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.

France

Analogous weaknesses and related constitutional problems were evident in the Bourbon monarchy in eighteenth-century France. As discussed, the earlier consolidation of 'absolutism' in France had revolved around an assault by the monarchy on seigneurial rights and privileges, and this period led to increasing uniformity in the legal foundations of the state. Despite these innovations, however, well into the eighteenth century the French state continued to operate at a high level of interpenetration with privatistic elements in society, and state functions were impeded by the persistence of regional, seigneurial and corporate claims to legal status, rights and entitlement.

The pluralistic fabric of the French state was particularly manifest in the fact that seigneurial rights of property ownership and seigneurial rights of legal jurisdiction remained interwoven. In France, as in other 'absolutistic' societies, private ownership of land remained a source of distinction under law: owners of landed property obtained seigneurial exemptions from particular laws, especially in respect of taxation, and even (albeit rarely) certain rights of legal precedence and powers of private jurisdiction.[19] This uncertain boundary between economic and legal/political status, reflecting a residually feudal blurring of public and private spheres, meant that the monarchical state could not legislate evenly over all matters of political importance, it could not apply laws equally through society, and its laws concerning judicial and fiscal questions were necessarily marked by high levels of regional or structural sensitivity. In addition, this pluralism was also evident in the fact that residues of feudal rights dictated that land was often an object of multiple ownership, and clear single rights of proprietary disposition over goods were not fully established (Chénon 1923: 91). This had the result, primarily, that monetary exchanges relating to agrarian production remained partly controlled by a legally privileged aristocratic elite. However, this also meant that monetary transactions could not easily be subject to uniform laws and that the monarchical state could not construct rights of property in fully abstract or generalized categories. Moreover, the internal intersection between the political system and private social groups was also visible in the highly corporate structures of economic management and association that prevailed in France. This had the consequence, first, that, despite all the attempts of the monarchy to suppress them,

[19] For contemporary commentary see Pothier (1830a: 4–5).

guilds, orders and corporations held far-reaching powers of autonomous professional self-regulation and jurisdiction, they reserved statutory control over many professional and economic activities,[20] and they conferred privileges on their members which determined procedures of legal access and inclusion in certain social functions. Professional functions were thus not assimilated to the simple statutory operations of the state: actors in the state routinely secured compliance by confirming the myriad privileges that determined the corporate form of French society, and a legal medium for addressing all persons in society as singular equivalent agents did not exist.[21] Further, this also meant that positions of economic advantage were often transacted through political channels and corporate membership brought privileged access both to economic benefits and to legal status (Taylor 1964: 488–9).

Throughout the eighteenth century, in consequence, political and economic structures in France overlapped almost insolubly, and the formation of the monarchical state as a positive centre of power was greatly obstructed by this. This characteristic of the French state had the most damaging consequences in the fiscal apparatus of the state. It meant that in fiscal matters the monarchy was unable to extricate itself from the mass of private legal agreements in society, and it could neither legislate uniformly over budgetary supply nor effectively maximize its revenue: by the 1780s, owing to its fiscal predicaments and its embroilment in unaffordable wars, the Bourbon monarchy was bankrupt. As a result, this period witnessed numerous reformist attempts to enforce a clear distinction between economic exchange and political structures, and to construct a uniform legal and fiscal regime, relatively indifferent to privilege and indemnity, consonant with this separation. Plans of this kind were pioneered by the physiocrats, who advocated a partial liberation of private, and especially agrarian, property both from state control and from multiple ownership.[22] In the mid 1770s, Turgot sought, in his famous Six Edicts, to implement physiocratic measures, and he launched a reformist attempt to increase state revenue by restricting the privileges attached to corporations and reducing the power of private actors in

[20] For analysis both of the functions of the corporations and of royal legislation against them, see Gallinato (1992: 183–4).

[21] One historian has gone as far as to claim that, as 'French society was organized corporatively', the 'individual had essentially no standing' (Fitzsimmons 1987: 270).

