Legality, legitimacy and the constitution: A historical-functionalist approach

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Introduction

This chapter attempts to comprehend the role of constitutions in modern society. In particular, it examines why in modern societies the interactions between law and politics are usually arranged in the form of a constitution, it assesses why modern political institutions tend to organize themselves around relatively stable constitutional norms, and it seeks to reconstruct the reasons why constitutions and constitutional rights act as dominant elements in the legitimatory grammar of modern politics. On this basis, this chapter also seeks to contribute to the understanding of political legitimacy quite generally, and it aims to account both for the form of legitimacy in modern society and for the correlation between legitimacy, rights and constitutions.

In addressing these questions, this chapter proceeds from the argument that standard modes of normative constitutional analysis are rather simplistic and do little to elucidate questions of legitimacy. This applies in particular to the claims deriving from the Enlightenment that constitutions are normative forms that stipulate principles of rational accountability by which the legitimacy of state power is measured and preserved.[1] To a lesser extent, this also applies to the more practical political-scientific claim that constitutions are patterns of institutional design, which secure legitimacy for political power by aligning the political system to prior models of stable and efficient government.[2] These theories throw little light on the broad societal foundations of constitutions, and they are not sensitive to the underlying or internal societal motives that lead political systems to adopt, and obtain legitimacy through, constitutions and constitutional rights. In different ways, both these theoretical approaches are structured around a formal antinomy between legality and legitimacy (or between norms and facts), and they simplify analysis of legitimacy by transforming factually evolved patterns of legitimacy into abstracted normative standards, which are then defined as external indicators of sustainable and valid authority. In the final analysis, these views postulate antinomically generalized laws as preconditions for legitimacy, and they can only give a rather reductive and eviden-

1 See my critique in *Thornhill*, Towards a Historical Sociology of Constitutional Legitimacy.
2 See the classic work of political science: *Sartori*, Comparative Constitutional Engineering, p. 196.

tially impoverished account of the function of constitutional norms in generating legitimacy for the state.

In consequence, this chapter responds to the deficiencies of conventional normative inquiries by endeavouring to propose a sociological approach to constitutions and their legitimatory status. Indeed, it argues that the nexus between constitutions, rights and political legitimacy can only persuasively be illuminated if constitutions and constitutional norms are examined in a very strict sociological perspective: that is, as factually emergent elements within *the constitution of society* as a whole. In the first instance, therefore, this endeavour picks up the threads of early constitutional sociology that are present, albeit rather inchoately, in the works of Durkheim, Weber and Léon Duguit. Constitutional sociology in fact began as an important subfield of sociology, but it was never consolidated as such, and this chapter might be viewed as an attempt to re-vivify some methodological aspects of classical constitutional sociology. At the same time, however, this endeavour also relates closely to other work in the contemporary social sciences that also aims to analyze constitutions from a sociological vantage point. In current theoretical research, it is possible to identify two broad theoretical lineages that approach constitutions from a sociological view, and together these have already generated a body of outstanding theoretical research. One of these lineages has a primarily systems-theoretical orientation: it is represented by (among other notable theorists) Gunther Teubner and Andreas Fischer-Lescano. The works of David Sciulli might also be cautiously placed in the margins of this lineage, as Sciulli also employs elements of functionalist institutionalism to assess the constitutional conditions of society.[3] The other of these lineages has a more obviously normative emphasis: it is stimulated originally by Habermas, and it is now represented most significantly by Hauke Brunkhorst.[4] In referring to this recent research on constitutional sociology, however, the analysis in this chapter attempts to set the terrain for an alternative sociological approach to constitutions and their legitimatory functions, and it proposes and utilizes a method that is substantially distinct from that used in both these lines of inquiry.

The sociological analysis of constitutions provided by recent theories in the systems-theoretical tradition, for example, has the striking benefit that it draws attention to new sources of quasi-public legislation in modern society, and it examines the laws articulating the constitutionality of public power as socially produced and highly variable and contingent forms, which often originate outside the conventional

3 For example, see *Teubner*, Societal Constitutionalism; *Teubner*, Die anonyme Matrix. For a US-American theory close to this milieu, see *Sciulli*, Theory of Societal Constitutionalism, pp. 78-80. See also David Sciulli's chapter in this voume.

4 Brunkhorst's work modifies Habermas's more strictly normative approach, and it accentuates ways in which constitutions bring legitimacy to society's politics by refracting and stabilizing underlying societal dynamics. See *Brunkhorst*, Solidarität, pp. 113-39. See also Brunkhorst's chapter in this volume.

spheres of state authority.[5] The primary yield of this work resides in the fact that it subjects more common state-centred perspectives on the sources of public law to a powerful revision, and it proposes a multi-focal and multi-causal account of the legal/normative structure of modern society. Although it uses a normative perspective in reflecting new modes of legal agency that limit or construct political power,[6] however, this research does not take as its object the deeper structural sources and the wider social functions of constitutions: in particular, it is not primarily concerned with the specific normative qualities of constitutions as documents of public law, and it does not identify written constitutions, or *constitutions of state*, as privileged sources of legal normativity in modern society. Moreover, this research does not explicate the central historical role of constitutions in the political stabilization of modern societies and in the production of legitimacy for modern political systems. In this theoretical lineage, neither the position of constitutions in the broader constitution of society nor the determinate normative status and functions of constitutions form the central object of inquiry. Although it promotes inquiry of the highest value into societal constitutionalism, therefore, this line of this theory does not offer a comprehensive sociological examination of constitutions and their societal functions. In conjunction with this, it is also arguable that, outside the systems-theoretical milieu more conventional normative approaches to constitutional sociology, such as those emerging in the wake of Habermas, also, for all their outstanding importance, fall slightly short of providing a general sociological method for interpreting constitutions. In fact, it is arguable that these theories ultimately move outside the terrain of strict sociological inquiry when examining the legitimatory reliance of modern societies on constitutional norms. Arguably, these works investigate the formation and function of constitutional norms in society by proceeding from the prior presupposition that agents within society possess a fundamental inclination towards the construction of normative or even quasi-consensual public institutions.[7] The constitutional formalization of public power provides political legitimacy for a society, then, because it articulates and gives realized and generalized form to this prior consensual inclination of social agents. In consequence, it can be argued that theories in the Habermasian lineage only, in the last analysis, account for the importance and the legitimatory status of constitutions because they pre-

5 Fischer-Lescano's analysis of how the 'political global constitution' of international society arises both from 'private governance regimes' and 'public governance regimes': *Fischer-Lescano*, Die Emergenz der Globalverfassung', p. 755. Together, Teubner and Fischer-Lescano also argue that the fragmented legal apparatus of modern world-society creates a number of auto-constitutionalized quasi-polities, existing in parallel to or interdependence with classical state forms. See *Fischer-Lescano/Teubner*, Fragmentierung des Weltrechts.

6 *Fischer-Lescano*, Emergenz der Globalverfassung, p. 721

7 Habermas's legal humanism revolves around the claim that a 'post-metaphysical understanding of the world' sees power as legitimate where it is formed in the 'language of law', through the 'discursive opinion- and will-formation of equal citizens' (*Habermas*, Faktizität und Geltung, p. 429).

construct an *anthropological* (that is, not *sociological*) body of practices and moral requirements as the common substrate of social life. Then, simply, they designate this substrate as bringing forth a normative order in society and as necessarily culminating in a normative-constitutional structure, to which states refer as the basis of their legitimacy.[8] For all their focus, on constitutions as factual institutions, therefore, these views do not yet comprehensively analyze constitutions as aspects of the more general constitution of society: in fact, in tacitly indicating that the terms of legitimacy are normatively external to states they suppress the social dimension of constitutions and constitutional norms and the post-Habermasian theory of the constitution resorts, lastly, to persistently antinomical constructions of constitutional legitimacy.

