enough for it to will. Every form is good, and its will is always the supreme law.'[51] As I have elaborated elsewhere,[52] this commonplace view overlooks that although Sieyès gave considerable discretion to the nation's constituent power, he did not regard it as normatively unbounded. Far from operating in a 'normless state of nature', his constituent power is limited and guided by natural rights. As he noted a few paragraphs before the above-cited passage: "Prior to the nation and above the nation there is only natural law".[53]

Sieyès's approach can best be understood if we focus on the central element of the natural rights tradition identified in the Introduction: natural rights are the end for which

[49] See Mikael Spång, *Constituent Power and Constitutional Order: Above, Within and Beside the Constitution* (Palgrave Macmillan 2014) 1–2. See also above note 15.

[50] Kalyvas, 'Constituent Power' (n 14) 102–103. See also Pasquale Pasquino, *Sieyès et l'invention de La Constitution En France* (Éditions Odile Jacob 1998) 49–52; Paul Bastid, *Sieyès et sa pensée* (Hachette 1939) 375–379.

[51] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 137-138.

[52] [Reference anonymised] (n 11).

[53] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 136.

constitutions are created. In his theory, natural rights serve as the objective of constitutions that justifies their creation. He makes this clear for example in *Reconnaissance et exposition raisonnée des Droits de l'Homme et du Citoyen* (1789): 'every social union, and consequently every political constitution, can have no other object than to guarantee, to serve, and to extend the rights of man living in society'.[54] To use Robert Alexy's term, Sieyès can thus be said to have understood natural rights as principles or 'optimisation commands':[55] norms that should be promoted to the greatest degree possible, while ensuring compatibility between different people's rights.[56] This was not merely a political or moral idea for Sieyès, but one that would have to be cast into law in the form of a declaration of rights, which he thought should precede every constitution. He continued accordingly, saying that the people's representatives in the French National Assembly 'must annunciate these rights, that a reasoned presentation of them in the form of a preamble must precede the constitution, that all political constitutions, without exception, must be preceded by the goals or objectives that all must strive to attain'.[57] The two

[54] Sieyès, *Préliminaire de la Constitution françoise: reconnoissance et exposition raisonnée des droits de l'homme et du citoyen* (n 21) 19 (my translation). See also Emmanuel Joseph Sieyès, *Vues sur les moyens d'exécution dont les représentants de la France pourront disposer en 1789* (1789) 12.

[55] Alexy, 'On the Structure of Legal Principles' (n 17) 295. See eg Sieyès, *Préliminaire de la Constitution françoise: reconnoissance et exposition raisonnée des droits de l'homme et du citoyen* (n 21) 6. This is not to say, however, that Sieyès (or Paine or Condorcet) adopted something like the proportionality test.

[56] See Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 472.

[57] Emmanuel Joseph Sieyès, *Reasoned Exposition of the Rights of Man and Citizen* (Oliver W Lembcke and Florian Weber eds, Brill 2014) 119.

most important natural rights, for Sieyès, were freedom and equality.[58] If they are fulfilled then everyone is able to 'find happiness'.[59]

Underlying Sieyès's natural rights account – and, as we will see, Paine's and Condorcet's – is the premise that human beings are creatures with certain needs.[60] This focus on needs as the 'true source of the rights of man'[61] suggests that Sieyès adopted what would today be called an interest-based rights approach because he took rights to be grounded in needs (ie interests).[62] Importantly, according to Sieyès, these needs or interests can only be met in civil society. As a Physiocrat, he emphasised the moral and legal continuities between the state of nature and civil society. Where Hobbes and others saw a rupture, he saw a natural and rational progression.[63] Individuals' needs, Sieyès argued, are better protected in civil society because society is 'a gain and not a sacrifice, and … should be regarded as a successor, as a complementary development to the natural order'.[64]

He distinguished three fictional epochs in the development of political associations to illustrate this point.[65] In the first epoch, individuals live atomistic lives. While they possess basic natural rights such as liberty and property, differences in intelligence and strength mean

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[58] ibid 120.

[59] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 153. See also Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 507–508.

[60] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 134; Pasquino, *Sieyès et l'invention de La Constitution En France* (n 50) 100.

[61] Emmanuel Joseph Sieyès, *Of the Gains of Liberty in Society and in the Representative System* (Oliver W Lembcke and Florian Weber eds, Brill 2014) 145.

[62] See above n 18.

[63] See [reference anonymised] (n 11) 1112.

[64] Sieyès, *Reasoned Exposition of the Rights of Man and Citizen* (n 57) 121.

[65] See Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 134-135.

that not all can meet their needs and be happy.[66] To overcome these inequalities and to fully realise their rights, individuals feel a natural pull toward forming an association by contracting with others. For Sieyès, the rational – and natural – reason for individuals to contract with one another is to better protect their natural rights. The guarantee of natural rights thus forms the foundation on which every association, and every nation, is built.[67]

This social contract takes individuals to the second epoch: civil society. Here, it is no longer individual wills that decide, but a common will is formed through cooperation and discourse. The common will decides on how to exercise public powers to meet the common interest. As Sieyès emphasises, the common interest should not be confused with Rousseau's general will. According to Sieyès, the general will is a universal and total will, whereas the common interest (or common will) only extends to protecting what individuals agreed to have in common: protection of their rights.[68] The common interest, for Sieyès, is thus not an abstract will, but simply an aggregate of individual wills: a *volonté de tous*, not a *volonté générale*.[69]

Sieyès anticipates that, with time, society will become too large, and its members will live too far away from each other to exercise their common will directly. To solve this problem,

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[66] Erwan Sommerer, 'Le contractualisme révolutionnaire de Sieyès: Formation de la nation et prédétermination du pouvoir constituant' (2011) 33 Revue Française d'Histoire des Idées Politiques 5, 7.

[67] See ibid 10.

[68] Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 466, 470.

[69] Oliver W Lembcke and Florian Weber, 'Introduction to Sieyès's Political Theory' in Oliver W Lembcke and Florian Weber (eds), *Emmanuel Joseph Sieyès: The Essential Political Writings* (Brill 2014) 19. Sieyès illustrates this point by drawing an analogy to Lycurgus's defensive 'wall' consisting of Spartan citizens as 'bricks': 'for me, it is the brick that is everything, the end of everything, the building itself is at its service': Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 471.

they commission representatives with the exercise of their common will.[70] The constituent power (*pouvoir constituant*) – itself delegated to the nation's representatives – marks the transition to this third and final epoch, in which majority decisions are taken by constituted bodies (*pouvoirs constitués*).

The fact that representation plays a vital role in Sieyès's theory has long been recognised.[71] Indeed, it is a feature that is, to a lesser extent, also mirrored in Paine's and Condorcet's theories and that helps emphasise the limited nature of constituent power.[72] What has received less attention, however, is that Sieyès believed that not only representatives lack the power to act outside the 'common affairs',[73] but also the nation itself lacks this power.[74] As he points out in *Opinion de Sieyès, sur plusieurs articles de titres IV et V du projet de constitution* (1795):

> When a political association is formed not all the rights of the members, and thus not the sum total of all the individuals' powers, come to be held in common. Rather what comes to be held in common under the name of public or political power is merely the necessary minimum: only that which is needed to enforce the rights and duties of each individual.[75]

Sieyès here follows in the tradition of other natural rights theorists adopting the preservation regime by arguing that (most) natural rights are preserved when individuals enter civil

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[70] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 134-135.

[71] See for a helpful overview Lucia Rubinelli, 'Of Postmen and Democracy: Sieyès's Theory of Representation' in Xavier Márquez (ed), *Democratic Moments: Reading Democratic Texts* (Bloomsbury 2018).

[72] I am grateful to an anonymous reviewer for this point.

[73] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 153.

[74] ibid 'What Is the Third Estate?', 142.

