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

by the later sixteenth century. In its original implications in the English setting, this theory pulled in two distinct, yet also residually overlapping, directions. On one hand, this doctrine accentuated the external common-law basis of the English constitution. In the last years of the sixteenth century, for example, Richard Hooker defined the best state as a state 'tied unto the soundest perfectest and most indifferent rule; which is the rule of law' (1989 [1593–1662]: 146). The view that the state was bound to 'fundamentall lawes' was then formulated in *The Elements of the Common Lawes of England* by (the eminent monarchist) Francis Bacon.[33] Underpinning these declarations was the principle that the state obtained legitimacy by accepting the external norm of the rule of law, and – by extension – that the law courts were privileged custodians of the constitution. The first years of the Stuart era, subsequently, gave cause for an accentuation of this debate. By 1610, although stating his respect for the common law, James I began simultaneously to resist informal-customary legal constraints on his power and to increase expectations of monetary supply from parliament. James I in fact ultimately insisted on the *royal prerogative* as an untouchable element of the constitution, and he defined the office of judges as to 'interprete the law of the King, whereto themselves are also subject' (1994 [1616]: 206). This led to a period of prolonged controversy in which parliament and courts assumed growing constitutional prominence, and the common-law principles of non-derogable rights and judicial constraint were invoked with greater vehemence to restrict royal legislation and jurisdiction. For example, in *Dr Bonham's Case* (1610), Edward Coke, dismissed by James I in 1616, famously concluded that courts of common law were authorized both to contradict royal prerogative and even, under some circumstances, to 'control acts of parliament' (Plucknett 1926: 34). In this regard, Coke's ideas looked back to earlier conventionalist theories of statehood, insisting on external customary legal limits on all acts of socially abstracted power. On the other hand, however, a doctrine of fundamental laws also emerged, in which lawyers (at times reticently) construed parliament itself, and legislation endorsed by parliament, as expressions of a fundamental law.[34] In parliamentary debates over supply in 1610, for instance, it was strenuously argued that 'parte of the law of England is that the king cannot impose without assent of parliament' (Gardiner 1862: 58–9), and the principle was asserted that parliamentary

[33] See the Epistle Dedicatory in Bacon (1639 [1597]).

[34] On the shaky foundations of the 'liaison between the Bench and parliament', see Waite (1959: 147).

debate and approval of taxes were integrally aspects of an 'ancient, general and fundamental right' under the English constitution (Tanner 1952: 246). Indeed, Coke himself repeatedly cited acts of parliament in petitioning against royal rulings, and he recurrently defined parliament as the primary institution and guarantor of the common law (Gough 1955: 64). At one point, notably, Coke argued that the 'weighty matters' of the realm 'ought to be determined, adjudged, and discussed by the course of parliament': they ought not to be judged by judges in courts of civil law or common law. He concluded that 'judges ought not to give any opinion of a matter in parliament, because it is not to be decided by the common law' (1797 [1628–44]: 14). For these reasons, the doctrine of fundamental laws in England contained rather conflicting dimensions, and it served simultaneously to constrain and to reinforce the positive power of the state. At one level, this doctrine insisted that statutory legislation was externally bound by the courts of law. Yet, at a different level, it accounted for parliamentary statutes themselves as internally legitimized by fundamental laws. In view of the nuanced equilibrium between consuetudinal constraint and statutory autonomy which it promoted, however, the doctrine of fundamental law in the English setting gradually expressed a model of statehood in which the statutory authority of parliament was tied a priori to an overarching public-legal order, and the exercise of statutory power internally presupposed the recognition of constitutional limits on the use of its legislative force. In this case again, therefore, the expansion of constitutional doctrine also described and underscored the growing autonomy of the state, and it traced a public construction of political power to facilitate the production and use of power in increasingly autonomous form.

It was during the religious wars in France, however, that theories of unshakable fundamental laws received their sharpest expression (Höpfl 1986; Schilling 2005: 375). Sixteenth-century French politics was generally marked by a substantial body of constitutional thought, and at this time it was accepted as a non-derogable principle that France was governed in accordance with customary laws, and that conventions of public representation needed to be preserved.[35] For example, Jean du Tillet argued that, although monarchs stood above legal conventions and were entitled to introduce statutes and change laws, they were obliged to seek wise council and respect the customs of the people (1579: 96). Innocent Gentillet argued that the kingdom of France was founded in

[35] For a typology of these arguments see Jouanna (1989: 167, 325–6).

