Introduction: Legality and legitimacy – Between political theory and theoretical sociology

The themes of the book

The question about the relation between legality and legitimacy – that is, about the necessary legal and judicial preconditions for the general exercise of power – is, to quote Niklas Luhmann, both the ‘basic question’ of modern legal and political philosophy and one of the most deeply constitutive conceptual problems in the history of theoretical sociology.1 The point of general convergence in post-Enlightenment political-philosophical debate is the claim that general laws are required to constitute or enshrine power as legitimate power, and that laws secure and transmit legitimacy insofar as they reflect rationally acceded norms or universally tenable values. Political philosophy, at least in its post-Enlightenment guise, is consistently fixed on the attempt to deduce and explain the legal-normative preconditions of legitimate power. Analogously, though, the initial impetus behind the formation of sociology as an academic discipline was also shaped by debate over ideals of legality and principles of political legitimacy. In fact, it is arguable that sociology first emerged as a corpus of theoretical analysis that opposed the normativism, the prescriptive rationalism, and the formal ius-naturalism of post-Enlightenment political philosophy,2 and that sought to examine political legitimacy, and the fabric of laws and rights sustaining and expressing legitimacy, in the many embedded and factual sites of its societal production and experience.3 Throughout the methodological consolidation of sociology, in consequence, the concern with political legitimacy and its legal prerequisites has remained at the centre of sociological inquiry, and the different formative stages in the evolution of legal and political sociology have been articulated through different accounts of law and legitimacy.4 The question of the relation between legality and legitimacy, in other words, marks the central or constitutive point in the two dominant avenues of theoretical inquiry in the social sciences; in addition, though, it

1 Luhmann, Soziologie des politischen Systems, p. 159
2 For this view, see Luhmann, Soziologische Aufklärung. However, for divergent comments on the emergence of social theory from the moral philosophy of the Enlightenment, see Manent, La Cité de l’Homme, p. 73; Heilbron, The Rise of Social Theory, p. 86; Fletcher, The Making of Sociology, I, p. 645. In his history of the Enlightenment, Peter Gay simply referred to the theorists of the Scottish Enlightenment as ‘Scottish sociologists’. See Gay, The Enlightenment, p. 34. It has even been argued in this respect that sociology was born in a ‘state of hostility to law’. See Timasheff, An Introduction to the Sociology of Law, p. 45.
3 See Deflem, Sociology of Law, p. 6.
4 See for example Weber, Wirtschaft und Gesellschaft, pp. 122-76; Pareto, Treatise on General Sociology, pp. 1299-1300; Parsons, Politics and Social Structure, p. 362
also marks the point of critical distance and variance between them. This book thus takes as its theme one of the central controversies in the history of the theoretical social sciences, and it aims to offer new perspectives, both objective and methodological, to illuminate this controversy.

In addressing the question of legality and legitimacy, this book as a whole and the individual chapters that it contains are shaped in particular by two distinct perceptions.

First, the book is motivated by the sense that throughout the history of reflection on law and legitimacy both political philosophy and legal and political sociology, although focused on internally related problems, have constructed their inquiries in unnecessarily and unhelpfully discrete analytical frameworks. To be sure, there are certain clear positional overlaps between the two theoretical lineages. Both political philosophers and legal and political sociologists, for example, normally subscribe to the idea that legitimacy depends on laws that obtain generalized acceptance, and that purely coercive laws are unlikely to be perceived as legitimate. Both also usually accept that legitimate power is tied to the common recognition and enablement of social freedoms, and even that legitimate power might necessarily be power underpinned by articulated principles of right and framed within the public order of a constitution. Indeed, modern philosophical and sociological analyses of legitimacy might both, whatever their subsequent variations, be seen to have originated in the endeavour, in and after the Enlightenment, to interpret legitimacy as a condition of constitutional rule. Beyond these elementary points of convergence, however, there is much seemingly irreconcilable methodological indifference and disagreement between normative and sociological accounts of law and legitimacy. Both lines of analysis tend to avail themselves of a rather limited and self-contained set of instruments, both tend to proceed from pre-determined preconditions in analyzing legitimacy and its legal substructure, and the accounts of legitimacy produced in one discipline are always unlikely either to contribute to the research or even to withstand the critical scrutiny of theorists working in the other.

