CHAPTER ONE

THE NATIONAL POLITICAL SYSTEM AND THE CLASSICAL CONSTITUTIONAL FORMULA

CLASSICAL CONSTITUTIONS AND SOCIETY'S FUNCTIONAL STRUCTURE

Analyses of contemporary constitutionalism normally explain the emergent constitutional law of global society by contrasting it with the classical constitutions of national societies. As mentioned, accounts of global constitutional law, whether critical or affirmative, usually presuppose that classical constitutions were inextricably linked to the concept of *national sovereignty*, and they assumed force as they expressed the will of one sovereign nation, both, internally, as the source of legislation, and, externally, as the basis of the state's territorial unity.[1] In much inquiry into global constitutional law, classical constitutions appear, simply and literally, as single normative documents, in which, in Alexander Hamilton's words, 'societies of men' establish the foundation of 'good government', using rational capacities of 'reflection and choice' (Madison, Hamilton and Jay 1987 [1787–88]: 87), and in which states derive legitimacy from the aggregated will of a national society. Against this background, most established literature on global constitutions claims that there exists a deep caesura between classical/national and contemporary/global patterns of constitutional norm formation.

The analysis below argues that research on contemporary constitutionalism has often interpreted transnational constitutional law in rather simplified fashion. One important reason for this is that it has

[1] See above p. 22.

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tended to misconstruct national constitutional law, and its perception of classical constitutionalism has stood in the way of an adequate analysis of contemporary constitutional tendencies. To understand the constitutional law of global society, it is necessary to revise widespread accounts of classical constitutionalism, and to develop a more sociological analysis of the origins and functions of constitutions in their original national environments. In particular, it is necessary to abandon *methodological literalism* in observing classical constitutional norms, and to renounce the principle that constitutions originally produced legitimacy for the political system by articulating simple processes of will formation for different national societies: this belief obstructs comprehension of both classical and contemporary constitutional norms. Constitutions first gained effect, most importantly, in a dimension of social organization that is not easily captured in literal analysis. Classical constitutions can be seen, not solely as literally objectivized normative agreements, but as adaptive instruments, through which, beneath the level of practical deliberation, societies consolidated their functional exchanges, and through which, above all, they learned to elaborate and preserve structures of general political inclusion. Constitutions, and the norms that they contain, thus, possess functional meanings alongside their literal meanings, and their functional meaning is expressed, not as literally agreed 'objects of public good' (Tomkins 2003: 5), but as formative elements in the inclusionary structure of society. In fact, we can observe the normative core of classical constitutions as a set of principles produced by, and within, the political system of society, through which modern society generally consolidated an inclusionary structure for its political functions, and through which, progressively, the political system insulated itself against the increasingly complex demands for legislation that it encountered. If we elucidate this non-literal, societally embedded meaning of classical constitutions, we can also gain fuller understanding of the constitutional law of global society.

This submerged dimension of constitutional law can be approached, most simply, through a sociological discussion of the rise of classical constitutionalism. It can be illustrated through observation of the different constitutional revolutions, which, beginning in 1688 in England and ending in 1795 in post-Thermidorian France, marked the division between the inclusionary forms typical of early modern society and those typical of a modern, relatively differentiated social order. Accordingly, this chapter proposes a dual foundation for sociological inquiry

into classical constitutions, which provides the premise for the examination of transnational constitutional norms in later chapters. First, it proposes a sociological reconstruction of the *basic norms* of classical constitutions – that is, of the norms by which classical constitutions, created in the revolutionary époques in Europe and America, brought legitimacy to their political systems. It offers a sociological analysis both of the implications of these constitutions, and the norms expressed through them, for the inclusionary structure of society at the time of their foundation. Then, second, it proposes a sociological analysis of the implications of classical constitutional norms for society in its changing contemporary form. In both respects, it sets out a historical-sociological perspective for understanding the origins of transnational constitutional law in contemporary society.

i Norm 1: Constituent power and national sovereignty

The primary norm by which classical constitutions distilled legitimacy for the political system is associated with the concept of *constituent power* and with the closely related concept of *national sovereignty*. Indeed, classical constitutions were almost invariably founded in some variation on the theory of national sovereignty and national constituent power. Obviously, the concept of national sovereignty has a range of quite distinct implications, and its meaning differs when applied to the international actions of a political system. In relation to the domestic constituency of a polity, however, the concepts of national sovereignty and constituent power imply that legitimate public order must be established through common processes of popular will formation, and that a political system derives its legitimacy from demonstrable acts of collective self-legislation, by a given people, in a given society, at a given historical moment. The concept of constituent power, in particular, implies that a polity only obtains authority to pass laws insofar as it gives immediate constitutional expression to the sovereign will of a particular people (or nation), so that the basic institutional order of the political system can be traced back to an original act of political volition, with some claim to express objectives shared by all society (Böckenförde 1991: 91). The classical theory of constituent power suggests that the legitimacy of a political system is derived from an *ex nihilo* moment of foundation, in which the national will, albeit perhaps mediated through representative actors, enunciates the original constitutional norms by which the polity as a whole is to be governed, and by which later acts of legislation are pre-determined. The

nation, thus exercises constituent power as a sovereign agent, which is not subject in advance to any given constitution. In this founding position, the nation is 'freed from all constraint', and the constitutional form that it chooses to confer upon itself becomes binding, as higher law, on all subsequent legislation (Sieyès 1789a: 20), determining and bringing legitimacy to all later governmental acts – especially statutes. Naturally, the concept of constituent power has been repeatedly modified. In its post-classical expression, this theory allows for more flexible forms of higher law making, incremental constitutional revision, and discursive re-direction of the polity (Ackerman 1991: 19–21). However, even such variations on the original doctrine contain the clear implication that constituent power constructs legitimate political order through exceptional moments of collective re-direction, in which the popular or national will is elevated above ordinary acts of law making, giving binding constitutional orientation to the polity as a whole. Throughout the history of modern political and constitutional reflection, the process of constituent authorization repeatedly figures as the condition *sine qua non* of a legitimate political system, and law enjoying legitimacy is almost invariably perceived as a directly authorized constitutional enactment of a national or popular will (see Carré de Malberg 1920–22: 490–91; Schmitt 1928: 23; Habermas 1992: 349; Loughlin 2013: 218).[2] Of course, more recent theorists of constituent power do not imply that legitimate order is invariably created through some manifest display of collective law making; the theory of constituent power or popular sovereignty now typically conceives of constituent power as a basic *procedure of justification* (see Habermas 1992: 466). However, the classical concept of constituent power is still echoed in the common theoretical claim that the legitimate political system draws legitimacy from a set of constitutional norms in which the people recognize themselves as the original source of law's authority: the constitution is still widely seen as a legal order in which the nation publicly enshrines its own primary authority.

The genealogy of the concept of constituent power is highly contested, and its emergence is visible in different ways at different points in modern history. The origins of this doctrine are perennially associated with the writings of Sieyès (1839 [1789a]: 45), who, in the months before the French Revolution, modified Rousseau's doctrine of

[2] This is perfectly exemplified by Grimm (2012: 223), who observes the 'distinction between *pouvoir constituant* and pouvoir constitué' as 'constitutive' of modern constitutionalism.

the general will to claim that only the single and unified will of the sovereign nation, admitting no privileges or distinctions of standing, can bring legitimacy to the state.[3] Notably, this theory gained intense influence in summer 1789, as the convention of the Estates-General, summoned by the Bourbon king to address the fiscal problems of the monarchy, collapsed, and the Third Estate, acting independently of the other Estates, claimed authority to reform the monarchy and to write a new republican constitution: Sieyès's theory of national sovereignty thus formed the original legitimating premise for the reconstruction of monarchical government in revolutionary France (see Sewell 1980: 83; Fehrenbach 1986: 75). Despite the importance of Sieyès, however, the doctrine of constituent power did not belong solely to the French Revolution. Something close to a constituent power can be perceived in the English convention parliament of 1688/89 (Pincus 2009: 283–6). Although it did not give rise to a new state in any strict sense, this parliament acted outside pre-constituted juridical constraints to draft a series of basic laws, which then became, and today still remain, binding on subsequent acts of the legislature and the executive. Moreover, it is often argued, especially by theorists standing in intellectual proximity to Sieyès, that the American Revolution (defined here as the period between the Declaration of Independence in 1776 and the interim completion of the Federal Constitution in 1791) did not produce a consistent theory of constituent power. This is usually ascribed to the loosely integrated federal substructure of the early American polity, and to the absence of a clearly unified nation, during the Founding era (see Schmitt 1928: 76). As a consequence, purportedly, the American people(s) could not be palpably imagined as the authors of public laws, and the public order created in the revolution could not be explained as the result of one concerted national will. Nonetheless, in the state legislatures prior to 1787 and then both in the Philadelphia Convention and the subsequent state ratifying conventions (1787–88), a constituent power, albeit pluralistically assembled and voiced, clearly shaped the rise of the constitutional state in America.[4] The concept of constituent

[3] Sieyès defined the nation (people) as 'the origin of everything [. . .] the law itself' (1789a: 79).

