



DIALOGUE AND DEBATE: SYMPOSIUM

Constitutional subjects: the formation and fracture of constitutional legitimacy. Towards a phenomenology of law and violence

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Abstract

This article addresses questions about the identity of the subject of constitutional law from a historical-sociological perspective. It aims to reconstruct, beneath the surface of constitutional texts, the actual material subjects that commonly give rise to constitutions. To do this, it isolates the constituent conjunctures in which constitutions have typically been written, and it describes the social pressures that obliged members of different societies to articulate their subjectivities in constitutional fashion. It uses this reconstruction to suggest a new framework for approaching questions of constitutional subjectivity and legitimacy, as, contrary to more deliberative methods, it explains how experiences of military violence usually shaped the emergence of constitutional subjects. On this basis, it argues that constitutions typically acquired stable legitimating force, not by enacting the will of identifiable constitutional subjects, but by displacing such subjects into a manageable form, separate from their military emphases. It cautions against idealist theories of constitutional subjectivity, arguing that most constitutions create legitimacy for government specifically as they promote societal integration in procedures that are not defined by the subjects to which they attribute their authorship. It concludes by addressing some current examples of constitutional crisis, considering how these have been shaping by literalist understandings of constitutional subjectivity.

Keywords: Subjectivity; militarism; constitutions; rights; phenomenology

1. Introduction

The insistence that constitutions need to extract legitimacy for government immediately from real, objectively identifiable subjects has strongly shaped the development of constitutional law. Much reflection on constitutional rule claims that individual persons in society accept constitutional government as legitimate because they perceive the norms of public order as principles that materialise rights and freedoms inscribed in their own subjectivity. In the earliest reflections on constitutional rule, some theorists detached constitutional rule from the specificity of human subjectivities, and they linked the constitutional authority of law to universal dispositions in human nature or the human will.¹ Later accounts of constitutional validity, especially those in the positivist milieu, stressed that extra-legal subjects could not be taken into account in analyses of

¹For Kant, the legitimate political order is a state in which citizens exist under a republican constitution in which the exercise of power is determined by the ‘pure source of the concept of law’. See I Kant, ‘Zum Ewigen Frieden’ in W Weischedel (ed), *Werkausgabe* (Suhrkamp 1976), vol. XI 205.

the sources of constitutional law.² Yet, the idea that constitutional law derives its force by attaching governments to manifest historical subjects, able objectively to identify with laws passed in their name, has accompanied the evolution of constitutional thought, often separating it from simple moral philosophy. This idea has frequently converged with the doctrine of constitutional identity. Seen in broad terms, the doctrine of constitutional identity doctrine implies that a constitution expresses norms which go beyond formal textual provisions and embrace subjects in society, individual and collective, in experiences of legal recognition based in an unreflecting or prior understanding of legitimate political practice.³

Such assumptions gained tentative expression in the earliest constitutional practices, and, from the outset, they crossed ideological fault-lines. For example, an early version of this idea appeared in the initiatives of Maximilien Robespierre, who, contra Emmanuel Joseph Sieyès, endeavoured to find a real subject in society to exercise acts of constitutional will formation, measuring the legitimacy of the constitution by its proximity to the assembled people.⁴ In altered form, such assumptions reappeared in subsequent, more cautiously historicist approaches to constitutional government. After the French Revolution, many historically minded thinkers lamented the fact that, through the revolutionary era, constitutional law had been formally abstracted against the factual dispositions of the people represented in such law, and they envisaged a legitimate state as one able to authorise law by articulating the plural historical experiences of its founding national subjects. For example, Carl von Savigny asserted that legitimate law arises immediately from the objectively experienced and interpreted 'life of people themselves'; such law cannot be distilled from any principles that formalise the life and freedom of the people in normatively perennial precepts.⁵ Parallel arguments then assumed an express phenomenological accent in the thought of Hegel. Hegel argued that constitutional norms assume legitimacy as they frame a legal order in which subjects (individual and collective) find protection for freedoms that are inherent in their inner historical fibre. A related historical method acquired alternative expression in early Marxism, as Marx saw constitutions as delegitimated by their alienation from the historical subjects that were supposed to confer legitimacy upon them.⁶ Across different theoretical lineages, these early outlooks claimed that constitutions that cannot display a deep attachment to underlying subjects lose legitimacy: that is, that a constitution must be sensitive to material subjectivities in society, connecting the basic laws of the polity with collective dispositions.

In these approaches, constitutional methods often displayed some informal proximity to later phenomenological ideas, and they approached law in constructions that would now be seen as containing certain phenomenological aspects. Each approach was based in the assumption that constitutional laws acquire authority because they are formed in a dense nexus between pre-formed subjective perceptions and objective institutions, and they project norms for public action that already exist in pre-legal or extra-legal form, in sites of social meaning shaped by subjective experiences of attachment, identity and integration. Accordingly, on such accounts, the validity of constitutional law presupposes a stratum of normative understanding amongst law's addressees that is not exclusively legal, but is formed through collective conceptions and orientations. That

²H Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* (Mohr 1922) 93–4.

³Carl Schmitt famously argued that a constitution is originally legitimated by the identity of the subject exercising constituent power. See C Schmitt, *Verfassungslehre* (Duncker and Humblot 1928) 238–76. See for a gradualist account of constitutional subjectivity: B Ackerman, *We the People, vol I: Foundations* (Harvard University Press 1991). Michel Rosenfeld links constitutional identity and constitutional subjectivity, stating that 'the constitutional subject' is an uncertain presence, which is 'incomplete and susceptible to further definition', yet which must remain articulate in constitutional law 'through the medium of a constitutional discourse, embedded in a common language'. See M Rosenfeld, 'The Identity of the Constitutional Subject' 16 (3–4) (1991) Cardozo Law Review 1053–62.

⁴M Robespierre, *Discours sur la Constitution* (Imprimerie Patriotique et Républicaine 1793) 22.

⁵FC von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung* (Mohr 1840) 30.

⁶K Marx, 'Zur Judenfrage' in K Marx and F Engels (eds) *Werke* vol. I (Dietz 1958) 364.

is – individual subjects possess prior dispositions for the recognition of public law, and they transfer their subjective understandings upwards to form the legitimating substance of the constitution.⁷ To this degree, the historical, sociological and pluralistic aspects of reflection on constitutional subjectivity converge around an informal phenomenological residue, which insists that constitutional law takes effect in a reality that cannot be simply split into a realm of subjective motivation and a realm of objective validity.⁸ Constitutional law is observed as acquiring legitimacy through endless acts of cognition, judgement, interpretation and value formation, which occur between these domains.⁹ For this reason, reflection on constitutional subjectivity again converges with reflection on constitutional identity, as accounts of constitutional subjectivity usually imply that constitutional law must be correlated with subjects that are bound to each other in pre-reflexive attachments, which constitutional law then articulates.

Recently, ideas regarding constitutional subjectivity and identity have again appeared at different points on the ideological spectrum. Such ideas have often acquired crude populist expression. The belief that a constitution must immediately translate popular subjectivities into law has become widespread amongst reactionary constitutionalists, to the extent that the constitution itself is at times subordinated to external identities. For instance, debates about constitutional subjectivity have typified constitutional thought that opposes the restriction of governmental authority by horizontal institutional balances or by international normative designs. In some contexts, such theories have been used to denounce constitutional texts as spuriously authenticated documents, especially if they give recognition to international norms or agreements. These theories create a basis for the claim that constitutions enacting norms that are not identical with the real subject of the society cannot demand compliance. This has been expressed in constitutional changes in Russia and Hungary.¹⁰ In some contexts, such as the USA, judicial rulings have been crafted to limit countervailing constraints on elected officials, assuming that the immediate political mandate provides legitimacy for the override of checks on executive powers and for the suspension of core constitutional principles.¹¹ The argument that constitutional law must be more transparently attached to constitutional subjects has frequently been articulated in constitutional debate in the UK, Brazil, Poland and other countries.¹²

Despite such appropriation, however, progressive reflection on constitutional law has also reproduced some motifs that typify theories of constitutional subjectivity. For instance, Jürgen Habermas's recent explanation of constitutional rule accentuates the phenomenological belief that constitutional law extracts legitimacy from its ability to integrate subjects in the political system via shared attachments, in which the subjects step outside their individual limits and strategic

⁷Note how this overlaps with the classical legal–phenomenological claim that, in a constitutional system, the individual subject constructs legal meaning in the 'supra-individual sphere that forms the legal community': G Husserl, 'Rechtssubjekt und Rechtsperson' 127 (2) (1927) *Archiv für die civilistische Praxis* 130. For recent analysis that bring together ideas of legal phenomenology and constructs of identity see T Bekrycht, 'Tożsamość kultury prawnej a legitymizacja prawa' 2 (2) (2013) *Filozofia Publiczna i Edukacja Demokratyczna* 78.

⁸One recent analysis of the 'legal-phenomenological perspective' argues that it is anchored in analysis of various 'forms of mediation' between constitutional law and constitutional reality. See U Becker and J Kersten, 'Phänomenologie des Verfassungswandels: Eine verfassungstheoretische und rechtsdogmatische Perspektiverweiterung anlässlich der demografischen Entwicklung' 141 (3) (2016) *Archiv des öffentlichen Rechts* 13.

⁹Variants on this analysis appear at different historical moments in, for example, the thought of Otto von Gierke, Hermann Heller, Rudolf Smend and Peter Häberle. A recent related approach is presented in K L Scheppele, 'The Social Lives of Constitutions' in P Blokker and C Thornhill (eds), *Sociological constitutionalism* (Cambridge University Press 2017) 35.

¹⁰One instance is Art 67 of the revised Russian constitution of 2020. Measures were taken in 2018 to amend the Hungarian Constitution to protect the national constitution from international law, establishing the principle that the constitution emanates from national identity. See E Várnay, 'The Hungarian Sword of Constitutional Identity' 63 (2) (2022) *Hungarian Journal of Legal Studies* 85–6; W Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Analysis' 23 (2021) *Cambridge Yearbook of European Legal Studies* 311–42.

¹¹See *Trump v. CASA, Inc.*, 606 U.S. (2025)

¹²See discussion below, section 4. 20–24.

purposes. On this account, subjects recognise laws as sources of legitimate motivation because they express freedoms that many subjects recognise as their own at the same time, partly based on their existing societal dispositions. In his late work, Habermas argues that the ‘constitutionalization of political authority [*Herrschaft*]’ is a process of trans-sectoral importance for modern society. This process occurs via the transposition of sacral-symbolic legitimational resources into a rational motivation structure, through the inter-subjectively formed *lifeworld*.¹³ This outlook appears as a variation in a long-standing theoretical lineage that observes constitutional subjectivity and constitutional identity as closely related, insisting that constitutional law must be embedded in underlying patterns of subject formation.

