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The Kantian Idea of Constitutional Patriotism
Part 1: Constitutional Patriotism and Revolution

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Abstract: The notion of constitutional patriotism defended by Jürgen Habermas and Jan-Werner Müller is articulated here. It is argued that constitutional patriotism needs to be grounded in the Kantian idea of a constitutional republic especially as that Kantian idea is developed by Ernst Cassirer and Karl Jaspers. This conception of the Kantian idea of constitution gives rise to a distinctive reading of the foundations of the constitution and of constitutional patriotism. It is also grounded in a distinctive, fundamentally public and agent-based, as well as historical, reading of Immanuel Kant and of Kant's whole work including especially *The Conflict of the Faculties*. Kant's notion of a revolution in thought and politics in *The Conflict of the Faculties* is discussed in relation to Karl Jaspers' *Die geistige Situation der Zeit*, to Ernst Cassirer's *Die Idee einer Republikanischen Verfassung*, and to Michel Foucault's "What is Revolution?"

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Constitutional Patriotism

According to constitutional patriotism, political attachments should center on the norms, the values and, indirectly on the very law-governed procedures that constitute a liberal democratic constitution.[1] "Constitutional Patriotism" is a term that notably Jürgen Habermas has taken up in order to characterize fidelity to the constitution of a nation or to the constitution of a multinational body.[2] The conception of constitutional patriotism was especially attractive to the public in Germany in the mid-1980s. Habermas promulgated the concept of "constitutional patriotism" at a time in Europe and in particular in Germany when even generations after the horrors of WWII, Europeans and especially Germans wished to avoid traditional nationalism yet also saw the value of participating in and to some extent identifying with a political community that was more narrowly defined than the cosmopolitan global community of humanity. Discussion of constitutional patriotism seemed perhaps particularly relevant to the case of the European Union, which, in the absence of a shared ethnicity, history or culture, would need to forge a sense of political identity that is at least partially independent of those contingent differences. More recently, the very structure of the European Union in

[1] This essay has greatly benefited from collaboration with my students, especially from suggestions and edits by Patrick Ryan and Christopher Spano.

[2] For example, Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy*, Cambridge, MA: MIT Press 1996, pp. 491-515.

the allegiance of its member states to its constitutional structure has come under attack with the threat of the Greek exit from the European Union and shortly thereafter the realization of the exit of Great Britain from the European Union. But even the more unitary structure of a Great Britain, Spain, Belgium, and Germany and other member nations of the European Union has come under increased pressure from the many fundamental ethnic, racial, cultural, and political divergences that lie just below the surface of the national identity that those nations initially seemed to present to the outside world and that they have forged or reforged in the wake of World War II.[3] In sympathy with Habermas, Jan-Werner Müller defends the notion that political attachment can be based on liberal norms rather than on ethnic or so-called racial ties.[4] Ties of blood or race are based on false and destructive mythology. And even ethnic, religious or other social ties are not an adequate basis for a modern state, as they rely on too much homogeneity of ethnic, cultural, and or religious background. For Müller, constitutional patriotism does not mean ignoring history or ethnicity in defining a political community. Critics of the concept of constitutional patriotism, such as, for example, Andrea Baumeister,[5] have falsely suggested that the notion of constitutional patriotism commits one to ignoring such substantive social commitments. Instead, Müller argues, the ethnically, culturally and religiously diverse background of the population of a country is compatible with the unification of those differences under a constitution-based sense of national identity. This national identity is one that is not tied to uniformity of religious, cultural or ethnic backgrounds, but it is based on a loyalty to the constitution that governs the state and the people living in that nation. People of very diverse backgrounds can be brought together by the idea of loyalty to a constitution. Constitutional patriotism is taken by Müller to mediate between the universal and the particular, yet it requires a background theory of justice and a common form of mutual respect among free and equal citizens. Such mutual respect necessarily involves agreement on lawmaking procedures. Those procedures of lawmaking are themselves capable of containing disagreement. Those procedures and the space for agreement and disagreement that they institute provide the basis for a common constitutional culture. That shared constitutional culture generates allegiance through judgments that reflect on the very context in which those judgments are made. Müller's constitutional patriot owes fidelity to the procedures for self-legislation that enable one to make judgments about one's current situation with one's fellow citizens. Participating in such public conversations is the means by which one identifies as a citizen, and also properly expresses patriotism.

While Müller's account is attractive, it seems to me by contrast that a different worry above all in the United States is that it is very difficult to pry apart the principles that truly underlie the constitution from false mythologies about the constitution. In the United States, up to and including the Supreme Court and the different branches of government, fundamentally divergent conceptions of what the meaning of the constitution is and how to understand its fundamental principles obtain and there are no common principles that allow for more than illusory agreement and disagreement.

