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This article examines the roles of courts in state-building and aims to bring the state-building literature into deeper conversation with institutional approaches to the study of courts. Doing so highlights that courts can play important roles in state-building including extracting revenue, coercing subjects, and generating legitimacy for the state by justly adjudicating disputes. Of these, courts' extractive role has been especially understudied. Yet, courts can raise significant sums through fees, fines, and confiscating property, particularly in less-developed states. These three roles of courts in state-building are explored in two highly disparate cases: the medieval Welsh Marcher lordships and the Union of Islamic Courts in twenty-first century Somalia.

Keywords: State-building, Courts, Extraction, Coercion, Legitimation, Wales, Somalia

Courts play major roles in the governance and day-to-day construction of states. As such, they are potentially powerful state-building tools.[1] For example, the Angevin kings of England leaned heavily on their courts to consolidate their rule. Angevin courts curtailed baronial franchises, provided information on the state of the realm, and asserted royal authority over land-holdings. By shifting land-holding cases from baronial courts to royal courts, the crown weakened the bonds of baronial lordship, which rested upon the barons' authority over land tenure.[2] If the barons

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1. Gianfranco Poggi, "Juridical Aspects of European State-Making: A Retrospect," *Working Paper No. 48* (Paris: University of Paris, 2007); and Charles Tilly, "Reflections on the History of European State-Making" in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton: Princeton University Press, 1975), 3–83, 6.

2. Wolfram Fischer and Peter Lundgreen, "The Recruitment and Training of Administrative and Technical Personnel" in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton, NJ: Princeton University Press, 1975), 456–561, 469–70; John Hudson, *The*

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resorted to private uses of force in contrivance of royal courts' rulings, they would be breaking the king's peace and thus subject to further, serious sanctions. Also, English kings imposed common law, as opposed to local variations of customary law, on non-royal courts in England (though not in Wales). Doing so both curtailed jurisdictional debates and reduced incentives for forum shopping, thereby enhancing royal power.[3] In short, courts helped centralize authority and increase the Angevin kings' power relative to the barony.

Nor were the Angevins exceptional in their use of courts. The Tudors relied on justices of the peace to act as administrative agents of the crown.[4] Judges also played a significant role in the formation of the Prussian state.[5] Courts, too, were important tools of French kings as early as the thirteenth and fourteenth centuries.[6] Likewise, studies on state-building in Africa, Latin America, the Arab world, Afghanistan, China, Russia, and the United States have found law played a considerable role.[7] Finally, many modern rebel groups have found diverting resources from exclusively military efforts to the provision of public goods, including adjudication and the provision of law, to be worthwhile. Such efforts increase both their internal and external legitimacy, thereby enhancing their overall war effort.[8] For instance, the Taliban used the resolution of local disputes as a central plank in their governance strategy even while

Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta (London: Longman, 1996), 141–5 and 220–3; Charles Petit-Dutaillis, *The Feudal Monarchy in France and England from the Tenth to the Thirteenth Century*, tr. E. D. Hunt (New York: Harper & Row, 1964); and Doris Mary Stenton, *English Society in the Early Middle Ages* (London: Penguin, 1965), 46.

3. Hudson, *Formation*, 20, 122, 139–45, 218, 225–6, and 232. The Magna Carta returned many cases to the barons' honorial courts.

4. Fischer and Lundgreen, *Recruitment*, 477–8.

5. Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Palo Alto: Stanford University Press, 1978), 74–5; and Charles Tilly, *Coercion, Capital, and European States, AD 990–1992* (Cambridge, MA: Blackwell, 1992), 105.

6. Kimberly Marten, "Debunking the Stationary Bandit Myth: Violence and Governance in Statebuilding History" in *Non-State Challenges in a Re-Ordered World: The Jackals of Westphalia*, ed. S. Ruzza, A. P. Jakobi, and C. Geisler (New York: Routledge, 2016), 175–90, 176; Petit-Dutaillis, *Feudal*, 242–5; Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Palo Alto, CA: Stanford University Press, 1990), 38–9 and 45; Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

7. Thomas J. Barfield, "Culture and Custom in Nation-Building: Law in Afghanistan," *Maine Law Review* 60 (2008): 347–74; Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

8. Megan A. Stewart, "Civil War as State-Making: Strategic Governance in Civil War," *International Organization* 72 (2018): 205–26.

they were still in the midst of an ongoing civil war.[9] In short, courts matter when it comes to state-building.

Despite this, there has been only limited engagement between the comparative law literature and the state-building literature.[10] This is unfortunate as findings from the comparative law literature have important implications for roles courts could play in state-building. That literature, especially institutional approaches to the study of courts within it, has shown that courts can coerce subjects, allocate resources, adjudicate among the ruled, and organize political power. Further, law depersonalizes and formalizes authority—an important step in moving away from governance as individual lordship over people and toward governance through an institutionalized state.[11] Law also shapes norms, structures interests, and codifies understandings.[12] Likewise, ruling in accordance with such shared understandings empowers and legitimizes rulers. For example, in medieval Europe, where such understandings were poorly articulated and initially limited to relations among elites, law worked, albeit very slowly, to more precisely describe those understandings and expand their scope.[13] The state-building literature would benefit from greater engagement with these insights into the role of courts and law in governance.

One of the main aims of this article, therefore, is to bring the state-building literature into deeper conversation with comparative institutional approaches to courts. Relatedly, the article aims to show that institutional approaches can be used to analyze courts' behaviors even in settings that differ significantly from the industrial and post-industrial state settings in which those approaches were first developed.[14] Specifically, this article explores the role of courts in the medieval March of Wales and early twenty-first century Somalia—settings very different from those where institutional approaches are often applied. Further, the Welsh case, by examining Marcher lordships rather than a kingdom or principality, expands our understanding of what states were in medieval Europe. The Somali case, on the other hand, sheds

9. Mujib Mashal, "In Recaptured Afghan District, Shattered Forces Show Hints of a Rebound," *New York Times* (June 22, 2019).

10. Political science and legal literatures often fail to fully engage each other, see: Martin M. Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2000), 1–7.

11. Poggi, *State: Its Nature*, 29; and Poggi, "Juridical," 2–3.

12. Sassen, *Territory*, 62.

13. Poggi, *State: Its Nature*, 40.

14. For example, see Tom Ginsburg and Aziz Huq, eds., *Assessing Constitutional Performance* (Cambridge, MA: Cambridge University Press, 2016); Tom Ginsburg and Robert A. Kagan, eds. *Institutions and Public Law: Comparative Approaches* (New York: Peter Lang, 2005); and Shapiro and Stone Sweet, *On Law*.

light on the issue of when institutions shift from being merely agents of local governance to engines of state-building.

A second major aim of the article is to show that in less economically and politically developed states, courts can be important sources of revenue. This extractive role of courts has been neglected in the state-building literature. Yet, courts can extract significant revenues through fines, confiscations, and charging fees for access. The lack of robust bureaucratic structures in many less-developed states makes direct taxation difficult. This means the ability of courts to perform extractive functions grants them an important role in state-building in such settings.

Last, the paper pushes back against a tendency in the state-building literature to reduce coercion to the employment of force. While force clearly matters for coercion in state-building, coercion is broader than the use of force. Legal, normative, and economic tools all play roles in coercion. Thus, courts' coercive abilities—even when not directly backstopped by force—illustrate the broader nature of coercion.

None of this is to argue that courts are always important in state-building. State-building varies tremendously. It reflects local conditions, including the concentration of capital, pre-existing political arrangements, culture, and levels of urbanization.[15] Additional confounding variables include interventions by outside states and international organizations, wars, ethnic fractionalization, and the nature of the polity being studied. Accordingly, courts' and judges' roles in state-building also vary.[16] For this reason, the article is neither a test of how often courts play an important role in state-building, nor a comprehensive survey of ways in which courts influence state-building. Rather, it explores three core ways courts can aid state-building: coercion, extraction, and legitimation. The remainder of the article is organized as follows. First, it defines courts. Next, it explores courts' roles in coercion, extraction, and legitimation in state-building. Finally, it examines those roles in cases on the medieval March of Wales and the Union of Islamic Courts in twenty-first century Somalia.

