

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

a factual reinforcement and promotion of the 'private rights of individuals' (Wood 1992: 325). In other words, American constitutionalism instituted a framework in which public power gained in uniformity and consistency, and in which the state abstracted and expanded its power as a positive and publicly usable facility. Yet it sustained this public power by using rights to secure a realm of relatively apolitical freedom around and outside the state, which meant that most personal liberties were exercised and most social controversies were voiced in relative indifference to state power. The power of the state resulted from a substantial depoliticization of society, which the constitution, its provisions over rights and review, and its controlled mechanisms for in- and exclusion, at once promoted and underwrote. The general dialectic between inclusionary state construction and exclusionary political selection or even depoliticization implied throughout the history of constitutional foundation thus culminated, momentarily, in the state constitutions of revolutionary America, and ultimately in the Federal Constitution itself. Through this process it became clear that the abstractive and differentiated construction of political power, as gradually formed in the European political environment, was most adequately accomplished by states preserving patterns of rights-based or higher-norm positive/internal self-validation, techniques for the self-displacement of power and political self-restriction, and instruments for simultaneously including and excluding persons and societal exchanges in and from power. In revolutionary America, the experimental fusion of nationally authorized sovereign (republican) power and politically withdrawn constitutional (liberal) rights allowed states with these features to develop.

The French constitutions

The American experiment in constitutional formation grew rapidly from a tax revolt into a state-building laboratory, in which claims over constitutional rights detached the state apparatus from colonial and monarchical authority and legitimized a new state as a powerful public and autonomous construct. In America, the insistence on rights of sovereignty was initially turned defensively against a different state: Great Britain. For this reason, the American constitutions phrased principles of public sovereignty and equality in rights holding in terms that were not primarily focused on questions of inequality between Americans: the proclamation of national unity and sovereignty as the substructure of the state was articulated (to a large degree) without

critical resonance for the fibre of American society. For the longer-term consequences of the American constitutions, however, it is vital to observe that, once transplanted back to a European setting, the balanced principle of rights and national sovereignty enunciated in America impacted dramatically on inner-societal structures under European states, and formed the basis for a state-building process that was directed, not against colonial authority, but against stratified privilege. In the European context, specifically, the American constitutions provided a model for the general construction of power that could be utilized both experimentally to refound political systems and to weaken private residues within the state. As documents that justified state power by articulating higher-norm principles of sovereignty and rights against imperial power, these constitutions fused in combustible manner with the anti-feudal evolutionary trajectory of most European societies, and they provided a new public-legal template for expressing the deep-lying process of legal positivization, political abstraction and structural centralization which shaped these societies.

The first replication of the state-building dimensions of the American Revolution occurred in revolutionary France, after 1789. As discussed, the French monarchical state survived into the late eighteenth century as a diffuse and obdurately interlocked amalgam of public and private authority. The power of the state was limited by bearers of privileged office, and society as a whole was unevenly included in political power and unevenly subject to legal authority. As also discussed, this had debilitating constitutional consequences for the state, especially in fiscal matters, and the Bourbon monarchy was critically hamstrung in its attempts to detach matters pertaining to public revenue from private interests, corporate liberties, and questions of status. This meant that the state was always forced to hold a large volume of social exchanges at a high and varied level of political contestation, it struggled to legislate positively and generally over its most pressing problems, and it invariably confronted a mass of privately motivated internal social obstructions to its power. Indeed, the French monarchy was compelled to attune its legislative acts to the highly personal and particular demands and rights of the people that it incorporated, and it lacked a general legal order for controlling its inclusion of those subject to its laws. Turgot, notably, informed Louis XVI in plain words about the cause of the fiscal malaise of his state. He observed: 'The cause of the evil, sire, results from the fact that your nation does not have a constitution. It is a society composed of different badly unified orders, of a people whose members

are barely connected by social bonds. As a consequence almost nobody cares for anything but his own particular interest' (1787 [1775]: 9). Later, at the Assembly of Notables in 1787, Calonne expressed the view that the weakness of France was caused by the lack of *loi commune*, which could be imposed across society regardless of immunity, privilege and other legal variation (see Behrens 1963: 468).

