

THE DARK FUTURE OF CONSTITUTIONALISM

THE COSMOPOLITAN CONSTITUTION. By Alexander Somek.¹ Oxford: Oxford University Press, 2014. Pp. xii + 291. \$98.50 (cloth).

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Behind every silver lining there is a cloud. – Glenn Gould

INTRODUCTION

Alexander Somek has written two brilliant books about E.U. law. In *Individualism*,³ he demonstrated how the E.U. stifles Europeans through intrusive regulation. The book is a sustained attack on the authority of bureaucrats to intervene in the lives of citizens. Through a trenchant analysis of E.U. smoking regulations, Somek demonstrates the stultifying effects of insufferable regulation by the State. The analysis is so compelling, one almost feels like lighting up a cigarette in one's office just to push back against the bureaucracy.

To similar effect, in *Engineering Equality*,⁴ Somek focuses his attention on E.U. anti-discrimination law. He has little positive to say about it. Not that he is not a good liberal: he supports anti-discrimination. His problem is not with the goal of anti-discrimination but with the fact that progressives are undermining their own normative aspirations. Through “deconstruction” of the

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3. ALEXANDER SOMEK, *INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION* (2008).

4. ALEXANDER SOMEK, *ENGINEERING EQUALITY: AN ESSAY ON EUROPEAN ANTI-DISCRIMINATION LAW* (2011).

distinction between “direct” and “indirect” discrimination, Somek draws the conclusion that E.U. anti-discrimination law is “normatively twisted.”⁵ E.U. anti-discrimination law inverts the hierarchy between direct and indirect discrimination, thereby rendering analysis and application of the law a “hotbed of moral controversy.”⁶ As a result, the field devolves into pseudo-normativity, the goal of which is the creation of “a world inhabited by *better people*—and not . . . a world where power differentials in the relation of capital and labour have been readjusted such as to approach evermore closely a sustainable equilibrium.”⁷

Now to his latest book, *The Cosmopolitan Constitution*. Regarding constitutionalism, Somek’s thesis is that modern constitutionalism has evolved through three distinct epochs. In the first epoch, best exemplified by the American experience, constitutionalism is about the constraint of public power. Grounded in the sovereignty of a people, the constitution is the expression of their liberty. It is the “constituent power”⁸ of a free people that gives the constitution its legitimacy.

After the Second World War, a different form of the modern constitution emerged. Now constitutional legitimacy flowed not from the people but from a commitment to the protection of human rights. The validity of a constitution thus became a function of the degree to which it passed muster in evaluation by a system of peer review among nations.

This second iteration of constitutionalism set the stage for the emergence of the third epoch of constitutionalism, what Somek dubs “The Cosmopolitan Constitution” (“TCC”). There are two faces to TCC. The first is political. In addition to the protection of human rights, TCC combats discrimination on the basis of nationality. Further, TCC develops modalities for managing state interactions with authorities outside the state. Secondly, and more darkly, TCC cedes political authority to various transnational administrative entities.⁹ What has developed, Somek contends, is a new form of constitutional authority: authority for an “administered world” (p. 242).

5. *Id.* at 16.

6. *Id.* at 17.

7. *Id.* at 15. Just as in *Individualism*, Somek disparages moralists—especially academics and bureaucrats—who want to make people “better.” It is one of the most refreshing aspects of his style.

8. For an excellent discussion of the history of this notion, see Martin Loughlin, *The Concept of Constituent Power*, 13 *EUR. J. POL. THEORY* 218 (2014).

9. These include ICANN, ISO, the IMF, the WTO, and the World Bank.

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 TCC is constitutionalism, Somek's real target is global capitalism.¹⁰ Somek believes the global polity is being systematically 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. Today, "peoples are dominated by core institutions of modern capitalism" (p. 238). Finance (i.e., the interests of global capital) has displaced "the people." The only way out, Somek avers, is "political action" (p. 283).¹¹

There is much one might focus on in a review of this rich and engaging book. Everything from the details of each constitutional epoch, the rise of transnational regulation, the intricacies of E.U. law, to the general topic of global constitutionalism deserve attention. Somek's writing is provocative, stylistically engaging, and well-informed. After providing an overview of the argument of the book, I will concentrate on Somek's most wide-ranging claim, mentioned above: viz., the current epoch of modern constitutionalism is firmly in the grip of global capitalism.

