the political sphere, and that constitutions act as institutions that provide such normative political articulation for societies. In this respect, the book stands outside the main conflict-theoretical canon of historical-political sociology. It rejects the originally Weberian notion of politics as a socially dominating struggle for power (Weber 1921: 852), and it rejects the widespread historical-sociological view of political institutions as social forms whose origins reside solely (or largely) in conflict between social actors over the monopoly of power, usually consolidated through domination of the fiscal-military resources in society.[17] However, the book also rejects the main lineage of functionalist method, which is also characterized by extreme normative relativism.[18] As mentioned, one methodological purpose of the book is to examine and explain the prevalent normative configuration of modern societies, to comprehend the reasons why societies produce normative institutions, and so to illuminate constitutions as essential components of normative societal organization. To this end, the book seeks to outline a theory of norms to unsettle the conceptual dominance of analytical theory in normative inquiry: it attempts to apply a sociological method to show how modern societies tend, for functional motives, to promote the emergence of relatively generalized societal and legal-political norms, and how this can be identified (and even advocated) without reliance on hypostatically rationalist patterns of deduction and prescription. In

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[17] See as primary examples Tilly (1975); Tilly (1985). For a more normatively inflected account of this, see Michael Mann's theory of *infrastructural power* (1984: 189), which views the growth in the state's power to 'penetrate civil society' as marked by a decline in its purely coercive status. For a more cultural perspective, see Corrigan and Sayer (1985). Yet, across methodological divides, the state-building process is still viewed as essentially one bringing about a conflictual convergence of society around a dominant bloc. I have assessed the literature in the classical canon of the historical sociology of states elsewhere (Thornhill: 2008), and I do not wish to repeat these points. Suffice it to say, though, that, in general, the historical-sociological account of the state revolves around the assumption, first promoted by Weber, Hintze and Schumpeter, that European states were formed as groups of actors who arrogated to themselves a monopoly of violence in society, and that the assumption of this monopoly is firmly tied to the need of states to gain fiscal supremacy in order to fund wars. In short, the *fiscal–military* paradigm in analysis of state building remains dominant. Recently, see Hopcroft (1999: 90); Kiser and Linton (2001).

[18] Naturally, the works of both Durkheim and Parsons contain an implicitly normative theory of social construction. But the latest position in this lineage, that of Luhmann, is resolutely anti-normative. Simply, Luhmann stated that political power has no necessary precondition *ab extra* (1981: 69). He added later that the legitimation of power is always a communicative act of 'self-legitimation' that occurs within the political system, and it 'excludes legitimation through an external system' (2000: 358–9).

general, therefore, the book uses a historical-functionalist method in order at once both to question the common normative indifference both of historical-political and functionalist sociology and to promote a theory of historically constructed norms that identifies the elaboration of a solid legal normative apparatus as a highly probable structural feature of modern societies. In its entirety, the book can be interpreted, not only as a historical-functional sociology of constitutions, but also as a historical-functional sociology of legal/political norms, which intends to analyse norms as objective institutions that are generated by inner-societal dynamics and functionally formative evolutionary processes.

It is in its approach to the normative fabric of modern society that the most controversial methodological aspect of this book becomes visible. Underlying the conception of the book, namely, is a theory of political power that positions itself in strict opposition to more widely established constructions of power and its social status. At one level, this book attracts controversy because it makes a sharp distinction between political power and the patterns of social influence, coercion and obedience, which are often characterized as power in other lines of sociology. The book thus places itself against the definitional basis of Marxist or Foucauldian micro-social analysis of power. It argues that the exercise of political power and the exercise of social power or coercion need to be quite sharply distinguished, that the use of political power needs to be viewed as the functional operation of a distinct set of institutions and exchanges in modern society, and that, in modern societies, the production and consumption of power are only required for a relatively circumscribed number of social objectives.[19] Of course, there is no intention in this book either to deny that exchanges in other spheres of society – for example, in the economy, in religion or in education – are to some degree supported by power, or to suggest that conflicts in these spheres do not refer to and presuppose strategies of coercion. However, the book claims that political power is not equally or even universally implicated in all spheres of social action. Additionally, it claims that modern societies have in fact characteristically evolved through a process in which the selective distillation of political power around a relatively discrete

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[19] In this respect, the book borrows aspects of Luhmann's theory of power. Particularly useful in Luhmann's theory is the fact that he viewed power, in strict terms, as the medium of communication for the political system and for the political system alone. He saw the political system as communicating power precisely by the fact that it holds itself at a level of inner consistency against the patterns of exchange in other parts of society (Luhmann 1969; 1988; 1991).

