

Constitutional Patriotism

Constitutional patriotism: An overview

Constitutional patriotism is a political theory that seeks to provide an explanation for the sense of ownership that most individuals have towards their national constitutional system. Specifically, constitutional patriotism assumes that free-thinking individuals involved in a discussion over the common good will reach an agreement that is perceived, at least by those involved in the debate, as having normative value. The awareness that such a deliberative process has historically been a part of the constitutional system also induces a sense of ownership of past historical accommodations of constitutional principles. The shared perception of being part of historically grounded institutions within a deliberative democracy is sometimes called the ‘normative surplus effect’ or ‘normative spill-over effect’ of the deliberative process. The theory, in its current form, was proposed by Jürgen Habermas and Jean-Werner Müller.

Debates over the common good might take place informally or within the state’s institutions. Pell-mell informal debates, with few exceptions, have a limited effect on amending constitutional norms. Yet, the prerogative to openly discuss laws and policies legitimised by constitutional norms is normally sufficient to develop an inner sense of belonging to a constitutional system. Deliberative debates within public institutions (e.g. parliaments and courts) are more likely to change the functioning of a constitutional system, but they are, by way of comparison to informal political discussions, normally constrained by the system of rules that regulate representative democracy and the administration of justice. Thus, the theory of constitutional patriotism provides an explanatory model for the historical development of a democratic constitutional system.

As one of the most persuasive explanatory theories of modern pluralist democracy, constitutional patriotism has attracted a series of well-articulated critiques. It has been suggested, for instance, that constitutional patriotism might not provide a plausible model of social integration for international organisations such as the European Union (EU). In this essay, I will provide an overview of the theory and a selection of its critiques.

Theoretical assumptions and normative claims

Constitutional patriotism assumes that a deliberative activity, between free members of the political community who intervene in public debates in good faith and who accept the persuasiveness of the best argument, will form a consensus over policies, the legitimacy of statutes and perhaps the normative values manifested in their constitutional text.

Drawing much of its epistemological strength from Kantian deontological thinking, constitutional patriotism proposes a theoretical justification for a democratic constitutional system without assuming the existence of a comprehensive theory of justice. It is a theoretical alternative to the concept of the nation-state, and it is widely

accepted as one of the most articulated theoretical explanations for the functioning of modern state institutions in modern diversified societies (Habermas 2004; Müller 2008; Softan 2008; Enns 2010; Khoo 2014; Hufas and Fel 2015). One of the key features of constitutional patriotism is, for instance, the assumption that individuals are free to express their opinions – or to silently agree about the opinions of others – in a political debate. Discussions over the common good might take place anywhere within a political community. An informal discussion, for instance, among white-collar workers on the Clapham omnibus contributes to the layering of shared political opinions that might trickle into institutional debates. Institutional debates, whilst limited by the system of rules that allows for the functioning of modern mass democracy, might foster communal agreements over new policies and statutes. The general persuasiveness of decisions taken within institutions, due to the inherent imperfections of any deliberative activity (e.g. limited information), is transient. Past agreements will be reviewed by new political discussions and the process will start again.

Consequently, constitutional patriotism describes the dynamic connection between the daily deliberative activity that distinguishes large liberal democracies and public institutions. The daily plebiscite that generates a patriotic attachment between individuals and their legal system occurs within institutions in which a farrago of political opinions generates endless discussions (Habermas 1998, 3). Yet, constitutional patriotism does not explain the reasons (e.g. self-interest, religious beliefs etc.) that motivate individuals to engage in political debates; it assumes it as a social fact.

This process of the constant tuning of previous political agreements has two pragmatic effects. Firstly, over a period of time, unchallenged agreements over the ‘common good’ will become part of the shared cultural assets. For instance, the due process clause in the English Magna Carta (‘No man shall be arrested or imprisoned ... except by the lawful judgement of his peers or by the law of the land’) and the Scottish assertion of individual freedom as a self-evident prerogative (‘It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom alone, which no honest man gives up but with life itself’) are currently part of the UK’s constitutional culture (Breda 2014).

