lords in matters of worldly significance was also clearly underlined. In England, the controversies in their strictest sense came to an end in the Concordat of London of 1107, which formulated a compromise between Henry I and Anselm of Canterbury. However, related conflicts continued and found their apotheosis in the murder of Thomas Becket in 1170. In the Holy Roman Empire, these controversies, which culminated in the excommunication of Heinrich IV, were resolved in the Concordat of Worms (1122). This concordat gave express legal form to an arrangement in which church power was sanctioned as unlimited *in spiritualibus* and imperial power was accepted as inviolable *in temporalibus*. Although it symbolically accepted papal supremacy in church offices, the Concordat of Worms also integrated the temporal elements of the church into the feudal system of the Empire, it placed the worldly possessions of the church under imperial law so that the emperor retained the right to confer ecclesiastical property in the form of regal rights (*regalia*), and it played a significant role in extending the feudal power of the Empire over all areas of worldly legislation.[13] Naturally, these agreements did not bring an end to the contests between church and state, and the papacy continued to claim that the pope possessed two swords, the spiritual and the temporal. A most notable example of this was the decretal, Per Venerabilem (1202), of Innocent III, which, while (reluctantly) accepting the claim of kings to supreme temporal jurisdiction, asserted that the pope had the power to decide whether candidates for imperial office were worthy of assuming this dignity. It was under Innocent, moreover, that the canon lawyers fully elaborated their theory of papal monarchy, and they defined papal powers in the church as specifically derived from Christ's original mandate (Pennington 1984: 38). Nonetheless, the diverse accords marking the end of the investiture contests put in place the foundations for a division of jurisdictional powers between church and state, and in principle they accepted a legal distinction of competence between these powers.

These legal controversies over investiture had the most far-reaching consequences for the secular-political structure of European societies. Indeed, one main result of these controversies was that political institutions began to design themselves around the same principles of positive legal order that had been consolidated in the church, and, in different

[13] For this interpretation see Classen (1973); Minninger (1978: 208); and Paradisi (1987: 387).

ways, conflicts over investiture stimulated a concerted migration of legal concepts from the church to the institutions of worldly power.

Most immediately, for example, the Gregorian era and its controversies over jurisdiction necessarily forced political actors in European societies clearly to explain and legally to justify their activities in those areas of social regulation that they contested with the church. This meant that nascent states assimilated elements of legal order applied in the church, and they began to approach law, as did the church, as a positive and internally consistent science, and to transform the law of the church for their own functional and explanatory purposes. In particular, on account of their contests with the church, political actors widely emulated the church in employing concepts of Roman law. Over a longer period of time, actors in secular institutions utilized Roman law to describe themselves, like the church, as actors with relatively independent legal personalities, and they were able to extract a constant construction of their functions to imply stable internal authorizations for their use of power and to define their power and their procedures for using their power in internally consistent and socially abstracted categories. In fact, in the wake of the investiture controversies emerging states also began to establish professionalized or at least laicized judiciaries, and to prescribe professional qualifications for bearers of judicial power.[14] The use of Roman law as the foundation for legal finding meant that law was increasingly administered by a privileged class of lawyers, who, like jurists in the church, were distinguished by specific qualifications and possessed a growing monopoly of legal authority. As indicated, moreover, the longer period of Gregorian reform coincided with the foundation of the Bolognese law school, which was established as the main forum for legal study in Europe by the middle of the twelfth century. The activities of this school centred, although not exclusively, on the study of civil law, and Bolognese law promoted the circulation and refinement of positive ideas of secular legitimacy. In particular, the elements of *lex regia* in Roman law began to form the basis for a strict doctrine of abstracted princely authority: at this time the first full systematic rendering of Roman law in Bologna, presumed to be the work of Irnerius, accorded to the prince a position above all other magistrates,[15] thus

[14] To exemplify, see Musson (2001: 47); and Reynolds (2003: 361–2).