[22] Under physiocratic influence, for example, Turgot defined land as the 'unique source of all wealth' and favoured the integration of agriculture into a free market, based in the 'circulation of capital' (1844a [1766]: 34, 45).

regulating trade and controlling labour supply, and by generally consolidating the legal independence of economic practice (Sewell 1980: 72; Sonenscher 1989: 283). Subsequently, shortly before the revolution of 1789, an Assembly of Notables was convened in Paris to discuss the fiscal crisis of the monarchy: this Assembly was presented with a series of projects to liberalize the economy, to reduce the extent to which privilege caused intersection between private status and public judicial functions, and, once more, to facilitate the raising of royal credit.[23] These projects were generally supported by a doctrine of singular personal rights, and they aimed to impose a uniform legal and monetary order to establish single persons as bearers of proprietary entitlements and to ensure that the economic activities of legal addressees were located and uniformly constructed outside the state.[24] However, these attempted reforms were unsuccessful. It has been well noted in recent research that fiscal privilege was already 'circumscribed' by 1787, and that by and large the Notables showed willingness to renounce some privileges (Gruder 2007: 37). Nonetheless, the proposals for reform submitted to the Notables triggered endemic internal resistance, and the French monarchy was unable autonomously to alter its fiscal laws: this was caused, not least, by the fact that many powerful actors called on to deliberate the functions of state were private or neo-seigneurial beneficiaries of fiscal rights and privilege, and they rejected the strict segregation of political functions from private privilege because this imperilled their own corporate standing and benefits. The internal and external privatism of the eighteenth-century French monarchy, therefore, remained a vicious paradox that prevented the stabilization of the state, and throughout this period the state was marked by acute structural problems caused by its inadequate abstraction and differentiation.

The greatest problem of the French monarchy in the decades before 1789, however, resulted from the fact that, as in earlier controversies, its procedures for introducing new legislation were adversely affected by the prerogatives of venal and hereditary office holders in the *parlements*. Indeed, the monarchy invariably struggled to legislate on issues that

[23] On this, see Egret (1962: 33–5, 130); Stone (1986: 5–9). It is of vital importance that the economic reforms were accompanied by a Decree Concerning the Administration of Justice (1788), which reduced powers of seigneurial justice.

[24] Turgot's edict against corporations of 1776 claimed (in semi-Lockean vocabulary) that it was vital to allow all French subjects the 'full and entire enjoyment of their rights', especially in respect of the ownership of the products of human labour – the 'inalienable right of humanity' (Turgot 1844b [1776]: 304–6).

touched the privileges of the members of the *parlements* – especially taxation – and it could not subordinate the judicial order of the *parlements* to one unitary legal system. As a result of this, throughout the eighteenth century the constitutional conflicts that had earlier culminated in the Fronde began to reappear: the Bourbon monarchy was, once again, repeatedly forced into bitter conflict with the *parlements*, and it sometimes suspended them altogether in order to pass new laws and fiscal packages. Prerogative suspension of the *parlements* occurred in the early 1750s and, more dramatically, in the early 1770s. In the latter case, Louis XV and his chancellor, Maupeou, sought to circumvent noble resistance by exiling members of the Parisian *parlement* and conspiring to replace the courts with a more compliant (and less venal) judicial order: the assault on the *parlements* was closely tied to an attack on venality of office (Egret 1970: 132; Doyle 1996: 117). The tension between the monarchy and the *parlements* then came to a head in the May Edicts of 1788, in which the king ordained before the Assembly of Notables that the *parlements* should be replaced with a single plenary court to register all laws, and that the privileges of the courts should be suspended and a uniform judicial structure imposed throughout France (Egret 1962: 270–5; Bell 1994: 181). This provoked great antagonism among the noble class, and it meant that the nobility represented in the *parlements* began to assume an intensified oppositional role as a focus for wider national constitutional resistance to the state (Gruder 2007: 3–4).

