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# LEGITIMATION

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The prevailing conceptions of legitimation in constitutional democracies stem from the “consent of the governed.” The “people” are sovereign and made up of free and equal citizens who legitimate the form of government by a voluntary agreement—a constitution (social contract). The constitution creates binding obligations and restrictions on their conduct and establishes political and legal institutions to enforce those constitutional commitments on the community. In other words, the “consent of the governed” includes two principles of legitimation—the principle of democracy (or popular sovereignty) and the principle of constitutionalism (or the rule of law). Habermas (2001: 766-68). The principle of democracy recognizes the classical notion that the republic and its laws are legitimate if they are the product of collective will formation and reflect the shared values of the political ethos. The principle of constitutionalism, on the other hand, puts limits on the collective will and protects the equal liberty of individuals from being overridden by the collective will. Moreover, the principles of constitutionalism and democracy provide standards for evaluating the legitimacy of political institutions, the legitimacy of particular judgments made by government officials running those political institutions, and the obligation of citizens to comply with the judgments of government officials. The following discussion will only deal with the first two of these three aspects of legitimation.

Different conceptions of legitimation, however, have been dominant at different times in the West and to ignore this broader historical and cultural context would result in an incomplete and inaccurate account of legitimation. To avoid this common error, the following will identify three different conceptions of legitimation—pre-modern, modern, and post-secular—that are still in contention regarding how the government and the law should be legitimated in constitutional democracies. After discussing the pre-modern conception, the two principles of legitimation (democracy and constitutionalism) in the modern conception will be further specified along with critical challenges to these principles including the internal challenges of identity politics and religious fundamentalism and the external challenge of globalization. The entry will close by discussing the strong signs that a post-secular conception of legitimation is on the

horizon, which would transform the prevailing understanding of the principles of democracy and constitutionalism. Finally, despite the prominence of the modern conception, it should be emphasized that the competition among pre-modern, modern, and post-secular conceptions of legitimation continues within and across national boundaries for the coveted prize of informing the social imaginary.

### PRE-MODERN CONCEPTIONS OF LEGITIMATION

Pre-modern conceptions of legitimation view God, rather than the people, as sovereign (Western monotheism) or view the cosmos as including some objective normative order which determines the proper function of humans in relation to that cosmos (e.g., Plato, Aristotle, Stoics, etc.). Governments and rulers are legitimate if they are ordained by God or if the political system is ordered in accordance with the normative cosmic order. Pre-modern conceptions, however, do not require the principles of democracy and constitutionalism. Kings, emperors, princes, and other rulers were thought to be ordained by God with the legitimate authority to rule over their subjects without democratic forms of government and without laws that limited their authority. They embodied sovereignty in the realm of human affairs as God's representatives. In the West, for instance, Constantine's unification of the Roman Empire with Christianity provides the archetype of the pre-modern conception. From Constantine's reign up through the Middle Ages, the church and state were distinct but were united in one Christian commonwealth (the *corpus Christianum*). The Protestant Reformation then divided the Western part of the Christian tradition into separate confessional institutions including Roman Catholic, Lutheran, Calvinist, and Anabaptist institutions. Each of these confessions professed different theological interpretations of Christianity with political theologies that included different conceptions of religious legitimation and the ideal form of government.

Regardless of the form of government, the common assumption among these political theologies was that a stable social order required rulers and subjects to share a common religion. Accordingly, under the pre-modern conception, the religion of the ruler was imposed on the people by their rulers and those resisting the official religion were persecuted. Resistance to this state-imposed religious solidarity resulted in extreme conflict within states and eventually war among states. Harold Berman concludes that "the confessionalization of Europe, that is, the virtual unification of church and state within each of the various European polities . . . led to the first Great European War, the Thirty Years' War of 1618-1648." Berman (2003: 61). The Protestants and Catholics ended the Thirty Years' War in 1648 by entering into two multilateral treaties often referred to as the "Peace of

Westphalia". The Peace of Westphalia usually marks the beginning of the modern nation state, modern international law, and a new constitutional principle of limited religious liberty. Berman (2003: 62). While the religion of the ruler was still the official religion of each territory and state, the Peace of Westphalia protected the religious liberty of Catholic, Lutheran, and Calvinist subjects when their religion differed from that of their rulers.

