

constitutions thus resulted, in the first instance, from an extension of the state's administrative procedures, and it enabled the state to acquire much more refined, internally cohesive and socially sensitive instruments of administrative co-ordination.

Additionally, however, modern states assumed their first quintessential features as they began to utilize political power as a distinctly abstracted and general medium of exchange and, in particular, as they initially assumed *statutory powers* of legislation: that is, as, often using techniques borrowed from the church, they began to transform customs into positive laws, autonomously to pass legal acts, and to use power in general positive form across increasingly diverse and differentiated societies. The fact that laws were increasingly *written* in textual form might be seen – across different regional contexts – as a technique for minimizing power's sensitivity to locality, privilege and status in society, and for holding both power and law in a condition of differentiated abstraction and generality.⁶¹ This defining feature of modern states also relied on the existence of representative and consultative functions in the state: that is, on a rudimentary constitution. The emergent states of the medieval era that possessed the greatest and most easily enforceable statutory power were ordinarily those that possessed elaborate and inclusive mechanisms (that is, representative constitutions) for producing and demonstrating wide societal inclusion. Indeed, the existence of a constitutional structure was normally a precondition for the formation of a state able effectively to integrate its population, raise revenue in addition to feudal levies and both incorporate, and utilize its power consistently across, wide territories. For this reason, representative constitutions, and the patterns of unified inclusion and compliance that they helped to articulate, were crucial instruments in the transposition of legal order from the informal arrangements of feudalism on to the positive-legal or statutory foundations of early modern statehood. In fact, in many societies statutes and constitutions were often contained within the same document, and together they provided preconditions for the state's use of power that were at once socially acceded, determined by positive decisions and separated from singular or personal actors (McIlwain 1947: 24; Holt 1972: 505). In this respect, then, it can be concluded that states developed constitutions because it was by using constitutions that they were able to disarticulate their power from

⁶¹ The necessary hostility of the aristocracy to written law seems sociologically self-evident. But this point is expressly made in Kejř (1992: 204).

exclusively private prerogatives, and progressively to reconstruct this power as an autonomous, positively generalizable – gradually *public* – societal resource. Constitutional inclusion, in fact, was the mechanism that enabled societies to stabilize and manage their increasingly autonomous reserves of power and to make effective use of power as it was abstracted from more immediate patterns of consent and coercion. The end of feudalism and the attendant formation of political power as an abstract and positive resource, in other words, were necessarily parts of a constitutional process.⁶²

In contributing in this manner to the positive construction of political power, early constitutions also performed wider and more fundamental functions for early European states. In particular, representative constitutions, as inclusionary foundations for the rule of law, emerged as institutions that both reflected and accelerated the transformation of society as a whole, and they changed society from a loosely decentered aggregate of private persons into a stratified and decisively *included* political community, capable of reacting in a uniform, general and inclusive manner to matters of potentially generalized political resonance. The first emergence of European societies as geographically extensive sources of integration and motivation was in fact closely linked to the growth of general constitutional laws and general patterns of political and territorial inclusion. As discussed, the modern European state began to emerge as a body of institutions that suppressed the private/seigneurial rights guaranteed under feudalism and so deeply altered the status of noble elites. In establishing constitutions, however, states were also able incrementally to convert these private rights into rights that were held, or at least negotiated, within and through the state, and this allowed the state both to transform private (feudal) rights into constitutive elements of public order and more easily to include bearers of such rights in the jurisdictional purview of the state. Emerging modern European states, in other words, relied on a representative constitution because they required a form in which political power could be applied evenly across society and in which, correlatively, society could be unified and brought into a uniform relation to power. As rudimentary constructions of public law, therefore, constitutions began (gradually) to form political power as abstracted *inclusionary power*: but they also

⁶² The relation between early constitutional formation and the end of feudalism has often been observed in different settings (Spangenberg 1912: 130; Bosl 1972: 321; Ganzo 2008: 421).

began to form societies as *inclusionary societies*, in which power could be utilized as a more evenly circulated resource, and in which all social domains became more evenly responsive to the growing, differentiated power of the state. The formulation of the key normative principle of medieval constitutionalism – *quod omnes tangit debet ab omnibus approbari* – can be seen in this context.⁶³ This principle allowed states to reflect on and consolidate the relatively abstracted autonomy and the increasing generality of their power by expanding their administrative resources, by integrating more members of society (however selectively) in functions of the state and by ensuring that relevant sectors of society received power in internally pre-formed fashion. The first typical constitutional structure of European states was thus a *dualistic constitution*. The first modern constitutional order was a political condition of society in which certain powers were centralized in the state, yet in which representatives of prominent feudal groups politically subordinated by the state (the nobility and the baronial class) were selectively co-opted in the periphery of the expanding administration and their legal titles and privileges were constitutionally recognized as sources of entitlement within the state. In the still highly fragmented political landscape of medieval Europe, this dualistic constitutional relation between regents and prominent social elites made the autonomous construction and inclusionary application of political power possible.