In the United States, the threat to national identity from centrifugal racial, social, cultural, regional, political and religious differences and authoritarian tendencies has never been more pronounced nor the threat to the constitutional fabric of the country more present. Fidelity to the idea of the constitution becomes ever more important as efforts are made, efforts with a long history to them, a history going back to the beginnings of the Republic, to draw on the very anti-democratic and sectarian and regional and anti-egalitarian tendencies in the original constitution that lead to the disenfranchisement of women, of those who did not own property, of native Americans and the recognition of slaves (who were to count as a fraction of a person for the purpose of the census and better representation of slave states in the Congress).

The present rise of fascism—overlapping with kleptocracy, bureaucratic central state-communism, militarism, religious sectarianism, totalitarianism, and hostility to culture and science—now poses a challenge to democracy unequalled since the 1930s, to the authority of constitutional norms, and to a political identity grounded in adherence to constitutional norms

[3] Mattias Kumm, "Why Europeans Will Not Embrace Constitutional Patriotism," *International Journal of Constitutional Law* 6/1 (January 2008), 117-136. Kumm took up the issue of constitutional patriotism in the light of the no votes on the European constitution.

[4] Jan-Werner Müller, *Constitutional Patriotism*, Princeton, NJ: Princeton University Press, 2007.

[5] Andrea Baumeister, "Diversity and Unity: The Problem with 'Constitutional Patriotism,'" *European Journal of Political Theory*, 6/4 (October 2007), 483–503.

and the norms of international law. At the same time, Étienne Balibar suggests that constitutional patriotism cannot be divorced from cosmopolitanism:

> Basic disagreement over how to interpret the relationship between cultures, religions, and public institutions are well and truly *cosmo*political, in that they crystallize, in a specific national microcosm that is open and unstable, elements drawn from the whole world and its millennial history. Under contemporary conditions, the harder we try to close a "national" problem in on itself, the more we denature and destabilize it. That is plainly the logic of the unrest that has been erupting in what might be called the "global suburbs," where the upshot of migrations, diasporas, colonization and decolonization is that encounters between different cultural heritages and religions have become everyday realities, as have, consequently, the conflicts between them—all this against a backdrop of massive inequalities in social status and institutional recognition. The whole social formation is concerned by these clashes, their localization in the "suburbs" notwithstanding.[6]

Constitutional patriotism faces two problems. Given disagreements about the meaning of the constitution and the tendency to confuse mythologies about the constitution for the constitution itself, the question becomes to what the constitutional patriot owes fidelity. Second, as centrifugal forces make more pronounced the differences between citizens, the question becomes what it means to share and identify with one's fellow citizens. Put otherwise, how can a shared identity as a citizen encompass the varied individual identities of those who form the citizenry?

The Kantian idea of a constitution affords solutions to these two problems. The notion of a constitution cannot be limited to the particularities of a particular text (for example, Britain lacks such a text) or even to a particular national culture. The understanding of the document and of the political culture in which that document is invested (if a constitutional document exists) must be held up to a standard that is grounded in the citizens' very abilities to engage with each other politically, economically, and socially and to form a conception of self. Kantian constitutional patriotism is not patriotic to the original text of the constitution, but to the underlying idea behind the constitution, the idea that gives it systematic and also historical unity through changing amendments to the written constitution, the idea of constitutional and representational self-government. In what follows, I provide an account of the Kantian idea of a constitution, trace its development, and then I articulate how constitutional patriotism properly grounded in the Kantian idea of a constitution compensates for inadequacies in alternative conceptions of constitutional patriotism.

Karl Jaspers, Immanuel Kant, and the Idea of the University

Karl Jaspers puts the Kantian idea (*die Idee*) front and center in his work going back to his *General Psychopathology*. Jaspers concludes his *Psychologie der Weltanschauungen* with an appendix where he develops the different senses of idea (*Idee*) in Kant's critical works and where he shows how these different senses are systematically related.

Searching for a means to understand the present moment in a way that would enable Germany, and Europe more generally, to address its post-war problems and the prospect for continued conflict that those problems pose, Jaspers turned to the idea of a community of scholars whose concern was to advance citizens' freedom.[7] His work on *The Idea of the University* starts from an argument that is at the core of one of Kant's final works, *The Conflict of the Faculties*, a work by Kant that is profoundly political and that also puts the role of the non-professional school in the university (the old philosophical faculty) and the role of the scholar, scientist, and especially the philosopher front and center in the establishment and in the public defense of truth and of the welfare of the whole person and of the whole body politic in the public sphere, while assigning to the faculty of religion a concern for spiritual welfare; of law for social welfare; and of medicine, for physical welfare. In the university, it is especially the philosophical faculty that is responsible for the public articulation of truth. Kant does not recognize the authority of the professional faculties of theology, law, and medicine to establish the truth proper even to their own domains independently of the government interest and self-interest that motivates them. The university has arisen in response to rather narrow self-interest and a felt need by the state in particular historical circumstances, but

[6] Étienne Balibar, *Secularism and Cosmopolitanism: Critical Hypotheses on Religion and Politics*, New York, NY: Columbia University Press 2018, p. 19.

