

Alexander Somek's *The Cosmopolitan Constitution*

Thinking Normatively Without Moralizing? Constitutional Theory — Somek's Style

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The Cosmopolitan Constitution is an intriguing and puzzling book.² In particular, the book has the uncanny ability to render fresh what is for the constitutional theorist familiar territory such as the debate on judicial supremacy and the counter-majoritarian difficulty, the expansion of the proportionality principle, etc. In fact, one of the most interesting aspects of its overarching argument is that given our present conditions—such as those of the cosmopolitan constitution or constitutionalism 3.0—we should be increasingly plagued by self-doubt, at least to the extent that we are to remain committed to the tenets that once animated our constitutional traditions. This implies that the partial sense of disorientation with which one is left after reading the book is deliberately provoked precisely because of the main insights it has to offer.

There is one sense, however, in which the book is perplexing in an unintended way and which obscures the kind of contribution it makes to contemporary constitutional theory. For all its display of theoretical erudition and sophistication, *The Cosmopolitan Constitution* is uncharacteristically unreflective when it comes to methodological questions, and this has, judging by some of the criticism the book has attracted, proved disorientating even to perceptive readers. By making its underlying methodological commitments explicit, I contend, one is in a better position to appreciate the kind of constitutional theory it elaborates, and the strengths and weaknesses of its argument. In what follows, I argue that while the book provides a normative account of modern constitutionalism, it sets forth a distinctive approach to the subject that tries to take more seriously the fact that its object, despite its constitutive universal ambitions, is a historically conditioned phenomenon.

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² ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* (2014).

A.

Read as an exercise in normative constitutional theory, *The Cosmopolitan Constitution* leaves the reader with something like a puzzle. As G. Itzcovich has pointed out, although Somek shows “some irritation at the moralizing attempts by the cosmopolitans,” he himself seems to engage in a primarily normative undertaking. He demonstrates that “social freedom” constitutes the true normative foundation of constitutionalism and that, consequently, the potential demise of constitutionalism is explained by the waning of social freedom under the conditions of post-national governance.³ Does Somek inconsistently elaborate a constitutional theory that is normative in the same sense the mainstream constitutional scholarship that he criticizes is?

Mainstream constitutional scholarship is normativist or moralist in the sense that it takes constitutional theory to be primarily an inquiry into the moral foundations—the justificatory moral principles—of a constitutional order and, thereby, as an undertaking that is essentially continuous with normative political philosophy as has been cultivated since J. Rawls’ *A Theory of Justice*.⁴ On this account, the task of constitutional theory is first and foremost to articulate the best reading of a constitutional order by selecting that conception of the constitutional order which accords to a preferred normative political theory, be it liberal, republican, radical-democratic, etc.⁵ What is usually objected to such normativist conceptions is that—by focusing on the constitutional models invented by philosophers—they downplay the protean character of constitutional practice and, more importantly, gain a facade of intellectual rigor at the cost of their socio-political relevance. Like the Kantian practical philosophy that inspires them, they disregard Hegel’s admonition about the impotence of the ought.⁶

This is precisely the sort of criticism that Somek formulates against “Panglossian” perspectives on constitutional pluralism which he finds “paradigmatically” represented by M. Kumm’s practice conception.⁷ By postulating a “sophisticated scheme” of four normative principles to govern the interactions between the autonomous sites of constitutional authority that compose the multi-level transnational system, Kumm tries to set forth an account that does away with the premise that the nation state and democracy are the

³ Giulio Itzcovich, *Libertà sociale e stato nazione: una relazione problematica*, LXVII RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 919 (2017).

⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁵ See PAUL P. CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* (1990) (discussing a standard presentation of the field along these lines).

⁶ MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 129 (2010).

⁷ SOMEK, *supra* note 2, at 234.

privilege site of constitutional legitimacy.⁸ The sanguine outlook that drives this kind of theoretical account leads them to remain oblivious to the ambivalence of our present circumstances and, thereby, end up being formalistic in the sense that they ignore the material conditions upon which these normative constructions are projected onto. In particular, such an account turns a blind eye to both the power differentials that determine the resolution of jurisdictional conflicts between the monads of constitutional practice—and, thus, “it may not be by accident that the pluralist practice conception is the darling of scholars belonging to hegemonic nations”⁹—and to the broader social context that is rendering ineffectual the idea of democracy as the self-government of a people—“it ignores, that is, the impact [of] the social dynamic of modern capitalism.”¹⁰