[75] Emmanuel Joseph Sieyès, *Sieyès's Views Concerning Several Articles of Sections IV and V of the Draft Constitution* (Oliver W Lembcke and Florian Weber eds, Brill 2014) 156. See also Rubinelli, *Constituent Power: A History* (n 38) 70–71.

society and create written constitutions. This is borne out by the fact that even the rights that individuals transfer to the society to be 'held in common' cannot license conduct on the part of the association that violates natural rights. As Raymond Kubben puts it, in Sieyès's theory '[t]he individual does not entirely submit to the political community, nor does he lose his natural rights. On the contrary, protecting and enhancing natural rights is the state's main aim and task'.[76] A corollary of this is Sieyès's understanding of public powers as powers that are legitimated, guided, and limited by the common (public) interest, that is, the protection and promotion of natural rights. Because the *raison d'être* of public powers is to serve the common interest, they cannot be exercised in violation of the common interest without ceasing to be *public* powers.[77] The notion of a public power wielding unlimited legal authority is only conceivable in a totalitarian system. But such a system, Sieyès held, would no longer be a '*ré-publique*' but a '*ré-totale*' – a form of government he vehemently opposed because of its harmful effects on the common interest.[78]

Crucially, Sieyès considered not only the *pouvoirs constitués* but also the *pouvoir constituant* to be a 'public or political power'.[79] This is because, like the former, the *pouvoir constituant* derives its existence from the common interest. Erwan Sommerer draws attention to this key point. As he emphasises, far from being a revolutionary and absolute power operating

[76] Raymond Kubben, 'L'Abbé de Sieyès: Champion of National Representation, Father of Constitutions' in Denis Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford University Press 2014) 296.

[77] Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 492–493.

[78] Sieyès, *Sieyès's Views Concerning Several Articles of Sections IV and V of the Draft Constitution* (n 75) 156.

[79] Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 432 (where he lists the 'mission constituante' as the first of six public powers).

in a state of normlessness, Sieyès's constituent power is itself 'predetermined'[80] by the prior decision of individuals (in the first epoch) to contract with one another to form an association to better protect their natural rights. As such, the constituent power, which emerges 'downstream'[81] of that earlier decision in the transition to the third epoch, is necessarily defined and limited by it. Simply put, the constituent power is limited by the natural rights norms guaranteed by the association, and its role is to institutionalise these natural rights through the constitution.[82] For Sieyès, then, the *pouvoirs constitués* are not the only public powers that can act *ultra vires* and thus cease to be public powers. The *pouvoir constituant* can, too.

This is significant because it shows that Sieyès believed that public institutions that violate the common interest do not only act immorally but also go beyond their legal powers. As he put it in Article 13 of (his own unofficial) *Déclaration des droits de l'homme en société* (1789), 'all those who are tasked with executing the law, all those who exercise any other part of authority or of public power, *cannot have the power to infringe the liberty of citizens*'.[83] Sieyès's choice of language here and in other writings is telling:[84] he does not say that power 'should not' (*ne doit pas*) be exercised arbitrarily – language that would have suggested moral reprobation. Instead, he says that such power 'cannot'[85] (*ne peut pas*) be exercised in this way

[80] Sommerer, 'Le contractualisme révolutionnaire de Sieyès: Formation de la nation et prédétermination du pouvoir constituant' (n 66) 16 (my translation).

[81] ibid 14 (my translation).

[82] ibid 16–21.

[83] Emmanuel Joseph Sieyès, *Déclaration des droits de l'homme en société* (Baudouin 1789) 8 (my translation and emphasis).

[84] See eg also Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 465 (where he speaks of 'serait nul', not 'devrait être nul').

[85] ibid 493 (my translation).

– implying a lack of legal ability or authority. This is confirmed in Article 23, where he uses strongly legalistic language to make clear that commands that are arbitrary are 'null', and those helping to execute them are 'guilty' and 'must be punished'.[86] Importantly, he points out that citizens subjected to such commands would not be confined to moral condemnation while legally having to obey them. Rather, as he continued in Article 24, they 'have the right to repel violence with violence'.[87] As this suggests, for him, powers that are exercised in ways that are arbitrary because they exceed their competence cannot only be challenged as being immoral, but also as being *ultra vires* and therefore lacking legal authority.[88] Strikingly, even after the Reign of Terror, Sieyès continued to believe in the normative salience of natural rights in civil society. This is reflected for example in the fact that his 1795 proposal for a *jury constitutionnaire* (constitutional jury) specifically envisaged that one of the functions of that institution was to safeguard the rights of man by applying natural law directly to cases where there was a gap in the positive law.[89]

To be sure, because Sieyès never developed a jurisprudential theory on the relationship between law and morality, it is difficult to determine for certain whether he believed in the stronger natural law position according to which even minor violations of natural rights would lead to illegality. However, read against the background of his Physiocratic and preservationist views, the above-mentioned arguments and statements give us reason to be confident that he rejected the view that natural rights cannot have *any* implications on the legality of a constitution. That is, he at least adopted the weaker conception on which a constitution created by

[86] Sieyès, *Déclaration des droits de l'homme en société* (n 83) 10 (my translation).

[87] ibid 10 (my translation).

[88] See Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 465, 510–511.

[89] Marco Goldoni, 'At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power' (2012) 32 Oxford Journal of Legal Studies 211, 223–225.

constituent power can suffer a lack of legal authority to the degree that it fails to protect natural rights.

Despite the many commonalities that the subsequent sections will identify in Sieyès's, Paine's, and Condorcet's theories of constituent power, Sieyès's differs from the latter two in several ways. One distinctive feature of Sieyès's theory is its strong emphasis on representation and its scepticism of direct popular involvement.[90] Whereas, as we will see, Condorcet and Paine supported citizen participation in shaping and re-shaping the constitution, Sieyès resisted it. Instead, he argued that the French people were 'too numerous and widely dispersed'[91] to exercise constituent power themselves and would thus have to commission representatives with its exercise in a constituent assembly. In addition, although in early work he seemed open to the possibility of submitting the draft constitution produced by the assembly to the people for a vote,[92] he later firmly opposed the idea of referendums,[93] and did not object to the Constitution's ratification by the French National Convention rather than by referendum.[94]

As this overview of Sieyès's theory of constituent power has revealed, he did not conceptualise constituent power as a revolutionary, absolute, and unbounded power. Rather, he saw constituent power as normatively constrained by natural rights. On his account, the Stain of Constitutionalism is washed off – or rather does not appear in the first place – because the

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[90] Stéphane Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' [2011] VIIIème Congrès national de l'AFDC: la circulation du droit constitutionnel 14.

[91] Sieyès, *Political Writings* (n 20) 'What Is the Third Estate?', 134.

[92] See Rubinelli, *Constituent Power: A History* (n 38) 57; Fauré, *Des manuscrits de Sieyès: 1773-1799* (n 21) 493.

[93] Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press 2015) 143; Emmanuel Joseph Sieyès, *Dire de l'abbé Sieyès, Sur La Question Du Veto Royal, à La Séance Du 7 Septembre 1789* (Baudouin 1789) 17.

[94] See Kalyvas, 'Constituent Power' (n 14) 103.

constituent power is not an unlimited power. Instead, like all other public powers, its scope of discretion is pre-determined by the association's purpose of protecting and promoting the rights of man. Sieyès thus developed a cogent conception on which constituent power is not in tension with constitutionalism, but is of a piece with it.[95]

Form follows principle: Constituent power in Thomas Paine's work

Thomas Paine (1737-1809) made a name for himself as an international revolutionary and writer of the singularly influential pamphlets *Common Sense* (1776) and *Rights of Man* (1791/1792).[96] These and other works of his are not often read as part of the constituent power canon.[97] However, as we will see in this section, there is no doubt that the Englishman developed in them a constituent power account that is worth taking seriously.