This article addresses perennial questions about the subjects from which constitutional law obtains authority and about the motivational premises of constitutional legitimacy. First, it argues, in general critical terms, that the subject-based reconstruction of constitutional law is miscast, and the societal worlds in which constitutional subjects come into being and establish legal identities are not adequately recognised in existing theories. For this reason, second, it concludes by proposing an explanation of recent variants on populist constitutionalism. It interprets populist government as the product of the subjectivist leaning in constitutional thought more broadly, and it argues that the misinterpretation of constitutional subjectivity in constitutional doctrine is conducive to the rise of populist governments, which usually lead to the erosion of constitutional rule. In both respects, it argues that the construction of strong constitutional subjectivities forms part of a deep paradox in constitutional law, in which constitutional law simultaneously articulates and undermines the grounds of its legitimacy. In presenting this argument, this article offers an account of constitutional subject formation that is designed to offset such tendencies, and to place constitutions on more secure premises.

To make these claims, this article applies a condensed approach to constitutional subject formation, and it attempts to reconstruct the actual subjects that commonly give rise to constitutions and from which constitutions typically derive legitimacy. To throw light on this, it presents a historical–sociological reconstruction of constitution-making processes, interpreting the social pressures that have, at different junctures, obliged members of different societies to articulate their subjectivities in constitutional fashion. It uses this reconstruction to suggest an alternative *socio-phenomenological* framework for analysing constitutional subjectivity and legitimacy, as it explains how – above all – it was *collective experiences of violence* that instilled constitutional dispositions in society and shaped the emergence of constitutional subjects.

It has often been indicated through the history of constitutional thought that constitutional agreements are determined by security pressures.¹⁴ However, this article shows how primary sources of constitutional law originated in the collective organisation of violence. As a result, the correlation of subjective expectations and objective obligations that is widely identified in constitutional law is formatively shaped by occurrences in which military conflict penetrated domains of human subject formation. The article thus outlines an alternative phenomenological approach to constitutional law. It inverts the usual perspective on reasons why subjects recognise constitutional law. It assesses this question, not by asking how real subjects become visible in law, but by asking how, and under what conditions, societies translate subjects into constitutional form. In this regard, it claims that any subjectivist account of the validity of constitutional law must include a structural phenomenology of violence and it must consider how violence shapes legal perceptions and conditions the normative propensities of societal subjects.¹⁵ On this basis,

¹³J. Habermas, *Auch eine Geschichte der Philosophie*, Bd. I: *Die okzidentale Konstellation von Glauben und Wissen* (Suhrkamp 2019) 862–4.

¹⁴See O Hintze, *Staat und Verfassung: Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte* (second edition, Vandenhoeck & Ruprecht 1962) 53; L. Colley, *The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World* (Profile 2021).

¹⁵This transfers to legal inquiry the claim that violence is a vital source of meaning or ‘sense-generating form of social or cultural expression’ in M. Staudigl, ‘Leitideen, Probleme und Potenziale einer phänomenologischen Gewaltanalyse’ in

the article presents the distinctive argument that constitutions usually acquired stable legitimating force as they became severed from objectively existing subjects in society: they assumed enduring effect, not by *enacting* the will of identifiable constitutional subjects, but by *displacing* such subjects into a manageable form, detached from their original military emphases. It cautions against value-laden theories of constitutional subjectivity, arguing that constitutions rely, essentially, on acts of displacement, in which they create legitimacy through patterns of subjective societal integration that abstract them against the subjects to which they attribute their authorship. Finally, the article uses this perspective to assess the causes of constitutional weakening in some contemporary societies. Contra more standard views, it argues that current paradigmatic cases of constitutional weakening, usually associated with populism, are caused, paradoxically, by *failures of subjective displacement*, in which constitutions derive legitimacy from subjects that have not been adequately insulated against their violent origin.

2. Part 1: Constitutional subjects and histories of violence

Modern constitutions have developed around a common legitimational structure, which is rooted in two normative concepts: first, constituent power; second, basic rights. That is, modern constitutions converge around the declaration that a government is legitimate if it: (a) reflects the constituent will of the people *qua* popular sovereign; (b) allocates different constitutional rights to persons subject to its laws, using basic rights to establish a system of consistent legal protections and political inclusion for individual persons. Taken together, these norms institute the architecture for a polity that derives its authority from an original commitment to instantiating the popular will, and it ensures that, once enacted, the constituent will remain alive in the state and retains the ability to influence legislation. This is not an exhaustive description of the prerequisites of constitutional legitimacy. Yet, these norms form the nucleus that defines modern constitutional law. They spell out certain founding compacts between governments and citizens, attaching governmental legitimacy to legal protections for individual subjects and to collective-democratic interaction between a government and these subjects. These norms were first conceived as an organic framework to capture constitutional subjects in the state, and they were expected at once to connect government to the primary constituent (collective) subjects of the people and to allow the varying commitments of single (individual) subjects to acquire expression through legislation. The underlying idea in this constitutional projection of government is that the constitution articulates laws with transpersonal force, and it produces legitimacy by enabling subjects to become real within the state both in its founding moment (as collective actors) and in particular procedures (as individual agents).¹⁶ In each respect, this implies that the constitution both expresses and incorporates subjects that exist outside itself, whose demands (collective and individual) are materialised through the state, forming a primary, external measure of its legitimacy. Both elements in the constitution project an organic channel between the constitution and existing social subjects, and it establishes its legitimacy by enabling subjects to obtain legal recognition of themselves in their collective and individual dimensions.

On one hand, this normative nucleus contains a static model of legitimacy, as it presumes that it can be moved from one polity to another to authorise governmental power. The rights-based aspect of constitutionalism may also confer a static fixity on constitutional subjects, as it implies that governments can be legitimated by reducing subjects to a small set of formal liberties, from whose protection they extract justification. However, this nucleus also encourages people to

M Staudigl (ed), *Gesichter der Gewalt. Beiträge aus phänomenologischer Sicht* (Fink 2014) 19. It also shares the sense that we need to assess how 'the experience of intersubjectivity is modified in situations of violence', discussed in C Ciocan, 'Violence and Affectivity' 43 (2) (2020) *Human Studies* 197.

¹⁶E-W Böckenförde, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991) 91.

imagine themselves in the material form of constitutional subjectivity. It presupposes that the people acquire a specific political agency, through which they transpose their interests into legal form, and that they perceive themselves as constantly present, as a live constituent power, in the exercise of government. This gives rise to the idea of the constitutional subject, which seeks to find itself in law and is suggestively co-implied in governmental acts. However, in both its static and its objective dimensions, this theory misrepresents the essential origins of constitutional law, and sociological inquiry finds little support for the legitimational idea of constitutional subjects. If we inquire into the objective causes that first forced societies to present themselves in these constitutional forms to their governments, we see that constitutional norms, and the cycles of subjective communication which they promote, are enmeshed in histories of violence and involuntary subject formation. Across a spectrum of constitution-making situations, the promotion of such norms recurrently resulted from collective exposure to violence, and the subjects that were articulated in such norms were formed, not as subjects that freely encountered themselves in law, but as subjects aggregated and involuntarily constructed by violence.

A. Constituent power

Constituent power stands at the normative origin of modern constitutional law. In recent years, complex genealogies of constituent power have been composed, and there are many interpretations of its legitimational functions.¹⁷ Essentially, however, the concept of constituent power expresses the assumption that a constitution is legitimated by the fact that it contains an original collective decision about the form of government, and it transposes the shared will of society into an overarching order in which day-to-day governance is conducted. Consequently, the legitimacy of a constitution depends on the guarantee that each of its provisions can be organically attributed to a popular decision about the design of the polity, so that, remotely, all citizens recognise the government as their own. On this basis, the constitution defines a higher source of public authority for government, and it establishes a unified legal form for society, in which all citizens are bound by the same laws, emanating from the same shared decision, such that, phenomenologically, they act as legal subjects and objects of law at the same time. The exercise of constituent power is commonly perceived as an act of consensual collective foundation, typically of a revolutionary nature, which separates the government legitimated by constituent power from political institutions based in arbitrary authority. Indeed, this perception was fundamental to the polities first created by acts of constituent power – the revolutionary polities designed in the USA and France between the 1770s and the 1790s.¹⁸

Assessed in its first causal foundations, however, this concept reveals a less articulated history of constitutional law, which is vital for appreciating constitutional conditions in contemporary society. In its initial emergence, the exercise of constituent power was part of a process of socio-institutional construction led by military agents. The doctrine that a polity is legitimate if its legal order springs uniformly from the will of the national people was expressed in settings deeply affected by external security pressures, and it created a premise for political authority that facilitated social organisation for war. Indeed, constitution making based in constituent power established a model of governmental legitimacy that allowed armies to assume functions of political integration, and it supported the absorption of large sectors of society in the military

¹⁷A Arato, *The Adventures of the Constituent Power. Beyond Revolutions* (Cambridge University Press 2017); L Rubinelli, *Constituent Power* (Cambridge University Press 2020).

¹⁸See in France E-J Sieyès, *Qu'est-ce que le Tiers-Etat?* (second edition 1789) 79. See in revolutionary America: T Tucker, 'Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice' in CS Hyneman and DS Lutz (eds), *American Writing during the Founding Era 1760–1805*, in 2 vols. (Liberty Fund 1983) vol. I, 610.

system.¹⁹ This means that constitutions first emerged through a process of societal administration that was primarily focused on military objectives, and constitutional subjects were formed to serve these purposes.

In revolutionary America, for example, the idea of constituent power appeared in two settings, and, in both, it reflected military imperatives. First, in the North American states, which had been British colonies until 1775–1776, the principle of constituent power was only inchoately formulated. However, from 1776, groups of citizens in different regions were mandated to create new constitutions, transferring power from imperial office holders to colonial legislatures, and they usually justified this mandate by asserting that they embodied the popular will. In this context, military organisations often emerged as central governmental actors and as *de facto* bearers of constituent power. In Massachusetts, the earliest constitutional resolutions were issued by towns, where militias had important roles.²⁰ In Pennsylvania, the first state constitution was influenced by militia members, and opponents of military associations were removed from the constitution-making process.²¹ More widely, state constitutions were created, in part, to facilitate the recruitment of soldiers in new states, presenting a focus of loyalty for popular armies mobilised against Great Britain.²² Under many such constitutions, inhabitants of former British colonies were immediately bound by military duties, and constitutional law formed an apparatus for the consolidation of military force.²³ Second, as the USA developed as a unified republic, the (still inchoate) doctrine of constituent power was utilised to legitimate the constitution of 1789, establishing a legal order for the entire polity.²⁴ This again reflected military impulses. For example, the 1789 Constitution reinforced the military system that had evolved under the Continental Congress, which was able to reach into the states to recruit military personnel,²⁵ and it stabilised the position of military elites at the centre of the government. Moreover, the constitution drew together separate former colonial states, binding them to a shared project of territorial enlargement, and, crucially, it formed a unifying legal structure in which new regions and their inhabitants could be incorporated into the new Republic. One recent account has explained that the idea of constituent power in the 1789 Constitution formed the axis for a ‘colonization constitution’, in which the assumption that basic laws originated in the popular will (constituent power) authorised the rapid assimilation of hitherto independent states into the polity.²⁶ The integration of new territories into the early American Republic was frequently conducted by military actors, involving the violent displacement or subordination of persons resident in incorporated regions.²⁷ It was publicly established at this point that the constitution created a legal

¹⁹One observer explains that governments of new nations created after 1945 signalled their legitimacy through possession of a ‘single coherent armed force’, so that nation building inevitably brought armies to prominence: M Janowitz, *Military Institutions and Coercion in the Developing Nations* (University of Chicago Press 1977) 15. This can be applied to the earliest national constitutional designs.

