

# INTRODUCTION

## EMPIRES AND CONSTITUTIONS: SOME DEFINITIONS

The first claim in this book is that the development of constitutional law has a dialectical relation to imperialism, and to military forces that accompany imperialism. From their first emergence, modern constitutions formed components in lines of state-building connected to inter-imperial rivalry, and they reflected the interlinking of states in a transnational military system. In this process, imperialism shaped the creation of constitutions in different ways. Many states acquired constitutions as they were separated from existing empires, so that national self-determination became the wellspring of constitutional law.<sup>1</sup> With some qualified exceptions after 1848, constitutions, as a rule, established normative foundations for governments, based in ideals of national citizenship, which were distinct from the institutional substructures imposed by imperialism. In many contexts, however, constitutions were built on norms of citizenship established in empires to serve imperialist ends. Many states acquired constitutions as they reconfigured their foundations while remaining empires, and many states became empires as soon as they acquired constitutions. Well into the twentieth century, a crisis of imperialism lay in the background to the formation of much constitutional law, and most constitutions were written so that states could adapt to or recover from such a crisis.

<sup>1</sup> One historian states simply that the constitutional moments that occurred in the American and French Revolutions started the longer process 'later described as "decolonization"' (Ahmed 2014: 1). In a similar context, one historian argues that the momentum towards 'self-determination and national sovereignty' was initiated in the American and French Revolutions (Üngör 2011: 2).

This meant that many constitutions replicated imperatives and conflicts inherent in imperialism, and many states constructed on a constitutional basis soon perpetrated actions typical of empires. Even in constitutions that detached the space occupied by nation states from empires, constitutional law rarely merely supplanted imperial rule, and constitutionalism usually evolved as a legal order for managing state actions in a form close to imperialism. As outlined in Chapter 1, the original forces that created constitutional law resulted from a reorganization of national societies in the face of imperial violence, and this origin frequently shaped societies in distinctive imperial fashion.

This background explains the title of this book, which defines its primary object as *post-imperial* constitutions. Many books have examined the development of *postcolonial law* in contemporary society. However, this book claims that the concept of *post-imperial law* most adequately captures the construction of modern constitutional order at the global level. It uses this term to describe how imperialism formed an overarching structure that diversely shaped the global development of constitutional law both in colonizing and in colonized zones. In so doing, it uses the prefix ‘post’ in ‘post-imperial constitutionalism’ carefully. This prefix is employed to indicate that constitutions typically emerged in different parts of imperial systems. In such contexts, constitutions were established to place government on discernibly national and symbolically consensual foundations, specifically opposed to imperial patterns of legitimacy. Yet, in so doing, they frequently perpetuated imperialism at the interstate level and reproduced or even intensified features of imperialism in domestic societies, so that imperialist impulses remained palpable in the constitutional polities that replaced, or grew within, empires. In many contexts, constitutions constructed national societies in a form that extended imperial modes of social formation, and, over long historical sequences, they often served the constant reconfiguration of imperialism. At least until 1945, many constitutions were post-imperial and imperialist at the same time, as they articulated patterns of legitimacy separate from empires but also reproduced imperialism as a global system. The concept of the *post-imperial constitution* is selected here as a dialectical term to interpret these realities. Strictly, only the British constitution can be classified, simply, as an *imperial* constitution.

The second claim in this book is rather more straightforward. This claim is that the link between imperialism and constitutionalism meant that constitutions promoted military violence in various ways. It is

often noted that the transition from empire to nation is a primary cause of military conflict, a fact explained by such factors as border disputes and ethnic irredentism.<sup>2</sup> On the account offered here, however, a deeper structural nexus exists between constitutions, imperialism and violence. Typically, constitutions were formed in environments marked by increased militarization of inter-imperial relations. In such contexts, they were designed to establish a sovereign order for the control of military force in society. A primary function of most constitutions was to separate citizens of one state from citizens of other states, defining national membership as a source of military duties in a system of military antagonism.<sup>3</sup> Moreover, the birth of constitutionalism coincided with the arming of national citizens, most of whom were not professionally trained as soldiers, a prospect that had alarmed earlier regents who feared an armed populace would turn against them. In such contexts, most constitutions created an enduring source of militarism in societies defined by constitutional rule. Since the advent of constitutions, self-evidently, many states without constitutions have declared war, and many have experienced civil war. No claim is made here that constitutional organization is an exclusive cause of military conflict, internal or external. However, constitutions usually brought substantial changes in warfare. Most states situated on a trajectory of constitutional organization experienced devastating war.<sup>4</sup> War between such states was qualitatively different from earlier wars, as warfare defined the conditions of citizenship in belligerent societies, and it entailed conflicts between constitutionally implicated citizens, in which one society, as a whole, fought against a different society, as a whole. In such wars, states frequently mobilized larger armies, and they sacrificed a larger number of soldiers than had earlier states.<sup>5</sup> Moreover, as

<sup>2</sup> See Wimmer 2013: 23–24, 110. On my account, the division sometimes posited between ‘revolutionary wars’ and ‘wars driven by the politics of nation building’ is not fully tenable (Wimmer and Min 2006: 876). Major revolutionary wars were caused by imperial fragmentation and nation-building was conducted in revolutionary fashion (France 1792; Russia 1918). Most importantly, revolutionary wars often transformed empires in ways analogous to secessionist wars, as they nationalized core states within empires.

<sup>3</sup> See pp. 134–5, 137, 197–8.

<sup>4</sup> Following one classic account of the correlates of war, nine of the ten states that lost most citizens in battle from 1815 to the 1980s were on a trajectory of constitutional organization and experienced intense conflicts as a result (Small and Singer 1982: 179). These states are Austria, France, Germany, Italy, Japan, Russia, Spain, Turkey and the UK; China is the exception. In each case, warfare tended to occur after or in the longer wake of intensified constitutional experiments, and constitutions were substantially forged in war, of different kinds, usually linked to imperialism.

<sup>5</sup> See pp. 68–70.

constitutions made all members of society present in warfare, they militarized domestic societies, and conflicts between domestic groups were inflamed by the fact that these groups encountered each other, as members of the same nation, in military environments.

The term *militarism* is used here in encompassing sociological fashion, and it extends further than most definitions, which tend to focus on civil–military relations, foreign policy and governmental use of military force. Militarism here describes a condition with some or all of the following features: (1) military prerogatives shape political institutions and military actors establish primary obligations for subjects in society; (2) military groups may have privileged social positions and define conditions of access to political power; (3) military demands and duties pervasively shape social and political behaviour beyond the strict military domain; (4) internal social conflicts are likely to engender and be resolved by military violence.<sup>6</sup> Militarism, further, often results in war – at least it intensifies conflict potentials in society likely to lead to war. The distinctive aspect of this definition is that it identifies militarization both in vertical and in lateral interactions in society, and it examines how factors in both dimensions create military violence. As explained in different chapters of this book, many major modern wars have been linked to contests over citizenship in the lateral dimension of society, resulting from constitutional organization. In most polities on a constitutional pathway, constitutions have created a deep causal convergence between intra-societal and international conflict, such that internal conflicts originated in, and in turn intensified, external military pressures.

On this dual premise, this book charts the long-term evolution of constitutional law since the last decades of the eighteenth century, when constitutions first became central institutions in governmental order. It shows how constitutions were initially defined by military imperatives arising from imperialism, which imprinted a military form on nation states. This form was globalized over time, with variations. This book then shows how, until relatively recently, constitutions produced ideas of governmental legitimacy that tended to induce

<sup>6</sup> This approach differs from accounts of militarism focused solely on civil–political relations. It is close to analysis of militarism as a cultural condition (Vagts 1981: 13) and it follows descriptions of militarism as a diffuse set of orientations that shape identity and nationhood (see Ben-Eliezer 2019: 26). However, it implies that, in most militarized contexts, external and internal militarism overlapped.

military violence, so that constitutionally ordered states frequently engendered militarism, both in their own societies and beyond.

Imperialism resists easy definition, and the ambiguities inherent in this concept are often mentioned in this book. For the sake of clarity, the following definition of imperialism is adopted. Imperialism is construed here as a form of sociopolitical administration that involves the extraction of land, labour and resources from prior inhabitants of a territory by colonizing agents. This administration is organized in a system that the parties from whom land, labour and resources are extracted cannot unilaterally terminate or even modify. Different groups are governed by different means under varying legal norms, enforced with different degrees of consensus and coercion. Military force is fundamental to imperialism, and relations between metropolitan and colonized subjects are sustained, whether directly or remotely, by military means. The military usually retains a key role in supporting governmental coercion in colonial territories; in fact, colonial societies retain features of military occupation.<sup>7</sup> Naturally, the daily government of colonized societies inside empires may rest on conventional agreements between implicated groups. By the twentieth century, imperialism had lost some characteristics of simple military occupation.<sup>8</sup> For instance, the British Empire was structured around a system of indirect rule that involved the co-opting of elites into colonial service and the avoidance of manifest military repression. Long before the twentieth century, the Ottoman Empire had established a complex semi-consensual patchwork to support imperial authority. Yet an empire is a type of polity in which power has violent purposes, so that – with internal and external variations – social roles are deeply defined by the extraction and enforcement of violence. As examined repeatedly below, one vital feature of empires is that they create diffuse polities in which the legal limits of the polity are hard to determine. Centrally, subjects of empires are often also military adversaries of empires, such that external war and civil war converge.

