

## **A general theory of constitutional patriotism**

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*This article offers a theory of constitutional patriotism independently from controversial social theories of modernization and rationalization, with which Jürgen Habermas's version of constitutional patriotism is associated. It argues that the purpose of constitutional patriotism as a set of beliefs and dispositions is to enable and uphold a liberal democratic form of rule that free and equal citizens can justify to each other. The object of patriotic attachment is a specific constitutional culture that mediates between the universal and the particular; and the mode of attachment is one of critical judgment. Finally, constitutional patriotism results in a number of policy recommendations which are clearly different from policies liberal nationalists would advocate.*

There is currently no general philosophical account of constitutional patriotism available. Advocates of this concept—which has been popularized in the English-speaking world mainly through translations of Jürgen Habermas's writings—have defended constitutional patriotism mostly by explicating Habermas's work, rather than offering a freestanding theory. This article articulates such a freestanding theory, or at least its key elements and normative building blocks. Also explored in this article are the *limits* of what a theory of constitutional patriotism by itself can do normatively. Constitutional patriotism, I contend, stakes a distinctive moral claim, but a relatively modest one. It is

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not simply a liberal variant of civic nationalism, or even just a sub-category of liberal nationalism – but at the same time it also cannot by itself be the source of a kind social solidarity that motivates large-scale egalitarian socio-economic policies.

In previous discussions, even the most fundamental question of what constitutional patriotism actually *is* has often remained unclear. It also seems an unresolved issue how much normative content, if any, the concept necessarily has to carry? Can members of an evil regime such as the Third Reich actually be constitutional patriots of some sort? Does constitutional patriotism depend on the operation of a single constitutional document? Can the British and Israelis, who lack such documents, nevertheless be constitutional patriots? And if not, is constitutional patriotism not in some sense always homogenizing, part of a potentially authoritarian “civil religion,” a faith that can be as intolerant as any other religion?<sup>2</sup> Might it even require a faith in a constitution that is “complete” and “total,” as Barbara Jordan famously put it?

Partly through an analogy with liberal nationalism—which in turn relies on analogies with the family and other special moral relationships—constitutional patriotism has often been described very generally as an “attachment,” or an “identity,” but also as a “resistance to identification.”<sup>3</sup> Liberal nationalists like David Miller have at least been clear on the idea that something called national identity comes first and then a particular political morality, in more or less direct ways, is supposed to “follow” from such an identity.<sup>4</sup> They do not have a problem presenting their theories as particularist, as essentially being about loyalty resulting from identity. Advocates of constitutional patriotism, on the other hand, have found it much harder to be clear on what comes first:

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substantially on JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (Princeton Univ. Press 2007).  
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<sup>2</sup> Compare SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (Princeton Univ. Press 1988).

<sup>3</sup> Patchen Markell, *Making Affect Safe for Democracy? On “Constitutional Patriotism”* 28 *POLITICAL THEORY*, 38–53 (2000).

an attachment to universal values, which is then realized in a particular political setting? Or do we start with a particular polity (and its people), which, as long as it meets basic standards of essentially liberal democratic universalism, could and should be made the object of a kind of civic loyalty?<sup>5</sup> Given the apparent tension between universalism and particularist loyalty, it is no wonder that critics have concluded that constitutional patriotism is simply an “inconsistent idea” or just a kind of aspirational oxymoron, a well-meaning normative muddle, rather than a coherent normative proposal to rethink political solidarity and attachment.<sup>6</sup>

Very often, this apparent dilemma of democratic constitutionalism and patriotism pulling in different normative directions has been evaded by providing a quasi-teleological account of societies already being in the process of moving towards post-national identities. Put rather crudely: history itself – in the form of modernization or rationalization of entire societies – itself is already carrying us onward and upward to a stage where the priority of values or polity is somehow no longer an issue. However, such teleological narratives or even “Kohlbergian triumphalism” – for which Habermas’ account of constitutional patriotism has often been faulted -- cannot substitute for a genuine effort of moral self-clarification<sup>7</sup>; and such theories cannot by themselves answer the question whether—even if we knew them to be absolutely accurate in describing the inner forces of history (or globalization, or modernization and rationalization, or the inevitable spread of liberal moral universalism, or perhaps something else entirely)—we should adopt constitutional patriotism, as opposed to other normative theories which might defy such developments. Put differently: are theories of

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<sup>4</sup> DAVID MILLER, *ON NATIONALITY* (Oxford Univ. Press 1995).

<sup>5</sup> Compare Andrew Oldenquist, *Loyalties* 79 *THE JOURNAL OF PHILOSOPHY* 173-93 (1980).

<sup>6</sup> Andrew Oldenquist, *Three Kinds of Nationalism* 1 *CROATIAN JOURNAL OF PHILOSOPHY*, 63-72, at 68.

<sup>7</sup> Kwame Anthony Appiah, *THE ETHICS OF IDENTITY* (Princeton UP, 2005), 220 and Andrea Baumeister, *Diversity and Unity: The problem with ‘Constitutional Patriotism* 6 *EUROPEAN*

constitutional patriotism calling for a particular set of political beliefs and dispositions, which we ought to adopt and cultivate even if historical forces point in other directions, or are theories of constitutional patriotism essentially reconstructing moral developments already under way, or perhaps offering marginally more attractive self-descriptions of existing liberal states?<sup>8</sup>

A sociologically sophisticated account of what terms like political attachment and loyalty can mean in highly complex twenty-first century societies is of course desirable; but the difficult normative work of justifying something like constitutional patriotism cannot be accomplished by assuming a development towards more liberal political cultures. Constitutional patriotism has to be able to stand without what has been criticized as the “historicism” of Habermas’s original theory.<sup>9</sup>

It has also often been unclear which particular overall purpose a theory of constitutional patriotism is supposed to serve. Is constitutional patriotism simply a functional equivalent of nationalism; is it about stabilizing expectations of political behaviour and ultimately an account of how to generate social integration and political stability? Put differently: Is constitutional patriotism essentially a variety of Rawlsian political liberalism, which is supposed to ensure the stability of societies divided by deep disagreements, without disrespect to a range of non-liberal comprehensive worldviews? Might it even be described as a form of “statist nationalism,” whose purpose is to ensure loyalty to the state, but which is structurally no different from cultural nationalism (and potentially equally illiberal), as critics have claimed?<sup>10</sup> Or does constitutional patriotism actually surpass Rawls’s political

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<sup>8</sup> Critical theorists would of course not accept his distinction.

<sup>9</sup> Oldenquist, *supra* note 6, at 68.

<sup>10</sup> See, e.g., CHAIM GANS, *THE LIMITS OF NATIONALISM* (Cambridge Univ. Press 2003).

liberalism in heightening “an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society”?<sup>11</sup>

Alternatively, is constitutional patriotism in fact a form of *civic empowerment*? In other words, does it potentially translate the attachment to political principles into kinds of political action that can turn against and destabilize governments—through civil disobedience, for example? As with the question of particular polities and values, those interested in a clarification of the concept might legitimately ask a question about priorities: does stability come first, or empowerment? And if they go together, what is the condition of possibility for that?

This article outlines in Section 1 the elements that any theory of constitutional patriotism needs to contain. In particular, every such theory, first of all, should clarify its overall *purpose*. What is the question to which constitutional patriotism is supposed to be the answer? We cannot take for granted that we need such theories in the first place.

