

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.<sup>69</sup> 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).<sup>70</sup> The constitutional project was driven by the view that only an integrative constitution and a national assembly could limit provincial power, pressurize the nobility,

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

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

create mechanisms for fiscal levying required by the state in its financially depleted circumstances after the wars with Napoleon, and so generally consolidate the administrative power of the state.<sup>71</sup> These plans for constitutional reform, however, were eventually brought to nothing by the old nobility and their speakers at the Prussian court, who rejected the attempt implicit in constitutional formation to impose general taxes, to create a political, legal and fiscal order that cut through patrimonial boundaries<sup>72</sup> and to construct bearers of power in formulae indifferent to inherited or local status. Eventually, in 1817, Hardenberg created a Council of State, which assumed some representative functions and concentrated the power of the state administration as the primary reserve of political authority. But this fell far short of a representative or constitutional system.

The opposition of the Prussian nobility to the reformist projects conducted by Stein and Hardenberg after 1806 contained an important constitutional paradox, which strikingly underlines the defining status of modern constitutions in relation to medieval constitutionalism. The Prussian estates acquired significantly increased constitutional importance during the French revolutionary era, and both the financial weaknesses of the state caused by the revolutionary and Napoleonic wars and the resurgence of proto-parliamentary ideas spread from Paris by the revolution meant that estate-based power, which had in any case been reinvigorated in the later eighteenth century, was further reinforced in the reformist period.<sup>73</sup> As early as 1798, a Diet was convoked in East Prussia, in which delegates demanded a catalogue of measures to liberalize the economy and to establish principles of equality through law. In 1808, then, a further Diet of estates was convened in East Prussia, and after 1809 the committee of estates assumed more central representative functions. Diets were also organized in Brandenburg in 1809–10. These processes reflected a substantial rise in influence on the part of the estates in Prussia, and the estates, led by the nobility, assumed a position in which they could use semi-elected authority to participate in modernizing and restructuring the state. Some members of the nobility even contemplated a voluntary renunciation of hereditary jurisdictional privileges to the state, and they began to envisage transforming

<sup>71</sup> For this view see Zeeden (1940: 112); Koselleck (1977: 209); Botzenhart (1983: 448); Neugebauer (1992: 233–4).

<sup>72</sup> See Simon (1955: 61); Klein (1965: 167, 192); Koselleck (1977: 313).

<sup>73</sup> For discussion see Botzenhart (1983: 431); Neugebauer (1992: 197–217); Gehrke (2005: 2).

themselves from orders of structural privilege into functional organs within the state (Neugebauer 1992: 239). Throughout the earlier nineteenth century, the concept of the estate (*Stand*) remained a deeply controversial constitutional principle in Prussia. Progressive sectors of political society urged a redefinition of the estate, which aimed to establish estates as ‘representatives of the people’,<sup>74</sup> acting to integrate diverse social interests within the administrative apparatus of the state. This remained one of the most pervasive arguments of German liberalism before 1848. Conservatives, in contrast, argued that the organic constitution of estates reflected a natural order of corporate society in which, not the ‘entire mass of the people’, but the particular rights of social groups obtained representation.<sup>75</sup> Such conservatives opposed the monistic integration of estates within the state and sought to preserve a social order based integrally on the dualistic assertion of embedded rights. In Prussia, therefore, the conflict between the dualistic-privatistic principle of late feudal constitutionalism and the monistic public-legal principle of modern constitutionalism received its paradigmatic expression. For the most part, the Prussian estates ultimately rejected their redesignation as politically integrated representative groups, and they offered strong resistance to the reforms in order to preserve their particular external prerogatives. Members of the nobility largely opposed the establishment of a national/constitutional system of representation, and the Prussian elite attempted instead to preserve the social constitution based in local power and diffuse privileges.<sup>76</sup>

The major German states, Prussia and Austria, in fact, did not obtain full written constitutions until 1848–9. Indeed, the concluding documents of the Congress of Vienna prohibited the establishment of representative constitutions in major German states. Article 1 of these documents defined sovereignty as a princely attribute, and Article 57 stated that princely sovereignty had no limits except in customary rights. Articles 54–56 stated that only estate-based dualist constitutional arrangements were legitimate in the German states, and that no internal system of representation was to be established. As a result of this, provincial estates were established in Prussia in 1823: they acted to reconsolidate the ‘older

<sup>74</sup> The quote is from the pre-eminent popular liberal thinker of the Vormärz, Karl von Rotteck (1997 [1819]: 19).

