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Rights and constituent power in the global constitution

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Abstract

Using an approach derived from sociological functionalism, this paper proposes a distinctive reconstruction both of the history of constitutionalism and of the changing form of constitutional law in global society. It argues that constitutional norms form adaptive principles for stabilising the inclusionary legal and political functions of society. Classical patterns of legal/political inclusion tended to rely on democratic forms of will formation (constituent power). Contemporary patterns of legal/political inclusion rely, in contrast, on rights. The shift in emphasis from constituent power to rights forms the constitutional foundation for the emerging global political system.

I. Introduction

This paper uses an interpretive method derived from sociological functionalism to propose a distinctive theory of constitutional norms, addressing these norms both in their historical formation and in contemporary society.[1] The paper is shaped by the claim that, in its more standard norm-based methodologies, constitutional debate examines its primary objects in a rather simplified, surface-level perspective. In particular, it claims that normative constitutional analysis commonly approaches constitutional norms, without regard for their submerged, internal meanings, as simply given phenomena, distilled from objective social practice and objective social deliberation. As a result, normative analysis of constitutions has certain significant shortcomings. On the one hand, normative constitutionalism struggles to account for its objects (constitutional norms) in penetrating or even comprehensively plausible fashion; indeed, it is often prevented by its use of basic concepts from obtaining a full construction of the objects that it discusses. As it views constitutional law as a body of norms 'derived from certain fixed principles of reason' and 'directed to certain fixed objects of public good' (Tomkins, 2003, p. 5), normative inquiry usually constructs norms rather hypostatically against their social origins, and it fixes its analysis of norms around questions of moral institutional preference and rationally justifiable adjudication. It thus struggles to understand the *inner meaning of norms* and it does not account for the functional reality that constitutional norms acquire in the societal environments in which they are produced. On the other hand, more problematically, normative inquiry struggles to make sense of changes in constitutional vocabulary, it tends to see one set of constitutional norms as *categorically distinct* from alternative or historically antecedent norms, and it closes its view to the continuous social processes that are reflected through constitutional normativity. For example, it omits to consider ways in which new constitutional norms might refract underlying transformations of societal structure; it does not consider how these norms might reflect changes in the environments to which law needs to be applied and in which it

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needs to be legitimised; it is curiously inattentive to the nexus between changing norms, changing social functions, and changing demands for law, power and legitimacy. As a result, standard constitutional literature lacks a broad perspective to capture new constitutional norms, and it observes new public-legal norms without comprehension of their sociological foundation. Very little analysis of constitutionalism cuts through the normative surface of constitutions and examines constitutional norms as abstractions of social process.[2] Very little analysis of constitutionalism allows us to conduct debate about constitutions except at a formal level of adjudication. These weaknesses of conventional normative theory have particular importance in the context of contemporary society, in which the basic fabric of constitutional order is exposed to rapid modification and new forms of *global constitutionalism* are rapidly evolving.[3]

In its critique of normative lines of constitutional inquiry, this paper makes a series of revisions to more conventional lines of constitutional reflection. First, this paper aims to explain the primary elements of classical constitutional theory and practice from a position that is functionally internal to the systemic structure of modern society. It examines the classical norms of constitutional legitimacy (e.g. constituent power, subjective rights, equality before the law, and democratic self-legislation) in a sociological perspective, explaining how the rise of these concepts was reflexively attached to changing systemic functions in society. In particular, it observes these concepts as *internal adaptive self-constructions* of society's different systems – especially the legal/political system. These norms, it is agued here, evolved, not – or not solely – as meaning or realities situated outside the law and politics, but rather as formulae *within* the legal and political exchanges of society. As such, they originally enabled the political system to adapt to, and to abstract itself in relation to, changing societal structures, and autonomously to perform its functions (that is, to produce political power, and to distribute power through acts of legislation) in the context of increasingly differentiated societies. This paper thus interprets classical constitutional norms, initially expressed in the constitutional revolutions of the Enlightenment, as constructs which societies generated to underpin their political exchanges, and to concentrate these exchanges on a defined number of differentiated societal functions. On this basis, second, this paper examines the ways in which contemporary global society is evolving a new *transnational constitutional form*, through which the norms of classical constitutionalism lose their immediate functional purchase. Rather than describing a deep rupture with classical constitutionalism, however, it argues that, like classical constitutions, this emergent constitutional order can be best interpreted as an adaptive dimension of the political system, which makes it possible for contemporary societies to produce and transmit power across the increasingly complex and highly variable, often transnational, interfaces which they contain. In this respect, the paper addresses deep, albeit half-submerged, continuities between the norms of classical constitutionalism and the norms of global constitutionalism, and it seeks to provide a sociological framework for examining global constitutional norms.

The functionalist method employed by the paper is based to some degree on the theory of social semantics and functional differentiation developed by Niklas Luhmann, especially as this theory concerns the political system of modern society (see Luhmann, 2000, pp. 319–370; 2008, p. 148). The method underpinning the paper differs discernibly from Luhmann's approach on several counts. It does so because, unlike Luhmann, it observes the legal and political systems of modern society as essentially homologous. It does so further because, unlike Luhmann, it observes the legal norms produced in society as real norms, and it argues that different periods of societal formation produce and *integrally depend upon* very distinct *structural norms*. On the analysis

2 For very important recent exception to this see Brunkhorst (2014).

3 See Part III below.

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proposed here, certain norms are indispensable for certain historical *époques*, and they are not, as for Luhmann, mere hyper-fictitious projections of inner-systemic communications. Nonetheless, the argument that public legal norms are generated, not through rational interpersonal deliberation, but within different social systems, has its origins in Luhmann's thought. The specific benefit derived from the use of a broadly Luhmannian approach is that it enables us to renounce the construction of constitutional norms as simply materialised principles, and we can penetrate the reflexive adaptive meanings contained beneath the literal surface of constitutional concepts. This in turn means that we can observe the societal pressures articulated through constitutional norms, and we can present a broad sociological analysis of the correlation between constitutional norms, changes in societal structure, and evolving societal demands for political power and law. In particular, this approach brings into view the role of concepts in stabilising societal structure, and it allows us to see the submerged functional meaning beneath the literal implications of normative claims. Overall, this approach creates a perspective in which we can interpret newly emergent expressions of constitutional normativity as part of deeper patterns of societal adaptation, in the context of embedded processes of systemic formation. In each respect, the paper proposes an encompassing theory of constitutionalism, both classical (national) and contemporary (global), as an account of the social construction of power, and it attempts to locate current analysis of *global constitutionalism* on more deeply reflected sociological foundations.

II. Constitutional concepts and society's functional structure

2.1 Constituent power

The doctrine of constituent power was perhaps the most central normative principle in classical constitutional theory. In varying ways, this norm was promoted as the basis of legitimate government through the English, American and French revolutions of the seventeenth and eighteenth centuries (Grimm, 2009).[4] In particular, the idea contained in this doctrine that legitimate political order is founded through the original exercise of a single popular will, which is located *prior to* the organic form of the political system, became vital to the normative logic of political-democratic self-legislation, through which modern society first explained its defining features of collective autonomy and socially inclusive institutional legitimacy. Long since the first construction of the constitutional/democratic state, in fact, the invocation of constituent power still remains both a symbolic instrument for conferring legitimacy on constitutional states and a norm by which the legitimacy of a constitutional state is typically evaluated (see Müller, 1995, p. 19; Maus, 2010, p. 28).

If we look beyond the positive realm of simply articulated norms, however, the importance of constituent power can be observed as one aspect of the adaptive structure of society, assuming resonance for a particular historical environment. Indeed, the importance of this concept arose, in part, because it expressed a conceptual reaction to a set of distinct sociological processes which impacted on the political form of early modern European societies. Beneath its normative content, constituent power appears – sociologically – as a concept which the political system of modern society produced *for itself*, and which, in its internalistic quality, played a key role in stabilising the distinctive political form of modern society at a defining moment in its emergence.

The sociological importance of constituent power qua norm is bound to the process of functional differentiation underlying the formation of modern society. From the outset, the theory of

4 On constituent power in the English revolution, see Pincus (2009, pp. 283–286). The classic expression of constituent power was formalised in revolutionary France (Sieyès, 1789, p. 79). Arguably, however, the purest expression of this concept was developed in the American Revolution (see Lafayette, 1839, p. 50; Thornhill, 2012, pp. 379–382).

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constituent power contained the implication that certain public norms emanated directly from the single and express will of the people, and these norms needed to be placed authoritatively at the origin and centre of all society's legal and political institutions (Malberg, 1920–22, pp. 490–491; Schmitt, 1928, pp. 21–1). This concept enabled the political system to propose itself as founded in the will of all society, and this imprinted an elevated legitimacy on institutions and actors attached to the political system. The political system was constructed as the repository of a socially inclusive *higher law*, and, as such, it acquired the authority both to introduce completely new laws (i.e. to eradicate consuetudinal laws and conventions), and to apply laws with equal and inclusive force across society (i.e. to insist that all persons, regardless of personal status, were evenly subject to the law). Through the invocation of constituent power as the source of political order, by consequence, all society became – at least in principle – subject to the same laws, and these laws were condensed around a clearly demarcated group of political institutions (a state). In these respects, the concept of constituent power, progressively enacted in the early constitutions created between 1688 and 1789/1791, reflected and intensified the wider process of differentiated political abstraction, centralisation, and consolidated institution building, which defined the sociopolitical order of most European societies and their peripheries in the eighteenth century. This concept gave potent impetus to the already advanced formation of an abstracted and centralised political system, able both to propose itself as the primary (sovereign) focus of political authority and positively and autonomously to impose legislation across all parts of society.

This role of constituent power was manifest in the way in which this concept was applied in the two main revolutions of the late eighteenth century. In revolutionary America, for example, the concept of constituent power was used to establish a legal/political order, which could apply generally inclusive laws across all society, and which had the force to prevail both over local authorities and momentary popular interests and demands. As it was enacted by constituent power, the Federal Constitution agreed in Philadelphia in 1789 became a repository of national (or popular) sovereignty, which was able to unify, and, at least notionally, to incorporate the diffuse territories contained in the new American Republic within a cohesive legal/political system.[5] Clearly, the Madisonian doctrine of popular sovereignty expressed during the Founding could easily accommodate the notion that singular powers of government were factually split between many different institutions, and were to be exercised *concurrently* by national and by state governments.[6] Yet, at the same time, the Federal Constitution articulated a fundamental overarching idea of the *law as national sovereign*, so that political organs with powers allocated under the Constitution could subject all parts of society to single legislative acts and to single judicial rulings (Farber, 2003, p. 22).[7] In revolutionary Europe, likewise, the theory of constituent power intensified the inclusive force of the political system, and it consolidated the political system as the source of the highest law-making authority in society. In Europe, the idea of constituent power was directed with particular sharpness against the multiple sovereignties and the localised or pluralistic normative design typical of the *ancien régime*. The rise of constitutionally formed statehood after 1789 meant that states could impose publicly authorised laws on local actors and institutions, so that islands of private governance in society (i.e. power based in corporate affiliation, status, custom, privilege and local or familial standing) were eradicated, and late-feudal monopolies of authority outside the state were

5 The intention of the Framers to create a centralised federal state, with relatively condensed sovereign powers, is quite clear in Art. VI.2 of the Federal Constitution. Obviously, mainly due to the rapid addition of new states, the American polity eventually became far less centralised than was first envisioned by the Framers.

6 See *Federalist* 46 in Madison, Hamilton and Jay (1987 [1787–88]). See further Fritz (2008, pp. 117, 151, 194); Amar (1987, pp. 1425, 1465).

7 Primacy of national law in the early Republic was cemented in the Judiciary Act of 1789.

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weakened.[8] As a result, states based in constituent power were far more effective than their authoritarian or purportedly 'absolutist' precursors in removing local or customary forces that had traditionally dragged against the centralised consolidation of legislative institutions.[9]

In revolutionary Europe, most specifically, the sociological implications of constituent power became most emphatic in the fact that this concept helped to eradicate the personalistic *gouvernement des juges*, which had formed a potent obstruction to the elaboration of socially dominant state structures in most European societies of early modernity.[10] Under many early modern governmental systems, the prevailing normative legal/order of society was largely defined by courts of law. Naturally, the composition and status of law courts varied from one proto-national society to another. In most European societies, however, members of the judiciary were entitled independently to make and apply law on the basis of inherited or venal privileges, without reference to any original or specifically declared justification, and they were able to exploit judicial privilege to secure their access to, and ultimately separately to arrogate, legislative authority.[11] This imprinted a highly acentric, pluralistic normative character on society as a whole, it militated against the consolidation of strongly differentiated state institutions, and it reduced the capacities for generalised legislation in society in its entirety. The rise of the concept of constituent power, however, allowed European societies to develop political systems which could cut across such jurisdictional pluralism, and this concept acted pervasively to abrogate the patchwork of judicial and legislative authority in European societies of the *ancien régime*.