number of functions has acted as a precondition of social stability and
has approached an advanced stage of development. It is taken here as an
insignia of modern society that societies learn to curtail their transfusion
with political power, that persons and exchanges relevant for power are
quite clearly demarcated from those not relevant for power, and that,
together with economic, legal, religious and scientific exchanges, polit-
ical power is necessarily held at a level of relative differentiation, abstrac-
tion and institutional exclusivity in relation to other spheres of social
practice. Power, in consequence, is defined here, not as a static conflic-
tual force, but as an evolutionary and adaptive social facility or a medium
of social exchange that is used by societies for making decisions that
possess highly generalized collective relevance, but is only marginally (or
exceptionally) expended in legal, economic, scientific or other activities.
Indeed, on this account, it is a determinant of modern societies that they
are required to generate power in a characteristically and distinctively
differentiated political form – that is, modern societies are structurally
marked by the fact that they segregate power from singular persons, they
require reserves of power that do not need to be policed and applied
through local and highly controlled acts of coercion, and they possess a
dominant tendency to augment and maximize the volume of selectively
politicized power over which they dispose. Modern societies, thus, are
defined by an incremental requirement for differentiated quantities of
political power, by the need to evolve mechanisms to produce, manage
and intensify their stores of power, and so also by an increased abstrac-
tion, differentiation and *multiplication* of their power. Although it inter-
sects with aesthetic, religious, economic and (especially) legal authority,
political power is not identical with these: these other realms of exchange
are in fact normally defined by the fact that they only rarely borrow or
support themselves with political power. Indeed, the distinction of
political power in relation to other spheres of social exchange is one
vital dimension in a modern society's intensification of the volume of
usable power that it contains, and the relative abstraction of power
against other social activities is a constitutive structural feature of mod-
ern society.

  For this reason, this book also argues that modern societies are
characterized by the fact that they rely on their ability to abstract and
utilize political power as a largely *autonomous* facility, which, in most
situations, is clearly distinguished from other patterns of social
exchange. Inquiry into the relative autonomy of political institutions is,
to be sure, a well-rehearsed debate: from Max Weber to Antonio

Gramsci, to Nicos Poulantzas, to Theda Skocpol, to Michael Mann, it has been argued that states are institutional actors in possession of a degree of (albeit curtailed) societal autonomy. The argument in this book builds in certain respects on such analyses, and it shares the widespread historical-sociological view that societies, especially in periods of rapid transition, converge around structurally autonomous political institutions, and that these institutions cannot be reduced to simple aggregates of economic influence. However, the emphasis of the argument proposed here is rather distinct from that evident in other examples of historical sociology. Central to this book, first, is the claim that modern societies are defined – in the first instance – by the fact that they require and produce, not autonomous political institutions, but rather autonomous reserves of political power: that is, the evolution of modern societies has depended on the capacities of these societies for generating quantities of political power that could be applied across complexly differentiated social terrains in reasonably positive, independent and easily *inclusive and reproducible* fashion, and whose utilization was not subject to endless local coercion or personalized controversy. The growing autonomy of political power, and the existence of capacities in society for the use of power in positive and replicable fashion, thus formed irreducible hallmarks of emergent modern societies. It was only through the abstraction of political power as a positive autonomous object that societies assumed features of spatial and temporal extensibility, positive inclusion and collective integration typical of modern social orders. Modern political institutions, then, first evolved, variably, as repositories of such abstracted and autonomous political power, and the progressive abstraction of political power gave rise to the formation of political institutions: political institutions were not initially identical with political power, and their development reflected the emergence of political power as a relatively autonomous and structurally independent social phenomenon. The defining characteristic of modern societies, thus, is that they are able to construct power at an increasingly refined level of positive force: institutions were first formed as part of a subsidiary process, in which power, as a positive phenomenon, was organized and distributed through society. Also central to this book, second, is the claim, accordingly, that, if political institutions possess some degree of autonomy, this is to be measured, not by their presumptive levels of societal penetration, mobilization or control, but rather by the degree to which they are able to use power in positive and self-authorizing fashion and to which they possess and unify institutional instruments (usually of a fiscal and

judicial nature) that enable them to transmit power through society as an abstracted and internally reproducible resource.[20] The autonomy of the state, in short, depends on the autonomy of political power in society: political institutions obtain autonomy if they can produce and consume power as a relatively consistent and abstracted object, and societies unable to mobilize power in a relatively autonomous form are likely to be characterized by weak political institutions.