[4] Lafayette himself declared in his reflections on Sieyès that the distinction between *pouvoir constituant* and *pouvoir constitué* had already been established in the American Revolution. He concluded that the French Revolution actually weakened the force of this concept owing to its recurrent 'mixture of constituent and legislative functions' (1839: 50). On the anteriority of the American Revolution in elaborating the principle of constituent power, see additionally Laboulaye (1872: 381), Zweig (1909: 2), Klein (1996: 15), Boehl (1997: 26) and Adams (2001: 63).

power had in fact been theoretically formulated in revolutionary America some years before Sieyès (see Tucker 1983 [1784]: 610). While drafting the Federal Constitution, then, Madison himself expressed a classical doctrine of constituent power, differentiating between 'a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government' (Madison, Hamilton and Jay 1987 [1787–88]: 327). The theory of constituent power as a higher, and specifically protected, source of law thus obtained particularly prominent expression in the American Revolution. Overall, therefore, it is perhaps most appropriate to adopt a broad construction of the doctrine of constituent power, which can be defined as the claim that the state owes its legitimacy to its public enactment of the collective will of the nation (or people). On this broad construction, constituent power, with wide variations, was at the core of classical constitution making, and even the most cautious processes of early national constitution writing contained some reference to the prior sovereignty of the nation as the sole source of legitimacy.[5]

In many ways, clearly, the constitutional revolutions in England, America and France in the period 1688–1795 reflected a deep conceptual disjuncture between early modern and modern patterns of social formation. Moreover, these constitutions clearly articulated deliberated agreements between powerful actors in society about the conditions of government, and they declared strict normative principles to which politically relevant actors in society publicly acceded. For instance, the constitution of England resulting from the revolutionary Civil Wars of the seventeenth century and cemented in 1688/89 established a system of restricted parliamentary government. This constitution permitted some degree of popular representation, showing respect for clearly delineated rights, and it probably reflected convergent opinions in society about the desirable aims and limits of government, at least amongst politically participant elites. Later, the constitutions of the US-American states and then of the early American Republic as a whole sanctioned some degree of popular- or national-sovereign will formation, and (in most cases) they accorded entrenched status to certain prior rights (natural, civil or human). As such, these documents projected a founding normative consensus in society, and we might feel inclined to presume that they condensed a broad resentment fostered by the suppression of colonial liberties and fiscal conventions by the

[5] See Art 3 of the Spanish Constitution of 1812.

Westminster parliament prior to 1776. By the same token, the constitutions of revolutionary France can be seen as documents, impelled by collective acrimony regarding the unaccountable use of power by the Bourbon monarchy, which distilled normative ideas about singular rights, the separation of powers, and popular participation, as essential components of legitimate government. As such, the constitutions introduced in France in 1791, 1793 and 1795 can be interpreted as texts that formulated normatively determined alternatives to the personalistic modes of government used under the pre-1789 monarchy. Viewed from this perspective, all classical constitutions possessed a certain literal, objective reality; all formalized common ideals of societal organization, and they framed the use of public power in terms giving immediate expression to shared political goals in one national society. Seen literally, classical constitutions were obviously written as normative documents by reflexive political agents, whose ideas were shaped both by a historical discourse of constitutional rationality, and who endeavoured to place the powers of government onto publicly accepted and inclusively legitimated conceptual foundations. To this degree, the revolutionary idea of constituent power or national sovereignty expressed a clear *literal norm*, which, in many settings, obtained foundational value for the general form of the political system (see Loughlin 2010: 228). Overtly, this norm imprinted on the emergent form of modern society the presumption that political power must originate in collective acts and general interests, and it cannot be applied to agents in society in the service of purely private prerogatives.[6] Many institutional structures – for example, national statehood, separation of powers, general rule of law, political representation of social interests – which are now viewed as invariable normative characteristics of modern society, were objectively devised, or at least solidified and justified, through this norm.

Notably, however, the early concepts of national sovereignty and constituent power also reflected a set of less manifest, more subliminal functional or sociological processes in society. The constitutional importance of national sovereignty was linked to less visible evolutionary tendencies underlying emergent modern societies, which, in Europe in particular, were in the process of dramatically transforming the position of the political system and of reconfiguring society's structure as a whole. To this degree, the norms distilled through the ideas of constituent power and national sovereignty were articulated, not solely in

[6] See the classic formulation of this view in Kant (1976 [1797]: 569).

the diction of manifest public argument but also at a more submerged level, *for and within* the inclusionary structure of society. These concepts helped to cast a new inclusionary form for the political system as it was confronted with new demands for legislation, and with pressures released by deep-lying processes of social change. Accordingly, these norms possessed a deep sociological meaning outside the positive sphere of deliberated discussion, and they had a structural impact on society for reasons quite separate from their literally intended content.

The sociological significance of the concepts of national sovereignty and constituent power resulted, first, from the fact that they imputed the authority of the political system to a collective will, standing outside the political system. These concepts defined this will, distinct from the interests of mere physical persons such as regents or magistrates, as a force that transmitted generalized social imperatives through the state. This meant that, as states were founded as constitutional states, defining their legitimacy as arising from a national constituent power, they were able to present themselves as institutions in possession of a distinctively apersonal, or *public* authority. In turn, this meant that, in constitutional states, holders of political power could distinguish themselves more strictly from other sources of coercion, and the essential differentiation of the political system in society was increased. The rise of constituent power as a norm of political legitimacy was deeply linked to the abstraction of a categorically *political* sphere in society, marked by a distinct body of public law, and capable of producing decisions with distinctive political authority.[7] Second, the sociological importance of the concept of national constituent power resulted from the fact that it instilled a principle of higher legitimacy in the state. As states were founded as *nationally constituted* states, they became a focus of distinct and superior legitimacy, claiming distinct authority to carry out regulative acts for all society, and for all members of society. As a result, the ideas of constituent power and national sovereignty created a societal condition in which states, once formed as constitutional states, proposed themselves as centres of *collective inclusion* in society, able to subject exchanges in all parts of society to uniform laws, so that, at least in principle, all actors in society were transformed into actors subject to laws enforced by the state. Political institutions extracting legitimacy from constituent power were able

[7] Tellingly, one eminent historian of early modern Europe observed that societies before the revolutionary constitutional caesura in the eighteenth century *did not possess politics* in the modern sense of the word (Sonenscher 1989: 46).

rapidly to introduce new laws, and – equally – importantly – to clear away old laws, and they acquired the power autonomously to define the basic legal/normative form of society as a whole. Most notably, where political systems claimed to embody constituent power and national sovereignty, they were able to assume authority endorsed by all society, and they could make, implement and transmit laws across society in rapidly accelerated, internally legitimated fashion. In both respects, the concepts of national sovereignty and constituent power led to a profound reinforcement of the political system and its inclusionary structure: these concepts greatly heightened the law-making capacities of the political system, promoting, simultaneously, an increased differentiation of the political system, an increased centralization of societies around political institutions, an increasing inclusion of society in the legal/political system and a rapid growth in the volume of law that the political system could make available for society. Overall, therefore, the concept of constituent power provided a basic inclusionary structure for modern society's political system at a decisive historical moment – at the moment at which the political system finally assumed the form of a state. Once explained as entities based in constituent power, states obtained a central position in their national societies, and they declared clear principles to underscore their monopoly of power across society. In this respect, the core concepts of early constitutionalism reflected a wider process of differentiation in society, and they evolved as norms that allowed the political system to separate itself from other social functions, to harden itself, in differentiated form, as a state, and to perform collective functions of inclusion for society in relatively autonomous fashion.

To illustrate these points, first, in revolutionary France, the emergence of the doctrine of constituent power rapidly intensified both the societal abstraction and the inclusionary reach of the national political system. The fact that the constitutional state created after 1789 claimed a foundation in a general will meant that it could easily give validity to new legislation, and it could impose uniform laws across the pluralistic legal design of society under the *ancien régime*. After 1789, therefore, assemblies claiming authorization through constituent power stripped away the remnants of local and seigneurial legislation, and they introduced legal codes to bring uniformity to agrarian customs and relations. In so doing, they brought historically localized spheres of social practice far more comprehensively under the jurisdiction of the national state than had been the case under the

(purportedly) 'absolutist' system of the *ancien régime* (Sagnac 1898: 36; Markoff 1996: 555). After 1789, moreover, the revolutionaries, claiming authority from constituent power, introduced laws to limit the power of corporations and intermediary organizations, which had traditionally stood between single persons and the state, and obstructed the growth of sharply defined political institutions.

The anti-corporatism of the French Revolution was clearly reflected in the blanket prohibition of economic corporations in the 1791 Constitution, and, most notably, in the *Le Chapelier* law of 1791. This law accused corporations, especially professional and artisanal associations, of splitting national society into pluralistic sectors, and it denounced corporations generally as 'seditious'. This law's author and Chairman of the Constitutional Committee, Le Chapelier, justified it in the following terms: 'There are no corporations in the state; there is only the particular interest of each individual and the general interest. It is not permitted to anyone to inspire intermediary interests in citizens or to separate themselves from the public interest [*la chose publique*] by a spirit of corporation' (Buchez and Roux-Lavergne 1834: 194–5). However, the anti-corporatism of the French Revolution had its most significant outcome in the suppression of the *parlements* in 1789/90: *parlements* were the corporate judicial institutions of the *ancien regime*, whose offices had historically been obtained and traded as venal goods, and which had traditionally fractured the unity of the monarchical state by cementing private corporate interests at the core of the public domain.[8] As an alternative, the French revolutionaries created, or attempted to create, a single judicial order, and they invoked the undivided will of the nation to concentrate judicial authority in vertically accountable institutions, in which private monopolization of judicial offices was prohibited. This was spelled out quite clearly in the provisions for judicial power in the 1791 Constitution.

