

founded in a balancing of horizontally structured private interests, and sovereign power was often inseparable from the immediate prerogatives of potent social groups, which meant that political authority remained rooted in specific milieux and professions. Government often vacillated between the magnates and the guilds, and much legislation was devoted both to enacting particular interests and to suppressing oppositional groups, who pursued motives of private justice in order to unsettle the *comune*. Second, it has also been widely observed that, if the *comuni* were formed as organs that cut through the feudal ties binding the cities to the Holy Roman Empire and the imperial aristocracy, they always existed alongside other channels of obligation, and they were not constituted as finally sovereign or independent institutions. Neither the feudal apparatus of the Empire nor the private associations of interests within the cities were ever fully brought under the force of the judicial authorities of the cities – the *podestà*. Moreover, the level of private violence in the cities remained very high, and it is difficult to claim that the *comuni* possessed an administrative apparatus enabling full public or sovereign control of the city or, in fact, even an approximate monopoly of force. Third, over a longer period of time the communal origins of the constitutions of the city-states were partly eroded. Most, although not all, cities progressively abandoned the broad-based model of government. Most opted instead, first, for a pattern of government in which power was removed from the *comune* and placed in a *signoria*, which in most (but not all) settings tended to assume a relatively closed oligarchical form.⁵² Later, then, most cities ultimately settled for government by an aristocratic *principato*, which centralized more power in one single dynastic elite. One commentator has observed that as early as 1300 much of northern and central Italy was under ‘despotic rule’ and that the ‘period of effective autonomy’ in the communes was very brief (Jones 1965: 71–2). In some cases, the transition from commune to *signoria* led to the consolidation of the city-states as quasi-territorial states, in which urban regions secured their power against the Empire by adopting hierarchical patterns of sovereign jurisdiction. In other cases, in seeming paradox, the transition from *comune* to *signoria* re-accentuated the private/familial control of political power, and it even involved a partial reintegration of the cities into the neo-feudal legal order that still prevailed in the Empire. In general, however, the advent of the signorial

⁵² Florence was the crucial exception, where, initially, the *signoria* extended political representation across class boundaries (Becker 1960: 423).

regimes led to a more monistic system of government above the plural sources of power in the commune, and it prefigured the later, more highly integrated, models of monarchical statehood. For all these qualifications, nonetheless, it remains the case that the Italian city-states of the high to later medieval era approached a type of statehood that separated public from private power to a greater degree than in most European societies in the earlier stages of feudal transformation, and that these cities also possessed institutions through which governors could exercise power across society from a relatively constant base. The most politically refined of these states were defined both by the consolidation of judicial and statutory powers in a fixed executive and by the solidification of intermittently free-standing legislative institutions. Indeed, in some cases, most notably that of Florence, the Italian city-states eventually succeeded in devising a complex apparatus for raising public finance and consolidating public debt, thereby further reinforcing their independent political structures.⁵³

Whatever their level of public construction, it was clearly fundamental to the emergence of statehood in the Italian cities that they elaborated a quasi-constitutional legal apparatus, and they tied the use of political power both to legally pronounced rules and preconditions and to acceded procedures of limited representation. Indeed, the emergence of rudimentary urban constitutions was a crucial element in the process through which the cities were able to extract their power from private or feudal milieux, and to regularize their power in predictable procedures: it was only by means of a series of entrenched legal and constitutional statutes that the cities were able to stabilize the form of political power and to apply their power in generally accepted procedures. The emergence of a political system as a functionally consolidated set of institutions, which possessed at least some degree of positive consistency against private power, relied crucially on the fact that its resources of power were supported by a constitutionally integrative or *inclusive* apparatus. The autonomous political order of the Italian cities, in other words, was founded both in the fact that these cities produced generalizable reserves of positive and statutory law and in the fact that they availed themselves of inclusionary functions offered by early constitutions. By fusing these elements, the Italian cities were able to extract a

⁵³ This occurred in Florence in 1345. For detailed analysis of this and its constitutional implications see Becker (1966: 17; 1968: 157–8).

public structure for themselves which enabled them to utilize political power at a distinctive level of autonomy and general inclusion.

