

Articles

The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina

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A. Introduction

Constitutional patriotism is on the ascent among contemporary constitutional theories. Its objective is to re-orient the loyalty of citizens away from particularistic attachment to a Nation, and towards the Constitution. In promoting political justice, constitutional patriotism relies on citizens' acceptance of a particular constitutional order not as an embodiment of particularistic ethnocultural, or even statist values, but rather as an expression of universal political principles. In other words, a constitutional order ought not to be seen as an instrument for a nation's political self-actualization, but rather as a framework for institutions and a repository of values that enable a diverse body of citizens to critically rework their particular traditions in light of universalist principles of political justice.

While the intellectual origins of constitutional patriotism stem from a specific set of concerns in post-1945 West German society, as a constitutional doctrine, constitutional patriotism increasingly has global appeal.¹ It has been suggested that constitutional patriotism is suitable not only to a society that shuns nationalism, and is coming to terms with darker aspects of its past, but also to contemporary deeply divided multinational societies. Different authors have expressed their hope that versions of constitutional patriotism may be relevant for diverse multinational states such as Canada, South Africa, Northern Ireland, or Bosnia and Herzegovina.²

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¹ For the intellectual history of the concept, see JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM 15-45 (2007).

² Omid Payrow Shabani, *Who's Afraid of Constitutional Patriotism? The Binding Source of Citizenship in Constitutional States*, 28 SOCIAL THEORY AND PRACTICE 419, 435 (2002); Elsa van Huyssteen, *'The Glowing Fire of our New Patriotism': The Constitutional Court, Civil Society and Constitutional Patriotism in South Africa* in GATHERING VOICES: PERSPECTIVES ON THE SOCIAL SCIENCES IN SOUTHERN AFRICA (Teresa Cruz Maria & Silva Ari Sitas eds., 1998); Gerard Delanty, *Habermas and post-national identity: Theoretical perspectives on the conflict in Northern Ireland*, IRISH POLITICAL STUDIES 1, 11 (1996); Esad Zgodić, *Ustavni patriotizam za Bosnu I Hercegovinu* (Constitutional Patriotism for Bosnia and Herzegovina), 1 GODIŠNJAK BOŠNJAČKE ZAJEDNICE KULTURE "PREPOROD" 13 (2010).

However, the uneasy relationship between constitutional patriotism and nationalism has not gone unnoticed, as constitutional patriotism faces two sets of objections: pragmatic and normative. The pragmatic objection comes in two variants. The first argues that adherence to abstract universalist principles renders constitutional patriotism motivationally powerless to sustain a vibrant democratic society that needs common political sympathies, based on shared ethnicity and culture, to enable social solidarity and political deliberation. The second is the flipside to the first and argues that constitutional patriotism is motivationally too strong—that its symbolic use of a particular political history motivates the majorities excessively, while at the same time alienating minorities from the particular polity. This latter pragmatic objection depends on a normative presupposition that a diverse polity must be ethnoculturally neutral in order to fulfill the demands of political justice. A polity that embodies the symbolism of a particular political history can never be free of ethnic bias, and hence ethnoculturally just. My quarrel with constitutional patriotism intersects with these normative arguments, but also cuts deeper. Constitutional patriotism is highly suspect as a political doctrine in a multinational political setting, in that it cannot compellingly respond to the problem of arbitrary delineation of territory.

The question of territory, the physical shape of a constitutional order, is neglected in constitutional theory (including constitutional patriotism), but nonetheless has deep salience for constitutional politics. The shape of a territory will determine the identity of the population, and, as a result, the population's attachments, symbols, values that are destined to 'trickle up' to the constitutional document. Equally, the inherited composition of the population will make certain institutional outcomes seem natural: unitary versus federal structure, consociational arrangements in the executive, regional vetoes in the legislature and the like. Even though constitutional patriotism aspires to critically rework inherited national traditions, any constitutional patriotic project will carry a particular national 'flavour,' and will necessarily respond to its territorial 'given.' This is not problematic in a traditionally homogeneous country such as Germany where almost everyone shares loyalty to the state, but remains inappropriate in countries such as Bosnia and Herzegovina, which has recently attracted the attention of several scholars as potentially fertile ground for constitutional patriotism outside of its original context.

With these initial concerns in mind, the aim in this paper is three-fold. First, my aim is analytical: I want to catalogue the defenses of constitutional patriotism and to demonstrate how none suffice when confronted with the 'territorial challenge' of constitutional theory. The purpose of critiquing the defenses of constitutional patriotism is both negative and constructive. I will discuss the problems of various defenses of constitutional patriotism with an aim to extract valuable normative commitments and psychological assumptions, that can be used to argue in favor of either a 'mutated' constitutional patriotism, or 'unencumbered agonism' a theoretical approach I prefer. In so

doing I stylize available defenses and extrapolate and assess others, which may build on resources already available in debates on constitutional patriotism.

My second aim is more practical, in that it is a modest intervention in the debates surrounding constitutional reform in Bosnia and Herzegovina. I argue that in addition to theoretical difficulties that would advise against applying constitutional patriotism to deeply divided states, the invocation of constitutional patriotism can serve the hegemonic purposes of any political elite that has a delineated territory as its basis of power. The simultaneous hypocrisy and sterility of invoking constitutional patriotism, as I will argue using the example of Bosnia and Herzegovina, only compounds its theoretical problems. As Bosnia inches toward a new round of 'mega constitutional politics,' it is important that doctrines with the potential to frame the constitutional debate and to provide moral imprimatur to political allegiances, be scrutinized, assessed, and, in this case, judged as problematic for being 'marketed' in deeply divided states.

My third aim is constructive: I will sketch an alternative to the account of unencumbered agonism that diverges from constitutional patriotism, while drawing on elements of its heritage. As a model, unencumbered agonism would be particularly suited for fragile and deeply divided states, in which there is no consensus on the most basic questions such as the very existence of a state as a unified polity.

In rejecting constitutional patriotism, this article joins a growing chorus of voices in constitutional scholarship.³ However, given the profundity of the territorial challenge at constitutional patriotism's foundation, this article cannot simply abandon it in favor of one of its closer conceptual cousins which, while departing from 'constitutional patriotism' seeks to salvage patriotism's 'brand.'⁴ For the same reason, my argument will go beyond

³ For a prudential critique of constitutional patriotism in the context of the European Union see Mattias Kumm, *Why Europeans will not embrace constitutional patriotism*, 6 *ICON* 117 (2008). For a critique in the Canadian context, see Jean-François Gaudreault-DesBiens, *The Fetishism of Formal Law, the Circumstances of Constitutional Patriotism, and the Fate of Complex Polities in NATION ÜBER ALLES: PROCESS OF REDEFINITION AND RECONSTRUCTION OF THE TERM NATION IN CENTRAL EUROPE* (Michal Vasecka ed., 2008). For a critique in the context of Northern Ireland, see Alexander Schwartz, *Patriotism or Integrity? Constitutional Community in Divided Societies*, 31 *Ox. J. Leg. S.* 503 (2011).

⁴ See Cecile Laborde, *From Constitutional to Civic Patriotism*, 32 *B. J. Pol. S.* 591 (2002); Antonino Palumbo, *Patriotism and pluralism: identification and compliance in the post-national polity*, 2 *ETHICS AND GLOBAL POLITICS* 321 (2009); Ephraim Nimni, *Constitutional or Agonistic Patriotism? The Dilemmas of Liberal-Democratic States in CONSTITUTING COMMUNITIES: POLITICAL SOLUTIONS TO CULTURAL CONFLICT* 94 (Per Mouritsen & Knud Erik Jorgensen eds., 2008).

even bolder rejections of constitutional patriotism, which in the name of “integrity”⁵ or “incrementalism,”⁶ assume and seek to preserve, the territorial frame of the state.

By the same token, the theoretical project of unencumbered agonism shares its rejection of constitutional patriotism with the more practice-oriented academic agenda of democratic consociationalism. It doesn’t, however, commit to consociationalists’ institutional prescriptions which request some form of power sharing between antagonistic groups in a deeply divided polity.⁷ While consociational power-sharing agreements will often emerge as a tentative result of constitutional struggles in these locales, unencumbered agonism is comfortable both with thicker forms of constitutional identity (should they emerge from the constitutional struggle), as well as with radical constitutional options such as secession and partition.⁸ Finally, while the implications of the theoretical argument of this paper and the constitutional prescriptions of democratic consociationalists partly overlap, the *tonality* of my and their suggestions is different. For consociationalists, secessionist agendas in deeply divided societies are *prima facie* suspect and dangerous—at any rate, not a preferred political outcome. In contrast, given the theoretical commitments of unencumbered agonism that will be revealed in the article, secessionists’ pursuits enjoy dignity as morally co-equal political projects within the constitutional struggle.