In both America and Europe, in consequence, the construction of states based in constituent power did much to promote the abstraction of a differentiated, sovereign political domain in society.[12] Moreover, it greatly heightened the authority and the inclusive legislative force of state institutions.

2.2 Rights

Overall, the concept of constituent power expressed a vital structural centre for contemporary social order. However, the sociological potency of this concept was always closely – albeit often rather paradoxically – correlated with the concept of *rights*. Indeed, the status of constituent power as an

8 The preamble to the 1791 Constitution in France prohibited corporations. This followed earlier, unsuccessful attempts under the *ancien régime* to do the same thing. Notable amongst these was Turgot's edict (1844) to suppress corporations in 1776. Lucien Jaume states simply (1989, p. 50) that, due to its association with pluralistic rights, the 'term corporation was particularly reviled' in revolutionary France.

9 In most cases, constitutions continued – at a level of increased efficacy – the reformist, centralising policies previously pursued by absolutist states. Again the best example is France (see note 8 above). But similar processes were characteristic of most centralised European states up to the nineteenth century. The idea of nationhood underlying the Federal Constitution in the US was, in my view, quite clearly expressed in the Supremacy Clause (Beer, 1978, p. 12).

10 The opposition between the judicial corps and the central state was especially strong in France, where the main judicial bodies – the *parlements* – were centres of aristocratic privilege. For example, the background to the short civil war, the Fronde of 1648, was dominated by royal attempts to limit the autonomy of the *parlements* (Burdeau, 1994, p. 43). Later, in the build-up to the revolution of 1789, the monarchy threatened to establish a completely new legal profession (Burrage, 2006, p. 60). Early theorists of the state, notably Bodin (1986 [1576], pp. 45, 61), were intent on showing how a strong state presupposed the elimination of private judicial offices. Jaume (1989, p. 365) argues that the *parlements* acted to 'decentre royal sovereignty'.

11 The classic example of this is – once more – early modern France (see Mousnier, 1945, p. 622). However, in most European societies, private monopoly of judicial office persisted unto the middle of the nineteenth century. See, for example, the (failed) 1848/49 constitution of pre-unification Germany, in which (in §167 (1) and §174) it was considered necessary loudly to prohibit private courts.

12 One historian observes, tellingly, of eighteenth-century France: 'politics in the modern sense of the word did not exist' (Sonenscher, 1989, p. 46).

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inner structural principle for the nascent modern political system was dependent – inextricably – on its correlation with constitutional rights.

To be sure, a clear ambiguity attaches to the relation between rights and constituent power in classical constitutionalism. In many respects, constituent power and rights exist as conceptual antinomies (Colón-Ríos, 2011, p. 365; Dyzenhaus, 2012. p. 230). In the literal terms of classical constitutional doctrine, first, constituent power had to be exercised *before* all legal rights, and rights could only appear as legitimate if they were elements of *constituted* power: rights only became fully valid rights to the extent that they were actively willed by a prior constituent power.[13] Once constituted, then, rights acted as blocks on renewed exercise of constituent power, and they stabilised constituted authority against unbounded constituent acts. This second antinomy still remains palpable today, both in civil-law and in common-law jurisdictions.[14] If observed in its functional meaning, however, the relation between constituent power and rights in constitutional thought appears rather more dialectical. Even in classical constitution writing, constituent power was always internally shaped by, and in many respects proportioned to, rights, and rights and constituent power evolved together, in deeply interpenetrated form. The division between constituent and constituted power may have been clear in theory, but in the functional dimension of constitutions it was always blurred.

In the American Revolution, for example, the initial exercise of constituent power was expressly explained both as a claim to, and as an assertion of, a corpus of already existing (i.e. *constituted*) rights. Here, the original enactment of constituent power was understood as a show of resistance to statutes deemed *repugnant* to given common-law rights (i.e. rights of ownership, fair trial, religious belief, equal treatment under law), which had been transplanted from England and preserved within an inherited colonial constitution.[15] Colonial courts of law were in fact often instrumental in rejecting statutes issued in Westminster and so in inciting the assertion of constituent power; they typically did this by insisting on time-honoured rights as higher law, standing above the authority of the Westminster parliament (Surrency, 1964). In revolutionary America, further, as soon as the process of constitutional founding was concluded in 1789/1791, the will of the constituent power was increasingly relocated into the custody of constituted institutions – law courts. Courts gradually defined rights as primary, condensed articulations of the popular will that had created the constitution, and they invoked rights, in isolation from this will, as the authorising premise for subsequent legislation.[16] After 1789, courts began – albeit tentatively – to use rights to check the compatibility of statutes with the constitution, and they effectively used rights to define and regulate the interests in society that could (constitutively) be translated

13 Classical theories of constituent power as the expression of the general will were all clear about this point. See most importantly Rousseau (1975, pp. 243–244).

14 The antinomy between rights and democratic constituent power is accentuated in civil-law jurisdictions. Common-law systems might be more generally characterised by the view that 'some rights are inherent and fundamental to a democratic civilised society' and are thus seamlessly expressed through democratic legislatures (*R (Daly) v. Home Secretary* (HL(E) [2001] 2 AC 548). But the tension between rights and constituent power also clearly informs constitutional thinking in common-law legal systems. See for illustration Woolf (1995, p. 59).

15 See the insistence on honoured rights on the Declaration of the Stamp Act Congress (1765) and the resolves of the Continental Congress (1774). For comment see Bilder (2004, p. 187). Notably, the 1777 Constitution of Georgia declared British tax levies 'repugnant to the common rights of mankind'.

16 On the theory of constituent power implicitly sustaining early rulings of the Supreme Court, see Eisgruber (1995, p. 67). The Bill of Rights was enacted in 1791 in part to avoid a renewed gathering of any constituent assembly in Philadelphia (Amar, 1998, p. 289; Maier, 2010, pp. 285, 295, 421, 444). The very earliest state constitutions in America usually gave primacy to legislatures. This soon changed. Many state constitutions written before 1787 used rights to avert the conflation of legislative and constituent functions (see Williams, 1987, p. 420).

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into law.[17] In both respects, rights always moderated constituent power, and it was only as a will proportioned to rights that the popular will was allowed to become manifest within the polity.

In revolutionary France, the constitutional entrenchment of rights was weaker than in America. In fact, between 1789 and 1795, French legislatures often acted, without objective normative constraint, as constituent assemblies in permanent session (Sieyès, 1796, p. 97; Jaume, 2003, p. 19). Even in France, however, the assumption that constituent power was determined by rights was strong, and the will of the people was envisioned as a will laying claim, and so proportioned, to *natural rights* (Zweig, 1909, pp. 126, 128, 240). In all three French constitutions of the revolutionary period (1791, 1793, 1795), rights were applied as directive principles to shape legislation, to underpin the separation of powers in the state, and to protect some areas of social practice (i.e. religion, property, privacy) from political encroachment. Indeed, after 1795, the conviction that rights could be applied as principles to restrain the use of public authority also found important advocates. This view surfaced repeatedly (although without immediate effect) in the later period of revolutionary constitution writing (Rolland, 1998, pp. 67, 75).

In the strict terms of constitutional theory, in consequence, rights, applied by judicial institutions, can only be examined as depositaries of *constituted* power. Practically, however, in the first processes of modern constitution writing, institutions with responsibility for applying rights norms (courts) were expected at times normatively to *predefine* and, in some cases, to *preserve* the popular will in its constituent form, if necessary allowing this will – as higher law – to override momentary expressions of popular interest and legislative inclination (Harrison, 1998, p. 347). The concept of constituent power, in short, only became fully operative insofar as it was condensed into *rights*. As a result, constituent power and constituted power were always dialectically interwoven.

This connection between constituent power and rights can also be viewed in a sociological perspective. Ultimately, in fact, the rights-based filtration of constituent power became integral to the sociological, system-building functions of classical constitutionalism. These sociological consequences of rights in early constitutionalism became evident in two quite different ways.

On the one hand, as they were formulated in the revolutionary constitutions of the eighteenth century, rights performed sociological functions analogous to those performed by constituent power: rights acted to accentuate the positive *inclusivity* of the emergent political system of modern society. Most notably, the principle that each person received power from public institutions as a holder of common subjective rights placed the state in an even relation to other parts of society, and it made all parts of society equally and evenly receptive to the stores of power held in the state (Thornhill, 2011, chapter 3). In this respect, the constitutional concepts of rights and constituent power had closely homologous sociological functions.

On the other hand, constitutional rights reacted vitally and dialectically both towards their own inclusionary functions and towards the inclusionary implications of constituent power: rights instilled a dimension of *exclusivity* within the political system. This is seen partly in the fact that, in early constitutions, formulated rights placed strict checks on the exercise of constituent power, and they excluded some spheres of social exchange from the purview of the political system altogether. In constructing legal principles to protect classical civil liberties, such as freedoms of judicial access, movement, contract, labour, worship, property, etc., constitutional rights specifically designated some spheres of social activity (those practices correlated with these

17 It is often argued that the early Supreme Court did not conduct rights-based review of statutes (Lewis and Trichter, 1981; Maier, 2010, pp. 463–464). Yet, in many early decisions, such as *Chisholm v. Georgia* (1793) and *Vanhorne's Lessee v. Dorrance* (1795), judicial opinions were expressly sustained through reference to human rights. Ultimately, John Marshall stated clearly enough in *Fletcher v. Peck* (1810) that judicial tribunals were appointed to 'decide on human rights' (U.S. (U.S. 6 Cranch) 87). This tendency was also pronounced in rulings of state courts. In 1817, the Supreme Court of New Hampshire declared that exercise of legislative power had to be curtailed by rights of mankind (Paust, 1989).

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rights) as normatively withdrawn from the scope of constituent will formation: that is, as protected by effectively supra-constitutional norms.[18] However, this is also seen in the fact that, to varying degrees in different settings, constitutionally sanctioned rights defined some contents of the popular will as elevated above ordinary legislative procedures, and they designated judicial institutions as entitled to preserve the most essential form of constituent power against momentary legislative inclinations or impulses of the people (the electorate). This function of rights formed the core of the distinction between the *constituent people* and the *electoral people*, which became fundamental to representative-democratic rule (Eijsbouts, 2010, p. 219). In both respects, rights stabilised the distinction between the political system and other spheres of society, and it meant that the political system could organise its reactions to concrete interests in society in internally measured, controlled procedures.[19] Rights thus acted to police the boundary between the political system and its social environments, and they formed strict filters between the state and other social domains.

2.3 Constituent power and rights: the constitutional formula

On this basis, we can identify a particular *constitutional formula*, dialectically combining *rights and constituent power*, which was abstracted during the constitutional revolutions of the late Enlightenment. *Externally*, this formula projected an image of a political system that derived legitimacy from comprehensive social inclusion and legal equality. *Internally*, this formula allowed the political system to operate at a high level of abstraction, and to perform uniform functions of legislation while restricting its openness to society and preserving its clearly differentiated standing in relation to other areas of activity. Above all, this formula played a central *sociological* role in consolidating the distinctively differentiated political functions of modern social order: in bringing about the general political centration and inclusion of society around reliably constructed and sustainably differentiated political institutions (sovereign states).

This functional analysis of the *constitutional formula* expressed in the revolutions of the eighteenth century has certain implications for our understanding of the basic vocabulary of modern democratic politics. In particular, this analysis suggests that the normative fabric of modern constitutional democracy should not be perceived in a strictly *literal fashion*. The normative concepts of constitutionalism, it is suggested here, lead a *double life*. They act *at a surface level* as abstractly articulated norms. But they also act *at a systemic level* as internally projected functional formulae. The core concepts of classical constitutional vocabulary can be seen as *internal adaptive configurations* of the emergent, increasingly differentiated political system of modern society, and these concepts created the foundations for the distinctively modern (differentiated) political form of contemporary society as a whole. Indeed, the proto-democratic revolutions of later early modernity can be viewed as social events, in which prominent agents identified the contours of the rising functional structure of society and (however unwittingly) formulated concepts that converged with this structure and expedited its elaboration.