The third claim in this book is of a broader nature. This claim is that constitutions reflect an uncertain distinction between nations and

<sup>7</sup> See pp. 149–51. One recent account of British colonization in India states that, in the early colonial period, the military was the ‘marrow’ of the imperial regime. Then, the later colonial period still showed the ‘preponderance of the military over all other competing demands’ (Sehgal 2021: 235–237).

<sup>8</sup> See p. 169.

empires, and they create a system of administration and legitimation in which the internal and external acts of states are not fully separate.

It is a sociological commonplace that the period since the eighteenth century witnessed the rise of modern sovereign states exercising control of the means of violence inside national society (Weber 1921/2: 30). Moreover, it is often argued that nation states are ruled by governments based in a clear distinction between internal and external functions. Such analysis implies that, through their development, modern states became less disposed to violence in their internal actions than in their external behaviour; this view is supported by renowned sociologists and observers of international politics (Elias 1976: 354; Linklater 2017: 422).<sup>9</sup> However, this book challenges this view, claiming that such views are selectively focused. In modern history, the dominant political form has been, not the sovereign *nation state*, but the diffuse *empire*. It was only after 1945 that nation states replaced empires as primary systems of social organization. In most contexts, national political institutions have been profoundly shaped by the intersection between empire and nation, in which traditional concepts of sovereignty cannot be applied without qualification.

For example, aspects of the above definition of imperialism can be applied to many modern nations, and, beneath the surface of many national societies, we can observe unilateral acts of territorial annexation. Most modern European states have their origins in diffuse composite territories, which were unified by incremental processes of centralization in which military actors performed primary roles.<sup>10</sup> Broadly, many European states developed through a two-stage pattern of imperialism. First, in their original emergence, European states developed through personal imperialism in which regents allotted privileges to local landholding elites to secure their frontiers, so that governments acquired national form by establishing lateral attachments with politically relevant actors. Second, in their modern form, most states developed by transforming such lateral agreements into vertical agreements, which reduced the power of landholders as a precondition for territorial order. This process was usually realized as states imposed direct military duties on individual citizens, so that

<sup>9</sup> Interestingly, Michael Mann (2012: 361) is an expert in interpreting state formation and imperialism, but he does not link his formative analysis of the states to his discussion of empires.

<sup>10</sup> One historian has claimed that Great Britain was the only non-unitary state in eighteenth-century Europe (Higginbotham 2005: 70). However, Poland, Prussia, Austria (if it existed) and (more arguably) Spain were composite states.

they integrated their citizens through military organizations. In different ways, the spatial processes that created national societies were not categorically distinct from imperialism. In fact, common nation-building trajectories often formed a template for modern empires.<sup>11</sup>

In addition, most European states were formed as they extended their institutional capacities outwards, so that the internal construction of state institutions coincided with the external imposition of imperial rule. Of course, Charles Tilly diagnosed the deep link between state formation and military mobilization and the equally deep link between military pressures and democratic integration.<sup>12</sup> Yet he was less attentive to the fact that, in most historical settings, state formation depended on military circumstances related to imperialism.<sup>13</sup> Before the rise of modern overseas empires, states were scarcely formed on a national design; at this time, most nations evolved in composite form and national governments had limited reach in domestic societies. Most notably, before the rise of modern empires, states rarely fought wars as nations, and the military capacities of states were limited. Before the eighteenth century, most large armies were recruited on a transactional basis from military entrepreneurs and they were deployed in wars for private interests – usually because of dynastic rivalries, often caused by succession crises. Through the eighteenth century, armies increased in size and were more strictly subject to national control, but they were not primarily recruited from national populations. In fact, the disarming of national populations, ensuring some distinction between civil and military functions, was a vital premise for early modern government, and it persisted until the later eighteenth century.<sup>14</sup> It was only after the constitutional revolutions in the late eighteenth and nineteenth centuries that armies were mainly recruited amongst national citizens, defined by national affiliations, such that states obtained direct purchase on their citizens. This state-building moment was closely connected to imperialism, and it reflected a deep intensification of inter-imperial conflict. In most settings, this development profoundly shaped the societies that provided soldiers. Societies acquired more integrated national form as states promoted the general extraction of military force, which supported the building of centralized institutions, linking all persons directly to the

<sup>11</sup> See discussions in Chapter 1.

<sup>12</sup> Tilly (2004: 89–90). See for similar analysis Levi (1996: 109).

<sup>13</sup> The common impact of imperialism on citizenship formation is not noted in Mann's (1987) typology of paths to citizenship.

<sup>14</sup> On this point, see excellent discussion in Rink (1999: 37).

state. It was at this time that wars presented legitimational challenges for all society, as military initiatives required governments to account for their actions amongst the citizens affected by them. In many cases, this defined the basic patterns of citizenship that typify modern nationhood, and citizenship evolved as an internal attachment between states and citizens as states widened their reach externally. These processes normally occurred because military force was required to govern external territories and citizenship rights were promoted as social agents were linked to the state as providers of military force.

Typically, in sum, nation states hardly existed before they were empires, and empires were rarely constructed by fully formed nation states. Some historians argue that Russia was unusual amongst modern polities as it was an empire before it became a nation state.<sup>15</sup> However, nothing is peculiar in this feature. Great Britain approached territorial integration as it became an empire in the eighteenth century. It then established a shared legal-political regime for its citizens through the late nineteenth century, closely mirroring stages of external expansion. The USA approached consolidation as a nation state as it annexed territories previously held by other peoples and empires; in essence, it became a nation state as it became an empire.<sup>16</sup> In the case of Germany, national integration and imperialism interacted inseparably in creating the first modern German nation state (termed an empire – a *Reich*) in the 1870s. Similar processes can be observed in Italy, Spain, Japan and, later, in Poland. In Austria and Turkey, the later nineteenth century was dominated by the endeavour to transform empires into polities supported by national or semi-national affiliations.

In each point, many governments reinforced their sovereign status through acts of control in which a strict, positive distinction between the inside and the outside of national society was not manifest. Generally, the rise of imperialism was not a phenomenon that was simply external to colonizing societies. Rather, it was a process that created and transfigured colonizing societies such that, in many cases, metropolitan and colonized regions evolved as two parts of the same imperial society or *imperial system*.<sup>17</sup>

Against this background, this book examines constitutions from a distinct perspective. Nation states and empires are usually seen as

<sup>15</sup> Blauvelt (2003: 42).

<sup>16</sup> Saler (2015: 19).

<sup>17</sup> Here, the book builds on recent historical research. See the critical assessment of the 'notion of a clear-cut break between empire and nation' in Esherick, Kayali and Young (2006: 13). Other



strictly differentiated systems of rule.<sup>18</sup> Moreover, many constitutions were originally legitimated by the claim that they established national governments on foundations that were opposed to imperialism. This was expressed in the first constitutions in revolutionary America and Europe, where constitutional citizenship was defined as membership in a political community decisively distinct from an empire.<sup>19</sup> Still today, constitutions are presented as expressions of nation-building commitments. However, this book shows how constitutions effected complex patterns of transformation in society, and they were mainly used to manage the effects of international pressures. As a result, they often organized societies in a hybrid form between nations and empires, extending imperial logics into national society. Of course, it is essential to differentiate between polities formed at different locations in imperial systems, as metropolitan states and colonial states usually developed on very different constitutional pathways. However, from the eighteenth century, imperialism formed an encompassing world system, and it shaped affected states in partly overlapping manner, regardless of whether states emerged at the metropolitan side or at the colonial side of imperial systems. Quite generally, the book argues that constitutions have typically been imprinted on national societies as the *form of sovereignty* adapted to a world created by imperialism. Owing to this form of sovereignty, constitutions shaped social order around imperatives in which the inside and the outside of national society overlapped, and the distinction between empire and nation was not clear. As discussed in Chapters 1–5, constitutions often distilled constructs of citizenship on premises first used to support empires. In some

historians observe the ‘entanglement of nation and empire’ in European history, explaining how empires were often sites of ‘advanced nation-building projects’ (Berger and Miller 2015: 4–5). The convergence of nation-building and empire-building is central to the observations of Osterhammel (2009: 603), who analyses the period of nationalism as congruent with a ‘world of empires’. Speaking of the Ottoman Empire, one historian focuses on the ‘fraught notion of a break between empire and nation’ (Kayali 2021: 16). One historian proposes the concept of ‘the “nation-state/empire” . . . as a basic unit in an analysis of international politics for the period between the late nineteenth century and 1945’ (Akami 2012: 178). See for overlapping conceptions Khalid (2006: 251); Kamisek (2018: 271); Malešević (2019: 70).

<sup>18</sup> The claim is common that empires are based ‘asymmetrical’ constructions of power and ‘hierarchical relations of law and membership’, while nations are formed through ‘social integration’ in Jureit (2019: 109). For related statements, see Kivelson and Suny (2017: 12). The claim is also frequent that ‘the nation-state tends to homogenize those inside its borders and exclude those who do not belong, while the empire reaches outward and draws, usually coercively, peoples whose difference is made explicit under its rule’ (Burbank and Cooper (2011: 8)). See congruent classical analysis in Eisenstadt (1993: 20).

