

Introduction

This is a book that is concerned with democracy. It aims to contribute to the defence of democracy, and to achieve this goal it aims to contribute to the broad understanding of democracy – that is, to enhance comprehension of the historical processes through which democracy developed, of its social foundations and of the expectations that people who live in democratic societies can reasonably entertain. In particular, a key objective of this book is to set out an analysis of democracy that responds to currently widespread reactions against established democratic arrangements, which are evident, in different expressions, across Eastern and Western Europe, the USA and parts of Latin America. A characteristic of these reactions is that they commonly involve a rejection of the transnational normative elements that typically underpin contemporary democratic systems, and they advocate a renationalization of democracy. Such reactions have of course not yet come close to reversing the great successes in global democratic formation that have been witnessed since the 1980s. But they demand extreme vigilance. For this reason, this book aims to account for democratic government in terms that are immune to both populist and nationalist impulses and to inflationary ideas of democratic representation, which inform many such reactions.

With these objectives in mind, this book renounces the normative terrain of much democratic theory, and it does not attempt to assess either the relative value of different models of democracy or the normative grounds for commitment to democracy. Instead, it seeks to alter the focus and the vocabulary of debate about democracy, observing democracy as a reality brought into life by quite contingent events, precarious circumstances and highly improbable – often clearly undemocratic – processes. As a result, it implies that much of the formal normative defence of democracy, which sees democratic institutions as justified by clear normative principles, has limited value. This book questions the

idea that obligations expressed through democratic government can be attached to the primary concepts, such as self-legislation, reasonable freedom and collective autonomy, that are used in classical democratic analysis.¹ It argues, at one level, that the defence of democracy has been made unnecessarily difficult because democracy is often explained and justified in historically unreflected, sociologically ill-construed categories. Democracy is often conceived and legitimated in conceptual forms that have little to do with the actual reality of democracy, and this burdens democratic institutions, in their factual structure, with expectations that are hard to satisfy. In fact, the terms in which democracy is usually defended acquire a spurious plausibility, and they can easily be turned against democracy as a social given reality, leaving democratic institutions vulnerable to internal criticism. In response to this, this book attempts to provide a more cautious and realistic account of democracy as a governance system, rejecting much of the classical conceptual apparatus of democratic theory, and it then defends democracy on this revised, more cautious and contingent basis. In so doing, it indicates that much of the common critique of democracy, demanding a return to nationalized, immediate experiences of participation, results from a miscomprehension of democracy, which is partly induced by the terms in which democracy is explained and advocated. Overall, this book tries to show that democracy has been misunderstood by those who defend it, and this misunderstanding is proving detrimental to its chances of continued consolidation. On the account offered here, democracy is both more and less than commonly assumed, and it needs to be vindicated as such.

In setting out this defence of democracy, this book also proposes a particular defence of sociology, and in particular of legal sociology, as a method for interpreting the rise of democracy, and for assessing the demands that we can channel towards democratically authorized institutions. Indeed, it defends the sociology of law as the most appropriate source of a plausible defence of democracy. It claims that democracy is most accurately understood and most effectively – i.e. realistically – defended if it is approached from a legal-sociological perspective. That is, democracy is best comprehended if categorical normative claim-making is renounced, if its functions are traced to underlying social processes, if its normative foundations are located within broad societal contexts and – above all – if the claims to obligation and legitimacy made by democratic

¹ See pp. 17–8 below.

institutions are observed in a perspective that probes at the social realities underlying legal-normative constructs. A sociology of democratic normativity is required to explain and, ultimately, to vindicate democratic organization – indeed, the more sociological analysis of democracy is, the more robust the defence of democracy is likely to be.

In this respect, this book makes the distinctive methodological claim that the sociology of law is the original and eminent science of democracy. The sociology of law, it is claimed here, first developed as an ambivalently affirmative inquiry into early democratic institutions, and, in its rejection of the simplified registers of classical democratic theory, it still provides the perspective in which democracy can be most accurately explained and protected.² To be sure, this book argues that the sociology of law has followed many stray paths along its historical course. However, this has usually occurred when it has digressed from the basic principles of the legal-sociological outlook. Consequently, this book attempts to consolidate the position of the sociology of law as a basic science of democracy by restating its core principles, and by applying a distinctive legal-sociological focus to processes of democratic formation in different parts of contemporary global society.

Before this book addresses its major questions, however, this introduction attempts to establish a definition of democracy, to identify the core conceptual elements of democracy and, above all, to account for the social and institutional implications of the categories in which democratic government is usually envisaged. In so doing, it aims to provide a framework in which, in subsequent chapters, the factual development of democracy can be analysed. Using this framework, later chapters in this book explain how democracy assumed a form that deviated from its classical construction, and they show how classical ideas of democracy contained internal normative constructs that inevitably steered democratic formation onto unpredicted pathways.

I.1 What Is a Democracy?

For the sake of simplicity, democracy is defined here, in relatively uncontroversial, practical terms, as follows. At an institutional level, democracy is *a societal condition in which individual members of a population or a*

² Law was a very important focus in early sociology, and the deep connection between legal analysis and sociology has often been noted (see Parsons 1977: 11; Gephart 1993: 86). Later, law's importance as a core object of sociological study declined.

designated political group, acting in the role of citizens, are included in a system of political representation, in which they have an equal participatory (that is, usually, electoral) role in constructing the general order of governance and in authorizing the particular laws that regulate their actions. At a normative level, thus, democratic institutions are defined and legitimated by the fact that they conduct processes of collectively endorsed legislation, so that citizens recognize the laws by which they are obligated as expressions of collective commitments.³ On this basis, shared obligation, often understood as shared freedom, lies at the normative core of democracy. The original principle of modern democracy was formulated in the political philosophies of the Enlightenment. This principle was, namely, that democracy is a political system in which laws acquire legitimacy because they publicly express reasonable freedoms – freedoms

³ My definition of democracy is close to that proposed by Rosanvallon, stating that: 'Equality in the polling station' is the 'first precondition of democracy, the most elementary precondition of equality, and the indisputable foundation of the law' (1992: 11). For a variation on this basic claim see Böckenförde (1991: 291). One recent analysis makes this point most clearly, stating that democracy presupposes a 'people, which is politically self-governing' and which 'is able to interpret the decisions of state as its own' (Haack 2007: 303). Iris Marion Young claims simply that the 'normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making process' (2000: 5–6). My definition is also close to that of Tilly, who sees democracy as involving 'broad, equal, protected, binding consultation of citizens with respect to state actions' (2007: 34), and as presupposing 'broad citizenship, equal citizenship', and 'protection of citizens from arbitrary action by government officials' (2000: 4). My definition also overlaps with Dahl's theory of polyarchy, claiming that in a democracy: 'Citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in the government' (1989: 220). Like my account, Dahl also states that 'democracy is uniquely related to freedom ... It expands to maximum feasible limits the opportunity for persons to live under laws of their own choosing' (1989: 89). See also Dahl's insistence on full inclusion as one of the criteria of democracy, such that '[t]he citizen body ... must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves' (1998: 78). Similarly, Beetham defines democracy as a 'mode of decision-making about collectively binding rules and policies over which the people exercise control', adding that a democracy is most perfectly realized 'where all members of the collectivity enjoy equal rights to take part in such decision-making directly' (1993: 55). Shapiro's definition of democracy (2003: 52) as a political system designed for 'structuring power relations so as to limit domination' is also compatible with mine. For the classical Hellenic definition of democracy, which also contained a presumption of equal participation of citizens, see Meier (1970: 37). The values of equality and freedom are also central to more recent attempts to calibrate the degree of democracy that exists in different polities (see Lauth 2015: 7; Munck 2016: 11). The norm of freedom as an element of democracy has been proclaimed most boldly by Goodhart, who observes democracy as resting on a 'political commitment to universal emancipation' (2005: 150).

that reasonable subjects (citizens) are likely to exercise.⁴ In fact, democracy rests normatively on a *double obligation*, in which citizens accept their obligation towards political institutions because these institutions recognize their obligation to express reasonable freedoms and to translate these freedoms into law. In realized form, both institutionally and normatively, democracy inevitably means more than this. Clearly, democracy can assume a multiplicity of forms – it can appear as direct democracy, parliamentary democracy, presidential democracy, council democracy, economic democracy, industrial democracy or even commissarial democracy. But democracy cannot easily mean less than this. Of course, democracy has been widely reconceived in recent years, especially in light of the supposed diminishing importance of national political institutions.⁵ Owing to the increasingly transnational form of contemporary society, the assumption that members of the single national people should act as the sole source of governmental legitimacy has become questionable.⁶ In fact, even at the origins of modern national democracy, national sources of constitutional agency were not fully separated from global normative orders.⁷ However, the above definition contains some necessary conditions that a political system – that is, *the mass of institutions in society responsible for producing legislation* – must satisfy in order to be qualified as democratic.

First, in order for a political system to be classified as democratic, there must be an ongoing practical authorization of the governmental order by its citizens. That is, there must be a *chain of communication*, reflecting both contestation and consent over the sources of legitimate

⁴ In the early construction of democratic theory, however, this claim was developed to imply that freedom is a condition in which the human being behaves in accordance with generalized maxims of practical reason: in which the human being finds a source of obligation in its own rationality, and acts in accordance with this. The legitimate state, then, is a state that externalizes the rational self-obligation of the citizen, so that the person acquires an objective obligation to the state as a legal guarantor of his or her subjective self-obligation. The freedom provided by the state is thus primarily not freedom, but obligation. We can find this argument in Rousseau and in the theorists of the French Revolution, who viewed freedom and virtue as coterminous and implied that citizens possessed an enforceable obligation to be free, in virtuous fashion (see p. 78 below). This argument finds the most distilled expression in Kant. For Kant, the human capacity for ‘inner freedom’ is linked to the fact that the human being is a ‘being that is capable of holding obligations’. Human freedom is thus an obligation ‘toward oneself’, and the human being enters a ‘contradiction to itself’, violating its own inner freedom, if it acts in breach of generally obligatory laws (Kant 1977b [1797]: 550).

⁵ See examples below at pp. 195–8, 201.

⁶ See analysis below at pp. 432–3.