In each of these laws, the concept of constituent power was used by the revolutionaries to eradicate obstructions to the inclusionary force of the state, to link the state more immediately to its societal constituencies and to intensify its penetration across society as a whole. Such inclusionary implications of revolutionary concepts were not lost on other early modern states, which soon borrowed judicial norms and procedures from revolutionary France to cement their institutional

[8] Jaume (1989: 365) argues that the *parlements* acted to 'decentre royal sovereignty'. He also (1989: 5) states that, due to its association with pluralistic rights, the 'term corporation was particularly reviled' in the revolution.

integrity (Schubert 1977: 521). In Prussia, notably, leading administrators in the state established a legal order based on appeals to nationhood, albeit without any primary revolutionary act, and they invoked the general authority of the nation specifically to legislate against entrenched corporate interests (see Rohrscheidt 1898: 316).

In revolutionary America, the concepts of national sovereignty and constituent power impacted on the political system in a rather different, yet still analogous manner. In this setting, first, the ideas of national sovereignty and constituent power were used to legitimize the new single-state polities as entities distinct from the British Empire, and, in different forms, these concepts appeared in a number of state constitutions.[9] By the late 1780s, however, these concepts began to underpin the political system of the emergent American Republic as a whole. Notably, the Federal constitution was legitimated by a two-stage drafting and ratification process, conducted, first, in the Federal Convention in Philadelphia and, subsequently, in specially convened state assemblies. Once ratified by the state assemblies, the constitution was proclaimed, in itself, as a repository of national/popular sovereignty, standing above all other laws, customs and conventions, as the 'supreme law of the land'.[10] The fact that the constitution could claim to be publicly authorized by the people underpinned a legal system in which the inherited colonial order could be flexibly redesigned and many colonial laws annulled, and new laws could be introduced with persuasive claim to authority, even across the highly disaggregated and often recalcitrant territories of the new Republic.[11] Moreover, responsibility for enforcing the national will expressed in the constitution was vested – in part – in the Supreme Court, which performed its duty by seeking to define highest laws for all component parts of the Republic (Burt 1992: 53). Although the day-to-day conduct of government was defined by a diffuse and concurrent partition of sovereign powers between the national government and state-level institutions, therefore, the Federal Constitution became a central and overriding source of legal authority, promoting equal citizenship under national law for enfranchised members of the American nation (Kahn 1997: 29; Bradburn 2009: 82). As in

[9] By way of example, see the preamble to the 1780 constitution of Massachusetts, which states: 'The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good'.

[10] See the Supremacy Clause, Art 6, 2 of the Constitution.

[11] During the longer period of revolution, constitutionally authorized legislatures assumed vital powers of legal repeal (see Nelson 1975: 90–92).

France, the concept of constituent power played a vital role in thickening an inclusionary structure for the new American state, which then evolved, at least by eighteenth-century standards, as a system of relatively even, uniformly penetrative, social inclusion.

It is evident on these grounds that the core normative vocabulary of early constitutionalism impacted in a deeply transformative fashion on the broad shape of early modern national societies. Beneath the literal discursive implications of classical constitutionalism, the concepts of constituent power and national sovereignty expressed a series of functional meanings for society at large. Above all, the rise of the *constitutional state*, which was able to account for itself as founded in collective constituent acts, refracted a deep shift in the inclusionary structure of society's political system. On one hand, constitutional concepts brought an increase in the differentiation, abstraction and centralized consolidation of state institutions, and they created a premise for the exercise of autonomous political functions –that is, functions of legislative, judicial and fiscal character – by the state. Notable in the process of constitutional formation in Europe was the fact that constitutionally ordered states, in reducing the societal role of corporations, concentrated directive and extractive powers in central state institutions, and, in so doing, they greatly reduced the authority of bodies based in private authority, positioned between the state and society.[12] On the other hand, constitutional concepts distilled a normative diction in which the political system was able to extend an inclusionary structure beyond the localized, personalized patterns of organization typical of early modern social organization. These concepts enabled the political system more easily to generate binding decisions, and to construct laws in a form that could be rapidly applied and reproduced across the growing spaces of modern societal order, in relative indifference to personal standing and local prerogatives.

On this basis, if observed sociologically, the early norms of constitutional theory appear as principles bound to deep structural processes in society. These norms were articulated, at least in part, because of their utility in allowing the nascent modern political system to adapt to its position in a widening, increasingly differentiated society, in which the historically localized shape of society was disappearing. Beneath the level of literal discourse, in fact, it is uncertain whether constituent

[12] For example, the abolition of corporations in France was inextricably linked to fiscal politics and the need to centralize instruments of fiscal extraction (see Martin Saint-Léon 1922: 615). For other contexts see Rohrscheidt (1898: 375–6), and Vogel (1983: 135).

power or national sovereignty ever existed as actual objective phenomena; these concepts appear instead as rather fictitious norms, from which society drew profound inclusionary benefits, but which existed more fully in society's functional domain, in the substructure of the political system, than as any factual reality. Indeed, if we seek to identify the exercise of national sovereignty or constituent power as a factual process or an objective historical occurrence, serving materially to underpin the power of national political systems, we are confronted with a series of deep paradoxes. These paradoxes cast doubt, generally, on the standing of constituent power as a literal norm of constitutional debate, and on the persistent theoretical claim that constituent power is a source of real legitimacy for the political system. In particular, these paradoxes cast doubt on constitutional outlooks which examine contemporary constitutional norms in light of classical ideals of national sovereignty,[13] or which observe the absence of national sovereignty as a particular feature of contemporary constitutional laws – this absence was, in fact, already a feature of classical constitutional laws.

First and most obvious among the paradoxes of constituent power is the fact that, in revolutionary France, supposedly the moment in which national sovereignty and constituent power were first fully expressed in constitutional law, constitutions created by the manifest exercise of constituent power – the monarchical constitution of 1791 and the Jacobin constitution of 1793 – did not become a factual basis for the state. The 1791 constitution, resulting from the Constitutional Assembly convened in 1789, was a very temporary document, and it became redundant with the demise of the Bourbon monarchy. The 1793 constitution, devised (arguably) as the foundation for a constitutional order in which the people were actively implicated in government,[14] was never enforced. The 1795 Constitution then proved slightly more durable. However, this document was conceived quite overtly as a counter-revolutionary constitution. Its aim was, not to activate any national political will, but to dampen the direct effects of any immediate constituent acts of the people. Notably, this constitution restricted suffrage through a property-based franchise, it provided for a semi-detached elite executive, and it curtailed the more expansive political rights granted (notionally) under the Jacobin Constitution of 1793, instead giving strict primacy to rights defined by elite economic interests (Gauthier 1992: 299). The drafters of the 1795 constitution, most

[13] See p. 28 above. [14] This common view is contested in Jaume (1997: 133).

prominently Sieyès, considered establishing full judicial protection for constitutional rights, thus suppressing uncontrolled re-enactment of constituent power (Rolland 1998: 67, 75; Troper 2006: 525, 537; Goldoni 2012: 23). Most importantly, the Napoleonic era after 1799 intensified the expansion of state authority and the extension of the law's inclusionary force first set in motion by the revolutionary rupture in 1789 (Church 1981: 110). However, Bonapartist constitutional practice shifted the source of constitutional legitimacy from constituent power to controlled plebiscite. For these reasons, although in the French Revolution the principle of constituent power was expressed as a founding norm of constitutional authority, and it undoubtedly promoted an accelerated dynamic of institution building and political-systemic differentiation, the constituent power of the nation scarcely became a material foundation for the political system. The political order of revolutionary and post-revolutionary France was specifically *not* determined by original acts of constituent power, and the formation of a secure and delineated political system in post-revolutionary France was clearly marked by a measured suppression of constituent power (Rosanvallon 2000: 257). Long after the French Revolution, leading constitutionalists continued to express dismay about the metaphysical reductivism implied in the founding concepts of national sovereignty and constituent power (Duguit 1921: 495).

The paradoxical quality of the concepts of constituent power and national sovereignty is apparent, second, in the fact that the more enduring constitutions which accompanied the rise of modern statehood during the nineteenth century did not derive their legitimacy from extensive socio-political inclusion. For example, most European constitutions that survived through the earlier nineteenth century (i.e. in post-Napoleonic France, some of the German states after 1815, and post-Napoleonic Spain) were conceived as instruments to harden the administrative structure of the political system, and to consolidate the state as a centre of legislative authority. They did this by adopting some procedural norms and some formal rights from revolutionary constitutionalism, but they did not express any meaningful commitment to national or popular sovereignty. These constitutions were intended at once to secure the structure-building, inclusionary benefits which national political systems derived from revolutionary constitutional norms but also to ensure that the functions of the state were not widely opened to society, and were not disrupted by onerous processes of democratic integration and national representation. Constitutions

based in constituent power re-emerged temporarily in 1848, albeit with little long-term impact. In fact, however, it was only after 1870, in the era of high Imperialism, that constitutionalism fully took hold in European societies, and in societies influenced by European constitutional ideals. By this time, however, few constitutions had any emphatic concern for constituent power or inclusive national sovereignty. By this time, most states constructed the legitimacy of the state in *positivistic fashion*: that is, they defined legitimacy as a basic condition in which executive acts were bound by simple set of legal rules, and the state's wider engagement in society was limited.[15] Unlike their revolutionary predecessors, many constitutions created after 1870 remained in force for long periods of time. Yet, these constitutions were designed quite consciously *not* to enact any original will of the people or nation. Instead, they were intended to display legitimacy through thin processes of legal inclusion and equal juridical recognition,[16] and to solidify a semi-representative executive above the increasingly intense divisions in national civil societies. In Europe, in consequence, constituent power did not act as a meaningful objective force in post-revolutionary constitutional practice. As constitutionalism was gradually established as the general premise for political order in the later nineteenth century, states began to use constitutional norms in strategic fashion, and they projected an inclusionary order which, although stabilizing the state executive above society, was designed only for the minimal inclusion of national populations.