[7] Karl Jaspers, *The Idea of the University*, ed. Karl W. Deutsch, transl. Harold A. T. Reiche and H. F. Vanderschmidt, Boston, MA: Beacon Press, 1959.

the university nevertheless embodies an a priori idea for Kant that gives systematic structure to the university. The overall structure of the university is governed by the systematic pursuit of the welfare of society through research, learning and instruction. Kant ascribes to the philosophical faculty and especially to philosophy a special status in the pursuit of spiritual, social and physical welfare, to recognize and publicly to express the core of truth and of the good requisite to restraining the confusion of narrow and fleeting self-interest with action that is truly for the welfare of each and all. Jaspers follows Kant in this, and perhaps even more significantly in seeing a seminal role for the philosopher in the public sphere, but he does so in the sense of his own understanding of Kant as the "indispensable philosopher"; for Jaspers "to go back" to Kant would mean to "look for the source" of Kant's philosophy and "to go beyond" Kant is "to enter into the movement of Kant's creative thinking, to let it act within one's own self in the new situation."[8] In the philosophical faculty, it is especially the philosopher, indeed in Königsberg, Kant himself, who is set the critical task of the public defense of truth and the public articulation of what matters to us most fundamentally.

Constitutional patriotism, and its very idea, and thus the idea of a distinctively Kantian constitutional patriotism, has become especially relevant to the post-WWII era (to what Jaspers refers to only in translation as the "modern age" but is more accurately rendered as the political-cultural situation of the time), the very idea of Kantian constitutional patriotism is perhaps more relevant than it has been at any time since the late teens, twenties, and thirties of the last century when Jaspers wrote *Die geistige Situation der Zeit*.[9] In its introduction, Jaspers alludes to the importance of the French Revolution for the development of "a specifically new epochal consciousness of time [and of the times]." The new consciousness involves auspicious beginnings and "prospects for the beginnings of a great future" coupled with the "horror before the abyss from which there is no salvation" (*GSZ* 10). The new epochal consciousness of time and of the times is a mark of the revolutionary times inaugurated by the American and especially by the French revolution. The new epochal consciousness of the times is a transformation that Jaspers connects to Kant's claim in *The Conflict of the Faculties* (1798) that the French Revolution—despite the Terror and the aristocratic reaction and repression in neighboring countries such as his own Prussia (which went to war with revolutionary France)—had become an event that would not be forgotten and would in a certain sense become a lynch-pin for future political developments to a republican form of government. In this respect, consciousness of one's time motivates and becomes a focal point for one's identity as a citizen, and the patriotism that can come with it; it unifies past, present and future around an event of deep significance for the public and social identity and for the very idea of the university and of a republican constitution.

One can see Jaspers' own sense both of the prospects for the new post-revolutionary Weimar Republic and his own worries about the possibility of the coming chaos; to be sure Jaspers notes in a foreword that he was hardly aware of the National Socialist German Workers' Party at the time in 1930 when he wrote the book (*GSZ* 4). Rather his concern arose from the chaos that ensued from World War I, the German defeat, the German revolution, reaction and post-war collapse, and the awful times of hyperinflation and the Great Depression. All of this was very much on his mind. Yet even if Jaspers regarded the German Empire and especially its Prussian aristocracy with critical regard, he also tends to show a genuine horror at some of the manifestations of a more classless society. Jaspers expresses his distrust of mass society; his attacks on mass society made Jaspers famous in Germany. For Jaspers, the critique of the masses is not an attack on the proletariat, but on a kind of social conformity that extends throughout society and threatens to overcome the universities with "mass existence" (*GSZ* 149): "Aristocracy and the masses are...no longer specifically political problems anymore" (*GSZ* 216).

The influence of Friedrich Nietzsche on this aspect of the thought of Jaspers is unmistakable, but Nietzsche is not a philosopher that Jaspers had ever understood in opposition to Kant. Jaspers rightly sees Kant as a fiercely public political philosopher who confronts uncritical thought in all of its forms. Like Nietzsche, Jaspers worries that mass society will prevent the development of the true aristocrats of the spirit, a conception that

[8] Karl Jaspers, "Kant," in *The Great Philosophers, Volume I: The Foundations*, transl. Ralph Mannheim, New York, NY: Harcourt, Brace & World 1962, p. 230-381, here p. 380.

