This latter point was central to the Petition of Right of 1628. It was reiterated in the Grand Remonstrance, which placed specific emphasis on judicial integrity. Oliver Cromwell's law reforms then also introduced measures to ensure fair judicial procedure.[67] This principle was finally confirmed by the Declaration of Rights in 1689. Through these petitions and statutes, concepts derived from the common law were accepted as normatively universal, and the extent to which royal courts could deviate from these standards was (in theory) subject to constitutional regulation. Indeed, these statutes and petitions also meant that the state as a whole was increasingly defined through reference to general and fundamental legal norms – or, as stated in the Grand Remonstrance, to 'fundamental laws and principles of government' – which were notionally extracted from the common law. In this respect, these statutes and petitions cemented the expectation both that those bearing state power were required to acknowledge and respect the 'laws which concern the subject in his liberty', and that all use of power in society was conducted according to abstractly acceded norms (Kenyon 1966: 231, 240).

In each of these respects, the growing constitutional order of the state brought great advantages to the political system. In internalizing a fixed legal construction of its foundations in this fashion, first, the state was able at once to reduce the political volatility attached to the law, to control its own intersection with the law and progressively to consolidate its unitary differentiated structure by limiting private conflicts over law. The acceptance of the common law as a constitutional apparatus, further, meant that the state was able to propose a coherent normative definition of itself to support its power, and to acquire a unitary set of procedures which simplified its use of power. Moreover, the normative corpus of the common law, conceptually absorbed within the state itself, provided the state with an apparatus in which it could internalize the sources of its authority, extirpate private or dualistic elements from its inner structure and adopt a public-legal order that exponentially increased the volume of power which it had at its disposal. The idea of the common law as a normative constitutional order within the state thus substantially heightened the power of the state. After the 1640s parliament was able to invoke a common-law constitution in order to assume semi-sovereign independence and, in fact, constitutionally

[67] Cromwell opposed full judicial independence. However, his reforms, notably Arts. XIX and LXVII of the 'Ordinance for the better Regulating and Limiting the Jurisdiction of the High Court of Chancery' (1654), were important for their provisions against executive law finding. This document is published in Firth and Rait (1911: 949–67).

to place its monopoly of legislative power above all conventionally acceded fundamental laws (and so, also, above all other judicial power).[68]

In addition, the constitutional order created during the longer period of the English Revolution also constructed the state as a political order with a balanced representative constitution, in which ratification by parliament became a precondition for legitimate statutory legislation. Naturally, views on the constitutional status of parliament varied greatly. The dominant view of the parliamentarians of the 1640s was that parliament was the highest focus of sovereign power, standing even above the common law. William Prynne stated this most boldly, claiming simply that the 'High Court of Parliament' was the 'Highest Souveraigne power of all the others, and above the King himselfe' (1643: 33). The Nineteen Propositions of 1642 clearly claimed that 'statutes made by Parliament' had authority to override other sources of authority, and that the 'justice of parliament', not the justice of privately appointed judges, was the supreme judicial force in the nation (Kenyon 1966: 246). Even before the execution of Charles I, the Commons of England declared that 'the people' were 'the original of all just power' and that 'the commons of England, in parliament assembled, being chosen by, and representing, the people' were in possession of 'the supreme power in the nation' (Davies 1937: 160). In his reply to the Nineteen Propositions, Charles I himself conceded that the legislative authority of parliament was an element of a balanced organic order of state, of which the monarch was merely one part.[69] Although lamenting the fact that his 'Just, Ancient, Regall Power' was 'fetched down to the ground' by the present parliament, he specifically acknowledged the existence of a mixed constitution in England, stating that 'In this Kingdom the Laws are jointly made by a King, by a House of Peers, and by A House of Commons chosen by the People, all having free Votes and particular Privileges.'[70] Subsequently, Cromwell's Instrument of Government of 1653 confirmed that 'supreme legislative authority of the Commonwealth of England' resided in the Lord Protector and the people assembled in parliament.