Secondly, the process of discussing past and present political issues generates a sense of ownership of past and present current agreements. The ‘winners’ in a debate might recognize an overlap between their perception of what the common good entails and the procedural soundness of the debate that made their perception part of the legal system. The ‘losers’, who might strongly disagree with the outcome of a political debate, accept instead that the deliberative process has been open and objective. Müller describes constitutional patriotism as a ‘collective learning process’ where winners and losers accept that it is their daily political involvement (and not the outcome of individual discussions) that supports and legitimises the gamut of values, assumptions and prescriptions set in their constitutional system (2008, 85).

Thus, constitutional patriotism does not suggest a comprehensive theory akin to Rawls’s theory of political liberalism (Rawls 1972). Constitutional patriotism acknowledges, instead, the normative foundations of the modern

liberal democracy that we inherited from the Enlightenment (e.g. individual freedom and a commitment to pursue truth and justice) and the dynamic nature of the interpretations of those principles in a highly-diversified society (Habermas 1994, 11–12). Each individual, within a liberal constitutional polity, tacitly (or explicitly if he/she acquired citizenship as a result of prolonged migration) subscribes to the values supporting the constitution.

Whilst simple in its formulation, constitutional patriotism has the benefit of clarifying the often-muddled relationship between constitutional law and the role of the idea of national identity. For example, in *Roper v Simmons*, Justice Anthony Kennedy describes how citizens and the United States Supreme Court honour the American Constitution as an expression of a communal endeavour. Kennedy explains this process as follows:

The document sets forth, and rests upon, innovative principles original to the American experience [...] These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it *to be our own*. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within *our own heritage* of freedom [My emphasis] (*Roper v Simmons* 2005, 578).

This is, as worded by Justice Kennedy, a manifestation of a patriotic attachment made by the members of an institution, the Justices of the US Supreme Court, to the universal values manifested in the American constitutional system. Whilst carefully worded, the passage does not cover the tension between the universal values protected by the US Constitution and the reference to the Constitution as a distinctive asset of the American nation (whatever that might be). At a conceptual level, individual freedoms and human dignity are influential aspects in the development of modern democracy, but, as such, are considered ‘universal’ (Tully 2002). From Kennedy’s narrative, it is reasonable to subsume that, firstly, the US Supreme Court perceived those universal values as belonging to a national heritage, and, secondly, that their interpretation is an exclusive element of American institutional history. This effect is the so-called normative spill-over (or normative sur-plus) of deliberative democracy (Müller 2007a, 49, 125, 147; Müller 2008, 76–77).

To sum up, constitutional positivism proposes an elegantly simple solution to the dilemma of creating a community of strangers who are actively (or passively) involved in a daily deliberative activity. This endeavour is composed of minute public engagements with neighbouring individuals and of debates within democratic institutions. The side effect of these activities is the formation of communities that value the rules they inherited from previous generations (as eloquently defined by Justice Kennedy in *Roper v. Simmons*) and that have the possibility of amending these rules in a way that seeks to enhance the commonwealth.

Constitutional patriotism: Recent critiques and developments

The previous section proposed a general overview of the theory of constitutional patriotism. Most probably, it is an

explicative theory of the effects of deliberative democracy in modern constitutional polities. Constitutional patriotism assumes that freedom, deliberation and a commitment to rational and objective decisions will help in steering a community of citizens towards the common good. As one of the most persuasive contemporary political theories, constitutional patriotism has also attracted a fair amount of criticism (Canovan 2000; Michelman 2001; Laborde 2002; Breda 2004; Kumm 2005). Given that the overarching aim of this Encyclopaedia is to seek to elucidate complex theoretical proposals and provide the reader with a springboard for further studies, this section will focus on a selection of critical engagements with the intention of clarifying the theoretical contribution that constitutional patriotism has made to the current understanding of the functioning of modern constitutional democracy. In particular, it will discuss the limits of constitutional patriotism in indirect democracies and in states that have not reached a level of political development that is essential in order to establish deliberative democracies.

