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).

revolution. At this time the administrative rule of law prevailed: this victory of 'absolutistic' ideals, however, was a victory which could only be accomplished through the concerted triumph of the sovereign nation and the overthrow of the monarchy, whose attempts at administrative reform had been undone by its own residual privatism and lack of national inclusivity. As in America, it was only when it founded itself on the national will that the French state could finally abstract an autonomous public legal order.

In this respect, to be sure, it needs to be noted that in revolutionary France the balance between republican (national-sovereign) and liberal (rights-based) constitutional ideas was rather distinct from that in America. In France, rights did not immediately assume the same potent exclusionary and restrictive functions which they performed in America. Notably, in France, owing to the endemic hostility to judicial independence, legislative functions were not immediately subordinate to the rulings of a binding catalogue of rights, and the early part of the revolution was shaped by a strong presumption in favour of direct exercise of sovereignty by the national will. Throughout the revolutionary era in France, in fact, both the nature of representative government and the locus of popular sovereignty were hotly contested, and the demand for an immediate legislative identity between government and governed was more persistently asserted than in America.[52] During the Jacobin interlude of 1793–5, for example, Robespierre reserved a Rousseauian scepticism for political representation of anterior rights and interests, and he sought to preserve a high degree of integrity between legislative, judicial and executive bodies, through which each of these institutions remained equally accountable to the popular will. He even argued that 'constitutional government', securing the stability of the state through administrative finesse, would have to wait until the period of 'revolutionary government', founding the Republic as a more direct expression of the will of the people, was concluded (1910 [1793]: 274). In addition, Robespierre expressed caution about basic rights (especially rights of property) and – in particular – about judicial autonomy: the Jacobins attacked the autonomy of the courts with particular vehemence, they dismembered the judicial system that evolved from the Declaration of Rights, and they even rendered courts subordinate to particular rulings of the legislature (Halperin 1987: 121–4, 267). The Constitution of 1793 contained particularly strong anti-judicial measures in order to protect

[52] See analysis in Rosanvallon (2000: 20); Cowans (2001).

administrators from judicial intervention. As a result of this, in France the popular will was first admitted to the state as a highly volatile force, and the height of the revolution was shaped by intense controversy over the location of this will, the methods for its inclusion in government and the need to transfuse all organs of state with its dictates.

Despite this, in revolutionary France the creed of national-popular sovereignty also – albeit gradually – began to adapt to and configure itself around the restrictive and dialectical principles, shaped by rights, that had marked revolutionary America. Although the notion of popular sovereignty remained intermittently central to French republicanism, the idea that the executive should be bound by direct vertical accountability to the legislature was not uniformly endorsed through the revolutionary era. With the exception of the short period of Jacobin rule, most of the revolutionary executives were based on the limited, anti-Jacobin principle of representative government first enunciated by Sieyès. In fact, Sieyès contributed in vitally enduring fashion to the revolutionary formation of the French state by arguing, first, that, although the nation was always the sovereign, the nation was only represented by those among its particular members who were active citizens (property owners). Moreover, he concluded, second, that the actual exercise of sovereignty by actors in a legislature could not be premised in factual unity between the sovereign legislature and the sovereign people. There existed, he claimed, a necessary distinction between the principle of popular sovereignty and the factual exercise of sovereignty:[53] it was only through its proportioned representation that the sovereign will of the people could be translated into the factually effective exercise of sovereign power – that is, 'good social administration' (1839 [1789]: 137).

Even in periods of intense conflagration, in consequence, the models of representative sovereignty pioneered in revolutionary France largely sanctioned the principle that the will of the people could only become concretely formative of state power in highly controlled and pre-manufactured settings. Furthermore, although the rights enshrined in the revolutionary constitutional documents were not placed in the custody of separate courts, rights remained pervasive filters for the popular will. This was the case, most obviously, because after 1789 rights provided the basis for a regular legal order in which, despite dramatic disruptions, presumption in respect of rights acted as a regulative force for statutory legislation, and it dictated procedures for conventionalized

[53] On the centrality of this problem in French republicanism see Gauchet (1995: 47–8).