As a result of this, it is arguable that we still await a fully evolved *sociological* method for analyzing constitutions. That is to say, we await a method that examines the constitutions of modern societies in a manner that recognizes the distinction of constitutions as legal orders organizing state power and that does justice to their functions in generating quite specific normative resources of legitimacy for states, yet that also reflects the normative/legitimatory role of constitutions as embedded in deep-lying social structures or deep-lying social functions and so as not simply deducible through externally rationalized procedures or privileged cognitive acts. The sociological approaches to constitutions that have been proposed to date necessarily fall on one side of a strict (though often only half-articulated) facts/norms dichotomy. They necessarily observe constitutions either as *normatively contingent* (although, in the case of Teubner, most categorically *not* normatively indifferent) or as deduced and imposed through essentially *asocial normative prescription*. What might be viewed as missing from both lines of approach is the ability to construe the normative forms enshrined in constitutions as expressions of *society's norms*: that is as normative forms which are essential to society, upon which society experiences a particular legitimatory reliance, and which are relatively generalizable and invariable across society, yet also as forms that a society produces for itself in response to its internal functions and exigencies. Because of this, then, both current lines of sociological constitutional analysis, for all the ground-breaking quality of their research, do not accord specific objective meaning to the condition of legitimacy in the political system, and they either construe legitimacy in highly unspecified and variable terms or they deduce its conditions by means of external procedures. To assess constitutions and their normative/legitimatory functions as conclusively inner-societal realities, in consequence, a method is required that pursues a macro-sociological approach to political constitutions and their legitimatory operations, and

8 See the argument in *Habermas*, Erkenntnis und Interesse. Brunkhorst's work is much more sociologically nuanced and less anthropologically hypostatic than that of Habermas. Yet his account of society's norms also relies on the assumption that 'communicative power' and 'democratic solidarity' are relatively constant fundaments of social practice: *Brunkhorst*, Solidarität, pp. 216-217.

that observes these operations as reflexive aspects of the constitution of society as a whole. This method, then, might establish parameters for constitutional sociology or the sociology of constitutions as a distinct sub-discipline of sociological inquiry. It might offer a theoretical perspective that positions itself outside the fact/norms dichotomy of much constitutional inquiry, and it might be able cogently to account for the legal-normative sources of legitimacy in a manner that does not either depreciate or externally prescribe the normative features of a society. This method, moreover, might even be authorized to use sociological analyses of constitutions to offer generalized models for examining the probable preconditions of legitimacy and the probable functions of effectively legitimatory constitutions in contemporary societies.

To provide a sociological method for addressing the question of political legitimacy and its relation to constitutions and constitutional norms, however, it is also essential to observe the processes underlying the historical formation of modern societies, and to evaluate the constitutions as objective constitutions arising in the course of modern societal formation. A sociology of constitutions, therefore, must also include a strong historical-sociological dimension. Here again, however, we encounter in many dominant sociologixcal methods a number of theoretical aporia that obstruct plausible sociological analysis of constitutions. One reason why the sociology of constitutions has not developed as a distinct element of sociology as a whole is because historical sociology is widely overshadowed by the sociology of states, and this body of literature habitually closes itself against normatively inflected inquiry. Analyses in this theoretical lineage usually argue, first, that modern states are formed through a process in which, in a given society, prepotent social agents deploy strategies of coercion and extraction in order to arrogate more or less exclusive power to themselves: this power is then concentrated in the institutions of the state.[9] On this conventional account, the condition of political modernity specifically depends upon the fact that a state produces directives for all members of a society, so that, across its sectoral variations, a modern society is inevitably forced into convergence around the coercive power of the state. Second, sociological analyses of the state also generally argue that, as the state is primarily an organ of political coercion and concentration, the precise institutional forms in which states elect to legitimize themselves are the results either of instrumental strategy or of highly contingent historical and cultural variations, and they cannot be assessed through any normative,

9 For my critique of this literature, see again *Thornhill*, Towards a Historical Sociology of Constitutional Legitimacy. For a history of state formation that abandons the normal fiscal/military focus, see *Corrigan/Sayer*, The Great Arch. This account, based mainly in the sociology of culture, has nothing in common with the analysis offered here. A further exception to the standard patterns of historical-sociological inquiry is Otto Hintze's analysis of the evolution of modern constitutional rights from earlier constitutional forms. See *Hintze*, Staat und Verfassung, p. 147. I am deeply impressed by Hintze's work, but my analysis here borrows nothing from it.

deductive or generalizable analysis.[10] In general, therefore, the sociology of states only rarely addresses the precise role that legal-normative institutes play in the organization of statehood, and it is widely indifferent to the normative structures, such as rights and political constitutions, that condense around state power and around which state power arranges and legitimizes itself. Indeed, whilst the broader evolutionary trajectory of modern social reality has tended manifestly toward a consolidation of the nexus between states and legal norms (especially in the form of constitutional rights), the sociology of states has been largely obdurate in refusing to fix its gaze on this fact, and it has, with some exceptions, persisted in its construction of the state as a coercive order and as detached from stable or fundamental normative legal form.[11]

In consequence, the attempt to counter-pose to other current sociological views a fully sociological method for examining constitutions and their normative/ legitimatory functions must also respond critically to the more traditional sociology of states. In particular, in attempting to elucidate how constitutions and constitutional norms evolve, and perform legitimatory functions, in the wider contours of societal formation sociological inquiry must begin to re-examine the historical formation of states, and it must seek to interpret the ways in which states depend on, and in fact even directly generate, constitutions and constitutional norms. The sociology of constitutions, thus, also presupposes a revision of classical views of the state, and it requires a thorough reconstruction of many standard positions in historical-political sociology. The analysis below, in consequence, seeks to comprehend and demonstrate how constitutions and their normative functions are interwoven with the structure of a modern society. To this end, it observes the relation between the historical formation of states and the normative processes of constitutionalization, and it examines ways in which states habitually obtain constitutional norms for their functional support and their reflexive legitimacy. In so doing, as well as illuminating the specific social functions of constitutions, this analysis seeks to offer a fully sociological account of the sources of the legitimacy of the modern political apparatus.

10 See, for example *Weber*, Wirtschaft und Gesellschaft, pp. 122-76. Of course, some sociological analysis of states has a pronounced normative bias. See *Parsons*, Sociological Theory and Modern Society, pp. 7-8. However, Parsons also suggests that the normative content of states can only be examined, not as resting on explicitly justifiable principles, but through reference to variable values embedded in social structure and residual cultural patterns of integration.

11 See *Tilly*, Reflections on the History of European State-Making, p. 37.

States, rights and political differentiation

Medieval constitutions

On this theoretical basis, it can be observed, first, that constitutions initially began to evolve in nascent European societies as responses to an incremental, although not always linear, process of *functional differentiation*.[12] This was a process that, as it initially commenced, exercised a deep and formative impact on the structure of European societies as a whole. Most significantly, this process was reflected, first, in the differentiation of political power from ecclesiastical power; second, in the (incipient) differentiation of the economy as a distinct, expanding and broadly specialized set of monetary transactions;[13] and, third, in the separation of an (emergent) public apparatus, containing vertically applicable power, from the private and local masses of agreements, privileges and overlapping jurisdictions that structured early feudal society. It is in this relation to this process of differentiation, then, that we can discern the first indications of a growing constitutional order in the political apparatus of European societies, and that we can observe the first legitimatory functions of constitutions. Indeed, the earliest European constitutions began to emerge as institutions that allowed societies, in a number of ways, to reflect on and to adjust to the evolutionary transformations that they experienced because of this complex differentiatory process, and they enabled societies to construct a political order that was sensitive and responsive to the increasingly differentiated pluralization of society's functions. In this respect, of course, it needs to be stated that there is some ambiguity attached to the use of the term 'constitution' in this context: this term, arguably, was not widely employed in its modern sense until the seventeenth century.[14] However, if a constitution is generally taken to include both a set of relatively stable and acceded legal circumscriptions placed on the use of political power, and a body of legally or customarily formalized arrangements for securing political consensus in major directive decisions, constitutions were factually widespread in the more centralized European societies by the fourteenth, and perhaps even by the thirteenth, century. The existence of such constitutions can be identified in most proto-modern European polities, from the Holy Roman Empire, to the monarchy of Castile-Léon, to the cities of medieval Lombardy, to later Norman and Angevin England, and to mid-

12 This argument refers to Niklas Luhmann's theory that there is a demonstrable 'connection between social differentiation and the development of constitutions'. See *Luhmann*, Politische Verfassungen im Kontext des Gesellschaftssystems, p. 6. Some points in the following historical sections discuss, in extremely condensed form, aspects of material that I am also treating in the earlier chapters of my forthcoming book: *Thornhill*, A Sociology of Constitutions. The context, the precise content, and the focus of the present analysis are different from those contained in the forthcoming book.