The Holy Roman Empire

The connection between state building and constitutional formation obtained its most striking expression in the Italian city-states. However, related phenomena were also evident in other societies. Indeed, in other social settings the aftermath of the investiture controversies also led to the development of states organized around a quasi-constitutional apparatus, and other states also began to distinguish and generalize their power by assuming a form in which they could account for themselves as inclusive centres of social integration.

This tendency could be observed in the Holy Roman Empire itself. After the stricter assertion of the *lex regia* in the years following the investiture controversies, the Holy Roman Empire began to form itself around a distinct constitutional order, and the idea that the imperial prerogative was the sole basis of legislation was sharply undermined in the later Middle Ages. This idea was quite widespread in the works of later commentators on Roman law, notably the post-glossators writing after the classical period of Bolognese commentary, who rejected the universalistic claims of the Empire and argued that imperial power was only sustainable within constitutional constraints. Yet this view also had earlier origins. For example, Azo clearly stated that the emperor had the authority to make laws (*ius condendi legem*). But he also stated that new laws and statutes had to be made in consultative fashion and presupposed consent ‘per principem and per populos’ for their validity (1506: 9). However, perhaps the defining step in this respect occurred in the thirteenth century, when an increasingly strict constitutional framework was established both to determine appointment to imperial office and to bind emperors to Electors after their assumption of office. The role of Electors was mentioned in the *Sachsenspiegel*, and it was acknowledged by Friedrich II in the 1230s. In 1276, then, King Rudolph committed himself by oath as required to obtain the consent of the Electors in major acts of legislation, especially those concerning the alienation of imperial lands (Krammer 1913: 169). This process culminated in the promulgation of the Golden Bull of 1356, in which the imperial Electors assumed formally enshrined rights of participation in government in the Empire. [Chapter 2](#) of the Golden Bull stipulated that whoever should be prospective emperor should recognize and reinforce all rights, privileges and

customs of the Electors, who were defined as ‘the most immediate organs of the Holy Empire’ (Weinrich 1983: 337). This section of the Golden Bull in principle defined the Empire as a polity with an organic constitution, through which the state obtained a legal identity that was clearly distinct from those holding office – even highest office – within it. Chapter 12 of the Bull stated that the Electors should convene each year to deliberate on matters of importance for the Empire (Weinrich 1983: 357). Through this provision the Electors effectively assumed the status of constituted organs within an imperial state.

In parallel to this constitutional organization of the imperial executive, moreover, the high to later medieval period was also marked by the increasing introduction of provisions for a delegatory system of government at regional or territorial level throughout the Holy Roman Empire: that is, by an increase in regional representation, established through a constitution of territorial estates (*Landstände*), especially in questions pertaining to taxation and fiscal supply. As a result of this, in 1231 legislation was introduced in the Empire that stated that in particular territories princes were not at liberty to pass new laws without the express consent of regional estates. The recognition of regional estates as constitutionally authorized participants in legislation was further cemented in subsequent acts of constitutional legislation, and by the 1290s the rights and privileges of the *Landstände* were expressed and sanctioned in increasingly contractual form. In 1311, the Ottonische Handfeste, the so-called Magna Carta of the German estates, was promulgated. This document enshrined the rights of estates, it protected noble jurisdictional privileges, and it placed a prohibition on arbitrary taxation by territorial princes. Throughout the fourteenth century, subsequently, further regional charters were introduced. In many cases, these arrangements either endorsed or presupposed a condominium between princes and estates as the form of government, and they created the basis for a constitution (*Ständeversammlung*), in which the estates played a key role in territorial government. This arrangement of constitutional balancing gradually replaced the more diffuse and personalized holding of power that characterized feudalism in its earlier form, and it bound powerful and wealthy members of society, often holding land and office under privilege and immunity, into a more unified and stable political order.⁵⁴ Indeed, the emergence of formal constitutional structures in the

⁵⁴ On the integrative dimensions of the process of estate formation see, classically, Below (1885: 48); Brunner (1968: 189–90).