5 Constitutional rule is usually perceived mainly as the object of normative analysis. For the clearest expression of this, see Finn, Constitutions in Crisis, p. 36. Early social theorists interested in law and legal validity also usually rejected formal constitutionalism. As points of departure for this analysis, see De Maistre’s seminal response to the constitutionalism of French Revolution: that is, his claim that all legal rights of persons are founded either in the concessions of monarchical personality or in the ‘anterior rights’ of historical tradition (De Maistre, Considérations sur la France, p. 81) and Burke’s claim that rights are ‘metaphysically true’ but ‘morally and politically false’ (Burke, Reflections on the Revolution in France, p. 59). See also Savigny’s view that the ‘production of law’ is a process of natural-historical self-interpretation, in which the ‘natural whole’ or the integral spirit of the people externalizes its defining characteristics and its specific rationality in the form of law (v. Savigny, System des heutigen Römischen Rechts, I, pp. 21-2. However, early sociology also contained a very clear, albeit still contextual and relativistic, vision of constitutional governance. See for example Durkheim, De la Division du Travail Sociale, p. 199; Duguit, Le Droit constitutionnel et la Sociologie.

6 John Rawls is perhaps the most salient example of a normative theorist of legitimate rule who attempted to incorporate a sociological dimension in his work. But his theory of the reasona-
In particular, pure normative/philosophical analysis of legality and legitimacy necessarily accentuates the deductive foundations of law, it is intent on obtaining categorical certainty in determining the norms that are definitive of legitimacy, and it usually arrives at its account of law’s necessity from prior and socially abstracted first principles. Normative reflections on legitimacy are consequently disposed towards critical corrective assessment and adjudication of prevailing legal-political conditions; however, they habitually derive their critical-normative substance from hypostatic postulates or at least from singular normative principles, and because of this they struggle to provide plausible objective evidence to support their normative claims. In contrast to this, sociological reflection on the same questions necessarily ascribes to the law a factually positive, and more contextually variable role in forming legitimacy. It tends to observe law’s legitimatory function as a capacity for expressing pre-existing societal orientations or for condensing positive societal motivations, and it is in principle prepared to accept a high degree of multi-valence in the law: many laws can form the legitimacy of power, power can be exercised as legitimate in many ways, and the normative status of norms is determined through their motivational, not their deductive, content. Sociological perspectives on legitimacy might thus also offer critical analysis of existing legal-political conditions; however, as they accept pluralism as a constitutive feature of society’s laws they lack the internal concepts to provide justification for determinate or binding normative critique, and they too struggle to provide compelling evidence to accompany their claims and observations. Because of these primary distinctions, then, each line of analysis tends to occlude itself against the insights produced in the other, and the accounts of legitimacy emerging in each discipline — either normative/deductive or factual/motivational — rarely reflect on or incorporate elements of analysis from outside their own conceptual structure. In consequence of this, moreover, it is arguable that neither line of inquiry on its own provides a fully convincing (that is, at once normative and factual) structure for analyzing conditions under which power and law may or may not be legitimate. Indeed, both lines of inquiry suffer from distinct evidential deficiencies, which can only be overcome if a method is used that constructively incorporates elements of both. The chapters in this volume are devoted, therefore, to opening a more consistent dialogue between rival traditions of reflection on law and legitimacy, they aim to counteract the methodological closure between these lineages, and, in some cases, they propose normative/factual arguments that traverse the evidential distinctions separating these lines of analysis.