Third, the concepts of national sovereignty and constituent power appear most paradoxical because of the basic inner vocabulary in which these norms were first formulated. In America, for example, the doctrine of popular (or, more properly, *national*) sovereignty was placed at the conceptual heart of post-1776 constitutionalism. The idea that the will of the people had to be manifestly enacted through public institutions described a deep symbolic division between American statehood and the colonial constitution, against which it reacted (Wood 1969: 266). However, in American constitutionalism the notion of the sovereign people as the objective source of state power was always wilfully fictionalized. In fact, the constitutions of revolutionary America, once realized, actively ensured that constituent power never became

[15] For the paradigmatic example of European positivism, see Laband (1901: 195–6). For comment on positivism in France, see Nicolet (1982: 156, 164).

[16] Primary examples, one monarchical, one Republican, are the constitutions of Germany (1871) and France (1875).

a real presence within existing political institutions. At one level, the very first American constitutions, written in different colonies before and after the Declaration of Independence, advocated strong legislative power, situated close to the constituent people. However, these early constitutions were rarely founded in any primary constituent acts. They were usually transcribed from a fixed template, and they were hurriedly pieced together as skeletal frameworks for the assumption of political power by sitting colonial administrations (Baum and Fritz 1997: 208–9). Early American state constitutions were not expected to be in force for very long, and concerns for constituent power were peripheral to their conception (Kruman 1997: 7; Adams 2001: 3). After the first feverish wave of constitution writing, then, state constitutions were normally drafted in more measured style. In this context, too, although popular sovereignty was routinely invoked as the source of legitimate government, constituent power was not exercised as a basis for constitution drafting. Only two of the pre-1789 state constitutions were directly ratified by the people.[17] Moreover, post-1776 constitutions quickly renounced any enthusiasm for strong legislative authority. State constitutions written after 1776 began to promote strong executives, reducing the influence of popular delegates. They also allocated growing powers to judiciaries, authorized by lengthy bills of rights, which were designed both to check unconstrained exercise of constituent power by the people and to ensure that single acts of legislation were consonant with the principles stabilized in the constitution (Lutz 1980: 51; Gerber 2011: 93, 222). In this classic constitutional setting, therefore, rhetorical enthusiasm for popular sovereignty was normally accompanied by devices to ensure that the people did not factually act as sovereign.

These paradoxes then persisted, and were in fact accentuated, in the writing of the Federal Constitution of the USA.[18] As mentioned, the Federal Constitution presumed legitimacy as a condensed articulation of national sovereignty, and, as such, it projected itself as the highest, sovereign law for the new American nation in its entirety (see Farber 2003: 4). This was reflected quite clearly in both the Preamble and the Supremacy Clause of the constitution. However, the sovereign acts conferring authority on the constitution were (at best) acts of devolved power, in which, not the people, but the single states, formed the constituent body: the authenticity of the claim that the constitution could

[17] These were the constitutions of Massachusetts (1780) and New Hampshire (1784).
[18] For discussions of the fictitious quality of popular sovereignty in the American Founding see Hulsebosch (2005: 229), Fritz (2008: 150–1) and Frank (2010: 10).

speak for the people – or the nation – was widely contested during its drafting and its ratification.[19] Moreover, once established, the constitution incorporated a number of instruments to prevent recurrent exercise of constituent power, and to stabilize the constitution against its constituents (the sovereign people). The main example of this is the Bill of Rights (1791), which was enforced precisely in order to avoid the convocation of a new constitutional assembly in Philadelphia (see Amar 1998: 289; Maier 2010: 285, 295, 421, 444). Subsequently, the judiciary increasingly acquired a defining role in interpreting the constitution, and higher courts were expected to ensure that the rights contained in the constitution prevailed over momentary popular demands, and even to elaborate binding norms for all society (see Ides 1999: 512). The idea that constituent power should be entrusted to the courts had been formulated by Hamilton, who claimed in *Federalist* 78 that it was the duty of courts to protect 'the intention of the people' underlying the constitution as a whole (Madison, Hamilton and Jay 1987 [1787–88]: 439). By the early 1790s, American judges claimed primary responsibility for protecting the will of the whole nation, originally voiced through the constitution; in fact, they expressly derived powers of judicial review from the concept of the original sovereignty of the people (see Casto 1995: 232).[20] Later, this view became axiomatic in the jurisprudence of John Marshall, who argued that the constitution was a superior, paramount law for the nation, and that the Supreme Court, speaking for the 'original and supreme will' of the people (Hobson and Teute 1990: 182), was obliged to obstruct any act 'repugnant' to the constitution (Smith 1996: 322). In America, in short, the national constitutional order was judicially entrenched to a far greater degree than in revolutionary Europe, and the years after ratification saw a rapid transfer of the constitutional will from the people to the courts. The result of this was, in effect, that courts could determine those interests in society that could be translated into legislation,[21] they filtered interests in society gaining

[19] The use of the term 'We the People' to present the constitution as authorized by constituent power was ridiculed by Patrick Henry in the Virginia ratifying convention of 1788 (Elliot 1941: 72).

[20] See the views of the Justices in *Chisholm* v *Georgia* (1793), especially the following: 'Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation'.

[21] Courts effectively acted as filters for social interests and defining decisions of the Supreme Court dictated that certain interests, at a certain time, could or could not enter the legislative

access to sovereign power, and they assumed responsibility for defining the emergent inclusionary form of the polity: courts, interpreting the constitution, became the bearers of sovereignty. Indeed, in the longer aftermath of 1789, courts played a leading role in giving real flesh to the idea of the American nation (Skowronek 1982: 23, 25, 27–8; Kersch 2004: 68, 112, 141). As a result, the first emergence of a national legal/political system, able to overarch the territories and peoples forming the American nation, was mainly driven, not by primary acts of national will formation, but by the extension of the judicial apparatus. Although it was the only revolutionary constitution of any permanence that had a plausible claim to be founded in acts of constituent power, the U.S. Constitution only referred to constituent power in a thin, dialectical fashion. It invoked the national will as a source of sovereignty, inclusion and systemic authority. But it also used the principle of constituent power as a barrier against uncontrolled popular inclusion or sporadic political reform. Even in this case, national sovereignty and constituent power ultimately appeared as concepts without firm objective reality – or even as concepts that actually obstructed their own realization. Once placed in the hands of the courts, national sovereignty was reconfigured as an *internal* legitimating principle for the political system, and the possibility that it could be objectively or manifestly enacted was lost. Madison himself made this quite clear by stating that American government had the distinct advantage that it, although it obtained its legitimacy as a Republic, also promoted '*the total exclusion of the people in their collective capacity*' from actual processes of governmental administration (Madison, Hamilton and Jay 1987 [1787–88]: 373).

In revolutionary France, the ideas of national sovereignty and constituent power had a similarly fictitious quality. In fact, these concepts were originally little more than a deliberate self-projection of one of the Estates gathered in Versailles in 1789. Prior to 1789, the French nation had only been very loosely conceived, and the patchwork corporate structure of society meant that few aspects of society were perceived in national categories or subject to nationally generalized laws (Fehrenbach 1986: 85–9; Vergne 2006: 90). During the convention of the Estates-General in 1789, however, the Third Estate, prompted by Sieyès, declared itself the incarnation of the nation as a whole,

system. Milestone examples of this process are *Fletcher* v *Peck*, *Dred Scott*, *Lochner*, *Brown* v *Board of Education*. This process of filtration was expressed through constructions of rights.

entitled to speak for the living will of the entire French people. Although soon proclaimed as an indivisible organic substrate for the French state, the nation was initially produced through a simple conceptual artifice, through an act of collective 'self-recognition' on the part of the Estates, and the constituent power of the nation was then exercised on that artificially constructed foundation (Kutzner 1997: 139). In addition, the construction of the nation in revolutionary France always implied, in the spirit of Adam Smith, that the exercise of the national will had to be partitioned along functional lines, such that all citizens of the nation obtained protection through a national constitution, but only active, educated, property-owning citizens could factually participate in expressing the constituent will (Sieyès 1789a: 21). Notably, Sieyès himself advanced a very 'attenuated conception of sovereignty', which was tied to a theory of restricted suffrage, and in which only active citizens (those with sufficient money) could lay claim to immediate exercise of constituent power (Deslandes 1932: 488).[22] This principle, with variations, was applied throughout the whole period of revolutionary constitution writing. Once endowed with primary law-giving authority, the French National Assembly employed the doctrine of constituent power to ensure that the nation, although symbolically present in the political system, remained external to the actual practice of government. Even in France, therefore, constituent power evolved as a projective concept. This concept legitimized the state's inclusive hold on society. Yet, it also cemented the distinction of the state from those persons and acts on whose inclusion its legitimacy factually depended. As discussed, the French nation was eventually constructed and unified, not by a popular constitution, but by a Bonapartist executive.