NATION-STATE AND CONSTITUTION

When one hears "The Cosmopolitan Constitution," the temptation might be to think the phrase is similar to, if not synonymous with, "Global Constitutionalism." Nothing could be further from the truth. Global Constitutionalism—the idea of one law for the globe—is a seminar room fantasy.¹² The nation-state, which has been the centerpiece of the global order of states since

10. Somek has posted a YouTube video in which he presents the main themes of the book. See University of Iowa Law Library, *Somek on "The Cosmopolitan Constitution"*, YOUTUBE (Sept. 26, 2014), <https://www.youtube.com/watch?v=47NLz2K4zc8>. The cover of the book features a painting by the Austro-Hungarian painter Adolf Hirémy-Hirschl, entitled "Souls on the Banks of the Acheron." (The painting hangs in the Belvedere Museum just outside the center of Vienna.) As Somek explains in the video, the painting shows "Hermes, the god of commerce [global capitalism], leading the deceased [political] souls into the underworld." He ends the video by asking the question whether "our constitutional experience' has come to an end." If it has, he suggests, the culprit is "global international capitalism."

11. Here Somek echoes themes similar to Hardt and Negri. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000). Somek is silent on what forms of political action he has in mind.

12. In *The Cosmopolitan Constitution*, Somek relentlessly skewers contemporary defenders of a global constitutional order.

the Peace of Westphalia, remains the focus of any effort to understand world order¹³ and, more importantly, the evolution of constitutionalism at the global level. The nation-state is central to Somek's brief for TCC.

As mentioned, Modern Constitutionalism has gone through three iterations. The first iteration of constitutionalism—Somek calls it “Constitutionalism 1.0”—is, as James Madison put it, “a charter[] of power[s] granted by liberty.”¹⁴ Liberty and power are of the essence of Constitutionalism 1.0. From the American perspective, which serves as the exemplar, sovereignty lies with the people. The constitution establishes limited, separated powers for government. In addition, judicial review subjects the executive and legislative branches of government to review of their respective exercises of power. When the executive or Congress chooses an end for the exercise of its power, “the relationship between the means chosen and the end pursued” (p. 7) receives judicial scrutiny.

Constitutionalism 1.0 is not obsolete, although the focus shifts in the move from Constitutionalism 1.0 to 2.0.¹⁵ The shift is in the focus from power to rights.¹⁶ Somek cites Germany's post-World War II constitutional experience as the exemplar of the evolution to Constitutionalism 2.0. In the 2.0 world, a constitution springs not from a sovereign people but from “an act of reasonable recognition concerning the supreme value and authority of human dignity and human rights” (p. 9). Constitutionalism 1.0 was about voluntary realization of the values of a people. 2.0 abandons voluntarism and embraces “the universal values of freedom, equality, and solidarity” (p. 9). The shift is from liberty to dignity.

Somek provides a wealth of detail in his incisive descriptions of each constitutional epoch. It is in these details that the reader sees a foreshadowing of the dark side of Constitutionalism 3.0. Constitutionalism 1.0 was a project of emancipation, best represented by the French Revolution and the American colonialists' revolt against Britain. The *raison d'être* of this form of constitutionalism is overcoming the externalities of status and privilege.

13. See, e.g., HENRY KISSINGER, *WORLD ORDER* (2014).

14. James Madison, *Charters*, NATIONAL GAZETTE (Jan. 19, 1792).

15. As Somek explains, each iteration of constitutionalism is recalibrated as we move from one epoch to another (p. 9).

16. See Richard Bellamy, *Political Constitutionalism* 6–9 (UCL School of Public Policy Working Paper Series, Paper No. 26, 2007).

Somek characterizes Constitutionalism 1.0 as “bourgeois” (p. 11). The downside of Constitutionalism 1.0 is that it locates its subjects “within a market society largely immune from state interference” (p. 11).¹⁷ Somek does not like this setup. In one of several gifted, bespoke examples that appear throughout the book, he says this about life in a market society:

Decentralized human cooperation in markets, however, works by virtue of unintended man-made necessity. If all surrounding barbershops offer complementary coffee, my shop has to offer it too. This necessity is “external” in the sense that the opportunities to which it gives rise do not reflect what one wants by virtue of who or what one takes oneself to be. There is no way of living off exploring the contraction of God at the moment of creation if all that people want is lean food and inexpensive mobile phone plans. Likewise, if others work for less, one has the choice of working for less oneself. If competitors innovate, one has the choice to innovate first. A competitive life is spent engaging in pre-emptive strikes. If one does not choose what one must choose, one will go under. The choice is the choice of necessity, objectively and subjectively considered. It is the choice of and by necessity (p. 11).