In this respect, in fact, many of the chapters in this volume also have the distinction that, even as they employ sociological methods to question more conventional normative assumptions, they remain attentive to the inner juridical dimensions of legitimacy. Sociological reflection on legitimacy has tended to be relatively indifferent to law: the prevailing sociological accounts of legitimacy are located in the realm of pure political sociology or the sociology of states, they have tended to observe legitimacy through a broad analysis of social structure, political formation and
human motivation, and they have not normally accorded a specific force to the law as a precondition for legitimacy. Indeed, additionally, the sociology of law itself has not yet provided anything more than very tentative paradigms for examining legitimacy as a distinct socio-legal condition, and legal sociology still awaits an analysis of law’s distinctive capacity for allowing power to construct and present itself as legitimate. In the most prominent cases in which sociological theorists endeavour to explain the legitimatory force of legal norms they either (as exemplified by Habermas) cease to think in distinctively sociological categories, or (as exemplified by Luhmann) they accept extreme normative latitude in their definition of a political system able to assume legitimacy. The chapters in this volume, however, all correct the common sociological devaluation of law, and all seek, in diverse ways, to illuminate the specifically formative relation between law, power, and the construction of power’s legitimacy. Indeed, connecting many of the chapters in this volume is an attempt both to question the more simplistic perspectives of normative theory yet also to place law at the centre of sociological analysis of power and to give due sociological prominence to law’s role in the constitution of legitimate power.

Second, the book is also shaped by the sense that the necessity of reconfiguring philosophical and sociological analysis in addressing law, power and legitimacy has been rendered particularly pressing through the fact that the societal conditions in which, conventionally, legitimacy could either be philosophically defined or sociologically observed have in recent years become increasingly unsettled and precarious. That is to say, the last decades have witnessed a fundamental transformation both in the societal location and experience of legitimacy and in the institutions producing or obligated to legal norms designed to secure legitimacy. As a result of this, debate about legitimacy must also re-reflect and refine its basic preconditions. Debate about legitimacy can longer presuppose the existence of static state structures or unitary societies as its objects of analysis; it can no longer attach its construction of norms to simple and easily identifiable, territorially dominant, uniform institutions; it can no longer anticipate evidence of the validity of its prescriptions or observations in easily discernable social socio-institutional settings; it can no longer presuppose a stable demos to underwrite its power, and it must explain itself through reference to multiple modes of agency, subjectivity and normativity. Above all, the fact that law now originates in many diverse environments and that political power is routinely applied across national limits and outside enforceable legal constraints means that the central normative presupposition that law is a simple and controllable medium for constituting, rationalizing and regulating power as legitimate has be-

7 Most seminal is again Weber, Wirtschaft und Gesellschaft. For Weber, the legal dimension of legitimacy possesses insubstantial motivational force.
8 Contrast the account of legitimacy contained in Habermas, Faktizität und Geltung, with that contained in Habermas, Strukturwandel der Öffentlichkeit.
9 At some points, Luhmann indicates that the second-coding of power by law might be a factual precondition of legitimacy. See Luhmann, Die Gesellschaft der Gesellschaft, p. 357. However, Luhmann finally resolves the question of legitimacy by observing legitimacy as the outcome of effective self-description in the political system. See Luhmann, Staat und Politik, 102; Luhmann, Politik der Gesellschaft, pp. 319-371.
come problematic: indeed, it is simply no longer tenable. In consequence of this, analysis of legitimacy and legitimatory norms must now position itself in relation to the processes of socio-political and economic change that have recently assumed formative importance in modern societies, and it must necessarily deploy a sociological methodology to assess the transformations affecting the origin and application of laws. In particular, analysis of legitimacy must seek to adjust its perspectives to examine the contours of legitimacy within a horizon marked by societal pluralization, economic globalization, the dislocation of law and legislation from national frameworks, the division of judicial and legislative power between national and trans-national institutions, and the multi-causality of objective juridical norms. For theory to be plausibly normative, in sum, it must also, arguably, be internally sociological, - do you take this to be the argument of all the papers? And, equally arguably, it is only theory that can maintain a high level of sociological sensitivity that can propose sustainable normative outlooks.