[68] The principle behind this point was captured in an anonymous pamphlet which argued that fundamental laws formed the 'politique constitution' of the commonwealth and imposed laws of consultative procedure, nature and equity on the king. Under such laws, however, parliament could not be guilty of 'Arbitrary Government' or contravention of fundamental law because the 'law was not made between Parliament and people, but by the People in Parliament betweene the King and them' (*Touching the Fundamentall Lawes* 1643: 8). Parliament, in other words, *was* the fundamental law.

[69] See the analysis in Weston and Greenberg (1981: 39).

[70] Charles I, 'His Majesties Answer to the Nineteen Propositions of Both Houses of Parliament' (1999 [1642]: 160, 168).

Article VI of the Instrument of Government stipulated that laws were not to be 'altered, suspended, abrogated, or repealed, not any new law made, nor any tax, charge or imposition laid upon the people, but by common consent in Parliament' (Kenyon 1966: 342–3). Through the revolutionary period, in short, parliament came to be considered as an institution that could not be dissolved or prorogued at royal behest, and it was accorded increasingly fixed duties, legislative competences and procedures, and, owing to its authority to form cabinets, substantial executive power. The rights of parliament, although weakened after the Restoration, were specifically acknowledged in the Triennial Act (1664), forming one part of the Restoration settlements: the Restoration was indelibly shaped by acceptance of an ordered parliament as a necessary organ of government (Seaward 1989: 77). These principles were then fundamental to the constitutional settlements of the Glorious Revolution of 1688–9. In 1688, parliament assumed the power to select and appoint English monarchs, and it functioned as a constitutional organ able to prescribe implicit contractual terms to those monarchs that it deemed fit to exercise power. The Convention Parliament of 1688–9 in fact acted in many respects like a constitutional assembly (with all the animosities typical of such assemblies), and it bound the power of William III to clear constraints and used the monarchical interim to extend its own legislative power.[71] Most notably, the 1689 Declaration of Rights was prefaced by an extensive attempt to discredit James II, and, almost as an effective contract between king and realm, it prohibited the non-parliamentary use of regal power in passing and enforcing laws (Williams 1960: 28).

In this regard, too, the seventeenth-century constitution greatly expanded the practical power of the state. The constitution that gradually emerged through the Interregnum, the Restoration and the parliamentary revolution of 1688–9 had the specific distinction that, in sanctioning the legislative power of parliament, it established an attributive structure that clearly identified the law's source, strictly separated the power of the state from the standing of singular persons, and conclusively consolidated the positive legislative operations of the state. The growing (yet still incompletely realized) idea of parliamentary sovereignty acted as a principle that greatly simplified the operations of the state: it assuaged the dualistic or polycratic elements in the state that had previously obstructed the use of

[71] It is noted, however, that William III accepted the crown before approving the Declaration of Rights (Speck 1988: 114). For a recent brilliant revision of common perceptions of the activities of the Convention Parliament see Pincus (2009: 283–6).

its power, it established clear procedures of political inclusion and it enabled the state to utilize its power at a previously unforeseen level of abstracted autonomy. In particular, it is notable that, although the ideal of parliament's obligation to the common law did not disappear, the assumption that parliament could be obligated to the courts of law began to recede during and after the Interregnum: by 1700 the principle of the statutory primacy of parliament was clearly prevalent.[72] If the revolutionary processes of the middle of the seventeenth century had been shaped by the joint insistence on the inviolability of common-law rights and on the authority of parliament, therefore, after 1688 the second of these principles took pronounced precedence over the first. This conceptual adjustment meant that, even where it was nominally sustained by the common law, parliament began to extricate itself from externalistic conventions and to remove quasi-legislative powers from the judiciary, and it concentrated its own power within a tightly defined, internally consistent, institutional organ. The doctrine of parliamentary supremacy, in short, created a regular fissure between polity and judiciary, did much to disaggregate the distinct legislative and judicial powers vested in parliament, set the foundation for the subsequent emergence of a unitary state with singular monopoly of jurisdictional power, and protected the state from dualistic destabilization through half-internalized controversies between legislators and judges.[73] This diminution of external judicial power was welcomed, not only by monarchists who had been threatened by countervailing claims to judicial power implied in the common law, but also by parliamentarians, who had initially insisted on powers of judicial review enshrined under common law to support their claims, yet who also saw judges as inclined to royalism and viewed the independence of the law courts as eroding the authority of the parliamentary order.[74] The ascription of full statutory powers of legislative