B. Exploring the Evolving Defenses of Constitutional Patriotism

How does constitutional patriotism respond to the problem of political founding, and the legitimate scope of a constitutional order’s territory? The first strategy ignores the problem, embracing the arbitrariness involved in the constitution of a political space, and employs the counterfactual device of unanimous contracting, operating solely at the level of constituting institutions, rather than the logically preceding condition for these institutions: the constitution of territory. The reverse side of this strategy is to shift the

⁵ See Schwartz, *supra* note 3.

⁶ See Hanna Lerner, *Constitution-writing in deeply divided societies: the incrementalist approach*, 16 NATIONS AND NATIONALISM 68 (2010).

⁷ For the consociationalists’ rejection of the Arab intellectuals’ invocation of constitutional patriotism in the context of Iraq’s constitutional transformation, see BRENDAN O’LEARY, JOHN MCGARRY & KHALED SALIH, *THE FUTURE OF KURDISTAN IN IRAQ* 30 (2005).

⁸ In contrast, the recent upsurge of interest in deeply divided societies among constitutional lawyers and political scientists focuses on the choice between “integration” and “accommodation.” See *generally*, SUJIT CHOUDHRY ED., *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* (2008). Those who consider secession a legitimate option seek to discourage it through constitutionalizing, a rather cumbersome procedure, see WAYNE NORMAN, *NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM AND SECESSION IN THE MULTINATIONAL STATE* 204 *passim* (2006).

ground of legitimacy along a horizontal, temporal axis: from the past in which the hypothetical social contracting occurred, to the future which holds the promise of political justice and social inclusion. The second strategy for constitutional patriotism is to rework the idea of past unanimity, understood from the vantage point of an individual—a ‘reasonable person’—who, if treated justly, cannot justifiably complain about being ‘captured’ within the boundaries of the existing polity. From the juncture of a ‘reasonable person’ the inquiry forks in two directions. On the one hand, we could attempt to inject the regulative ideal of ethnocultural justice into constitutional patriotism in order to argue how a ‘reasonable’ citizen ought to behave in the context of deeply divided states. On the other hand, we can choose to understand the ‘reasonable person’ of constitutional patriotism, less as a normative ideal, but rather as a virtuous, meek, character who accepts the initial territorial delineation. Finally, the fourth strategy—contrary to all the previous ones—cedes ground on the issue of the legitimate territory, and argues that constitutional patriotism must remain silent on the issue of the scope of a democratic unit.

1. From Worthy Founding to Worthy Aspiration

While Habermas is not considered a theorist of political foundational moments in the same way as Hobbes, Rousseau or Arendt, his work shares in the intellectual patrimony of social contract theories. Like many other notable contemporary theorists, the social contract is, for Habermas, a counterfactual device used to induce an intellectual disposition that would enable us to see ourselves as co-equal authors of the laws we are subjected to. The idea that “an arbitrary number of persons *freely enter* into a constitution-making practice satisfies the important condition of an original equality of the participating parties, whose ‘yes’ and ‘no’ count equally.”⁹ But, to enter into “constitution-making practice” is not the same as entering into the practice of creating a constitutional order in its totality. The logically and temporally preceding question of constituting a territory, before constituting a constitution with a capital “C,” is irrelevant. Habermas readily concedes that he simply assumes a “spatiotemporally delimited collectivity” in “the real world” where boundaries are “settled by the arbitrary outcomes of wars and civil wars.”¹⁰

Habermas is aware, if unconcerned, that a particular composition of the polity must affect the content and outcome of constitutional deliberations at the fourth constitutive moment, irrespective of the formal demand for unanimity. He writes that “if the population of citizens as a whole shifts new discourses will be held about the same

⁹ Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POLITICAL THEORY 766, 776 (2001).

¹⁰ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, 133 (William Rehg (tr., 1998).

questions and new decisions will be reached.”¹¹ This suggests that a change in the composition of the polity will tilt political decisions toward the will of the new political majority, and that the rules of the constitutional game are fundamentally decided by the initial composition of consociates.

At a later stage, however, Habermas subtly shifted his justification for constitutional patriotism. While not mentioning constitutional patriotism by name, he elaborates themes already present in *Between Facts and Norms*. He revisits the idea of self-legislation and again argues that citizens must be able to understand themselves as self-legislating actors. However, he no longer employs the device of unanimity, but argues that self-legislation implies equal consideration of the political views of the members of the polity, as well as equal appreciation for their interests.

This shift in Habermas’ justification of a constitutional patriot polity emerges when he tackles the objection of infinite regress to his proceduralist attempt to reconcile popular sovereignty and the idea of human rights.¹² The procedural legitimacy of a political outcome depends on the legitimacy of the rules that frame that particular discourse from a temporal, social and material point of view. Habermas admits that such a legitimizing chain reaches back beyond “constitution-making practice.” A constituent assembly, after revolution or secession, for example, cannot safely vouch for the legitimacy of the rules according to which it was constituted. And even if it could, it wouldn’t solve the problem: we would still need to justify these rules by invoking a higher set of norms. Such an imaginary constituent assembly would lack legitimacy not only because of the absence of prior procedural rules that legitimated its existence; more importantly, its legitimacy would be dubious because there are no legitimate rules for delineating its territorial jurisdiction, and consequently its very composition. The problem of infinite regress is not constrained to the issue of constituting institutions, but stretches back to the very beginning of a polity in its totality, including the territorial aspect of a constitutional order.

Habermas’ answer to infinite regress is to turn our attention away from the political foundation, and toward the future. He meets the challenge of legitimacy by pointing out that constitution-making is a “tradition-making enterprise,” an understandable expression of a future-oriented character, or openness.”¹³

Yet, there are two problems with this account. The first is that Habermas’ turn to the future is not decisive; the promise of future inclusivity can only work if subsequent

¹¹ JÜRGEN HABERMAS, STRUGGLES FOR RECOGNITION IN DEMOCRATIC CONSTITUTIONAL STATE *in* 8 THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY, 203, 213 (Ciaran Cronin & Pablo DeGreiff, eds., 1999).

¹² Habermas, *supra* note 9, at 772.

¹³ *Id.*

generations adjust their political disposition, and decide to see themselves as being “in the same boat” as the founders. All participants in subsequent “interpretive battles” must be able to judge the constitutional order from the “same perspective.” But that is precisely the problem in deeply divided societies. That “same perspective” is, among other things, an arbitrary territorial referent that, at the time of founding, was supported by some, and vehemently opposed by other purported ‘consociates.’ The promise of social inclusion doesn’t undo the fact of national exclusion, or over-inclusion.

Even if he were to sever the link between the founders’ intention and the desirable direction of the constitutional ‘boat,’ Habermas’ invocation of a desirable future horizon is vulnerable on its own. As Bonnie Honig observes, Habermas “legitimizes constitutional democracy by way of *future* promised reconciliation.”¹⁴ Habermas’ “hoped for future in progressive terms,” according to Honig, turns that future into a ground of legitimacy of constitutional order. Its character as an open-ended future is undone by progress’ guarantee.”¹⁵ Honig cautions against the possibility that participants in “interpretive battles” who remain in the minority are often unpersuaded by the logic of the majority. Instead, they are “minoritized, over and over, into silence and aggression.”¹⁶

Honig’s point is well taken, but we would still do well to ask what would be the end-result of such progress. What is the asymptote toward which Habermas’ constitutional progression strives? Habermas is not explicit about the wished-for, end result. Yet, his illustration of American constitutional development gives us an indication of what he has in mind. He claims that interpretive constitutional battles in the United States brought about the “*inclusion* of marginalized groups and the *empowerment* of deprived classes,” which, in time, all participants in political life came to appreciate as legitimate.¹⁷ In a similarly lateral remark, Jan Werner Müller argues that minorities can try to tell stories about ever widening circles of inclusion, appealing to a common patriotic care to remain faithful to constitutional essentials and render their realization ‘ever more perfect.’¹⁸

While ever more perfect solidarity and inclusion feature both in Habermas’ and Müller’s accounts, its profile should be raised higher. As aspirations, solidarity and inclusion should

¹⁴ Bonnie Honig, *Dead Rights, Live Futures: A Reply to Habermas’s “Constitutional Democracy,”* 29 POLITICAL THEORY 792, 797 (2001).

¹⁵ *Id.* at 797.

¹⁶ *Id.* at 798.

¹⁷ Habermas, *supra* note 9, at 775 [emphasis author’s].

¹⁸ Jan-Werner Müller, *A European Constitutional Patriotism? The Case Restated*, 14 EUR. LAW J. 542, 547 (2008).

survive in an updated version of agonistic politics more suitable for deeply divided societies. I will return to this point toward the end of the essay.