In addition, every theory should provide an account of what I call the *object* of attachment, the *mode* of attachment and the *reasons* for attachment. Related to the first in particular, there is a requirement of *specificity*—that is to say, the theory must explain why those committed to universal principles should attach themselves to one polity rather than another. Finally, a theory ought to answer questions about the precise motivational (and, perhaps, emotional) *consequences* of constitutional patriotism. Are we in the end talking about a kind of civilized form of allegiance, reasonable loyalty, about some sort of tempered pride, or about other kinds of emotions altogether? What political mentality and set of collective dispositions would characterize a people subscribing to constitutional patriotism?

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<sup>11</sup> JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (MIT Press, 1998) at 500.

Before answering these questions, a fundamental distinction needs to be drawn so as to avoid some of the most common misunderstandings of constitutional patriotism. Following Rainer Forst, I argue that constitutional patriotism is a *normatively dependent* concept—it is not by itself a theory of justice or of legitimacy.<sup>12</sup> It is possible to think of a purely positivist notion of constitutional patriotism, that is, broadly speaking, any lasting attachment on the part of citizens to enduring political arrangements (irrespective of any orientation toward human rights and democracy). However, a *normatively substantive*, or *moral*, reading of constitutional patriotism needs a background theory of what renders political arrangements legitimate. Therefore, in order to answer the questions posed above, we must sketch a moral background theory of fairness that renders our vision of constitutional patriotism normatively substantive. The background theory offered here is centered on the idea of sharing *political space on fair terms*. Note, however, that one could formulate other background theories that argue for different accounts of fairness or justice.

As stated at the outset, a general theory of constitutional patriotism should be clear about its own limits. Constitutional patriotism by itself is not some kind of civic panacea in cases of collective political breakdown but, more importantly, I will argue—perhaps disappointingly for some—a concept that must rely to some extent on existing political units. It is not a freestanding theory of political boundary formation and, therefore, does not answer questions about political self-determination that rival theories, such as liberal nationalism, might well be in a position to answer (although those answers might turn out to be unsatisfactory from a normative and practical standpoint). Likewise, constitutional patriotism cannot by itself generate large degrees of social

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<sup>12</sup> For the idea of normative dependence, see RAINER FORST, *TOLERANZ IM KONFLIKT: GESCHICHTE, GEHALT UND GEGENWART EINES UMSTRITTENEN BEGRIFFS* [TOLERANCE IN CONFLICT: THE HISTORY, CONTENT AND PRESENT MEANING OF A CONTROVERSIAL CONCEPT] 48–52 (Suhrkamp 2003). I am much indebted to discussions with Rainer Forst on this point.

solidarity in the sense of high spending on welfare, as some of its proponents have claimed.<sup>13</sup> Rather, social solidarity in this specific sense will crucially depend on how strong an interpretation of the underlying idea of fairness can take hold in a particular political culture.

These two seemingly defeatist conceptual concessions might prompt questions, about the point of constitutional patriotism. As I argue in section 2, constitutional patriotism makes it possible to avoid the “sources of moral danger” (Alasdair MacIntyre) often associated with both liberal nationalism and traditional forms of patriotism—and this is its distinctive virtue.<sup>14</sup> Serving both as a source of civic trust (and therefore stability) and as a source of civic empowerment, it is inherently Janus-faced. The strong moral reading of constitutional patriotism outlined here always (and not contingently, as with liberal nationalism) contains what one might call a “normative surplus” that serves as a basis for civic empowerment, dissent, and—at the limit and as a kind of litmus test—as a justification for civil disobedience, or what some proponents of constitutional patriotism have specifically called “constitutional disobedience.”<sup>15</sup> Politics subscribing to constitutional patriotism strengthen their defenses against illiberal and antidemocratic challenges—but they also willingly render themselves vulnerable to “normative disturbances” that derive their power from constitutional patriotism’s normative surplus.

This normative surplus can also be invested in the mutual opening of constitutional cultures, making it conducive to what I shall call, mixing metaphors freely, “normative spillovers” and “transnational norm-building”—whereas liberal nationalism

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<sup>13</sup> See, e.g., Omid Payrow Shabani, *Constitutional patriotism as a model of postnational political association: The case of the EU*, 32 *PHILOSOPHY AND SOCIAL CRITICISM* 699–718 (2006).

<sup>14</sup> See ALASDAIR MACINTYRE, *IS PATRIOTISM A VIRTUE?* (Department of Philosophy, University of Kansas, 1984), 15 (remarking that patriotism “turns out to be a permanent source of moral danger”; or GEORGE KATEB, *Is Patriotism a Mistake?*, 67 *SOCIAL RESEARCH* 901-24 (contending that “patriotism is inherently disposed to disregard morality.”)

<sup>15</sup> Joxerramon Bengoetxea and Juan Ignacio Ugartemendia *Civil disobedience as constitutional patriotism* 17, *LEGAL STUDIES* 434-477.

contingently might or might not have this feature.<sup>16</sup> This normative spill-over is another advantage that constitutional patriotism has over its philosophical competitors, a claim that obviously depends on the desirability of transnational norm building—a stance I cannot fully justify within the scope of this article, but for which I shall provide some reasons later on.

Finally, in section 3, I ask what constitutional patriotism might mean as policy. Would it have the same practical consequences as liberal nationalism, or instances of civic nationalism (such as French Republicanism)? Are all these concepts ultimately interchangeable abstractions, as similar policies could be derived from them? How would one even recognize a “constitutionally patriotic polity”? Could we designate a polity as such, given certain criteria, when the leaders and citizens of that polity do not actually use the words “constitutional patriotism”? How, in other words, will we know it when we see it?

## **1. A General Theory**

### **1.1. Objects of attachment**

As stated, constitutional patriotism is *not* itself a theory of justice. Nor is it primarily a theory of the self, although the notion of post-conventional identity plays an important role in Habermas’s conception of constitutional patriotism. Rather, as Frank Michelman has pointed out, constitutional patriotism is part, and *only* part, of a response to the challenge of conceiving, justifying, and maintaining democratic political rule—with the proviso that a successful justification will in turn make for the just and stable exercise of

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<sup>16</sup> Compare THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., Cambridge Univ. Press 2007).

political rule.<sup>17</sup> Constitutional patriotism is not that justification—but justification will yield the reasons for attachment.

Put differently: a theory of constitutional patriotism provides one possible language for exercises in collective ethical self-clarification. Who and how do we want to be, as far as political rule over ourselves is concerned? Do we see such rule centered on some kind of cultural essence that should be preserved over time? Or do we conceive it as a project that sustains, and is in turn enriched by, a series of political conversations about the principles of justice that should govern political rule? Constitutional patriotism conceptualizes the beliefs and dispositions required for citizens to maintain a particular form of political rule.

The deepest impulse animating a normatively substantive account of constitutional patriotism is the idea of individuals recognizing each other as free and equal and finding fair terms of living together—finding enough common, mutually acceptable grounds to answer the question, “how do we want to live together?.” The seemingly innocuous phrase “living together” has larger implications than may be apparent at first. It means that constitutional patriotism refers necessarily to particular, more or less clearly bounded, political associations. Its primary focus is on particular, pre-existing political structures, not on humanity as a whole. In this, and in this sense only, could it be said to be “statist;” and, returning to the question about the priority of values and politics posed at the outset, we have to answer that we indeed start with politics.

To spell out further what I have just called the deepest normative impulse: political rule, as the ground rules for the collective exercise of force over the members of the political community, ought to be justified to those subject to collective decisions.