Freedom in this form of social order is “formal”; so much so that “it is even indifferent to its own choosing” (p. 11).

Constitutionalism 2.0 takes a different approach to human freedom. Here negative liberty is still endorsed but it does so “through the pooling of risks” (p. 11). The aspiration of a society of dignity is freedom from economic necessity. Where peoples’ choices “are driven by their needs and their fear of losing their livelihood” (p. 12), they are not really “free.” Constitutionalism 2.0 is all about rising above the buffeting effects “of our nature” (p. 13) as we try to free ourselves from the “potentially enslaving effects of bourgeois emancipation” (p. 13). It’s all quite bleak.

American constitutional practice is fixated on interpretation of the written text of its constitution. This practice is the key element of the judicial review of the constitutionality of legislation. By contrast, Constitutionalism 2.0 is grounded in the recognition of human rights. In this regard, the reflexive constitutional engagements revolve around proportionality. The questions are “whether government action has been too intrusive

17. Throughout the book, Somek makes clear his disdain both for capitalism and markets. He has no affection for ideas like “creative destruction” and there is no place for Adam Smith in his pantheon.

vis-à-vis fundamental rights or not sufficiently protective of them” (p. 17).

Now Constitutionalism 3.0 starts to emerge.¹⁸ 2.0 is based on recognition of human rights. But this presupposition occurs within the frame of a state with sovereign peoples. Curiously, human rights—which are supposed to be “superior” to sovereign authority—require that very same sovereign for their articulation and realization. The import of this relationship cannot be overstated. Somek writes:

This relationship of simultaneous superiority and dependence is of enormous import. First, it means that any institution wielding public authority needs to be as good as any other in the face of human rights. Second, whether the institution meets the relevant standard can only be ascertained by heeding what peer institutions are doing. Human rights depend for their articulation and realization on public authority even though they also transcend any instantiation of it. The transcendence of particularity can be real only in horizontal self-relativization. There is no other way. Sovereignty serves human rights through its own abdication. Authority says: “I am one among others. In order to find out whether I live up to my standards, I will look around and see what my peers are doing” (p. 17).

This is the European model of constitutionalism. Through the Court of Justice of the European Union and the European Court of Human Rights, transnational standards of rights protection are established outside the sovereign state with force and effect within the states’ borders. This raises the obvious question of conflict between national and transnational standards, thereby engendering the challenge of pluralism which is dealt with by the doctrine of “margin of appreciation.”¹⁹ The doctrine, Somek maintains,

is based on the idea that national authorities are better positioned to strike the balance between individual rights and the common good since they are in “direct and continuous contact with the vital forces of their countries.” That the vital forces could be evil forces does not enter the picture as long as the societies continue to be democratic (p. 19).²⁰

18. As discussed below, the dynamics are largely a matter of economic integration.

19. See, e.g., *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, ¶¶48–49 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>.

20. Citing *Handyside*, 1 Eur H.R. Rep. ¶48.

Pluralism—competition among legal orders for control—is a hallmark of European constitutionalism.²¹ The legal theoretical issue is one of legitimate authority. In a clash between legal orders, say the Court of Justice of the European Union and a national constitutional court, the question is who wins? The practice has been for national courts to enforce extra-national norms “so long as” the extra-national norm meets the minimal requirement of the national norm.²²

The intercourse between legal orders raises the question of authority. *Solange*²³ jurisprudence is accommodative and untidy. Somek disparages it as “the law of the jungle” (p. 21). He makes his point this way:

In practice this means that in the course of pluralist interaction, all participants are able to exercise any power so long as they can effectively get away with it. While this smacks of the law of the jungle, it is obvious that the overall interaction between and among national or international or supranational sites is eventually embedded into political constraints. Owing to their existence, each participant realizes it would be imprudent or unwise to offend others. They realize that they had better respect what is important to others and grasp opportunities to avoid conflict by leaving matters undecided. Constitutionalism 3.0 is, therefore, witness to the return of *political* constitutionalism. Effective constraints emerge not from law but from more or less subtle equilibria of power. In contrast to the legally grounded political constitutionalism envisaged by the system of checks and balances, this political constitutionalism is rather crude. The overall constitution of

