

constitutional law were perceived as obstructing this objective. In the successive waves of post-authoritarian constitutional-democratic transition, in the 1940s, 1970s and 1990s, the model of the constitution as an institution guaranteeing basic rights and a separation of powers, and usually subjecting both executive and legislature procedures to statutory compliance with prior non-derogable norms, was widely adopted as a necessary construct whose normative validity and general functional utility were beyond question. To be sure, constitutional sociology did not entirely disappear after 1945. In Germany, elements of a functionalist sociology of constitutions were present first in the works of Helmut Schelsky (1965 [1949]) and then in the writings of Niklas Luhmann (1965; 1973; 1991). Jürgen Habermas's early analysis of constitutional legitimacy also contains a tentative and often revised sociological approach to the functions of constitutional law (1990 [1962]: 326–42). Constitutional formation assumes vital status in Richard Münch's sociology of modern political culture (1984: 311). In the United States, moreover, Talcott Parsons gave an important, although marginal, role to the constitution and the rights contained in it, which he saw as sources of far-reaching inclusion and structural stabilization (1969: 339).⁴ Generally, however, the attempt to construct the rule of law and the public-legal regulation of governmental power as expressions of societal, rather than deductive/prescriptive, norms lost intellectual momentum in the later twentieth century. Indeed, for all their practical/political advantages and utility in stabilizing democratic regimes, the preponderance of normative principles in post-1945 constitutional discourse and practice weakened sociological understanding of the motives which lead societies to produce, and habitually to articulate, their grammar of legitimacy in constitutional laws. The fact that constitutional order has been promoted as a general ideal of legitimacy in post-1945 politics has tended to obstruct sociological inquiry into the deep-lying normative structure of society, and the increasing reliance of modern societies on relatively uniform patterns of constitutional organization has not been reflected in a consonant growth of society's self-comprehension in respect of its normative political foundations. In fact, it is arguable that in the later twentieth century the original and formative post-Enlightenment dichotomy between normative and sociological inquiries into constitutions and constitutional legitimacy reproduced and reconsolidated itself. In this process, the assumption that constitutional principles, especially those

⁴ See my longer discussion of contemporary aspects of constitutional sociology in (2010a).

condensed into formal rights, could be definitively illuminated as normative objects became almost unshakably predominant.⁵

This situation, it needs to be noted, has begun to change in very recent years, and it is now possible to identify a number of theorists and researchers, working across the disciplinary distinctions between politics, law and sociology, who employ sociological or socio-theoretical methods to illuminate constitutions. This can be seen in the neo-functionalist legal sociology of David Sciulli (1992). It is evident in the quasi-ethnographic approach to constitutional formation in the writings of Kim Lane Scheppele. It is apparent more recently in the post-Luhmannian school of legal analysis, centred around Gunther Teubner, which, although largely focused on the changing sources of private law, has provided an outstandingly complex account of the pluralistic constitutional structures of modern society.⁶ This is also manifest in the post-Habermasian constitutional analyses set out by Andrew Arato and, in particular, by Hauke Brunkhorst, who has developed a far-reaching model of constitutional formation that seeks to account for both the societal/evolutionary and the normative dimensions of constitutions and their legitimating intentions (2000: 55; 2002: 136). On this basis it is plausible to suggest that the sociology of constitutions, in different expressions, is gradually resuming its former importance in social theory. Indeed, it can be observed that, despite the prevalence of formal-normative orthodoxy in constitutional analysis in modern societies, the transformations in the constitutional design of Western societies in the last fifty or so years are slowly becoming objects of adequately sociological interpretation.

Despite this, however, it is also fair to say that, to date, the recent attempts at sociological constitutionalism, although often comprising research of the highest theoretical importance, have not succeeded in re-establishing constitutional sociology as a sub-discipline of law, politics or sociology. This is the case for two reasons. On one hand, recent sociological interpretations of constitutions have tended to focus on one particular aspect of constitutional formation – that is, habitually, either on the rights dimension of constitutions, or on the changing functions of constitutions in increasingly internationalized societies or societies with post-traditional political structures.⁷ The constitution as a legal

⁵ The most extreme case of this might be the theory of Dworkin, who argues that it is imperative to isolate ‘the problem of rights against the state’, and so pushes the case for a ‘fusion of constitutional law and moral theory’ (1977: 149).

⁶ See the argument in Fischer-Lescano and Teubner (2006).

