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).

regulatory support for regents through their territories, and, in return, their rights and freedoms, which they originally held as private/personal rights under feudal laws, were progressively translated into rights of co-optation and representation within a central political order. The *Ständestaat* marked a momentarily balanced or hybrid model of statehood, in which the plural and embedded rights of feudal society were gradually articulated as rights obtained within and through a formal state apparatus. However defined, the *Ständestaat* reflected a pattern of state building in which the representative or delegatory dimension of governance performed a key and increasing role. In Saxony, for example, estates began to negotiate on an organized basis with territorial lords in the 1430s, and a representative order in fiscal questions was consolidated by the 1450s. In Brandenburg, it was agreed in 1472 that regents would not sell land without formal approval of the estates. In Prussia, the estates became an integral part of government in the course of the fifteenth century. In Württemberg, where a particularly robust set of constitutional arrangements ultimately emerged, Diets were also regularly convoked by the fifteenth century, and the Tübingen treaty (1514) formally enshrined principles of representation and fiscal control for the estates.[14]

For each of these reasons, the type of early sovereign statehood particular to the German regions of the Holy Roman Empire – that is, the pattern of territorial supremacy (*Landesherrschaft*), entailing the partial transfer of jurisdictional rights in a particular region from the Empire to one prince, duke or count[15] – was only sustainable because territorial regents engaged in firm constitutional arrangements with their subjects. Underlying the formation of territorial rule was an evolutionary shift in which the personal rights and obligations of feudal law (*Lehnrecht*) were supplanted by regionally concentrated

[14] On these points see Küntzel (1908: 100); Näf (1951a: 68); Helbig (1955: 418, 451); Carsten (1959: 6–12).

[15] This is the crucial concept for understanding state building in late medieval Germany. *Landesherrschaft* describes a principle of territorial domination exercised by princes who originally obtained land and jurisdictional rights under *regalia* granted under feudal law and eventually transformed their holdings into hereditary goods, over which they consolidated their dominion. This transformation can be seen to have presupposed a wider transformation of feudal tenure and feudal relations, in which inhabitants of land originally bound to their lords by feudal obligations had to be mobilized as consenting subjects. On the rise of *Landesherrschaft* see Krieger (1979: 341); Willoweit (1983). On the process of de-feudalization implied in the construction of territorial power see Stengel (1904: 300); Klebel (1960).

rights and authorities (*Landrecht*), and in which power was tied to fixed geographical spaces and specific rights of localized authority: this transition from diffuse personal law to vertical territorial law depended on consensual instruments for consolidating and administering the regions to which power, in increasing uniformity, was now applied.[16] The inclusion of estates in government gave structural solidity to emerging territorial states, it allowed political actors to detach power from the fluid personal arrangements of feudalism, and it integrated the people of one territory in a relatively uniform and regimented manner within the political system. In fact, in the German regions, the transformation of the variable power of feudal society into a regime of regionally centralized dominion presupposed that states could construct relations of compliance in which all relevant members of society recognized themselves as subject to the same power in similar fashion, and this, in turn, presupposed that power was utilized on an integrative, consultative foundation.[17]

The emergence of an estate-based polity at the end of the Middle Ages was not peculiar to the German territories. Throughout the fifteenth century, the states of the Netherlands also developed a powerful consensual apparatus, in which individual provinces established representative assemblies to deliberate matters of military and fiscal significance. These assemblies then sent delegates to the States-General, which, in rudimentary form, were first convened in 1464, and were obliged to consult with local bodies before arriving at major decisions (Parker 1977: 30–3; Koenigsberger 2001: 32; Tracy 2008: 45). Indeed, in some parts of the Netherlands the tradition of governmental consultation through regional estates went back as far as the early thirteenth century: a charter of rights for the estates in Brabant was in place as early as 1312.

In each of these examples, the processes of later feudal societal formation and territorial intensification that shaped the transition from the Middle Ages to early modernity in Europe normally created states with a pronounced constitutional order: in fact, outside smaller cities, where oligarchical power was more easily sustainable, some element of constitutional formation was a widespread prerequisite for the rejuvenated

[16] On the increasing 'dualism between land law and feudal law' towards the end of the Middle Ages see Droege (1969: 410).

