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

influence of (sacral or customary) external law on territorial jurisdiction was diminished, and legal and political order was consolidated around positive statutes, enforced by a relatively monistic executive. The results of the Reformation, in short, might be most accurately observed, not in uniform state construction, but in the intensification of the autonomy of political power. In bringing towards conclusion the positive abstraction of political power, however, the Reformation created preconditions, varying substantially from region to region, for the formation of integral, ultimately even *sovereign*, states.

If the processes of legal and political transformation in the Reformation fell short of creating generalized models of statehood, they had the consequence that worldly political actors in those societies that experienced a Reformation were confronted with broadly analogous societal objectives, and they were faced with similar requirements in relation to the production and legitimation of political power. The Reformation had the outcome, first, that actors utilizing power were required, often in highly precarious and unprecedented settings, to formulate singular and autonomous accounts of their authority and new explanations for their inclusionary functions. In addition, the Reformation also meant that, as they eradicated external and conventional sources of law, states became largely exclusive centres of political power and jurisdiction, and they were obliged, often against extremely unstable backgrounds, independently *to produce* the power that they needed to fulfil their basic functions: that is, they witnessed an increased societal need for statutory legislation, and they were compelled to transform their institutional order to adapt to these requirements. The shared characteristic of societies shaped by the Reformation, therefore, was that – to a large degree – states began to act as positive and increasingly undivided centres of jurisdictional power, they experienced and used power as a highly contingent and normatively unsettled phenomenon, and they were obliged to generate and maintain more power (without external assistance) to respond to their increasing functions of statutory legislation and social inclusion, for which they were also compelled to provide positive and independent legal justifications. This meant that, as customary and religious sources of law were in part extirpated from the political system, states (or institutional orders close to states) needed to generate *more power* for their societies, and, in face of deep societal polarization and loss of traditional legitimacy, they were expected to explain and apply this power as a highly abstracted and autonomous resource. If the political construction of later medieval European

societies had reflected an increasing abstraction and autonomy of political power, therefore, it was in the Reformation that this process gained its conclusive expression. Subsequently, it was as a response to the need for the positive production of political power that European societies after the Reformation developed (with substantial temporal variations) their distinctive patterns of sovereignty and statehood.

Positive law and the idea of the constitution

It is of the greatest importance in this process of legal positivization and consolidated political abstraction during the period of the Reformation that the reliance of emergent states on an internal constitutional fabric also increased. Naturally, it was not the case that all post-Reformation states evolved according to an identical constitutional pattern. In the longer wake of the Reformation, different states responded to the problems arising from their growing administrative density in different ways. However, the simultaneous positivization and abstractive expansion of statehood at this time meant that states began to require more ramified inner structural and inclusionary dimensions. In fact, as an event that transposed the legal basis of states onto positive premises, the Reformation generated a multi-levelled set of requirements for legitimacy and inclusion in nascent European states, and at each level it tended to promote the formation of a constitutional political order within Evangelical societies. Constitutional formation, in other words, was a mechanism that allowed states in post-Reformation societies both to adapt to and to organize the increased mass of abstracted and precarious power that they contained, and to adjust to the problems of self-explanation and inclusion arising from the rapid positivization of their power's foundations. In most Evangelical states, consequently, the Reformation had the immediate result that it reinforced the constitutional power of parliaments and estates, and in most Evangelical societies parliaments and estates were utilized to recruit support for the Reformation and to legitimize decisions of regents in questions concerning rapid religious reform and intense political upheaval. In fact, parliaments, reflecting broad constitutional presuppositions, often filled a justificatory void in states undergoing dramatic religious transformation, and they enabled states to assume legitimacy while conducting highly disruptive and legally unprecedented executive processes.