<sup>19</sup> See pp. 57, 73.

instances, the ideal of national sovereignty condensed in constitutional law had an intrinsically imperial focus. Many states legitimated by ideals of national citizenship were propelled onto an expansionist trajectory, so that they were not obviously separate from empires. At different points in the book, the concept of the *imperial nation* is used to explain the formation of constitutionally ordered states. This view of constitutions is advanced as an interpretive framework through the book. Using this perspective, the book analyses constitutions in different global regions, including Eastern and Western Europe, the Middle East, North and South America, Asia and Africa, as texts that translated imperial impulses into legal-political form.

To examine these matters, this book defines a constitution in the following terms. A constitution is observed here, first, as a legal order that allocates powers in the state and constructs the legitimacy of the state on public premises rooted in consensual attachments between citizens and government. As such, a constitution need not be democratic. Very few constitutions became truly democratic until after 1945. Yet a constitution must contain some commitment to popular electoral representation, and it generates legitimacy by establishing *a norm of inclusion oriented towards full democracy*. On this definition, modern constitutions appeared in North America and Europe between 1776 and 1795. Characteristic of modern constitutions is that they define a legitimate state as one whose authority is based in the *construction of all citizens as politically implicated actors* whose will is manifested through elections, with varying degrees of popular participation. Second, a constitution is observed here as a legal order that presents the state as a public order because it creates rules for the definition and protection of citizens. That is, constitutions present governmental legitimacy as the result of a legal regime to guarantee rights of citizenship, usually granting all citizens certain personal and procedural rights, and assigning rights of political participation to some social groups. This book restricts its focus to states that have entered enduring trajectories of constitutional formation based in this model. For this reason, although China comes into focus at different points in the book, China is not examined in depth.

## CONSTITUTIONS AND EARLY IMPERIALISM

The connection between imperialism and constitutionalism was evident in the origins of constitutional formation. In medieval Europe, many polities developed semi-constitutional procedures for collective

deliberation. Such procedures were usually focused on the conduct of war, and their purpose was both to organize military supply and to ensure the military loyalty of regional elites at the margins of the polity. Subsequently, late medieval Europe witnessed the formation of estate-based constitutions. In such arrangements, the power of estates to influence governmental policy was strongest in times of military activity, in which fiscal demands placed on government were high. In early modern Europe, some states with estate-based constitutions underwent extensive territorial expansion and representative bodies played important roles in subjecting colonized regions to central government. In post-medieval Poland, for example, institutions facilitating political representation were used to connect different parts of the polity as it expanded across large regional spaces.<sup>20</sup> Later, the reinforcement of parliamentary rule in post-1688 England supported the early growth of empire and sustained the fiscal institutions that made imperialism possible. Despite these connections, however, early constitutional systems were largely intended to secure privately financed supplies of troops; such force was usually provided by corporate bodies such as companies, foreign financiers or noble administrative districts. This meant that, to obtain soldiers, governments entered private contracts with military corporations, and constitutions were not required to facilitate the immediate extraction of military capacity from society.<sup>21</sup> By consequence, most constitutions restricted full rights of citizenship to select social groups.

The causal thread connecting constitutionalism and imperialism became most palpable in the eighteenth century. Each major constitutional system formed at this time evolved in a context in which imperialism pervasively shaped processes of polity-building. Each system constructed a legal order designed to promote direct communication between government and citizens, especially in matters relating to military recruitment. At this time, the first written constitutions were implemented in the regions that became the USA, Poland and France, and they established a formally agreed order to legitimate governmental power. These constitutions were created in diverse environments and for different purposes. The federal constitution of the USA was the only national constitution that remained in force for any length of time. However, all these constitutions ordered state institutions in response

<sup>20</sup> This is documented at different points in Polish state formation. See discussion in Mazur (2006: 134) and Kupisz (2008: 25).

<sup>21</sup> See discussion of the end of this system at pp. 47–8, 70.

to imperialism, and all based the legitimacy of government in ideas of general citizenship able to sustain imperialism.

Each early constitution-making situation was caused by the Seven Years' War. This multifocal war involved conflict over maritime domination between France, Britain and Spain, especially in North America and the Caribbean. It also involved conflict for domination in parts of Central and Eastern Europe between Russia, Prussia and the Habsburg dynasty. As examined below, this war created great global demand for military force, and it was conducted in scenarios separated by large geographical distances. Through this war, crucially, European imperialism underwent a deep transformation. Before the eighteenth century, European empires were mainly personal empires or trading empires organized around relatively loose affiliations between metropolitan and colonial regions.<sup>22</sup> By circa 1750, however, empires began to operate as more robustly constructed administrative entities, imposing concentrated military and fiscal domination on their populations. As discussed in Chapters 1–5, the intensification of empire in the eighteenth century was expressed, diversely, in the fact that different empires promoted new concepts of imperial membership, in which the distinction between metropolitan subjects and colonial subjects was reduced. In fact, owing to military pressures, empires began to acquire functions now usually associated with nations, and they promoted increasingly uniform ideas of legal obligation, close to imperial citizenship. Importantly, this transformation of empires was one aspect of a wider process of transformation that occurred in the eighteenth century. At this time, many national societies moved away from patterns of social integration predominantly based in lateral attachments between particular groups and agents towards a model of social integration based in vertical attachments, linking individual agents more directly to state in institutions. The transformation of nations and the transformation of empires at this point were closely linked phenomena.

The transformation of imperialism shaped the rise of constitutionalism in diverse ways. Generally, the rise of imperialism meant that military pressures assumed increased force in connecting state and societal actors. Early constitutions then formed a structural reaction to this change as they enabled governments to produce legitimacy for their actions in societies defined by vertical affiliation and membership. This occurred in variations, some more specific to Europe, some more

<sup>22</sup> See pp. 40, 220–1.

general. Yet, broadly, constitutions responded to these transformations in three fundamental ways.

First, the relation between imperialism and early constitutionalism is seen in the fact that early constitutions established governmental orders that enacted a *legal transformation of geographical space*. This process was already advanced before written constitutions became common. Before the 1780s, most European societies had seen extensive legal codification, establishing shared legal obligations for social actors, which went some way towards placing national societies under a unified legal apparatus.<sup>23</sup> However, early constitutions were written as texts that authorized general legal norms across society, which meant that all persons were connected to governments through formally defined obligations. This transformation marked the beginning of modern citizenship as it created a legal regime bearing equally on all territorial residents, albeit usually with status variations. This was shaped by the principle that mere occupancy of land could not produce binding rights or duties, and that inhabitants of a given territory only entered binding obligations if occupancy of territory was subject to unifying legal duties.

Such legal reorganization was directed against modes of government based in informal authority. In European contexts, it was directed against aristocratic independence. In the Americas, it was directed against colonial rule. In both settings, the legal ordering of social space clearly articulated patterns of imperialism. At one level, legal codification was an act of colonization, as it led to the displacement of local elites from inherited social positions and transposed societal control onto a vertical axis.<sup>24</sup> It tended also to reduce the autonomy of religious organizations and to ensure that the legitimation of authority was concentrated in the state. However, legal codification was usually accelerated in societies in which governments were involved in external military expansion. As discussed below, the supreme acts of legal codification – the creation of constitutions – almost invariably coincided with inter-imperial conflict.

Second, the force of imperialism in shaping modern constitutionalism can be observed in the fact that early constitutions organized political institutions in the face of war. In each instance, constitutions transformed the military orders of early modern society into public organizations in which military obligations of national populations were more

<sup>23</sup> See pp. 72–3, 96, 101.

<sup>24</sup> See p. 96. My account overlaps with Osterhammel's (2009: 168) idea of the 'ordering of space'.

fully controlled by the state. At a fundamental level, the essential legal norms that support constitutions originated in military law. This can be seen through legal-historical analysis. Before the eighteenth century, as mentioned, armies had usually been assembled by groups of nobles, entrepreneurs, and commissioned recruiters, who were bound to their soldiers through private-legal monetary agreements. This contractual relation formed the most sensitive point in early modern statehood, as the private-legal premise of military recruitment meant that armies were costly, unruly and often unreliable. During the emergence of early public law, increasing emphasis was placed on the insistence that regents should possess the sole power to approve military contracts, so that private actors could not raise troops except in the royal name. In the middle part of the eighteenth century, before modern constitutional law was consolidated, military law clearly subordinated military organizations to central authority, and the control of military contracts was an essential feature of the emerging sovereign state.<sup>25</sup> Subsequently, early constitutions built on and enlarged this foundation and reinforced the strictly public-law dimensions of military law. Manifestly, constitutions created representative procedures in which citizens could elect governments, so that states could negotiate directly with citizens about military finance. In this regard, constitutions established agreements between public bodies and citizens to secure military capacity, and they made it possible for governments to rebuild military institutions in rapid time.<sup>26</sup> In most contexts, further, early constitutions tied citizenship to military service and a deep military emphasis was inherent in the legitimational diction of early constitutional law.

