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Jan-Werner Müller: Constitutional Patriotism

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INTRODUCTION

“**C**ONSTITUTIONAL PATRIOTISM”: the expression will sound in many ears like a contradiction in terms. Constitutions serve, by definition, to limit political power and to render power impersonal; patriotism is about mobilizing men and women for personal political sacrifice. Constitutions are, for the most part, settlements that emerged from interest-based bargains, they are the “autobiography of power”;¹ while patriotism, on the other hand, makes an appeal to transcend self-interest. Constitutions, ideally, articulate not just norms and wider social aspirations, they also protect individual rights; patriotism, however, tempts citizens with illiberal forms of “group-meaningfulness” (George Kateb) and can make them ride roughshod over civil rights and liberties.² Perhaps it’s true that patriotism, as Alasdair MacIntyre once put it, “turns out to be a permanent source of moral danger.” Or it might even be the case that, as Kateb has claimed, “patriotism is inherently disposed to disregard morality.”³

“Constitutional patriotism”—as understood by those who originally put forward the idea and as understood in this essay—designates the idea that political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution. Put differently, political allegiance is owed primarily neither to a national culture, as proponents of liberal nationalism have claimed, nor to “the worldwide community of

human beings,” as, for instance, Martha Nussbaum’s conception of cosmopolitanism has it.⁴ Constitutional patriotism offers a vision distinct from both nationalism and cosmopolitanism, but also from republican patriotism as traditionally understood in, broadly speaking, the history of Euro-American political thought.

The idea of constitutional patriotism has enjoyed very varying fortunes so far. It was born in post-war, divided Germany and has often been seen as a poor substitute for a “proper” national identity—a substitute that was to become redundant after the country’s unification. Yet constitutional patriotism has experienced a major renaissance since the mid-1990s when observers both inside and outside Germany began to view it as a normatively attractive form of civic, non-national (or perhaps even post-national) attachment for increasingly multicultural societies.

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.”⁵ Why would such a thing be necessary? A common response goes like this: the process of European integration has remarkably sped up during the 1980s and especially the 1990s; this rapid “deepening,” together with the continuous enlargement of the European Union (EU), has led to much agonized thinking about what could “hold Europe together.” While politicians, scholars and citizens continue widely to disagree about the exact nature of what a former President of the European Commission, Jacques Delors, once called an “unidentified political object,” only few dispute that the EU now faces an increasing gap between what Michael Walzer terms “moral” and “legal communities.”⁶ The legal community of the Union is stretching from the Canary

Islands to the Eastern border of Poland; from Malta to Lapland; and Europeans—as citizens and consumers—are ever more frequently affected by decisions taken in Brussels. Yet for only a minority of citizens does the EU seem like a genuine moral community, an entity that inspires attachment, “care,” or even just meaningful political concern. In short, this supranational, unidentified entity lacks what some philosophers have described as an “identification mechanism for the civic body as a whole.”⁷

It’s against this background—the perceived lack of identification and attachment—that the concept of constitutional patriotism has been increasingly debated across Europe, even if its exact relevance has not always been fully spelled out by its proponents. In fact, in many ways, visions of a European constitutional patriotism might seem decidedly absurd. Edmund Burke put it bluntly: “men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations”—and, one might presume, with Europe—“as with individuals.”

Yet even if papers and seals could tie men (and women) together—about which constitution are Europe’s citizens supposed to be patriotic? The more than 80,000 pages of the European Union’s rules and regulations, the *acquis communautaire*? A shorter written constitution—but still falling far short of the brevity of the American one—as has been attempted in the early years of the twenty-first century? Or should Europeans’ hearts simply warm to the Euro-anthem, and should they pledge allegiance to the star-spangled blue banner and other symbols notorious for their artificiality? And if such ideas are rejected, would becoming post-national (or supranational) not amount to becoming “post-emotional” (or perhaps supra-emo-

tional)? Can affect not be made to work for democracy at all beyond the nation-state?

Then there's also the—somewhat more urgent, one might say, and certainly more real—question of what constitutes a “patriot act” in countries that feel threatened by outside enemies, or inside enemies, for that matter. Many in the United States have been searching for a conception of patriotism that might give significant leeway for dissent or even civil disobedience; but just repeating over and over that “dissent is patriotic” clearly isn't enough. Patriotism, it seems, would have to be linked with a larger moral vision for the country, perhaps even a global vision, if one does not hold to what might be called the “vacuum theory of patriotism”: the idea that unless the forces of light engage in patriot talk, the topic will be captured by the forces of darkness. But perhaps that's false: perhaps *any* patriot talk furthers illiberal tendencies, rather than preempting them.

