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).

also took place in Prussia, notably in the preliminary drafting of a civil code under Friedrich II.[10] More tentatively, eighteenth-century France experienced parallel innovations, and the concept of ownership as a singular right of personal disposition and entitlement began to assume prominence in the course of the eighteenth century. The early and middle decades of the eighteenth century, in particular, gave rise to a wave of legal doctrine, especially the works of Boutaric, Bourjon and Pothier, which sought to synthesize French common law by applying principles of legal rationalism to the existing legal corpus. The treatises of these jurists did not finally distil a concept of purely private rights, they did not advocate the elimination of all privileges, and they did not efface from law all local or seigneurial power: in fact, the contrary was the case.[11] However, Pothier began to construct legal rights and entitlements as distinct from social rank, and to determine principles of ownership to separate economic activities from political functions (1830b: 145). Similarly, Bourjon sought to restrict patrimonial office holding, to concentrate judicial power in the monarchy, and to offer a systematic account of freedom of contract.[12]

In none of these European societies, notably, were all private rights strictly liberated from political control. However, theories of rights began to provide unitary regulation for questions of private economic activity, and they progressively brought private resources into a structured external relation to the state. As in the sphere of public law, then, these innovations were functionally vital to the rise of statehood, and, in stipulating certain rights as generally valid across society, they enabled the political system at once to distinguish its own functions from the economy, to produce clear categories to preserve its functional abstraction, and so to simplify its inclusionary application of power. In fact, legal documents constructing private rights gave rise to the characteristic feature of modern societies that political power was condensed in the state, but that many spheres of exchange, containing activities distinguished by personal rights, were detached from constant state jurisdiction: singular proprietary rights traced the progressive separation of state and society, and they enabled states to position themselves as societal

[10] See pages 171–2 below.

[11] Boutaric argued that in France powers of jurisdiction were patrimonial and that those subject to jurisdiction could not opt for their cases to be heard under other jurisdiction (1751 [1745]: 45).

[12] On these distinct points, see Bourjon (1767 [1747]: 211, 306, 409–413).

actors located within an increasingly pluralistic and functionally specialized societal landscape, in which other spheres of exchange also possessed a high degree of abstraction and autonomy. In addition to this, in fact, by the eighteenth century other private rights, apart from economic rights, were also widely acknowledged, especially in respect of religion, and partial rights of confessional freedom and tolerance were promoted in most early modern European societies. To be sure, few states offered equal rights to bi-confessional populations: in most states, in fact, political stability became most imperilled where religious plurality was reflected at state level, and the restriction of the political resonance of dissent against a state religion was a common precondition of the positive stability of early modern statehood. However, most European states applied selective rights of religious freedom and even tentatively adopted latitudinarian principles to prevent – where possible – religious controversies from migrating across society into the political system.[13]

In these different respects the, at least rudimentary, recognition of basic political and certain private and civil rights by early modern European states served to stabilize state power in a reasonably abstracted form, to ensure that not all conflicts or questions in society converged around the state, and to underscore the emergent pluralistic differentiation of society in its entirety. Additionally, however, it is worth noting again that, if one of the primary challenges for early states was the need to overcome their residual dualism or inner-structural pluralism and to consolidate their power over the private interests that originally possessed a stake in the state, rights, both public and private, contributed vitally to this process. Indeed, many early modern states continued to exist in a precariously unified condition of statehood, and they were intermittently exposed to the danger of privatistic *re-particularization*: in particular, states were susceptible to destabilization owing to the threat that their ability to unify and balance the private interests that they incorporated could be eroded, that public offices might be privately

[13] A salient example is the English Act of Toleration of 1689. Less well documented are the religious implications of the Treaty of Westphalia (1648) for the German states. The treaty gave express sanction to the equality of different confessions, including Calvinism. A degree of religious tolerance was fundamental to the rise of Prussia: an Edict of Tolerance was passed in 1685 to allow Huguenots to obtain residence in Prussian territory. Apologists of enlightened absolutism in Prussia were also keen to prompt religious tolerance. For example, Nicolaus Gundling defined religious tolerance as a particularly effective way of guaranteeing public security (1743: 787). Samuel Pufendorf also suggested that restraint in addressing religious dissidence was beneficial for the state (1687: 168).