Courts and State-Building

Courts elude simple definition. Even Shapiro's classic comparative work on courts never explicitly defines courts despite discussing their attributes at length.[17] He

15. Stein Rokkan, "Dimensions of State Formation and Nation-Building: A Possible Paradigm for Research Variations within Europe" in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton, NJ: Princeton University Press, 1975), 562–600; and Tilly, *Coercion*, 14–15 and 194; and Susan Woodward, *The Ideology of Failed States: Why Intervention Fails* (Cambridge, MA: Cambridge University Press, 2017), 65.

16. Barfield, "Culture"; Carothers, *Promoting*; and Fischer and Lundgreen *Recruitment*.

17. Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981); and Carolyn Williams, "Booknote," *Houston Law Review* 20 (1983): 947–57, 951.

does, however, lay the groundwork for establishing a definition. To start, he rejects that courts are independent from the overall political system, inherently adversarial in structure, tightly bound by preexisting rules, and required to issue winner-take-all decisions. While courts at times act in accordance with these attributes, they often deviate from them. In particular, they often deviate from legal rules and issue mixed decisions in attempts to gain the consent of the disputants. These observations imply that courts vary considerably in their attributes and that any definition must be quite general, while not being so loose as to encompass all third-party mediators. While courts clearly are third-party mediators, many such entities exist. Courts differ from these other mediators in relative, not absolute, ways.[18] In particular, the use of courts is often less voluntary than the use of other third-party mediators and arbitrators. Further, there is greater, though not total, specificity in the rules that guide courts' decisions when compared to other third parties.[19] Crucially, courts cannot be separated from the overarching political system in which they are enmeshed and are often used by political regimes to assert social control.[20] They are political and administrative actors that make policy and exercise power. Yet, they also behave differently than other political or state administrative bodies.[21] Most clearly they lack the budget, administrative capacity, and armed coercive tools that many other state bodies possess.[22] These observations are consistent with an implicit definition of courts that can be found within Shapiro's work: courts are bodies that engage in dispute resolution, social control, and lawmaking.[23] This definition—and the observations that precede it—separate courts from both other state administrative bodies and also from non-state third-party mediators while remaining general enough to cover courts across a variety of states and eras.

With courts defined, albeit loosely, it is possible to turn to their roles in state-building. Courts' contributions to state-building vary. This results from the fact that the nature of courts, and the states they serve, also varies considerably across time and space. Even so, it is possible to think broadly about how courts could contribute to state-building. I argue that courts can contribute to state-building in at least three ways: coercion, extraction, and legitimation. While there is more to state-building

18. Shapiro and Stone Sweet, *On Law*, 14.
19. Shapiro, *Courts*, 5–6.
20. Shapiro, *Courts*, viii.
21. Ginsburg and Kagan, *Institutions*, 3; Shapiro, *Courts*, 1 and 20; and Shapiro and Stone Sweet, *On Law*, 16–17.
22. Shapiro, *Courts*, 13.
23. Shapiro, *Courts*; and Williams, "Booknote," 948.

than these three processes, they are crucial.[24] Indeed, coercion and extraction are necessary for states to function. States must be able to compel their populations to perform desired actions and to refrain from undesired ones. States must also obtain the resources necessary for governance from that population. Likewise, while non-legitimate states and governments can survive, the lack of legitimacy makes their exercise of power much more difficult and costly. Thus, courts' coercive, extractive, and legitimating functions matter greatly. Courts' contributions to each of these three functions are developed below, beginning with coercion.

Coercion is broader than the use of the military or even the use of force. Economic, normative, and legal instruments are powerful, coercive tools even when not directly backstopped by force. For instance, in Angevin England, civil officials, rather than the military, enforced court rulings.[25] Likewise, even in violent settings like medieval Europe, normative coercion remained a powerful tool.[26] In fact, excommunication, not death, was in many ways the ultimate sanction.[27]

Courts coerce through their rulings. While these rulings are, at times, carried out by force—by police, militias, or militaries—this is often unnecessary. Much as with international law, as long as the parties to the dispute want to continue to utilize the law and participate in economic and political systems underpinned by that law, they have strong incentives to accede to rulings that go against them.[28] Presumably, such incentives are far stronger in domestic settings, where frequent interactions with the broader community are informed by law, than in the international realm. Courts also gain coercive leverage by adjudicating matters such as property disputes, family law, or questions of inheritance. Because such rulings give the government a direct role in the disposition of economic resources, they strengthen the state's coercive and extractive apparatuses while simultaneously providing a real

24. Charles Tilly, "Entanglements of European Cities and States" in *Cities and the Rise of States in Europe, A.D. 1000 to 1800*, ed. Charles Tilly and W. P. Blockmans (Boulder, CO: Westview Press, 1994), 1–27, 5–9.

25. Samuel E. Finer, "State- and Nation-Building in Europe: The Role of the Military" in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton, NJ: Princeton University Press, 1975), 84–163, 89 and 109.

26. R. R. Davies, "The Medieval State: The Tyranny of a Concept?," *Journal of Historical Sociology* 16 (2003): 280–300, 285.

27. Rodney Bruce Hall, "Moral Authority as a Power Resource," *International Organization* 51 (1997): 591–622.

28. Thomas König and Lars Mäder, "The Strategic Nature of Compliance: An Empirical Evaluation of Law Implementation in the Central Monitoring System of the European Union," *American Journal of Political Science* 58 (2014): 246–63; and Alyssa K. Prorok and Benjamin J. Appel, "Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War," *Journal of Conflict Resolution* 58 (2014): 713–40.

service to the governed. Further, law is not only a basis for punishment and dispute resolution, but serves as a guide for the governed to avoid becoming embroiled in disputes thereby reducing the need for overt coercion.[29] Thus, legal coercion is not reducible to the direct employment of force.

This is not to say the state's overall possession of armed coercive capacity is irrelevant to coercion through courts. That the state could ultimately defeat a rebellion, roundup scofflaws, or even punish entire communities, clearly matters. Such threats, however, usually remain latent. Courts can compel individuals to comply with their rulings even in the absence of police and without the state actively employing force. In other words, courts are not simply ratifying or legalizing outcomes derived by force.

Even in cases where such legal and economic incentives are insufficient, enforcement can be outsourced to the broader community rather than to a force-wielding governmental body. Communities have incentives to carry out courts' rulings to continue to enjoy the benefits of law and avoid falling afoul of courts themselves. This communal enforcement of rulings is consistent with the notion that police are merely "an organization authorized by a collectivity to regulate social relations by utilizing, if need be, physical force."[30] These communities, thus, could employ force against their own members to enforce rulings. Courts are much the same thing, minus force, and can return the enforcement of their rulings back to the community itself. While this cuts against Weber's definition of the modern state, which rests heavily upon the monopolization of the legitimate use of force, his definition applies only to modern, European states, not all states.[31] Further, as such communal enforcement would be authorized by courts, the state would retain control over the legitimacy of the use of force. In short, courts are important institutions of state coercion, though the nature of that coercion varies by setting.

Like the ability to coerce the governed, the ability to extract resources from society is vital to states' success. State revenues are often envisioned as taxation. Yet, for many states, taxation is incredibly difficult. Taxation requires an exchange economy to derive valuations for income and wealth. This is necessary to avoid both tax evasion and the expropriation of revenues by the tax collectors themselves.[32] Further,

29. Hudson, *Formation*, 7–8.

30. David H. Bayley, "The Police and Political Development in Europe" in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton, NJ: Princeton University Press, 1975), 328–79, 328.

31. Davies, "Medieval State," 291; and Dipali Mukhopadhyay, *Warlords, Strongman Governors, and the State in Afghanistan* (Cambridge, MA: Cambridge University Press, 2014), 317.

32. Gabriel Ardent, "Financial Policy and Economic Infrastructure of Modern States and Nations" in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton, NJ: Princeton University Press, 1975), 164–242, 164–6; and Mick Moore, "Revenues, State Formation,

people actively and at times violently resist taxation.[33] Most forms of direct taxation, therefore, require powerful bureaucracies, something many states lack.

