

Seven Ways to Misunderstand Constitutional Patriotism

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“Constitutional patriotism” designates the idea that political attachment ought to centre on the norms and the values of a liberal democratic constitution – as well as, more indirectly, the procedures and institutions which at least partially reflect and operationalize these norms and values. Put differently, political allegiance is owed primarily neither to a national culture, as proponents of liberal nationalism have claimed; nor to “to the worldwide community of human beings”, as, for instance, Martha Nussbaum’s conception of cosmopolitanism has it. Constitutional patriotism offers a vision distinct from both nationalism and cosmopolitanism.

The idea of constitutional patriotism has enjoyed highly varying fortunes. It was born in post-war divided Germany: the political philosopher Dolf Sternberger, a pupil of Hannah Arendt, coined the term in the late 1970s; it was subsequently taken up (and significantly re-worked) by Jürgen Habermas; through his political philosophy and, even more so, his political commentary, the notion became better known in the English-speaking world. In Germany itself it has often been seen as a poor substitute for a “proper” national identity – a substitute which was to become redundant after the country’s unification in 1990. Yet constitutional patriotism has experienced a renaissance since the mid-1990s when observers both inside and outside Germany began to view it as a morally attractive form of civic, non-national (or perhaps even: post-national) attachment for increasingly diverse, multicultural countries. It has also been promoted as a form of belonging in deeply divided, post-war societies: for example, the head of Bosnian Muslims has explicitly called for a pan-Bosnian constitutional patriotism; and in his last interview Richard Rorty advocated constitutional patriotism as an appropriate way to conceptualize solidarity and hope in countries transitioning from theocracy to democracy (the context of the discussion was Iran)¹. Last but not least: in recent years, the idea has also been advanced as a way of conceptualizing “civic identification” at the supranational level; with some scholars explicitly calling for a “European constitutional patriotism” (though after the apparent failure of the Constitutional Treaty such calls have of course become more muted).

Despite the fact that the pros and cons of constitutional patriotism have been debated for some time now, there tend to recur a number of characteristic misunderstandings of the concept. I would like to engage with these in this very brief

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essay. Obviously clearing up these misunderstandings does not amount to any kind of final normative vindication – quite different or maybe entirely new normative or empirical objections might be raised and perhaps one will prove fatal to the idea of constitutional patriotism. My point here is simply that a whole range of standard objections should be dispensed with, so that, as the old joke goes, while we might still be confused (or, as the case might be, opposed to constitutional patriotism), at least we will be confused (or opposed) at a higher level.

1. “*Too universalist*”. This is arguably the most common objection to the idea of constitutional patriotism. It is usually alleged that constitutional patriotism lacks specificity (why support our particular constitution and not another one?) and suffers from a deficit in motivating power, as supposedly “bloodless” norms and values fail to inspire meaningful political action.

However, constitutional patriotism is decidedly not a theory of self-determination: it does not start with a picture of unattached individuals asking themselves the question: “Where do I belong? Where do I find the best liberal-democratic constitution?” Rather, it asks how citizens within existing political communities should think about their allegiances, and also what they might do to improve the kinds of political arrangements with which they find themselves confronted. It is not so much *foundational* (motivating a choice of political allegiances or constructing political order *ex nihilo*) as *transformative* (moving existing political cultures in a more universalist direction).

In any event, universal norms and values are not somehow “given”, so that every state will ideally end up with identical constitutions; rather, they are appropriated, contested and re-appropriated against the background of particular historical experiences, specific cultural reference points and narratives that situate constitutional experience within wider horizons of meaning. To be sure: the fact that constitutional patriotism starts with given borders does reveal an (in my view) unavoidable deficit: it is not a theory that yields conclusions about self-determination, or, more broadly, speaking, normative reasons for border formation.