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<sup>17</sup> Frank Michelman, *Morality, Identity and “Constitutional Patriotism”* 14 *RATIO JURIS* 253-271

Otherwise, some citizens will simply dominate others. However, the need for justification does not apply to each single law or measure; rather, the system of lawmaking generally—the “law of lawmaking”—and the principles animating it, must be justifiable to all citizens. Thus, for citizens to accept situations where they find themselves in a minority, they must have endorsed what John Rawls once called “constitutional essentials.” In particular, they must have endorsed the general procedures that are presumed to produce legitimate law. Thus, according to Michelman,

[S]pecific exercises of coercive political power are justified when they are validated by a set of constitutional essentials ... that everyone can see that everyone has reason to accept in the light of his or her interests ..., considering himself or herself to be one among a company of presumptively free and equal co-inhabitants, all of whom are under moral motivational pressure to find agreement on fair terms of cooperation within their necessarily shared social space...<sup>18</sup>

Citizens are asked, then, to attach themselves to, and maintain, a system of rules for lawmaking that tracks their interests and that they would have no good reason to reject. It is on such a basis that ordinary laws and ordinary politics, as well as reasonable disagreements about particular interpretations of the constitution, should be acceptable even to those who find themselves in a minority. Ordinary law will then have at least an indirect justification—it is produced by way of directly justified legal procedures defined in the constitution, and is therefore presumed to be legitimate.

Michelman argues persuasively that citizens have to be attached, in the first place, to the very *idea* of a constitution—or, if one wishes to avoid overburdening the notion of “constitution,” the idea of committing oneself to mutual justification in a well-

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(2001).

<sup>18</sup> *Id.*, at 261.

ordered society, with fair terms of cooperation and fair terms of limiting power. However, citizens are not asked to agree on or accept a particular constitution in all its specificity. In fact, it is perfectly reasonable for citizens to disagree even about constitutional essentials (and not just their application). Such disagreement will be likely, since a general justification on the one hand and application on the other cannot properly be separated. Citizens will not be able to foresee the outcomes of particular applications, and may in many instances have good reasons to disagree about how to translate constitutional essentials into actual legal and political institutions. In fact, norms and their realization in particular institutions are hard to separate at all. One need not go as far as Michelman and claim that “constitutional law is institutional stuff from the word go,”<sup>19</sup> but it should come as no surprise that constitutions will serve as the site of intense, yet reasonable moral and political contestation, not least in light of the core idea of fairness that is, as yet, imperfectly realized in any given, really existing constitution.

Constitutions, then, necessarily produce a form of contained disagreement, or limited diversity. What contains and limits is, again, the attachment to the very idea that citizens conceiving each other as free and equal should find fair terms of political cooperation that they can justify to each other. It is to this critical and admittedly highly abstract idea that constitutional patriots must adhere through thick and thin. And yet it is not at all irrelevant that citizens have such an “abstract and critical democratic-constitutional orientation to the systems of cooperation in which they find themselves”; as James Tully has put it, they at least share “a mode of problematisation of their political identity.”<sup>20</sup> Political situations look very recognizably different where such a

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<sup>19</sup> Frank I. Michelman, ‘Family Quarrel’, in: Michel Rosenfeld and Andrew Arato (eds.), *Habermas on Law and Democracy: Critical Exchanges* (Berkeley: University of California Press, 1998), 309-22; here 320.

<sup>20</sup> James Tully, *The Unfreedom of the Moderns in relation to the ideals of constitutional democracy* 65 MODERN LAW REVIEW 204-228 (2002).

mode is absent, where fair cooperation or even just somehow trying to share a political space have ceased to be common goals – whereas, as for instance Heinz Klug has shown with regard to post-apartheid South Africa, democratic constitutionalism can bring about a certain degree of civility even in deeply divided societies.<sup>21</sup>

It is on this still rather abstract level that constitutional patriotism enters the picture. In (inevitable) cases of reasonable disagreement, constitutional patriotism will provide minorities with a genuinely moral motivation to maintain the constitutional regime as a whole. After all, they have reason to maintain a system which is supposed to embody the ideal of mutual justification, even if—in all likelihood—no individual citizen at any one point will judge the embodiment of this idea in all its specificity congruent with his or her conception of fairness. Citizens who find themselves in a minority might not always see that the system as a whole is in their interest when they feel that they have lost out on what for them is an important issue. In such cases, constitutional patriotism exerts additional moral pressure to uphold the system; it furnishes minorities with good, normative reasons to give “losers’ consent.”

At the same time, constitutional patriotism also provides minorities with a language to contest majority decisions, when they feel they have been treated unjustly. In other words, constitutional patriots in a minority will have a way of appealing to the majority’s attachment to principles of fairness—in which case the majority cannot simply dismiss the minority as those whose self-interests have lost out with particular decisions. For instance, minorities can try to tell stories about ever widening circles of inclusion, appealing to a common patriotic care to remain faithful to constitutional essentials and render their realization “ever more perfect.” In that sense, constitutional patriotism is also part of an account of the sources of the long-term stability of

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<sup>21</sup> HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA’S POLITICAL*

constitutional regimes—it provides a common language, or a mode of political problematization or contestation within a shared normative framework.

From specific debates and even disagreements about the constitution eventually emerges what some have termed a “constitutional identity,” but what I would prefer to call a “constitutional culture.”<sup>22</sup> “Identity,” in my view, suggests too static a picture, and tends to narrow the focus to an actual written document; whereas “culture” points to the fact that we ought to include shared symbols, rites and rituals of membership, and venerated institutions, such as constitutional courts, that are associated with and, at least partially, express constitutional essentials.<sup>23</sup> But it might also be something more abstract—such as certain practices of conducting debate in civilized fashion—that could come to characterize a constitutional culture; such situated practices would then also demand support from constitutional patriots.<sup>24</sup>

Constitutional culture is not as expansive a term as “political culture”; at the same time it might turn out to be more, not less particular, than “political culture,” even if the constitution itself, in line with Habermas’s initial conception of constitutional patriotism, is seen as characterized, primarily, by what we take to be or have negotiated as universal norms. After all—to say what for sociologists in particular will appear as the obvious—constitutions do not interpret or apply

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RECONSTRUCTION (Cambridge Univ. Press, 2000).

<sup>22</sup> For instance George P. Fletcher, *Constitutional Identity* 14 *CARDOZO LAW REVIEW* 737-46 (1993). For a somewhat different conception of ‘constitutional culture’ see PETER HÄBERLE, *VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT* (Duncker & Humblot, 1982).

<sup>23</sup> See also Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 *LAW AND PHILOSOPHY* 353-79 (2003)

<sup>24</sup> As Craig Calhoun observes: ‘The notion of *constitution as legal framework* ... needs to be complemented by the notion of *constitution as the creation of concrete social relationships*: of bonds of mutual commitment forged in shared action, of institutions, and of shared modalities of practical action.’ See Craig Calhoun *Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere*, 14 *PUBLIC CULTURE* 147-71 (2002).

themselves; they are read and reread in light of particular historical experiences, new information, mutual learning across borders, and so on.<sup>25</sup>

These experiences cannot be neatly separated according to those contained in a single “majority culture” and those of a number of “minority cultures”; and it cannot be the goal of constitutional patriotism completely to “decouple” majority culture and political culture and to chase the illusionary aim of total state neutrality, as some of Habermas’s initial formulations suggested.<sup>26</sup> Rather, the point is that a more narrow conversation about constitutional culture remains open to a diverse range of experiences, which need to be translated into a language that relates to constitutional essentials – in order to interpret and develop them, but ultimately also re-affirm their normative content.<sup>27</sup>

The term culture, as opposed to “identity,” also underlines that we are not dealing with something homogeneous or necessarily harmonious, and that the idea is precisely *not* the notion that the constitution is primarily the expression of an underlying national core identity.<sup>28</sup> Constitutional cultures are at least partly defined by the very nature of ongoing disagreements and deep-seated conflicts within a general constitutional settlement; and yet, characteristic forms of conflict and difference still refer to the same thing; and, as political theorists from Machiavelli to Albert Hirschman have argued, contained conflict can in fact also have an integrating and stabilizing

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<sup>25</sup> Contrary to persistent caricatures of his position Habermas has always stressed precisely this point, not least with regard to a constitutional patriotism for the EU. See for instance *BETWEEN FACTS AND NORMS* (MIT Press, 1998), at 500.