[17] In the Brandenburg constitution of 1472, the terms 'lordship' or 'dominion' (*Herrschaft*) and 'subjects' (*Unterthanen*) are tellingly introduced together, and they act as structurally correlated concepts (Näf 1951b: 67).

growth of statehood at this time. Notably, the consolidation of statehood still tended, in most polities, to depend on the preservation of a *dualistic constitution*, whose origins clearly lay in the multiply privatized legal order of feudalism. That is to say, at the caesura between medieval and early modern Europe most states still employed constitutional arrangements to maintain a balance between actors within the political system and actors (usually members of the nobility endowed with seigneurial or patrimonial authority) outside the state, and constitutional conventions were in most cases employed to guarantee a body of external social rights, privileges and exemptions, the bargained preservation of which enabled actors within states to purchase social acceptance for the rising power of central polities.[18] The margins of the political system still remained blurred and fluid: these late medieval constitutions expressed an equilibrium between originally private privileges or charters and the claims of public order, and they mobilized compliance for the state by specifically recognizing that some localities, freedoms and functions could not be subsumed under state power. At the same time, however, these constitutions also acted incrementally to expand the periphery of the state: that is, they established a loose inclusionary order on which the state relied for the execution of basic uniform functions – such as legal enforcement and the maintenance of fiscal supply – in specified territories. To follow the argument of J. Russell Major, therefore, in many cases late medieval society was marked simultaneously by the 'revival of royal authority' and by the promotion of a constitutional balance between regents and provincial estates (1960: 16). In fact, each of these two dynamics at once presupposed and intensified the other, and the widening of representative constitutional structures allowed increasingly powerful states to engender support for their policies (especially in fiscal matters), to avail themselves of an administrative apparatus that could consolidate their power, and to concentrate their power around firm territorial boundaries. Similarly, Werner Näf has plausibly concluded that the original dualistic relation between monarchs and parliaments or estates that characterized the late medieval era was in fact a constitutional and territorial *partnership*, in which both parties relied on each other and both, in collaboration, gave rise to the basic legal, administrative and fiscal structure of the modern state (Näf 1951a: 242). Each of these arguments implies, as Peter Blickle has also observed, that in the late Middle Ages the concentration of monarchical power, the increasing

[18] For ideal-typical reconstruction of the dualistic constitution see Bosl (1974: 55).

princely control of land, tax and courts, and the wider 'territorialization and intensification of government' were necessarily sustained by the emergence of multi-levelled representative and inclusionary structures (1973: 435).[19] As in the earlier medieval period, therefore, the social abstraction of political power was closely correlated with the promotion of inclusionary mechanisms to support power's reproduction and distribution through society. These mechanisms in fact enabled the state to produce and sustain a sufficient mass of power to conduct its growing body of functions and to increase the volume of positively generalized power available in society.

The Reformation and the differentiation of state power

This vital correlation between late medieval state building and constitutional formation obtained its most intense expression in those states which, in the course of the sixteenth century, either fully renounced their political attachment to the Roman Catholic church or underwent substantial political disruption owing to religious reform.

In each society that experienced an (either complete or partial) Reformation, the period of religious transformation at once responded to and intensified the two processes which had formed the vital political dimensions of European societies under high feudalism. The Reformation revolved, at a most manifest level, around a continued differentiation of the state from the church, and, in consequence of this, it led, evidently, at once to an increase in the functional autonomy of political power and to a general centralization and consolidation of the institutions of state power (gradually recognizable as modern states). Still more fundamentally, however, the Reformation was an event that at once reflected and was induced by a multi-causal increase in the positivization and formalization of legal relations in society, which resulted from earlier processes of legal secularization and feudal decline in European society. In the Reformation, therefore, the two dominant political tendencies of the Middle Ages – the abstraction and intensified autonomy of political power and the positive abstraction of power's legal foundations – coincided to stimulate a period of extreme structural upheaval in European society as a whole. The Reformation, most essentially, was an occurrence in which the status of power as a relatively autonomous phenomenon was greatly accentuated and in which the

[19] For similar views see Hintze (1962a [1930]: 133); Bosl (1974: 44, 107).

legal construction of political power underwent a process of dramatically accelerated positivization.

