

privileges of his natural born subjects within the kingdom of Great Britain.’ These rights were attached in particular (Art. 3) to defence against fiscal expropriation, and, accordingly, the Declaration stated: ‘That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.’ Negative rights concerning property and taxation, in short, became the axis around which the legitimacy, not only of the colonial fiscal system, but in fact of the entire legislative order of the English parliament in America, was observed and contested (Mullett 1966: 83; Kruman 1997: 10, 93). The first stage of independent institution building in America was founded in a self-protective legalism, and it was born from a highly defensive and juridified climate of debate,²⁸ which insisted on rights of institutional autonomy, not primarily as positive expressions of political activity, but as institutes for preserving historical liberties against the power of imperial government.

This essentially defensive concept of rights was also reflected in the earliest state constitutions of America. These constitutions were commonly drafted, under endorsement of the Continental Congress, as documents that accentuated earlier rights guaranteed under English law and emphasized the prohibitive dimension of rights to construct an alternative to colonial rule by the British crown. In particular, these constitutions typically proceeded from an idea of the legitimate state based in a Lockean defence of rights of equality, freedom and proprietary integrity. This was evident in the resolutions of the First Continental Congress (1774), which derived the rights of ‘the inhabitants of the English colonies in North-America’ both from ‘the immutable laws of nature’ and from ‘the principles of the English constitution’. The first resolve of the Continental Congress justified the rights of the colonies by stating that the first settlers ‘were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England’. The classical example of this was the 1776 Virginia Declaration of Rights, which became the basis for many subsequent catalogues of rights. Article 1 of this Declaration stated: ‘That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest

²⁸ Speaking of America, Burke famously mused: ‘In no country, perhaps, is law so general a study’ (1981 [1775]: 123).

their posterity.’ Notably, the more defensive quality of rights was visible in the fact that in many constitutions rights under English law were specifically invoked and preserved. This was the case in the first declaration of independent sovereignty, that is, the Mecklenburgh Resolutions of 1775. Article III of the resolutions stated that ‘every one of our former laws’ was still valid, but that ‘the Crown of Great Britain’ could not be seen as ‘holding rights, privileges, or authorities therein’. This principle was, by way of example, repeated in the 1776 constitution of Delaware (Art. 25), which stated that the ‘common law of England . . . shall remain in force’ unless it was ‘repugnant to the rights and privileges’ contained in the constitution and the principles that it protected. The four constitutions written prior to independence in 1776 in fact specifically provided for a reconciliation with the British crown (Tarr 1998: 67).

In these primary respects, early constitutionalists in revolutionary America identified in rights a broad function similar to that possessed by rights in the English context before the Civil War. That is to say, rights were used to restrict sovereign power (in this instance, the power, not solely of the British king, but also of the king’s parliament in Westminster), and to insist on customary entitlements as immune to political encroachment. Indeed, this process began, in distinct form, to re-express some of Coke’s injunctions against king and parliament in the first decades of the seventeenth century. At the same time, however, this restrictive concept of rights also gradually promoted a political ethic, which, in separating American rights from their English provenance, began – inevitably – to denounce the English creed of virtual representation in parliament, and claimants to defensive rights in America progressively expressed a more active demand that they should assume some of the sovereign statutory powers attributed to the Westminster parliament (Selsam 1936: 170; Wood 1969: 176). Although cautious in origin, therefore, doctrines of rights in America began to emphasize local sources of authority and legislative power, they imagined the state as formed by particular and individual experiences of participation and freedom, and they ultimately conceived the legitimate state as a repository of directly represented *national* or even *popular* sovereignty, which presupposed representative autonomy for the American colonies (Pole 1966: 537; Wood 1969: 383; Reid 1989: 33, 145; Kruman 1997: 159). Defensive political controversy over fiscal rights, in short, also generated principles of shared identity and political community in revolutionary America, it unified bearers of fiscal grievances and claimants to singular legal protection into one increasingly political group of actors, and the

demand for rights under English law incrementally redefined groups of self-protective American property owners and taxpayers as a formative, and practically sovereign, political community. As an example of this, among the first wave of state constitutions, the rights contained in the 1776 constitution of Pennsylvania, the most fully republican of all the revolutionary documents, came close to expressing a comprehensive doctrine of constituent popular sovereignty, cemented in a supreme unicameral legislature (Selsam 1936: 191; Williams 1989: 551–5). This constitution stated (Art. III): ‘That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.’ It added (Art. IV): ‘That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.’ Other state constitutions in the first wave of constitution writing up to 1777, although normally replicating the split legislature of the British state, proceeded from the assumption that ‘all political power is vested in and derived from the people only’ and that the people of each state ‘ought to have the sole and exclusive right of regulating the internal government and police thereof’.²⁹