States lacking large administrative structures must turn to other methods of extraction. These include customs fees, excise taxes, the sale of lands and offices, state monopolies, demesne agriculture, the confiscation of property, and debasing coinage.[34] Courts provide some of these sources of revenue. Most notably, they confiscate property and fine wrongdoers. They can also act as chokepoints for taxation by restricting access to the courts to those who pay user fees. This is similar to states' use of other chokepoints, such as major ports where custom fees are imposed or taxes on specific goods such as salt or alcohol, which states can more easily monitor and thus effectively tax. This limiting of justice to those who are able to pay is a form of selective service provision. Many governments have used selective service provision to aid revenue collection.[35] When fees obtained through the selective provision of justice are combined with confiscations and fines, courts become potent sources of revenue.

Such fees and fines can be substantial in the aggregate. For instance, in 923–924 fines "formed no less than 48 per cent of the total revenue" of the Arab Caliphate.[36] Similarly, courts were a crucial means of extraction in medieval France.[37] Likewise, fees and fines imposed by royal courts filled the coffers of the Angevin kings of England as both great lords and freemen were willing to pay to access royal justice.[38] Likewise, the quite numerous justices of the peace in Tudor England were able to live off the fees they imposed, meaning an important arm of state administration was self-financing.[39] This ability of courts to serve as a source of revenue, even in feudal states, cuts against traditional arguments in the literature that argue feudal lords had to rely on demesne agricultural production for the bulk of their revenues.[40]

Last, courts are potential sources of legitimacy for states. To the extent that courts act as reasonably fair arbiters of disputes among the governed, individuals may see

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and the Quality of Governance in Developing Countries," *International Political Science Review* 25 (2003): 297–319, 298–300.

33. Ardent, "Financial Policy," 167–73.

34. Ardent, "Financial Policy," 187–91; and Tilly, "Entanglements," 11.

35. Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1989).

36. George E. Von der Muhll, "Ancient Empires, Modern States, and the Study of Government," *Annual Review of Political Science* 6 (2003): 345–76.

37. Marten, *Debunking*, 176; Petit-Dutaillis, *Feudal* 242–5; Poggi, *State: Its Nature*, 38–9 and 45; and Sassen, *Territory*.

38. Hudson, *Formation*, 141–5 and 220–3; and Stenton, *English*, 46.

39. Fischer and Lundgreen, *Recruitment*, 465 and 477–8.

40. See for example, Norbert Elias, *State Formation and Civilization*, tr. E. Jephcott (Oxford: Basil Blackwell, 1982), 203–4.

courts, and hence the state itself, as fair and legitimate.[41] As legitimate power is less costly to wield than illegitimate power, states that have high degrees of internal legitimacy should face less internal resistance, holding all else equal.[42] Of course, biased, especially rapacious, or ineffectual courts would not enhance states' legitimacy. Nor would states' legitimacy be based solely on their courts. Rather, legitimacy would be bound up with states' overall actions and characteristics. Even so, courts are likely to play an important role in fostering a sense of legitimate governance—provided the justice they afford is real.

In sum, courts play several important roles in constructing states. They can coerce subjects and increase the state's control over economic resources. They can also extract significant revenues. Last, they can confer legitimacy onto the states they serve. This means courts, while not a necessary institution for state-building, can and do play significant roles in the construction of many states. This argument is illustrated below in two case studies.

Case Selection

The medieval case of the Welsh Marcher lordships and the modern case of the Union of Islamic Courts (UIC, also known as ICU) in Somalia were selected for two reasons. First, both are instances of state-building in violent settings—not places where one would expect courts to play a major role. They are also both settings that depart significantly from the industrial and post-industrial state settings where institutional approaches were developed and have most often been employed. Thus, the cases expand the scope of evidence used to examine such approaches.

Second, the case selection reflects a comparative approach and has emphasized selecting cases that are substantially different from each other. Such a comparative approach is consistent with much legal scholarship, including institutional approaches.[43] By selecting cases with substantial differences between them, it increases the likelihood that if courts play an important role in state-building in both cases, they likely would matter in a wide variety of settings. The main differences between the

41. R. Shep Melnick, "'One Government Agency Among Many:' The Political Jurisprudence (sic) of Martin Shapiro," in *Institutions and Public Law: Comparative Approaches*, ed. Tom Ginsburg and Robert A. Kagan (New York: Peter Lang, 2005), 19–44, 23; and Shapiro, *Courts*, 17–18.

42. Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2007); and Moore, "Revenues," 300–1.

43. Ginsburg and Kagan, *Institutions*, 4; and Martin M. Shapiro, "Law, Courts, and Politics," in *Institutions and Public Law: Comparative Approaches*, ed. Tom Ginsburg and Robert. A. Kagan (New York: Peter Lang, 2005), 275–98, 280.

cases are as follows. The cases come from very different times and places: medieval Europe and twenty-first century Africa. The courts also employed distinct legal traditions. The Marcher lords' courts combined English and Welsh customary law, while the Somali courts blended Islamic law with Somali customary law. Further, the Marcher lordships arose out of foreign conquest, while the UIC came about after the collapse of the Somali state. Last, the imposition of law in medieval Wales was primarily a top-down process driven by the Marcher lords' desire to govern their territories more effectively. In contrast, the creation of the Somali courts was primarily a bottom-up process driven by ordinary Somalis' desire for better governance. In other words, the Somali case is very much a modern story not only because it occurred recently, but also because of the role ordinary Somalis played in the creation of the court system. This contrasts sharply with the Welsh case, which is overwhelmingly a story of elites. Thus, the cases are quite different from each other.

This is not to say there are no similarities between the cases. Both cases cover areas of low capital intensity. Theory suggests state-building in such regions would be characterized by strategies that focus on coercion rather than capital formation.[44] Both cases fit this supposition. Rulers in both cases also dealt with considerable foreign threats. The Marcher lordships were confronted by the remaining independent Welsh principalities and the UIC was gravely threatened by Ethiopia and the United States.

Another similarity is that both cases are examples of states or governance structures that have not survived. The UIC was quickly destroyed by Ethiopia in late 2006 and the Welsh Marcher lordships were eventually absorbed in the English state under the Tudors. Oddly, this may be a virtue, as state-building is not guaranteed to be successful. Further, states and governance structures come in a wide variety of forms and levels of maturation. Institutions that play important roles during earlier periods of state formation and state-building may not be the ones that are crucial later on.[45] Studying forms of governance and states that did not survive provides a way to examine such intermediate institutions. The chosen cases, therefore, may offer insights into what institutions are important in early periods of state-building, especially in regions with limited capital. Also, the Welsh Marcher lordships were not destroyed, but rather were peacefully absorbed into the English state. Indeed, the English crown inherited many of the lordships prior to their legal absorption. Just as it would be wrong to dismiss state-building in Bavaria or Scotland

44. Scott Abramson, "The Economic Origins of the Territorial State," *International Organization* 71 (2017): 97–130, 114; and Tilly, *Coercion*, 57 and 199–201.

45. Davies, "Medieval State," 283; and Tilly, *Coercion*, 48.

because they were absorbed into a Prussian-dominated German state and an English-dominated British state respectively, it does not make sense to ignore state-building activities in the Welsh March. For these reasons, both cases offer insights into the roles courts play in state-building.

Welsh Marcher Lordships

The medieval March of Wales was a collection of territories seized in piecemeal fashion by Anglo-Norman lords from the Welsh between 1066 and the Edwardian conquest of Wales in the late 1200s. It endured as a legally distinct area until the 1500s when it was disbanded by the Tudors. At first blush, the selection of the March as a case of state-building may seem odd, as it appears to be simply a military frontier consisting of several dozen sub-state units subject to the King of England. Yet, these Marcher lordships were cohesive socio-political entities that existed for over 400 years. They were self-governing in administrative, judicial, and financial terms. Therefore, they are best seen as petty states.[46] Viewing such polities as states is consistent with recent scholarship that classifies members of the Hanseatic League, sub-units of the Holy Roman Empire, and the more independent medieval counties of France, such as Toulouse, as states.[47]

It is worth reviewing in some detail the properties that made the Marcher lordships states. First, the lordships were geographically compact polities unlike the scattered possessions typical of the nobility in England.[48] All non-church lands in a Marcher lordship were held directly or indirectly by the lord.[49] Indeed, seven out of eight tenants held land directly from the lord—a much higher percentage than anywhere in England including the Scottish Marches.[50] By the 1200s, many Marcher lords had "transformed their lordship over the Welsh territories within their Marcher domains into an intensive and well-circumscribed territorial authority."[51]

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46. R. R. Davies, *Age of Conquest: Wales, 1063–1415 (Oxford: Oxford University Press, 2000)*, 283 and 391; Brock W. Holden, *Lords of the Central Marches: English Aristocracy and Frontier Society, 1087–1265 (Oxford: Oxford University Press, 2008)*, 46–7 and 66; and Annette J. Otway-Ruthven, "The Constitutional Position of the Great Lordships of South Wales," *Transactions of the Royal Historical Society* 8 (1958): 1–20, 2.