'good laws', governed by kings advised by royal councils and benefiting from the 'good and virtuous advice' of the Estates-General and provincial assemblies (1609 [1576]: 82, 88). Pierre Rebuffi, although accepting the need for strong royal power, also argued that princes wishing to pass laws required both the approval of God and the consent of the people (1581 [1550]: 18). Bernard de Girard du Haillan developed the most institutionally refined version of these claims, and he asserted that all princes were bound to principles of justice enunciated in courts of law, and that legitimacy in the exercise of power presupposes communication between the monarchy and the people through estates (1572 [1570]: 5, 27–8). Indeed, Henri II was instructed in 1549 that the 'true and solid glory of the King' was evident in his willingness 'to submit his highness and majesty to justice, to rightness, and to the observation of his ordinances' (Zeller 1948: 80). These ideas clearly fostered a limited constitution in sixteenth-century France: through the era of religious transformation it was progressively accepted that the monarchy was constituted around six fundamental laws, acknowledged as 'unchangeable and inviolable' (Doucet 1948: 66), which included laws regarding royal succession, regency, the inviolability of Catholicism as the state religion, and the inalienability of the royal domain. These principles acted to tie the monarchy to a minimal constitutional order, and to abstract a minimally independent public personality for the state (Mousnier 1974: I, 505).

It was among the most adversarial parties in the French wars of religion, however, that the strictest and most compelling principles of fundamental law were formulated.[36] Among the Calvinist theorists of this time, Théodore de Bèze argued that the foundations of a polity must reflect divine law: no people, he claimed, was allowed to form a state in contravention of God's law, and the power of each state had to be constitutionally limited, so that lower magistrates could remove sovereigns from office if they tended towards tyranny (1970 [1574]: 44–5). In this, de Bèze employed principles of neo-natural law in order to construct a fully constitutional model of state legitimacy, which made the power of the state at once absolutely contingent on law and absolutely distinct from those persons who utilized its power. The radical constitutional ideal of the state typical of French Calvinism culminated in the notorious anonymous pamphlet, *Vindiciae contra Tyrannos* (1579). This pamphlet in fact gave earliest expression to the modern concept of

[36] In agreement, see Schilling (2005: 375).

legitimacy, and it defined the legitimate state as a state acting in compliance with legal norms external to the monarch. It concluded that 'legitimate princes' are those who 'receive laws from the people' and are bound by a double legal obligation, both to the people and to God (Celta 1580 [1579]: 105, 136). Such abstracted views were not the exclusive domain of the Huguenots. On the contrary, the theorists of the Catholic League also expounded a doctrine of fundamental laws to define state legitimacy. The *ligueurs* argued that the monarchy was accountable to absolute and quasi-theocratic principles of natural right, that, in consequence, the monarchical state was subject to inviolable laws, and that monarchs were to be appointed by the people and were commissioned by the people to preserve the true faith.[37] Both extreme camps in the era of religious war, thus, endorsed a universal model of state legitimacy, in which religious and consensual rights of subjects articulated a clear distinction between the legal order of the state and persons momentarily using its power, and it fully authorized the reclaiming of state power from rulers in breach of the constitution.

Both at a practical and at a conceptual level, consequently, the formation of European states as increasingly unitary and increasingly positive actors after the Reformation produced a deep need for a conceptually articulated constitutional apparatus in the state. This was reflected in the first consolidation of modern public law. European societies, divided by bitter religious controversy and subject to a dramatic positivization of their political foundations, sought uniformly to produce patterns of legal consistency and popular inclusion in order to express and preserve their political power. In particular, the idea of the state as constitutionally formed by abstract fundamental laws began to emerge as a conceptual structure through which states could observe the sources of their power as distinct from local persons or agreements and as *internal* to their own structure. In distinction from their pre-Reformation prototypes, this enabled states, however precariously, to acquire legitimacy for their political order in a highly volatile social and intellectual landscape, to produce and utilize their power in increasing autonomy, and to adapt their political power to new degrees of positivity and inclusion. At face value, self-evidently, debates about fundamental law often had little connection with the positivization of power or the acceptance of the contingency of state authority. On the contrary, in the