One should not be surprised to find that one of the major themes in the book is the claim that to understand the present predicament of the constitutionalist project is necessary to consider how it has been affected by the social dynamic of modern capitalism. So much so, in fact, that perceptive readers like D. Patterson have been led to the conclusion that

The story of an evolving constitutional order is the political/legal aspect of Somek’s narrative but it is not the most important part of his argument. While the ostensible subject of *T[he] C[osmopolitan] C[onstitution]* is constitutionalism, Somek’s real target is global capitalism. Somek believes the global polity is being subjugated to the will of a global financial elite. From the rise of transnational governance to the withering effects of the Troika, democratic participation is inexorably being crushed by the interests of global capital.¹¹

For all its lucidity, a reverse reading along these lines mistakes the nature of exercise. Such a reading wrongly suggests that Somek aims—like the most influential strands of legal sociology—to empirically dispel the normative illusions of constitutionalism and to disenchant constitutional law by showing that the reproduction of society depends on unconscious and self-directed material mechanisms of social integration.¹²

⁸ *Id.* at 197–99, 234–7.

⁹ *Id.* at 237.

¹⁰ *Id.*

¹¹ Dennis Patterson, *The Dark Future of Constitutionalism*, 30 CONST. COMMENT. 667, 669 (2015).

¹² JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 43–56 (2008).

For all its attention to the material conditions that subvert the constitutional project, Somek's theoretical approach rejects the adoption of a hermeneutics of suspicion. Somek thinks constitutional theory becomes "soulless" if it renounces to understand "how different regimes or systems of government fit with how we conceive of our practical rationality and overall motivational setup."¹³ The challenge, however, remains: How is one to articulate a normative account of the cosmopolitan constitution without moralizing? The starting point for such an account is to be found not in abstract constitutional principles but concrete constitutional experience. In this sense, the normative tenets of constitutional theory are to be discovered rather than invented and be more a matter of acceptance than choice. This kind of constitutional theory, in consequence, takes its object— modern constitutionalism— not as a given but a strongly conditioned historical phenomenon, as something that is not imbued with any sort of necessity. Somek—like other constitutional theorists such as D. Grimm¹⁴—thinks it is crucial to remind us that modern constitutionalism is an endangered historical achievement, a fallible project whose realization depends on certain preconditions that nowadays are unravelling.¹⁵ The challenge becomes translated into the question of whether it is possible—and, if so, how—to articulate a philosophical account of modern constitutionalism that takes seriously the consequences that follow from the historically conditioned constitution of its object.

B.

What is distinctive about Somek's approach is that the historical reconstruction of the transformations of modern constitutionalism it offers is of philosophical import, something the reader of *The Cosmopolitan Constitution* comes to perceive most clearly as it increasingly resorts to Hegelese to express its most important normative insights—for example, social freedom, external state, recognition, and the like. More important for my present purposes is that in terms of theory-construction the book seems to be no less Hegelian. This is reflected with particular force in its overall explanatory strategy which is namely to trace the three main "stages" of "the development of the constitutional idea" in order to show how, when seen retrospectively from the vantage point of its last phase, they "integrate dialectically" into "the totality of constitutionality."¹⁶ Let us examine this more closely.

¹³ Alexander Somek, *Replica*, LXVII RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 932 (2017).

¹⁴ DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE (2016).

¹⁵ SOMEK, *supra* note 2, at vii (2014).

¹⁶ *Id.* at 282 ("Within the gestalt of the cosmopolitan constitution the three stages in the development of constitutionalist project comprise a totality.").

The Cosmopolitan Constitution is, firstly, an inquiry into particular constitutional traditions—all of them “exemplar” constitutional traditions of the North Atlantic world¹⁷—to discover matters that are of transcendent if not universal import, that are of significance to anyone committed to the constitutionalist project, whether or not he is from the United States, Germany, or Europe.¹⁸ Put differently, Somek’s reconstruction of the historical trajectory of the constitutionalist project is philosophical in that it mines from the raw materials of particular constitutional cultures—e.g. U.S. constitutional law, post-war German constitutional law, European Convention system and EU Law, etc.—what might be called, paraphrasing Habermas, the particles of “existing reason”—and “existing unreason”.¹⁹