21. For discussion, see KLEMEN JAKLIC, *CONSTITUTIONAL PLURALISM IN THE E.U.* (2013).

22. Somek elaborates:

Pluralism in the European Union has given rise to forms of (mutual) embedding. One legal order pledges to yield to the norms and jurisdiction of another “so long as” its level of fundamental rights protection is sufficiently “equivalent” to that of the yielding legal order. This is now established doctrine not only for German constitutional law *vis-à-vis* the European Court of Justice but also for the European Human Rights law *vis-à-vis* the same court, and, most famously, for European Union law *vis-à-vis* the UN Security Council. The national legal orders and the European Convention System yields to E.U. law, the E.U. yields to the United Nations and, not least, the Convention system yields to the participating states “so long as” the requisite others stay within a margin of appreciation, however it may be actually defined. The system to which room is conceded, need not be identical, however, a sufficient similarity must be manifest in the long run (p. 196, citations omitted).

23. “*Solange*” names important decisions of the German Constitutional Court regarding constitutional limits to the primacy of E.U. law. For discussion, see *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 411-412 (Armin von Bogdandy & Jürgen Bast eds., 2009).

the multilevel system ceases to be law altogether. It is a factum, not a norm (p. 21, citations omitted).

Somek has little positive to say about the present era's treatment of transnational legal phenomena. Having decided that Constitutionalism 3.0 is really "a form of political [as opposed to legal] constitutionalism" (p. 22), Somek bemoans the "erosion" of Constitutionalism 1.0. The erosion reaches from human rights to transnational law. He writes:

That constitutionalism 3.0 is a form of political constitutionalism can be observed also against the broader social context from which it emerges. It is a world in which the remains of constitutionalism 1.0 are increasingly subject to erosion. As a result, one arrives at a twofold picture. While the world of human rights protection is "pluralistic" owing to various forms of formal or informal peer review, the organizational part of constitutional law is permanently under siege by the exigencies of practical problem solving across national borders and various layers of an emerging multilevel system.

The pressures of practical problem solving, which are most salient in combating terrorism or rescuing a common currency, affect the role of legislature, which took center place in the world of constitutionalism 1.0. Nowadays, societies exist under conditions of permanent social acceleration. Not least owing to the influence of mass media reporting, the public and politics are under the impression of being persistently seized by this or that crisis. Under these conditions, expeditious and effective problem solving becomes imperative. Authority is, therefore, systematically inclined to migrate toward *transnational* fora (or "networks") of *executive governance*. The new allocation of power is occasioned by the *impression of necessity*. The authority that is constituted *de facto* ceases to be based on a charter created by liberty. In its more disturbing instantiation, constitutionalism 3.0 is the constitutionalism of necessity (p. 22, citations omitted).

Human rights protection, constitutional law, and even transnational fora are all evidence of a crisis in power which is expressed as a failure in authority that responds to the necessities of the moment. Gone are the days when there was clarity about constitutional authority (i.e., the era of Constitutionalism 1.0).

Now the exigencies of the moment have delivered power into the hands of the executive.²⁴ Again, Somek:

Once repeated and expeditious problem solving becomes the categorical imperative of governance, the executive branch is likely to gain power at the expense of the legislature. Officially, the central role accorded to the legislature stays in place. However, in the face of the exigencies of interventions and the technicality of regulation, the legislature needs to cede ground to administrative processes. Legislative delegations and various avenues of oversight are means to retain the superiority of the legislature at a symbolic level. But these are, in fact, *mere* symbols. While delegation has long ceased to be convincing as a doctrine, oversight might not be terribly effective owing to a lack of capacity on the part of the legislature to monitor and apprehend even a fraction of what is done by the administrative branch. The very reasons that make delegation reasonable explain why oversight is blunt, in particular owing to the legislature's lack of information and expertise.

The real world of constitutionalism 3.0 is the world of a perplexingly diffuse administrative state sans sovereignty juxtaposed with a multilevel system of fundamental rights protection. Old domestic authorities persist, not least because the national coercive apparatus is indispensable for purposes of implementation. It is more cost-effective than private enforcement or security services. Nevertheless, the center of gravity with regard to risk management and crisis intervention shifts to transnational governance structures. As the European sovereign debt crisis has revealed, formal legal constraints are bent in order to accommodate necessities. Elections on the national level matter inasmuch as they add public acclaim to one or the other *fait accompli*. If the voters do not deliver "reasonable" results they are suspected of adhering to dangerous right-wing ideology (pp. 22-23, citations omitted).