⁷ See the impact of global norms in the French Revolution, reflected in Abbé Grégoire’s draft for a *Declaration of the Rights of Nations* (1793). This is reprinted in Grewe (1988: 660–1).

legislation, that connects citizens with different organs of the political system, and this communication must be institutionally entrenched, so that it cannot be unilaterally abrogated. This is an ineradicable part of a democracy.

Second, to be defined as democratic, a political system must be centred around a construction of the citizen as an individual person, capable equally of reflexively responsible and politically implicated decisions that impact on acts of legislation, processes of inclusion and the distribution of goods in society. This cannot be left out of any definition of democracy.⁸ Indeed, democracy revolves around a construct of the citizen as a basic focus of legitimacy or as a basic *subject of democracy*, and the recognition of the citizen as a source of law's obligatory force is foundational for the democratic political system as a public order.⁹ Democracy, therefore, is a mode of government in which the citizen forms the core *legitimational figure* for the political system. From the first emergence of the basic elements of modern democracy, the political system explained its legitimacy and authorized its functions on the basis both of the legal-normative recognition of rights of citizens and of the translation of the interests, commitments and freedoms of citizens into legal form.¹⁰

On this basis, third, to be considered democratic, a political system cannot, except perhaps on grounds of age, incapacity or avowed hostility to democracy, exclude distinct sectors of society from the factual exercise of citizenship rights.¹¹ As discussed below, democracy presupposes the

⁸ See Seyla Benhabib's definition: 'Popular sovereignty means that all full members of the *demos* are entitled to have a voice in the articulation of the laws by which the *demos* is to govern itself. Democratic rule, then, extends its jurisdiction in the first place to those who can view themselves as the authors of such rule' (2004: 20). See the definition of the citizen as a person 'associating with other persons to have voice and action in the making of our worlds' in Pocock (1995: 52). See Habermas's claim that 'citizens of a democratic legal state understand themselves as the authors of the laws, which they, as addressees, are obliged to obey' (1998: 152).

⁹ The American Supreme Court has stated accordingly: 'This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right. Citizenship is man's basic right, for it is nothing less than the right to have rights.' *Perez v. Brownell* 356 U.S. 44 (1958).

¹⁰ I agree with Charles Tilly's claim that citizenship is a necessary but not sufficient condition of democratization (2004: 8).

¹¹ Representative government, therefore, is not necessarily democratic, and it may often be the opposite of democracy. Representative government does not presuppose factual inclusion of citizens. See for this argument Schmitt (1928: 2009); Pitkin (1967: 190–1). Both the French and the American Revolutions were driven in part by hostility to pure

equality of citizens as a precondition of legitimate legislation, and it contains an essential disposition towards full political inclusion of citizens, so that as many people as possible in society participate in creating laws and recognize legislation as expressing their own claims to liberty.¹² Political systems that make it impossible for some social groups who are affected by law to participate in making law belong outside the category of full democracy.

In the definition of democracy set out above, it is clear that democracy is, above all, a system of inclusive and authoritative legislation. In this definition, laws only become legitimate to the degree that they are passed by a legislative body, whose acts originate in procedures for collective participation, expressed most essentially in elections. Notably, in the eighteenth century, when the conceptual basis for modern democracy was first established, it became an article of faith that personal freedom could be most effectively guaranteed by a legislature, representing the people or the nation as a whole. The direct correlation between personal freedom and the collectively mandated legislature thus became a defining feature of early democratic theory. At different global locations, the legislature was conceived as the dominant organ of government, in which collective freedoms could be enforced as the foundation for society's legal order.¹³ Early in the American Revolution, James Otis saw

representative government, and some of their protagonists saw the democratic exercise of popular or national sovereignty as an alternative to inherited ideas of representative government. The French Revolution reacted – initially – against established ideas of representative government (see Rosanvallon 2000: 19–21). During the Jacobin period, notably, Saint-Just claimed that government spoke directly for the people (see Jaume 1997: 133). In the American Revolution, there was less hostility to representation than in the French Revolution, but, ideologically, it renounced the English doctrine of virtual representation (see Pole 1966: 54; Wood 2008: 8, 26). For an early critique of virtual representation in America, see the claims in Otis (1769: 28). Rousseau's theory of national sovereignty, which gave conceptual impetus to the French Revolution, was based on a critique of democracy as representation (1966 [1762]: 134).

¹² Amongst early proto-democratic theorists, Rousseau argued that citizens all become 'equal through the social contract' (1966 [1762]: 137). Kant argued that citizens (*Staatsbürger*) are the members of a particular society – a state – and they are defined by the fact that they are 'unified for legislation'. For Kant, the essence of citizens resides in their equality, and it is expressed in the exercise of political rights: in 'the capacity for participation in elections constitutes the qualification for citizenship'. Crucially, for Kant, a citizen is not obliged to show obedience to a law to which he or she has not 'given approval' (1977b [1797]: 432–33).

¹³ Of course this principle was stimulated by Locke. It was then elaborated by Blackstone (1765: 143). It later became an article of faith in revolutionary France. In the USA, early constitutional rebellions were deeply marked by insistence on 'the colonial right to control of legislative power' and early state constitutions clearly placed the legislative branch at the centre of the constitution (Pole 1966: 29–31).

the 'supreme legislative' power as the 'sovereign power of a state' (1769: 4), and he claimed that 'supreme and subordinate powers of legislation should be free and sacred in the hands where the community have once rightfully placed them' (1764: 52). The 1776 Constitution of Maryland declared simply that 'the right of the people to participate in the legislature is the best security of liberty, and the foundation of all free government'. One account argues that the French Revolution witnessed the birth of a 'unique conception of legislative authority', capable of radically transforming society as a whole (Achaintre 2008: 21). Accordingly, during the French Revolution, Saint-Just stated that the 'legislative body is like the unmoving light that distinguishes the form of all things ... It is the essence of liberty' (1791: 102).

The primacy accorded to the legislature in democratic theory means that laws not created through inclusive popular participation in legislative acts have questionable, contestable legitimacy. Moreover, this means that laws created through popular participation have higher-order status, they override other laws, or other legal norms, that a society may contain, and, above all, they have primacy over laws created in other institutions. This latter fact possessed particular importance in the historical rise of democratic institutions, as, in most pre-democratic societies, legislation was not a dominant source of law, much law existed in piecemeal informal normative orders and there was no clear hierarchy between different normative structures in different parts of society.¹⁴ Consequently, popular participation in law making evolved as a norm that allowed governments to centralize society's law-making powers and to establish strict hierarchy between different laws. As a result, legislation is the central element of democracy, and the legitimacy of democracy depends on its claim to channel the will of the people or the nation, through the legislative organs of government, into law.

Of course, this is not to say that in a democracy participatory acts are channelled without filtration into law. It is necessarily the case that democracies establish constitutional systems, centred on human rights guarantees, to ensure that all citizens in society can participate adequately in political will formation. Indeed, the common theoretical claim that democracy presupposes rights is perfectly sustainable, and it is not

¹⁴ Before the French Revolution, governments did not monopolize powers of legislation, and, thereafter, they did so only notionally. In medieval societies, law was not made, but found in local sources in conventions, and even monarchical attempts to bring order to such conventions caused friction between central institutions and local elites (see Grinberg 1997: 1021, 1025).

contradicted here.¹⁵ On the contrary, it is argued throughout this book that there is little sense in imagining a modern democracy without also imagining the citizen, defined as a holder of general and temporally secure rights, as the basic point of legitimational reference for the political system.

Nonetheless, in a strictly constructed democracy, basic rights – for instance, rights regarding personal inviolability, freedom of movement and expression, access to justice – obtain value to the extent that they underpin the participatory dimension of democracy, securing and maximizing access to the procedures required for electoral authorization of law. Such rights, therefore, must be rights that shape democratic procedure, which prevent exclusion of social actors from collective decision-making processes, and which stabilize a general, equal and inclusive construct of the citizen as a participant in legislation. Democracy always presupposes that the citizen, as an equal participatory agent, stands at the origin of law making, and law is created by acts of citizens oriented towards legislation. In consequence, democracy contains the normative implication that rights are willed by citizens as principles that promote equal inclusion in legislative processes, and that rights obtain legitimacy because they act to ensure that the citizens retain a position at the origin of laws. Guarantees for rights lose democratic legitimacy if they obstruct their origin in democratic choice making. In a strictly constructed democracy, it is legitimate to assume that basic rights themselves are designed by constitution-making decisions, or at least by practical consensus between citizens, such that any normative or procedural constraint placed on acts of popular will formation possesses a clearly political origin.¹⁶

I.2 The Citizen

In this definition, the idea of the citizen is central to the norms, the practices and the obligations that support modern democracy. Notably, the period in which the modern democratic state began to take shape, the revolutionary period of the late eighteenth century, implanted in society the idea that the state and the citizen are integrally connected, and that the state is formed and legitimated as an entity that stands in an immediate and directly constitutive relation to the persons that it integrates – that is,

¹⁵ For different expressions of this theory see Habermas (1994: 88–9); Beetham (1999: 93); Benhabib (2009); Benvenisti and Harel (2017: 40).

¹⁶ See this claim in Bellamy (2007: 51); Loughlin (2010).

to citizens (see Bendix 1996 [1964]: 89–90). Democracy, in consequence, is originally a system of legislation that is created by, and remains centred around, citizens. In Europe, this association between state and citizen is underlined most symbolically by the Declaration of the Rights of Man and the Citizen in France in 1789. In the USA, the positive state-founding implications of citizenship were defined in equally forceful fashion.¹⁷

During the early rise of democracy, first, the state consolidated itself – functionally – as a public order by defining and legally demarcating the persons subject to its power, by bestowing, variably, certain equal rights upon them, and, in so doing, by removing them from alternative local affiliations (Gosewinkel 2001: 138; Gironda 2010: 70, 343). This involved the recognition of persons as citizens. In some states, in fact, the concept of the citizen was constructed quite instrumentally by political actors in order to weaken the power of aristocratic estates, to create a vertical hierarchy – that is, a ‘rational order of rank’ – in society, and so to establish ‘closer relations between the nation and the constitution of state’.¹⁸ The construction of the citizen was thus integral to practices of institutional formation and territorial integration that underpin modern statehood.¹⁹ In close connection to this, in its early emergence, the modern state was formed, normatively, as an entity that was authorized through the voluntary commitment of single persons, and it extracted legitimacy and legislative power from the generic construct of the citizen – by granting extended rights of participation, and by establishing preconditions for civil and political inclusion.