Finally—and briefly—constitutional patriotism has even been advocated 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—an odd idea, many might say, given that even the most optimistic observers of the Balkans would concede that the Bosnian constitution is a convoluted, “consociational” legal monster that freezes living, breathing human beings in their supposedly singular “ethnic identities” (or, if you like, “civil war identities”).⁸ If this seems overambitious, it's not unreasonable, though, to think that constitutional patriotism might be relevant in established democracies with increasingly diverse populations who seek to establish a kind of “civic

minimum” to determine how they want to live together—and who, can belong, and who perhaps, shouldn’t.

The idea of constitutional patriotism has been shadowed by many—and often seemingly contradictory—suspicions. On the one hand, constitutional patriotism—again, understood as a post-national, universalist form of democratic political allegiance—is rejected on account of its abstract or, as an especially inappropriate metaphor goes, “bloodless” quality. Given the universalist morality at the heart of constitutional patriotism, so the critics argue, there is no reason to identify with any particular polity. In other words, constitutional patriotism is accused of being a kind of aspirational oxymoron, in which the universalist part, indicated by the concept of constitutionalism, will always drive out the idea of loyalty, indicated by the concept of patriotism.

However, a second criticism holds almost exactly the opposite from the first; here it’s argued that constitutional patriotism, while appearing universalist, is in fact particular through and through. According to what one might call a “genealogical” critique, it is claimed that constitutional patriotism might have been appropriate in the context where it originated—namely West Germany, a “half-nation” with a sense of deeply compromised nationality on account of its Nazi past. But, so the argument goes, other countries do not have a comparably difficult past, and therefore are better served by forms of liberal nationalism—nationalism, that is, which is concrete, passionate, alive, and yet kept in check by liberalism. A further argument holds that other countries either have no constitutions (or at least no written constitutions, as in the United Kingdom and Israel), or that they simply do not venerate the constitution as a focal point of democratic loyalty in

the way Germans might (or might not, in fact) do. In short, then, according to the genealogical critique, constitutional patriotism is a sort of particularism in universalist disguise—and one that might be foisted on Europe as a whole, if the advocates of a “European constitutional patriotism” have their way. In a strange fashion, Thomas Mann’s nightmare—a German Europe, rather than a European Germany—might come true, after all.⁹

It’s somewhat astonishing to note just how polarized debate has become around a supposedly anodyne concept. On the one hand, there are those who dismiss the idea as naively, if not recklessly, idealistic: a “pale thought born in the seminar room,” as a former Justice of the German Constitutional Court once put it; one of Europe’s most respected journalists, Joachim Fest, called it a typical “kind of professor’s idea which is invented at the writing table, then further discussed by other professors,” only to conclude: “a beautiful idea—but it doesn’t work because people don’t feel that way.” In other words, “people” just want to be British, or Indian, or Irish-American, or Serb-Bosnian for that matter, not “constitutional patriots.”

And yet many Americans, when, let’s say, a professor of political theory laboriously expounds the supposedly professorial idea, react by saying, “Of course—it’s what we do every day.” And arguably the American “Creed” has always been the implicit reference point for advocates of constitutional patriotism; this was especially the case for European thinkers such as Jürgen Habermas, who first popularized the term in the late 1980s and who wanted the Germans (and other European countries) to move away from the notion of ethnically homogeneous nation-states. Another form of social cohesion is possible, philosophers like Habermas seemed to be saying, and you only

have to look across the Atlantic to see that it can work—you only have to look to the land of what John H. Schaar once termed “covenanted patriotism.”

More recently, though, this situation appears almost to have been reversed. The contrast between a non-ethnic, constitutively open, and liberal universalist America, Jefferson’s “Empire of Liberty” and Emerson’s “Asylum of all Nations,” on the one hand, and a nationalist Europe, on the other, has been replaced by a quite different opposition: a post-national, postmodern, even post-heroic Europe, on one side, and a United States that appears to act in all the normatively doubtful, aggressive ways that used to be identified with ethnic nationalism. Suddenly it’s discovered that the American civic “Creed” might have been associated all along with what Louis Hartz had called “compulsive nationalism.”¹⁰

It’s a thought that might also engender second thoughts about the concept of constitutional patriotism as such. Is constitutional patriotism not always potentially illiberal, authoritarian, or, as postmodernists might say, “normalizing”? Is civic allegiance not, when all is said and done, the opposite of true individuality? Why spin theories that justify or even reinforce what is, if we are to believe MacIntyre, in any event a source of “moral danger”?