On these grounds, the revolution that began with the convention of the French Estates-General in 1789, although clearly expressing the volitional reaction of certain social groups to conditions of governance under late absolutism, was in the first instance a functional reaction within the political system to the haphazardly unsustainable internal order and the unenforceable power of monarchical authority under the Ancien Régime. Indeed, the first acts of legislation during the revolutionary period figured as devices for simplifying and maximizing the power contained in the French state and for manufacturing a societal environment in which this power could be easily and more inclusively produced and applied. The first piece of legislation to perform these functions was the famous law of early August 1789, in which the newly established National Constituent Assembly decided to abolish the legal residues of feudalism and to declare illegitimate the seigneurial powers still preserved by the nobility, especially those rights concerning tax exemptions and patrimonial jurisdiction. It has been forcefully argued in the historical literature that feudalism was already obsolete in France by the time of its statutory abolition in 1789, and it has been persuasively shown that many privileges had long since either fallen into disuse or were no longer in the hands of the nobility (Chaussinand-Nogaret 1976: 63; Gruder 2007: 37). Moreover, it has been demonstrated that many seigneurial conventions remained in force after 1789: even the Rural Code of 1791, which reinforced some provisions of 1789, was based in a compromise over the implications of feudal entitlement and collective rights (Jones 1988: 82, 137; Woloch 1994: 171). Nonetheless, the anti-feudal laws of the early revolution had the distinction that they succeeded, where previous royal legislation had failed, in creating a unitary legal order for the state. In so doing, they initiated a process in which uniform principles of rights were applied through society to eradicate particularistic interests from the state's structure and to concentrate the state's monopoly over its reserves of political power.

The first thrust of the laws of 1789 was that they effaced the traces of private/feudal authority from the state by separating rights under law from local or personal standing, and they defined status and entitlement

under law as derived, not from socio-structural position, but from general legal-subjective personality. In the first instance, this was reflected in the fact that rights of property were detached from feudal privilege, and feudal proprietary rights were transformed into rights held, not under personalistic convention or authority, but under generally consented contracts. These laws in fact gave formal expression to the principle of individual integrity in ownership and legal standing, and they abolished (in part) the system of shared ownership of crops and land, through which lords had possessed time-honoured rights to taxes on the products of their feoffs. In this regard, these laws, jointly with the secondary – more powerful – anti-feudal laws introduced in the 1790s, served to designate persons under law as individual and uniform agents, to simplify the imputation of legal rights and claims and, consequently, to harden the external lines of differentiation between public authority and privately held resources. Second, these laws acted to dissolve the remnants of the legally cemented fusion of land tenure and jurisdictional power, they separated questions of legal entitlement from questions of local or customary authority and they at once restricted the powers of patrimonial justice that still applied in some regions and ensured that all persons were formally equal before the law and (notionally) had equal access to judicial hearing (see Markoff 1996: 44). In this respect, notably, the anti-feudal laws were supplemented, in the constitution of 1791, by laws banning corporations, which also acted to diminish the legal impact of private status and privilege and finally brought a ‘reduction of all citizens to an equal submission to the law’ (Sewell 1980: 89).

In these different respects, the swathe of anti-feudal laws passed in the early stages of the revolutionary era in France created a setting in which the emergent republican state was able significantly to increase both its inclusionary unity and the level of abstract intensity at which it could circulate its power through society. In applying formal constructs of legal personality and singular subjective rights to split apart the overlapping entitlements imputed to social agents under seigneurial law, these laws meant that the state obtained an internal apparatus to include particular social agents both more generally and more selectively in the political exchanges of society: that is, the state was only required to include social agents as bearers of economic interests, as addressees of law or as contestants for a portion of state power, but not in all these capacities at the same time. In this respect, these laws ensured that it was more difficult for actors to invade or privately to monopolize state power, and the state was able to refer to and assimilate societal actors in political