In both these respects, the modern state was formed as an entity that was correlated with the citizen as a *claimant to rights*, and the state acquired public authority for its functions by including citizens in this capacity. The modern state was elaborated as a system of shared rights, allocated to citizens, in which political institutions were able to incorporate their constituents and authorize legislation on the basis of these rights. Consequently, Shklar argues – quite persuasively – that there is ‘no notion more central in politics than citizenship’ (1991: 1). Similarly, Dahrendorf states that the

¹⁷ On the American Revolution as reflecting a strong positive ethic of political foundation see Wood (1992: 325); Edling (2003: 4).

¹⁸ This was the plan in Hardenberg’s designs to reform the Prussian state after its military defeat by Napoleon (1931 [1807]: 316–18).

¹⁹ The modern construction of the citizen was of course linked to earlier structural processes. It accelerated and consolidated pre-existing processes of territorial state formation, in which the increasing unity of legal order had already stimulated the growth of centralized, territorially concentrated political institutions (see Brunner 1942: 261).

entire 'revolution of modernity' can be summarized in one word: 'the citizen' (1965: 79). Gosewinkel adds to this by defining citizenship as the core concept underpinning the 'patterns of development of modern statehood' (2016: 37).

At the historical centre of the concept of the citizen, and of the modern state more generally, are two principles: *individual decision* and *collective equality*. First, modern citizenship was conceived as a condition that is freely and reflexively elected by individual persons. On this basis, it contains the expectation that it will enhance personal freedom. At least formally, second, the condition of citizenship implies that all citizens, having decided to be citizens, are equally included in a shared system of public rights, by means of which they are able to shape legislation and define the objective conditions of personal freedom and obligation. The combination of these two principles underpins the basic form of the modern state.

In revolutionary France, for example, the idea of the citizen assumed importance as the localized corporate structure of society under the *ancien régime* dissolved. A modern concept of the citizen developed in France as a body of persons began to identify and promote a common set of interests, which were opposed to the corporate power of the Bourbon monarchy, but which, in their relative consistency, detached individual persons from their more private societal locations in guilds, professional corporations and estates, which were defined by status-related privileges and immunities.²⁰ Citizenship was thus linked to a twofold process of *individualization* and *collectivization*, in which single members of society decided, separately, to become members of an extended national community, and their exercise of singular rights led, collectively, to the formation of a generalized, extensive, national society, with authority to override the legislative edicts of any corporate entity, including the monarchy. Even before 1789, some advocates of national membership had suggested that the institutional structure of the *ancien régime* already contained commonly binding basic laws, which expressed and protected the shared interests of all members of the citizenry, overriding particular or local privileges.²¹ During the revolutionary period, the decisive rejection of particular legal privileges,

²⁰ See discussion of the individualizing impact of the dissolution of the guilds in France in Garaud (1953: 11); Fitzsimmons (2010: 58). On the transformation of citizenship through the dissolution of estates in other European societies see Koselleck (1979: 109); Boli (1989: 43).

²¹ See relevant analysis in Bickart (1932: 1–2, 73, 103, 133); Duclos (1932: 30–31); Echeverría (1985: 3); Vergne (2006: 263).

and their replacement with generally applicable obligations, became a core article in thinking about citizenship.²² During the Revolution, in fact, the elements of voluntarism and collectivism in the figure of the citizen assumed acutely intensified form as the citizen, literally, was mobilized in the process of nation building. At this time, military engagement in defence of the Republic became a core determinant of citizenship, and the first Republican governments made the ascription of rights of citizenship conditional on the personal willingness of members of society to serve in the army. As a result, the exercise of political citizenship was integrally fused with the concept of the *citoyen-soldat*.²³ Notably, attempts in revolutionary France to provide a constitution for the nation were closely connected with attempts to provide a constitution for the army, and early draft military constitutions stated that the *soldat* and the *citoyen* should remain as closely connected as possible.²⁴ In some declarations, the personal experience of death in combat for the revolutionary polity was viewed as the most concentrated expression of equal citizenship. During the Revolution, Billaud-Varenne described the experience of death in defence of the Republic as a ‘recall to equality’, distilling an essentially formative – elective/collective – aspect of Republican existence (Billaud-Varenne 1794: 31).

In revolutionary America, analogously, national citizenship was projected as the result of an elective personal decision, and the construct of the citizen was closely linked to military engagement. American citizenship was originally associated with service in anti-colonial militias, and the initial expansion of citizenship in the early years of the Revolution was driven by a need for citizens to accept conscription in the struggle against colonial rule. This created a body of persons claiming citizenship as a distinct legal category, electively positioned outside the royal franchises created in England, and decisively committed to the American revolutionary

²² German historiography still differentiates between society based on estates and society of citizens (*altständisch* or *staatsbürgerlich*) to determine the division between early modern and modern society, such that the concept of the citizen expresses a great historical caesura. On the semantics of this see Weihnacht (1969: 41).

²³ The ‘valeur de nos soldats républicains’ was described by Robespierre as a distinctive bastion of the Republic (1793d: 2). The *citoyen-soldat*, one historian claims, condensed a ‘new type of political subjectivity’ (Hippler 2006: 89). See also Boli (1989: 11).

²⁴ See Art XXXXIII of the projected military constitution for revolutionary France in Lacuée, de Cessac and Serva (1790: 12). If we accept Hintze’s claim (1962: 53) that every ‘constitution of state is originally a military constitution’, the concept of the citizen-soldier that evolved in the age of revolution can be placed at the core of a new comprehension of public authority.

cause.²⁵ Accordingly, an early commentary on American citizenship, by David Ramsay, explained that, through the revolution, the ‘political character of the people’ had been transformed ‘from subject to citizen’: the relation of the citizens to the state resided in the fact that they were united, through a voluntary personal act, such that the citizen possessed ‘an individual’s proportion of the common sovereignty’ (1789: 3–4). Slightly later, the Supreme Court declared, in strikingly military language, that:

Citizenship, which has arisen from the dissolution of the feudal system ... is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship, differ, indeed, in almost every characteristic. Citizenship is the effect of compact; allegiance is the offspring of power and necessity. Citizenship is a political tie; allegiance is a territorial tenure. Citizenship is the charter of equality; allegiance is a badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude. Citizenship is communicable; allegiance is repulsive. Citizenship may be relinquished; allegiance is perpetual. With such essential differences, the doctrine of allegiance is inapplicable to a system of citizenship; which it can neither serve to controul, nor to elucidate.²⁶

In both early revolutionary settings, in consequence, the citizen was the fundamental lynchpin in the emergent political system. As such, citizenship was conceived as the result of an equal and voluntary political decision, of the choice to identify with a particular, integrative community, often of a military or partially militarized nature, through which the citizen could raise claim to certain collective rights and freedoms. This decision separated the community of citizens from traditional patterns of government founded in coercion and dependence or from traditional patterns of affiliation based on involuntary obligation (Rosanvallon 1992: 72–3).²⁷ Voluntary collectivism, expressed in concentrated form in military obligation, formed the centre of the volitionally constructed

²⁵ See Kettner (1978: 127); R. Smith (1997: 87); Kestnbaum (2000: 21). One account argues that the ‘citizen soldier’ was institutionalized in the French and American Revolutions (Janowitz 1980: 14). In Kloppenberg (2016: 360), the argument is proposed that war against England created an ethic of citizenship in America, based on autonomy and equality.

²⁶ 3 U.S. 133 *Talbot v. Janson* (1795).

²⁷ The connection between citizenship and military identity goes back a long way, and it was famously formulated by Machiavelli. In revolutionary America, rules of citizenship had to be defined at an early stage in the revolutionary wars, as laws had to be established to regulate persons not loyal to the Republican cause and to disarm potential traitors. See for example Articles 27–8 of the Articles of War of the Continental Congress, 1775. In France, citizenship clearly also hinged on a willingness to take up arms. Indeed, military service was an intensified experience of citizenship (Hippler 2002: 16). See generally on the link between military service and citizenship rights Janowitz (1976: 190–1); Sanborn (2003: 4–5).

national state.²⁸ Indeed, the linkage between citizen and soldier formed a key precondition for the longer rise of democratic citizenship, and, throughout modern history, the militarization of society has recurrently led both to the solidification of existing patterns of political enfranchisement and demands for enfranchisement by hitherto marginalized citizenship groups.²⁹

This association between democracy and citizenship is not meant to indicate that, within a democracy, citizenship is a simple or static construct, or that democratic institutions can gain legitimacy through the simple and immediate substantiation of the will of citizens. Like democracy, the citizen is definable in multiple categories, and some aspects of citizenship do not, by necessity, give rise to democratic government.³⁰ Moreover, clearly, the contours and obligations of citizenship cannot be neatly drawn (see Isin 2002: 272). It is ingrained in the democratic construction of the citizen as a legitimational figure that, in establishing general rights, it contains multiple meanings and stimulates multiple, often conflicting, claims to rights, and it reflects socially variable demands for legal recognition and political participation. In particular, the concept of the citizen can easily be taken to project a generalized, homogeneous

In both cases, citizenship resulted from a clear and decisive choice. See important discussion in Kettner (1974: 218, 241); Zolberg (2006: 86–7).

²⁸ This thread runs through all research on democracy. See for discussion Turner (1990: 211).

²⁹ On this principle see Tilly (2004: 89–90). An important example of this is the experience of African Americans in the USA, where military mobilization repeatedly led to push-back against racist citizenship laws. On this process in the late 1860s see Berry (1977: 92). Tilly's general claim is that the centralization of government originating in extraction for military purposes creates basic conditions of citizenship (1990: 83, 115–20).