Overall, in sum, the first basic constitutional concepts of constituent power and national sovereignty were originally formed as fundamentally paradoxical principles. These concepts evolved as principles through which the modern political system imagined the sovereign nation as its own deepest source of legitimacy, promoting a greatly expanded inclusionary structure for its functions on that basis. This doctrine, however, was primarily an inner construction of the political system, and its correlation with objectively manifest facts or practices

[22] Sieyès decided that only those with 'active rights' (rights of property) were allowed to play a role in political will formation (1789b: 19, 21). Eventually, in 1795, he also proposed the establishment of a constitutional jury to oversee conformity of statutes with the original norms of the constitution.

in society at large was very restricted. In most instances, these concepts referred *to a nation that did not materially exist*, and although they summoned the nation into being as a norm of inclusion, they ensured that the reality of nationhood which they proclaimed (the factual inclusion of national society in the political system) could not become reality. As Kelsen (1950: 6–7) observed much later in a different context, the idea that the constitutional state was willed by the constituent nation was always a fiction, as the nation only emerged post factum: the nation only became a real entity after the state, extracting its legitimacy from an imagined nation, had been constitutionally organized. To a large degree, the concept of constituent power remained a self-construction or an *internal formula of inclusion* for the emergent modern political system and for modern society as a whole. It is implausible to suggest that this concept was entirely bereft of material reality; some measure of original popular approval attached to classical constitutions, and some popular acclamation was instrumental in defining their legitimacy and inclusivity. However, the functional reality of this formula for and within the political system was greater than any factual reality that it possessed outside the political system. Above all, seen sociologically, the formula of national constituent power evolved as an inner precondition for the extension of an inclusionary structure for society's political system. It provided a basic cohesive structure to sustain a political system capable of complex acts of legislation, and it offered functionally vital support for acts of legal and political inclusion as society experienced a reduction in the standing of local power, a decline in personal-corporate status as a basis for legal order and a resultant demand for centralized, easily iterable legislation. This formula helped to underpin the basic autonomy of the political system. Yet, it should not be seen as a literal norm for measuring the legitimacy of different constitutional systems.

ii Norm 2: Rights

The second basic norm of classical constitutionalism was expressed in the principle that state authority gains legitimacy if those persons subject to it are recognized, constitutionally, as citizens with common legal entitlements – that is, as *holders of rights*. As is widely documented, the original standing of constitutions as documents bringing legitimacy to public institutions depended on the fact that they allocated a limited set of rights to all persons in society, such that the subordination of these persons to state power was only considered acceptable if this power did not prevent their exercise of certain basic liberties, defined

as *rights*. This was reflected in many early American state constitutions, some of which contained separate Bills of Rights, strongly influenced by the Virginia Declaration of Rights of 1776. This was also reflected in the first amendments to the Federal Constitution, in 1791. All revolutionary constitutions in France contained catalogues of rights, appended as preambles to the main trunk of the constitution.

In the first instance, such classical constitutions formulated certain *subjective rights* as the precondition for legitimate rule, stating that persons should be treated as equal under law and as endowed with like claims to dignity. On this basis, classical constitutions dictated recognition of select rights of judicial and procedural equality and, within constraints, of personal inviolability as a normative precondition for the legitimate use of power. In some cases, classical constitutions also formalized certain *positive rights* of political participation and political representation as principles of legitimate government. In addition, classical constitutions formulated certain rights as *negative freedoms*, and they insisted that a legitimate government must protect certain rights, such as freedom of ownership, devotion, mobility, labour, exchange and contractual autonomy, which they defined as withdrawn from arbitrary constraint by the state. In this respect, early constitutions placed limits on the ability of states to expand their power into spheres of society and areas of social exchange not directly accountable to the political system. Early constitutions, in fact, attached quite particular emphasis to rights of independent property ownership and contractual autonomy, and they typically provided particular protection and entrenchment for property rights. This was illustrated by early American constitutions, which were expressly designed to protect independent property from unwarranted fiscal depredation. The Virginia Declaration of Rights, for example, clearly defended 'the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety' as a core right, foundational for human society. The Federal Constitution itself only contained limited express guarantees of property rights. However, the contract clause was soon interpreted as a declaration of absolute prior rights, giving primacy to property rights over other rights.[23] This was further exemplified by the

[23] See *Sturges* v *Crowninshield*, 17 U.S. 4 Wheat. 122 122 (1819). Note in this regard Marshall's claim, albeit in a dissenting opinion, that 'individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties'. *Ogden* v *Saunders*, 25 U.S. 12 Wheat. 213 (1827).

constitutions of revolutionary France, which made extensive provision for the protection of property, and whose assault on the remnants of feudal law was intended to institute free ownership and free circulation of goods as protected economic principles. Notably, for example, tentative projects for a new Civil Code, reflecting ideas of proprietary autonomy, were drafted in the height of the revolutionary period in France.[24] By 1795, the principle of monetary autonomy was clearly a dominant source of constitutional rights in France, behind which other rights had lost much of their initial importance (see Gauthier 1992: 299). As a result, rights securing economic freedoms, such as freedom of contract, freedom of exchange and freedom of employment, assumed increasing primacy over other rights. This was eventually reinforced in the Napoleonic Civil Code of 1804, later emulated in much of Europe, which enshrined uniform property rights, freedom of contract and individual self-reliance as the legal basis for civil society. Tellingly, in fact, the main initial drafter of this code, Jean-Étienne-Marie Portalis, was very sceptical about the active exercise of national sovereignty as a foundation for government. However, he clearly insisted (Portalis 1827: 317, 365) on the inviolability of rights of property ownership, which he saw as 'inherent to the existence of each individual'. This process of codification in France was closely correlated with the dissolution of single persons from their previous attachment to estates and corporations, whose fabric of rights based in local and sectoral privilege, had prevented free exchange of contract and free movement of money, goods and labour (see Fehrenbach 1974: 12).

In many ways, the construction of rights as principles of constitutional legitimacy for the political system was immediately connected with the concepts of constituent power and national sovereignty, and the concept of rights has a similarly paradoxical nature. Indeed, constitutional rights acted in a close functional homology with constituent power and national sovereignty to establish a basic inclusionary structure for the political system of nascent modern societies. On one hand, for example, the fact that classical constitutions explained the legitimacy of the political system by conferring rights on those subject to power – that is, by defining all members of society as equal rights holders, and as evenly subject to legal and judicial procedures – helped to consolidate the political system as an inclusive sphere of functional

[24] The revolutionary French civil code (1793) was intended to regulate 'civil rights', which were strictly separated from the 'political rights' regulated by the constitution. This code, drafted by Cambacérès, is reprinted in Barazetti (1894: 313–451).

exchange, able to define and transmit its power across society as a clearly public resource. Recognition of persons subject to power as holders of similar basic rights meant that the political system could authorize and distribute power, in very different social contexts, in easily reproducible procedures, applied equally (in principle) to all persons and to all places. Moreover, the fact that power was applied to rights holders meant that laws contained an inner account of their public origin, so that laws enforced by the state could be immediately acknowledged as having publicly inclusive authority, in many different social settings. Rights, constitutionally instilled in the political system, greatly simplified its functions of legislative and judicial inclusion, and the constitutional construction of the state as a legal order based in rights rapidly intensified the penetration of the state into society. On the other hand, as mentioned, the fact that persons were recognized as rights-holding citizens meant that these persons experienced a weakening of the local or particular rights, attached to status and corporate association, which had previously defined their freedoms and obligations, and they were placed in a more immediate relation to the state. This also meant that the political system was able to position itself in a relatively uniform social environment, and it could transmit laws straightforwardly and in easily reproducible fashion across the social terrains over which it assumed jurisdiction. In both respects, rights formed a general inclusionary structure for the political system, connecting it closely to other parts of society. In both respects, rights did much to construct the persons located in societies around the political system as uniform nations, susceptible to relatively even legal inclusion by the emerging national political system.

To illustrate these points, for instance, in revolutionary America, the insistence that all citizens were holders of identical rights brought enhanced uniformity to the legal/political order of the emerging American political system and the emerging American nation more widely. Clearly, the assumption that laws acquired legitimacy from recognition of rights meant that laws, at least in principle, were applied in similar form in different parts of society, and persons were constructed and addressed by the law in broadly consistent fashion. In particular, however, the unifying role of rights was evident in the fact that citizens could challenge laws through the national courts by appealing to rights, guaranteed equally to all citizens in all states, and the national courts could invoke rights to determine certain national laws as having precedence over local or state laws. Through this process, courts placed

individual persons in an increasingly direct relation to central organs of public power, and individual legal claims intensified the standing of federal norms alongside more customary legal practices.[25] In consequence, individual persons across the Republic defined their claims and obligations in a more immediate national context. As a result, courts implanted rights in American society as instruments of nation formation, and judicial actors, applying constitutional rights, played a core role in establishing the American Republic as a factual inclusionary reality. In both respects, rights acquired a very distinct importance in establishing a consistent inclusionary structure for the national political system.