Contemporary examples of the pre-modern conception of legitimation take many forms. In the United States, some maintain that the government has been legitimated by a particular religious tradition since its founding—the “Judeo-Christian tradition”—and urge that federal and state government officials to govern in accordance with this religious foundation and to recognize it symbolically by posting the Ten Commandments and displaying crèches on government property. In addition, countries like Iran (1979), Afghanistan (2004), and Iraq (2005) are part of a growing group of predominantly Muslim countries that are constitutional theocracies or constitutional democracies recognizing Shari’a (Islamic law) as “a” or “the” source of law. Hirschl (2010: 3-4). While the principles of democracy and constitutionalism play a role in legitimating these constitutional democracies, the religious legitimation predominates the constitutional and democratic legitimation. Similarly, French republican secularism exhibits characteristics of a pre-modern conception of legitimation. The French government currently seeks to impose an ideological form of secularism—the unofficial religion of the ruler—on its citizens to promote the secular solidarity mandated by the doctrine of *laïcité*. Rather than promoting secular unity, the doctrine of *laïcité* has exacerbated cultural and religious conflict with Muslims and threatened religious liberty by prohibiting children from wearing headscarves or religious symbols in public schools. Modak-Truran (2008: 215-222). Moreover, like the prevailing modern conceptions of legitimation, pre-modern conceptions are not historic relics but viable conceptions of legitimation that compete for allegiance in many different countries and in various cultural contexts.

### MODERN CONCEPTIONS OF LEGITIMATION

According to Max Weber, modern conceptions of legitimation developed in part because the specific and peculiar rationalism of the Enlightenment resulted in the “disenchantment of the world.” Weber (1946: 155). Before disenchantment, religious and metaphysical worldviews gave comprehensive explanations of the whole of life; life was not yet differentiated into spheres. Science, the only form of objective knowledge, then showed that religious and metaphysical worldviews could not provide a “rational” explanation of the world.

Weber (1946: 355). Society was also differentiated into many autonomous spheres of life (e.g., formalistic law, economics, morality) that are oriented toward different values and that require different bases of legitimation. Weber identified four basic types of legitimation: (1) traditional; (2) affectual (emotional) faith; (3) value-rational (including ethical); and (4) legal (positive enactment). Weber (1978: 36). The processes of rationalization following the Enlightenment, however, minimized the first three types. “Today,” Weber claims, “the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.” Weber (1978: 37). Once religious and metaphysical worldviews have been eliminated as a justification for law, law must be legitimated—in a seemingly paradoxical manner—by its legality (*i.e.*, by positive enactment according to generally accepted formal procedures).

Weber articulates a key assumption of modern conceptions of legitimation—that the rationalization of society (*i.e.*, secularization) has eliminated religious and metaphysical justifications for law and has differentiated law from politics and morality. Like Weber, some theorists interpret the rationalization thesis as descriptive, others view it as normative (John Rawls), and still others consider it to be both descriptive and normative (Jürgen Habermas). After examining the principles of constitutionalism and democracy further, the following will examine these three modern conceptions and their response to the paradox of democratic sovereignty.

The principles of democracy and constitutionalism are “co-original” so that “[o]ne is not possible without the other” and that the “two concepts are interdependent; they are related to each other by material implication.” (Habermas 2001: 767). The principle of constitutionalism protects the equal liberty of individuals by requiring that political power “should be exercised in accordance with and through a general system of principles, rules and procedures, including procedures for amending any principle, rule or procedure.” Tully (2002: 205). In its broadest sense, the principle of constitutionalism includes the rule of law and requires a fair system of rules and procedures to govern the actions of all those subject to the jurisdiction of the political association in question. By contrast, the principle democracy requires that the people or peoples in the political association impose the constitutional system and the rule of law on themselves. In other words, the principle of democracy refers not to the narrow contemporary notion of the will of the majority but to the broader classical notion of self-rule. The sovereign people or peoples participate in self-ruling by engaging in democratic practices of deliberation that are open to democratic amendment. Moreover, “a

political association is legitimate if and only if it is equally constitutional and democratic: that is, the combination of *constitutional* democracy and *democratic* constitutionalism.” Tully (2002: 206).