13 See *Lousse*, La Societé d'Ancien Régime, p. 123.

14 *McIlwain*, Constitutionalism Ancient and Modern, p. 97.

to late-Capetian France. In each of these settings, constitutions played a vital role in enabling growing centres of political agency to detach themselves both from the church and from the privatistic and functionally interlocking foundations of feudal order, and they made it possible for societies gradually to evolve a political apparatus adequately adapted to, and capable of asserting legitimacy within, an increasingly differentiated and functionally specialized societal setting.

The earliest constitutions helped early European societies to adjust to their underlying differentiation, first, because they provided legal-technical arrangements, usually in written form, that enacted a function of *political abstraction* for society. That is to say, early constitutions acted as documents that protected the liberties of some social groups, that identified some social practices and personal attributes as beyond the reach of state power, that regularized procedures used by political actors for utilizing and applying power through society, and that gradually stabilized basic principles or agreements concerning the origins, functions and ends of state power. In these respects, on one hand, these early constitutions served to mark out terms of *inclusion* for the political system, and they allowed early states to construct themselves as possessing acceded collective personalities, in which (politically relevant) parts of society were implicitly present.[15] For this reason, constitutions also acted, crucially, to delineate the political system of society as a relatively independent and thematically specialized realm of social exchange, whose functions could be disembedded from highly privatistic concerns, prerogatives and milieux. In some cases, in fact, these constitutions also instituted devices for resolving conflicts at the boundaries between the political system and other parts of society (especially at the boundaries between polity and religion and polity and economy: i.e. in conflicts over ecclesiastical jurisdiction and fiscal revenue, the resolution of which, more than any other factor, allowed states to evolve as possessing central jurisdictional power in a given society).[16] In doing this, early constitutions began to reformulate private rights and immunities as rights recognizable and reflected through states, and thus also to transform centrifugal rights into inclusive principles of public order. In each of these respects, therefore, it can be observed that the fact that in medieval society bearers

15 On the religious origins of the state's transpersonal personality, see *Black*, Monarchy and Community, p. 14. This point was made most famously by Gierke. See *Gierke*, Das deutsche Genossenschaftsrecht, III, p. 275.

16 The Holy Roman Empire gave conclusive constitutional form to the Imperial office in the Golden Bull of 1356. Subsequently, the princely states within the Empire also assumed (less formalized) constitutional structure, as through the later fourteenth and the fifteenth century these states often developed patterns of delegation of territorial estates [*Landstände*]. Indeed, as early as 1231 it was forbidden by Imperial decree for German princes to raise taxes without consent of the Landstände. In Spain, the kings of Castile-Léon began to convene meetings of estates after 1188, and delegates at these meetings had extensive quasi-legislative powers. In France, the differences between Philip IV and Pope Boniface VIII before and after 1300 led to the first convocations of the Estates-General. In England, the Magna Carta of 1215 set out an early constitutional design for the state, and by 1300 parliamentary assemblies, with extensive fiscal powers, were regularly convened.

of political power began to surround themselves with legal/constitutional arrangements specifically enabled these actors to concentrate their power in the inclusive form of early statehood or proto-statehood, and to consolidate society's political functions as an increasingly self-contained body of interactions, distinct from other realms of social practice. Indeed, this fact permitted early states internally to formulate the principles underscoring their power, and it played a crucial role both in the first differentiation of states from the overlayered functional structures of feudal political order and in the broader de-feudalization of society more generally. These constitutions allowed the political system to incorporate a mass of decisions that could be abstractly specified and transmitted quite quickly and without incessant renegotiation across society, and they ensured that the political system could operate as a political or proto-public apparatus that no longer, in the fashion of power under feudal regimes, relied on highly privatized acts of agreement and recognition in order to mobilize collective resources.[17] The first consolidation of a differentiated and centralized polity, using power as an abstracted and differentiated commodity, was, in short, only possible because the early form of the polity mobilized constitutional forms in order to sustain its social abstraction.[18]

In relation to this, second, early constitutions also allowed European societies to react to their underlying differentiation because they enacted a process of *political generalization* for society. In separating the political apparatus from other exchanges and, in particular, in giving normative-legal form to the boundaries and limits of states and the procedures for transmitting political power, constitutions made it feasible for the state to use its power in reliably inclusive and relatively reproducible manner.[19] The fact that constitutions conferred a general legal form on political power made it possible for states to emerge as institutions that were able to extend their power across societal divisions, positively to underwrite the circulation of their power in very different societal settings, and, in so doing, constantly to reconstitute their own operative preconditions. Crucial to this aspect of constitutional formation was the fact that in specifying legal forms for the use of power and mobilizing manifest consent for important decisions constitutions allowed states to pass laws at an increasingly high level of positivity: that is, in the form of *statutes*. The very earliest

17 On the emergence of a concept of public law, see *Post*, The Theory of Public Law and the State, p. 52.

18 See *Major*, Representative Institutions in Renaissance France; *Spangenberg*, Vom Lehnstaat zum Ständestaat, p. 130; *Koenigsberger*, Parliaments and Estates.

19 In this, we can identify the cause of the structural nexus between increasing legal regularity and reinforced constitutional arrangement in later medieval societies. Societies that possessed relatively centralized polities in later medieval Europe – i.e. France, England, Spain, Sweden, the Holy Roman Empire, some Italian cities – also implemented increasingly generalized law codes and obtained increasingly regular legal systems, and they incorporated widening mechanisms of constitutional integration to support their legislative and jurisdictional acts. Notable amongst these codes were the Siete Partidas in Spain (mid thirteenth century), the Swedish Land Law (1350s), the refined construction of the English common law commissioned by Henry II, and the Sachsenspiegel in some parts of Germany (1220-35).

legal structure of European societies was determined by the fact that laws were of essentially customary or consuetudinal character, and proto-state actors had only limited freedom to alter customs or to legislate in autonomous or positive fashion.[20] As states increasingly began to function as positively differentiated political actors, however, it also became essential for states to legislate at a growing level of positive autonomy, and to apply law, more variably, to more disparate social themes: that is, primarily to apply law through statutes. The ability of a state to construct and to refer to itself as possessing a constitutional or consensual structure was fundamental for its ability to pass laws in positive form and to legitimize new statutory acts.[21] Indeed, it can clearly be observed that the emergent European states with the most elaborate constitutional apparatus and the most uniform legal order were also the states that were best equipped positively to pass and authorize statutory laws, and so rapidly to transmit power through society. The consolidation of the state as an institutional body able to generalize power across society in the form of positive law thus also presupposed that the state could act in compliance with a constitutional form, that it could account for itself as containing a legal personality distinct from any particular bearer of its power, and that it could regulate its power through constitutional norms.