<sup>26</sup> JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION*, trans. Max Pensky (Polity, 2001), 74.

<sup>27</sup> The idea of translation is closer to Habermas’s recent thoughts on the role of religious experience in the constitutional state. Jürgen Habermas, *Religion in the Public Sphere* 14 *EUROPEAN JOURNAL OF PHILOSOPHY* 1-25 (2006)

<sup>28</sup> Many constitutional lawyers broadly following the lead of Carl Schmitt still cling to this ideal. For an overview of this tradition see my *A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT* (Yale Univ. Press, 2003).

effect.<sup>29</sup> A constitutional culture, then, will be characterized by certain styles of political claim-making and contestation, as well as ways of (at least temporarily) agreeing to disagree. In other words, conflict perceived as legitimate can be as important as consensus for a particular constitutional culture.<sup>30</sup>

## 1.2. The need for specificity

Let us return to the question of the general architecture and content of a theory of constitutional patriotism. What is the overall purpose of constitutional patriotism? In a nutshell: to enable and uphold a just constitutional regime. And, further, what is its object? The object of attachment is *not* the (written or unwritten) constitution in all its concrete, historical specificity, as a positivist rendering of constitutional patriotism would have it. Rather, it is the very idea of citizens mutually justifying political rule to each other—and thus, in the end, the moral intuition that things should not just be done *to* people. Constitutional patriotism contests any conception of common life as a matter of “who whom”—to use possibly one of the shortest definitions of power as domination.

More specifically, citizens attach themselves to the norms and values at the heart of the constitution, that is, the constitutional essentials, and, in particular, to the fair and democratic procedures that can be presumed to produce legitimate law. Habermas has stressed time and again that complex modern societies cannot be sustained by a “substantive consensus on values but only by a consensus on the procedure for the legitimate enactment of laws and the legitimate exercise of power.”<sup>31</sup> Yet it is important

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<sup>29</sup> See, e.g., Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society* 22 POLITICAL THEORY 203–218 (1994).

<sup>30</sup> Note, however, that this stress on conflict does not effectively counter two other possible objections: that constitutionalism inevitably carries a statist legacy, and the reproach of ‘constitutional fetishism’, according to which a focus on constitutionalism is misplaced, as many ways to exercise power escape a constitutionalist framework. See Neil Walker, *The Idea of Constitutional Pluralism* 65 MODERN LAW REVIEW 317–359 (2002).

<sup>31</sup> Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, MULTICULTURALISM, 107–148, 135 (Amy Gutman, ed., Princeton Univ. Press 1994).-

to bear in mind that even in this picture universal moral norms remain the ultimate source of attachment; they have simply “retreated” into the particular procedures that structure the rules for reworking a constitutional culture.

I have offered a preliminary answer to the question about the object of patriotic attachment. But from what has been said thus far, constitutional patriotism would clearly not fulfill any specificity requirement. Men and women might simply decide to attach themselves to whichever regimes they find best embodies the constitutional essentials they deem most important. To fulfill the specificity requirement, we must enlarge the object of attachment to include what I refer to above as a constitutional culture. The kinds of conversations, controversies, and disagreements that characterize constitutional cultures are necessarily related to particular national and historical contexts. These contexts inform the judgements citizens make about the constitution and the forms of reasonable disagreements that can emerge. But the norms included in the constitution in turn will transform the way in which citizens view their traditions and the local, regional and national cultures with which they find themselves confronted. In short, constitutional culture mediates between universal norms and particular contexts. Moreover, constitutional culture itself would then be formed through what could be envisioned as a circular process, in which constitution, constitutional culture and a diverse and evolving set of cultural (including national and sub-national) self-understandings in a more general sense would come to influence and, ideally, reinforce each other. In short, constitutional culture can be conceived as an ongoing project, a permanent process devoted to the always “controversial *realization* of universalist constitutional principles.”<sup>32</sup>

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<sup>32</sup> Habermas, *supra* note 26, at 489.

So constitutional patriotism *is* specific. But this does not mean that we have replaced one particularism with another and that constitutional patriotism is ultimately as good (or rather as bad) as liberal nationalism. Those who object to constitutional patriotism along such lines and essentially claim that any mediation between the universal and the particular is simply another particularism would have to demonstrate how a politics that permanently embodies the universal would look like. But it is simply an illusion, or an illegitimate appropriation to think “the universal” can somehow be accessed directly or claimed in some incontestable manner—instead of being earned in conversation and negotiated and contested.

Even in its specificity, however, constitutional patriotism remains primarily an attachment to norms or principles. What makes constitutional patriotism different from other forms of attachment is that it is not a group of people or a culture tout court that claims allegiance. Constitutional patriotism is meant to be political through and through: people and “culture” become relevant only to the extent that they have an impact on politics, or, more specifically, the ground rules for the collectively authorized exercise of coercion.

Now it is possible to redescribe the object of attachment as, ultimately, a way of life or form of life, or even as a kind of community. In fact, there has been considerable debate over where to draw the line between universalist morality—which, *prima facie*, must be more or less the same at the heart of every constitution—and what, in Habermas’s language, are acts of “ethical self-clarification.”<sup>33</sup> Such self-clarifications are about forming “authentic collective identities,” based on existing values and world-

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<sup>33</sup> See in particular Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, in *HABERMAS ON LAW AND DEMOCRACY* 115-53 (Michel Rosenfeld & Andrew Arato eds., [University of California Press, 1998]); and Richard Bernstein, *The Retrieval of the Democratic Ethos*, in *HABERMAS ON LAW AND DEMOCRACY* at 287-305.

views, shared histories and cultural narratives. They have an *existential* quality and are always inevitably enmeshed with particular cultural settings.

Habermas has proposed a division of practical reason into what is practically expedient, ethically appropriate and morally right. The first is based on instrumental, strategic considerations; the second is concerned with questions of personal identity and the good life; while the third – the moral -- aims at finding rules and decisions which are rationally acceptable to all affected by the rules. According to Habermas, it is in the realm of the ethical that collectives reach an understanding of who they would like to be, and which of their traditions they should continue or modify in the light of moral discourses. Unlike in the realm of morality, here one cannot presume “right” answers. But one can hope for authentic and coherent self-descriptions under which collectives can properly recognize themselves.

Even in the eyes of those sympathetic to Habermas’s concerns, he has assumed far too many political and legal questions to be answerable purely in the moral realm. Some critics have gone a step further and blurred the line between moral and ethical altogether. As Thomas McCarthy has put it, “because we only ever have access to the abstract system of basic rights as “refracted” through particular constitutional traditions, hermeneutic processes of self-clarification remain indispensable.”<sup>34</sup> Thus it is reasonable to presume that much of political debate—even constitutional debate—will take place in the realm of the ethical. Especially in increasingly diverse societies, debates about values and traditions cannot be expected to be resolved once and for all in the light of moral discourses. Instead, “who do we want to be?” might well be a question subject to persistent and reasonable disagreement. Or, to quote McCarthy again, “under conditions of posttraditional [sic!] pluralism and individualism, proposed solutions to the practical

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<sup>34</sup> McCarthy, *supra* note 33, at 131.

problems of living together non-violently and organizing our common life cooperatively cannot generally be expected to meet with universal agreement.”<sup>35</sup>

I do not see what would be lost, analytically or normatively, if Habermas and some of his followers made concessions on this point—especially as the sympathetic critics are by and large framing their criticism as a point about the empirical conditions of present-day societies. On the other hand, the fact that questions about universal rights and collective identities cannot easily be disentangled in practical political debate is not in itself an argument for giving up on the distinction altogether. In particular, the distinction might serve to motivate citizens to distance themselves, to the extent possible, from their ethical commitments in order to view specific disagreements in a more general light. Even within inevitably complex, moral-cum-ethical debates about particular laws and policies, participants should remain willing to shift to higher levels of abstractions, wherever possible, in order to reach agreements.

