May 29, 2013

Constitutional Patriotism: A Reasonable Theory of Radical Democracy?

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Available at: https://works.bepress.com/vito_breda/1/
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Abstract: Since its first appearance just over a decade ago, Habermas's constitutional patriotism has inspired a rich and articulate series of theoretical analyses and has indirectly encouraged constitutional projects such as the Constitution for Europe. The popularity of constitutional patriotism among political and constitutional theorists has, however, also generated some confusion over the aims and basic structure of Habermas's endeavour. For instance, it is unclear whether constitutional patriotism ought to be considered a constitutional or political theory. This paper seeks to clarify some of the misunderstandings surrounding constitutional patriotism. It will contend that the theory is, at its core, a political theory that explains the implications of having a democratically open constitutional polity.

The paper is divided into three sections. The first section introduces Habermas's theory of constitutional patriotism. I argue that one of constitutional patriotism's main contributions to current constitutional and political debates is an increased awareness of the democratic accountability of constitutional norms. The second section discusses the effect that pluralism should have in a deliberative democracy. In the third section, I discuss the implications of pluralism in the debate over the role of nationalism and democracy.

Introduction: Constitutional patriots should be democratic patriots

Constitutional patriotism suggests a plausible alternative to the omnipresent liberal constitutionalism. The former is a remarkable theoretical endeavour that might have some important constitutional implications for the formation, for instance, of a truly European constitutional polity.¹ As a theory, it also caters to individuals’ and groups’ ever-increasing sense of alienation toward political institutions (which are ever more distant and unresponsive) by providing a way to knit together individuals who do not share any personal, ethnic, or faith-related beliefs but who live within the borders of the same constitutional polity.² Even for Habermas, this is an ambitious goal.

However, constitutional patriotism delivers a clear understanding of the partnership between individual rights and the formation of constitutional norms. The validity of norms is dependent³ upon an open deliberative debate in which citizens single out issues, which are then discussed in a more formal setting, such as in parliament or in a constitutional

² Bauman Z. Bauman and T. May, 'Identity, Consumerism and Inequality' (2004) 13(3) Sociology Review 24,
³Jan-Werner Müller, Constitutional Patriotism (2007)47
convention. The debate over the interpretation and formation of 'citizens' constitutional norms' is open (i.e. all those who are potentially affected by its decisions may participate in the deliberation process), presupposes the equality of the participants, and aspires to have universal value (i.e. the participants have to accept the normative validity of the best argument).\footnote{This is a prosaic rendering of an articulated theoretical position that is surrounded by a series of corollaries. For instance, the speakers cannot intervene in a deliberative debate by asserting the falsity of their interventions.}

On the level of pragmatism, constitutional patriotism has the benefit of explaining why a pluralist society, where a kaleidoscope of social groups holds a range of conceptions of what is the common good, should be prepared to democratically discuss the potential conflict that might be generated by constitutional norms. In particular, Habermas offers a critical assessment of the partnership between nation and state a framework he calls the nation-state.\footnote{J. Habermas, 'The European Nation-State and the Pressures of Globalization' (1999) \textit{New Left Review} 46, 47} It might not come as a surprise, then, that constitutional patriotism has become popular among European political scientists; a constitutionally patriotic Europe might, for instance, distinguish the process of European legal integration from an sociological endeavour that seek to establish an elusive European identity.\footnote{Jan-Werner Müller, \textit{Constitutional Patriotism} (2007)158}

Given the implicit critiques of liberalism and of the nation-state, constitutional patriotism has also attracted some scepticism. Political theorists like Cohen note that Habermas's constitutional patriotism presupposes the existence of a series of reasoned procedural principles (such as the freedom of speech and equality) that are part of a liberal tradition.\footnote{J. Cohen, 'Reflections on Habermas on Democracy' (1999) 12(4) \textit{Ratio Juris} 385, 390} Instead, sociologists, like Canovan,\footnote{Margaret Canovan, 'Patriotism Is Not Enough' (2000) 40/3(3) \textit{British Journal of political science} 413,} remain unconvinced of the difference between, on the one hand, Habermas's patriotism and, on the other, the modern version of nationalism that, for instance, encourages democratic participation among constitutionally protected minority groups.\footnote{Z. Bauman, 'Identity in the Globalising World' (2001) 9(2) \textit{Social Anthropology} 121, ; Ulrich Beck, \textit{Power in the Global Age : A New Global Political Economy} (2005)} In this essay, I shall argue that constitutional patriotism might be rescued from sociological critiques by considering pluralism a requirement of a modern deliberative democracy.