legal finding. Although the judiciary was not conceived as a countervailing force, in fact, the Tribunal de Cassation remained an important institution after its foundation in 1790, and rulings of this court were (albeit variably) influenced by rights. In addition to this, further, in the longer wake of 1789, especially in the post-Thermidorean era (1795–9), a growing body of administrative law began to emerge which, in absence of extensive judicial control, placed internal restrictions on the arbitrary use of executive authority. This allowed the state at once to vest power in a unified administration and legally to control and proportion its application. Most importantly, however, rights checked and filtered the popular will because, implicitly, they ensured that most activities covered by rights were conducted outside the state. This meant that activities relevant to rights only exceptionally required express politicization, that objects for legislation were pre-selected, and that, in observing persons as rights holders, the state could define the conditions under which the demands and activities of these persons might assume formative relevance for the use of state power.

In France, as in America, therefore, the reference to the founding nation as the sovereign source of power created a legal apparatus in which political power was able to propose itself as authorized by those subject to it, in which its positive/inclusionary circulation through society was greatly enhanced by this implicit authorization, yet in which it could also police its differentiation from, and its measured inclusion of, those persons whom it constructed as its original volitional/legitimating sources. Above all, by referring to itself as a state founded in national sovereignty – that is, based in an abstract subject detached from particular persons or locations – the revolutionary French state produced a conceptual structure of public law that ultimately enabled it both to exclude private actors and to integrate wide and diverse fields of society in its exchanges. It was thus able, progressively at least, to use this constitution to include members of society equally and evenly under law. At the same time, however, popular sovereignty fused with rights to create a reference through which the state was able to exclude the people in most of their factual activities, so that the sovereign body of the people was at once both inclusively present and exclusively absent in the operations of the state. In this respect, the conjunction of national sovereignty and rights made it possible for the state to project a relatively uniform and legally defined environment for its functions and for the general application of its power, and it allowed the state abstractly to construct its origins and pre-emptively to select and delineate the

societal settings in which it used its power. Vitally, in short, a constitution combining national sovereignty and rights as sources of legitimacy allowed the state dramatically to intensify its reserves of usable abstracted power.

In all these respects the provisions for rights and national sovereignty in the French constitutional texts of the revolutionary era marked a culminating moment in the evolutionary logic inscribed in constitutional formation from the earliest constitutional documents of medieval Europe. The 1791 Constitution performed the abiding function that it allowed the French state autonomously to organize its exchanges with bearers of particular interests as external to itself, it hardened the state's boundaries against unnecessary internalization of private motivations, and it enabled the state positively and inclusively to control and reproduce its power within its own structure. It was only with the invention of a state deriving its legitimacy from a rights-based national-sovereign will that the process of political construction underlying European society from the twelfth century could be brought towards completion: it was only in the constitutional principle of *national inclusion* that political power could finally be distilled as an abstracted and positively inclusive social resource. In a wider context, moreover, the 1791 constitution of France and the rights that it imputed to social agents also brought towards completion the underlying process of societal reconfiguration attendant on constitutional formation. The principles of rights and sovereignty established in the first French constitution put an end to the particular or corporate rights of feudal society, and they conclusively transformed society from a diffusely structured array of particular status-defined groups, diversely and pluralistically related to the state, into an evenly ordered mass of – in principle – functionally autonomous individuals, selectively included in and excluded from political power. The relations between these individuals, then, were increasingly mediated through the state: that is, through rights guaranteed by the state as a centre of representative sovereignty. In this respect, this 1791 Constitution and its provisions for rights created preconditions both for the formation of a generally inclusive society and for the institution of a strong general state, to which all subjects had (in principle) an equal and uniform relation, and which was functionally authorized, by rights, to exercise a monopoly of political power in society.[54]

[54] In agreement, see Raumer (1967: 182).

Constitutional rights, in sum, although habitually perceived as limits on the state, first assumed formal prominence as institutes that were deeply formative both of independent state power and of the societal constellation in which state power could be exercised. By the end of the eighteenth century, the modern European state was formed as an institution consolidated around uniform rights: constitutional rights acted as the structural precondition of the modern state and of modern society more widely. If 'absolutism' had acted as a progressive technique for the unitary production of positive power in early modern Europe, thus, the political impetus of 'absolutism' failed because government not underpinned by principles of rights and national/sovereign representation remained lacking in inclusive cohesion, and it was unable to abstract its power against the inherited privatism of privileged society. The abstracted production and transmission of positive political power could only be accomplished by states founded in rights-based national sovereignty: indeed, the increase in rights in society brought a directly correlated increase in power. Absolutism thus found both its apogee and its nemesis in early constitutional democracy.