It is in this respect, then, that this book courts controversy most flagrantly. In suggesting that power is required and produced in modern societies as an autonomous and positive facility, it also suggests that political power has an intrinsic relation to law. Indeed, it argues that in the course of power's construction as a differentiated and positive medium of societal exchange, the intersection between law and power has necessarily increased: the intersection of power and law in fact serves the increasing need for autonomous reserves of positive power which characterizes modern societies. In this respect, this book again positions itself against micro-analytical and exceptionalist accounts of power and against analyses of power (i.e. Marxist or conflict-theoretical approaches) that observe law as a mere coercive instrument of political control. Against these positions, as discussed, the book revolves around the claim that in differentiated societies political power tends, over longer periods of time, to be constructed and applied in increasingly conventionalized fashion, and the wider abstracted specialization of power on a select number of exchanges means that power evolves as a facility that is only rarely applied as pure coercion.[21] As a result of this, political power also normally assumes correlation with a pronounced body of legal norms. Legal norms in fact facilitate the positive specialized and internally reproducible construction of political power, and power normally suffers from internal deficiencies if its legal-normative fabric (and the legal fabric of society more widely) is diminished or corrupted. In both these respects, the book adopts a controversial stance. While opposing analytical/deductive philosophy, as mentioned, it makes a strong case for the probable existence of a normative political structure in modern society, and it claims that through its formation as an autonomous resource power necessarily adopts a legal/normative form.

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[20] Note my critique of Davidheiser (1992).

[21] Here I follow both Parsons and Luhmann in associating an increase in the differentiated reserves of power with a growth in options contained in society and a correlated diminution of physical violence (Parsons 1963: 243, 237; Luhmann 1988: 78–9).

While pursuing a historical-sociological line of inquiry, further, it rejects the conflict-theoretical model that prevails in much sociological analysis, and it suggests that the construction of power is most deeply marked, not by irreducible political conflict, but by patterns of normatively inflected self-reproduction, multiplication and *inclusion*. In fact, the book pursues its analysis of constitutions from a perspective that observes modern societies as containing an internal political disposition towards normative self-construction in order to augment the mass of power accessible within a society, and it suggests that this disposition is especially concentrated around constitutions (see Luhmann 1991: 201).

Finally, it needs to be noted that this book is conceived as the first in a series of books on the sociology of constitutions, and it is anticipated that it will be followed by a volume on the transformation of constitutional order in the increasingly internationalized societies of the contemporary world and by a volume on post-colonial constitutionalism. This fact reveals much about the rationale shaping this first volume. In the first instance, this volume is designed to illuminate the societal processes that originally constructed and gave rise to states in their specific form as constitutional states. In consequence, it focuses to a large degree on the formation of modern European states, from the medieval era into the era of high modernity. To illuminate this process, naturally, it is not possible to ignore the constitutional developments in revolutionary America and beyond, and Chapter III, addressing the first formal constitutions, discusses aspects of early American constitutionalism. However, although it is assumed that the analytical paradigm employed here can be applied (in part, at least) to post-colonial settings and the settings which borrowed European constitutional design at a late historical juncture, such constitution writing is a topic in its own right, it requires a subtly modified interpretive structure, and it is reserved for a further volume. Similarly, although it is also assumed that much of the analysis here can also be transferred to the formation of post-national constitutional systems, certain revisions and qualifications are again required to make this transfer sustainable, and this, too, must be held over for a subsequent work. This book, in short, is a book that seeks to illuminate the formation of centralized states as relatively autonomous repositories of political power, the role that constitutions play in this process, and the underlying normative apparatus of state power. The largely European focus of this book is explained by this ambition.

1

Medieval constitutions

The social origins of modern constitutions

The earliest modern constitutional arrangements can be identified in different European societies in the high medieval period: that is, in the later part of the twelfth century and throughout the thirteenth century. In this period, most European societies were beginning gradually to move away from the highly diffuse social order of early feudalism, which had itself supplanted the more vertical political structures of the Carolingian period, and the more advanced societies of this time witnessed a substantially increasing centralization of their political institutions and a growth in the inner consistency of their legal apparatus.[1] This does not imply that the highly localized jurisdictional structures based in lordship, lateral association and private force that characterized earlier feudalism had dissolved by the twelfth century. In fact, a recent outstanding monograph has persuasively demonstrated the contrary (Bisson 2009). However, by the later twelfth century many European societies were beginning to develop more regularly constructed legal and political systems, and they were in the process of devising at least the bare practical and conceptual instruments to make this possible. The transition from early to high feudalism was thus marked by a deep societal impetus towards more formal legal administration: this ultimately shaped the constitutional design of emergent centres of political power.[2]

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[1] For samples of the vast literature on this theme, see Fournier (1917); Berman (1977: 894); Reynolds (1981: 223); and Brundage (2008: 3–4). For the classical treatment of this wider theme in English, see Berman (1983: 113).