II. Between Reasonableness, Justice, and Ethos: The Character of a Constitutional Patriot

Both justifications—worthy foundation, and worthy aspiration—operate along the horizontal, temporal axis of the life span of a constitutional patriot polity. Yet, a permutation of these justifications enables us to change the manner of justifying constitutional patriotism away from the quality of the past and future state of being, and toward an individual psychosocial disposition that ought to sustain the constitutional patriot project in any moment. For Omid Payrow Shabani, it is the ideal of a reasonable person that “makes the normative proposition of constitutional patriotism possible.”¹⁹ Grounded in the ideal of a reasonable person, constitutional patriotism should apply to a gamut of liberal-democratic states: from a nation-state, to a multinational state, to a supranational political order.²⁰

But what about politically mobilized groups in multination states who do not wish to belong to a common political framework? According to Shabani, “[i]f we view the constitutional state as composed of “reasonable” people who have to live together despite their differences, it is hard to understand why recognition of the fact that they are the authors of the system of laws that applies to all of them equally, is not enough psychologically to make them identify with each other, as fellow citizens.”²¹ Shabani’s claim about reasonableness of reconciliation with a pre-existing constitutional patriotic order critically hinges on his claim that reasonable people somehow ‘have to live together despite their differences.’ Is ‘having to live together’ an empirical observation about the practical difficulty of carving out a new polity from an existing one, or is it a normative precept demanding citizens live together in spite of their differences?

On the one hand, Shabani’s claim appears to be empirical. He writes that the redrawing of boundaries, such as in the Balkans during the 1990s, is unrealistic and naive given intermixed populations and the “diverse reality” of the existing states. If that is the case, the ultimate justification for constitutional patriotism would be a prudential calculus of the moral hazard of breaking apart existing states, and not a normative claim about why an existing state ought to exist with its current boundaries. Shabani is mistaken in his optimism about the ease with which equal treatment translates into a sense of political belonging. Persistent secessionist mobilization of the Basques, Flemish, Catalans and

¹⁹ Shabani, *supra* note 2, at 435.

²⁰ *Id.* at 436.

²¹ *Id.* at 437.

Québécois disproves his claim. On the other hand, if having to live together is a normative precept, we need to ask what do universalistic ethical principles of political justice demand, when contextualized in a multinational, deeply divided state?

Shabani invokes Kymlicka favorably in flashing out his account of constitutional patriotism, but never engages directly the prescriptions that Kymlicka's account may hold for such states. In the following section I will try to unpack Kymlicka's prescriptions and ask how useful they actually are for the project of political justice as applied to multinational states. Doing so raises the question whether the trope of a reasonable person is just a provisional rest stop in the development of an argument that ricochets between past foundation, future aspiration, and omnipresent pursuit of justice.

III. Constitutional Patriotism and Ethnocultural Justice

While Shabani suggests that justice is an inescapable feature of the idea of a reasonable person—who sustains constitutional patriotism in the face of deep diversity—he never connects constitutional patriotism with a theoretical program that directly speaks to questions of justice in a multinational setting. Yet, for justice to be operative in the context of deeply divided, most often multinational states, it must address the normative legitimacy of nationalist aspirations. It would seem logical for constitutional patriotism to align itself with the program of ethnocultural justice if it wanted to increase its cachet as a credible political alternative in deeply divided states.

While charging that modern unitary liberal-democratic states provide unfair advantages to the dominant nation by organizing the public sphere around the dominant national culture,²² theorists of ethnocultural justice do not offer precise constitutional blueprints. In addition, these states often define themselves constitutionally as belonging to the dominant nations. Ethnocultural justice demands that these unfair advantages be remedied. Ethnocultural justice may, according to Will Kymlicka, be satisfied by individual minority rights, but may also include territorial autonomy, or can be satisfied by reconstructing the state as a multinational federation. However, it is not clear which of these possible solutions Kymlicka prefers, and why. For example, Kymlicka claims not to be defending the concept of territorial autonomy, *as such*.²³ Yet he states that “adopting multination federalism [which, of course, entails the most robust territorial autonomy] creates a *genuine form of equal treatment*, by giving national groups the same power to govern themselves and to live and work in their own language.”²⁴ Also, while he does not

²² WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 108 (1996).

²³ Will Kymlicka, *Reply and Conclusion in CAN LIBERAL PLURALISM BE EXPORTED? WESTERN POLITICAL THEORY AND ETHNIC RELATIONS IN EASTERN EUROPE* 345, 362 (Will Kymlicka & Magda Opalski, eds., 2001).

²⁴ *Id.* at 354 [emphasis added].

commit to a specific model, he notes—contrary to Shabani’s prescriptions for a ‘reasonable person’ of constitutional patriotism—that “it is not reasonable or realistic” that a multinational state be seen as a political unity in perpetuity.²⁵ By advocating multinational federalism, Kymlicka suggests that a unitary state ought to be constitutionally reconstructed as a just multinational federation. However, by not committing to the ideal of perpetuity, Kymlicka does not exclude secession from the range of legitimate solutions – even in a situation where the state, for example, a multinational federation – is ethnoculturally just.

This raises the question of why. If a state is ethnoculturally just, why should we allow for—and not condemn or demand mobilization against—attempts to create a new independent (mono-) national unit?²⁶ This appears to be the position advocated by Shabani in his articulation of constitutional patriotism. For Kymlicka, “there is no obvious way for a free and democratic country to prevent a self-governing region from electing secessionist parties, and from holding referenda on secession.” Preventing this, according to Kymlicka, “can only [be] prevent[ed] by undemocratic and illiberal means.”²⁷ But if a just state ought not to prevent a secessionist referendum, why shouldn’t it simply ignore it?²⁸ And if secessionists were to try to disrupt the workings of the state, the state would, arguably, be justified in quelling the rebellion, by force, if necessary. Kymlicka does not address this question directly. He does say that the accommodation of minority nationalist demands (possibly in the form of territorial autonomy) diminishes the possibility of violent conflict. From this it would follow—although Kymlicka is not explicit about this—that the consequentialist calculus as to what constitutional settlement would be welcomed with least resistance, is an inescapable element in deciding on a particular prescription of ethnocultural justice.

Equally, from a normative standpoint, the requirements of ethnocultural justice are vulnerable to shifts in perspective. Kymlicka’s vantage point is local and domestic. *Local* ethnocultural justice may require reconstituting the unitary state into a multinational federation, and creating new sub-national territorial units. However, if we ask what

²⁵ WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 118 (2001).

²⁶ Kymlicka, *Western Political Theory and Ethnic Relations in Eastern Europe* in 13 KYMLICKA, *supra* note 23, at 27.

²⁷ Kymlicka, *supra* note 23, at 390.

²⁸ At this point the answer might be that multinational federalism is an expression of the compact between self-determining peoples, which implies the right to secession. In words of Jacob Levy, “if ... ethnically-sensitive federalism is justified on grounds that the group gaining control of a province is a national and if nations have a prima facie right to self-determination, then moving toward such federalism seems to grant a key premise of a future argument for secession.” Jacob T. Levy, *National Minorities Without Nationalism* in THE POLITICS OF BELONGING: NATIONALISM, LIBERALISM, AND PLURALISM 155, 156 (Alain Dieckoff ed., 2004).

ethnocultural justice would require *globally*, we would not have much in the way of guidance on whether sub-national territorial units should remain part of multi-national federations. If Montenegrins, Fijians or Luxembourgish can have an independent state, and not filter their presence in global politics independently, and not through the colander of a multinational state, why should Québécois remain a mere member of a locally ethnoculturally just Canadian federation?²⁹ Why would their demands—to use Shabani’s terminology—be unreasonable? Depending on one’s perspective, we may understand a multinational federation either as a principled solution required by (local) ethnocultural justice, or as a prudential, second-best compromise in the absence of full independence for the minority nation, according to a conception of (global) ethnocultural justice.

This leads to a further complication. If we reject the perspective of *global* ethnocultural unfairness, we might be impelled to reconsider the nature of multinational accommodation in the domestic context. If the local perspective is the only perspective there is, and other options, such as independence, or territorial autonomy, are out of the question, then the accommodation of the minority nation in the form of territorial autonomy may itself be considered unfair, and subject to further modifications. After the dissolution of Yugoslavia, Bosnian Serbs fought to create their own independent state, or join Serbia. The quasi-federal structure of today’s Bosnia and Herzegovina can be seen as a compromise between the frustrated efforts of Bosnian Serbs to achieve their first-order preference, and the frustrated but also legitimate efforts of Bosnians to maintain a unitary Bosnia and Herzegovina. Republika Srpska (RS), the Bosnian-Serb entity within independent Bosnia and Herzegovina, can be seen as a principled compromise between those two projects. However, if the tacit legitimacy of an independent polity for a minority nation is denied, it serves to undermine the logic of constitutional accommodation usually associated with ethnocultural justice, where sub-state territorial units are seen as a response to minority nations’ demands for recognition and political equality.³⁰

If independent status for a minority nation is not considered as a legitimate possibility, this would open the door to the normative argument that all the territorial units within independent multinational states, such as Bosnia, be refashioned according to the demands of ethnocultural justice. This would mean that the *minority within the minority* has the same right to protection against being dominated in the first order minority’s territorial unit. For example, Bosniaks in Republika Srpska – one of the two quasi-federal units in Bosnia and Herzegovina – have complained that the symbols of the RS violate the norms of national equality. As a result, a ruling of the Bosnian Constitutional Court ordered

²⁹ A potential way around this difficulty is to say that ethnocultural justice is important *only* domestically, because only domestically does it impact individual autonomy and flourishing. The fact that a member of a national community does not have a unit to call her own in an international setting does not subtract from the possibilities for her individual autonomy.