\textbf{Constitutional patriotism: A reasonable theory of radical democracy}

Constitutional patriotism is a radical theory of democracy that seeks a reasonable justification for citizens' attachment to their constitution.\footnote{J. Cohen, 'Reflections on Habermas on Democracy' (1999) 12(4) \textit{Ratio Juris} 385, 390} It assumes that citizens who are willing to accept the rationality of their constitution and who are also willing to accept the
validity of reasonable argumentations will perceive constitutional norms as a representation of their legal and moral values.¹¹

The conclusion stems from a radical rendering of the role of democracy in a modern constitutional polity. In a modern constitutional polity, democracy is unavoidably linked to law.¹² Law is a factual necessity of mass democracies that require a certain level of decentralisation in the decision-making process. At the same time, a system of norms is a conveyor of commonly accepted moral values. In most democracies, those moral values are directly associated with liberal values.

According to the classical conception, the laws of the republic express the unrestricted will of the united citizens. Regardless of how the laws reflect the existing ethos of the shared political life, this ethos presents no limitation insofar as it achieves its validity only through the citizens’ own process of will formation. The principle of the constitutional exercise of power, on the other hand, appears to set limits on the people’s sovereign self-determination. The rule of law requires that democratic will formation does not violate human rights that have been positively enacted as basic rights.¹³

Habermas is particularly unconvinced by the normative value that law attributes to these basic rights. It is worth noting Habermas’s concession that a legislative system is not merely an executor of democratic parliamentary decisions but that it also conveys normative perceptions. Law has a privileged status that pragmatically bridges the gap between democracy and the projection of a communally accepted moral way of life and the functional requirements of norms (some of which are backed by a threat of punishment). However, Habermas argues that the protection granted by liberal rights to individuals’ private autonomy is overstated.

He observes that some of those rights are for the exclusive benefit of one segment of the population. For instance, the right of free enterprise creates an entitlement only for those individuals with income and/or capital. He also notes that justification for the protection of these rights is set in advance by a substantive theory of rights. One of the side effects is a political system driven by private interests, one in which citizens seek the recognition of a link between the protection of their own resources and a pre-political theory of rights. The constant emergence of new reasons for the recognition of pre-political (direct, indirect,


¹²James Tully, ‘The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy’ (2002) 65(2) Modern Law Review 204,

¹³Jürgen Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29(6) Political Theory 766,
horizontal, or numerated) rights drives the state into a constant cycle of legitimation crises and, at the same time, prevents those who are lacking resources from entering into a political debate (that is dominated by 'who' and 'to whom' narratives).

The critique is accompanied by Habermas own solution, what he calls 'discursive democracy'. Cohen provides, I think, one of the most lucid renderings of the theory:

> The intuitive idea is that democracy, through its basic constitution, institutionalizes practices [...] of free, open-ended, reflective reasoning about common affairs, and] tames and guides the exercise of coercive power by reference to those practices. To be sure, democracy does not guarantee the subordination of the sovereign will and the coercive power it guides to [or by] the force of the better argument [...] but it establishes conditions favorable to such subordination.15

What individuals lose in terms of a substantive protection of rights is compensated, in Habermas's deliberative democracy, by the increased level of rationality in the political debate.