reclaimed or enfeoffed by potent privileged actors (especially in the nobility) outside the state, and that they might once again dissolve into loose aggregates of persons protected by private rights and privileges (Mousnier 1945: 2). However, as they acquired the capacity internally to construct different social groups as bearers of general rights and to delineate different spheres of activity as covered by rights, states acquired highly effective devices for preserving themselves against loss of internally unified autonomy. In particular, rights made it possible for states to dictate the activities in which private groups could appear relevant for the state, to impose highly selective restrictions on the processes in which actors outside the state needed to be politically internalized, and generally to consolidate their boundaries against prominent bearers of private or local status. Rights thus allowed states to reconstruct the diffuse dualistic structure that they had carried over from the later feudal period as an integrated internal constitution, and they enabled states to include social groups under law while ensuring that this inclusion was partial and pre-structured and that most addressees of power were held outside the state. This gave to the state heightened reserves of flexibility, as it allowed the state to legitimize itself as socially inclusive and accountable yet also to limit its structural porosity as a public organ. If early modern states, in short, had originally been founded in a dualistic political regime, in which the sources of constitutional order and agreement were external to the state, modern states separated themselves from their private interwovenness with society and transformed their constitutional order into an internal apparatus: the allocation of uniform rights to persons under law played a vital role in this.

Rights and constitutions, in sum, began to emerge in later early modern Europe as the most adequately articulated form of political power, and these normative institutes played a deeply formative role in the creation of the state as a positive political agent. The separation of public law and private law, which underpinned the emergence of early modern states, was a process in which two distinct sets of rights (public and private) served, in distinct yet overlapping fashion, to abstract and maximize the power preserved within states. Rights and constitutions in fact gradually began to express a *revolutionary* form of modern power: they allowed power to apply itself through society at a high level of generalization, autonomy and pluralistic legitimacy, they allowed members of society to be included in power in uniform fashion, and they dramatically raised the level of inclusivity at which power could be utilized.

Constitutional crisis and failed state formation

Across different European societies, the evolution of the characteristic instruments and legitimating procedures of modern statehood remained a complex and tortuous process. Throughout the later early modern period, as previously mentioned, many states encountered obstructions to the formation of their power as an abstractly centralized and uniform societal phenomenon, and they often struggled to distribute their power through even, uniform laws. Indeed, many states failed to consolidate a constitutional order to facilitate their reliable use of power, and their ability to perform functions of statehood remained uncertain. In each case of this kind, the weakness of the state was closely tied to the fabric of rights existing in society, and the structural problems of European states were normally caused, in part at least, by the fact that states encountered difficulty in generating a fully internal system of rights, and their normative capacity for uniform legislation was blocked by potent rights inside and outside the political system, which preserved and reinforced selective social privileges. Increasingly, in fact, the solidity of emergent European states was defined by the extent to which they were able to produce laws founded in generally constructed rights to replace the diffuse constitutional order that had been formed in the early stages of feudal transformation. At the threshold of political modernity, the constitutional integrity of different states widely depended on their success in combating and assimilating structurally embedded rights, and states sustaining an uneven rights apparatus tended to experience malfunctions in their legislative operations and were often susceptible to destabilization.

Poland and Sweden

One pattern of eighteenth-century constitutionalism, accordingly, was found in states that substantially retained the weakly integrated constitution that had accompanied their formation in the late medieval period. Key examples of this were Poland and Sweden. It is notable, in this respect, that for much of the early modern era Poland and Sweden were, with England and the Dutch Republic, the European states that possessed the most elaborated constitutional structure. However, in contrast to England, in both Poland and Sweden the constitutional order of the state retained pronounced dualistic features, including particularistic guarantees over rights, which by the eighteenth century proved fatally damaging for the state.