Of course, from the 1770s on, most constitutions prescribed procedures to functionally separate government from militaries. This is visible, emblematically, in the 1791 constitution of France, which dictated that the army should be ‘essentially obedient’ and could never assume a deliberative role in politics (Title IV/12). This is also reflected in *Federalist* 41, where James Madison argued that armies pose a constitutional threat, to be checked by provisions that limit the term of revenues granted to them.<sup>27</sup> Such caution remained

<sup>25</sup> See this formulation in France in Briquet (1728: 1–2). For one construction of military law as a fundamental part of public law, see the discussion of Prussia in Müller (1760: 13).

<sup>26</sup> Some observers have noted that constitutional transitions after 1945 brought militaries to central political roles, as armies formed the ‘most organized, national-oriented social force’ (Hinnebusch 1990: 11). However, this can be generalized across most constitution-making scenarios.

<sup>27</sup> References are to the 1987 edition of the *Federalist*, based on the 1787/8 publication (Madison, Hamilton and Jay 1987 [1787–8]: 269).

a common part of constitutional law.<sup>28</sup> Nonetheless, such rules only had superficial effects, and a deep attachment to the military defined the core of early constitutional law. As discussed below, constitutions were formed in imperial states, in colonies and in states acting as both colonies and as empires, and, in each setting, they were used for military ends, to solidify military force in the state. Central to each early constitution was a concept of the citizen, presented as a member of a publicly defined nation, who obtained certain legal-political rights through constitutional law, and who was required, by way of payment for these rights, to perform military service (conscription) for the government. Early constitutions evolved, in essence, as *military contracts* in which the brokering of military supply, which, in private-legal form, lay at the heart of earlier estate-based constitutions, was translated into a system of near-universal public obligations. The basic legitimational unit of the modern political order – the citizen – was constructed as a means of generating military violence for the state. Of course, this unit initially comprised all members of society, whose utility was immediately determined by warfare. However, by the age of total war, women also became citizens through and after war, as warfare integrated women in constitutional bargaining structures because it transformed labour markets and made women indispensable to the government.

In different ways, the military transactions underlying constitutional law resulted from imperialism. In the longer wake of 1648, many European states had – with variations – promoted policies to ensure that armies were centralized and military positions were staffed by accountable officeholders. By 1750, many states possessed substantial standing armies, comprising soldiers paid either directly or indirectly from the public purse. These armies were partly filled by mercenaries and foreign recruits, but they were subject directly to national authority. Over time, however, the pressures of inter-imperial warfare, especially in the Seven Years' War, meant that the maintenance of permanent standing armies became expensive. Accordingly, each early constitution was drafted at a time when states were overstretched by military financing, and they were conceived as instruments to establish new lines of military supply. Further, early constitutions took shape in environments in which governments already promoted in rudimentary form the recruitment of national conscript armies, in

<sup>28</sup> See pp. 68, 77, 213, 245, 256.



which subjects were mobilized as soldiers because of their residence in a particular region. By the later eighteenth century, the reliance of governments on large armies led to the increasing enlistment of conscripts and militias, and the widening of international empires was reflected in the expansion of military service. Militia service began in France in the 1680s, but it was formalized between 1719 and 1726. In Spain, it was imposed stepwise in the 1730s, the 1760s and the 1770s. Prussia was an important pioneer in this regard. By the 1730s, the Prussian monarchy introduced a cantonal system of recruitment that enforced selective involuntary conscription. Militia service was expanded in Britain in 1757, and it was common in British colonies in the North Atlantic at this time. The writing of constitutions after 1775 was closely tied to such recruitment patterns. Early constitutions were usually written in regions where the role of militias had been widened, and they served to transform militia service into national service. In this respect, early constitutions often built upon military affiliations already constructed by empires, and, throughout history, constitutions have frequently evolved as documents that translated military attachments formed by empires into national legal obligations.

Third, the influence of imperialism on early constitutionalism is tangible in the fact that the first constitutions reacted to transformations in labour markets, reflecting the long emergence of early capitalist economies. By the later decades of the eighteenth century, most European societies were in the middle of a process in which workers in rural communities were being liberated from coerced labour, so that the obligations attached to serfdom were progressively weakened. This was clearly expressed in acts of legal codification in the eighteenth century, which tended to support the recognition of legal rights for peasants.<sup>29</sup> As a result, for the first time in modern history, governments were consolidated on a material foundation in which economic production was (formally) based in increasingly free individual labour, so that public support for government was not purchased through legislation to reinforce serfdom or other unfree economic practices. Most constitutions brought these developments towards completion, and they constructed governmental legitimacy around an idea of the citizen as an autonomous economic agent. All early constitutions contained provisions to abolish or at least to reduce the force of coercive labour systems, and they began to assign some political rights to persons

<sup>29</sup> See p. 96.



extricated from the bonds of serfdom. In this context, the transformation of subjects into citizens at the core of modern constitutionalism reflected in legally abstracted form the end of a longer process of social formation in which the local obligations of feudalism had been qualified, and single persons in society had been placed in a more vertical relation to central governments.

In vital respects, the liberation of agricultural labour that began to prevail in eighteenth-century Europe was the outcome of imperialism, and it was determined by military forces. By the Seven Years' War, the consumption of soldiers by national governments had increased markedly and governments were forced to reach deeper into their populations to extract military personnel and monetary resources. On one hand, such military expansion imposed fiscal burdens on national states that necessitated agricultural reform and proto-capitalist innovation, to augment agrarian production and to increase taxes levied on agricultural products. One outcome of such policies was that serfs were released from traditional obligations, so that economic modernization for military purposes increased social liberty. One motivation for the weakening of serfdom in Europe was that it increased the capacity of national governments to tax agrarian products and to use tax to finance armies. However, such reforms had a more immediate military purpose. Serfdom conflicted with national initiatives for military conscription, and it obstructed the direct recruitment of soldiers for national armies. The abolition of serfdom allowed governments to obtain immediate access to potential soldiers; early national armies placed serfs in direct relation to their regents, which then altered their relation to their territorial lords, forming a tight individual line of obligation between subjects and state.<sup>30</sup> Both the liberation of labour and the transformation of the serf into the soldier that early constitutionalism promoted can be ascribed, in part at least, to military pressures resulting from imperialism. The rise of early capitalism and demands for military reform were closely interlocked, and both were causally attached to imperialism. Together, these forces promoted a *military-economic logic of individualization* in early national societies. In this process, persons

<sup>30</sup> In eighteenth-century Spain, for example, militia service conferred privileged legal status on soldiers, as it designated them as royal soldiers and separated them from some customary legal obligations (see Andújar Castillo 1991: 12). In Russia, military service provided an important pathway out of servitude. In other territories, military service was introduced as serfdom was abolished.

were extracted from rural economies, religious corporations and local administrations and placed in life horizons defined by individual economic contracts towards other people and individual military contracts towards the state. This process of military-economic individualization usually reinforced secular constructions of legitimacy for the state as it transferred the source of societal duties from religious to governmental institutions.<sup>31</sup>

As discussed throughout this book, the impact of these processes on constitutional organization remained pervasive long after the first wave of constitution making. It took approximately a century from the 1770s until constitutional rule became a common system of political organization. By this time, the original functions of constitutionalism – the legal construction of space, the formation of citizenship through military obligations, and the solidification of individualized labour markets – had acquired a strategic emphasis. In their initial development, however, constitutions built on processes that, owing to imperialism, were already structural to society. In this setting, constitutions established a legal order in which states could manage the internal preconditions of their sovereignty and stabilize their position in relation to changing external security challenges. This created a global path dependency in which the integration of citizens as constitutional subjects was directly determined by military pressures resulting from imperialism.

## LEGITIMACY AND THE PATHOLOGIES OF CONSTITUTIONALISM

In these respects, modern constitutional law developed in the eighteenth century as a reaction to imperial pressures. At the same time, it developed as a mechanism for managing the social and military crises that imperialism engendered. The aggregate of interlinked dynamics outlined above was caused by deep social contradictions in imperial societies in which traditional structures for the administration of military force lost efficacy so that governments were compelled to alter the instruments used for organizing violence. By the later eighteenth century, governments were able to conduct external military conflict only

<sup>31</sup> In classical sociology, war is seen as countervailing individualism (Durkheim 1950: 92). However, to support my claims, one specialist in French military history explains how, with conscription laws introduced in 1793, the individual replaced the *collectivité* as the basic unit of political obligation (Vallée 1937: 9). One analysis of Japan supports my argument by explaining how rural populations in nineteenth-century Japan first experienced individual integration through military organizations (Smethurst 1974: 87–88).

if they deepened their legitimational support in national society, especially in matters concerning military supply. To obtain such support, governments were forced to interact more directly with their populations and to create instruments that incentivized popular military engagement so that imperial environments forced states to acquire more fully national form. In projecting uniform ideas of citizenship and establishing representative organs, constitutions played a central role in structuring this process, and they were designed to create a legal-political (legitimational) order in which states could articulate bargains over military supply and military capacities could be reconsolidated.

Crucial in this respect, however, is the fact that constitutions did little to assuage social contradictions in imperial societies. Distinctively, modern constitutions usually reacted to structural challenges caused by imperialism by defining the state as an organization with immediate responsibility for all society, legitimated by the idea that it expressed a concept of sovereignty in which all citizens were implicated. On this basis, modern constitutional law brought contradictions between social groups to increased political prominence, so that civil conflicts tended, under certain circumstances, to encompass the whole of society and to incite violence that embraced large social factions.<sup>32</sup> As a result, most constitutions created governments that acted towards their own populations as they acted towards external populations. Moreover, as members of society were linked to state institutions by military procedures, these conflicts were frequently articulated through military organizations, and armies were often brought into central political roles.