### **1. 3. Modes of Attachment**

Having clarified the object and the specificity of constitutional patriotism, I will move on to the other elements that are needed for a general account, as set out at the beginning. In particular, I will focus on the mode of attachment. In moral-psychological terms, it might best be defined as reflective, critical, or even ambivalent sometimes. Constitutional essentials, and constitutional culture more widely, are viewed in a critical light and are subject to periodic evaluation and re-evaluation in light of what citizens take to be universal norms.

Constitutional patriotism is supposed to be reflexive. That is, it occasionally must be revised and refined in light of the further development and refinement of the

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<sup>35</sup> *Id.* at 139.

principles at the heart of our constitutional regime. In that sense, it could also be called, drawing on a very Habermasian concept, a “collective learning process.”<sup>36</sup> It presumes an open future and the willingness of citizens to adjust the reasons, the object, and the mode of their attachment in light of new experiences; consequently, they see their constitutional culture as always *open* and *incomplete*—a project in which those in the past have been engaged and in which their descendants will invest.<sup>37</sup>

We know that, practically speaking, polities cannot live in permanent states of self-questioning and ambiguity. The (highly stylized) point is about a basic attitude toward politics that calls at least sometimes for intense critical attention. We cannot tell in advance what these moments will be like, what might trigger them, or whether “collective learning” might not go wrong under certain conditions and lead to a “collective un-learning.” But this point is hardly trivial, as conceptions of constitutional patriotism centered on a static “constitutional identity,” or forms of liberal nationalism that tend to rely on a reified core ethnic identity, would not necessarily frame the picture this way.<sup>38</sup>

As far as reasons for attachment are concerned, I have already indicated that citizens who seek to treat each other as free and equal in a common social space have reasons to adopt the principles of constitutional democracy. They also have reasons to sustain a struggle for the best realization of these principles through reasonable disagreement. Clearly, there are more or less strict versions of this argument, depending

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<sup>36</sup> As Habermas put it: ‘...the interpretation of constitutional history as a learning process is predicated on the nontrivial assumption that later generations will start with the same standards as did the founders...All participants must be able to recognize the project as the *same* throughout history and judge it from the *same* perspective’. See Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 *POLITICAL THEORY*, 775 (2001).

See also Günter Frankenberg, *Der lernende Souverän* 35 *KRITISCHE JUSTIZ* 297-311 (2002).

<sup>37</sup> See also Ciaran Cronin, *On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue* 19 *RATIO JURIS* 343-369 (2006).

<sup>38</sup> For an argument that demonstrates the persistence of “ethnic cores” within liberal nationalism, see Arash Abizadeh, *Liberal nationalist versus postnational social integration: on the nation’s ethno-*

on the moral background theory adopted: in a more strictly Kantian version, for instance, reasons for attachment could be construed exclusively as duties to uphold a just political order<sup>39</sup>; in a different version that stresses the importance of democracy for individual dignity, there might be instrumental reasons to sustain a constitutional culture or identity that allows for collective agency and collective learning processes. In other words, the reasons for attachment are not always the same; they depend on one's particular moral background theory.

Does any of this imply that attachment has to be entirely rational? Certainly within constitutional patriotism as a form of attachment cognitive elements will predominate. But the symbolic contents of a constitutional culture, its narratives and projections into the future, will also evoke particular emotions. In fact, it will in all likelihood evoke a complex set of emotions—as opposed to simple pride, for instance.<sup>40</sup> Shame, righteous indignation, and even anger and guilt might play more of a role than other emotions or passions commonly included in accounts of belonging.<sup>41</sup> These emotions, however, will necessarily depend on “cognitive antecedents”; it is a mistake not to recognize that cognition and emotion are intimately related—emotions (or at least those of concern in political life) are, after all, based on beliefs.<sup>42</sup>

The moral life of constitutional patriots, then, is potentially rather complex—which is not to say that it is somehow uniquely complex. At the same time, it would be

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*cultural particularity and 'concreteness'*, 10 *NATIONS AND NATIONALISM* 231–250 (2004).

<sup>39</sup> Pauline Kleingeld, *Kantian Patriotism*, 29 *PHILOSOPHY AND PUBLIC AFFAIRS* 313–341 (2000).

<sup>40</sup> Especially as pride generally is unrelated to agency. It does not possess what has been called “action tendencies.” See JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 283 (Cambridge Univ. Press 1999).

<sup>41</sup> Passions are not the same as emotions which in turn are not the same as moods. As Philip Fisher has shown in a brilliant book, the modern vocabulary of the emotions is directly opposed to that of the ‘vehement passions’ as almost inherently anti-social. Yet, one of the most interesting dynamics among the passions is one passion “blocking another.” And it is perfectly plausible that an account of constitutional patriotism would include a notion of shame, or even anger, blocking other undesirable passions such as fear. See PHILIP FISHER, *THE VEHEMENT PASSIONS* (Princeton Univ. Press 2002).

<sup>42</sup> ELSTER, *supra* note 40, at 249–250.

wrong to claim that constitutional patriotism involves a standard set of emotions and passions; what is certainly *not* compatible with the picture of a complex post-traditional society, however, are unquestioned pride and linear or homogeneous national narratives of heroes and victories. In that sense, a post-traditional constitutional culture is indeed also a post-heroic one; and it is post-nationalist, rather than post-national (and also post-*traditionalist*, for that matter).<sup>43</sup> After all, the constitutional culture remains not only based on, but also permeable for, national and sub-national experiences, and, in particular, narratives of troubling pasts, of oppression and possibly of oppression overcome.

Finally, there is what I posed as a question about the results or the “product” of constitutional patriotism. Habermas has spoken of modern democratic citizenship as “an abstract, legally mediated solidarity between strangers.”<sup>44</sup> This is certainly a far cry from Aristotelian or Florentine civic friendship, arising in a society of face-to-face political contacts. Yet, it is not clear whether solidarity is quite the right term here. In the account I have offered so far, it is not obvious whether citizens are truly asked to make any sacrifices for each other. In an indirect way, the fair value of the rule of law and democracy and, in particular, the ideal of a public sphere open for deliberation from diverse points of view, needs resources that citizens must be willing to provide each other. Depending on the context, constitutional patriotism might support constitutional essentials that include very extensive redistribution of resources. In itself, however, constitutional patriotism is not in any obvious way an argument for an extensive welfare state.