That Paine drew the distinction between constituent and constituted powers becomes clear in *Rights of Man*, the political text in which he defended the French Revolution against the Irish conservative Edmund Burke.[98] There, he refers to the nation's power to form its own constitution as the 'original constituting power'.[99] Paine also introduced a distinction equivalent to that between constituent and constituted powers when differentiating the nation in its

[95] See also Pasquale Pasquino, 'The Constitutional Republicanism of Emmanuel Sieyès' in Biancamaria Fontana (ed), *The Invention of the Modern Republic* (Cambridge University Press 1994).

[96] Mark Philp, 'Thomas Paine' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2021, Metaphysics Research Lab, Stanford University) <https://plato.stanford.edu/archives/fall2021/entries/paine/>.

[97] For a notable exception see eg Kalyvas, 'Constituent Power' (n 14) 100.

[98] Edmund Burke, *Revolutionary Writings: Reflections on the Revolution in France and the First Letter on a Regicide Peace* (Iain Hampsher-Monk ed, Cambridge University Press 2014).

[99] Paine, *Collected Writings* (n 21) 'Rights of Man: Part Two', 579.

'*original* character' from the nation in its '*organised* character'.[100] Applying this distinction to the French National Assembly, he argued that the Assembly's members are delegates of the nation in its original character. As such, he argued, they represent the people in the social contract and exercise their constituent power, by creating a written constitution that can be 'quote[d] article by article'.[101] By contrast, future (legislative) assemblies would operate under the constitution created by the National Assembly and thus represent the nation in its organised character, exercising constituted powers.[102]

Importantly for our purposes, Paine was not only a constituent power thinker, but he was also a *natural rights* constituent power thinker. To understand this, it is again helpful to focus on the central element of the natural rights tradition mentioned above: natural rights serve as the end of constitutions. This defining element is encapsulated in a dictum Paine advanced when contemplating the new French constitutional system at the time: 'Forms grow out of principles, and operate to continue the principles they grow from'.[103] According to Paine, the *forms* of the constitution are not arbitrary – or at least they should not be. A flourishing constitution can only grow from fertile soil, that is, from the right *principles*. In his theory, the right principles are the principles of natural rights, in particular individual freedom and basic equality.

Paine's theory is similar to Sieyès's (and as we will see Condorcet's), first, because it understands natural rights broadly as principles in the sense outlined above, that is, as

[100] ibid 'Rights of Man', 469 (emphasis in original).

[101] ibid 'Rights of Man', 468.

[102] See also Jack Fruchtman Jr, *The Political Philosophy of Thomas Paine* (Johns Hopkins Univerity Press 2011) 98.

[103] Paine, *Collected Writings* (n 21) 'Rights of Man', 489.

requirements of justice that society ought to advance as much as possible.[104] Second, Paine, too, took rights to derive from human interests, similar to how interest-based theorists understand rights today.[105] And, third, he also took natural rights to serve as the goal and justification of constitutions.[106] This latter idea is perhaps put most plainly in Article 2 of the Declaration of the Rights of Man and the Citizen (DRMC; 1789), which Paine viewed as one of its cornerstone articles and which he annexed to *Rights of Man*:[107] 'The end of all political associations is the preservation of the natural and imprescriptible rights of man'.[108]

Like Sieyès, Paine arrived at this foundational role of natural rights by way of a fictional story of individuals contracting with each other to protect their interests. And like Sieyès's, Paine's story can also be divided into three stages.[109] In the first stage – the stage of natural liberty – we encounter a small number of individuals who possess equal natural rights. These rights, he holds, appertain to human beings not because of sovereign fiat, but because of humans' God-given nature – an idea that is rooted in Paine's Quaker upbringing, as we will see below.[110] However, as he points out, while men in the state of nature are 'equal in rights' they

[104] See above 5. See eg ibid 'Rights of Man', 462-465. See also Robert Lamb, *Thomas Paine and the Idea of Human Rights* (Cambridge University Press 2015) 29.

[105] See eg Paine, *Collected Writings* (n 21) 'Rights of Man: Part Two', 598. See also Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 67.

[106] See Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 26.

[107] Paine, *Collected Writings* (n 21) 'Rights of Man', 508.

[108] ibid 506 (emphasis removed).

[109] Although he did not always tell it in three stages: see eg ibid 'Letter to Thomas Jefferson', 368-369.

[110] Fruchtman Jr, *The Political Philosophy of Thomas Paine* (n 102) 87–89.

are 'not equal in power',[111] and the weaker ones are thus in danger of being dominated.[112] This leads individuals to form a society, and thus to enter the second stage.

This second stage of life in society is characterised by individuals who are 'perfectly just to each other'[113] and fully reciprocate the rights of others. In contrast to more complete adherents of the preservation regime, Paine holds that not quite *all* natural rights are carried over into society. Rather, he introduces a distinction between perfect and imperfect natural rights. Perfect natural rights are the rights which persons are naturally capable of exercising without external aid. According to Paine, this is the case for intellectual rights such as freedom of thought, speech, religion, the right to vote, as well as the 'rights of acting as an individual for his own comfort and happiness'.[114] Imperfect natural rights, by contrast, are rights which individuals cannot exercise and defend without assistance. Because such rights can only be properly held in society, Paine also calls them 'civil rights or rights of Compact'.[115] The right of man to 'judge in his own cause', that is, to punish others, is the one right Paine mentions in this context.[116] Upon entering society, he argues, individuals only retain their perfect natural rights. Imperfect natural rights are given up in exchange for public protection of individuals' needs.[117]

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[111] Paine, *Rights of Man, Common Sense, and Other Political Writings* (n 41) 'Dissertation on First Principles of Government', 403.

[112] Fruchtman Jr, *The Political Philosophy of Thomas Paine* (n 102) 91.

[113] Paine, *Collected Writings* (n 21) 'Common Sense', 7.

[114] ibid 'Rights of Man', 464-465; Paine, *Rights of Man, Common Sense, and Other Political Writings* (n 41) 'Dissertation on First Principles of Government', 397.

[115] Paine, *Collected Writings* (n 21) 'Letter to Thomas Jefferson', 368.

[116] ibid 'Rights of Man', 465. See also Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 71.

[117] Paine, *Collected Writings* (n 21) 'Letter to Thomas Jefferson', 368-369.

Finally, noting that 'nothing but heaven is impregnable to vice',[118] he argues that it is only a matter of time until some members of society neglect their duties toward others. In order to prevent rights violations to occur as a result, people move to the third stage: they establish government to remedy the defects of people's moral virtue.[119] It thus becomes the people's goal 'to establish a constitution' that protects their interests.[120]

According to Paine, 'the simple voice of nature and of reason'[121] will reveal to people that they can only secure their freedom, equality, and security if they enter society (second stage) and then create laws and a government (third stage). The *principles* of natural rights, on this account, naturally generate the *forms* that are best geared to protecting and optimising those principles. As he points out, natural rights provide not only the 'end of government', but also its 'just … design'.[122] To draw again on his dictum, the principles of natural rights are enshrined in the forms of the constitution, which then 'continue the principles they grow from'.[123]

As he maintained in numerous works, only republican constitutions can 'continue the principles' and meet the requirements of the third stage. That is, republics are the sole form of government in which people can flourish and be happy.[124] According to Paine, only republican governments are based on the social contract: 'the only mode in which governments have a

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[118] ibid 'Common Sense', 7.

[119] ibid 7–8.

[120] ibid 'Rights of Man: Part Two', 585, 572. See also Fruchtman Jr, *The Political Philosophy of Thomas Paine* (n 102) 98.

[121] Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 9.

[122] Paine, *Collected Writings* (n 21) 'Common Sense', 7.

[123] ibid 'Rights of Man', 489.