³⁰ The normative concept of citizenship is deliberately reflected here in wide and encompassing terms. The contemporary idea of citizenship comes in all theoretical sizes. This concept can be phrased in semi-classical terms, as practical worldly engagement (Arendt 1958: 257). It can be focused on deliberative interaction (Habermas 1992: 649). It can imagine civil society as a primary locus of citizenship (Arato 2000; Alexander 2006: 34). It can place emphasis on social conflict (Touraine 1994: 24, 113). It can accentuate the importance of shared identities and engaged social membership (Walzer 1994: 54). It can prioritize political participation (Pateman 1970: 105; Barber 1984: 132). It can include participation in market activities, alongside more classical arenas of political agency (Somers 2008: 279). It can assume radical, experimental features (Brunkhorst 1998: 10). It can be seen as a pattern of exclusion and contestation (Isin 2002: 35–6). It can accentuate the transferability of national citizenship to the global level (Linklater 1998: 36; Bosniak 2000: 508). It can imagine a reality of citizenship that transcends national membership (Soysal 1994: 165; Benhabib 1999: 734). It can even envisage cosmopolitanism and community membership at the same time (Delanty 2000: 145). In each formulation, however, the idea of citizenship is unified by the fact that it implies that the citizen is a *political transformer* of societal interests into legally generalized norms.

pattern of inclusion, which cannot simply accommodate multiple groups existing in society at a given moment. As discussed below, the connection of citizenship to dominant social groups of necessity means that, to become reality, citizenship must acquire a pluralistic institutional form. In consequence, the citizen necessarily forms a centre of contest, and, simultaneously, it pushes at the historically given boundaries of societal in- and exclusion, legal recognition and non-recognition. As one theorist has observed, citizenship always refracts the fault lines between membership and non-membership, participation and absence of participation (Barbalet 1988: 97).

Nonetheless, even in its most ambiguous and contested dimensions, democracy depends on citizenship, and citizenship is fundamental to democracy and the obligatory force of democratic laws.

First, in the original emergence of modern national societies, citizenship contained several layers of rather distinct meanings, which were not fully differentiated, and which still in fact partly overlap. Initially, during the first period of national revolution in the eighteenth century, early nation states began to define members of society as holders of certain general legal titles, which meant that they were protected by national laws. At this level, citizenship was defined as possession of a general body of thin protective rights, linked to legal membership in a nation. Moreover, at this time, nation states began to allocate political rights to their members, which meant that some members of society appeared as citizens in the sense that they were entitled to participate in the political life of the national community. At this level, citizenship was defined as possession of general rights to shape legislative processes, linked to national membership. This meaning of citizenship eventually became the cornerstone of democracy. In establishing these two sets of rights, however, states were also forced to decide which members of society were to be assigned such rights, in order to determine the legal qualifications of persons assuming national membership and seeking access to legal protection and political influence. This was clearly the case in revolutionary America, where it was necessary to distinguish American citizens from Britons. This was also the case in revolutionary France, where the new Republic was quickly threatened by foreign intervention and intrigue, and citizenship presupposed Republican loyalty. For this reason, as soon as they began to allocate inclusive constitutional rights, states also began to establish more exclusionary, identificational principles of citizenship, or nationality, to determine affiliation to a particular polity and to justify and regulate access to centrally allocated rights.

From the outset, therefore, citizenship possessed quite divergent normative implications: it implied rights to claim membership in a nation, or nationality (however defined); it implied rights to passive legal protection in a national community; it implied entitlement to the active exercise of certain primary rights of political participation. In some settings, these meanings have been elided. In the French Revolution, notably, the separate meanings of the terms citizenship and nationality were not clearly distinguished (Schönberger 2005: 23). In other linguistic contexts, the vocabulary capturing the distinct senses of the citizen as a legally protected member of a people and of the citizen as a participant in public life, and indirectly also in legislative processes, is not fully elaborated.³¹ As a result, different aspects of citizenship contribute to democracy in different ways, and not all principles of citizenship fully and unambiguously endorse a participatory political ethic.

Despite these ambiguities, however, each aspect of citizenship is vitally formative of democracy. Indeed, even more technical, reduced definitions of citizenship that simply address qualifications for national membership are not devoid of democratic implications. From the eighteenth century onwards, even the simple construction of citizenship as a set of formal rights belonging to co-nationals contained the implication that being a citizen implied a status that was distinct from private or feudal allegiance. Even this primary legal definition of citizenship created generalized rights for members of the nation, as it conferred a publicly ordered form on rights that had previously been dependent on objective membership in guilds, families and associations. Even in its reduced aspects, therefore, citizenship was premised in primary notions of legal equality and equal freedom (Fahrmeir 2000: 19). Indeed, the concept of the citizen in this basic legal sense contributed greatly to the legal formation of the nation state as a system of inclusion, and it played a core role in expanding a legal order across society that was decisively separated from the residual private attachments that had underpinned feudalism (Gosewinkel 2001: 11). Even citizenship in the sense of simple nationality thus involved implicit legitimational claims about the essentially egalitarian nature of the community to which a citizen belonged.

³¹ In German, *Staatsangehörigkeit* denotes membership of a people, with consonant legal rights, and *Staatsbürgerschaft* approximates to (but does not fully cover) the sense of the citizen as political participant (Gosewinkel 1995: 545). On the slow transformation of the concept of the citizen in late-Enlightenment Germany see Schlumbohm (1975: 158); Stolleis (1990: 337–8).

Second, clearly, the concept of the citizen is not constitutively linked to the collective commitment to democratic rule, and citizenship can be defined in ways that contradict democratic ideals. In societies of classical antiquity and in medieval Europe, rights of citizenship were the exclusive property of particular social strata, and they implied duties and obligations specific to socially privileged groups.³² Moreover, a distinction is often made between the traditional Republican concept of the citizen as an active, public participant in political community and the traditional Liberal concept of the citizen as a relatively passive holder of private legal rights, linked to individual freedoms.³³ Accordingly, some concepts of citizenship see citizenship as an actively politicized process of contested engagement, and some concepts of citizenship view citizenship as linked primarily to the enjoyment of certain protected rights.³⁴ In many contexts, a more reduced, liberal definition of citizenship as a legal condition, in which certain prior entitlements are preserved, has been accepted, and this does not of itself provide a basis for robust democracy. Indeed, hypothetically, citizenship as a condition of private rights holding is entirely possible in societies that are not easily qualified as democracies.³⁵

Despite this, however, in the late Enlightenment, a new and enduringly resonant figure of the citizen was constructed, whose normative implications cannot be eradicated from political-legitimational debates about democracy. During the Enlightenment, first, the citizen was constructed as a singular legal person, with certain private legal rights attached to membership in a national community. This idea of the citizen was clearly articulated in the legal theories of Locke and Kant. At the same time, however, the citizen was imagined not solely as a single or private person, but as the political articulation of *nationhood*: that is, as a *collective singular* person, claiming rights and freedoms of a collectively binding nature, and expressing the interests of the nation as a whole. This idea of the citizen was clearly expressed in the legal theories of Rousseau and Sieyès.

³² Of course, Aristotle did not accept an encompassing model of citizenship. Exclusion was also embedded in the culture of citizenship in ancient Athens (Manville 1990: 11). In medieval Europe, membership in corporations, such as guilds or cities, was a typical precondition for the possession of citizenship rights.

³³ See Young (1989: 252–3); Kymlicka and Norman (1994: 353); Hutchings (1999: 7–8); Miller (2000: 43–4); Bellamy (2011); Carter (2001: 149).

³⁴ For the former approach see Lipset (1960: 84–5) and for the latter see Marshall (1992 [1950]).

³⁵ In fact, for much of the nineteenth century, European states possessed legal systems based on private rights, but they did provide expansive political rights until around 1870.

These two dimensions of the citizen flowed together in the revolutionary culmination of the Enlightenment, and they formed an essential foundation for the later growth of democracy. In the revolutionary period, in fact, the two faces of the citizen – the liberal face of passive or protective private rights, and the Republican face of active public duties – were galvanized. This produced an idea of citizenship that entitled the citizen both to legal protection for private rights and to legal-political participation in the exercise of public rights. Above all, this entailed an idea of citizenship in which the exercise of political rights often conflicted with laws intended for the preservation of more passive protective rights, and political rights were often focused on renegotiating the scope of personal rights.

Through this fusion, the citizen emerged in the late Enlightenment as a legal figure combining *singular private subjective rights* and *collective public subjective rights*, whose actions mediated between the domain of private interaction and the realm of public authority, and in which inchoate personal/societal demands were articulated with public institutions.³⁶ Through this construction, the citizen became a line of communication between government and society, and rights became the diction of this communication. The establishment of the citizen as legitimational figure for the political system created an abiding and often unsettling impulse for the political system of modern society, as it connected the public-legitimational form of the polity to deep-lying private or societal interests. At one level, the construct of the citizen established citizenship as a political form of interaction, based on rights to participate in creating collectively binding laws. Yet, the construct of the citizen also tied the polity at the most integral legitimational level to private claims, prerogatives and conflicts. This meant that a distinctive form for the citizen was created, in which the citizen engaged with the political community through claims to rights and through the exercise of rights, and in which the political system acquired information from society, mediated through the citizen, in the form of rights. Through this dual form, the citizen became the *primary environment* of the national political system, acting as a *line of transmission* through which social demands, in the medium of rights, could be directed towards the political system, and processed by the political system.

³⁶ Habermas explains this by claiming that citizens of state and citizens of society are physically identical persons, but appear in 'complementary roles' (1992: 442). For a claim, close to mine, that the 'substance of citizenship' is rights, and that 'rights of citizenship' refract lines of contest of social in- and exclusion, see Isin (2009: 376–7).