But, it seems, spin theories we must. What is rather abstractly called “social integration” has become a problem, or, if one prefers less loaded language, a challenge, in many different countries and across countries and for different reasons, to be sure, and in different forms: “regional integration,” as with the European Union, is not the same as the “integration” of immigrants and minorities. There’s a diffuse notion that globalization has reinforced the need for what is often referred to as a “sense

of belonging,” a reconfiguration of collective identities, politically, legally, and, not least, emotionally. Sovereignty has become “frayed,” as one scholar puts it, and citizenship “disaggregated.”¹¹ Perhaps we might even say that what Todd Gitlin has observed about the United States—that it “invites anxiety about what it means to belong, because the national boundary is ideological, hence disputable and porous”—is now true for ever more countries.¹² Perhaps all the world is becoming America; less dramatically put (and also less threateningly, for some, no doubt), it has become harder to conceptualize both individual and collective “belonging” almost everywhere—the civic bond is in question.

And yet one can exaggerate this. Did people in the past feel more “at home in the world” somehow? Were the morals of membership unproblematic when, just to take the example of Europe, the twentieth century alone was characterized by recurring shifts in borders, and what sometimes has been referred to as the “three terrible e’s”: exterminations, expulsions, and exchanges (of populations, that is)? Surely, even with an increase in the overall number of civil wars, and with significant increases in migration, in many contexts membership has also become more secure.

All this is just to make the point that political theory must not turn into kitsch, by telling comforting (or disquieting) stories about the past. But it should provide the concepts, the languages, to allow citizens to rethink what they might or might not have in common, and what they perhaps should have in common. Nationalists have been doing this for centuries; cosmopolitans have now also begun telling different stories. I want to show that there is room—and a case—for a conception in between that incorporates the most attractive moral intuitions at the heart

of liberal nationalism and cosmopolitanism. In particular, I want to claim that constitutional patriotism theorizes the civic bond in a way that is more plausible sociologically and that leads to more liberal political outcomes than its main “domestic” rival, liberal nationalism. Liberal nationalists have made much of the supposed “abstractness” of constitutional patriotism, but what liberal nationalists conceive as the core object of their theory—a singular “national culture”—is in fact *more* of an abstraction than a set of normative commitments centered on a constitution. And whereas liberal nationalism often relies tacitly on liberal legacies of tolerance in countries like Britain and Canada to render nationalism safe for liberal democracy—without, however, telling us how such legacies can be kept alive—constitutional patriotism offers us *concrete* normative resources—norms and values—for maintaining political regimes as well as for contesting them.

Why do such apparently minor academic differences matter? Because the languages we use for collective ethical self-clarification—“who do we want to be?”—do matter for actual policy outcomes: a liberal nationalism that essentially reifies “national culture” is likely to opt for immigration and integration policies that are highly assimilationist; it’s also more likely to place limits on political dissent and insist, for instance, that heroic national histories can’t be questioned since they allegedly need to serve as sources of “national pride.”

An Overview

I’ll start this essay with a brief conceptual history of constitutional patriotism. This is not just an exercise in anti-quarianism, or a bit of scene setting; rather, it’s a way of

taking seriously what I've above already called the "genealogical" critique of constitutional patriotism. I shall argue that this genealogical critique is indeed not without force; while of course neither constitutionalism nor patriotism were invented by Germans, constitutional patriotism, as a theory distinct from both liberal nationalism and republican patriotism, was elaborated most clearly in post-war West Germany—and for clearly discernible historical reasons.

Moreover—and this has been less obvious even to the most informed students of constitutional patriotism—rather than being merely a universalist response to a nationalist past, constitutional patriotism has always relied on "supplements of particularity" to become effective as a form of political attachment.¹³ In the German context constitutional patriotism has contained strong doses of what, by way of shorthand, I shall call "memory" and "militancy." Memory here refers primarily to a self-critical remembering of the Holocaust and the Nazi past; militancy, on the other hand, has been shown toward the enemies of democracy, mostly through judicial means such as banning political parties and restricting free speech. In other words, a militant democracy is explicitly *not* neutral about its own principles and values—and puts in place strong checks on those hostile (or perceived as hostile) to them.

Political agency, then, as envisaged by the proponents of constitutional patriotism, has been conceived as animated by a set of universalist norms, but enriched and strengthened by particular experiences and concerns. These particular experiences and concerns have been concentrated in what one might call two "negative contrasts," namely a contrast of present democracy with the

evils of the past, and a contrast of present democracy with real or potential anti-democratic challenges.