In revolutionary France, yet more strikingly, the doctrine of constitutional rights was proposed specifically to consolidate the inclusionary power of the state. It was stated quite clearly during the revolution that, as the state guaranteed constitutional rights, rights allocated by other persons or legal entities were not legitimate, and rights could not be secured outside the state: the state was defined as an *exclusive source of rights*.[26] In this respect, formal constitutional rights were applied to eradicate institutions, notably corporations, which had traditionally allotted particular rights of status and affiliation to their members, and to cut away the structures standing between the state and the citizen, heightening the immediacy of the relation between persons and the state. Anti-corporate legislation in fact had a long history in prerevolutionary France. Such policies had already been enforced in the late sixteenth century, and they culminated, initially, in Turgot's edict of 1776 (Turgot 1844: 302–18) to suppress corporations, which, indicatively, was clearly shaped by Lockeian ideals of personal rights holding. After 1789, however, uniform conceptions of rights were widely enforced to reduce the influence of professional monopolies, privileges and corporations, and the constitutional assumption that all persons, qua citizens, were holders of identical civil and monetary rights was enforced to diminish the significance of rights derived from corporate status or membership.[27] The result of this was that the political system was able to harden its peripheries against private arrogation of public

[25] The expansion of federal power by the American courts was specifically justified by reference to constitutional rights, especially rights of contract (see Currie 1985: 128).
[26] Speech by Chapelier in 1791. Quoted in Martin Saint-Léon (1922: 623).
[27] See Jaume (1989: 50). Sewell argues (1980: 136) that the granting of simple property rights in the French Revolution 'changed the French nation from a hierarchical community composed of corporate bodies' into an 'association of free individual citizens'.

power, which had proved a formidable obstacle to the construction of strongly abstracted political institutions. In turn, this meant that society converged more evenly around the political system, and the political system, dispensing equal rights to all persons, was able to implement laws and distribute power across society in simplified, inclusive fashion, without unsettling regard for variable local and corporate hierarchies.

In the constitutional revolutions in both America and France, therefore, the circulation of rights gradually transformed localized societies into extensive and evenly inclusive environments for the political system – into societies taking the form of *nations*. In the French and American revolutions, in fact, nations first evolved as such as rights pierced through the local/corporate order of early modernity and bound different parts of society together in a generalized order of political inclusion, and the construction of persons as *rights holders* was a core element in the formation of society's underlying political structure. As has often been intuited in sociological literature,[28] nations and rights were to some degree co-original: rights were deeply formative of the first inclusionary structure of modern societies, and they constructed the basic stratum of norms around which historical communities began to form, and account for themselves as, uniformly integrated national societies.

Notably, however, the functions of constitutional rights in creating an inclusionary structure for emergent national political systems were not restricted to the positive promotion of societal integration. Rights also supported the inclusionary functions of the modern political system because they placed limits on the quantity of exchanges in society that the political system was obliged to internalize.[29] As mentioned, the most important rights guaranteed under classical constitutions were in fact, neither subjective rights of equality, nor positive rights of participation, but *negative rights*, covering freedoms to be exercised outside the immediate jurisdiction of state power, which categorized certain spheres of societal activity as exempt, or *excluded*, from the intrusive use of state authority. The fact that the first modern constitutions contained lists of rights, sanctioning freedoms relating to economic

[28] For example, Durkheim (1950: 93–6) argued that the modern national state, of itself, creates rights, and it operates as a differentiated body because it allocates rights to individuals, as they become disaffiliated from organic corporations. Parsons (1965: 1015) also conceived of rights as institutions that give effect to the inclusionary dynamics inhering in the national social system.

[29] This theory is elaborated more fully in Luhmann (1965: 135)

exchange, religious disposition, mobility and expression, which were largely immune to state control, meant, initially, that exchanges in the economy, religion, publishing, academic teaching, science, etc., could only become relevant for the political system in exceptional circumstances. In this respect, the allocation of rights involved the formal inclusion of persons in a system of legal protection, but, in practice, it meant that the political system was relieved of authority and functional responsibility in many parts of society. In fact, the inviolability of negative rights meant that the political system could claim legitimacy by including members of society, through legal recognition of their negative rights, while also stabilizing the factual position of these persons outside its own functions and reducing its accountability for the objective regulation of interactions between members of society. At one level, therefore, constitutional rights may have supported the emergent political system by heightening its normative *inclusivity*. Dialectically, however, constitutional rights also sustained the political system by allowing it to explain its inclusivity without being forced objectively to integrate persons in its functions or to promote inclusion as anything more than a thin legal reality. Indeed, the recognition of negative constitutional rights allowed the political system to restrict its inclusionary acts of legislation and legal protection to a very narrow sphere, and to obviate extensive absorption of social agents or exchanges.

Overall, early constitutional rights provided a vital inclusionary formula for the modern political system because they allowed it to limit and differentiate its functions against other spheres of interaction, and to promote legal and political inclusion without exposing itself to broad social demands, to improbable extension of its responsibilities or to excessively unsettling conflicts. Rights provided a balanced inclusionary structure, which heightened the basic autonomy of the political system, and which enabled it to perform inclusionary acts without renouncing its essential functional distinction. This secondary role of rights in forming the inclusionary structure of modern society is most clearly in evidence in the manner in which rights (as the second founding norm of constitutionalism) interlocked with national sovereignty (as the first founding norm of constitutionalism). The integral fusion of these two concepts, in fact, formed the most fundamental inclusionary structure for the early form of modern society and its political system.

In the first instance, it needs to be noted that, in the strict conceptual categories of classical constitutionalism, the two primary constitutional norms – national sovereignty and rights – were originally

conceived as antinomies. The classical constitutional doctrine of constituent power implied that constituent power created and legitimated the political system by enacting the sovereign will of the nation without any prior normative constraint. As such, the concept of constituent power imagined the nation as the source of a sovereign power that was *absolutely prior* to all rights, so that rights could only assume validity to the extent that they were expressly willed by constituent power. In revolutionary France in particular, rights not constituted by the manifest will of citizens were always objects of suspicion: rights of citizens were expressly designed to replace the disordered mass of plural, venal and status-defined rights characterizing the landscape of the *ancien régime* (Ray 1939: 367). For this reason, rights could only become legitimate as elements of *constituted power*, and they could only impact on legislative procedures if formally willed and prescribed by the constituent power. If scrutinized beneath the purely conceptual level, however, rights acquired a significance in classical revolutionary constitutionalism that did not appear in the literal terms of constitutional doctrine. Although rights were posited in a partly antinomical relation to constituent power, they actually evolved as normative institutes that occupied a position between the strict categories of constituent and constituted power, and, in this position, they had a profound impact on the inclusionary structure of the political system. In this intermediary position, in fact, rights moderated the standing and the authority of the sovereign nation, and, in so doing, they abstracted the most essential inclusionary formula for the political system of modern society.

To illustrate this point, first, in the main cases of classical constitution making, rights *pre-defined* national constituent power. In both revolutionary France and revolutionary America, the context in which constituent power was first exercised was internally shaped by rights, and rights provided normative principles which clearly dictated the content and the scope of national sovereignty. In revolutionary France, for example, the assertion of constituent power in the National Assembly in 1789 derived impetus from a twofold conception of rights: rights formed something close to an implied constitution, to which the actual exercise of constituent power was supposed to give effect. On one hand, the exercise of constituent power was motivated by a deep hostility to the variable fabric of rights, based in corporate exemptions and privileges, which underpinned late Bourbon society, and it was expected to supplant this with a uniform system of rights (see Sewell 1980: 85). On the other hand, the assertion of constituent power was

impelled by strong conceptions of natural law, which insisted on the equal and uniform imputation of rights to all members of society. Both these conceptions were directly expressed by Sieyès, who saw the constituent nation as a nation of equal rights holders, actively negating all special rights or privileges.[30] In both respects, the revolution proposed a theory of national sovereignty in which the nation became sovereign by willing certain common and generally binding rights, and in which certain prior rights were constitutively co-implied in the exercise of sovereignty. Common rights, therefore, formed a higher implied constitution, and it was only by activating such rights that constituent power became a source of legitimate government. This theory eventually culminated in the thought of Robespierre, who clearly argued that rights formed prior limits on the exercise of constituent power, such that the constituent power could only legitimately will if it *willed rights*. In 1793, Robespierre stated simply (Robespierre 1957: 507): 'The Declaration of Rights is the constitution of all peoples; other laws are by their nature changeable, and subordinate to it. It must be present to all spirits, it must shine at pinnacle of your public code, and its first article must be the formal guarantee of all rights of man'. In revolutionary America, similarly, rights were very deeply embedded in national society, and they pervasively pre-formed the exercise of constituent power. In fact, the first stirrings of constituent power in America were shaped by the perception that the American colonies possessed de facto a common-law constitution, based in manifest rights. In particular, it was claimed at this time that the Westminster parliament had imposed laws, typically fiscal levies, which encroached on rights to which all inhabitants of the colonies could self-evidently lay claim. As a result, the earliest revolutionary documents – for instance, the resolutions of the Stamp Act Congress (1765) and then of the Continental Congress (1774) – authorized popular resistance to the English crown through reference to rights, which were observed as already formally constituted and protected elements of the constitutional order. In some instances, prior to the Declaration of Independence, resistance to unwarranted legislation was actually initiated and authorized by courts of law, which specifically refused to implement Westminster tax levies on *constitutional grounds* (see Morris 1940: 431; Williams 1978: 126; Grey 1978: 880). Early state constitutions then also explained their revolutionary legitimacy by underlining how British taxation laws had been *repugnant* to the rights

[30] Sieyès argued that the nation, as constituent power, is a people 'all equal in rights' (1789b: 19).

guaranteed by the inherited common-law constitution.[31] In America, in short, the demand for rights became the elemental *language of revolution* (see Rakove 1997: 288–338; Levy 1999: 253; Bradburn 2009: 29).