²⁰See C Niemeyer, ‘“Town born, Turn out”. Town Militias, Tories and the Struggle for Control of the Massachusetts Backcountry’ in J Resch and W Sargent (eds), *War and Society in the American Revolution, Mobilization and Home Fronts* (Northern Illinois University Press 2007) 29.

²¹GT Knouff, *The Soldiers’ Rebellion. Pennsylvania in Arms and the Forging of Early American Identity* (Pennsylvania State University Press 2004) 49.

²²See one case in S Rosswurm, *Arms, Country, and Class. The Philadelphia Militia and ‘Lower Sort’ during the American Revolution, 1775–1783* (Rutgers University Press 1987) 59.

²³See for example Art XL of the 1776 constitution of New York, which declared: ‘it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it’.

²⁴See J Madison, A Hamilton and J Jay, *The Federalist Papers* (Penguin 1987) 327.

²⁵See JG Marston, *King and Congress. The Transfer of Political Authority 1774–1776* (Princeton University Press 1987) 177–8; HM Ward, *The War for Independence and the Transformation of American Society* (Routledge 1991) 111.

²⁶A Dahl, *Empire of the People. Settler Colonialism and the Foundations of Modern Democratic Thought* (University of Kansas Press 2018) 18.

²⁷M Edling, *A Hercules in the Cradle. War, Money, and the American State, 1783–1867* (Chicago University Press 2014) 7–8.

order, in which acts of territorial acquisition conducted by military force obtained public sanction, and the system of legal norms emanating from constituent power underpinned a process of military nation building.²⁸ In each respect, the uniform ordering of the legal system promoted by constitutional rule was not separable from originally military designs.

In parallel, the exercise of constituent power in revolutionary France from 1789 to 1795 was integrally connected to military factors. First, the revolutionary constitutions in France were designed as documents to resolve the military deficiencies of the *ancien régime*. The *ancien régime* collapsed in 1788/89 because the Bourbon monarchy could not cover the costs of inter-imperial warfare, and one primary task of the constituent assemblies convened from 1789 was to devise a taxation system to fund a national standing army. From the outset, the constitutionalists assembled in Versailles were concerned with exploring new means for recruiting soldiers, and military advisors played a prominent role in drafting constitutional provisions.²⁹ In 1790, then, national citizenship was expressly associated with military service, within France, as all active citizens (citizens who could vote) were required to enlist in the National Guard. After 1791, revolutionary constitution makers wrote their texts in direct response to warfare. In this context, the idea that constitutions emanated immediately from a shared political will created a justification for government as it imposed a unified legal structure on society, and, from 1790, a long process of systematic legal codification – in civil law, criminal law, and agrarian law – was initiated. At the same time, this idea formed the normative premise for government as it galvanised society's military capacities. By 1792, the revolutionary polity placed strict obligations on citizens, notionally bearers of constituent power, to mobilise for armed conflict – both within and outside French territory. From this point, the French polity, legitimated by constituent power, was able to extract cheap military labour from its constitutional subjects, and, by these means, it consistently triumphed in wars against its monarchical rivals.

In its inception, in short, the concept of constituent power was connected to dynamics of military integration, directed by external security threats. The claim that government is based in some original expression of the popular will established a norm through which governments could expand their monopoly of military force, both within the organs of the state and across and beyond national society. In other words, the first basic constitutional norm – that idea that a government must enact the will of a collective subject, encompassing all social domains – was produced by military pressures. Viewed sociologically, the constitutional subject was originally a military subject, and it was pressed into constitutional roles for military ends. Viewed phenomenologically, this subject was formed through the rapid militarisation of social lifeworlds, as military imperatives cut deeper into pre-modern spheres of existence and drew subjects into environments and identities that were mediated through the government, as it mobilised society for war. One historian has explained, illuminatingly, how temporal experiences of human subjects were transformed during this period, as military demands eradicated the customary rhythms of everyday life, leading to a *militarisation of time*.³⁰ The irreducible preconditions of human subjectivity were thus configured by war.

After the first wave of early constitutionalism, constituent power retained its status as a norm that cemented military authority and integration. This can be seen toward the end of the revolutionary period, in the 1812 Constitution of Spain. This constitution was authorised by the constituent *cortes* assembled from 1810–1812 in Cádiz, after the Napoleonic occupation of most of Spain in 1808, and it was central to a plan to transform the military basis of the Spanish state and

²⁸Judicial rulings based on this principle resembled military acts of annexation. The Constitution created a legal order whose judicial interpreters presented themselves as 'Courts of the conqueror', treating invaded land as *terra nullius*. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

²⁹The first military constitution in revolutionary France was written in 1790, the *Décret du 28 février 1790 sur la constitution militaire*.

³⁰O Forcade, 'Le temps militaire à l'époque contemporaine: pratiques et représentations' 157 (2) (1999) Bibliothèque de l'École des Chartes 481.

to place the army on new legal foundations.³¹ It was written in the context of multi-polar warfare, as the *cortes* was engaged both in mobilising armies against Napoleon and in recruiting soldiers to reclaim Spanish colonies seeking independence in Latin America. In Latin America, constitution making became widespread after 1808. With variations, such constitution-making processes occurred in circumstances defined by intense social militarisation. Here, through wars of independence, military elites became dominant institutional actors, with key positions in constitutional assemblies.³² In most of Latin America, early constitutions established governments not easily distinguishable from military rule. In these processes, national subjectivities (identities) hardly pre-existed the rise of constitutions. Instead, they were constructed through citizenship regimes established by military leaders. Indicatively, those societies in South America, such as Brazil, which did not experience warfare during the independence period, possessed much less compact citizenship structures.

In the later 19th century, constituent power temporarily lost importance as an express norm of governmental legitimacy, and many constitutions were created without extensive popular debate. However, constituent power did not disappear as a legitimational principle, and most European constitutions after 1848 still claimed to enact the will of a sovereign nation and they remained rooted in the claim that they enacted founding human liberties. At this time, most major constitutions were founded by actors committed to strengthening the social role of the military, and they established cohesive legal orders to secure military patterns of integration. For example, the 1871 Constitution of Germany was based on the 1867 Constitution of the North German Federation, which imposed a new military order on the parts of Germany to which it was applied. In this context, the German (Prussian) army formed the substructure of the emerging national polity, and constitutional law was enforced to cement processes of unification led by the army. The laws that formed the 1875 Constitution of France were written by a precarious alliance of actors, still rebuilding political institutions after French defeat in the Franco-Prussian War. These constitutional laws were flanked by laws to modernise the army (1872–1873). In Italy, the 1848 Constitution of Sardinia-Piedmont was incrementally imposed across all parts of the emerging polity during the wars of unification in the 1860s. In this context, the enforcement of national constitutional law followed the shifting lines of battle. Inhabitants of Italy finding themselves inside the frontiers covered by the constitution were immediately integrated in the army, under conscription laws. Similar principles were reflected, diversely, in the first Ottoman constitution (1876) and in constitutions of smaller states, such as Denmark (1849), post-Ottoman Serbia (after 1869) and pre-independence Bulgaria (1879). Analogous tendencies can be observed in constitution-making patterns in South America in the later 19th century. Indicatively, the 1886 constitution of Colombia, which dictated a unified national form for society, was forged through civil war. One of its purposes was to create a national army to stabilise the post-bellum dominance of conservative elites (Articles 165–166). The republican constitution established in 1891 in Brazil resulted from the intervention of military leaders, and it reflected trajectories of nation building and military recruitment propelled by the Paraguayan war (1864–1870). By this time, constitutional norms were widely adopted for strategies of military integration and state building. The Japanese constitution of 1889, partly borrowed from Prussia, was the centrepiece in a process of national consolidation, in which military elites acquired important political offices and integrational roles.³³

Constitution making in the 20th century began in similar fashion. The first constitution of a major state in the new century, the Russian constitution of 1906, dictated a new military order for

³¹MB Ollol, *Orden público y militarismo en la España constitucional* (Alianza Editorial 1983) 82.

³²On one calculation, in independence-era Argentina, 5 per cent of the population were in the army: A Rabinovich, 'La militarización del Río de la Plata, 1810–1820. Elementos cuantitativos y conceptuales para un análisis' 3 (37) (2012) *Boletín del Instituto de historia argentina y americana* "Dr. Emilio Ravignani" 34–5.

³³BS Silberman, *Ministers of Modernization. Elite Mobility in the Meiji Restoration* (University of Arizona Press 1964) 111.

society, including increased conscription (Article 70). This followed the Russo-Japanese war, in which, for the first time in modern history, a rising non-European power gained military victory over a European empire. After this experience, several non-European states (Iran 1906–1907, Ottoman Empire 1908–1909, China 1911–1912) began to use constitutions as instruments to harden the military basis of their sovereignty.³⁴ After World War I, constituent power acquired renewed importance as a source of governmental legitimacy, and many post-1918 constitutions were established through popular deliberation, reflecting deepening commitments to democracy. As in earlier contexts, most post-1918 constitutions also served, in different ways, to impose military patterns of integration on their societies. In Poland, the interim constitutional text of 1919 was introduced as Poland engaged in war with neighbouring states, through which groups of Polish citizens, many of whom had fought against each other from 1914–1918, were incorporated into one people (constituent power). The more permanent Polish constitution of 1921 was designed to consolidate society around a military model of citizenship, in which social attachments created by war were expected to radiate into national society as a whole.³⁵ The 1919 Constitution of Germany was conceived as a document that anchored government in strategies of administration and political affiliations formed during World War I.³⁶ Article 48 transferred some powers of the wartime executive to the newly appointed President, who was responsible for instilling national cohesion between the regional units of the national polity. Article 157 reproduced the model of economic cooperation established after 1914; it placed productive labour under national protection, and it projected the experiences of labour during wartime as the integrational substructure for national democracy. In some post-1918 settings, military leaders directly initiated constitution-making processes.³⁷

B. Basic rights

Similar observations can be made about the second legitimational norm of modern constitutionalism: that is, the norm that all persons bound by constitutional rule are subjects (citizens) that hold protected basic rights. As mentioned, constituent power may be taken as the founding norm of constitutional legitimacy, in which the people claim authorship of the constitution in an original subjective act. Yet, the enumeration of basic rights means that constitutions also signal legitimacy by defining constitutional roles for more localised and individual subjectivities in society, and they allow multiple social agents to communicate interests into government and to protect such interests at the limits of government. This means that subjects acquire more specific roles in ensuring and displaying state legitimacy, and the state attaches itself directly to embedded modes of agency. Together constituent power and basic rights distil a complex nexus of constitutional subjectivities, in which primary laws are at once attributed to collective decisions and then opened to more specific channels of communication. This second constitutional norm is usually sub-divided into provisions for two separate sets of rights. First, constitutions typically enshrine legitimacy for public bodies by offering to citizens universal guarantees for subjective and procedural rights (eg, rights of ownership, bodily integrity, equality

³⁴See discussion of this at different points in N Sohrabi, *Revolution and Constitutionalism in the Ottoman Empire and Iran* (Cambridge University Press 2011).