[2] It needs to be acknowledged here that I use the concept of feudalism despite controversy over its validity. The use of this term was widely assailed in the 1960s, most vehemently by Richardson and Sayles (1963: 117), who described feudalism as 'a modern concept, an abstraction . . . owing much to the desire of scholars for symmetry'. This term is now commonly viewed as a 'discredited formulation' (Bisson 2009: 31). In persisting in the use of this concept, I do not wish to make grand claims for feudalism as a term to define an

In earlier feudal societies, political power had normally been constructed through a pattern of societal organization in which kings, princes or other regents granted land and noble or seigneurial rights of private lordship to feoff holders, and, in return, feoff holders accepted certain, usually military, obligations towards feudal lords. Through this system, seemingly public resources of political and judicial power were obtained through private transaction and held as private goods in the hands of barons or territorial lords, who then assumed personal legal and judicial rights over those subordinated to them by feoff. Through this system, moreover, rulers widely conceded legal exemptions, immunities or other powers of jurisdictional autonomy to inhabitants of their territories, so that private islands of judicial independence proliferated outside vertical power relations.[3] It is widely documented that earlier feudal societies contained a distinctive inner legal order, and, as an overarching societal system, feudalism stabilized judicial structures in otherwise highly disordered social settings: the exchange of feoffs meant that the use of power by those in superior positions in the feudal chain was countervailed by the rights attached to feoffdom, and violations of feudal rights could be pursued at different levels in private feudal courts. Societies under early feudalism contained a diffuse, yet prominent, lateral legal apparatus, in which customary and personal rights and rights of status groups were articulated at various points in society, and judicial rights were strongly attached to private embedded relationships.[4] However, feudal societies, or at least societies at a relatively early stage of feudalization, were pervasively shaped by very irregular and personalistic patterns of lordship and legal settlement, and, as

overarching social system, with uniform characteristics and a clear beginning and a clear end. I simply use it to describe a particular mode of socio-political organization, accepted as a reality (albeit not in England) even by Richardson and Sayles (1963: 118), in which 'sovereignty was divided between the king and his feudatories'. A primary characteristic of feudal society, following this residual definition, was that *jurisdictional power was held in part in private hands*, society as a whole witnessed a 'collapse of public justice' (Bisson 1994: 71) and power was not 'experienced publicly and institutionally' (Bisson 2009: 14). See also Bloch (1949: 135). For this reason, feudalism is construed here as a societal regime in which power was applied, often by violent means, through lateral private bonds, and thus did not clearly exist as *political power.*

[3] There is a substantial body of literature on immunities. Immunity is defined here as an institution that at once placed royal power as a private good in the hands of bearers of an immunity, and allowed them to 'isolate themselves from the state' (Boutruche 1968: 132–3). It involved 'exemption from certain fiscal burdens' and delegation to the lord of 'certain judicial powers' (Bloch 1949: 122). This captures the sense of the immunity as a legal principle that at once supported and gradually fragmented centrally applied power.

[4] For analytical examples, see Milsom (1976: 58).

mentioned, feudal lords often purchased support for their power by allocating private rights or offering indemnities in respect of judicial force, taxation and service. For this reason, earlier feudal societies tended to be highly particularized and endemically violent, they embedded reserves of power in deeply privatized local and familial milieux, and they had limited recourse to a reliably centralized or regular legal apparatus. In the high medieval period, however, the decentred legal structure of early feudalism began to be supplanted through a gradual shift towards a societal order in which power was more directly mediated through central political actors, and social relations increasingly became subject to stable administrative control. Indeed, the high medieval era generally witnessed the beginnings of a deep transformation of political authority, such that centralized administrative institutions, which were increasingly funded, no longer solely by land tenures based in a partic- ular lordship but also by taxation, began to act as the mainstay of political order: as a result of this, holders of political power very gradu- ally began to construct their authority, not by granting seigneurial rights over land, but by raising revenues on the lands, offices and exemptions that they conferred on others (Wickham 1984: 27). This, in turn, brought an expansion in the size of government, it increased the mass of social exchange that was administered through governmental power, and it increased the need for regular consistent legal order to delineate the obligations underlying government.