[9] Karl Jaspers, *Die geistige Situation der Zeit*, Berlin, DE: Sammlung Göschen, 1932. [Henceforth cited as *GSZ*, translations by Pierre Keller.] There is an English translation with the misleading title *Man in the Modern Age*.

Jaspers also associates with Kant. Jaspers draws starkly from Kant's *Religion within the Limits of Reason Alone*—but also with an eye to the Lutheran-Kantian ideas of an invisible church and mystical body that inspired Friedrich Hölderlin, G. W. F. Hegel, and F. W. J. Schelling in Tübingen:

> The aristocracy of the spirits who exist as who they truly are is strewn about the world. The person who enters that aristocracy does not select himself through being judged [to be an aristocrat of the spirit], but by realizing his own being. The unity of this irregular distribution is like the invisible church of a mystic body [*corpus mysticum*] in the anonymous chain of friends, from whom here and there a member becomes visible to another, perhaps distant, self. [*GSZ* 215]

Neither mass culture nor the culture of the Prussian aristocracy could be appropriate objects of patriotic pride, for neither provides a means to actualize one's own individual identity via one's identity as a member of a group. The aristocracy of social status fails because membership is grounded in ties of blood, land, or wealth. Mass society fails in that it impedes individual self-development. One must look to those who are concerned with enlightenment and with the idea of a civil constitution and to the very idea of a university instead. One must especially look to the members of the community of agents who share both in individuality of achievement and in the cooperative endeavor of making ours a better world. Kant's idea of the "invisible church" brings individuals together in the common spiritual-cultural purpose of pursuit of individual and general welfare constrained by the good. For Kant, the "invisible church" is the true civil society of those concerned with both the individual and the common welfare, of which the church and the state are only external manifestations. One only gains admittance to the invisible church of persons with true character through a complete revolution in one's life. For only such a revolution can bring about the integrity and unity of purpose involved in truly having a distinctive character. Kant's "revolution in thought" is already a transformation of the whole character of the human being. The "invisible church" of Kant's Religion is constituted by the truth and the good that philosophy recognizes in and as what motivates us in all the diversity of historical faiths.

Here is how Michel Foucault would put Kant's point in the face not of the German revolution of the late teens, and the rise of Fascism in the early thirties, but of the events of 1968 in Paris:

> Therefore, it is not the revolutionary process which is important, it matters little if it succeeds or fails, this has nothing to do with progress, or at least with the sign of progress that we are seeking. The failure or success of the revolution are not signs of progress or a sign that there is no progress. But still if it were possible for someone to understand the Revolution and know how it would unfold, well they themselves have to undergo this Revolution of which they are not the active agents.[10]

Through the courageous participation of the spectators of the French Revolution (such as Kant himself) who embraced the fundamental principles of the Revolution while decrying its methods, and ignored the threats from conservative reaction, the Revolution would become a signal event with a significance that binds human history together in a newly significant and systematic manner by showing a capacity in us to promote freedom and human rights, republican principles and anti-militarism. Kant himself viewed the manner in which the spectators of the French Revolution interpreted the event as a recognitive sign of the will for a republican and non-bellicose state that would become a rememorative sign of that event and its republican significance. As such, the spectator's interpretation would look forward, as a prognosticative sign, to a future without war and with true cosmopolitan republican self-legislation that would establish human rights. Here again is how Foucault frames this issue as it is presented by Kant in *The Conflict of the Faculties*. Foucault writes:

> The Revolution as spectacle, and not as gesticulation, as a repository for the enthusiasm of those who watch it and not as the principle of upheaval for those who participate in it, is a "*signum rememorativum*," [rememorative sign] since it reveals this predisposition as originally present, it is a "*signum demonstrativum*" [it is a demonstrative sign] because it shows the present efficacy of this predisposition; and it is also a "*signum pronosticum*" [a prognostic sign] since even if some results of the Revolution can be challenged, one cannot forget this predisposition that was revealed through it. [*WR* 91]

Foucault implicitly recalls both Jaspers' and Ernst Cassirer's appeal to Kant's transformative revolutionary understanding of a signal event in human history that

[10] Michel Foucault, "What is Revolution?" in *The Politics of Truth*, ed. John Rajchman, transl. Lysa Hochroth, Los Angeles, CA: Semiotext(e) 2007, p. 90. [Henceforth cited as *WR*]

has fundamental importance both for human rights and for the overall trajectory of human history and for the very role of the philosopher and of the university in the state. As Cassirer makes the point:

> It is the certainty of this disposition on which is founded the hope of the evolution of a condition of natural right in the relation of the individual to the state and in the relation of separate states to each other. A phenomenon such as the French Revolution was, will never be forgotten, because it has revealed a capacity for the better in human nature, the like of which no politician would have rationalized from the course of things till now, and which alone unites nature and freedom in accordance with the inner principles of right in mankind.
>
> Now it is shown that the ideal of the state, as the great social theoreticians have regarded it—as the ideal of a constitution concordant with the natural rights of man—is no empty chimera, but rather the standard for every civil constitution in general. And with this insight "perpetual peace" ceases to be a mere dream: for the establishment within a nation of a constitution strictly democratic and republican in spirit also offers the external guarantee—as the book *Perpetual Peace* had already put forward-that the intent of unjustly oppressing one nation by another, and likewise the means of realizing this intent, are progressively weakened, so that approximation to the "cosmopolitan" condition is also progressively fulfilled in the history of nations.[11]

Kant takes the development of the idea of republican constitution to be grasped through the action of the philosopher in the philosophical faculty who embraces the idea of the university and endeavors to speak the truth and especially truth to power by proclaiming in the public sphere the importance in world-history of a revolution intended to establish the fundamental rights of human beings.

The importance of the French revolution for establishing human rights only becomes apparent when one can see it as an event that brings forth a signal and historically significant public participatory response to that event and that allows one to occupy in and through one's action the Copernican standpoint which is able to grasp the system of changing spatial and temporal, but also socio-political and historical relations from within a changing standpoint in that very system of relations and to avoid the stance of those who are stuck in modes of past thought, including the ones that cannot give up the idea that humans occupy a historically and socially as well as spatio-temporally unchanging standpoint in the universe. Kant discusses the significance of the French revolution for a revolution in our thought that will lead us in human history to the respect for and establishment of human rights and the republican form of self-government that for Kant underlies all self-government. Kant writes that to orient ourselves systematically in history (and in nature), we need to take up the proper Copernican stance to history:

> If the course of human affairs seems so senseless to us, perhaps it lies in a poor choice of position from which we regard it. Viewed from the earth, the planets sometimes move backwards, sometimes forward, and sometimes not at all. But if the standpoint selected is the sun, an act which only reason can perform, according to the Copernican hypothesis they move constantly in their regular course. Some people, however, who in other respects are not stupid, like to persist obstinately in their way of explaining the phenomena and in the point of view which they have once adopted, even if they should thereby entangle themselves to the point of absurdity in Tychonic cycles and epicycles.[12]

In *The Conflict of the Faculties*, Kant retrieves the dynamic significance of the Copernican standpoint from the vantage point of a philosopher speaking the truth in the public sphere. In publicly articulating the significance of the French revolution for the idea of a republican constitution and for the development of humanity toward the universal respect for human rights, Kant is simultaneously publicly articulating the standpoint and expressing the agency of the philosopher committed to understanding the cosmos in terms of the systematic normativity of the good. Kant sees the normative role of the philosopher and of the philosophical faculty in general within the university and the state in publicly telling the truth as constitutive of their very constitutive significance in the very idea of the university and of the state. This is why, in the end, even the scholastic pursuit and analysis of truth cannot be divorced from its political and social context and political and social agency in behalf of the normativity of human rights and of the good.

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[11] Ernst Cassirer, *Kant's Life and Thought*, transl. James Haden, New Haven, CT: Yale University Press 1983, p. 40.

[12] Immanuel Kant, "The Conflict of the Faculties (1798)," transl. Mary J. Gregor and Robert Anchor, in Religion and Rational Theology, eds. Allen W. Wood and George Di Giovanni, New York, NY: Cambridge University Press 1996, pp. 233-328, here p. 300.

Ernst Cassirer and
The Idea of a Republican Constitution

At roughly the same time as Jaspers was engaging with Kant's *The Conflict of the Faculties* and its idea of a university and of a republic and the role of the philosopher in mediating between the idea of a republic and of the university in the public sphere, Cassirer too put forward Kant's revolutionary conception of the philosopher in the university and in the public sphere but in a way that was even more emphatically committed to the idea of a republican constitution and to the Kantian idea of constitutional patriotism. In his defense of the idea of the Republican Constitution, Cassirer recalled the past of German thought and its present in order to draw strength for the future in the defense of republican ideals. In his speech on *The Idea of a Republican Constitution*, published as a book in 1929, Cassirer argued in a heroic defense of the Weimar Republic on the eve of the Nazi takeover and dissolution of the new German Republic that the republican form of government was not an alien import, as German imperialists had been claiming, but had its modern roots in the social thought of G. W. Leibniz, Christian Wolff, and Kant.[13]

