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

more stable legal periphery for the application of its power, and it began internally to simplify and pre-construct both the social terrains in which it utilized power and the procedures by means of which its power was distributed. Furthermore, third, the principle that parliament was the inviolable sovereign organ of the people also promoted the idea that all people, as members of the founding sovereign body, possessed highly generalized rights, which formed the implicit basis for all acts of statutory legislation, and this, too, reinforced the positive inclusionary functions of the state. Whereas earlier traditions of representation and free assembly had promoted representative assemblies as expressions of the freedom of singular persons or singular groups to assert particular entitlements, to insist on particular embedded privileges or to influence particular points of policy, the incremental constitutional revolution in Stuart England gave clearer expression to the idea that, as rights holders, all members of society were equally co-implied in the authorship of laws, and that, because of this, laws had to reflect, to be constrained by and to enact certain immutable and imprescriptible general rights. This aspect of the English constitutional settlement formed a body of public law which, in separating the state from manifest particularism, dramatically extended the integrative dimensions of the state. It created a legal order, both factual and symbolic, which greatly facilitated the integration of social actors into the state's legal and political reserves, which gradually eliminated particular and vested obstructions to the circulation of power through society as a whole, and which, in separating power from particular persons, intensified and simplified the power available to the state. Most importantly, however, in defining itself as a formal repository of general legitimate rights in society the parliamentary/constitutional state established after 1688 clearly asserted that it held both a monopoly of societal rights and a monopoly of societal power, and that other – particular or local – rights were valid only insofar as they were consonant with and confirmed by the state: the state, thus, was the supreme bearer and custodian of rights, and so also the supreme bearer of society's political power, and, as such, it was uniquely entitled to expect obedience.

The constitutional rights that were implemented as internal components of public law through the seventeenth century, in sum, acted both practically and normatively to minimize the potentials for a collapse of legitimacy in the English state, they enabled the state to articulate its functions in more consistently controlled procedures, and they greatly augmented the volume of usably abstracted power that the state

possessed. Above all, the aggregate of constitutional rights instituted during and at the end of the struggles between parliament and monarchy in early modern England clearly expressed the belief that the state must be viewed as a public entity, that its public quality was defined and exercised under laws independent of the groups of persons factually utilizing its power, and that the public sources of the state's authority were distinct from any personally negotiated set of privileges and agreements. The fact that the state acknowledged those subject to its power (notionally) as uniform rights holders allowed the state to extract an account of itself as a universally public body, which assumed power by principles detached from any singular or private entitlement. This public-legal dimension of rights was the functional wellspring of the English constitution. At one level, these constitutional principles acted to remove personal influence from the state: the 'advice of private men' was formally effaced from government, and all 'matters as concern the public' were to be brought before the 'great and supreme council' of parliament and not 'debated, resolved and transacted' elsewhere (Kenyon 1966: 244). Additionally, however, these principles also reduced the dualistic elements in the state: as it gradually implemented a uniform body of norms to determine rights of access to state power, the emergent English constitution condensed all political power into the state, and it drew all members of society into a uniform relation to power. Through its constitutional reference to rights, therefore, the state obtained a device in which its sovereign abstraction could be at once asserted and legitimized, and in which other rights (in particular, rights attached to powerful actors outside the state) could be diminished and subject to state control. The constitutional rights-based state evolved as the most powerful device for strengthening political authority, for eliminating particular sources of political power in society or in the margins of the state, for integrating all political actors into the state, and for circulating power through society in simplified, differentiated and generalized form. The rights-based transformation, in England, of the dualist constitution of later feudal society into a more monistic or internal order of state was perhaps the decisive step in the construction of a distinctively modern state, and it was the decisive achievement of the constitution growing from the protracted period of English revolution.

On balance, to conclude, the longer period of early modern European history gave rise to states in a distinctive, although still undeveloped, modern form. Most societies of this period began to converge around unitary or *sovereign* political institutions that were clearly distinct from

institutions relating to other social spheres, most members of society began to enter a relatively and even uniform relation to state power, and power began to be transfused through society in relatively positive, even and structurally neutral fashion. The construction of a constitution entailing mechanisms for parliamentary deputation and provisions for basic rights (both in the state and in the judiciary) proved a highly effective device for cementing the differentiated political form of emerging modern societies. Indeed, while medieval societies had possessed the normative tendency to produce rudimentary forms of *public law* to abstract their political resources, early modern societies subjected this normative evolution to far-reaching refinement: these societies began successfully to evolve rights structures as instruments both for consolidating and differentiating their political resources, for condensing their power in unitary institutions, and for transmitting their power, in internally reproducible form, throughout society. Constitutions and constitutional rights, in short, began to be identified as the most adequate normative mechanisms of transmission for political power, and constitutions and constitutional rights came to act as internal instruments for producing and authorizing political power as a positive, public or *sovereign* social facility. Those societies that did not evolve normative institutions of this kind, often those retaining 'absolutistic' structures, tended to circulate political power at a lower level of autonomy, generality and differentiation: they tended to possess, in factual terms, *less power*.