[124] Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 76. See also Paine, *Collected Writings* (n 21) 'The Forester's Letter III', 83.

right to arise'.[125] The reason for this is that, as Robert Lamb has emphasised, *consent* plays a key role in Paine's social contract account.[126] According to Lamb, Paine viewed the protection of natural rights as a necessary condition for public authority. However, it is not a sufficient condition. As Lamb argues, on Paine's account 'individuals are bound only to recognise the legitimacy of a *particular* government should they have authorised it through their consent'.[127] Political authority was therefore considered legitimate and imposed obligations on individuals if it guaranteed – in a way only republics could – the protection of individuals' rights *and* enjoyed their consent.[128] The key right to ensure this, according to Paine, is the right to vote, which allows individuals to choose the representatives they think best capable of defending their interests. This emphasis on representative democracy has parallels with Sieyès's. However, it is worth noting that, in contrast to the latter, Paine believed that equal freedom can best be achieved through annual elections that practically dissolve the boundary between representatives and represented.[129]

An important implication of Paine's argument is that public institutions lose their authority when they act outside or contrary to consent and rights. As he observed, '[m]an did not enter society to become worse than he was before, nor to have less rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights'.[130] More pertinently, he argued that civil, that is, public power 'is made up of the

[125] Paine, *Collected Writings* (n 21) 'Rights of Man', 467. See also ibid 'Letter to the Authors of The Republican', 379.

[126] Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 76.

[127] ibid 74 (emphasis in original).

[128] ibid 27, 56.

[129] ibid 86–91 (with one third of representatives being freshly elected every year).

[130] Paine, *Collected Writings* (n 21) 'Rights of Man', 464.

aggregate of that class of the natural rights of man … That … power produced from the aggregate of natural rights, imperfect in power in the individual, cannot be applied to invade the natural rights which are retained in the individual'.[131] In other words, public bodies are only empowered to act within the public good – the *res publica*.[132] Similar to how Sieyès's defined the common interest, Paine held that the public good is nothing other than the good of all individuals, consisting of respect for their consent and natural rights.[133]

Did Paine merely contemplate the loss of moral legitimacy – but not legal validity – of powers exercised in violation of the common interest? We have good reasons to believe he did not. First, although he submitted that individuals transfer some natural rights (the imperfect ones) to the sovereign, he argued that they keep the majority of natural rights (the prefect ones). As such, he was a proponent of the preservation regime on which, as we saw above, law and morality are seen as interconnected. Second, while he differed with Physiocrats on some economic matters,[134] he was a Physiocrat insofar as he saw civil society as a rational progression from the state of nature.[135] Third, he, too, used legalistic language when discussing arbitrary acts by public bodies. For example, discussing governments that deprive some of the right to vote, he noted that '[t]he proposal … to disfranchise any class of men is as *criminal* as the

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[131] ibid 465.

[132] See ibid 'Rights of Man: Part Two', 565. See also ibid 'Letter to the Authors of The Republican', 376-377.

[133] Thomas Paine, *Selected Writings by Thomas Paine* (Ian Shapiro and Jane E Calvert eds, Yale University Press 2014) 'Dissertations on Government, the Affairs of the Bank, and Paper-Money', 132.

[134] Gregory Claeys, *Thomas Paine: Social and Political Thought* (Routledge 1989) 98.

[135] See Richard Whatmore, '"A Gigantic Manliness": Paine's Republicanism in the 1790s' in Stefan Collini, Richard Whatmore and Brian Young (eds), *Economy, Polity, and Society: British Intellectual History 1750–1950* (Cambridge University Press 2000) 147–151; Frank W Garrison, 'Paine and the Physiocrats' [1923] The Freeman 205.

proposal to take away property'.[136] In a similar vein, in his critique of paper money as a threat to freedom and property,[137] Paine stated that an assembly which allows the issuance of such money 'assumes a *power unknown in civil government*, and commits *treason* against its principles',[138] adding that 'consequently the people *cannot be bound to obey a law* which abets and encourages treason against the first principles on which civil government is founded'.[139] Finally, Paine did not only draw that conclusion for unjust laws, but also more generally for unjust constitutions. He emphasised that governments that do not live up to republican values are 'unworthy of the name'[140] republic and, in some cases, amount to being governments of 'slavery'[141] rather than governments of law.

To be sure, Paine's rhetorically loaded style and the fact that he did not develop a full theory of law advise caution when it comes to passages such as the above-mentioned ones where he appears to adopt a strong natural law position, and to infer illegality ('criminal') from the immorality of an act or law. However, it would be implausible to claim that he denied *any* legal effect to natural rights. Like Sieyès, he did not distinguish strictly between morality and legality, nor draw a sharp line between the state of nature and civil society. Considering his preservationist approach and Physiocratic leanings, it would therefore be wrongheaded to assume that he nonetheless wanted to keep morality and legality separate, and simply forgot to

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[136] Paine, *Rights of Man, Common Sense, and Other Political Writings* (n 41) 'Dissertation on First Principles of Government', 398 (emphasis added).

[137] See generally Karen M Ford, 'Can a Democracy Bind Itself in Perpetuity? Paine, the Bank Crisis, and the Concept of Economic Freedom' (1998) 142 Proceedings of the American Philosophical Society 557.

[138] Paine, *Collected Writings* (n 21) 'Attack on Paper Money Laws', 365 (emphasis added).

[139] ibid 'Attack on Paper Money Laws', 365-366 (emphasis added).

[140] See ibid 'Letter to the Authors of The Republican', 376-378.

[141] ibid 'Rights of Man: Part Two', 588.

say so. Hence, it is reasonable to think that he at least endorsed the weaker natural law position on which constitutions cannot only have reduced moral legitimacy but also reduced legal authority to the extent that they fail to track the common interest and protect natural rights.

From the natural rights premises of Paine's account, we can also infer another fundamental point: he believed that not only government (the nation in its organised character) is legally bound by the ends set by individuals' consent and rights. The constituent power (the nation in its original character) is, too. Like Sieyès's story of the social contract, Paine's reveals that the decision to join society and to exchange certain natural rights for civil rights (the transition from stage one to stage two) is *prior to and pre-programmes* the formation of laws and government (the transition from stage two to stage three).[142] As such, the condition which individuals attach to their entering of society – the protection of their rights – necessarily serves as a constraint on all public powers that are downstream of that decision.[143] This includes not only the constituted powers, but also the constituent power, which only becomes relevant at the passage from the second to the third stage. Like the constituted powers, it is a power to act in the common interest, and only that.

Paine understood that the common interest does not dictate one specific form of government. As he emphasised, people must have some degree of choice in their form of government.[144] However, to him, that choice was not between republican and non-republican governments, but only between different forms of republican governments.[145] This is because a choice of the former sort would have conflicted with his more fundamental claim that only republics

[142] See also Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 64.

[143] See Paine, *Collected Writings* (n 21) 'Rights of Man', 467.

[144] See eg ibid 'Rights of Man', 438-439.

[145] Cf also Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 163–166.

have legitimate governments 'established and conducted for the interest of the public'.[146] As Lamb reminds us, in Paine's theory, '[n]o individual can legitimately consent to a political authority that will deny … any of his rights'.[147] And if one cannot deny one's own rights then, *a fortiori*, one cannot deny the rights of others. According to Paine, this included the rights of people who are not born yet. Because all humans are born equal in rights, he argued, current generations cannot legitimately bind future generations in ways that would violate their rights, such as by erecting a hereditary government that would deprive future humans of their political rights.[148] 'Wrongs', as he pithily put it, 'cannot have a legal descent';[149] even if – we can add – they derive from the constituent power.

The fact that Paine's theory accords natural rights a key role as the end of constitutions shows its kinship with Sieyès's and (as we will see in the next section) Condorcet's theory. This should not hide the fact, however, that there are aspects that distinguish Paine's account. One such aspect is the religious overtone that pervades his work. By contrast to Sieyès's and Condorcet's secular accounts of natural rights, Paine's account was inspired by his upbringing in a Quaker household. Drawing on the Quaker idea of a divine spark that is inherent in all humans and that makes all of us equal in the eyes of God, he insisted that it is not by convention that we hold natural rights, but by the grace of God.[150] Paine's Protestantism is not merely an inconsequential backdrop to our discussion. Rather, to draw on Barry Slain, it may have played an important role in Paine's adoption of the idea 'that a presocial right or privilege might be so

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[146] See also Paine, *Collected Writings* (n 21) 'Rights of Man: Part Two', 565.