In consequence, it is proposed here that the formation of the vocabulary of democratic-constitutional legitimacy in the eighteenth century was a theoretical process in which societies engendered *internal structural norms* to stabilise their political systems – or their political form

18 This is evident in the first American constitutions, where rights were increasingly used to prevent the explosive or uncontrolled exercise of constituent power (Lutz, 1980, p. 51). For theoretical background to this part of my argument, see Luhmann (1965, p. 135).

19 See Hamilton's claim in *Federalist* 78 that courts protect 'the intention of the people' underlying the Federal Constitution as a whole (Madison *et al.*, 1987 [1787–88], p. 439). Later, John Marshall argued that the court spoke for the 'original and supreme will' of the constitution (Hobson and Teute, 1990, p. 182). See analysis in Griffin (1999, p. 2156).

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more broadly. The combined formula of constituent power and rights spelled out a self-explanation (however paradoxical) for the political system in which, for a definite yet decisively formative period of time, it could include social exchanges in manageable fashion, meet rising demands for legislation through society, build reliable normative structures, and propose and stabilise itself as a relatively autonomous and generically differentiated set of exchanges. It is only if we divest constitutional concepts of their pure normative carapace that we can understand the reasons for their social influence and structural/systemic prominence.

III. The second *gouvernement des juges*

Despite its largely internalistic, formulaic status, the concept of constituent power has shadowed the history of constitution-making from the eighteenth century until the recent past. As mentioned, the image of the volitional externality of law's origin to the factual, positive form of the law which this concept projects has proved a persistent principle for envisaging the distinctive legislative authorisation of the modern political system.[20] The insistence on law's original founding externality to itself remains a deeply embedded claim in theoretical reflection on politics.

In contemporary global society, however, it is increasingly apparent that the norm of constituent power can no longer produce adequate supplies of legitimacy for political institutions that perform functions of decision-making and legislation. Empirically, we can see that the defining revolutionary/constitutional self-construction of the political system is quickly forfeiting its adequacy to contemporary society. In contemporary society, the political system (that is, institutions applying generally binding laws in society) extends across several societal and geographical levels, and it is increasingly split into functions focused on national phenomena and functions focused on phenomena either positioned outside, or crossing the lines between, delineated national jurisdictions. Indeed, in contemporary society it becomes necessary to examine the political system, not as a specifically mandated body of organs in one national society, but rather as a mass of global political exchanges. The political system appears now as a diffuse aggregate of institutions and actors involved in authoritative decision-making, which include – with all their specific diversity and characteristic features – national political institutions, but which also clearly connect integrate national institutions with organs of supra-, inter- or transnational decision making and norm construction. In this global political system, notably, it is increasingly the case that the legitimating principle of constituent power is invalid: the space for the exercise of an originally extra-juridical will to authorise law has (at least partly) disappeared, and, at different levels, the political system is unable to explain its legislative acts through reference to monocentric or external/volitional acts (see Somek, 2012). The fate of constitutional democracy appears, in fact, to be that constituent power and constituted power are increasingly fused together, and founding laws are established by actors with a constitutionally *hybridised* character. At different tiers of the global system, in fact, even primary laws are now in fact routinely constructed through *inner-juridical* functions: that is, through the application of laws and legal norms that are already formed within an existing legal/political system, and through the implementation of laws and norms by *already constituted* judicial institutions. In consequence, legally preconstituted actors, typically judicial bodies, now assume manifest and far-reaching responsibilities for the exercise of those primary law-making and legitimating powers which were classically accorded only to constituent actors.

We can find numerous examples of this constitutional tendency towards the partial supersession of constituent power by constituted power in contemporary society.

20 This remains persistent in core texts of political theory, concerning both traditional and post-traditional polities. On the first, see Habermas (1992, p. 451). On the second, see Fossum and Menéndez (2010, p. 92).

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In the first instance, we can see the displacement of constituent power occurring, in different ways, in *national* polities. This is especially prevalent in national polities in a process of democratic or post-authoritarian transition. In such polities, founding constitutional laws are typically pre-constructed and legitimated by international codes and agreements (especially those enacting international human rights norms), and they are authorised by institutions, most often courts of law, exercising powers, and enforcing specific legal norms, that are, in the strict sense, *already constituted*: i.e. which are defined under international conventions and treaties. This results mainly from the fact that emergent democratic states are almost invariably subject (normally before they even exist) to international jurisdictions, and they adjust their primary domestic laws to international directives, especially regarding human rights, in order to gain acceptance and perceived legitimacy in the international community of states.[21] However, this also results from the fact that emergent democratic polities usually signal compliance with international expectations by establishing powerful national Constitutional Courts, which are commonly armed with strong provisions for judicial review of legislation (both constitutional and statutory) in the light of international human rights obligations. Once operative, these courts form solid structural links between national state institutions and international judicial communities, and they regularly borrow norms from international law to define the prior normative (i.e. constitutional) premises for the exercise of national governmental authority (Renner, 2009, p. 554; Nollkaemper, 2009, p. 77). Often, this means that constitutional courts preside over uncertain transitional processes of national institutional consolidation, and they apply norms derived from international law to block the gaps in existing, generally improvised and tentatively legitimated, national constitutional systems (see Yeh and Chang 2009, pp. 155, 165). In extreme cases, the entire underlying design of post-transitional states is formed in accordance with dictates received from the international legal arena (see Dann and Al-Ali, 2006). Such weakening of constituent power in national political settings, however, is not exclusive to transitional states. Even in national states with deeply committed traditions of democracy and entrenched regard for the functions allocated to constituent and legislative power, the exercise of constituent power is now normally both constrained and, to some degree, predefined, by international norms, especially by norms concerning human rights (see Fabbrini, 2008; Stone Sweet, 2008; Kavanagh, 2009, p. 275; Lasser, 2009, p. 24).

Above the national level, the displacement of constituent power is also a prominent characteristic of growing *supranational* polities. In the European Union (EU), for instance, the lack of a constituent power has long been a matter for concerned reflection (see Kaiser, 1960; Murswiek, 1993, p. 165; Walker, 2007).[22] In the absence of such a power, already constituted actors, usually courts of law, have assumed authority independently to produce and codify an effective supranational constitution for European Member States. This began – tentatively – with the famous *Van Gend en Loos* and *Costa* decisions of the European Court of Justice (ECJ) in 1963 and 1964, declaring first the direct effect and then the supremacy of European law in Member-State societies. However, by the 1970s, the ECJ began to form the EU as a normatively consistent (i.e. constitutionalised) political system by designating itself (without specific authorisation by original treaties of the European Economic Communities) as a custodian of rights jurisprudence, and it drew entitlement from this jurisprudence to enforce legal norms with de facto constitutional rank across all incorporated jurisdictions (Stein, 1981; Weiler, 1991; Alter, 1996; Stone Sweet, 2004; Claes, 2007).

21 Modern states are often made by international organisations, and compliance with the normative dictates of such organisations is a precondition of statehood (Alvarez, 2005, pp. 128, 264; Duxbury, 2009, p. 104; Chesterman, 2004, p. 140).

22 Note the repeated use of the term *gouvernement des juges*, signifying a return to the fragmented statehood of the *ancien régime*, to describe use of judicial power in the EU (Peters, 2001, p. 275; Somek, 2008, p. 32).

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The ECJ was initially obliged to define itself as a centre of rights jurisprudence because its claims to judicial supremacy in the EU were challenged by powerful national courts (Davies, 2012, p. 74), and it appointed itself as a protector of supranational rights norms because this enabled it to assuage the anxieties of national high-court judges, and so to impose a uniform legal structure across traditional divides between national jurisdictions (Douglas-Scott, 2006, 2011). Through this process, however, the ECJ was able to dispense with classical forms of constituent authorisation, and simply to project a constitution from existing inner-juridical norms. This politically constitutive role of courts is reflected, rather more weakly, in other supranational legal communities (Helfer and Alter, 2009; Petersmann, 2005, p. 93).

The displacement of constituent power is also visible in the more informal *transnational* dimension of contemporary political organisation. Inchoately at least, as mentioned, global society in its entirety is in the process of evolving a distinct, multilevel, diffusely co-ordinated political system. The term *political system* is used here in a manner that is sharply differentiated from more common definitions of the political system as a *state*: a political system is taken here to mean *that set of institutions in a society which are required to produce and authorise collectively relevant decisions*. On this definition, the political system of contemporary society both overarches and incorporates national and supranational political domains, but it also adds important *transnational* dimensions to political institutions situated and operating in national and supranational contexts. The transnational level of the political system is partly configured by international law, arising from norms originally based on interstate agreements. But it has acquired a contingent, internal legal fabric, which is independent of state volition and is generated from multiple sources. The specifically transnational part of the global political system is also marked by an increasingly refined constitutional structure, and, like other dimensions of the global political system, it organises its legal/constitutional dimension without reference to primary constituent acts, obtaining legal order through the recursive power of already constituted actors – primarily international courts. Courts are in fact rapidly evolving as hinge elements in the emergence of a comprehensive *transnational constitution*, which integrates and systemically consolidates political institutions operating in the national, the supranational, and the more uncertainly defined transnational domains of global society. In this regard, to be sure, it needs to be stated that the creation of *transnational law* in the general sense of the word is not exclusively the province of judicial bodies. If we accept the increasingly common definition of transnational law as a fully free-standing legal domain (see Jessup, 1959, p. 63; Scott, 2009, pp. 873–744), such law is evidently not derived solely from courts. Transnational law is formed in increasingly pluralistic fashion, and, especially below the strictly defined level of public law, it emanates from multiple sources and norm providers (say, law companies, firms, regulators, standard setters, NGOs), which often lack distinct public authority.[23] Despite this, however, much transnational law clearly originates (both directly and indirectly) in international judicial institutions. In fact, if we can distinguish certain transnational laws that are able to acquire de facto constitutional rank in contemporary society (i.e. that are commonly binding on transnational legal subjects),[24] these laws normally presuppose the presence of a system of *transjudicial* norm construction, and courts, unauthorised by constituent power, remain decisive actors in the promotion of a transnational legal/constitutional order. International courts provide a quasi-constituent framework for regulating

23 On the split private/public status of NGOs, see Baehr (2009, p. 4); Schuppert (2011, p. 386). For select analysis see Quack (2007, pp. 645, 650, 655); Calliess and Renner (2009, p. 273); Engel (2001, p. 583; 2004, pp. 219, 233); Nicolaidis and Shaffer (2005, p. 302).

24 For positions ascribing a specific constitutional dimension to transnational law, see Teubner (2006, p. 161); Zumbansen (2002, p. 432); Wai (2002, pp. 273–274).

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and steering exchanges traversing the boundaries between different national societies, and they increasingly produce hard constitutional norms for exchanges in the transnational arena.[25]

On the one hand, for instance, courts progressively flesh out a potent jurisprudence, extracted from singular personal rights, and, over the heads of national states, this imposes duties and expectations, on *public* bodies (Parlett, 2011, pp. 335, 359; Paust, 1992, p. 62). Moreover, national courts are increasingly guided by the case-law of international courts, and, intermittently at least, they assume authority to act against, and normatively to veto, other state organs in the polities in which they are situated (Nollkaemper, 2011, pp. 12, 301). In both these respects, courts supplant constituent agency as the source of public law, and they elaborate an effective transnational constitutional order, in which single states gradually take a place alongside other actors and legal subjects (Klabbers, Peters and Ulfstein, 2009, pp. 154, 179), and are bound positively and in semi-obligatory fashion by norms enforced by courts.[26] To some degree at least, all subjects are now bound by a nationally overarching constitution, which, increasingly, is distilled directly from the subjective rights and obligations of single individuals.[27] Through this process, the classical distinction of statehood as a constituted centre of public law with a formally sui generis legal personality is progressively diminished. Even the basic idea that states obtain a higher juridical distinction and integrity vis-à-vis other organisations by virtue of their origin in constituent power is eroded through the global norm-setting acts of international courts. In addition, courts play an important role in producing semi-constitutional norms for the regulation of *private* exchanges; the rights jurisprudence articulated in public international law increasingly filters horizontally into private international law, and in this domain it also places obligations on states, on single persons, and on other organisations, private, public and semi-private/semi-public (Zumbansen, 2006, p. 747; Fischer-Lescano, 2003, p. 751). In such cases, too, the basic classical sense that volitional constituent acts underpin processes of compulsory norm production in

25 This claim requires diverse exemplification. At one level, transjudicial communications create powerful transnational norms in relatively informal fashion. Courts create such norms by borrowing and fusing laws emanating from different jurisdictions, often bringing about a close linkage of domestic and international law. For excellent analysis, see Waters (2005, pp. 490, 527). For the more general principle at play here see Slaughter (1995, 2003). At a more formal level, in supranational polities rights are used to tie together different levels of jurisdiction, and they act as the cement between tiers of quasi-federal bodies, imposing and legitimating legal uniformity. The main example of this is the EU (Sabel and Zeitlin, 2008, p. 300; Stone Sweet 2004, p. 14). In such polities, similarly, private rights, and attendant processes of litigation, act to generate an overarching legal structure (Kelemen, 2006, p. 102). In a different dimension, we can also observe that the transnational promotion of rights norms also create a normative background in which international organisations at a global level can be constructed and regulated, so that national competences can be effectively devolved to such organisations (Reinisch, 2000, p. 291).