³⁵The laws on Polish citizenship of 1920 (Dz.U.1920.7.44; Dz.U.1920.81.540) imposed deprivation of citizenship on persons evading military service. These decrees specified that evasion of military service would be evidenced if a potential recruit (a citizen) left Polish territory during war. However, this decree was passed in late 1920, at a time when the borders of Polish territory had not yet been legally settled. See D Malec, 'Obywatelstwo państwa polskiego w świetle orzecznictwa Najwyższego Trybunału Administracyjnego 1922–1939' 14 (2) (2015) *Miscellanea Historica-Juridica* 73–90.

³⁶H Boldt, 'Der Artikel 48 der Weimarer Reichsverfassung. Sein historischer Hintergrund und seine politische Funktion' in M Stürmer (ed), *Die Weimarer Republik. Belagerte Civitas* (Athenäum 1980).

³⁷This was the case in Poland. Both post-1918 constitutions, in 1919 and 1921, were written under the oversight of Jozef Piłsudski, during an extensive process of military reform.

before the law, and protections against arbitrary use of power). Second, constitutions incorporate citizens more fully in legislative acts by according to them general political rights (eg, rights of political expression, association and electoral participation).

Constitutional norms assigning basic rights to citizens were devised, originally, as part of a mechanism for the organisation of military force. In this question, some nuance is required, as the relation between war and constitutional rights is complex and dialectical. Since the 19th century, many constitutions have included provisions that allowed governments to suspend basic rights in cases of internal or external conflict, often in circumstances defined as a state of siege.³⁸ Moreover, constitutional rights have frequently been abrogated through emergency legislation after wartime. Obvious examples of this are emergency laws passed in Germany in 1914, the Defence of the Realm Act (1914) in Britain, and the Sedition Act (1918) in the USA. Such factors have led many theorists to observe warfare as a constant obstruction to rights-based constitutional rule; this assumption supports much contemporary research on constitutional exceptionalism.³⁹ Nonetheless, the relation between constitutional rights and war is rarely unidirectional, and it does not necessarily lead to the simple depletion of rights. At least in states with pronounced democratic features, war has normally played a vital role in elaborating the rights guaranteed in constitutional law. Indeed, war frequently formed the conjuncture in which national populations acquired constitutional subjectivity as holders of rights. It is a common aspect of democratic state formation that governments manage their requirements for military force by offering new sets of rights to citizens, to strengthen the willingness of citizens to fight. Above all, in periods *leading up to the outbreak of war* or in periods *directly following the conclusion of military hostility*, governments with democratic commitments have frequently expanded access to rights for citizens, widening inclusion and participation for hitherto marginalised groups.⁴⁰ Important cases of this are the full political integration of Social Democrats in Germany from 1914–1918; the formation of the French Communist Party in 1920; the political integration of Communists in Brazil in 1945/46, and the final enfranchisement of black Americans after 1945, a process in which the US army played a leading role.⁴¹ Here again, certain caveats are in order; many democratic governments also imposed heightened security laws after war.⁴² Even in such cases, however, the reinforcement of security laws went hand in hand with the far-reaching expansion of other rights, especially regarding electoral participation.

This background can be seen in both sets of basic rights protected by modern constitutions. Incrementally, rights of different types were constructed in most constitutional systems because of unsettling national security pressures. These rights made it possible for states to extract human and material resources from their populations, in order to stabilise their sovereignty as they were exposed to external military risks. This meant that subjects were materialised in constitutional law because of external violence, and the obligations and attachments that define constitutional identities entered law for military reasons.

First, *procedural rights* usually obtained constitutional protection in conditions defined by military imperatives. Most European polities began to formalise such rights as part of a process of territorial centralisation in the 18th century, in which governments increased national fiscal extraction and extended military recruitment. In many early-modern societies, regents

³⁸Prominent examples are the 1850 Constitution of Prussia (Art 111); the 1876 Constitution of Spain (Art 17); the 1891 Constitution of Brazil (Art 80); the 1919 Constitution of Germany (Art 48).

³⁹For the origins of this view see C Schmitt, *Der Hüter der Verfassung* (Duncker und Humblot 1931) 131.

⁴⁰For similar claims, see RR Krebs, 'In the Shadow of War: The Effects of Conflict on Liberal Democracy' 63 (1) (2009) International Organization 177; DL Rousseau, *War and Rights: The Impact of War on Political and Civil Rights* (University of Michigan Press 2021) 23.

⁴¹Executive Order 9981, implemented by President Truman in 1948, mandated the desegregation of the U.S. Armed Forces and expedited desegregation in other domains.

⁴²In 1920, the UK Defence of the Realm was widely enforced in Ireland, and the Emergency Powers Act was imposed. In the USA, the Internal Security Act was passed in 1950 (against Truman's presidential veto).

strategically facilitated access to national courts for all social groups because guarantees of equal legal protection connected subjects in society more immediately to the central state, circumventing traditional intermediary judicial authorities (the nobility). For instance, France had begun to develop a system of administrative justice by the mid-1700s. In Prussia, the imposition of central legal codes began in 1747, and it gained momentum with the *Landrecht* of 1794. This code provided some subjective protection for individual citizens, and it even, tentatively, developed the concept of proportionality as a legal principle, vital for later constructs of legal subjectivity in administrative law.⁴³ Such reforms were carried out as part of a longer process in which governments legislated to weaken noble land tenures, to centralise jurisdictional powers, and to increase military conscription. Austrian domains saw extensive legal codification from the 1770s, flanked by measures to increase military recruitment across the emerging Habsburg Empire. Subsequently, it was in the Napoleonic period, marked by unprecedented military mobilisation, that modern administrative law first took shape, establishing subjective legal protections for citizens in their interactions with public agencies.⁴⁴

Through the 19th century, guarantees for legal equality and procedural integrity were typically hardened in periods of intensified militarism. This was expressed in both constitutional law and administrative law. For example, administrative law reforms in 18th-century Prussia after 1750 re-commenced in some German states in the 1860s and 1870s. In France, administrative jurisdiction was reinforced, and key norms of modern administrative law were established in the 1870s, notably the principle of state liability for damages caused by public agents.⁴⁵ World War I then brought an accelerated increase in the significance of administrative courts, which were often created to hear appeals regarding compensation for injured ex-soldiers. In post-1918 Austria, illustratively, cases involving ex-soldiers claiming invalidity allowances formed about 66 per cent of all cases in the superior administrative tribunal.⁴⁶ World War II then marked the decisive point in the concretisation of procedural rights. In many constitutional states, the longer aftermath of 1945 led to the general expansion of subjective rights in public law. This was reflected in strengthened rule-of-law guarantees in constitutional law, but it was also manifest in the refined elaboration of administrative law. One important example is the passing of the Administrative Procedure Act (1946) in the USA. The 1960s saw rapid expansion and formalisation of administrative law in the UK.⁴⁷ In West Germany, the years after 1945 saw a partial convergence between constitutional law and administrative law, in which administrative law was more closely proportioned to basic rights.⁴⁸

Second, *political rights* first gained formal-legal expression in the period of revolutionary constitution making in the USA and Europe. Through the 1770s and 1780s, extended electoral franchises were established for male inhabitants of the regions that became the USA, so that an unusually large proportion of men were endowed with political rights. In Europe, extended voting rights were established in some polities between 1789 and circa 1814. In the decades of relative

⁴³B Remmert, *Verfassungs- und verwaltungsrechtsgeschichtliche Grundlagen des Übermaßverbotes* (Müller 1995) 27.

⁴⁴Tribunals for contentious cases, *conseils de préfecture*, were created after 1800. The year 1806 then saw the creation of the *Commission du contentieux*, an administrative division of the Conseil d'État.

⁴⁵Tribunal des conflicts, 8 février 1873, Blanco, n° 00012.

⁴⁶See T Olechowski, *Der österreichische Verwaltungsgerichtshof* (Verlag Österreich 2001) 48.

⁴⁷See the four leading cases that redefined UK administrative law in the 1960s: *Ridge v Baldwin* [1964] AC 40 (HL); *Conway v Rimmer* [1968] AC 910 (HL); *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL); and *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 AC 147 (HL). For an important historical account of this 'transformative period in administrative law' see TT Arvind and L Stirton, 'The curious origins of judicial review' 133 (2017) *Law Quarterly Review* 92.

⁴⁸See discussion throughout in T Schmidt, *Die Subjektivierung des Verwaltungsrechts* (Duncker und Humblot 2011). From the outset, progressive lawyers saw the Grundgesetz as the basis for administrative law claims. See the argument (1951) that the implied presumption in favour of 'social-legal' statehood in the Grundgesetz contained 'law that binds the administration': O Gönnerwein, 'Verfassungs- und Verwaltungsrecht' 6 (15/16) (1951) *JuristenZeitung* 525.

peace after 1815, virtually all European polities reduced electoral representation to a minimum, a condition that persisted until well after 1848.