After the rights revolutions I: the Bonapartist temptation

In Europe, the years directly following the great constitutional revolutions stretching from the 1770s to the 1790s were marked by an increasingly reflected recognition that the selectively abstractive dimension of rights-based constitutionalism could be isolated from its sovereign democratic claims, and that constitutional rights possessed clear utility as instruments for the technically measured centring of society around state power. While the first modern constitutions constructed strong states because of their anti-privatistic and strongly inclusionary principles, therefore, the proto-democratic line of constitutionalism culminating in early revolutionary France soon ceded ground to a second wave of post-revolutionary constitution writing, which normally adopted a more programmatic and controlled approach to constitutional functions of state reinforcement. The period after 1795 saw a continued impetus towards the formation of constitutions imputing subjective rights under general law to those persons obligated to the state. Yet, albeit with variations across different settings, the constitutions of the initial post-revolutionary era also began more strategically to diminish the element of popular sovereignty in previous legal texts, and to renounce the commitment to state legitimacy through expansive societal

inclusion. These constitutions generally marked the inception of a period of more distinctly instrumental constitutionalism, in which constitutions were employed, often under royal fiat, both for steering European societies towards a condition of restricted and supervised political inclusion and for controlling the initial absorptive expansion of state power caused by the concept of popular sovereignty.

As mentioned, the French Jacobin constitution of 1793 was clearly an exception to this tendency. This constitution contained provisions both for a deep-rooted unicameral democratic order and for substantial social/material rights: it thus abandoned the clear separation of private rights and public laws that had characterized the 1791 Constitution. Aspects of this constitution were also emulated in a number of short-lived and, in some cases, brutally suppressed Italian republics of the later 1790s, which were strongly influenced and supported by the French Directory and later by the Napoleonic armies.[55] For instance, the Bolognese constitution of 1796 guaranteed a catalogue of basic rights, and it stressed the entitlement of all citizens to participate in making laws (Art. 20). The principles of unitary statehood and democratic sovereignty were also central to the Batavian constitution of 1798, established in Holland following the French-inspired revolution of 1795 (Schama 1977: 320). Indeed, more expansive ideals of popular sovereignty persisted still longer in constitutional peripheries. In the last throes of the Napoleonic wars, for example, Norway was constituted as a state (albeit still under Swedish dominion) for the first time in more than four hundred years. This was accomplished through the progressive, semi-democratic constitution of 1814, which abolished personal privileges (Art. 23), placed legislative power in the parliament (Storting) (Art. 49), and prescribed regular elections (Art. 54). Despite this, however, the more widespread pattern of post-revolutionary constitutionalism was set directly in France. In France, the Jacobin constitution of 1793 was never implemented, and its commitment to integral-democratic sovereignty was not factually tested. After 1795, France embarked on a course of much more selective constitutionalism, which, while still accepting the formal principle of popular sovereignty, deployed constitutional law to place checks on the volatile politicization of society triggered by the 1791 Constitution and, still more, by the unenforced 1793 Constitution.

This functional transition in constitutionalism after the Jacobin experiment was reflected, initially, in the French constitution of 1795 itself, which marked the culmination of the Thermidorean reaction. The

[55] See the excellent discussion of this in Davis (2006: 94–5).

1795 Constitution remained committed to republican concepts of sovereignty. In its list of rights it stated boldly (Art. 6) that 'the law is the general will, expressed either by the majority of the citizens or the majority of their representatives', and that 'sovereignty resides essentially in the universality of citizens' (Art. 17). It also retained the core rights of man, placing particular emphasis on rights of 'security' (Arts. 1, 4) and judicial equality (Art. 3). Following the judicial violence of the Terror, it emphasized principles of due process under law, and it took pains to eliminate judicial arbitrariness and retroactive laws (Arts. 7–14). In the main body of the text, it instituted a fully separate judiciary (Art. 202), including a high court with reinforced powers to assess accusations against members of the legislature (Art. 265).