The period of legal and political transition in question here was emphatically not a period of widespread *de-feudalization*: that is, it did not detach power from private land holding, or integrate rights and lands granted either as feoffs or under feudal immunity into a vertical state apparatus. Despite this, however, the later twelfth century and the thirteenth century gradually gave rise to an internal transformation of the deep-lying political structures of feudalism itself. Through this trans- formation, the balance between central power and feoff holding was tilted towards centralized agency. Both the diffuse holding of feudal rights, exemptions and unbridled (often violent) lordship were increas- ingly controlled by dominant figures in society, who were beginning (very tentatively) to acquire a monopoly of the instruments of political coercion. Through this process, albeit with substantial regional differ- ences, the powers attached to lordship, to local privileges and to sei- gneurial rights were weakened. Indeed, throughout the entire transformation of feudalism, the feudal nobility, originally exercising power at a high degree of independence, experienced a slow change in

political status: the private authority and independence of the nobility were slowly reduced, and in more advanced states the nobility was commonly brought into a more controlled and subordinate relation to central dynastic authority. Indeed, instead of locating power in private hands, feoffs, immunities and noble privileges came to act as legal devices for intensifying regalian powers, for strengthening the central authority of proto-state institutions, and for weakening actors (i.e. the nobility) defined by possession of privilege.[5]

If the transition from early to high feudalism was marked by an incipient centralization of the political system in European societies, it was also coloured by a further, more encompassing, transformation of society as a whole. In particular, this progressive change from political order based on lordship and private land tenure to political order based in administrative institutions can be seen as a broad reaction to the very early emergence of a differentiated and independent economic system in many European societies. The institution of a formal administrative system for securing political control responded to an aggregate of processes in which, throughout Europe, trade routes and more consistently monetarized patterns of commerce began to spread over increasingly large geographical areas (Lousse 1943: 123). The early emergence of a widening monetary economy meant that economic transactions were increasingly conducted through relations of contract, which presupposed replicable legal principles of personal autonomy that precluded feudal control,[6] and independent ownership of property and monetary reserves liberated some social groups from feudal affiliations. The progressive differentiation of society's economic interactions meant that most European societies of the high feudal period began to require administrative institutions whose functions could be performed at a growing level of social and personal abstraction and consistency, and societies increasingly developed instruments for using power to regulate highly diverse and regionally remote exchanges in generalized, predictable and replicable fashion. In some instances, most notably the northern Italian cities, in fact, the *public* power of emergent administrative organs began to evolve because of the expansion of distinctively *private*

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[5] For important views on this structural change within feudalism, paving the way for the eventual supplanting of feudal order, see Mayer (1939: 457–87); Lousse (1943: 120, 294); and Wickham (2003: 6).

[6] On the relation between monetarization and the rise of contractual legal principles see Lopez (1998: 73).

modes of ownership in the economy (Goetz 1944: 93; Calasso 1949: 156). That is to say, the gradual extension of monetary transactions and individual property ownership and the disintegration of property-holding groups from feudal tenures created an early urban economic elite, and this class intensified its authority through techniques of governance and legal integration that were not tied to socially embedded customs and feudal arrangements (Bertelli 1978: 29; Dilcher 1967: 7; Faini 2004).

In the later twelfth and thirteenth centuries, in sum, it is possible to discern a broad set of transformative processes, which, in conjunction, at once disaggregated different spheres of social activity and diminished the local or personal embeddedness and the violent contestability of political power. As a result, European societies began to develop institutions that were able to utilize political power as a facility that was increasingly indifferent to the local, personal and patrimonial distinctions underlying feudal social structure, and which possessed a certain distinction or even tentative autonomy against other modes of social exchange. In consequence, these societies also began to require institutions that could organize their functions in a relatively firm and consistent legal apparatus. Indeed, the general restructuring of feudalism throughout the high medieval period was reflected most distinctively in the law, and, in promoting gradually generalized and differentiated patterns of social exchange, this transformative process clearly stimulated a growing need in most European societies for precise and increasingly constant legal forms. At a general level, this period witnessed a wide employment of more consistent legal formulae across very different spheres of society, and the widespread rise in the distinction between separate social practices meant that each set of social activities required constructs to support its exchanges at a growing level of internal abstraction: in particular, the first emergence of a relatively independent economy presupposed the use of legal forms that could be predictably applied to monetary transactions in very different locations. At a specifically political level, this period was marked by a need for legal instruments able to store political power in relatively stable, centralized form, to reinforce political institutions above the highly personal rights and customs of immunity and vassalage characteristic of early medieval societies, and to formalize relations between political actors and those granted feudal rights in increasingly settled legal arrangements. In addition, in view of their wider incremental differentiation, European societies of the high feudal era also experienced an increased need for political institutions that