German lands acted at once to integrate powerful social actors into nascent states and to establish early territorial governments as political orders with relatively secure and inclusive procedures of regional domination and a relatively firm monopoly of territorial power. In both these respects, the quasi-delegatory arrangements of estate-based governance brought great solidity to early territorial states in Germany, and they played a vital role in assimilating addressees of power into expansive (even proto-national) societies, in unifying territorial domains, and in solidifying the power of political institutions over increasingly cohesive and extended territories.

In the longer wake of its consolidation as a body of institutions distinct from the papacy, therefore, the Holy Roman Empire clearly began to assume the form of a multi-levelled state with a subtly balanced and articulated constitution. At the end of the Middle Ages, this constitutional apparatus of the Empire came under intense strain because of the increasing territorial power (derived from feudal *regalia* and immunities) of the princes, which eventually eroded the substance of the Empire. However, these arrangements persisted well into the early modern era, and even for a long time after the Reformation the use of political power in the Empire was dominated by an equilibrium between three political groups: the regional estates, the imperial estates and actors around the emperor himself. In this instance again, in consequence, it can be observed that, in order to stabilize itself as a political order capable of applying political power in generalized fashion across diffuse social terrains, the Empire was obliged to evolve a wider organic personality and to incorporate impersonal methods for integrating and unifying its territory. Indeed, the emergence of the Empire as a public order, overarching a number of private domains and capable of dislocating power from private actors, structurally presupposed, not only that it contained a formal legal order, but that it could selectively integrate private actors in its corporate structure. In so doing, it obtained a transpersonal legal system for itself and it created conditions of factual legal regularity and probable inclusionary compliance throughout society.

The central monarchies

In England, similarly, the formation of the state as an increasingly positive apparatus for using power depended on the construction of a proto-constitutional order. In the first instance, for example, it can be observed that under the conventionalized expectations of early

feudalism members of the English monarchy exercised power from a residually private domain in society. Although having a general land tax at their disposal, English monarchs were expected to live and finance their operations either through intermittent feudal aids or *from their own resources* (i.e. from revenues raised on their own lands). The progressive growth and centralization of the monarchy as a central and increasingly dominant source of justice and order, however, meant that the English monarchy rapidly required more money, and that the feudal apparatus for levying funds was insufficient. Consequently, in order to obtain funds to support the exercise of centralized power, the monarchy was obliged, in a gradual process, at once to sever itself from the personal structure of feudalism and to introduce new patterns of direct and indirect taxation. To facilitate this, it integrated prominent sectors of society into the perimeters of the emergent governmental order, and it promoted the use of consultative parliaments to obtain revenue (Hoyt 1950; Wolffe 1970: 25): indeed, earliest parliaments, like the general eyres in the judicial sphere, were part of a royal strategy for reducing local influence in administration and for pursuing effective centralization of government.⁵⁵ The need for tax thus intensified a dynamic of defeudalization in the English state, and, driven by its monetary needs, the monarchy began to construct itself as a complex of institutions that possessed extensive consultative mechanisms and inclusionary procedures for underwriting its extractive powers. To be sure, the emergence of the early English state as a public constitutional order, in which monarchs performed distinctively public duties and recruited support from public office holders, was not completed in the medieval period. Yet it was already clear in Magna Carta that any effective conduct of government presupposed inclusionary, representative foundations. Indeed, even the assizes of Henry II required common assent for the passing of legislative acts and legal rulings (Butt 1989: 81; Maddicott 2010: 75, 90). Throughout the thirteenth century, subsequently, a fully parliamentary order began to emerge, and parliamentary assemblies, evolving out of the king's court, gradually assumed well-defined, semi-constitutional powers. By the middle part of the thirteenth century, the concept of parliamentary authority was clearly established in England (the earliest use of the term is dated to 1236) (Butt 1989: 79; Maddicott 2010: 226). This period was also marked by a series of baronial plans and petitions for constitutional reform, designed to reinforce the representative

⁵⁵ This theory seems self-evident. But to support it see Plucknett (1956: 153).

powers of parliament. The Paper Constitution (attributed to 1244) and the Provisions of Oxford (1258) were salient among these documents. Indeed, the Provisions of Oxford created a full, although short-lived, constitutional system, in which governmental power was placed under direct baronial control by means of an appointed council. By 1300, then, the assemblies gathered to grant taxes had acquired a form close to that of constituted national assemblies, and at this point it was assumed that the king could only raise tax in *pleno parlamento* (Willard 1934: 13; Clarke 1936: 8; Butt 1989: 150).