[72] Cromwell's judicial legislation stipulated that 'No Decree shall be made in Chancery against an Act of Parliament' (Firth and Rait 1911: 959).

[73] This point is also made in Grey (1978: 846); Burrage (2006: 415).

[74] In England, parliament, like the monarchy, was desperate to reduce the influence of centres of judicial power outside parliament – i.e. courts of common law. See the exclamation in the Commons Debates of 1621: 'The Judges are Judges of the Law, not of the Parliament. God forbid the state of the Kingdom should come under the sentence of a Judge' (cit. Mosse 1950: 128). Thus, although parliament called on the common law for its own justification, it also saw the limiting of common-law authority as a precondition of its sovereignty. Later, note John Pym's defence of parliamentary supremacy against judges who 'presume to question the proceedings of the House' (cit. Jones 1971: 138). On attempts to expel lawyers from the Commons and on the hatred of the Levellers for lawyers see Veall (1970: 100, 107, 203).

control to parliament resolved disruptive problems of this kind: the progressive reinforcement of parliament through the later years of the seventeenth century meant that the conflict between royal courts and parliament was attenuated, and the extent to which the state could be split through the politicization of particular acts of legislation and particular processes of judicial finding was restricted. Indeed, this period also witnessed a more systematic ordering of the common law and statutes, through which boundaries of competence between judicial and legislative organs were still more clearly defined.[75]

The rise of the parliamentary constitution, in other words, expressed a potent inclusionary dynamic through which dualistic or centrifugal elements of the English polity could be more coherently welded together. The symbolic connection of parliament and the common law had deeply felicitous implications in the emergence of the English state, and it enabled a powerful unitary legislature to develop, which was able to account for itself, normatively, as a custodian of time-honoured liberties and freedoms, yet which could also legislate with unprecedented levels of abstraction and positive autonomy. If the constitutional idea of fundamental law emerged in England in the earlier seventeenth century as part of an attempt to articulate residually medieval ideas of convention against the power of the monarchical executive, therefore, this idea ultimately fused with parliament to create a constitution containing a potent independent legislature acting both as internally bound by, yet also as released from, socially embedded basic laws. In this condition, the English parliament was able to act as an organ that internalized the diffuse dualistic constitution and the normative expectations of later medieval society into the state, and that condensed the laws of this society, not as a normative legal body of fundamental laws standing outside the political apparatus, but as the *state's own constitution*: as an internal constitution of public law, serving to articulate and expand the state's own power and positively to transmit the state's own legal acts.

In combining ideas of parliamentary autonomy and uniform legal rule in this fashion, crucially, the English constitutional settlements of the seventeenth century also formed a political system, in which parliament obtained firm control of the levers of finance, which meant that taxation could not be introduced without the endorsement of the assembled parliament. This was stated in the Petition of Right, which defined 'common consent by Act of Parliament' as the basis for new taxes

[75] See the account of this in Shapiro (1974).