47. Abramson, "Economic Origins," 102–4.

48. Davies, *Age of Conquest*, 95 and 405; and Max Lieberman, *The Medieval March of Wales: The Creation and Perception of a Frontier, 1066–1283* (Cambridge: Cambridge University Press, 2010), 4.

49. A. C. Reeves, *The Marcher Lords* (Llandybïe: Christopher Davies, 1983), 19.

50. Holden, *Lords*, 47.

51. Lieberman, *Medieval March*, 206.

Second, this territorial control was greatly reinforced by customary and statutory legal rights held by the Marcher lords as established in their interactions with, and enshrined in numerous legal documents issued by, the English monarchy. They had virtual regal jurisdiction within their lordships and their courts held near judicial omnicompetence. Marcher courts issued rulings in the lord's name, appealable only to the lord. The lords were exempt from royal taxation, had the power of legislation, had rights to mines, and could claim treasure troves, royal fish, and wrecks—all normally rights of the king. Lords also could build castles, raise armies, take a third of their soldiers' plunder, alienate lands, escheat the property of traitors, charter boroughs, control weights and measures, and establish forests, markets, fairs, and tolls, again all normally royal prerogatives.[52] Nor, unlike with their fellow barons in England, were the lords' prerogatives challenged by any rival royal governance structures within the March. The king's writ only ran in the March in the filling of ecclesiastical offices and disputes over the inheritance of a lordship.[53] The lords' legal rights amounted to nearly complete sovereignty and distinguish the Marcher lords from modern warlords. While both warlords and the Marcher lords can be seen as "individuals who control small pieces of territory using a combination of force and patronage," warlords "rule in defiance of genuine state sovereignty."[54] That cannot be said of the Marcher lords, who ruled by right, not in contrivance of it. Even Ahram and King, who disagree that warlords are necessarily in opposition to state sovereignty, argue that warlords are sub-state actors whereas Marcher lords possessed "regality."[55] In other words, they were legally the equivalent of kings, not subjects under a king.

These rights were enshrined in the Magna Carta and reconfirmed by successive English kings.[56] Henry III declared that Marcher lords "had regality in their lands, and that their writ, not his, ran there."[57] Likewise, Richard II confirmed that Marcher lords should "enjoy royal jurisdiction . . . as in the cognizance of all pleas,

52. Davies, *Age of Conquest*, 283–6 and 401; Holden, *Lords*, 70; Lieberman, *Medieval March*, 3 and 218–45; Otway-Ruthven, "Constitutional," 5–10; and Reeves, *Marcher Lords*, 14–15 and 180.

53. Davies, *Age of Conquest*, 95; Otway-Ruthven, "Constitutional," 11; and Reeves, *Marcher Lords*, 14–15.

54. Kimberly Marten, *Warlords: Strong-Arm Brokers in Weak States* (Ithaca: Cornell University Press, 2012), 3.

55. Ariel I. Ahram and Charles King, "The Warlord as Arbitrageur," *Theory and Society* 41 (2012): 169–86.

56. Lieberman, *Medieval March*, 14; Reeves, *Marcher Lords*, 17; and David Walker, *Medieval Wales* (Cambridge: Cambridge University Press, 1990), 65.

57. Lieberman, *Medieval March*, 218.

personal, real and of the crown."[58] Nor were the Marcher lords shy about asserting their rights.[59] For example, in 1269 in response to a royal request, the Earl of Arundel, stated that, "in the parts of the March of Wales where he now resided, he was not bound to do anything at the king's mandate, and nothing would he do."[60] Likewise, in 1284, Arundel's heir claimed the right "to declare, to add or to reduce the . . . laws, customs and services of their lordship whenever and howsoever it pleases them."[61] These are but two examples of the lords' regular and successful insistence that the March was outside of England and not subject to the king's law.

Last, relationships among the various Marcher lordships and between them and the independent Welsh principalities possessed many of the characteristics of interactions among states. There was no overarching legal authority across different lordships. Marcher lords had the right to make war. They signed formal treaties among themselves and with the native Welsh rulers. The lords also established various conventions among themselves governing the extradition of criminals, the swapping of stolen cattle, the protection of subjects when they travelled between lordships, and the settling of boundary disputes.[62] Finally, they often held a diplomatic "day of the March" when the lords or their representatives would meet as a body to resolve outstanding issues that had arisen between the various lordships.[63] Taken together, these external behaviors of the Marcher lordships, when combined with their internal traits described above, demonstrate the lordships possessed the characteristics of statehood. Though it is vital to avoid projecting modern conceptions back onto medieval states, most certainly states they were. As Welsh historian Rees Davies puts it,

> Indeed by almost any criteria we care to adopt the Marcher lordships were virtual "states." Their lords called themselves "lords royal;" they raised their own taxes and mustered their own armies; they exercised what they called "regal jurisdiction" and "with full liberty;" they referred to the inhabitants of their lordship as "their subjects;" they claimed and exercised the right to wage war, to issue letters of credence (letters of march, as they were called) and to arrange extradition treaties and associated matters with neighbouring

58. R. R. Davies, *Lordship and Society in the March of Wales, 1282–1400* (Oxford: Clarendon Press, 1978), 152.
59. Lieberman, *Medieval March*, 98.
60. Lieberman, *Medieval March*, 227.
61. Davies, *Lordship*, 151.
62. Davies, *Age of Conquest*, 285–6; and Reeves, *Marcher Lords*, 14–15 and 100–1.
63. Reeves, *Marcher Lords*, 15.

> lords . . . It would surely be casuistical to exclude them from being at the very least considered for membership—honorary membership, maybe—of the roster of medieval states as often nowadays defined by historians. Instead they have been cast into the oubliette as anomalous appendages of the English state or as seigniorial units caught in a time-warp and awaiting absorption into the English/British state.[64]

In ruling these petty states, Marcher lords leaned heavily on their courts. Their courts followed an amalgam of English and Welsh legal traditions. They built heavily upon existing local Anglo-Saxon courts that convened monthly throughout England in the tenth and eleventh centuries to resolve disputes, prosecute criminals, and levee taxes. These courts were transformed by the Marcher lords to fit their needs and the conditions of the March. The lords also created additional courts as the need arose. In all cases, the courts were used as tools of profit and of territorial control, much as the old Anglo-Saxon courts had been in England.[65]

The courts handled a wide range of matters including property disputes, contract law, matters of inheritance, debts, pledges, trespasses, assault, theft, the receiving of stolen goods, defaults on payments due to the lord, encroachments on pasture lands, and losing the lord's goods.[66] Myths about the lawlessness of the March notwithstanding, Marcher courts proved as effective at punishing criminals and keeping the peace as their counterparts in England. They achieved this despite there being no standing police force to enforce their rulings. Instead, whole communities were pledged to pay communal fines if their members broke the lord's law, creating incentives for the populace to implement the courts' rulings.[67]

The courts' rulings were based on unwritten, customary law derived from both Welsh and English legal traditions including English common law and trial by jury.[68] Reliance on unwritten customary law was widespread in northern Europe in contrast to southern Europe where Roman law predominated.[69] Despite the unwritten nature of the law, the courts followed specific legal procedures and the lord rarely sat as judge. Instead, designated judges, versed in legal affairs, heard cases from suitors, made legal determinations, and issued rulings. The courts also met regularly,

64. Davies, "Medieval State," 294.

65. Davies, *Lordship*, 154; *Age of Conquest*, 283; Lieberman, *Medieval March*, 190–200 and 211; and Walker, *Medieval Wales*, 59.