These perceptions converge in a more general intuition, which is also at the centre of this book. This is the intuition that traditional theoretical vocabularies, either normative or sociological, can no longer plausibly be applied to the contexts and problems of legitimacy in contemporary, increasingly international and heterarchical societies, and that a thorough and substantial revision of the methods used to approach legitimacy is now indispensable as a precondition for adequate theoretical debate. The last decade has witnessed a proliferation of new methodologies for determining legitimacy and new conceptual models for imagining a legitimatory recoupling of law and politics. Despite this, however, most social-scientific disciplines and sub-disciplines have failed to propose transferable paradigms for accounting for the changing realities of legitimacy and for the changing role of law in creating or reflecting legitimacy. In fact, even in most recent inquiry the analysis of the relation between law and legitimacy has tended still to fall on one or other side of an inherited or relatively simple facts/norms dichotomy: that is, it has tended either to view the laws of modern society as normatively suspended or contingent, or, even as it seeks to account for law sociologically, it has been inclined to uphold substantial or foundational assumptions in order to account for law’s normative legitimatory content. Albeit in occasionally surreptitious form, therefore, the traditional dichotomy between sociological and normative accounts of legality and legitimacy persists in pervasive fashion in current debate – even at a time where new, reactively complex and multi-disciplinary paradigms are pressingly required to comprehend the changing relations between law, statehood and legitimate power. The papers contained in this volume, in consequence, all position themselves in express relation to the antinomical structure of this methodological dichotomy. All are shaped by the recognition that it is necessary to mediate between these two sets of paradigms, that it is essential critically to fuse sociological and philosophical analysis of legitimacy,

10 See Fischer-Lescano/Teubner, Regime-Kollisionen.
11 At the most theoretically refined end of these recent discussions, see Teubner, Globale Zivilverfassungen, p. 138; Brunkhorst, Rights and the Sovereignty of the People, p. 55.
12 Egregiously open to this accusation is Alexander, The Civil Sphere, p. 153.
and that this objective has, in existing theories, not yet been adequately fulfilled and requires further theoretical labour.

Though varying greatly in focus and ranging from highly contemporary analysis to broad-ranging historical or philosophical reconstruction, in sum, all the chapters in this volume combine sociological examination of the changing conditions of legitimacy with the insistence that legitimate power needs to be accounted for as possessing determinate normative features and preconditions. Some of the contributions in this book are devoted to constructing and reconstructing the relation between sociological and normative analysis of law and legitimacy. Some seek to show how the conflict between these approaches rests on false or artificial preconceptions, and they suggest ways in which the form of the problem of legitimacy might need to be rephrased. Some offer new socio-theoretical models for evaluating or envisioning legitimacy. All chapters, however, are structured either around an interdisciplinary analysis of the normative preconditions for the legitimization of political power or around a cross-disciplinary attempt to re-devise the theoretical constructions employed to evaluate legitimacy.

The structure of the book

For the sake of thematic and methodological coherence, the papers in this volume are organized under the following sectional headings:

Section I. The form of the problem of legitimacy: Critiques and alternative paradigms.

Section II. Legitimacy as a problem in international law: Critical and cosmopolitan approaches.

Section III. Legitimacy as an institutional problem.

Section I: The form of the problem of legitimacy: Critiques and alternative paradigms

The chapters in the first section all focus on the customary formulations of the question of legitimacy. Most suggest ways in which the question of legitimacy might be reconsidered, and all present critical analyses of the inherited paradigms through which legitimacy is analyzed and propose alternative theoretical constructions for approaching problems of legitimacy.