The over-layering of centralistic political abstraction and legal positivization in the Reformation was apparent, first, in the fact that all states converting to Lutheranism vehemently attacked the use of canon law in their territories, and the success of particular princes and regents in conducting a Reformation and reinforcing their political institutions depended on the ability of these regents to suppress the system of legatine authority imposed by the papal courts. The first legal precondition of the Reformation, thus, was that regents were powerful enough to eradicate external or sacral elements from their legal orders. One of the most powerful political origins of the German Reformation lay in the fact that princely rulers of nascent states objected to the imposition of ecclesiastical jurisdiction (and the attendant ecclesiastical taxes and indulgences, which deprived them of revenue) in their lands. In consequence, they utilized Luther's theological attack on the canon law, driven by his early antinomianism, to campaign for an exclusion of papal jurisdiction from worldly power, to reduce the legal power of the church in secular territorial government, and so to strengthen their legal, jurisdictional and fiscal authority in their territories.[20] In the course of the Reformation, German Evangelical states began to integrate the canon-law courts, they began to consolidate more complete territorial control of judicial procedures, and they transformed canon law and objects of ecclesiastical-legal procedure into inner elements of state jurisdiction.[21] In so doing, these states suspended large swathes of legislation embedded in the judicial fabric of their societies, and they greatly augmented the jurisdictional and statutory authority of single princes. In England, a similar process occurred, and the first concrete impulse for the Reformation, the divorce of Henry VIII, entailed an assertion of royal exemption from, and then supremacy over, the courts of church law, which was formalized in the Act in Restraint of Appeals (1533). This

[20] As early as 1515 Luther argued that obedience to law cannot bring salvation. Law, he argued, 'inflates people' and 'makes them boastful' (1960 [1515–16]: 245). Justification, he claimed, can only occur as a passive experience of grace which is indifferent to law. The most famous case of royal opposition to papal courts was the divorce of Henry VIII. But this was widespread throughout Germany, and by 1555 all Evangelical territories had substantially augmented their jurisdictional power in both church and state. In the Netherlands, the contest over ecclesiastical regulation was a primary cause of the first revolt against Catholic Spain.

[21] See Heckel (1956); Mauer (1965: 253); and the contributions in Helmholz (1992).

then led to the submission of the judicial powers of the clergy and the integration of the canon-law courts into the sphere of royal jurisdiction: Thomas Cromwell prohibited the university study of classical canon law, and the need for a new body of canons was stated as early as the mid 1530s. The courts of common law in fact assumed a large amount of the business formerly treated in the church courts, and they did much to extend royal authority over all matters of the realm. Reflecting this transformation in the law, moreover, the Reformation saw, in all Evangelical societies, the emergence of new patterns of legal analysis, often drawing on Roman law, which employed decisively positive templates for examining conditions of state power, legitimacy and legal justice. During the Reformation in the German states, for example, legal theorists such as Johann Oldendorp began to use specifically secular concepts of natural law for deducing reproducible normative foundations for judicial acts (1549: 90). In England, an analogous tendency became manifest in the works of Christopher St German. St German proposed a model of legal and political authority which denounced the powers accorded to ecclesiastical courts and ascribed all legitimate secular power to the state. Above all, he argued that the parliamentary monarchy, as a consensually legitimized executive, should assume 'absolute power' in all legislative and judicial matters (1532: 24), and that the common law should form the basis for all legal finding.[22]

The connection between these two processes of political consolidation and legal positivization was evident, further, in the fact that those states that converted to one or other variant on the Evangelical faith assumed regulatory authority over the church as a whole, and they transformed the church from a source of external legal-normative obligation into an institution governed under a territorial constitution. Naturally, this process was marked by striking variations: no fully general pattern of church government developed in the Reformation. However, all states that underwent a Reformation assimilated the sacral laws of the church into their administrative apparatus. This began in the later 1520s in some German territories, as secular rulers reacted to the alarming spread of iconoclasm, lay preaching and disorder in the church by imposing orders of visitation to supervise teaching and worship in the church and to establish

[22] Even before the Reformation was fully in process, St German included both 'particular customes' and 'statutes made in parliament' among the sources of the laws of England (1613 [1523]: 17). Like Oldendorp, St German also took the principle of 'equitie' as the basis for positive law (1613 [1523]: 55).