In these settings, the allocation of political rights to national populations was inseparable from the organisation of military violence, and such rights enabled the army to act as a primary organ of social inclusion and citizenship formation.⁴⁹ In revolutionary America, many state-level constitutions with broad franchises were introduced in societies that had recently experienced very high levels of conscription.⁵⁰ Moreover, most state constitutions only guaranteed rights for social groups that assumed primary military duties. Notably, women were not admitted to electoral franchises, and black residents, most of whom were exempt from military recruitment, were routinely excluded from political participation. In revolutionary Europe, most states initially allowed their subjects to exercise political rights in return for military service. The first laws imposing universal conscription were passed in France in 1793; these provisions were formalised in the 1793 Constitution and made permanent in 1798. Such laws were quickly copied across Europe. By 1815, some conscription had been imposed in Austria, Prussia, Bavaria, Spain, Norway and semi-sovereign parts of Poland.⁵¹ In each case, conscription was tied either to the establishment of political rights under new constitutions, or at least to the promise of imminent constitutional enfranchisement. Across Europe, the connection between military service and political rights was expressly acknowledged, and it was widely observed that there was a causal link between warfare and constitutional democratisation. In 1815, indicatively, a transnational security regime was devised in the Congress of Vienna, whose function was to limit warfare between European governments. The Congress system was based in the conviction that the avoidance of uncontrolled inter-state conflict presupposed the limitation of political rights exercised by citizens: to regulate warfare, the Congress promulgated norms to prohibit constitutional democracy in states subject to it.⁵²

Later, the linkage between political rights and warfare in Europe was tangibly reinforced. The decades after 1848 witnessed both the renewed intensification of inter-state rivalries and the rapid spread of constitutional rule. By the 1870s, many European states had begun again to engage in, or at least to prepare for, international conflict, and, in this environment, most states established constitutions allocating extensive political rights to their male citizens. In this process, laws that protected constitutional rights were integrally connected to laws imposing military conscription. Constitutional systems establishing high, or at least rising, levels of electoral participation and high levels of military conscription were enforced *inter alia* in Denmark (1849), Italy (1860–1870), Austria (1867–1868), Germany (1867–1871), and France (1875). In some cases, importantly, the political rights established in these constitutions were created by executive fiat, with limited input by elected members of legislatures. Indicatively, Bismarck wrote the 1867 Constitution for the north German states, carried over to the German Reich in 1871, when he was on holiday in late 1866. This constitution granted universal suffrage to men, in return for military service. The Austrian constitution of 1867 was also introduced by executive action, and it was followed by conscription laws in 1868. In these contexts, rights formed instruments to consolidate subjects in a form adapted to military pressures, and the extent to which such rights emanated from concrete agents in society is at least disputable.

The connection between conscription and political rights became almost universal around 1914. World War I triggered a broad wave of democratic constitution making, leading to the

⁴⁹See sociological accounts of this process in M Levi, 'The Institution of Conscription' 20 (1) (1996) *Social Science History* 133; C Tilly, 'Where Do Rights Come From?' in T Skocpol (ed), *Democracy, Revolution, and History* (Cornell University Press 1999) 57.

⁵⁰D Higginbotham, *War and Society in Revolutionary America. The Wider Dimensions of Conflict* (University of South Carolina Press 2005) 28.

⁵¹The Duchy of Warsaw obtained a Napoleonic constitution in 1807. Military service was imposed in 1808.

⁵²The Concluding Documents of the Congress (1820) prohibited democratic constitutionalism in Central Europe (Art 57). The Congress army invaded Spain in 1823 to suppress a military coup to reintroduce constitutional government.

generalisation of political rights for men, and in some cases for women. Democratic constitutions of this period were often specifically expected to signal recognition for social groups that had discharged military service.⁵³ In some cases, political rights for men resulted from acts of executive agents operating outside normal legislative procedures, based in parliamentary representation. In many cases, the granting of political rights for women after World War I was conducted either by non-elected executives (Austria, Germany, Hungary, Poland) or by governments acting after their normal legislative mandate had lapsed and whose composition changed substantially during the war, without elections (UK). Wartime energies thus led to a dramatic push for rights, largely transmitted through executives that had acquired relative autonomy through war, and, in many regions, the basic structure of modern constitutional polities can be traced to this process.⁵⁴ In other words, it was not national democratic agency, but *war itself* that distilled the essence of constitutional subjectivity at this time.

In Latin America, the introduction of constitutions granting political rights to citizens was inseparable from military service. Many polities in Latin America established large electoral franchises from the moment of their formation, in the decades after 1808.⁵⁵ Such franchises usually lacked reality, as participation in voting was limited and elections were not reliably competitive. Yet, notionally at least, electoral rights were typically more inclusive in Latin America than in Europe until the last decades of the 19th century. In most cases, the granting of such rights was part of a contractual arrangement in which members of society were, at least selectively, co-opted into the army. This was visible in the regional and municipal Constitutions in Nueva Granada created in 1811; the 1821 Constitution of Gran Colombia; the 1853 Constitution of Argentina; the 1824 and 1891 Constitutions of Brazil. Each constitution expressed a social agreement establishing some political rights and prescribing some military service.

3. Part II: Mitigating constitutional subjectivity

In each of its key elements, the original normative structure of constitutional law was configured around violence, and citizens were linked to the state as constitutional subjects formed through violence. That is, societies condensed their political form into ideas of constituent power as they were exposed to rising international pressures, and citizens were incrementally integrated into the political system through the allocation of rights used for the extraction and mobilisation of violence. On this basis, there is a deep need to revise common preconditions of constitutional thought, and the assumption that constitutions take root in spheres of interaction between subjective dispositions and objective directives is difficult to substantiate. Constitutional subjects were configured in social worlds defined by the structural force of violence, and violence lay at the genetic social origin of constitutional law. Moreover, what is striking in this regard is that, with few exceptions, the attachment of constitutional subjects to violence was not restricted to *vertical relations* between government and citizens. On the contrary, the fact that constitutions placed citizens in vertical roles required for the deployment of violence generated violent subjectivities in other social domains, which catastrophically fractured the identities required to uphold a unified constitutional order. Quite generally, societies on the path to constitutional order tended to experience militarisation amongst their citizens in the dimension of *lateral interaction*, such that some pattern of endemic civil conflict became a primary feature of emergent constitutional systems. This can be seen in different, often overlapping variations, outlined below. However,

⁵³This was noted in M Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie* (Mohr 1921/22) 308.

⁵⁴This expands arguments made in different chapters in E Kier and RR Krebs (eds), *In War's Wake. International Conflict and the Fate of Liberal Democracy* (Cambridge University Press 2012). Chapters in this book also reject the claim that warfare simply increases executive power and reduces its accountability.

⁵⁵H Sabato, *Republics of the New World. The Revolutionary Political Experiment in nineteenth-century Latin America* (Princeton University Press 2018) 54.

most constitutional systems took shape through a process in which the imposition of constitutional order generated acute intra-societal militarisation, so that constitution making converged with civil war.

First, some constitutional systems acquired social purchase because they were linked to forcible nation-building strategies, close to internal colonisation. In such cases, constitutions were written or enforced as central states established a binding legal order in their integrated territories, typically by military means, and constitutional provisions were imposed on society through civil war. Examples of this are Germany 1867–1871; Italy post-1860; USA, the amended constitution post-1865; Japan 1868–1889; Poland 1919, 1921; Israel 1948; Colombia post-1821. *Second*, some constitutions reflected ideals of citizenship formed by divisions in national armies, so that constitutions split armies into rival factions, and they generated enduring conflicts between these factions and the social groups attached to them. Examples of this are Spain 1812, 1869, 1876; Brazil post-1891; Turkey post-1908; Greece post-1909; China post-1912. *Third*, some constitutions presented definitions of citizenship for society that brought existing intra-societal fissures to sharpened articulation, generating long-term civil antagonism. This phenomenon became widespread by the later 19th century as states designed larger electoral franchises, allowing widening sectors of the population to share in the exercise of political subjectivity. *Fourth*, some constitutions imposed shared definitions of citizenship in societies in which some groups did not accede to the prescribed national affiliation, and many constitutions were put into effect as governments mobilised military force against minority groups, or at least used the military to absorb and control such groups. Examples are Germany post-1871; Poland post-1921; USA post-1789; Turkey post-1908–1909; Israel post-1947–1948; India 1947–1950. *Fifth*, some constitutions were created in situations in which the subjects with which the legitimating norm of constituent power was supposed to be correlated did not exist. This meant that armies became primary organs of governmental power and societal integration, claiming legitimate authority to represent the state in its nationally unified form. This trajectory underlies the national structure of many societies, including USA; Germany; Brazil; Argentina; Nigeria; Pakistan; Egypt, and Syria. In general, very few constitutional systems did not go through periods of military rule, in which the military internalised functions of constitutional subject formation. In some instances, the prevalence of internal violence formed a cause of external military violence, as states aimed to occlude their authority against intra-societal antagonisms by establishing strong national affiliations through outwardly directed national mobilisation (examples are France in 1870 and Germany in 1914).

The major exception to these models is the British constitution. The British constitution was clearly produced by military violence. Each stage in the widening of legal-political rights in Great Britain was connected to military imperialism, and Britain became a constitutionally integrated nation, internally, as it became an empire, externally. The 1832 Reform Act followed internal militarisation in response to Napoleon and it coincided with Britain's early imperial dominance; the 1867 Reform Act followed the formation of the Raj in India; the 1884 Reform Act followed the occupation of Egypt, and the beginning of the scramble for Africa; the 1911 Parliament Act, which established the elected Chamber of government as the main legislative body, occurred because of the need to increase taxation for military spending; the 1918 Representation of the People Act rewarded soldiers for involuntary service in World War I. The bedrock of the British constitution, the Bill of Rights (1688–1689), resulted from a military coup led by a foreign army. Despite this, since the 1640s, constitutional formation in Britain has not stimulated extreme lateral violence, or civil war. Contrary to general perceptions, however, the main reason for the weak constitutional nexus between external and internal violence in Britain was that external violence affected a relatively small proportion of the population, partly because Britain had no vulnerable land borders, and it was only after 1945 that the UK saw full peacetime conscription. In turn, the British government experienced less pressure than other governments to allocate political rights to citizens in return for military service. In late 1918, when male suffrage was established, Britain had

among the lowest levels of electoral enfranchisement of all European states that possessed full sovereignty. This meant that the British state government derived less of its legitimacy from national constitutional subjects than other European governments, and intra-societal contests over legitimacy tended to be socially confined and more muted, with weaker propensity to trigger nationwide civil violence. In other words, reduced exposure to external violence led to low conscription, which led to weak guarantees for political rights (low enfranchisement), which, in turn, meant that the experience of militarisation in the lateral dimension of society was controlled.⁵⁶

To tell the story of the history of constitutional rule, in short, is to describe a dialectical process. Most constitutions derived legitimacy from subjects constructed for violence, and they were forced to integrate these subjects for external military purposes. This pattern of subject construction was reflected in the essential norms of constituent power and basic rights. However, the legal integration of such subjects as manifest political agents typically brought extreme instability to the inner structure of state, and most states were chronically unsettled by the subjects on which they founded their legitimacy. Most constitutionalising states were afflicted by diffuse experiences of military violence, partly focused on vertical militarisation, but partly expressed through lateral militarisation. Owing to this constitutional law became centred on a deep structural paradox: constitutions were both legitimated and delegitimated by their underlying subjects, galvanised by military conjunctures. Indeed, constitutions were legitimated by subjectivities that were artificially inserted in society for military purposes, but these subjects commonly assumed a societal reality that eroded the legitimacy of the governments that constructed them. Ultimately, in fact, states only approached constitutional stability as they learned to design their legitimacy by redirecting their attachments to their founding subjects, and as they pacified the subjects on which their legitimacy was based, detaching themselves from the military imperatives that engendered them. It was only after 1945 that constitutional rule, marked by enduringly high levels of political enfranchisement (political rights), became a stable and broadly secure phenomenon. In different variations outlined below, this was closely linked to the reconstruction of the primary norms through which states gave expression to constitutional subjectivities.

