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).

fashion: those assuming public office and functions were not released from representative obligations, and they were not authorized to exercise power as a private commodity. In some questions, parliaments continued to function throughout the regime. Indeed, for Napoleon parliamentary assemblies retained an important role in his techniques of raising revenue, and they performed consultative functions that assisted the consolidation of state finance characteristic of his regime (Collins 1979: 15).

In these respects, Napoleonic government remained within the category of constitutional rule. At the same time, however, the first Bonapartist constitution of 1799 had strategic features that distinguished it from the mainstream of early, proto-democratic constitution writing. First, although it incorporated separate clauses protecting rights of citizenship, personal inviolability and protection from wrongful arrest (Arts. 76–82), this constitution contained no specific bill of rights. Second, this constitution was not approved by a constituent assembly, and the legitimating claim that it arose spontaneously from the sovereign will of the nation was strongly qualified: it was in fact approved by plebiscite. In addition, the constitution provided for a substantially reduced franchise, in which, as mentioned, members of representative bodies and other public functionaries were elected from local and regional lists of delegates, and the election of delegates to public functions had to be endorsed by the Senate (Art. 20), whose membership was partly controlled by the First Consul. Third, this constitution was also specifically designed as a counter-revolutionary document. It was intended both to cement and to bring to a halt the demands for active rights and sovereign power that had been intermittently expressed during the revolutionary era, and it was designed selectively to preserve some and to reject other aspects of revolutionary legislation in accordance with their utility in strengthening the administrative order of the state. Fourth, this constitution also, initially, declared Napoleon First Consul for a period of ten years, and it restricted the potency of institutional counterweights to the personal executive. Indeed, contrary to the original plan for the constitution set out by Sieyès, the First Consul was accorded a monopoly of legislative power, competence for legislative initiative, and the right to nominate ministers and members of the Council of State.

In its ambiguous fusion of representative-democratic and anti-democratic principles, therefore, the first Bonapartist constitution was an attempt to create a governmental system which secured the functional

advantages accruing to states from the principle of national sovereignty, from the establishment of general laws and from the recognition of limited societal rights, yet that also welded these principles together to construct a hardened and functionally consolidated administrative apparatus. This constitution played out the concept of constitutionalism against the concept of democracy, and it deliberately intensified the dialectical balance between national sovereignty and legally guaranteed personal rights contained in earlier constitutions. This constitution reflected the sense that the constitution itself was sufficient to ensure adequate representation of the people, and it indicated that the people, in their factual existing quality, required only minimal or 'theoretical' inclusion in the state (Bourdon 1942: 82). Indeed, it implicitly suggested that the purpose of the constitution, while guaranteeing certain civil liberties, was to relieve persons throughout society of the burdens of actively engaged political freedom. To this end, the Napoleonic regime specifically selected as legitimate those rights that it deemed politically neutral, and, although protecting private rights, it weakened those rights that had a pronounced political content: that is, rights of expression, agitation and immediate participation (Woloch 2001: 186). Under the arrangements of 1799, in fact, the final locus of popular sovereignty was transferred from the parliamentary legislature to the Senate, which was supposed to ratify all acts of state under observance of their compatibility with the norms in the constitution: maintenance of the constitution thus became the primary obligation and guarantee of sovereign power. For the first short period of Napoleonic rule, in consequence, the constitution began to operate as a nominal higher-law instrument, and it was intended to maintain minimal conditions of liberty outside the state, to curtail access of particular social actors to the actual organs of statehood itself, and to allow the state at once to internalize and politically to withdraw (that is: to *depoliticize*) the inclusionary sources of its legitimacy.

The early constitutional regime of the Napoleonic era was a system designed to piece together rudimentary and substantially depleted elements of constitutional liberalism in a form that supported an executive-led oligarchical regime. The residual reliance of the constitution on basic aspects of liberalism such as separate powers, (curtailed) parliamentary representation and private/personal rights enabled the state to obtain the functional benefits of liberalism: that is, to extract its structure from private milieux and to authorize its societal inclusivity, to pre-structure its societal environments and to generalize procedures