⁷ Habermas and Brunkhorst might exemplify the first tendency and Teubner might be a case of the second.

apparatus emerging in, and functionally defined by, its structural integrity with a historically formed state has only rarely been placed at the centre of recent sociological inquiry, and the normative functions of classical state constitutions still assume a withdrawn role in sociology. There is, as yet, no encompassing sociological attempt to explain why states have tended to evolve around constitutions as classical documents of public law, and what exact sociological functions constitutions fulfil for states. Moreover, recent theories addressing the political functions of state constitutions have often tended to step outside the realm of strictly sociological methodology in accounting for the normative status of constitutions and constitutional rights. Specifically, they have often fallen back on the more deductive foundations of Enlightenment theory in their attempts to illuminate the reliance of modern societies on constitutional norms, especially in respect of rights.⁸ Exactly which internal forces cause societies to produce constitutions and constitutional rights has not been explained without reliance on residually foundationalist theories of universal human nature or universal human reason. In consequence, we might consider that the founding sociological attempt to enable modern societies internally to comprehend their articulated normative structure has not been concluded. Indeed, modern societies still lack a conclusively sociological vocabulary for explaining their convergence around normatively restricted political systems and for elucidating their relatively uniform dependence on stable patterns of public-legal legitimacy, secured in constitutions.

This book, therefore, contains an attempt to draw together the existing, yet inchoate, threads of the sociology of constitutions, which date back to the very genesis of sociological interpretation. In the first instance, this book attempts further to consolidate the development of constitutional sociology in contemporary debate, and it wishes to contribute, in some measure, to the growing recognition of constitutional sociology as a free-standing field of intellectual inquiry. Naturally, this book is not intended to reflect any presumption that all practitioners of constitutional-sociological analysis will sympathize with the methodological approach adopted here. The book carries the consciously

⁸ I have considered this problem elsewhere (Thornhill 2010b). In brief, though, this tendency is illustrated by the fact that Brunkhorst's sociology of constitutions relies on the assertion that the demand for solidarity is a constitutive disposition of human life (2002: 203). See also the neo-foundational approach to rights in Alexander (2006: 34, 69).

deliberated title *A Sociology of Constitutions* (that is to say, it is not called *The Sociology of Constitutions*). This reflects the anticipation that a number of other constitutional sociologies might either oppose or sit alongside this book without undue mutual inconvenience. Yet aspirations of the book are that it might add substance to the current literature addressing constitutions from a sociological standpoint, and that it might establish co-ordinates for the future direction of inquiry in this field.

In seeking to cement sociological analysis of constitutions, however, this book is also shaped by an attempt to re-articulate and reinforce the original ambitions of constitutional sociology. Like its remote precursors, it aims critically to reappraise and reconfigure the classical questions of post-Enlightenment normative political inquiry – that is, questions regarding the normative foundations of political legitimacy and legal validity, the essential content of constitutional laws and constitutional norms, and the reasons for the reliance of political institutions on normatively abstracted legal principles. In so doing, it wishes to account for the structure of political legitimacy without reliance on hypostatic or purely deductive methods, and it seeks to illuminate the fabric of legitimacy using socially internalistic paradigms. At one level, in this respect, unlike much early sociology, this book is not hostile to normative constitutional claims. In fact, this book shares the conventional position unifying most normative political theories arising from the Enlightenment, and it accepts as valid the common normative assumption *that particular political institutions (usually states) acquire legitimacy by means of constitutional documents, and that constitutionally enshrined subjective rights, protecting those subject to political power from non-mandated coercion and recognizing these persons as bearers of immutable claims to dignity, equality and like redress, are probable preconditions for the legitimate exercise of power.* This book, therefore, proposes a definition of political legitimacy which would be acceptable to most normative theories: it defines legitimate political power as *power exercised in accordance with public laws, applied evenly and intelligibly to all members of society (including those factually using power), which are likely to give maximum scope to the pursuit of freedoms that are capable of being generally and equally appreciated by all social actors.*⁹ Against the

⁹ The classical expression of this view occurs in the writings of Kant. Kant argues that a state with a legitimate ‘republican constitution’ reflects the formal ‘laws of freedom’ which human beings deduce as conditions of their autonomy (1976 [1797]: 437). These views now resurface in more contemporary debate in the works of Rawls and Habermas.

