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Abstract

This article sets out a sociological reconstruction of the constitution of the European Union (EU). Utilising a methodology derived from historical-functionalist sociology, it explains the distinctive court-led, judicial form of this constitution within a wide comparative-sociological framework, and it cites earlier examples of judicialised constitutions to elucidate the adaptive functions performed by judicial actors in the EU constitution. The article proposes a new method for analysing constitutions in general and that of the EU in particular, and it offers an encompassing sociological perspective for addressing the increasing preponderance of judicial institutions in contemporary democratic polity building.

Introduction

Two new, and closely related, lines of research are beginning to emerge in legal and political sociology. Each of these lines of inquiry reflects a distinct endeavour on the part of leading-edge sociological theorists to establish a methodology able to analyse rapidly emergent patterns of political formation in contemporary society.

On one hand, recent research has begun to focus on law courts as primary objects of specifically sociological study. In particular, sociologists have begun to examine the prominent role of Constitutional Courts in contemporary societies, and they have increasingly directed attention towards the polity-building role of such courts. This has produced a body of research that uses a sociological perspective to examine the increasingly widespread *judicialisation* of democratic politics and legislation,[1] and which attempts sociologically to account for the growing proliferation of constitutional models in which the judicial branch assumes atypically far-reaching authority. Of course, concern with judicial politics currently traverses the social sciences. Across various disciplinary boundaries, it is commonly observed that the classical features of political democracy have been transformed in recent years by the rising power of judicial institutions, and it is widely suggested that traditional patterns of democratic governance have been redesigned through a *rights revolution* or even a *constitutional-court revolution*, as a result of which rights are constitutionally extracted as institutions that curtail the authority and autonomy of legislatures.[2] However, what defines the specifically sociological literature on these phenomena is that it endeavours to position these tendencies within a comprehensive account of contemporary societal formation. This literature includes highly critical inquiries, which allege that the growing status of courts reflects a strategy for the protection of international economic elites (Hirschl, 2004; 2007,

1 On the origins of this concept, see Tate (1995, p. 27).

2 Note the use of the term 'judicial review revolution' to describe recent changes in democratic design (Renoux, 1994, p. 892). In political science, it is often observed that pure parliamentary sovereignty has 'faded away' across the globe (Ginsburg, 2003, p. 3).

p. 723; Ferejohn, 2002, pp. 41, 44). It includes anthropological analysis of the increasing influence of courts, observing how courts embed acceptance for constitutions in different political settings (Scheppele, 2003). It includes research focused on the composition and self-understanding of high-court judiciaries (Schnapper, 2010), research on the internal systemic functions of Constitutional Courts (Gawron and Rogowski, 2007; Hesse, 2006),[3] and research examining the functions of courts in particular processes of regime change (Schatz, 1998; Miller, 1997). It also includes a large body of research which analyses the rising judicialisation of political decision-making and legitimisation as reflecting broader societal patterns of transnational convergence in the increasingly globalised political arena (see Commaile and Dumoulin, 2009; Commaile, Dumoulin and Robert, 2010).

In parallel to the growing recognition of Constitutional Courts as important objects of sociological inquiry, political sociologists have also attempted over recent years to devise sociological models to explain the distinctive processes of constitutional integration underlying the formation of the European Union (EU). Conventionally, sociological inquiries into the specific character of the EU focused on citizen-level perspectives in the experience of integration and supranational polity construction (e.g. Saurugger, 2008; Delanty, 2005). More recently, however, researchers in political and institutional sociology have elaborated a wide range of methodological perspectives for examining the specifically constitutional dynamics of polity building which characterise the EU.

Without doubt, analysis of the distinguishing constitutional features of the EU remains primarily the province of researchers outside sociological fields of inquiry, and pure legal and political-scientific analyses still possess a monopoly in this area. Outside political sociology, the emergent constitutional order of the EU has been subject to diverse and frequently controversial reconstruction. Across different approaches, however, it is commonly accepted that, although its attempts at formal constitution writing have to date remained inconclusive, the EU is marked by a historically specific and even *sui generis* constitutional order: that is, it possesses a distinctive *material constitution*, which acquires clear autonomy both against national constitutional law and the conventional corpus of international law.[4] This constitution, it is argued, results originally from a highly judicialised process, in which original interstate treaties have been consolidated, amended and normatively distilled by European courts, and it has been cemented in the EU Charter of Fundamental Rights.[5] Specific and distinguishing constitutional characteristics of the EU, it is normally claimed, include the following: (1) a transnational, multilevel, yet still deliberatively informed legislative process (Joerges, 2011, p. 477); (2) a piecemeal, mosaic-like, and uncertainly pluralistic legal order;[6] (3) a structurally prominent commitment to rights norms, as a result of which rights are applied by supranational courts (primarily by the European Court of Justice (ECJ), acting de facto as a Constitutional Court in comity with national courts,[7] but also by

3 A precursor for functionalist sociological research on courts can be found in Parsons (1969, p. 48).

4 For competing accounts of the autonomy of EU law, see Pollack (2003, pp. 188–89); Maduro (2005, p. 337); Weiler (1999, pp. 286–323).

5 This account is distilled from Menéndez (2004, p. 120). See also the descriptions in Shaw (2000, pp. 344–45); Kumm (2005, pp. 268, 305). For the classic analyses of this process, see Stein (1981); Weiler (1991, p. 2407); Stone Sweet and Brunell (1998, p. 77). For the specific application of the *sui generis* construction examined here, see Shaw (1996, p. 233); O'Neill (2009, p. xix); MacCormick (1999, p. 103).

6 See the chapters in Walker, Shaw and Tierney (2011); Kumm (2005, p. 301); Harding (2000).

7 The status of the ECJ as a Constitutional Court is often disputed (Shapiro and Stone, 1994, p. 411); O'Neill (2009, p. 7); Rosenfeld (2006). However, its classification as a Constitutional Court began in the late 1970s and was generally established by the 1980s. See Walter (1999); Weidmann (1985, p. 294). This view, although still not universal, is now common; see Vesterdorf (2006). Note the recent description of the ECJ as a 'comprehensive Constitutional Court' in Bauer (2008, p. 174).

the European Court of Human Rights (ECtHR), which enforces a distinct legal order, but from which the ECJ borrows and authorises aspects of its jurisprudence),[8] as unifying normative parameters for transnational legislation and policy-making;[9] (4) a high level of political judicialisation and a widespread displacement of political competence to judicial actors (Burley and Mattli, 1993, p. 71; Everson and Eisner, 2007, p. 191);[10] (5) a reliance on courts of review, applying rights, as agents of transnational integration – tellingly, in fact, the construction of the EU polity has been described as a process of 'integration through rights',[11] in which the ECJ and its doctrine of direct effect has played the most potent role in EU-level polity and constitution building; (6) weak emphasis on classical reserves of constituent power, integration of multiple sources of constituent power into the constitutional process, and assumption of de facto constituent power by courts;[12] and (7) fluid interplay between different organs exercising both constituent and legislative power, and flexible use of diverse actors, in national and transnational settings, to perform political and legislative functions.[13] On the last two points, in fact, it has often been claimed that in the public-legal order of the EU the authority of courts is not exhausted in their simple ability to subject legal norms in member states to post factum review. Instead, the courts, applying rights, act as primary bearers of *constitution-making power*. In consolidating interstate treaties as basic norms for legislation and defining jurisprudential norms to support the supremacy of European law, they routinely perform the acts of public-legal norm production that are imputed in classical constitutional polities to constitutional legislators authorised by an identifiable *demos* (Weiler, 2003, p. 9). Many diverse legal and political-scientific explanations have been proposed to account for the salience of judicial power in the EU polity and for the position of the ECJ as effective trustee of the EU constitution, and certain views have particular influence amongst such explanations. For example, from a more classical international relations perspective, it has been often claimed that the European courts reflect strategic interests and motivations of particular national-state actors within the EU (Garrett, 1995, pp. 172–73). Similarly, it is widely contended that the judicial institutions of the EU enact a process of constitution making that is independent of clearly defined Member-State interests (Alter, 1998, p. 142; Stone Sweet, 2004, p. 285; Burley and Mattli, 1993, p. 57), and in fact that judicial third parties of necessity assume heightened importance in

8 On the partial comity between these courts, see Lebeck (2007, pp. 235–36); Walter (1999, p. 981); Simon (2001, pp. 36, 44).

9 The at times weak or equivocating presumption in favour of rights in ECJ jurisprudence has been widely noted; see most notably Coppel and O'Neill (1992, p. 245). Yet, in broad terms, it is observable that rights form something close to a '*ius commune*' underlying EU law and norms originally derived from the post-1945 conventions on rights and solidified through the Charter of Fundamental Rights form a common quasi-constitutional bedrock for polity building and legislation (Douglas-Scott, 2011, p. 129). See further Piris (2006, p. 64); Harding (2000, p. 141); Wiethoff (2008, p. 37).

10 Note the repeated use of the term *gouvernement des juges*, signifying a return to the weak statehood of the *ancien régime*, to describe this (Peters, 2011, p. 275).

11 This expression is used in Douglas-Scott (2006, p. 630; Scheeck (2005, p. 3). In agreement, see Haltern (2005, p. 362); Bogdandy (2001, p. 170). Elsewhere, the EU is described as arising from a 'fundamental rights revolution' (Lasser, 2009, p. 3).

12 See MacAmhlaigh (2011, p. 26); Schilling (1996, pp. 393–95); Maduro (2003, p. 78; 2005); Neyer (2010, p. 906). Anxiety about weak constituent power shaped earliest debates about the constitution of the (then) EEC. See in particular Kaiser (1960).

13 In the EU, it is argued, there is 'no scope for creation *ex nihilo* of a distinctive constituent power' (Walker, 2007, p. 259; 2009, p. 172). See also the analysis provided by Anne Peters, arguing that in the EU constituent power and constituted power cannot be fully separated and the ECJ assumes the role of 'permanent *pouvoir constituant*' (Peters, 2001, p. 410). In addition see Seiler (2005, p. 307). In agreement for different reasons, see Klabbers, Peters and Ulfstein (2009, p. 179). See also Stone Sweet's recent idea of 'decentralized sovereignty' to capture this (2012, p. 53).

multilaterally contested processes of polity construction (Stone Sweet, 2000, p. 3; Bogdandy, 2000). Across these divergent analyses, however, the basic perception that the EU polity is distinguished by a constitution with a strong judicial emphasis remains constant.

Although the court-based constitution of the EU is mainly examined from perspectives in law and political science, however, in very recent literature the judicial dimension of the EU polity has been identified as a distinctively sociological research question. In particular, the role that the ECJ, borrowing elements of jurisprudence from the European Convention on Human Rights (ECHR) and other human rights agreements under international law, has played in forming the normative bedrock for European integration has begun to attract sociological attention. The status of the ECJ as an organ applying rights jurisprudence is of course in itself disputed. Originally, the European Coal and Steel Community (ECSC) and European Economic Community (EEC) Treaties did not contain a catalogue of human rights (although mention was made of specific rights of bargaining and equal payment in Articles 118 and 119 of the Treaty of Rome; de Witte, 1999, p. 863; Defeis, 2007, p. 302). In its earlier rulings, notably *Stork* (1959), the ECJ refused to apply rights as a basis for judgment. Subsequently, it is well-documented that the commitment to rights in ECJ rulings remained halting, and was not fully consolidated until relatively late in the integration process: i.e. with the Treaties of Maastricht, Amsterdam and Lisbon, through which human rights acquired a focal and ultimately binding status in EU jurisprudence.[14] In fact, the elaboration of a strict rights jurisprudence by the ECJ was driven in part by the fact that its rulings were contested by national Constitutional Courts (especially the *Bundesverfassungsgericht* in the renowned *Solange* cases), so that the ECJ's obligation to rights resulted, not only from autonomous principles, but from an incremental uploading of rights norms from national constitutions (Martinez, 2003, p. 446).