³⁰ KYMLICKA, *supra* note 25, at 101.

the RS National Assembly and the Parliament of the Federation of Bosnia and Herzegovina to change some of its symbols to incorporate the symbols of other constituent nations.³¹ Equally, the Constitutional Court of RS has declared that the RS anthem violates the vital national interest of Bosniaks and Croats in the RS. The aim of these legal challenges and court decisions was, arguably, to dilute the national 'flavour' of the two respective entities, to make them more inclusive and ethnoculturally just on a sub-local level. The result can be seen as undermining the project of ethnocultural justice on a local level, because it brackets off the possibility of implementing a global strategy of ethnocultural justice. The upshot of these examples is that ethnocultural justice is less instructive in judging constitutional legitimacy than we might think at the first, due to its unresolved geographic range.

Ethnocultural justice commends the reconstruction of the unitary mono-national state in the direction of decentralization where the component nations' perpetuation will be given institutional help. However, ethnocultural justice does not tell us whether this should be in the form of a new territorial polity. It also does not specify its constitutional status. For example, should it be only territorial autonomy within a unitary state, or a federal unit in a multinational federation, or a fully 'upgraded' territorial autonomy, an independent state? In a similar vein, ethnocultural justice does not tell us how the boundaries of a territorial autonomy should be drawn. While it suggests that a national group should form a numerical majority within a territory, it is silent on whether the boundaries should be drawn *expansively*, that is, to encircle as many members of the national group as possible. Or, whether boundaries ought to be drawn in a more *restricted* manner, so as to exclude as many non-nationals from the new political unit. By the same token, ethnocultural justice provides no guidance as to whether there should be only one unit encapsulating members of the national group within a larger federation, or whether there may be several sub-national polities in which there are numerical majorities of the same group.³² Finally, ethnocultural justice does not tell us—due to the unresolved question of perspective—how the new polity, created for the sake of a minority nation, should be internally organized. Should it be a monolithic polity, as compensation for not achieving full independence, or should it have further robust constitutional guarantees – like veto, proportional representation, etc., – for 'new' minorities within minorities? To put it

³¹ The national symbols featured in the coat of arms of Republika Srpska and the Federation of Bosnia and Herzegovina were based on "distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *U-4/04, Partial Decision on the Merits, 31 March 2006*, (Constitutional Court of Bosnia and Herzegovina) at para. 124, available at: <http://vlex.com/vid/-59929523> (last accessed: 23 December 2011).

³² Kymlicka treats this possibility as a way to dilute the political power of the ethno-national group, but the territorial pattern of distribution of this group may be such that it would not be possible to include the majority of them within a single territorial unit without wronging the other ethnic group within a multinational polity.

differently, ethnocultural justice does not come with a built-in perspective, yet its prescriptions are perspective-sensitive. As a result, constitutional patriotism cannot become normatively immune to nationalist challenges if injected with ethnocultural justice.

IV. A Constitutional Patriot in a Divided State: Meek, Not Reasonable

The inability of ethnocultural justice to stabilize an argument in favor of constitutional patriotism in deeply divided states undermines, by implication, the appeal of a constitutional patriot *qua* 'reasonable person' as well. But Shabani's reasonable person need not only be understood as an embodiment of the demands of justice. Equally, the idea of a reasonable person can be understood as shorthand for the desirable psychosocial disposition that a constitutional patriot should maintain, irrespective of (or in addition to) the capability to engage in the discourse of justice. In other words, we need not inquire into normative justifications for constitutional patriotism, but rather to articulate a virtuous character of a constitutional patriot.

One may argue that this view is already present, if unstated, in other justifications for constitutional patriotism. Recall Habermas' defense of the fiction of unanimous contracting as a self-motivating device that enables us to see ourselves as self-legislators. A more explicit explanation of unanimity links unanimity to reasonableness, and reasonableness to being prone to modify one's arguments. For Thomas Nagel, unanimity describes a mode of reaching agreement "which could be achieved among persons in many respects as they are, provided they were also reasonable and committed within reason to modifying their claims, requirements, and motives in a direction which makes a common framework of justification possible."³³ Even though Nagel remains committed to 'reason,' his account of unanimity is impossible without persons being committed to modifying their political demands.

While Nagel links 'commitment to modification' to the idea of reason, recent writings on constitutional patriotism emphasize a "moderate way of life," which arguably leads to such a 'modification,' as a free-standing virtue, and highlight an "idealistic citizen [who] has a special obligation to adopt a moderate stance"³⁴ According to Karol Soltan, constitutional patriotism as a vehicle for moderation appears particularly well suited to multinational states because "moderation requires ... both a recognition of the pervasive power of destruction and violence, and making the defeat of destruction a central goal." Notice however, how the virtue of moderation remains instrumental, invoked to help fend off

³³ Thomas Nagel, *Legitimacy and Unanimity in 3 EQUALITY AND PARTIALITY* 33, 34 (1995).

³⁴ Karol Soltan, *Constitutional Patriotism and Militant Moderation*, 6 *ICON* 96, 99, 103 (2008).

violence. While it is true that a number of separatist movements promote illiberal radical ideologies, there are other movements that would take issue with being labeled as immoderate. As Scottish, Québécois, and Montenegrin secessionists have pursued, and in the Montenegrin case succeeded, in achieving secessionist projects without destruction and violence. Therefore, positing ‘an idealistic citizen,’ instrumentally committed to moderation in the context of multinational, deeply divided states is inadequate as justification for constitutional patriotism.

In a description of a desirable character, we would need to go deeper, and ask: what sort of person would not hold a grudge against the historically contingent incorporation of his ethnic group in a larger state? What kind of a character would, instead of plotting tirelessly to form an independent state, engage generously in political give and take, aiming to construct a common constitutional culture? Or, what kind of a character would extend a welcoming hand, and not perceive threat to his group’s cultural survival? An ethos of such a person would require more than mere ‘reasonableness’ or ‘moderation.’

The most cogent sketch of such a character comes from an elegiac, late essay by Norberto Bobbio, “In Praise of Meekness.”³⁵ Meekness belongs to the so-called “weak,” or “private” virtues that are inherent to “private, insignificant or inconspicuous individuals.”³⁶ The meek, Bobbio laments, are not of this world; they don’t show off, and are not aggressive. More importantly, they detest the very spirit of “contest, competition, rivalry, and winning.” Such people not only dislike struggle, but the underlying psychological impulses that cause one to have the affinity for struggle. They are not vindictive or resentful, nor do they brood over past offences or historical injustices. They have a deep detachment from “vanity or pride that urges an individual [or a group, we might add] to stand out.” They detest “perpetuate quarrels” and reject “succession of reciprocal grudges and reprisals expressed through the usual justification ‘you did that to me so I do this to you’.”³⁷ A meek person rejects a “destructive life contest”, not only because it is dangerous, as Softan seems to suggest, but more profoundly, “out of a sense of annoyance for the futility of its intended aims.”³⁸ The political world that a meek person would want to inhabit is “one where there are neither winners nor losers.” In such a world, there are no contests for primacy, no struggles for power, and no competitions for wealth.”³⁹ How different an account from the bases of modern constitutionalism!

³⁵ Norberto Bobbio, *In Praise of Meekness* in *IN PRAISE OF MEEKNESS: ESSAYS ON ETHICS AND POLITICS* (2000).

³⁶ *Id.* at 26.

³⁷ *Id.* at 30.

³⁸ *Id.* at 29.

³⁹ *Id.* at 29.

What is the relevance of meekness to constitutional patriotism? Bobbio reminds us that while a Machiavellian fox, or a Hobbesian wolf are distinctly political animals, a meek lamb never found its way into the metaphorical imaginary of political life.⁴⁰ But, if meekness is an antipolitical virtue, can constitutional patriotism as a theory of constitutional *politics*, still make use of it? An idea along these lines is not as unprecedented as it may seem. While implicitly positioning himself as *ambivalent* about constitutional patriotism, Joseph Weiler has, in the context of European Union constitutionalism, argued in favor of a ‘habit of soul’ similar to Bobbio’s meekness. Instead of trying to find ultimate authority in a constitutional demos—which, we have seen, is precisely what is disputed in deeply divided states—Weiler suggests a turn toward ‘a constitutional ethos’ which is not obsessed with constituting or reconstituting constitutional *demoi*, but rather which submits to the existing constitutional regime, where the “end is to try, and try again, to live a life of decency, to honor our creation in the image of God, or the secular equivalent.”⁴¹ While *meekness* is a cardinal Christian virtue, Weiler anchors his discussion of submission to constitutional Nomos in Jewish religious tradition, which, at least superficially, does not bring tangible benefits to those who blindly submit to a [territorial] Nomos.