In addition to this, third, constitutions helped early European societies to adapt to their widening differentiation because they provided instruments that performed a service of incremental *political selection* or even of *social de-politicization* for society as a whole. In demarcating the peripheries of the political order and in formulating normative principles to trace out or even to govern the points of intersection between the political system and other social spheres, constitutions created normatively stabilized legal devices in which societies were able to stipulate in relatively regular manner what was and what was not subject to immediate inclusion in the political system. Most obviously, this enabled political systems to reinforce their abstracted independence of privately or locally embedded agreements. However, this also enabled political systems to withdraw many social exchanges from unabated internalization in their exchanges, and to ensure that many conflicts and contests in society were not placed immediately under political jurisdiction. In consequence, this function of constitutions also allowed emergent political systems to make decisions in thematically selective manner, to focus their power on a specific set of social phenomena, and to limit the degree to which they encountered (or stimulated) societally amorphous or unpredictably resonant obstructions in their use of power. Indeed, where the societal boundaries between the growing political system and other systems were precarious or prone to conflict (especially, for instance, in religious or fiscal questions), constitutions widely acted to provide mechanisms for the pacified resolution of antagonism, and they offered utensils for the formal *exclusion* of some exchanges from the inner structure of politics. Not lastly, therefore, the earliest constitutions evolved as normative documents that ensured that not all of society needed to be ceaselessly immersed in political power, and that those exchanges to which power was relevant could be accurately described and proportionately included in differentiated acts of political jurisdiction. In this respect again, the limiting of state power performed by the legal arrangements formalized as early constitutions might be seen as marking a crucial juncture in the evolutionary transition of early European society from the relatively undifferentiated, highly privatized condition of feudalism towards the differentiated and functionally specialized reality of modern society and modern political order. It was only as a result of the limiting function of constitutions, or through the controlled and proceduralized political in- and exclusion of different social exchanges, that societies that were rapidly expanding across differences of time and place were able to form and explain their power as a commodity that could be used in a reliable and effective manner in a differentiated society.

In each of these respects, in sum, constitutions brought great functional advantages to the gradually modernizing modern societies of medieval Europe. In particular, they helped the political systems of these societies to develop a body of normative arrangements in which they were able to employ power at an appropriate level of differentiated abstraction and inclusive generality. Constitutions and constitutional norms thus contributed directly to forming the reserves of *practical-functional legitimacy* for early political systems: that is, they allowed political systems to obtain legitimacy for themselves by establishing an apparatus in which they could stabilize their exchanges, effectively and inclusively utilize their power, and adjust both to the pluralistic environments in which they were located and to the functional demands directed to them. In addition to this, however, constitutions also brought benefits to European societies because they instilled – or at least began to instil – within the political system a body of norms from which it could project constant and reproducible accounts of itself and its power, and so, gradually, they allowed the political system both to internalize and articulate, *from within itself*, positive principles to

20 *Reynolds*, Law and Communities.

21 It is of course not possible here to cover all the literature on statutes and their contribution to the emergence of a modern society. However, two salient cases can be noted. First, the Italian cities of high medieval Europe might be seen as trailblazers in the promotion of statutory legislation. As, after the wars of the Lombard League, a legal vacuum emerged between the Holy Roman Empire, the papacy, and local territorial powers, the cities of northern Italy obtained a legal concession of statutory power [*ius statuendi*], and they began progressively to transform their customary laws into constitutional statutes. For a tiny sample of the literature on this, see *Pini*, Dal comune città-stato al commune ente amministrativa, pp. 471-2; *Zorzi*, La giustizia imperiale nell'Italia comunale, p. 89. At a later stage, in England the use of statutes as instruments for introducing new laws increased exponentially through the thirteenth century and this culminated in the extensive swathes of statutory legislation introduced during the reign of Edward I. See *Plucknett*, Legislation of Edward I, p. 10; *Plucknett*, Statutes and their Interpretation, p. 30. The Second Statute of Westminster introduced by Edward I in 1285 is seen as marking a seminal moment in the 'transformation of the law of England from a basis of custom to a basis of statute'. See *Wilkinson*, Constitutional History of Medieval England, I, p. 44. In both these cases of accelerated legal positivization, notably, the promulgation of positive statutes was made possible by the fact that states, either in the form of the consoli in Italy or the parliament in England, evolved an extensive constitutional apparatus for supporting and legitimizing their laws.

support and simplify its activities and to accompany its particular acts of legislation across society.[22] In stabilizing a normative account of the political system in objectively differentiated and internalized legal principles, in other words, early constitutions also allowed nascent political systems to call upon an inner reservoir of *conceptual or reflexive legitimacy*: that is, they permitted political institutions to incorporate a stable and organically constructed account of their functions, to which they could refer to explain their power, and which enabled them to perform their operations for society at an increasingly high level of abstraction, generality, and iterability. Most especially, the fact that they obtained from constitutions a set of inner principles for formulating their legitimacy meant that evolving political systems were able, with some reliability, to project preconditions, to pre-structure the social terrain, and to provide constant and pre-emptive explanations, for the future use of their power. In addition to promoting political abstraction, political generalization and social de-politicization as prerequisites of the first formation of a political system in a differentiated society, therefore, early European constitutions had the function that they offered to states a stable, consistent, and socially withdrawn normative formula through which they could freely consume and reproduce their legitimacy while conducting their concrete societal functions.[23] The *normative* principles that underpinned earliest European constitutions, thus, were also *functional* elements of society, and these norms allowed the political apparatus of society at once to internalize plausible descriptions of itself and to simplify the general transmission of its power. The antinomy between facts and norms that perennially perplexes the established tradition of political and constitutional theory thus appears in this perspective to be a misconstructed antinomy.[24] In fact, in analyzing constitutions from a historical-sociological perspective we can observe that constitutions originally emerged as institutions in which evolving modern societies first learned to bring their functional requirements and their normative requirements into convergence, and this made it possible for societies, and political systems within these societies, to develop in their essential modern (i.e. differentiated and positivized) form. From the period of their earliest formation, therefore, constitutions were evidently defined by their normative structure, and they articulated an abstracted corpus of norms around which a society could shape its political functions. Yet this structure was not imported into society as an external check on the power of society's political system. On the contrary, constitutions evolved as the adaptive functional form in which political power was able to abstract, generalize and positivize itself for those functions in society requiring power. Constitutional norms, in other words, first emerged as the adequate form of *society's norms*.

To summarize these points, therefore, we might conclude – to argue at a high level of generality – that the formation of constitutions (that is, the relatively formal and stable interpenetration of politics and law) played a crucial role in allowing nascent European societies to form themselves as characteristically modern (differentiated) societies. Indeed, we might also say that a society assumes modern (differentiated) form through certain primary acts of *inclusion* and *exclusion*, and that both these acts were tied to constitutions.[25] In particular, we can say, first, that a society emerges in its proto-modern structure as it develops patterns of extensive and simplified *inclusion*: that is, as it learns to reproduce certain modes of exchange (both juridical and political, but increasingly also monetary) across widening local and temporal spaces, and as it acquires the facility to incorporate social agents in these exchanges without being forced constantly to adjust the form of these exchanges to all the structural particularities of those agents included in them. Then we can say, second, that a society develops the features of a proto-modern society because, by virtue of its inclusivity, it constructs its members in a relatively positive and generalized fashion, its members recognize themselves as generally and quite uniformly identifiable with this society and as included within its patterns of exchange, and because media of social exchange can be used in relatively uniform and internally reproducible fashion, so that these media do not have to be re-formulated in every act of their application. A society becomes a modern society as a shared aggregate of functional horizons, in which persons are transformed from bearers of highly local or particularized expectations into subjects of extensible media of exchange, which presuppose the uniform *inclusion* of their addressees as a basis for their own self-reproduction or iterability. The generality and inclusive iterability that give foundation to a proto-modern society, thus, first resulted – at least in part – from the ability of the emergent political system in society to include its addresses under generalized, uniform and positive laws: in fact, the formation of a political system as a relatively independent centre of legal order initially both accompanied and reinforced the wider generalization and increasing inclusivity of society as a whole.[26]

22 This argument is influenced by Niklas Luhmann's claim that, through the positivization of law, law and politics were forced to devise patterns or semantics for their 'self-foundation' [*Selbstbegründung*]: *Luhmann*, Die Gesellschaft der Gesellschaft, p. 976.

23 This theory of legal positivization as formative of modern society has its origins in Luhmann's legal sociology. Yet note that my account of positivization – that is, the translocation of law onto autonomous and self-generated foundations – sees the beginnings of this process at a much earlier historical stage than Luhmann, who makes a distinction between positive law and natural and sees the former assuming dominance in the eighteenth century. See *Luhmann*, Das Recht der Gesellschaft, pp. 38-9.