In the English case again, therefore, as the state began to utilize power in increasingly autonomous fashion and as it transposed its legal operations into a positive statutory form, it relied on an elaborate constitutional apparatus to unify its addressees and to produce support and legitimacy for its decisions. Although the monarchical state extended its power at the expense of the baronial class, early parliaments allowed the crown partly to integrate this class and they provided the monarchy with consensual instruments for passing and applying laws through society. It is documented, for example, that the period of baronial revolt against the monarchy in the thirteenth century, far from dissipating the Angevin policies of administrative centralization, reinforced the central judicial order of the state. The Provisions of Westminster (obtained by the barons in 1259 and reissued 1263), notably, limited powers of franchise courts and other private jurisdiction and reinforced appellate powers of the king, and the rise of parliament brought the courts under direct monarchical jurisdiction (Treharne 1932: 171; Palmer 1982: 292). The growth of parliamentary procedures thus strengthened a framework in which the monarchy could construct its power as power inclusively generated and applied throughout society, and it instituted an acceded set of conventions through which state power could be legitimized and experienced as public power, and the private goods of subjects (taxes) could be more regularly and peacefully transacted through the state. In this respect parliaments greatly simplified the statutory operations of government. Indeed, the rise of parliament coincided exactly with the rise of statutory legislation in England, and the state's increasing need to authorize new laws across all society interlocked with a rapid inclusionary expansion of parliament. The highly generalized statutory production under Edward I, notably, was marked by a widening of parliamentary power and an increasing use of parliament as the 'main instrument of public governance' (Maddicott 2010: 283). The formation of governmental power as legislatively independent and positively

abstracted, in consequence, had its defining precondition in a defined constitutional order. This early constitution acted to unify the widening territorial domains in which power was applied, to detach political power from pure private interests or prerogatives and selectively to integrate social groups who were politically weakened by the rise of statehood. In both respects, the medieval constitution made possible the early use of power as a generalized social facility.

A similar process can also be identified in the kingdoms of León and Castile in medieval Spain, which possessed a particularly strong constitutional tradition. During the eleventh and early twelfth centuries, the rudimentary beginnings of a representative tradition were already clearly in evidence in these societies.⁵⁶ In 1188, the Cortes of León, and later of Castile-León, was founded as a representative assembly, comprising, as well as prelates and nobles, elected representatives of towns with a municipal organization. This assembly possessed pronounced legislative functions, especially in fiscal matters, and it was accepted as a point of constitutional principle that no new laws or taxes could be introduced or vital political decisions taken except in a council comprising bishops, nobles and good men (Procter 1980: 51). The convocation of councils and assemblies was often, as in England, bound to the king's commitment to observe customary laws of the realm, especially in respect of the equal provision of justice and consensual levying of fiscal reserves. Both the supply of taxation to the monarchy and the exercise of both statutory and jurisdictional force depended on the monarch's respect for established constitutional agreements, and representative assemblies acted at once both to limit the private authority of royal prerogative and to support a general, more inclusionary and more immediately flexible, use of royal power across society.⁵⁷

France followed a slightly different path in this respect. It has often been noted as a distinctive feature of medieval French history that representative parliaments were slow to be formed as organs of state that were substantially different from judicial chambers. Owing to this fact, it is often claimed, French parliaments lacked the ability to assume constitutionally formative legislative power (Pollard 1920: 43; Maddicott 2010: 450–1), and medieval France was only able to develop a relatively weak system of representation. Whether this is true or not, it remains the

⁵⁶ For background see Colmeiro (1883: 8, 115, 118–20); O'Callaghan (1989: 9–19).