Yet, the upshot of Weiler’s argument is that the unintended, practical consequence of a submissive attitude may be individual emancipation. I will not explore here how this claim translates into the domain of constitutional patriotism; for the purposes of this essay, it suffices to note that anchoring constitutional patriotism in an ambitious virtue, at least theoretically, provides the strongest case for constitutional patriotism *in all contexts*. While making the strongest case for constitutional patriotism—not as a deontological or consequentialist, but as a virtue-based project—it would also acknowledge just how ambitious this project is in the context of multinational, deeply divided states. A more practical implication of this sort of justification would be to redirect theoretical energy away from devising macro-political heuristic devices, such as a ‘social contract,’ or a ‘reasonable person,’ and toward micro-political *practices* such as civic education for charity, generosity, and ‘turning the other cheek,’ not only in the private, but also the public sphere.

V. Retrenching constitutional patriotism: Jan-Werner Müller and (modest) hope for constitutional patriotism in deeply divided states

The normative problems associated with achieving a just constitutional regime in the context of deeply divided states have not been lost on recent generations of theorists of constitutional patriotism. If the general purpose of constitutional patriotism is to “enable

⁴⁰ *Id.* at 28.

⁴¹ Joseph H.H. Weiler, *In defense of the status quo: Europe’s constitutional Sonderweg in 1 EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7, 18 (JOSEPH H.H. Weiler & Marlene Wind eds., 2003)

and uphold a just constitutional regime,” and yet we do not have a reliable indication of what would such justice require, it is no wonder that the theoretical ambition of constitutional patriotism was truncated.⁴²

In a recent article, Jan-Werner Müller thus makes a crucial concession: constitutional patriotism is “not a freestanding theory of boundary-formation, and therefore, does not answer questions about political self-determination that other rival theories, such as liberal nationalism, may be in a position to answer.”⁴³ This underlying normative uncertainty leads Müller to modesty about its practical applicability. He admits that constitutional patriotism is not “some kind of civic panacea” to be applied to cases of “collective political breakdown,” adding that constitutional patriotism has to rely on existing political units, understood as “more or less clearly bounded political associations.” While constitutional patriotism cannot create motivation for a politically just and socially inclusive polity, it can still help us understand an ongoing commitment to those ideals.⁴⁴ While Müller is correct to cede ground on the issue of territorial boundaries, the range of applicability of constitutional patriotism hinges on how we understand the clause “more or less clearly bounded.” Formally speaking, every member state of the United Nations is ‘clearly bounded,’ as its territorial integrity is protected by the UN Charter. However, there are a number of states which are challenged from within or from without. In these contexts, are their territories more or less clearly bounded? If they are, ought constitutional patriotism be legitimately ‘marketed’ to deeply divided societies where there are profound divisions in matters of constitutive constitutional politics?

Müller’s concession on normative issues informing the politically prior question of territory allows for a modest understanding of the scope of constitutional patriotism. Yet, Müller’s practical and normative concession is not unequivocal. While he likely would not claim, like Shabani, that those who reject a just constitutional patriotic order are ‘unreasonable,’ he entertains hope that constitutional patriotism could help curb “the sources of moral danger” often associated with both liberal nationalism and traditional forms of patriotism.⁴⁵ Even in these contexts Müller remains optimistic about the prospects of constitutional patriotism to bring about a “certain degree of civility even in deeply divided societies.”⁴⁶

⁴² Jan-Werner Müller, *A general theory of constitutional patriotism*, 6 *ICON* 72, 82 (2008).

⁴³ *Id.* at 76.

⁴⁴ Jan-Werner Müller, *Three Objections to Constitutional Patriotism*, 14 *CONSTELLATIONS* 195, 199 (2007).

⁴⁵ Müller, *supra* note 42, at 76.

⁴⁶ *Id.* at 79.

Equally, while his modesty in relation to first-order normative issues would suggest that he would remain agnostic about matters of ethnocultural justice, Müller claims that “no demand for cultural self-preservation by means of political autonomy could be deduced from the theory of constitutional patriotism.” What is more, constitutional patriotism “[i]s more likely to come down on the side of political arrangements that integrate rather than those that separate.”⁴⁷ Finally, while claiming that constitutional patriotism is not incompatible with secession, his justification of secession appears restrictive, providing justification only in cases where minorities suffer “unbearable oppression.”

Irrespective of some vacillation, Müller’s concessions on the theoretical scope and practical import of constitutional patriotism are welcome. But, his sympathy for integration in deeply divided societies is a potentially dangerous position, which could lead to more bad than good in times of serious civil strife. In the next two sections I will argue against constitutional patriotism in the context of Bosnia and Herzegovina, and suggest a more fitting theoretical model, which, while forsaking constitutional patriotism, takes on board its concern for solidarity and social inclusion.

C. Constitutional Patriotism in Bosnia and Herzegovina: Some Arguments

The inability of constitutional patriotism to cope with the territorial challenge counsels against its invocation—both as a realistic possibility as well as a distant aspiration—in deeply divided states, such as Bosnia and Herzegovina. Fifteen years after the end of the war, Bosnia and Herzegovina is far from reaching consensus on the normative justification for its existence. While Croats and Serbs in Bosnia grudgingly accept its existence as a matter of external fiat, representatives of Bosniaks and the ‘international community’ at large—international administrators, western diplomats and experts—take its existence for granted, and frame the debate surrounding constitutional reform in terms of improving the ‘functionality’ of the ‘broken’ Bosnian state.⁴⁸

As a trope, constitutional patriotism exists in a rhetorical field that seeks to provide justification for state building, and is almost indistinguishable from its older theoretical cousin, civic nationalism. While theorists of constitutional patriotism insist that constitutional patriotism be carefully distinguished from civic nationalism, the reality of political rhetoric in Bosnia suggests otherwise.

⁴⁷ *Id.* at 89.

⁴⁸ William Hague & Paddy Ashdown, *Broken Bosnia needs western attention*, FINANCIAL TIMES, Dec. 29, 2009, available at:

<http://www.ft.com/intl/cms/s/0/bf60a826-f4af-11de-9cba-00144feab49a.html#axzz1eM2x8sa8> (last accessed: 23 December 2011).

Consider similarities between the rhetoric of Bosniak political parties, who support the project of a civic, unitary Bosnian state, and members of the intellectual elite and civil society, who advocate constitutional patriotism. On the one hand, the program of the Party for Bosnia and Herzegovina (SBiH) declares that Bosnia is “older” than any of its ethnic nations, is “founded by the sovereign free will of the people [understood in a civic sense], with the mission to promote a common welfare, sustainable development, and inner cohesion.”⁴⁹ Similarly, the Party of Democratic Action (SDA), defines Bosnia and Herzegovina as “a democratic State that belongs to all her citizens” and advocates “nurturing of the patriotic feeling of belonging to the State of Bosnia and Herzegovina.”⁵⁰

On the other hand, constitutional theorists such as Zdravko Grebo, argue that through the idea of constitutional patriotism “people don’t renounce their rights and other identifications, but simply feel they are the citizens of their country.” According to Grebo, “one sentence is enough for that, one sentence that they will say with pride and respect: I am a citizen of Bosnia and Herzegovina.”⁵¹ Equally, for political scientist Nerzuk Ćurak, constitutional patriotism is “an identification with a state in which you live, but not based on some myths or historical dwellings [sic], but rather based on the loyalty of the state towards its citizens, and their loyalty towards her.”⁵² Others, such as a civic leader from Tuzla, the most multiethnic region in Bosnia, demand constitutional reform that would pave the way toward “a constitutional patriotism of the citizens of Bosnia and Herzegovina toward this state.”⁵³

In addition to scholars and public intellectuals, religious leaders such as Bosnian Grand Mufti Mustafa Cerić, have also voiced support for constitutional patriotism in Bosnia and Herzegovina, a pronouncement received with close attention from theorists of constitutional patriotism, such as Kim Lane Scheppele and Jan-Werner Müller.⁵⁴ Cerić’s

⁴⁹ Stranka Za Bosnu I Hercegovinu, *Programska orijentacija Stranke za Bosnu i Hercegovinu* (Program Orientation for the Party for Bosnia and Herzegovina), available at: <http://www.zabihana.com/sadrzaj/programska-orientacija-stranke-za-bih.html> (last accessed: 23 December 2011).

⁵⁰ Stranka Demokratske Akcije, *Political Declaration as adopted on the 5th Party Congress*, available at: http://sda.ba/download/PROGRAM_DECLARATION_5TH_CONGRESS.pdf (last accessed: 23 December 2011).

⁵¹ Interview with Professor Zdravko Grebo, “Potrebno je samo da s poštovanjem kažemo da smo građani ove zemlje,” (“You just have to respectfully say that we are citizens of this country,”) RADIO STUDIO 88, Nov. 25, 2008, available at: <http://www.studio88.ba/bh/38/bih/11804/> (last accessed: 23 December 2011).