These outcomes are visible in the primary social functions of constitutions, each of which stimulated heightened social conflict.

First, the fact that constitutions induced the legal transformation of geographical space stimulated lateral violence in society, and, once subject to constitutional organization, most societies experienced deeply polarized attitudes towards legal integration. In most emerging nations, the construction of legal categories of citizenship was experienced by some groups as a process that resembled imperialism, and it instilled a deeply conflictual grammar, frequently close to civil war, at the heart of national society.<sup>33</sup> By the nineteenth century, the formation of constitutionally ordered nation states often depended on the

<sup>32</sup> For a similar claim, see Rougier (1903: 556).

<sup>33</sup> See discussion of early cases in Chapter 1.

forcible imposition of a unified legal order on society. In European polities such as Germany, Italy, Spain and Poland, strategies of military centralization were eventually required to impose constitutional law on society, and the military served as a primary organ of integration. In Latin America, constitutional law was frequently employed as an instrument of internal colonization, as elites utilized it both to harden their domestic positions and to incorporate regional groups in emerging states. In such processes, early constitutional systems emulated techniques of political centralization previously used in empires.

Second, the fact that constitutional law served the recruitment of soldiers had clear implications for social violence.

On one hand, early constitutions were designed to mobilize armed citizens, *soldats-citoyens*, to fight for constitutionally defined states. As examined in Chapters 1–5, the military idea of the citizen at the centre of modern constitutionalism typically meant that most early experiences of constitutional government had some military dimensions. However, the *soldat-citoyen* was rarely based in uniform social support for constitutional rule, and the mobilization of citizens in support of constitutional government usually triggered counter-mobilization. This aspect of constitutionalism meant that, for many, national citizenship was an intensely undesired condition as the assumption of rights of legal membership entailed exposure both to violence and to military ideology: the constitutional personality of the citizen was inextricably attached to the potential experience of violent death. Unsurprisingly, in most early constitutional states, some newly enfranchised citizens went to great lengths to avoid citizenship and the military duties that went with it. Exemplified by the Vendée, early constitutional regimes repeatedly provoked conscription rebellions, close to civil war.<sup>34</sup> More profoundly, the military substance of constitutionalism meant that the citizen was placed at the legitimational centre of government in a form that lacked universal social appeal. Most constitutional states constructed their legitimacy around subjects mobilized for military purposes, but they were forced to manufacture consent for their actions amongst the military subjects on whom they relied.

These factors had several consequences. Generally, as constitutional rule was designed to secure military force for government, constitutions placed military actors in prominent positions, allowing them to determine the form of the state. Often, further, constitution making

<sup>34</sup> See examples at pp. 47, 85, 153, 285.

converged with civil war and rival political factions were linked to opposing groups in the army. In many such contexts, the army acquired central administrative functions in society, such that the preservation of public order became a designated role of the military.<sup>35</sup> Before the 1780s, the maintenance of social peace was mainly entrusted to local and religious bodies. However, as modern constitutions set out norms of national representation to support the legitimation of law, they also established provisions for enforcing emergency laws. In such provisions, they defined the conditions in which laws could be enforced without compliance with regular procedures – typically against internal actors and insurgents.<sup>36</sup> This meant that political exceptionalism became a common feature of constitutional rule, and constitutionalism was intertwined with the use of military units to enforce the law without social support. More structurally, the undesirability of the roles conferred on citizens in early constitutional law created a set of constitutional-legitimational problems that shaped the entire history of modern statehood. Throughout the nineteenth century, states consolidated their social positions by managing conflicts between the citizens to which they attached their legitimacy, and the organization of military force for external war was flanked by policies for the pacification of national society and the avoidance of civil conflict. This was partly reflected in constitutional measures to soften material antagonisms; for example, in early social-welfare policies.<sup>37</sup> As discussed below, after circa 1870, welfare systems developed, in part, as integration mechanisms designed to manage social conflicts caused by militarism.<sup>38</sup> Yet, in many cases, national states controlled the social conflicts that they internalized by forcibly regulating those groups – usually distinct religious, ethnic or sociopolitical sectors – who were not easily harnessed to the military form of the citizen. Moreover, states often used war itself to extract legitimation from their citizens. Many wars, especially the Franco-Prussian War and World War I, were partly initiated by belligerent states to manifest popular acclamation for governments.<sup>39</sup> Such

<sup>35</sup> See pp. 68, 110.

<sup>36</sup> The 1791 constitution of France provided for a ‘public force’ to ensure the maintenance of order (IV/1). Articles 365 and 366 of the 1795 constitution of France allowed the use of the military against domestic groups. In the 1848 constitution of France, Art. 106 contained state-of-siege provisions. Other early constitutions followed suit. The Prussian constitution of 1850 contained provisions for the exceptional suspension of basic protections (Art. 111).

<sup>37</sup> See pp. 140–1.

<sup>38</sup> See p. 134.

<sup>39</sup> This theory is often rejected in political science, although it is partly supported in Blainey (1988: 78–82) and Gelpi (1997: 277). This approach is more widespread amongst historians.

conscious promotion of military citizenship was always perilous for national governments, and it tied their legitimacy to contingent events. When military initiatives failed, belligerent states normally experienced acute legitimational crisis and, frequently, soldiers led revolts against their governments. The Napoleonic Wars, the Crimean War, the Austro-Sardinian War, the Austro-Prussian war, the Franco-Prussian War, the Russo-Ottoman War (1877–8), the Russo-Japanese War and World War I all caused deep constitutional transformation in the states that fared poorly in conflict. In most such cases, military defeat created extreme political instability, usually expressed both in constitutional reform and in intensified militarism, in the polities in question.

Third, the fact that constitutional law was related to agrarian reform and the reconstruction of labour markets created a volatile focus of violence in society. Through the rise of constitutional law, most states – in essence – entered a bargain with their citizens in which some basic rights were given to involuntary labourers, who were extracted from coercive labour regimes in return for military force. This was visible in the constitutional position of serfs in revolutionary Europe, but it was partly mirrored, simultaneously, in the constitutional position of slaves in the Americas. One result of this was that responsibility for peasant economies was removed from regional authorities and national governments assumed increasing duties in regulating labour markets and labour-related disputes between different groups of citizens. In Europe, different governments approached these contradictions in different ways. Through the earlier nineteenth century, most states simply retracted from peasants the rights originally promised to them in constitutional law. Across Europe, the legal abolition of serfdom was frequently not concluded until the decades after 1848. During the nineteenth century, nonetheless, national governments were confronted with an abiding structural predicament which could not be papered over by simple exclusion or repression. As states were formed in the context of imperialism and related interstate conflict, they remained enduringly dependent on national military resources and personnel, and they were forced to establish some general construction of citizenship in order to mobilize soldiers. This had the consequence that, by the latter part of the nineteenth century, problems of social

For one of its exponents, see Wehler (1972: 455). I agree with the claim that external mobilization by military leaders is often similar to a domestic coup, as it effects violent repression and regime change in the belligerent polity (Dassel 1998: 122).

management resulting from the abolition of serfdom could not be deflected from the political arena. By 1900, most European states were engaged in the political and economic integration of social groups with histories of unfree labour, and some political rights for classes comprising former forced workers were granted in most polities. In many states, however, this led to the militarization of conflicts between groups with different economic prerogatives and different positions in national economic systems. Indeed, the militarization of intra-societal conflicts can be viewed as the price states paid for their original promotion of citizenship as a military contract.

In each point, constitutional rule evolved as a legal-political order with a dialectical relation to social violence. Constitutions acquired prominence as the form of sovereignty pressed into society by pressures for vertical integration released by imperialism, forming a bargaining system to stabilize legitimacy for national governments in face of changing military constellations. Yet this form usually affected society in unpredictable fashion. Although vertical integration was strongly linked to the separation of individual subjects from traditional (local or religious) milieux, it induced multiple experiences of collective violence, and few bargaining systems used to absorb such integration held up in face of the antagonisms that they released. From the eighteenth century, governments constructed their legitimacy as they elaborated sets of rights for their subjects.<sup>40</sup> Under most constitutions, the formation of such rights brought collective violence to the surface of society, and many constitutions created polities in which civil war and inter-state war overlapped. Typically, constitutions brought national armies into central governmental roles and they imprinted a military form on national political systems: *they promoted vertical militarization*. Once created, constitutional states were frequently forced to operate in an external landscape defined by imperial rivalry, which necessarily cemented the position of military forces. Moreover, the vertical impact of constitutions transmitted violent social conflict through society at large, so that horizontal attachments that connected society were also defined by military volatility: *they promoted lateral militarization*. This was evident in the first constitutions created in the eighteenth century. However, this dimension of constitutional violence did not recede and it afflicted constitutional rule, at different points in imperial systems, well into the twentieth century. In most cases, the vertical integration

<sup>40</sup> See pp. 139–43.



of citizens gave rise to deep militarism in the lateral dimensions of society. In this regard, many constitutional states immediately acquired primary characteristics of empires: (1) their internal and external military actions converged, and they created integration regimes for citizens to meet external military needs; (2) they legitimated themselves in coercive categories that produced lateral violence inside domestic societies; (3) this production of internal violence often led to the intensification of external violence.