26 Some human rights charters, notably the International Covenant on Civil and Political Rights, accentuate the obligation of private parties to acknowledge rights of others (Paust, 1992, p. 56; Portmann, 2010, p. 126; Gardbaum, 2009, p. 126; Barak, 2001, pp. 28, 42; Buergenthal, 1997, p. 722; Bamforth, 1999; Sohn, 1982). For examples of this see the seminal rulings of the European Court of Human Rights in *Airey v. Ireland* (1979) and *P, C & S v. United Kingdom* (2002), where national states were made responsible for facilitating recognition of rights between private citizens. Underlying this phenomenon is a change in the primary status of international courts from functioning as fora for settlement of disputes to functioning as fora for norm construction and general standard setting (see Bogdandy and Venzke, 2011, p. 980; Ginsburg, 2005, p. 25). For a dissenting view, arguing that international law has weak purchase in national courts, see Benvenisti (1993, pp. 179, 183).

27 See, for example, the assumption that states must protect and underwrite private rights expressed in Art. 2(e) of the Convention on the Elimination of all Forms of Discrimination against Women. This stipulates that state parties must 'take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'. See also Art. 3(3) of the Convention on the Rights of the Child, declaring that state parties 'shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision'. For helpful comment see Lucke (2005, pp. 154–155).

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society becomes precarious. In both respects, courts, with authorities originally defined under *international* law, increasingly act to dictate principles for a distinctive *transnational* constitutional order, which is formed simultaneously at a national and at an international level and draws contingently on elements of public and elements of private law. Through the prominence of courts, private and public exchanges are able to draw validity and normative force from internationally pervasive rights norms, which either formally or informally replace constituent authorisation or manifest displays of consent as a basis for regulating and constraining political acts.

In each of these examples, in sum, the founding idea that there is a *legitimating externality* at the core of constitutional law has become deeply questionable. At different tiers of the global political system, the pre-legal location for unconstrained acts of democratic formation, norm construction and constitution-making has begun to evaporate. As a consequence, a constitutional reality is rapidly emerging that has certain similarities with the juridical conditions of early modernity, which were originally supplanted through the rise of the concept of constituent power. The relatively uniform state-centred legal order designed around the concept of constituent power has been replaced by a legal order composed through multiple and uncertainly overlapping or patchwork patterns of judicial law finding and law-making. In this condition, judicial actors and other less formal norm-setting bodies apply internally authorised norms as ground rules for legal validity.[28] International courts, interacting fluidly with national courts,[29] commonly take the place of constitutively authorised actors and institutions in generating and legitimating the basic laws of political organisation (national, supranational and transnational) for society as a whole. Self-evidently, of course, this does not mean that there is no element of constituent democratic volition in contemporary processes of polity building and constitutional foundation. However, in more contemporary history, the primary acts of polity building (national, supranational and transnational) have been centred, to no small extent, around the cross-border borrowing and transplanting of pre-constructed legal norms, usually influenced by international rights jurisprudence. In many cases, even the basic constitutional laws of national polities have taken shape as international judicial principles have been configured in a fashion that is variably adapted to particular national sociopolitical settings.

IV. Rights and/or constituent power

In general terms, therefore, the underlying construction of normative order in contemporary society is based in an increasing interdependence between constituent and constituted power. What most deeply characterises the different levels of the emergent constitutional order is that, in different dimensions, the constituent source of legitimacy is contained *within the law*, and the symbolic moment of extra-juridical founding and norm production is (to a large degree) effaced from the political system. In turn, the shift from constituent to constituted power as the premise for society's legal/political order reflects the fact that the principle from which the political system derives legitimacy for its legislation has migrated, substantially, from *constituent power* into *rights*. At each level (national, supranational and transnational) of the global political system, judicial institutions assume increasing authority to establish primary laws, and, typically, they explain their legislative functions in authorising such laws by reference to *rights*. On the different planes of global political-systemic formation described above, the justification both for single acts of law and for wider processes of institution-building is mainly derived, not from acts of democratic

28 Though on the often highly fractious and contested relationships between judicial orders, see Krisch (2008, p. 196); Kingsbury (2012, pp. 210–212); Wai (2008, p. 109).

29 For a selection of literature on comity, borrowing and deference between courts, see Scheeck (2005); Douglas-Scott (2006, p. 657).

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foundation, but from recourse to rights norms, which, in their original form, are *already constituted* as formal elements of the inter- or transnational legal order. At different levels of formality, rights norms are cemented in international laws, conventions and judicial case-loads, and courts typically invoke and enforce these rights, instead of constituent power, when they exercise law-making functions. Indeed, the parameters within which democratic law-making can be conducted are almost invariably delineated through a powerful bundle of already defined rights, of which, at different levels of the global political system, judicial bodies act as primary depositaries and interpreters (see Haltern, 2005, p. 370).

Naturally, none of this is meant to say that in contemporary global society rights are not subject to egregious violation. It clearly does not mean that judicial custodians of rights perform their functions without palpable lapses. Yet, the rise of inter- or transnational rights norms as a basis for founding legal and political structures appears to be the most distinctive aspect in contemporary constitutionalism, and it impacts substantially on the construction of all political vocabulary and political practice in global society. The political system of contemporary society has clearly begun to construct hard legal norms to determine exchanges at each of its levels, and so to acquire a de facto transnational constitutional order. This constitution relocates the foundation of its legitimacy from single acts of constituent power to the fluid and multiple forms of authorisation provided by *rights*.[30]

V. The global constitution and the global political system

The change from constituent power to rights at the centre of the legal/political order of contemporary society is a matter of primary interest for constitutional theory. Indeed, the distinction between *national constitutionalism* and *global constitutionalism* currently occupies a central position in constitutional inquiry. Against this background, a significant body of literature has developed that examines the multilevel political system of global society as containing a distinctively *post-constituent* constitution:[31] that is, a legal/normative order which lacks the original element of collective/volitional centration or active consent, yet nonetheless imposes normative obligations, with a status approaching effective constitutional rank, across the divides between national jurisdictions.[32]

The literature on the emergent global constitutional order contains significant variations, and it typically divides into two very different theoretical camps. One camp is essentially *internationalist*, comprising theories that identify a relatively hierarchical, near-unitary constitution, centred in basic human rights conventions and other non-derogable principles of international law, as defining the legal form of contemporary society; one camp, by contrast, is essentially *transnationalist*, comprising theories that identify a pluralistic constitution, based in hybridised and

30 Of course, some theorists of the global constitution argue that the global authority of rights reflects the emergence of a new unitary constitutional system. For a distillation of this view see Milewicz (2008, pp. 422, 432). In contrast, my view is that rights underpin a pluralistic form of legitimacy, and they enter contingently into different levels of the global political system to produce highly iterable, reproducible resources of legitimacy.

31 See Part III above.

32 A point similar to this has recently been elaborated, in a different theoretical context, by Harlan G. Cohen. Cohen (2012, pp. 389, 391) also sees the human rights foundation of international law as creating a new and highly distinctive legal community, in which, not *factual* state consent, but *abstract* human dignity acts as the source of law's binding force. Like the argument outlined here, Cohen also sees this inner shift in the law as greatly facilitating law's ability to run and reproduce itself across national boundaries, for this shift implies that law can be authorised horizontally – across boundaries – and it can circumvent specific expressions of consent as a source of legitimacy.

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more spontaneous patterns of transnational law, as founding the legal-normative structure of global society. These two lineages, in turn, are also subject to significant inner variations and differences of emphasis, and it is difficult to canvass all subsidiary lines of this field of research here. To speak generally, however, we can identity both a critical and an affirmative line of analysis within the internationalist literature, and we can identify both a critical and a more affirmative line of analysis within the transnationalist literature on global constitutionalism.

For example, in many prominent *internationalist* accounts of global law, the rise of the global constitutional system is observed as a final realisation of universal normative order, and the predetermining of constituent power by global rights norms is perceived as the conclusive fulfilment of the Kantian vision of a world constitution.[33] By contrast, some critical interpreters (usually gravitating to the political left) view the rise of global transjudicial authority, based in international rights norms, as a process that simply enforces unmandated elite economic prerogatives across global society. From this perspective, global rights are viewed as the antithesis of democratic political practice, and the promotion of rights to create a supra-constitutional normative order is perceived as militating against founding democratic liberties of self-legislation.[34] Other critical observers (usually, but not always, inclining to the political right) criticise the surrogacy of constituent power by rights as an illegitimate intrusion on the domain of national sovereign agency.[35] Amongst *transnationalist* approaches to global law, similarly, some accounts of global constitutionalism interpret the pluralistic normativity of contemporary transnational society as a flexible legal order, in which global society as a whole is able to develop pluralistic analogues to classical constitutional norms, so that it acquires problem-solving capacities not open to overburdened national states (Teubner, 2012, pp. 160–611). By contrast, other transnationalist perspectives reject any assumption that transnational law can generate a reliable or comprehensive normative structure (Krisch, 2010, p. 17; Kingsbury, 2012, pp. 210–212; Oeter, 2004, p. 60).

For all their differences, however, all these lines of analysis are connected by the fact that they construe the rise of a global constitutional apparatus as a basic element of contemporary society, and they view the growing global or transnational constitutional order as marking a deep breach with classical constitutionalism. At the centre of this diagnosis, in each case, is the perception that the weakening of national constituent power is a structurally defining feature of modern society, which profoundly transforms the legitimating reserves of contemporary society as a whole.

Against this background, this paper attempts to make a distinctive contribution to debate about the present transformation of constitutional order. In particular, it proceeds from the claim that the existing literature on global constitutionalism is marked by an explanatory shortcoming: established analyses have not yet offered a full explanation of changes in contemporary constitutional order, and, above all, they lack a paradigmatic framework to give a causal account of these processes. This is because these approaches have not yet generated a sociological method to capture the relation

33 The most extreme version of this view suggests that there exists a hierarchy of international laws, close in structure and force to the hierarchy of classical public law. On this view, national states act as constituted subjects in a constitution of international law, and they cannot exercise powers exceeding this status (Franck, 1992). For a general cross-section of the variant positions in the global-constitutionalist literature, see Fassbender (1998); Dupuy (1997); Henkin (1995, p. 39); Kadelbach and Kleinlein (2007); Kumm (2004); Stone Sweet (2009, p. 637); Ackerman (1997, p. 777). For the general picture see Chapter 1 in Schwöbel (2011).

34 Close to the political left, see the now near-classical view in Hirschl (2008). See also Chapter 3 in Bellamy (2007). Closer to the political right, see Trimble (1997, p. 1966).

35 In the US, for instance, Justice Scalia and other Conservatives in the US-American judicial establishment have repeatedly insisted that judgments of the Supreme Court assimilating international legal norms violate democratic procedures (Lo, 2005, p. xi; Blackmun, 1994; Cohen, 2006, p. 326). For theories of sovereignty closer to the democratic left, see Grimm (1991, p. 31); Loughlin (2009).