(Kenyon 1966: 84). This was then confirmed in the *Instrument of Government*, and it was finally refined in Article 4 of the Declaration of Rights. These agreements began formally to recognize the idea of personal rights (that is, rights against fiscal depredation) as constitutive and actionable constitutional principles, and they began to express the conviction that parliament protected rights of persons in all aspects of their social lives and that parliament was an objective guarantor for a primary group of collective personal entitlements. Most importantly, however, the constitutional reinforcement of parliamentary powers of fiscal control had the practical result that the fiscal opposition between monarch and parliament was terminated, or at least substantially palliated, and that the political system as a whole acquired monetary instruments to stabilize its unitary functions. Indeed, the period of revolutionary constitutionalism in England was also a time of substantial fiscal rationalization, in which the procedures for securing monetary supply for the state were dramatically improved. The fact that the English state of the later Stuart period was a state that endorsed parliamentary review of taxation meant that, like the Dutch Republic, the state was able to generate a high level of social trust in its activities, and this allowed it exponentially to raise its capacities for obtaining revenue. It is notable, above all, that, as the monarchy renounced more prerogative approaches to securing its fiscal base, the finances of the state improved substantially, and the period of greatest parliamentary control of revenue coincided with an increase in the state's monetary buoyancy.[76] As in the Dutch Republic, this relatively easy relation between crown and creditors meant that the state was able to borrow money on trust, to found a national debt and even to establish a central lending bank, which at once further enhanced its credit supply and stimulated the growth of capital in private markets (Dickson 1967: 45). On this count, therefore, the constitutional guarantee for parliamentary ratification of fiscal measures also softened the earlier destabilizing interpenetration between economic and political questions, and it created a series of mechanisms that allowed both state and economy to evolve both in relative autonomy and in a reciprocally beneficial relation. In this respect again, the revolutionary

[76] For examples of the mass of literature on this, see North and Weingast (1989: 805, 817, 819); Brewer (1989: 89); Carruthers (1996: 119); Braddick (2000: 221); Stasavage (2003: 173). Importantly, crucial elements of the taxation system of the Restoration period were introduced during the Interregnum. They were legitimized by popular (or at least parliamentary) approval and subsequently retained as expedient (Ashley 1962: 83; Tanner 1966: 125; Wheeler 1999: 148).

constitutional texts of seventeenth-century England greatly augmented the abstracted and unitary power of the state, and they greatly expanded the state's capacities for the general and positive distribution of political power.

Of further benefit for the construction of the English state was the fact that, as they established parliament as a permanent and legally protected body of state, the constitutional settlements of the Stuart era allowed the state, in albeit very tentative manner, palliatively to internalize sources of political conflict and aggressive resistance in society. Through these constitutional arrangements, the state was able reliably (although not conclusively) to divide its legislative, judicial and executive functions, and it developed a largely separate parliamentary organ, independently sanctioned by the constitution, into which it could channel social conflicts and to which issues of the highest social volatility could be referred for legislative regulation. This pattern of organization substantially expanded the administrative flexibility of the state, and it greatly diminished the political controversy attached to the boundaries between the political system and other parts of society. More importantly still, as discussed, the incorporation of parliament as a distinct legislative organ allowed the state to internalize previously potent bearers of private privilege and sources of political dissent, to convert externalistic or private conflicts into disputes that could (to some degree) be settled within the state, and so to weaken the power of private actors that had previously been protected by customary laws. In the earlier documents of the English constitution, thus, the *separation of powers* began tentatively to emerge as a principle that stabilized the state both above society and its own day-to-day operations, that helped further to transform the dualistic elements of earlier constitutional arrangements into inner components of the state, and that endowed the state with more complex facilities for engaging with and pacifying social conflict. This was highly relevant for the financial condition of the state: it meant that parliament could exercise its powers of fiscal control and the state could obtain revenue through relatively stabilized procedures of negotiation. Most importantly, however, the fixed institution of parliament meant that the state, in very rudimentary manner, began to evolve internal organs in which adversarial opinions could be articulated and dissenting positions expressed without the danger that these would immediately lead to the unsettling of the state itself. In the documents resulting from 1688, in particular, the state limited its tendency to prohibit rival outlooks, and it established a legal order in which it could both integrate, and also

gradually mollify, highly divergent political stances.[77] This very gradual institutionalization of opposition in parliament, although not concluded until well into the eighteenth century, meant that the English state was able to entertain and express a number of views about its particular governmental policies without exposing itself to unmanageable levels of insecurity.[78] The possibility that legitimate – or even *loyal* – opposition could exist as an internal element of the state itself meant that the state was able to separate its power from momentary controversies and control obstructions to its power and that, very slowly, it acquired capacities for placating serious sources of obstruction and even for transforming these into elements of public order.