[15] See the observation that the 'Romanum princeps' is 'caput omnium magistratum' (Irnerius? 1894: 21). In other earlier medieval glosses the prince was even described as the 'caput aliorum iudicum' (Fitting 1876: 148).

imputing to the prince an ultimate monopoly of worldly power. These ideas became progressively prevalent through Europe, and, spreading outwards from Bologna, Roman law was broadly employed throughout high medieval European society as a device for asserting the growing territorial supremacy of temporal rulers, and for constructing the state as a consistent and uniform legal personality, able, in some matters, to subordinate the church. The very origins of the modern concept of state sovereignty might in fact be discerned in the strategic appropriation by worldly states of the Roman-law principles of *plenitudo potestatis*, *plena potestas* and *lex animata*, which were increasingly used by reformist popes as formulae for constructing their own abstract legislative status.[16] In the Holy Roman Empire, for example, where the conflict over the balance of authority between church and state was at its most intense, Roman law was the legal medium in which this conflict was distilled and conducted, and emperors widely employed aspects of Roman law to claim a fullness of secular/territorial power. Early glossators of Roman law, notably Accursius, specifically borrowed the ecclesiastical idea of the *lex animata* to describe the status and powers of the Emperor in the Empire (see Krynen 2009: 173).[17] As discussed below, Roman law was commonly utilized to consolidate the civil foundations of imperial power in terms that directly mirrored and rivalled the descriptions of papal power offered by the canon law. In smaller proto-national societies, moreover, a similar process of legal translation can be observed, and national regents also began to use abstract notions of legal power to sustain their authority and to eliminate external legal influence from their territories.[18] The period of church reform, in short, was also a period of secular reform in which emergent states, however tentatively, began juridically to harden their legal form, and certain early states emulated the church by using the law – and specifically Roman law – to explain themselves as regularized bearers of socially abstracted administrative power.

At the deepest societal level, however, the process of legal abstraction in the church and the transfer of legal concepts between church and state were reflections of a more fundamental and encompassing process of societal transformation. Indeed, if the question of rights of jurisdiction

[16] This is discussed in Haller (1966: 40); Pennington (1984: 38); Paradisi (1987: 302); and Erwin (2009: 55, 72).
[17] Yet on the dialectical implications of the work of Accursius see Tierney (1963).
[18] See pages 50–5 below.

and ordinance was the primary object of legal dispute in the investiture contests, these controversies also revealed, and were shaped by, a less evident, deeper-lying structural problem in high medieval society, and the refined elaboration of legal power in both church and state caused by the controversies distilled a problem of still more profoundly constitutive importance for medieval politics. This, namely, was a question that touched on the central nerve of feudalism itself. It was the question, first, of whether any institution or group of institutions could separate itself from, or place itself above, the highly personal and locally embedded accords forming the underlying legal apparatus of feudal society. Second, it was the question of whether any institution or group of institutions could release itself from personal incorporation in feudal bonds and legislate in growing inner autonomy and consistency and as relatively specialized on a distinct, overarching and personally indifferent set of social functions. In this respect, the investiture controversies, although raising a particular question about the church's political status and authority, were actually expressions of a wider contest over the substance and future of feudalism *in toto*. These controversies influenced the political order of European societies by describing and enacting a broad change in the functional structure of early European societies, and they stimulated a migration of legal forms from church to state because they created an environment in which both church and state began to act simultaneously as distinctly constructed institutions.

The jurisdictional conflict between the church and the state was at root a legal controversy in which the church initially began to generate principles of social organization that negated the privatistic, functionally interdependent and personal attribution of power in early feudalism. In this respect, the investiture contests reflected a submerged dynamic of feudal transformation and even of incipient *de-feudalization* throughout European society as a whole, and they created a social conjuncture in which both ecclesiastical and political institutions began to separate their functions from the local and structural relations of feudal society in order to consolidate themselves as relatively abstract, specialized and internally consistent societal actors. It was for this reason that the investiture contests gave rise to a growth in legal order in both the church and the state. In the wake of the investiture contests, both the church and its rivals in early states experienced an increasing requirement for law, and they relied on a consistent legal apparatus as an instrument at once for organizing the integrity of their power in relation both to their own specific functions and to other spheres of

practice, and for unifying their power so that it could be transmitted, in relative abstraction, across the widening social spaces that their functions now incorporated. Law, thus, became the instrument by means of which church and state began to organize their differentiated autonomy.