The book’s approach to constitutional theory is Hegelian in that it looks philosophically to the past with a practical intent namely to make sense of constitutionalism’s present predicament. *The Cosmopolitan Constitution* is built upon a distinctively recollective conception of reason according to which one understands ideas—here, constitutional ideas—by placing them in “larger historical developmental structures,”; a genealogical exercise that provides both justification to our present commitments and orientation for the future: the “way one moves forward [is] by looking backward (traditions are lived forward but understood backward).”²⁰ Somek’s constitutional theory, thereby, aims to retrieve from past historical experience the normative self-understanding that has animated modern constitutionalism all along. He wants to reconstruct—to use another distinctively Hegelian concept that Somek makes his own—the “spirit of constitutionalism,”—that semantically

¹⁷ One might take issue with Somek’s selection of exemplars, wondering how representative they are. The constitutional tradition of the United States, with its more than two centuries old constitution and with the oldest practice of constitutional adjudication, seems to be entirely exceptional. Similarly, the way in which the German Basic Law and constitutional practice took shape after the war may have something to do with, for example, Somek’s contention that the dwindling of the constituent power is characteristic of the second phase of the constitutionalist project. Seen from the perspective of most nations, which have joined the constitutionalist project in a great majority cases as a part of a process of independence or decolonization and which have remained in the receiving end of an unbalanced world order, the European constitutional experience must result a distant reality. If *The Cosmopolitan Constitution* were an exercise in comparative constitutional law rather than constitutional theory such suspicions would be more damaging. Given its philosophical interest in tracing the development of key constitutional ideas, it makes sense to examine selectively those paradigmatic cases that have reached a high degree of articulation and are taken by others as blueprints for understanding and reforming their own constitutional practices. Under such conditions it becomes rather difficult to come up with better cases than those chosen by Somek.

¹⁸ While accepting the Eurocentrism that infuses the book, Somek remarks that it “addresses—concededly, at a high level of abstraction—a regional phenomenon without downplaying its genuinely universal ambition. Any group of states that chooses to commit itself to the selfsame ideas does not have to have a European cultural background. The final stage of constitutionalism could be taken anywhere in this world.” Somek, *supra* note 13, at 928.

¹⁹ HABERMAS, *supra* note 12, at 287.

²⁰ ROBERT B. BRANDOM, REASON IN PHILOSOPHY 23, 102 (2009).

unsaturated foundational normative core which sustains the authoritativeness of this shared realm of action and experience and is continuously redefined by self-reflection.²¹

The task that *The Cosmopolitan Constitution* takes on, in consequence, is to retell the history of modern constitutionalism—the project to establish and constrain powers using law as a means²²—as the march of practical reason through history. It is under the light of this recollective, normative perspective that constitutionalism comes to be reconstructed as the progressive development of a “project of emancipation” such that the stages of the historical unfolding of the constitutional idea become the steps in that “learning process” that is the “history of liberty.”²³ Somek’s reconstruction of the historical unfolding of the spirit of modern constitutionalism is not, however, as Whiggish as one might expect given its Hegelian methodological commitments. This is shown most eloquently by the fact that his story of the development of the project of constitutionalism ends with a dissonant, deceptive cadence.

C.

Modern constitutionalism in its final cosmopolitan phase—which under some respects presents itself as its “consummation” or “truth”—has reached a point at which it becomes increasingly manifest that it is “lying about itself” and the forces underlying this “falsity” have risen to menace the whole constitutionalist project with its “potential demise.”²⁴ The cosmopolitan constitution, seen from the tradition of modern constitutionalism that preceded it, appears to be a regression, a return to the “pre-modern way of conceiving constitutional authority,” marking “the point at which constitutional law comes to an end.”²⁵ By closing with such dark overtones what up to this point was essentially a progressive historical trajectory, the argument of *The Cosmopolitan Constitution* leaves the reader—by deliberate design—with a discomforting cognitive dissonance. This needs some brief unpacking, however.

In a highly schematic way, the narrative strategy of *The Cosmopolitan Constitution* is structured upon four main threads. First, while our constitutional past had its internal tensions (especially the “fateful antinomy” of constitutionalism 1.0 between *actio* and

²¹ SOMEK, *supra* note 2, 128, 132, 243; ALEXANDER SOMEK, *THE LEGAL RELATION: LEGAL THEORY AFTER LEGAL POSITIVISM* 45–46 (2017).

²² SOMEK, *supra* note 2, at 1.

²³ *Id.* at 84, 153.

²⁴ *Id.* at vii, 281–82.