In each of these points, the incremental formation of the English constitution throughout the Stuart period amounted to a supreme act of unitary and independent state building. In many ways, it marked a highly successful process of abstractive and differentiated political formation, and it exponentially extended the reserves of power which the state was in a position to produce and utilize. This was in fact directly reflected in even the most divergent theoretical constructions and controversies of the era, many of which acted conceptually to intensify the positive structure of state power. Throughout the revolutionary period, much theoretical literature centred around the extraction of a prominent *constitutional formula* to simplify and increase the autonomous power of the state. That is, this literature created and enriched a vocabulary in which government was constructed as a commonwealth, subject to rule, not by physical persons, but by abstracted laws, and in which political power was required to explain itself as an internally consistent and positively abstracted phenomenon in society (Scott 2004: 133). This was evident in the writings of republican protagonists in debate, such as Marchamont Nedham, who argued that states with republican constitutions – based in the 'due and orderly succession of their supreme assemblies' and separate from natural or particular actors – were able to maintain large reserves of distinctively political authority, and to assume a degree of positive sovereignty not accessible to states based in natural

[77] Note the unsettling prohibition of Nonconformist factions through the 1680s and its resolution after 1688 (Lacey 1969: 153, 163).

[78] This is exactly what had been missing before the Civil War (Sharpe 1992: 715). It should be clear that the relation between political factions was not immediately pacified after 1689. For evidence to the contrary see Rose (1999: 62–104). However, even this documentation shows that the state was acquiring the facility that it could incorporate rival views as countervailing parts of its structure.

hierarchy (1767 [1651–2/6]: 14, 85). James Harrington also argued that government, defined, *de iure*, as a 'civil society of men' that was 'instituted and preserved upon the foundation of common right or interest', was far more effective in applying political power than government founded in 'private interest' (1887 [1656]: 16). At the monarchical end of the spectrum of controversy, even royalists such as David Jenkins, who asserted that 'the Regality of the Crown of England is immediatly subject to God and to none other', defined the state as formed by a corporate constitution, which placed the king beneath an internal law and bound the king to accept acts of parliament (1647: 7). Notably, the work of Thomas Hobbes also gave rise to a doctrine of collective obligation, which played the most vital conceptual role in augmenting the power of the state. Hobbes proposed a theory in which the state drew power and legitimacy from its internalization of a public will, which could never be factually identical with private interests or acts of volition (1914 [1651]: 66). In incorporating this will, the state emerged as a public contractual order or 'artificial personality', that was able, in its corporate artifice, to eliminate countervailing personal forces (i.e. the church, the independent courts and the aristocracy), to concentrate all power singularly within its own structure and to apply its power across all society as a generalized, equally inclusive and personally insensitive social resource.

The common idea of the state as a public body thus acted throughout revolutionary England to provide a conceptual device that mirrored the expansion in the state's growing capacities for producing and transmitting power, and it formed a store of terms inside the state from which political power could project motives for its acceptance at a high level of social autonomy and internal abstraction. In all their different dimensions, in fact, the English constitutional innovations of the seventeenth century created a highly internal apparatus of public law for the state, which it could use to concentrate and preserve the abstraction of its political power. This allowed the state at once to abstract itself from other spheres of society, to soften the volatility of its exchanges with interests located in other parts of society, to exclude actors with privatistic claims to power, and gradually to internalize those actors within society that possessed the most acute political relevance. In all their different dimensions, therefore, these documents and processes dramatically increased both the volume of power stored in the state and the positive facility with which this power could be employed. The constitutional order that evolved in revolutionary England, thus, might be viewed as a distinctively effective solution to the accelerated abstraction

and positivization of political power which marked the threshold of early European modernity.