[147] Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 65. Lamb plausibly grounds this view in an interest-based interpretation of Paine's rights approach.

[148] Paine, *Collected Writings* (n 21) 'Rights of Man', 462-463.

[149] ibid 518.

[150] Fruchtman Jr, *The Political Philosophy of Thomas Paine* (n 102) 87.

integral to the accepted goals of organised social life or essential to being fully human that it could be neither traded nor relinquished without nullifying those ends'.[151] As he observed in a footnote in *Rights of Man*, 'before any human institutions of government were known in the world, there existed … a compact between God and man, from the beginning of time'. According to him, 'all laws must conform themselves to this prior existing compact'[152] – and so must the constituent power.

As this section has shown, Paine's answer to the Stain of Constitutionalism is similar to Sieyès's: the Stain disappears once we stop viewing constituent power as an unlimited, unconstitutionalist power that can be exercised in arbitrary ways. This means that constituent power is not an expression of what Paine called 'sovereignty of Will'[153] – that is, despotic sovereignty. Instead, like all other public powers, it should be seen as being conditional upon respect for individuals' consent and natural rights and can only be exercised within those limits of justice.[154] Bound by *principles*, it ensures that the right constitutional *forms* grow from them. Importantly, however, like other adherents of the natural rights tradition, Paine also rejected the notion that *only* normative principles of justice matter.[155] Recognising the importance of

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[151] Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton University Press 1994) 321. See also Fruchtman Jr, *The Political Philosophy of Thomas Paine* (n 102) 10.

[152] Paine, *Collected Writings* (n 21) 'Rights of Man', 509.

[153] Paine, *Selected Writings by Thomas Paine* (n 133) 'Dissertations on Government, the Affairs of the Bank, and Paper-Money', 135.

[154] See also Lamb, *Thomas Paine and the Idea of Human Rights* (n 104) 166; Philp, 'Thomas Paine' (n 96).

[155] Cf Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity Press 2022) 48 (arguing that 'democracy ... is valuable only insofar as it contributes to the common good'). See also on the willingness of Terror thinkers such as Louis Antoine de Saint-Just to replace positive law with natural law

(representative) democracy, popular choice among different institutional forms, and consent, his account tries to reconcile popular sovereignty with natural rights, arguing that constitutions are 'founded on the Rights of Man *and* the Authority of the People'.[156]

Democratic constituent power: Marquis de Condorcet

The third and final constituent power theory we will consider is that of the French polymath Marie-Jean-Antoine-Nicolas de Caritat, Marquis de Condorcet (1743-1794). A leading mathematician, philosopher, and political scientist of his time, Condorcet devoted numerous texts to questions of constitutional theory and law. While none of his works focused solely on the topic of constituent power, we can reconstruct a cogent and potent natural rights theory of constituent power, which he defended across much of his *oeuvre*.[157]

The fact that Condorcet developed not only a general constitutional theory but more specifically a constituent power theory has been noted by different scholars.[158] Like Sieyès and Paine, Condorcet emphasised the need to distinguish the 'pouvoir constituant'[159] from constituted powers and in particular the legislature – an idea that also made it into the Girondin

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Dan Edelstein, *The Terror of Natural Right: Republicanism, the Cult of Nature, and the French Revolution* (University of Chicago Press 2010).

[156] Paine, *Collected Writings* (n 21) 'Rights of Man', 505 (emphasis added).

[157] See Williams, *Condorcet and Modernity* (n 44) 45.

[158] See eg Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' (n 90); Kalyvas, 'Constituent Power' (n 14) 102.

[159] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'Sur l'étendue des pouvoirs de l'Assemblée nationale', 27. See Franck Alengry, *Condorcet: Guide de la Révolution française, Théoricien du Droit constitutionnel et Précurseur de la Science sociale* (V Giard & E Brière 1904) 595 (referring to it as the 'pouvoir constituant distinct').

constitutional project.[160] In *Sur l'étendue des pouvoirs de l'Assemblée nationale* (1790), where Condorcet discussed the constituent power that the National Assembly exercised on behalf of the French people, he argues that the 'national will' (ie the people) must distinguish the constituent power from other powers by conferring on the Assembly 'only the power to regulate the constitution, the form, and the actions of the various powers'.[161]

Importantly for our purposes, Condorcet tied this power directly to natural rights, which, like Sieyès and Paine, he understood as requirements of justice.[162] The Assembly, he stressed, is 'elected by the people to re-establish them in their natural rights'.[163] A close reading of Condorcet's works reveals just how prominent natural rights were in his theory more generally, confirming his place in the natural rights tradition of constituent power. In particular, Condorcet was committed to the idea that natural rights serve as the end and reason for which constitutions, understood as written documents, are created.[164] As he stated in *Lettres d'un*

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[160] See Title IX, Article 1 in François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 12 (Firmin Didot frères 1847) 'Projet de constitution française', 476. See also ibid 'Exposition des principes et des motifs du plan de constitution', 408.

[161] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'Sur l'étendue des pouvoirs de l'Assemblée nationale', 27 (my translation).

[162] See eg François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 9 (Firmin Didot frères 1847) 'Lettres d'un bourgeois de New-Haven à un citoyen de Virginie', 14-15; Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Sur le décret du 26 aout 1792: Relatif au serment imposé par la constitution civile du clergé', 17.

[163] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 25 (my translation).

[164] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Lettres d'un bourgeois de New-Haven à un citoyen de Virginie', 28. See also Alengry, *Condorcet* (n 159) 381. On the written character, see Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Sur la nécessité d'établir en France une Constitution nouvelle', 414.

bourgeois de New-Haven à un citoyen de Virginie (1787): 'We want a constitution whose principles are uniquely founded on the natural rights of man'.[165] On his theory, the end of political association and the reason why constitutions should be created is, ultimately, to render people free and happy.[166] Without a constitution, he pointed out, 'a people necessarily floats between tyranny and anarchy'.[167]

In contrast to Sieyès and Paine, however, Condorcet did not arrive at this conclusion by employing the notion of a social contract. Although already Sieyès and Paine conceived of the transition from state of nature to civil society as a gradual one, Condorcet's account was even more explicit in rejecting the idea of a rupture between state of nature and civil society. Instead, he regarded the transition even more clearly as a continuous progress.[168] This makes Condorcet's account a particularly paradigmatic example of the Physiocratic tradition and the preservation regime.[169] In the posthumously published *Esquisse d'un tableau historique des progrès de l'esprit humain* (1795), he recounts no fewer than nine historical epochs that describe this continuous progress. The epochs range from people uniting as tribes, to the development of agriculture, written languages, the sciences, the printing press, and the French

[165] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Lettres d'un bourgeois de New-Haven à un citoyen de Virginie', 14 (my translation).

[166] See Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'Des conventions nationales', 195, 204. See also Horst Dippel, 'Projeter le monde moderne: La pensée sociale de Condorcet' in David Williams (ed), *Condorcet Studies II* (Peter Lang 1987) 171.

[167] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Sur la nécessité d'établir en France une Constitution nouvelle', 536 (my translation).

[168] Williams, *Condorcet and Modernity* (n 44) 71.

[169] See Edelstein, *On the Spirit of Rights* (n 19) 83–84.

Republic.[170] Civil society is not the creation of humanity in any of these epochs. Rather, as David Williams observes, for Condorcet '[c]ivil society was as natural to man as it was to the bees'.[171] Condorcet here followed in Aristotle's footsteps, who famously held that 'man is by nature a political animal'.[172] Hence, although Condorcet spoke of a 'social pact'[173] in some of his writings, he did not believe that civil society arises from a social contract in the strict sense.[174] Rather, he viewed society as co-emergent with humanity in the sense that man always lived in society.