At first sight, the trade-off suggested by Habermas might appear to be a relatively 'bad deal'. The substantive protection of individual rights might deliver a meagre defence against an abuse of powers, but it might be reasonable to assume that individuals are unwilling to relinquish it. What would be the motivation for an individual to exchange a prerogative such as the freedom of enterprise with a slightly more rational legal system? Habermas suggests that a side effect of a reasoned constitution system is an increase in the individual's perception of ownership of his/her constitution. Specifically, individuals who are given the opportunity to freely select the issues that they might consider worthy of constitutional accommodation in a formal debate (e.g. in parliament or in a constitutional convention) will perceive decisions taken within those formal debates as representative of their constitutional identity.16

In this representation of democracy, Habermas outlines a consensual theory of legitimacy, according to which constitutional norms can be both rational and legitimate only when

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14 This point is the base of Habermas's critique of the relationship between capitalism, liberalism, and democracy, which he set in his ‘Legitimation Crisis’. However, the crisis of liberalism has been a constant theme in all his works until recently. See, for instance, Jürgen Habermas, *Legitimation Crisis* (1976); Jürgen Habermas, *The Theory of Communicative Action* (1984); Jürgen Habermas, *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society* (1989); Jürgen Habermas, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy* (1996); Jürgen Habermas, *The Postnational Constellation : Political Essays* (2001) However, Habermas’s critique of liberalism—which, as far I know, has not changed since the early days of his career—should be distinguished from his analysis of the relationship between legal systems and democracy, which has constantly evolved.


political interests are openly discussed. The prospect of achieving this rational legal system, Habermas points out, depends on, first, the partnership between an open democracy that guarantees the protection of the freedom of citizens to intervene in public debates and, second, on the equality of the speakers. These two limits ensure that individuals will be involved in the democratic process with the sole interest of disclosing personal reflections and with the aim of singling out issues that are then engaged in political debate that is more formal (e.g. conducted by elected representatives in parliaments).

The openness of the public debate influences the rationality of the political decisions by requiring that law, as final product of a parliamentary debate, is the result of an activity of communicative persuasion. If those affected by a legal statute have participated in the communicative process that singles out the issue and in the deliberative process that leads to its legal solution, the agreements that are reached within the parliament should be perceived as morally 'correct' and legitimate.

The concept of the commonly perceived legitimacy of a legal system is the springboard from which Habermas develops a theory of constitutional patriotism. The perception of rationality and its linkage with morality generates in individuals a sense of ownership of the norms that are decided by means of the deliberative process. It is important to note that all statutes have the potential to generate in citizens a shared sense of ownership; however, constitutional norms are far more likely to be closely scrutinised by a democratic process and therefore are more apt to generate a sense of ownership within a member of a polity. Firstly, it is reasonable to say that constitutional norms are more likely to affect all. Secondly, the general implications are more likely to stimulate a larger debate. We should assume that larger debates (ideally, in boundless political arenas) should help speakers on discriminating rational arguments from irrational narratives. One of the effects of larger participation is therefore that constitutional norms are supported by objective logic and reasons. Thirdly, given the link between rationality and the perception of moral validity, individuals are more likely to perceive constitutional norms as legal projections of a commonly accepted morality.

It is also worth noting that a reasoned acceptance of the moral validity of 'citizens' constitutional norms' does not prevent individuals from considering other systems of norms, such as religious prescriptions, as morally superior to constitutional norms. Rather, rational citizens (whatever their system of beliefs) should perceive the rational validity of constitutional norms as the closest common representation of their individual morality as accepted by reason.

18 Muller describes it as a dependent concept. Jan-Werner Müller, Constitutional Patriotism (2007) 47.
19 Ibid (47)
20 Jürgen Habermas and William Rehg, Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy (1996)104
The idea of patriotic constitution being the manifestation of commonly accepted morality might be appealing. Going back to the example of the freedom of enterprise, the deliberative process of a distinctive community might ascertain that such a freedom is a basic right of modern constitutional democracy. The difference between freedom of enterprise as qualified by an open deliberative democracy and its liberal orthodox understanding is that a communicative acceptance of a legal right cannot yield a conflict against the procedure of deliberative democracy. The idea of attaching a normative priority of democracy to, for instance, international financial constraints is attractive, but it also reveals a limitation in the structure of deliberative democracy and constitutional patriotism. It might be argued, for instance, that both theories are unreasonably open.