A series of critiques will not be fully reviewed because they might misconstrue the theory of constitutional patriotism. Firstly, this short review of the critiques on constitutional patriotism will not consider those critiques that consider constitutional patriotism as a theory of justice. This is not one of the aims of constitutional patriotism (Müller 2009, 22). Freedom and equality are procedural requirements of deliberative democracy, as discussed elsewhere in the Encyclopaedia, and they overlap with liberal assumptions of modern liberal democracy, yet constitutional patriotism does not seek to be a normative justification for liberal democracy.

Secondly, constitutional patriotism does not justify the sense of ethnic ownership of the constitutional values manifested in the constitution (Kumm 2005; Müller 2006). Constitutional patriotism, at least the version considered in this essay, is not one of the manifestations of liberal nationalism. The supporters of this ‘thick’ constitutional patriotism assume, for instance, that there is a causal link between the historical development of the nation-state and the establishment of large, indirect, deliberative democracies (Miller 1995). Again, nationalism is discussed elsewhere in this Encyclopaedia. It is sufficient to say that whilst the nation-state developed during the Industrial Era and that period coincides with the establishment of constitutional democracies, claims that a national community might help the development of a parliamentary democracy in England or that national communities might endanger the development of modern democracies are equally misshaped (Smith 1971; Fukuyama 2012). However, constitutional patriotism elucidates how in open and culturally diversified deliberative democracies, individuals might perceive themselves as active parts of normative endeavours.

Thirdly, this introductory review will not consider the details of the critique which depicts constitutional patriotism as a form of civil religion (Breda 2004; Müller 2007b, 202). Müller argues, for instance, that constitutional patriotism might generate an uncritical acquiescence of inherited constitutional culture (2007b, 202). Inserting an *a priori* protection of identity-based communities, such as the freedom to manifest religious beliefs, which is already part of the constitutional assets of most liberal democracies, might be a sufficient safeguard against the potential homogenising effects of constitutional patriotism as civil religion. This is the solution adopted in consociational political systems such as those found in Belgium, Northern Ireland and Myanmar (Wolff 2004).

This summary of the critique review will focus instead on those critiques which question the procedural assumption of constitutional patriotism, since they question the theoretical soundness of a proposal. For instance, by making reference to the EU, where institutions such as the European Council (hereafter the Council) and the Council of Ministers are bound by a series of multiple commitments to the national cabinets, their parliaments and to the members of their respective constituencies (Müller 2007a, 94; Kumm 2008). In other words, the role of the Member States' representatives as speakers within the Council is severely limited by the political mandate and thus agreements formed within those institutions are often the result of behind-closed-doors diplomatic discussions.

It could be argued that open, unbiased discussions are only an ideal epistemic requirement and thus that an individual speaker cannot ever be free in a way that meets with Kantian epistemic requirements. Constitutional patriotism assumes that free-thinking individuals who, in good faith, are involved in a discussion over the common good will form an agreement over some aspects of good communal life. An agreement over the effect of luck on the redistribution of individual gifts in modern capitalist societies, for instance, must be accompanied by some level of redistributive justice. Kumm argues that the setting of macro-policy decisions within the EU is so far removed from the actual requirements of an open discussion that the result of the institutional debates cannot be associated with a level of objectivity and rationality that is necessary to trigger a patriotic commitment (Kumm 2008; Breda 2015). The problematic issue of EU representation is discussed elsewhere in this Encyclopaedia, but it is sufficient to say that the Council's policies are the result of carefully orchestrated diplomatic negotiations between sovereign states and that an agreement might be difficult to justify in universal terms. For instance, the policy of subsidizing EU farmers might reduce the level of competition and impoverish communities outside EU borders such as those in Northern Africa.

Indeed, it might be idealistic to expect that diplomatic negotiations are as open as informal chats between fellow commuters are, but Kumm's critique shows a general limitation of the epistemic assumptions of constitutional patriotism. Modern democracy is an indirect democracy. If the institutional mandate is too narrow, it is illogical to assume that institutional agreements will generate a perception of objectivity and a shared sense of ownership of the decisions taken within that deliberative arena.