However, that does not make Condorcet any less of a natural rights thinker when it comes to constituent power. According to him, natural rights are 'derived from the nature of man' as a sentient being, from which it follows 'necessarily that he must enjoy these rights, that he cannot be deprived of them without injustice'.[175] More specifically, although Condorcet held that society itself is natural and therefore not the product of a contract, he also argued that individuals only enter *political* society on the conditions set out in the declaration of rights.[176] As Condorcet explains in *Exposition des principes et des motifs du plan de constitution* (1793), which formed part of the Girondin constitutional plan, rights declarations are an 'exposition of

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[170] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 41) 'Esquisse d'un tableau historique des progrès de l'esprit humain', 1.

[171] Williams, *Condorcet and Modernity* (n 44) 70.

[172] Aristotle, *Politics* (Harris Rackham tr, Harvard University Press 2014) Book I, 1253a.

[173] Eg in Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Projet de déclaration des droits naturels, civils et politiques des hommes', 417; 'Sur le sens du mot révolutionnaire', 620.

[174] Alengry, *Condorcet* (n 159) 259, 382; Williams, *Condorcet and Modernity* (n 44) 71–72.

[175] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Lettres d'un bourgeois de New-Haven à un citoyen de Virginie', 14 (my translation).

[176] Alengry, *Condorcet* (n 159) 410. Alengry talks here of a 'quasi-contract' on which the political association relies: ibid 414 (footnote 1).

the conditions on which each citizen submits himself to enter the national association of the rights which he recognises in all others'.[177] By placing the constitution on a stable foundation of rights, these declarations serve as 'a powerful shield for the defence of freedom, for the maintenance of equality'.[178]

Like Sieyès and Paine, Condorcet put a premium on equal liberty, proposing that, ultimately, natural rights are about enabling individuals to employ their own faculties to satisfy their interests.[179] Other natural rights would flow from equal freedom.[180] One such right is the 'right to contribute, either immediately or through representatives, to the making of the laws and all acts done in the name of society'.[181] Like Paine, Condorcet believed that for government to be legitimate, it requires individuals' consent, which would only be granted if their natural rights are respected.[182] As he claimed, any state in which some or all men (and women[183]) are

[177] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Exposition des principes et des motifs du plan de constitution', 354 (my translation).

[178] ibid 354 (my translation).

[179] Alengry, *Condorcet* (n 159) 380, 400.

[180] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'De l'influence de la Révolution d'Amérique sur l'Europe', 5-6. See also Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Projet de déclaration des droits naturels, civils et politiques des hommes', 417.

[181] François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 8 (Firmin Didot frères 1847) 'De l'influence de la Révolution d'Amérique sur l'Europe', 6 (my translation).

[182] See Williams, *Condorcet and Modernity* (n 44) 72.

[183] See on Condorcet's feminist views, radical for his time: ibid 158–171.

deprived of the right to contribute politically 'ceases to be a free state' and is 'no longer a true republic'.[184]

We can detect here the same logic that underpins other accounts in the natural rights tradition: once we understand that the end of society and constitutions is to promote and protect natural rights, then their scope of action is necessarily constrained by that end. Only the 'interests of the nation', as Condorcet holds, can serve as the 'bases on which enlightened reason can establish the edifice of laws'.[185] Put another way, the common interest provides the grounds and bounds for all public powers.[186] Condorcet explicitly tied this back to the idea that society is the natural state for human beings. As Franck Alengry notes, for Condorcet natural rights are not anterior to society, but rather 'form part of the very *essence*, the *idea* of society, [and] can be realised only in it'.[187] In fact, because natural rights 'derive from the very nature of man, they cannot be violated without depriving man of his human character'.[188] In other words, there is no constitution, no society, and even no human nature without natural rights.

Was Condorcet only talking about the moral goals of constitutions that they can violate without undermining their legal authority? Hardly. Read in the context of his Physiocratic

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[184] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Lettres d'un bourgeois de New-Haven à un citoyen de Virginie', 14-15 (my translation). See also Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Sur la nécessité d'établir en France une Constitution nouvelle', 536.

[185] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 181) 'Essai sur la constitution et les fonctions des assemblées provinciales', 231 (my translation).

[186] On the need to have majority decisions on what lies in the common interest, and the requirement for such decisions not to be arbitrary, see Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Exposition des principes et des motifs du plan de constitution', 390.

[187] Alengry, *Condorcet* (n 159) 379 (my translation; emphasis in original).

[188] ibid 378 (my translation).

outlook and his membership in the preservation regime, it becomes clear that Condorcet believed that some unjust constitutions are not only morally but also legally deficient. Like Sieyès and Paine, he suggested that a constitution that violates natural rights can undo its own authority.[189] That is, it can be so unjust that it becomes arbitrary, and thus illegal – a non-constitution, if you will. Condorcet explicitly made this point when discussing constitutions that violate citizens' equality of rights: if it does not provide for equality of rights, he holds, 'a constitution is not really free, *is not really legal* [vraiment légale]'.[190] Like Sieyès and Paine, he also employed legalistic language in other contexts. For example, in a discussion on slavery, he emphasised that '[e]very legislator … is subject to the laws of natural morality. An unjust law that violates the right of men, whether national or foreigner, is a *crime*'.[191] As Condorcet put it in a response to Voltaire: 'it is not sufficient that society is governed by law; that law must be just. It is not sufficient that individuals follow the law; that law must itself conform to what is required to maintain everyone's rights'.[192]

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[189] See also Williams, *Condorcet and Modernity* (n 44) 173 (noting that, for Condorcet, 'the authority of law derived from natural needs and rights').

[190] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Lettres d'un citoyen des États-unis à un Français sur les affaires présentes', 103 (my translation and emphasis). See also ibid 'Lettres d'un bourgeois de New-Haven à un citoyen de Virginie', 14-15; Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Ce que les citoyens on droit d'attendre de leurs représentants', 567.

[191] François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 7 (Firmin Didot frères 1847) 'Réflexions sur l'esclavage des nègres', 77 (my translation and emphasis). See also Le Mercier de la Rivière, *L'ordre naturel et essentiel des sociétés politiques* (n 36) 85 (using the same language).

[192] François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 4 (Firmin Didot frères 1847) 'Notes sur Voltaire', 620 (my translation). See also Condorcet's unpublished manuscript cited in Alengry, *Condorcet* (n 159) 383 ('... ces lois doivent être faites pour conserver ces droits et ne doivent violer aucun').

To be clear, as in Sieyès's and Paine's case, Condorcet's account presents us with the difficulty that he did not develop a full-blown legal theory exploring the relationship between law and morality. His theory is therefore not free of ambiguities. For example, despite talking of unjust laws as a 'crime', he sometimes still referred to them as 'laws'.[193] This suggests that Condorcet was not a straightforward proponent of the strong conception of *lex injusta non est lex*. However, considering his general refusal to draw sharp distinctions between a constitution's morality and legality, it would be misguided to infer that he believed that natural rights can *only* have moral purchase. As Alengry has noted, Condorcet was not a legal positivist, but a member of the broader natural law school which originated in Cicero and which does not treat legal validity and moral legitimacy as separate issues.[194] As we saw above, there is one important branch of that school that adopts a weaker conception of natural law, according to which not every single legal rule or constitutional provision that is unjust is null and void, but which holds that a constitution as a whole can lose its legal authority to the degree that it violates natural rights.[195]

[193] See eg François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 5 (Firmin Didot frères 1847) 'Vie de M. Turgot', 197 (my translation).

[194] Alengry, *Condorcet* (n 159) 372–373. See eg Marcus Tullius Cicero, *On the Laws* (David Fott tr, Cornell University Press 2013) Book 2, para 13.