On this basis, constitutional law expresses a deep paradox for modern society. Constitutions developed as legal documents that stabilized the essential political rights that typify modern life, extracting legitimacy from politically implicated citizens and creating sovereign states with powerful integration functions. Yet constitutions extracted legitimacy from citizens in unreliable, violent form and they usually engendered *more violence*, unsettling the states whose sovereignty they were intended to uphold. As a result, although conceived to organize nations, most post-imperial constitutions rapidly reproduced elements of imperialism.

## IMPERIALISM, CONSTITUTIONS AND INTERNATIONAL LAW

The relation of constitutional law to violence is further reflected in the historical links between constitutional law and international law. In the early development of constitutionalism, it was often claimed that constitutional states were unlikely to violate provisions for international peace.<sup>41</sup> Today, this assumption is reflected in claims that national constitutional law and international law contain convergent moral claims.<sup>42</sup> However, constitutional law and international law frequently evolved as alternative ways of managing the violence sovereign states produced, and of absorbing the effects of imperialism. Accordingly, throughout history, constitutions typically presented models of legitimacy that contradict norms established at the international level, often generating expressions of violence that international law was intended to avert.

Before the rise of modern constitutions, some principles of international order for European society had resulted from the Peace

<sup>41</sup> See p. 73.

<sup>42</sup> See for prominent examples Brunkhorst (2002: 110) and Habermas (2012).



Treaties of Westphalia of 1648, bringing an end to the Thirty Years' War. Both the actual force and the novelty of these treaties are questionable, and the importance ascribed to them is often more symbolic than real. Yet these treaties established a normative climate that framed the emerging European state system, and they had important consequences for the management of violence.

These treaties began to endorse norms of state action and responsibility that identified core political domains, especially in questions of security, that were formally subject to the authority of heads of state. In the Holy Roman Empire, the main scenario of the Thirty Years' War, the treaties established a multilateral security community, comprising separate princely states, in which treaties agreed between these states assumed contractual status.<sup>43</sup> First, this meant that princes had acquired sovereign responsibility for their territories. However, it also meant that the emperor could not declare war without approval of the territorial princes whose domains formed the empire. This was set out in the Art. VIII, §2 of the Treaty of Osnabrück (1648). In addition, these treaties stipulated that princes could not form alliances against the empire or against the terms of peace. These treaties also led to the establishment of a permanent Diet in Regensburg, operative from 1663, which discharged policies of *securitas publica*.<sup>44</sup> In this context, interstate war became a matter subject to international law, and, in parts of Europe, war was determined by norms established between sovereign states.<sup>45</sup> This was reflected in the institutionalization of peace congresses to manage interstate conflict – for example, in Cambrai in the 1720s. This period also saw the expansion of diplomatic bodies as permanent institutions in which heads of state devolved representative functions to formal emissaries, thereby institutionalizing interstate interaction as a strict attribute of regents.

In these respects, these treaties were intended to obviate the experience of warfare that typified the Thirty Years' War (1618–48), and they promoted a concept of statehood to restrict the effects of war. Between 1618 and 1648, armies had largely been raised by private agents, possessing limited loyalty to regents and governments, and they were rarely supported by adequate fiscal resources. Consequently, the violent quest for booty by private soldiers was a constant feature of war, and it

<sup>43</sup> Böckenförde (1969: 452).

<sup>44</sup> On the role of the Diet in serving to guarantee interstate peace, see Schindling (1991: 177–185).

<sup>45</sup> See Berber (1964: 191).

frequently destroyed elemental structures of public order. As a result, the Thirty Years' War had an indistinct military form. It had many hallmarks of an intra-imperial war. Battles were fought between armies (notionally) attached to the Holy Roman Empire and armies mobilized – in part – by emerging states within the empire, seeking some degree of autonomy from it. However, it had hallmarks of a civil war; it was fought between armies of different states in the Holy Roman Empire, and it entailed extreme hostility between armies and catastrophic penetration of warfare into the civil sphere. Against this background, the treaties of 1648 were intended to manage military conflict in a context marked by imperial collapse. They constructed state responsibilities, in part, to avert, or at least to confine, war, and they sought to ensure that war could be ordered in a form that was legally distinct from civil war. Importantly, such ideas were reflected in the development of military law in emerging national societies, which, as discussed, was used to concentrate military power in the state. The decades after 1648 saw frequent and lengthy wars in which the efficacy of such norms was always limited. Yet in the eighteenth century, sovereign states asserted control of military supply and armies were increasingly sustained by national fiscal systems: this was one precondition for the rise of standing armies. Accordingly, the use of military force was circumscribed and societies in some parts of Europe were partly demilitarized, so that the avoidance of uncontrolled war became a shared commitment.<sup>46</sup> Importantly, standing armies were rarely used for public-order functions against citizens. Whether accurately or not, one leading observer commented in the 1770s that, through the eighteenth century, 'wars became less cruel'; this was partly because 'vanquished peoples' were not subject to harsh acts of requisitioning and extraction.<sup>47</sup>

The period of constitution making in the later eighteenth century was a period in which the principles of the post-1648 world reached the end of their sustainability, and this was largely the consequence of imperialism. This can be seen in the historical contexts in which constitutions evolved. At a specific level, as mentioned, the wave of

<sup>46</sup> See my earlier claim in Thornhill (2021: 56–57). See the observation that 'the militarization of society in the *Ancien Régime*' was limited by the fact that regents separated armies from society (Carl 1993: 11).

<sup>47</sup> Guibert (1803: 263). This is echoed in sociological analysis in Luard (1986: 126). One commentary explains how, after around 1700, there evolved a 'clearly marked separation between the space of combat and the spaces where civil peace was preserved', so that 'wars were more effectively circumscribed' (Comette 1993: 33).

constitution making in the late eighteenth century was caused by the Seven Years' War. The Seven Years' War itself had its origins in Europe in the Prussian annexation of Silesia from the Habsburgs beginning in 1740, which initiated the dissolution of the interstate structure created in 1648.<sup>48</sup> This conflict involved deep societal annexation and the military imposition of civil government by one German state on subjects of a rival German state, both of which were positioned within the Holy Roman Empire. As such, 1740 initiated a period of interstate antagonism in which competition for supremacy in Central Europe was intensified and the distinction between interstate war and civil war lost clarity. At a more general level, the first wave of constitution making originated in conditions in which laws of war lost efficacy. Outside Europe, the Seven Years' War was caused by minor territorial disputes between Britain and France in Pennsylvania. In this environment, central state institutions had only limited control of their armies and warfare was not easily subject to laws of sovereignty. For example, the British military effort required large-scale conscription of colonial subjects whose loyalty to the British government was at times uncertain. This war entailed the mobilization of military units in informal conflicts or remote settings, so that laws of war intended to tame military conflict could scarcely be enforced. Essentially, the principles of sovereignty and state responsibility set out in 1648 encountered their limits in colonial wars, which became widespread through the eighteenth century. In promoting colonization, sovereign states engaged in conflicts with multiple populations, often only informally attached to flags of state, and they were required to mobilize armies in rough terrains outside regular command structures. By the revolutionary period, the rising frequency of imperial conflicts meant that the constraints on warfare notionally established after 1648 had been eroded. It was in such conditions that the early impetus to constitutional order took place. States turned to their citizens as providers of violence in environments where sovereign administration of warfare was limited, and citizens acquired constitutional roles as interstate war and civil war converged.

Over a longer period, the constitutional construction of government recurrently reflected and induced modes of violence that

<sup>48</sup> In discussions of Prussian history, this war served to 'transform the situation in Europe' as it involved widespread use of 'irregular forces' (Grünhagen 1890: 3, 307–308). Early military theorists viewed this war as an 'epochal event' 'in military history' and even in 'world history' (Berenhorst 1872: 52–53). More recently, this war is described as 'the beginning of a new époque' both in terms of its distinct nature and its impact on the European balance of power (Bein 1994: 56).

fractured international security structures. Generally, constitutions were formed in five major waves, each with different emphases. These waves were essentially as follows: (1) the period from 1776 to 1824; (2) the period from 1848 to 1891; (3) the period from 1916 to 1920; (4) the period from 1945 to the 1960s; (5) the period starting in the 1980s. A smaller sub-cluster of constitutions can be found after 1905 in Iran, Russia, China, Mexico and Turkey, which were arguably less effective in creating representative systems. In each wave, constitutions formed reactions to an international order, put in place to organize sovereign states and to structure military relations in settings that resulted from imperial conflicts. As discussed, the first wave of constitution making occurred against the background of the Treaties of Westphalia. Later, the second constitutional wave occurred through the long dissolution of the European order of public law created by the Congress of Vienna in 1815. The Congress of Vienna established a system of inter-monarchical peace designed to limit warfare by re-stabilizing existing imperial blocs after the Napoleonic interlude. Initially, this system was intended to restrict nationalist movements in European societies, limiting sovereign titles to formal heads of state. Ultimately, this system created the basis for the inter-imperial order that evolved in the later nineteenth century. Then, the third constitutional wave coincided with the formation of the League of Nations in 1919–20. The approach of the League of Nations to imperialism was equivocating. It was partly intended to oversee the dismantling of major empires in Europe, reflecting Woodrow Wilson's ideals of national self-determination and the primacy of the nation state. However, like the Congress of Vienna, it stabilized some empires, notably those centred in London and Paris, at the expense of others.<sup>49</sup> This was partly because the USA did not ratify the covenant of the League of Nations. It meant that Germany, Austria and Turkey emerged after 1919 as post-imperial polities bordered by strengthened empires. The fourth constitutional wave converged with the creation of the United Nations, one of whose primary functions was to manage the dissolution of European empires in Asia and Africa and to stabilize nation states in this context. The fifth wave of constitution making was shaped by the rise of an international human rights consensus in the 1980s.