Not only is constitutionalism descending into the depths of political uncertainty, we are now witnessing the ever-growing threat of "authoritarian liberalism" (p. 23). We are approaching the dark side of Constitutionalism 3.0.

The protections of Constitutionalism 1.0 erode in the 3.0 era. This is why Somek disparages 3.0 as the age of "political constitutionalism." The cause of this breakdown is the direct

24. This theme is well developed in the work of Saskia Sassen. See SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 148-271 (2006).

result of the development of conditions of “permanent social acceleration”(p. 22).²⁵ Among the victims of increased speed is authority. Increased speed requires faster decisions and more effective problem solving than government can provide. Thus we witness the rise of *transnational* fora of *executive* governance. The effect is the production of an “administrative state sans sovereignty” (p. 23). What’s really at the bottom of all of this: capitalism, of course. More on this below.

As mentioned above, the Cosmopolitan Constitution has two faces. The political face of TCC begins with the understanding that, as cosmopolitans, we are at home anywhere in the world. Bounded democracies are paradoxical because they are as normal as they are morally defective. For a bounded democracy to be truly “cosmopolitan,” the interests of “foreigners” must be represented. But how can people who are by definition “outsiders” be represented in a democracy? The answer, Somek avers, is “virtual representation.” Virtual representation “requires adherence to human rights, democracy, the rule of law, and non-discrimination” (p. 245).

The paradox of bounded democracy is “solved” by what Somek refers to as “the darling dogma of bourgeois Europeanists” (p. 253). Often cast as a matter of one state imposing externalities on another, Somek illustrates the doctrine with an example. If Spain decides to ban the importation of red wine because it has ill effects on labor productivity, that act will have a negative effect on the economy of Portugal. Enter the dogma: “it is undemocratic for bounded democracies to adopt decisions whose implementation affects citizens of other states without giving these citizens a voice” (p. 28).

The dogma contains a paradox. If polities cannot regulate their own space, then democracy is stifled. Regulation is the legislative expression of democratic choice. But if that choice is hindered by restraint on the imposition of externalities on “foreigners,” then democracy is stifled. The Darling Dogma would thwart the work of democracy.

Liberalism puts rights above the political process: rights are “trumps.” The efficacy of the Darling Dogma requires a theory of (constitutional) rights that protects the claims of “foreigners.” Alas, the dogma “says nothing about the *legitimacy* of the

25. Citing William E. Scheuermann, *Citizenship and Speed*, in *HIGH-SPEED SOCIETY* 287–306 (Hartmut Rosa & William Scheuerman eds., 2009).

demands of others. It is substantially empty” (p. 29). The answer is the transnational and the administrative.

The second face of Constitutionalism 3.0—its administrative face—is its dark side. Because the state is all about (economic) integration, and because the legislature has ceded its authority to the executive, the state simply “administers” in terms most favorable to the markets. It’s the state against the markets and the markets are winning. Political life has been “diluted” by subservience to markets. It is the age of “Authoritarian Capitalism.” This is the dark side of Constitutionalism 3.0.

Somek identifies “administration” as the nefarious force suborned by Constitutionalism 3.0. It is through administrative rationality that the polity loses its democratic character. And, of course, administrative rationality is the handmaiden of global capitalism. As I said above, Somek argues that capitalism lies at the root of the demise of democracy. The administrators of modern nation-states²⁶ have become unwitting objects of the force of global capital. Hence Somek’s characterization of the present moment as one of “authoritarian liberalism.”

PLURALISM

European constitutional law is preoccupied with pluralism in a way that tends to go unnoticed in the American context. Of course, this is due in large part to unique features of European Union law. From a technical point of view, the question is sometimes articulated from the perspective of legal orders or legal systems: just how many legal orders are there in Europe?²⁷ The second nexus for pluralist discussion is that of the transnational. The growth of transnational phenomena and the rise of transnational regulators are subjects of intense scholarly interest. Again, pluralism is a central feature of these discussions.

There are both legal theoretical as well as political issues implicated in discussions of pluralism. Somek articulates pluralism as an issue in legal theory before discussing its place in Constitutionalism 3.0. His thesis is that contemporary conceptualizations of pluralism set the stage for the demise of law

26. The rise of administrators as agents of nation-state policies is explored in ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

27. One of the best treatments of the question from the point of view of legal theory is Julie Dickson, *How Many Legal Systems?: Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union*, 2 *PROBLEMA* 9 (2008).

and the rise of global capitalism. They do this by (unwittingly) replacing “legal constitutionalism” with “political constitutionalism.” As Somek states, “Pluralism . . . marks the point at which constitutional law comes to an end” (p. 197).