Weber’s conception of legitimation presupposes that the rationalization thesis is a fact so that modern individuals (who are presumed to embrace scientific rationality) are faced with the knowledge of an absolute division between objectively rational facts and subjectively rational values. Although objective scientific rationality can determine the "technically correct" means to a given end, it cannot determine the "correct" value-orientation. Value-orientations are only subjectively rational; they are based on an irrational, arbitrary, and criterionless choice. Weber (1946: 152). Accordingly, Weber reduces legitimation to procedural rationality—positive enactment by generally accepted formal procedures—but can only justify these procedures by a mere belief or faith in their legitimacy. This faith or belief in legality merely presupposes that the legal order is legitimate. Consequently, Weber’s theory of legality as legitimacy is circular and constitutes legal fideism because it substitutes belief in the validity of legal procedures for a proper justification of them.

Weber’s legal fideism also highlights the devastating consequences of the paradox of democratic sovereignty for modern conceptions of legitimation. The paradox arises from the fact that democratic governments come into being from nondemocratic conditions. William Connolly clarifies that the paradox stems from the fact that the ethos of sovereignty must precede the kind of laws needed to nourish it, but that “those good laws, in turn, would need to be preceded by that very ethos if they were to emerge. The laws and the ethos must precede each other.” Connolly (2005: 134-35). Rousseau’s solution to the paradox of sovereignty “is what has always forced the fathers of nations to have recourse to the *intervention of heaven* and to attribute their own wisdom to the Gods.” (Rousseau (1978: 69). The founders must rely on a divine source of authority to found the democratic state. With this authority, the people subject themselves to the laws of the State “recognizing the same power in the formation of man and of the City” and “obey with freedom and bear with docility the yoke of public felicity.” (Rousseau (1978: 69). Contrary to Rousseau’s Roman Catholic reliance on church authority, Weber’s “Protestant” solution to the paradox does not reference religious authority but posits embracing the validity of legal procedures on faith alone or legal fideism. Neither Weber’s Protestant nor Rousseau’s Catholic “solutions” eliminate the paradox; they merely put it off for another day.

John Rawls proposes a second type of modern conception of legitimation that embraces the rationalization thesis as a normative requirement that political association and political decision making should be rationally justified independently of any particular comprehensive religious, philosophical, and moral doctrines. In *Political Liberalism*, Rawls argues for a non-universal rational justification of the law based on a political conception of justice (“implicit in the public political culture” of a democratic society). Rawls (1996: 192). He further maintains that this “political and not metaphysical” conception of justice is part of public reason, which provides a justification for constitutional essentials and matters of basic justice (*i.e.*, the principles of constitutionalism and democracy). Rawls (1996: 10). Public reason allows citizens and public officials to provide a rational justification of their political proposals without relying on their comprehensive doctrines. Rawls holds out the U.S. Supreme Court as the “exemplar of public reason” and emphasizes that “[t]he justices cannot . . . invoke their own personal morality, nor the ideals and virtues of morality generally,” even when the law is indeterminate. Rawls (1996: 236). Rather, Rawls emphasizes that judges should rely solely on the political values of public reason, which are independent of any particular comprehensive religious, philosophical, or moral doctrines. Rawls (1996: 139).

Jürgen Habermas sets forth a third type of modern conception of legitimation that embraces the rationalization thesis as a fact—the disenchantment of the world has eliminated the possibility of an “objective” legitimation of law based on religion or metaphysics—and specifies a normative proposal for justifying political association and political decision making independently of religious convictions—a discourse theory of law and democracy. Habermas argues for a universal rational justification of the law based on the procedures of the discourse principle. In the discourse of justification, the discourse principle provides that voluntary, intersubjective rational agreement by all those affected by a legal norm after free and full debate provides a basis for legitimating legal norms. Habermas (1996: 104). Although Habermas recognizes that almost all legal norms are indeterminate, he maintains that the principle of appropriateness and the discourse of application allow for an impartial application of law. The discourse of justification justifies legal norms that are then applied by judges in the discourse of application to come to a “‘single right’ decision[.]” in every case without reopening the question of legitimation. Habermas (1996: 220). Consequently, the discourse of application can produce a single right decision in all cases via the principle of appropriateness despite the indeterminacy of all legal norms. Modak-Truran (2007: 94-98).