Is Habermas's deliberative democracy unreasonably open? The case of religious pluralism

The empowerment of citizens might be perceived by some as a beneficial aspect of the theory of constitutional patriotism. It allows all members of a polity, whatever their position in society, to promote a qualification of constitutional rights that they perceive as matching their moral views, doing so without the fear of having their opinion curtailed by an imposed set of values.

It is unclear, however, how a deliberative arena would decide the rational validity of an argument. According to logic, the validity of a narrative demands a rational assessment of the reasons that support it, but in a theory of deliberative democracy, there are no clear indications of how to assess arguments and/or their supporting reasons.21 For instance, the tension between, on the one hand, political arguments based on religious assumptions and, on the other, their laic rebuttal is one of the debates that deliberative democracy is expected to accommodate.22

Historically, the debate over balancing the religious perception of political values and their laic rendering has generated two sets of difficulties. The first has to do with whether religious believers are willing to consider the reasoned decisions that come from a political debate as the representation of a reasoned common morality. We should expect that a deliberative democracy will solve the dilemma by asserting the separation between private and public perceptions of rationality. In private, citizens might insist on the existence of a self-evident hierarchy of values (whatever the origin of those values might be), but it is the democratic process that decides how this hierarchy of values should be logically perceived by the members of the constitutional polity.

The second set of difficulties cannot be solved as quickly. The dilemma branches from the long-term implications, for subsequent debates, of a decision regarding a hierarchy of values. In a liberal democracy, for instance, the right to manifest religious beliefs is granted by default due to a constitutional right. The extent of the right is decided by a practice that seeks to balance the principle of equal treatment for all religions with the series of pragmatic difficulties that a myriad of religious groups might create.

Rosenfeld calls this form of constitutional accommodation ‘comprehensive pluralism’.

Comprehensive pluralism requires that all conceptions of the good represented within the relevant political order be granted equal consideration, and if possible equal accommodation. But since in any complex multicultural contemporary political setting it is impossible equally to accommodate all competing conceptions of the good, comprehensive pluralism seek to strike the best possible balance between identity and difference.\textsuperscript{23}

It might be argued that the present accommodation of religious beliefs is the pragmatic result of an historically inherited compromise (and we might say that, compromises in a debate over values is a mistake), yet Habermas’s deliberative democracy does not yield an appealing alternative. In his deliberative democracy, the acknowledgement of a plurality of philosophies of life is militantly neutral, and we are left with the sensation that pluralism is an inconvenient side effect of mass democracy. He suggests that the practice of discussing political arguments should filter out irrational reasons. The issue is whether a deliberative democracy might accept a reasoned limit of that practice.

Even if we find an agreement regarding the exclusion of religious extremism that denies the basic principle of deliberative democracy,\textsuperscript{24} the specific risk of Habermas’s commitment to rational neutrality is the possibility of turning the process into a vicious cycle in which a religious group is progressively disenfranchised from mainstream political debates.\textsuperscript{25}

The critique might be downplayed. We might for instance say that in all theories, there is the possibility of a pragmatic error in their application. It is also not unusual that such errors might have long term effects. However, in a political theory that seeks an alternative to the liberal model, overlooking the possible undemocratic side effects of its decisional process might deal a fatal blow to the persuasiveness of the entire theoretical proposal. Cohen again elucidates the issue in a succinct narrative:

\textsuperscript{23} Rosenfeld Michel, 'Habermas's Call for Cosmopolitan Constitutional Patriotism in an Age of Global Terror: A Pluralist Appraisal' (2007) 14(2) Constellations 1, 172
\textsuperscript{24} Michel Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism' (2008) 6(2) International Journal of Constitutional Law 415, 34
The problem is that the discourse principle, which states, again, that practical norms are legitimate if and only if all possibly affected persons could agree to them as participants in rational discourses, appears to rely on a highly generic account of reasons—not an account restricted to political argument in a democracy of equal members. But with no restriction on what can count as a reason, […] what constrains the ‘discursive equilibrium’ in the way that Habermas proposes?26

The lack of restrain in Habermas's deliberative democracy is particularly unsettling if it is compared to the protection that liberal democracies grant to the freedom to manifest dogmatic religious beliefs in political debates. ‘[T]he congress shall make no law respecting an establishment of religion. Or prohibiting the free exercise thereof; or abridging the freedom of speech, or press’.27 It is worth noting that the constitutional protection given to religious groups by a comprehensive (liberal) pluralism is not necessarily neutral. In Europe, there are cases in which liberal states have an established Church that takes on the task of protecting a specific religion (e.g. Sweden and Norway), and other secular states maintain preferential relationships with certain recognised religions (e.g. Germany, Poland, Italy, and Austria). Independent of how religious beliefs are constitutionally accommodated, the liberal protection of religious pluralism creates rights for individuals to manifest their beliefs in political debates.