In *The Social Contract* (Book I, Chapter 8), Jean-Jacques Rousseau maintains that human beings acquire "moral freedom" with civil society.[14] This freedom makes human beings masters of themselves; it emancipates human beings from slavery to their appetites by making them autonomous and capable of governing themselves according to law: "obedience to a self-prescribed law is liberty" (*SC* 114). The ability that persons have to take responsibility for their actions allows them to institute laws for themselves and in this sense to be self-legislating and autonomous. Following Georg Jellinek,[15] Cassirer argued that the German conception of autonomy in the tradition of Leibniz, Wolff, and Kant introduced something crucial both to the American and French revolutions and to their conceptions of a republic governed by the people and with a fundamental respect for human rights. Rousseau's conception of freedom and autonomy as the basis for civil participation in the states was an important modern development. But Jellinek argued that there was something that was fundamentally lacking in Rousseau's conception of autonomy, a fundamental place for individual human freedom in the new freedom instituted by the social sphere. Rousseau's social contract has its basis in "the total alienation of all association and of all its rights to all community," an "alienation made without reservation and with "no right for any association to reclaim" that alienation of its rights (*IRV* 11). The importance of the community is, to be sure, emphasized by Rousseau, who is significantly influenced by the Greek *polis* and the hope of re-establishing a modern version of the Greek *polis* in Geneva. However, Rousseau's commitment to individual freedom and rights is far less pronounced.

The Leibnizian-Wolffian-Kantian tradition emphasizes the fundamental character of the human rights of individuals and takes those rights of individuals to be inalienable:

> Leibniz is also—so far as I can see—the first among the great European thinkers to have defended the principle of the inalienable rights of the individual with full emphasis and all decisiveness in his grounding of ethics and in his philosophy of the state and of right. [*IRV* 13]

Leibniz argues in his *Méditation sur la notion commune de la justice* in favor of such inalienable individual rights. According to Jellinek and Cassirer, Leibniz's conception is worked out in Wolff's works on natural law and then goes on to influence the American conception of liberty (*IRV* 15). The American conception of liberty is embodied in the Declaration of Independence and the Constitution and anticipated by the Virginia declaration of right of June 12th, 1776; the Wolffian conception of natural law is taken by Jellinek and Cassirer to influence the formulations of human rights especially in the constitutions of the American states through William Blackstone's 1765 *Commentaries on the Laws of England*. While Blackstone's work is undeniably also influenced by John Locke, Jellinek and Cassirer maintain that its commitment to inalienable

[13] Ernst Cassirer, *Die Idee der Republikanischen Verfassung: Rede zur Verfassungsfeier am 11. August 1928*, Hamburg, DE: De Gruyter, 1929. [Henceforth cited as *IRV*, translations by Pierre Keller.]

[14] Jean-Jacques Rousseau, *The Social Contract: Principles of Political Right*, transl. Henry J. Tozer, New York, NY: Charles Scribner's Sons 1898, p.114. Hathi Trust online https://hdl.handle.net/2027/uc1.31210000666089. [Henceforth cited as *SC*]

[15] Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History*, transl. Max Farrand, New York, NY: Henry Holt 1901, p. 11. Project Gutenberg online http://www.gutenberg.org/ebooks/29815.

human rights is due to the German natural rights tradition and especially to Wolff's work.[16] Cassirer then goes on to argue in *The Idea of a Republican Constitution*, with Jellinek and Erich Voegelin, that the bills of right of the individual American states, influenced by that conception expressed in Blackstone, were in turn the basis for the conception of rights expressed by the French National Assembly on August 16th, 1789.[17] Cassirer and Jellinek probably overestimate the extent to which the work of Leibniz and Wolff that came to fruition in Kant, German Romanticism, and in German idealism actually influenced the mainstream in American thought in the run-up to the American and to the French revolutions.

Habermas has observed in his early paper on "Natural Law and Revolution" that the aims of the Bill of Rights amended to the American constitution comes after rather than before the Constitution.[18] The aim was to show that on the basis of universal natural rights, that the rights that the former colonists had enjoyed as colonies still obtained in the new independent state. The revolutionary aspect of the American Bill of Rights is its appeal to natural law, understood as universal natural law, to ground the new society. By contrast, in France a break with a thousand-year history and a formulation of a new order based on natural law and universal natural rights was on the agenda. Thus, universal natural law became the starting point for the revolution in a very different sense. The Americans assumed, following Locke, that the function of rights stemmed from protecting private property. Therefore, only those who could own property, unenslaved adult males, enjoyed the rights articulated in the Bill of Rights. Moreover, the relevant rights and duties are only those that come with private property ownership. The French could not take such (only apparently) egalitarian principles for granted in a society that had been highly structured and governed aristocratically and especially feudally and monarchically (including by the clergy). The French revolutionaries aimed for a completely new revolutionary society. The Rousseauian conception of social-political autonomy together with the need for a new revolutionized French society meant that previous rights and privileges needed to be radically swept away. In the American colonies, the Lockean conception of private property (and the protection of private property) as the basis for human rights coupled with the conservation of the rights that the previous colonies still enjoyed meant that much of the status quo ante was preserved. Thus, in both the American and the French revolutions, the extent to which universal human rights and the respect for individuality were both sustained and preserved was severely limited.