66. Lieberman, *Medieval March*, 44–5; and Reeves, *Marcher Lords*, 92–4.

67. Davies, *Lordship*, 170; and Reeves, *Marcher Lords*, 100.

68. Holden, *Lords*, 65–6; and Reeves, *Marcher Lords*, 92.

69. Sassen, *Territory*, 62.

even during serious Welsh revolts. Typical was the court in Dyffryn Clwyd, which met 136 times during 1322–1323.[70]

The line between the judicial and administrative functions of the courts, however, was not sharp. Rather, the courts were a place where the lords exercised broader coercive powers vis-à-vis their subjects.[71]

> [Courts] were more than simply occasion for the keeping of law and the punishment of criminals. They were also the channel whereby the lord's subjects could be coerced if he deemed necessary. Statutes and ordinances on all manner of things were issued by lords in their courts, and it was in courts that lords made their charters public. Any infraction of the lord's authority could appear on the agenda of a court session. Courts, in other words, were more than the prime instrument of judicial lordship; they were tools for the exercise of lordship over men and land.[72]

In particular, the courts were crucial to the consolidation of the lordship through the processes of distraint (the seizure of enfeoffed lands for failure to perform feudal obligations) and forfeiture. Distraint was the ultimate sanction of Marcher courts and indeed of lordship. Most vitally, it was how military obligations were enforced.[73] Legal coercion underpinned the lords' rule.

Beyond the role courts played in coercion, their ability to extract revenues was vital. Judicial lordship was immensely profitable, far more profitable than demesne agriculture. These judicial profits made holding Welsh Marcher lordships particularly attractive to the Anglo-Norman nobility. For on their English estates, it was the king, and not the lord, who controlled the courts and took profits from them. To maximize revenue, lords, much as the kings of England, sought to ensure there were no alternatives for the resolution of legal disputes outside of their courts.[74]

There were several ways, both strictly judicial and quasi-judicial, that the courts generated revenue for their lords. In the strictly judicial category were fees subjects had to pay to access the courts. While fees varied from court to court, representative examples include ten pounds "to have the help of the court," two pounds for a jury or search of the court rolls, and six pence for judgment in a case of debt or a lord's protection over one's grain. In one instance, a Welshman in Dyffryn Clwyd paid six

70. Davies, *Lordship*, 157–69.
71. Davies, *Lordship*, 166 and 181.
72. Reeves, *Marcher Lords*, 94.
73. Holden, *Lords*, 62–8.
74. Davies, *Lordship*, 164–5, 187, and 178–9; *Age of Conquest*, 401–2; Reeves, *Marcher Lords*, 105; and Walker, *Medieval Wales*, 60.

shillings and eight pence to secure a jury verdict when he was accused of stealing only six pence of grain![75] These were significant sums in a period where a laborer or longbowman might receive three pence a day.[76] Further sources of strictly judicial income were fines for failure to prosecute or appear in court, shares of damages awarded, fines for settling out of court, forfeited chattels of felons and intestates, the escheating of estates, and fines for wrongful judgments or false testimony.[77] Fines collected as punishments for crimes committed were an important component of this judicial income.[78] For example, the court at Brecon issued a single fine of £400 for the crime of clearing land for agricultural use without permission. In a five-year period (1352–1357), that court issued £1717 in fines for such offenses as wrongful judgments, evading tolls, and acts of violence.[79] These revenues were so attractive that lords often became more concerned about profits than justice. Out of a desire for more revenue, criminals could, at times, avoid further punishment by paying fines to the lord and giving compensation to the victims. While such practices were rooted in Welsh law, they created opportunities for the cynical selling of justice.[80]

There were quasi-judicial revenues as well. These included fees for transferring land or fines for failures to perform duties owed to the lord. More importantly, they included revenues from special court sessions held by itinerant judges, called eyres, which compelled entire communities to buy pardons for past bad acts—sometimes from many years before. Examples of such fines include forty pounds for "disobedience," £135 for not hauling timber for the lord, £400 for acquiring land without permission, £500 for evading tolls, and £720 for attacking men of a neighboring lordship. A single eyre could raise several thousand pounds. For example, an eyre in Brecon in 1373 raised almost £2000. Nor was this an exception. Revenue from eyres composed more than 20% of all of the lordship's income in Chirkland in the 1340s, 60% in Maelienydd in the 1350s, and 40% in Brecon and Cydweli from 1413–1422.[81]

Given the very real threat of fines from sessions in eyre, communities sought to protect themselves by paying for the granting of charters outlining their communal rights and by buying immunities and pardons. These actions, which were often

75. Davies, *Lordship*, 153, 160–1, and 181–2.
76. With 240 pence to the pound.
77. Davies, *Age of Conquest*, 181–2; Lieberman, *Medieval March*, 47; Otway-Ruthven, "Constitutional," 7; and Reeves, *Marcher Lords*, 125.
78. Lieberman, *Medieval March*, 204.
79. Walker, *Medieval Wales*, 60–1.
80. Davies, *Lordship*, 173–4.
81. Davies, *Lordship*, 174 and 181–4; and Davies, *Age of Conquest*, 402.

initiated by the communities themselves, also brought significant revenues into the Marcher lords' treasuries. For example, the sale of three charters by the Earl of Arundel to his subjects in Chirkland between 1324 and 1355 netted him £2933.[82] Likewise, the people of Brecon paid a "gift" of £1800 in 1375 to avoid another expensive eyre such as had occurred just two years before.[83]

Some caution is warranted in drawing overarching conclusions about what percentage of the Marcher lords' revenues was derived from courts. There was substantial variation in revenues from year to year and lordship to lordship. Further, the survival of baronial accounting records is spotty. Still, it is clear that judicial and quasi-judicial revenue composed a substantial portion of Marcher lords' revenues, especially in lordships dominated by Welsh-occupied uplands. A survey of Marcher revenues during the fourteenth century found that judicial and quasi-judicial revenues accounted for between 18% and 80% of annual revenue depending on the year and lordship. For instance, in 1398, the lordship of Brecon generated an income of £1405 of which £778 came from the courts.[84] Likewise, in 1356–1357, judicial income was responsible for £129 of the £216 total receipts of the lordship of Maelienydd.[85] While records are spottier in the thirteenth century, evidence again suggests courts were crucial sources of revenue. In 1256–1257, judicial and quasi-judicial methods were responsible for 31% of the revenue from Monmouth and 38% in Abergavenny.[86] Judicial revenues remained important into the fifteenth century. The £240 of judicial income out of total revenue of £335 for Newport in 1447–1448 is reasonably representative for the March as a whole during this period.[87]

Nor are the high ratios of judicial income to non-judicial income a result of the Marches being poor sources of revenue. Many of the most powerful Anglo-Norman nobles derived much of their wealth from Marcher lordships. For example, the Despensers, arguably the most powerful baronial family in England during the reign of Edward II, derived a third of their total revenue from Welsh lordships, while their main rivals for supremacy in England, the Mortimers (Earls of March), derived their power entirely from Wales. Likewise, the Clares (Earls of Gloucester and Hertford) earned half of their income from Wales.[88] The various Mortimer and FitzAlan (Earls of Arundel) estates in Wales could yield over £2000 for their lords and the Despensers

82. Otway-Ruthven, "Constitutional," 7; and Reeves, *Marcher Lords*, 69 and 123.
83. Walker, *Medieval Wales*, 60–1.
84. Davies, *Lordship*, 177–80.
85. Reeves, *Marcher Lords*, 104.
86. Holden, *Lords*, 71–6.
87. Reeves, *Marcher Lords*, 104.
88. Walker, *Medieval Wales*, 57–60.

obtained £5000 in one year from their Welsh holdings. These are huge sums considering many English earls had annual incomes of roughly £1000. These massive revenues allowed Arundel to have £19000 in ready cash stashed in his various castles in the March at Michaelmas 1370. These great families saw their Marcher lordships, and hence their courts, as sources of vast revenues, which conferred upon them significant political power.[89] Clearly, "justice and profit were close accomplices in the March."[90]

None of this is to claim that military coercion was unimportant. The Welsh Marches were a military frontier for most of their existence and military lordship was always a large factor. Marcher lords formed a militarized elite who were largely responsible for the defense of England against the free Welsh and who used military force to control their Welsh and English subjects.[91] During the early centuries of the March, military cooperation between the lords and their subjects very much contained an element of mutual self-interest given the Welsh threat. Likewise, the lords' subjects owed military service or cash substitutes. The exact nature of these duties varied greatly and reflected a range of bargains struck between the Marcher lords and their subjects.[92] Even after the Edwardian conquest of Wales resulted in the decline of the Welsh threat, the March remained a militarized society.[93] Lords continued to raise soldiers from their estates for use in Wales, England, and France well into the 1400s.[94] This very fact of the Marcher lords fitting within a militarized view of state formation, however, is what makes the role of courts in the March so intriguing. Even in a highly militarized region, courts played major roles in both coercion and extraction.