⁵² Omer Karabeg, *BiH-zemlja zamrznutog konflikta* (Bosnia and Herzegovina: A country frozen in conflict), RADIO FREE EUROPE, <http://www.slobodnaevropa.org/content/article/1371186.html> (last accessed: 23 December 2011).

⁵³ FORUM GRADJANA TUZLE, available at: <http://www.forumtz.com/bos/vijest21.html> (last accessed: 23 December 2011).

⁵⁴ Jan-Werner Müller & Kim Lane Scheppele, *Constitutional Patriotism: An Introduction*, 6 *ICON* 67, 67 (2008).

attachment to the underlying values of constitutional patriotism appears dubious, however, in light of his pronouncements elsewhere. Ironizing the existing Bosnian constitutional framework, Cerić, somewhat wistfully, declared:

It is now completely obvious that all ethnic groups of the former Yugoslavia—Slovenians, Croats, Macedonians, Montenegrins and soon, Albanians—realized their exclusive right to their home- and nation-state. Obviously, only the state of Bosnia and Herzegovina, where Muslims are in the majority, ought to have ... a tribal and not a civic constitution.⁵⁵

In light of this statement, civic constitution—and constitutional patriotism—appear less as a means of achieving universalistic values than as a stratagem for achieving what, in Cerić's words, was denied to Bosnian Muslims: their own nation-state.

Does this self-interested strategic invocation, coupled with conceptual confusion, militate against constitutional patriotism in deeply divided societies? A theorist of constitutional patriotism may argue that such meshing of civic nationalism with constitutional patriotism is accidental and does not impinge on the theoretical value of constitutional patriotism. Civic nationalists seek to develop an attachment to a nation, understood not in an ethnic sense, but rather as a community of equal citizens. Constitutional patriotism, on the other hand, seeks to establish allegiance not to a nation—no matter how defined—but rather to a constitution, as a repository of universal, albeit contextualized principles. But that constitution (and the principles it embodies) applies to a referent; the “constitution” of constitutional patriotism regulates the political life of a “community,” or establishes the principles for attaining the “common good,” and obviously applies to some “country.” It is a short step from these unitary referents to that of invoking the idea of a “nation,” as a standard part of any modern constitutional imaginary.⁵⁶ We might shirk from invoking a Bosnian civic nation, but if pressed we would still be incapable of explaining the difference between a community of citizens having allegiance to the Bosnian constitution, and a community of citizens understood as a Bosnian civic nation. Since constitutional patriotism doesn't abandon the vocabulary of a political community, it can legitimately be seen as closely related to civic nationalism. And subtle theoretical alterations, such as Shabani's, that constitutional patriotism actually “resists creating a fixed identity altogether” cannot paper over the fact that *some* identity, at some point will be created.⁵⁷ The fact that it isn't *fixed* is of little consolation to those who find themselves unwillingly captured in a

⁵⁵ Eldin Hadžović, *Reisov Manifest [Reis's Manifesto]*, 619 BHDANI,, Apr. 24, 2009, available at: http://www.bhdani.com/default.asp?kat=kol&broj_id=619&tekst_rb=1 (last accessed: 23 December 2011).

⁵⁶ Some constitutionalists, for example, use the two terms indistinguishably. See Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Post-Conflict State*, 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 301, 316 (2010).

⁵⁷ See Shabani, *supra* note 2, at 441.

particular territorial order. And while an identity won't remain fixed *forever*, the territorial boundaries of a state necessarily constitute an imagined spread of symbolic possibilities within which any identity formation can fluctuate. To put it differently, no amount of boiling will turn celery and carrots into tomato soup.

In a multinational setting, both civic nationalism and constitutional patriotism are often used by the state's ethnic majority to justify a specific constitutional design that would translate that group's demographic position into political power. Users of such rhetoric conveniently forget that "civic" and "ethnic" nationalisms are less empirical realities than rhetorical resources used to assume the moral high ground over one's opponent. An external decision about which set of boundaries to endorse—such as the decision to recognize Bosnia in its administrative boundaries—directly empowers *majorities* in the units designated for autonomy or independence to assume the stance of good civic nationalists or—constitutional *patriots*. Thus, adherence to the constitutional patriotism/civic nationalism political agenda disregards the manner in which Bosnia and Herzegovina came to be an independent state, and simply asserts that Bosnia is "older" than any of its component nations.⁵⁸

The flipside of hegemonic invocation of constitutional patriotism in a multinational context is that everybody can invoke it (or the gist of it) for their particularistic purposes as long as the invocator's group forms a majority in the referent territory. Constitutional patriots are aware of this. Soltan, for example, claims that constitutional patriotism can be directed toward many different objects of loyalty, but only when it can be simultaneously directed toward a universal civilization.⁵⁹ Constitutional patriotism can be grafted onto any political unit, and any political project, so long as there is an appropriate territorial referent that enables politicians who, when speaking of constitutional patriotism, use it to invoke the inclusive "people of:" the people/citizenry of Bosnia, the people of the Serb Republic in Bosnia, the people of Canada, the people of Quebec, instead of the sectarian *adjectival* people: Serb, Québécois, Croatian people. And as the political dynamic in Bosnia and Herzegovina shows, universalistic ethical principles can be parasitic—as more or less sincere rhetoric—upon any claim in the volatile constitutional politics in deeply divided societies.⁶⁰ For example, while Republika Srpska has often been portrayed as a result of the

⁵⁸ This hegemonic invocation doesn't need to have a solely domestic side. If constitutional patriotism is defined against its ethnic other, and if that ethnic other is constructed through the external endorsement of a particular territorial distribution, then, in a particular context constitutional patriotism serves the purposes of those who, from the outside, have an interest (and not only an unselfish desire) to maintain a territorial status quo. The practical consequences of such a stance may be good or bad, but at least—at a theoretical level—we would do well to acknowledge that constitutional patriotisms structurally depend on 'invisible' actors who enable it to configure itself as an alternative to vicious ethnic nationalism.

⁵⁹ Soltan, *supra* note 34, at 96.

⁶⁰ Perhaps, for this reason, recent writings on constitutional patriotism among Sarajevo intellectuals offer only qualified support for the constitutional patriot project. For Esad Zgodić, constitutional patriotism can equally be

genocidal policies of war-time Bosnian Serb leadership, a new generation of more adept (hypocritical?) Serb politicians has employed more inclusive rhetoric that does not smack of ethnic nationalism. Responding to alleged attempts on the part of Bosniaks to achieve hegemony within Bosnia and Herzegovina, Milorad Dodik, the Prime Minister of Republika Srpska, has stated that the status of the RS doesn't depend on the will of Bosniak politicians but on the "will of the people who live in Republika Srpska, which also means Bosniaks who live here."⁶¹

As a result, any verdict on the practical impact of constitutional patriotism must be negative. Constitutional patriotism is both prone to hegemonistic manipulation, and simultaneously available to any intelligent contender. Its potential inflammatory effects ('why constitutional patriotism in your unit, and not in mine?') and its practical incapacity to discriminate between political projects ('I can be a constitutional patriot in the same way you are') compound the theoretical problems discussed in the previous section. If this is the case, what is the alternative?

D. The Alternative: Toward Unencumbered Agonism

The previous discussion suggested that we cannot count on ethnocultural justice or its proxies in the form of a reasonable person to stabilize a proto-polity and create a field in which constitutional patriotism can operate. We *could* follow Bobbio and Weiler and prescribe an ethos of acceptance, timidity and meekness as a moral ideal that would prescribe a 'new man' of constitutional patriotism. Though highly unrealistic—and going against the grain of political and constitutional theory that 'takes men as they are' (Rousseau), and who are 'not angels' (Madison)—'meekness' would at least provide constitutional patriotism with an axiomatic and unequivocal starting point. The recent wave of constitutional patriots, such as Müller, have themselves counseled moderation – not in relation to a citizen's character, but with regard to the theoretical ambition of constitutional patriotism. While applauding the reluctant thrust of such an understanding of constitutional patriotism, this essay gestures toward an alternative stylization of constitutional politics.

grafted onto the Dayton constitution of Bosnia and Herzegovina, which, for him, would be morally unacceptable given the war crimes and ethnic cleansing that led to the current internal territorial division of the country, entrenched in this constitution. Instead, his understanding of constitutional patriotism's promise—echoing Shabani's theme of reasonableness—gestures towards patriotism's potential to liberate the country from "malevolent irrationalism" of nationalism and "'custom-based' patriotism." See Zgodić, *supra* note 2, at 23-4.

⁶¹ Interview with Milorad Dodik, "Mi svoj put znamo," FOKUS, Banja Luka, published on the GOVERNMENT OF REPUBLIKA SRPSKA WEBSITE, available on file with the author.

Such constitutional politics would equally take ‘men as they are,’ and accept that the discourse of justice is of limited relevance, but would also take on board some of the less articulated aspirations of constitutional patriotism. I will call the sketch of this proposed model *unencumbered agonism*. Unencumbered agonism is inspired by the writing of James Tully, but as will immediately become apparent, my proposition qualifies some of Tully’s arguments, frontlines some of his more implicit claims, and takes into account the critiques his theory has encountered, engaging in the end the preceding discussion of constitutional patriotism.