If the investiture controversies began to crystallize the abstracted form of church and the state as legally distinct and semi-autonomous entities, therefore, this is because the controversies brought a decisive fissure into the social order of feudalism, and after this time both state and church began to develop as institutions that were equally foreign to feudalism. Both church and state evolved into their modern form through a process of functional and institutional division and specialization, which, although born of feudalism, could not ultimately coexist with the diffuse principles of feudal order. Where the church and the state began to operate as distinct institutions – that is, as relatively autonomous institutional entities that used power in general and internally consistent categories, that increasingly negated locality and consuetudinal privilege and that relied on written and formally memorized principles to support their legitimacy and integrity – the legal arrangements of feudalism could not, in pure form, enduringly prevail.[19] The legal separation of church and state in the investiture contests was in fact only secondarily a separation of two rival institutional bodies: in its essence it was a conjoined separation of two general, differentiated and increasingly *public* structures of political agency from the densely interwoven and deeply personalized legal background of feudal society, and, as such, it both reflected and intensified a wider underlying process of feudal transformation in European society. In this respect, most vitally, the conflict of church and state, and the resultant migration of legal forms between ecclesiastical and political institutions, not only gave rise to the basic legal apparatus of the state: it actually formed a preparation for the far longer conflicts that would ultimately determine the political structure of modern European states. Both the growing functional distinction and the growing legal autonomy of church and state were the emergent preconditions for the separation of the state, not only from the church, but also from other sources of external private privilege and personal power, and the tentative formation of public legal forms in this period

[19] Tellingly, it has been observed that both church and states are entities that were naturally 'outside' the legal realm of feudalism (Olivier-Martin 1984: 202).

ultimately allowed emergent states to propose themselves as centres of coercion above those social groups holding power (through immunity and seigneurial indemnity) as a private attribute. The process of legal and judicial abstraction in the church thus laid the foundations for the gradual formation of European states as primary autonomous centres of public order, and it set the terrain for the consolidation of political power against particular actors and localities and for the ultimate termination of feudal patterns of socio-political organization more generally.

In these respects, the investiture contests can be seen as playing a formative role in the first construction of distinctively *political* forms of power in European society. The legal organization of the church reflected a process in which European societies began to require condensed reserves of political power to resolve matters of generalized significance, to evolve specifically political functions, and – accordingly – to abstract their political power as a functionally distilled and autonomous phenomenon – that is, as a resource that could be used positively, distinctively and consistently to address politically resonant questions and which was only marginally reliant on other spheres of practice for its authority. The emulation of ecclesiastical principles by worldly actors in the wake of the investiture contests was in fact, at the deepest level, caused by the fact that both church and state required a rudimentary public personality in order to apply power as a general abstract resource. The conflicts between church and state created a social condition in which worldly political actors were compelled to produce legal instruments and to extract clear principles for capturing their growing autonomy and for managing their power as a positive abstracted and increasingly public phenomenon, and they provided legal constructs in which new institutions could account for and apply their newly abstracted resources of public power. Indeed, more arguably, the investiture contests also began to reflect and consolidate a legal structure in European societies, in which different institutions were required independently *to produce* abstracted resources of power, and to find devices to expand and reproduce the quantities of power that they incorporated. Through the investiture contests, both church and state began to emerge as institutions required internally to generate their own power, and to exercise this power against the privatistic fabric of early feudal society. The emergent principles of public law at once described the separation of state from church and created a legal structure in which states could account for their power in positive form and increase the volume of power which they possessed.

Patterns of early statehood

The incipient formation of states through the disaggregation of the local and privatistic social order of feudalism assumed different form in diverse national/cultural settings, and a number of patterns of political formation through feudal transformation can be discerned. In each case, however, the law was the crucial agent in the transformation of feudalism. The law, initially abstracted and rationalized in the church, enabled states to stabilize themselves in the political vacuum that emerged as the personalistic fabric of feudalism incrementally lost structural importance.

Law and feudal transformation I: the Holy Roman Empire

Perhaps the classic case of state formation as incipient de-feudalization was the Holy Roman Empire itself. As mentioned, after the altercations over investiture and jurisdiction between church and Empire, the imperial executive began to deploy the hierarchical principles, and in particular the *lex regia*, of Roman law, as utensils for consolidating imperial authority both against the papacy directly and against the cities and territories which the Empire incorporated. Indeed, it is widely documented that the school of Roman law in Bologna had very close ties to the Empire, and the glossators in Bologna concentrated their work on providing commentaries on the *Digest* of Justinian in order to support imperial authority. As mentioned, the imperial party sought to define the medieval Empire as a revival of classical Rome, and emperors widely employed the *lex regia* of the *Digest*, and above all the principle that the prince's will has force of law (*quod principi placuit legis habet vigorem*), to insist on their authority to create law and to express the universal primacy of their temporal power.[20] In employing these concepts, the Empire was able at once to distinguish its power from that of the church and to define relations of supremacy and obedience between the emperor and those persons and regions holding power from the Empire in the form of feoffs. In this last respect, the consolidation of Roman law deeply altered the legal structure of feudalism in the Empire,

[20] The close links between Emperor Friedrich I (Barbarossa) and the legists in Bologna are of particular significance and widely documented. Notably, the Bolognese jurists described Friedrich I as embodying the *lex animata* (see Colorni 1967: 149).

and it progressively formed the imperial regime as a centre of distinctive public sovereign authority.