The “gist” of pluralism, Somek argues, is to be found in the distinction between institutional pluralism and system pluralism (pp. 193-194). When a president and a court each assert their authority to interpret the constitution, this is an instance of institutional pluralism. The clash is internal in that each protagonist lays claim to the interpretive authority within the same legal order.

When two legal orders claim ownership of a question or issue, we have an instance of systems pluralism. The clash is much deeper than that of the institutional context because each legal order is asserting its authority vis-à-vis the other.²⁸ As Somek puts it, the “norms belonging to different systems are irrelevant to one another” (p. 194). He provides an example:

The now classical instance of system pluralism in the European Union is manifest in the assertion by the European Court of Justice that the European legal system is autonomous and hence independent of any external limitations determined by the constitutional laws of the Member States. This assertion is matched by Member States constitutional courts’ claims that the authority of the European Union is derivative of the delegations made pursuant to national constitutions and can never go, within such constitutions, beyond constitutionally proscribed limits (p. 194, citations omitted).

Somek treats the problem of clashing legal systems as fundamentally jurisprudential. He points out that the clash between competing legal systems “could only be resolved on the basis of one overarching system” (pp. 194-195). Given this structure, a third system is needed to manage the conflict and decide which system controls the question. Somek credits Hans Kelsen with this insight. Of course, *Solange* jurisprudence tries to

28. Somek cites and quotes the classic reference to the problem. It is the work of Neil MacCormick:

Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another. In this case, ‘constitutional pluralism’ prevails (p. 190 n.90, quoting NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 104 (1999)).

massage the situation through a careful dialectic of accommodation.²⁹ Somek will have none of this.

Somek rejects institutional pluralism on grounds of legal theory. In addition, institutional pluralism paves the way for political constitutionalism. Here Somek draws a distinction between law and politics. The question is “what mediates mutual yielding and explains its legitimacy?” (p. 197). The answer to the legitimacy question is “nothing.” As a consequence, “[p]luralism . . . marks the point at which constitutional law comes to an end” (p. 197). Pluralism is not “law” but “the law of the jungle” (p. 198). It is “political” because “it comprises merely political processes whose patterns may actually reflect power differentials” (p. 197).

Somek disparages the work of a variety of “apologists of pluralism” (p. 198), especially that of Mattias Kumm. Regrettably, Somek’s disparagement depends on a distinction for which he provides absolutely no argument, between the “legal” and the “political.” As he has done in previous work,³⁰ Somek invokes the authority of Hans Kelsen in drawing this all-important distinction. That is fine, as far as it goes, but citing Kelsen is not the same thing as providing an argument. And this Somek fails to do. Somek credits Kelsen’s insight (described as “valid”) that an overarching system is needed to break the deadlock between competing legal systems.

29. Somek describes the matter thus:

Each system lays down the conditions under which it concedes authority to others. The others [sic] laws are respected and applied even though they are of foreign origin. This way of managing the pluralist situation is epitomized in the ingenious reply formulated in the so-called *Solange I* decision of the Federal Constitutional Court. In this case, the Court had to address the claims made by the Court of Justice of the European Union that EU law is autonomous and supreme. The thrust underlying these claims was, of course, that no national law, not even national constitutional law, could trump EU law. The Federal Constitutional Court replied calmly that while the autonomy and supremacy of the EU legal order could not be disputed, the scope within which EU law can trump German law is to be determined pursuant to German constitutional law. Within the space allocated by the German constitution to EU law it is allowed to reign supreme (p. 195, citations omitted).

30. In an earlier article on Kelsen, Somek makes the same question-begging move; that is, invoking Kelsen with no explanation of what he (i.e., Somek) means by “law”: The purveyors of legal pluralism, fragmentation and ‘polycontextuality’ offer valuable insights; but they should make explicit, too, that in speaking about a plurality of legal systems they produce an equivocation in the concept of legal validity. Legal validity may well be in demise. This should give the advocates of pluralism reason to acknowledge that what they are talking about is no longer law. Alexander Somek, *Kelsen Lives*, 18 EUR. J. INTERN’L LAW 409, 425 (2007) (internal citations omitted).