Engaging a diversity of philosophical traditions, Tully’s agonism is a constitutional theory that places the *struggle* for political recognition—and not meek surrender, nor the pursuit of normative consensus—at the centerpiece of political life and theoretical inspection. A proponent of agonism maintains that political conflict cannot be resolved outside of the struggle itself, by invoking counterfactual heuristic devices such as a social contract, or by trying to deduce what universalistic principles would demand in a particular case. *Prima facie*, then, agonism seems more fitting to the realities of multinational polities, than does constitutional patriotism.

My sketch subscribes to Tully’s general argument, but departs from it in several ways. The first is that unencumbered agonism doesn’t share the tenor of Tully’s argument. Tully has pointed out that the struggle can take the form of ‘agon,’ the chivalrous competition between participants in a constitutional game of striving for political recognition. Tully finds inspiration for his articulation of agonism in the spirit of the Olympic games. The “[y]oung Olympian athlete,” writes Tully, “greet[s] the dawn’s early light with a smile, rises, dusts herself off, surveys her gains and losses of the previous days, thanks her gods for such a challenging game and such worthy opponents, and engages in the *communicative-strategic agon* anew.”⁶² A problem with this metaphor is that it suggests that noble contest should be seen as one of the virtues of constitutional democracy. But, as political life in many pluralist societies demonstrates, political actors do not necessarily perceive their activity as a sort of sport.⁶³ And, even if they do, they do not wish to be engaged in it all of the time. Ancient and modern, Olympics take place at regular intervals. However, our agonist—a Bosnian, Serbian or Croatian politician—may decide when to pick a fight, but not when and how to end it. Therefore, we should simply acknowledge, rather than celebrate, the inescapable feature of ongoing political struggle to constitute and re-constitute political communities.

⁶² James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideas of Constitutional Democracy*, 65 MLR 204, 219 (2002).

⁶³ As Patchen Markell rightly argued “[t]he maxim, ‘it’s not whether you win or lose,’ only goes so far, especially in politics.” PATCHEN MARKELL, *BOUND BY RECOGNITION* 33 (2003).

More importantly, unencumbered agonism takes constitutional struggle across the boundaries of an existing polity. Tully does admit this when quoting Foucault approvingly, he claims that political activity is never closed off by a frontier, and that those engaged in these struggles participate “at a multiplicity of sites,” both domestic and international.⁶⁴ If this is indeed so, how can Tully claim that those who ultimately make a constitutional decision are “citizens who are affected?”⁶⁵ Does positing the ultimate decisional authority with the citizens of an existing polity presuppose the normative legitimacy of an existing polity? If so, then doesn’t constitutional agonism suffer from the same territorial challenge as does constitutional patriotism?

In this regard, I agree with Emiliios Christodoulidis’ and David Armitage’s critique of Tully. For Christodoulidis, the “asking price” for meaningful agonistic constitutional politics is that the basic structure that provides the framework for agony and deliberation is not put at stake.⁶⁶ Even in Olympic sporting events there are referees and level playing fields. Christodoulidis argues that “the case for constitutionalism as perpetual transgression is to ignore how the rules of recognition, which pin down jurisdiction and constituency, must be kept fast. To claim otherwise is to stretch the constitutional moment to the breaking point and undo what it is we achieve through it.”⁶⁷ Equally, for Armitage, Tully’s “practice of civic freedom implies, at the very least, the existence of a *civitas* within which all agents may conduct themselves as a *cives*.”⁶⁸

In order for Tully’s constitutional project to succeed, there must exist if not an ultimate decider who decides who the ‘*cives*’ is, then at least a tacit *underwriter* of the provisional territorial field of the constitutional game, even if this game is endless and open-ended. While granting that the constitutional struggle is ‘not closed off by a frontier,’ neither Tully nor other theorists who celebrate agonism emphasize that the field of constitutional struggle is enlarged to encapsulate actors, forums and normative spaces outside of the distinct constitutional order. This is understandable, because Tully’s lens is chiefly on Canada, a vast, Western liberal democracy, which has experienced little external constitutive pressure.

Needless to say, the constitutional context in Bosnia and Herzegovina is markedly different. Even a cursory look at the Bosnian constitutional agon reveals how the space of

⁶⁴ JAMES TULLY, 1 PUBLIC PHILOSOPHY IN A NEW KEY: DEMOCRACY AND CIVIC FREEDOM 139, 141, 154 (2008).

⁶⁵ *Id.* at 175.

⁶⁶ Emiliios Christodoulidis, *Constitutional Irresolution: Law and the Framing of Civil Society*, 9 ELJ 401, 416 (2003).

⁶⁷ *Id.* at 426.

⁶⁸ David Armitage, *Probing the Foundations of Tully’s Political Philosophy*, 39 POLITICAL THEORY 2011, 124, 127 (2011).

the constitutional struggle is enlarged, and that the putative ‘referees’ cannot stay above the fray. The ultimate political and legal authority in Bosnia, the Office of the High Representative—“the referee,” for all intents and purposes—is challenged not only domestically in Bosnia, but increasingly internationally, in the locales of the United Nations and other great powers.⁶⁹ The government of the Serb entity in Bosnia has taken the constitutional struggle outside of Bosnia and Herzegovina, complaining to the UN Security Council that the Office of High Representative endangers prospects for political stabilization and the rule of law. Conversely, other domestic actors, such as Bosniak political parties, have invited international ‘referees’ (i.e. the Office of the High Representative) to continue their participation in the agon, and remain in Bosnia as a state-builder, setting it irrevocably toward integration into EU-NATO structures.⁷⁰

If the field of the struggle—the territory—is accepted in Bosnia and Herzegovina, it is not because of its normative salience. Rather, what “pins down the constituency,” to use Christodoulidis’ term, is nothing but a recognition of geopolitical fiat—that is, the power differential that makes challenging territory practically unfeasible, if not normatively unjustified. Unlike constitutional patriotism, which inadvertently leads us to neglect the larger context of geo-constitutional struggle, unencumbered agonism enlarges our political vision, and may, one can hope, make political struggle in deeply divided states more self-aware, and by implication, more prudent.

However, there is an underlying assumption in agonism that should be made more explicit. If the political struggle that challenges the inherited territorial frame is to be considered legitimate, and if the demands of political *qua* ethnocultural justice are inadequate as a reliable guide, as I have argued above, then under-articulated political desires for greater autonomy, even secession, enjoy *prima facie* legitimacy. In other words, unencumbered agonism, to be a legitimate stylization of constitutional politics in deeply divided states, must go hand in hand with what I would provisionally label here as “democratic reductionism.”⁷¹ Demands for greater autonomy must be engaged not because they are

⁶⁹ *Second Report of Republika Srpska to the United Nations Security Council on the Situation in Bosnia and Herzegovina*, 2219/09 (2009).

⁷⁰ “Sulejman Tihić repeated the position of SDA that the OHR has to stay in Bosnia and Herzegovina until it is ... capable to function independently and fulfill its obligations on the road towards the full membership in NATO and the EU.” [translation mine] Official Website, PARTY OF DEMOCRATIC ACTION, available at <http://www.sda.ba/vijest.php?id=626> (last accessed: 23 December 2011).

⁷¹ I won’t elaborate further on the idea of ‘democratic reductionism’ in this article. However, I will remark that support for it may come from diverse political and legal traditions. Hans Kelsen, a legal positivist, known cosmopolitan and a pacifist, argued for the satisfaction of national demands wherever possible. See for example, HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS, THE OLIVER WENDELL HOLMES LECTURES, 1940-41*, 141, 163 (1948). From within a liberal tradition, on the other hand, Richard Flathman constructs the concept of ‘willful liberalism’ that embraces the legitimacy of under-argued, opaque political desires. See RICHARD FLATHMAN, *WILLFUL LIBERALISM: VOLUNTARISM AND INDIVIDUALITY IN POLITICAL THEORY AND PRACTICE* (1992). Finally—and more directly

deserved (recall, from the perspective of ethnocultural justice we cannot reliably gauge what different ethnonational groups actually “deserve”), but because they are *willed*, and yet at the same time are themselves willing to engage the interests of the other side.

By naming the implicit imperative to satisfy autonomist political desires “democratic reductionism,” I also highlight a tension in Tully’s account. On the one hand, Tully demands that challengers to an existing constitutional arrangement “present reasons for why current forms of recognition are unacceptable.”⁷² Equally, he asks that “dissenters remain attached to their democratic society” because they know that their loss is temporary. Finally, Tully posits the principle ‘*quod omnes tangit*’—what concerns all should be approved by all—at the centre of constitutional agonism.