As for the alleged motivational deficit: it cannot simply be taken as an obviously correct empirical observation that something like “national culture” inspires quite large sacrifices of resources – at the limit: life itself – while norms and values do not. While clearly family and friendship are special in this regard, nothing justifies an analogy between family and nation as somehow both a matter of kinship and therefore equally capable of motivating loyalty, even if it is very costly. Charles Taylor is undoubtedly right when he points out that attachment “has to motivate a degree of giving”: serving in the armed services, paying taxes to enable large income transfers, but ideally also a willingness to invest in civic activities and political participation². But where that giving is not simply a matter of routine, or driven by fear of coercion anyway, it might well be justified by the sense that everyone ought to do their *fair share* in an existing scheme of social cooperation – which in turn should be supported by a sense of constitutional patriotism. These schemes will of course be particular in certain ways; they will

have their specific symbolic representations and political rituals, their particular practices of conducting political debates and conversations.

2. *Any trace of particularism invalidates universalist aspirations.* If such schemes of social cooperation are – inevitably – particular, if the interpretation of political principles is – inevitably – coloured by historical experiences, and cultural background, and, if, further, constitutional patriotism relies on existing borders and states – then, critics are ready to charge, any normative distinctiveness of this idea simply disappears. It is just liberal nationalism under a different name, and the real normative divide runs between cosmopolitanism on the one hand and liberal nationalism and constitutional patriotism, on the other.

But this presumes that some pristine universalism, untainted by particularity of any sort, is actually attainable somehow – and that all else is more or less the same normatively. Alas, such a universalism is not available, and the distinctions between conceptions of political allegiance *do* matter, at the level of principle and at the level of policy. Liberal nationalists, for instance, are far more likely to tend towards assimilationist and exclusionary policies, as they seek to reinforce a sense of belonging to a “shared national culture” (a concept that is as abstract as “norms and values” and that tends towards reification).

3. *“Too particular”.* The reasoning here goes as follows: if constitutional patriotism cannot be caught out on universalism, then maybe it can be exposed as actually particular through and through. It is said that because constitutional patriotism originated in particular circumstances – post-war divided Germany with its compromised national past – it remains ultimately bound to this context. But of course even universal norms and values have to originate *somewhere sometime*. To point to historical origins is simply not the same as disproving normative arguments.

4. *Reification.* Here it is claimed that constitutional patriotism must have an actual written constitutional document as its object – and that therefore countries which do not have a single written constitution are bound to turn to liberal nationalism or other comparable normative theories. Britain and Israel would be prime examples.

However, nothing warrants such a form of reification. Constitutional patriotism takes as its object not a written document, but what I call a “constitutional culture”. This culture can have a written document as a focal point, but it does not have to do so. What matters are the liberal-democratic norms and values that are both stabilizing and yet periodically contested and at stake in a given political community. These norms and values are – to say the least – unlikely ever to be fully and finally realized in any given document or set of institutions, rules and practices that in a state like Britain *de facto* amount to the constitution. There should not be (and there hardly can be) anything like “constitutional closure” – the point of universal liberal-democratic norms and values is precisely that they afford the normative resources to contest and contest again. The American civil rights struggle is an obvious example.

This whole point was perhaps best made by Felix Frankfurter when he said that the constitution “is most significantly not a document but a stream of history”.

5. *Juridification of Politics.* Here it is claimed that the focus on constitutions or even on a constitutional culture in the way I have just suggested will lead to an understanding of politics as, ideally, deliberation among judges. Rawls’s claim about the Supreme Court as the “exemplar of public reason” comes to mind. It cannot be denied that one of the main functions of constitutions is precisely to constrain; constitutions are not – and cannot be – completely open-ended fields of contestation. But it does not follow that constitutional patriotism is somehow biased against popular mobilization; or that radical politics must necessarily take the form of campaigns for constitutional amendments. While profound changes in constitutional culture will ultimately come to be reflected in a constitutional document (or in the core institutions and practices of a state without a single written constitution), neither day-to-day politics nor conflict over more fundamental principle has to be immediately focused on the constitution. To be sure, it is both more likely and, in any event, desirable that contestations and, in particular, adversarial conversations are conducted within a broadly liberal-democratic framework. But within that framework, protest groups, for instance, may lay a “siege” to parliament and executive, putting pressure on them from within civil society – as opposed to going straight to court³.