Somek condemns the “so long as” style of reasoning not only because he deems it “political,” but because as such “[t]he people are lost” (p. 201). As he puts it, “Constitutionalism 3.0 admits *bourgeois anarchism* to constitutional law” (p. 200). Because courts are “entrusted with the task of protecting rights” (p. 201), it is paramount that they remain within the bounds of the law. Here we see the last remnants of Constitutionalism 1.0 snuffed out:

In the context of constitutionalism 1.0, publicists explained the authority of the constitution by resorting to the idea of a social contract. The idea was that the constitution represents a mutual promise of citizens who thereby become members of a people or political society. They pledge to each other to respect constituted authority and to conduct themselves as members in good standing of their polity. The constitution is a norm that is shared by them. It lends unity to all relationships that citizens engage in (p. 200).

Everything Somek says about constitutionalism depends on the distinction he draws between law and politics. There are two issues with Somek’s reliance on this distinction. First is the question whether the distinction is precise enough to yield the consequences Somek desires. His position is based on the view of law as essentially apolitical, as something that is able to keep politics in check. Judith Shklar could have been describing Somek’s views when she wrote in 1964: “Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies.”³¹ But such views—Somek’s included—do not appreciate an important nuance: when law attempts to constrain politics, it arguably becomes politicized.³² Treatment of pluralism as a jurisprudential phenomenon—and not as a wider political and societal condition—leads Somek to neglect the fact that law is likely to reflect and often amplify political differences rather than ameliorate them. The same process could be happening in the European Union, and

31. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 111 (1964).

32. As Martin Loughlin puts it, “legalization of politics has led primarily to the politicization of law.” MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 233 (2000).

jurisprudential clashes between courts could simply be a symptom of underlying political pluralism.

This brings us to the second question: do we have reason to prefer legal over political solutions to the fact of pluralism? The resolution of this issue supervenes on Somek's ability to make a sharp distinction between law and politics, and his capacity to show that his idea of law is somehow preferable to politics. Constitutional pluralists take the opposite approach: they argue that less crude forms of regulation and political engagement are superior to Somek's hierarchical model.³³ On such views, not only is the complete legalization of the constitutional domain in the European Union impossible, but it is also normatively problematic under the circumstances of disagreement and pluralism. There is also an important strand of theoretical thinking about constitutionalism that rejects its legalized form and recommends political constitutionalism as an alternative.³⁴ Perhaps Somek would agree with them that the courts should not deprive people of their democratic political experience. But then his plea for a legal-hierarchical form of legitimation on European level is puzzling: he cannot have it both ways.

TRANSNATIONAL GOVERNANCE

Although transnational governance networks or institutions lack a public law pedigree, they are part of what Somek identifies as "a perplexingly diffuse administrative state sans sovereignty and a multilevel system of fundamental rights protection" (p. 233). For the "legitimacy" of institutions such as ICANN,³⁵ it is necessary that they be "rooted in some constitutional order" (p. 229). But, Somek explains, transnational institutions are not legitimated through law, rather, their measure is "first and foremost in administrative accomplishment" (p. 229), that is, "effective management of administrative processes" (p. 229).

Just as with constitutionalism, transnational governance is dismissed as "anarchical" (p. 230). Somek does not explain what

33. See, e.g., Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, in *CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND* (Matej Avbelj & Jan Komárek eds., 2012).

34. See, e.g., RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007); ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005).

35. ICANN is the non-profit California corporation responsible for the assignment of domain names on the internet.

would make transnational processes legitimate other than some connection to “law.” More darkly, transnational institutions and processes are all part of the bleak edifice of Constitutionalism 3.0, the defining feature of which seems to be the “collapse” of Constitutionalism 1.0. In the course of things, “the people” are lost. They become “a counterfactual social fact” (p. 238).

How have things gotten so bad? The answer is simple: capitalism. Somek explains:

It has already become somewhat of a truism that nowadays peoples are dominated by core institutions of modern capitalism. The reactions of economic agents, such as financial markets or rating agencies, are of utmost importance to the design of economic and fiscal policies, while, at the same time, these agents do not bear any public responsibility. Financial markets have a neoliberal predilection for public austerity. Consequently, governments cooperating across national bounds need to ever more tightly contain grassroots resistance against retrenchment in order to implement from above what is good for a “healthy economy.” Therewith emerges a new brand of authoritarian liberalism. Similar to its original form, it stands for economic governance that severs its dependence on the support of parliamentary democracy. It is subtler today, however, than it was in the 1930s. Members of the assembly are no longer simply sent home. They are expected to bow to the reasonableness of pacts concluded between governments and financial institutions. (pp. 238-239).