<sup>49</sup> One excellent account describes its results as 'a shameless betrayal of the promises of self-determination' (Pedersen 2015: 77).

In each period, constitutions developed in complex relation to international law, which was in turn positioned in a complex relation to imperial power. In essence, in each step, the corpus of international law developed as a set of instruments for ordering sovereign statehood in contexts defined by imperialism, and the major international moments of legal foundation coincided with the crisis of an imperial or an inter-imperial structure. This can be seen in 1648, 1815, 1919–20 and 1945. Of course, such normative structures clearly perpetuated extreme violence in some regions, as they were usually designed to legitimate violent state action in regions not protected by the title of sovereignty.<sup>50</sup> Despite this, at different junctures, law-based security systems were established, whose purpose was to manage violence and to prevent the diffuse societalization of war. This phenomenon is addressed in different historical locations throughout this book. In such settings, however, international law usually collapsed because it could not contain imperialism and imperialism strained the models of sovereignty around which international order was designed. Against this background, constitutions were initially written at moments when international arrangements to manage violence began to fracture. This can be seen from the 1770s, as the Westphalian order was fragmenting; after 1848, as the Viennese system was beginning to dissolve; after 1918, as the international order around the League of Nations was critically weakened at the moment of its inception. In each setting, constitutions were established in a dialectical relation with international law. On one hand, constitutions replicated the focus of international law as they solidified the sovereign authority of states, allowing states to stand as independent entities in the international system. On the other hand, as they constructed vertical foundations for nation states, constitutions had intra-societal consequences that weakened the states that they supported, and they often organized national populations in forms that could not be contained in the international order of sovereign states. Each constitutional moment in the earlier waves of constitutionalism – around 1789, after 1848, after 1920 – gave rise to states that mobilized their populations for the sake of sovereignty yet which, in so doing, triggered acute violence, both internally and externally. As discussed at different points below, constitutions were often

<sup>50</sup> See the claim that the ‘universalization of international law’, based in positivist accounts of sovereign statehood, served the imperialist expansion of European states in the nineteenth century in Anghie (2005: 32–33). See further discussion at p. 150.

constructed amidst irregular warfare and their results sat uneasily with the ideals of international law, focused on the containment of violence.

These processes occurred in many variations, and, at different times, constitutionally ordered societies were marked by predominantly lateral or predominantly vertical models of military violence. However, up to circa 1945, societies usually became more constitutionalized as they were more militarized, and they became more militarized as they were more thoroughly constitutionalized. Few polities created constitutional rights without exposing citizens to war, and the patterns of integration typical of constitutional law rarely developed independently of military pressures. However, few states controlled the military outcomes of this process. It was only after 1945 that constitutions began to frame legitimacy in categories that were more convergent with international law.

## RESEARCH LANDSCAPE

In presenting this analysis, this book challenges three common outlooks in research on constitutional law and the legal foundations of statehood.

First, this book builds on the common sociological interpretation of a constitution as a textually ordered agreement that supports the integration processes that underlie national societies. Most constitutional theorists with a sociological disposition argue that constitutions allow the enactment of citizenship in relatively peaceful fashion, sustaining the long-term integration of different social groups and creating a premise for democracy in civil society.<sup>51</sup> By contrast, this book claims that constitutions have usually promoted social integration by establishing legal structures conditioned by external military dynamics, in which armies acquire a primary role.<sup>52</sup> Of course, constitutions do more than manage military capacity, and they reflect bargains between different groups in society. However, in most contexts, acts of constitution making served to restructure society's military basis, and they formed, essentially, a *security constitution* for national society: they resulted, not from *civil society*, but from *military society*.<sup>53</sup> In this respect,

<sup>51</sup> See classic statements of this view in Durkheim (1950: 99), Parsons (1965), and Habermas (1973: 148).

<sup>52</sup> Amongst early sociologists, Franklin Henry Giddings (1901: 3) identified the close relation between democracy and empire.

<sup>53</sup> The parallel concept of 'war society' is used in related, slightly narrower fashion in Kruse (2015: 12).

the book advances some arguments that converge with claims often viewed as Foucauldian, as it indicates that constitutional democracy first developed as an apparatus for physical administration. However, its conclusions are anything but Foucauldian. It is supported by a long-term constitutional theory of social integration, which outlines the conditions under which states may exercise sovereignty in effective, relatively legitimated fashion.

Second, this book opposes a central presumption amongst constitutionalists, who analyse constitutional law as part of the doctrine of limited government. On this common account, constitutions are perceived as consensual devices for framing domestic government, taming the excesses of political arbitrariness, and establishing a procedural order for the use of public authority. This book argues that the rights secured under classical constitutional law usually resulted, not from moments of deliberation between citizens, but from wars. Few enduring constitutional systems were created by peaceful change, and the hard apparatus of constitutional law was usually driven into society by war. To be sure, most states weakened constitutional rights *during actual warfare*, as exceptional powers were transferred to executive branches of government, especially in the surveillance of internal dissidents.<sup>54</sup> Many states also preserved intensified executive powers directly after wars.<sup>55</sup> Yet most states that assumed constitutional form were created through *military bargaining* between government and citizens: that is, they were normally formed in periods leading up to war, when governments were forced to motivate soldiers, and in the longer wake of war, when governments rewarded, pacified and reintegrated soldiers. This meant that constitutions formed political designs for creating legitimacy for government in military environments. As a result, most wars created a complex and intricate constitutional balance in which some coercive powers of executive bodies were augmented, but the rights of citizens to shape the legislation defining such powers increased sharply.<sup>56</sup> Self-evidently, not all wars led to the reinforcement of constitutional rule. Yet until the late twentieth century, few constitutions were not established as wars forced populations into proximity to government. As discussed below, the primary problem of constitutionalism arose from the fact that states

<sup>54</sup> See examples at pp. 176, 196.

<sup>55</sup> Amongst the most famous twentieth-century examples are, in the UK, the Emergency Powers Act (1920), and, in the USA, the Internal Security Act (1950).

<sup>56</sup> I agree that there is no simple *ratchet effect* in the relation between war and rights (Posner and Vermeule 2003: 610). The claim that war leads to executive reinforcement and weakens constitutional rights reflects a simplified dichotomy.



usually became more democratic when exposed to war, which often meant that democratic interactions had a strong military character, and wars affected constitutional formation by generating liberty and repression together, both in exponentially heightened fashion.

In analysing these factors, this book builds on research that assesses the relation between the construction of constitutional rights and warfare, explaining how militarism often creates implied political and social bargains that expand constitutional provisions.<sup>57</sup> It also elaborates on research that has illuminated the origins of constitutionalism in imperial constellations.<sup>58</sup> However, its focus differs from existing research. It attempts to illustrate how constitutional bargains created through military demands were often liable to fracture, and it outlines a theory of constitutional democracy that shows how constitutions experienced crisis when the military bargains that supported them proved unsustainable. That is, constitutions were created to broker military capacity, and they integrated national citizens to that end. However, these bargains were susceptible to engender renewed military violence – in different social dimensions. Finally, it seeks to explain how crises inherent in such functions can be managed. On this basis, the book claims that a new vocabulary is required to interpret constitutions which assesses how the formation of constitutional rights is both determined by and likely to induce military conflict.

Third, as mentioned, this book expounds the view that constitutional regimes are causally related to war. Constitutional regimes are – typically – the results of war, so that war and constitutional government are linked in a complex legitimational nexus. Moreover, constitutions organize society around violent bargains and vertically constructed obligations, which often promote intra-societal conflicts that induce warfare. In this component, the book uses a method based in the historical sociology of law to elucidate the causes of war. That is, it reconstructs the broad social constellations in which constitutions were created and, in so doing, it describes how, through constitutions, governments internalized deep structural emphases towards violence, and how this affected democratization and its outcomes. It utilizes this

<sup>57</sup> This aspect of the book builds on research that examines war as the basis for social bargains that created basic rights. This is exemplified by Tilly (1990: 83), Krebs (2006: 29; 2009), different chapters in Kier and Krebs (2012), Rousseau (2021: 23) and Obinger (2020: 9).