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between constitutional norms and the wider condition of society. In this respect, to be sure, it is clear that analysis of transnational law in particular is often positioned – by express design – at the most sociologically refined end of conventional legal inquiry.[36] Some approaches to transnational law – for example, in Hirschl (2004, p. 43) and Schneiderman (2008, p. 4) – have located the changing pattern of constitutional normativity in the sociological context of global capitalism. Other approaches to transnational law accentuate advanced societal differentiation as the environment for the production of transnational law (Teubner, 2012). Therefore, these inquiries can clearly not stand accused of sociological vacuity. For all their brilliance, however, even such analyses tend to observe constitutional norms as secondary objective forms, which materialise as the result of essentially independent formative processes (for example, globalisation, assertion of hegemony, differentiation). They do not examine the inner reflexive meanings of these norms, they do not probe the structural reasons for the distillation of distinct constitutional norms, and they do not directly link changing norms to changing societal structures: the inner meaning of norms *for* society is not placed in the focus of inquiry. This means that the sociological content of constitutional norms – disclosing *why* a society produces, and *why* it shows structural reliance on, certain norms under certain conjunctures – has not yet been made visible. For this reason, although a large body of literature has identified the changing status of constitutional concepts as a defining fact of modern society, we lack a paradigm through which the changes in constitutional law and the rise of global constitutional norms can be construed in the light of their deeper sociological causes.

This paper aims to correct this sociological gap in research on global constitutionalism. It aims to provide a macro-sociological account of constitutional norms and their functions, and it seeks to position the current transformation of constitutional concepts, especially the displacement of constituent power by rights, in this context. In so doing, in particular, it proceeds from the assumption that existing descriptions of the constitutional normativity of contemporary society lack adequate explanatory force because they remain too focused on the *literal* legal form of global constitutionalism. Only by isolating constitutional norms as inner-systemic formulae can we capture the latent sociological meanings expressed through them, and only in this manner can we place them in relation to the broad societal forces that determine them. Building on the above analysis of classical constitutions, therefore, this paper attempts to provide a deeply embedded reconstruction of the transformation of constitutional norms in contemporary society. It endeavours to account for the legal norms defining the contemporary global constitution as part of a sociological reaction to specific functional pressures, impacting, *within* the legal and political system, on society's capacities for political-systemic abstraction, legislative inclusion, and the social production of power. In these respects, this paper intends decisively to separate constitutions (both classical/national and contemporary/transnational) from surface-level or literal accounts of their content and status, and it describes how both classical and contemporary constitutional norms are determined by, and, in turn, adaptively reflect, the evolutionary trajectory of society in general. Above all, the paper seeks to bring together analysis of classical and contemporary constitutional norms in order to propose a long sociological history of constitutional norm creation, and it attempts to explain how constitutional vocabulary *sociologically distils* the most formative processes in society.

36 The emergence of the 'sociology of transnational law' was announced almost twenty years ago (Friedman, 1996). But the development of this line of inquiry has not yet really gained momentum. The most obvious, and easily the most important, elaboration of this still rather inchoate sociological programme is evident in the work of Gunther Teubner. See in particular Fischer-Lescano and Teubner (2006, p. 53). Literature on the sociology of international law is canvassed in Kirsch (2005).

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To reach these objectives, *first*, this paper agrees with much current constitutionalist inquiry that we can identify a deep shift in the underlying form of constitutional law, and that this shift is a structurally defining fact of contemporary society. However, it deviates from other constitutionalist approaches by arguing that this shift is most adequately interpreted, not – or not *exclusively* – as an objectively given legal reality, but as an inner, self-reflexive re-formulation of the political system itself. In a primary sociological dimension, the displacement of constituent power by rights accompanies the emergence of a political system which conducts its exchanges at many societal levels, over quickly widening cultural and geographical distances, and which typically lacks predictable or objective support or justification in national societies and their politically assembled constituencies. If closely (sociologically) analysed, therefore, the legitimatory shift from constituent power to rights allows us to appreciate how, through its multilevel form, the global political apparatus is required to produce and authorise its power in increasingly contingent, positive fashion, and how, to secure this, it presupposes new and highly distinctive processes of inclusion, norm generation and structural formation. The reliance on rights in the political system makes it possible for the political system to obtain and express new sources of authority to sustain its mobilisation of power and its acts of legislation, and it enables it to secure affirmation, acceptance and legitimacy from its addressees (those to whom power and law are objectively applied) in very new, rapidly changing and highly adaptable ways. The shift from constituent power to rights thus opens a window on one of modern society's deepest sociological questions: it touches on the basic question of how contemporary society adapts to new demands for the abstraction of power, for political-systemic formation and for legislative inclusion in the face of its increasingly complex global form.

Second, this paper argues that, although the legitimatory shift (from constituent power to rights) at the centre of the contemporary political system clearly establishes new patterns of normative inclusion, this shift does not, at an underlying functional level, need to be seen exclusively, or even primarily, as marking a deviation from classical models of constitutional order. On the contrary, if viewed against a wide sociological background, the emerging legal/political order of global society can equally be observed as extending and even, in some ways, as *consolidating* the original adaptive functions of classical constitutionalism and its theoretical vocabulary – albeit in relation to a new societal conjuncture. If we accept the premise that the classical formula of constitutional legitimacy (constituent power and rights) was, at least subliminally, an adaptive or self-reflexive configuration within the political system, we can approach the principle of constitutional legitimacy in contemporary constitutionalism (systemically internalised rights) from a similar functionalist perspective. We can interpret the rise of rights over constituent power as articulating a *new constitutional formula*, which echoes and replicates the functions of the formula of classical constitutionalism. We can thus observe rights as conceptual or reflexive constructions, in which political institutions internally trace out and objectively project the conditions of their autonomy in a particular societal constellation, and in which society as a whole abstracts for itself an autonomously sustainable aggregate of political functions. Moreover, like the core principles of classical constitutionalism, we can see the reference to rights as an internal self-construction of the political system, which specifically augments the volume of power and legislation that the political system can generate for society more broadly. Behind the different *époques* of constitutional concept formation, we can identify a deep continuous thread of functional adaption in society's political system and in society more generally.

The fact that constitutional polity building is now usually conducted through reference to rights, in short, can be taken to indicate that rights, like constituent power at the origins of modern society, now form *dominant adaptive configurations* for the political system. Contemporary society articulates its defining political conflicts and positively abstracts its political functions through reference to this normative term, and it uses the concept of rights as a means for organising its political system as it

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reacts to deep changes in its inner formative dimensions. Above all, rights provide structural support for society's political system as it loses its centration on national or even generically fixed constituencies, and, accordingly, as it necessitates, and internally generates, new techniques and justifications for producing political power and legitimating legislation. Against this background, rights bring the defining benefit for the political system of contemporary society that they allow it to transform the sources of its legitimacy into *inner elements* of its own structure. By imagining persons receiving power in society as holders of invariable rights and by defining its power (legislation) as proportioned to rights, the contemporary political system, in each of its national, its supranational and its transnational dimensions, is able to transfer its source of legitimacy from a point *outside itself* (constituent power) to a point *within itself* (the single rights holder). Under contemporary constitutional conditions, as outlined above, the political system is able (however counter-factually) to borrow a justification for its power from a body of norms (rights) which it already contains: political actors are able simply to assume authority for themselves by complying with rights, and by referring their decisions (laws) to an inner construction of persons subject to their laws as *rights holders*. On this basis, the political system can derive validity for its decisions – and even for its founding laws – without any recourse to a situation in which law requires validation *outside the law*. Through this process of normative internalisation, in fact, *rights become constituent power*. Rights assume the function that they project an internal basis of legitimacy for the political system: they instil within the political system an internal principle to cover and authorise its distinct legislative acts, they ensure that power is applied in a legal form adapted to its addressees, and they create a general normative background to guide and justify specific law-making functions. In so doing, rights allow the political system to dispense with the external dimension of democracy (symbolised through constituent power). They lend authority to the political system by permitting it autonomously to construct and endlessly to reproduce its legitimating source (the rights holder), so that it can accompany each act of legislation with internally stored, rapidly iterated, justifications. The broad sociological consequence of this, then, is that contemporary societies are able to rely on a global political system which, split across national, supranational and transnational levels, can produce, preserve and legitimate political power in highly contingent and internalistic fashion, and which can utilise political power through society in relative indifference to external actors (persons outside the political system) and with limited dependence on factual objective approval (mandates arising outside the political system). Rights are passed from one level of the contemporary global political system to another, and, at each of its levels, the political system increasingly assumes legitimacy by simply reflecting its power as obligated or proportioned to internally stabilised rights norms. In this respect, rights implant replicable internal residues of constituent power in the political system, and they make it possible for the political system internally to support and spontaneously to underwrite legislation across all different domains of global social order.

On this account, the rise of rights over constituent power in today's global constitutional order needs to be observed, sociologically, as a centrally illuminating example of the more general process through which societies construct conceptual norms so that they can internally stabilise their basic functions. In particular, the revised normative fabric of contemporary (global) constitutionalism tracks a profound change in the political system and in the societal production of political power more broadly. As discussed, the legitimating norm of constituent power was never entirely real, and it obtained its reality primarily as a formula produced for and within the political system. However, its quality as a functional formula for the political system has now been diminished, and it has been supplanted by rights. The legitimating principle of rights is also not entirely based in an external reality, and it, too, assumes reality primarily as a formula proposed for and within the political system. We cannot, for example, realistically assume that the construction of persons as rights holders by the political system literally shows recognition of

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these persons as discernibly recognised or implicated in the social production of power. But, nonetheless, this formula assumes particular efficacy in the construction of political power for contemporary global society, which is marked by highly contingent, unsupported and acentric needs for legislation, and it describes a deep adaptive change in the inner structure of the political system.

If viewed in this light, additionally, we can observe, sociologically, that the rise of rights over constituent power is part of the growing *differentiation* and increasing *internalism* of the distinct functional domains of global society.[37] Rights obtain political prominence as part of the process through which the various function systems in society approach a condition of *intense differentiation*: that is, as different sectors of society approach a reality of extreme internal complexity, as they are required to conduct their exchanges in very rapid, globally extensive and highly positivised fashion, and as their ability to derive specific support or authority from factual actors or objective principles situated externally to their own functions is diminished or even relinquished.[38] In this societal condition, society's various spheres of functional activity are obliged to account for, legitimise and reproduce their operations at rapidly increasing levels of autonomy, distinction and *internality*: that is, they are (to a large degree) required to sustain their functions through principles which they can spontaneously generate and reproduce within their own structure. Rights perform this function – specifically – for the political system. This is how, at a sociological level, we can explain the rising political significance of rights in today's society.[39] Rights obtain salience in contemporary society as the political system differentiates itself fully from other function systems, and as – by consequence – it forfeits its ability to presume support from specific constituencies, objectively situated actors and milieux, and externally constructed norms. The reference to rights within the political system makes it possible for the political system to function at a high level of differentiated abstraction, to produce power, internalistically, in independence of other parts of society, and, accordingly, to authorise acts of legal inclusion and law-making without being reliant on, or even making reference to, any external structure or source of agency. In other words, the disjunction of rights from constituent power allows modern society to live – politically – with its own highly evolved acentricity and intra-systemic differentiation,[40] and rights now enable society to produce legitimacy for its political functions in a fashion that is rapidly iterated and internally adjusted to this acentricity.[41] In contemporary

37 Close to my analysis of the coincidence of societal globalisation and extreme systemic differentiation is Albert (2002, p. 274).

38 This extreme differentiation can be seen most prominently as a tendency in the political system of modern society. But it is disputable whether other function systems – for example, the education system or the scientific system or even the aesthetic system – operate by satisfying criteria that are objectively external to their own self-constructions. For the political system, we can observe that its centration around simple external decisions, principles, directives and shows of support was always fictitious. However, under current social conditions, the external legitimisation of the political system is simply impossible: the political system has all but lost its classical external environment (the people). For background analysis see Luhmann (1981a, p. 69). Consequently, the political system is forced to generate alternative, internal sources of legitimacy – this is where we can identify the current sociological prominence and importance of rights.

39 Theories of rights in fact now proliferate amongst sociologists. It is even argued that current social theory reflects a specific 'fascination' with human rights (Anleu, 1998, p. 198). However, the functional dimension has not been widely researched in the contemporary expansion of literature on the sociology of rights. For an exception see Baghai (2012).