<sup>75</sup> This was the view of Friedrich von Gentz, conservative commentator on the French Revolution and its aftermath in Germany (1979 [1819]: 218–19).

<sup>76</sup> See Vetter (1979: 146); Vogel (1981: 48); Botzenhart (1983: 444–6); Neugebauer (1992: 229).

German constitutions' of the pre-1789 period and to prevent the convergence of society around broad-based state executives (Rauer 1845: 1–2). This tendency set the foundations for a constitutional system in which privatistic elements were allowed to survive in the state, and legislative power remained largely in the hands of particular and local elites. To be sure, there were striking exceptions to this tendency. The 1831 constitution of Saxony, although accepting obligation to an estate-based model, contained a powerful legislative chamber, some of whose members were elected in provincial elections. The 1831 constitution of Hesse, analogously, remained nominally committed to estate-based delegation. Yet it also contained a powerful catalogue of rights and, crucially, it made provision for a semi-elected legislature with the power to initiate laws. Nonetheless, the longer period of post-Napoleonic reform and restoration created an especially fateful legacy for many German states. The reforms substantially reinforced the central power of the state bureaucracy: during the reforms, as Hegel enthusiastically observed, the civil service was formed as a liberal elite, it acted as the force behind modernization, and it even assumed quasi-constitutional functions in restricting the prerogatives of monarchy (1969 [1821]: 473). After 1820, however, the state administration was increasingly populated by more conservative figures, who reattached central state power to more particular interests. This meant that by the middle decades of the nineteenth century many larger German states were marked by a condition of statehood, in which private interests were concentrated in the administration of powerful central states. In fact, the subsequent development of the Prussian state, and later also of the German state, was deeply shaped by the fact that during the post-1806 reforms the central authority of the state was reinforced, yet this process was not flanked by an effective exclusion of private power (see Koselleck 1977: 409).

### *Britain*

The intensification of state power through constitutional inclusion was also evident in other states that did not acquire a single written constitutional order. In the later eighteenth and early nineteenth centuries, for instance, Britain also experienced a change in constitutional structure that heightened its inclusionary power and abstracted authority. Although in the late eighteenth century British political debate was marked by wide hostility to the French Revolution, and theorists at diverse points along the spectrum reviled the formal declaration of

revolutionary rights in 1789,<sup>77</sup> the British polity at once prefigured and emulated aspects of the wider rights-based constitutional transformations of this time. On one hand, through the eighteenth century the original constitutional conception of parliament as a balance against monarchical power was revised, and both the fiscal and statutory competences of parliament were substantially extended. Parliament, in fact, became the primary centre of governance, and it was increasingly conceived as an organ of full representative sovereignty (Cannon 1969: ix–xiii; Dickinson 1976). Blackstone stated this clearly in arguing that parliament, of which the king was one element, possessed ‘supreme and absolute authority’ (1979 [1765–9: 143]). In this respect, further, parliamentary power incrementally broke through the local structure of noble authority, and it established a more generalized public foundation for the use and legitimization of political power. Moreover, despite violent attempts at reactionary retrenchment after 1789, governmental and monarchical powers were finally divided in the eighteenth-century English state: the state assumed an increasingly impersonal constitutional order, and single politicians were able, if required, to act independently of the monarchy and to remove ministries endorsed by the king. As a result of this, both parliament and civil service evolved towards an increased level of independence, and the power of government was concentrated in distinct ministries, each containing a distinct administrative apparatus (Parris 1969: 49, 82). Through the later eighteenth century, therefore, the British state generally experienced a process of internal concentration typical of states under more formal constitutions.