In both classical constitutional revolutions, rights existed prior to constituent power, and in many respects they pre-determined or even *pre-constituted* the specific volitional content of this power. This meant that rights invariably subjected the constituent power to prior constraint, and they proportioned constituent power towards particular normative objectives: they defined what constituent power could actively will, and, to some degree, they prescribed the conditions under which the national will could become sovereign. This was especially notable in America, where the constituent process was strongly focused on preserving rights of free property ownership, immunity against depredatory taxation and rights of fair trial and fair judicial redress. By identifying such goods as primary values, the discourse of rights removed certain areas of social activity from the reach of constituent power, and it ensured that the transformative force of constituent power was restricted. In this respect, ultimately, the theory of constitutional rights provided dialectical service for the emergent inclusionary structure of modern society. In particular, the principle that the political system owed its legitimacy to the recognition of prior rights meant that, although it extracted its authority from the constituent power, the political system always engaged with the national people in highly selective, filtered fashion. Indeed, it was only required to include the people in those specific practices covered by rights, and it was able to perform this function by offering and underwriting a relatively small number of legal guarantees. As a result, the political system preserved a clearly differentiated position towards the people in whose inclusion its authority was founded, and it was able to extract authority from the people in a highly simplified manner, through the simple recognition and legal protection of a small body of rights. In fact, rights transformed the sovereign nation into an inner construction of the political system; the political system internalized the nation, not as a mass of people, but as a body of rights holders, entitled to legal inclusion and protection in a limited set of practices and it authorized its inclusionary functions through reference to this simplified inner image of the people. From the outset, therefore, the inclusionary structure of national societies evolved through the

[31] For comment see Bilder (2004: 187). Notably, the 1777 Constitution of Georgia declared British tax levies 'repugnant to the common rights of mankind'.

circulation of rights both as *media of inclusion* and as *media of selection*, and rights stabilized the political system in society by allowing it to proportion its acts to a simplified model of the persons from which it derived its power, and to a series of quite limited functions and obligations.

If rights helped to consolidate the inclusionary structure of the political system by *pre-defining* constituent power, however, this selective function became far more evident through the standing of rights *after* the initial exercise of constituent power. This is illustrated, in complex fashion, by circumstances in revolutionary France. Rights of course assumed great symbolic importance in the French Revolution, and the Declaration of the Rights of Man and Citizen, attached to different constitutional texts, was surely the most prominent statement of intent in the whole revolution. However, after 1791, rights were given only limited formal protection in the course of the French Revolution. Each of the revolutionary constitutions was committed, in point of principle, to defending the primacy of the legislature, and to constructing an approximate identity between the national people and the political system as a basis for legitimate power (Rosanvallon 2000: 20). None of these documents accepted prior formal restriction on acts of popular will formation. Moreover, because of the association of the Bourbon judiciary (in the corporate *parlements*) with venal privilege, the French Revolution reflected a deep contempt for independent judicial bodies (Jaume 1989: 365), and the constitutions of 1791 and 1793 placed strict limits on the exercise of judicial power, avoiding any blurring of legislative and judicial functions. During the most intense periods of revolutionary activity, further, normal judicial procedures were routinely suspended and laws were introduced by executive fiat, with little regard for even the most emphatically declared natural rights. The moderation of constituent acts, in consequence, always remained fragile in the French Revolution, and systemic counterweights to national sovereignty were weak. Despite this, nonetheless, rights retained a certain moderating significance during the revolutionary era. Notably, rights played an important role in the formal shaping of legislation, and they were reflected in the strict separation of powers in the early constitutions, which was promoted, notionally, to protect rights through society from executive violation. From 1795 onwards, the idea also surfaced intermittently that rights could be invoked by a designated court to police the content of parliamentary legislation (Rolland 1998: 67, 75). As discussed, moreover, both in revolutionary France and in the

extended sphere of Napoleonic influence singular/personal rights were used to underpin the system of civil law, and these rights were secured in relatively apolitical form, outside the constitution of the state. In each of these respects, constitutional rights placed certain formal constraints on the political will of society.

In revolutionary America, rights obtained much higher formal standing than in France, and they clearly determined the conditions under which constituent power was activated. In this setting, a nexus between rights and constituent power was galvanized, which proved deeply influential for subsequent patterns of constitution writing. This is reflected in particular in the rising importance of judicial power in the early years of the American Republic, both within the political system and in society at large. As mentioned, in pre-revolutionary America judicial scrutiny of legislation was not unknown. Distinctively, however, after 1789, the status of rights in the Federal Constitution meant that the powers of the courts increased, and courts assumed great salience in the control of legislation. As discussed, the Bill of Rights was introduced in the first instance as a measure to counteract demands, voiced by anti-federalist factions in state assemblies after 1787–88, to re-convene a constituent assembly in Philadelphia, in order to thoroughly revise the Federal Constitution. As such, the Bill of Rights was clearly designed to moderate the exercise of constituent power. Gradually, then, the Bill of Rights, along with the more general rights expressed through the constitution in its entirety,[32] created a legal framework in which the judiciary began to review legislation to ensure its conformity with rights protected in the constitution. In notable early rulings, the Supreme Court began expressly to refer to rights norms, often derived, somewhat informally, from the law of nations, to assess the acceptability of statutes and to adjudicate in contested cases. In many early decisions, for example *Chisholm v. Georgia* (1793) and *Vanhorne's Lessee v. Dorrance* (1795), judicial opinions were expressly sustained through reference to basic rights of individuals (Paust 1989: 572).[33] During Marshall's tenure as

[32] Hamilton claimed, in *Federalist* 78, that the constitution as a whole was a collection of 'political rights'. In *Federalist* 84, he argued that the constitution was of 'to every useful purpose, a Bill of Rights'(Madison, Hamilton and Jay 1987 [1787–1788]: 437, 477).

[33] Note Cushing's opinion in *Chisholm* v *Georgia*: 'Further, if a State is entitled to justice in the Federal court against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed, the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is government'.

Chief Justice, the principle was clearly stated, for example in *Fletcher* v. *Peck* (1810), that judicial tribunals were appointed to 'decide on human rights',[34] and they acted, to some degree, as custodians of the original power of the people, whose first exercise had been proportioned to rights, deciding which new laws were consonant with the popular will declared through the constitution. In many cases, the American courts specifically interpreted constitutional rights to give primacy, nationally, to monetary rights and contractual rights, whose expansion heightened the legal cohesion of the new Republic.[35] Through this process, rights were articulated both as primary expressions of the constituent will – that is, as elevated norms instituted by the people as national constituent power – and as objective checks on the laws that could be willed by the people in its constituted form (see Paust 1989: 571). This meant that, just as rights had originally pre-defined the content and the reach of constituent power, they also, in many ways, insulated the political system of the new Republic against the renewed assertion of this power, and they curtailed the factual impact of the sovereign national people on actual processes of legislation. Rights ensured that the will of the nation could only be re-admitted to the polity in strictly measured fashion, and that certain areas of activity (those expressly covered by rights) could not be freely subject to legislation. Courts, with authority to apply rights, were transformed into concentrated repositories of constituent power, and they demarcated the boundaries of the political system against social actors seeking to introduce new constituent interests into the political system.

In both classical constitutional revolutions, therefore, constitutional guarantees over basic rights (especially private, economic and monetary rights) separated the emergent political system from the national society in which it was situated, and it offered a means of national inclusion without factual integration. In so doing, it hardened the boundaries of the political system against the sovereign nation from which it purported to receive legitimacy. At a functional level, this moderating quality of rights had vital importance for the emergence of the modern political system. It meant that society obtained a political system which was able to derive authority from a public inclusionary structure, based in the authoritative will of the people. But it also meant that the

[34] *Fletcher* v *Peck*, 10 U.S. (6 Cranch) 87 (1810).
[35] *Fletcher* v *Peck* is the obvious illustration of this tendency. But see also *Sturges* v *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

political system was able internally to regulate its processes of inclusion, and to check its boundaries against any uncontrollable integration of objective social interests. This meant that the constituent power of the national sovereign people, although always of the highest significance as a source of normative legitimacy for legal acts, only existed as an *implicit* force within the political system. The political system could refer to the people to sustain inclusionary acts without factually incorporating the people as an existing entity: inclusion occurred through the recognition of persons as protected in their rights.