A. Constituent power

In the later 20th century, most constitutions were stabilised, slowly, as they reconfigured the military emphases of constituent power. In the first instance, military agents retained a vital role in shaping constituent power in many contexts after World War II. First, in some post-authoritarian polities created after 1945 (West Germany, Italy, Japan), foreign military officials instigated constitution-making scenarios, and domestic constituent actors worked within parameters set by occupying forces. Second, during decolonisation in Africa and Asia, military actors often remained primary agents of constituent power. Third, in much of Latin America, at least up to the 1980s, military bodies retained influential roles in constitutional formation.⁵⁷ In Europe, similar tendencies appeared in France (1958) and Portugal (1976), where constitutions originated in military conjunctures.

Despite this, after 1945, the military fibre of constitutional law was altered, and the perennial knot between military mobilisation and constitutional legitimation was – in part – loosened. Crucial in such processes was the fact that, from 1945 onward, most constitutions were established within a normative landscape in which the exercise of constituent power was partly pre-

⁵⁶One stimulating interpretation claims that, in the UK, relative social peace was linked to the fact that, unlike in Germany, the Conservative Party was prone to social compromise. See D Ziblatt, *Conservative Parties and the Birth of Democracy* (Cambridge University Press 2017) 109–10. However, it was more probably due to the fact that the British Conservative Party confronted much weaker opposition than in Germany, as until 1918 only about 50 per cent of working-class British men could vote. Germany had full male suffrage, albeit for a weak legislature, from 1871.

⁵⁷Examples are the Brazilian Constitution of 1946; the Argentine Constitution of 1949.

constituted, mainly by the growing force of international law, especially international human rights law. In this context, the recognition of human rights law often formed an implied prior condition of constitutional legitimacy, so that constituent power was proportioned to an overlaid system of norms. This can be seen after 1945 in constitution-making processes in West Germany, Italy, Japan, and India, where constituent power was exercised within pre-determined, rights-based constraints.⁵⁸

This constitutional design changed the relation between constitutions and their subjects. It meant that the basic constitutional subject that shaped principles of governmental legitimacy was patterned on an external model, so that constitutions did not extract all their legitimacy from the actual subjects to which they ascribed constituent power, and the idea of the subjective origin of constitutional law was attenuated. In turn, this meant that, once constitutions were operative, the exercise of political rights by constitutional subjects was bound by prior constraints, as the scope of legislation issued by constituted bodies was expected to comply with basic rights norms. These factors had the outcome that, in key respects, constitutional subjects were pacified, and intra-sectoral conflicts caused by constitutional law were reduced in intensity. For example, under such systems, the extent to which governments could manufacture support by promoting highly nationalised identities was curtailed, as social subjectivities were expressed in a form proportioned to basic rights. Moreover, over time, basic rights began to form points of convergence between historically hostile social groups, so that, in many societies with a constitutional order, intense experiences of lateral inter-group antagonism could be palliated. Illustratively, in many post-1945 democracies, trade union activity, historically oriented towards mass-mobilised class conflict and even to the collective refusal of labour (general strikes), was widely limited to labour-market regulation, to protect the rights of individual industrial workers.⁵⁹ Perhaps most vitally, the linkage between constitutional law and basic rights meant that some aspects of state legitimacy were structurally consolidated before states actually came into existence, such that groups engaged in factual contests in society lost their capacity to define the state. In different ways, the proportioning of constitutional legitimacy to basic human rights weakened the constitutional effects of warfare, and it diminished the volatility that constitutions had historically instilled in the subjects to which they accorded legitimating power.

By the 1980s, the exercise of constituent power had been largely differentiated from military functions. This decade marked the beginning of the largest ever conversion to constitutional rule, as, for the first time, democracy was broadly acknowledged as a common constitutional goal – or even as a binding right of citizens.⁶⁰ In this conversion, some states that embarked on a transition to constitutional rule in the 1980s and 1990s did so under military conditions, as military bodies – either internal or external – continued to influence the exercise of constituent power. This can be seen in constitutions created in Colombia, in some polities in the former Yugoslavia, and – later – in Iraq and Afghanistan, where constituent power was often structured by external military fiat. Russian military engagement in Afghanistan was also an important cause of Soviet systemic collapse. However, with qualifications, the 1980s marked a constitutional dividing line in the military construction of constitutional law. From this time, the primary norm of constitutional legitimacy – constituent power – was frequently expressed in conditions where military actors had little immediate impact. This occurred, for example, in Poland, Czechoslovakia, Russia (in part), Brazil (in part), Bolivia, Kenya, Benin (in part), and Ghana (in part). In many cases, constitution

⁵⁸In each constitution, provisions for basic rights were modelled on the UN Declaration of Human Rights (1948). The West German *Grundgesetz*, which established openness to international as a directive principle (Art 25), was initially imagined as an entirely monist document, applying international law immediately to individual citizens. See for this suggestion C Schmid, Speech of 18.11.1948 in *Parlamentarischer Rat, Verhandlungen des Hauptausschusses* (Bonner Universitäts-Buchdruckerei Scheur 1949) 529.

⁵⁹W Streeck and A Hassel, 'Trade Unions as Political Actors' in JT Addison and C Schnabel (eds), *Handbook of Trade Unions* (Edward Elgar 2003) 335.

⁶⁰R Ezetah, 'The Right to Democracy: A Qualitative Inquiry' 22 (1997) *Brooklyn Journal of International Law* 509.

making occurred through a process in which, in central dimensions, the exercise of constituent power was shaped by expectations enshrined in an external normative order, so that international law replaced military violence as the meta-constitution of national public law. The content of new constitutions in Europe was clearly shaped by documents in the inter- or transnational domains, such as the Helsinki Accords (1975), the 1990 Charter of Paris, and the EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union (1991). For example, in transitional Hungary, judges freely aligned constitutional norms to international law without even creating a new constitution.⁶¹

B. Political rights and social rights

Alongside this, a secondary process occurred after 1945, which also tended to mitigate the military force of constitutional subjectivity. This process was strongly attached to the formation of welfare states at this time. Through this development, different governments established new instruments to manage political conflicts in society, and they dispensed welfare resources in a form that softened institutional interactions with political subject and allowed political rights to be articulated in pacified procedures. Accordingly, the integration of subjectivities articulated through political rights became more manageable as they were also framed by social rights.

From the later 19th century onwards, most governments on a constitutional trajectory had attempted to devise methods to pacify lateral conflicts between the political subjects that they incorporated. This was partly performed through the allocation of *social rights* to parties in constitutional formation, which was intended to ensure that holders of political rights could exercise such rights in environments that protected some minimal need for material security. From the outset, the construction of social rights was one part of the military-constitutional contract, through which governments purchased support from the subjects on which they relied for the provision of violence.⁶² Illustratively, most states established constitutions protecting social rights in response to pressures caused by inter-state warfare. In Europe, the organisation of public welfare provisions initially approached national form in the later 19th century, and it usually followed the introduction of conscription laws. As one striking example, in Austria, legislation of 1867 created the legal basis for the first social insurance system, established in 1868.⁶³ The year 1867 also saw the introduction of a new liberal constitution, and 1868 was the year in which universal conscription was imposed. More generally, at this time, social rights were offered to citizens as a component in a diffuse security bargain, designed to motivate citizens to perform military duties and to accept military integration over longer periods. Bismarck's social insurance legislation of the 1880s exemplifies this; it coincided exactly with the initiation of the German imperial programme. In France, analogously, the year 1884 saw the implementation of legislation to protect early trade unions. This legislation was sandwiched between laws that intensified conscription (1872, 1889) and it coincided with laws in which parliament gave approval to enlarged imperial budgets. Social rights expanded in much of Europe in the build-up to World War I, as inter-imperial pressures intensified. Almost universally, then, guarantees for social rights increased exponentially after 1918. In some societies, this reflected an articulated contract, in which hardship suffered in World War I was compensated by governmental acceptance of welfare duties.⁶⁴ Some constitutions expressly extended social commitments entered during war into peacetime. For example, the 1919 Constitution of Germany contained a section for the

⁶¹A Sajo, 'Reading the Invisible Constitution: Judicial Review in Hungary' 15 (2) (1995) *Oxford Journal of Legal Studies* 259.

⁶²See H Obinger, 'Conscription, the Military, and Welfare State Development' 45 (2) (2020) *Historical Social Research*; H Obinger and C Schmitt, 'World War and Welfare Legislation in Western Countries' 30 (3) (2020) *Journal of European Social Policy* 261.

⁶³This was the *Allgemeine Arbeiter-Kranken- und Invalidenkasse*, founded in Vienna in 1868.

⁶⁴In 1915, one observer stated that 'general conscription and a general duty to provide care are inseparable concepts': G Marchet, *Versorgung der Kriegs-invaliden und ihrer Hinterbliebenen* (Strache 1915) 27.