This process culminated in, and was in return reinforced by, the Reform Act of 1832. This law increased the number of voters admitted to the electorate, it enfranchised new industrial centres,<sup>78</sup> and it eradicated constituencies (rotten boroughs) that provided support for local and noble authority. In so doing, the Reform Act distributed entitlement to political representation ‘more evenly’ across the country (Chester 1981: 106), it reduced the importance of local power through more general political inclusion, and – vitally – it began to allocate political/representational rights, not on a communal or local foundation, but as entitlements of singular persons. In each respect the Reform Act expanded and regimented the integrative basis of the state, and, although surely not in definitive fashion, it acted to sever political inclusion from

<sup>77</sup> See by way of examples Burke (1910 [1790]: 59); Bentham (2002: 30–1).

<sup>78</sup> An example of this was my own adopted city, Glasgow, which, despite its size, was represented before 1832 by one quarter of an MP.

informal structures of local deference and patronage: after 1832, the tendency towards party alignment became more rigid, and parties formed a stronger link between executive and society.<sup>79</sup> The Reform Act was intended at one level as part of a strategy of social palliation, and it was guided by the assumption that electoral reform was a device for avoiding revolutionary upheavals stimulated by the autocratic shift in British policy under Pitt and Wellington (Hill 1985: 230; Turner 2000: 218). Yet, in widening the foundations of the state, the Reform Act also performed the functionally intensifying objectives of other constitutions. The progressive integration of the population in the political system, further augmented by subsequent reform acts, acted as part of an inclusionary regimentation of state power, and it was closely linked to the growing statutory sovereignty of parliament and the rise and influence of parliamentary parties. One major outcome of the Reform Act, significantly, was a constitutional reinforcement of the office of prime minister and other ministerial departments, and a wider consolidation of the state as a public order. The expansion of electoral inclusion thus stimulated and provided legitimacy for a restriction of personal influence on the state executive, for a rationalized reinforcement of state power as distinct from personal authority, and for a marked growth in the effective power of the state.

Across the whole wave of post-revolutionary constitutional construction, constitutional reform – either wholesale or piecemeal – was used to institute a determinably public form for the state, and constitutions created inclusionary instruments in which state power could unify widening societies and transmit itself more easily and positively across these societies. At this time, most European societies responded to their longer-term processes of political abstraction, differentiation and generalized inclusion by adapting, in a manner reflecting their distinct structure, proto-democratic constitutional techniques for separating public from private functions, for extending the power of central states and for promoting inclusive patterns of support to utilize their power. Most states employed national constitutions and constitutional rights to suppress extreme dualism or polyarchy in their exercise of power and to establish preconditions under which they could consolidate their power as self-contained institutional actors. Moreover, most states began to rationalize the system of their civil laws and formally to juxtapose their

<sup>79</sup> For discussion, see Phillips and Wetherell (1995: 434). On the pre-history of this see O’Gorman (1982: 63).

inner public-legal structure to uniformly constructed rights-based legal relations located outside the state. As in earlier settings, the growth in the volume of rights underwritten by states was directly reflected in the effective power of states. Rights acted as a normative formula in which states constantly augmented their inclusive effective power.

Constitutions, in other words, performed the most vital functions of selective political inclusion for European states in the early decades of contemporary society, and these functions enabled states to operate as such. The expansion of statehood in increasingly modern European societies both coincided with and presupposed the formation of constitutions as documents of functionally proportioned inclusion. In most cases, nonetheless, the consolidation of political structure in society remained partial, post-Napoleonic societies were only loosely integrated around abstracted reserves of political power, and most European states employed elements of constitutional design developed in the French Revolution in order specifically to prevent a fully inclusionary increase in political power. Above all, rights remained very weakly enacted in society, and in most settings their power to shape social structure was limited: private inner-societal authority remained strong, and rights acted primarily to liberate a limited political superstructure, which often fused closely with private power. Only gradually did rights clear the terrain for subsequent, more extensive processes of inclusionary social formation and political abstraction.