From the Enlightenment onward, the citizen could not be imagined as a purely passive holder of allocated private rights, and citizenship necessarily implied a condition in which members of society were implicated in, or at best challenged for access to, the legislative system of the polity. Indeed, it is fundamental to the modern concept of the citizen that it translates claims to rights and freedoms into political form, it demands political recognition for rights, and it cements rights as elements of public order and public obligation, shared equally by all society and demanding recognition in all aspects of legislation. A democratic citizen is constructed through a process in which political institutions acquire obligations towards persons in generalized legal form, so that citizens are legally implied and recognized as holders of rights that underpin all acts of legislation. As the environment of the political system, the citizen appears as a broad aggregate of rights, allocated to all members in society, and subject to general expansion, which form the basis for the legitimacy of the political system as a functional order. The ability of a citizen to insist on rights that are enacted in all law, even in law that does not specifically concern each particular citizen in each moment of her or his life, might easily be seen as the basic criterion of a democracy, separating democracy as a political form from a simple corporation. The citizen, thus, is only imperfectly constructed if its actions are solely expressed as demands for fulfilment of momentary interests or enactment of private commitments. Instead, a democratic political system is defined by the fact that citizens seek common recognition of rights, so that rights become ingrained in the public constitutional fabric of society: a modern, geographically expansive democracy is difficult to envisage without a structure of public law of this kind.

On this basis, the democratic political system is defined by the fact that it reacts to claims to rights expressed by citizens, who constitute its societal environment, and it translates such claims into generalized form, giving recognition to the citizen as an agent of an eminently *public* character – that is, as an agent *who is normatively co-implied in all legislation*. In this capacity, the citizen becomes a central part of the political structure of society, articulating the norms that all laws must recognize. To this degree, the modern citizen is categorically separated from the private actor, seeking localized or punctual endorsement or protection for particular interests. In a democracy, by consequence, the citizen becomes a socially transformative figure, both legitimating and challenging the contours of the political system through new demands for rights, and expressing rights at consistently heightened degrees of inclusivity. This process of

claiming and gaining recognition for rights is primarily institutionalized through democratic elections. Clearly, it was through suffrage extensions that modern democracies were created; widening of electoral franchises reflected, historically, the 'acceptance of the concept of *unit citizen* of the nation state', distinct from private or lateral associations, as the basic source of public authority (Rokkan 1970: 27). However, this also presupposes other patterns of subjective mobilization outside and in parallel to elections.

Of necessity, third, the idea of citizenship contains exclusionary implications, and the process of accessing rights inherent in citizenship refracts manifold social conflicts, both ethnic and socio-economic in nature. These implications also sit uneasily with democracy.

The initial early-democratic construct of the citizen as an embodiment of the nation inevitably led to the exclusion or marginalization of some groups; in fact, this occurred as soon as this construction was confronted with a factually existing, pluralistic society. In most early national societies, rights pertaining to citizenship were initially withheld from minority groups, who were often defined on ethnic grounds. In some cases, citizenship rights have only been expanded in gradual, measured, circumspect and prejudicial fashion to non-dominant ethnic sectors, such that the granting of rights to some ethnic groups has widely implied the withholding of rights from other social groups (Kymlicka 1995: 74). Moreover, early prototypes of modern national democracies also restricted rights of citizenship on socio-economic grounds. Tellingly, the discovery of the citizen in revolutionary France led almost immediately to the imposition of restrictions on the groups allowed to exercise full rights of citizenship (see Grandmaison 1992: 88, 239; Rosanvallon 1992: 72). The idea of citizenship entailed both the exclusion of some social groups seen as threatening to the Republic, and the subdivision of the body of designated citizens into different categories of political entitlement, calibrated by degrees of activity, passivity and entitlement to legislative participation.³⁷ Such distinctions between different grades of citizenship were typically based on income or wealth, as, in many post-1789 societies, only persons with a certain level of ownership were deemed actively implicated in national affairs.³⁸ This principle was established early in the French Revolution,

³⁷ On the first point see Wahnich (1997: 81) and on the second see Rosanvallon (1992: 87). The distinction between active and passive citizens is discussed in Sieyès (1789: 12).

³⁸ In the French Revolution, income-based calibration of citizens was theoretically constructed by Sieyès. But this principle soon became widespread. For instance, Kant retained the distinction made by Sieyès between active and passive citizenship, determined by

as rights of active citizenship were founded in birth, age, domicile, fiscal contribution and employment.³⁹ Similar processes were reproduced in many new nations created in the longer wake of 1789, and it was common for national populations to be divided *de facto* into passive citizens and active citizens, of which only the latter had full suffrage rights.⁴⁰

As a general point, it can be observed that, across all societies, there exists a close correlation between the early rise of democratic citizenship and the emergence of class conflicts. The rise of the citizen was closely linked to, and in fact causally implicated in, the rise of social class as a focus of agency. As discussed, the principle of citizenship was originally connected to the socio-geographical expansion of national societies, and it reflected the construction of societies as aggregates of individuals with similar rights and duties, distinct from local status hierarchies. Owing to its connection with nationhood, the citizen necessarily assumed central importance in the societal order of the nineteenth century. In particular, citizenship created a condition in which social groups were increasingly separated from their historically localized positions, and conflicts between groups were transferred from the local/sectoral settings typical of *ancien-régime* structures onto the more extended territorial conditions of national society. In this setting, different individuals recognized individuals in other locations as possessing similar interests and problems, and members of particular social groups inevitably began to identify themselves as *classes*, possessing relatively uniform and unifying collective motivations across different social locations.⁴¹ As soon as people perceived themselves as citizens, therefore, they necessarily perceived themselves as members of classes, and they used rights attached to citizenship to advance claims attached to class interests. This is expressed both in the fact that, through the expansion of national societies, some class groups mobilized for increased citizenship rights and in the fact that some status groups mobilized to exclude other groups from enjoyment of such rights.⁴²

property ownership (1977b [1797]: 432–33). Notably, Robespierre challenged this principle, stating that to deprive persons of rights of active citizenship was ‘the greatest of all crimes’, and it was wholly incompatible with the abolition of privileges at the core of the Revolution (1791: 21).

³⁹ See the presentation of this plan by Sieyès to the National Assembly in (1789: 72).

⁴⁰ See general discussion of early franchise restrictions at pp. 134–7 below. The distinction between active and passive citizens was widespread, not only in Europe, but also in Latin America (see Guerra 1992: 372–3).

⁴¹ On the connection between nation-building, citizenship and class formation see Bartolini (2000: 180).

⁴² See discussion below at pp. 287–90.

Overall, from its first emergence as a political concept, citizenship implied varying degrees of inclusion and political privilege, and it released inter-group conflicts that had been less generally articulated in the political order of pre-modern society. It cannot, therefore, simply be assumed, in the manner of T. H. Marshall, that rights of citizenship have a necessarily 'homogenizing effect', leading seamlessly to more consistent integration of population groups (Gosewinkel 1995: 536). On the contrary, some rights of citizenship are necessarily conflictual, and citizenship and class conflict express a common process of societal formation.

As discussed below, however, citizenship has proved more powerful as a norm of inclusion than of exclusion, and the claim to equality implied in citizenship has recurrently provided a robust internal measure by which exclusionary constructs of citizenship have been challenged.⁴³ From the outset, citizenship spelled out a powerful logic of inclusion, and, once established as a principle of legitimacy, citizenship contained an unmistakable orientation towards full and comprehensive inclusion. Indicatively, Robespierre stated in the French Revolution that under a constitution based on popular sovereignty '[a]ll citizens, whoever they may be, have the right to lay claim to all levels of representation ... and [e]ach individual has the right to contribute to creating the law by which he is obligated ... If not, it is not the case that all men are equal in rights, or that each man is a citizen.'⁴⁴ Likewise, in private correspondence in the early stages of the American Revolution (1776), John Adams clearly perceived the emphasis on full inclusion in the concept of the citizen, stating that the result of the principle of citizenship would be as follows:

There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell.⁴⁵

After the revolutionary era, Tocqueville apprehended this point equally clearly, explaining that, once separated from status, citizenship releases an

⁴³ See on this Dahrendorf (1965: 79); Janoski (1998: 147). See the claim in Münch that 'the development of rights of citizens' necessitates 'inclusion of all social groups in membership in the social community and in equal exercise of civil rights' (1984: 297).

⁴⁴ See Robespierre (1789). This is a speech held in the National Assembly in October 1789.

⁴⁵ This correspondence is reprinted in Adams (1979: 211).

unstoppable inclusionary momentum. He explained: 'This is one of the most invariable roles that govern society. The further electoral rights are extended, the greater is the need of extending them. After each new concession, the strength of the democracy increases, and its demands increase with its strength' (1866 [1835]: 89).⁴⁶

Above all, citizenship contains two principles that create an overriding matrix of inclusive social recognition. On one hand, it contains the core principle of equality. On the other hand, it ties public rights to private rights. On this joint basis, citizenship emerged as a term in which social agents were able both to challenge political exclusion (by claiming equal rights of electoral participation) and to demand social inclusion (by claiming an equal entitlement to collective freedoms).⁴⁷ Of course, these processes are always incomplete and inherently conflictual. Both normatively and factually, however, the citizen linked society's political system to a multi-level contest over the terms of legislative inclusion, and through this the system that we now call democracy was able to evolve.

I.3 The Citizen as Inclusion

The principle of inclusion projected by the idea of the citizen has vital implications in the normative, legitimational dimension of the political system. To speak in terms close to those used by Hauke Brunkhorst, the rise of the modern citizen in the American and French Revolutions in the late Enlightenment produced a distinctive transformation in the content of law itself. From this time, law was integrally legitimated by its claim to represent the reasonable freedoms of all citizens, and the law could not silence demands for inclusion without silencing the grounds of its validity (Brunkhorst 2010: 15). In polities defined by a commitment to citizenship, therefore, attempts to diminish, or to bar persons from, the exercise of the rights of citizens have usually shown recognition of their own perversity, and such polities have enacted exclusionary measures in furtive,

⁴⁶ For similar processes in classical democracies, see the account of the growth of Greek citizenship in Meier (1980: 87, 127). For more recent statements of this point see Przeworski (2008); Goodin (2010: 199).

⁴⁷ As one account has aptly stated: 'Citizenship defines membership of a political community, and so invites the excluded to struggle for inclusion' (Foweraker and Landman 1997: 31).

clandestine or openly ideological form.⁴⁸ As one theorist states, once the principle of equal citizenship is established in a polity ‘no acceptable reason can be given to justify unequal distribution of citizenship in violation of the formal idea of equality’ – any such unequal distribution must *de facto* acknowledge its own lack of legitimacy (Thompson 1970: 179). At core, the citizen articulates a teleological idea of national society, in which the founding principle of equality steers and directly regulates processes of contestation and inclusion.