for using political power. Yet the Napoleonic order specifically employed these institutions to curtail the openness of the state to actors throughout civil society, and to condense the exchanges between state and other areas of society into highly formulated intersections. Important in this respect was the fact that the political constitution of Bonapartism was supplemented by the introduction of the Napoleonic Civil Code (Code Napoléon) in 1804. This code implemented a rights-based legal apparatus for the organization of civil life, and it constructed a legal order providing for the attribution and preservation of singular proprietary rights (Arts. 544–546), and for ensuring the inviolability and integrity of freely entered contracts (Arts. 1101–7). The Civil Code was also intended to limit judicial independence, and it placed a clear veto on constructive law finding by judges. Flanked by the Civil Code, then, the Napoleonic constitution formed a political system that sustained a strong centralized state on one hand, able to maintain minimal requirements of consensus and support through society, and a rigorously privatized rights-based social order on the other, in which a corpus of civil rights ensured that many areas of private regulation were at once brought under clear judicial structures and excluded from recurrent state control. In this regard, the Napoleonic state, at least in its early years, consolidated the dialectical dislocation of state and society, which had first culminated in the extracted apparatus of public law in the revolutionary documents of 1789 and 1791, and it defined legal parameters for the simultaneous growth of centralized public authority and the structuring of a legally ordered private economy. In so doing, the early Napoleonic constitution replicated some constitutional-monarchical ideals of 1789, which first shaped the constitutional endeavour of Sieyès and others, and it provided the foundation for the evolution of limited monarchical liberalism, which became the constitutional norm throughout the nineteenth century. Above all, the constitution of Bonapartism was an extended reflection of the restrictive and exclusionary functions that were, from the outset, implicit in liberal constitutionalism. This system fleshed out a constant authoritarian potential within liberal constitutional practice, and it strategically utilized the potentials for the intensification of state power always inherent in liberal constitutions. Bonaparte himself was hardly a critic of constitutional ideas. He argued simply that a constitution 'must be made in such a manner that it does not irritate the actions of government and so force it to violate it' (Thiry 1949: 101). In principle, he identified the constitution as an integral, yet withdrawn, principle of order within the state, through

which the state regulated its societal boundaries, eliminated external checks on its power and externalized legitimating constructions of its factual sovereignty.[61]

After the rights revolutions II: monarchy limited and intensified

Restoration France

Elements of this instrumental reorientation in constitutional design were again evident, in different fashion, in the restoration constitution that followed the collapse of the Napoleonic regime: the imposed Charte of 1814. The Charte established a constitutionally limited monarchical system, which, although intermittently swayed by ultra-royalist groups, was intended to preserve in a monarchical order those elements of revolutionary legislation that reinforced the stability of the state.[62] On one hand, the Charte made general (although deeply ambiguous) provisions for partial parliamentary control of the executive, it upheld the (selective) liberation of property effected in 1789, it sanctioned (in diminished form) the rights of judicial equality and personal liberty in the revolutionary documents, it reduced noble rights (Art. 71), and it retained clauses securing the inviolability of property enunciated under the Code Napoléon of 1804. The Code Napoléon in fact remained foundational for French civil law throughout the nineteenth century. Yet the Charte also accorded full judicial supremacy to the monarch (Art. 57), it placed legislative initiative in the person of the monarch (Art. 16), it made only equivocal provisions for legislative elections, and it enabled far-reaching monarchical control of the executive (Art. 13). The Charte thus again concentrated authority in a powerful personal executive, and it sharply curtailed the claims to popular sovereignty and political rights expressed in earlier constitutions. Tellingly, more liberal actors in the political establishment of the restoration, notably Constant, endorsed a system of government in which sovereignty, although residing in the 'universality of citizens', was not expressed through any identity between the factual body of the people and its governmental institutions, but in a form limited or 'circumscribed' by basic rights (1997 [1815]: 312, 319).

[61] This paradox in Bonapartism is well captured by Brown (2006: 236), who describes the Brumaire as revolving around a fusion of liberal principles and anti-democratic strategies.

[62] For discussion of such continuity see Bastid (1954: 361–83); Sellin (2001: 203).