40 Note the relevance to this analysis of Luhmann's work on the political system in a thoroughly decentred society. See in particular Luhmann's claim (1981b, pp. 22–23) that it is not possible to 'centre a functionally differentiated society on politics without destroying it'.

41 Again in reference to Luhmann's theory of society, my suggestion is that rights should be construed as the *basic medium* of the contemporary political system. This proposal is based in a modification of Luhmann's

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society, rights articulate the grammar of political legitimacy because rights allow society internally to abstract a coherent political structure and effectively to circulate political power without forcing society to organise its political system around a single objective political source or centre or in relation to a single material environment. To this degree, rights enable today's society to cover the rapidly increasing mass of demands for legislation which, in its acentricity, it constantly produces and encounters.

VI. From constituent power to rights: new patterns of inclusion and systemic formation

Observed in a macro-sociological perspective, therefore, each level of the global political system (national, supranational and transnational) is abstracted and supported by rights. In each dimension of the contemporary political system, notably, rights distil internal premises for consistent political functions, and they allow society to adapt to its hyper-complex demands for legislation. This concrete *system-building* function of rights becomes evident, primarily, in the following dimensions of global political organisation.

First, the system-building force of rights can be observed in the case of *national* polities, or in the national dimension of the global political system. We can see this already – to some degree – in the historical evolution of consolidated democracies. In the US, for example, where the integral structure of the federal state is traditionally weak, courts of law, reinforced by their assimilation of rights norms derived from international law,[42] played a vital, compensatory role in elaborating the inclusionary, relatively autonomous, structure of the national state (see Skowronek, 1982, p. 2308). Indeed, as a multilevel and diffusely aggregated political system extending power (legislation) over loosely consolidated territories, the political system of the US is in some respects a prototype for the emergent political system of global society as a whole, and its use of rights as institutes of overarching inclusion has an explanatory value that reaches beyond one national polity. In the specifically national components of the global political system, however, the system-building effect of rights is most pronounced in polities undergoing democratic transition. In most recent processes of democratic or quasi-revolutionary polity building, leading actors within the political system have employed international rights norms in order both to reorganise and stabilise political institutions, and to accompany and authorise single acts of legislation, both

ideas, but it is not entirely out of line with Luhmann's own thought. Most obviously, Luhmann defined *power* (not rights) as the medium of the political system. However, he reflected lack of confidence in this claim by also arguing (1993, pp. 424–425) that power could only be transmitted through society in the medial form (the *second code*) of law. In consequence, Luhmann saw the constitutional state, imprinting the legal hyper-code of rights-based constitutional law on political power, as the most probable form for the modern political system; he at least implied that rights could be construed as a refined medium for the transmission of power. My construction of rights as the inner systemic coding of political power, thus, although responding to an explanatory problem in society at large, is also a response to a set of categorial aporia and uncertainties in Luhmann's sociology.

42 It is of course widely claimed that the law of the US is not easily permeable to international law. From the first foundation of the American Republic, however, the fact that federal courts claimed the right to apply international law underpinned the high degree of law-making autonomy possessed by the courts. Most periods of consolidated intensification of the power of the federal government were marked by the fact that federal courts used international rights norms to enhance the standing of federal law over state law. For example, see the ruling in *Chisholm v. Georgia* (1793) in which it was noted by Chief Justice Jay that the 'national judiciary [. . .] responsible to the whole nation' had in part been designed to supervise the 'conduct of each state, relative to the laws of nations' (Sloss, Ramsay and Dodge, 2011, p. 41). Note in addition the rise in influence of international treaties and conventions as background to the legal success of the civil rights movement and the weakening of the power of the states which this implied (Power, 2000, p. 112).

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constitutional and statutory. In most cases of this kind, the domestic incorporation of international rights norms has made it possible for institutions in transitional polities to function in relative structural autonomy by allowing rights to act as internally insulated sources of legitimacy for their laws. In general, this has brought a number of appreciable benefits in respect of state structure and autonomy.

For example, the use of rights to support legislation has proved stabilising for transitional political systems because it has allowed them to pass laws without first being forced to secure legitimacy by addressing expansive social antagonisms or pacifying hostile fragmented constituencies, and it has even made it possible for political institutions to display internally simplified mandates for legislation in face of deeply divided societies. Notably, in some transitional settings the fact that rights were used to authorise primary constitutional legislation, and so specifically obviated the need for constant external assertion of constituent power, had a deeply solidifying impact on otherwise fragile institutions,[43] and it greatly simplified autonomous law-making processes in so doing (see Klug, 2000, p. 1). Equally importantly, this use of rights enabled political systems to legislate without excessive or obstructive regard for entrenched interests in society at large, and even to dispense with the support of traditionally influential social groups, located outside the political system (strictly defined). In turn, this intensified the evenness with which transitional polities have been able to apply laws to their national societies, and it permitted them generally to maximise their capacities for the positive and relatively autonomous use of power across society. In most cases, this acquired particular importance because democratic political transitions have been conducted in societies marked by a background of chronically depleted autonomy in the political system: that is, by endemic weakness in political structure, by egregious private monopolisation of public office, by low law-making capacities, and, as a result, by reduced penetration of the political system into society. In such settings, the assimilation of rights from an international legal domain provided independent principles for legislation, and it allowed actors within the state to control access to state office, to diminish the countervailing authority of local actors, and generally to tighten the distinction between society's private and public functions. Moreover, in transitional processes, the incorporation of international human rights law normally permitted prominent state institutions, usually constitutional courts, internally to raise the quality of legislation, to subject different stages of the legislative process to procedural scrutiny, and, as a result of this, to transmit legislation more inclusively across society. In each respect, the use of international rights norms in transitional and post-transitional polities has proved vital for their consolidation, and rights have typically enabled precariously differentiated national societies to organise their political functions in a functionally demarcated domain, defined in reasonably reliable and abstracted form. In each respect, in particular, rights have brought manifest structural benefits to newly formed national political systems because they have allowed states to authorise themselves in highly internalistic manner, which has enabled state institutions positively and internally to control both the terms of access to law-making power and the procedures used for power's societal circulation.

Multiple examples of such processes can be found in recent constitutional transitions. The most striking historical cases are observable in post-1975 Spain, post-1989 Soviet Union, other East European states after 1989, West and Southern Africa, and some Latin American societies in the 1980s and 1990s. In these cases, the domestic absorption of rights defined under international law

43 The classic example of this is post-apartheid South Africa. But Hungary is also notable in this regard. In 1993, the Hungarian Supreme Court stated that 'generally recognized rules of international law' need to be seen 'without any (additional) transformation' as 'part of Hungarian law'. This ruling declared participation in the 'international community of people' a 'constitutional imperative for inner-state law' (Brunner and Sólyom, 1995, pp. 524–525). Through this, the Court became the primary bearer of constituent power, and it used this power independently to determine the basis for legislation.

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greatly intensified the legislative reach of state institutions into society, and it substantially accentuated the autonomy and distinction of the political system (Fogelklou, 2001, p. 244; Solomon, 2008, p. 66; Inclán and Inclán, 2005, p. 78). This was due partly to the fact that the increasing intersection between international human rights law and domestic law provided a basis on which national judiciaries could assume greater consistency, and it led to an elevation of judicial independence and distinction in societies traditionally afflicted by high political control and high regional variation in the exercise of judicial functions. This was also due, in part, to the fact that the assimilation of international law in domestic legal systems allowed national political systems to give supra-constitutional standing to certain principles of normative order, and to evade historically destabilising exposure to unmanageable, often class-based, conflict over legislative procedures.[44] In addition, however, this function of rights is also evident in semi-transitional polities. An important example of this is contemporary China, where over recent years the growing (albeit still only partial) assimilation of international rights norms by judicial bodies has increased the ability of state institutions to penetrate into society, to heighten the inclusionary force of the political system, and significantly to raise the legislative autonomy of the state as a whole (Wan, 2007, pp. 739, 742; Paler, 2005, p. 301).

In each of these examples, the use of international rights norms to construct legitimacy for transitional political systems generally raised the probability, even in deeply insecure processes of institution building, that state power could be concentrated in a distinct and formally independent legislative apparatus. Despite obvious variations, moreover, the fact that the political system internally constructed itself as authorised by rights meant that normative justifications for legislation became generally identifiable, that legitimacy in the introduction of legislation can be visibly evaluated, and, in consequence, that edicts with the force of law in society could be attributed to a clearly differentiated political order, so that the systemic impact of external prerogatives and external controversies was diminished. As a result, although this process is usually seen as a check on national state sovereignty (see Stein, 1994, p. 448), the filtration of international rights norms into transitional national polities typically had the outcome that rights enabled states to reach a condition close to a monopoly of coercive authority within a national society. Indeed, the transplanting of international rights norms has normally meant that, across all parts of society and without regard for embedded private claims to status and influence, the decisions of the political system obtained elevated inclusive force, and were met with increased levels of compliance. The use of rights as internally assimilated sources of systemic legitimacy, therefore, acted widely as a precondition for the structural stability of those components of the global political system that operate predominantly at a national level. Indeed, in some cases, it was only because national societies were penetrated by the global political system and its rights-based mechanisms for legal/political legitimisation that reliable forms of statehood, able to prevail over private authority, were able to develop. The inclusion of national societies in a system of transnational rights repeatedly served as a de facto precondition for the consolidation of national political systems, and, in many cases, it is only because they have been constructed as one part of a global political system that national institutions have been able to generate and enforce legislation effectively.

Alongside their role in consolidating national aspects of the global political system, however, rights play an analogous, or in fact much greater, system-building role in the elaboration of those dimensions of the contemporary political system that extend beyond national environments. In its supra- or transnational extensions, the contemporary global political system shows still deeper

44 This is a widespread phenomenon, but the classic example is the democratic transition in Argentina in the 1980s (see Nino, 1989, p. 154).

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reliance on rights as institutes to abstract and to solidify its basic functions of differentiation and structural formation, positive legislation, and social inclusion.

Notably, second, the system-building force of rights can clearly be observed in emergent *supranational* polities. In such settings, polity formation is normally very deeply reliant on the normative force of rights, and rights bring vital structural support to, and they augment the inclusivity of, different political institutions. In the EU, for example, rights have the particular characteristic that they provide an inner self-reference for the political system, which enables highly diffuse and geographically extensive political institutions to obtain coherence in their organic structure, to mobilise (often highly improbable) support for themselves, and internalistically to project a unified basis of authority for complex acts of legislation. Indeed, the role of rights in the systemic formation of the EU can be seen as a response to the fact that the EU's ability to muster visible external consensus and support for legislation is weak. This means that, like other supranational polities, it is forced to depend on internalistically produced and systemically projected reserves of legitimacy.[45] Of distinct importance in this regard is the fact that European public law, which was supplemented through the 1970s and 1980s through the incremental assimilation of rights norms from the European Convention on Human Rights,[46] has shown an increasing tendency to construct single persons as rights holders, and it imposes immediate positive obligations on states to obviate violation of rights of, by and between private parties.[47] This internal reference to single persons as rights holders has allowed a political system to evolve, which immediately overarches the jurisdictions of national societies, draws these societies together in one normative order, and pierces deep into the legal apparatus of national polities (Garrett, Kelemen and Schulz, 1998, p. 169). The single rights holder, not the collective act of constituent power, thus becomes the basic internal source of political-systemic cohesion in the polity of the EU, and it acts as the primary normative reference for the systemic production of political structure.

The system-building results of rights norms in the EU can be viewed, most obviously, in the fact that rights are used to conjoin and bind different tiers of the supranational European polity. Rights provide a universal normative register, which imposes common standards across separate parts of the supranational polity, and ensures that decisions can be made at different levels of the polity in relatively uniform fashion.[48] Through the ECJ's doctrine of direct effect, in particular, both primary laws and regular statutes in national jurisdictions are partly formed by courts (Maduro, 2005, pp. 335–356; Pernice, 1999), and, internally authorised by its enforcement of rights, the ECJ acts in conjunction with national courts to weld the different levels of the supranational political order into a coherent whole (Kokott, 1998, p. 75; Lasser, 2009, p. 3). In this respect, it has often been noted that the EU, like other rising supranational polities, relies extensively on preliminary

45 See for critical comment Brunkhorst (2012, pp. 201–202).

46 This was realised through a series of single cases, but it was determined in particular by the *Report on the Protection of Fundamental Rights as Community Law* (1976) and the *Joint Declaration on Fundamental Rights* (1977).