In revolutionary America, in sum, rights acted as elements of state construction and political consolidation in two quite divergent ways. Rights were configured both as negative, defensive and even customary checks on state power and, equally, as positive, formative expressions of national cohesion and popular engagement, and these distinct dimensions in rights joined to form a powerful constitutional impulse towards independent statehood. In fact, these two dimensions of rights ultimately performed distinct, yet closely interdependent, structural functions, which together served to cement and intensify the political power of the American states, and ultimately of the new republic itself. This was evident, initially, in the negative status of rights.

First, the negative reference to rights in the American revolutionary constitutions meant that emergent centres of political authority, both at state and later at federal level, could be separated out of the colonial legal system, and directly legitimized both through and in contrast to this system. The fact that the new states could construe themselves as defenders, against the British crown, of traditionally established and sanctioned rights meant that these states possessed from the outset a higher-norm

²⁹ Arts. 1 and 2 of 1776 constitution of North Carolina. See also Arts. 1 and 2 of the 1776 constitution of Maryland.

vocabulary through which they could organize themselves as institutional bodies ‘distinct from and superior to’ the imperial government against which they reacted (Wood 1969: 266). In this respect, rights, construed as the defensive starting position for the formation of the political system, allowed colonial states to develop rapidly as institutions focused on a distinct and apersonal set of responsibilities, and as capable of justifying these functions in emergent and unpredictable settings (Douglass 1989: 133). This, in turn, created a legitimating environment in which power could be transferred in relatively simple fashion from the English parliament to colonial assemblies and, later, to the federal state, and it meant that a set of established principles could be used to insulate the state-building transition against extreme disorder or loss of legitimacy. Indeed, the negative articulation of common-law rights played a vital role in the state-building process in America because it made available a pattern of *ex-nihilo* validity for the American states. This had the result that states could use rights to internalize explanations of their power that were at once constant, recognized, and yet also highly fluid, and through reference to these rights states were able rapidly to legislate at a high level of independence (Wood 1992: 252). The fact that American states could refer to a tradition of rights-based judicial opposition to the English crown within England thus greatly strengthened their impetus for independence, and it offered a legal structure in which states could pre-empt challenges to their legitimacy and generally consolidate their power.

Second, the defensive conceptions of rights integrated in early American state constitutions fulfilled the function that they checked unregulated use of authority by the new independent states, and they propitiously shaped the inner institutional architecture of the polities established at this time. In the first instance, the emergence of rights-based constitutions helped to construct particular states with consistent procedures for fulfilling their most essential functions. For example, most state constitutions provided for regular judicial procedures, entitlement to fair trial, equal security under law and personal protection from encroachment by state power. Equally importantly, most constitutions also provided uncontroversial instruments for raising revenue through parliamentary agreement.³⁰ To exemplify both these points, the 1776 constitution of North Carolina contained guarantees for judicial

³⁰ As one example, see the provision in the 1776 constitution of New Hampshire: ‘That all bills, resolves, or votes for raising, levying and collecting money originate in the house of Representatives.’ Further, see the 1776 constitution of New Jersey (Art. 14): ‘That the

regularity and equality (Arts. 7–14), consensual taxation (Art. 16), and freedom of conscience (Art. 19), and it prohibited all legal privilege (Art. 22). Likewise, the 1776 constitution of Pennsylvania set laws for administrative accountability (s. 22), independent judicial procedure (s. 23), judicial equality and fairness (s. 25), and legally regulated fiscal levying (s. 41). In each of these respects, rights performed the vital function that they simplified the use of political power, and they clearly articulated and controlled the points of separation between the state and other parts of society. In addition to this, however, these constitutions also progressively provided for an inner rights-based differentiation of state functions.³¹ Indeed, in the American context rights instituted a principled commitment to the *separation of powers*, and, although this separation was only haphazardly organized in the earliest state constitutions (see Corwin 1925: 514–15; Tarr 1998: 76–7), rights were gradually applied to mark out the limits of competence for judiciary, legislature and executive, and to prevent both legislature and executive from exceeding certain allotted functions. This was accomplished through rights to fair trial, which presupposed the closure of judicial process to political intervention, and rights to freedom of movement, expression, assembly and legislative participation, which placed legal limits on the powers of the executive in relation both to the legislature and the judiciary. In this respect, rights gradually brought the functional benefit that they enabled states to segregate their judicial procedures from the executive, and to protect processes of legal inclusion from volatile