24 The longest rumination on this perplexity is *Habermas*, Faktizität und Geltung.

25 For recent analysis of inclusion as the formative dimension of society, see *Stichweh*, Inklusion und Exklusion, p. 71. Unlike Stichweh (and Luhmann before him), my analysis here emphasizes the function of exclusion as the correlative of inclusion.

26 The emergence of sovereign states as a process correlated with a widening of societal inclusivity can be seen in most stages of state building. In Capetian France, for example, the increasing exercise of quasi-sovereign power by the state was flanked by the delocalization of societal structures, by the increasing dissemination of law, articulated as positive law by the légistes, as a general medium, and by the increasingly public organization of the state's foundations. See *Aubert*, Le Parlement de Paris, pp. 7-11; *Bardoux*, Les Légistes, p. 34. In the German territories, the construction of inclusive societies was also specifically linked to the

More particularly, though, these processes of inclusion also resulted from the formation of the state as a group of institutions endowed with a constitutional order, and the state's ability to construct itself as a uniform legal personality was central to society's capacity for utilizing power as an inclusive and reproducible medium of exchange and for stabilizing itself over aver large geographical and temporal spaces. In addition to this, however, this general process of inclusion also presupposes that a political system in society can clearly differentiate those dimensions of the exchanges conducted by its addressees that are susceptible to assimilation under law and under power from those that are not, that it can eliminate from its functions those social exchanges that are not (normally) articulated as politically relevant, and that it can avoid the recurrent or internal *controversialization* of the procedures in which it uses power and law. In this respect, for instance, it might be argued that nascent modern societies gradually learned to limit the degree to which they defined economic exchanges as primary objects of political inclusion, that these societies also very gradually (with many lapses) found ways of disengaging religious contents from legal and political procedures, and that these societies managed to separate power from informal spheres of private practice and arrangement. Each of these processes was a precondition for the capacity of a society to use power as a generalizable and differentiated facility. The element of legal-political *inclusivity* at the core of an emerging modern society, in consequence, also requires certain acts of primary *exclusion* on the part of a political system, and it presupposes that the political system can recognize that in order to *include* certain exchanges it must also *exclude* others. In both these respects, the status of early constitutions is vitally formative of modern society. In identifying and formalizing the boundaries of the political

emergence of states and to the formation of constitutional mechanisms within these states. The constitutional arrangements of the Landstände in some German territories specifically acted to detach the exercise of power from private persons, to consolidate power in one social setting, and to delineate in relative permanence the territorial locations subject to power. For classic commentary on constitutions as the hinge between the formation of states and the emergence of inclusive societies, see *v. Below*, Territorium und Stadt, p. 55. At a later stage, England under the Tudors might be seen to mark an early culminating of this process. Although the formal concept of sovereignty was not yet established at this time, in the early 1530s Thomas Cromwell was able to describe the polity of England in terms that accorded to it a status close to de facto sovereignty, asserting that it was able to provide justice in all matters and without any superior. See *Dickens*, The English Reformation, p. 117; *Lehmberg*, The Reformation Parliament 1529-1536, p. 164. Though on the limits of sovereignty see also *Loades*, Tudor Government, pp. 1-4. This process fell well short of constituting the Tudor state as an exclusive centre of social control. However, through the course of the Tudor period the power of royal courts was substantially reinforced, and monarchical control both of the fiscal system and of the means of jurisdiction was tightened. See *Richardson*, Tudor Chamber Administration, pp. 79-80. Of particular importance was the fact that the edifice of state emerging under the Tudors was beginning to assume features of a fully public apparatus: that is, it was effectively distinct from the model of semi-private government characteristic of the Middle Ages, and it organized its administrative (and especially its fiscal) mechanisms as devices for general rule across a national kingdom. See *Elton*, The Tudor Revolution in Government, pp. 4, 150.

system, in reflecting the immunity of social agents in their non-political activities, in specifying activities relevant for political inclusion, and in abstracting political power as a distinct and distilled societal resource, early constitutions enacted the exclusion required to complement the state's inclusion, and in so doing they acted (as far as possible) to immunize society against experiences of undifferentiated political saturation. In both respects, constitutions served to extend and augment the resources of usable power over which the incipiently differentiated political system disposed.

A constitution, in sum, might be seen, in its essential and original social functions, as an objective normative construction in which societies first began to balance the necessary inclusionary and the necessary exclusionary functions of a modern political system. It was only through the ability of political systems to use constitutions to found adequate normative self-constructions for their functions that modern society as a whole, as a selectively in- and exclusive aggregate of exchanges, was able to evolve and sustain its typically differentiated form.

Early modern constitutions

The constitutions of European states that emerged during the early modern period also performed their primary function through the fact that they allowed developing political systems further to adapt to the accelerating differentiation of the societies in which they were located. At the caesura between medieval and modern Europe, most particularly, it can be observed that states were now approaching a condition of relatively high autonomy in relation to other social exchanges. Accordingly, the constitutions that evolved at this time acted in different ways to provide refined support for the adequately abstracted and positive organization of the functions of these states, and they again helped states, both in- and exclusively, to sensibilize themselves to the complexly differentiated social realities to which they applied their power.

First, for example, most constitutions of the early modern era were conceived as documents that specified the limits of monarchical, or imperial prerogative, and that ensured that particular persons (i.e. regents) could not detach the form of the state from the public-legal order established by practical legal consensus or convention. These constitutions, and the ideas surrounding them, had their normative emphasis in the principle that there existed *basic laws* of state, which even those personally utilizing the state's power could not contravene.[27] In this regard, constitutions of this

27 For the classic case of this, England, see *Eusden*, Puritans, Lawyers, and Politics, pp. 44-49. The idea that there are basic laws, whose recognition involves rights that can be invoked against the state, is at the core of the original meaning of the concept: constitution. This idea was also widespread across most early modern European states. The Dutch jurist, Ulrich Huber, explained constitutions as laws that irrevocably founded the structure of the state. See

period were intended to make sure that political power was conclusively condensed in the public/organic form of a *body politic*, and that it could not re-converge with the private objectives or proprietary claims of individually powerful political actors. In consequence, early modern constitutions contributed directly to the differentiated and specifically political construction of the state, and they instituted procedures and legal forms that substantially reinforced the abstraction of the state's societal boundaries. Moreover, in framing political power in acceded public norms these constitutions also reinforced the legal personality of the state, which had been more tentatively elaborated in medieval constitutional texts: in so doing, they articulated a firmly inclusionary and transplantable support for society's power, and they simplified the generalized transmission of power across society.

Second, however, the truly salient point in this epoch of constitutional foundation was that these constitutions were organized – though, as yet, only to a limited degree – around the incipient principle that constitutions were required to enshrine and guarantee *rights*. That is to say, the most progressive and elaborated constitutions of this period had the distinctive dimension (albeit with extreme regional variations) that they gave formalized and uniform recognition to claims over property ownership and personal autonomy and judicial integrity, and they sought to preserve attributes of personal autonomy by rendering general and permanent hitherto sporadic or informal agreements over customary freedoms between established political actors around the state and consolidated or emergent interests in the economy.[28] The most advanced early modern constitutions, in consequence, extended beyond merely practical provisions for basic laws. In addition to this, they also offered normative sanctions for proprietary freedoms throughout all society (i.e. they cemented rights against non-mandated taxation and expropriation); they enshrined general procedural entitlements (i.e. they granted rights of protection from judicial irregularity) for legal subjects (or for a select number of legal subjects); in some instances, they acted to uphold delegatory rights for members of an exclusively circumscribed (i.e. independently property-holding) political class.[29]

It can be observed from a socio-functional viewpoint that the advent of rights as dominant norms in the legitimatory grammar of politics brought a large number of

Huber, De Jure Civitatis, I, p. 125. In Germany, Althusius had already moved this idea closer to a doctrine of popular sovereignty. See *Althusius*, Politica, p. 169. This idea is also evident in slightly earlier principles of French constitutionalism. See *de Haillan*, De l'Estat et Succes des Affaires de France, III, p. 43.