I want to argue that memory and militancy were not accidental forms of particularity associated with constitutional patriotism; rather, there is an inherent normative connection to the universalist kernel of constitutional patriotism. Put in the vocabulary of “identity talk,” memory and militancy (thus defined) reinforce “identity” through negative contrasts—with the past that is being repudiated, or with anti-democratic political actors in the present (or potentially in the future). Positive political principles do *imply* these negative contrasts, but this is not to say that all forms of constitutional patriotism would have to come with a strong emphasis on memory and militancy. In other words, and contrary to one of the most widespread clichés of our time, not every “identity” needs primarily to be “constructed” through an “Other.” So the genealogical critique of constitutional patriotism, I claim, does not by itself invalidate the concept. There might be good reasons, however, not to put too much stress on memory and militancy as aspects of constitutional patriotism, as both have an illiberal side, and I shall say more about these pitfalls in the context of my discussion of the European Union.

I then move on to a more general theory of constitutional patriotism, which also seeks to elucidate as clearly as possible the *limits* of what a theory of constitutional patriotism can by itself prescribe. Constitutional patriotism, as explicated here, is a distinctive moral proposal, but it has only limited application. In particular, constitutional patriotism is not by itself a theory of justice: it is what has been called a *normatively dependent* concept, that is, it depends on a wider theory of justice to gain substantive normative content.¹⁴ And what I offer here is a

distinctly *moral* reading of constitutional patriotism by attaching it to a moral background theory centered on the idea of *sharing political space on fair terms*. But it's perfectly plausible to offer different versions that make constitutional patriotism normatively dependent on different background theories of justice. What is not plausible, however, 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.

In previous discussions of the concept even the most fundamental question of what constitutional patriotism actually *is* has often remained unclear. Partly through an analogy with liberal nationalism—which in turn trades on analogies with the family and other special moral relationships—constitutional patriotism has been described very generally as an "attachment," or as an "identity," but also as a "resistance to identification."¹⁵ Liberal nationalists have at least been clear on the idea that *national identity comes first*, so to speak, and a particular political morality based on "fellow-feeling" is then in more or less direct ways supposed to "follow" from such an identity.¹⁶ Advocates of constitutional patriotism, on the other hand, have found it much harder to be clear on what comes first: an "attachment" to universal values, which is then realized in a particular political setting? Or do we start with a particular polity, which, as long as it meets certain standards of what we construe as liberal democratic universalism, could and should be made the object of a kind of civic loyalty?¹⁷

It's also often been unclear which particular overall purpose a theory of constitutional patriotism is supposed to serve. Is constitutional patriotism about stabilizing expectations of political behavior—in other words, is it ultimately an account of how to generate political *stability*? Put differently, is constitutional patriotism essentially a variety of political liberalism, which in the end is supposed to ensure the stability of societies divided by deep disagreements? Or is constitutional patriotism in fact a form of what might be termed *civic empowerment*? In other words, does it potentially translate the attachment to political principles into kinds of political action that can turn *against* governments, and even destabilize them—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 about priorities: does stability come first, or does empowerment? And if they go together, what is the condition of possibility of the two going together? These are the questions taken up in the more general chapter, where I'll suggest that constitutional patriotism is indeed what you might call Janus-faced: oriented both toward stability *and* civic empowerment.

In the last chapter I'll then examine an area in which, according to many political thinkers, constitutional patriotism appears to be particularly attractive or at least useful: the challenge of supranational “belonging,” as exemplified here by the European Union. I don't want to say too much for now about the rather complex argument about European constitutional patriotism that I try to develop in the final chapter, but I want to stress that what I offer in the chapter are ways of thinking differently about these issues, not clear-cut policy prescriptions in the way

that, in my view, academics are sometimes too eager to produce for Brussels. The reader—and citizen, I also hope—will have to decide where to take these thoughts, if they can be taken anywhere at all.

Finally, a very brief word on the usually much-dreaded subject of “method.” Here, two clarifications are in order: first, almost always discussions of liberal nationalism, constitutional patriotism, and similar concepts appear to come down to decisions along the lines of “Well, I take a little more emotion,” while someone else might say, “Well, I’ll get by—just by reason.” Put less frivolously, it might appear that these debates are ultimately undecidable, unless we actually had very complex *empirical* studies that would somehow yield the right moral-psychological “mixture” of reason and emotion in, for instance, motivating solidarity, or making citizens want to defend their liberal-democratic institutions. While political and legal theorists are sometimes too quick to discard empirical approaches—to put it mildly—it is in this case not unduly pessimistic to think that no such clear-cut results are likely to emerge anytime soon. Thus, one ought to be as clear as possible about which moral-psychological assumptions enter arguments about loyalty, attachment, and belonging, how plausible they could be in general, and also to what extent we can do without them.

Second, in debates about post-national or cosmopolitan forms of political attachment, especially in the case of the EU, there is also an unfortunate tendency for opponents to make facts into values—and for proponents, and Euro-cheerleaders in particular, to make values into facts. What follows is, I am afraid to say, indeed part fact and part value—but I shall at least try to delineate which is which.