

were policed by other rights: it was the coalescence of rights of sovereignty with other particular (formal and negative) rights that made the enduring formation of state power in America possible. The American states were able gradually to construct themselves as independent political organs and to develop effective legislative competences because they sanctioned a precisely constrained interplay between the inclusive and the exclusive functions of rights, and, after the first ebb of revolutionary/democratic or republican fervour, they insisted that representation of the sovereign nation must be entrusted to agents whose delegated functions and legislative actions were prescribed and preformed through established rights. By founding their legitimacy in this dialectical fusion of sovereignty and rights, the American state constitutions developed a conclusive technique for managing the boundaries of the political system, and they evolved a device both for organizing and including the sources of their abstracted power and its legitimacy and for preselecting those exchanges that the state was required to incorporate.

Ultimately, these interwoven functions of rights culminated in the Federal Constitution itself. On one level, to be sure, the Federal Constitution assimilated the positive implications of rights. Although it was less able to mobilize pure-republican legitimacy than the individual state constitutions, the concept of popular sovereignty, in modified form, was placed at the centre of the Federal Constitution. The Federal Constitution contained an implied idea of national citizenship, national equality under law (Art. 4.2), and national representation, and, although it recognized some state rights as limits on federal power, it drew its originating legitimacy from the same positive principles as state constitutions. Despite this, however, the defensive construction of rights again played a substantial role in the construction of the federal state. As is well documented, the revolutionary period in America was marked by a deep conflict between parties urging the formation of a strong federal state and those parties favouring the concentration of sovereignty in particular states. In this setting, it was initially the opponents of the federal state, the Anti-Federalists, often repeating earlier arguments directed against the Westminster parliament, who adopted a defensive conception of rights and were keen to promote a Bill of Rights to place checks on federal authority. In exemplary fashion, for instance, Luther Martin argued that a Bill of Rights would 'serve as a barrier between the central government and the respective states and their citizens' (Mason 1964: 77). The Federalists themselves only gradually came to view a formal Bill of Rights as necessary, and a separate catalogue of rights

was not added to the Federal Constitution until 1791. This delay was due in part to the initial belief of the Federalists that human rights could not be fully enumerated and that any attempt to systematize rights must leave some rights unmentioned and vulnerable to violation. This delay was also due to the view, expressed by Alexander Hamilton in *Federalist* 84, that the constitution in itself already de facto comprised a Bill of Rights (Madison, Hamilton and Jay 1987 [1787–8]: 477). Additionally, however, the late acceptance of a Bill of Rights resulted from the conviction, expressed by James Madison, that governments only exercise powers specifically allotted to them, and that any formal catalogue of rights reflected a vague, dangerously expanded view of the extent of state power. Governments, in Madison's view, only laid legitimate claim to limited functions, and they could never encroach on natural human rights: the precautionary circumscription of the federal state with catalogues of rights was, consequently, superfluous (Mason 1964: 80–1). Nonetheless, by 1791, the Federalist framers, and particularly Madison, reacted to amendments proposed by the state ratifying conventions, and they drafted a bill based on those already contained in many state constitutions.³⁷ In the early federal era, in consequence, the use of rights was tied, across the spectrum, to the belief that rights served, not positively to form or transfer power to states, but defensively to restrict and selectively to filter state power.

These negative rights in the Federal Constitution played a core role in constructing statehood in the early American republic. As in the state constitutions, the establishment of a Bill of Rights in the Federal Constitution had the primary outcome that it removed crucial social issues from the centre of political intensity, and it reduced potentially destabilizing controversy around the state. This was evident, for example, in provisions for rights of judicial equality, which separated the law from constant political exposure. This was also evident in the question of religion: the constitutional guarantee of rights of religious freedom (already highly refined in colonial charters) and the independence of the church acted to remove religious conflict from the sphere of political control. In addition, the fact that the federal constitution gave endorsement to singular rights of ownership by protecting persons from expropriation helped to ensure that the political system was relatively indifferent to economic conflicts, and, in defining questions of ownership as covered by primary rights, it was able internally to limit the social

³⁷ For a helpful account of Madison's change of mind see Dumbauld (1958).