townships, at their annual town meetings for electing other officers, shall choose constables for the districts respectively; and also three or more judicious freeholders of good character, to hear and finally determine all appeals, relative to unjust assessments, in cases of public taxation; which commissioners of appeal shall, for that purpose, sit at some suitable time or times, to be by them appointed, and made known to the people by advertisements.' See also the 1776 constitution of Pennsylvania (s. 41): 'No public tax, custom or contribution shall be imposed upon, or paid by the people of this state, except by a law for that purpose: And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burthens.' Similar clauses are found in most early constitutions.

³¹ For example, the Declaration of Rights in the 1776 constitution of North Carolina stated (Art. 4): 'That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other.' This insistence on the separation of powers became stronger after 1776. Note the clause in the 1786 constitution of Vermont (Ch. II: VI): 'The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.'

political pressures. Moreover, this arrangement meant that rights allowed states to integrate the sovereign body of citizens in a discrete and controlled fashion in an institutional setting (the legislature), which was formative for the entire system yet whose direct consumption of power was limited. Furthermore, through the separation of powers, rights also enabled the state to ensure that final political authority was concentrated in a distinct functional location (the executive) which was withdrawn from day-to-day consultative and judicial exchanges. On each point, the separation of powers created an institutional order in which no one part of government was fully responsible for producing political legitimacy, and no part of government was fully and exclusively central to the political process.³² The simultaneous triadic convolution and partition in the functions of the state established a highly effective system for managing political power. It cemented an administrative order in which the state as a whole could distinguish itself from the sum of its parts, and thus reproduce its power at a heightened level of internal legitimacy. Further, it enabled the state to guard against the possibility that one of its components or one group of persons using its power might be forced to provide all legitimacy for its acts or be burdened with an excess or unsustainable volume of power. In their implications for the inner structure of early American states, rights fulfilled their more typical functions in negatively securing state power, and they both clearly simplified the relations between state power and other social functions and distinctively articulated the internal boundaries in the mechanics of state power.

At the same time, however, in the revolutionary American setting the positive dimension of rights was also central to the process of state construction. In particular, the fact that the idea of rights was increasingly correlated with the idea of the sovereign nation, and that rights were perceived as entitlements to equal representation in the state and its legislative functions, instituted a formula for power that complemented the negative aspect of rights and contributed decisively to the structural consolidation of post-colonial polities in America. In particular, the foundation of rights in a representational doctrine of equal national

³² This was not spelled out in all state constitutions. But, for example, I/V of the 1780 constitution of Massachusetts declared that 'All power residing originally in the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, are the substitutes and agents, and are at all times accountable to them.'

sovereignty also helped to make it possible for states to account for themselves as authorized by a highly abstracted and internal source of legitimacy, and this, together with the negative reference to rights, provided a secondary *ex-nihilo* justification and reinforcement for state power. This principle was already clear in the Mecklenburgh Resolutions, whose authors defined themselves as representing ‘a free and independent people’ who ‘of right ought to be a sovereign and self-governing association, under the control of no power, other than that of our God and the General Government of the Congress’.

Most importantly, the concept of national sovereignty permitted states to internalize a source of authority which they could use to accompany all applications of their power and all acts of political inclusion, and it made it possible for states to apply their power at a high level of abstraction across society. In reflecting and describing themselves as national-sovereign actors, in fact, states began to envision themselves as qualified to legislate for persons which they already factually *included*, and so to circulate power through society as effectively produced and authenticated by those to whom it was applied. In this regard, the idea of rights-based national-popular sovereignty in early America became a crucial term both for constructing political power as an inclusive societal resource and for promoting its iterable transmission across society. The fact that power could explain itself as invariably formed by those persons to whom it was applied substantially enhanced the inclusionary dimension and perceived validity of power, and – in particular – it heightened the ease with which power could be formed and employed in uncertain transitional contexts. The concept of national or popular sovereignty, then, became foundational for the particular state constitutions, which, although reluctant to support universal male suffrage, widely professed to draw power from the sovereign people and to pass laws immediately authorized by, and so factually including, their subjects. Although up to 1784 only the constitution of Massachusetts (1780) was ratified by the people through any actual show of consent, popular sovereignty was recognized as a legitimating general principle for the new states. Again, this was most emphatic in the constitution of Pennsylvania. In its Declaration of Rights, this constitution stated (Art. V): ‘That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community.’ It added to this the principle that ‘the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal’. The direct

sovereignty of particular states was also supported by the Articles of Confederation (ratified 1777–81), which, in Article 2, strongly protected the immediate exercise of sovereignty of single states.³³