methods resulting from the Enlightenment, nonetheless, this book is shaped by the conviction that the constitutional structure of society and the legitimacy of political institutions can be illuminated only weakly by normative analysis. In fact, normative analysis is incapable of illuminating that object which it has made its most common analytical focus: rights-based constitutional legitimacy. In consequence, this book suggests that an encompassing sociological perspective is required to address these questions and to account for the motives underlying the constitutional construction of legitimacy, and it tries to cast light on the legitimating status of constitutions by examining the societal functions and the objective societal exigencies that are reflected in constitutional norms. Primarily, therefore, the book seeks to examine and explain, sociologically, why modern societies have tended, independently and with some consistency across socio-cultural variations, to elaborate constitutions, why societies tend to concentrate their political functions in constitutional form and why constitutions, and the normative reserves that they contain, prove vital to the stability of modern societies and the legitimacy of their political institutions. In this respect, although the book does not engage in great detail with the preconditions of distinct lines of normative analysis, it contains the implicit argument that the original sociological attack on the normative analyses of the Enlightenment needs to be re-initiated. In order for a valid explanation of the normative structure of modern society to be obtained, the constitution needs once more to be constructed as an eminently sociological object – that is, as an object formed by inner-societal forces and explicable through analysis of broad patterns of social formation.

What is a constitution?

One question necessarily and invariably faced by sociological inquiry into constitutional law is the question, *what is a constitution?* Indeed, this question has recurrently punctuated and stimulated the development of inquiries into public law that employ a sociological perspective. This question obtained central importance in the first aftermath of the French Revolution and its processes of constitutional formation in 1789/91: at this time, the definition of a constitution of itself separated theorists pursuing a normative orientation from theorists adopting a more sociologically oriented interpretive disposition. The Enlightenment in general was marked by a specific conception of political modernity, and it widely pressed the claim that the possession of a

formally prescribed and written political constitution was a hallmark of progressively realized or *enlightened* modern societies. The first self-designated theorists of modern constitutionalism in fact tended flatly to deny that societies without single written constitutions possessed constitutions at all, and they saw societies without such documents as archaically structured and residually despotic.¹⁰ This view, then, has been diversely reflected in conceptual-historical literature on constitutionalism, which often implicitly replicates the strict distinction between societies that possess and societies that do not possess constitutions – or at least between societies marked by modern and societies marked by pre-modern constitutionalism.¹¹ The earliest proto-sociological theories of the constitution, in contrast, were driven by a critical response to such clear distinctions, and they promoted a more nuanced, and historically variable, sense of a society's constitutionality and of the historical sources of its normative structure. Many theorists whose work anticipated the first emergence of legal sociology reacted to the constitutionalism of the French revolutionaries by denouncing as reductive the insistence that a constitution could only take the form of a single written document or a single catalogue of rights,¹² and they argued that all societies incorporate a particular, organically evolved legal order and a factual constitution.¹³ More elaborated sociological analyses of the constitution subsequently also tended to dismiss the claim that there existed a clear distinction between societies with a written constitution and societies without a written constitution, and they viewed elements of constitutional order – rights, separated powers and so on – as evolving elements of society's inherent ethical structure.¹⁴ More recent sociological interpreters have also usually accepted latitude in the definition of the constitution (Luhmann 1991: 179).

The concept of the constitution proposed in this book builds on earlier sociological taxonomies. It suggests that, long before the advent of

¹⁰ Art. 16 of the French Declaration of Rights (1789) stated simply, 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.'

¹¹ See McIlwain (1947: 81). It is claimed in further important literature that the concept of the constitution was an innovation specific to early modernity (Stourzh 1977: 304).

¹² This was exemplified by Bentham (2002) and Burke (1910 [1790]).

¹³ See Savigny's claim that the 'production of law' reflects a process of natural-historical self-interpretation, in which the 'natural whole' or the integral spirit of the people externalizes its defining characteristics and its specific rationality in the form of law (1840: 21–2).

¹⁴ This is implicit in Durkheim (1950: 92–3).

formally written constitutions, it was customary for societies to comprehend themselves as possessing a distinctively normative constitutional shape, which could not be exclusively reduced to a single body of written precepts. The strictly constrained account of the constitution is thus seen here as a projection of normative analysis, which revolves around a highly controlled construction of its object and its legitimating functions. A sociological approach to the constitution, in contrast, needs to resist the suggestion that there occurred a radical caesura between early modern and modern constitutions.¹⁵ Indeed, it is fundamental to sociological examination of constitutions that, in perceiving constitutions as documents reacting to conditions within a broad inner-societal environment, it opposes purely textual definitions of constitutionality, and it is prepared to recognize societies as possessing a multiple and diffuse constitutional apparatus. For normative analysis, it is clear that a constitution comprises a body of norms that (either adequately or inadequately) prescribes legal conditions for the public use of power and forms a focus for normative debate about the self-conception of society as a whole. For sociological inquiry, however, it is always possible that a society might have a normative constitution that evades simple forms of prescription and cannot easily serve as a singular focus for society's self-reflection or normative self-construction. Indeed, a sociological approach might observe constitutions as evolving through multi-levelled historical/functional processes, and it might identify the suggestion that categorical disjunctures occur in the formation of constitutions as revolving around a simplification of society's functional structure.