### CRITIQUES OF MODERN CONCEPTIONS OF LEGITIMATION

In general, “postmodern” thought has been critical of modern conceptions of legitimation, like those proposed by Weber, Rawls, and Habermas, that claim to justify neutral political institutions that fairly adjudicate political conflict among the multiplicity of conflicting conceptions of the good without privileging any class, race, gender, etc. (Rosenfeld 2011: 10-11). Michel Rosenfeld further emphasizes that identity politics and religious fundamentalism “challenge the project of the Enlightenment, in general, and liberalism, in particular.” (Rosenfeld 2011: 3). Ethnic-based identity politics challenges the Enlightenment’s universalization of conceptions of equal liberty and justice. Religious fundamentalism presents a more radical rejection of the Enlightenment project and political liberalism in part because religious fundamentalists refuse to compromise their religious prescriptions when they conflict with the law. In addition, globalization threatens the Westphalian nation-state from above and makes accommodating identity politics and religious fundamentalists at the national level even more difficult. Thus, “as the need for greater convergence on a transnational scale joins the need for greater room for divergence on a national and infra-national scale, appropriate standards of legitimacy and normative validity adapted to these new circumstances are called for.” (Rosenfeld 2011: 4).

Similarly, James Tully has argued that the “politics of cultural recognition constitutes a third movement of anti-imperialism and constitutionalism, this time by the peoples and cultures who have been excluded and suppressed by the first two movements of decolonisation and constitutional state building,” including “Aboriginal peoples, women, linguistic and ethnic minorities, intercultural groups, suppressed nations and supranational associations.” Tully (1995: 16). The politics of cultural recognition views these six types of cultural recognition as calling for forms of self-rule in accordance with the principle of democracy. For example, Aboriginal peoples “strive for their own political institutions” while “multicultural groups and women” “seek to participate in the existing institutions of the dominant society, but in ways that recognize and affirm, rather than exclude, assimilate and denigrate, their cultural diverse ways of thinking, speaking and acting.” Tully (1995: 4). In other words, the politics of cultural recognition rejects the redescription and adjudication of their claims—as claims for the right of self-determination and the right of minorities to be protected from discrimination—under the principle of constitutionalism. Moreover, the politics of cultural recognition is further complicated because cultures are no long “separate, bounded and internally uniform” but “overlapping, interactive and internally negotiated,” which means that “[c]ultural diversity is a tangled

labyrinth of intertwining cultural differences and similarities not a panopticon of fixed, independent and incommensurable worldviews in which we are either prisoners or cosmopolitan spectators in the central tower.” Tully (1995: 10, 11).

Critical discussion has also uncovered other features of the constitutional and democratic principles of legitimation that are contrary to their interpretation under modern conceptions. For instance, the principles of constitutionalism and democracy are abstract and indeterminate so that they are open to on-going contestation. Contestation results in reasonable disagreement and “the ‘agonistic’ dimension of constitutional democracy” because “no rule of law, procedure or agreement is permanently insulated from disputation in practice in an open society.” Tully (2002: 208). For instance, the meaning of liberty in the Due Process Clause of the Fourteenth Amendment depends on the judge’s theories of constitutional interpretation, federalism, fundamental rights, and other presuppositions. To the contrary, Rawls argues that public reason can definitively determine the meaning of liberty with the equally abstract and indeterminate conception of equal liberty under the political conception of justice. Similarly, Habermas insists that the discourse of application can discern the single appropriate norm of liberty via the principle of appropriateness without judges relying on their own normative beliefs is equally unlikely. Both Rawls’s and Habermas’s accounts come up short when trying to explain hard cases like those interpreting the concept of liberty in the Fourteenth Amendment and suggest that their modern conceptions of legitimation do not maintain the secularization of law in hard cases.

### POST-SECULAR CONCEPTIONS OF LEGITIMATION

While still in their infancy, post-secular conceptions of legitimation are beginning to appear in political and legal theory. For example, in political theory, Stephen K. White identifies a weak ontology in the work of Judith Butler, William Connolly, George Kateb, and Charles Taylor. White argues that this weak ontology is important for Western notions of human rights because they offer “figurations of human beings in terms of certain existential realities, most notably languages, mortality or finitude, natality, and the articulation of ‘sources of the self.’” White (2000: 9). In legal theory, I have been arguing that the increased public role of religion and burgeoning religious pluralism resulting from globalization and immigration require a new post-secular paradigm of law and religion. Despite the secularization of the text of the law, the post-secular paradigm results in a legitimate plurality of religious convictions implicitly legitimating the law and thereby *de-secularizing the law*. Additionally, the *religious*

*pluralization story* should replace the predominant secularization (modern) and Christian America stories (pre-modern) in the modern social imaginary so that the post-secular paradigm is properly supported. Modak-Truran (2008: 160-66, 185-201, 229-233).