Thus, the Marcher lordships' internal characteristics—their circumscribed territories and the regality of the lords' in legal, fiscal, and military matters—were those of states. Likewise, they interacted with each other and the native Welsh kingdoms as states. Though the March was a military frontier, the rulers of these petty states relied heavily upon their courts to govern their lordships. These courts were able to coerce the lords' subjects. Even without a police force, these courts were able to keep the peace—at least by the standards of medieval Britain—and ensure obligations owed to the lords were carried out. The courts also extracted significant

89. Davies, *Lordship*, 176 and 195; and Davies, *Age of Conquest*, 401–5.

90. Davies, *Lordship*, 182.

91. Davies, *Age of Conquest*, 280–1; Holden, *Lords*, 48–62; Lieberman, *Medieval March*, 81–4 and 102–37; and Reeves, *Marcher Lords*, 68.

92. Lieberman, *Medieval March*, 176–85.

93. Davies, *Lordship*, 50; and Lieberman, *Medieval March*, 173.

94. Reeves, *Marcher Lords*, 63–4; and Walker, *Medieval Wales*, 62–3.

resources from the populace. Especially in lordships consisting primarily of Welsh-inhabited uplands, courts were major sources of revenue. This revenue, of which there was no parallel among noble estates in England, was a major attraction of being a Marcher lord. The courts were crucial organs of state that carried out administrative, fiscal, and judicial tasks. It is impossible to fully comprehend how the March was ruled and organized if they are ignored.

Somali Union of Islamic Courts

Courts also played an important role in the return of governance to Somalia in the first decade of the twenty-first century. With the collapse of Siad Barre's regime and the Somali state in the early 1990s, Somalia came under the control of rivalrous clan- and sub-clan-based warlords, bandits, and other armed criminals. This decline in governance pushed coalitions of business leaders, militias, and neighborhood groups to search for new ways to improve security and predictability, reduce transaction costs, and instill the rule of law. This demand for governance ultimately led to the emergence of the UIC.[95] The initial response, however, was the formation of loose, overlapping polities led by clan elders, members of the *ulema* (clergy), and business leaders at the neighborhood or municipal level. The courts built upon existing, pragmatic methods to resolve disputes within sub-clans and formalized those existing practices as court-based governance structures.[96] Such local legal systems are often able to maintain order in the absence of centrally imposed law.[97] In Somalia, local courts incorporated clan and religious leaders as judges, controlled local militias, and extracted revenues in the form of fines and taxes. In short, they acted as local governance apparatuses.

One of the earliest and most important of these courts emerged in northern Mogadishu within the Abgal sub-clan of the Hawiye. Over 6,000 criminal and civil cases were heard by the court between August 1994 and September 1996. The court increased local security and its rulings were enforced by the local militia. It was disbanded, however, when a dispute arose between the court headed by Sheikh Ali

95. Aisha Ahmad, "Taliban and the Islamic Courts Union: How They Changed the Game in Afghanistan and Somalia," *Policy Perspectives* 6 (2009): 55–72, 59; Aisha Ahmad, "The Security Bazaar: Business Interests and Islamist Power in Civil War Somalia," *International Security* 39 (2015): 89–117; and Ken Menkhaus, "Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping," *International Security* 31 (2007): 74–106, 82.

96. Menkhaus, "Governance," 85.

97. Barfield, "Culture," 355; and Tobias Hagmann and Mark V. Hoehne, "Failures of the State Failure Debate: Evidence from the Somali Territories," *Journal of International Development* 21 (2009): 42–57.

Dhere Sheikh Mahamud and the local militia led by Ali Mahdi. Both men had hoped to use the court to strengthen local governance, but had different ideas about what such a government would look like and who would be empowered by it. When Ali Mahdi saw the court was strengthening his opponents, he scuttled the project, though ironically the resulting disorder actually weakened his control of northern Mogadishu.[98]

Similar courts emerged elsewhere. In rural areas, some courts went beyond a narrow focus on security and instead also set up water supplies and regulated local market places. Most courts funded themselves through user fees or levied taxes.[99] For example, in Belet Weyne in the Hiran region a court was established from 1995–1998. Its authority derived from clan elders. It collected taxes to fund its activities and created a 500-person militia. It was broadly popular, especially among merchants, and initially successful at restoring law and order. However, it collapsed as it was drawn into inter-clan feuds and failed to collect taxes owed to the court. This experience was typical of many nascent, local courts in the late 1990s.[100]

The crucial step that ultimately led to the formation of the UIC was the creation of sub-clan courts in southern Mogadishu. This occurred after warlord Mohammed Aideed, who had opposed the courts, died in 1996.[101] The first courts were formed by the Saleban sub-clan of Habr Gedir and the Ayr and Duduble sub-clans. Additional sub-clans quickly followed suit.[102] Much as with other courts, the impetus for their formation came from the business community—especially food traders, the import/export sector, and remittance companies. These merchants sought to avoid the costs imposed on them by local militias.[103] The courts quickly spread to both Lower Shabelle and Merca.[104]

As with other local courts, the jurisdiction of these courts was initially limited to their sub-clans. However, the courts in southern Mogadishu contained members of the Islamist group Al-Itihaad Al-Islamiya who were interested in broader governance. These individuals successfully pushed to combine the various sub-clan courts

98. Cedric Barnes and Harun Hassan, "The Rise and Fall of Mogadishu's Islamic Courts," *Journal of Eastern African Studies* 1 (2007): 151–60, 152; Andre Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives* (Geneva: Centre for Humanitarian Dialogue, 2005), 42; and Oscar Gakuo Mwangi, "The Union of Islamic Courts and Security Governance in Somalia," *African Security Review* 19 (2010): 88–94.

99. Menkhaus, "Governance," 86.

100. Le Sage, *Stateless*, 43–4.

101. Le Sage, *Stateless*, 44.

102. Barnes and Hassan, "Rise," 152.

103. Le Sage, *Stateless*, 44–5.

104. Barnes and Hassan, "Rise," 153; Le Sage, *Stateless*, 44–5; and Mwangi, "Union," 89–90.

of southern Mogadishu into one unified body.[105] Moving past sub-clan governance and into the governance of a broader population not based on familial ties brought the courts clearly into the realm of state-building. This was achieved in 2000 when the separate courts combined to form a precursor to the UIC, the Joint Islamic Courts Council (JICC). The courts also merged their militias. The new, unified court was headed by Hassan Mohammed Addeh with Sheikh Hassan Dahir Aweys, an important former member of Al-Itihaad Al-Islamiya, acting as the power behind the scenes. This consolidation created the first non-warlord-controlled pan-Hawiye military force since the collapse of the Somali government.[106]

The declining security situation in northern Mogadishu led to courts being revived in that section of the city as well. They soon merged with the JICC, giving the courts a shared 400-person militia—the largest military force in the capital—to enforce their rulings.[107] The JICC courts also spread to Galguduud, Aweys' home region, though attempts to spread to Kismayo and Belet Weyne failed.[108] By 2005, there were eleven courts operating under the JICC umbrella in Mogadishu with each linked to a given clan or sub-clan. With few exceptions, they mostly focused on security issues in their area of the city and maintained a significant amount of local autonomy within the larger governance structure. By using Islamic legal framing, the JICC was able to appeal across clan-boundaries. As the JICC and its militia drew upon all of the clans and sub-clans served by the courts, it transcended clans and so offered a distinct alternative to the militias of the warlords and, unlike earlier local courts, offered protection from criminals living in one community and operating in another.[109] The success of the JICC courts also stood in sharp contrast to those set up by the Transitional National Government (TNG), which were barely functioning.[110]