In Sweden, for example, although Gustav Vasa invoked the plenitude of royal power to vindicate the Lutheran conversion of the state,

representative estates, present in the *riksdag*, played an important role in paving the way for the Reformation and for ensuring its approval (Roberts 1968a: 58, 139, 219). After this time, Sweden developed a powerful constitutional system, in which throughout the sixteenth century parliament acted as a vital instrument in cementing monarchical authority. Similarly, in Denmark in 1536 Christian III called a meeting of the Rigsdag to endorse the Reformation. In Poland, the early move towards Reformation gained extensive support among the noble estates, the *szlachta*, and the Execution Movement, often sympathetic to the Reformation, urged the creation of a state based in a reformed church, comprising a reinforcement of the bicameral system and stronger laws to protect the interests of the gentry. In the lands to the east of the Holy Roman Empire, generally, the noble estates were often at the forefront of the Reformation and the religious conflict gave further vitality to the constitutional cause of the estates (Schramm 1965: 5–6, 233; Bosl 1974: 141; Eberhard 1981: 28).

In the English Reformation, although the Henrician regime saw an expanded use of royal prerogative, a similar pattern was observable. Through the Reformation, the principle of rule by king-in-parliament became a key legitimating device of royal government. The ability of the king to refer to parliament as a source of support and approval in legislation helped to elevate the king above more consuetudinal legal obligations, and it instilled a heightened flexibility in the legislative system. In particular, this formula enabled the king to suspend constitutions made by the clergy, and to incorporate the clergy and the canons under the jurisdiction of secular statutes. At the beginning of the English Reformation, the Reformation parliament, convened in 1529, was held for almost seven years, and it served as a vital instrument in the reforms. Subsequently, Henry VIII obtained parliamentary support to enforce statutes removing papal jurisdiction in England: the 1533 Act in Restraint of Appeals, the 1534 Dispensations Act, the 1534 Act of Submission of the Clergy and the 1539 Act of Proclamations were among the most important examples of this use of statutes. Throughout the entire period of the Reformation, in fact, English monarchs were able to employ parliamentary mechanisms to ratify acts and statutes that greatly augmented their judicial power and consolidated their authority in both state and church.[29] Notably, both the Henrician and the Elizabethan Acts of Supremacy were authorized as acts of

[29] The Treason Act of 1534 is a good example of this (Elton 1972: 284).

parliament. The constitutional juncture between king and parliament thus played a pivotal role in forming the early modern English state during the Reformation, and the legitimating constitutional presumptions attached to parliamentary consultation underpinned the emergence of the state as a sovereign centre of political power, capable of separating its acts from both external religious laws and customary norms. Indeed, the ability of the state to legislate in positive statutory fashion during this period of positive legal proliferation depended on its recognition of a parliamentary constitution as the *form of government*.[30] By the 1560s, anticipating the conceptual framework of the mid-Stuart period, Thomas Smith declared that parliament, including the monarch, was the 'most high and absolute power' in England, and that no 'Bill of Law' was valid without prior approval in parliament (1621 [1583]: 34, 37). Smith developed this theory to define the state as a unitary inclusionary body, and he even claimed that parliament was a place where every Englishman 'of what preheminence, state, dignitie or qualitie' was present 'either in person, or by procuration and Atturney'. Similarly, John Hooker defined parliament as 'the heist, cheefest, and greatest Court', which, by virtue of the fact that it 'consisteth of the whole Realme', 'may jointly and with one consent and agreement: establish and enact any Laws, orders, & Statutes for the common welth' (1572: 31). Underlying this strengthening of the English parliament, notably, was a deep and far-reaching constitutional shift. The formation of a monarchical/parliamentary order in the sixteenth century gradually created a new and highly inclusive internal constitution for the state: the idea of the state centred, under public law, on parliamentary representation replaced the medieval convention of government by a mixture of higher laws and customary privileges, and it substantially augmented both the central position of parliament in the state and the mass of positive power which the state could dispense through society.

The Reformation in the German states necessarily gave rise to a twofold process of constitutional construction. The first result of the Reformation in the German parts of the Holy Roman Empire was that it consolidated both the overarching constitutional relation between the Empire and the growing territorial and princely states and the balanced internal relation between the princes and the regional estates

[30] For excellent analysis see Dunham (1964: 26). For an outstanding discussion of this and the constitutional controversies attached to it (i.e. the erroneous grounds for the denunciation of Tudor government as despotic), see Heinze (1976: 85).