In the case of eighteenth-century Poland, the fact that the constitution guaranteed rights of statutory veto and regional control to the noble estates led to a far-reaching fragmentation of state power around personalities and localities, and it clearly impeded the consolidation of state power in a densely integrated political apparatus (see Hoensch 1982: 328). Indeed, as the noble estates used their rights routinely to oppose new taxes, the estate-based constitution ultimately made Poland vulnerable to external military intervention: it was ultimately responsible (in part) for the partition of Poland, which began in the 1770s. It is notable, in fact, that the response of the Polish political elites to the onset of partition was to draft a progressive national constitution (finalized in 1791), which was arguably the first modern constitution in Europe. This constitution was designed internally to strengthen the state and to preserve it against internal erosion, and it provided for rights-based judicial regularity, separated powers and some degree of national representation.[14] The provisions of this constitution, however, were deeply contested by the nobility, and, although it instituted a primary legislature accountable to the popular will, it reserved distinct recognition for noble privileges and elements of feudal law in respect of the peasantry, and it only 'gingerly' admitted persons outside the *szlachta* to the national franchise (Duzinkiewicz 1993: 69). Moreover, the 1791 Constitution was never fully enforced, and it was swept away by the partitioning powers. Poland thus remained an extreme example of a state that did not fully integrate medieval estates into a centralized unitary state apparatus, and its integrity was undermined by the unregulated power of the estates and by the haphazard exercise of particular rights by the nobility.

The eighteenth-century Swedish constitution contained certain similarities with the Polish case. In Sweden, as mentioned above, the powerful constitutional arrangements of the seventeenth century were abrogated in a series of royal decisions initiated in 1680, in which Charles XI restricted the power of the nobility and the Council of State and drastically diminished the powers of legislative ratification, veto and policymaking held by the legislative Diet. At this time the Swedish monarchy summarily curtailed the force of aristocratic constitutionalism, and the king opted instead for a model of concentrated bureaucratic legal rule, supported strongly by the commoners (Barudio 1976: 102; Upton 1998: 46). However, the absolutist regime established in the 1680s

[14] For discussion see Lukowski (1991: 94–5).

was ultimately rejected, and after 1718, which marked the beginning of the Age of Freedom, it was supplanted by a more representative system, centred in a formally written constitution (introduced in 1719 and revised in 1720). This constitution, expressly designed to strengthen the state, gave very substantial co-legislative powers to the assembly of estates (s. 4), it insisted that the ministerial executive was accountable to the estates (s. 14), and it initiated a brand of parliamentary rule that was distinct from the gentry constitutionalism of the previous century (Roberts 1986: 9, 82).[15] The parliamentary system of this era mirrored the British polity in that it, too, gave rise to two rival political parties, the Caps (conservative) and the Hats (progressive), through which different branches of the nobility vied for power. Despite this, however, the eighteenth-century Swedish polity clearly succeeded only moderately in placing the state above private interests, and it remained dominated and debilitated by noble factionalism. Indeed, it has been noted by both near-contemporary and more recent commentators that the Swedish state in the Age of Freedom was close in form to an oligarchical system, in which the nobility arrogated both legislative and executive powers, and it was marked at once by a deep disregard for popular rights and liberties and by extensive privatization of public office (Sheridan 1778: 154–5; Roberts 1973: 34–6). The parliamentary constitution was ultimately overthrown in 1772, and Sweden reverted to a more authoritarian monarchical system. In particular, the overthrow of the 1720 Constitution resulted from the fact that the nobility had grown anxious at the fact that the lower estates were beginning to act as concerted force in the Riksdag, capable of overruling the nobility and threatening to transform parliament into an organ of more fully democratic inclusion. The constitution was repealed through a coalition of retrenchment between the monarch and the nobility in order to preserve noble privileges (Metcalf 1982: 258–9; Roberts 2003: 194–201), and the return to semi-absolutism at this point was intended to reconsolidate privilege and private power within the state. Sweden too, thus, was a prominent example of a state in which noble privileges in the political system led originally to a strong representative governmental order and yet, ultimately, countervailed the construction of an inclusively unified state.

In both Poland and Sweden, for very diverse reasons, the function of parliament as a guarantor of noble privileges preserved a dimension of

[15] Rutger von Seth kindly helped me with translations of the *Regeringsformen* of 1719. This and other relevant texts are printed in Brusewitz (1916).

constitutional dualism in the state. This placed limits on the state's capacities for unitary modernization and for full rights-based inclusion. In effect, it prevented the complete construction of the state as an autonomous public order, and it left the state highly vulnerable to private power.