Nonetheless, by the 1970s, it is clear that the ECJ increasingly relied on human rights norms as a dimension of its legal reasoning (Bengoetxea, 1993, pp. 77, 80). The cases of *Stauder* (1969) and *Internationale Handelsgesellschaft* (1970) established rights norms as elements of European jurisprudence and stipulated that fundamental rights had to be seen as 'general principles' of European law.[15] The rulings in *Nold* (1974) and *Rutili* (1975) were supported by reference to the ECHR (the first of these rulings preceded *Solange I*). This tendency was then substantiated in the 1976 *Report on the Protection of Fundamental Rights as Community Law*, and the *Joint Declaration on Fundamental Rights* (1977), which accentuated the 'prime importance' attached to the protection of rights in Member States (Mancini and Keeling, 1994, p. 187; Schimmelfenig, 2006; Wincott, 1994, p. 254). By the later 1980s, and especially after *Solange II* (1986), it was accepted that human rights form core aspects of European jurisprudence. In *Hoechst* (1989), pronounced regulative significance was accorded to the ECHR. Now the EU Treaties list human rights as fundamental, and effectively constitutional, principles of European legal order, and the integrative legitimacy of the European legal order is expressly tied to rights. Overall, therefore, although only gradually developing a formal rights jurisprudence, the consolidation of rights norms as a foundation of European law can be seen as a core achievement of the ECJ, and the ECJ, interacting with the ECtHR, has promoted rights jurisprudence through concerted (although of course often contested) collaboration with other courts and other rights systems.[16] The reference to rights has in fact played a vital role in the normative self-justification of the ECJ in its programme of centralisation,

14 The application of rights by the ECJ is commonly viewed as driven by centralising imperatives, economic prerogatives and a desire to manufacture legitimacy (de Witte, 1999, p. 866; Greer and Williams, 2009, p. 478). On incoherence in EU rights norms see Alston and Weiler (1999, p. 7).

15 See Williams (2004 p. 145). It is argued that through *Stauder* and subsequent cases the ECJ 'fleshed out' an effective Bill of Rights to support its rulings (de Waele, 2010, p. 5). See, additionally, Scheeck (2005, p. 17).

16 For theoretical explanation of this, see Pernice (1999); Voßkuhle (2010); Sabel and Gerstenberg (2010, pp. 526, 543).

and it has formed an internal or even auto-constitutionalised *higher law*, in reference to which the ECJ has been able to reach across national legal boundaries and authorise its pursuit of legal convergence and de facto polity building (see Weiler, 1986, p. 1135; Manners, 2008, p. 60). Although their formalisation has been circuitous, in short, rights have acted as polity-building elements in the EU, and the authority that they have conferred on judicial actors has been crucial to the construction of the EU as an aggregate of state-like institutions (Engel, 2001, p. 159).

In its current form, the incrementally judicialised character of the EU constitution is an object of increasing concern for sociologists, and, from different perspectives, the constitution-making role of judicial actors is seen as reflecting a deep change in the political structure and patterns of political agency in contemporary societies. Sociological literature addressing these phenomena includes a growing body of historical-sociological research, which follows Bourdieu in examining the elite actors originally giving impulse to the formation of the European system of human rights legislation (Vauchez, 2008a; 2008b; Madsen, 2010). It includes neo-Durkheimian functional analysis, which addresses the 'court democracy' resulting from the generalisation of EU law through the ECJ as part of a transnational process of functional differentiation and resultant *individualisation* (Münch, 2001, p. 196; 2003, p. 27; 2008, p. 522). Recently, this literature has incorporated a model adopting a more institutional-sociological approach to the functions of judicial actors in the EU. This research examines the reliance of the EU polity on the '(supra-) constitutionalization of basic rights' through judicial actors as one element of a broader transnational process of post-traditional polity building (Frerichs, 2008, p. 67). This process, it is claimed, is marked by a general tendency towards governmental pluralism, hybridity or *governance*, in which, in increasingly globalised societies, a variety of institutional actors, including judiciaries, are required to assume effective legislative power (see Kjaer, 2010, pp. 158–59). Across these different lines of investigation, the basic foundations for a sociological analysis of judicial integration have emerged as important elements in research on European polity building. Each of these lines of research attempts to uncover the social motivations for the distinctively judicial constitution of the EU, through which, in absence of any primary founding democratic act, courts acting as custodians of rights construct the overarching normative order of the EU polity in toto.

The expansion of judicial power, in sum, forms an object of rapidly rising interest at the intersection between two emergent lines of contemporary sociological inquiry, and it is a matter of primary concern both for sociologists of legal politics in the widest terms and for political sociologists researching on EU integration more specifically. As a result, the position of the ECJ in the EU is a question around which two lines of sociological analysis are beginning most intensely to coalesce. Sociological research concerns itself with the ECJ both in its specific inner-European functions and as an institution giving distilled expression to the tendency towards court-led political and constitutional construction that is assuming heightened visibility in most contemporary polities. As such, the ECJ forms an object that allows sociologists to observe an increasingly generalised institutional phenomenon in intensified fashion, and it is able quite distinctively to illuminate the broader formative political tendencies of contemporary society.

Despite the cross-field importance of the ECJ as a focus of sociological analysis, however, we still await the emergence of a theoretical model capable of elucidating the deep-lying societal pressures giving rise to the judicialised constitutional structure of the EU. As yet, we do not possess a methodology able to explain this dimension of the EU on the basis of an encompassing theory of sociostructural evolution. That is, we lack a methodology able to show how the intensification of judicial functions in the EU reflects transformative processes in society more generally, and to distinguish in concrete fashion how judicial norms enable societies to adapt to underlying structural changes. Even those interpreters adopting the most encompassing sociological analysis of constitutional politics have not yet clarified the judicial aspect of the EU constitution in

relation to its fundamental societal preconditions, and they have not identified the precise societal functions of judicialisation in the EU.[17]

The objectives of this article are shaped by this research background. This article addresses the questions of constitutional judicialisation in the EU and in contemporary society more generally. However, it aims to move beyond more established modes of inquiry and to construct a broadly focused sociological perspective for examining these questions, which contributes to and connects both the above fields of research: the political sociology of the EU and the sociology of judicial politics more widely. To this end, first, this article approaches the line of constitutional construction underlying the EU as one example of a wider process of *judicial constitutionalisation*, which is deeply shaped by the emergence of highly contingent transnational patterns of polity building. In this process, rights, applied by highly abstracted courts, impel a dynamic of constitutional formation, and, without immediate external support from bearers of originating constituent power, rights sustain, authorise and bring normative cohesion to the diffuse institutions of the EU polity. Second, this article aims to examine the underlying functional features that imprint on contemporary society in general a propensity towards judicial constitutionalism, and it proposes an encompassing theory of societal transformation and systemic adaptivity to capture this widespread change in the legal/political system, both in the EU and in modern society more generally. Using a perspective derived from historical-functionalist sociology, in particular, it aims to identify *the functional exigencies* in society that are likely to be reflected in a constitution formed through the displacement of constituent or democratic power towards judicial actors. In each of these respects, this article seeks to provide a comprehensively sociological method for observing both judicial constitutionalism in general terms and the constitutional system of the EU in particular. It attempts to explain the European constitution, not merely as a stand-alone phenomenon, but as part of an adaptive inner-societal reaction, foreshadowed by analogous processes in earlier societies, to increasingly articulated elements of European society's functional structure.

The judicial constitution of Europe: a functionalist approach

To elucidate the sociological basis of the EU constitution, it is suggested throughout this article that the public-legal order of the EU only appears to possess a unique character if the basic dimensions of more conventional constitutions are observed from a highly *literalistic* perspective, which is not sensitive to the functional aspects of constitutions and their legal-normative contents. That is to say, the constitution of the EU only appears to comprise a *sui generis* design if constitutions in their more standard form are analysed in statically *ideal-typical* manner: if they are perceived as strictly normative arrangements of public law, in which collective political actors deliberately and reflexively authorise a set of higher-ranked laws as defining principles for public order.[18] However, if constitutions are examined from a standpoint that remains attentive, in less literalistic fashion, to the internalistic, adaptive and sociofunctional dimensions of constitutional law, the characterisation of the EU constitution as a fully unique legal order is rather less compelling. If it is approached from a historical-functionalist angle, it is possible to identify a complex set of precedents for the constitution of the EU polity, and most especially for its pronounced judicial dimensions. In fact, it is possible to discern a broad set of societal functions performed by constitutions with strong

17 None of this is meant to denigrate the attempt by Münch to conceive of the role of the ECJ within a wider process of organic differentiation (Münch, 2001, p. 22; 2003). Yet Münch approaches these questions in generalised terms and does not clarify, specifically, how judicial actors help societies respond to their changing underlying conditions.

18 This definition is still used by theorists sceptical of the constitutional status of the EU. See, for example, Grimm (2009).

judicial emphasis. This is relatively independent of whether constitutions are written in unitary national, federal national or transnational settings: the functions of judicial constitutions in national politics are not marked by an absolute qualitative difference from those in transnational polities.[19] Further, it is possible to observe that judicial constitutional emphasis enables the political system of society to respond to quite distinct problems, across longer historical periods, and judicial emphasis brings quite specific and relatively generalised functional benefits to the political system, such that judicial constitutions perform relatively constant adaptive functions in the evolutionary stabilisation of modern political structures. In consequence, it is proposed here that an internal/functional analysis of judicial constitutionalism in different historical settings makes it possible for us to construct a broad sociological perspective for explaining contemporary tendencies towards the judicialisation of polity building. This, then, might enable us sociologically to illuminate the societal factors underlying the judicial constitution of the EU.

Legislative uncertainty and weak legitimacy

In the first instance, it is observable from a functionalistic perspective that throughout modern history societies in which judicial actors have assumed a central role in polity building and constitutional construction possess certain common features, and the political systems of such societies are exposed to generally characteristic pressures. In such societies, the intensified role of the judiciary recurrently forms an adaptive facility within the political system, and it allows the political system, often in compensatory fashion, to secure core functions and to maintain consistent political structures in society despite potentially unsettling internal or external conditions. The intensification of judicial power within the political constitution can thus be seen, in the first instance, as a *compensatory functional response* within the political system, and it typically becomes prominent in conjunction with a set of generally discernable societal phenomena, to which the political system is required to adapt.

Most notably, the prominence of judicial actors in constitutional orders tends to bring specific benefits for societies which are marked by conditions of *high legal/political contingency*, *uncertain legislative outcomes*, *low institutional density*, *weakly centred external support* and (consonantly) *insecure reserves of legitimacy* within the political system. In societal settings in which such conditions are prevalent, the transfer of functions in respect of legislation, institution building and constitutional norm construction from elected legislatures to actors in the judiciary performs internally adaptive functions for the political system, and it generates resources within the political system which mitigate its exposure to these conditions. Under such conditions, crucially, the prominence of judicial power acts, in compensatory fashion, to *raise the autonomy* of the political system in societal environments in which abstracted use of state power is otherwise problematic.[20] In particular, the judicial pattern of constitutionalism enables the political system to absorb, and control its reactions to, high levels of unpredictability in its everyday legislative functions, it insulates the political system against potentially overwhelming challenges to its legitimacy, and it

19 Judicialisation may become prevalent in transnational societies, but its functional origins are earlier. This implies a critique of Münch's Durkheimian analysis.

20 In this context, the concept of state autonomy is used to designate *the capacity of a state, where necessary, to legislate against potent private actors in society, independently to specify policy options and to produce and stabilise sufficient reserves of power to enact these, and independently to generate reasonable levels of compliance for legislation through society.* This conception is linked to established accounts of state autonomy in political science literature. For established views on state autonomy as the ability of a state to determine its own preferences against societal actors, see Nordlinger (1981, p. 22); Migdal (1988, p. 41). More specifically, my conception of state autonomy reflects the Luhmannian principle that a political system obtains legitimacy if it is able autonomously and self-referentially to produce power to meet inflationary and uncertain demands for decisions in contemporary society (see Luhmann 1981; 1988, p. 91).

articulates a stable set of normative formulae in which political power can be applied and consumed in relatively autonomous form across highly uncertain societal environments. Overall, judicial constitutionalism can be observed, across varying historical periods, as a mechanism through which society as a whole immunises its political functions against otherwise destabilising volumes of legislative contingency and insecurity.

A number of concrete examples can be offered to support this historical/functionalist approach to the formation of constitutions with prominent judicial features. Some of the more indicative of these examples are considered below.