Notable in the 1814 constitution was the fact that it aimed to avoid provoking extreme political controversy, and it was intended to prevent the unchecked migration of societal antagonisms into the state. To this end, it left many principles of political order undeclared, and it was able to accommodate a number of different regimes. In the first instance, powers of government were shared between the king, an upper chamber and a deeply reactionary chamber of representatives, the *chambre introuvable*. Progressively, however, the Charte was utilized to countervail renewed tendencies towards royal autocracy, and the stipulations of the Charte, especially its cautious rulings on the core question of ministerial responsibility, were cited to undermine the legitimacy of the increasingly authoritarian Bourbon monarchy in the later 1820s. Indeed, the Charte was ultimately invoked to authorize the July Revolution of 1830, which reacted against the dissolution of the Chamber of Deputies and the suppression of the free press imposed by Charles X. During the July Revolution and the resultant establishment of the Orléanist executive, the wording of the 1814 Constitution was altered. After 1830, for instance, the monarch was accorded his title, not by God, as in the Charte of 1814, but by the nation, and laws were introduced to prohibit censorship of the press, and to ensure that meetings of the upper chamber were public and open (Art. 27). Furthermore, the 1830 Constitution made important provisions to increase the legislative initiative of parliament (Art. 15). However, the change of regime did not necessitate an entirely new constitution, and the constitution was able to offer legitimacy for the bureaucratic progressivism of the Orléanists without a political redefinition of the state. Under the cautious guidance of François Guizot, the July monarchy in fact elaborated a pattern of limited representation that extended the constitutional reaction against full sovereignty commenced in 1795 and reinforced in 1814, and it continued to draw strength and legitimacy from a highly restrictive application of liberal ideals.[63] Speaking for the liberal royalist Doctrinaires, Guizot argued that a system founded in the 'equal right of individuals to exercise sovereignty' was 'radically false'. As an alternative, he advocated representative government, which he defined as government founded, not in popular sovereignty, but in 'reason' (1855 [1821–2]: 108, 112). The 1814 Constitution and its variant forms after 1830 thus consolidated a tradition of constitutionalism that was strategically aimed

[63] For brilliant analysis of Guizot's moralizing view of democratic legitimacy see Rosanvallon (1985: 190).

both at raising the intensity of state power and at mollifying the politicization of society. To this end, it provided (at most) for a very cautious widening of the political content of the state apparatus, and it legitimized itself through reference to rights and freedoms that structurally presupposed the exclusionary non-identity of the state and factually existing members of society.

Spain

Following the Napoleonic invasion, Spanish society also obtained a constitutional order designed to consolidate state power at a level of selectively inclusive abstraction. This process began with the abdication of Carlos IV and the passing of the Napoleonic Statute of Bayonne in 1808, which cleared the path for the ultimate formation of a constitutional monarchy in Spain. This continued in antiseigneurial legislation of 1811, and it culminated in the 1812 Constitution of Cadiz, drafted outside territory controlled by Napoleon. This constitution created a limited constitutional or 'moderate' monarchy, in which monarchical power was constrained by a formal rights regime, and partial legislative powers were vested in the parliamentary Cortes. In Article 3, the Cadiz Constitution defined sovereignty as pertaining to the nation (notably – not to the people), and it expressed an organic concept of national sovereignty by fusing the idea of the nation as primary legislator with the idea of the nation as a repository of historically formed basic laws. This constitution also had the peculiar distinction that it utilized constitutional conventions imported from France in order to strengthen Spain against French hegemony, and the constituent Cortes in Cadiz invoked rights of national resistance and traditional independence to legitimize the new constitution (Moran Orti 1986: 68–9).

Most notably, the Constitution of Cadiz was shaped by an attempt finally to erase the privatistic power of the *seňorios* from Spanish society, and it acted to separate, as earlier in France, legitimate from non-legitimate seigneurial rights: that is, to abolish seigneurial rights entailing private ownership of public resources (that is, rights with political, fiscal or jurisdictional force) and to convert seigneurial rights with merely economic substance into private rights of persons (Arts. 2, 4). In consequence, this constitution borrowed from France the idea that a national/sovereign constitution could be used to cut through the traditional privileges of late-feudal society in order to reinforce and rationalize the power of the state, and fully to integrate within the state the