The JICC courts in Mogadishu and others throughout Somalia that remained independent had remarkably similar structures. They were composed of a *shura* (council), chairman, and a military commander. The *shura* was composed of political, business, and religious leaders from the sub-clan. It appointed the chairman and the chairman in turn appointed the military commander subject to the *shura's* approval. Below the chairman, there was a vice-chairman and four judges. The courts financed their activities, including the maintenance of militias, in a variety of ways. They extracted contributions from signatory communities (essentially by taxing

105. Barnes and Hassan, "Rise," 152–3; and Le Sage, *Stateless*, 44.
106. Barnes and Hassan, "Rise," 153.
107. Barnes and Hassan, "Rise," 153; and Le Sage, *Stateless*, 45.
108. Le Sage, *Stateless*, 48; and Mwangi, "Union," 90.
109. Ahmad, "Taliban,"; "Security," 100; Le Sage, *Stateless*, 47; and Mwangi, "Union," 90.
110. Le Sage, *Stateless*, 29–30; and Mwangi, "Union," 90.

merchants), charged fees to appear in court, sold off confiscated goods, collected tolls at check points run by the courts' militias, and accepted private donations.[111] Crucially, the courts went into operation prior to having created militias to enforce their edicts, though the militias certainly enhanced their ability to govern.[112] The courts were not bodies to ratify and legitimize actions of the militias, but rather bodies that were able to compel compliance prior to having loyal militias to back their rulings. Even after the court militias' formation, the militias clearly remained under the auspices of the courts and not the other way around.[113] Still, these courts differed from those in the March of Wales. The JICC and later UIC courts' rulings were often directly enforced by their associated militias, which acted as police and jailers in addition to their military roles.

The courts had three main responsibilities: organize militias to apprehend criminals, rule in civil and criminal cases, and incarcerate convicted prisoners.[114] The judges were not necessarily versed in any specific school of *sharia* (Islamic law). Indeed, many had little legal training or were illiterate. Most rulings were based on *xeer*, a clan-based system of Somali customary law. *Sharia* served to supplement *xeer* and *sharia*-based punishments that were harsher than those called for by *xeer* were rarely imposed before 2006.[115]

The reliance on *xeer* meant that the courts' authority derived from sub-clan elders. Initially, rulings applied only to a given court's own sub-clan. Enforcement was, at times, possible even when courts possessed little in the way of armed, coercive power because under *xeer* enforcement of a sentence is carried out by the accused's own clan, sub-clan, or familial group. This is possible because *xeer* relies heavily on intergroup mediation and the accused's group must assent to any court ruling. This ensures speedy execution of judgments, but *xeer* works best between groups of reasonably equal power. In practice, weak groups did poorly under *xeer* as relatively stronger groups proved able, at times, to ignore the courts' rulings prior to the UIC's formation in 2006. Likewise, most of the courts stayed out of clan disputes and politics and limited their authority to family matters, business disputes, minor crimes, and banditry. Indeed, this was the key to their success and kept the warlords from dismantling them.[116] This reluctance to become involved in politics and to enforce rulings against more powerful clans was limited to these early incarnations

111. Le Sage, *Stateless*, 39–40; and Mwangi, "Union," 89.
112. Mwangi, "Union," 90–1.
113. Le Sage, *Stateless*, 39.
114. Le Sage, *Stateless*, 38.
115. Le Sage, *Stateless*, 30–3 and 37–40; and Mwangi, "Union," 91.
116. Le Sage, *Stateless*, 35–40; and Mwangi, "Union," 91.

of local courts and would later be abandoned by the UIC. The UIC's possession of armed militias allowed it to carry out rulings against powerful sub-clans and sharply differentiated the UIC courts from earlier incarnations.

The courts in Mogadishu were the exception to this early practice of remaining aloof from politics. Indeed, had all of the courts abstained from politics, there would be no state-building story to tell. The Mogadishu courts, unlike other courts, began to encroach on the authority of the Hawiye warlords in Mogadishu. This resulted in assassinations of some of the courts' leaders prompting retaliatory attacks against the TNG in 2005.[117] Matters rapidly came to a head when the courts became involved in a dispute between Abukar Omar Adane, a major benefactor of the courts, and Basjir Rage, who was associated with the clan-based warlords. The courts, with the support of much of the populace of Mogadishu who saw the warlords as self-serving and the courts as providers of order, quickly gained control of most of the city in April and May 2006. Subsequent bandwagoning behavior resulted in defections from the warlords' militias and ultimately the reunification of the city for the first time in sixteen years. This achievement was marked by the creation of the UIC as the government of the city and as a viable alternative to the TNG.[118]

Nor did the UIC rest on its laurels. It quickly moved to evict squatters, curb the drug trade and kidnappings, halt the illicit exporting of charcoal, end illegal land grabs, and establish courts for the restitution of property.[119] The UIC likewise moved to eliminate its competitors. It used its enhanced revenues to build up a militia that could overawe any rivals. Neighborhood watches and civic associations were disbanded. The UIC also acquired weaponry from Eritrea, which hoped to use the UIC as a proxy in its conflict with Ethiopia.[120] The UIC, moreover, expanded outside of Mogadishu. It seized the port of Kismayo and became, for a brief time in 2006, ascendant in much of Somalia.[121] Obviously, many of these UIC activities were no longer judicial in nature. Courts performing judicial functions, however, remained central to UIC governance.

The UIC initially proved popular. The UIC imposed lower taxes compared to those of the ousted warlords. Likewise, the UIC proved effective at resolving and preventing conflicts. It also removed roadblocks and garbage from the streets of Mogadishu, restored seized properties, and reopened the airport and seaport. The greater

117. Barnes and Hassan, "Rise," 153–4.
118. Ahmad, "Taliban," 63; Barnes and Hassan, "Rise," 151–4; and Mwangi, "Union," 90–1.
119. Barnes and Hassan, "Rise," 155; and Menkhaus, "Governance," 89–90.
120. Menkhaus, "Governance," 76 and 88–9.
121. Barnes and Hassan, "Rise," 155–7; and Hagmann and Hoehne, "Failures," 51.

security, stability, and reduced armed predation naturally resulted in a burst of business activity.[122] Because of these successes, the courts and their militias were popular and seen as legitimate by ordinary Somalis.[123]

However, the UIC quickly began to overreach. It implemented deeply conservative Islamist policies, which proved unpopular. It also began openly criticizing the TNG and Ethiopia. The UIC also opposed the United Nations' Security Council Resolution 1725, which authorized the deployment of African Union peacekeepers to Somalia. Likewise, the UIC's expansion into Kismayo was resisted by the local population, as they were not part of the Hawiye clan. Further, this expansion threatened Ethiopia and the TNG. This decision to challenge Ethiopia and its proxies in Somalia proved disastrous. An Ethiopian invasion at the behest of the TNG and the United States in December 2006 easily defeated the UIC's forces and ended the courts' rule.[124]

This rapid military defeat initially soured public opinion on the UIC, but given the chaos and violence that followed the UIC's overthrow, many Somalis ultimately began to look back at the period of UIC governance as a relative golden age.[125] This is not to claim the courts had universal support. They did not. Yet, the improved security conditions they had provided, especially for the business community, and their ability to curtail violent conflicts between factions created real support for the courts and elites aligned with them. The local population, including many economic elites, accepted UIC governance in return for security. Thus, the courts served as security providers.[126] They were, prior to the Ethiopian invasion, successful at extracting resources, coercing the population, and providing stability—something the warlords' militias had struggled to do in the preceding decade-and-a-half. In other words, they had provided more robust governance in comparison to the warlords they supplanted.