The legal process of feudal transformation in the Holy Roman Empire attached in particular to the question of immunities and regalian rights. As discussed, immunities, indemnities and *regalia* were a crucial element of legal control in many feudal societies: immunities and *regalia* formed a pluralistic legal reality through which a feudal lord, in return for payment or obligation, ceded jurisdiction over a particular territory to another person or corporate body.[21] Owing to the link between indemnities, *regalia* and judicial power, feudal societies were built around parcellated and cross-cutting jurisdictions, many localities were exempted from central jurisdiction by virtue of the fact that they were covered by immunity or indemnity, local or seigneurial justice was ordinarily conducted without central control, and many areas were subject to a number of jurisdictions at the same time. Rule by immunity or indemnity was thus a legal regime in which immunity or indemnity was applied in lieu of general law, and in which legal order was sustained through a multiplicity of agreements and overlapping powers (Buschmann 1999: 22). Moreover, in the earlier feudal order of the Holy Roman Empire both regalian grants of land and office and the immunities and indemnities attached to these grants had often been converted into hereditary holdings, so that the bearers of exemptions had over generations assumed a high degree of jurisdictional autonomy in different territories within the Empire. The legal transformation of feudalism in the Empire, however, which began in earnest under the intermittent regime of the Hohenstaufen (1138–1254), brought a deep change to this system of independent tenure, local jurisdiction and legal immunity, and it replaced the localizing and centrifugal use of privileges, immunities and bonds with a more formal system of legalized feudal hierarchy (*Lehnrecht*). This new style of legal order had the primary feature that the granting of *regalia* placed the recipient or recipients of a feoff under close imperial control, and it sought to prevent the permanent transfer or alienation of feoffs yielded as *regalia* without imperial consent. In 1180, most notably, the feudal bond (*Lehenband*) was strictly reformulated as a direct legal relation between the emperor and his subjects

[21] Immunities, as distinct from *regalia* more generally, were initially granted to ecclesiastical bodies. Eventually, though, their use often ran together with *regalia*. On the origins of immunities see Anton (1975: 1). On immunities as originally weakening central legal authority see Kroell (1910: 20). For a recent slight revision of this view, which nonetheless still examines immunities as elements of 'private jurisdiction', see Rosenwein (1999: 6, 15).

or vassals: this led to a stricter organization of the high nobility in the Empire. At this point, feudal law was transformed into a more clearly integrative apparatus for conducting government, and the law, based on a vertical obligation between lord and vassal, began to engender a more hierarchical political apparatus, in which subjects obtained their status and legal rights as corollaries of regal office and were consequently drawn into a more immediate relation to the Empire (Stengel 1948: 297). One crucial constitutional consequence of the investiture contests was that from this time onwards the imperial executive utilized *regalia*, not as legal grants for conceding immunities or indemnities and so for sustaining a diffuse or centrifugal legal order throughout the Empire, but as instruments of direct coercion and integration, binding actors in society into an increasingly uniform subjection to the Empire's administrative authority.

As a result of these legal changes, the governmental elite of the Holy Roman Empire was transformed from a loose ruling stratum into a more strictly regimented and centralized bloc, and subjection to this elite was increasingly consolidated through accountable office holding.[22] The main legal edicts promulgated by the Hohenstaufen dynasty can clearly be interpreted in the light of these tendencies. As discussed below, the centralistic policies of the Staufer were perhaps most evident in the degree to which they transformed the political landscape of northern Italy. The most exemplary process of feudal transformation effected by the Staufer, however, was evident in their regime in the Kingdom of Sicily (1194–1266), which, although not integral to the Empire, was in many ways a testing ground for the construction of post-feudal statehood. The Hohenstaufen regents of Sicily employed Roman law to create a proto-modern administrative state, combining a relatively centralized governmental and judicial system, a formal legal code, and a state bureaucracy imposing regal authority through special appointees. The statutes of the Hohenstaufen regime in Sicily, usually referred to as the Liber Augustalis (1231), expressly affirmed the *lex regia* as the basis of government and jurisdiction, and they were designed clearly to consolidate the territorial authority of the ruling family. These statutes – or royal writs – concentrated power in a form that was specifically opposed to feudal tenure: that is, they stipulated that the regime of the Hohenstaufen should appoint its own agents in place of local consuls or administrators, and that no local or customary use of political or legal

[22] See the argument in Haverkamp (1971: 160).

authority would be tolerated.[23] Any towns appointing their own administrators were subject to violent suppression (Conrad, Lieck-Buyken and Wagner 1973: 44, 77).