In consequence, this book proceeds from a definition of constitutions that denies that (for example) 1689, 1787–9 or 1789/1791 formed points of categorical discontinuity in the legal-normative history of modern society. For this reason, the book observes pre-modern and early modern societies as possessing documents or legal arrangements that can clearly be classified as constitutions and that pre-empt, and respond to the same functional and general societal pressures as, post-Enlightenment constitutions. On the account offered here, in sum, a constitution has the following features. It is a legal order impacting on the exercise of political power that (a) contains an effectively established presumption of public rule in accordance with principles or conventions, expressed as law, that

¹⁵ It has recently been argued that in pre-1789 France the view was common that, although France lacked a written constitution, the 'basic structure of society' could be viewed as possessing an informal constitutional force (Vergne 2006: 127).

cannot easily (i.e. without societally unsettling controversy) be suspended; (b) is designed to constrain or restrict egregiously mandatory use of power in both public and private functions; (c) allocates powers within the state itself, and comprises some form of popular/political representation in respect of questions perceived as possessing importance for all politically relevant sectors of society; and (d) expresses a legal distinction between the form of the state and those persons assuming authority to borrow and enforce the power stored within the state. To this degree, this book uses the more expansive definition of the constitution common in much classical sociological literature, and it defines the constitution in terms that can be applied to many societies in different historical periods. In parallel to this, however, this book also limits its view of the constitution by claiming that a constitution, although often a socially embedded legal order, is characterized by the fact that it refers primarily to *the functions of states*, and it establishes a legal form relating to the use of power by states, or at least by actors bearing and utilizing public authority. Some contemporary legal sociology has persuasively argued that private laws obtain quasi-constitutional force (Teubner 2006): indeed, this view was central to the earliest works of constitutional sociology.¹⁶ However, the constitution is defined here as a distinctively political structure, originally and enduringly typified by its function in producing, restricting and refining power utilized by states. The constitution is thus observed as a restrictive order of public law that possesses a distinct normative valence for those who use and those who are subject to political power: it is an institution that allows societies to construct and articulate power as the power of states. As such, the constitution may assume a high level of variability across different societies, and it may (quite obviously) exist at different levels of articulation and evolutionary prominence. Naturally, in medieval societies, which possessed only a highly uncertain distinction between private law and public law, the form of the constitution differed markedly from the state-centric model prevalent in modern differentiated societies. Moreover, many constitutional documents or aggregates of such documents in medieval societies possessed an incomplete normative structure, and they left many gaps in the legal apparatus of the state and were scarcely applied across all regions included in a particular society.

¹⁶ The use of private-law concepts to articulate a theory of constitutions was central to the first historicist reflections on the public law of the Enlightenment. For an example, see Hugo (1823 [1792]: 77).

Nonetheless, the definition of the constitution as a (however incomplete) order of *public law* (that is, a legal order describing conditions for the use of political power) allows us, ideal-typically, to examine the emergence and function of constitutions across a large number of societal settings, and it clearly specifies the distinctively political structure of societies that have constitutions. The constitution, in short, is observed in this book as a gradually evolving and highly variable social phenomenon, extant to different degrees in different societies. Yet it is determined by the fact that, both internally and externally, it creates legal conditions for the use of political power, and it possesses a certain primacy above other elements of the law and the political system.

In setting out this definition of a constitution, it is naturally impossible for this work to consider every single important constitution, either pre-modern or modern, and a high degree of selectivity has been exercised in deciding which constitutions should form objects of analysis. The guiding concern in this respect has been to identify processes of constitutional formation which condense and illuminate deep-lying and widespread transformations in society in different historical periods, and to analyse most extensively those constitutions that reflect substantial shifts or developmental patterns that are common to, or prefigure tendencies in, many societies. In particular, in attempting to elucidate how constitutions were first formed as objects that were internally interwoven with the construction and legitimation of political institutions, the book focuses on processes of historical evolution in societies that produced the prototypes for modern constitutions and modern states. It thus concentrates on decisive and characteristic periods of constitutional formation in European societies, and its primary objective is to clarify the social causes and functions of constitutions in the major European states.