The protection of religious pluralism has a beneficial regulatory effect on liberal democracy that should be separated from its historical origin. The benefit is twofold. First, the constitutional protection of religious pluralism increases awareness of the existence of a pluralistic system of beliefs—that is, the existence of a multiplicity of religious beliefs that yields a multitude of political argumentations.28 Second, liberal democracy seeks a pragmatic accommodation of the conflicts between these narratives and does not impose a hierarchy of values on a polity.29 To sum up, in liberal societies, the constitutional protection of religious pluralism is a manifestation of a larger commitment to balance the openness of democracy with the protection of its social diversity.

However, Habermas’s idea of a pluralistically neutral deliberative democracy appears to overlook the logical necessity of balancing openness with the protection of diversity, and that has serious implications for the internal coherence of constitution patriotism. Let me explain this point with an analysis of the recent case of Lautsi and Others v. Italy.

In the European Court of Human Rights, Lautsi challenged the compatibility of Article 118 of Royal Decree no. 965 of 30 April 1924, which allows crucifixes to be displayed in state schools, with Art. 2 of Protocol n.1 and Art. 9 of the European Convention on Human Rights.

preferences regarding the education of their children, and Art. 9 protects the freedom of the manifestation of religious beliefs. It is worth noting that Italy does not have an established Church, and the freedom of the manifestation of religious beliefs is analogous to the one set in the Convention. The Grand Chamber of the European Court of Human Rights eventually decided in favour of Italy. In explaining the significance of Art. 2, the court states that:

As its (Art 2) aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed.\(^{30}\)

Thus, the Court says that the right of parents to ask the state for a religious education that meets their beliefs (Art. 2 of protocol n.1) is tramelled at the pragmatic level by the protection of religious pluralism in Art. 9. In other words, it is up to the state to find a pragmatic accommodation for the different parents' expectations of religious education. '\(\text{[T]}\)he setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era.'\(^{31}\) As long as such an accommodation does not impose a specific philosophy of life, the court cannot consider the state regulation to be incompatible with the Convention. That is not to say that the crucifix is not a manifestation of religious belief. However, insomuch that state accommodation of parents' expectations does not impose the teaching of, for instance, secularism and/or Catholicism, the Italian state has a margin of discretion for setting marginal educational policies, such as those regarding the décor of state-run educational establishments.

Lautsi and Others v. Italy is a reminder of a more general conundrum in modern mass-constitutional polities, where different perceptions of a moral life construct different hierarchies of values. It is also a reminder of the possibility that a state might get the 'balance wrong', and so individuals are entitled to question the pragmatic decisions regarding its accommodation of comprehensive pluralism. In this case, the Court said that Italy had the correct balance, but this does not imply that such a balance should not be revisited in the deliberative arena or passed on to parliament for reconsideration.

The ability to questioning how a state accommodates beliefs is part of the freedom of debating what has been historically settled by previous generations. Such a freedom might

\(^{30}\) Lautsi and Others v. Italy (European Court of Human Rights, Grand Chaber, Application n. 30814/06, 18 March 2011))\(^{26}\)

\(^{31}\) [My Emphasis] Ibid.
be rationally questioned by means of prosaic narratives (e.g. What do these people want next?), but its reach is proportional to the desire of a free society to pursue them. Weiler explains the general importance of questioning the accommodation of pluralism in a liberal democracy.