activities that were internalized by the state and to pre-construct its responses to its constituents.³⁸ In fact, although property rights were in the main treated rather implicitly in the Federal Constitution, the constitution as a whole was designed to protect private rights of ownership, it entrenched rights of property under the Contract Clause (Art. 1, 10, 1) and the Fifth Amendment, and it determined property as an object of rights which was categorically withdrawn from the reach of legitimate state power. This was clear enough in preceding bills of rights, notably the Virginia Declaration of Rights, which defined ‘the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety’ as a primary right of human association. In cementing a full list of subjective rights, therefore, the Federal Constitution removed swathes of regulatory responsibility from the state, and it created a body of legal institutions and procedures that – in relatively apolitical manner – could both deflect social issues from the state and preserve a sphere of functional liberty around the state. Moreover, this stabilizing impact of rights was also manifest in the question of taxation. The Federal Constitution (Art. 1.7) provided that all ‘bills for raising Revenue shall originate in the House of Representatives’. In securing rights of popular revenue control, the constitution produced a simplified apparatus for regulating public finance, which restricted dispute over that source of controversy. As in earlier proto-constitutional polities, in fact, it enabled the state to fund a national debt, and even to create a central bank. It is widely documented that the push for a central federal state was largely dictated by exigencies of public finance and the need to create a taxation system able to raise a public debt to cover costs incurred during the revolutionary wars.³⁹

For these reasons, the Federal Constitution provided a particularly potent constitutional formula for supporting a strong central state in the era of early state construction. At one level, the reference to popular or national sovereignty enabled the new American state to accomplish what no earlier national state had achieved: that is, to extract a body of public law which separated the functions of state from private activities and provided a unifying and legitimating basis to sustain particular acts of state. National sovereignty was in fact the absent formula in state-building processes in European societies, and other states had suffered residual

³⁸ For sardonic commentary see Morgan (1988: 233).

³⁹ For various accounts see White (1948: 507); Jensen (1950: 302); Ferguson (1961: 289–305).

weakness or internal pluralism because they had not been able to abstract and construct their power by appealing to national sovereignty: national sovereignty was the key instrument for effective abstractive state building, and it was distinctively elaborated as a principle of public law in the setting of revolutionary America. In founding its public law in rights of national sovereignty and equality, the Federal Constitution created a legal arrangement that enabled the state to define and internalize the grounds for its monopoly of power in society, to accompany its use of power with abstracted, internal and reproducible justifications, and so to legislate, in relatively even, positive fashion, across the politically relevant exchanges of society. In addition, however, the Federal Constitution, to a greater extent even than the state constitutions, had the notable feature that it used negative rights, in dialectical fashion, both as elements of sovereign inclusion and as instruments to police its inner structure and integrity, and this reinforced the state-building functions of the concept of public sovereignty. This dialectic was manifest in provisions for the separation of powers and in injunctions on absolute legislative supremacy contained in the constitution (Art. 1.9). More vitally, however, in sanctioning a formal Bill of Rights and in validating other rights at an implicit level, the constitution used private rights to separate many social exchanges from the sphere of political power, it designated many social questions as not requiring political power, and it thus depoliticized much of society and many of its own functions. In each of these respects, by 1791 the Federal Constitution brought towards completion the implicit social functions of rights in the European context, and it created a political order centred around an abstracted or *public-legal* state structure that was able both to legislate in relative autonomy and, as both corollary and precondition of this, to limit social politicization and to cement its own boundaries in relation to the rest of society. The politically abstractive dimension of the constitution arose directly from its fusion of ideals of national sovereignty and defensive rights. The demand for sovereignty impelled the extraction of the constitution as a body of public law which could be stored in the state and used both to accompany its legislative acts and, inclusively, to reproduce its power. Yet the demand for rights also ensured that the structure of public law remained differentiated from other activities, and rights strictly governed the distinction of private and public functions. Whereas previous and contemporary political systems in Europe struggled to maintain legislative sovereignty because of their uneven rights fabric, the American constitution used national sovereignty to

create the state as a public order and it utilized rights to delineate the extent and limits of state power. In so doing, it solved the problems of uncertain differentiation and endemic re-particularization typical of other constitutions. It thus became the template for the modern differentiated (sovereign) state, able to use its power as an abstracted and autonomous facility.