The initial abstraction of political power in the formation of European societies, to conclude, was shaped by a twofold normative impulse. Political power required the law for its transmission and reproduction through society, and it required the law for the inclusion of its addressees. As power first became political power, it inevitably assumed the internal normative shape of *constitutional law*.

⁶³ On the application of this concept in England see Maddicott (2010: 227–8).

Constitutions and early modernity

Constitutions and the rule of law at the end of the Middle Ages

The fact barely needs emphasis that in late medieval societies European states did not increase their jurisdictional power or reinforce their ability to separate statutory acts from local custom and agreement in a linear or conclusive fashion. Many later medieval societies were endemically afflicted by lawlessness, and many societies, especially in the fifteenth century, witnessed a forfeiture of state authority through civil war and internecine strife.¹ Nonetheless, in most European societies with relatively established political structures the centralistic constitutions of the high medieval period did not disintegrate in the later Middle Ages, and the last decades of the medieval era witnessed both a renewed growth in the positive statutory power of the law and an increase in the uniformity and concentration of legal order. Indeed, in much of Europe the latter period of the Middle Ages experienced the formation of more strictly organized monarchies, which renewed and reinvigorated the centralizing tendencies discussed in [Chapter 1](#).

In England, for instance, after the dynastic conflicts of the fifteenth century the early Tudor administration began centrally to strengthen both the fiscal and the judicial apparatus of the state and to extend royal law more consistently across society. This period of English history is usually viewed as an era in which, after the Wars of the Roses, the machinery of royal justice resumed sufficient strength to suppress particularistic, compacted and even clientelistic patterns of law finding in the counties, and royal courts again became effective instruments of government.² In France, in partial distinction, by the fifteenth century

¹ This was particularly, but not uniquely, acute in England, and the resultant condition is often described as 'bastard feudalism' (Stone 1968: 96–134; Bellamy 1989). This was also endemic in Spain, where the ceding of royal jurisdiction was widespread through the fourteenth century (Nader 1990: 77).

² This is accepted even by historians sceptical about the use of the term 'bastard feudalism' (Carpenter 1983: 235).

the extension of central power during the era of high feudalism had, due to protracted military depredation, yielded, in part, to a process of institutional decentralization. Because of this, monarchs appointed regional governors to regulate financial and judicial matters in areas originally subject to feudal authority. This meant that, owing partly to the physical dimensions of the country, the importance of municipalities and villages grew significantly in France, and these obtained semi-independent legal and jurisdictional status. Despite this, however, the aspiration towards unitary statehood and legal order remained strong and it was progressively reasserted towards the end of the Middle Ages. By the 1430s, during the last part of the Hundred Years War, France again had a central *parlement* in Paris. Shortly afterwards, royal *parlements* were established in the provinces. In 1454, the Ordinance of Montils-les-Tours was passed. This statute prescribed the uniform editing of customary laws in the provinces: this process was not completed for over a century, but it was designed in part to dictate the primacy of royal statute over seigneurial laws and centrally to regulate the apparatus of justice (Grinberg 1997: 1021). The late medieval period thus saw a substantial tightening and refinement of the judicial divisions of government, and this continued through the sixteenth century.³

In the Holy Roman Empire, similarly, the last decades of the Middle Ages witnessed a steady growth in the density of statehood, as a result of which both the jurisdictional and the fiscal powers of the Empire were augmented. The Middle Ages effectively came to an end in the Holy Roman Empire in 1495: this year saw the final establishment of a permanent central court (*Reichskammergericht*) for the German parts of the Empire. This court, mainly applying Roman law, was created primarily to suppress feuding and private lawgiving, and it imposed a common legal code (*Ewiger Landfriede*) throughout the German territories. During the first decades of its institution, this court was also at the centre of a comprehensive reform of the judicial administration. Among other innovations, this period saw the introduction in the Empire of more systematic procedures for trial, and it eventually witnessed the implementation of a comprehensive catalogue of criminal law (the Carolina of 1532) (Angermeier 1984: 216–17). In this context, it is notable that, although it was founded by the emperor, the central legal apparatus was established largely because the imperial princes demanded the institution of a high court, and the court ultimately