Early American republic

America during the founding era and the early republic is the most obvious historical case of constitutional construction in which strong judicial emphasis performed reflexive functions for the political system. Indeed, this period forms a prototype for subsequent processes of judicial constitutionalisation. Throughout founding-era America, the gradual elaboration of a constitutional order with strong judicial components played an important role in enabling the political system to adapt to a societal background of acute legislative insecurity and weak legitimacy. In so doing, the judicial constitution also acted to consolidate the foundations of the political system as a body of institutions able to apply political power through society at a reasonable level of self-reliance and inner consistency, and it had vital importance in raising the general capacity of the political system for the autonomous use of power.

To illustrate this, for example, well before 1787–1789 the judicial branch of government had acquired unusual prominence in the American polities of the colonial era, and this assumed decisive significance in consolidating these polities during and after their separation from the British crown. Throughout the later colonial era, semi-independent judicial rulings in American county courts had already created a quasi-constitutional setting in which colonial polities had been able to appeal to higher, institutionally extracted norms to organise their activities, and this established a foundation on which particular American states could ultimately assert and justify independence from Britain. In fact, the initial impetus towards American independence was triggered by the fact that the colonial states rejected the Blackstonian doctrine of parliamentary sovereignty accepted in England, and they invoked higher justiciable norms, often even phrased – inchoately – as *rights*, in order to oppose parliamentary legislation and to claim independent legislative power (see Reid, 2003, p. 4; Bradburn, 2009, pp. 27–29). During the great crisis of imperial authority in the 1760s, courts on occasions appealed simultaneously to the colonial constitution, to notions of natural law, and to concepts of rights in order to criticise, overturn and even declare unconstitutional controversial acts of royal legislation (see Morris, 1940, p. 431; Williams, 1940, p. 126; Bilder, 2004, pp. 195–96; 2007, p. 542; 2008, pp. 7, 19; Grey, 1978, p. 880). By this time, courts had clearly begun to articulate a set of normative principles by which colonial polities were able, albeit very tentatively, to express their legitimacy in independent terms, and constitutionally to construct themselves in relatively autonomous fashion. In the first decade of state constitution writing after independence, then, judicial bodies continued to assume distinctive prominence as institutions that were equipped, during a period marked by extremely contested institutional legitimacy and juridical exceptionalism (Rakove, 1999, p. 1940), to produce reasonably stable and extracted norms for the creation of interim polities, and to provide normative support for new acts of legislation. Notably, a number of the first state constitutions written after 1776 even contained clauses providing for judicial review of new statutes,[21] and they

21 See most notably Gerber (2011, pp. 93, 204, 222). Both historically and in contemporary politics in the USA, the legitimacy of judicial review is of course highly contested. For historically founded attacks see Tarr (1998, pp. 76–77); Kramer (2004, p. 98).

invoked judicial norms as instruments for reinforcing the authority and legitimacy of legislation passed in the first era of tentative polity building after independence. Throughout this period, in fact, judicial power was utilised to project a higher constitutional justification for the weakly consolidated political structures of the American states. This served to insulate the nascent political systems of the American states against pressures arising from their structural weakness, it brought cohesion to rapidly founded polities, and it generated procedural reserves of legitimacy to support the use of power by political actors endowed with only deeply fragile structural autonomy.

As is well documented, the salience of judicial power in revolutionary America eventually culminated, in 1787–1789, in the establishment of the Federal Constitution, which gave unprecedented influence to the judiciary, and began to formalise the powers of judicial actors to approve and veto legislation. The Federal Constitution itself contained only sketchy provisions for separate judicial authority. However, the already very strong judicial dimension of American constitutionalism was substantially hardened in the Judiciary Act (1789), which established a Supreme Court with power to act as arbiter in questions of constitutional authority and contested legislation.[22] In the course of its institutional consolidation, the Supreme Court brought a number of structural benefits to the state of the early American republic, and it contributed greatly to stabilising the apparatus of federal statehood as a whole. At a practical level, the court performed the function that, in applying rights-based legal norms to validate legislation,[23] it elevated the constitutional source of the state's legitimacy above the immediate operations of daily government, it gave extracted prominence to the norms of the constitution as principles to authenticate and authoritatively to insulate legislation as it was enforced through society, and it enabled the state (at both federal and regional level) to assert and promote uniformity in the laws applied throughout its territories.[24] At a more submerged functional level, the court generated an institutional design in which the state could call on the judiciary to produce additional legitimacy for new laws, and it meant that the state was able to draw legitimacy from a body of norms that were internally secured inside the political system yet also relatively withdrawn from the most intense cycles of politicisation around the state. This meant in particular that the most highly controversial matters of legislation could be deflected away from the most politically implicated departments of the political system, so that the state was not endlessly exposed to immediate or uniquely concentrated conflicts over legitimacy: the production of legitimacy for particular acts of legislation was removed from strictly legislative institutions, and the legislature was able to rely on secondary sources of legitimacy conserved within the judiciary. This became especially significant after the passing of the Bill of Rights in 1791. The addition of a Bill of Rights to the original constitution of 1789 meant that the most potentially destabilising controversies of the early republic, especially questions concerning federal–state relations, could be referred to actors

22 The background to this is Hamilton's theory of repugnance: i.e. his claim that there could be 'no other way' to protect constitutional laws 'than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void' (Madison, Hamilton and Jay, 1987 [1787–1788], p. 438).

23 Some distinguished commentators have claimed that the Supreme Court did not apply strict rights jurisprudence until the incorporation of the Bill of Rights in the Fourteenth Amendment (e.g. Stone Sweet, 2008). To my mind, this view takes a very literal and limited view of rights jurisprudence, and it fails to do justice to the fact that the constitution in its entirety was conceived as a document of rights. In *The Federalist Papers* 78, for instance, it was made clear that the Federal Constitution in toto was a corpus of 'political rights' (Madison *et al.*, 1987 [1787–1788], p. 437).

24 The primacy of courts over Congress is usually seen to have commenced as a consequence of *Marbury v. Madison* (1803). On my account, however, powers of judicial review were established considerably earlier, and they had their origins in the colonial constitution. To support this, see, for example, Currie (1985, pp. 55–70); Graber (2003, p. 631). For an important analysis of pre-1789 theories of judicial review (especially in the writings of Tudor Tucker and James Iredell), see Goldstein (1986, p. 64).

in the judiciary, and subject to extracted and *partially depoliticised* normative adjudication. This meant in turn that the intensity of political controversy was divided between different actors within the state, that no single focus of authority was over-burdened with potentially destabilising controversy, and that acts of law could absorb additional legitimacy through secondary judicial ratification.

Throughout the era of revolutionary transformation in America, in consequence, judiciaries assumed a highly distinctive functional position in the emerging constitutional system. The American republic was formed in a sociopolitical setting in which (both before and after 1776) the legitimacy of the political system was fragile and defined largely *ex nihilo*, the ability of the emergent national state to authorise legislation in the face of complex opposition and diffuse, loosely integrated societal environments was questionable, and outcomes of legislative acts were deeply uncertain. The highly judicialised rights-based constitution which evolved between the late pre-revolutionary era and 1789 then, in part, enabled the nascent political system to adjust to this structurally unsettled setting, and both the prominent position of judicial actors and the application of rights to control and authorise legislation assumed vital importance in enabling the political system to stabilise itself against this environment. At one level, this rights-based judicial focus enabled the new American polity both to define its legitimacy against an alternative source of power (the imperial authority exercised by the Westminster parliament), and it made it possible for this polity to operate at a manageable level of autonomy in a setting in which external reserves of legitimacy (social consensus) were rather weak, and a stable normative horizon for the transmission of political power could not easily be presupposed. At a different level, the judicialisation of its constitution served to weaken the state's dependence on *external* sources of legitimation, and to ensure that normative sources of legitimacy for legislation were stored, at different locations, *inside* the inner fabric of the state itself. In each respect, the judicial constitution acted to instil an internalistic construction and projection of legitimacy within the political system, and this served immeasurably to elevate the state's capacity for autonomy and equal social control. For example, the fact that the state accounted for itself as drawing legitimacy from recognition of rights held by generalised *single subjects* meant that it was able increasingly to reach across the deeply embedded structures of local power, and to draw all members of society (as a nation) into an immediate relation to state institutions. The judicial reference thus allowed the state to configure society as a relatively uniform environment for the use of power. Moreover, the judicial emphasis of the constitution meant that a political system could evolve in which, across diffuse and volitionally uncentred territories, lower courts assumed partial responsibilities for law-making, general social inclusion and even political structure building.[25] Despite its compound character, the political system was able to produce and enforce legislation at a reasonable level of consistency. On the basis of its judicial constitution, the early American republic developed as a federal state marked, for the standards of the late eighteenth century, by a relatively advanced degree of integrity and autonomy (Edling, 2003, p. 219). The early American republic formed the classical example of a political system that utilised a judicial constitution to reduce its vulnerability to internal and external contingency, to generate secondary sources of legitimacy for legislation, and generally internally to augment its basic autonomy.

New democracies after 1945

The second period of highly judicialised constitutional construction occurred in the wave of post-authoritarian transitions, which took place in Europe after 1945. The two main examples of this were the constitutions established in Italy (1948) and the Federal Republic of Germany (1949).

25 Standing in for a large body of literature, see Kramer (1992, p. 270).

Both of these constitutions provided for the eventual institution of Constitutional Courts with far-reaching powers for review of statutes, and both these courts played a vital role in solidifying state institutions that traditionally lacked solid structure and legitimacy.

In both Italy and West Germany, the formation of a judicialised constitutional order responded in some respects to societal pressures and fulfilled systemic purposes similar to those characteristic of post-1776 America. In fact, after 1945 these functions of judicial constitutionalisation began, to some degree, to assume politically reflexive status, and courts were strategically deployed in new constitutions because of their functional status.[26] In both postwar Italy and West Germany, the existence of Constitutional Courts created a vital additional residue of legitimacy for the political system, it brought internal cohesion to traditionally weak institutional structures, and it facilitated the internalistic production of legitimacy in the political system. Above all, these courts significantly elevated the statutory autonomy of the state and the capacity for the abstracted use of power possessed by the state, and they helped immunise society as a whole against problems induced by weak political abstraction.

In Italy, for example, the Constitutional Court, which began to hear cases in 1956, created a normative forum in which legislation could be concretely checked against higher-norm principles, which were partly based, under Article 10 of the constitution, in international law. The Constitutional Court brought several structural benefits to the political system. Notably, it instilled a reservoir of legitimacy within the state to support particular acts of law, it insulated legislation against unmanageable contestation, and it proposed a normative construction of political order able to unify powers in the state and cohesively to overarch the use of power through society.[27] In addition, the court helped to ensure that power could be distributed through society in reasonably stable legislative procedures, and that norms centrally defined by the state acted as the primary basis for all legislation in society (Luther, 1990, p. 78). On the one hand, this brought the advantage that it helped both to expand (otherwise highly depleted) confidence in the legal integrity of the state and to augment potential compliance for legislation. In so doing, vitally, it enabled the state to legislate with greater freedom over controversial issues across society (Volcansek, 1994, p. 495; de Franciscis and Zannini, 1992). On the other hand, more importantly, in determining fixed norms for the authorisation of legislation, the court ensured that the possibility of gaining access to state power was made subject to formal procedural control, it restricted the private and local dissipation of state power which had afflicted pre-1945 Italian politics in endemic fashion, and it concentrated society's reserves of power within the state (Bartole and Vandelli, 1980, p. 180). In both respects, the Constitutional Court helped to cement political power in a clearly delineated set of institutions, and in defining the state as an actor marked by a clear and objective normative order it significantly enhanced the autonomy of the political system.

In West Germany, the Constitutional Court assumed similar functions, and its construction of a clear set of norms, based to some degree – following Basic Law Articles 25 and 100(2) – in international law, to regulate legislation contributed vitally to the consolidation of the political system in the post-1945 transition. After the West German court became operative in 1951, notably, many of the most unsettling controversies concerning the legitimacy and direction of the

26 It is often argued that the German Federal Constitutional Court was based primarily, not on the US Supreme Court, but on the Constitutional Court (established 1920) of the First Republic of Austria. In respect of institutional design and position in relation to the regular judiciary, this may be the case. However, the court pioneered by Hans Kelsen in 1919/1920 did not apply a jurisprudence of rights. The primary forerunner of the Constitutional Courts in post-1945 Europe (and beyond) was in many respects the US Supreme Court.