[37] For example, see Cromé (1977 [1593]: 54, 78). On the constitutional tendencies of the *ligue*, see Constant (1996: 169, 243).

setting of the French wars of religion much constitutional doctrine aimed at the establishment of a quasi-theocratic magistrature, and it was expressly shaped by a rejection of positive constructions of the law. For this reason, it has been widely observed that subsequent processes of state formation, particularly in France, reflected an endeavour to release the functional structure of the political system from religious controversy and to stabilize a de-theocratized political apparatus above the violent antagonisms prevalent throughout society.[38] This argument has clear factual validity, and it is not contested here. In fact, before and during the French wars of religion more positivist theories of state also began to gain momentum. Certain theoretical factions, looking forward to the simpler statism of the seventeenth century, began to promote an account of the state as indifferent to religion and determined solely by political laws (L'Hospital 1824 [1560]: 394–5). However, beneath the surface of the theocratically charged constitutional doctrines of the protagonists of the wars of religion, the idea of fundamental laws also served, in slow reflexive fashion, to outline the contours of a concept of statehood in which the law expressed a clear distinction between the state and the persons using its power, and in which – accordingly – the state, even where defined in theocratic categories, was able to propose a positive and internalistic source for its authority, which substantially augmented the power stored in the state. The translation of dispute over positive law into debate over divine law enabled states to detach their legal sources from specific persons, customs or privileges and to extract from their own functions a highly coherent definition of their power. This, in fact, formed a definition of their power, strictly, under *public law*: it was a definition which states could separate from external laws and from their own momentary operations, and which they could stabilize in their own apparatus as a static legal self-construction. States were then able to remove this self-construction from factually existing social conditions and internalize it as a clearly articulated and internally perennial justification for their functions. This, in turn, helped states to satisfy the requirements for inclusivity and legitimacy arising from their newly acquired positive fullness of power, and it enabled them to generate an autonomous description of themselves to differentiate, unify, simplify and authorize their power in their diverse operations.

[38] This point is a commonplace in historical literature. For some influential versions of this see Oestreich (1969: 190); Koselleck (1973 [1959]: 11); Saunders (1997: 89).

The extreme polarization of legal debate in the religious controversies after the Reformation might, in consequence, be viewed as a moment in which European societies subjected the positive form of the law to most intense dispute and contest, but in which, even counter-intentionally, they extracted a model of statehood capable of producing and using political power in heightened positive and autonomous fashion. The constitutional idea of the state as containing and constrained by a corpus of natural or fundamental laws, above all, began to allow states to generate power at a growing level of inclusivity and iterability and more easily to satisfy the requirement for political decisions (statutes) characteristic of early modern societies. The constitutional principles of fundamental law and natural law became devices through which states sought to imagine their own unity and inclusivity and in which they devised a unitary internal construction, distinct from the semi-private dualistic constitutions of medieval society, to support and connect the varied acts of power's application. Public law progressively emerged as a construction of the state which transformed the private constraints on state power of medieval constitutionalism into an internal autonomous description of the state, and as such it greatly augmented the volume of power that the state contained. As in earlier periods of state formation, in other words, in the Reformation and its aftermath, it was the evolving concepts of constitutionalism that made the positive production of power, and resultant forms of statehood, possible, and the growing abstraction of political power presupposed and relied on a constitutional apparatus for its effective usage and production. Each incremental step towards positive statehood was mirrored by an increase in the integrity and abstraction of constitutional order. The formation of the constitution as a body of public law, internal to the state, marked a decisive transition from the weak statehood of medieval society to the stronger statehood of early modernity.