47 See the ruling in *Francovich* (1991), which acknowledged state liability to private parties under EU law.

48 This was formalised most clearly in the *Solange II* ruling of the German Constitutional Court in 1986, in which European law was allowed to take precedence over German national law as long as it was consonant with the basic human-rights norms enshrined in the West German constitution. Through this ruling, rights became a medium which made it possible for a national state to transfer 'sovereign powers' to interstate institutions and generally to disperse judicial and legislative powers across the polity as a whole (Hofmann, 1993, p. 46). Although the 1986 *Solange* ruling resulted from a long history of conflict between the German Constitutional Court and the ECJ, this ruling, in essence, established a system of comity, in which different courts used rights to mark out boundaries of competence, deference and mutual recognition. Rights formed a language of constitutional or in fact *constituent* dialogue between different tiers of a supranational political system. On the *Solange* rulings as a basis for comity see de Búrca (2010, p. 43); Lavranos (2008, p. 312); Isiksel (2010, p. 562).

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referrals between national and supranational courts to ensure conformity between national and supranational laws, and it draws justification for legislation from implicitly deferential dialogue between national and supranational courts and their judges – which is directed in part by presumptions regarding rights (Alter, 2001, p. 54; De Visser and Claes, 2013). This means that, in the EU, supranational judicial power reaches deep into national legislative procedures, and judges, attentive to questions of normative compliance, are able to police the process of legislation in Member States long before draft laws assume the form of statute (Alter, 1998).[49] This also means that the authority of legislation can be defined in highly internalistic fashion, without frequent reversion to authorising principles or directives external to the political system, so that legislation is normatively insulated against contest as it approaches the statute book. Although typically seen as reducing the democratic substance of legislation (Brunkhorst, 2012, p. 201), such judicialisation of legislative procedure often engenders inner-systemic legitimacy for legislation in the face of low manifest support and high degrees of external uncertainty, and it allows legislators internally to adjust to rising insecurity in legislative outcomes. In all these respects, rights assume simultaneous legitimating and system-building functions. They provide internal normative cohesion for the EU polity as a whole, and they allow the political system of the EU to hold itself, and to produce legislation, at an improbably high level of internal consistency and differentiation against its unstructured and disconnected external environments.

In addition, however, the role of rights in the systemic formation of the EU as a polity has a simpler, more concrete structural dimension. For example, it is notable that the EU uses rights to construct a normative framework within which it can devolve particular law-making functions to private actors and organisations, and rights thus serve flexibly to reinforce and extend its capacities for legislation. The fact that, in the EU, policies are increasingly explained through an overlying reference to rights means that it can allocate legislative competence to a fluid array of actors and organisations, situated, as momentarily required, either in supranational or national, or in private or public, domains, as long as those actors are qualified and recognised as obligated to rights norms.[50] One result of this is that the EU can easily widen its own perimeters by incorporating different organisations in the political system, and, often temporarily, it is able to lend legislative power to a number of different bodies, including bodies with essentially private-legal status. This means – in turn – that the political system can construct a broad and easily extensible social periphery for its institutions, connecting it more integrally with the social environments to which it applies power, and it can utilise rights to embed itself, and expand its law-making capacities, in societies in which institutional and consensual foundations for its power are otherwise fragile (see Schuppert, 2011, p. 386; Frerichs, 2008). Moreover, it is notable that, in partial emulation of the US, the strengthening of presumptions in favour of singular rights has promoted a growing culture of litigation in the EU, which also means that courts can supplement the inclusionary legislative force of the political system across society (Kelemen, 2003, 2006). In both these respects, rights acquire the most vital importance for the EU as polity, and they generally bring internal cohesion and legislative flexibility to its supranational structure despite its insecure social foundations and lack of conventional reserves of legitimacy.

49 For analogues outside Europe see Pasqualucci (2002, p. 242); Tatham (2011, p. 165); Medina (1990, p. 444).

50 Consider here Kelemen's observation (2011, pp. 22, 50–51) that the ECJ has 'expanded statutory rights' through 'expansive interpretations' of European law in order strategically to 'expand EU power vis-à-vis the member states'. This is ascribed to the fact that in the EU rights act to create a diffusely integrative political system (including national courts, lawyers and multiple private actors), which is able to extend its authority and obtain compliance despite 'the high degree of fragmentation' and 'limited implementation and enforcement capacity' characterising the EU polity as a whole. For historical background see Kaiser and Meyer (2010, p. 13).

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Equally significantly, then, the system-building force of rights can be observed – third – in the more generalised construction of a *transnational* political system in contemporary society: if the formation of those dimensions of political-systemic organisation which are founded neither in national nor supra-national jurisdiction nor in specific interstate agreements. Most straightforwardly, of course, rights contribute to the construction of a transnational political system because certain rights norms have effective inviolable or *erga omnes* status for national states. To this extent, these rights vertically frame acts of national states within an international normative order, and they are internalised in national polities as patterns of orientation for legislative acts. In this respect, rights help to create a normative structure to facilitate legislation both at nation-state level and across the boundaries between national states, in relation to legal phenomena resulting from the international domain. However, at the same time, the system-building effect of rights at a transnational level is visible in certain rather less clearly prescribed and formalised ways, and rights also establish a more flexible system for ordering for transnational exchanges. In particular, rights project a systemic framework in which institutions embedded in different national settings are brought into convergence across national divides, and in which those interactions (governmental, sub- and inter-governmental), which can only be performed beyond the limits of fixed national jurisdictions, are co-ordinated (see Slaughter, 2004). On the one hand, for example, in the transnational domain, rights have increasing force as principles that govern acts of international or interstate organisations, and they create a normative system in which such organisations explain and legitimate their actions, projecting a clear regulatory structure for legislative procedures not centred around nationally embedded institutions (Reinisch, 2001, p. 134). On the other hand, rights habitually trace out contours of compatibility both between institutions and between individual persons that are based in separate national settings, but which engage with each other across national jurisdictional frontiers. Under the authority of international courts and international rights conventions, for example, expectations in respect of rights create a quasi-constitutional substructure for inter- or transnational regulation, and, often through intense (although disputed) third-party application,[51] they define a normative/inclusionary background in which, with some degree of cohesion, societies can order both institutional and personal interactions traversing national boundaries (Mills, 2009, pp. 124–125). Exchanges in different national societies reaching beyond the boundaries of these societies are increasingly measured against standards derived from international rights norms; rights provide a normative *hyper-code* to cover those acts and exchanges located at intersections between different national legal orders. In a variety of ways, in consequence, rights norms increasingly consolidate an internal backstopping structure, which helps to connect and render compatible different tiers in an emerging global political system. Rights become most prominently articulated at the conjunctures or overlaps between national and transnational levels of the global political system, and they generally provide flexible patterns of normative orientation, which allow meaningful law-making and legal regulation in circumstances where legal phenomena are not subject to express constitutional organisation.

In close relation to this, fourth, rights also perform transnational system-building functions because they establish a hybrid legal-systemic order, fusing private law and public international law, which also brings some degree of normative stability and uniform regulatory structure to exchanges located beyond the domain of purely national jurisdiction. The fact that in

51 For an account of the relevance of transnational rights norms for ordering private exchanges, see Clapham (1993, p. 94). On the implicit privatisation of constitutional law through the third-party application of rights, see Kumm (2006, p. 359). On the third-party application of rights rulings in international courts, see Kingsbury, Krisch and Stewart (2004, pp. 30, 33). On similar functions performed by WTO law see Trachtman (2006, pp. 639–640); Cass (2005, p. 22); Steinberg (2004, p. 248).

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transnational society private persons are able (however variably) to claim immediate rights protection means that exchanges in both private and public law are increasingly proportioned to expectations in respect of rights, so that rights are invoked to authorise, control and normatively to determine interactions that occur in both legal dimensions (Wernicke, 2007, pp. 402–406). This means that public and private law can easily combine, and together they permit the emergence and consolidation of a transjudicial legal system, which, however fluidly, creates, through reference to rights, a normative structure standing outside national states, which is able to produce laws that guide the actions of both private and public actors in the transnational arena.[52] At a most general level, for example, expectations in respect of rights filter pervasively into private law, and they increasingly shape cross-boundary guidelines in respect of trade, labour, employment, medicine, healthcare, sport, media, electronic communications (Internet), etc.[53] Across national divides, these standards then gain growing (although always contested) obligatory force for both private and public actors (Wood and Scharffs, 2002, p. 566). In some cases, more specifically, rights are assimilated directly in judicial rulings to establish a body of international private law containing quasi-constitutional obligations for public bodies.[54] Moreover, the growing frequency of extra-territorial tort proceedings means that private persons and organisations can increasingly be held to account for promoting human rights abuses, and even for association with public bodies guilty of contravening human rights norms.[55] Under certain circumstances, this has the result that private individuals can assert rights in international law, and, to some degree, it even engenders laws with obligatory force for both public and private bodies (Kunstle, 1996, pp. 320, 346). In each regard, rights move between public and private law, and they underpin a system of legal/political inclusion which is able flexibly to bridge the national and the transnational dimensions of global society, and which, spontaneously and with little express political authorisation, produces hard norms for global political organisation. Indeed, the increasing inner spontaneity of transnational law creates a legal environment in which even the attribution of law-making powers, classically reserved for publicly constituted actors, becomes hybridised. Against this background, for example, private associations, especially those assuming accountability for rights protections such as non-governmental organisations (NGOs), can easily assume quasi-public functions of governance and legislation:[56] NGOs in particular obtain the authority to set normative standards, which assume near-obligatory status for public and private

52 What I mean by this is that courts interact with each other across national boundaries to produce transnational norms, which obtain near-binding force both in and beyond particular national settings. The engagement between courts promotes an increasingly uniform transnational normative standard in key legal questions. Often, this leads de facto at least to a fusion of international law and domestic law, through which norms of international law, especially those based in rights, are used to create overarching standards and guidelines for national courts, applicable in both private and public law. For general comment on this see Unger (2008, p. 126); Waters (2005, p. 547).

53 An example of this might be the use of human rights norms by national courts in addressing (in essence global) questions relating to free speech and/or libel on the Internet. See, for instance, the Australian High Court ruling in *Dow Jones & Co v. Gutnick* (2002), in which human rights agreements were considered as instruments for providing a common standard for transnational disputes regarding the potentially defamatory content of Internet sites.

54 See by way of example the ECJ's ruling in *Krombach v. Bamberski* (2000). This judgment implied that private law was bound to reflect principles contained in the ECHR, and in so doing it accorded de facto constitutional rank to certain norms of private law (see Mills, 2009, p. 205).

55 See extra-territorial cases brought under the US-American Alien Tort Statute, most notably in *Doe v. Unocal*. For comment see Chambers (2005). On the emergence of private/public norms to determine acts of private/public organisations, see Kinley and Chambers (2006, pp. 468, 489).

56 In relation to this, it is claimed, tellingly, that: 'Most NGOS probably exist to influence, to set direction for, or to maintain functions of governance or to operate where government authority does not' (Gordenker and Weiss, 1995, p. 546).

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actors, both nationally and internationally (Spiro, 1995, p. 48; 2000, p. 572; Gunning, 1991, p. 230). In all these respects, rights make it possible for global society to construct a hybrid model of public/private normativity, legislative authority, and normatively structured governance. This system of governance does not depend on specifically articulated (i.e. *constituent*) authorisation, and it can be extended rapidly across different spheres of society, providing a highly flexible normative setting for the co-ordination of many different exchanges and many acts of legislation. This system of governance derives authority and cohesion primarily from rights.