28 The English constitution can be seen as the classic case of this. See *Ogilvie*, The King's Government and the Common Law, pp. 4, 6.

29 England is again the main example. For England's constitution in nuce, see *Aylmer*, The Struggle for the Constitution, pp. 222-229. These principles were stated in the Petition of Right, which defined 'common consent by Act of Parliament' as the basis for new taxes, and it was refined in Article 4 of the Bill of Rights. See Kenyon (ed), The Stuart Constitution, p. 84. Sweden was also an example of a state guaranteeing formal constitutional rights and the general rule of law. See Roberts (ed), Sweden as a Great Power, pp. 20, 26; *Roberts*, Gustavus Adolphus and the Rise of Sweden, p. 85.

adaptive benefits to evolving European societies, and they strongly reinforced the functions of constitutional norms that are described above. First, these constitutional rights acted to translate particular freedoms into freedoms invoked and obtained through the state. In this respect, rights both consolidated the publicly differentiated form of the state and consolidated its inclusive organic personality. Second, in instituting generalized procedures in which power had to be utilized and in defining addressees of law as bearers of like status, rights greatly simplified the generalization of power through society. Most important amongst the social functions fulfilled by rights, however, was the fact that constitutional rights also served dramatically to strengthen the tendencies towards inclusionary political selection and exclusionary societal de-politicization, which modern societies, and the modern political systems situated in these societies, structurally presuppose. The constitutions and constitutional rights of early modern Europe accomplished this, most evidently, because they clarified and perpetuated the conditions of articulation between the state and other social domains, and in recognizing certain activities as protected from political encroachment by rights they limited the tendency of social themes indiscriminately to migrate towards the political system and they reduced the extent to which themes originating in different parts of society (notably in religion or in the economy) had to be ceaselessly regulated by or internalized, as *political*, within the state.[30] Additionally, moreover, the constitutions and constitutional rights that were gradually formulated during this period also created clusters of sanctioned legal formulae and procedures at the periphery of the state, which also helped to regulate exchanges between the state and other social domains and generally served society's depoliticization. The fact that states now began to incorporate clear provisions over rights meant that the political system acquired a corpus of norms and precedents, in reference to which debates about pressing social themes could be conducted and which could be invoked to deflate moments of intense political controversy. Indeed, these constitutions engendered conventions by means of which many controversial issues could be directed to sub-sectors of the state administration (usually to legislatures or courts of law, with constitutionally prescribed realms of competency) and so resolved in placatory procedural fashion.[31] Under pre-modern constitutions, therefore, state execu-

30 Here again, it should be noted that my account of rights is indebted to Luhmann's work on the sociology of rights. It should also be clear, though, that I ascribe a stable normative function to rights that Luhmann is not willing to countenance. For Luhmann's analysis of rights, see *Luhmann*, Grundrechte als Institution, p. 135.

31 Before the concession of formal constitutional rights, courts contributed widely to the destabilization of the state, and states struggled to bring their own judicial apparatus under control. In England, for example, the courts of common law were central to the constitutional conflicts prior to the Civil War. For contemporary insistence on the integrity of judicial procedure as a check on the state, see *Coke*, Selected Writings, III, p. 1271. For the implications of this, see *Judson*, The Crisis of the Constitution, pp. 191, 211; *Hart*, The Rule of Law, esp. p. 39; Kenyon (ed), The Stuart Constitution, p. 92. In France, the conflict between the monarchy and the sovereign courts was also one main constitutional cause of the revolution of 1789. France's belated evolution of a constitution was one reason why the monarchy was structural-

tives had usually been objects of constant and sporadic personal *petition* by particular social agents, and actors in the executive had been recurrently forced, in often personalized and irregularly intensified manner, to pursue statutory functions in response to individual complaints or demands.[32] Under early modern rights-based constitutions, in contrast, it gradually became possible for states regularly to transport political decisions into subordinate courts, into separate legislatures, or, as far as these can be distinguished from legislatures and courts, into the (politically neutralized) civil service.[33] This greatly expanded the administrative flexibility of the state, and it greatly diminished the political volatility attached to the boundaries between the political system and the rest of society. In consequence, the tendency in many early modern constitutions exponentially to reinforce (and constitutionally to protect: i.e. *through rights*) parliamentary authority, increasingly to separate parliaments from royal courts, and to transform royal appointees into professionalized civil servants, might be viewed, in a functional light, as a process that limited the overt

ly weak. For samples of the literature on this, see *Hamscher*, The Parlement of Paris after the Fronde, p. 119; *Hurt*, Louis XIV and the Parlements, pp. 149-172; *Stone*, The French Parlements, p. 76. In Germany, notably, even many of the most powerful states did not possess full jurisdictional supremacy in their territories until well after 1648. On the tortuous conflict over the formation of a jurisdictional-constitutional balance between territories and Empire in the German context see: Ulrich Eisenhardt (ed), Die kaiserlichen Privilegia de non appellando; *Weitzel*, Der Kampf um die Appellation, p. 87; *Diestelkamp*, Zur Krise des Reichsrechts. Chronologically inaccurate in its analysis of the emergence of early statehood in Germany is *Berman*, Law and Revolution, vol. II, p. 62. In each of these cases, the consolidation of statehood depended on the internalization of the courts of law into the state by means of a regular constitutional system.

32 On this general aspect of very early parliamentary activity in different settings, see *Wilkinson*, Constitutional History of Medieval England, II, p. 6; *Procter*, Curia and Cortes, p. 206; *de Dios*, El Consejo real de Castilla, p. 67; *Moraw*, Versuch über die Entstehung des Reichstags; *Neuhaus*, Reichsständische Repräsentativformen, p. 26

33 Here again, I argue against widespread orthodoxy in historical sociology. The emergence of a centralized state bureaucracy is usually seen as a sign of increasing societal convergence around the state (Here again, my argument is respectfully opposed to Weber. See *Weber*, Wirtschaft und Gesellschaft, p. 825). In my view, the emergence of a powerful state bureaucracy in European societies reflected a process of functional sub-division within the state, which enabled the state to store administrative reserves towards which it could deflect volatile social exchanges. On this process in England, see *Stone*, Crisis of the Aristocracy, p. 10. On the professionalization of the English civil service, see *Aylmer*, The Crown's Servants, p. 101. In France, the emergence of state bureaucracy was hampered by the fact that many public offices were venal, and the French monarchy, owing to its personalized constitution, struggled to form an independent civil service. For commentary, see *Mousnier*, Les Institutions de la France sous la Monarchie Absolue, p. 466; *Zeller*, Les Institutions de la France au XVI siècle, p. 142. Sweden might be seen as an early example of way in which states used constitutions to integrate oppositional forces in the state administration. See *Lindegren*, The Swedish military state, p. 309; *Buchholz*, Staat und Ständegesellschaft in Schweden, p. 127. The classic, though somewhat later, example of this process is Prussia, in which the belated course of constitutional formation famously consummated a move to government by a 'parliament of civil servants' [*Beamtenparlament*] that was placed next to the monarch. See *Vogel*, Allgemeine Gewerbefreiheit, p. 132.

politicization of social themes, that exclusively reduced the intensity of political conflict around the executive apparatus of states, and that augmented the positive statutory power of the state. Quite evidently, in fact, this constitutional process – entailing, but not exhausted in, an early separation of powers – helped secure a positive sphere of operative freedom around the administrative organs of the state. As a result of this, the particular actors situated in this administrative body were not encumbered by an excessively large or excessively politicized mass of commitments,[34] and states obtaining a parliamentary constitution were able integrate complex yet politically withdrawn procedures for responding to social exchanges. The proclamation of legitimate state power as residing in a rights-based parliamentary constitutional state thus dramatically expanded the positive power of the state, and it exponentially increased the facility with which power could be employed and disseminated through society.