27 This was immediately noted in Gueli (1958, p. 355).

new democratic state were deflected to the court for review, and the court frequently acted to intercept highly charged disputes over legislation and to soften antagonism attached to these issues. This can be seen in numerous cases. But it is exemplified most clearly in the court's early handling of cases regarding freedom of opinion. In the most decisive of such cases, the court, as point of principle, stated that all basic rights (private and political) had *fundamentally constitutive* status for West German democracy, and thus, implicitly, that all social exchanges (public and private) were subject to normative guarantee by the court.[28] In one respect, to be sure, this was a highly expansive political decision, which dissolved classical boundaries between the public and the private domain: it meant that the court assumed power to dictate the external political form of society as a whole. This decision projected a comprehensive normative *value* of a society based in private and public rights, and, in implication, it expanded the boundary of the political system to include normative regulation of all society. At the same time, however, in this judgment the court situated itself as a filter between society and other branches of the political system, and, in indicating that all disputes over basic rights needed to be referred to the court, it acted both to obstruct the undiluted convergence of social contests around the state (Stamm, 2001, p. 18), and to define the form in which social interests could be specifically politicised. At a practical level, therefore, the growing rights jurisprudence of the court enabled the legislature to avoid the most immediate confrontation with deeply politicised conflicts regarding questions of legitimacy, and it permitted the political system as a whole to invoke superior norms, reposed in the court, in order to support the authority of legislative acts, to ensure uniformity in judicial ruling throughout the federal territories, and to filter and police societal conflicts as they were directed towards the political system.[29] At a more fundamental level, the court made it possible for the newly established state to project an extracted construction of its legitimacy and authority, which was substantially distinct both from the momentary functions of the political system and from specific concrete actors within the state. It is no coincidence that one leading early observer of the *Bundesverfassungsgericht* described the court as an organ that finally conferred 'real unity' on the German state as a whole (Leibholz, 1957, p. 111). As in Italy, the court finally permitted the West German state to assume encompassing organic cohesion, and so to overcome the traditional pathologies of German statehood: that is, high political personalism, low independence of public office, haphazard circulation of authority between government and opposition, and general weak reserves of autonomy.

In both Italy and West Germany, in sum, Constitutional Courts projected a normative order which provided a vitally important secondary, encompassing basis of legitimacy for the political system. This made it possible for the state as a whole to insulate its weakly embedded, transitional form both against externally destabilising societal conflicts and internally destabilising disaggregation, it facilitated the uniform circulation of power through society, and it enabled the state to presuppose a store of legitimacy which it was not required endlessly to generate and reproduce. For these reasons, these courts served to promote confidence in the political system, and to intensify both the effective power held within the state and the level of autonomy at which this power could be utilised. In both Italy and West Germany, the ability of the state to propose itself as autonomously holding a monopoly of legitimate power had traditionally been rather limited. This weakness, albeit only partially in the case of Italy, was ultimately rectified by the institution of a Constitutional Court, through the ratification of statutes by courts applying rights norms, and through the pronounced judicialisation of the constitutional system. As in the

28 See Bundesverfassungsgericht (1958).

29 See the theory of the German Constitutional Court as an agent of depoliticisation in Gawron and Rogowski (2007, p. 126). On this general principle, see Baird (2001).

first process of judicial constitutionalisation in post-revolutionary America, judicial emphasis assumed clear inner-systemic functions for post-1945 states. Above all, it enabled states internalistically to pre-construct and preserve their legitimacy, it immunised the political system against inner loss of integrity, and it dramatically increased the capacity of states for independent uniform law-making.

Recent democratic transitions

More recent processes of political transformation and re-foundation have witnessed an intensified growth of constitutions with strong judicial dimensions. Indeed, during more recent state-founding transitions, judicial power has retained and even accentuated its functional attributes in earlier polity-building settings.[30] In these transitions, judicial constitutionalism has again acted to generate supplementary reserves of legitimacy for structurally unconsolidated political systems, and it has provided mechanisms for hardening the political system against exposure to high levels of internal and external disruption. In each respect, it has acted as a vital instrument in preserving the political system as an abstracted autonomous actor in society.

These sociological functions of judicial constitutionalism assumed singular significance in the lines of democratic re-foundation in post-authoritarian polities in Eastern Europe before and after 1989. In many transitional societies in this period, the process of constitutional reorientation contained an unprecedentedly strong judicial dimension. For example, in Hungary and Poland, one key determinant of democratic transition was the fact that these states had instituted semi-independent constitutional tribunals well before 1989.[31] In both these countries, leading judicial actors, influenced by the international rights norms enunciated in the Helsinki Accords, had already begun to project an independent normative basis for the use of state power before the Communist regimes collapsed (Thomas, 2001, pp. 169–94). From the outset, therefore, the transitions in Poland and Hungary were shaped by the fact that judiciaries were in a position to propose an extracted definition of the state as constitutionally distinct from its momentary actions, and courts instilled an abstract normative model of legitimacy in the political system, which acted at once as stimulus, foundation and objective for legislative reform.[32] In the longer course of the transition after 1989, subsequently, both Hungary and Poland developed political systems in which courts exercised their autonomy to project quasi-constitutional parameters for state actions. In both these cases, courts claimed the authority both to interpret existing constitutional provisions and to implement principles of international law, especially regarding human rights provisions, in order to generate binding principles for control of legislation, and they assumed great normative power as agents able to oversee and protect the first stages in the process of constitutional consolidation.[33] In devising a normative basis to check and authorise

30 The status of the US constitution as precursor of much later transitional constitutions has been observed elsewhere (Teitel, 1997, p. 2071).

31 On the reformist power of the Constitutional Court in Poland, see Ludwikowski (1995, p. 154); Garlicki (1988, p. 724); Brzezinski (1993, pp. 153, 171, 174, 176, 186). In Hungary, although independent judicial organs were weaker than in Poland before 1989, a Council for Constitutional Law was established in 1983 (Dupré, 2003, p. 5; Klingsberg, 1992).

32 This judicial construction of the state naturally stood in marked contrast to most constitutions established after 1945 in Eastern Europe, in which the judiciary was typically placed under direct legislative control, and basic constitutional norms (rights) possessed little more than declaratory status. For example, art. 48 of the constitution of the Peoples' Republic of Poland maintained that courts were 'custodians of the social and political system'.

33 This was especially the case in Poland, where an interim constitution, established in 1992, was fleshed out by the court up to the passing of a full constitution in 1997; see, for commentary, Brzezinski and Garlicki (1995); Schwartz (1998). On the construction of rights norms by the Polish Constitutional Court see Weber (2008, p. 275). On the use of international law in this process, see Klich (1996, p. 60). See the important study of

transitional legislation, courts functioned in Hungary and Poland de facto as a self-constructed constitution, and they employed their normative power to preserve the co-ordinate branches of government against loss of legitimacy caused by uncertainties of transition, distrust of political elites, and weak democratic familiarity, and effectively to unify and bring cohesion to different departments of the emergent state (Brzezinski, 2000, pp. 108–109; Schiemann, 2001, p. 357). In these settings, courts articulated a set of normative premises on which hastily structured states were able to organise their legislative functions at a reasonable level of consistency, to absorb and compensate for uncertain external legitimacy, and internally to solidify foundations for legislative security and legitimacy. Across different patterns of national democratic transition after 1989, in fact, powerful judiciaries, concentrated in strongly protected Constitutional Courts, routinely bundled together the typical functions of constituent, legislative and judicial actors. As in earlier cases of judicial constitutionalisation, courts performed the function that they generated strong internalistic reserves of legitimacy for states confronted with extremely unpredictable objects for legislation, and they clearly reinforced the operative autonomy of tentatively emergent democratic polities.[34]

In these historical examples from the 1770s to the 1990s, it is possible to identify a series of social conditions in which constitutions with a strong judicial emphasis bring specific functional benefits for society. Most strikingly, the construction of highly judicialised constitutions obtains particular functional utility in polity-building exercises, which are marked by insecure external legitimacy and unstable compliance for legislative acts. Judicial extraction and application of founding norms provides a vital secondary, highly internalistic or even self-constituted reserves of legitimacy for the political system in societal settings in which external legitimacy is not solid, institutional integrity is low, and support for legislation is generally questionable. On this basis, it is possible to speak of constitutions with potent judicial dimensions as institutions which permit political systems to adapt to conditions of *high societal contingency and deeply precarious legitimacy*. In all cases examined above, judicial constitutions have contributed and indeed continue to contribute to raising the autonomy of state power, and to enabling state actors to abstract their power as a usable and reproducibly transmissible phenomenon, even in societal conditions of extreme external inconsistency.

Weak constituent power

If the formation of a judicialised constitutional system has historically served primarily as a mechanism for insulating the political system against legislative insecurity and low external legitimacy, a high level of judicialisation also performs vital functions in constitutional orders situated in societal environments in which the political system is only weakly authorised by a clearly present *constituent body*. Indeed, judicial constitutionalism specifically permits the political system to compensate for the absence of constituent power. There are two distinct reasons for this. First, in conditions where polities are formed in absence of a symbolic procedure for expressing a

the role of the Hungarian court in regulating political branches and underpinning the transition as a whole in Teitel (1995, pp. 189–90). On the construction of rights norms by the Hungarian Constitutional Court, see Sólyom (1994, p. 228); Pogany (1992, p. 676). As background on the opening to international law in post-1989 constitutions, see Stein (1994). The Hungarian court was established under the amended constitution of 1989, so it did not possess constituent power to the same degree as the Polish court, but it defined itself as 'depository of the Rechtsstaat revolution' and even in some cases initiated laws by ordering parliament to enact human rights legislation (Sajó, 1995, p. 257).

34 In some literature, it is argued that courts possess weak legitimacy (Caldeira and Gibson, 2001, p. 222). It is also argued that courts do not help to generate legitimacy for the political system as a whole (Hyde, 1983, p. 408). But elsewhere a strong argument has been made for courts as institutions acting to generate legitimacy for the political system; see, for example, classically Dahl (1957, p. 295); Epstein, Knight and Shvetsova (2001, p. 156).

pre-constitutional constituent power, it is often the case that the political system is required to generate alternative, often multiple and compensatory, sources of legitimacy.[35] In particular, it is a characteristic of political systems operating under such conditions that they are obliged to produce *highly internalistic* constructions of the origins of their legitimacy, and they rely on descriptions of their power which they propose, manufacture and project from within an internal body of constructs or formulae. Second, under circumstances where polities are not directly constructed by an identifiable constituent agent, political systems habitually possess a diffuse, highly pluralistic institutional structure. As a result, such states rely on abstracted legal/normative constructs to formalise relations between different organs of state, to confer unity on their operations, and to project a semblance of unitary authority to support their laws. In both these respects, the probability that states lacking clear foundation in constituent power will be inclined to rely on judicial actors for surrogated and internally secured sources of legitimacy and inner cohesion is high. In both respects, moreover, judicial actors perform indispensable stabilising functions for the political system, and this contributes integrally to augmenting the autonomy of state power.

Early American republic

The most important early example of the use of judicial constitutionalism to offset and compensate for weak constituent power can again be found in the founding period of the American republic. In post-revolutionary America, in particular, the powerful judicial dimension of the constitution had the notable function that it allowed the federal state to presume general democratic legitimacy for its functions despite the fact that its external popular support was disputable and tenuous. Indeed, it allowed the state to claim consensually acceded legitimacy for its laws despite the fact that it lacked foundations in a fully cohesive constituent power. To be clear on this point, the Federal Constitution assuming force in 1789 had been approved by ratifying conventions of the thirteen constituent states of the American republic, and it was able, on that premise, plausibly to project itself as authorised by an originating democratic constituent power. At the same time, however, the constituent legitimacy obtained by the constitution was symbolically weak. One reason for this was that the Federal Convention, which wrote the constitution in Philadelphia in 1787, was not marked by the proximity to popular delegates possessed by some of the bodies that drafted state constitutions in and after 1776: the Federal Constitution was perceived as lacking the immediate grounding in popular sovereignty from which earlier state constitutions had extracted legitimacy.[36] One still more important reason for its weak legitimacy was that the Federal Convention was the product of delegated constituent power. That is to say, it was written by actors claiming authority through secondary constituent power, which had been devolved by the primary constituent power of the states to the Federal Convention, so that, although the Federal Constitution purported to derive legitimacy from an original popular will, it was the states themselves, not any immediate organs of 'the people', which acted as the constituent power sustaining the constitution.[37] In consequence, the constitution could only presuppose a relatively weak external constituent force to underwrite its legitimacy. Its originating reference to constituent power was rather remote, and it provided only somewhat insubstantial founding legitimacy for the compound, disparately federal character of the emerging state of the American

35 I follow the classical definition of constituent power in Carré de Malberg (1920–1922, pp. 490–91).

36 Note, however, that up to 1784 only one constitution (Massachusetts 1780) had been ratified by any show of popular support.