On the other hand, Tully claims that demands for greater autonomy must be accommodated, such that the desirable tendency of the constitutional agon should be toward satisfaction of autonomist demands, even if there is no wider consensus. As long as there is internal consensus within the minority itself he writes, “it is not necessary for the final decision to be made by a majority or by a consensus of all affected.”⁷³ Tully argues that letting the majority decide would be ‘unfair,’ and that asking for consensus would be ‘utopian.’ But, by judging a certain decision to be ‘unfair’ isn’t Tully in fact smuggling in an idea of what justice requires in deeply divided states? If my earlier argument about the problematic usefulness of the idea of ethnocultural justice is persuasive, I think that the only way to justify agonism is by positing democratic reductionism as its animating principle. Respecting nude democratic desires is precisely the spirit of the Canadian *Secession Reference*, a judgment that figures prominently in Tully’s account. The Supreme Court of Canada didn’t ask Québécois to ‘explain themselves,’ to answer why exactly do they need secession, or what they plan to do with their independence. Instead, the Court posited *prima facie*, a priori legitimacy of secessionist pursuits, demanding that participants in the federation negotiate in good faith—not over secession, but over its terms.

At this point, I would like to offer three qualifications. The first anticipates an objection to my putative permissiveness toward political radicalism. I do not believe that democratic reductionism is a royal road to extreme nationalism. To the contrary, the *prima facie* legitimacy of democratic desires for greater autonomy is not anchored in any pre-packaged concept that may be complicit in categorical agendas, such as popular sovereignty or self-determination. Democratic reductionism, I would argue, does not create a legal and

relevant to the project—there are theories of secession that build on the idea of individual autonomy to justify reconfiguration of political boundaries. See generally CHRISTOPHER WELLMAN, *A THEORY OF SECESSION* (2005).

⁷² TULLY, *supra* note 52, at 212.

⁷³ *Id.* at 177.

political *entitlement*. Rather, it legitimizes a radical *aspiration*, and indicates the direction in which political negotiations should be moving. In fact, unencumbered agonism shares in constitutional patriotism's desire to 'make affect safe for democracy.'⁷⁴ But it does so not by concocting an affective and intellectual attachment to a constitution, or by imploring citizens to be 'reasonable', but rather by *airing* those radical desires and subjecting them to prudential yardsticks of viability and mitigation of violence.⁷⁵ In such a way, those radicals will not, as Honig complains in the case of constitutional patriotism, be minoritized into silence and aggression, but will be given a genuine opportunity to 'discharge' their resentment.⁷⁶ Having said this, allow me to clarify: by remaining open to nationalist agendas, unencumbered agonism does not retreat into prescribing homogenizing national(ist) polities, not even in the form of liberal nationalism. What emerges out of constitutional struggle may not be separate nationalist mini-states, but actually a renewed awareness of being 'stuck together' by the realistic impossibility to extricate oneself from the common constitutional framework.⁷⁷

Second, I do not claim that participants in political struggles will not invoke the tropes of justice, fairness and expediency. While following Tully, I would like to also clarify that those claims are parasitical upon the deep structure of constitutional agon. In a sense the metaphor of agon is actually quite fitting: constitutional politics is not, and cannot be, a political theory seminar injected with concerns of ethnocultural justice, but rather something akin to 'constitutional' jiu-jitsu. Wrong footing, causing paralysis in the political system, taunting and throwing off balance (and thus delegitimizing), is the true content of an agonistic repertoire, and not pursuit of normative consensus. "Eristic," "permanent provocation," and even "occasional rebellion" are, as Tully rightly notes, inescapable features of constitutional agonism.⁷⁸ If compromise emerges, it emerges not out of a sense of what justice requires, but rather as a result of a political war of attrition, where compromise arrives either as a result of fatigue, or out of surrender to a political calculus of violence.

⁷⁴ Theorists of agonism are generally keen to distinguish themselves from more rabid nationalists. Agonism, for Chantal Mouffe, for example, is a progressive step away from ant-agonism, implicit in nationalist sectarian struggles. See CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* 117, 133 (2005).

⁷⁵ Responding to speculation about a potential decision about holding a referendum on secession of Republika Srpska, Bosnian Serb politician Nikola Špirić, currently the Bosnian prime minister, said: "What would such a referendum mean anyway, if nobody recognized it?" RADIOTELEVIZIJA SRBIJE (Jan. 20, 2010), available at: www.rts.rs (last accessed: 23 December 2011).

⁷⁶ TULLY, *supra* note 52, at 181, 183.

⁷⁷ For an interesting neo-republican articulation of a community of fate, a community of individuals connected not through normative ideals but rather by a simple fact of being 'stuck' together, see HERMAN R. VAN GUNSTEREN, *A THEORY OF CITIZENSHIP: ORGANIZING PLURALITY IN CONTEMPORARY DEMOCRACIES* (1998).

⁷⁸ *Id.* at 147, 163.

Third, while I argue that democratic reductionism enjoys *prima facie* legitimacy, engaging the important deep-structure aspiration of constitutional patriotism is inevitable. If unencumbered agonism doesn't share constitutional patriotism's "fondness for deliberation, for error-correction mechanisms,"⁷⁹ it still acknowledges the importance of the not-so-explicit aspiration highlighted in the preceding discussion of Habermas and Müller: "widening circles of inclusion." If participants in unencumbered agon understand that the field of constitutional struggle is wider than the territorial boundaries of a state, then they also understand that the fortunes of those who make radical demands on the status quo will improve if they align themselves with a project of social inclusion.

But doesn't this acknowledgment immediately discredit any radical political movement that seeks to achieve *greater* autonomy, or even separation? Not necessarily. In fact, explicitly stating this ideal will bring more honesty to political life than a strategic invocation of constitutional patriotism, irrespective from which side it comes. For example, if Bosniak political and intellectual elites claim a commitment to the ideal of pan-Bosnian social inclusion, as opposed to morally vacuous and dangerous pursuits of political autonomy on behalf of Croats and Serbs, then, in principle, they should have nothing against enlarging the scope of social inclusion, not only to encompass Bosnia as a whole, but also to include a wider political, neo-Yugoslav unit comprising Bosnia, Croatia and Serbia. The fact that these are three formally independent countries cannot weigh against the principled invocation of what is essentially a moral aspiration. Equally, if Bosnian Serbs pursued their autonomist demands, they would need to find innovative rhetorical strategies to offset claims that this would diminish overall social inclusion. They would need either to link their consent to deeper intra-Bosnian integration with demands for wider, regional Yugoslav integration, or to show how a political reconfiguration of boundaries that would serve their interests, does not ultimately violate the principle of social inclusion. Whether this latter tack is possible remains an open question.⁸⁰ In any event, unencumbered agonism intersects with constitutional patriotism in that it is, irrespective of the assumption of democratic reductionism, "open to more encompassing units."⁸¹ Unlike constitutional patriotism, however, it allows for testing of the sincerity of

⁷⁹ Soltan, *supra* note 34, at 99.

⁸⁰ One argument could be that even if the scope of territorial solidarity would diminish, it would be offset by the larger involvement of the nascent polity in providing international aid. Pre-empting the objection of selfishness seems to animate the position of the Scottish National Party, which advocates the secession of Scotland from the United Kingdom. The SNP International Development spokesperson has, for example, claimed that "SNP share[s] [the] ambition and look to the example of other small nations such as the Norwegians, the Irish and the Danes *who punch way above their weight* in making a positive contribution. "It's Time for a Say on International Aid," THE SCOTTISH NATIONAL PARTY OFFICIAL WEBSITE (Mar. 27, 2007), available at: <http://www.snp.org/press-releases/2006/it2019s-time-for-a-say-an-international-aid/view?searchterm=international> (last accessed: 23 December 2011) [emphasis added].

⁸¹ Soltan, *supra* note 34, at 98.

'patriotic' claims for ever-increasing social inclusion.

E. Conclusion

Through cataloguing existing defenses of constitutional patriotism, exploring new potential avenues, and noting its retrenching moves, the first aim of this article was to counsel a renewed vigilance against constitutional patriotism in the context of deeply divided states. I argued that constitutional patriotism is, by and large, incapable of responding to the question that logically precedes the constitution of political institutions: the constitution of territory. Though this is increasingly understood among constitutional patriots, my lateral argument was that there may be a theoretically sound way to justify constitutional patriotism, even when it is confronted with the territorial challenge. Instead of trying to construct normative arguments, or conceptual devices that would paper over initial arbitrary territorial inclusion, constitutional patriots might posit a virtuous character, as an axiomatic starting point: a meek constitutional patriot who, by definition, would not hold a grudge against arbitrary inclusion in an undesired political community.

While such an approach is theoretically not unattractive, I proceeded in the opposite direction. Engaging with the work of James Tully, I proposed a more fitting theory for deeply divided states such as Bosnia and Herzegovina. Following Tully, I called that approach unencumbered agonism; a constitutional theory that focuses on the inescapable struggle over all aspects of constitutional existence—including territory. Finally, I argued that while constitutional patriotism and unencumbered agonism are theoretical opposites, they may productively intersect. Those who participate in the constitutional agon in the name of more autonomy, will still need to confront the ideal implicit in constitutional patriotism: to enlarge, and not to diminish levels of social inclusion and solidarity.