Both the negative and positive dimensions of rights in the American revolutionary context proved to be vital elements in the production and construction of political power for the transitional society of America after its revolutionary break with Britain. Most crucially, however, it needs to be noted that in early America neither negative nor positive principles became politically formative in undiluted fashion. On the contrary, the positive ideal of national sovereignty was always dialectically checked and filtered by negative rights, and it was in negative conjunction with rights that the positive principle of national self-legislation assumed effective foundational status for new American states. Indeed, the defensive functions of rights served constrictively to moderate the more volatile implications of the idea of national sovereignty, and the primary negative rights underlying the American polity contained institutes that selectively preserved the integrity of the emergent state apparatus and obstructed tendencies towards precarious over-inclusion stimulated by principles of wholly integrated sovereignty.

To be sure, the very earliest constitutions usually, in the spirit of Tom Paine's republicanism, expressed bold proclamations of popular sovereignty and anticipated only weak constraints on the popular legislature.³⁴ Moreover, not all early state constitutions contained bills of rights, or consistently separated judicial, legislative and executive functions, and many imputed a high degree of sovereign latitude to legislative institutions. It has been noted that the commitment to preserving inviolable property rights in the states was originally weak (Bruchey 1980: 1157; Treanor 1985: 699). Nonetheless, after 1776, the original cautious functions of rights became more and more pervasive in revolutionary state construction, and in most states rights were increasingly used to limit the legislative powers of government and to place mandatory constraints on the sovereign authority assumed by parliamentary bodies. The state constitutions written after the Pennsylvania constitution of 1776, in fact, tended specifically to use rights to stabilize the political apparatus and to measure and curtail the sovereign powers accorded to the legislature: constitutions drafted from 1777 on widely reflected a move away from the simple republicanism that infused

³³ On controversy over this and the ultimate shift from state to federal sovereignty, see Jensen (1940: 161, 176, 239; 1950: 43).

³⁴ For comment see Tarr (1998: 65, 86–7).

the first wave of state constitutions (Williams 1988: 416–20). For example, seminally, the 1777 constitution of New York contained provisions for a strong executive to balance the legislature (Arts. 17–19). The 1777 constitution of Georgia defined rights as institutes to restrict sovereign legislative authority.³⁵ Similarly, the 1777 constitution of Vermont (II, 8) stated that members of the legislature ‘shall have no power to add to, alter, abolish, or infringe any part of this constitution’. The 1780 constitution of Massachusetts (Part 2, Chapter 1, Art. 4) only allowed the legislature to establish ‘orders, laws, statutes, and ordinances, directions and instructions’ as long as these were expressly ‘not repugnant or contrary to this constitution’. Throughout the later period of constitution drafting, additionally, bills of rights were widely used in a more circumspect fashion, and they became ‘longer, more detailed, and stronger in their prohibitions’, thus paving the way for the more proportioned model of internally balanced governance advocated by the Federalists (Lutz 1980: 68). This was not a universal tendency, and even some post-1787 state constitutions, notably the 1790 constitution of Pennsylvania, still espoused a strong theory of popular sovereignty. Even in these cases, however, rights were usually employed with restrictive functions in mind. In the second wave of state constitution drafting, therefore, the principles of negative constrictive rights and positive popular sovereignty were balanced against each other, and rights were routinely employed to restrict access to legislative power and to limit the mass of exchanges over which legislators were allowed to pass laws. Indeed, earlier American state constitutions ultimately constructed national-legislative sovereignty around the representation of *pre-defined rights* (i.e. rights regarding property, taxation, judicial security, etc.), and they ensured that representative duties of legislation fell to those with an interest in preserving rights that had received prior sanction (i.e. that they were owners of property).³⁶ In this respect, the early American constitutions gradually formed an organizing matrix that enabled most states at once to obtain legitimacy through wide claims to popular sovereignty, yet also, at the same

³⁵ Art. 7 declared: ‘The house of assembly shall have power to make such laws and regulations as may be conducive to the good order and wellbeing of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained In this constitution.’