37 The use of the term 'We the People' to present the constitution as authorised by constituent power was famously ridiculed by the Anti-Federalist Patrick Henry in the Virginia ratifying convention of 1788. For details, see Elliot (1941, p. 72).

republic (Ostrom, 1987, p. 152). Owing to this weakness of constituent power, moreover, the state structure of the early American republic inevitably evolved on a somewhat loosely centred and diffusely authorised institutional pattern. Although capable of relatively advanced autonomy and securely centralised for a federal state in the late eighteenth century (Riker, 1987, p. 9), the early American republic lacked immediately authorised integrative force, and the general institutional cohesion of the state remained moderate.

Under such circumstances of weak constituent power and consequent reduced internal institutional integrity, the judiciary soon assumed vital status in constructing and preserving the state apparatus of the early American republic. As examined, the passing of the Judiciary Act of 1789 led rapidly to a partial displacement of power from the Congress to the judiciary in the early years of the American Republic. At a surface level, this had the practical outcome that the state was able to borrow from the judiciary a unifying set of norms (based in rights) to support and bring consistency to its legislative acts, and the judiciary played a vital role in bringing some degree of integrity to the diverse legislative organs (both federal and state level) of the American federal state. In extracting from the state a body of norms to authorise federal legislation, the court projected an image of juridical unity, through which the disparate organs of the political system were brought into reasonably articulated relation to one another and laws were authorised in broadly consistent fashion. In many respects, in fact, the judiciary acted as the primary integrating organ of the state, and it was only in the judiciary that the federal state as a whole obtained symbolic gravity and uniform legislative consistency (often called sovereignty) (see Lacroix, 2010, p. 201; Skowronek, 1982, pp. 23, 25, 27–28). At a deeper functional and conceptual level, however, the prominence of the judiciary as a set of organs for reviewing and affirming legislation in the light of rights meant that the post-1789 American constitutional order as a whole was able to store an account of itself as legitimised by a distinct and cohesive will, and the judiciary, culminating in the Supreme Court, transformed the normative corpus of the (uncertainly authorised) constitution into a consistent set of principles able internally to accompany and validate general acts of legislation. As has been widely noted, the early American republic was based in Madison's theory of divided – or, in my view more accurately, *concurrent* – sovereignty, in which the original constituent sovereignty of the American people (or, more properly, the American nation) was exercised, fractionally, both by the different confederated states and by the federal state as an encompassing entity (Lacroix, 2010, p. 103; Pinnegard, 2009, p. 123; Amar, 1987, p. 1465). Against this background, however, the Supreme Court soon began to act as the primary embodied locus of sovereign authority in the federal state, and it enabled the state fictitiously to manufacture an illusion of singular normative power and uniformly constituent sovereign order, which could be internally projected to traverse and legislatively to overarch the inconclusively integrated and often latently secessionist states of the Union.[38] The strong reliance on rights-based judicial authority after 1789 thus formed a dimension of the nascent republic, which enabled the state internally to envision for itself a consistently unified source of authority, to overcome the weak legitimacy resulting from its two-level, compound basis, and in fact internally to generate an image of sovereignty and constituent power which transcended and incorporated the factually fractured institutional basis of its authority. In this setting, dialectically, the judicialisation of constitutional power permitted a simultaneous splitting of the unit of sovereignty and a unitary relocation of this same unit as a normative focus, situated above the federal state as a whole and able to authorise legislation at different institutional junctures and at a high level of abstractive legitimacy.

38 For the theory of the judiciary as depository of constituent power see *The Federalist Papers* 78 (Madison *et al.*, 1987 [1787–1788], p. 439).

On these grounds, in early post-revolutionary America the judiciary originally acted as a source of legitimacy *in lieu of* a unified and singularly sovereign constituent will, and it allowed the state to imagine itself as constructed by a single founding constituent authority, which could be invoked to accompany, justify and simplify distinct acts of legislation. In so doing, the judiciary enabled the republic to internalise a reference to an original authorising will without certainty that this will factually existed, or that this will could be identified as concretely manifest outside the political system. In the early American context, in short, the powerful position of the judiciary was able to bring internal unity and legitimacy to the state, it instilled within the state an image of its original authority which it was not able objectively to extract from any external source, and it marked an internal compensatory reaction within the state to the fragile foundations of its constituent legitimacy. In each respect, the judicial dimension of the constitution played a vital surrogate role in heightening the abstraction of political power in American society and in increasing the internal level of abstraction and autonomy at which the state's powers of legislation could be constructed and utilised.[39]

Judicial politics after 1945

In the period of post-1945 constitution writing, these internalistic and simplificatory functions of judicial constitutionalism were intensified in some societies, notably – again – in Italy and West Germany. In these settings, the capacity of judicial actors for augmenting the inner cohesion of political institutions, for projecting a counter-factually unified constituent power to support the state, and for raising the autonomy of the political system was once again dramatically re-articulated. At this time, in particular, new constitutions widely reinforced the principle established in the early American republic that constitutional-democratic order involved, not a direct inclusion of some external constituent power, but rather a dialectical projection and systemically internalised reconfiguration of constituent power. In fact, the process of constitution drafting after 1945 often hinged on the principle that the judicial dimension of constitutional order could be strategically utilised to curtail and *manage* the presence of immediate constituent power within the state. At this time, judicial institutions, usually acting as guardians of rights norms, were instituted in order specifically to procure legitimacy for legislation not sustained by potent external reserves of constituent authority.

The dramatic rise of judicial power after 1945 normally occurred against a distinctively charged sociological background, and its status in constructing constituent power had the most vital importance in stabilising autonomous functions of statehood. Notably, the constitutions of interwar Europe had struggled fatefully with, and ultimately been brought to crisis by, the problem of constituent power, and it was only through the dynamic of constitutional judicialisation after 1945 that this problem was resolved. In the immediate aftermath of 1918, most European states had obtained constitutions intended to absorb the pressures resulting from

39 This is a matter for a separate study, but it can be noted here in passing that the construction of a unified national political system in the USA took place in three periods of intensified state and nation building (i.e. the founding and Federalist era, Reconstruction, and the era of the Warren Court). In each case, the Supreme Court, applying increasingly refined rights jurisprudence, played an important role in drawing society into a more even and immediate relation to the political system. On this account, the landmark rulings of the Warren Court appear as a last stage in a long process of uniform state and nation construction, effected through rights. Central to this period was the fact that the court accentuated the principle of equality in the exercise of individual rights to reach beyond local and private obstructions to the power of the national state and to include all society more evenly in the reach of the political system. This was achieved through a 'rapid increase in the pace of the process by which provisions of the Bill of Rights were made applicable to state proceedings' (Casper, 1972, p. 39). See, additionally, Kurland (1970, pp. 59, 61, 96); Cox (1968, p. 33). The role of the Supreme Court during Reconstruction is of course much more controversial, and it is typically seen as having betrayed the amended constitution. Yet for a persuasive revisionist account of the role of rights as nation-building institutions during Reconstruction, see Brandwein (2011, pp. 64, 98).

simultaneous processes of mass and material democratisation induced by World War I; typically, these states tried to achieve this objective by developing constitutions and promoting models of legitimacy founded in a *very wide and external* definition of constituent power. Strikingly, most post-1918 constitutions were usually designed in such a manner as to place the constituted power of the state in a constant close relation to the constituent power of the people, and they endeavoured to secure powerful reserves of legitimacy for state action by ensuring that constituent power was ceaselessly and immediately channelled through society and transmitted through the organs of state. In other words, these constitutions aimed to ensure that the will of the people, in both its political and material dimensions, was uninterruptedly invoked and *represented* in the state as a concrete foundation for all acts of law (Schmitt, 1928, pp. 84, 209). For this reason, most European states after 1918 assumed constitutions with a strong corporate/organic bias.[40] After 1918, corporate constitutionalism was widely employed as a political-constitutional design intended to solidify a relation of ceaseless material integrity between the state and its constituents. This brand of constitutionalism premised the legitimacy of political power on the capacity of the political system for internalising and fulfilling the immediate claims and demands expressed by citizens in different dimensions of their lives, and for intricately translating the pluralistic demands of society into the one inner cohesive will within the state. In consequence, it was widely reflected through the 1920s that states obtained and preserved their legitimacy as an ongoing *total event* of societal integration or by an all-encompassing *everyday plebiscite*, in which constituent power, in both its political and material dimensions, was incessantly activated through acts of concrete inclusion performed by actors in the state (Smend, 1968 [1928], p. 182).

In most cases, ultimately, the commitment to endless corporate inclusion of the constituent will of society triggered extreme malfunction in interwar European state institutions. The attempt of states fully to incorporate the external will of the people frequently placed unbearable structural strain on the fragile new democratic polities of post-1918 Europe, and it meant that public institutions in many societies struggled to maintain their status as clearly public autonomous actors. In fact, the corporate constitutional experiment after 1918 often gave rise to a pattern of political order in which the expansive and integrative use of political power, to which states were obligated by their constitutions, was only sustained through the co-opting of private actors into the state periphery: that is, through the fatefully endemic *reprivatization* of public power. Many countries through the 1920s witnessed an egregious fragmentation of public order, and in many cases private monopoly of public office was widely simplified and commonplace, and functions of state were preserved and supported through society by means of a loosely dilated coalescence of public authority and private influence.[41] Ultimately, the corporate-democratic constitutionalism resulting from World War I gave way to a more authoritarian brand of corporate constitutionalism: a type of constitutionalism typically known as 'fascism'. This system – at least in its own proclamations – shared with democratic corporate constitutionalism a commitment to mobilising constituent power as the endlessly active foundation for everyday acts of legislation. Fascism, too, premised its claim to legitimacy on a presumed identity between the state and the people: it purported to obtain legitimacy from the complete and cohesive internality of the constituent people to the state order (Gentile, 1929, p. 50). Beneath this veneer, however, fascist government, like earlier corporate systems, was marked by an extremely fluid intersection of

40 This was clear in Germany and Italy where chambers for the representation of labour were either established or projected. But this is also noted as a characteristic of states that retained their basic pre-1914 constitutions (Middlemas, 1979, p. 151).

41 The classic example of this is Germany during the presidential period 1930–1933, in which high offices of state were widely accessed and transacted by private actors.

public and private functions, and in many cases fulfilment of regulatory obligations assigned to state institutions depended on the uncontrolled assumption of public offices by private elites (Mellis, 1988, pp. 262–63). Typically, fascist regimes were forced to resort to high levels of internal privatism to maintain even basic levels of social control, and, in extreme cases, they perpetuated their functions by acting as variably equilibrated aggregates of private/public power: that is, *as non-states* (Costa Pinto, 2011, pp. 206–207). Both the democratic constitutions established after 1918 and the anti-democratic constitutions established in some countries after 1922, therefore, typically resulted from an *over-intensified construction* of constituent power. States with corporate constitutions routinely purported to obtain legitimacy by transposing the external will of all society into the inner agency of the state. These states, however, were unable to maintain structural integrity in face of these legitimatory expectations, and they often renounced their distinctively public status in their attempts to mediate the full plurality of demands and conflicts inhering in the societal will which they claimed to represent (see Schmitt, 1923, p. 22).

It is against this sociofunctional background of state crisis that we can analyse the emergence of strongly judicialised constitutions in some societies after 1945, especially Italy and West Germany. Indeed, it was often as a reaction against the political pathologies of extensive and immediate *constituent inclusion* induced by World War I that the constitutions of the period after 1945 were constructed. As examined, in both Italy and West Germany judicial actors generally played a crucial role in the transition from fascism to democracy, and they contributed in far-reaching manner to consolidating the historically uneasy autonomy of these states. In both settings, however, the greatest judicial contribution to state autonomy resulted from the fact that Constitutional Courts provided a solution to the perennially unsettling problem of *constituent power*.