[195] This would explain why, for Condorcet, a constitution that does not provide for an adequate mechanism of constitutional amendment but does not violate natural rights in other respects would likely be classified as unjust, but legal; whereas a constitution that disregards the fundamental principle of equality altogether is not only unjust but also 'not really legal': Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Lettres d'un citoyen des États-unis à un Français sur les affaires présentes', 103 (my translation).

Importantly for our purposes, such a gradual diminution of legal validity can also be incurred by unjust exercises of the constituent power. As Condorcet emphasised in an unpublished manuscript, *no one* can have the power to act arbitrarily:

> No power can legitimately violate [natural] rights: no law that contravenes these rights can be just, even if it emanates from the entire nation. No representative assembly, no unified nation, has itself the right to subject a single individual to a law that is unjust in itself. *The power to make arbitrary laws cannot belong to anyone*.[196]

This argument applies not only to constituted powers, but also to the constituent power. If the power to act arbitrarily – that is, to violate natural rights – cannot belong to 'anyone', then it cannot belong to the constituent power either. Exercising that power in a way that infringes natural rights would therefore be to act *ultra vires*, that is, without legal basis. Even worse, because Condorcet believed that there is no constitution, society, or human nature without natural rights, constituent power would operate outside of society and human nature to the extent that it ignores natural rights.

Condorcet's theory cannot be fully appreciated if one only considers the question of limits, however. For him, *enabling* rather than limiting the exercise of democratic power was the primary focus. He believed that the people should have ample opportunity to revise their constitution, and he introduced a distinction between periodic and non-periodic constituent conventions to explain when and how people could exercise their power. As noted above, Condorcet shared Paine's view that a constitution needs the consent of its citizens.[197] Laws must

[196] Cited in Alengry, *Condorcet* (n 159) 50 (my translation and emphasis).

[197] See on Sieyès's similar (but more mediated) view of consent Rubinelli, *Constituent Power: A History* (n 38) 53.

therefore not be imposed on future generations without their consent.[198] Every twenty years, a periodic convention would be necessary to guarantee this consent, as well as to perfect the constitution in line with progress in enlightened thinking.[199] Matters arising in the interim, by contrast, would be handled by non-periodic conventions. Because Condorcet thought that these latter conventions would more often than not result from momentary passions, he argued that they should have limited authority and not be allowed to amend any of the constitutional fundamentals, including the declaration of rights and the conditions of citizenship.[200]

If only non-periodic conventions have such limited authority, could one not infer that periodic conventions have unlimited power and can discard some or even all natural rights listed in the declaration?[201] I do not think so, for two reasons. First, Condorcet's concept of constituent power was embedded in a democratic system that was characterised by a collaboration between elected representatives and citizens who decide directly on some political matters.[202] Specifically, citizens would have the rights to launch popular initiatives to amend the

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[198] See Article XXXIII in Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Projet de déclaration des droits naturels, civils et politiques des hommes', 422.

[199] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'Des conventions nationales', 193-194. See for Sieyès's similar proposal of periodic revisions Article 42 in Sieyès, *Déclaration des droits de l'homme en société* (n 83) 14.

[200] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'Des conventions nationales', 200-201. See also Nadia Urbinati, 'Condorcet's Democratic Theory of Representative Government' (2004) 3 European Journal of Political Theory 53, 61.

[201] Cf Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' (n 90) 10. See also *e contrario* Alengry, *Condorcet* (n 159) 597.

[202] See Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' (n 90) 5, 9, 14–15. See also Charles Coutel, 'Instituer le citoyen selon Condorcet' [1999] Expressions 117, 125; Kalyvas, 'Constituent Power' (n 14) 102.

constitution;[203] to trigger legislative initiatives;[204] and to vote on new proposed constitutions in referendums.[205] On Condorcet's account, these rights, as well as the right to elect representatives, flow from the more fundamental right we encountered above: the natural right to participate in collective decision-making.[206] Because the entire functioning of the democratic system relies on it, this right could never be abolished, even by a periodic constituent convention with ostensibly absolute powers.[207]

Second, the large discretion Condorcet accorded to periodic constituent assemblies must be understood in light of his unshakable optimism and belief in human perfectibility.[208] As he pithily noted in the *Esquisse*, the march of progress 'will not be regressive, at least so long as the earth occupies the same place in the universe'.[209] For him, only constitutions that can be constantly revised are able to track the progress of Enlightenment and can thus be truly

[203] See Article 33 in Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Projet de déclaration des droits naturels, civils et politiques des hommes', 422.

[204] ibid 'Exposition des principes et des motifs du plan de constitution', 351. See also Title VIII, Article I in ibid 'Projet de constitution française', 469.

[205] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 160) 'Exposition des principes et des motifs du plan de constitution', 345. See also Title IX, Article XII in ibid 'Projet de constitution française', 478. See generally Alengry, *Condorcet* (n 159) 600.

[206] Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' (n 90) 7.

[207] See also Alengry, *Condorcet* (n 159) 378. Only its manifestation as the right to citizenship (*droit de cité*) could be regulated by the people directly: Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' (n 90) 7.

[208] See on this also Williams, *Condorcet and Modernity* (n 44) 280–281; Alengry, *Condorcet* (n 159) 603–604.

[209] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 41) 'Esquisse d'un tableau historique des progrès de l'esprit humain', 13 (my translation).

rational.[210] Condorcet's constitution, as Charles Coutel observes, is based on the idea of 'founding with a view to constant re-founding'.[211] As such, and in contrast to Sieyès and Paine, Condorcet conceived of natural rights not so much as brakes that curb the exercise of constituent and other public powers. Rather, natural rights, and in particular the right to participate in the formation and revision of the community's rules, are *enabling conditions* for a freer and more equal society. The constituent power plays a key role in this account because it creates a constitution that is founded on the principles of the declaration of rights and gives citizens the tools to monitor and revise the constitution in line with their (increasing) understanding of their rights.[212]

For these reasons, Condorcet's discussion of periodic conventions should not be interpreted as suggesting that constituent power was absolute. As we saw, he was just as opposed to arbitrary constitutional systems as other members of the natural rights tradition. Instead, we should understand his discussion in light of his belief that, in an educated society, public powers will be exercised rationally, that is, so as to protect and extend rights and liberties.[213] Violations of rights by a constituent power would then simply not be a problem practically, as

[210] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 21) 'Des conventions nationales', 192.

[211] Coutel, 'Instituer le citoyen selon Condorcet' (n 202) 118.

[212] As Mouton puts it, on Condorcet's account, 'the constituent power is not a force of resistance but a force of movement': Mouton, 'L'apport de la théorie du pouvoir constituant de Condorcet au droit constitutionnel contemporain' (n 90) 15 (my translation).

[213] Cf ibid 17.

sufficiently 'reflective judgement could direct the will towards just laws', to use Nadia Urbinati's words.[214]

It is worth noting that Condorcet thus arrived at a conception of constituent power that was quite different from Sieyès's and Paine's. Despite having started from similar Physiocratic and preservationist points of departure, Condorcet's theory contrasts with Sieyès's and Paine's in the almost complete lack of explicit boundaries that it imposes on exercises of constituent power. As such, it would seem to bear more similarities to theories that are critical of entrenchment, such as Jeremy Waldron's, which is sceptical of entrenched rights,[215] and works on the assumption that majorities are committed to individual and minority rights.[216] However, as we saw, Condorcet recognised one explicit boundary that Waldron rejects: he believed that even constituent power could not infringe the natural right to participate in collective decision-making.[217] What is more, Condorcet was not a naïve democrat. He was aware of the problems that populism and the dangers of uneducated masses pose for constitutions that try to uphold people's equality and rights. For instance, during the Revolution of 1789, he argued that it would be better for the National Constituent Assembly itself to adopt the Constitution rather than to submit it to popular ratification because he thought the people were insufficiently educated at

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[214] Urbinati, 'Condorcet's Democratic Theory of Representative Government' (n 200) 63. See also Dippel, 'Projeter le monde moderne: La pensée sociale de Condorcet' (n 166) 174. François Arago and Arthur Condorcet O'Connor, *Œuvres de Condorcet*, vol 1 (Firmin Didot frères 1847) 'Lettre aux auteurs du journal de Paris', 348 (emphasis removed).