6. *McCarthyism; constitutional patriotism as a civil religion.* The criticism here is that constitutional patriotism actually generates what Taylor has called “chauvinism of a certain kind”: towards the outside world a “smug superiority” about one’s own moral-political principles, and potentially “civilizing missions” and interventions to promote these principles; and on the inside: intolerance, perhaps even outright persecution of those deemed insufficiently loyal to those values, or those suspected of what Carl Schmitt once called *Verfassungsverrat* (treason committed against the constitution). There is, to be sure, no guarantee that patriotism centred on values – as opposed to one’s musical traditions, landscape, the bravery of one’s soldiers in a battle hundreds of years ago – could not deteriorate in this manner. On the other hand, precisely a focus on the past – and the fact that our ancestors, even if they tried their best, have often failed to notice injustices; the glaring fact of the far from complete realization of certain values in our own history should reinforce a disposition to self-criticism, which certain theories of constitutional patriotism advocate quite explicitly anyhow. Moreover, constitutional patriotism – given the norms and values which it promotes as objects of attachment – contains within itself the normative resources to contest developments in the direction of intolerance, a reverential, uncritical attitude towards the past, etc. In short, there is much to be said for Taylor’s view that while constitutional patriotism poses dangers, it is still “the least dangerous form of social-political cohesion”⁴.

7. *Dependence on a particular social theory.* Even sympathetic critics of constitutional patriotism are often led to believe that the idea forms an integral part

of Jürgen Habermas's political thought and his broader social theory (especially as far as its evolutionary aspects and emphases on rationalization are concerned). But constitutional patriotism can in fact be detached from Habermas's larger theoretical enterprise; it can be made to perform a role in quite different accounts of liberal democracy that are in need of explaining how liberal democratic regimes can maintain stability over time, while also enabling or even encouraging dissent or even civil disobedience within a distinctly constitutionalist register.

The point is that constitutional patriotism has to be understood as a *normatively dependent* concept. It is not any kind of free-standing theory of political boundary-formation or the legitimacy of different ways of exercising political rule; it is also most certainly not in itself a theory of justice. Rather, as a *normatively dependent* concept, it depends on a wider theory of justice to gain substantive normative content⁵. It is perfectly plausible to offer different versions from that of Habermas, or Rawls, that make constitutional patriotism normatively dependent on different background theories of justice. Which is not say, of course, that anything would go: there are limits to what can plausibly count as a liberal-democratic theory justice with universal aspirations. Moreover, what is not plausible, as I have already argued above, is to reduce constitutional patriotism to what might be called a purely positivist reading. Such positivism would hold that we have "constitutional patriotism" whenever we observe people being attached to persistent political arrangements, without any further normative specifications. But constitutional patriotism is a *normative* concept that needs a specific theory to give it a specific meaning – although different political contexts might also require different normative background theories.

I hope this brief overview of seven standard objections to constitutional patriotism has helped to overcome some misunderstandings, clarify the normative promises of constitutional patriotism, and also more fairly pointed out the limits of what work the concept can do.

Notes

¹ Rorty claimed: "In a theocratic country, a leftist political opposition must be prepared to counter the clergy's claim that the nation's identity is defined by its religious tradition. So the left needs a specifically secularist form of moral fervor, one which centers around citizens' respect for one another rather than on the nation's relation to God".

² http://www.ssrc.org/blogs/immanent_frame/2008/01/12/constitutional-patriotism/ [last accessed 25 January 2009].

³ The metaphor of "siege" is drawn from Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg, Cambridge, Mass.: MIT Press, 1996.

⁴ http://www.ssrc.org/blogs/immanent_frame/2008/01/12/constitutional-patriotism/ [last accessed 25 January 2009].

⁵ For the idea of normative dependence, see Rainer Forst, *Toleranz im Kontext: Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs*, Frankfurt/Main: Suhrkamp, 2003, pp. 48-52. I am much indebted to discussions with Rainer Forst on this point.