For analogous reasons, where there is a lack of freedom for those who intervene in institutional debates, constitutional patriotism might not provide an explanatory model for patrimonial political systems (Fukuyama 2012, 129). The practice of patrimonialism, which originated in rural societies, included an informal vertical power relation between the power holder (e.g. the patron/landowner) and a number of inferiors such as temporary workers (Fukuyama 2014, 14, 86–104). For instance, a few European political systems show signs of the isomorphic mimicry of neo-patrimonial systems (Caciagli 2006). In this political system, patrimonialism is horizontal and might include a nationwide network of individuals that exchange tangible favours such as jobs, public contracts and political votes at the national level (Caciagli 2006, 159; Fukuyama 2012, 124). In a patrimonial system (and neo-patrimonial political systems), indirect representatives might refer to a general principle of good government such as the endorsement of the freedom of enterprise and public institutions might claim the cost-effective delivery of key services, yet the

majority of the population expects that politicians and civil servants will use their prerogative for their personal benefit and for the benefit of their clientele (Faure 2013, 5, 198).

It is important to remember that debates over the common good within a democratic society are, according to the theory of constitutional patriotism, a manifestation of a daily plebiscite between all members of the polity and their institutions (Habermas 1994, 3). More precisely, the theory of constitutional patriotism explains that discussions give individuals a sense of ownership of the general principles manifested in the constitution, as well as the rules that might trickle down based on those principles (Cohen and Sabel 1997).

The possibility of making sense of the communal ownership of past and current political decisions requires, however, a series of functioning modern institutions (Fukuyama 2012, 14). Thus, there is an overlap between the conditions necessary for the development of truly meaningful deliberative activities within an institutional setting and the inner workings of the state's institutions. There is also a correlation between how public representatives form an agreement within an institution and the possibility that the process that forms such an agreement is perceived as objective and rational (Breda 2016). From Fukuyama's analysis, it appears that many formally modern constitutional systems are *de facto* patrimonial political communities and, for these types of polities, constitutional patriotism might not provide an explicative working template. As was mentioned in the review of Kumm's critique, it is idealistic to expect that debates will be set in optimal deliberative conditions and so it is unreasonable to expect that those participating in a debate are completely unbiased. However, the deliberative institutions' main operating function in both patrimonial and neo-patrimonial political systems is to provide for their clientele. Representatives are expected to harvest the state's resources (e.g. public contracts and jobs) and distribute them among the members of their fiefdoms. The ability to provide for the clientele is the rational criterion that is used to assess the representatives' suitability for their post. It is reasonable to suggest that constitutional patriotism cannot provide a normative model for constitutional systems that have not reached the level of development that is necessary for a fully functioning deliberative democracy.

A summary

This encyclopaedic entry provided a concise overview of the theory of constitutional patriotism and of the selection of its critiques. The first section focused on the general structure of the theory by looking at Müller and Habermas's interpretation of constitutional patriotism. From the analyses of these two authors, it is reasonably clear that constitutional patriotism is a political theory which seeks to explain the epistemic structure of modern mass democracies. It assumes that in a free, open and socially diversified political system, individuals will interact with others in a way that seeks to find objective and rational agreements over the common good.

Constitutional patriotism has the benefit of explaining how informal and institutional debates among strangers are funnelled into local and national institutional discussions. Most of these debates are impromptu informal public discussions among family members, friends and strangers. A smaller number of these political discussions take place

within the state's institutions. Cohen and Sabel's analysis shows that individuals are involved in multiple, local deliberative activities and the debates generate a perception of ownership (or the desire distancing oneself from ownership) over commonly agreed policies. Thus, constitutional patriotism provides a theory that bridges the informal and formal debates over the common good. It also explains how current institutional debates, such as the one reported by Justice Kennedy in *Roper v Simmons*, consider the inherited constitutional principle as an essential normative asset of a constitutional system.

The second part of the essay reviewed some of the critiques against constitutional patriotism. It is possible to conceive that some of the pre-conditions for a patriotic constitutional system might be ill suited in explaining the workings of deliberative institutions within large international organisations such as the EU. It is also improbable that a sense of ownership of constitutional values would be perceived as a side effect of a deliberative activity within the patrimonial political system which has only formally embraced the supporting ideals (e.g. freedom, equality, objectivity and rationality) that we inherited from the Enlightenment.

Biography

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