offices and powers susceptible to privatization under the vestigial structures of feudalism. In early nineteenth-century Spain, significantly, the jurisdictional powers of the nobility and the resultant seigneurial legal patchwork remained substantially more entrenched than had been the case in pre-1789 France, and the 1812 Constitution was clearly charged with the task of rectifying the traditional jurisdictional and legislative weakness of the Spanish monarchy. In this case, therefore, the concept of the nation was emphasized in order to nationalize the residually patrimonial power of the monarch (Sebastiá Domingo and Piqueras 1987: 52), and it was promoted to assist the monarchical state (now defined as a state bearing the dignity of national sovereignty) in eliminating the quasi-political competences of the nobility, and in consolidating the powers that it had relinquished through its earlier feudal 'debility' (Moxó 1965: 39). The 1812 Constitution was suspended by the king in 1814, and many of its anti-seigneurial provisions were rescinded. However, many of these reappeared in further legislation of 1823 and in the liberal constitution of 1837.[64] It was in fact only in 1837 that Spain's path towards a limited constitutional order was settled and a state was created that clearly (although still with qualifications) reflected the generalized anti-privatistic political structure of a functionally specialized and inclusive society. Nonetheless, as a document that combined an anti-feudal construction of rights and a structurally condensed recognition of national sovereignty, the Constitution of Cadiz enacted principles analogous to those of the constitutions in France during the later revolutionary era. In its cautious avoidance of ideas of popular sovereignty, moreover, it distinctively utilized the idea of law's national source to extract power from potent private agents and to distil power in the state, yet also firmly and selectively regulate the boundaries between the state and its addressees.

German states

In most German states, in partial analogy, the revolutionary and Napoleonic periods stimulated processes of cautious constitutional reform, often shaped by a clear state-building design. For example, the longer aftermath of the French Revolution saw the establishment of constitutions in some of the German states, notably in Bavaria and Württemberg in 1818 and 1819 respectively, which had obtained sovereign status through Napoleon's dissolution of the Holy Roman Empire

[64] For a longer account see Hernández Montalabán (1999).

in 1806, and these constitutions were evidently conceived as devices to consolidate state power in post-feudal societies.

The constitution of Württemberg was the only German constitution of this period that was not imposed by a ruling dynasty. It contained strikingly progressive provisions for equal rights before the law (§ 24), equal access to public office (§ 22) and freedom of conscience, opinion, contract and ownership (§ 27–30), and it established an effective legislative veto for the estates, ordered in a bicameral parliament (§ 88, 124). However, this constitution also pursued a policy of tactical modernization: that is, it selectively strengthened the democratic dimensions of the polity in order to eliminate noble privileges in fiscal and jurisdictional matters (§ 92), and it prescribed strong public control of judicial process, even providing for a limited constitutional court (§ 195) in order to harden state authority against private-judicial corrosion. In Bavaria, the reformist establishment under Maximilian Montgelas pursued a policy of constitutional foundation determined to guarantee national representation and a property-based franchise as early as 1808. The reforms conducted by Montgelas were shaped by the belief that the constitutional doctrine of popular sovereignty could be invoked as an instrument that at once inclusively simplified society and stabilized and intensified state power against the nobility (Hofmann 1962: 32). The 1808 constitution (never fully enforced) was thus conceived as part of a strategy for solidifying the state. At one level, it pursued this goal by prohibiting serfdom (I, § 3), by largely abolishing noble privileges under law (I, § 2, § 5), and by ensuring that the state exercised its newly obtained sovereign force in uniform judicial and fiscal policies: the constitution and subsequent laws also strongly restricted the powers of patrimonial courts. At a different level, it pursued this strategy by granting political rights in order to ensure that rights did not entail a private stake in the power claimed by the monarchy, to construct less particularistic procedures of political inclusion, and to make sure that all members of society showed equal obedience to the state (I, § 7). The 1808 constitution of Bavaria clearly reflected the conviction that only a state organized under a constitution granting general rights to subjects of the crown could detach political power from territorial or patrimonial tenures, and that a national constitution was required to construct a simple and uniform relation between state and society.[65] The anti-feudal policies essayed by Montgelas suffered

[65] On the Bavarian constitution as an instrument of sovereignty, see Hofmann (1962: 283–6); Doberl (1967).

a number of setbacks through late-feudal reaction. Indeed, the 1818 Constitution, which was more generally implemented, gave renewed recognition to noble privileges of patrimonial jurisdiction: these were not finally abolished until 1848.