⁵⁷ For the argument that the monarchy of Castile-León depended for its territorial 'consistency' on a balance between estates, see González (2006: 157).

case that the consolidation of the French monarchical state as a substantially independent and geographically extensive centre of power occurred in a period characterized by a pronounced dynamic of constitutional formation. During the reign of Philippe le Bel, most strikingly, the French monarchy asserted its independence from the papacy by claiming that the monarch embodied not merely private royal power, but the power of the national community of France as a whole: that is, the power of the 'communautez des villes'.⁵⁸ Moreover, owing to his conflicts with Boniface VIII, Philippe le Bel was the first monarch (in 1302) who summoned the Estates-General, comprising the orders of clergy, nobility and third estate, to deliberate affairs of the realm. Further, in part because he began to institute a regular taxation system distinct from the feudal *taille*, he oversaw a substantial increase both in the consultative functions of the estates and in the frequency of their convocation (Boutaric 1861: 19; Bisson 1972: 548; Krynen 1993: 270). Both Philippe le Bel and subsequent Capetian kings utilized the estates both to secure the 'independence of the crown' from the papacy and to stabilize the fixed apparatus and revenue supplies of the monarchy (Bardoux 1877: 29). Even the *légistes*, for all their extensive justifications for the diminution of papal power, were decidedly not apologists for royal absolutism. The *légistes* were in fact keen to frame the legitimacy of royal power within a broadly constructed constitutional apparatus, and they identified integral constitutional support as a precondition of the sovereign autonomy of the state (Pegues 1962: 225). In France, therefore, the process of feudal transformation did not only lead to the early formation of the state as a distinct and functionally specialized centre of sovereignty: it also of necessity produced a need for a legitimating national constitution to facilitate the state's increasing statutory and judicial functions.⁵⁹

It has been argued in highly influential literature on medieval constitutionalism that medieval societies possessed a constitutional structure that was clearly distinct from that of modern societies. On this account, medieval societies contained customary constitutions, in which counterweights to royal power were derived from consuetudinal laws, interpreted by actors in the judiciary: it was only in early modern societies that elite actors began to use legal principles to weaken royal power and to force a constitutional

⁵⁸ See the 'Lettre des Nobles du Royaume de France' (1910 [1302]: 13).

⁵⁹ The correlation in France between the growth of sovereignty and the constitutional 'dialogue between the sovereign and his realm' has been brilliantly observed in Petit-Renaud (2001: 363).

order on the legislative functions of government (McIlwain 1947: 87). The argument proposed here, however, suggests that this analysis, although correct to identify a constitutional apparatus in medieval societies, requires revision. The account offered here implies that the basic dimensions of constitutional rule were established in many European societies by the high medieval period, and that such constitutions, prefiguring their later functions, were a necessary prerequisite for the political differentiation and functional specialization of these societies and so also for the formation of strong governmental systems. Of course, this is not to claim that medieval societies possessed constitutions in the modern sense of a formally acceded set of basic norms for the state. However, if the two primary elements of constitutional rule are, first, the existence of a prescribed legal order, usually containing strong ideas of right and entitlement, to determine conditions for the exercise of power, and, second, the existence of representative and consultative mechanisms in matters of common societal importance, it is difficult to argue that constitutional rule was not a prominent feature of governance in many medieval societies. Constitutions in fact developed in medieval European societies as necessary responses to wider exigencies, caused by deep-lying processes of social transformation, which continued to stimulate the formation of constitutions into the modern era.

At a practical level, the first elements of a constitutional apparatus in proto-modern states evolved – quite simply – because the density of governance increased. That is to say, as states required more and more resources to perform their growing judicial functions they also needed adequate public mechanisms for expressing and securing support. In particular, the institutions of representative government in early constitutional states developed specifically because the more personal and informal structures of feudal governance proved incapable of managing the volume of administration and of levying the volume of revenue that were required for the conduct of governmental affairs. In England, France and Spain, for instance, both the assemblies of estates and the regular courts of law are normally seen to have grown out of the more informal *curia regis*, in which royal government had originally been consolidated,⁶⁰ and the establishment of these more inclusionary institutions permitted a heightened flexibility and specialization in the administrative resources of the state. The practical function of

⁶⁰ Baldwin (1913: 308); Pollard (1920: 112); Aubert (1977: 1, 259); Estepa Díez (1988: 57); O’Callaghan (1989: 19); Sicard (1990: 68); Maddicott (2010: 153).

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).