3

States, rights and the revolutionary form of power

The progressive formation of sovereign states in many European societies in the sixteenth and seventeenth centuries was part of a substantial transformation in the basic structure and application of political power, which saw an increase in the volume of power and the mass of political decisions required by different societies. Indeed, the formation of states reflected a process in which power became political power in the modern sense of the word: it constructed power as a resource that was relatively indifferent to singular persons, that was not fully reliant on direct conflict or coercion for its usage, and that contained a positive internal structure which allowed it to be applied inclusively and reproduced across significant structural, regional and temporal variations in particular societies. The construction of states, beginning with the disruption of feudalism in the high Middle Ages, is widely viewed in historical-theoretical literature as a process of concerted expropriation, in which regents, in order to heighten their extractive force, coercively eliminated all intermediary authorities between themselves and those subject to power.[1] However, the primary feature of this process was not, in fact, that power was applied more coercively or became more *forceful*. On the contrary, this process meant that power was refined as a differentiated social object, that it was utilized in increasingly constant procedures, and that it was defined and applied in legal formulae that could be used, in internally replicable manner, to regulate very different questions across wide social boundaries. This had the result, in turn, that power was transmitted to all social agents in increasingly uniform and inclusive fashion: through its internal transformation, power constructed its societal addressees at a growing level of inner consistency and legal uniformity. This of course does not mean that European states were fully formed by the seventeenth century. Similarly, this does not mean

[1] This view is most famously associated with Charles Tilly (1975: 24), but it is widely replicated in historical literature; see, for example, Wehler (1987: 221).

that by this time distinctions of private status and locality were eradicated from the use of power. On the contrary, by the end of the later seventeenth century only the most centralized European societies had begun to develop fully structured states, and even these were scarcely in a position to distribute power evenly throughout all territories and across all social divisions. If the essential modern experience of political power is that all members of society receive power in immediately equivalent and relatively unobstructed fashion from a central public authority, this condition was not reached in most societies until the nineteenth century. In some European societies, in fact, it took longer still. Nonetheless, the most striking feature of early modern European societies was that they witnessed an intensified change in the form and the circulation of political power: they were marked by an incremental tendency to employ political power as a generalized, positively abstracted and uniformly applicable substance.

Through this process of growing political abstraction, European states also gradually began – with substantial variations – to consolidate themselves around a series of distinctive structural characteristics. First, states increasingly evolved institutional mechanisms for integrating powerful private groups into their administrative apparatus. Second, states gradually developed more regular boundaries, or patterns of articulation, in their relation to other social spheres, and they began to produce devices and acceded procedures for simplifying and formalizing their interactions with the economy, with religion and with potentially destabilizing exchanges in other parts of society. Third, states also began to control and to limit 4the number of issues that had to be filtered through the political system, and in employing power as a uniform commodity, organized in distinct procedures, they evolved instruments to ensure that each particular application of power did not have to be negotiated with consolidated bearers of local authority or structural status and that many social exchanges could be conducted without an immediate or palpable requirement for power. Central to the structure of modern political power, in sum, was the fact that states assumed the ability to act as relatively positive public actors, capable of extricating and presupposing constant and positive foundations for their use of power through society, and they established iterable and relatively uncontroversial principles and public procedures which allowed them to apply and reproduce power in abstracted inclusionary fashion and to withdraw the internal basis of political power from incessant contest.