In most polities defined by a commitment to citizenship, in consequence, the concept of citizenship has been used either immediately or incrementally to extend democratic integration to social groups prohibited from exercising full rights of political participation. This applied, first, to marginalized or to incompletely represented social groups, such as members of the working class in nineteenth- and early twentieth-century Europe and Latin America. However, it also applied to more systematically excluded social groups, such as women in polities with only male suffrage, people of colour in classical apartheid regimes (for example, pre-1964 USA, pre-1994 South Africa), and indigenous populations living in incompletely decolonized states (pre-1991 Colombia, pre-2009 Bolivia). All these groups have claimed the normative substance of civil and political citizenship as a focus for extending their socio-political inclusion.⁴⁹ In such instances, conflict over citizenship laws and legal interpretation of citizenship formed the structuring principle for intensified democratization:⁵⁰ citizenship generated a norm of contestation by

⁴⁸ One example is the restoration monarchy of France initiated in 1814, which preserved a parliamentary chamber for symbolic reasons, although this chamber was strategically designed so that it scarcely possessed representative powers (Bastid 1954: 219; Sellin 2001: 240). An extreme example is the disfranchisement movement in the Southern States of the USA around 1890, which deployed a combination of open fraud and manipulation and great subterfuge and oblique techniques to suppress electoral rights of black citizens (Kousser 1999: 32–6; Riser 2010: 14, 46). See Balibar’s comment that, once articulated, the equality implied in citizenship ‘is not limitable’ (2011: 58). See also Lockwood (1996: 542).

⁴⁹ See discussion below at pp. 437–42.

⁵⁰ Note that in early concepts of citizenship in revolutionary America black people were described as ‘inhabitants, but not citizens’ (Ramsay 1789: 2). Think, then, of the *Dred Scott* ruling (1857) in the USA. *Dred Scott* flatly denied that black Americans could obtain rights of federal citizenship. This triggered the Civil War – a war about citizenship – and resonated through long processes of civil struggle, which were not completed until the 1960s. Note also the franchise reforms in the UK, which began in the nineteenth century. The first of these, in 1832, was specifically designed *not to create* a democracy. However, as discussed below, the Great Reform Act stimulated a process of suffrage reform, completed in the twentieth century, which eventually constructed most people in society as citizens.

which patterns of exclusion could be challenged and processes of inclusion expanded and intensified. This is lucidly exemplified by the female suffrage movement in the French Third Republic, in which suffrage activists focused their energies on posing the simple question: Did the legal terms *citoyen* and *français*, which constructed clear general rights for French people, also include women? (Hause 1984: 11). Moreover, the concept of citizenship formed a mainspring for democratic inclusion in societies without typical representative systems of governance. This is evident, in particular, amongst members of colonized populations in territories subject to imperial rule, where the ideal of citizenship has been widely utilized to mobilize people against dominant colonial regimes.⁵¹ In such cases, citizenship provided the basis for the formation of new governmental institutions. Overall, citizenship sets out a universal norm, which is relatively indifferent to polity type, and which can be articulated as a demand for inclusion *wherever there is a political system*.

The principle of inclusion projected by the idea of the citizen also has implications in the systemic, structural dimension of the political system. Indeed, as mentioned, this concept often underpins the practical processes in which national political systems gain an expanded integrational hold on society, bringing actors in different parts of society into proximity to the political system, and supporting practical/systemic trajectories of nation building and societal formation. In particular, this is reflected in the fact that societies founded in constructs of citizenship have typically witnessed a multi-level process of institutional formation, in which citizenship has been broadened to include more social groups, and in which, consequently, the number of rights exercised by citizens has also increased. Through their longer-term evolution, most modern political systems built up a three-level corpus of citizenship rights in their societies, containing *private economic rights*, *political rights* and some *social rights*. These rights evolved through the contested practices of citizenship, and they marked the widening of citizenship across society. However, these rights also acted institutionally to embed the political system within a given regional or national society. Notably, the consolidation of each stratum of rights involved the elimination of local power, it intensified the immediacy of

⁵¹ This began in revolutionary America. In the Spanish colonies in Latin America, the figure of the citizen was fundamental to the 'break with colonial order' and 'the construction of new national communities' (Conde Calderón 2009: 13). This continued through decolonization in Africa. Note the telling comment that in South Africa 'African intellectuals' fought the legacies of colonialism by 'using liberalism's egalitarian proclivities to their advantage' (Halisi 1997: 65).

the link between citizens and government, and it led to a reinforcement of governmental infrastructure – e.g. increase in judicial control of society, centralization of public bodies, rising fiscal penetration of the state and increasing welfare responsibilities.⁵²

In consequence, the concept of inclusion projected by the idea of the citizen underpins the material-institutional structure of the modern political system, and it has proved a key element in the creation of political systems with extensive socio-geographical reach. The construct of the citizen, claiming and enacting rights, is integrally linked to a process of societal nationalization, in which society as a whole is increasingly underpinned by reasonably uniform norms, and central institutions penetrate deep into society. Indeed, the fact that the citizen is defined by a claim to rights of equality means that the more a society is defined by citizenship practices the more it tends towards nationalization and societal convergence around central legal and political institutions, and the less important private, regional and sectoral affiliations become.⁵³ The citizen forms a link between the political system and its society which impels both the political system and society as a whole towards a condition of higher integration, more compact centralization, and deeper nationalization.

On each of these counts, not surprisingly, leading texts in general sociology have identified the citizen as a matrix of *inclusionary modernization* in contemporary society. In this perspective, the citizen of democracy is perceived as a core element in the creation of national societies and national institutions. In this perspective, in fact, citizenship allows, or in fact renders essential, the removal of structural variations in society. Moreover, it allows, or renders essential, the generalized expansion of societal membership beyond localized, segmentary or private affiliations.⁵⁴ Most paradigmatically, Weber argued that the modern state

⁵² See examples of the voluminous literature on the link between the expansion of citizenship and progressive nationalization in Schattschneider (1988: 89–90); Bendix (1996 [1964]: 90); Bartolini (2000: 180); Caramani (2004).

⁵³ Of course, this process of centralization does not preclude federalism or even ethno-federalism. However, it implies legal uniformity. For examples of federalism obstructing legal uniformity see discussion of the USA below at pp. 289–93.

⁵⁴ For example, Durkheim saw the rise of citizenship as replacing local and particular identities, playing a key role in the expansion of governmental consciousness through society: as such, he saw citizenship as ‘what constitutes democracy’ (1950: 120). Of course, Marshall viewed citizenship as a focus of inclusion which mediated and supplanted class antagonisms. This idea is taken up in Honneth (1992: 191). Parsons saw the expansion of rights-based citizenship as reducing the weight of particularistic identities and affiliations (1965). Habermas viewed citizenship practices as a category of interaction capable of liberating persons from unreflected attachments, and empowering them to establish universally

is characterized by the fact that, in contrast to the internally privatized political order of pre-modern society, it extracts its power from, and explains its power in relation to, *the citizen*. For Weber, the 'concept of the citizen' is central to the legitimacy of the modern state, and the state owes its legitimacy to the fact that it is authorized by the people *qua* citizens. As a citizen, the members of the people are uniquely extricated from their 'particularization in professional and familial positions' and they are abstracted against 'distinctions of material and social circumstances' – the 'unity of the people', in contrast to the 'dividedness of private life spheres', is reflected in the citizen, and the state acquires legitimacy through its focus on the citizen as a fully generic source of inclusion (1921: 266). Above all, for Weber, this legitimating reference to the citizen coincides with the nationalization of the state – with its functional expansion across national society. The citizen accompanies and supports the state in this process, and it allows the state to legitimate its power, in relatively depersonalized general form, across the divisions that separated the personal power structures of pre-modern society.

In its different implications, in short, the principle of citizenship has converged around a basic construction of the person as an equal addressee of law, correlated by necessity with an inclusive legal order, and able to claim rights of participation in this order.⁵⁵ Indeed, in the modern definition and comprehension of citizenship, it is difficult fully to separate the three different categories of rights that, with variations, coalesce around this term – (1) the right of affiliation to a community; (2) the right to recognition, protection and private freedom under law; (3) the right to participate in collective deliberation and law creation in a community. Different theories and different legal models may of course give privilege to one or other of these sets of rights. But a theory of citizenship cannot easily exclude any one of these three groups of rights.⁵⁶

valid normative agreements. This underpins Habermas's orientation of citizenship away from ethnic and cultural backgrounds towards rational political participation (1992: 636). Luhmann observed citizenship as a generalized form of social inclusion, which at once underpins the differentiation of the political system, and establishes a 'generalized relation' between the person and the state, creating complex, non-coercive lines of communication between the political system and those persons that it addresses (1965: 15–56). See important discussion in Turner (1993: 4).

⁵⁵ Pocock defines this as the sense that 'human social life' resides in 'universality of participation' (1975: 75).

⁵⁶ See for example Benhabib's overlapping triadic definition of citizenship, including collective identity, privileges of membership, and social rights and benefits (1999: 720–2).

In all its variations, moreover, the concept of the citizen as claimant to rights formed a core foundation for the rise of democracy from the eighteenth century to the present. Democratic systems are defined by the fact that they confer institutional form on the rights and practices attached to citizenship, by which means they extract legitimacy from the citizen as a basic general fulcrum of public order. In exercising their rights, citizens construct and revise the terms of their obligation towards public institutions, and rights stabilize generalized obligations both for the government and for citizens throughout society. Essential to this construction of obligations through rights is that democratic systems avoid extreme disparities in the construction of citizenship, and they project the citizen, from which they derive legitimacy, in relatively general terms, as an agent that is able to claim similar rights, that is equally recognized in legislation, and that is implicated in similar fashion in the production of legislation. Democratic systems can easily tolerate cultural, regional and interest-dependent variations in citizenship. For example, democracy may be enhanced by the establishment of mechanisms to ensure minority representation, whose interests cannot easily be captured under national models of citizenship.⁵⁷ Moreover, it is perfectly possible to imagine, at least, a democratic system that is not attached to a national community – in essence, citizenship is a hallmark not of a democratic nation state, but of a democratic political system. However, democratic polities cannot easily survive great unevenness or acute variations in political affiliation, at least if this affects the extent to which citizens perceive the political system as a focus of social and legal obligation. More categorically, democratic polities cannot tolerate disparities in the distribution of rights, at least rights of procedural and political character. As discussed below, states unable to institutionalize a general construct of the citizen, possessing equal and generalized rights, have struggled to establish democracy as a socially meaningful form.