Independently of one’s view of the substantive result [...] [there] are few long-term issues on the European agenda that are more urgent, more complex and more delicate than the way we deal with the challenging problems of State and Church, religious minorities, the questions of collective identities of Europe and within Europe, and the parameters of uniformity and diversity of our states and within our states. All these issues are encapsulated in Lautsi.32

This awareness of the possibility of revisiting previous democratic decisions that accommodate the claims of a collective identity is missing in Habermas's rendering of deliberative democracy.

In Habermas's deliberative arena, agreements are intended to represent their citizens, but the presumed neutrality of such decisions might seriously hinder the possibility of a historical questioning. The lack of awareness of its fallibility combined with the importance of the issues that a deliberative arena is supposed to accommodate both greatly reduce the plausibility of constitutional patriotism as an alternative to the present liberal state.

**Constitutional patriotism: A plausible alternative to the nation-state?**

Constitutional patriotism is 'leaning on' Habermas's theory of deliberative democracy,33 yet the openness of Habermas’s deliberative democracy is unreasonably linked to a requirement of neutrality. There is very little consideration for potential errors, and the theory overlooks pluralism as a factual element of modern democracy. By inserting the protection of pluralism, perhaps modelled on the liberal safeguard of freedom of faith, constitutional patriotism might gain much cognitive strength.

In this part of the essay, I argue that such a protection of pluralism would also reduce the persuasiveness of Habermas’s critique of the nation-state. ‘The nation-state must renounce the ambivalent potential [the linkage between it and nationalism] that once propelled it’.34

The implausibility of the patriotic polity as an alternative to the framework of the nation-state stems again from constitutional patriotism's lack of awareness of the democratic implications of pluralism. However, the narrative is closer to a textual rendering of constitutional patriotism.


33 Jan-Werner Müller, *Constitutional Patriotism* (2007)47

Before I address the core of Habermas's narrative, a preliminary issue has to be clarified. There are strong indications that nationalism is democratically dangerous and that its assumptions are not as rationally justifiable as those of other ideologies (let us say, for instance, socialism or liberalism), yet in a society that values its pluralism, we cannot assume that such a risk grants an *a priori* exclusion of national-identity arguments from democracy.

Constitutional patriotism cuts across two different debates. The first debate concerns finding the right balance between the power given to individuals (to alter their inherited constitution) and the concerns that such a power might create. In relation to this debate, constitutional patriotism deems radical democracy to be the best method for setting constitutional norms. The second debate concerns the element(s) of a constitution system that citizens might perceive as 'worth fighting for'.

Habermas questions the plausibility of the nation-state as a believable object of attachment. He argues that the plausibility of the nation-state as a default answer to the constitutional integration dilemma is dependent on a balanced equilibrium between integration with a national identity and the protection of individual freedom. If the relationship between the two is not well adjusted, it might hinder the democratic stability of the constitutional polity.

Habermas notes, for instance, that national identity and rights have to be perceived in a hierarchical relation: 'This ambivalence [the partnership between state and nation] remains harmless as long as a cosmopolitan understanding of the nation of citizens is accorded priority over an ethnocentric interpretation of the nation as [being] in a permanent state of war'. The term 'war' might be too evocative here (this language is perhaps borrowed from Schmitt), but the reference to a potential conflict between national identity and aliens is a serious concerns in a European state with limited control over internal common market mass immigrations.

Habermas notes that the key difficulty concerning the framework of the nation-state goes beyond the pragmatic risk of accepting the nation as a model of social integration. The framework of the nation-state assumes a partnership between two systems of values.

Popular national self-consciousness provided the cultural background against which 'subjects' could become politically active 'citizens'. Belonging to the national community made possible, for the first time, a relation of solidarity between persons who had previously been strangers to one another. Thus the achievement of the

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36 Jan-Werner Müller, *Constitutional Patriotism* (2007)47
nation-state consisted in solving two problems at once: it made possible a new mode of legitimation based on a new more abstract form of social integration.\(^\text{38}\)

On the one hand, a polity needs a system of state institutions. Legitimate state institutions are a factual necessity of any large group of individuals that seeks to pursue a common enlightened project. On the other hand, the nation is a concept that expresses the right of self-determination of a group of individuals who share a common ethnic background. The differences between the two concepts are exacerbated by a globalised society, but there has been a precarious relation between the two from the outset.