In the transnational dimension of the contemporary political system, in consequence, rights steer and inform acts of legislation and judicial rulings in both the private and the public legal domains. On one hand, this means that acts of national states and other classical public institutions are pre-defined by an amalgamated body of private/public rights norms (Calliess and Zumbansen, 2010, pp. 75, 166–168, 243). This has the system-building consequence that those acts of national public institutions reaching across national boundaries can be located and addressed in a normatively pre-defined environment, so that these institutions are insulated against legislative uncertainty and derive authority and direction from already established norms. On the other hand, this means that laws with obligatory status can be generated very flexibly and spontaneously, and laws can be produced in many different locations in society. Through a series of complex and contingent processes, rights stabilise legislative environments outside simple state jurisdiction, and they offer a reasonably secure framework for orienting and justifying legislation in such contexts. In fact, rights now freely cross the boundaries between different categories of law, and they allow society, from within the law, to generate a fluid regulatory apparatus through which it can capture and legislate over transnational legal phenomena. In this respect, rights augment and maximise the legislative capacities of society in the face of the increasing quantity of transnational or unlocalised exchanges that society produces and contains. In addition, however, this has the further system-building consequence that organisations (in particular NGOs) that define their functions as relevant for rights are often able to assume authority, and even formal personality, under law, and they are widely incorporated as powerful players within the transnational political system.[57] The reference to rights allows multiple actors to move in and out of the political system, often assuming temporary, very specific, regulatory functions. Indeed, transnational rights establish a normative order in which a variety of organisations, some originating in the private domain, can be accorded governance functions, address extensive regulatory problems (especially in economic practices), and even assume de facto legislative power.[58] In these respects, rights enable global society to generate normatively consolidated political structures in highly improvised fashion, and they allow society to perform a *relatively spontaneous and internally*

57 This applies most obviously to NGOs. See in support of this Scott, Cafaggi and Senden (2011, pp. 8, 11); Gaer (1995, p. 402). More generally see Koh (1999, p. 1412). On the legal personality of NGOs, see Schuppert (2006, p. 212). Schuppert (2003, p. 403) also notes the simultaneity of the privatisation of governance functions and the growth in the 'respect for human rights'. On the international legal personality of NGOs, see Karsten Nowrot (2004). For the legal framework for this see the ECOSOC Statute of 1996 on 'Arrangements for Consultation with Non-Governmental Organisations', online: ‹http://www.un.org/esa/coordination/ngo/Resolution_1996_31/Part_1.htm›.

58 This means that private agencies, under judicial supervision, can easily assume law-making roles (Vandenbergh, 2005, pp. 2088–2090; Renner, 2009, p. 535; Nicolaidis and Shaffer, 2005, p. 302; Engel, 2004, pp. 219, 233; Alvarez, 2005, pp. 154, 504). See the excellent analysis of how private actors such as NGOs create standards close to law by boycotting company practices on the basis of rights norms, in Spiro (1996, p. 962). The legal status of NGOs is defined and acknowledged under a series of international human rights conventions. Examples are Art. 71 of the Charter of the UN; Art. 25 of the ECHR; Art. 44 of Inter-American Human Rights Convention; Art. 45 of African Charter on Human and Peoples' Rights. For exact classification of the legislation-related functions of NGOs, see Charnovitz (1997, p. 272). On more general law-making functions of NGOs, see Nowrot (1999, p. 592); Berman (2007, pp. 312, 322); d'Aspremont (2011, p. 5).

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controlled extension of the political order, so that acts of legislation regarding the mass of transnational phenomena in society can be conducted in adequately iterable, spontaneous and internally positivised fashion.[59]

More tentatively, fifth, the system-building force of rights in contemporary society is also observable in the fact that rights allow different areas of social practice, especially those extending beyond clearly consolidated national-jurisdictional boundaries, independently to generate a normative order for their exchanges. For example, we can observe that global interactions in medicine, art, science, etc., borrow from international human rights law a skeletal set of principles to organise their exchanges, and, even in matters which escape all vertically obligatory regulation, the reference to rights means that different functional sectors of global society can internally project normative constructs to control and temporally to determine their operations.[60] On this basis, each sphere of functional exchange in society, reaching horizontally across national boundaries, is able to give itself a recognisably political-systemic structure, and so to regulate its interactions, in relative differentiation and autonomy, without immediate reliance on conventional or state-centred public institutions.

VII. Conclusion

Contemporary society is marked in its most fundamental normative features by the rise of a pluriform global political system, some levels of which are structurally located in a primarily national domain and some of which assume functions extending beyond distinct national contexts. Many exchanges conducted within this political system are only uncertainly subject to the jurisdiction of clearly public institutions, and not all of its exchanges can be backed directly by democratically mandated power. At each of its levels, however, this political system is internally sustained and constitutionally abstracted by *rights*. The national, the supranational and the transnational tiers of the global political system rely on *highly internalised* rights norms to construct an account of their legitimacy, to project an integrally cohesive image of their organic form, and to control their functions and to generate laws. At each level, the inner reference to rights brings pronounced structural advantages to political institutions, and it allows the political system as a whole rapidly to adapt to complex demands for legislation, to perform precarious acts of legal/political inclusion, and to stabilise differentiated political structures in the face of increasingly complex and acentric environments.[61] In the *national* arena, rights consolidate the authority of political institutions, and, with obvious variations from society to society, they typically enable weak institutions to differentiate and insulate their functions against unmanageable external pressures, and adequately to expand their power and to pass laws across domestic environments. In the *supranational* arena, rights internally promote the formation of institutions able to apply power and legislate in highly abstracted fashion, despite their basic lack of social centration and their weak external support. Above all, the *transnational* dimension of the global political system is formed by the fact that laws or law-like decisions can be produced

59 Anne Peters (2006, p. 128) notes, for example, that 'the protection of basic rights' persists as a tendency in transnational constitutional law despite the 'privatisation' of governance functions.

60 This has been examined by Teubner (2012) as a process of societal constitutionalisation, in which systemic exchanges in different parts of society generate a constitution for themselves, independently of the political constitution. Contra Teubner's account, despite my great admiration for it, I am inclined to define each area of practice, construed by Teubner as a separate societal constitution, as one part of society's overarching political constitution.

61 It is, of course, usually argued that rights applied through international law weaken state institutions (see note 32 above). Yet for a view in agreement with mine, albeit one only emphasising the position of state power in its international orientation, see Slaughter and Burke-White (2006, p. 348).

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through an inner-systemic reference to rights norms, and, through this, laws can be constructed in highly improvised, internally authorised fashion. At each level in the global political system, rights compensate for the fact that the use of power (as legislation) is covered by very weak external mandates, and that political structures often need to be devised in an ad hoc fashion: rights facilitate the highly differentiated and even internally *auto-generative* use of power, and they make it possible for society to form highly fluid and positively abstracted normative structures across its complex interfaces. At the same time, however, rights obviate the unmanageable diffusion of political structure, and they ensure that both access to political authority and use of legislative power, even in structurally unsettled environments, are subject to some degree of normative control and visible qualification. Indeed, the reference to rights can be seen to guarantee that, even in a political system producing very diffuse and multi-original legal acts for society, law is able internally to preserve a certain degree of generality and distinctive publicness (i.e. it is still publicly recognisable and acceptable as *law*), and it can be applied at a reasonable level of generalised legitimacy across society.[62] Rights – in short – continue, at each of its levels, to instil an element of constituent power at the centre of the contemporary political system, and they enable the political system to meet highly sporadic demands for legislation without losing reference to an internally consistent, cohesively system-building source. This means that many entities can be incorporated (often very temporarily) within the law-making functions of the political system, yet it also means that, insofar as these entities authorise their functions in relation to rights, the political system can preserve a construction of itself as underpinned by higher norms and as possessing a distinct quality of *public authority* (authority to speak for collectively held principles) in legislation.[63] To this degree, rights become sociologically explicable as institutions that make it possible for contemporary society, even as it expands improbably beyond national boundaries and loses its reliance on localised and measurable external support, to produce and employ political power (through legislation) as a distinctly and publicly differentiated, and thus as a consistently usable and transmissible resource.[64]

The global political system is held together by a shift in its legitimatory formula from constituent power to rights. This switch is at the centre of the global political system. In many respects, however, the legitimating vocabulary of rights only marks a deviation from classical constitutional norms if classical constitutionalism, and its underlying formulae, are viewed in entirely literal fashion. If the formulae supporting classical constitutional norms are scrutinised in the light of their inner functions for society, the internalistic formula of rights in the contemporary constitutional system has not *superseded* the systemic functions of the original vocabulary of constituent power: in fact,

62 I agree with Benedict Kingsbury (2009a, pp. 36, 57) that even the highly fragmented law of global society is recognisable as law, and that the distinctive publicness of this law provides an operative basis for its application. I also agree with Kingsbury's argument that law relies on publicness as traditional sources of law become weaker. But I think that this derives from the fact that law is sustained by reference to rights. On insecurities surrounding the basic concept of law in global society, see further Zumbansen (2010, p. 166); Calliess and Renner (2009, p. 269); Cotterrell (2008, p. 2); Snyder (2003, p. 404). I refer here also to the argument by Bogdandy, Dann and Goldmann (2011, p. 228) that the 'basic principle of public law is human self-determination'. On my account, the fact that in global society the law is able to authorise itself through rights means that it retains a distinct quality of publicness, even when emanating from obviously private sources.

63 In this, my construction of rights again relates to the theory of 'publicness' – that is, 'the claim made for law that it has been wrought by the whole society, by the public' – proposed by Benedict Kingsbury (2009b).

64 This takes a position against more established positions in the growing sociological literature regarding the social origins of rights, which usually emphasises the foundation of rights in human motivations. See, diversely, Turner (1993); Barbalet (1998, p. 140); Alexander (2006, pp. 34, 69). My view is that a macro-sociological explanation of rights needs to see rights as normative constructs that are internally generated within the political system.

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it has both *extended* and *intensified* these functions. The principle of national/collective authorship of the political system expressed by constituent power originally made it possible for the emergent modern political system to abstract and differentiate its power from distinct local and private milieux, and to channel this power more evenly throughout the increasingly differentiated form of society. In remote functional analogy, the reference to rights as the source of legitimacy for the political system now expresses a constitutional formula that enables the contemporary political system to distil its power at a degree of post-national abstraction and internal political iterability, adequate to the complex conditions under which global society needs to produce and consume political power. Indeed, the displacement of constituent power through rights might be observed as a process in which the political system spells out a new inner vocabulary for explaining and solidifying its differentiated functional autonomy. The vocabulary of rights, whatever its strategic design, articulates requirements for new systemic structures in the political arena, and it permits the political system to propose principles through which it can concentrate its power into autonomously and internally reproducible form against the background of the rising complexity, acentricity and *multi-environmentality* of contemporary society. The transition from constituent power as an external principle of legitimacy to rights as an internal principle of systemic legitimacy describes a process in which society moves from (national) centration to (transnational) acentricity, and in which it is obliged to use and to regenerate its reserves of power accordingly, without an identifiable external or centric social foundation. In earlier societies the functional form of the political system was condensed around the principle of constituent power. The construction of this functional form now falls to rights. Through the internal standing of rights in the global political system, the political system becomes, to a large degree, highly differentiated, internally constituted, or even *auto-constituent*: it includes within itself a normative reference through which it can spontaneously generate and recursively multiply the complex mass of power and law required by society.

On this basis, we can conclude that the entire trajectory of political-systemic abstraction in modern society is divisible into three historical phases, each of which was centred on a distinct principle of structural/systemic formation, inclusion and legitimacy: that is, each historical period was centred on a legal formula through which it was able to solidify and extend an inclusive and relatively autonomous political order across society. In its regionalised acentricity, the feudal society of medieval Europe conducted political abstraction and inclusion and through reference to the legal formula of personal *status*: status designated the legal right to inclusion in power, and it elaborated local structures for the transmission of power.[65] In the centralised reality of early nation states, *constituent power* became the structural principle through which society explained, authorised and differentiated its power, in response to geographically expansive requirements for legal inclusion. In the acentricity of contemporary global society, the concept of *rights* is beginning to form the dominant structural principle, and it allows processes of political abstraction and acts of legislative inclusion to be conducted at an adequate level of iterability, extremely differentiated contingency, and inner positive extensibility. This responds to a broad social reality in which law and power have to be used rapidly and in hyper-positivized fashion, and they require highly internalistic sources of self-justification and self-explanation. The distinction rights / not rights has now become the basic political vocabulary or political code of contemporary society. The political system forms itself as a distinct domain across society by drawing internal legitimacy from reference to rights, by including persons and exchanges as relevant to rights, and by building spontaneous political structures founded in rights. Rights are now the internal foundation of political power, and contemporary society applies political power

65 For the classical sociological analysis of the function of status as legal principle, see Weber (1921, p. 401).

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(legislation) through its internal construction as *rights-based power*. Through the changing conceptual vocabulary of constitutionalism, thus, we can trace a deep transformation in the social construction of power, and the shifting balance between constituent power and rights forms an internal social hieroglyph from which we can read out this process of profound structural adaption.

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