At one level, therefore, in the latter decades of the Ancien Régime some members both of the *parlement* of Paris and of the lesser regional *parlements* began to perceive their functions as public/constitutional obligations patterned on the English parliament, and, although not elected, they defined their duties in increasingly constitutionalist terms. This view was even seconded by proto-republican political theorists before 1789. Gabriel Bonnot de Mably, for example, advocated a transformation of the *parlements* into fully representative assemblies (1972 [1758]: 168). In general, the members of the *parlements* insisted that effective registration of laws in the *parlements* was one of the 'fundamental laws' of the French state: this law, they claimed, ensured that the state retained a perennial and organic legal form, and it even enabled the nation as a whole to consent to and to take part in the 'formation of laws' (Bickart 1932: 43, 73). By 1788, the *parlement* of Rennes was able to declare itself and other *parlements* the 'depositories and the inflexible guardians of the laws' of the French polity (Bickart 1932: 96). Indeed, the *parlements* even went as far as to construe themselves as custodians of

'an original contract' between state and society, and on this basis they suggested that some acts of the monarchy might be formally classified as 'anti-constitutional' (Vergne 2006: 263, 434). At a different level, however, whereas the English parliament was an integrated institution of state containing elected and (albeit nominally) accountable delegates, the French *parlementaires* occupied a dual status both within and outside the state. Although assuming (normally purchased) office within the state, the members of the *parlements* defended powerful vested interests against the central state, they preserved a piecemeal judicial order giving extensive sanction to corporate rights, and they clearly fragmented the judicial unity and the legislative autonomy of the state (Vergne 2006: 90). Crucially, for example, the *parlements* opposed Turgot's assault on the corporations, and they sought to defend the privileged pattern of economic control (Horn 2006: 25). Through their dual status, the *parlements* in fact perpetuated confusion between 'public power and private property' in the French polity (Mousnier 1945: 622), they dragged against the formation of the state as a public entity, and they prevented the state from applying its power as a relatively abstracted and even social facility. Indeed, many prominent *lumières*, notably Voltaire and d'Holbach, combined their advocacy of a free rational state founded in common natural rights with a vehement contempt for the *parlements*, whose particularism they viewed as blocking rational legal and judicial reform.[25]

For these reasons, the French state of the later eighteenth century existed in a condition of barely suppressed monetary and legislative crisis, often veering towards bankruptcy and statutory deadlock and presiding only over a highly fragmented and semi-privatized judicial order. This was caused in no small part by the fact that the monarchy possessed a socio-constitutional system for deliberating over its fiscal and legislative processes that made it impossible for the state to free itself from private motives and obstructed the construction of private actors and private prerogatives as irreducibly external to the political system. As a result, the fiscal problems encountered by the state necessarily assumed the dimensions of major constitutional traumas, and the state's endeavours to pass general fiscal laws inevitably engaged it in conflict

[25] See the claim of d'Holbach that judicial power needs to be seen as an 'emanation of sovereign authority' and that judges should not exercise 'legislative power' (1773: 220–2). See, likewise, the argument of Voltaire denying the claims to constitutional powers made by the *parlements* (1771: 5–6). For a general account see Echeverria (1985: 156, 232).

with the private interests situated at its constitutional core. Each fiscal problem underlined and intensified the need for constitutional reform and for the formation of a public order that could allow legislation and financial levying without highly privatized internal negotiation and opposition. However, the French state possessed a constitution that made a reform and unitary construction of its functions impracticable: those actors that constitutionally controlled the form of the state's power had a vested interest in preventing its fundamental reform, their social position depended structurally on the persistence of inner dualism in the state, and they remained 'firmly attached to civil feudalism' (Garaud 1958: 156).[26] From the 1750s to the 1780s, in fact, members of the *parlements* were often among the most vocal advocates of a re-convention of the Estates-General, and they clearly perceived that the state could not legislate effectively without a more systematic de-privatization of its consultative apparatus. Protest in the *parlements* at their suspension in 1788, notably, was a key reason for the summoning of the Estates-General in 1789. Tellingly, however, the *parlementaires* and other members of the nobility were widely recalcitrant in acceding to the abolition of representational privilege (i.e. representation by orders) in the Estates-General (Fitzsimmons 1987: 284). The revolutionary laws passed after 1789 then soon abolished the *parlements*, and leading members of the revolutionary executives observed powerful judges as a deeply corrosive force in the state. Moreover, as office holders and bearers of originally feudal privilege, many members of the *parlements* were put to death during the revolution caused by the Estates-General of 1789, which they had helped to summon.