The Federal Constitution made perhaps its most enduring contribution to the stabilization of state power by virtue of the fact that, building on the judicial provisions of some earlier state constitutions, it established strong principles for judicial review of statutes and new legislation by the courts of law. A vital dimension of the constitution, thus, was that it instituted a Supreme Court to protect constitutional principles in legislation and to ensure compatibility of single statutes with constitutional norms. This provision (rather vague in the Federal Constitution itself) was reinforced almost immediately under the Judiciary Act (1789): this Act cemented the powers of the national courts, it assigned to the courts the power (increased after 1803) to review statutes in the light of constitutional norms, and it appointed marshals to enforce federal constitutional law in different states. This rights-based strengthening of judicial power, in fact, might be viewed as the most distinctive and characteristic innovation in the constitutional apparatus of the American republic. The idea of judicial review of legislation was fundamental to American constitutionalism. If the English Revolution had grown from a contest between judiciary and parliament and had ultimately utilized judicial rights to create a sovereign legislature, able to legislate in independence of the law courts, the American Revolution deviated substantially from this pattern of political abstraction. To be sure, the first state constitutions were hardly consistent in placing legislative power under judicial control (Tarr 1998: 72). However, even prior to independence, the principle of strong judicial power ran through the entire American Revolution like a deep pulse.⁴⁰ In some cases, county courts had gone as far as to overturn contested colonial legislation, including the Stamp Act. In America, the rise of legislative power was closely linked to the belief that the law itself was a reservoir of rights. Indeed, the belief that statutes had to be checked by courts produced a model of higher law that supplanted the principle of statutory supremacy in eighteenth-century English constitutionalism, and it played a primary role in first allowing early American politicians to

⁴⁰ On pre-1787 cases of judicial review see Corwin (1925: 521). On the anti-Blackstonian implications of this see Snowiss (1990: 16, 20, 90).

authorize the transfer of power to colonial assemblies (Grey 1978: 873). This emphasis on judicial power became programmatic in Hamilton's account of the judiciary in *Federalist* 78, which argued that the constitution must be regarded by all judges as 'a fundamental law', and in case of 'variance' between the norms of single statutes and the norms of the constitutional text 'the Constitution ought to be preferred to the statute' (Madison, Hamilton and Jay 1987 [1787–8]: 439).

The tendency towards reinforcement of judicial power in the institution of the Supreme Court gave rise to what has often been perceived as the central paradox in early American history: namely that the Federalists, who considered the central constitutional state a political ideal, wished to limit this power through the establishment of horizontal controls on legislation through the courts (Rodell 1955: 43). However, it is not necessary to see the commitment to a central state and to judicial power as a paradox. In fact, the creation of a supreme legal institution to act as protector of the constitution and to preserve the state's highest legislative legitimacy brought a number of significant structural and functional benefits for the new American state, and the transfer of a portion of state power to judges greatly expanded the effective power of the state.

First, at a practical level, the institution of a Supreme Court helped to consolidate the federal state at a practical level, and it was utilized by parties committed to building an authoritative central state. The foundation of the court was closely tied to the Supremacy Clause (Art. VI) of the Federal Constitution, and it reflected a strategy to transfer judicial power from particular states to the federal state: the assertion of the constitution as highest law in the courts entailed a process of national-political concentration. Indeed, early members of the Supreme Court were usually Federalists, and they were prepared to use the court to maximize the power located in the federal state. The outcome of this was that, through a number of precedents in the 1790s, both statutes and court rulings were progressively tested for consistency with the constitution, and laws seen as violating the constitution were deemed void by the federal judges.⁴¹ In addition, moreover, the judiciary became responsible for resolving highly resonant questions regarding the division of competence between the federal state and the individual states. The courts were charged with responsibility both for stabilizing and asserting primacy of federal power through arbitration of federal–state disputes

⁴¹ On this and early post-1789 practice of judicial review see Currie (1985: 55, 70).

and, at the same time, for checking and 'limiting the reach of national government' and preserving, through recognition of the rights of states, the particular liberties of individual agents within the states.⁴² Through subsequent practice the courts obtained authority to use limited powers of judicial review to police the legislative procedures of national (sovereign) government and, under some circumstances, to declare co-ordinate branches of government as acting *ultra vires*.⁴³ Central to each of these processes was the (albeit ambiguous) conviction that the constitution enunciated the 'original right' of the people, that legislative acts contrary or 'repugnant' to this primary constitutional right could not have force of law and that courts were specifically appointed to determine that principles of national constitutional law were uniformly prevalent (Van Alstyne 1969: 16, 36, 37).

Second, the existence of a Supreme Court consolidated the federal state at a deeper functional and conceptual level by virtue of the fact that it conferred an inviolable status on the Federal Constitution itself. Under the protection of the court, the constitution came to represent a law above all other laws, and the body of norms contained in the constitution was distinguished from the more informal, positive or statutory constitutions existing in common-law states (Haines 1944: 17). The court formally enabled the new American state, drawing legitimacy from the constitution, to explain itself as singularly authorized by a corpus of higher norms, which it used the courts to sanction, preserve and extract from everyday contestation. In this respect, in fact, it was the creation of a Supreme Court that enabled the American republic fully to obtain benefits of the constitution. By placing the constitution under protection of the courts, the state was able simply to internalize its constitution, to support all its legislative acts through overarching reference to the constitution and positively to reproduce its power as legitimate power, yet also to ensure that the constitution (the state's original source of legitimacy) was extricated from daily processes of political controversy around the state. The Supreme Court thus at once condensed and displaced the power held in the state, and it transformed the constitution into a politically withdrawn document to authorize and control the use of state power.