Even in the German states in which no formal constitution was enacted, certain elements of revolutionary legislation were implemented to create a quasi-constitutional order, and the state-building techniques utilized under the revolutionary and the Napoleonic regimes also assumed influence in polities less strictly regulated by a formal order of public law. As discussed, for example, Prussia had obtained a uniform legal code in 1794, which imposed a general procedural order on the law courts. After the Napoleonic invasion, a process of legal and economic reform, shaped by the belief that the French Revolution had awakened the 'sleeping forces' of the French nation through its constitutional reforms, was initiated by the great Prussian reformers Stein and Hardenberg.[66] The reforms conducted by Stein and Hardenberg after 1806 were also, in part, marked by direct hostility to the seigneurial powers of the nobility. Indeed, the reformist administration came repeatedly into conflict with the regional nobility, which habitually blocked and weakened the reform policies and sought to restore governmental and patrimonial conditions close to those that existed before the Napoleonic period.[67] Nonetheless, this period saw both the abolition of the feudal rights on land (including serfdom) and the removal of legal barriers preventing intermarriage and other forms of mobility between social classes. This period also witnessed an intensification of debate about rights in the civil sphere, and the attempt gathered momentum to recast laws of property ownership in accordance with principles of Roman law and to eliminate legal principles of divided tenure, multiple collective privileges and shared possession.[68] This did not lead to the introduction of a general code of civil law in the German states, yet throughout the German states inherited legal relations, especially in

[66] See the *Rigaer Denkschrift* (1931 [1807]: 305).

[67] The reformers made no secret of their dislike for the old nobility. Stein and his close collaborator Johann August Sack concluded that a 'constitution and organisation of the estates' were imperative in the attempt to remove 'all traces of the feudal system' and to inhibit the power of the nobles: the nobles, Sack opined, were solely committed to their own 'crudest egotism' and were 'totally useless for anything except for preventing what is good' (Stein 1961: 352).

[68] The classic example of this was the attempt of Savigny to deduce rights of ownership from the singular will of the property owner (1837 [1803]: 25).

respect of property, were slowly converted into more organized form. As in France, in particular, Roman law was employed in the wake of the Napoleonic invasion to clarify rights of singular economic autonomy, and to cement the division between political and economic competence. Central to the Prussian reforms after 1806 was also an attempt to abolish the judicial powers of the Prussian gentry. As late as 1800, many judicial powers in Prussia were still in the hands of the nobility, and earlier attempts to subject these powers to regular state control remained inconclusive. Even by the middle of the nineteenth century patrimonial courts, although increasingly subordinate to local state administration, had not disappeared in the rural areas of Prussia (Wienfort 2001: 34, 79, 151, 251). In 1807, however, the reformers announced measures to integrate patrimonial courts into the state, and senior reformers sought to impose more rigorously generalized procedures for legal order and to eliminate constitutional weaknesses caused by private courts.[69] As in the previous century, therefore, a general rights structure was imposed in Prussia to reinforce state power and to exclude private/dualistic sources of authority from the state.

The reformist period in Prussia also witnessed an (unsuccessful) attempt, led by Hardenberg, to establish a constitution providing for formal national representation, and it saw the tentative emergence of an independent legislative body within the Prussian state. Like other reforms, the plan for a written state constitution in Prussia was conceived as a means for simplifying and solidifying state power. Hardenberg's design for a constitution was not shaped in the first instance by a desire for popular representation. On the contrary, as in Bavaria in 1808, the constitution was proposed as the centrepiece of a design for a strong sovereign Prussian polity, capable of acting in administrative autonomy against dualistically structured and actively Frondist social groups. In particular, Hardenberg's constitutional ideal deviated from classical theories of representation in that it opposed the strict separation of powers, and it envisaged that the civil service would play a key role in receiving delegations from social interest groups and conducting reforms (Koselleck 1977: 162; Wehler 1987: 446).[70] The constitutional project was driven by the view that only an integrative constitution and a national assembly could limit provincial power, pressurize the nobility,

[69] Altenstein's *Denkschrift* of 1807 announced that all private or patrimonial courts had to be integrated into the state (1931 [1807]: 510).

[70] Hardenberg suggested that parliamentary representation might lead to an 'amalgamation' of popular delegates and the reformist elements in the civil service (Huber 1957: 296).