[215] Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 18.

[216] See Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale Law Journal 1346, 1364–1366.

[217] Waldron, 'A Rights-Based Critique of Constitutional Rights' (n 215) 39–41.

the time.[218] In the Girondin constitutional project of 1793, he proposed that the people's right to ratify the draft constitution should be limited to provisions that interfere with their natural rights (which he thought people would naturally understand). Only at a later stage, with increased popular enlightenment and understanding of the common interest, did Condorcet consider it possible to extend the right to referendum to all kinds of laws.[219] According to Condorcet, such enlightenment should be actively promoted through public education, in which he put great stock.[220]

Let us recapitulate. As this section has revealed, Condorcet's natural rights theory of constituent power stands out because of its emphasis on democratic participation, which presents us with an alternative way of avoiding the Stain of Constitutionalism. On his approach, there is no tension between the constituent power and constitutionalism because – if exercised by sufficiently enlightened citizens and representatives – constituent power cannot but promote natural rights. Put another way, the reason why Condorcet argued that constituent power needed few substantive limits was not that he wanted to allow arbitrary exercises of that power. Rather, he believed that, under the right conditions, such exercises simply would not be a problem practically because no rational people would exercise the power arbitrarily. Popular sovereignty, on this account, is at the same time a manifestation of and guarantee for natural rights.[221] Even if Condorcet's faith in human betterment may appear overly optimistic to modern readers, his theory is still valuable for us today because of its attempt to develop an account of democratic participation based on respect for basic rights.

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[218] Alengry, *Condorcet* (n 159) 592–593.

[219] Arago and Condorcet O'Connor, *Œuvres de Condorcet* (n 162) 'Sur la nécessité de faire ratifier la constitution par les citoyens, et sur la formation des communautés de campagne', 428-430.

[220] See Dippel, 'Projeter le monde moderne: La pensée sociale de Condorcet' (n 166) 169.

[221] Alengry, *Condorcet* (n 159) 414.

Conclusion

In this article, I explored the natural rights tradition of constituent power, the original approach to constituent power that rejects unbounded popular constitution-making. The natural rights tradition surfaced in the tumultuous circumstances of the late eighteenth century in the French and American Revolutions. By closely analysing the accounts of Sieyès, Paine, and Condorcet, I have demonstrated that these three adherents of the tradition viewed constituent power as a public power that, like all other such powers, can only be exercised legally in pursuit of the common interest, that is, the protection and promotion of natural rights in civil society. In this, I have argued, lies the tradition's solution to avoiding the Stain of Constitutionalism: because constituent power does not operate in a 'normless state of nature',[222] but rather under the antecedent constraint of having to create a constitution that promotes the common interest and people's natural rights, it is not in tension with constitutionalism. Constituent power is itself a constitutionalist concept because, like all other public powers, it is limited. As we saw, these limits are not merely moral but also legal, among other reasons because natural rights are 'preserved' in and through civil society, where they are given effect through positive law.

That is all well and good, a sceptic might respond, but why is the natural rights tradition relevant to how we should think of constituent power today? If modern-day constitutional revolutionaries do not believe in natural rights (and many may not), then what can awareness of the natural rights tradition do about executive power-grabs and other abuses of constituent power?[223] This question is pressing also considering that the natural rights tradition might not be the only one that is able to deal with the tension between constitutionalism and constituent power. For example, Kalyvas tries to reconcile the two by conceiving of constituent power as

[222] Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (n 2) 227.

[223] Thanks to an anonymous reviewer for pressing me on this.

the power of actors to 'co-institute'[224] a new constitutional order, which he argues presupposes among other things a commitment to equality. Jürgen Habermas adopts an alternative approach, according to which human rights and democracy are 'co-original', that is, interdependent.[225] Due to this article's focus on revealing the natural rights tradition's existence and on portraying its main features, I could not assess whether these other theories provide compelling answers to the Stain of Constitutionalism, nor did I compare their respective merits with those of the natural rights tradition. A full-blown moral defence of the natural rights tradition was also beyond the purview of this article. However, that should not be taken to mean that there is no case for adopting the natural rights approach in modern-day constitution-making processes. To respond to the sceptic and to show that the natural rights tradition is not merely of historical interest, I shall end this article by sketching what I believe a moral defence of the tradition could look like.[226] To be clear, such a defence is not required for the argument that the natural rights tradition is the original conception of constituent power, but it adds additional weight to why we should take the tradition seriously today.

The main case for adopting the natural rights tradition, or developing an account inspired by it, rests on the fact that it promotes two central values: fundamental human rights and democracy. Another way of putting this is to say that the natural rights tradition manages to combine both *norm* (ie human rights) and *will* (ie democracy). The tradition achieves this reconciliation because it does not throw out the baby with the bath water and secure fundamental rights protection by sacrificing popular sovereignty. In contrast to some natural law approaches

[224] Kalyvas, 'Constituent Power' (n 14) 105 (emphasis removed).

[225] See Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Political Theory 766, 767.

[226] Developing a natural rights-based constituent power theory is the aim of my broader research project [title anonymised].

to constituent power that are a- or even anti-democratic,[227] it steers a middle course between the Scylla of 'full juridical objectification'[228] (ie *norm*) and the Charybdis of absolute popular power (ie *will*). Granted, not all proponents of the natural rights tradition drew the line between popular participation and fundamental rights protection in the same place. However, the three thinkers I analysed were united in their attempt to reconcile the two.

By combining norm and will, the natural rights tradition can help solve or at least alleviate two problems besetting modern constitution-making processes that involve invocations of constituent power. First, as the Venezuelan example mentioned in the Introduction illustrated, the notion of unlimited constituent power has been invoked to abuse institutional powers and to put people's rights at risk.[229] Because such acts transgress the limits of constituent power, the natural rights tradition would deny the legal validity and moral legitimacy of the resulting constitutions. Second, constituent power's traditionally national focus has been difficult to square with the increasing salience of international law and international bodies such as human rights courts.[230] The natural rights tradition manages to resolve the tension between the national and the international by conceiving of constituent power as a power that is limited by fundamental rights, which are reflected in the peremptory of norms of international law as well as other international human rights norms, and which are adjudicated by human rights courts. As such, the natural rights tradition is not only in tune with the commitment to

[227] See the insightful discussion in Colón-Ríos, *Constituent Power and the Law* (n 10) 151–158. See also above n 155.

[228] Kalyvas, 'Constituent Power' (n 14) 108 (internal quotation marks omitted).

[229] For an early critique of this sort, see Hannah Arendt, *On Revolution* (Penguin Books 1965) 163.

[230] See eg Nico Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14 International Journal of Constitutional Law 657.

constitutionalism that has become widespread,[231] but is also a better fit than some other accounts with the prevalent view that human rights impose legal limits on what states can do.[232]

Of course, a theory of constituent power cannot, on its own, stand in the way of revolutionaries powerful and determined enough to override even the most sacred norms. However, a theory can at least cast doubt on the legality and legitimacy of unlawful constitution-making acts. Herein lies the promise of the natural rights tradition. While it is no sure-fire method to avoid populist and other abuses of constituent power, it is not a stretch to think that widespread adoption of the natural rights tradition would at least make such abuses less likely. And, as such, the tradition can help show why – despite recent calls to the contrary – it would be premature to abandon the concept of constituent power.[233]

[231] See Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771.

[232] See Edelstein, *On the Spirit of Rights* (n 19) 2.

[233] See eg Verdugo, 'Is It Time to Abandon the Theory of Constituent Power?' (n 10).