(*Landstände*). Naturally, the acrimony between the Empire and the imperial princes and princely estates (many, although not all, of whom converted to Lutheranism or Calvinism) was greatly exacerbated by the Reformation. The already fraught constitutional link between princes and the imperial party was further burdened by religious controversy, and after 1530 negotiations between Empire and estates at imperial Diets often degenerated into military conflict, which made the relative constitutional position of Empire and estates uncertain. By about 1600, however, the position of the imperial estates had been structurally reinforced: by the first decades of the seventeenth century it was widely acknowledged that the Empire was internally formed as a constitutional order, and that the exercise of imperial power was constrained by legal norms reflecting princely interests. During this time, princes claimed the right to act as participatory members in the legal form of the Empire, and this gave rise to an influential body of imperial constitutional law (*Reichsstaatsrecht*). The crucial constitutional argument in this body of law was that a constitutional distinction had to be made between the sovereignty of the Empire and the sovereignty of the emperor: that is, the majesty of the Empire was a *real* majesty whereas that of the emperor was a *personal* majesty, and the personal majesty of the emperor was merely derived from, and secondary to, the *real* majesty of the Empire. The most important principle arising in this context was the claim that the Empire should be seen, not as the patrimony of an imperial dynasty, but as an organic political entity, of which Electors, other imperial estates, and the emperor himself were constitutive elements.[31] These ideas articulated a definite constitutional structure for the Empire, and they centred on the idea that the Empire possessed an organic personality that transcended, and could be normatively isolated from, all its factual composite parts. At an express level, of course, the formation of a body of public law in the Empire was a result of positional and confessional conflicts between different constitutional actors in the Empire. At a more functional level, however, it resulted directly from the facts that the legal foundations of the Empire had become precarious through the Reformation, the Empire had lost its support in customary legal bonds, and it was obliged

[31] Reinhard König gave seminal expression to this doctrine (1614: 646). He asserted that it was only as a representative of the real (or constitutional) majesty of the Empire that the emperor was entitled personally to make laws, so that the emperor, as a person, was always subject to the constitutional laws of the Empire: the emperor, in fact, was merely an organ of state.

to extract for itself a wider abstract account of its source and functions in order to produce and support the volume of power that it now required. The increasingly articulated or distinctively *public-legal* constitution of the Empire thus immediately reflected the rise in its abstraction and autonomy.

In addition to this constitutional conception of the Empire, however, in most German territories that converted to Evangelical doctrine regional assemblies also played a substantial role in sustaining territorial power during and after the Reformation. As in other societies, German princes or territorial regents habitually called on their local estates to support the introduction of reformist policies, and, to secure their adherence, they were compelled to widen their procedures for consultation and inclusion. The basic institutions of constitutional rule were solidified in many German territories during the Reformation, and in certain cases the estates showed signs of assuming permanent and integrated status within the formal order of territorial states. For example, in Hesse, although the estates were not consulted prior to the Reformation, regional estates obtained prominent political functions through the Reformation period: this was due in part to the fact that the spiritual estate was excluded from political negotiations after 1527. From the 1530s, then, the noble territorial estate effectively acted as an internal component of government. In Saxony, the estates participated extensively in the process of reform, and important acts of ecclesiastical policy were introduced at the instigation of the estates. In Brandenburg, the estates obtained a particularly powerful position through the sixteenth century, and by the middle of this century they possessed almost exclusive control of the fiscal apparatus of the emerging territorial state.[32] The construction of the German territorial state as a positive integrated polity was thus reliant on the fact that, in different settings, territorial rulers were able to draw on multiple forms of structural sustenance throughout society. In the initial wake of the Reformation, the constitutional balance between imperial Diets, territorial Diets and local Diets was often deeply reinforced, and the century following the Reformation saw estates assume a general position of unprecedented power (Oestreich 1969: 282; Neuhaus 1982: 33–4).

The increase in the power of constitutional institutions during the sixteenth century was most notable and most dramatic in the

[32] On these separate points see Siebeck (1914: 27); Reden (1974: 163); Fürbringer (1985: 44–9).