From a position based in the history of the philosophical tradition, Blandine Kriegel outlines an opening approach that draws wide parameters for addressing questions of legality and legitimacy. She argues that, across the distinctions between dif-
ferent theorists, classical philosophy was *in toto* oriented towards a conception of the legitimate state as a state exercising power in uniform laws. In contrast to this, she views the rise of sociological theories of law both as accentuating the pluralism of modern law, yet also as eroding the quest for a unity of legality and legitimacy within the state of law. She argues provocatively that the increasing prevalence of sociological analysis of norms 'has simultaneously made norms relative and undermined the law', and so requires correction through a new 'legal construction of norms'.

Chris Thornhill examines the question of legality and legitimacy from a standpoint derived from a historical-functionalist sociology of power. He argues that analysis of legality and legitimacy has necessarily concentrated on accounting for the role of constitutions in modern societies, and that constitutions are usually seen as documents that condense societal norms into a heightened legitimatory expression. However, he suggests that to date neither purely normative nor avowedly sociological methodologies have been able convincingly to interpret the ways in which constitutions generate normative reserves of legitimacy for political systems. To resolve this, he proposes a historical paradigm to examine how constitutions have allowed societies at once factually to respond to and normatively to organize their wider processes of evolution and functional construction. He concludes that constitutions act as vital repositories of *factual norms*, through which modern societies support and legitimize their political functions.

Samantha Ashenden phrases the argument in her chapter as a set of critical reflections on the standard methodological self-comprehension of sociology. She questions the widespread assumption that sociology is an analytical-descriptive scientific discipline, which is strictly counterposed to normatively organized jurisprudence and political philosophy. She traces the emergence of the idea of 'social-scientific laws', and she notes that these laws, though they share nothing with classical jurisprudence, provide the immanent norms of 'the social'. In particular, she claims that the legitimacy of modern forms of governance is often premised on norms and legal constructs constituted through ostensibly value-free social scientific knowledge. She concludes that legality and legitimacy need to be construed as effects of multiple practices of governance, in which the social sciences play an active and normalising role.

Pierre Guibentif argues that a fourfold sociological perspective is required in order adequately to examine the legitimacy of the contemporary political system. First, he argues, this perspective must incorporate the participant’s perspective: it must acknowledge that legitimacy depends on the inner conviction of social actors ‘that there are good reasons to accept a given social order or, in particular, a certain rule.’ Second, this perspective must contain an observational dimension: it must recognize that legitimacy depends on the fact that people are motivated to accept an order as legitimate through ‘observation of the behaviour of other people.’ Third, this perspective must also include awareness of the fact that legitimacy depends on the fact that collective social actors, i.e. states, ‘develop means to enhance the global level of
ceptance of certain rules.’ Fourth, then, this perspective must also reflect the fact that legitimacy necessarily involves the third-order ‘justification of social rules’. In particular, Guibentif concludes that social-scientific analysis needs to be placed within the fourth dimension of this perspective, and has the role of third-order observer, able to stimulate substantive normative inquiry into the legitimacy or otherwise of given and explicit social rules.

David Sciulli also challenges and modifies the common frame of reference for examining legitimacy. Building on his earlier research on societal constitutionalism, he claims that standard explanations of state power are inadequate for understanding the conditions of legitimacy in contemporary societies. Examining the weaknesses of state-centred positivist and voluntaristic/foundational constitutional constructions of state power and its legitimacy, he argues for a societal-organizational approach to the formation of democratic authority and the procedural-legimatory limitation of state coercion. He concludes that the establishment and maintenance of lawfulness in society arises from the ‘immediate positional and corporate interest’ that is brought to bear on public institutions by ‘societal constituents’.

Darrow Schecter’s chapter concludes this section with a far-reaching analysis of the theoretical constructions that underlie the question of political legitimacy. He argues that if legitimacy in law is to be conceptualized in terms that are normatively and sociologically tenable it is necessary to abandon simple positive observation of the ‘legitimacy-neutral legal order’ of current capitalist societies and to adopt a foundational analysis of the social and epistemological preconditions of legitimate law. In this respect, Schecter’s approach presents a counterpart to Hauke Brunkhorst’s method of extracting categories of law and legitimacy from the epistemological aspects of Critical Theory. He argues that the outstanding positions in modern social philosophy have pointed – either intuitively or expressly – to the fact that legitimacy does not merely reside in a positive relation between law and power, but must also possess a ‘marked rational and epistemological dimension’.