‘Organization of Economic Life’, which set out protections for social and economic rights. This was closely shaped by a pro-welfare consensus established after 1914. In many societies, soldiers and their dependents were privileged beneficiaries of early welfare states.⁶⁵

Centrally important in this regard, however, is that – in most societies – the allocation of social rights did not simplify the exercise of political rights, and it formed a primary cause of lateral social conflict. In most settings, protections for social rights proved highly unsettling for constitutional systems, and they tended to inflame conflicts already expressed through the exercise of political rights, so that most societies converged around the overlapping politicisation of social demands (class conflict). By the 1930s, most constitutionally organised societies had polarised into hostile factions, in which rival political groups were divided by attitudes to welfare and social spending. In many cases, this led to the construction of emergency regimes, in which governments regulated social conflicts through para-constitutional instruments. In most cases, governments deployed military force to suspend – or at to curtail – constitutional protections for social rights.⁶⁶

In the aftermath of World War II, constitutional states began to stabilise social rights in revised, less volatile form, and they applied social rights as institutions to weaken political contestation. At this time, there was no universal model of a welfare system. Yet, virtually all democratic constitutional states used either constitutional clauses or statutory acts to establish social rights with relatively broad reach, which extended social rights beyond their historical scope. To some degree, the allocation of such rights remained connected to military pressures. In some countries, early welfare laws compensated former soldiers or their dependents. This is evident, to different degrees, in the Servicemen’s Readjustment Act (1944) in the USA and, in West Germany, in the *Bundesversorgungsgesetz* (1950). Generally, however, social rights were fully detached from the management of military functions. For example, most social rights charters that acquired influence after 1945 emanated from the inter- or transnational domain, and they did not result from actual political will formation at the national level.⁶⁷ Indicatively, after 1945, some social rights were promoted in post-colonial societies that had not existed before World War II, and which had limited experience with militarism. Perhaps most importantly, in the longer wake of 1945, social rights were conceived in universal fashion, in relative indifference to social function, and they were accorded to groups whose military utility had been limited. The growth of welfare states in Europe progressively increased material protections, of a specific nature, for women. In particular, the growing role of the state as a distributor of goods was flanked by laws that weakened the material reliance of women on familial support, reflected for example in divorce laws that forced husbands to give support to divorced spouses and offspring.⁶⁸ In these ways, the extension

⁶⁵M Geyer, ‘Ein Vorbote des Wohlfahrtsstaates. Die Kriegsopferversorgung in Frankreich, Deutschland und Großbritannien nach dem Ersten Weltkrieg’ 9 (2) (1983) *Geschichte und Gesellschaft* 230; T Skocpol, ‘America’s First Social Security System: The Expansion of Benefits for Civil War Veterans’ 108 (1) (1993) *Political Science Quarterly* 85; V Pawlowsky and H Wendelin, *Die Wunden des Staates: Kriegsoffer und Sozialstaat in Österreich 1914–1938* (Böhlau 2015); P Pironti, *Kriegsoffer und Staat. Sozialpolitik für Invaliden, Witwen und Waisen des Ersten Weltkriegs in Deutschland und Italien (1914–1924)* (Böhlau 2015).

⁶⁶See anti-labour coups led by military units or militarised parties in Spain 1923; Lithuania 1926; Poland 1926; Portugal 1926, 1933; Germany 1933; Austria 1933–1934; Spain 1936–1939; Greece 1936.

⁶⁷This acquired strongest expression in the Atlantic Charter. But some national plans for welfare states, for example the Beveridge Report in the UK, acquired transnational valence. See N Kersch, ‘L’Influence du rapport Beveridge sur le plan français de sécurité sociale de 1945’ 45 (4) (1995) *Revue Française de Science Politique* 570; W Abelshauser, ‘Erhard oder Bismarck? Die Richtungsentscheidung der deutschen Sozialpolitik am Beispiel der Reform der Sozialversicherung in den Fünfziger Jahren’ 22 (3) (1996) *Geschichte und Gesellschaft* 377. More generally, see A Abbott and S DeViney, ‘The Welfare State as Transnational Event: Evidence from Sequences of Policy Adoption’ 16 (2) (1992) *Social Science History* 245.

⁶⁸See one early example in the UK, the *Matrimonial Causes (Property and Maintenance) Act* (1958). The longer development of the welfare state was usually flanked by laws that weakened individual reliance on familial attachments and augmented personal material autonomy, so that increased state intervention in private domains typically brought increased subjective individualisation. In some settings, the willingness of taxpayers to support welfare spending was directly linked to their desire for personal autonomy, which presupposed the reduction of familial authority. See one discussion of this in NF

of social rights created openings for new constitutional subjectivities that were decisively separated from war.

Very significantly, the growing force of social rights was attached to a process in which such rights were severed not only from military conjunctures, but also from active political subjects in society. The rising universality of social rights reflected a dynamic in which the acquisition of such rights was placed on general legal premises, and material welfare could be obtained by individual citizens without membership in structured political organisations such as trade unions and associations of organised labour. Accordingly, the increasing accessibility of social rights meant that concrete struggles between political factions lost some emphasis. For instance, the rise of state-endorsed social rights tended to weaken individual dependency on collective organisations, and political parties lost some of the monopolistic force that they exercised in some social milieux before 1945. Indicatively, further, in most post-1945 constitutional democracies, political parties with historically distinct class affiliations accepted a broad consensus around the promotion of welfare services, so that the deep inter-party hostilities that had fractured pre-1939 democracies were partly assuaged. In Europe, societies that developed robust welfare states, such as West Germany, Austria and France, were governed by parties of the right for much or all of the 1960s, the decade that saw the most rapidly increasing social investment. The outcome of both these factors was that states could allocate social rights to political subjects on a relatively stable and individualised basis, without inducing acute polarisation between social constituencies. In this respect, social rights also opened the political system to new constitutional subjectivities; in the longer wake of 1945, constitutional agency was often formed around identities linked to gender, sexuality and ethnicity, in which the convergence of social and political commitments was less pronounced.

In each respect, a sociological analysis of constitutional law shows that the evolution of constitutional subjectivity was a process of incremental social integration. Constitutionalism evolved, in essence, as a legitimational system which claimed to extract legitimacy from the citizen in primary subjective roles defined by constituent power and basic rights. However, the vital step in the process of constitutional formation occurred after 1945. At this point, constituent power and basic rights were mediated (displaced) through a secondary constitutional system, comprising international human rights and reinforced social rights, which directed constitutions on a new integrational pathway, abstracted against their first legitimational norms. Citizenship acquired a shape in which the rights allocated to constitutional subjects by deep experiences of war (constitutional rights and rights to social welfare) became relatively stable. Yet, these rights only acquired stability as they were attached to subjects that displaced the modes of military subject construction in which they had originated. The subject of constitutional law can, thus, not be identified materially in society, and it must be located in the dialectics of its own displacement.

4. Part III: Legitimacy and crises of constitutional subjectivity

If this dialectical model of constitutional subjectivity is accepted, it becomes possible to identify certain general features in contemporary experiences of constitutional weakening and collapse. Indeed, the double movement, outlined above, which supports constitutional legitimacy – the dialectical articulation and displacement of constitutional subjectivity – forms a paradigm that can explain crises of legitimacy in some current constitutional systems. Most experiences of crisis in contemporary constitutional law result from the fact that governments claim to increase their legitimacy by attaching their authority to manifest constitutional subjects or strong constitutional identities. In most such cases, then, the projection of deep constitutional subjectivity

Christiansen and K Petersen, 'The Dynamics of Social Solidarity: The Danish Welfare State, 1900–2000' 26 (3) (2001) *Scandinavian Journal of History* 177–96.

catastrophically disrupts the form of the constitution, and it unstitches (dis-integrates) the fabric through which constitutional rule evolves. In some cases, this leads to the re-awakening of the military proclivities of constitutional subjects. The sections below examine constitutional events in a series of states whose governments have recently experimented with direct invocations of constitutional subjectivity. In these cases, governments extract legitimacy from immediate subjects or identities, and, as they do this, mechanisms for the displacement of constitutional subjectivity (international law and social rights) are weakened, such that constitutional law loses its legitimating insulation against the sources of its own authority. Indicatively, such processes often lead to the partial remilitarisation of constitutional identities, unsettling society as a whole both in its lateral and vertical dimensions.

A. Case study 1: UK

The constitution of the UK is the product of war, and, as mentioned above, constitutional subjects acquired their most strongly implicated roles in forming the UK constitution in military conjunctures. However, full political integration of the population only occurred after 1945, as the UK was one of last European states to accept equal universal suffrage (1948–50). This integration was framed by a dual process. It was framed by rapid welfare-state construction, gaining impetus in 1945, so that constitutional incorporation of citizens was supported by strong social rights provisions. It was also framed by the increasing importance of individual rights. This was led initially by the strengthening of individual rights in administrative law,⁶⁹ and, from the 1970s, by the deepening recognition of human rights law and the increased use of concepts of constitutional rights.⁷⁰ Through this two-level integration process, the national population became a subject inside the political system, acting through the organs of parliament. Recently, however, leading politicians have endeavoured to intensify the legitimacy of government by appealing to constitutional subjects in more direct, less individualised form. In doing this, they have made strong claims for collective constitutional identity as the prerequisite of legitimacy and insisted that the national parliament should display legitimacy by giving unmediated expression to the national will, clearing away laws passed in the European Union. These processes condensed around the 2016 Brexit referendum, in which the population was invited to identify itself as a live constitutional subject. Although expected to amplify the immediate expression of national commitments through the sovereign parliament, however, this relocation of constitutional identity produced a deep crisis in the constitution. In pure constitutional terms, this crisis was reflected in the weakening of parliament, and in governmental mobilisation of the population against the constitutional principle of parliamentary sovereignty that it had sworn to accentuate.⁷¹ In fact, the abolition of EU law was effected in a process of intensified delegated law making, bringing the enduring transfer of powers to the executive,⁷² At a societal level, this crisis was reflected in strategical inflammation of inter-group hostility. It was even reflected in the (failed) promotion of military identities for citizens, as Rishi Sunak pledged to impose national conscription in 2024, partly for defence purposes but partly also to keep young and anti-Conservative citizens under control. Preconditions for this crisis can be found in policies introduced in preceding decades, especially after 2008, which had dismantled the integration structures that had shaped post-1945 democratisation: (1) the long-term reduction of social rights, beginning in the 1980s, but greatly intensified through post-2008 austerity policies, in which –

⁶⁹See discussion above, section 2B. 12.

⁷⁰C Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge University Press 2018) 340.

⁷¹*R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* ([2019] UKSC 41).

⁷²The Retained EU Law (Revocation and Reform) Act (2023) gives the power to replace EU laws to executive bodies. See commentaries of such executive reinforcement in C Barnard, 'Taking Back control? Rule by Law(s) and the Executive in the post-Brexit world' 38 (1) (2022) *Oxford Review of Economic Policy* 12; S Pywell, 'Something Old, Something New: Busting some Myths about Statutory Instruments and Brexit' (2019) *Public Law* 119.

vitality – the Conservative party renounced its status as a net investor in social rights; (2) the strategic erosion of national commitments to human rights law, rooted in the claim that such law obviates the immediate expression of constitutional subjectivity. In each point, the UK appears as a low-level case of *increased lateral militarisation*, in which the attachment of legitimacy to unmediated constitutional subjects has fractured the constitution itself.