On these grounds, eighteenth-century France might be viewed as the most significant example of a state that endeavoured centrally to abstract its power and to construct the law as a uniform corpus of norms, but that possessed mechanisms of inclusion and exclusion that obviated this. The primary reason for the weakness of the French state of the Ancien Régime was that, through its abiding constitutional privatism, it did not possess uniform legal categories in which to extract a clear construction of its functions and limits, or to reflect, differentiate and externally to define its legal addressees, and it was prevented by its inner corporate dualism from codifying laws in an adequately stable and internally

[26] On this see also Stone (1981: 17, 77). Note, however, the recent analysis of Gruder, who emphasizes the role of the aristocracy in creating a revolutionary culture before 1789 (2007: 4).

uniform rights structure. Both in their production and application, laws of the French polity remained deeply interwoven with privatistic milieux and interests, the state was unable to establish a constitutional order to detach its legislative functions from private status, and its recognition of multiply overlayered public and private rights meant that it could not legislate over external (primarily monetary) functions without internal constitutional disruption.

Constitutional revolutions and the form of political power

In very general terms, therefore, by the eighteenth century some European states were approaching a relatively high level of effective differentiation and positive abstraction. These were normally states that were able to distinguish and control their own societal boundaries, and to determine, with reasonable consistency, what was internal and what was external to the state. These states were usually states that had acquired a written or an informal constitution. The most effective constitutions of this era were those, first, that used a growing public-legal body of *political rights* (usually explicated through natural-law doctrine) to provide for controlled social representation within the state, and to extract a definition of the state which ensured that its legislative functions remained protected from undue or repeated external private influences (including from actors using power within the state). Second, the most effective constitutions of this period were those that used *civil or private rights* to ensure that members of society were (more or less) equally reflected in the legal system as bearers of certain general substantial and procedural claims: that is, habitually, as endowed with rights of equality before the law, and as entitled to certain basic and uniform rights of free ownership, movement, confession and opinion. The most effective constitutions of this era, thus, were those that at once allocated and clearly distinguished between private rights and public rights, and that employed both sets of rights to avert the unsettling coalescence of private and public power.

The view is not expressed here that by the middle or later decades of the eighteenth century public and private rights, even under the most advanced states, were extensively or invariably applied. Clearly, the contrary was the case: even in more state-centred societies such as England, rights were limited and repeatedly subject to dispute and abrogation. Yet by this time the constitutional state, ensuring both public and private rights, was surely emerging as the form of polity that was

most adequately adapted to the extensive, pluralistic and functionally specialized demands for power in modern society. This had largely to do with the growing status of subjective-personal rights (both public and private). States that struggled to structure their power in positively abstracted or effective inclusionary manner were usually states that maintained a varied or polystructural rights regime, that accepted high degrees of personal distinction under rights throughout society, and that preserved a blurred boundary between private rights and public rights. If the eighteenth century – the era of Enlightenment – was the age of rights, therefore, the reason for this was that by this point in European history, owing to the growing differentiation of societal structure as a whole, political power had evolved into a condition in which it could not be abstractly circulated or supported throughout society if it did not internalize a generalized rights-based construct of itself and its addressees.

Rights revolutions

The major rights revolutions of the later eighteenth century can both be examined against this background. Indeed, both the American and the French revolutions of 1776 and 1789 can be interpreted as political events in which states, both at an institutional and at a conceptual/reflexive level, underwent an accelerated internal transformation, as a result of which they began to utilize highly refined constitutions and constitutional rights to legislate consistently across society, and to organize their power as a general, inclusionary and autonomously abstracted facility. In the early part of the revolutionary era (that is, in the first decades of the period 1776–1848), therefore, rights began to act as instruments through which states brought towards completion the processes of differentiation and positive inclusionary abstraction through which they had originally been formed as states, and rights played a decisive role in the formal consolidation of political power.