### **Constitutions and social design: 1848**

Of the three constitutional elements implicit in the French Revolution – private rights, political rights and national sovereignty – the first was the principle that exercised the strongest immediate influence. As discussed, through the decades that followed the revolution of 1789 this principle allowed states to simplify and attenuate their primary attachment to the second two principles, and subjective rights were widely employed by states to restrict the immediate exercise of popular sovereignty in governmental power without relinquishing the benefits of internal public-legal order and uniform political inclusion. Towards the middle decades of the nineteenth century, however, in many settings the increasingly uniform societal structure that had emerged from the revolutionary era began to generate social and political movements insisting on more universally expansive political freedoms and more centrally authoritative and socially integrative states. In particular, this



period saw a widespread inflation of the concept of national sovereignty, in which, in conjunction with rights, the idea of national self-legislation began to act as the leading impulse of inclusionary political formation. This reached an apotheosis in the (largely unsuccessful) constitutional revolutions of 1848, when in many European societies the demand for constitutional formation and rights-based representation coincided with an impetus towards the construction of states founded in more fully and cohesively integrated national societies. The period prior to 1848, as a whole, might be viewed as one in which the inclusionary and politically abstractive implications of rights became more pervasively and fundamentally embedded in the structure of European societies. This had the result that societies assumed more homogeneous shape (often appearing as *nations*), and it meant, accordingly, that these societies experienced a more pronounced requirement for generalized and articulated reserves of political power. The construction of societies comprising uniform rights-holding social constituencies (nations) and requiring consonantly abstracted constitutional states, which was tentatively anticipated in the earlier revolutionary period, thus assumed heightened expression in 1848.

The growing constitutional significance of nationhood expressed itself in several, quite distinct patterns of political transformation and state formation in the period of revolutionary change around 1848. In cases such as France, first, the salience of national sovereignty was expressed in the formation of more radically inclusive, or even democratic, constitutions, which used the idea of national-sovereign self-legislation to terminate the bureaucratic gradualism of post-revolutionary institutional conditions and fully to realize the constitutional promise of equal inclusion in the political system expressed in 1789. The rise of national sovereignty was expressed, second, in national state building (sometimes with an irredentist dimension) within existing empires or supra-national states. In such cases, the idea of national sovereignty began to bring about a more even anti-privatistic distribution of power within territories, especially those under Habsburg and Ottoman rule, controlled by late-feudal imperial bureaucracies, and the vision of the sovereign self-legislating people facilitated the construction of societies opposing and traversing imperial boundaries. Third, the growing significance of national sovereignty was also expressed in the incremental formation of unified national states, such as Italy and Germany, which were formed through the fusion of loosely connected cultural blocs which had formerly been under diverse administrative control. In such cases the concept of national sovereignty began to authorize the



construction of societies at a heightened degree of political inclusion, and the belief in the nation as constituent power began to extend societies and their political reserves more easily across local and feudal frontiers. In each case the rising prominence of national ideas of sovereignty remained correlated with the functions of social inclusion and general political construction expressed by constitutional rights, and the growth of national statehood formed an intensified manifestation of the impulse towards political abstraction and general inclusion originally contained in rights-based constitutionalism. Following different patterns in different settings, the emphatic expansion of nationhood in early nineteenth-century Europe marked a process in which societies were progressively formed, through personal rights, as cohesive and regionally extensive, in which the local privatistic design of society was dissolved, and in which, accordingly, societies required states as strongly abstracted centres of power, formally situated against relatively ordered and inclusive societies. In most cases, in fact, the rise of national sovereignty reflected a social order that was already deeply shaped and integrated by general subjective rights, and the impetus towards national statehood reflected a requirement for political power adequate to a society constructed and rendered uniform and stabilized by the construction of social agents as uniform rights holders.

*France: popular democracy*

In France, the revolutionary movement of 1848 culminated in the overthrow of the administrative liberalism of the Orléanist regime, and it led to the formation of the Second Republic. As France already possessed a moderately centralized state, the defining debates of 1848 revolved primarily, not around national integrity, but around the substantial content of rights and the inclusionary extent of sovereign power. The Second Republic was founded, first, in the proclamation of a democratic franchise reflecting the full sovereignty of the nation (Art. 1): it rejected the Orléanist aversion to comprehensive popular sovereignty, and it temporarily reinvigorated Jacobin ideals. Second, the constitution of the Second Republic was conceived, initially, as an attempt to fuse bourgeois-republican and socialist-democratic political concepts in order to thicken the content of the rights established in 1791. At least initially, the founders of the Second Republic promoted highly inclusive ideas of citizenship as the basis of political legitimacy. On one hand, the constitution of 1848 sanctioned classical liberal rights, and it provided