Crucially, however, the Thermidorean constitution also reflected a deeply held intention to bring to an end the sovereign inclusivity of the revolutionary era. This was evident, first, in the fact that it sought to eliminate executive-led republicanism by binding popular sovereignty to the majority will of electors and repressing claims to sovereign authority by individuals or small groups. Moreover, it placed a list of duties next to its catalogue of rights, and it defined rights as entitlements obtained through legal observance and obedience (Arts. 5–7). Further, it abandoned some of the popular rights, such as those to education and subsistence, espoused in 1793, and, in the list of duties, it gave property rights singularly high status: it specified property ownership as the foundation of social order (Art. 8). Additionally, the 1795 Constitution favoured a Girondist concept of representation: it stipulated a high property qualification for those nominated to stand in the electoral assemblies that controlled access to the legislature and other public functions (Art. 35). One of those contributing to the constitution, Boissy D'Anglas, tellingly explained that sovereign powers needed to be reserved for the wealthiest and most educated members of society, whose possession of property he saw as anchored in the 'social order', and whose right to govern was founded in the 'state of nature' (1795: 22). Furthermore, the 1795 Constitution rejected the model of undivided sovereignty in the 1793 Constitution by opting for a bicameral legislative system (Art. 44), in which a Council of Elders was appointed to review legislation, and it established a small executive Directory, comprising five members. Most important, however, was the fact that the 1795 Constitution began more emphatically (albeit still inconclusively) to sanction the notion that the constitution needed to be viewed, not only as a practical guarantor of popular sovereignty, but also, as in America, as a supra-positive norm,

standing above and regulating the factual exercise of sovereign power. In the deliberations on the 1795 Constitution, Sieyès suggested that the constitution was a 'corpus of obligatory laws', which had to be placed under judicial custodianship and preserved, as inviolate, from particular or sporadic expressions of sovereign force.[56] To this end, Sieyès acted against the dominant anti-judicial theme of the French Revolution by proposing that a constitutional jury should be established to limit the sovereignty of the state to the terms and rights enshrined by the constitution and, in acting as 'a court of appeal for the constitutional order', to offer neutral resolution in cases of perceived constitutional infraction. He interpreted the constitutional jury, tellingly, as a 'conserving depositary' of the original constitutional act (Troper 2006: 525, 537). These proposals were not accepted in 1795, but they became important elements of later constitutional debates.

Revolutionary constitution writing in France, in consequence, reached its interim conclusion in a constitutional design – that of 1795 – which derived the legitimacy of the state from the sovereign will of the people, but that projected strict mechanisms to ensure that the state was never factually identical with this will and remained distinct from the factual persons from which it obtained its inclusive legitimating force. This idea was first proposed by Sieyès. However, it was later elaborated in the early liberal doctrines of Benjamin Constant, who argued for a *pouvoir neutre* or 'pouvoir préservateur' to check the power of the legislature, and to conserve the anterior rights of human beings, declared in the constitution, as necessarily withdrawn from the state and its sovereignty (1991 [1810]: 401). Underlying these models of constitutional rule was the principle that the constitution represented the people most effectively if it relieved them of incessant factual responsibility for sovereign governance. Indeed, the principle began to surface in the 1795 Constitution that rights guaranteed freedoms most consistently if they made sure that members of society were not fully included in the exercise of power.[57] In this respect again, the 1795 Constitution acted, dialectically, as an instrument that more schematically both in- and excluded the sovereign force of the people. That is, it incorporated this force as at once an internal mainspring for power's positive autonomy and a device for simplifying

[56] Sieyès's views on the need for a legal 'guardian' for the constitution are reprinted in Appendix 4 in Troper (2006).

[57] The 1795 Constitution looked forward to Constant's later view that rights offered freedoms as *modern freedoms*: that is, as freedoms that were expressly not predicated on constantly politicized or immediately formative sovereign actions (1997 [1819]).

its societal transmission, yet it also acted as an instrument for differentiating the state from other parts of society: especially from those people from whose inclusion it purported to derive legitimacy.