Third, by designating the Supreme Court as a guardian of the normative sources of its legitimacy, the federal state obtained a mechanism that

⁴² See Choper (1980: 247); Fried (2004:15). See also, classically, Wechsler (1954: 559–60); Schmidhauser (1958: 11–17).

⁴³ See analysis of *Marbury v. Madison* in Choper (1980: 62); Wolfe (1986: 81–3).

allowed it to govern its relation to the sovereign body from which it derived its power and legitimacy, and to translate national sovereign power into a form that could be effectively and generally utilized through society. The Supreme Court performed this function in various ways. At one level, the court acted as an instrument by means of which the most central questions of sovereign legislation could be referred to subsidiary institutions, and laws could be tested in accordance with politically withdrawn norms. This meant that as, gradually, judges acquired the power to declare acts of Congress unconstitutional, the concentration of political power around the legislature was dispersed, and the constitution of the state, supposedly expressing the primary force of national sovereignty, could be extracted from everyday political conflict, so that the constitution was only rarely required to be subject to contest or openly politicized. Judicial review strictly limited the full localization of political power at any one point of sovereignty in the state, and it enabled the state, in part, to reduce the volatility of many of its sovereign functions. Additionally, however, the creation of a Supreme Court asserting powers to protect the constitution had the outcome that the will of the people, which the state purported to represent and from which it obtained legitimacy, was not entitled to shape the actual structure of the state or to gain immediate influence on the constitution. In consequence, the state obtained a mechanism through which it could structure and anticipate the precise forms in which it included its constituents, and it precisely determined its inclusion of the popular will. This was perhaps the decisive distinction between the constitutionalist visions of Federalists and Anti-Federalists, many of whom wished to preserve easier powers of amendment and to guarantee closer identity between the state and its subjects (Kruman 1997: 58). The early American republic, thus, utilized judicial review both to legitimize and stabilize itself, distinctively, against the English crown and against the more volatile acts – the ‘various and interfering interests’ and the ‘spirit of party and faction’ examined by Madison in *Federalist* 10 – of its own sovereign constituents (Madison, Hamilton and Jay 1987 [1787–8]: 124). In each respect, the fusion of sovereignty and rights was foundational for an abstracted and effective political system.

Through the incipient judicialization of sovereign power, in short, the American state instituted a body of recursive and functionally expedient principles at its own core. In its deeper functional dimensions, the doctrine of judicial power enabled the American republic rapidly to construct its political order, predictably to unify and give consistency

to its widening legislative processes, and internally to control and explain the use of its power. The construction of statutory power as checked and authorized by a judiciary acting to preserve constitutional norms created a reservoir of legitimacy through which the new American state insulated itself against its own precariousness, absorbed uncertainty about its authority and reproduced internal legitimacy to cover the rapidly growing need for statutory legislation.⁴⁴ The federal state claimed to derive legitimacy from a constitution embodying the national will of the people. Yet, in designating this will as expressed in a number of higher-order *fundamental laws* and as concentrated in a catalogue of formal rights, the state adopted an instrument to ensure that the legislative expressions of this will were in fact checked by lawyers and interpreted by the courts, who then became guardians of the will (that is, the rights) of the people.⁴⁵ The partial displacement of sovereign power from the legislature to the courts meant that the sovereign people remained both present and absent in the state's structure, and it instituted procedures that counteracted a full politicization of the state. The Supreme Court established a circular relation between the popular will, the constitution and the courts, which meant that each of these organs produced legitimacy for the state, but none became an exclusive focus of over-intense political controversy. The Supreme Court allowed the state at once to authorize itself through reference to the higher-law expressions of the popular will contained in the constitution. Yet, at the same time, it allowed the state to avoid direct articulation or interpretation of the popular will. Indeed, in referring the legislative acts of the popular will to the judiciary, the constitution served factually to prevent the state from directly confronting the source of its legitimacy, it imposed limits on the extent to which the actual will of the people ever required express declaration, and it enabled the state to legitimize itself, dialectically, through the simultaneous inclusion and exclusion of the popular will. At the heart of the system of judicial review established after 1787–9, therefore, was an act

⁴⁴ A point close to this is made in Rakove (1997: 1059–60).