I.4 The Citizen and the Political

Overall, from the late eighteenth century onward, the state–citizen nexus became the core formative dimension of public authority. The basic legal construction of citizenship cements a series of subjective rights at the core of public order, which define the legitimacy of government as correlated

⁵⁷ This point is made expertly in Young (1989).

with the fulfilment of certain collective obligations.⁵⁸ Implicit in the state–citizen nexus is the principle that it articulates certain bilateral obligations between the citizen and the polity, which separate the state both from privatistic or patrimonial patterns of social organization typical of pre-modern structures, and from momentary processes of government and the persons momentarily exercising governmental power. As a result, the citizen, or the fact that the political system is correlated with the citizen, allows a society (of citizens) to see some institutionalized norms as entirely public, in which the freedoms of all persons are implicated, and which cannot be derived from single private interests.⁵⁹ In this respect, vitally, the citizen underpins a distinct domain of strictly *public law*, in which certain laws, rights and norms of recognition are firmly stabilized as the substructure of government.⁶⁰ As a result of its general recognition of citizenship, in turn, the state assumes a clear higher-order position in society, with primacy amongst other institutional systems, and it is authorized to implement laws with higher validity than other sources of obligation, slowly eradicating other repositories of power.⁶¹ In consequence of this, then, the state becomes an immediate presence for persons in society, and social relations are increasingly directed through the state.⁶²

In this respect, the citizen is deeply constitutive of what we now perceive as the categorically *political* dimension of society, and the normative dimension of classical democratic theory contains an emphatic

⁵⁸ Subjective rights are usually seen as indicators of interests in private law. But the concept of citizenship clearly means that some subjective rights, relating to procedures for participation and legal recognition by administrative bodies, are also established in public law, reflecting interests directed towards public persons. For a classification of subjective rights in public law see Kelsen (1911b: 630). For Kelsen, there exists expressly a ‘right to vote in the subjective sense’, which results from a subjective interest in the ‘result of an election’ (2007 [1906]: 318).

⁵⁹ This concept of the citizen is expressed, paradigmatically, in the theory of public opinion set out diversely by Carl Schmitt and Jürgen Habermas. For Schmitt, a political order depends for its political quality on the fact that citizens engage with each other as public actors, which occurs through participation in the public sphere. This condition is always threatened by the danger that citizens may lapse back into a condition determined only by private interests; indeed, he saw this danger as specifically institutionalized in parliamentary government (1928: 245–7). For Habermas, in partial analogy, the legitimacy of a democracy depends on engagement of citizens in public debate (1990 [1962]: 142).

⁶⁰ See for related ideas Balibar (2008: 525).

⁶¹ In France, citizenship replaced the power of the aristocracy. In America, it replaced colonial power. In other societies, it replaced other traditional power structures; for example, it replaced the power of the cities in the Dutch Republic (see Prak 1997: 416).

⁶² See Tilly’s simple claim: ‘Strong citizenship depends on direct rule’ (1995: 228).

construction of society's political domain.⁶³ Indeed, the determination of a certain part of society as distinctively political was of fundamental importance for early democratic practice and reflection. At an overarching symbolic level, both of the early democratic revolutions made expansive claims about the political substance of society. In both revolutions, it was expressly argued that revolutionary (democratic) government was legitimated by the fact that it possessed a categorical political quality, and its legitimacy was derived from the fact that it originated in clearly political acts, possessing both a generally inclusive foundation and collectively binding implications. In both revolutions, moreover, a political vocabulary was devised to distinguish political exchanges from exchanges in the rest of society, and to consolidate the political domain as a generic sphere of interaction. Notably, in the early democratic vocabulary of the revolutionary era, the political system was constructed in terms that accorded to it a distinct *origin*, a distinct pattern of *agency* and a distinct mode of *communication*, each of which possessed an inherently political character. Each of these elements was closely tied to the concept of citizenship, and each element acted to consolidate and reproduce the political system as a distinct societal domain.

In the revolutionary period, first, the *origin* of the political system was constructed through the development of the revolutionary doctrine of the *pouvoir constituant*, which became central to the constitutional thought of the French Revolution. In the French context, this doctrine claimed that a polity obtains legitimacy if it is created through the collective decision of the sovereign nation of citizens, establishing – *ex nihilo* – a constitutional order to determine the content of legislation to which members of the people owe obligation, and to bind acts of public officials and holders of delegated power.⁶⁴ This doctrine placed the aggregated will of the citizens at the origin of the national polity, and it stated that all law had to be legitimated through reference to an original, binding political decision. In revolutionary America, the authority of the emergent Republic was also, clearly, imputed to founding collective acts of constitution making, which ensured that an original political decision formed the legitimational core

⁶³ The correlation between citizenship and the distinctive characteristics of the political dimension of human life has been widely noted. See for example Touraine (1994: 121); Arendt (1958).

⁶⁴ The classical expression of this principle is in Sieyès (1789). But most theorists that insist on an emphatic political dimension in society have replicated this view. See for example Schmitt (1928: 76).

of the polity.⁶⁵ In both settings, the theory of constituent power projected an idea of the political system as higher-order social domain, with inclusionary authority across all society, and it anchored this authority in a primary collective political decision.

In the revolutionary era, second, the *pattern of agency* characteristic of the political system was constructed through the development of the concept of the citizen as political participant. As discussed, the ideal of citizenship supported a distinctive construction of the political system, and it marked out the political arena as a domain in society that is quite distinct from other functional spheres. In the first instance, citizenship described a set of voluntary commitments standing at the origin of the political system, constructing the political system as a unique societal space, which is structurally detached from local and private sources of authority. Once established, citizenship evolved as a set of practices in which the political system organized its interactions with other parts of society, translating social demands into public political form. In particular, the citizen helped to form a location in which legislation could be created for all society, and engagement in law making helped to produce legitimacy for laws as they were applied across all parts of society. As a result, most importantly, the citizen instilled a principle of general higher authority in the political system, constructing the political system as a social domain with a disposition towards *necessary inclusion*, enabling the political system to extend its authority at an increasing degree of penetration across society.

Less visibly, third, the *mode of communication* that defines the political system was established in the revolutionary era through the importance attached to rights in the figure of the citizen. As a legal construct, the idea of the citizen expressed the principle that a legitimate political order is based on a series of commonly exercised, equally applied rights, and it articulated the formative connection between the political domain and the exercise of rights.⁶⁶ Through this connection, the principle became widespread that contests about the form of public order are to be transmitted through claims to rights, and the widening boundaries of the political domain and the shifting contours of political legitimacy are traced and challenged through claims to rights. On this basis, then, laws are justified

⁶⁵ This theory was repeatedly set out in the *Federalist* (Madison, Hamilton, and Jay 1987 [1787–8]: 327). It underlies the entire doctrine of constitutional sovereignty, which forms the centre of the USA as polity.

⁶⁶ In agreement see Linklater (1996: 93).

through their recognition of rights, and they are authorized across society as enactments of rights. General rights of the citizen, thus, became the dominant, *eminently political* vocabulary of society, in which deep-lying legitimational conflicts could be refracted, vindicated and stabilized, and in which the political system could generate collectively plausible explanations for its functions. Indeed, rights institutionalized channels of politicization in society, and they created a medium in which the cycle of communication between government and society could be structured. On this basis, the political system began to communicate with the citizen through rights, and processes of expansionary inclusion within the political system were focused around the positive consolidation of rights.⁶⁷ In this respect, rights allowed the citizen to act as the social environment for the political system.

These three political elements, each of which was connected to the figure of the citizen, created the foundation for the modern democratic political system. On the basis of these three elements, the modern political system was defined by the fact that (a) it possessed an inclusive construction of its legitimacy, incorporating all society in the production and legitimation of law; (b) its legitimacy was of a higher-order nature, and it was able to authorize legislation across all parts of national society; (c) it was functionally distinct from other systems, and it did not rely for its authority on any source that was not founded in political communications and acts of political inclusion. On this basis, the growth of democracy was inseparably associated with the basic emergence of a distinct, differentiated political domain in modern society. The rise of democracy and the rise of a strictly delineated political system were two parts of the same process.

Since the French Revolution, many attempts have been made to isolate the specific political dimension in modern society. Strikingly, many theorists have identified *conflict* as the irreducible political component of society.⁶⁸ At the formative core of the modern political system, however, lie three elements – constituent power (origin), the citizen as participant (agency) and rights (communication). Characteristic for the political system, constructed by these three elements, is that it separates the law from private or personal relations, and it extends across society a system of norms which, by their inner telos, place all members of society

⁶⁷ For a similar claim, namely that the ‘politicization of citizenship’ was the first step in a process in which statutory form was conferred on subjective rights, see Colliot-Thélène (2010b: 104).

⁶⁸ See for salient claims in this lineage Schmitt (1932a); Weber (1921: 506); Lefort (1986: 51); Mouffe (2005: 9).

an equal footing. Central to this system is the translation of social claims into rights, which are then applied as the general legitimational basis for legislation. Although access to these norms may be dependent on singular experiences of conflict, the basic normative fabric of the political system is defined not by conflict, but by an implied universality and by a normative logic of extending inclusion.

I.5 Conclusion

Democracy can be defined as a condition marked by some ongoing production of consent through a line of norm-generating communication, articulated through rights of citizenship, between the people and the organs of governmental legislation. In its normative substance, the concept of democracy, based on the idea of the individual citizen as a practical and general source of legitimacy, contains an ineradicable presumption in favour of *equal and comprehensive inclusion* in the production of law. Once articulated, the idea of a political order founded on democratic citizenship implies that any selectivity in the representation of the people falls below the normative expectation inscribed in democracy. Any societal inequality in the distribution of rights of political participation contradicts the defining principle of democracy, and so reduces the obligatory force of law. Once democracy is established as a norm, systems of representation that do not give effect to equal and comprehensive inclusion are, if judged by democracy's own inner criterion, merely partial and incomplete, and the obligations that citizens possess towards their institutions are also partial and incomplete.⁶⁹ Full democracy implies full citizenship: the less people act as citizens, exercising equal rights to obtain shared freedoms, the less democratic a society is.