Compare 'freedom' in the sense of national independence. i.e. collective self-assertion vis-à-vis to other nations, with 'freedom' in the sense of political liberties the individual citizen enjoys within a country; the two notions are so different in meaning that, at a later point, the modern understanding of republican freedom can cut its umbilical links to the womb of the national consciousness which had originally given birth to it.\(^\text{39}\)

So Habermas argues that a patriotic commitment to a constitution is a possible alternative to the framework of the nation-state in which citizenry might be confused with ethnic militancy.\(^\text{40}\) The idea of substituting an active citizenry for the framework of a nation-state might be quite appealing among pro-European elites who are seeking an elusive common identity. However, the conclusion is not convincing. Habermas assumes that the partnership between national identity and liberal values is confusing and can be politically manipulated. We have to distinguish a factual difficulty of separating the internal structure of nationalism (and the risk associated with it) from the range of political commitments that a national identity might bring to a pluralistic democracy.

In this process of assessing the internal social structure of nationalism, the most notable distinction is the separation between what Smith calls 'ideological ethnocentric nationalism and 'polycentric nationalism'. 'For an “ethnocentric” nationalist both power and values inhere in his cultural group [...] my group is the vessel of wisdom, beauty, holiness, and culture; hence power automatically belongs to my group'.\(^\text{41}\) An example of this form of ideological nationalism is the one that afflicted the former Yugoslavia during the war in

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\(^{38}\) Jürgen Habermas, 'The European Nation State: On the Past and Future of Sovereignty and Citizenship' in Jürgen Habermas, Ciaran Cronin and Pablo De Greiff (eds), The Inclusion of the Other : Studies in Political Theory (1999):105 111


\(^{40}\) Ibid 3

\(^{41}\) Anthony D. Smith, Theories of Nationalism (1971)158
Bosnia. Smith suggests that this form of nationalism contains the general characteristics of ancient and mediaeval communities that claim there is a linkage between the national group and divinity.

In contrast, the second variety of nationalism considers a nation to be an ensemble of different groups. 'Polycentric' nationalism perceives other nationalities as equal, and it tries to join different nations in a family of nations. Polycentric nationalism appeared after the French Revolution, and it is a 'mutation' of the sociological nature of nationalism. Polycentric nationalism adds three features to the old ethnocentric nationalism. Firstly, modern nationalism is an autonomous political movement that does not need to link itself to divinity (as ethnocentric nationalism does) in order to demand the protection of its political rights. Secondly, it claims that each nation has its own distinct sociological characteristics. The protection of these cultural features provides the theoretical supports for its political claims. Given that these sociological aspects vary, different nations have different claims. Thirdly, modern nationalism recognises the existence of equal rights among different nations. The acknowledgment of the existence of other groups with their own claims makes modern nationalism respectful of the aforementioned comprehensive idea of pluralism.

In contrast with Smith, Habermas focuses exclusively on the potentially destabilising ethnic element of nationalism. In Habermas all nations are inherently dangerous and directly connected with a history of intolerance and genocide. Examples given by Habermas of less dangerous nation-state partnerships include the American and Swiss federations. The ‘average’ American or Swiss citizen might be constantly reminded of the pluralist genesis of the countries' constitutional assets. However, the sense of attachment to libertarian principles such as the freedom of speech (and other substantive rights) cannot be dissociated from the practices that have incorporated those constitutional assets into a shared national image. It is unclear, however, whether the U.S. and/or Switzerland could be considered constitutional polities that are less or more ‘nationalist’ in comparison to any

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42 See Michael Ignatieff, Blood & Belonging: Journeys into the New Nationalism (1994) For a theoretical rendering of some of the problems that might have triggered the civil war, see, for instance: Miodrag A. Jovanović, ‘Recognizing Minority Identities through Collective Rights’ (2005) 27(2) Human Rights Quarterly 625,
43 Anthony D. Smith, Theories of Nationalism (1971)158
44 Ibid (1
45 Rosenfeld Michel, 'Habermas’s Call for Cosmopolitan Constitutional Patriotism in an Age of Global Terror: A Pluralist Appraisal' (2007) 14(2) Constellations 1,
46 Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996)111
47 Michel Rosenfeld, The Identity of the Constitutional Subject (2010)
other European polity. The American loyalty to constitutional values is, for instance, understood by Americans as a national asset, not as a protection of universal constitution.49