The constitution and the function of constitutional rights

The most important accomplishment of the seventeenth-century English state, however, was that it began to utilize *constitutional rights* as internal instruments of formal political abstraction and pervasive socio-political inclusion. At this historical juncture, civil and political rights began discernibly to play a vital role in stabilizing the differentiated position of the political system in society, and this again greatly reinforced the inclusionary circulation of political power throughout society as a whole.

In the course of all the processes described above, the English Revolution established the principle of parliamentary authority (if not supremacy) in legislation as one component of a balanced constitution. Through this constitutional revolution, the common laws, which had originally been designated by common-law judges either as institutes to sanction particular privileges or as eternal protectors of socially embedded natural rights, were positively integrated *within* the state: far from acting as external normative limits on power, rights became parts of the state's internal functional, public-legal apparatus. After 1688, parliament was placed above particular fundamental laws, and the 'consent of parliament' itself became the fundamental law of the constitution (Williams 1960: 28). Parliament, acting now as an integrally fixed organ of the polity, identified itself both as a legislator legitimized by the rights inhering in ancient common laws and (at the same time – however paradoxically) as factually and positively enforcing its own laws throughout society, whose normative content it defined as derived from rights. Indeed, although the principles of rule by law and governance by parliamentary statute are often perceived as antinomies, the success and distinction of the post-revolutionary English constitution lay precisely in the fact that it offered legitimacy to the legislature as an organ that both implicitly internalized general principles of law (rights) and was authorized to legislate as a fulcrum of autonomous statutory power. The conventional antagonism between law (the judiciary) and the state (the administration) was (at least symbolically) resolved in the earlier documents of the English constitution, and under the post-1688 constitution parliamentary legislators began to present themselves, even in their acts of positive statutory legislation, as the legitimate custodians of basic

common-law rights, such as rights of equality before the law, of equal legal redress, of free disposition over private property, and of protection from arbitrary fiscal extraction. In particular, the parliamentary constitution after 1688 tied together procedural rights (i.e. rights of legal redress), proprietary rights and rights of representation, and, as described by John Locke, it established the parliamentary legislature as an organ that proclaimed and obtained *natural* legitimacy by passing positive laws that represented and protected all three sets of antecedent rights at the same time (1960 [1689]: 364). In justifying itself through reference to rights in this manner, the parliamentary state obtained several distinctive practical benefits, and its legitimating fusion of positive law and internal obligation to rights greatly expanded its legitimacy and facilitated its autonomous functional operations.

Most obviously, first, the establishment of a parliamentary system that drew its positive statutory legitimacy from its implicit preservation of rights under common law meant that the English state was in a position to incorporate an internal and normatively extensible account of its own foundations, which it could use to accompany and simplify its procedures, and which greatly raised the probability that its legal decisions would be met with compliance. In this respect, the fact that the English constitutional state could declare as a prior position that it was constrained to legislate in accordance with laws derived from rights, and that it recognized all members of society as bearers of rights, meant that the state could presuppose confidence through society, and it obtained an exponentially increased liberty in its normal positive legislative, judicial and fiscal operations. Additionally, second, as it sanctioned rights-based principles of judicial uniformity and founding legal order, the state evolved a technique to reduce the personalistic elements of its power, and to obtain a more secure and less unwieldy structure of *legal inclusion* for its addressees. This culminated in the 1701 Act of Settlement, which, reinforcing similar provisions in the Declaration of Rights, ruled that the tenure of judges rested, not on royal pleasure, but on their behaviour and competence (*quamdiu se bene gesserint*): in this statute, judges became, in the last instance, accountable to parliament, and the administration of law was separated from all prerogative and personal favour and defined primarily as the application of rights (Williams 1960: 59). This statute at once limited variations in the wider legal fabric of society, and it reduced the degree to which the state exposed its power to private conflicts or private access. Through its construction as a legal order based in rights, in consequence, the post-revolutionary English state also acquired a