To conclude this section, it can be seen that the more refined constitutions of early modern European states helped to stabilize society's differentiated political form because they began (albeit still gradually and rudimentarily) to implant within the state a normative construction of those persons subject to its power as *holders of rights*. This norm performed the practical function that it helped to minimize fractious controversy about the terms of exchange between the political system and other social systems, and it facilitated processes of sub-division in the political system: both of these processes augmented the differentiated stability and the positive/technical efficacy of the political system. In addition, these constitutions brought the still greater, but less apparent, benefit for early modern states that they dramatically enlarged the reflexive resources of positive legitimacy that states could obtain and employ. As they learned to refer to their addressees as entitled claimants over rights and as they then evolved constitutions that normatively formalized and perpetuated this recognition, early modern states slowly acquired an internally consistent and reproducible *vocabulary of inclusion and exclusion*, which had inestimable functional and legitimatory advantages for their further development. That is to say, as they began to define and include those subject to their power as endowed with rights, political systems began, first, to integrate a reflexive/normative apparatus through which they could administer the application of political power to their addressees in categories that were at once replicable, flexible, uncontroversially generalizable and internally differentiated. Second, through this process they began to account for themselves as possessing a perennial and generalized legal personality, and this meant that they could project themselves as positively entitled to pass laws across all social differences of region, status or time. Third, they also began to ela-

34 On the overlapping of delegatory and judicial functions in pre-modern states in different national contexts, see *de Dios*, El Consejo real de Castilla, p. 18; *Schubert*, König und Reich, pp. 323-4; *McIlwain*, The High Court of Parliament and its Supremacy; *Brown*, The Governance of Late Medieval England, p. 159; *Pollard*, The Evolution of Parliament, p. 149. Pollard sees the strong fusion of judicial and parliamentary functions in England as a root of English democracy. This fusion was quite general, however.

borate permanent and routinized procedures in which they could utilize their power across very diverse exchanges with a minimum of societal disruption and convergence. In these respects again, therefore, the normative/legitimatory dimension of a state's constitution should not be viewed as an external attribute of the state or as a formal standard of legitimacy, against which state power should be measured. On the contrary, the normative/legitimatory aspect of the constitutions of developing European societies acted as a primary functional precondition of the state's emergence as a differentiated fulcrum of inclusive political power.

Revolutionary constitutions

During the seminal period of revolutionary constitution writing between the 1770s and the 1790s, it can again be seen that states acquired constitutions as instruments that helped them to formalize, generalize and positively to organize their power as a differentiated social facility. In fact, it was through these constitutions that states were able to bring towards a conclusion their slow emergence as differentiated centres of abstracted, generalizable, functionally specified and positive political agency.

The functions enacted by the revolutionary constitutions can be seen, first, in the fact that they took decisive steps to eliminate reference to monetary status and private social standing as foundations for legal inclusion, and they ensured that states recognized those subject to their power as holding rights of equality before law, which were usually guaranteed by a separate and independent judiciary.[35] As in earlier constitutions, the recognition of these rights meant that states acquired a legislative and judicial apparatus that allowed them, positively and generally, to introduce laws in a form that was not shaped by unnecessary sensitivity to the personal or economic situation of law's addressees and that effectively effaced the last traces of private or structural singularity from the state's legal apparatus. This greatly increased both the abstraction and the flexibility of the state, and it substantially expanded the state's ability to apply and sustain power as a generalizable resource across society. Second, the functions performed by these constitutions can also be seen in the fact that these constitutions accentuated earlier rights of proprietary integrity and personal autonomy, and they gave uniform validity to rights of free contract, free belief, free assembly and free expression of opinion. Indeed, these constitutions greatly reinforced and extended the status of constitutional rights, and they began to explain and conserve these rights by defining them as irreducible foundations for law and as

35 The correlation between the constitutionalization of rights and the reinforcement of public authority is observed in some of the historical literature on the American constitution. See *Wood*, The Radicalism of the American Revolution, p. 324. On the reinforcement of the French state administration in the years after 1789, see *Bosher*, French Finances, pp. 232, 295; *Garaud*, La Révolution et L'Égalité Civile, pp. 131-33; *White*, The French Revolution and the Politics of Government Finance, pp. 227-255.

invariably attributable to *all persons* through society: that is, as *subjective rights* or *human rights*. In sanctioning extended rights of autonomy as pertaining to every member of society, then, these constitutions, acted to remove vast swathes of social activity from the state's own structure, and to construct, through the law, a firm universal boundary between itself and the rest of society. In one universalizing moment, in fact, the constitutionalized concept of human rights spectacularly reduced the volume of social exchanges that states were required to regulate, and this ensured that most activities of social agents, imagined as bearers of rights, were necessarily perceived by the political system as belonging to other areas of social life and so as excluded from direct political inclusion or manifest politicization. Provisions over civil rights, thus, curtailed the extent to which states could be called to account for or destabilized by exchanges arising in those parts of society comprising activities covered by rights (i.e. in religion, employment, the press and publishing, science). Moreover, these provisions allowed the political system narrowly to pre-define those exchanges that it was expected to recognize as relevant for its legislative acts, and to apply its power solely to those exchanges that it observed as political. The status of rights as institutions of societal – and, in particular, political – differentiation, in short, was suddenly and powerfully intensified at this time. This dramatically heightened the adequacy of the political system to the differentiated societal landscape in which it found itself, and it dramatically increased the volume of positively usable power that the political system contained.

In addition to this, however, these revolutionary constitutions also had the function that they provided new normative and reflexive reserves for the political system. Indeed, they instituted at the centre of the political system heightened facilities for generating positive political legitimacy, and in so doing they greatly enhanced the capacity of the political system for positively applying its laws, for stimulating legal-political compliance through society, and for responding adaptively and positively to pluralized societal demands. The revolutionary constitutions performed this function of legitimatory positivization in two particularly important ways.

First, in enunciating the normative principle that the state obtains its legitimacy through its *inclusion* of the popular will of society (often configured as *the nation*, *the sovereign nation*, or the *nation of citizens*), the constitutions of the late eighteenth century enabled the state to describe itself as incorporating a concrete yet fully abstracted public source, and they permitted the state finally to internalize a reference for itself through which it could easily and positively reproduce its power across society. Indeed, the idea of civil inclusion expressed by these constitutions had the specific importance that it offered to states an image of their legitimacy, which they could conserve in simple fashion, and which ensured that their explanation of their power could not easily be disrupted or destabilized by external challenges or principles. That is to say, these constitutions derived the legitimacy of states from the claim that those to whom laws of the state were objectively applied were also the subjective origins or the authors of these laws, and that law's legitimacy was thus generated by a real and material identity between law's subject and

law's object, both of whom the law, as the law of an inclusive and constitutionally legitimized state, always factually contained within itself. In storing this principle for the state, then, these constitutions performed the immeasurably important service for modern society that they ensured that states could, in each act of legal application, explain their laws as automatically, internally and reproducibly legitimized,[36] and they permitted states, in their everyday processes of legislation, to use and describe laws as universally adjusted to, subjectively authorized by, and in fact always internally *including*, their objective addressees. The civil inclusivity of law promoted by the revolutionary constitutions was thus, in the first instance, an idea through which the state discovered a rounded formula, in which, at one level, it could plausibly include and indefinitely presuppose its inner legitimation, and through which, at a different level, it could harden its legitimacy against external interference and in fact freely pre-construct its addressees and manufacture the differentiated social horizons on which it expended its power. In the principle of proto-democratic political formation implied in the idea of law's inclusion, in fact, the modern state obtained a conceptual norm through which – finally – it could produce, authorize, and consume its power as a narrowly abstracted, positively justified, and (to a large extent) internalized and depoliticized commodity: this, once again, greatly intensified the positive abstraction of the state, and it vastly expanded the resources of internally differentiated and positively usable power that the modern state possessed.