exchanges as constituents of an equal and evenly constructed *external* environment. In fact, as it replaced the multiple rights and privileges of seigneurial communities with the uniform juridical rights of contractually autonomous equal subjects, the state acquired a uniform legal corpus that at once markedly expanded its own general power and increasingly made other agreements in society – previously constructed in pluralistic fashion – dependent on the state and the rights that the state autonomously allocated and legally underwrote. This construction of the state as a primary allocator and guarantor of rights greatly intensified the power stored in the state. At a more practical level, moreover, the abolition of privileges and exemptions under law also meant that the state was able to integrate members of society in a more controlled manner into its vital functions, and, in particular, that it could apply general fiscal laws without risking unabated constitutional friction with actors within its inner structure. The end of seigneurial law – and of privileges and corporations more widely – thus brought the benefit to the state that, in eradicating status, privilege and affiliation as determinants of fiscal contribution, it was able to implement a rational and centralized fiscal system in parallel to its increasingly ordered judicial system, and so gradually augment its fiscal revenue. Notably, the fiscal system put in place through the revolutionary period, although often revised, formed the basis of French taxation until the early twentieth century.

At this primary level, the very first statutory acts of the early revolutionary regimes in France acted fundamentally to promote the simultaneous differentiation and consolidation of state power, and this acted legally to simplify the boundaries of the state, to tighten and regulate its processes of political in- and exclusion and to solidify society around power vested in the state. This dimension of the revolutionary legislation was then reinforced in the 1789 Declaration of the Rights of Man. Article 1 of the Declaration, for instance, renounced the principle of social distinction as a qualification for rights, and it constructed all members of society as equal addressees of the law. Articles 6 and 7 protected rights of judicial equality and procedural integrity. Article 17 guaranteed rights of individual property ownership under law. Article 14 enshrined the right of public consent to taxation. Articles 10 and 11 supported rights of free expression and belief. Article 15 began to prescribe clear duties to public officials, and to set the legal basis for a fully professional (and less venal) civil service. In these respects, this proto-constitutional document aimed to separate out the public functions of society from their previous interdependence with private authority, to construct a

firm legal and institutional boundary between the state and those persons and social exchanges subject to its power, and distinctively to delineate the contexts in which inclusion in state power was required. The promulgation of natural rights in 1789 intersected closely with the anti-seigneurial laws to promote (in principle) a public and internally consistent model of statehood, which was able to legislate in relatively differentiated and autonomous fashion and to position its power against internally controlled and uniform social environments.

The implementation of these laws sanctioning uniform rights, constructed within the political system, was followed rapidly by the establishment of a uniform judicial order and by a revolutionary formalization of the instruments of justice. Indeed, one distinct impetus of the early revolutionary legislation in France was that it favoured a strict separation of powers within the state, in which all legislative functions were placed in the parliament, all administrative functions were placed in the *pouvoir constitué* of the executive, and judges were appointed to highly specific judicial commissions and strictly prohibited from exercising any political influence. If the American Revolution had possessed a strongly favourable attitude to judicial power, the converse was true for the French Revolution. The French Revolution, reflecting the long-standing political conflict in France between state administration and the judicial power of the *parlements*, tied its revolutionary transformation of the state to an intense hostility towards independent judicial activity. Indeed, the leading revolutionaries expressly associated judicial freedom with the corporatistic traces of feudalism, and they introduced measures almost immediately to consolidate the state administration against the courts of law.⁴⁶ In 1789, the *parlements* were suspended, never to be reconvened, and a committee for judicial reorganization was established. The report on judicial reform, presented by Thouret to the Constituent Assembly in 1790, condemned the corrosive effects of the corporate spirit of the pre-revolutionary judiciary (Carré 1912: 201), it denounced the patrimonial control of judicial rights and powers, and it reflected scathingly on the fact that in the Ancien Régime the judiciary had seen fit to emulate 'legislative power' and had 'disturbed the operations' of the administration (Thouret 1790: 2–3). In August 1790, in consequence, laws were passed to ensure that judicial functions remained separate from administrative procedures, and a

⁴⁶ For an account of the 'profound distrust of the judge' in the French Revolution, see Badinter (1989: 19). Generally, see Burdeau (1995: 47); Lafon (2001: 102).