for the usual rights in respect of property, belief, education and equal access to public office. Additionally, however, the founders engaged deeply in debates over rights as instruments of *material inclusion*, and early drafts for the constitution contained clauses acknowledging a strong presumption in favour of *material rights*: especially rights to employment and to decent living conditions. During the process of constitution writing, however, the different revolutionary factions turned on each other and the bourgeois factions rapidly suppressed the more radical revolutionary groups. Accordingly, the social ideals of the constituent assembly faltered, and the material rights promised in the Assembly were weakened in later drafts of the constitution. For instance, Article 7 of the provisional constitution of June 1848 already marked a move away from the original aspirations of the constituent body, and it described the right to work – in the vaguest terms – as a right that society must recognize by ‘productive and general means’.<sup>80</sup> In the final constitution, this commitment was further diluted, and the right to gainful employment was treated, not as a formal entitlement, but as a protected liberty. Article 13 of the 1848 Constitution stated that ‘the constitution guarantees to citizens the freedom to work’, and it declared that society ‘promotes and encourages the development of labour’: it thus abandoned the full inclusionary scope of its first conception. Nonetheless, the 1848 Constitution still established a strong principle of popular sovereignty, and it provided for a unicameral legislature (Art. 20), based in universal male suffrage, and for a nationally elected president. In this case, above all, the principle of national sovereignty acted as a device for selectively reinforcing the state, and as Karl Marx (perhaps inadvertently) recognized, its function was to organize power in a strong state executive, and to establish the state as a powerful, yet abstracted actor capable of applying power independently across society (1958–63 [1852]: 197).

### *Greece, Belgium, Hungary and the early Risorgimento*

The second pattern of national constitutional formation first (momentarily) became reality in Greece, in the initial stages of the unification process that gradually gave rise to the modern Greek state. In Greece, the early aftermath of the French Revolution and the first influx of revolutionary ideas had stimulated a body of constitutional thought, plotting the liberation of Greece from Ottoman rule. Ultimately, after the wars of

<sup>80</sup> For comment, see Bastid (1945: I, 277).

independence against Turkey, the first Greek constitution (only partially applied) was drafted in 1822, and it was followed by revised documents in 1823 and 1827. The 1822 Constitution, although influenced by the French Thermidorean constitution, did not fully separate executive and legislative functions, and members of the executive retained control of military units and the state administration. It is also notable that, at such an early stage in the process of nation building, this constitution, although notionally centralistic, performed only weak integrating functions for the state, and it secured only loose control of the governmental periphery (Dakin 1973: 105; Argyriadis 1987: 68). Moreover, the resultant republic was short-lived, and it was soon replaced by a more authoritarian system. Nonetheless, the 1822 Constitution of Greece created a rudimentary state apparatus, and it contained sufficient symbolic power to draw members of an emergent society into an increasingly immediate and unified relation to the state. In partial analogy to this pattern, the Belgian constitution of 1831, highly influential for later constitutions of multi-ethnic societies owing to its provisions for language rights, concluded the separation of the Belgian provinces from Holland by providing a structure for a cautiously progressive constitutional monarchy. This constitution, strongly informed by the assimilation of Napoleonic law in Belgian provinces under French rule up to 1815, reflected the unitary construction of society under rights-based law by breaking dramatically with estate-based constitutions (Juste 1850: 301). It created a governmental order with two elected chambers (Arts. 47, 53), it gave the elected legislature (albeit representing only a tiny franchise) final control of legislation (Art. 28) and – above all – it made strict provisions for ministerial accountability to the legislature and it removed ministerial power from dynastic authority (Art. 89).

The prominence of national constitutionalism in anti-imperial national state building gained most exemplary expression in Hungary. In Hungary, the constitutional movement clearly incorporated two distinct state-building impulses: it consolidated both the inner-societal anti-feudalism and the strong external claim to national/territorial sovereignty typical of early constitutional foundation. Up to 1848, elements of feudal social order remained strongly embedded in Hungary. To be sure, after the 1820s reformist principles had become increasingly pervasive. However, there was no constitution in Hungary except for an assembly of organic laws. Serfdom still existed in rural areas, the delegatory order of estates, led by the aristocracy, remained intact, and administrative power was based in regions or counties (*vármegye* or