Prussia and smaller German states

An alternative example of a state weakened constitutionally by a conflict between general constitutional rights and structural privileges was Prussia. In the course of the eighteenth century in Prussia, semi-constitutional rights were in fact introduced, with the specific aim of intensifying state power and eradicating the dualism of earlier constitutional arrangements. By the middle of the eighteenth century, for instance, the Prussian monarchy had embarked on a campaign to efface the constitutional residues of feudal privatism through a far-reaching reform of the legal and judicial apparatus. Like other 'absolutist' dynasties of the eighteenth century, the regime of the Hohenzollerns promoted a strengthening of state power through extensive legal rationalization and anti-seigneurial codification. Indeed, although the Recess of 1653 had preserved jurisdictional rights of the nobility, this agreement was clearly not accorded final validity in Prussia throughout the eighteenth century. The legal reforms of the eighteenth century were in part intended to curtail noble autonomy in judicial matters and centrally to impose a uniform legal order and uniform rights of legal redress across all actors in society.

This process of political concentration through uniform allocation of legal status, shaped by concepts of natural right, was discernible in the first general law code of eighteenth-century Prussia: the Codex Fridericianus, introduced between 1747 and 1749. This code prescribed uniform legal procedures for the courts of law, thus guaranteeing basic rights of legal access and hearing, and it sought to subordinate questions of fiscal importance to an independent central judiciary. Indeed, in parallel to similar proposals for legal reform in the Habsburg territories, the establishment of a common judicial order in Prussia was clearly intended to detach legal control from the noble estates and to relocate judicial authority from local actors into the civil service.[16] Additionally,

[16] See Kocher (1979: 14, 18, 28). Koselleck states simply: 'The law of state pierced through the order of estates' (1977: 37).

however, this process of legal/political schematization also assumed a quasi-constitutional dimension. The centralization of judicial authority inevitably presupposed that the state, in itself, evolved a neutral legal consistency, and that the general status of the law, increasingly formulated through reference to natural rights, acted to reduce the private power, not only of potent seigneurial actors outside the state, but also of regents themselves: the growing uniformity of the law also prohibited egregious infraction by persons (even monarchs) momentarily using the power stored in the state. By the middle of the eighteenth century, therefore, the Prussian monarchy began openly to legitimize itself, at least rhetorically, through reference to its independent legal and administrative functions, and the exclusion of private/patrimonial influence from the law began to produce an idea of the state as an impersonally transcendent and powerfully overarching legal order, based in equal legal obligation.[17] This process of early-constitutional law reform ultimately gave rise to a comprehensive legal code for Prussia, the Allgemeines Landrecht of 1794, which was drafted, among others, by Carl Gottlieb Svarez. The Landrecht, conceived in antipathy to the nobility as a political force (Schwennicke 1998), was intended to generalize the foundations of the law, to integrate members of society as evenly as possible under state authority, and to include all persons as bearers of rights and entitlements under law. Svarez in fact favoured a highly abstracted concept of the state. He insisted that national law had to be founded in principles of natural right and personal autonomy, and he applied principles of natural law as institutions for enforcing political centralization and for bringing private actors under the 'highest territorial jurisdiction' (2000 [1791–2]: 69). In these respects, Prussia was a striking example of a state that began strategically to create a uniform rights-based legal order for itself in order to heighten its ability to apply political power evenly through society and to divest itself of its earlier dualistic dimensions. The abstraction of the state and the reinforcement of the state's constitutional order and rights structure were thus closely integrally conjoined.