³ Generally on these points see Doucet (1948: 167); Major (1960: 5–7); Glasson (1974: 8–9).

reflected a compromise between the constitutional designs of the Electoral princes and the centralizing ambitions of the Habsburg rulers.⁴ In the high medieval period, as discussed, the push for a central court and a general legal order had usually been the prerogative of the imperial executive, and the promotion of a stable legal system was intended, in part, to reduce the territorial power of princes and the nobility; indeed, this objective survived in part into the fifteenth century, and in the first half of this century the impetus for legal centralization was still commonly associated with the imperial party.⁵ By the late fifteenth century, in contrast, the power to impose territorial peace had been ceded by the imperial party to the territorial princes: the princes now pursued their own policies of concerted legal pacification, and it was, to some degree, their interests that were reflected through the central court. At one level, the creation of the new court weakened the Electors, as the laws that founded the court called into question the privileges that they had obtained under the Golden Bull, and the court again subjected their territories, albeit with certain immunities, to the jurisdiction of the Empire,⁶ and it was (albeit to no avail) intended as a device to facilitate regular fiscal supply.⁷ Yet the court also reinforced the constitutional position of the princes. In particular, the formation of a central court ensured that the princes could influence imperial jurisdiction, it removed supreme judicial power from the hands of the emperor, and it meant that the emperor could be subject to legal decisions and his power determined in legal categories. Through the establishment of the court, in any case, both the imperial control of the law and the protracted search for territorial peace came to an effective end, and the mechanisms for enforcing peace in the Empire reflected a constitutional balance between Empire and princes.

In most European societies, in sum, the final decades of the Middle Ages were marked by a substantial concentration of the apparatus of legal and political control. In particular, the institutions attached to monarchical government were beginning, after the widespread disorder

⁴ For this point see Angermeier (1966: 489, 539, 253; 1984: 253); Durchhardt (1996: 4).

⁵ The *Reformatio Sigismundi*, which was the main imperial reform document of the earlier fifteenth century, was clear in demanding the universal introduction of a law book based in Roman law, to be applied through imperial courts (1497 [c. 1438]: 14).

⁶ On this crucial point see Angermeier (1966: 550); Weitzel (1976: 87); Diestelkamp (1983: 49–63).

⁷ The reforms also tentatively foresaw the implementation of a common tax (Schmid 1989: 223–4).

of the later Middle Ages, to reconsolidate a monopoly of legal authority in society, and the ability of central political organs both to pass laws and to rule over legal cases in predictable fashion increased significantly. As in the high medieval era, however, at this stage in European history the imposition of the rule of law did not simply reflect a simple extension of royal prerogative, and the process of political centralization was not solely effected through social coercion or extraction. On the contrary, the intensification of legal and political order at the end of the fifteenth century usually arose from a set of political arrangements in which consensual supports for the process of centralization were reinforced: the consolidation of central legal and political institutions relied on a growing body of representative structures. In fact, in the last decades of the medieval period most European societies continued to witness an increase in the inclusionary and even representative dimensions of government, and this period generally consolidated the dualistic constitutions which had first accompanied and facilitated the formation of the earliest European states.

The extension of the inclusionary aspects of statehood at the threshold of early modernity in Europe was, to be sure, not a universal fact. In many Italian settings, as mentioned, the pluralistic constitution of the medieval *comuni*, often destabilized by the military engagements between different cities, rapidly gave way to more oligarchical regimes, in which popular institutions fell, in part, under the sway of leading families.⁸ Some cities, such as Florence and Venice, retained their republican structure for longer than others. However, just as governmental power over Milan was assumed by the Viscontis and then the Sforzas, Florence also eventually fell into the embrace of the Medici family. By the early sixteenth century, after the short popular revival under Savonarola, the Florentine republican regime was effectively dissolved.⁹ After this time, the republic was increasingly defined, not as an inclusive corporate order, but as an artificial coercive edifice, largely dissolved from prior legal constraints and representative obligations.¹⁰ In the Italian cities governed by dynastic oligarchies, a pattern of statehood began to emerge, in which the personal and sectoral privileges of different social groups were restricted, and political

⁸ The point has been well made, though, that republican statutes did not simply disappear and the transition from one regime to the other was not seamless (Chittolini 1991: 34, 37).