Even with this qualification, one might still say that constitutional patriotism paints too irenic a picture of the political world. Where, one might ask, do questions of

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<sup>43</sup> Cronin, *supra* note 37, at 19.

inclusion and exclusion enter? If they do not enter at all, is constitutional patriotism not potentially a sort of philosophical sedative that makes us put up with unexplained and unjustified inclusions and exclusions? It is here that the issue of motivational sources for agency and the question of loyalty intersect. Loyalty, by definition partial and relational, is said always to attach to a “historical self”; it is also argued that “realm of loyalties is tribal and particularistic: I support my country, my family, my neighbourhood because they are mine.”<sup>45</sup> In other words, it is supposed to refer to a smaller or larger group of people (or perhaps just one loved person), and it appears to presume a shared history with particular people (or a person).<sup>46</sup> Moreover, it is always exercised in the face of some threat, or, more precisely, another potential object of allegiance. Accordingly, what tests loyalty is the availability of some possibly quite attractive alternative—another person, another party, or perhaps another country. If that is so, one is naturally led to ask with George Fletcher: “how might one be disloyal to the Constitution? There is no alternative lurking in the wings. It would make no sense for an American judge to consider applying the German or the Canadian constitution.”<sup>47</sup>

To answer this conundrum, one might first of all draw a distinction between two different kinds of loyalties—loyalty to people, and loyalty to principles. In practice, this distinction will often be blurred; let us say, for instance, that we have engaged with others in a common effort in the past—a successful political struggle for greater justice

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<sup>44</sup> Jürgen Habermas, *Why Europe Needs a Constitution* NEW LEFT REVIEW 5-26, at 16 (2001).

<sup>45</sup> GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (Oxford Univ. Press 1993) and Oldenquist, *supra* note , at 71.

<sup>46</sup> Not everyone sees it this way, of course, and some would argue that loyalty to persons only is in fact a sign of being pre-modern. Witness, for instance, Michael Oakeshott’s observation that in a pre-modern “morality of communal ties . . . loyalties are not to chosen moral principles but to persons.” MICHAEL OAKESHOTT, *MORALITY AND POLITICS IN MODERN EUROPE: THE HARVARD LECTURES* (Shirley Robin Letwin ed., Yale Univ. Press 1993).

<sup>47</sup> FLETCHER, *supra* note 45, at 63. *But see* CARL SCHMITT, *VERFASSUNGSLEHRE [CONSTITUTIONAL THEORY]* (8th edition, Duncker & Humblot, 1989)(1928) (theorizing the idea of *Verfassungsverrat*

and civic inclusion. What participants in that struggle might feel attached to is not only the principles of justice and inclusion but also other participants, with whom they share a history. In all likelihood, they also feel attached to the actual outcome of the struggle—to particular political institutions devoted to justice, for example, or to a more diffuse change in political mentalities. However, just as the distinction can be blurred, these two kinds of loyalty may also come into conflict. People we care about may behave, or even develop, in ways that violate principles we care about. The main point is that it is not the case that “the gears of loyalty simply do not engage the Constitution.”<sup>48</sup> Principles can command loyalty as much as people can.

A better objection than saying that there is no “alternative in the wings” would be to claim that if we *only* care about principles, we might as well leave a country whose constitution is developing in such ways that the principles in question are being violated. The issue is the extent to which loyalty depends on any kind of shared history, as Fletcher claims. The answer, taking off from the discussion about constitutional culture, would seem to me to be something like this: even universal principles are embodied in particular institutions and practices—and we can become attached to these institutions without automatically turning into particularists. These particular institutions and practices *also* have meaning for us by virtue of our attachment—and our involvement in the shared history of supporting, criticizing and revising them.<sup>49</sup> As Joseph Raz has put it, “meaning comes through a common history, and through work. They make the objects of one’s attachment unique.”<sup>50</sup> So it is certainly possible—conceptually, and empirically—to be attached to universalist principles *and* feel loyalty to a particular constitutional culture.

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(constitutional treason).

<sup>48</sup> FLETCHER, *supra* note 45, at 64.

<sup>49</sup> JOSEPH RAZ, *VALUE, RESPECT AND ATTACHMENT* 16 (Cambridge Univ. Press 2001).

Why should all this be important? A reasonable one-word answer would be McCarthyism. Any discussion of loyalty and the constitution is haunted by the spectre of political witch-hunts of those suspected of lacking political loyalty or “civic reliability.” Proponents of cultural nationalism especially have felt tempted to oppose uncomplicated belonging, by virtue of culture, to membership based on achievement or oath. It is often claimed that the latter does not allow for a genuine sense of “being at home,” as belonging will be dependent on potentially changing standards of political behavior. Paradoxically, then, the unchosen (birth or culture, for example) makes for *political* freedom and enables tolerance (think of an idealized version of Britain, tolerant of political eccentricities)—whereas the possibility of political choice makes for exclusion (think of the US and McCarthyism).

I am not sure that this argument can be easily trumped. It does presume culturally homogeneous entities (otherwise, fragmentation and the possibility of exclusion re-enter). And it does presume that the political expression of these cultural entities will not place limits on *cultural* tolerance. But this in itself is not an argument for exclusively *political* identities as an alternative. In fact, we might have to admit that there is no guarantee that constitutional cultures will not turn out to be intolerant. But by the same token, it is hardly inevitable that political forms of belonging will cash out as the need for loyalty oaths. In any case, the more heterogeneous societies become, the less they have an option to stick with an expectation of cultural conformity and not give citizens a choice.

There is also a further, theoretical response to anxieties about McCarthyism—although it provides no guarantee either. After all, constitutional patriotism itself—at least in the way I have presented it—refers us back to the core idea of citizens

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<sup>50</sup> *Ibid.*, 20.

recognizing each other as free and equal. It is hard to see that constitutional cultures built around this idea could ever become so perverted as to encourage systematic intolerance—but it is not impossible, of course. What needs to be stressed, though, is that the self-critical and the reflective is built into the very notion of constitutional cultures that constitutional patriotism is supposed to sustain—as a form of post-conventional, post-traditionalist, post-nationalist belonging, in the strong moral reading suggested here. Such a constitutional patriotism finds the normative resources for contestation *within itself*—it has recourse to the very grounds of the constitutional essentials that are being violated; or, put differently, it is *reflexive*.

## **2. The limits of constitutional patriotism**

As indicated at the outset, it is important to stress what constitutional patriotism does not provide: in particular, it is not in itself a theory by which to determine political boundaries. In this regard, one might say, it shares a weakness of liberal thought more generally: that of by and large taking for granted existing bounded political space. Certainly no demand for cultural self-preservation by means of political autonomy could be deduced from the theory. It is true that constitutional patriotism makes a claim for the de-centering and mutual opening of existing constitutional cultures. In that sense—very broadly speaking—it is more likely to come down on the side of political arrangements that integrate, rather than those that separate. But this is a relatively weak guideline. It is conceivable in theory that a national minority, faced with unbearable oppression, would set up its own state, institute a constitutional regime, and make a point of critically reworking its own traditions. There is nothing necessarily contradictory about a group of politically self-

determining post-nationalists. So, unlike what critics have claimed, constitutional patriotism can offer an account of political continuity by virtue of its focus on constitutional cultures. But it cannot offer a full-fledged account of political demarcation.

Having said that, constitutional patriotism remains compatible with—and in fact encourages—what I call “transnational norm-building.” The latter entails the emergence of ever more complex political and moral ties across state borders—without these ties making state borders superfluous or morally insignificant—as well as practices of mutual learning and mutual deliberative engagement.<sup>51</sup> Constitutional patriotism, on account of its commitment to universal norms, will be conducive to the formation of such ties—but, since it recognizes legitimate differences among constitutional cultures, it will not collapse into a version of monist cosmopolitanism, that is, a cosmopolitanism that considers political boundaries morally irrelevant and assumes that all human beings stand in exactly the same moral-political relation to one another.