Second, it can also be observed in this respect that, although they purported to draw legitimacy from the practical *inclusion* of national citizens, the constitutions of the late eighteenth century actually located the source of the state's normative/inclusionary authority, neither in the existing nation nor in the wills of its particular constituents, but in a formal written document (and the subjectively ascribed rights that this document contained), which remained largely static against the people and its highly varied acts of volition. In consequence of this, these constitutions ensured that the legitimatory norm of inclusion underlying the state remained at all times highly dialectical, depoliticized, or even chimerical. In fact, they allowed the state to refer to its inclusive legitimatory source and constantly to utilize and further to positivize its power through reference to this source whilst also endlessly *excluding* the purported origin of legitimacy from the concrete apparatus of the state and ensuring that the constituent origin of the state's power could not meaningfully act as a formative, or even integrated, element of the political system. In defining members of the people or nation as constitutionally acknowledged protected *rights-holders*, therefore, these constitutions served restrictively to pre-construct the activities and the judicial procedures in which members of the nation could appear as relevant for the political system. In this again, they acted, as far as possible, to offset the concentrated politicization of any given site of power within the state or in society more generally, and they conferred abiding stability upon the state's form by dislocating the state both from the factual persons named as originary bearers of power and from the particular or emergent demands of members of its constituent body.[37] Once more, therefore, these constitutions offered to the state a legitimatory norm from which it could further positivize its power whilst averting any specific increase in its politicality, whilst holding itself in a condition of high abstraction in relation to other social spheres, and whilst substantially closing itself against external interference.

The revolutionary constitutions in the USA and France, in short, enacted the structurally indispensable feat for emergent modern societies that they allowed the power of the political system to reflect and legitimize itself, in entirely differentiated manner, as *political* (that is, as conclusively distinct from private, colonial or dynastic power and so as fully adapted to and generally applicable in a differentiated society). In so doing, they created a norm of self-reflection in which the political system was able recursively to generalize and to positivize both its broad foundations and its particular statutory acts. However, at the same time, in locating the sources of power's inclusivity and legitimacy in formal catalogues of rights these constitutions also ensured – to a large degree at least – that the everyday mechanics of state activity did not need to be interrupted by any socially expansive claims, by perceived civil obligations, or by precariously unfiltered social conflicts. In consequence, these constitutions allowed the state to express and reproduce the legitimatory origin of its power at a low level of internal and external political intensity, so that its legitimacy could not be challenged or questioned in any but the most exceptional crises or moments of conflict. The normative fusion of the *inclusionary* republican concept of *citizenship* with the *exclusionary* liberal concept of *rights*, above all, was the positivizing normative mainspring of the legitimatory functions performed by these constitutions. In these constitutions, the differentiatory dynamic underlying earlier constitutions came towards its culmination, and both the abstracted political design and the legitimatory reserves required to sustain a modern pluralistically differentiated society were put in place.

36 Rousseau first formulated this idea in Du Contrat Social. It also informs all post-Rousseauian democratic thought.

37 On this phenomenon in France, see *Deslandres*, Histoire Constitutionelle de la France, III, pp. 78-9; *Thompson*, Popular Sovereignty and the French Constituent Assembly, p. 25. On the difficulties attached to this reduction of the state's political emphasis, also, see *Gooch*, Parliamentary Government in France, p. 251. On the USA, see *Wood*, The Creation of The American Republic, p. 266; *Wills*, Explaining America, p. 213. On the early function of the US-American constitution as promoting the 'establishment and acceptance' of limits on social politicization, see *Sharp*, American Politics in the Early Republic, p. 13. On the similar role performed in France by the constitution of 1791, see *Duclos*, La Notion de Constitution, p. 11.

Conclusion

On these grounds, it is possible to propose foundations for a tentatively generalized sociology of constitutions, and for a macro-sociological approach both to the rights and to the juridical norms that constitutions commonly contain and the legitimatory functions that they habitually fulfil. The constitutional-sociological thesis proposed here suggests – first – that constitutions are produced by relatively uniform processes of socio-functional causality, which, with evident variations, are formative and deep-lying in all modern societies. As a result of these processes, constitutions are indispensable for the functional organization of modern societies and the politics of these societies. Modern societies have a functional *need for constitutions* and for the interlinked web of functions and norms that these provide. Constitutions perform functions of abstraction, generalization, depoliticization and positivization for the political power of a modern society. The functional and reflexive reserves of legitimacy produced by constitutions are among the main reasons why modern society is able to exist, politically, in a functionally differentiated and pluralistic. Second, the analysis proposed here also suggests that in approaching constitutions it is essential both to observe and fully to appreciate their specific normative component, yet also to recognize that norms enshrined in constitutions are not external to society or to society's political functions. The normative apparatus of a constitution might in fact be seen as the reflexive form into which a society adaptively distils its functional exigencies. The norms of a constitution are always *society's norms*, and they allow a society both functionally and reflexively to adjust to its underlying differentiatory processes. Indeed, the extent to which a constitution permits a society to respond to its differentiation might be viewed, both functionally and normatively, as the primary index of its legitimacy (or otherwise).

In this respect, it might also be tentatively suggested that the sociology of constitutions outlined here contains a partial corrective to more widespread inquiries into the constitutional origins of political legitimacy. At one level, this approach opposes standard normative theory in arguing that normative analysis must be grounded in a functional and structurally adequate reconstruction of the constitution of society as a whole, and it is only if it accounts for norms as reflecting the wider constitution of society that analysis can account for the preconditions of a constitution likely to help secure legitimacy for society's political system. At a different level, however, this approach might be viewed as a sociological theory that identifies and seeks concretely to explicate the correlation between political legitimacy and constitutional norms, and it argues that sociological analysis cannot remain blind to the legitimatory status of norms (as social facts), and it needs to interpret norms – and even quite specific norms – as key elements of society and as preconditions of political legitimacy. On this account, in fact, sociology is also entitled to propose a generalized theory of political norms, and, in examining norms as adaptive articulations of societal process, it might offer grounds to evaluate different constitutional norms in light of their reflexive contribution to the legitimacy of the political system.

On the basis of the above reconstruction, then, the approach outlined here indicates that a constitution capable of obtaining and preserving legitimacy will probably be one that effectively responds to and facilitates the processes of political abstraction, generalization, selective de-politicization and positivization, which usually act in modern societies as preconditions for the adequate construction of political power. Naturally, it is necessary to observe here that after the period of classical constitution writing, constitutions have recurrently been required to respond to new social demands. In particular, the constitutions of the early decades of the twentieth century deviated from earlier constitutions in that they addressed questions of social rights and material citizenship; the constitutions drafted in the three waves of democratic transition in the late 1940s, the 1970s and the 1990s were substantially devoted to problems attached to the de-coupling of state, economy, military and judiciary; very contemporary processes of constitution writing, then, have focused on problems of overlapping statehood, on the splitting of power between multi-levelled executives, and on the emergence of sites of soft law as new patterns of constitutionality. Despite this, however, the earlier processes of constitutional reflection laid out in very general terms both the basic functionnal/evolutionary and the basic normative/legitimatory template for the politics of a modern society, and the functional exigencies to which these constitutions reacted still remain structurally formative, even in later-modern societies. Indeed, if we observe that in contemporary societies states enjoying legitimacy are primarily those that guarantee a limited set of rights, that avoid the amorphous, arbitrary or functionally indeterminate exercise of power, that transmit power in adequately generalizable legal form, and that contain plausible and easily internalized descriptions of their authority, we might also observe that this is because these states have a constitution with a design that allows a political system to sustain itself, both functionally and normatively, in the conditions of a pluralistically differentiated society. To this extent, the historical/functionalist approach proposed here might be invoked as a premise for analysis of contemporary constitutions, and it might (within broad parameters) explain, using both normative and sociological evidence, why some constitutional norms are likely to promote legitimacy and others are not. Above all, however, the approach outlined here might insist that conventional analysis of constitutions habitually struggles to explain the constitutional sources of legitimacy because it views constitutional norms as distinct from the societal functions that require legitimacy. The legitimatory function of norms can be best comprehended and evaluated as an articulated expression of societal functions: a fully sociological method, however, is required for this.

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