Conclusion

Both cases offer significant support for the contention that courts play important roles in state-building and highlight why the state-building literature should engage more deeply with the comparative courts literature. The courts of the Marcher lords were central to both their coercive and extractive capacities. They were crucial in enforcing feudal obligations and keeping the peace—both directly through punishments

122. Mwangi, "Union," 90–2.

123. Hagmann and Hoehne, "Failures," 51; Le Sage, *Stateless*, 41; and Menkhaus, "Governance," 86.

124. Barnes and Hassan, "Rise," 155–7; and Mwangi, "Union," 90–1.

125. Barnes and Hassan, "Rise," 157.

126. Hagmann and Hoehne, "Failures," 51; and Le Sage, *Stateless*, 38–40 and 48.

such as fines, capital punishment, and distraint, and indirectly by outsourcing punishment to the community as a whole. Enforcement was effective by the standards of the day even in the total absence of a police force and was not closely tied to military coercion.

The Marchers' courts were also sources of significant revenue—revenues that often far outstripped those available from English estates where court revenues went to the king, not to the barons. Tellingly, such court revenues were greatest in the extremely capital-poor Welsh uplands as opposed to in the richer English-settled river valleys where revenues generally took the form of agricultural rents. This fits with Tilly's argument that states in capital-poor areas are likely to focus on coercive strategies as opposed to capital formation.[127] It is striking that this variation is found within individual lordships, especially when compared to Europe as a whole, all of Wales was capital poor.

Less clear is if these courts were seen as legitimate. In the hands of more predatory lords the courts could "easily become legalized oppression."[128] Some of the Marcher lords, like Hugh Despenser the Younger, were despised by their subjects. Yet others, like Humphrey de Bohun (d. 1298), had widespread support in their lands, though his grandson, also named Humphrey (d. 1361), was not well-loved.[129] Thus, the lords' popularity varied by lordship and from generation to generation. At a minimum, the various lords' subjects were willing to pay fees to access justice through the courts. This implies they found access to formal justice useful or necessary regardless if they found it legitimate.

Likewise, Somali courts proved effective at increasing security. The increased stability that emerged from the courts' actions led to a significant uptick in business activity. The courts' successes ultimately led to them supplanting the rule of clan-based militias. Crucially, these courts emerged prior to the court militias, which ultimately acted to enforce many of the courts' rulings. The militias were an adjunct to the courts, not the other way around. Even so, after the establishment of the JICC and UIC, armed coercion played an important role in enforcing the courts' edicts. Previously, however, courts often were able to enforce their rulings by outsourcing punishment to the community at large, much as courts in the March of Wales did.

Somali courts were also successful at extraction. They were largely self-funded through fees, fines, and the confiscation of criminals' goods. The courts also collected taxes from the business community as that community found the order provided by

127. Tilly, *Coercion*.
128. Davies, *Lordship*, 156.
129. Davies, *Lordship*, 268–9 and 290–2.

the courts to be worth the cost. Unsurprisingly, the courts—at least prior to the introduction of more conservative elements of Islamic law—were seen as legitimate by the Somalis they governed. This legitimacy enabled the UIC to form a non-clan-based government, which for a time controlled much of Somalia.

Taken together, the cases show that courts are able to play major roles in state-building and show the promise of bringing the state-building literature into closer conversation with the legal literature in general and the institutional courts literature in particular. Courts can extract resources, coerce the ruled, and expand the civilian machinery of government—the lack of which has proven to be a major obstacle to modern state-building. Courts also strengthen the rule of law, which is increasingly necessary for states to fully access the global economy.[130] Given the significant differences between the two cases (and from cases where institutional approaches to courts are most often employed), it is unlikely these findings would be limited to a narrow set of circumstances.

Courts in both cases did have certain advantages. The Welsh Marches were removed from the center of European power competition, and therefore, possibly faced a lower threat environment than other polities would. However, they did face threats from native Welsh kingdoms, and similar military marches, such as the Catalan counties, managed to survive elsewhere in Europe, suggesting the Marcher lordships' survival was not heavily dependent on their isolation.

The UIC possessed the advantage of existing in modern times when territorial states are the dominant de jure units of the international system and armed territorial revision is perceived as illegitimate. This normative privileging greatly increased the odds that Somalia would continue to exist under some form of governance. Even given these potential advantages, the achievements of courts in both cases are notable.

Another potential complication is that both sets of courts employed mixed legal systems. The Marcher lords' courts blended Welsh and English customary law, while the Somali courts mixed Islamic law with Somali customary law. Mixing legal systems has implications across coercive, extractive, and legitimating roles of courts. In regards to coercion and extraction, parties to disputes—including the state—naturally would be tempted to have courts use whichever legal precepts most favored their position. States would favor the set of laws that increased extraction and coercion, while individuals and non-state groups would generally want to avoid such outcomes, though in disputes between private parties, some parties may prefer highly coercive outcomes. Further, in situations where some courts are under tighter state

130. Woodward, *Ideology*, 66 and 134–5.

control than others, states may emphasize the use of legal systems aligned with state-controlled courts. Certainly, this was true in England where Henry II pushed for disputes to be resolved using royal common law courts as opposed to baronial courts that used other forms of English customary law. Likewise, Marcher lords had strong incentives to move cases to their courts and away from pre-existing Welsh systems of mediation and arbitration.

The effect of mixed legal regimes on legitimacy is also complicated. For instance, the native Welsh appreciated aspects of English customary law, such as trial by jury, while Marcher lords appreciated Welsh laws that allowed offenders to pay fines in lieu of prosecution. Neither group consistently favored its own native legal code. In Somalia, the use of Somali customary law was more popular than the use of Islamic law, though this dichotomy arose only after especially severe Islamic law punishments were imposed. The use of Islamic law broadly speaking was seen as legitimate—hardly surprising in an overwhelmingly Islamic society. Thus, while mixed legal regimes matter, they do so in complex and potentially indeterminate ways.

It is possible, however, to make too much of mixed legal regimes as they are reasonably common and rules usually emerge about which legal tradition is to be used in a given instance. Mixed systems often result from foreign conquest where the conquering or colonizing power finds it necessary or useful to retain much of the pre-existing local legal codes and traditions.[131] The Welsh case is an example of this process. Indeed, the English customary law the Norman barons brought with them was in fact a mix of Saxon and Norman legal traditions. Further, mixed codes are common in empires. For example, law in the Roman Empire in practice was an amalgam of Roman legal traditions and those of the populations the Romans had conquered.[132] If one takes a long enough view, all legal systems have elements of mixing as they combine elements not only of different localities' legal traditions, but different legal codes within a given locality. For example, in the West, states' legal codes often incorporate elements of Roman, customary, natural, canon, and mercantile law.[133] The Somali mixing of customary and Islamic law is another example of combining local legal codes. Thus, it is unlikely that the cases' mixed legal systems would limit the applicability of the findings.

Last, it is worth considering how the findings would vary for courts in post-industrial states. Such states have greater penetrative abilities allowing them to

131. Vernon Valentine Palmer, "Two Rival Theories of Mixed Legal Systems," *Electronic Journal of Comparative Law* 12 (2007): 1–28, 2 and 14.

132. Palmer, "Rival Theories," 19–20.

133. Palmer, "Rival Theories," 16–18.

limit violence and increase their means of extraction. Presumably, this would make coercion through courts easier given the lower levels of non-state violence. The extractive role of courts, however, would be considerably less given such states' greater abilities to raise revenue through direct taxation. Even so, courts could engage in extraction to fund specific activities in such states, though they likely would be less efficient than standard taxation as the costs of collection would be significantly higher. Certainly, court fines and fees have been important, if controversial, sources of revenue for many localities in the United States in recent years.[134] Thus, though courts should be less likely to serve as significant tools of extraction in post-industrial settings, the possibility remains—especially if increased taxation is politically unpopular—and thus should not be dismissed out of hand.

In sum, the article suggests that studies of state-building should avoid underplaying the role of courts. Courts matter for coercion, extraction, and legitimation. How widespread and varied their roles in state-building are, however, remains an open question. Further research into the roles of courts and judges is needed, especially as it relates to revenue extraction. Likewise, the article highlights the promise of bringing the state-building and institutional courts literatures into closer conversation with each other. Doing so would enrich the state-building literature.

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134. Matthew Menendez and Lauren-Brooke Eisen, "The Steep Costs of Criminal Justice Fees and Fines," *Brennen Center for Justice* (November 21, 2019).