conformity in articles of faith. In the German territories, the first formal church constitutions of the later 1530s, pioneered by Philipp Melanchthon,[23] defined care of the church as a primary duty of territorial authority and they provided for the appointment of religious superintendents and the formation of an Evangelical consistory to regulate the church, both of which were accountable to princely power.[24] Territorial supremacy over the church in the German states was in fact constitutionally established in the two primary documents of the German Reformation: that is, in the Confessio Augustana of 1530 and the Religious Peace of Augsburg (1555). The first document, comprising the founding articles of faith of Lutheranism, declared that the church should be seen solely as a spiritual institution, holding only the power of the keys, and it implied that princely authorities should defend and protect the church in the worldly arena (Art. 28). The Peace of Augsburg enunciated the juridical principle that came to underpin the Evangelical state church: *cuius regio eius religio*. This was gradually interpreted by Evangelical lawyers to the effect that papal jurisdiction in sacral matters was suspended, and territorial princes assumed the (as yet not constitutionally sanctioned) right to reform the church (*ius reformandi*) and to impose confessional uniformity in their territory (Stephani 1612 [1599]: 16, 51–2). From 1555 onward, it was loosely accepted in most states of the Holy Roman Empire that Evangelical princes were authorized to dictate ecclesiastical policy, and the church was directly subject to territorial rule.

Outside the German heartlands of the Reformation, Sweden was perhaps the most complete example of the incorporation of the reformed church within the state: indeed, Gustav Vasa organized the Swedish church as a simple 'department of state' (Roberts 1968a: 116). In England, through the sixteenth century the form of the ecclesiastical polity varied greatly from monarch to monarch. Vitally, however, Henry VIII appointed Thomas Cromwell to act as vice-regent in spiritual matters as early as 1535, and in this role he was given full responsibility for regulating ecclesiastical affairs. The Elizabethan settlement of 1559, in turn, authorized parliament, under royal supervision, to legislate over matters in the church.

[23] Philipp Melanchthon concluded seminally that the territorial prince should act as the *Patronus* of the church (1836 [1541]: 684).

[24] The classic case of this is the *Wittenberger Gutachten* of 1538, partly penned by Melanchthon, which provided for government of the church through immediate command of the territorial prince (1851 [1538]).

In different ways, in short, the Reformation brought towards a conclusion the conjoined process of political abstraction and legal positivization which had underpinned many European societies in the Middle Ages, and it created an environment in which worldly states experienced an expedited growth in the abstraction and the social centrality of their power and in which the legal foundations of their general authority and single statutory acts were defined in increasingly positive terms. Despite these common political features unifying different patterns of the Reformation, however, great care needs to be exercised in order to maintain historical accuracy in assessing the Reformation as an epochal event in the history of European state building. It is too easy to see the Reformation as a moment in which European states, in a relatively uniform manner, simply assumed full contours of statehood. It is surely not the case, as even the most learned historians have asserted, that the Reformation created a legal/political condition in which sovereign states immediately exercised complete positive jurisdictional authority.[25] In fact, in different parts of Europe the process of legal/political positivization underlying the Reformation stimulated very diverse patterns of state building, none of which immediately engendered fully evolved sovereign princely states.

In England, notably, the Tudor regime, reinforced by the Reformation, began to acquire the hallmarks of modern sovereign statehood. The formal concept of the state as an actor able to exercise a monopoly of legislative power was not widespread at this time. However, in the early 1530s Thomas Cromwell was able to describe the polity of England as an institution possessing qualities close to undivided sovereignty, and, to legitimize the break with Rome, he asserted that the state was able to pass statutes and provide justice in all matters and without any superior.[26] Through the Tudor period, the power of royal courts was substantially reinforced, and monarchical control over both the fiscal system and the means of jurisdiction was consolidated.[27] Moreover, the amount of business transacted through the state administration also expanded substantially, leading to a further concomitant growth in state authority. Of particular importance, moreover, was the fact that

[25] Speaking of the German states, Harold Berman argued (in my view, rather absurdly) that the Reformation marked the 'ascendancy of the prince and his high magistracy' and constituted a 'final stage in the transition . . . from the *Ständestaat*, rule by estates, to the *Fürstenstaat*, rule by princes' (2003: 65).

[26] On this see Lehmberg (1970: 164). Yet on the limits of sovereignty see Loades (1997: 1–4).