At a simple level, Constitutional Courts performed this function in the wake of 1945 because they concentrated an image of the popular constituent will into a series of static norms preserved within the state. That is, in insisting that laws were only authorised if consonant with the rights norms inscribed in the constitution, Constitutional Courts projected an image of the state as a whole and of each single act of state law as legitimised by the original presence of a constituent body of rights holders: courts made it possible for the state to conceive its sovereign origin as distilled in a set of abstracted norms (condensed into rights in the constitution), and they enabled the state internally to articulate legitimacy for all acts of legislation by referring to prior constitutional rights as constant expressions of constituent power.[42] At a rather more submerged level, however, the construction of constituent power as expressed through rights and protected by courts relieved the state of the endless and often destabilising need to engender support from a constituent will situated in a societal location external to itself, and it allowed states, referring to rights, to project a simplified conception of constituent authority to accompany and support their legislation. On the one hand, these functions of Constitutional Courts brought the benefit that the state could invariably authorise its power as resulting from a uniform, internal and normatively consistent source. Yet, on the other hand, these functions meant that the state could ensure that this will was produced and controlled within the political system itself, that the state was able internalistically to construct the foundations of its legitimacy, and, in consequence, that the state was not required constantly to regenerate authority to support single acts of legislation.

On several grounds, the presence of strong Constitutional Courts after 1945 did much to stabilise state power. Notably, the fact that courts constructed a static image of constituent power simplified the production and legitimisation of laws, it strengthened the state's control over its functions, and it allowed the state to predetermine which societal exchanges and demands needed to gain access to the political system. Further, courts enabled states to bring cohesion to their constituted form, and, in

42 Related to this, see Eijsbouts (2010).

proposing a highly formalised, internalistic source of constituent power, they hardened the state periphery against problems of over-inclusion and reprivatisation of public power that had afflicted states in the interwar era. Above all, the translation of constituent power into a set of judicial norms insulated states against volatile or potentially de-legitimating controversy over the constitutive direction of state and society, and it enabled states, using their own inner facilities, to presume internal authority to make far-reaching decisions about the normative structure of society as a whole.[43] In each respect, judicial constitutionalism evolved after 1945 as a model of political construction bringing potent benefits to the political system in societies in which traditional levels of state integrity and autonomy were very low, where the ability of the state to mobilise power across society was weak, and where the inability of the state to preconstruct constituent power had historically led to forfeiture of state autonomy. The judicial construction of constituent power proved a vital constitutional remedy to these afflictions.

Transitions after 1989

The functional importance of judicialised constitutional forms in enabling states internally to manage their reference to constituent power and so to securitise their capacities for autonomous legislation increased still further in later cases of post-authoritarian transition. For example, in the cases, examined above, of Poland and Hungary in the 1980s, the role of judicial actors extended significantly beyond the fact that courts simply alleviated transitional states of responsibility for the immediate integration of constituent power. In Poland, in particular, the constituted power of the Constitutional Court actually predated the establishment of a real constituent power to authorise binding constitutional documents for the newly formed democratic polity, and the court pre-defined the normative parameters within which the eventual content and structure of the constitution were projected and ultimately established. In this setting, judicial power effectively assumed and *stood in for* objectively existing constituent power. In so doing, it facilitated a process of democratic transition, in which the factual need to mobilise constituent power, with its attendant risks of personalistic fragmentation, extreme polarisation and systemic overload through unmanageable controversy, was evaded. In eliding constituent and constituted power in this way, the judiciary pre-structured and normatively insulated the process of constitutional foundation, and it acted as a central underlying normative support for the secure use of power in the course of political transition.

Perhaps the most important case of this transitional elision of constituent and constituted power in Constitutional Courts occurred in the *perestroika*-era Soviet Union under Gorbachev. Prior to 1989, the political system of the Soviet Union was marked by many traditional features of one-party states: that is, specifically, by weak public control of political office, personalistic monopoly of political authority, high levels of clientelism, reduced policy-making options, and, above all, inertial personal and systemic obstruction to new statutory programmes. As a result, the late-Soviet regime was a weak and extremely unwieldy state, marked by low levels of practical autonomy,[44] and only able to distribute power across society by coalescing with personalistic structures and networks (Willerton, 1992, p. 227). Against this background, it is notable that the reformist redirection of the state under Gorbachev coincided with a rise in the status, quality and independence of judicial power. Indeed, the reform of the political system culminating in *perestroika* was first stimulated by an initial reconstruction of the judicial apparatus. At the very

43 See the historical account of this in Henne (2005, p. 219); Bryde (2006, p. 324).

44 On pre-1989 Soviet as a weak state with restricted policy-making autonomy, see McFaul (1995, pp. 221, 224); Easter (1996, p. 576; 2000, p. 13). On the weakness of public power in the Soviet Union, see Tompson (2002, pp. 936–38). For analysis, stressing weak central control and neo-patrimonial brokering of public office as features of the Soviet system, see Anderson and Boettke (1997, pp. 38, 43–44); Garcelon (2005, p. 31).

beginning of the reforms, Gorbachev specifically proclaimed *perestroika* a revolution committed to establishing a state founded in the rule of law, in which the judiciary, applying rights norms to regulate legislation, was to play a leading role (Thorson, 2012, p. 28).[45]

In this setting, the typical functions of judicial norms in raising the abstraction and autonomy of state power again became clear. In particular, under Gorbachev, judicial actors began to invoke rights to articulate an internal overarching normative framework within the political system, through which the basic lineaments of the state assumed cohesive form against their previous embeddedness in the personalistic oligarchy of the Communist Party, and actors within the state were able to invoke clear and abstract authority to introduce policies in independence of personal or vested prerogatives. In fact, the ability of judicial actors to generate defining norms for the political system gradually established a powerful basis of autonomy for the state, and the fact that the judiciary declared normative legal consistency as the objective of reform permitted the state apparatus internally to concentrate its legitimacy, and so to legislate at a significantly elevated level of independence. In the Soviet Union of the late 1980s, therefore, the judiciary acted as the first element in an emerging constitution, and it played a vital role in heightening the autonomy of the political system in its entirety.

In the wake of 1989, subsequently, judicial bodies continued to assume a leading position in the process of proto-democratic constitutional transition in the Soviet Union. Between 1989 and 1991, a Constitutional Supervision Committee was established, which until 1991 assumed functions not far removed from those of a Constitutional Court. In 1991, the Committee was replaced by a formally appointed Constitutional Court. In the first instance, from 1989 to 1991, the Committee projected a rights-based normative construction of the state apparatus, which served at once to prescribe guidelines for subsequent reform, to render state action accountable to formal rights norms, and to condense internal normative justifications for state action. In particular, the Committee applied international legal expectations (especially in respect of rights) to authenticate new legislation, and it constructed a de facto reserve of quasi-constituent normative authority in the state (Hausmaninger, 1990, p. 306; Vereshchetin, 1996, p. 36). The first appointed Constitutional Court under Zorkin played a notably active role in assimilating international norms in order concretely to constitutionalise subjective rights (Trochev, 2006, p. 166). Throughout these processes, the reformist position of the judiciary enabled the state in part to define and legitimise itself as a simple cohesive institution, effectively to consolidate its power in administratively secure form, and to sever offices of state from singular actors (i.e. actors privileged by party status and personal affiliation) conventionally utilising its power and resources. Most essentially, however, the judiciary was able to use rights norms to guide the transformative reorientation of the state, internally to project normative principles for the legitimisation of future legislation, and progressively to preconstruct a new comprehensive constitutional order. This meant that the basic elements of a reformed democratic state could be instituted *from within* the political system, and the state divested itself of the prior need to secure legitimacy from an externally assembled constituent power. Indeed, this meant that judicial actors within the state could project a normative environment for constitutional reform in which the need for factual or external constituent authority was curtailed, and reform could be conducted in internally controlled and autonomously directed fashion. As in other cases, judicial constitution making allowed the state systemically to insulate itself and its acts of legislation, and to elevate the autonomy of its functions during a highly contested and uncertain process of transition, in which immediate and external constituent power could not be mobilised. None of this, of course, implies that the

45 As early as 1986 the Communist Party of the Soviet Union passed a resolution 'On the Further Strengthening of Socialist Legality and Legal Order', which was designed to restructure the courts and protect the rights of citizens.

judicial reforms pioneered in transitional Russia were an unequivocal success, or that they resulted in a comprehensive rights culture. It is well documented both that the transitional Russian state, especially under Yeltsin, eventually entered a condition of near collapse and endemic reprivatisation (see, for example, Garcelon, 2005, p. 7), and that the first experiment with rights-based judicial review was ultimately superseded by a more authoritarian model of judicial control under Putin (Thorson, 2004, p. 189; Baudoin, 2006, p. 697; Solomon, 2002, p. 123).[46] Despite this, however, the internal projection of constituent power by judicial actors authorised by rights norms was a precondition for the original revolutionary capacity of the political system of the Soviet Union to separate itself from its dense interpenetration with private office holders and party *nomenklatura* and to construct itself as an autonomous body of institutions.

Parallels to the quasi-constituent status of Constitutional Courts in post-Communist Eastern Europe can be found in processes of constitution drafting in other recent post-authoritarian contexts – notably, in some countries in South America and in transitional South Africa. In the latter setting, most notably, the Constitutional Court was able to act as a very powerful repository of surrogate constituent power in the transitional state, and potent judicial actors played a vital role in acting internally to stabilise the newly founded political system in the face of extreme social polarisation. Like the courts in transitional Poland and Hungary, in South Africa the court preconstructed and defined the normative basis of government in the period between the interim constitution of 1993/1994 (created by a co-opted technical committee) and the final constitution of 1996/1997 (approved by an elected Constitutional Assembly) (Klug, 1996, pp. 49–51). During this uncertain legal transition, the court, applying a Bill of Rights based in international law, acted as custodian of a prior normative foundation for the practical exercise of government.[47] This meant that the elected parliament could exercise circumscribed constituent powers (Dugard, 1997, p. 78). But it also meant that divergent societal factions within the constituent body did not intrude too destructively on constitutional design, and the court generally mitigated external factors challenging the process of transition (Klug, 2000, p. 1). The work of the court in projecting normative parameters for constitution writing thus had the outcome that a final constitution could be produced through a two-stage process of constitutional foundation, in which the fragile dynamics of constituent authority remained relatively immune to wider pressures arising from expansive societal polarisation (Klug, 2000, p. 115). In fact, the ultimate form of the constitution remained subject to veto by the Constitutional Court, and the final draft constitution was initially rejected by the court for amendment prior to ratification (Sachs, 1996, p. 1257). The classical relation between constituent and constituted power was, to some degree, inverted in the South African transition. To employ a neologism, the recursively auto-constituent constituted power of the court shadowed, presided over, and generated systemically internalistic reserves of normatively legitimacy for the entire process of reorientation.

In each of these examples, judicial actors exercised some functions accorded in classical constitutional theory to agents vested with *pouvoir constituant*. In each example, moreover, the fact that judiciaries accounted for their validity as derived from rights enabled judicial actors normatively to authorise their constitution-founding practices and to stabilise wider processes of transition and reorientation. In each of these cases, the fact that governmental functions were initially entrusted to, and legitimised by, highly abstracted judiciaries meant that the normative origin of power's legitimacy was translated into a form that could be stored and projected from inside the political system, and it offered an internally manufactured construction of constituent

46 At the most optimistic end of the spectrum of opinion regarding the rule of law under Putin, see Hendley (2006, p. 370). For the opposite end of the spectrum, see Sakwa (2010).

47 On the reception of international law in South Africa, see Sarkin (1998, pp. 181, 183).

power to underscore the legislative acts of the polity. The fact that these transitions were presided over by courts applying rights meant that the political system could imagine itself as enacting in each piece of legislation the will of an original constituent power, which it defined as a body of rights holders. Yet it also meant that the political system was relieved of the need factually to mobilise or integrate any real external constituent will. The result of this *dialectic of constituent power* was a rapid rise in the level of autonomy at which the state could utilise political power.