⁹ Stephens dates the erosion of the Republic to the period 1471–80 (1983: 23). In agreement, see Rubinstein (1997: 151).

¹⁰ Note Botero's argument that the 'principal foundation of every state is the obedience of subjects to the superior' (1590 [1589]: 17).

power was progressively condensed in a centralized bureaucracy. Indeed, it has been widely noted that these oligarchies pre-empted the model of the 'absolutist' state, which later became prevalent in much of Europe.¹¹ That is to say, the regimes in these cities tended to integrate new families in government at the expense of those holding established privileges, and they diminished the political status of particular societal privileges or indemnities by transforming bearers of privileges into actors within the expanding state administration. Moreover, in reaching for support beyond late-feudal elites, these oligarchies solidified bases of political approval through different strata of society, and they used their powers of legislation and jurisdiction in uniformly inclusionary fashion and in relative indifference to private status (Kent 1978: 5; Najemy 2006: 471). Above all, in centralizing the means of coercion and extending laws in relative uniformity across all members of society these later Italian city-states brought about a close fusion between *state* and *territory*, and they began to consolidate their institutional order as evenly concentrated within fixed spatial boundaries. In Castile, processes analogous to those in the Italian cities were also evident. To be sure, in Castile many elements of the medieval constitutional tradition survived to the beginnings of the early modern period. Through the fourteenth century, successive monarchs had repeatedly confirmed that no new taxes could be levied without consultation in the Cortes. In 1387, Juan I pledged that no acceded laws could be abrogated without the agreement of the Cortes, thus placing a factual limit on the authority of the crown. However, the statutory powers of the monarchs expanded significantly in the late medieval era, and by the fifteenth century the consultative institutions of the earlier period were (arguably) in decline and the nobility was (temporarily) in retreat (de Dios 1982: 119; Carretero Zamora 1988: 66; Nieto Soria 2002: 247). After the establishment of the Catholic monarchy, which united Castile and Aragon, the crown was able to introduce laws in the form of ordinances, which assumed statutory force without prior approval through the Cortes (Edwards 2000: 51).¹²

Despite this, however, most late medieval European monarchies and principalities were characterized by an extension of their delegatory and representative procedures. In Poland, for instance, the middle of the fifteenth century saw a concerted reinforcement of the representative

¹¹ There is a huge body of literature on this. For some examples see Rodolico (1898: 75); Baron (1966: xxvi); Martines (1968: 424).

¹² On the weakening of the Cortes under the Catholic monarchy see Carretero Zamora (1988: 46–51); Suárez Fernández (2003: 124).

dimensions of the constitution, and the Polish king accepted that major decisions of state required prior approval by small regional parliaments (*sejmiki*). A central bicameral parliament (*sejm*) was established after 1492, and regional assemblies began to send deputies to represent noble interests in a newly constituted chamber. In 1505, a long period of charter granting culminated in a formal law, the *nihil novi* statute, which placed political power in the hands of the aristocracy and bound the king to obtain the support of the assembled nobility whenever he introduced new legislative acts. This effectively assured legislative equality for the Polish nobility, and it created a parliamentary system, dominated by the aristocracy, whose force was unrivalled in Europe. Ultimately, the union of Lithuania and Poland in 1569 was also ratified by parliaments of both states, and it is habitually claimed that the union was designed to preserve those noble interests (freedom from taxation, right of habeas corpus, right to elect deputies, rights to participate in election of kings) that were traditionally represented in local and national assemblies (Dembkowski 1982: 3, 210).

In France, as mentioned, the central governmental order constructed by the Capetian monarchs had fragmented under the pressures of war in the fourteenth century, and by the end of this century the importance of the Estates-General had also declined. Indeed, much historiography has argued that after 1439, when Charles VII obtained consent to collect annual national taxes, the significance of constitutional consensus in France was dramatically reduced, and the monarchical state began to assume early 'absolutistic' characteristics (Marchadier 1904: 131; Lewis 1962; Wolfe 1972: 33, 51). Despite this, however, it has equally been noted that even in the fourteenth century local representative institutions still played a vital role in the French polity (Lewis 1968: 351–3). More importantly, the progressive reassertion of monarchical power in the later fifteenth century was accompanied by an active revival of estates (both general and provincial) and other representative bodies, and these served both as legal checks on royal power and as integrated components of the growing administrative system of government (Major 1960: 16). The creation of a more compact and ordered princely state during the Renaissance in fact specifically presupposed a consultative constitution in which estate assemblies, albeit primarily at a provincial level, served both to support and administratively to extend state power across society (Doucet 1948: 339; Major 1960: 61). Subsequently, in the sixteenth century, French provincial assemblies become more powerful, and they began to assume distinct institutional form, comprising stricter rules of