Section II: Legitimacy as a problem in international law: Critical and cosmopolitan approaches

The chapters in this section all address questions of legitimacy in the context of international law and in theoretical frameworks relating to international law. Common to all these chapters is the attempt to assert new models of legitimacy to capture the evolving reality of post-national societies. However, all chapters also reflect on the instruments offered by cosmopolitan patterns for theorizing transnational governance, and all engage critically with and seek to revise and reconstruct the normative ideas of international law that support the prevalent outlooks of cosmopolitanism.

Inger-Johanne Sand’s chapter concentrates on the legitimatory resources that law presupposes, and she argues that through recent societal transformations the contexts of law’s validation and application have been substantially altered. One consequence
of this is that the ability of law to draw legitimacy from its correlation with democratically legitimized states has been undermined, so that an intensified contingency has been instituted at the centre of the law. As a result of this, although in contemporary society law does not renounce its need for legitimization, the foundations of law and its supporting semantics tend to become highly precarious and variable. For these reasons, she observes that a ‘new way of thinking about legitimacy’ is needed, which abandons its attachment to transparently applicable norms. This approach ‘may have to deal more profoundly with multiple and more complex and conflictual meanings and situations’.

Hauke Brunkhorst expands his theory of critical cosmopolitanism to argue for the necessity of a new conception of democratic legitimacy. He argues that in recent decades the legitimatory accomplishments of national states have been eroded by changes in the relation between state and other social systems, especially the system of the international economy. Chief amongst these changes is the ‘complete transformation of the state-embedded markets of regional late capitalism into the market-embedded states of global turbo-capitalism’. To combat the loss of legitimacy that was historically preserved in traditional (national) state structures, Brunkhorst argues that classical dualist constructs of democracy as representative or pure constitutional democracy need to be abandoned: that is, the dualistic ‘power-limiting constitutionalism’ of classical democracy needs to be replaced by ‘power-founding constitutionalism.’ This, he argues, will form the foundation for a political reality in which legitimacy in the static classical sense gives way to ‘a legally organized procedure of egalitarian and inclusive legitimization’.

In his chapter on concepts of legitimacy in international law, Robert Fine questions the validity of the assumption that international law can be invariably invoked as a higher legitimatory norm for determining legal and political rulings. On one hand, he concedes that the ‘appeal to international humanitarian and human rights law as an authoritative ground of political argument […] offers an essential response to escalating dangers that were inherent in the structure of the nation state.’ Yet he adds the cautionary note that the idealization of international law and international jurisdictional procedures for guaranteeing human rights obscures the relations of power inscribed in law, and in positing absolute standards of legal normativity it effectively erodes the law-determining force of political argument itself. He concludes that the (allegedly) supra-positive forms of human-rights legislation always need to be supplemented and in fact ‘stand in need of a politics able to give them the recognition that is their due’.

Costas Douzinas responds to the claims made by Fine, and he sets out a far-reaching critique of cosmopolitan theories of government. In particular, he argues that the dream of universal law that supports cosmopolitanism is a fictitious ideal, and he explains how the concepts of humanity, rights and generic equality that sustain it falsify the conditions of human liberty. The cosmopolitan construction of all humans as bearers of rights, most especially, has, he asserts, led to a depletion of freedom, through which human beings encounter only an ideological mirage of
themselves, tuned to the ideological exigencies of international capitalism. Douzinas then proposes a corrective to more established cosmopolitan theory by proposing an ethic of singular solidarity, based in ‘respect’ for ‘the singularity of the other’.