Netherlands, and the Dutch Reformation created an exceptionally strong constitutional system. Indeed, whereas in other societies the estates merely assisted regents in the Reformation, in the Netherlands the religious changes culminated in the Dutch revolt, in which, as discussed, the estates deposed the ruling dynasty and initiated a lengthy experiment in republican governance. In the last decades of Habsburg rule in the Netherlands, the regional estates had already become very powerful institutions: one reason why Habsburg rule came to an end was that before the revolt the estates refused to obey Habsburg directives regarding taxation, and they were able independently to raise taxes and to dictate terms of supply for the Habsburg government. Through the Reformation, subsequently, the religious and political interests of the estates in the Netherlands began to converge, and religious dissidence coincided with the independent use of political power by the estates. The lower nobility widely converted to Calvinism, and its members used their strong hold over fiscal institutions to resist the reimposition of Roman Catholicism, to revolt against the Habsburgs and progressively to establish a new governing body. Through the revolt, the estates were able, relatively simply, to use their power to create a separate fiscal system, which enabled them successfully to oppose the Empire militarily (Tracy 1990: 183, 211; Koenigsberger 1994: 149; Fritschy 2003: 63). The broad-based estate-led constitution that was established in the Netherlands during the Reformation era ultimately proved to be a highly effective administrative instrument, and it played a vital role in maintaining support for the Dutch state through the course of its separation from Habsburg rule (Hart 1993: 173).

Across these very diverse settings, to conclude, the Reformation at once stimulated and concentrated a number of transformative processes in European states, each of which tended, normally, to force states both to assume a tightened unitary form and to intensify their constitutional structure. During this time, as discussed, states typically renounced highly external sources of legal validity and legitimacy, they became more conclusively reliant on positive statutory powers of legislation, and, habitually in extremely contingent environments, they were required to supply internally autonomous accounts of their power to support acts of legislation. During this time, in consequence, societies were marked by a rapidly growing abstraction of statehood and state power: many societies came to converge around actors able positively to use power to regulate societal conflicts, they experienced a growing need for institutions able to create and consume power in autonomous

statutory fashion, and all volatile societal conflicts were progressively directed immediately to the state. As a result of these processes, many societies evolved a heightened need for deep-rooted mechanisms to support and elucidate their use of power, and their use of power as a positive resource depended on their production of *inclusionary power*: they required instruments of societal integration and constitutional co-option in order both positively to generate and reinforce and effectively to apply their power. In fact, the thickening of the constitutional structure of European states in the wake of the Reformation allowed states both to respond to the growing societal need for positive legislation and cohesively to consolidate their power in unpredictable and highly contingent societal contexts. In the first instance, the recurrent gathering of parliaments in different post-Reformation European states had the practical purpose that, both factually and symbolically, it gave a broad foundation to the state, and it permitted the state to articulate new forms of legitimacy and inclusivity in face of new uncertain requirements for statutory legislation. In addition, however, the state's growing constitutional integrity had the outcome of giving a corporate or organic density to the emergent structure of the state, and it infused the state with a personality that allowed it, even in absence of conventional justification, positively to underwrite its power and more coherently to support its acts across the diverse functions and the geographical and temporal distances that it now incorporated. The increasing role of parliaments and estates at this time thus acted to resolve a positive/definitional problem for the state, and the expansion of a representative constitution, or a body of public law inside the state, allowed states effectively to organize the abstraction of their power by reflecting their power as consensually founded, and, to an increasing degree, to use their power as a constant, positive and evenly inclusionary resource. Both practically and conceptually, in sum, the rise of constitutional principles after the Reformation was a response to the increase in the positive contingency and the uncertainty of the political power which states had at their disposal, and constitutional mechanisms provided an inner apparatus in which states could control and gather support for their newly abstracted reserves of power. The constitution made it possible for states to absorb their growing positivity, and to mobilize reserves of power in settings in which power had become simultaneously condensed and uncertainly authorized. After the Reformation, in consequence, a constitutional model began to emerge in which the state assumed all political power in society for itself, in which external – either religious or

local – power structures were increasingly assimilated into the positive form of the state, and in which states utilized consensual techniques of public law to produce and to account for growing reserves of positive political power that they contained.