On the basis of these examples, we can see that the periods in which judicial constitutionalism has assumed greatest prominence have strong similarities, and, across diverse historical conjunctures, judicial constitutionalism brings analogous benefits to the political system. The judicial construction of the constitution forms a pattern of constitution making that generates particular benefits where classical external reserves of legitimacy are weak, and judicial constitutions perform core internally adaptive functions in such settings. Across the spectrum of these cases, judicial constitutionalism commonly plays a vital role in societal conjunctures marked by diffuse, weak or deeply fragmented sources of constituent authority. Judicialisation of political power performs invaluable functions for political systems that are constructed in environments shaped by deeply insubstantial volitional foundations, and in which, accordingly, state autonomy is low. The rights jurisprudence typical of judicial constitutionalism brings the specific benefit that it permits the political system internalistically to configure a legitimating image of constituent power in circumstances where such power cannot easily be presupposed as the basis for legislation. In situations of high precariousness, this significantly extends and intensifies the legitimacy and the autonomy of the political system. As discussed above, the rise of judicial power in constitution-making processes typically limits the exposure of the political system to unmanageable external pressures, it makes it possible for the political system to abstract power in a form that can easily be used, authorised and reproduced across uncertain social environments, and it generates an internally unifying construction of the state and its legitimacy under conditions in which its originating authority is otherwise insecure. Above all, judicial constitutionalism condenses a (self-constituted) image of constituent power around rights, and this permits the political system to legislate at a high level of internally managed, and often counter-factually legitimated, consistency.

The constitution of the EU and the abstraction of political power

In reference to the above examples, it is possible to identify a broad set of sociofunctional conditions, in which the normative structures provided by Constitutional Courts bring indispensable functional advantages to political systems. Moreover, it is possible to isolate a series of quite clear adaptive functions that judicialised constitutionalism normally performs for political systems, thus consolidating basic political resources throughout society. Naturally, it needs to be clearly acknowledged that the above cases reflect, variously, very distinct patterns of political institution building, and many of these are embedded in the contexts of rapid *ex-nihilo* (usually transitional) state construction. The extent to which tendencies typifying such contexts can be generalised is of necessity subject to dispute; it might appear questionable whether general sociological analyses can be extrapolated from these cases. Nonetheless, these cases all possess a distinctly generalisable explanatory value, and they illuminate the wider societal functions that judicial constitutionalism generally performs for modern societies. In each case, it is possible to identify certain structural features of modern society, which tend to be correlated with certain patterns of constitutional formation. In each case, moreover, it is possible to observe judicial constitutions as stabilising elements both within modern political systems and within the functional structure of society as a whole. In other words, it is possible to discern certain societal conditions in which a strong judicial dimension is likely to be of high adaptive utility, and we can identify judicial constitutionalism, under given circumstances, as a probable precondition of the political system's

autonomy. Specifically, these cases allow us to observe that the prominence of judicial power in state constitutions is likely to be intensified under conditions where societies are marked by conditions of increasing legislative uncertainty and weakly formed legitimacy, where they are unable to presuppose stable sources of constituent power, and where they experience a need for immunity against weak abstraction of political resources. As illustrated in the above historical examples, there are many possible reasons for the reliance of a political system on judicial power. Generally, this is likely to be stimulated by processes of uncertainly legitimised constitutional transition, or expedited and insecurely founded polity building and state construction. However, judicial power is likely to play a vital role in stabilising the autonomy of a political system in all contexts marked by the attributes of weak external legitimacy and diffuse constituent power. Indeed, the systemic functions performed by judicial constitutions are not specific to one pattern of state construction: they generally act as adaptive dimensions of a political system in settings where compensatory functions are required for secure legitimacy production and the consolidation of state autonomy, and the utility of these functions can in principle be generalised across a number of polity-building contexts.

If examined against this background, it becomes possible to examine the judicial features of the constitution of the EU within a wide sociofunctional constellation, and to generate a broadly explanatory paradigm for addressing this constitution. From this angle, it also becomes evident that, although in certain respects it forms a transnational legal order *sui generis*, many aspects of the EU constitution can be placed on a continuum with earlier processes of nationally embedded constitutional construction.[48] Indeed, it is observable in different ways that the functions of judicial constitutions in earlier transitions and state-building processes are re-enacted, albeit in distinct manner, in the foundations of the polity of the EU. In consequence, other more conventional models of constitutional formation can be invoked to illuminate the functional pattern of constitutionalisation underlying the EU.

To illustrate this, the standing of courts as organs using rights as instruments of constitutional formation and normative integration in the EU can be seen as performing systemic functions analogous to those manifest in earlier, more traditional, processes of constitutional polity building. As in more conventional cases of constitutional formation, first, the articulated position of rights in authorising judicial legislation and legal integration in the EU enables the political system at once to compensate for its own legislative uncertainty and weak legitimacy, and to accept, and mollify its exposure to, high volumes of external contingency in its legislation. In both respects, judicialised constitutionalism allows the diffuse polity of the EU to build and reinforce its legislative authority against structurally unsettled societal backgrounds. Second, the judicialised substructure of rights norms in the polity of the EU also enables the political system to adapt to, and compensate for, its lack of a single or originating constituent power. As in other cases, the strong judicial reference to rights in the EU constitution means that the political system is capable of generating a normatively distilled image of constituent power from within itself in order to sustain its legislative acts, to simplify and bring cohesion to its diffuse complex organic form, and to manage the boundaries of its sociopolitical inclusivity. In both respects, the judicialised constitution of the EU replicates classical functions of judicial constitutionalism in elevating the structural autonomy of institutions using political power.

On the first point, for example, the central position of the ECJ and its strongly rights-based jurisprudence means that the political system of the EU obtains a constitution by means of which

48 See the excellent analysis of the prefiguring of the EU constitution in early America in Fabbrini (2007, pp. 17, 231–32); see also Goldstein (2001, p. 13). On the anticipation of non-exclusive or decentralised sovereignty in the USA, see Goldstein (1997, p. 189). For seminal, although now somewhat dated, analysis, see Cappelletti, Seccombe and Weiler (1986, p. 23).

it is able to accompany legislation with internally legitimating rights norms, and through which it can reproduce legitimacy to sustain extremely diverse and uncertain legislative processes. This generates many functional benefits for the political system of the EU, which are broadly analogous to those performed in earlier judicial constitutions. At one level, the prominent judicial emphasis of the constitution enables the political system of the EU to support legislation at a high level of consistency across transnational societies, which are weakly centred and only fluidly interconnected, and in which classical reserves of external legitimacy for the political system are consonantly fragile and inchoate. Indeed, the rights-based jurisprudence of the EJC makes it possible for legislators in the EU to presuppose a model of constitutionally legitimised authority for their legislative acts, the reliance of which on external societal support is minimal or at least internally filtered: it permits the political system to fabricate high levels of *internalistic* legitimacy for its laws, which it can then easily invoke to reproduce its power across structurally changing and politically uncentred societal settings.[49] To this degree, judicial constitutionalism is a precondition for the capacity of the political system to dispense power in a pluralistic transnational society, and it provides an insulating internal reference for political power as it is transmitted across highly varied social fields. At a different level, the prominence of rights-based jurisprudence as a medium of integration means that rapidly evolving societal phenomena can be flexibly assimilated into the legal order of the EU, and legislation can be generated in a spontaneous yet regular and authoritative manner to address geographically unconnected and substantially diverse objects of regulation. On the one hand, for example, rights permit the highly contingent absorption of legal objects into the political system of the EU, and rights-based jurisprudence instils an authorisation in the political system which enables it rapidly, yet consistently, to apply law, across diffuse environments, to new societal phenomena. The fact that the political system of the EU gives salience to rights jurisprudence means that it can quickly produce laws to address unprecedented or rapidly changing matters for legislation, even those posing hitherto unknown challenges in spontaneous, yet reasonably coherent, fashion.[50] Additionally, the status of rights means that the courts of law, applying rights, assume a high level of structurally constitutive autonomy in forming and reproducing the political system of the EU, and litigation through the courts acts in partial independence of designated political actors to cement and bring cohesion to the otherwise diffuse overarching legal order (Kagan, 1997, p. 177; Kelemen, 2003; 2006; 2009, pp. 3, 18). Owing to the potency of rights as media of political integration, courts are in fact authorised to build a cohesive normative institutional system which reaches across the regional and national fissures in the EU, and this adds a stabilising second structural tier to the otherwise only weakly embedded governance system.

On both these counts, the fact that judicialised rights norms are defined as extracted internal dimensions of the political system of the EU dramatically augments the self-dependency of its political structures, and it means that the basic form of the polity can, through judicial rights, be easily extended across diffuse and highly acentric societal terrains. The more general function of judicial constitutionalism in permitting political systems to absorb, and consume legitimacy in spite of, very high levels of legislative contingency is strikingly re-expressed in the polity of the EU. Indeed, in the structurally uncentred political system of the EU the judicial dimension of the constitution acquires particularly vital importance. In a political system where national/cultural reserves of cohesion and legitimacy are incompletely consolidated, where the mobilisation of uniform external support for legislation regarding new phenomena is cumbersome, and where the

49 This phenomenon of informal ius-generation is sometimes captured under the category of 'legal pluralism' (Berman, 2007, p. 322).

50 The establishment of rights for migrant communities would seem to be an important example of the relative autonomy of courts in creating new norms (Joppke, 2001, p. 340).

political system is exposed to highly unpredictable legislative challenges, rights-based judicialisation of law-making allows the political system to presuppose a highly *internalistic* construction of its authority to legitimise its acts of legislation.[51] This means that the political system is able consistently to legislate without presuming external or popular support typical of more conventional democratic constitutions, and it is able plausibly and consistently to include new objects for legislation. In this respect, in the EU, the conventional functions of judicial constitutions in stabilising the political system against high contingency and low external legitimacy have defining status.

On the second point, similarly, it is discernable that the judicial basis of the EU constitution has replicated the systemic functions of earlier judicial constitutions by making it possible for the political system internalistically to produce new forms of (often counter-factual) constituent power to legitimise and stabilise legislation, and to bring coherent order to the polity as a whole. At one level, the prominence of rights in the judicial construction of the EU projects a higher-order normative foundation for the political system, through which the EU polity can presume a normative reference to constituent authority as an element of its inner structure, and thus circumvent the need to declare a single original constituent power as its legitimating source. As a result of this, different actors, positioned variably within the political system, can (either permanently or sporadically) assume de facto constitution-making power, such that a high degree of flexibility exists in the procedures through which the normative form of the constitution can be recurrently formed, amended and applied. The fact that the EU as a whole is overwritten with a rights-based judicial constitution means that, as long as they show recognition of justicialised rights-norms, a fluid array of organs can be required to perform specific quasi-constituent functions, and the legal apparatus of the EU can, in ongoing acts of constitutional foundation, be defined and reproduced by multiply overlayered actors, some assuming a central or federal position and some embedded in originally national settings.[52] At a different level, however, its primary constitutional emphasis on rights means that the EU can retain a definition of itself as containing a consistent underlying normative order, so that the flexible allocation of constituent power to multiple actors can always be conducted within a preconstructed and flexibly pre-legitimated framework. The judicial basis of the constitution of the EU thus allows the polity to select its own sources of constituent power, to generate constitutional norms from many sources, yet also to preserve a legitimating self-definition as shaped by clear authoritative principles. In fact, the foundation of rights in the constitution means that the constitution always preconstructs its own constituent source, and it articulates a broadly predetermined normative structure within which it can easily assimilate and activate new, subsidiary expressions of constituent power. In this respect, the EU constitution is clearly underpinned by the classical function of judicial constitutionalism in providing *compensatory cohesion* and internalistic self-legitimation for the political system.

While allowing the exercise of multiple constituent powers in the EU, the rights-based jurisprudence of the ECJ in the EU polity has the further outcome that it permits the assimilation of multiple legislative organs in the EU polity. In fact, the judicial structure of the EU has the specific distinction that it subjects private agents (singular and corporate) to rights norms, and so

51 Overlapping closely with my own analysis, note Keleman's well-documented observation that the ECJ has 'expanded statutory rights' through 'expansive interpretations' in order to 'expand EU power vis-à-vis the member states'. This is ascribed to the fact that in the EU rights act to create a diffusely integrative political system (including national courts, lawyers and private actors), which is able to extend its authority and obtain compliance despite the 'the high degree of fragmentation' and 'limited implementation and enforcement capacity' characterising the EU polity as a whole (Kelemen, 2011, pp. 50–51, 22, 24).