strict principle of separated powers was applied to guarantee that neither administrative functions nor legislative operations were subject to review by the courts.⁴⁷ The independent judiciary of the Ancien Régime became an early strategic victim of the revolution, and regional *parlements* and the last vestiges of the seigneurial courts were quickly replaced by justices of the peace, initially elected, who were placed under direct state control.⁴⁸ These laws marked the beginning of both the tradition of legislative supremacy and the tradition of independent administrative law (*droit administratif*) that became typical of subsequent French constitutional politics.⁴⁹ In particular, these laws brought a strict curtailment of judicial powers of statutory and administrative review, and they expressed the principle that acts of state could be subject to review by organs within the administration itself: they in fact gave rise to the principle of the *juge gouvernemental* (Bigot 1999: 101; Le Yoncourt 2006: 33). The years 1790 and 1791 also saw both a wholesale restructuring of the French judicial system and the introduction of a universal code of penal law. Taken together, these provisions gave a pronounced articulation to the boundary between the state and society, they eliminated particular judicial access to the state, and they enabled the state to construct and apply power to its addressees in highly externalized categories, which could be easily generalized from within the state itself.

The state-building functions of the early acts of revolutionary legislation were substantially reinforced in the 1791 Constitution, which provided for the transformation of the Bourbon dynasty into a constitutional monarchy and designated the king himself as a representative of the nation and primary civil servant. This constitution reinforced earlier provisions in respect of rights and legal status. Its preamble stated that hereditary distinctions were not admissible as qualifications for special legal rights and that all seigneurial and patrimonial courts were abolished. Additionally, it finally proscribed the venal acquisition of office, and in so doing it erased one of the most structurally damaging feudal residues from the judicial apparatus of the state. Under the catalogue of rights, the constitution also repeated earlier provisions for equal rights of persons before the law, for personal rights of proprietary autonomy and

⁴⁷ For classic comment see Laferrière (1896: 477).

⁴⁸ For analysis, see Woloch (1994: 350); Jones (1988: 267); Godechot (1951: 117). For more detail see Bell (1994: 189).

⁴⁹ On the origins of *droit administratif* and its expansion after 1789, see the classic account in Dareste (1862: 166–9).

for personal rights of freedom of expression. Moreover, the 1791 Constitution generally intensified the veto on independent judicial power in earlier documents: it stated clearly that the courts were not allowed to ‘interfere with the exercise of legislative power’, and it made arrangements for a court of last resort (Tribunal de Cassation) to address appeals and preserve judicial integrity for the entire nation (Chapter V). It also provided for a limited system of national representation, in which electoral rights were based (following the promptings of Emmanuel Sieyès) in *active citizenship*: that is, in a formal property qualification. The powers of the elected legislature included control of the public purse.

In each of these respects, the 1791 Constitution, building on preceding pieces of legislation, responded directly to pronounced problems of political abstraction in French society. These documents acted to transpose the state onto more conclusively abstracted public foundations, and they marked a decisive attempt to liberate the state from its hazy integrity with private motives and interests. In separating legislative and judicial powers, first, the 1791 Constitution reacted against the blurred lines of public power crystallized in the *parlements* of the old regime, and it ensured that half-internal judicial counterweights to the state were removed. In enshrining rights of judicial equality, proprietary integrity and autonomy, freedom of expression, confessional freedom and so on, moreover, it gave to the state an apparatus in which it could distinguish its power from exchanges within these social spheres, and in which it could refer to precise formulae in order to regulate its exchanges at the boundary with each of these areas of practice. In separating the state from its vestigial attachment to feudal privileges in the economy and the law, therefore, the 1791 Constitution endowed the state with capacities for legislating positively and evenly over a number of diverse social contents, for filtering and organizing its responses to the issues addressed to it, and – above all – for pre-constructing and limiting the processes through which its power had to be applied. As in America, the principles of rights contained in the first French constitution acted as instruments of pre-ordered in- and exclusion within the state, and, as such, they contributed very greatly both to the distinction and intensification of state power in society and to the wider differentiation of society as a whole.