Early modern constitutional conflicts

Despite the impetus towards political concentration and constitutional formation after the Reformation, in early modern Europe many states proved unable to condense their functions into a durable unitary constitutional structure. In many instances, states were deeply strained by the degree to which they became objects of general politicization, and they fragmented, both practically and conceptually, under the pressures caused by their need to produce power to incorporate a large volume of

social exchanges, many of which they were forced to hold at a high level of internal intensity. In consequence, few early modern European states reached a conclusive constitutional settlement that served permanently to defuse their inner antagonisms, to unify their political functions or to offer a final set of public principles to accompany and positively to authorize their laws. In particular, most early modern states struggled unitarily to integrate the diverse social interests which they had previously reflected in a dualistic constitutional structure, they encountered difficulties in applying power as an even, unified and public resource throughout society, and they were often brought to crisis point by debilitating conflicts between centralistic and dualistic constitutional forces in society. These conflicts normally became evident in questions concerning legal status and monetary supply, and throughout the course of their development in the early modern era European states tended prominently to externalize their structural weaknesses and lack of public cohesion in relation to these questions.

The intensification of statehood during the Reformation era, in short, did not lead to a conclusive process of state building, and some unitary patterns of state construction were less effective than others. Dualistic contests between political actors and private centres of interest remained dominant political determinants throughout early modern European history, and most societies struggled to distil political power in a positively autonomous or reliably integrated apparatus. Indeed, the defining political problem in most European societies of the post-Reformation period centred enduringly (as before the Reformation) around the constitutional instruments which they employed for extracting power from private/personal privilege and for solidifying their foundations in relation to centrifugal social groups (especially the nobility). Post-Reformation states, therefore, can be broadly categorized in terms of the constitutional mechanisms which they deployed for maintaining political power at an adequate level of abstracted autonomy. A comparative analysis of different states indicates that some constitutional designs were more or less effective than others in preserving political power at a level of usably differentiated abstraction and in enabling states to utilize political power as a positively constructed object.

The constitution of absolutism

Some states in early modern Europe reacted to the increasing societal requirement for abstracted political order by seeking to suppress, in part

by coercive means, the dualistic/consensual apparatus of government that had emerged in the Middle Ages. Initially, this was most pronounced in societies that did not experience a Reformation, and whose states were not required to expand their inclusionary processes to legitimize religious transformation. Indeed, some states developed strategies for the unitary concentration of power that, to some degree, enabled them to circumvent or weaken established constitutional procedures of delegatory consultation in respect of legal and fiscal disputes. It is for this reason that some states in early modern Europe are habitually seen as embodying a system of governmental 'absolutism'.

Spain

One early example of a state based in a selective suppression of medieval constitutional organs was Spain, where the establishment of the Catholic monarchy after 1469 and the subsequent assumption of power by the Habsburgs after 1516 created a state with features later typical of 'absolutism'. That is to say, a state began to emerge in Spain in which leading actors cemented their power by centralizing administrative structures, suppressing seigneurial privileges and attempting to secure increased direct monarchical control of the judicial and fiscal organs.[39] In particular, this state (albeit to a debatable extent) curtailed the representative capacities of the Cortes, and the monarchical executive was able, to some degree, to stabilize its power above local centres of noble deputation and authority in society. The foundations for this system were set as early as 1348, when the Ordenamiento de Alcalá confirmed the jurisdictional supremacy of the monarchy in Castile.[40] Subsequently, the position of the Cortes came under further attack, and by the sixteenth century the number of representatives was reduced and the legislative capacities of the Cortes were limited to rights of voting over taxation and presenting grievances. Throughout this period, it was commonly acknowledged (in principle, at least) that the monarchy possessed a fullness of power, and, both in Castile and later in Aragon, the constitutional power of the nobility was diminished. This was spelled out by Bernabé Moreno de Vargas, in whose *Discourses on Spanish Nobility* noble rights were seen as derived from the monarch and kings exercised powers as *monarcas*

[39] For succinct analysis see de Dios (1985).

[40] This should not be taken too literally, as it preceded the realm of Enrique II, who was profligate in ceding jurisdiction over land and cities (Nader 1990: 77).

absolutas (1622: fol. 7). After 1664, finally, the Cortes of Castile was reduced to an organ possessing mainly ceremonial status.