The history of the last two centuries has been the story of fitful attempts to do full justice to both individuality of the individual and of cultures and heritages and to a fully cosmopolitan conception of truly universal human rights; we live in a time when that very goal is under severe and unrestrained attack from the forces of entrenched special interest and anti-enlightenment reaction. The American and French conceptions of rights at this point manifest a tension between the individual and the universal. The Lockean conception makes individuals' private interests the source of their individual rights. The Rousseauian conception holds that rights emerge only in virtue of one's association with others and in order to manage that association. The way in which one's identity as a citizen is unified with one's individual remains obscure if one's entitlement to rights is treated as a matter of one of these aspects of one's self exclusively.

Cassirer's contemporary, the great German historian Friedrich Meinecke, demonstrates the centrality of the dynamic unity of the particular and of the universal embodied in Romantic thought. According to this conception of what Hegel calls the "concrete universal," neither the individual, the particular or the universal can ever adequately be understood independently of each other and of the process through which the authority of norms is established in and by what we do. This is the notion of individual, of local community, of nation and of cosmopolis not at odds with each other but in which individual, community and cosmopolis at least strive to find their own individual place in a whole in which the aspirations of each individual, each community are also recognized. Meinecke argues that the conception underlies German thought into the formation of the second German Reich. The notion of community and individuality in question is not juxtaposed to universal

[16] Ernst Cassirer, *Freiheit und Form: Studien zur deutschen Geistesgeschichte*, Berlin, DE: Bruno Cassirer 1918, pp. 492 ff. Archive online https://archive.org/details/freiheitundforms00cassuoft.

[17] Erich Voegelin, "Der Sinn der Erklärung der Menschen- und Bürgerrechte von 1789," *Zeitschrift für öffentliches Recht* 8/1 (1928-1929), 82-120, here pp. 82-5.

[18] Jürgen Habermas, "Natural Law and Revolution," in *Theory and Practice*, transl. John Viertel, Boston, MA: Beacon Press 1973, pp. 82-120.

standards including human rights but ultimately express themselves in terms of a commitment to a universally structured, but also individual-oriented and socially concerned cosmopolitanism.[19] Meinecke himself shifts away from this attractive ideal and away from the Idea of Republican Constitution to affirm the importance of overcoming this dynamic cosmopolitan conception of republican unity in favor of a different conception of where Germany's distinctive contribution to social thought is to be found, in the apotheosis of the Prussian-German nation state.

Cassirer and Jaspers may be said both to accept and indeed emphasize an important dimension of Meinecke's narrative. Cassirer and Jaspers affirm the dynamic unity of the individual, the particular and the universal in the cosmopolitical process through which the identity of German thought is instituted. They affirm that the rights of individuals and their aspiration to excellence and, following Fichte, that the very conception of the German nation is tied to the cosmopolitan destiny of German culture. They view the cosmopolitan nationalism of which the Prussian-German states are the heirs as a force to be marshalled against the forces in the Prussian and German nation-state fundamentally arrayed against such cosmopolitanism.

Meinecke, Cassirer, and Jaspers are right that a distinctive cosmopolitan, pluralist and dynamically individualistic, but also universalist conception of freedom did emerge in the tradition of German thought. This conception of cosmopolitan autonomy lies at the heart of the idea of a Republican Constitution especially as Kant articulates that idea. This conception also did become the basis upon which the German Republic in Weimar (itself once the center of German Romanticism and German idealism) could lay claim to a republicanism not transported onto Germany from an alien soul, but at the heart of German thought, including the thought of Cassirer himself and of the thought of his somewhat younger contemporary, Jaspers. This is a cosmopolitan, pluralist conception of universal human rights that would become the focus of Jaspers' thought in the period following the collapse of the Nazi regime and in the ensuing post-war period. It would pave the way for his conception of truth and logic as grounded in a truly inclusive world culture and world philosophy. It is no less important today to recall this idea of a Republican Constitution and of a cosmopolitan conception of philosophy and of politics than it was in the twenties and thirties and in the wake of World War II. One cannot and need not give up on individuality in favor of universality, or on universality in favor of particularity and individuality. Also, one does not need to think of the abstractions of theoretical philosophy and even of mathematics and physics as floating free of the significance that things have for citizens in the social and political domain of the public sphere. Even the abstractions of logic, mathematics, and physics are part of a public culture of research and the exchange of ideas with a seat especially in the university and dependent even outside of the university on the very idea of a university as a free public sphere for the communication of truth as well as for vocational training. Embrace of a dynamic cosmopolitan individualism also does not involve embracing the excesses of political and other forms of Romanticism. The effort to develop an alternative conception of social and political order and of the public sphere is at the heart of Kantian developments in political and social philosophy that have extended from the work of Jaspers to that of the most prominent students of the great American political theorist John Rawls.