[27] For discussion see Hoyle (1994: 1177).

the edifice of state emerging under the Tudors was beginning clearly to assume characteristics of a public apparatus: that is, it departed from the model of semi-private governance characteristic of the Middle Ages, it organized its administrative (and especially its fiscal) mechanisms as devices to sustain its general rule across a national kingdom, and it clearly relied on reserves of general social recognition and support that were deeply rooted across different echelons of society.[28] In the Netherlands, similarly, the Reformation also brought about an accelerated consolidation of state power. This process deviated markedly from the state-building dynamics of the English Reformation. The underlying structure of the modern state in the Netherlands was not created until the Pragmatic Sanction of 1549, which transformed the seventeen provinces of the Netherlands into one administrative entity, and, even after gaining independence from Habsburg Spain, the Dutch provinces did not form an integrated central unitary order: they were, in fact, opposed to conventional notions of sovereignty. However, the Reformation and the resultant religiously motivated revolt against Spain clearly brought unprecedented autonomy to the States-General, which governed the Dutch Republic. Between 1576 and 1581, the States-General began to operate as an independent government. The Reformation thus led to the transformation of the States-General into an effective centre of sovereign republican statehood, able to exercise powers of jurisdiction formerly held by Habsburg rulers (Tracy 2008: 291).

In the German territories, as mentioned, the Reformation also significantly reinforced the territorial dominance (*Landesherrschaft*) of princely regents. In the course of the Reformation, in particular, the claim to ecclesiastical supremacy made by Evangelical princes placed intense strain on the constitution of the Holy Roman Empire, and, owing to the support of the emperor for the papal church, it finally became clear that the Habsburgs could not rule the Holy Roman Empire as a centralized dynastic state under one set of supreme institutions. By 1555, the assumption of ecclesiastical supremacy by princely estates greatly strengthened their claims to jurisdictional independence within the Empire, and the princes became the clearly ascendant force in the constitutional conflict between estates and Empire (Angermeier 1984: 317). Notably, in the German regions the Reformation reinforced the power

[28] See primarily Elton (1966: 4, 150). Yet it should be noted that at a fiscal level this sometimes involved reinforcing elements of feudalism. For this view see Buck (1990: 209).

of secular regents because the assumption of ecclesiastical autonomy by territorial regents consolidated the conversion of land held through feudal immunity into land held under independent jurisdiction, which meant that princes were able to declare that they governed their lands under rights of territorial sovereignty. Despite this, nonetheless, in the princely territories of the Holy Roman Empire the Reformation did not create an aggregate of political institutions even remotely approaching modern notions of statehood. Even after 1555 many political functions were not ceded by the Empire to the territories. In fact, the structural determinants of statehood often eluded territorial regents in German areas for well over a century: in many territories a complex body of interwoven feudal, territorial and imperial jurisdictions persisted long after the Reformation, and the controversy over jurisdiction and the limits of territorial power remained 'by far the most important theme' in constitutional debate in sixteenth-century German states (Willoweit 1975: 34). It was only around 1600, as exemplified by the seminal work of Andreas Knichen, that jurists began even tentatively to define German princes as possessing 'universal and superior' powers in a territory (1603 [1600]: 17). Territorial supremacy was not consolidated as a practical reality until considerably later.

The Reformation, in consequence, was not a singular state-building occurrence: its causes, immediate consequences and longer-term political results in respect of state formation were highly varied and contingent. In fact, in the German context it cannot unreservedly be argued that the Reformation led in any immediate way to a reinforcement of statehood. The Holy Roman Empire was already, albeit to a limited degree, constructed as a state before the Reformation began in 1517: this state was then dismantled in the wake of the Reformation, and it was only after 1648 that it was slowly replaced by similarly well-integrated particularistic state institutions. In one respect, however, it is possible to discern a certain overarching uniformity in the Reformation and its results. The longer-term state-building significance of the Reformation resided, namely, not in any universal increment of state integrity and density, but in the fact that it dramatically intensified the processes of *political abstraction* and *legal positivization*, which had from the outset supported the construction of statehood in Europe. In the European polities that experienced a conversion to the Evangelical faith, in consequence, the period of Reformation had one common characteristic: it led to the creation of judicial and political institutions, in which the counterbalancing of different legal sources was reduced, the