Constitutions and fundamental law

These constitutional developments in sixteenth-century Europe were also flanked by the emergence of a doctrinal corpus of ideas which began to explain the positive unity and autonomy of states in consistent fashion and proposed fixed categories to account for the power of states. In the first instance, the aftermath of the Reformation in many societies saw the formulation of a strong doctrine of *fundamental laws* (*leges fundamentales*), which, often sustained by ideas of natural law, was used to express the form and content of state power. This theory, based in the claim that states were defined and constrained by a distinct and stable body of inviolable legal norms, clearly had its origins in the judicial ideals of the Middle Ages, and it reflected the medieval belief that regal power was curtailed by customary rights and privileges. However, in many ways this doctrine differed notably from the legal maxims of the later Middle Ages, and it mirrored the rise of the state in its distinctive modern positive form: as such, it marked the formation of a distinct and specialized corpus of *public law*. In particular, this doctrine tended to renounce the principle that fundamental laws were derived from societal norms or conventions existing outside the state and placing external limits on state power. Instead, albeit tentatively and without clear or linear conceptual certainty, it began to propose a definition of statehood that accepted the growing abstraction and relative monistic autonomy of the state, and that insisted on the state's fundamental-legal or constitutional form in order, specifically, to preserve the state's internal abstraction and to prevent the re-submergence of statehood into its personal or societal origins. The longer aftermath of the Reformation, thus, witnessed the development of a normative constitutional doctrine that clearly reflected the growth and centrality of the state and began to fashion a model of legitimacy to cement the power of states constructed as autonomous orders. Indeed, just as the most rudimentary elements of public law had emerged after the investiture contests as concepts that intensified the abstraction of political power, post-Reformation doctrines of fundamental law began to offer concepts of legitimacy that

enabled states to retain inner consistency and autonomy and more reliably to produce and utilize power as a positive societal facility.

The rise of the doctrine of fundamental laws was evident in most societies that experienced a Reformation. As discussed, in the Holy Roman Empire the idea that the imperial state was at once formed and constrained by acceded legal principles was prevalent by the first half of the sixteenth century, and electoral compacts possessed a semi-contractual status as early as 1519. However, the later sixteenth century witnessed a deep reinforcement of the doctrine of fundamental laws: as mentioned, in the years after 1600 the imperial state was commonly defined by a body of organic laws that clearly differentiated it from any factual persons that temporarily utilized its power. In this respect, notably, between 1519 and approximately 1600 the principle of fundamental laws was transformed from a doctrine of practical external compacts into a theory of the state's internal organic personality. By the early seventeenth century, this doctrine found accentuated expression in the works of Althusius, who argued that any legitimate polity must be structured by pre-existing invariable laws, and it must legislate in accordance with absolute principles of natural right. Althusius argued that 'universal law' was 'the form and substantial essence of sovereignty [*majestatis*]', and he described all members of the polity, including the prince, as bound by such universal law (1614 [1603]: 174, 177). This doctrine, although clearly insisting that laws placed strict checks on state power, changed the substance of earlier constitutional theory as it observed fundamental laws as *internal* components of the state and began to imagine the state as a legitimately autonomous actor, capable of utilizing an abstracted account of its own legal structure to produce and reflect internal justifications for its power. The emergent doctrine of quasi-natural fundamental laws thus described a transformation in the inner structure of the state, and it allowed the state to construct a highly contingent and generalized analysis of its power, which, in relative indifference to external agents, it could propose to accompany all acts in which it expended its power. This subtle change in the construct of fundamental laws in the sixteenth century projected a positively consistent and self-contained model of statehood, and it acted, not legally to circumscribe, but in fact to produce a conceptual design to maximize the amount of power contained within the state and dramatically to facilitate societal expenditure of political power.

In England, the idea that the state was bound by a set of fundamental laws and inviolable institutional arrangements was also well established