The American constitutions

The constitutions established in revolutionary America had their original source and reference in the English judicial context, and, for this reason, in early American constitutional debate rights initially expressed a distinctively defensive attitude. In particular, the normative background both to the particular state constitutions founded in America in the 1770s and 1780s and eventually to the Federal Constitution of

1787–9 was formed by ideas of rights derived from the English common-law tradition. These ideas were recognized in America through a long history of colonial charters, which in many cases guaranteed common rights of English subjects, extensive colonial liberties, and partial rights of local assembly and representation for inhabitants of the American colonies.[27] English rights began to assume heightened constitutionally formative status in America in the course of the 1760s, as residents of the colonies invoked rights under English law to oppose seemingly non-mandated taxation by the English parliament through the Stamp Act and the Townshend Act. The constitutional movement in America in fact first drew impetus from the insistence that rights guaranteed in England under the rule of English law should also apply in the colonies, and it reflected the belief that all British subjects had equal rights under common law. Most notably, early American constitutionalism was shaped by the Lockean view that no English subjects could legitimately be taxed without their express agreement and taxation could not be selectively levied. Transposed into the colonial setting, this meant – of necessity – that the first American constitutionalists rejected the Blackstonian doctrine of the positive statutory supremacy of parliament established in England in the longer wake of 1688. They invoked older, more defensive, conceptions of honoured rights and judicial protection to oppose the authority of singular parliamentary statutes (Reid 1976: 1120; Snowiss 1990: 16).

In general terms, therefore, the first constitutional debates of revolutionary America expressed the very cautious and self-protective idea that rights formed customary checks on state power. Through an incremental process, however, in the 1760s debate about rights under English law expanded into a broader account of the corporate rights of colonial societies, and the demand for private entitlements under English law began to give rise to the conviction that colonial assemblies were institutions mandated to represent and preserve common-law rights. This process gathered pace, notably, in the Stamp Act Congress that met in 1765 to deliberate opposition to British taxes. The Declaration of Rights proposed by the Stamp Act Congress stated (Art. 2): 'That His Majesty's liege subjects in these colonies are entitled to all the inherent rights and

[27] It is usually claimed that the Pennsylvania Charter of Privileges (1701) was the key precursor of later rights-based documents (Schwartz 1977: 50). This Charter provided that for 'the well governing of this Province and Territories, there shall be an Assembly yearly chosen, by the Freemen thereof'.

privileges of his natural born subjects within the kingdom of Great Britain.' These rights were attached in particular (Art. 3) to defence against fiscal expropriation, and, accordingly, the Declaration stated: 'That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.' Negative rights concerning property and taxation, in short, became the axis around which the legitimacy, not only of the colonial fiscal system, but in fact of the entire legislative order of the English parliament in America, was observed and contested (Mullett 1966: 83; Kruman 1997: 10, 93). The first stage of independent institution building in America was founded in a self-protective legalism, and it was born from a highly defensive and juridified climate of debate,[28] which insisted on rights of institutional autonomy, not primarily as positive expressions of political activity, but as institutes for preserving historical liberties against the power of imperial government.

This essentially defensive concept of rights was also reflected in the earliest state constitutions of America. These constitutions were commonly drafted, under endorsement of the Continental Congress, as documents that accentuated earlier rights guaranteed under English law and emphasized the prohibitive dimension of rights to construct an alternative to colonial rule by the British crown. In particular, these constitutions typically proceeded from an idea of the legitimate state based in a Lockean defence of rights of equality, freedom and proprietary integrity. This was evident in the resolutions of the First Continental Congress (1774), which derived the rights of 'the inhabitants of the English colonies in North-America' both from 'the immutable laws of nature' and from 'the principles of the English constitution'. The first resolve of the Continental Congress justified the rights of the colonies by stating that the first settlers 'were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England'. The classical example of this was the 1776 Virginia Declaration of Rights, which became the basis for many subsequent catalogues of rights. Article 1 of this Declaration stated: 'That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest

[28] Speaking of America, Burke famously mused: 'In no country, perhaps, is law so general a study' (1981 [1775]: 123).