B. Case study 2: Brazil

The constitution of Brazil is originally the product of military agency. In the 1820s and from the 1880 to the 1890s, it was created by military leaders who pursued a strategy of progressive nation building. Later, Brazilian constitutional history was punctuated by military interventions, notably in 1930, 1937, 1946, culminating in the installation of the dictatorship in 1964. Brazilian democracy was secured after 1985, with the abolition of military rule and the first institutionalisation of universal suffrage. The 1988 Constitution was incrementally embedded in society as its functions were accompanied by the increased entrenchment of international law, especially after amendments of 2004, and by rising social-rights protection under the presidency of Lula. However, the societal bedrock for constitutional law was always weakly consolidated; commitments to the protection of social rights were rarely strong enough to traverse party boundaries, and different Presidents adopted widely divergent policies on social spending. As a result, welfare policies retained a highly personalised character, with a strong potential for the militarisation of inter-group conflicts regarding social rights. Against this background, the constitution was brought to temporary crisis by the leadership elites that acceded to power after 2016, who motivated their supporters in society by appealing to immediate expressions of constitutional subjectivity. By 2018, the President extracted legitimacy from policies based in exclusionary citizenship and social militarisation: this was reflected both in direct appeals to the people, defined not as an aggregate of materially integrated persons, but as a nationalised collective subject, and in deep hostility to the international architecture of human rights law. Such rhetorics were linked to strategies to reduce welfare commitments, which deliberately induced lateral conflicts in society over material goods; from 2016, anti-welfarist policies led to substantial reductions in federal investment in health care and education.⁷³ The military has shown partial willingness to contribute to such actions. The army has partly identified itself as an actor that embodies the national will qua constitutional subject, displaying some solidarity with groups hostile to social rights investment. This became unmistakably clear in September 2025, when ex-President Bolsonaro received a lengthy prison sentence for conspiring to launch a coup with leading military figures. At least up to 2022–2023, Brazil appears as a model of *convergent lateral and vertical militarisation*, with both elements rooted in constructs of immediate constitutional subjectivity.

C. Case Study 3: Russia

The 1993 Constitution of Russia was created in a symbolic process of demilitarisation and external normative orientation. From 1993, constitutional legitimacy was initially signalled in strongly externalised fashion: ie, through assimilation of and (select) compliance with international normative expectations, expressed in the internal primacy of international law and culminating in accession to the Council of Europe. This was eventually reinforced by extensive reforms in the system of administrative law, which greatly expanded the purchase of basic rights at the level of individual interaction with public agencies. In 2002, President Putin declared the intention to

⁷³The source for these data is: Siga Brasil Dataset, at <<http://www9.senado.leg.br/QvAJAXZfc/opendoc.htm?document=Senado%2FSigaBrasilPainelEspecialista.qvw&host=QVS%40www9&anonymous=true&select=LB137,2019>> (last accessed 8 October 2021).

reinforce procedures for human rights protection and to guarantee easier access to justice.⁷⁴ He stated later that it was vital to ‘create an efficient mechanism for the resolution of disputes between the citizens and the state through enhancement of both administrative procedures and judicial mechanisms’.⁷⁵ The years 2001–2002 saw the adoption of new procedural codes in Russia, most notably the Civil Procedure Code, but also a code regarding litigation involving business interests (*arbitrazh*). Both these codes made it easier to initiate administrative litigation, and both contained a chapter that regulated the procedures for judicial review. In parallel, from 1993, the legal order was marked by the extreme depletion of social rights and widespread reliance on informal protection mechanisms (personal relations, corruption, gangs), which led to deep popular disengagement from the constitutional system.⁷⁶ A distinctive model of constitutional subjectivity emerged in this setting, in which individual rights were protected in the administrative domain, but they lost effect at the political level, and both sets of rights were weakly supported by social rights. Eventually, from circa 2014, Putin projected a model of legitimacy that aimed to reconnect the population with government directly through military integration, especially as the outward normative orientation attempted after 1993 became discredited. As mentioned, this was flanked by constitutional amendments that defined governmental legitimacy as the expression of a historically formed national subject. Military integration rapidly became a dominant source of constitutional integration, first weakening and then destroying rights-based constitutional provisions. Russia now appears as a mode of constitutional crisis expressed in *strong vertical militarisation*, supplanting fragile processes of integration based in individual rights and social rights.

D. Case study 4: Poland

Poland has a constitutional tradition defined by extreme experiences of militarisation and military citizenship formation. However, the most recent constitutional experiment in Poland (1997) entailed the passing of a constitution with a strong emphasis on the recognition of international norms. The constitution also contained a commitment to protecting social rights, but it was implemented after a long period of deep social disinvestment. In recent years, the constitution has been unsettled by parties and politicians who have tried to associate governmental legitimacy directly with traditional subjectivities, embedded in Polish national culture. Up to 2023, successive governments conjured historical identities linked to religious beliefs to generate social loyalty, and they promoted hostility to international norms as a framework to project constitutional legitimacy. The international security conjuncture after 2014 created increased support for such constitutional discourse because it fostered a generalised consensus on single core issues, and it placed traditional national interests in the forefront of public discussion. Through this period, Poland’s military force increased dramatically, as rising military expenditure has remained a constant process under governments of different colours. However, anti-constitutional parties exploited national security concerns to encourage acceptance of militarised identities amongst many voters in society, based on historical experiences of militarisation in Poland.⁷⁷ In parallel,

⁷⁴Poslaniye Prezidenta Rossiyskoy Federatsii Federalnomu Sobraniyu ‘Rossii nado byt silnoy i konkurentosposobnoy’ (President of the Russian Federation Annual Address to the Federal Council ‘Russia Needs to be Strong and Competitive’) Rossiyskaya Gazeta 71, 19 April 2002.

⁷⁵Poslaniye Prezidenta Rossiyskoy Federatsii Federalnomu Sobraniyu (President of the Russian Federation Annual Address to the Federal Council) Rossiyskaya Gazeta 93, 17 May 2003.

⁷⁶Russian administrative law reforms were intended to weaken this dependence. See Yuriy Starilov, ‘Administrativnoye pravo kak sredstvo razrusheniya “sindroma bespraviya” v sovremennom pravovom gosudarstve’ (Administrative law as a means of destruction of ‘syndrome of lawlessness’ in the contemporary rule of law state) (2005) 4 Zhurnal Rossiyskogo Prava 29.

⁷⁷See E Maj, ‘Obrona terytorialna i wojska obrony terytorialnej w myśli politycznej Polski współczesnej’ 28 (3) (2017) *Bezpieczeństwo. Teoria i Praktyka* 305.

constitutional identities were often devised to instigate inter-group conflicts, especially along fissures between rural and urban citizens, between Catholic and non-Catholic communities, and between groups with more or less tolerant attitudes to non-traditional sexualities. Up to 2023, Poland formed a model of *partial vertical militarisation*, supported by medium-level intra-societal militarisation. Importantly, the turn away from constitutional authoritarianism in the 2023 elections was largely determined by the fact that the majority of voters suspected that authoritarian constitutional retrenchment would weaken Poland's position in the international security landscape.

E. Case study 5: USA

The USA has a constitution that originated in war, as, step-by-step, the electoral integration of citizens took place in reforms resulting from military conflict, notably in 1787, 1865–1870, 1920, and 1964–1965. By the 1960s, the constitutional wiring that bound citizens to government was framed by the classical integration matrix: it depended on the reinforcement of social rights (increased welfare spending, welfare consensus across major parties) and on the stronger domestic recognition of international human rights law, clearly reflected in the Civil Rights Act (1964),⁷⁸ the Voting Rights Act (1965), and the Immigration and Nationality Act (1965). Full citizenship thus came into being through an integrational structure that was *not based* on national subjectivities. This matrix began to collapse because of neoliberal social policies in the 1980s, and it was further eroded by inter-party polarisation in the 1990s. Recently, some Presidents, notably Donald Trump, have exploited this constellation to invoke unmediated societal subjectivities as the basis for government, showing a strong tendency towards the mobilisation of projected constitutional subjects against the constitution. This is conducted in an atmosphere marked by antagonistic inter-ethnic relations, deep hostility to international norms, and even the widening of regular political participation to include military actions. As in Brazil, rising lateral conflict in society is linked to the fact that Presidents have used racial dictions to antagonise some disadvantaged groups, potential beneficiaries of social rights, against other (racially distinct) beneficiaries of the same social rights, in the name of pure constitutional subjectivity. Through this, nationalist vocabularies have been used to support a race to the bottom in social welfare provision. In this example, volatile societal militarisation contains some potential for armed civil conflict, and the transformation of one institutionalised party (the Republicans) into a unit with some military or paramilitary aspects cannot be ruled out. Of course, this tendency became acutely tangible in the summer of 2025, in Trump's use of the army to suppress demonstrations against anti-immigration policies in California and his willingness to deploy military forces to combat crime in other states. In future, policy decisions of the regular army may become decisive in upholding (or otherwise) the Federal constitution. The USA forms a model of *accelerating lateral militarisation*, with clear potential to assume vertical form.

5. Conclusion

A historical-sociological reconstruction of constitutional subjectivity usually finds military conjunctures at the core of constitutional law. Such conjunctures typically produced high demands for constitutional integration and legal uniformity, and they attached social agents more closely to government for military reasons, a process effected through basic norms of constituent power and constitutional rights. Through this process, the constructs of constitutional subjectivity and identity that are widely used to explain constitutional law gained form, and the piercing of traditional social life worlds by military directives gave rise to the subjectivities that have driven

⁷⁸For the international-law background to the Civil Rights Act, see President Johnson's speech to the UN General Assembly in late 1963, [Lyndon B. Johnson-Address to the U.N. General Assembly \(17 December 1963\)](https://www.youtube.com/watch?v=Lyndon_B_Johnson-Address_to_the_U.N._General_Assembly_(17_December_1963)) (youtube.com).

the formation of constitutional law. However, such conjunctures typically induced highly volatile, horizontally contested experiences of constitutional inclusion. Most constitutions only reached stable democratic form as they were placed in a secondary integration matrix, which detached them in part from the military conjunctures and modes of subject formation by which they were created. This pattern of displacement is not easily captured in reflection on constitutional identity. It implies that the identities usually placed at the core of constitutional democracy cannot support the actual integration processes that establish constitutional government; in fact, the constitutional integration of citizens requires the dispersal of the identities normally imputed to them. As mentioned, the implied phenomenological aspect in much constitutional research needs to be reconfigured to include an explicit phenomenology of law and violence, showing how constitutional subjectivities refract the penetration of military violence into societal life worlds. The pattern of displacement described above means that, for a constitution to assume legitimacy as a legal order that integrates and materialises its subjects, it cannot attribute a strong identity or even ascribe pre-constitutional form to these subjects. The procedures of legitimation through which a constitution integrates its subjects separate it from the factual subjectivities symbolically attached to these subjects as collective authors of constitutional law. In selected contemporary cases, it is visible that the fragmentation of the secondary constitutional matrix, rooted in international law and social welfare rights, lies close to the core of constitutional crisis: strong constitutional identities are presented as an alternative to this matrix, and, as they weaken it, they erode constitutionalism in its totality. In some such cases, military subjects begin to reappear at the edges of constitutional subjects.