<sup>58</sup> See my earlier account in Thornhill (2021). This has also been addressed in Colley (2021), who does not focus on democratic problems arising from this connection.



method to question the claim, common amongst theorists of international relations, that democratic states show limited willingness to declare war, *at least against each other*.<sup>59</sup>

This book questions assumptions about *inter-democratic peace*, first, by arguing that war is not a simple interstate practice involving the declaration of hostility by one state against a different state, in which the inside and the outside of society are strictly separate. Instead, war needs to be understood more broadly in terms that incorporate multiple patterns of conflict. As the book argues against conceptual purism in defining nations, it also argues against purism in defining wars. During their constitutional evolution, most societies experienced acute inter-group hostilities, many of which fell between strictly distinct categories of interstate war, civil war and civil disorder. Indeed, most societies entered periods of violence in which wars had convergent internal and external dimensions, both of which were linked to conflicts over citizenship. Moreover, imperialism held many democratizing societies in states of violence, not simply classifiable as war, in which political order depended on military force. In analysing these phenomena, the book shows how internal and external violence are not always fully separate, and different forms of violence contain aspects of war.

This book questions the inter-democratic peace theory, second, by claiming that exponents of such theory usually show an unnuanced understanding of democracy, which does not fully address the restrictions imposed on popular representation in most purportedly 'democratic' states.<sup>60</sup> The relation between war and democracy is a hard case for testing whether a state is democratic, as war is a situation in which the decisions of some people have mortal outcomes for many others. Therefore, it is reasonable to claim that a state warranting classification as a democracy is one whose government allots to people expected to fight and die for it (potential soldiers) the right to vote for it. This definition was implicitly proposed by Max Weber around 1918

<sup>59</sup> This idea was popularized by Kant (1796: 197). See the later claim that 'constitutional constraints eliminate autocratic caprice in waging war' in Oneal and Russett (1997: 268). The assertion that democracies do not wage war on each other is clearly stated in Maoz and Russett (1993: 636) and Rummel (1995: 458). For more emphatic support for this theory, see Levy (1988: 662) and Weart (1998: 13). For a sceptical approach, see Gleditsch (1992: 37). My analysis is close to the claim that 'semidemocracy is associated with an increased likelihood of civil war' in Henderson (2002: 119).

<sup>60</sup> On one account, electoral enfranchisement of ten per cent of the adult population qualifies a state as democratic (Levy 1988: 662). However, states permitting fractional enfranchisement usually did so for deliberately non-democratic reasons: to discriminate strategically against non-enfranchised social groups.

(1921: 308) and it is taken here as a threshold for the categorization of a polity as democratic. Moreover, it is reasonable to claim that a state warranting recognition as a democracy will enable other adults immediately affected by conflict, including female citizens, to take part in national elections for governments that conduct war. In other words, a democracy needs to be defined as a state that allows full male and female suffrage. If the first part of this definition is accepted, very few states were democratic for any length of time before 1918. If the second part is accepted, there were very few enduring democracies before 1945. Most ‘democracies’ that existed before 1945 were only partial or intermittent democracies, in which large sectors of the population were normally excluded from electoral participation because of their class, ethnicity or gender. When such ‘democracies’ declared war, they only legitimated this declaration to select domestic groups, often not including persons mobilized as combatants: simply, *such decisions were not democratic*.

If this definition of democracy is applied, inter-democratic peace theory is on shaky ground. Importantly, evidence to support such theory is often extracted from analysis of World War I, assuming that this war was fought between democracies (France, UK, USA) and autocracies (Germany, Turkey, Austria–Hungary) (Weart 1998: 144). However, no belligerent state in 1914 was genuinely democratic. New Zealand was democratic, but it entered the war as part of the British Empire. France was the most democratic major European state at this point, although French women could not vote until 1944–5. Measured by the proportion of the population that could vote, Germany was far more democratic in 1914 than the UK. The UK only had circa 60 per cent male enfranchisement in 1914; many working-class men were excluded from voting, so that many persons called up for military service from 1916 were not enfranchised until 1918 (if they were still alive). Potential military recruits had far stronger political representation in Germany than in the UK. The conflict began with the declaration of war by Austria on Serbia, neither of which states were fully democratic, but both of which had deeper enfranchisement than the UK.<sup>61</sup> Belgium, the country invaded by Germany in 1914, was hardly

<sup>61</sup> On one calculation Serbia, whose electoral system had a property threshold and prevented soldiers from voting, had circa 70 per cent male enfranchisement before 1918 (Popović-Obradović 2013: 233–234). This was roughly 10 per cent higher than the basic franchise in Britain, and Britain had substantial plural voting. The Austrian part of Austria–Hungary had full male suffrage from 1907.

a democracy – it had a system of plural voting whose purpose was to prevent equal male suffrage.<sup>62</sup> In this context, it is difficult to see relative democratization as a factor that impacted on the *war proneness* of European states at this time. The same logic applies to the Balkan Wars (1912–13), in which the protagonists were undergoing sporadic democratic reinforcement. Moreover, one reason why, before 1945, predominantly democratic states were reluctant to declare war is that many polities with the extensive enfranchisement had small populations (for example, Sweden, Denmark, Norway, New Zealand). Their motives for not declaring war on other states were probably based, not on constitutional accountability, but on a survival calculus. After 1945, then, many democracies were allied to a global superpower, the USA. The USA frequently initiated war against other states and tolerated war by its allies against non-allied states. It also overthrew several democratizing governments through *actions (formally) short of war*.<sup>63</sup> Yet, the USA reduced the probability that democracies allied to it would declare war on each other. Here too, the extent to which relative belligerence was conditioned by democracy is at least disputable.

Against this background, this book claims that a dynamic reciprocal link needs to be posited between war and democracy, in which internal democratization often depended on war. To capture this link, *partial democratization* is advanced here as a framework for examining propensities for war amongst states. Large-scale interstate wars before 1939 were typically conflicts between states that had obtained only partial democratic features, and, in this process, war had usually accelerated their elaboration of inclusive constitutional norms. Before 1945, in fact, most military conflicts were conducted by *partly democratized states* against *peoples that did not live under sovereign states*: they were imperial wars. Generally, the tortuous path *towards* constitutional democracy is the condition in which war has commonly arisen, and, in such settings, war, constitutional democracy and imperialism have been intrinsically intertwined.<sup>64</sup> Up to 1945, constitutional inclusion was usually driven by the global imperial system, and, as examined below, it tended to create partial democracies, democratic enough to support national

<sup>62</sup> Electoral rights became universal, but not equal, for Belgian men through the amended constitution of 1893. However, the revised Art. 47 of the constitution allowed some men – namely, those who met a certain property threshold or had attained a certain educational level – to cast more votes than others. This meant that there was a relative concentration of power in a small, privileged group of men. At the same time, all German men could vote.

<sup>63</sup> See discussion in Chapter 6.

<sup>64</sup> Here my claims converge with Mansfield and Snyder (1995: 7–8; 2002: 299).

armies but not democratic enough to transform the state.<sup>65</sup> Partial democracies, in turn, induced many wars – civil wars, interstate wars or wars containing both elements. Some of the most aggressive states in world history, such as Germany, Japan and Italy in the 1930s, were tangibly the products of democratization. Their external military actions reflected internal conflicts that had arisen due to imperial pressures and because of social and political bargains established during (partly) democratic interludes, preceding transitions to extreme authoritarianism. In such cases, external and internal wars were not easily separable, and constitutional systems reflected inter-group interactions of a hostile nature that spilled over into external violence. Moreover, wars usually had convergent outcomes in participant states. As discussed, wars intensified democratization in belligerent states, at least in those that remained sovereign after conflict. But they also shaped constitutions in a form that remained sensitive to militarization. It was only after 1945 that constitutions were able to stabilize peace, internally and externally.

In this light, this book contributes distinctively to debate about war and democracy as it explains how the links between democratization and war have fluctuated over time, and it identifies the constitutional and legitimational forms that have proved most likely to secure peaceful democratic rule. In this regard, it seeks to draw insights from periods marked by the reduction of *democratic militarization*, and it isolates the models of constitutional law that create legitimacy for government in a form able to pacify society. This analysis may contribute to explaining the preconditions of interstate war. One implication in the book is that deep-rooted propensities in democracy are always likely to induce a remilitarization of citizenship. Democracy thus presupposes constitutional designs that avert this.

The first chapters of this book explain how constitutional systems were created by war, usually of an inter-imperial nature. These sections show how military pressures on constitutions fractured constitutional order, often elevating military actors to prominent positions and inducing internal and external conflict. A theory of the *occupation constitution* is proposed to capture this; this theory argues that, in different dimensions, constitutions evolved as elements in complex processes of military occupancy. The later chapters explain how constitutions learned to limit the structural paradoxes on which they were based. These chapters assess

<sup>65</sup> See discussion in Chapter 2.

how, after 1945, democracy developed through the management of the violence from which it originated. Here, the book advances a theory of *world law* to argue that constitutional models eventually secured democracy as they preserved aspects of constitutional law created by violence, but they also separated governments from their military origins. The book concludes by underlining the intense precariousness of constitutional democracy, outlining how the original attachments between constitutional law and violence are currently being rearticulated. In this last respect, the book adds to literature on world systems. Its claim is that imperialism constituted a world system of violence, which was reflected through the early development of constitutionalism, as constitutions allowed states to position themselves in this world system. Then, after 1945, the world system changed and constitutions reflected this change. The final chapter of the book, Chapter 10, outlines ways in which the world system is changing once more, expressed in new constitutional techniques for legitimacy production.