One might object at first, rather paradoxically, that constitutional patriotism could precisely block such mutual engagement—because “we” want jealously to protect “our” constitution, and not have “our” constitutional judges cite foreign law and import other people’s constitutional essentials—and that a strong emphasis on constitutions as a focus of political belonging could easily foster a kind of narcissism of minor constitutional differences. But such *constitutional nationalism* or *constitutional fetishism*—or, in Frank Michelman’s more benign formulation: constitutional “integrity anxiety”—clearly violates the understanding of constitutional patriotism advanced here, namely, one that sees constitutional cultures not as fully

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<sup>51</sup> On the normative peculiarity of the state compare Mathias Risse, *What to Say about the State*,

“achieved” and closed to self-critical learning but, rather, as an ongoing project of realizing certain norms and values in an “ever more perfect” way.<sup>52</sup> At the same time, it leaves open the possibility of significant variations in constitutional cultures, even in constitutional essentials—*after* a process of mutual engagement, and weighing of other political possibilities, not as a dogmatic closing-off of a transnational discussion of norms and values on account of the stipulated self-sufficiency of national democratic self-government.<sup>53</sup>

Thus, constitutional patriotism recognizes the legitimacy of political morality being *multilayered*—and accepts the idea that bounded schemes of fair living together impose more stringent obligations than “the worldwide community of human beings.”<sup>54</sup> It also values the fact that there are borders and bounded schemes of cooperation—but hoping to transform such schemes in ever more liberal, just and inclusive directions. Borders and schemes of cooperation are not simply obstacles, but also resources, or even achievements (as exercises in state- and nation-building from scratch sadly demonstrate). Constitutional patriotism attempts to conceive what we might call *fairness in the face of achieved institutions*—without assuming that institutions can be normatively achieved and justified once and for all. This is no doubt one major concession to the political reality of a world already divided into states and, for some, this may seem as already one crucial concession too many.

This element of political realism also has other, less defeatist implications, however. In particular, constitutional patriotism, as sketched here, does not fall victim to what we might call the *foundationalist fallacy*. It does not claim, as often alleged

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<sup>52</sup> Frank I. Michelman, *Integrity-Anxiety?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., Princeton Univ. Press 2005).

<sup>53</sup> See JEREMY RABKIN, *DEMOCRACY WITHOUT NATIONS?* (Princeton Univ. Press 2005).

<sup>54</sup> See also Thomas Nagel, *The Problem of Global Justice*, 33 *PHILOSOPHY & PUBLIC AFFAIRS*, 113–

by critics, that men and women must come together *ex nihilo* to create a polity based on pristine universalist values.<sup>55</sup> Constitutional patriotism transforms, it does not create out of nothing. In the same vein, it does not fit what we might call the *rationalist-voluntarist fallacy*, either. It does not claim that attachment has to be purely rational and voluntary. Constitutional patriotism reshapes—or rather we reshape—our dispositions and emotions, and does not depend on a completely unrealistic pure politics of will.

This also means that constitutional patriotism dispenses with the distinction between “good civic” and “bad ethnic” nationalism that sociologists have rightly called “conceptually ambiguous, empirically misleading, and normatively problematic.”<sup>56</sup> Consequently, we also should not call constitutional patriotism a fancy version of civic nationalism: it is a transformative conception of living-together different from civic nationalism; and it does suggest a different moral psychology than nationalism of any sort, whether ethnic or civic.

### **3. Constitutional Patriotism as Policy**

Finally, I turn to more concrete questions, particularly to address the suspicions that “applied constitutional patriotism” might simply be liberal democracy of one variety or another, as far as institutions are concerned, and just a matter of more self-critical attitudes, when it comes to what citizens themselves actually feel and think. If this were so, why would one need the elaborate theoretical apparatus proposed so far?

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147 (2005).

<sup>55</sup> Compare Bernard Yack, *The Myth of the Civic Nation* 10 CRITICAL REVIEW, 193–211 (1996).

<sup>56</sup> ROGERS BRUBAKER, *ETHNICITY WITHOUT GROUPS* 5 (Harvard Univ. Press 2004).

Could it be that, in the contexts where something like constitutional patriotism matters, it is impossible to produce it, and where it already exists, it does not matter much whether it fades into liberal nationalism or something like it? In this section, I tackle what constitutional patriotism might imply practically—especially for the “integration” of minorities and of societies at large.

But first a broader point: there is only so much that can be said at a very general normative level about “integration.” There is a core set of principles that liberal democracies must not violate; but beyond those, much will depend on the particular background histories and aspirations of the countries and minority groups in question, cultural belief systems, family and clan structures, and so forth. Claiming, for instance, that “Muslim communities” across Europe have to be “integrated” in a certain way assumes that the fact they are Muslims is the most important thing there is to know—as if the differences were not greater between a second-generation Turkish non-citizen member of the middle class in Germany, whose father was a guest worker, and a second-generation French citizen whose father fought the Algerian rebels alongside the French army in the war of Algerian independence.

Moreover, the very language of “integration” thus conceived suggests an image of human beings being moved, or pushed, around in large-scale, possibly high-minded, schemes of social engineering—an image that further seduces its exponents to think that “boundaries” or “thresholds” can clearly be specified, so that humans are recognizable as above or below the threshold, or as inside or outside the national culture – the concept that liberal nationalists cherish above all.

What can be said about integration generally is this: its core principles are based on fairness—the very idea that animates the strong moral reading of constitutional patriotism proposed in this article. What this means, above all, is that there is a prima

facie case for civic inclusion for those who have lived and worked within a polity that conceives itself as subscribing to constitutional patriotism. Thus, for example, an interminable exclusion of guest workers, or “illegal aliens”—when it is clear that the human beings in these categories contribute to a bounded scheme of social cooperation—cannot be permissible under the reading advocated here.

It is permissible, however, to require that those to be included meet certain criteria—criteria that can be more clearly and more justly specified in a framework of constitutional patriotism than under the rubric of liberal nationalism. It is, in my view, wrong to see constitutional patriotism and its expression in more concrete policies as inevitably contaminated with culture and ethnicity, and therefore as exclusionary in the way that, for instance, Dora Kostakopoulou has suggested.<sup>57</sup> It is perfectly true that citizenship tests alone will not ensure anything, and that integration, when understood as a “collective mental process,” cannot be “ordered by law.”<sup>58</sup> An environment where the contributions of immigrants and their descendants are properly recognized might indeed be far more important for integration and “identification” than one that relies on political knowledge, which, in any case, might say little about the actual political attitudes of an applicant for citizenship. Declarations of high-minded universalism will appear hypocritical at best, if not matched by a scheme of fair opportunities and a culture of non-discrimination. This is arguably the tragedy of French Republicanism that promises universal accessibility through the state and yet countenances everyday discrimination in society—except that the state cannot see it, because the ban on culturally and ethnically coded statistics renders the state blind and society illegible.

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<sup>57</sup> Dora Kostakopoulou, *Thick, Thin and Thinner Patriotisms: Is This All There Is?* 26 OXFORD J. LEG. STUD. 73–106 (2006).

<sup>58</sup> Dieter Grimm, *Integration by constitution*, 3 INT’L J. CONST. L. (I•CON) 196 (2005).

In the same way, the ability to speak the majority language of a country is much more likely to contribute to integration than mastering a specific civic vocabulary would be. The main point, however, is that not all requirements or expectations beyond a simple procedure of civic registration send a signal of hostility, and not everything that appears to affirm “identity” is primarily designed to reinforce exclusion. Not all political or even historical knowledge that might be seen as important for citizenship is automatically exclusionary on an ethnic basis. Events, historical figures, and broader principles themselves might well become part of a larger narrative of inclusion: it all depends *how* it is done.