In analogy to this, many of the German territories in the Empire also experienced a process of attempted legal concentration at this time. The twelfth century and the early thirteenth century, in particular, were marked (albeit rather inconclusively) by a number of both local and general endeavours to impose conditions of legal regularity across the German territories of the Empire. This resulted in the implementation of a series of laws intended to establish uniform conditions of territorial peace, to consolidate imperial authority as the dominant source of law and, as a result of this, to transform informal customary procedures for law finding into a clear body of criminal law. This process was expressed in the promulgation of an early uniform penal code, the *Mainzer Landfriede* (1235), and in related proclamations stressing the royal origin of all supreme jurisdiction (Fischer 2007: 32). This process also coincided with the establishment of a regular (although still ambulatory) imperial court and the appointment of increasingly fixed judicial staff, which was designed to promote more uniform legal procedures throughout the Empire and in particular to suppress the use of feuds and private violence as sources of law (Franklin 1867: 66–72; Diestelkamp 1983: 50–1). In general, thus, this era witnessed a pronounced growth in the strictness of legal regulation, and it saw the introduction of the main law books of medieval Germany, most especially the *Sachsenspiegel* (and variants on this text) around 1230. Tellingly, in fact, contemporaries knew this text as the Law of the Emperor (*keyserrecht*) (Erkens 2002: 82).

The concentrated legal order of the Holy Roman Empire can be seen as a feature of an early state that resulted from the investiture contests and the attendant transformation of the legal relations of feudal society. The imperial state used formalized legal resources, borrowed originally – in part – from Roman law, in order to restructure the personal legal arrangements of earlier feudalism, and to translate the plural private jurisdictions and immunities of feudalism into a body of vertically (although still very incompletely) controlled *regalia*. In this context, the transformation of regalian law through Roman-legal principles constructed a basic form of autonomous public law (*ius publicum*), and this enabled the state to extract principles to support its power that at once

[23] My account is influenced by Friedl (2005: 21–9); Calasso (1971; 118); and Pepe (1951: 42).

reflected and rivalled the claims for juridical autonomy and internal consistency that underpinned the Gregorian church.[24] Through this process, a political system began to emerge that condensed political power into a distinct proto-modern administrative edifice. In particular, this regime succeeded, in a rudimentary manner, in projecting an independent legal order for itself, and in using law uniformly to enforce vertical territorial control. In addition, this regime succeeded in establishing office holding as founded in a direct relation to the state, and in so doing it created a legal/political apparatus which, unlike the privatistic apparatus of feudal power, functioned (albeit rudimentarily) as a generalized and in principle impersonal and extensible system of social domination.

Law and feudal transformation II: Italian city-states between church and Empire

A distinct process of state building resulting from the investiture contests and the incipient transformation of feudalism can be observed in the governance of the cities of northern Italy, the *comuni*, which were mainly under the rule of the Holy Roman Empire. In this context, the investiture controversies also provided an immediate impetus for the construction of political power in independent positive form, and in this setting, too, the controversies over secular and ecclesiastical jurisdiction acted to differentiate and consolidate political agency as a socially independent function, reacting strongly against the privatistically interwoven legal structures of earlier feudalism. The form of independent political power resulting from the transformation of feudalism in northern Italy, however, assumed a distinctively broad-based and socially integrative quality.

The first impulse behind the construction of relatively independent political institutions in the Italian city-states arose from the fact that the investiture contests led to a marked decline of episcopal power in many cities, and for this reason they created a setting in which new patterns of authority began to evolve. In many city-states, civic and political authority had originally been vested together in holders of episcopal office, and the bishops governing these cities had obtained the right to exercise civic rule through feudal immunities or *regalia* granted by the Empire.

[24] In agreement, see Dilcher (2003: 285–6); Kannowski (2007: 176).