A note on method and central concepts

This book deviates from most research on constitutions in that it proposes an approach to constitutional analysis that is at one and the same time historical and functional. In this respect, it places itself in a distinctive relation both to historical-political sociology and to more conventional functionalist sociology, and it combines elements of both methodologies to propose a method of constitutional inquiry that might be classified as *historical functionalism*. That is to say, central to the book is an endeavour to understand constitutions both as highly varied outcomes of inner-societal processes of historical/political

formation, yet also to appreciate constitutions as institutions through which emergent European societies, in relatively generalized fashion, regulated and adapted to their underlying functional dimensions and exigencies. This methodological aspect of the book uses an account of the functional structure of modern societies, elements of which, in very broad terms, are shaped by the theory of European modernity outlined by Niklas Luhmann. In particular, the book employs select aspects of Luhmann's theory to show how constitutions have evolved through a process of historical *functional differentiation*, which, at a certain level of generality, decisively determined the overarching form of modern European society. Further, it adapts from Luhmann the view that, as separate realms of social exchange are differentiated, they elaborate meaningful concepts to unify and give *positive* (that is, internally abstracted) consistency to their communications. On this basis, it claims that constitutions have assumed legitimating prominence in modern society through their efficacy in enabling societies at once objectively and positively to reflect and control the differentiation of their diverse spheres of social exchange, and to simplify and consistently to distinguish the complexly interwoven functions resulting from their differentiated and pluralized evolutionary form. In this respect, the book suggests that the formation of constitutions has been caused by relatively generalizable evolutionary conjunctures, which, with inevitable differences, tend to characterize societies marked by a *pluralistic functional structure*. Naturally, this theory of socio-functional differentiation as the source of constitutional formation is not posited as a singular or universally identical causal source for the construction of constitutions, and throughout the book close attention is paid to salient variations of cultural and developmental structure in different societies. Nonetheless, the book observes that the pluralistic functional reality of modern societies has effectively necessitated the evolution of constitutions as instruments for the sustainable organization of political power.

In proposing a historical-functionalist method, however, this book moves away from much more conventional functionalist analysis and much historical/political sociology (including that of Luhmann) in that it places primary emphasis on the normative dimensions of modern society, and it is underpinned by a sociological analysis of *legal norms* as structurally central dimensions of modern social formation. In particular, the book is based in the argument that highly differentiated societies tend to require complexly articulated and prominent legal norms in order to stabilize and conduct their differentiated functions, especially in

the political sphere, and that constitutions act as institutions that provide such normative political articulation for societies. In this respect, the book stands outside the main conflict-theoretical canon of historical-political sociology. It rejects the originally Weberian notion of politics as a socially dominating struggle for power (Weber 1921: 852), and it rejects the widespread historical-sociological view of political institutions as social forms whose origins reside solely (or largely) in conflict between social actors over the monopoly of power, usually consolidated through domination of the fiscal-military resources in society.¹⁷ However, the book also rejects the main lineage of functionalist method, which is also characterized by extreme normative relativism.¹⁸ As mentioned, one methodological purpose of the book is to examine and explain the prevalent normative configuration of modern societies, to comprehend the reasons why societies produce normative institutions, and so to illuminate constitutions as essential components of normative societal organization. To this end, the book seeks to outline a theory of norms to unsettle the conceptual dominance of analytical theory in normative inquiry: it attempts to apply a sociological method to show how modern societies tend, for functional motives, to promote the emergence of relatively generalized societal and legal-political norms, and how this can be identified (and even advocated) without reliance on hypostatically rationalist patterns of deduction and prescription. In

¹⁷ See as primary examples Tilly (1975); Tilly (1985). For a more normatively inflected account of this, see Michael Mann's theory of *infrastructural power* (1984: 189), which views the growth in the state's power to 'penetrate civil society' as marked by a decline in its purely coercive status. For a more cultural perspective, see Corrigan and Sayer (1985). Yet, across methodological divides, the state-building process is still viewed as essentially one bringing about a conflictual convergence of society around a dominant bloc. I have assessed the literature in the classical canon of the historical sociology of states elsewhere (Thornhill: 2008), and I do not wish to repeat these points. Suffice it to say, though, that, in general, the historical-sociological account of the state revolves around the assumption, first promoted by Weber, Hintze and Schumpeter, that European states were formed as groups of actors who arrogated to themselves a monopoly of violence in society, and that the assumption of this monopoly is firmly tied to the need of states to gain fiscal supremacy in order to fund wars. In short, the *fiscal-military* paradigm in analysis of state building remains dominant. Recently, see Hopcroft (1999: 90); Kiser and Linton (2001).

¹⁸ Naturally, the works of both Durkheim and Parsons contain an implicitly normative theory of social construction. But the latest position in this lineage, that of Luhmann, is resolutely anti-normative. Simply, Luhmann stated that political power has no necessary precondition *ab extra* (1981: 69). He added later that the legitimation of power is always a communicative act of 'self-legitimation' that occurs within the political system, and it 'excludes legitimation through an external system' (2000: 358–9).