²⁵ *Id.* at 13, 21, 197.

jurisdictio that turned into the intractable “counter-majoritarian difficulty”²⁶ and darker aspects (the potentially “enslaving effects” of this “bourgeois emancipation”),²⁷ taken as a totality, it could be seen as embodying a progressive “history of liberty” under the condition that its normative kernel (i.e. the “turn to human dignity and human rights” brought by constitutionalism 2.0) became aligned with a less formal and individualistic, “social understanding of freedom.”²⁸

Second, the internal tension that accompanied the first phase of modern constitutionalism, namely, the counter-majoritarian difficulty that confronted the sovereign legislature with the judicial exposition of constitutional law, was only apparently neutralized in its second phase. It has, however, reappeared recast as a “super-majoritarian difficulty” wherein constituent power acquires a markedly passive mode.²⁹ The constitution “becomes a self-denying ordinance of the part of the sovereign” to the extent that human rights are taken as a kind of universal value that the people recognize and adopt not as an “act of choice” but of “obedience” to pre-existing “moral requirements.”³⁰ The difficulty derives from the fact that these universal human rights are by nature subject to multiple interpretations and are mutually conflicting in their application, making necessary for each political community to find its own particular way of reading them and striking a balance. But if they constitute truly universal values, human rights cannot simply mean what each particular community decides they mean. Here is the central question then: How can these autonomous particular communities commit themselves credibly to universal values if there is no higher stance to which they appeal than their own practical reason?³¹

Third, the cosmopolitan constitution emerges from the realization that the tension between universality and particularity that is generated by the super-majoritarian difficulty can only be mediated by a system of “peer review” to which each member of the review group conditionally yields to. The only way to show that one’s commitment to universal human rights is not mere pretense is by matching it with the practice of other polities that we recognize as reasonable, expecting in turn to be recognized by them as reasonable. It is this step, in Somek words, “from earning authority through practical reason to earning it through ‘mutual engagement’ [that] marks the transition to constitutionalism 3.0.”³²

²⁶ *Id.* at 2–8, 51–70.

²⁷ *Id.* at 13, 158–65.

²⁸ *Id.* at 9–13, 123–33, 169–75.

²⁹ *Id.* at 87–97.

³⁰ *Id.* at 15, 94.

³¹ *Id.* at 17–18, 176–78.

³² *Id.* at 178.

Constitutionalism 3.0 offers peer review mechanisms of “self-correction”—for example, the European Convention system—with a view to keep each member within the parameters of reasonable interpretation while at the same time acknowledging them a right to have their own particular understating of both the meaning of human rights and the means necessary to protect them— a “margin of appreciation”.³³ The members of the peer group, however, retain final authority and hold on to a “room to defy peer judgment” that derives from the restrictions that core domestic constitutional commitments impose on delegations of authority to supranational institutions—each pledges to “yield so long as” it does not overstep its own constitutional identity.³⁴

Finally, despite its appeal, “the progress of emancipation becomes overlain with regression,” in the final stage of modern constitutionalism.³⁵ First, the cosmopolitan constitution is not truly a legal constitution anymore. The pluralist order that derives from the “yielding so long as” authority of constitutionalism 3.0 is such that there cannot be an encompassing normative framework of authority. As each member determines unilaterally the conditions under which it will yield, any exercise of authority ends up legitimized by the mere fact that the rest has decided that the conditions warranting resistance have not been met.³⁶ Under the conditions of crisis-prone late capitalist societies wherein politics is primarily reactive and focused on problem-solving, this structure of authority becomes coupled with a transfer of power from deliberative political institutions—such as national parliaments—to “transnational fora (or ‘networks’) executive governance” that seem to have the expertise and agility necessary to manage the recurring economic and security crises. Constitutionalism 3.0 becomes, thereby, a world of “administration without sovereignty” that progressively cripples a democratic politics that still depends on processes of collective deliberation at elections, parliaments, and national publics. Most of what remains of constitutionalism persists in a “symbolic sphere” focused on issues that are “highly morally charge[d]”—for example ,euthanasia, abortion, gay marriage, etc.—but “largely neutral” in terms of political economy.³⁷ The irony here is that the growing impotence of national constitutional democracies to domesticate the impact of global capitalism is—at least in part—their own making.³⁸

³³ *Id.* at 179–91.

³⁴ *Id.* at 17–20, 191–96.

³⁵ *Id.* at 13.