As indicated above, this process of general political abstraction in society should not be viewed as exclusive to one kind of political order, and, across manifest distinctions, these tendencies typified all consolidated European states in the later early modern period. Nonetheless, the English state, established through the reforms of the later seventeenth century, was a salient example of early statehood that enabled political actors to legislate without uncontrolled integration of social themes into the decision-making apparatus, without requiring an endless and exhaustive redefinition of the principles on which state power was founded, and without reliance on obdurate private bargains through society. This should under no circumstances be seen to imply that by the later seventeenth century the English state had established itself as a fully abstracted public or sovereign order. Yet, by the first decades of the eighteenth century, the English state had obtained a certain limited public status, and it had acquired the ability to project itself as a perennially consistent public personality, which greatly facilitated its use of power. Notably, it had begun to stabilize itself as a body of administrative organs situated above the divergent interests of society, it possessed the beginnings of a ministerial order that was independent of the persons factually consuming power, and it had begun to elaborate a system of limited representation and sanctioned opposition that allowed it both to adjust and to harden its social foundations without constant risk of overthrow.[2] Most especially, the fact that the British state now contained the rudimentary elements of a party apparatus, in which state power was rotated between two political groupings, which, for all their real antagonism, tentatively accepted aspects of the basic form of the state and identified the state as distinct from individual actors or interest, meant that power was not entirely bound to personal chains of command or to allocated ranks or affiliations. Naturally, this development should not be simplified, and, owing to the weakness of parliamentary procedure and the persistent allocation of office through courtly patronage, the principle of legitimate political opposition was not commonly established in England until the 1730s.[3] Gradually, however, this principle endowed the state with heightened flexibility in its administrative reactions, it meant that the state could respond to complex social challenges without placing the foundations of its legitimacy in question, and it enabled the state to overcome the diffuse privatism of feudal politics by deploying

[2] See the famous accounts in Plumb (1968: 158); Roberts (1966).
[3] Classically, see Foord (1964: 18–33).

techniques of inclusion to ensure that conflicts over power were conducted, internally, within the state itself. The emergence of an early party system, in other words, allowed the political system to stabilize itself around a distinction between government and state, or government and constitution, and this constitutional extraction of the state from the everyday mechanisms of government greatly consolidated the state as a societally abstracted repository of positive power. This process was condensed in Henry Bolingbroke's argument that, if unified by recognition of certain constitutional principles, political parties were crucial for national political liberty and brought reserves of solidity to the state (1786 [1733–4]: 312). Later in the eighteenth century, Edmund Burke reinforced this point by claiming that political parties were essential organs of governance, and that political opposition was, in some circumstances, a vital device for holding 'the constitution to its true principles': the abstracted distinction between state and government thus presupposed the presence of oppositional parties (1775 [1770]: 100). Indeed, the fact that the English political class began to divide into two separate party-political factions, the progressive Whigs and the conservative Tories, brought the distinctive advantage that the nobility could interpenetrate with social groups emerging from the independent economy, and the state could evolve an integrative ideology in order incrementally to include increasingly powerful social groups without undergoing fundamental transformation.

If the societies of early modern Europe were generally oriented towards the abstractive maximization of their reserves of power, therefore, the existence of a regular or public-legal internal constitution, exemplified by that of the English state, was a key component in this process. In addition to this, however, it was of vital importance in this process that the most advanced states began to cement their adaptive structure around the normative concept of personal subjective rights, and the uniform laws shaped by such rights. In many instances, the rights sanctioned by early modern constitutions were little more than formalized compilations of existing particular rights and privileges. However, most states of the later early modern period were marked by a tendency to internalize an abstracted image of those subject to power as bearers of general subjective rights, to construct rights as uniform attributes of persons under law, and to apply law primarily to persons as *rights holders*. In each respect, rights, as abstracted and prominent components of constitutions, played an extremely important role in the positive expansion of political power. Indeed, rights evolved – to an ever increasing degree – as inner elements of power's abstracted autonomy.

This growing status of rights was reflected – first – in the evolving patterns of public law in early modern Europe, and many states at this time began to envisage their power as correlated with and authorized by uniform and publicly sanctioned rights. Indeed, the gradual emergence of unified bodies of public law, containing elementary provisions for rights, was a general characteristic of early modern states that had reached a high degree of centralization and inclusion, and which, as a result, had weakened their local administrative supports and eroded the privilege- or estate-based societal constitution surviving from the medieval period. Such states used uniform rights to replace the complex feudal structures of society (rights based in estates, towns and corporations) with a monistic order comprising integrally controlled patterns of integration, in which rights were allocated directly by actors in the state, and they used their rights to include social agents in an increasingly even and predetermined manner in political decisions. The formation of the state as a centre of territorial inclusion was thus flanked by an expansion of internal state-conferred rights, and a rights-centred order of public law became a necessary basis for the abstracted power of the state.