At the same time, however, the state of eighteenth-century Prussia was only able to obtain a very incomplete degree of political unity and abstraction, and it retained certain underlying dualistic features. To be sure, if compared with the Habsburg crownlands, the strength of the Prussian executive over the noble estates was firmly established, and, by

[17] Friedrich II famously styled himself *the first servant of the state* (1913–14 [1777]: 235).

the middle of the eighteenth century, the law was concentrated in relative uniformity across Prussian territories. Austria retained a more pluralistic constitution throughout the eighteenth century: in fact, Austria was prevented by the imperial authority of the emperor, whose power and legitimacy depended on the preservation of a constitutional balance between regional estates and territorial princes, from establishing a fully evolved system of territorial rule (Strakosch 1976: 8, 17). Nonetheless, a dimension of socio-constitutional polycracy also persisted in the Prussian state throughout the early modern period, and even the Landrecht did not cement the state as a fully positive or public agent. The Landrecht in fact comprised a delicate compromise between the centralistic impulses of the monarchy and the local/centrifugal forces of the estates and nobility, and it clearly reconfigured the original bargain through which the noble estates had accepted confirmation of their social privileges as a condition for their transformation into a functional corpus within the state.[18] For example, the Landrecht promulgated a single law code for all inhabitants of Prussia. Yet it also, with qualifications, recognized the independence of 'provincial decrees and the statutes of singular communities' (Introduction, § 2). In fact, Svarez expressly accepted the legitimacy of patrimonial courts as representing a 'competence of the noble landowner', and he acknowledged that not all power could be concentrated in the state (2000 [1791–2]: 69). Similarly, the Landrecht proclaimed that 'general rights of the human being' were founded in 'natural freedom'. Yet it also accepted that some rights were to be judged as acquired through birth or status (Introduction, §§ 82–3). Most importantly, the Landrecht defined 'the right to tax' as a 'sovereign right' of the state. Yet it acknowledged that some persons were exempted from fiscal contribution by 'contracts or express privileges' (Part 14, §§ 2–4). Throughout the later eighteenth century, in short, Prussia remained an internally dualistic or even polymorphous state. This was reflected in the fabric of rights that underpinned Prussian society, and the socio-structural and regional variability of rights remained a powerful obstruction to the full unitary formation of the state.

In other German territories in the Holy Roman Empire, the estates also retained an ambiguous constitutional status throughout the eighteenth century, and other states were defined by a high degree of structural dualism or even pluralism. On one hand, in most territories

[18] See Koselleck (1977: 24). Excellent on this is Birtsch (1995: 145).

regional estates, led by the local nobility, acted de facto as integrated and subordinate elements of political systems ruled by princely regents: a basic degree of territorial sovereignty (*Landeshoheit*) was established in most particular societies. Yet, on the other hand, the powers of princely regents in their own particular territories remained defined and restricted by customary laws and by the constitution of the Empire as a whole. In most regions, in fact, the internal power of the territorial state was subject to clear formal and informal limits, and it was checked by regional estates, which were recognized under imperial law as independent bodies with customary rights which, under the imperial appellate order, could be appealed and reclaimed against territorial rulers. In certain cases, the regional estates were very effective in resisting the concentration of power around the unitary territorial state. As late as 1770, for example, the duke of Württemberg was forced, in the course of a series of fiscal negotiations, to recognize the estates as 'corpus repraesentativum' of the territory (Vierhaus 1990: 108). In the great compilations of imperial public law written during the eighteenth century, regional estates (*Landstände*) were routinely defined as constitutionally entitled representative organs, which acted as effectively distinct from, and authorized constitutionally to oppose, the imperial estates (*Reichsstände*): that is, the highest princely regents. For example, the great early positivist constitutional theorist, Johann Jakob Moser, interpreted the public law of the eighteenth-century Empire as a balanced constitution, founded in a multilateral 'contract' unifying, on one side, the emperor and the imperial estates and, on the other side, the territorial sovereigns and the regional estates or parliaments (*Landstände*) in the territories (1766–82a: 540). Moser reserved particular venom for the 'servants of sovereignty' – that is, the princes and their administrators who pledged themselves to limitless territorial power (1766–82b: 1146). Slightly later, Johann Stephan Pütter also defined the Empire as a constitutional order, based in a three-level internal equilibrium (1777: 42, 57).

Owing to the intersecting jurisdictions of territories and empires, in sum, most German territorial states retained a twofold constitutional composition: they integrated regional estates as components of their inner constitution, yet their regents, and their estates, possessed a specified position within the overarching constitution of the Empire as a whole. Consequently, these states retained a deeply uneven inner legal order, they consumed power and authority in a fashion reflecting a plurality of local and intersecting jurisdictional and appellate rights, and they struggled to elaborate a unified constitutional order to control their functions.