The most telling signs of a post-secular conception of legitimation come from the dramatic increase in attention to political theology. See Vries & Sullivan (2006). Paul Kahn has taken things a step further by arguing that political theology “is best thought of as an effort to describe the social imaginary of the political.” Kahn (2011: 26). Kahn draws a parallel between the contractual origin of political community in liberal political theory and the principle of constitutionalism and the sacrificial origin of political community in political theology and the principle of popular sovereignty or democracy. As evident from the increased tension between the principles of constitutionalism and democracy from the increasing depth and breadth of diversity noted in the prior section, liberal political theory has subsumed the principle of democracy under the principle of constitutionalism and has viewed law too narrowly as a source of order but not as a source of meaning. Kahn (2011: 7-8, 29). Kahn further connects the role of the Supreme Court in constitutional decision making to the deciding the exception and speaking “in the voice of a transhistorical popular sovereign.” Kahn (2011: 13). In this role, the Court cannot be charged with the counter-majoritarian difficulty because the Court is not participating in ordinary politics like a legislature but is deciding the exception and protecting “the sacred character of the popular sovereign” or “we the people.” Kahn (2011: 14-15). The principle of constitutionalism on the other hand, “is politics as a fully secularized practice of reason,” which reduces the constitution to a social contract that merely facilitates settling disputes. Kahn (2011: 16, 19). Conversely, Kahn stresses that “[s]overeignty is not the product of reason” and “has nothing to do with agreement.” Kahn (2011: 19). Rather, “[p]olitical theology understands politics as an organization of everyday life founded on an imagination of the sacred,” and political theologies “contain an implicit metaphysics.” Kahn (2011: 23, 132). Finally, Kahn’s characterization of political theology strongly supports developing a post-secular conception of legitimation that can properly recognize its religious character, its importance for expanding the scope of self-ruling under the principle of sovereignty, and its significance for creating a new post-secular social imaginary.

**Cross References: Constitutionalism; Liberalism; Rule of Law; Political Theology; Sovereignty; Secularization.**

**REFERENCES AND SUGGESTED READINGS:**

Berman, H. J. (2003) *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Cambridge, MA: Belknap Press.

Connolly, W. (2005) *Pluralism*. Durham, NC: Duke University Press.

Connolly, W. (Ed.) (1984) *Legitimacy and the State*. Oxford: Basil Blackwell.

De Vries, H. and Sullivan, L. E. (Eds.) (2006) *Political Theologies: Public Religions in a Post-Secular World*. New York: Fordham University Press.

Habermas, J. (2001) "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?," *Political Theory* 29 (6): pp. 766-781.

Habermas, J. (W. Rehg trans., 1996) *Between Facts and Norms: Contributions a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press.

Hirschl, R. (2010) *Constitutional Theocracy*. Cambridge, MA: Harvard University Press.

Kahn, P. W. (2011) *Political Theology: Four New Chapters on the Concept of Sovereignty*. New York: Columbia University Press.

Modak-Truran, M.C. (2008) "Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion," *Mississippi College Law Review*, 27 (1): pp. 159-233.

Modak-Truran, M.C. (2007) "Secularization, Legal Indeterminacy, and Habermas's Discourse Theory of Law," *Florida State University Law Review* 35 (1): pp. 73-118.

Rawls, J. (paperback ed. 1996) *Political Liberalism*. New York: Columbia University Press.

Rosenfeld, M. (2011) *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account*. Cambridge: Cambridge University Press.

Rousseau, J-J. (Roger D. Masters ed. & Judith R. Masters trans., 1978) *On the Social Contract with Geneva Manuscript and Political Economy*. Boston: St. Martin's Press.

Schmitt, C. (2005) *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: The University of Chicago Press.

Taylor, C. (2004) *Modern Social Imaginaries*. Durham, NC: Duke University Press.

Tully, J. (2002) "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy," *Modern Law Review* 65: pp. 204-228.

Tully, J. (1995) *Strange Multiplicity: Constitutionalism in An Age of Diversity*. Cambridge: Cambridge University Press.

Weber, M. (G. Roth & C. Wittich eds., 1978) 1 *Economy and Society: An Outline of Interpretive Sociology*. Berkeley, CA: University of California Press.

Weber, M. (1946) *From Max Weber: Essays in Sociology*. Edited and Translated by H. H. Gerth and C. Wright Mills. New York: Oxford University Press.

White, S. K. (2000) *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory*. Princeton, NJ: Princeton University Press.