This increasingly technical/dialectical aspect of constitutionalism found its most extreme expression under the early years of the Napoleonic regime in France. The early Bonapartist system worked within evident constitutional constraints. In many respects, although often characterized as dictatorship, Napoleon's 1799 Constitution was conceived in continuity with the provisions made in 1791 for constitutional monarchy, and it was intended selectively to conserve the achievements of the early period of revolution.[58] Even after the constitutional reforms of 1802, when the authoritarian powers of the Napoleonic executive were reinforced, it is doubtful whether Bonapartist rule fell completely outside the pattern of constitutional governance. Indeed, his elevation to imperial grandeur after 1804 did not mean that Napoleon governed wholly without parliamentary checks, and his regime preserved (albeit highly limited) countervailing powers in the state.[59] At Napoleon's first accession to power, however, the constitutional dimensions of his regime were clear and pronounced. Initially, for example, Napoleon was appointed to act as one of three consuls, alongside Sieyès and Roger Ducos, and his authority was counterbalanced by a powerful Senate. Most notably, the 1799 Constitution, once again bearing the imprimatur of Sieyès, was intended to complete the establishment of separate powers, effective public representation and particular subjective rights, which had been projected in earlier documents. The 1799 Constitution in fact included, not just the conventional three, but no fewer than five distinct powers, each of which was designed to be proportioned to a particular functional objective, and each of which was expected to hold the others in equilibrium and ensure that particular freedoms in society were not annexed by one part of the state (Godechot 1951: 478). These powers comprised, first, a legislative power that was divided between two assemblies: that is, between a *tribunat*, which processed and presented laws before the legislature, and a legislature, which finally accepted or rejected these laws. These powers included, second, an executive structure divided between an executive power and a governing power. The governing body included Napoleon himself and two other consuls, both,

[58] For this view see Thiry (1947: 228); Thiry (1949: 122); Godechot (1970: 798).
[59] For strong criticism of the interpretation of Napoleon's regime as dictatorship, see Pietri (1955: 8); Kirsch (1999: 212).

until the reforms of 1802, appointed for ten years: the First Consul was entitled to present draft laws to the legislative bodies and both to promulgate and to execute laws (Arts. 25, 41, 44), and the Second and Third Consuls had a 'consultative voice' (Art. 42) in this process. These powers also entailed, third, a separate judicial order, and a conserving power (*pouvoir conservateur*): the Senate. In respect of the latter, Sieyès thought that the Senate, of which he would be president, ought to act as the custodian of state authority: so that the Senate might, in some circumstances, overrule the *tribunat* or government on questions of legislation and act as an 'interpreter and guardian of the supreme law' that was enshrined in the constitution (Vandal 1903: 497, 515). Sieyès even envisaged the institution of a Great Elector to supervise the application of constitutional provisions, to ensure that at no point in the system of balances was power unduly concentrated or personalized, and, if necessary, to counteract the power of the First Consul. Ultimately, this institution was not accepted, owing to the opposition of Bonaparte.[60] Moreover, the powers of review ascribed to the Senate were reduced in the revised constitution of 1802 (Art. 54).

In addition, the 1799 Constitution originally foresaw that representative assemblies would play a significant role in the business of the state. It is calculated that the 1799 Constitution provided for a basic electoral franchise of over five million voters: that is, of primary voters, who elected communal lists, from whom departmental notables and members of the legislature were selected, under Napoleon's supervision, by the Senate (Campbell 1958: 54). To be sure, from the outset the Bonapartist regime diluted the representative principle embodied in earlier constitutions, and in the 1802 reforms this principle was weakened further. For example, under the 1799 Constitution elections were conducted at cantonal level, and in the revised constitution of 1802 the presidents of cantonal assemblies and electoral colleges for these assemblies were normally appointed by the First Consul (Arts. 5, 23). After 1802, moreover, the First Consul could nominate his own appointees for the Senate (Art. 63), and he transformed the Senate into a much more compliant organ of the executive. Nonetheless, the 1799 Constitution did not abandon the principle that the supreme powers of the state were legitimized by their immediate representative connection with the people, and that power must be exercised by those who enjoyed the confidence of the people. In 1799, therefore, power was surely not re-personalized in dictatorial

[60] For an account of this see Thiry (1947: 230); Lepointe (1953).