The ideal foundations for democratic governance were originally established in the short revolutionary interim in France and the USA in the late eighteenth century. Tellingly, one leading political thinker has stated that 'thinking of democracy today means that we have to think about the convergence of the two revolutions at the end of the eighteenth century' (Gauchet 1995: 178).

Naturally, there were great distinctions between the French and the American Revolutions in the conception of the citizen by which they were determined. Notably, the constitutional lineage of the USA placed greater emphasis on the fact that government acquires legitimacy if

⁶⁹ See discussion of this in the USA in Kaczorowski (2005: 17).

citizens exercise and gain recognition for private rights; the French lineage placed more emphasis on the immediate exercise of popular sovereignty as a source of legitimacy.⁷⁰ Of course, further, neither the French nor the American Revolution was centred around a unified idea of citizenship or a unified idea of popular self-legislation. The divergences between revolutionary factions in France and between the individual constitutions created in France in 1791, 1793 and 1795 have been widely examined. One recent authoritative account claims that the French Revolution was split between three rival models of government – one based on democratic Republican citizenship, one based on a mixed constitution or limited monarchy and one close to twentieth-century authoritarianism (Israel 2014: 695). One alternative account states that political reflection in the Revolution oscillated between the ‘relatively passive’ concept of representative government and ‘more audacious vision’ of sovereignty as the factual exercise of power by the people (Rosanvallon 2000: 20). The American Revolution was perhaps even more polarized in its conception of the citizen. The division between Federalist and Anti-Federalist ideas of the Republic, based on divergent approaches to the relative authority of the national government and the separate states, persisted long after the Founding.⁷¹

Moreover, both Republics quickly deviated from the construction of citizenship on which they were founded. As discussed below, the early American Republic was initially based on a restricted, semi-aristocratic idea of political participation, but it became more socially inclusive through the nineteenth century. In France, by contrast, democratic formation followed a reverse trajectory. During the Revolution, democracy was often envisioned in maximalist terms, based on the ideal of the immediate presence of the people in government. For example, Robespierre accepted the practical need for delegation of competence in government functions. He observed that ‘democracy is not a state in which the people, in continual assembly, regulate by themselves all public matters; and he saw democracy as a type of polity in which the people rely on ‘delegates’ to do ‘what they cannot do by themselves’ (1793b: 5–6). However, Robespierre tried to ensure that governmental organs were placed as close to the people as possible, and that the people should be able to scrutinize the actions of

⁷⁰ See Rosanvallon (2000: 49–100). By 1795, notably, Sieyès tried to limit the absolute concept of sovereignty by proposing a theory of judicial review, or by establishing a ‘jury constitutionnaire’ (Sieyès 1795: 1311).

⁷¹ For the Federalist idea of citizenship see Sinopoli (1992: 131). See discussion below p. 289.

their representatives and that government was open to public observation (1793a: 22). At the same time, Saint-Just declared that popular representatives are bound directly by the indivisible will of the sovereign people, and any assembly of representative 'deliberates in place of the people' (1793: 17): any constitution loses legitimacy if 'the general will is not applied exactly to the formation of laws' (1793: 18). Of necessity, such conceptions were quickly abandoned. After the revolutionary period, political theorists in France soon elaborated a very nominal concept of democracy in which the representative body of government was separated from any claims to direct identity with the people, such that democracy was increasingly founded on a strict functional distinction between the factual people and the governmental power.⁷² The functionally divided conception of democracy as representation was in fact already evident in some theories of representative government elaborated in the revolutionary era, such as those of Sieyès and Condorcet.⁷³ Across Europe, however, it was soon accepted after 1789 that democracy had to be constructed on a representative design, which some earlier democratic theories originally perceived not as a form of, but as an alternative to, democracy (see Manin 1997: 4).⁷⁴

In the longer wake of the revolutionary period, infact, the ideal of the common self-legislation of citizens implied in democracy was subject to a series of fundamental revisions, and it was re-imagined as one element of a governance system combining elements of popular will formation and elements of limited constitutionalism. Often, democratic ideas were assimilated into models of monarchical constitutionalism, in which constitutional rule, expressed in some basic charter or constitutional document, was established through the prerogative acts of sitting dynasties, and the assumption that citizens could exercise sovereign power was suspended.⁷⁵ In fact, the creation of a constitution by fiat remained the most common pattern of constitution making until the late nineteenth

⁷² For varying reflections on this process in different contexts see Carré de Malberg (1920/2: 203, 504); Duguit (1923b: 128); Constant (1997 [1819]); Wood (2008: 8); Tuck (2015: 249). As Dahl has explained, this fusion of democracy and representation entailed a 'transformation of democratic theory and practice' that underpins the essential structure of all modern democracies (1989: 29).

⁷³ See Sieyès (1789: 20). See for comment Rosanvallon (2000: 16, 65).

⁷⁴ Rousseau, notably, stated that representative government could not be seen as government by the general will. This idea was later articulated by Schmitt (1928: 218).

⁷⁵ For discussion of this process in different countries see Kirsch (1999: 24, 53); Schmidt (2000: 111); Laquière (2002: 67).

century. Naturally, these doctrines could not easily accommodate simple democratic ideals.

As discussed below, in sum, the ideal structure of democracy that began to take shape in the revolutionary era was not followed by its concrete realization, and the normative claims of revolutionary democracy filtered only very marginally into political practice. In most cases, as Brunkhorst has stated, it was only the memory of these claims that persisted into the nineteenth century, and these claims acted primarily as grounds for performative contestation, in which social groups articulated opposition to existing power structures.⁷⁶

Despite these restrictions, however, both early revolutionary settings produced a concept of the democratic political system, which, although in its details superseded, still casts a normative paradigm for contemporary democratic politics and democratic reflection. Central to both revolutions of the late Enlightenment was a conception of a political system based, as discussed, in the three elements of citizenship – that is, in the claim that a polity obtains legitimacy (a) through primary constitution-making acts; (b) through the inclusionary participation of politically implicated citizens and (c) through the ongoing assertion of basic rights.

From a contemporary perspective, of course, aspects of the classical conception of the political system appear redundant. Above all, the factual exercise of constituent power appears an improbable criterion of democratic legitimacy. Some theorists have resolutely insisted that democracy must trace its legitimacy to a founding constituent act.⁷⁷ Other theorists are more inclined to adjust this concept to given societal realities (Ahlhaus and Patberg 2012: 25; Lang 2017: 23). Normatively ineradicable from the core elements of political democracy, however, is the claim that some active presence of the people in framing the legal order of government, some active exercise of citizenship in upholding government and some factual claiming of political rights are original and essential aspects of democratic practice. Normatively ineradicable from these elements, further, is the claim that, in a political system claiming democratic legitimacy, the *people stand at the beginning of law*. In a legitimate democratic polity, the people exist, originally, outside the law: the people form a political

⁷⁶ For Brunkhorst the norm-founding claims of great revolutions form deep-lying 'normative constraints', which, once established, become ungrained in society and shape subsequent processes of social development (2014: 38, 467). See discussion below at pp. 196–7.

⁷⁷ See Carré de Malberg (1920/2: 490–1); Schmitt (1928: 72); Böckenförde (1991: 294–5); Müller (1995: 47); Möllers (2000: 199–200); Colón-Ríos (2010: 242); Grimm (2012: 223); Loughlin (2014).

entity that is external to law, and the government must enact the prior will of citizens through its laws. The original revolutionary idea of democracy presupposed that the people, as citizens, are incorporated in a line of communication, access to which is determined by inclusive rights, in which popular demands and claims to rights are translated into legislative acts. In this conception, the people cannot be reduced to an actor without agency, and the popular agency of citizenship cannot be reduced to a simple legal dimension or to a process that occurs within the legal system: this concept implies, fundamentally, that law refers outside itself, to basic political acts of citizens, to obtain legitimacy. Still today, this part of the classical construction of democracy persists: *the idea of the active citizen cannot be effaced from the concept of democracy, and it cannot be eliminated from the origin of democratic law*. Democracy, thus, contains two quite distinct implications: one primarily legal and the other primarily political. It is a system of rights-based legal integration, in which citizens themselves, in their political capacity, create the rights in, and by means of which, they are integrated.

The concept of the citizen underpinning modern democracy came into being as a central figure in a number of collective social processes. This concept was at the centre of the social process that created nations, performing attendant functions of integration. It was at the centre of the social process that created political systems, performing attendant processes of centralization. The association between the democratic citizen and wider social processes has instilled particular, emphatic normative expectations in the conceptual structure of modern democracy. The citizen appears as the subject of law, demanding full legal inclusion in a system of rights. Further, the citizen appears as a subject of law demanding full inclusion as a distinctively *political* agent, in a categorically *political* system, in which rights originate in categorically *political* actions and demands for freedom.⁷⁸ The combination of these principles necessarily means that democracy appears as a political system created by citizens assuming the form of distinct political subjects, actively authorizing the norms by which they are integrated. It means that, after the construction of democratic citizenship in the revolutionary era, theorists of democracy were invariably required to look for a political subject (citizen) to which they could attribute the formation of democratic systems, and by which such systems were brought into being. Political theorists typically looked for the citizen

⁷⁸ On the deep linkage between law and politics in the concept of the democratic citizen, see Peters (1993: 208–9, 322).

as a rational agent, capable of translating reasonable freedoms into laws. Moreover, it means that theorists of democracy were required to observe the political system, created by society's political subject, as the dominant institutional focus of society. As discussed below, however, these expectations may have reflected impulses in deep-lying social processes, but the actual subject around which they coalesced (the people, as an aggregate of citizens) is not easy to find. Indeed, the dual assumption attached to the democratic subject – that the citizen demands legal inclusion and political participation – created contradictions that most democracies struggled, functionally, to overcome.