procedure, duties and membership. The principle of the constitutionally balanced polity was also pervasive in the theoretical literature of late fifteenth-century France, and it was expressed in exemplary fashion by Claude de Seyssel. Seyssel defined the French state as a monarchy in which the exercise of regal power was subject to three sources of normative constraint: religion, justice and policy (1961 [1519]: 119). This contained the implication that the royal will was accountable to *parlements*, and that it could not contravene the statutory ordinances, 'made by kings themselves and subsequently confirmed and approved from time to time' which acted as a *de facto* constitution for the realm as a whole.

A further example of this tendency towards semi-organized condominium as the basis for later medieval governance was the English polity. It has been widely observed that during the Wars of the Roses the Lancastrian party sought to cement its legitimacy by promoting an integrative model of government, giving relatively large sectors of society a role in the political process (Pickthorn 1934: 134–5). Throughout the fifteenth century, the principle that royal prerogative was limited was sharpened, and it was accepted that kingship was an office to which prescribed duties and obligations were attached. Further, the convention of invoking the authority of parliament to demonstrate the legitimacy of legislation was reinforced, and the presumption that new laws and new taxes could only be introduced through statutes approved by parliament was strong (Chrimes 1936: 61, 75; Ladner 1980: 62). The constitutional doctrines that supported Lancastrian government, exemplified by John Fortescue, also expressed strong hostility to monarchical absolutism. Fortescue argued for a mixed royal and political constitution, balancing royal prerogative and parliamentary power (1942 [c. 1470]: 79). He defined royal power as subject to counsel and obligated by customary principles of common law and natural law, and he insisted that parliamentary mandate and royal will needed to be constitutionally conjoined in the making of statutes. In England, Fortescue stated plainly, statutes were not imposed by a king 'able to change the laws of his kingdom at pleasure' or to preside over his people 'with a power entirely regal' (1942 [c. 1470]: 25).

The processes of state formation and constitutional construction that occurred in the Holy Roman Empire at the end of the Middle Ages were particularly indicative of this broad societal connection between centralistic legal-political consolidation and representative inclusion. As discussed, the formation of a central judicial system at the end of the Middle

Ages was reflected in an implicit constitutional balance between the imperial party and the territorial princes. Additionally, however, the creation of the central court was also flanked by a wider step-wise constitutional settlement, in which fixed imperial Diets (*Reichstage*) were established to deliberate and resolve matters of importance for the Empire. In these Diets, which at once replaced the movable courts and personal assemblies of the medieval era and established procedures for the representation of princely interests, it was expected that major questions should be settled on a consensual basis. Further, after 1519 it became habitual for emperors, on assumption of office, to commit themselves to quasi-contractual electoral pledges (*Wahlkapitulationen*) as prerequisites of legitimate imperial governance. These contracts rapidly obtained implicit constitutional status, and they were widely invoked to bind and judge the exercise of imperial power.¹³

As in the earlier medieval period, further, this constitutional balance between the imperial party and the princes in the Holy Roman Empire acted as one aspect of a multilayered process of state formation in the Empire, and the Empire continued to develop as a diffuse polity in which power was consensually structured at multiple institutional junctures. In fact, in the last century of the Middle Ages many of the duchies and principalities within the Empire began to assume a much stricter inner constitutional order, as the regional estates also demanded greater rights of political consultation and participation in important decisions, especially those regarding taxation. In many parts of Germany, thus, the century prior to the Reformation witnessed the formation of semi-autonomous territorial states with a constitutionally sustained political constitution: this pattern of statehood is traditionally called the *Ständestaat*. At least in its ideal-typical construction, this was a political order in which the constitutional balances of the earlier territorial regimes were tightened, and different estates (in some areas, including clergy, an early mercantile class and the peasants) were accommodated as collaborative and politically represented actors in an increasingly cohesive administrative structure. Central to the formation of the *Ständestaat* was a process in which regents began to transform different social estates, who were in many cases originally dynastic vassals and holders of feudal rights, into ranks and orders within the institutional hierarchy of a distinct territory. As such, then, the estates provided

¹³ For these details, see Kleinmeyer (1968: 20, 101–6); Oestreich (1977: 61); Moraw (1980); Neuhaus (1982: 26).