⁴⁵ Hence Hamilton's repeated claim that 'no other way' to protect constitutional limits existed 'than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void' (Madison, Hamilton and Jay 1987 [1787–8]: 438). See also Madison's record from the Federal Convention, noting the need to place a 'check on the Legislature' by means of a Supreme Court (Farrand 1911: II, 79). Note, though, that Madison was also cautious about judicial review (Snowiss 1990: 97).

of *exclusionary self-depoliticization* within the state: in creating a court to supervise the legislative acts of the national will and to ensure their compliance with prescriptions and rights enshrined in the constitution, the state employed principles of rights to curtail the *immediate* manifestation of the national will. By these means, the state was able to use instituted constitutional rights both internally to structure its responses to matters requiring legislation and to remove the inclusive centre of its political sovereignty from direct or intense politicization. Indeed, its strong judicial dimension meant that the constitution itself was transformed into an extracted element within the state, which accompanied and controlled the use of state power and through which the state could guarantee legitimacy, but which only exceptionally became an integrated component of the cycles of political engagement attached to legislative functions. The constitution, flanked by the Supreme Court, thus acted to construct a sphere of relative apoliticity around the highest functions of the state: the state internalized a document through which it could simultaneously explain itself as the political expression of the people, yet also hold the exact factual demands of this will at a level of implicit latency.

In each of these respects, the early constitutional construction of the American republic can be seen as an experiment in which rights – in both their negative and their positive dimensions – enacted a legitimating process of controlled political in- and exclusion in the state apparatus. Rights-based constitutional procedures formed a technique for constructing a central state that was authorized by the idea of national sovereignty, yet that both reduced the impact of the more democratic claims of the state constitutions and expelled the sporadic or pluralistic expressions of the will of the people from the final structure of the state. It barely requires emphasis that the leading Federalists were intent on building a national-sovereign state that made only scarce concessions to full democracy, and they insisted on the unsustainability of any pure identity between government and governed. This was illustrated by Edmund Randolph, speaking in the Federal Convention, who identified the ‘chief danger’ for the state as arising ‘from the democratic parts of our constitutions’. Randolph complained that none of the state constitutions ‘provided sufficient checks against the democracy’ (Farrand 1911: I, 26–7). Similarly, Madison warned in the Convention against ‘equality of suffrage’ (Farrand 1911: I, 37). In *Federalist* 10, Madison described democracy as liable to suppress ‘both the public good and the rights of other citizens’. He concluded that ‘popular government’ could only exist

if governmental power was entrusted to popular representatives who were not the people (Madison, Hamilton and Jay 1987 [1787–8]: 125). Madison made a strict distinction between republicanism and democracy, and he stressed that a republic needed to be based in the ‘delegation of the government . . . to a small number of citizens’ (Madison, Hamilton and Jay 1987 [1787–8]: 126). The Federal Constitution, therefore, was ultimately constructed at once as a bearer of federal sovereignty against state sovereignty and as a bearer of *national* sovereignty against pure *popular* or *democratic* sovereignty. In both these respects the Supreme Court, and the equilibration of the negative and the positive aspects of constitutional rights, performed a vital function.

For all these reasons, the early American republic emerged more generally as a polity that, at different levels, employed rights both to articulate principles of legitimacy for political order and to organize its functions in a manageably abstracted fashion. The federal state used rights to assume and justify its monopoly of power in society: by referring to itself as a repository of rights it gave internal foundation to its exclusive authority. Yet it also used rights to check and internally to police its power, to reduce its power to particular specified functions, and to restrict the possibility of its own excessive politicization. Much literature on the American Revolution is coloured by a controversy over the question whether liberal rights or republican principles were the main determinants in the course of constitution formation, and whether the federal state eventually emerged as a state marked by power-limiting liberal rights or power-forming republican sovereignty (Appleby 1984: 18, 22; Adams 2001: 301–14). From the perspective outlined here, however, this dispute revolves around a false antinomy. It was in fact the convergence of liberal and republican elements that facilitated the construction of the American republic. Rights acted both as active sources of legitimacy and as negative checks on power, and through both these correlated dimensions they served to form the state as a positively abstracted and effective sovereign actor: the state’s positive formation depended, dialectically, on its reflexive self-restriction. Rights, therefore, clearly served as instruments of simultaneous political in- and exclusion: they allowed both the individual states and the federal state to apply power positively and evenly across society, but they also controlled the boundaries of the state against extreme expansion or over-inclusion.

The wider societal corollary of these constitutional tendencies was that early post-revolutionary American society began to be formed simultaneously around a growth in the ‘public power of the state’ and