A more convincing theory of constitutional patriotism would suggest a close monitoring of the partnership between national identity and state rather than an a priori exclusion of claims based on nationalisms. In this reasonable version, constitutional patriotism is an inspirational model of social cohesion for citizens who participate in the process of setting their constitutional norms. It is unavoidable that such an unhinged process (that might requires vigilant democrats) will take some risks, and the citizen has to be made aware of those risks. However, the historically justified vigilance regarding the possible undemocratic effect of nationalism or religious extremism cannot be stretched in order to exclude either religion or nationalism from a deliberative democracy. Again, that would be forcing a community to accept neutral pluralism rather than reasonably deliberating over its implications.

**Conclusion**

Constitutional patriotism is a theory of deliberative democracy that provides a rational justification for the partnership between citizens and their constitution. Starting from the assumption that law is a factual necessity of modern mass society, Habermas proposes a theory of deliberation in which citizens have the possibility of raising and openly discussing any issue that might have constitutional implications. These discussions, depending on the consensus gathered, might continue in a setting that is perceived to be legally appropriate for that specific debate. Finally, if the debates over these issues follow some essential procedures (e.g. respect for the equality of the speakers, an openness of the deliberation process, and acceptance of the best arguments), the decision reached concerning any issue will be perceived as rational.

An important side effect of the open process of deliberation is the formation of a sense of ownership of the decision taken by a deliberative arena. Intervention in the deliberative process transforms individual speakers into committed citizens who perceive their constitutional norms as representing a commonly accepted morality. So citizens' constitutional norms are in a patriotic state not self-evident national truths or God given; rather, they are the products of an activity of critical enlistment and persuasion.

This conclusion is appealing. It is appealing, at least in Europe, because constitutional patriotism cuts across two different topical debates. One debate is over the relationship between state and faith. The second is over the role of national identity. In both debates, constitutional patriotism provides a narrative for a democratically driven endeavour in which rationality and constitutional law are married in a common, enlightening project.

Are constitutional patriotism’s aspirations too good to be true? Probably yes. There is little concern regarding the possible implications of considering each deliberation as a set of

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49 Margaret Canovan, 'Patriotism Is Not Enough' (2000) 40/3(3) British Journal of political science 413, 426
logical right answers to constitutional dilemmas. Given that Habermas's deliberative democracy lacks a set of criteria for assessing the validity of a claim, logic wants that previous decisions be consulted in order to reach logical solutions to constitutional debates. However, without a limit to what could be considered a legitimate reason, there is a strong possibility that previous decisions might greatly reduce the quality and quantity of the deliberative process. Recall that previous decisions reached through a deliberative arena are perceived as both logical and morally correct responses to a specific issue. The risk is that the process of open deliberation becomes so dependent on the correctness of previous deliberations that it reproduces, rather than generates, rational decisions. The side effect of such an eventuality is a progressive disfranchisement of individuals and groups whose arguments are not represented in Habermas's rational constitution.

This essay tested the possible implications of Habermas's constitutional patriotism in debates concerning both the manifestation of religious beliefs in state institutions and the partnership between nation and state in a globalised society. In both debates, the possibility that a religious or nationalist group might take over the political institution convinced Habermas to suggest an exclusion of claims based on unverifiable beliefs. However, the conclusion is posited too strongly. In modern pluralistic societies, the democratic representativeness of constitutional debates depends on protecting the possibility that arguments are constructed using different perceptions of morality. If these conceptions of morality are not protected, constitutional patriotism cannot expect to generate in citizens a common sense of attachment to their constitutional norms.

In conclusion, Habermas's constitutional patriotism has to be read with a grain of salt, particularly when it critiques the framework of the nation-state and religious beliefs without considering that national identities and religious groups are democratic parts of a pluralistic society.

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