The growing functional reliance of European societies on articulated public laws and increasingly formal rights was in fact one of the main reasons for the wide diffusion of natural-law ideals in early modern Europe, which culminated in the political doctrines associated with the Enlightenment. Throughout Europe in later early modernity, doctrines of natural law began to promote the idea that political power was legitimate only if it was applied to subjects holding certain stable rights, and if it was constrained by general practical principles of natural law condensed into rights. These doctrines immediately accompanied and facilitated the construction of European states as societal actors possessing a highly abstracted volume of legally transmissible power, and they greatly contributed to the production of state power as an autonomous and adaptively differentiated phenomenon. Indeed, throughout the last century of early modern European history, the theoretical corpus of natural law played the most profound role in substantiating the power of states. In implying that law could be legitimized by reference to singular general principles, and that it was justified if it reflected social agents as bearers of inherent rights, natural law allowed states to impose increasingly uniform legal regimes across society, to overarch and eliminate the particular authorities of local or intermediary actors, and internally to store positively usable justifications for their legal structures. As discussed, this obtained its clearest expression in the works of

Locke, whose theory of rights helped to concentrate the state as the primary source of sovereign power and allowed the state to imagine itself as applying law to an equal and even group of addressees, situated outside its own structure. In other societies, however, philosophers of natural law engaged still more directly in the processes of public-legal codification which underscored the positive formation of statehood. Leibniz's doctrine of natural law, for instance, culminated in his compiling a general legal code for the German states of the Holy Roman Empire.[4] Moreover, by the mid eighteenth century natural-rights theories were clearly invoked as an impetus for positive legal centralization in growing territorial states. In Prussia, Samuel Cocceji's theory of natural rights acted as the template for the systematic construction of legal procedure, for judicial reform, and for the separation of courts from the state executive.[5] In France, likewise, natural-law principles had crucial status in the repeated attempts of the monarchy throughout the eighteenth century to unify the judicial apparatus. Advocates of legal reform, whether favouring or opposing the concentration of legal authority around the monarchy, used natural-law constructs to found positive principles of judicial uniformity and abstraction.[6] In each case, the conceptual attempt to deduce natural foundations for the law acted both to intensify the power condensed into states, to explain general terms for the monopoly of power held by states, and to establish formulae for the simplified positive circulation of power throughout society more widely.

However, the politically abstractive function of rights was primarily manifest, not in public law, but in the sphere of civil law or common law, especially as this related to economic and monetary activities. The case of England has already been briefly discussed. In England, the state began at an early stage to identify legal persons under common law as bearers of (rudimentary) subjective proprietary rights, which could not be violated by any natural or artificial person (Atiyah 1979: 86). A basic principle of private subjective rights was in fact already implicit in the conflicts between Edward Coke and James I. However, the revolutionary era witnessed a growth in the potency of private rights in England, and

[4] Leibniz argued that natural law, as it guides society towards perfection, must serve practical human interests (1693: 10).

[5] Cocceji used principles of natural law to insist on the need for a formally independent judiciary, separate from the executive body of the state, which could ensure that the functions of law were systematically defined and implemented (1791–9 [1713–18]: 159).

[6] See note 25 below.

this also brought benefits to the state. In particular, the rise in the significance of rights under private law gradually acted to trace the boundaries and limits of state inclusion, and it delineated spheres of activity covered by rights as normally irrelevant for political power and removed from the public arena. In this respect, private rights greatly facilitated the formation of the state, not only as an abstracted construct, but also as a functionally specialized bearer of power. Indeed, the state's ability to abstract itself as a public order was closely correlated with its ability to define some social functions as covered by private rights and so as not eminently political. Like public laws, private rights enabled the state to solidify itself against private actors, to preserve private activities outside the state, and to avoid an excessive or blurred politicization of spheres of society not internal to the political system.

The increase in the status of private rights gathered pace through the eighteenth century, and in most cases it was immediately connected with a consolidation of state power. In England, this assumed characteristic expression in the works of William Blackstone. Blackstone, notably, insisted on simple principles of natural law in order to justify rights of personal autonomy in private society. However, he also used natural law to cement the power of the state by endorsing the principle of parliamentary sovereignty, and he offered a definition of parliament as an institution legitimized by subjective rights.[7] Similar processes were also, albeit to a lesser degree, accomplished in other national settings. The Savoyard state in Piedmont, for example, saw repeated acts of legal codification in the early decades of the eighteenth century. These reforms were designed at once to support state power, to establish royal tribunals above local and seigneurial courts, and to specify and preserve private rights and singular claims to ownership (Viora 1928: 186).[8] The main private-law compilation of eighteenth-century Austria, the Codex Theresianus (never enforced), was also centred around a definition of property ownership as an unrestricted right exercised by single persons over objects,[9] and it aimed to secure the direct and uniform legal rule of the monarchy throughout the Habsburg crown lands. Similar processes

[7] Blackstone argued that society is formed in order to 'protect individuals in the enjoyment' of 'absolute rights', and he observed that the state, insofar as it protects rights of singular persons, obtains a 'natural, inherent right' to pass laws and to demand uniform compliance (1979 [1765–9]: 47).

[8] As elsewhere, the reforms in Savoy had a pronounced 'anti-noble' impetus (Quazza 1957: 169).

[9] See *Codex Theresianus* (1883 [1766]: 42).