Gavin Anderson’s chapter reflects Douzinas’s scepticism about the capacity of international legal rules for generating and expressing legitimacy, and he uses analysis of the legal status of indigenous peoples, and the relation between colonial and indigenous law, to identify the oppressive functions of law’s universalism. In this respect, Anderson also echoes Schecter’s claim that legal constructs need to be viewed as articulating knowledge strategies and as founded in a distinct epistemological dimension’. He concludes by arguing that a ‘normative development of the ethic of constitutional pluralism’ is required, and that legitimate application of law presupposes a legal apparatus capable of sustaining a plurality of rights and of accommodating diverse modes of legal cognition and recognition as the substrate for rights.

Kirsten Campbell focuses on the question of legitimacy, and its sociological determinacy, in the context of international criminal law. She uses an analytical method derived from Pashukanis to examine law as a ‘historical form of regulation’ that has emerged from, and incessantly refracts, the social relations of international capitalism. In particular, she claims that the principles of validity and legitimacy underlying contemporary international criminal law need to be analyzed as the legal form of ‘emergent force-relations’, which expresses ‘global relations as juridical relations’. She concludes by arguing that normative claims for legitimacy in criminal law can only be accurately comprehended if they are seen as elements of the global legal form.

Section III: Legitimacy as an institutional problem

The chapters in this section aim to elucidate contemporary problems of political legitimacy by examining specific – and specifically problematic – institutional settings and expanding this analysis to form the basis for wider-range theoretical inquiries. In particular, the chapters in this section probe at the fragility of the legitimatory foundations of contemporary institutions, and they examine and propose different methodologies both interpretively to account for and normatively to promote an enhancement of state legitimacy.

William Outhwaite addresses the legitimatory problematics of the EU. He argues first that the democratic or legitimatory deficit in the EU has to be examined both as resulting from the ‘the relatively unpolitical (though of course politically relevant) spheres of EU policy-making’ and from the internal policies of ‘the member states themselves’. He responds to the legitimatory weaknesses of EU institutions by advocating a restatement of the Habermasian project of constitutional patriotism, and he concludes by asserting that the EU can consolidate itself as a fully legitimate polity only if the ‘already shaky identification of modern Europeans with democratic parliamentary politics’ is overcome both at European and at member-state level.
Andreas Hess replies to Outhwaite’s approach by using an examination of the question of transitional legitimacy in the Basque country to set out a far-reaching critique of the doctrine of constitutional patriotism. He explains how the one-size-fits-all model of social integration through identification with the normative substance of constitutions cannot be adapted to all traditions of state- and nation-building in Europe. He concludes with the claim that if the construction of legitimacy through constitutional integration is a desirable goal, then the US-American model of constitutional patriotism might be considered more easily transportable than the primarily (West) German vision of moral-constitutional identity.

In similar vein, David Saunders explores a particular question of institutional analysis in order to conduct a wide, historically reconstructive survey of the legitimatory preconditions of modern states. His argument focuses primarily on the principle of post-secularity in contemporary political and ethical discourse, and he questions the seeming neutrality with which ‘the assimilation and the reflexive transformation of both religious and secular mentalities’ is accepted in current analysis of law and power. His conclusion is a strong statement of the conviction that the foundations of state legitimacy are essentially incompatible with any public commitment to the traces – however ‘post-secular’ – of religious disposition and belief patterns.

Nicholas Turnbull also adopts a simultaneously theoretical and institutional approach to legitimacy; he describes this as a ‘philosophical and political orientation towards public problems’. As a general explanatory framework for understanding the legitimatory structure of contemporary states, he proposes a theory of problematology, which considers the state as the fulcrum of a set of rhetorical or problematic social relations within society. He claims that the problematological method makes it possible to appreciate states as institutions that possess both normative and contingent or rhetorical instruments for obtaining legitimacy. He concludes by claiming that states secure their legitimacy through a dual process: both by establishing firm legal parameters and by evolving rhetorical procedures for addressing questions of ‘shared contingency’.

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