To be sure, constitutional patriotism is not meant to be a return to traditional, and rightly discredited, ideals of assimilationism as cultural conformity that have often been associated with civic nationalism (which in turn, as often noted, is not in any way itself an indicator of actual cultural openness, let alone socioeconomic porousness). Constitutional patriotic integration is not simply code for absorption, which itself might be code for assimilation, which might in turn figure as code for “acculturation”—in other words, the same chain of unwarranted assumptions and expectations that liberal nationalism tends to encourage. Rather, following Rogers Brubaker, we might imagine a shift from “transitive” to “intransitive” understandings of assimilation, of integration not as something done to “them” but, rather, as something accomplished in common through mutual deliberative engagement (for the most part under state auspices), but above all, done “with them”—in such a way that a reconstituted “we” emerges.<sup>59</sup> Integration thus understood is not normatively opposed

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<sup>59</sup> Think of the de facto creation of the *Conseil Français du Culte Musulman* by the French state, and the series of *Islamkonferenzen* initiated by the German Interior Ministry. One might object that these are rather desperate attempts to address challenges of cultural diversity with the tools of old-style European corporatism. However, the reaction from within the French and German Muslim communities have been far too favourable simply to dismiss these efforts as crude state attempts at forcing society to be legible. For subtle discussions of French Republicanism’s multiple, contested,

to the value of difference or diversity, but is meant practically to prevent marginalization and “ghettoization” and, therefore, contrasts, above all, with “benign neglect.”<sup>60</sup>

Finally, I want to suggest a number of indicators by which we might detect an existing or developing form of constitutional patriotism—the thing, that is, not the word:

First: Is a country’s particular immigration regime one that can broadly be classified as a “universal source” regime?<sup>61</sup> Or do ethnic preferences structure immigration policies? Note that immigration policy does not necessarily have to be particularly liberal (in the sense of generosity, or openness)—although more openness would be an indicator of constitutional patriotism. Clear ethnic preferences, however, would generally be a strong indicator of liberal nationalism, by which certain ethnic groups are seen as more easily “compatible” with the “national culture.”

Second, are citizenship tests and rituals of membership focused on political values, or are they for the most part—whether explicitly or implicitly—about a way of life, a national culture, or a “thick” *Sittlichkeit*? Are they about political loyalty or about proving membership in a national collective through knowledge and through a

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but also often hard-to-detect adaptations, see OLIVIER ROY, *LA LAÏCITÉ FACE À L’ISLAM* [SECTARISM CONFRONTS ISLAM] (Stock 2005), PATRICK WEIL, *LA RÉPUBLIQUE ET SA DIVERSITÉ* [THE REPUBLIC AND ITS DIVERSITY] (Seuil 2005), Riva Kastoryano (ed.), *LES CODES DE LA DIFFÉRENCE* [THE CODES OF DIFFERENCE] (Sciences Po 2005) and Cécile Laborde, *Secular Philosophy and Muslim Headscarves in Schools* 13 *J.F. POL. PHIL.* 305–329 (2005). For the quasi-official justification of the German *Islamkonferenzen*, see Wolfgang Schäuble, *Muslims in Deutschland* [Muslims in Germany], *FRANKFURTER ALLGEMEINE ZEITUNG*, September 25, 2006. For the German variant of liberal nationalism in the form of the idea of a *Leitkultur* (‘guiding culture’), see Bassam Tibi, *Leitkultur als Wertekonsens - Bilanz einer missglückten deutschen Debatte* [Guiding Culture as a consensus on values – summing-up a failed German debate], *AUS POLITIK UND ZEITGESCHICHTE*, B 1-2 (2001), at 23–26.

<sup>60</sup> BRUBAKER, *supra* note 56, at 116–131.

<sup>61</sup> CHRISTIAN JOPPKE, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* (Harvard Univ. Press 2005)

demonstrated willingness to abandon one's own way of life?<sup>62</sup> Obviously, it is hard to draw hard and fast distinctions here. Nevertheless, a preponderance of questions focused on high culture, or specific confrontations with highly specific segments of a way of life may point to liberal nationalism, rather than constitutional patriotism.

Third, are tests and rituals of membership applied across the board to applicants? Inconsistencies would indicate liberal nationalism, or a form of republicanism that remains, more or less secretly, imbued with a particular national culture.<sup>63</sup> Take as an example the initial attempt by some German states to apply certain tests only to applicants for citizenship from so-called Muslim countries.

Fourth, is public justification of immigration regimes and membership rights and duties oriented toward political values and constitutional essentials in particular? Again, it will be difficult to draw hard and fast distinctions—but there clearly is a difference between these regimes and those that justify immigration through kinship, or economic benefits, or historical bonds and legacies.

Fifth, what is the legal approach to the *de facto* multiculturalism of a given country? In particular, is it consistent across ethnic, religious and cultural communities? For instance, is there a libertarian free speech regime, or one that could be called “dignitarian” because, as in German and other European law, the dignity of collectives and their capacity to be insulted is explicitly recognized?<sup>64</sup> If so, is what appears as the

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<sup>62</sup> There is some empirical evidence that in today's Europe members of majority cultures are not so much intolerant vis-à-vis Muslim ways of life, but are concerned about political loyalty to the country. What kinds of “loyalty tests” – if any – are legitimate is a question that is beyond the scope of this article. Compare PAUL M. SNIDERMAN AND LOUK HAGENDORN, *WHEN WAYS OF LIFE COLLIDE: MULTICULTURALISM AND ITS DISCONTENTS IN THE NETHERLANDS* (Princeton Univ. Press, 2007).

<sup>63</sup> For the perhaps less obvious example of the Danish case as one of universalism imbued with national and religious particularism, see Per Mouritsen, *The Particular universalism of a Nordic civic nation: Common Values, state religion and Islam in Danish political culture*, in *MULTICULTURALISM, MUSLIMS AND CITIZENSHIP: A EUROPEAN APPROACH* 72–93 (Tariq Modood *et al.*, eds., Routledge 2006).

<sup>64</sup> James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty* 113 *YALE L. J.* 1151–1221 (2004).

majority culture subject to particular protection (in the way that for instance, the Turkish Penal Code makes “insults to Turkishness” punishable?<sup>65</sup>) The claim is not that one is necessarily a pointer toward constitutional patriotism, and the other away from it; rather, the question is about consistency, of either a libertarian or a dignitarian approach. Inconsistencies here – hard to separate, to be sure, from the balancing of different values and policy goals -- would point toward liberal (or even illiberal) nationalism, rather than constitutional patriotism.

Sixth, in what way are immigrants, and applicants for citizenship in particular, expected to relate to “difficult national pasts” —such as complicity in the Holocaust or a legacy of colonialism? Are immigrants asked to share such critical attitudes with regard to the majority’s national past? Or are they to make the “politics of regret” meaningful for the histories and national narratives of their (or perhaps their parents’) countries of origin? It is wrong to think that a critical engagement with the host country’s difficult past would necessarily indicate liberal nationalism, in the sense of everyone revising and furthering the same national identity or project. Nor is it realistic to assume that all difficult pasts can easily yield “universal lessons,” so that national specificity would somehow be avoided altogether. A stress on “universal lessons,” where plausible, would point toward constitutional patriotism, as would a more inclusive approach that focuses on “entangled histories.” The latter could be a particularly strong sign that political cultures are becoming more porous, in a process of mutual opening, in the manner advocates of constitutional patriotism have long demanded.<sup>66</sup>

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<sup>65</sup> [HTTP://WWW.TBMM.GOV.TR/KANUNLAR/K5237.HTML](http://www.tbmm.gov.tr/kanunlar/k5237.html)

<sup>66</sup> JEAN-MARC FERRY, *LA QUESTION DE L’ÉTAT EUROPEEN* [THE QUESTION OF THE EUROPEAN STATE] (Gallimard 2000).