At the same time as using rights to shape the conditions of its inclusion and differentiation, however, the state founded in the French revolutionary period, following earlier American constitutions, also utilized the principle of the nation, national sovereignty and sometimes

even popular sovereignty to construct and explain its power. In revolutionary France, as in America, the concept of the nation was used to define the sovereign community of equal citizens, who were unified in their rights and who, by virtue of rights, possessed a claim to be formatively represented in the state. Additionally, however, this concept was used to denounce the privilege-based social order of the Ancien Régime, and the concept of nationhood specifically demanded a form of governance based in equality under law and the eradication of private or singular distinction. In the first stirrings of the revolution, thus, it was argued that the nation was the community of persons that recognized no legal distinction and no hereditary entitlement, and that all legitimate legislation presupposed its authorization by a nation configured in this way. This concept of the nation was already implicit in the foundation of the Constituent Assembly in July 1789, in which (unprecedentedly) deputies were viewed as representatives, not of privileged localities, but of the nation as a whole (Burrage 2006: 79). The revolutionary implications of nationhood were elaborated by Sieyès, who, in 1789, construed the nation as the ‘group of citizens belonging to the common order’, bound by ‘a common law, and a common representation’ and thus admitting no legal privilege (1839 [1789]: 45). He also used this concept to justify the original formation of the Third Estate assembled by the king in 1789 as one sovereign legislative body, renouncing all distinctions of social gradation, whose collective sanction was the sole source of legitimate law. The idea of the nation as a legally homogeneous sovereign power then pervasively shaped the ideas, the composition and the self-legitimization of the National Assembly, and it underpinned both the Declaration of the Rights of Man and subsequent constitutional texts. Article 3 of the Rights of Man stated that: ‘The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.’ Central to the 1791 Constitution, subsequently, was the proclamation that all power was derived from the nation of citizens. It stated: ‘Sovereignty is one, indivisible, inalienable, and imprescriptible. It appertains to the nation; no section of the people nor any individual may assume the exercise thereof.’

In France, in consequence, the concept of the nation offered a legitimating principle through which the emergent French state could define itself as nationally integrative and extract an account of its power as a focus of public-legal, sovereign legislative agency. Above all, the concept of national sovereignty enabled the state to reduce its porosity to private

power, and to elevate itself above the privatistic socio-political relations of late feudalism. As in revolutionary America, the principle of national sovereignty acted, next to formal rights, as the second wellspring in the construction of an integral autonomous state. In implying that the state's power was derived from those persons to whom it was applied, this principle created an abstracted foundation on which the state could manage its inclusionary processes, produce laws that could be evenly and positively applied across society and generally augment its store of power. As in America, thus, the concept of national sovereignty employed to justify the governments of revolutionary France effected a dramatic increase in the density, centrality and inclusivity of the French polity. The founders of the 1791 Constitution were in fact under no illusions about the nature of their labour in this respect. They clearly recognized that, in invoking uniform principles of national sovereignty, they perpetuated and intensified the ambitions for political abstraction and state integrity held dear by the regents of the Ancien Régime. However, owing to their invocation of rights and nationhood to simplify the structure of power's application through society, they were able to concentrate far more power in the emergent state executive than had been the case under the pre-1789 monarchy (Church 1981: 110; Brubaker 1992: 49).⁵⁰ In this, the constitutional fathers of 1789–91 fulfilled the earlier dreams of 'absolutist' French monarchs, which had been thwarted by the corporatistic privatism of society under the Ancien Régime, and they came close to constructing the strong and territorially unified state with a single judiciary and a single administrative order to which earlier monarchs had only been able fancifully to aspire (Woloch 1994: 37; Vergne 2006: 94). The definition of power as *national power*, in short, comprehensively increased both the volume of political power in society and the inclusionary facility with which it could be utilized.⁵¹ If early modern French political history had been dominated by a conflict between the particularistic idea of the rule of law based in the (feudal/patrimonial) judiciary and the general idea of the rule of law based in (monarchical) administration, this conflict was finally settled in the

⁵⁰ The function of rights as instruments for eliminating social obstructions to state power had already been recognized under Turgot. Further, Turgot's chief clerk, Pierre-François Boncerf, published a tirade against feudal law in which he argued tellingly that 'the eminent domain of sovereignty is more effective than suzerainty, legislative authority more powerful than feudal authority, and the right of the citizen forms bonds more precious than those between vassal and seigneur' (1776: 59).

⁵¹ On the medieval origins of this see Weidenfeld (2001: 85).