The weakening of the Cortes in Castile was not a linear or conclusive process, and well into the early modern era the Castilian Cortes continued to play a role in deliberating on decisions regarding key matters of state – that is, war, peace and tax. Indeed, it is well documented that the Cortes remained intermittently influential until the later seventeenth century, and that the strengthening of central monarchical power by no means incapacitated the Cortes.[41] It is now widely accepted that, owing to the parlous finances of the monarchy, the Castilian Cortes managed to claw back some power in the later sixteenth and earlier seventeenth century (Jago 1981: 310; Elliott 1986: 96; Thompson 1994: 190), and it has even been claimed that the Cortes retained a 'formidable position' in Castilian government (Thompson 1990: 81). Long parliamentary sessions were normally held precisely in periods of most sustained monarchical authority; the monarchy was discernibly reinforced in periods of heightened reliance on the Cortes. In Aragon, moreover, where noble powers were more solidly preserved, the Cortes retained greater influence than in Castile: the Aragonese Cortes, consisting of permanent deputations since the early fifteenth century, was integral to the legislative process and its competences were clearly formalized in an official protocol of the 1580s, and by the late sixteenth century a body of constitutional law existed defining the Cortes as an organ representing the entire nation.[42] In fact, in both Castile – and, to a substantially greater degree – in Aragon, at the inception of the early modern era, period constitutional arrangements settled around a pattern of government by compactual constitutional rule: *pactismo*. *Pactismo* described a constitutional regime in which the monarchy obtained licence to legislate by acknowledging in contractual fashion certain private legal and judicial privileges existing in society, in which the passing of particular laws was tied to clear preconditions and redress of particular grievances, and in which delegates of privately privileged groups granted taxes to the monarchy in return for singular acts of redress and for the preservation of particular customary rights (Torres 1989: 122).

[41] This view is especially associated with the work of Charles Jago (1981; 1985). Notably, though, it is also documented that during the reign of Philip IV the Cortes were in session for thirty of forty-four years (Stradling 1988: 134).

[42] See de Blancas (1641: 196).

Despite this, nonetheless, it remains arguable that early modern Spain was marked, however variably, by monarchical attempts to undermine the Cortes, and the Cortes was widely perceived as a bastion of noble privilege against the monarchy. This was manifest in the ultimate suspension of the Cortes. It was also manifest in the fact that successive monarchs sought to circumvent the Cortes, either by negotiating with other bodies for supply or by selling charters to corporate actors, usually to towns (Nader 1990: 158). Indeed, a tendency towards the weakening of representative power might also – more arguably – be identified in the system of *pactismo* itself, which appeared, superficially, to support the position of the Cortes. Owing to the model of *pactismo*, the representative functions of the Cortes was at times restricted to the brokering of particular compacts and specific agreements. The establishment of private pacts as the basis of monarchical rule meant that the convoking of assemblies and the recognition of general laws did not, even within a limited political society, involve a process of fully general inclusion or representation: assemblies acted primarily to provide particular legal – or even *civil-legal* – protection for private arrangements and legal privileges (Torres 1989: 126; González Antón 1989: 220). Indeed, it is arguable that *pactismo* privatized the monarchy as a whole, and thus eroded the public integrative structure of the state in its widest dimensions. Under such conditions, the fully representative qualities of the Cortes were diminished, and it acted primarily as a particularistic bargaining agent and source of judicial arbitration. To be sure, even when the meetings of the Cortes became sporadic and less formal, it retained a position within the constitutional order of the state. However, *pactismo* might be seen as a constitutional order that limited the general representative functions of parliamentary organs, and in fact implicitly re-privatized and weakened their abstracted and inclusionary force.[43]

At one level, in consequence, the model of government in early modern Spain acted as a response to the growing requirement in society for condensed statehood, and during the rise of the Spanish Empire it manifestly established a political apparatus capable of high levels of military mobilization. Indeed, this political system can easily be seen as a distinctive type of constitutional rule, which stabilized the monarchy in its institutional form and used selective means of societal

[43] Notably, *pactismo* was despised by the 'popular mass' (Maravall 1972: 290). On the particularism implicit in *pactismo* see further González Antón (1989: 220).