52 Close to this idea, see Schuppert (2003, p. 900).

creates a matrix in which these agents can be regularly incorporated in decision-making procedures (Joerges, 2008, p. 227; Herberg, 2008, p. 114; Wernicke, 2007). This makes it possible for governmental functions to be conducted in fluidly inclusive, easily adaptive fashion – often by interchangeable actors within a dense but fluctuating range of networks (Schuppert, 2006, p. 37; Bach, 2008, p. 121). On these grounds, the constitutional projection of the EU as founded in a layer of extracted judicial rights creates a setting in which different actors in the periphery of the political system are able effectively to borrow legislative power, so that the polity as a whole can operate as a multifocal legislative body, in which many actors, situated in both national and transnational settings and often placed between the strictly public and the strictly private domain, derive and justify their authority to legislate from the rights instilled in the constitutional structure. At one level, the salient jurisprudence of rights expands the perimeters of the political system of the EU, and it allows diverse actors to be flexibly co-opted into the margins of political system. This means in principle that, provided they are capable of showing recognition of rights norms, a number of highly diffuse and originally private societal agents can assume either temporary or permanent governance functions. Rights thus facilitate the establishment of a highly complex governance apparatus, in which political offices can be rapidly devolved to private bodies and institutions. At a different level, however, the construction of rights as the constituent origin of the EU also means that politically authorised actors preserve an *internal code* by means of which their position in the political system can be explained and formalised, which means that, despite its capacity for allocating political power to a plurality of organisations the boundaries and internal structures of the political system remain distinct.

In these respects, the reference to rights as the constituent source of power means that the political system remains defined by an extracted normative order through which it can determine which actors are admissible to the political system and which actors are not and in reference to which it can control the allocation of power to otherwise private bodies, and so avoid structural fragmentation. In consequence, the jurisprudence of rights in the ECJ facilitates the construction of a political order in the EU as a whole that is at once immensely inclusive and extensible, yet also internally codified and capable of sustaining clear distinctions between functions and actors falling within and functions and actors falling outside the political system. As a result, the political system is able to legislate at a relatively high degree of autonomy despite its exposure to high levels of structural fluidity and high degrees of internal and external contingency. Overall, the foundation of governance functions in prior rights permits rapid, context-dependent functional extension of the governance system, and it enables even the most diffuse political organs to account for themselves as internally legitimised, authoritative and so able in demonstrably legitimate fashion to utilise political power. In both these respects, the judicial constitution of the EU has constructed a political system which, despite the inner diffuseness of its structure, retains a capacity for explaining itself and reproducing its power in a complexly differentiated transnational society at a relatively high level of inner consistency and abstraction, for utilising this power in inclusive manner across highly diffuse and unpredictable social terrains, and for conducting structural inclusion within the political system at a high and in fact often improbable level of autonomy.

Most importantly of all, however, the dominant reference to judicialised rights in its constitution means that the EU possesses an internally constructed device to compensate for its lack of clearly concentrated *external* sources of constituent legitimacy. That is to say, the status of the ECJ as guardian of legislation means that the EU can incorporate within itself a set of rights-based norms as abstracted signifiers of an original constituent body, and it can imagine itself and its distinct legislative acts as deriving authority from a primary body of constituents identified as *rights holders*. The underlying reference to rights means that the EU is not obliged to presuppose, or imagine itself as founded in, any original political community or constituent power lying outside

itself. On the contrary, the reliance of the EU polity on a jurisprudential construction of its constituent origin means that the source of its power is always internally contained within itself, and, as it projects itself as applying law to a community of rights holders, it endlessly configures its constituent source as an internal dimension of its own structure. On these grounds, the EU is able to conduct a process of rights-based auto-constitutionalisation, in which rights, standing in for constituent power, create binding and legitimisable norms for legislation at a high level of abstraction from all factually existing constituent actors. Naturally, this systemic internality of constituent power substantially increases the degree of autonomy at which the legislative organs of the EU can utilise and apply their power, and it means that actors within the EU polity can validate legislation across highly varied external terrains at a high level of independently controlled autonomy and consistency. Indeed, the political system of the EU is empowered by its internalistic constitution to propose a system of selective or virtual representation, or even selective or virtual citizenship,[53] in which laws include and are authorised by persons (rights holders), which exist only *within the law*, and in reference to which laws can be passed at a very high level of flexibility and extended across highly diverse and varied societal environments. Much of the most thoughtful theoretical literature on the EU has been concerned with showing how new *external* modes of constituent power, citizenship and civil legitimation might be mobilised to support its constitution.[54] Notably, however, this literature, for all its discursive finesse, misses the point that the constitution of the EU is structurally defined by the inclusion of constituent power and citizens as projected elements of its *internal* structure.

In each of these respects, the prominence of judicial institutions in the process of European constitutional formation reflects the more general constitutional features of polities requiring an alternative to factually existing, systemically external constituent power. Classical definitions of popular/democratic sovereignty are founded in the claim that democracy resides in a direct relation between actors within and actors external to the political system. The judicialisation of democratic rule typically occurs, however, where this founding homology cannot even residually be presupposed: judicial constitutional democracy allows the political system to stabilise within itself alternative sources of its authority and legitimacy, and so to project itself as an internally authorised and autonomous centre of legitimate power. As discussed, this tendency was intermittently implicit even in the earliest processes of modern constitutional formation. This tendency has become increasingly pronounced in the late twentieth century, especially in socially disputed transitions. It now approaches a high level of clarity in the multifocal, multi-original and externally *aconstituent*, or – more precisely – internally *auto-constituent* constitution of the EU.

Conclusion: a new model of constitutional analysis

The above historical discussion of judicial emphasis in constitutional government is based in a rather distinctive reconstruction of constitutionalism and the sociological functions and preconditions of constitutions in general. This approach calls into question common preconceptions concerning the foundations of constitutional rule. In the first instance, the account of constitutionalism proposed above evaluates constitutions quite generally from a systemically *internalistic* perspective: that is, it conceives constitutions as constructions evolving *within* the political system of a society, whose normative formalisation of the reserves of power stored within the political system is

53 For a similar point, see Jacobson and Ruffer (2003, pp. 83, 86, 90).

54 Think of the famous attempts by Habermas and Touraine. Think also of the theory of multilevel government proposed by Pernice (1999) and the theory of constitutional synthesis in Fossum and Menéndez (2011, p. 53). Most recently, see the account of the European Constitution as resulting from an association of Constitutional Courts in Vo&kuhle (2010).

linked to a series of core sociopolitical functions, which are constitutive for modern society as a whole. Most centrally, the above analysis suggests that the constitution has the functional purpose that it facilitates the *abstraction of political power* within modern specialised societies. In so doing, it raises levels of operative state autonomy, and it increases the volume of differentiated and specifically *political* power made available for distribution within any given society. That is to say, from the early modern period of European history to the present day, constitutions have typically acted at once to clarify the relation between the political system and other parts of society, to harden the differentiated autonomy of political power against interactions situated outside the political system, and to construct reserves of legitimacy for states in their transmission of power across structurally varied and differentiated societies. Most notably, the fact that modern constitutions are normally centred around bills of rights means that constitutional states are able to internalise a constitutional construction of their power as authorised by persons defined as formal *rights holders*, and they are able to utilise this construction in order autonomously to project a general image of persons receiving power from the political system. This means, in turn, that constitutional states are able to simplify their circulation of power through society by visualising the addressees of power in uniform categories, and in conceiving their power as authorised by persons as rights holders they acquire a formula through which are able abstractly to reproduce and internally to legitimise their power even in the most diverse and contingent social settings.[55] In fact, the construction of the person subject to power as a rights holder instils an *internal self-reference* within the power of the political system, and this makes it possible for the political system to claim legitimacy as a *democratically inclusive* actor, yet also to store the grounds of its inclusivity as a fully internal and autonomously controlled dimension of its own intrinsic form. This permits the political system to utilise its power at a high level of inner consistency and abstracted autonomy across the external environments of society, and it means that, even in its self-construction as democratic, the political system is able internally to control and predefine the ways in which it responds and opens itself to specific societal phenomena or actors. In both respects, the self-construction of the state as constitutionally obligated to apply power through the medium of rights is a vital factor in preserving the modern political system as a differentiated and autonomous actor. In both respects, moreover, it is discernible that constitutional states generate power from an internal construction of rights, in which rights supply legitimacy *instead of* a constituent democratic will, and rights ensure that political power can authorise itself inclusively while at all times avoiding the need for recruiting and mobilising fully external sources of democratic legitimacy.

It is against this background that the current rise of judicial constitutionalism can be explained. As discussed, judicial constitutions articulate their functions most clearly in the most unsettled and contingent societal environments. The judicialisation of constitutional order is a phenomenon that, in modern history, has usually assumed clear stabilising functions in transitional contexts, where secondary, additional reserves of legitimacy are required to consolidate the political system, and to preserve its functional autonomy as an aggregate of institutions able positively to utilise political power through society. However, judicial constitutionalism is not specific to transitional settings, and it in fact expresses a broader tendency in constitutionalism more generally. The rights-mediated internalisation of constituent power within the political system under conditions of judicial constitutionalism is a functional mechanism which gives full articulation to the wider function of constitutional rights as adaptive institutions for sustaining the abstracted autonomy of the political system. This model of constitutionalism brings specific benefits wherever the political system is required to abstract and legitimise political power against singularly

55 See the important related account of basic rights as 'levers for unitarization' in Starck (2003, p. 124).

problematic external realities. In contemporary societies, quite generally, political systems increasingly find themselves confronted with complex, uncentred environments, in which matters for legislation present themselves haphazardly and external resources of legitimacy cannot easily be mobilised. Judicial constitutionalism plays a vital role in allowing political systems internalistically to adapt to such generalised conditions. The constitution of the EU is one example of this.

If viewed from the perspective of this broad-ranging historical-functionalist sociology, in consequence, it is arguable that the constitution of the EU is not, in any essential way, a constitutional order *sui generis*. As mentioned, the view that the constitution of the EU forms a *sui generis* order of public law is typically expressed because the EU is marked by high salience of rights, by powerful judicial actors, by multiple sources of constituent power, and by a fluid interrelation between different sources of normative authority (MacCormick, 1999, p. 106). This perception of the EU often gives rise to an attempt to re-imagine constituent power, and to identify new sites of externalised legitimacy formation. However, if constitutionalism as a more general phenomenon is examined, not as an invariable pattern of public-legal construction, but as an aggregate of adaptive functional mechanisms for the abstraction and autonomous construction of political power in the evolution of modern society, the constitution of the EU might be construed in a rather different perspective. Above all, this constitution can be observed as comprising a highly refined elaboration of functions that are more fundamentally inherent in constitutional order, and it gives sharp expression to the functions of constitutional rule in stabilising the contingent abstraction of political power. If it is accepted that the most distinctive aspect of the EU constitution is the role of courts applying rights (especially the ECJ) as a normative motor of integration and polity building, the EU constitution clearly reflects and intensifies wider and more deeply rooted aspects of constitutional formation. In particular, the judicial dimension of the EU constitution assumes such salience, not because of the seeming structural peculiarities of the EU, but because it is marked by exposure to high contingency, low inner unity and weak external legitimacy, and it adapts to, or secures immunity against, these pressures through reliance on judicial actors as sources of cohesion, legitimacy and auto-constituent power. The historical function of judicial constitutionalism in enabling political systems to securitise themselves against contingency obtains most refined expression in the EU. At one level, to be sure, in some of its features the constitution of the EU departs strikingly from classical models of constitutional order. Nonetheless, it is only necessary to perceive these features as exceptional if conventional models of constitutional foundation are observed in highly literalistic fashion. If constitutions are analysed, in their submerged, sociofunctional dimensions, as legal constructions that simplify the reactions of a society to the rising contingency and accelerating differentiation of its political functions, the constitution of the emergent EU polity can be placed on a clear continuum with earlier constitutions.

The growing constitution of the EU might be seen as reflecting a model of democratic constitutionalism, in which the originally external elements of constitutional order (constituent power and societal legitimacy) have been to a large degree finally internalised within the political system. This establishes a structure of constitutional normativity, which allows the European political system to utilise power at a high level of inner autonomy and differentiation in face of a deeply fragmented social horizon. In its extreme internalism, the EU constitution is a constitution that is especially adapted to the unprecedented contingency and weak centration of political power in transnational democracy. To this extent, this constitution marks a *sui generis* legal/political order. As such, however, it does not deviate fundamentally from more classical patterns of constitutional normativity. On the contrary, it at once makes evident and preserves the deep functional substance of these patterns in promoting autonomous processes of political abstraction and reproduction.

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