Kant's notion of fidelity to the constitution, and constitutional patriotism in the tradition of Cassirer and Jaspers involves fidelity to the very idea of a republican government and that is for Kant and the Kantian tradition fidelity to the fundamentally public process through which citizens are able together to establish laws according to which they govern themselves not by dogmatic decree but through the insight that this furthers the shared freedom and good of all. Habermas' conception of fidelity to the constitution is more abstract in that it views fidelity to the constitution in terms of the commitments of a normative discourse ethics; at the same time, it is more specific than that of the Kantian tradition in that it takes fidelity to a constitution to be fidelity to a specific nation state as the embodiment of the normative requirements of discourse ethics. The abstractness of Habermas' conception is in part a function of his attempt to graft an analytic speech act theory of language onto the foundations of what was initially a much more inclusive and rich conception of the public sphere as the grounds of action thus stripping his original conception of the public sphere of its richly normative and socio-cultural resources. Habermas attempts to ground reason in the social use of language

[19] Friedrich Meinecke, *Cosmopolitanism and the National State*, transl. Robert M. Kimber, Princeton, NJ: Princeton University Press 1970, especially pp. 49 ff.

in communicative action and in an ethics of discourse that is too thin to give him substantive results. And thus, he is pushed back to appeal to a kind of consensus conception of truth that fails to ground an idea of the constitution that would be both sufficiently general and universal and also sufficiently specific and particular. Habermas has invoked the enlightenment and his narrowed conception of rational discourse against post-modernism and Foucault. Foucault's response is in line with Jaspers' conception of a reason that is not fundamentally theoretical and is inclusive rather than exclusive. Foucault appeals to a more inclusive and less narrowly rationalistic conception of enlightenment that he also sees in Cassirer's account of enlightenment. Foucault can be said to engage Jaspers' Kant against the methodologically solipsistic and monological Kant of the later Habermas. Habermas's effort to enrich his monological Kant with the resources of speech act theory and communicative action falls short because ot the fundamental deficiencies of the abstractions with which he works.

Foucault maintains "Kant seems...to have founded the two great critical traditions which divide modern philosophy" (*WR* 94). He distinguishes an abstractly theoretical "analytic philosophy of truth" from a praxis-oriented "ontology of ourselves" that is grounded in present historical circumstances. For Foucault, the analytic of truth is developed in Kant's *Critique of Pure Reason* (and has its successor in contemporary analytic philosophy and in Habermas' monological Kant) while the ontology of ourselves is developed in Kant's writings on the philosophy of history and by the Frankfurt school and by Foucault himself. Foucault implies that his own project of critique is closer to the critical theory of the original Frankfurt school than is Habermas's attempt to push back against Nietzschean "irrationalist" tendencies that he diagnoses in the thought of Theodor Adorno and in contemporary post-structuralism, including Foucault. Foucault is skeptical of Habermas' embrace of analytic philosophy and speech act theory.

Against Foucault, I would argue that one can and must embrace an "analytic philosophy of truth in general" that is grounded in but is not without an "ontology of ourselves" and an "ontology of the actual" as its fundamental basis or one would ultimately misunderstand both. I would argue that the *Critique of Pure Reason* is what Foucault refers to as an "analytic philosophy of truth" that is systematically sunk into "an ontology of the actual." "The Transcendental Doctrine of the Elements" is according to the introduction to the "Transcendental Analytic" in its Transcendental Analytic a "logic of truth"; it is my contention that "The Transcendental Doctrine of the Elements" is grounded in "The Transcendental Doctrine of Method" and its conception of a public and social-historical conception of reason that engages with the contemporary concerns of the Age of Critique. The Kantian understanding of critique and of an analytical philosophy of truth is tied to the framework of public debate in its social and political and religious context, as well as to the place of the university within its framework of the political and cosmopolitical society. This does not involve a relativization of the Kantian standpoint, for Kant's political and cultural Copernican revolution consists not only in the realization that the terms of the debate about all matters great and small fundamentally change as the systematic framework in which a society is situated changes, but also the realization that one is never limited to one's own standpoint. For even the realization that one has a standpoint, the beginning of the Copernican turn, involves a fundamental grip on one's own place and the place of what a society can do in the whole systematic and comprehensive context of the cosmos.