³⁶ *Id.* at 17–22, 193–201.

³⁷ *Id.* at 22–24, 213–41, 273–81.

³⁸ *Id.* at 24 (“[S]tates that jointly abstain from controlling markets expose themselves fully to their force.”).

D.

What seems to be most striking to the readers of *The Cosmopolitan Constitution* is the dark colors with which it portrays the constitutional and political world we live in.³⁹ The book, however, does not limit itself to recount the “demise of the people” in the face of “authoritarian liberalism” and the “bourgeois anarchism” that prevail in the pluralist world of constitutionalism 3.0.⁴⁰ Somek still juxtaposes a political face to this administrative one. This political face, however, is more than anything else a call to arms to the citizens of this world—that is, to the citizens of the states that live therein—to oppose resistance to the obliteration of their political selves. By showing that cosmopolitan citizenship is nothing but an empty promise, Somek invites us to embark on a sort of counter-politics against the administrative face of the cosmopolitan constitution, making use of what remains of institutions of self-government at the level of the nation state. Although the constitutional concept of the people involves an idealization that has become for the most part unsustainable, the old democratic structures of national government may still be deployed to tame expert executive networks and haute finance which have become the ruling powers in this world of political constitutionalism redux. Looking to a deep past to obtain some orientation about how to live in a world that has dispensed with the modern conception of constitutional authority, Somek proposes us to move “forward with Aristotle and Machiavelli” and retain some particles of the spirit of constitutionalism in an era that has no place for true political self-determination.⁴¹ With these Machiavellian afterthoughts the book risks falling into the temptation of moralizing and betraying its commitment to take seriously the strongly historically conditioned nature of its object.

Regardless, it seems to me that the book is not overly pessimistic about our immediate constitutional future but only appears to be so due to the overly optimistic account it offers of our constitutional past. It goes without saying that when it comes to books that exhibit this level of scholarship any significant shortcoming is going to be a matter of nuance and subtlety. It seems to be fitting, in consequence, to limit myself to end this Comment by pointing to a certain imbalance that affects its overarching argument. Taking some distance from the rich detail with which Somek’s story of constitutionalism is woven, the narrative arc of the book conveys a problematic impression. The narrative arc of the book suggests that the project of modern constitutionalism—and with it, the practice of democratic self-determination—has become most endangered in its last phase. Additionally, it questionably suggests that contemporary threats to constitutionalism and democratic self-determination can be conceptualized fundamentally in a similar manner to those that menaced constitutionalism 1.0—there is a return of the external state, the private polity, and

³⁹ *E.g.*, Patterson, *supra* note 11.

⁴⁰ SOMEK, *supra* note 2, at 200–12 (2014).

⁴¹ *Id.* at 237–82.

authoritarian liberalism of a bourgeois political mindset, but with a transnational or cosmopolitan twist. The rise of neoliberalism, I admit, has brought back some of the hazards that imperiled constitutional democracies before the coming of the welfare state, but still if democracy dies anytime soon it will die very differently.

Modern constitutionalism and democracy are improbable historical achievements which have been constantly endangered. The nascent representative republics of the nineteenth century had to live under the menace of restoration in Europe and of civil wars and military *caudillismo* in the Americas. During the first third of the twentieth century, democracy had to face the rise of fascism and revolutionary communism. During the Cold War, democracy lived under the threat of civil wars, *coups d'état*, and military interventions, as the two world superpowers had no scruples about encouraging, supporting, and financing the breakdown of democratic constitutional governments when it suited their interests. It is true, and Somek's book helps us on this greatly, that constitutionalism and democracy after the end of the Cold War has become overconfident and complacent. Theorists of constitutionalism and democracy seem to be exceedingly at ease with the thought that today there is no other recognized form of legitimate government. This remainder about how fragile constitutionalism and democracy are—even in the US and old Europe—is of special importance now, because in our times the end of democracy will most probably not be a violent one. It is not going to come as a consequence of a military intervention shutting down parliaments and elections, curbing the free press, and political party competition, and so on. Democracy seems to be dying a peaceful death where all the distinctive institutions of democracy remain in place while the energy to drive social, economic, and political change has migrated elsewhere, to transnational institutions, multinational corporations, and financial markets.⁴² This time round, as Somek warns us, democracies themselves will bear a great share of responsibility in their own undoing.

⁴² COLIN CROUCH, *POST-DEMOCRACY* (2004).