On this basis, constituent power and rights fused to form the first wellspring for the inclusionary structure of modern society. Together, these concepts projected a formula that was able to produce legitimacy for the emergent political system at a relatively high degree of autonomy and recursivity. This formula – constituent power and rights – constructed an inclusionary basis for the political system as the form of society as a whole widened beyond its historical local boundaries, as society directed an increasing volume of demands for legislation to centralized institutions (the state) and as the political system began to acquire a specifically differentiated form. This conceptual fusion supported the emergence of a political system able to claim encompassing authority for society and to legislate across different societal domains at a heightened level of inclusivity. However, this formula created a normative structure for a political system whose inclusionary functions were always limited, and it ensured that society as a whole emphatically *did not* enter the political system as a unified national sovereign agent. In this respect, ultimately, the fusion of national sovereignty and rights in classical constitutions only promoted political inclusion for a relatively thin domain of society. In fact, this formula projected an inclusionary structure for the political system in a society in which general consumption of law was still low, in which the inclusionary demands addressed to the political system were limited and in which the political system was not required to penetrate deeply into society. In France, in particular, the primary function of the classical constitutional formula was that it established an inclusionary structure for a political system that replaced corporations as dominant centres of organization. In post-revolutionary America, despite the salience of the rhetoric of constitutional rights, the factual exercise of rights by citizens remained very curtailed.[36] Far

[36] A recent analysis of America after the Civil War states that 'only a minority of Americans actually exercised full civil and political rights. Restrictions in state and local laws placed most

from presenting an objective reality of popular sovereignty, there, classical constitutional doctrine can be seen, sociologically, as merely the first stage in a long process of national inclusion. Of itself, classical constitutions merely established an inclusionary structure for a political system at a very rudimentary stage of differentiation and inclusionary formation. Seen sociologically, in fact, classical constitutionalism articulated inclusionary principles, which would only approach reality through a long subsequent process of social and constitutional formation.

CONCLUSION

In conjunction with each other, the principles of rights and national constituent power began in the later Enlightenment to form the normative foundation of modern statehood. Together, these principles constructed a formula of inclusion for the political system of a society whose pluralistic local or sectoral form was beginning to be eradicated. From this point on, in particular, national sovereignty became a dominant *norm of inclusion* for society's political order. National political systems were centred on the principle that they perform inclusionary functions for all society: they were defined as institutions that legislate with some degree of uniformity across all society, that presuppose generalized normative support in society and to which most persons and exchanges enter an even, relatively immediate relation. Subsequently, these principles were repeatedly contested and ignored. However, few political systems after 1789 conclusively rejected the idea that they were created for purposes of national representation and integration. After the revolutions of the eighteenth century, most societies, or at least those not directly subject to imperial control, began, slowly, to assimilate elements of this constitutional formula, and they used this formula to design political systems which were able to obtain and preserve legitimacy in face of expanding (national) societal environments. Through this formula, the political system was able to articulate a sustainable inclusionary structure for its functions, and it initially experienced a substantial increase in its capacities for producing and distributing laws, across the increasingly widening and complex environments that it controlled. On this conceptual foundation, the modern political system was first formed as an essentially separate, autonomous functional

people somewhere on a very broad middle ground, removed from slavery on one side, but also distant from the full range of rights on the other side' (Edwards 2015: 153).

domain, able to produce and re-generate its power from within itself, and to extend laws beyond the local fissures of early modern society. National societies more widely were then defined and *constituted* by the inclusionary structure of the political system, and they began to converge, as nations, around national political systems.

Despite this, however, the norms of classical constitutional government should not be seen as an objective measure of governmental legitimacy. In fact, neither the concept of constituent power nor the concept of rights was fully correlated with an objectively given reality. Both concepts, although not entirely illusory, assumed their highest significance as adaptive principles *for* and *within* the inclusionary structure of society's political system. As discussed, the concepts of national sovereignty and constituent power did not genuinely imply that all national society was implicated in founding the political system. Likewise, the concept of rights did not truly indicate that all members of society were equally respected or recognized in acts of legislation. Together, however, these concepts combined to enunciate a specific inclusionary formula, through which the political system was able to instil within itself an authoritative, yet sustainable, declaration of its legitimacy. This construction meant that the political system could purport to derive legitimacy for law making from outside itself (from the people, in the form of the sovereign nation), while in fact distilling its legitimacy in highly internalistic form, to which the people as a factually existing entity or group of agents was only symbolically admitted, through the exercise of a select group of pre-defined rights. If national sovereignty became the *norm of inclusion* for the modern political system, in other words, rights became the *medium of inclusion* for the modern political system. After the constitutional revolutions of the Enlightenment, constitutions acted as normative premises for political inclusion, in which laws were authorized by the presumption that they were produced by the sovereign people, and the people were selectively integrated in the political system by guarantees over rights. *The balance between these concepts meant that the nation was defined as the founding inclusionary norm for society, but the nation only became real, and it only entered the political system, through the medium of rights: rights became the inclusionary medium of the nation, and rights translated the idea of national sovereignty into a meaningful inclusionary structure for the political system. The nation became the basis for the functions of the political system only insofar as the nation was translated into rights*. The ability of these concepts to establish an inclusionary structure for the political

system, however, depended on the fact that they did not possess a full material reality. Both concepts in fact acquired their primary meanings in the projective, functional dimension of society.

Viewed sociologically, further, classical constitutions created an inclusionary formula for a political system which was only at an incipient level of differentiation and social penetration, whose inclusionary functions still had limited reach and which, accordingly, did not presuppose extensive support through society. The formula of national sovereignty and rights first appeared as a formula of *minimal inclusivity*, to support the functions of a political system which was only gradually beginning to perform extensive inclusionary functions and whose hold on society was not deep. The first fusion of national sovereignty and rights was in fact manifestly proportioned to the structure of a society, in which the political system needed to proclaim inclusive authority for certain laws, but in which the quantity of exchanges actually subject to central legal control was low. Clearly, the prominence of private and economic rights in classical constitutionalism restricted the inclusion of the nation to a small set of practices, and it ensured that the political system could integrate persons, in their quality as rights holders, without great administrative challenges. As early constitutional states integrated persons by guaranteeing and enforcing economic rights, in fact, most functions of inclusion were focused, paradoxically, on ensuring that persons whose rights were protected by the state were not subject to excessive state interference. The primary rights allocated by classical constitutions specifically acted to prevent the factual inclusion of persons in society; classical constitutions gave recognition to persons as holders of economic rights, but, in so doing, they ensured that these persons placed few demands on the political system. As discussed, the inclusionary formula of classical constitutionalism used rights to include the nation in highly measured, selective fashion, and the people were admitted to the political system only in dimensions defined largely by economic rights: in fact, legal inclusion of the people through economic rights did not require their factual inclusion. The formula of classical constitutionalism thus merely distilled the *first layer* of modern society's inclusionary structure. Through this formula, the political system derived authority from a national society. But it only included this nation through the restricted medium of private, monetary and economic rights, and the nation only entered the political system through such rights.

Despite the limited reach of classical constitutional norms, national constitutionalism ultimately instilled a distinct formative dynamic within the inclusionary structure of modern society. After the creation of the first national constitutions, general inclusion became the main source of legitimacy for national political systems. From this time on, societies commonly articulated their inclusionary structures through the formula of national sovereignty and rights: their political systems, acting at an increasing level of differentiation, penetrated further and further into society by using this inclusionary formula. After the first emergence of national constitutions, the political systems of modern societies were enduringly defined by this inclusionary model, and, having called the nation symbolically into being, these political systems were required, slowly, to give reality to the nation from which they drew authority, and to make the nation meaningful in their own acts. As the localistic fabric of society became weaker through the nineteenth century, in particular, political systems experienced greater need for wide societal support, and they began to give stronger expression to the idea of the sovereign nation as a real source of legitimacy. Gradually, states began to incorporate the nation in the political system by allocating thicker, more extensive, strata of rights, alongside the small body of private, monetary and economic rights guaranteed in the revolutionary era, which acted as less ephemeral inclusionary media for the sovereign people. As discussed in Chapter 4, the norm of national sovereignty eventually compelled political systems to elaborate an extensive, multitiered system of rights in society, located on top of the *first tier* of private, economic rights established in the revolutionary era. As the political system reached gradually more deeply into society, it was forced to allocate different strata of rights – initially, more substantial political rights; then other supplementary rights, including social-material and even ethnic rights – to ensure that it could obtain support amongst the social groups subject to its power, and thus to expand its basic inclusionary structure. National sovereignty eventually became a more palpable material reality, and it was slowly realized through the construction of an expansive system of rights around the political system. Through the stabilization of different strata of rights, constitutionalism ultimately established a more complex inclusionary structure for national society, able to integrate the population in the political system as a material presence – albeit often with unintended and fateful outcomes. In its initial classical form, however, constitutionalism created a very

simple inclusionary formula – constituent power and basic rights – which underpinned a political system whose functions of national inclusion were still very limited and whose penetration into society was curtailed.

The early normative form of constitutionalism, accordingly, should not be seen as an objective reality, and it should not be taken as a standard for the observation of other patterns of constitutionalism. It should be seen, rather, as the first stage in the emergence of modern society's inclusionary structure. From the eighteenth century onward, the political system designed its inclusionary structure through a combination of national sovereignty and rights, using rights to integrate the nation within the political system. The formula of classical constitutionalism thus marked the beginning of a long process of inclusion, in which contemporary constitutional norms are still implicated. The positing of a strict dichotomy between classical and transnational constitutional norms is usually the result of an excessively literal interpretation of classical constitutions.