³⁶ Note the declaration in the 1776 constitution of Pennsylvania (s. 17) that ‘representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty’. Note also the provision in the 1776 North Carolina constitution (XVI): ‘That the people of this State ought not to be taxed, or made subject to the payment of any impost or duty, without the consent of themselves, or their Representatives in General Assembly, freely given.’

time, to limit the factual inclusion of their constituents: that is, they implemented rights in a form that allowed emergent states both to reflect themselves as possessing inclusive legitimacy and authority, yet also to prepare and manufacture both the origin of their power and the social terrains to which their power was applied. In asserting that their positive sovereignty depended on negative protection of rights, therefore, states again used rights as an internal apparatus which extracted a construction of the state as a stable order of public law, but which also ensured that many exchanges in society were not defined as relevant for the political system, that social actions either covered by or indifferent to rights-based legal sanction were ordinarily excluded from power, and that state power – both in its source and its application – was only applied as a highly specialized and abstracted resource.

Rights, in sum, performed a threefold function of abstraction, differentiation and inclusion for new states in the revolutionary American setting. First, in expressing entitlements under inherited law, rights traced out lines of negative justification and higher-norm legitimacy and abstraction in the state. Second, in organizing procedures for judicial integrity, fiscal scrutiny and institutional specialization in the state, rights acted to effect processes of political exclusion and procedurally to delineate the state's internal and external functional boundaries. Third, in promising powers of participation and national representation, rights allowed states, for the first time in modern history, to obtain legitimacy through the claim that they derived their positive power – their sovereignty – directly and exclusively from those persons subject to this power. Through this third inclusionary implication of rights, states began to explain themselves as using power generated by their subjects, and they obtained legitimacy by claiming that all addressees of power were integrated in and subject to power as *their own power*. In this principle, states obtained a dramatically heightened formula of abstractive inclusion for their power, and this enabled states to elaborate internal grounds for the ongoing reproduction and the evenly inclusive application of their power. It is noteworthy in this, however, that the divergent implications of rights were not elaborated as conflicting principles. In fact, these principles reinforced each other as related structural components of statehood. In particular, positive rights of national sovereignty, even in their first formulation, were not pursued in the direction of factually and comprehensively inclusive sovereign statehood. Instead, the inclusionary implications of national sovereignty were gradually qualified by the fact that sovereign powers of political formation

were policed by other rights: it was the coalescence of rights of sovereignty with other particular (formal and negative) rights that made the enduring formation of state power in America possible. The American states were able gradually to construct themselves as independent political organs and to develop effective legislative competences because they sanctioned a precisely constrained interplay between the inclusive and the exclusive functions of rights, and, after the first ebb of revolutionary/democratic or republican fervour, they insisted that representation of the sovereign nation must be entrusted to agents whose delegated functions and legislative actions were prescribed and preformed through established rights. By founding their legitimacy in this dialectical fusion of sovereignty and rights, the American state constitutions developed a conclusive technique for managing the boundaries of the political system, and they evolved a device both for organizing and including the sources of their abstracted power and its legitimacy and for preselecting those exchanges that the state was required to incorporate.

Ultimately, these interwoven functions of rights culminated in the Federal Constitution itself. On one level, to be sure, the Federal Constitution assimilated the positive implications of rights. Although it was less able to mobilize pure-republican legitimacy than the individual state constitutions, the concept of popular sovereignty, in modified form, was placed at the centre of the Federal Constitution. The Federal Constitution contained an implied idea of national citizenship, national equality under law (Art. 4.2), and national representation, and, although it recognized some state rights as limits on federal power, it drew its originating legitimacy from the same positive principles as state constitutions. Despite this, however, the defensive construction of rights again played a substantial role in the construction of the federal state. As is well documented, the revolutionary period in America was marked by a deep conflict between parties urging the formation of a strong federal state and those parties favouring the concentration of sovereignty in particular states. In this setting, it was initially the opponents of the federal state, the Anti-Federalists, often repeating earlier arguments directed against the Westminster parliament, who adopted a defensive conception of rights and were keen to promote a Bill of Rights to place checks on federal authority. In exemplary fashion, for instance, Luther Martin argued that a Bill of Rights would 'serve as a barrier between the central government and the respective states and their citizens' (Mason 1964: 77). The Federalists themselves only gradually came to view a formal Bill of Rights as necessary, and a separate catalogue of rights