The bottom line is that in the era of Constitutionalism 3.0, governments have become hostages to global capital.

Somek advances a fascinating narrative in support of his assertion of a deep connection between Constitutionalism 3.0 and global capitalism. Following the German sociologist Wolfgang Streeck,³⁶ Somek’s narrative begins after World War II. He describes the situation thus:

If Streeck is right, the post-war development of the Western economies has been witness to a displacement of the original conflict between capital and labor with a persistent tug-of-war between countries with high public debt, on the one hand, and financial markets, on the other. Countries that struggle to restore private credit to their damaged economies have to increase their public debt. In order to succeed at that, they depend on a favorable response from those institutions that

³⁶ See, e.g., Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 *NEW LEFT REVIEW* 5 (2011).

actually benefit from their largesse. Evidently, the locus of control shifts from politics to the economy. The consequences are disheartening. In order to come out with a sustainable credit score, countries need to implement austerity programs that signal credibility to credit markets. Countries seem to have no choice. The affected populations either react with revolt or realize that there is nothing left for politics to decide and turn away from democracy. It begins to dawn upon them that the real constraints on governance are economic. They are intrinsic to fostering the public weal (p. 23, citations omitted).

What emerges is what Somek identifies as “authoritarian liberalism” (p. 23). Nation-states are subjugated to financial markets. States, and their economies, are governed not as democracies but run like businesses. Everything is economic: it’s all about “micro-management” (p. 24).

Streeck maintains that, following the Second World War, capitalism permitted politics to enter in economic planning. By the 1970s, *laissez-faire* capitalism was dead, having been replaced by “some political control of the economic system” (p. 239). Capital then pulled out of the earlier post-war settlement, owing to rising inflation. To combat capital flight, states reduced wages and tolerated high unemployment. The perennial conflict between capitalism and democracy then moved into the forum of electoral politics. Governments responded to rising wages and the threat of economic slump by deregulating the financial sector. This gave birth to what Crouch calls “Privatised Keynesianism,”³⁷ epitomized, Somek claims, “by the policies of the Clinton years” (p. 240). With the disappearance of wage increases and increasingly austere social policy, risky credit filled the void with “[i]ndividual private debt replac[ing] public debt” (p. 240). Then, in 2008, the U.S. housing bubble burst, forcing the government to rescue the banks. As mentioned, ironically, governments find themselves beholden to the same institutions which benefitted from their assistance. It gets worse. Somek summarizes the situation: “International institutions, such as the International Monetary Fund, or supranational bodies, such as the Commission and the European Central Bank, demand these programs. The spoils and benefits of the banking system are now financed through pension cuts and the phasing out of entitlements” (p. 240).

37. See Colin Crouch, *Privatised Keynesianism: An Unacknowledged Policy Regime*, 11 BRITISH J. POL. & INTERN’L REL. 382, 387–88 (2009).

Somek describes the “tug of war” between governments and finance thus:

It is important to realize that the tug-of-war between governments and haute finance is merely a *symptom*. Generally, symptoms are unsuccessful attempts at problem solving. An inflammation, for example, is a defense mechanism, and in this respect it is beneficial; but it is also painful and can give rise to additional ailments. The underlying problem, of which the domination of states by financial markets is the symptom, is the conflict between the interests of capital, on the one hand, and the interest of the great mass of people who until a few decades ago had been able to use democracy in order to assert their interests politically. The pre-eminence of finance *vis-à-vis* politics is merely a displaced manner in which the latter experience their subordination to the former (p. 240).

This leaves nation-states answerable to two different sorts of “people.” The first are their own citizens and the second are a group Streeck calls “market people.” Market people are a private polity but they have all the power. They vote with their feet and their money. “They vote through the buying or selling of securities, through investment in a local business project or through accepting well-paid employment” (p. 241). It is the fate of the polity—“ordinary folks”—to cling to their withering “social rights, guaranteed on the basis of national constitutional arrangements” (p. 241). The only way to ameliorate this situation is for “constitutionalism . . . to return to a way of thinking from which it had once emerged” (p. 241).

There are two questions to ask about this diagnosis of the present situation in constitutional law (Constitutionalism 3.0). The first regards the plausibility of Streeck’s analysis, on which Somek so heavily relies. Second, even if Streeck is correct in his diagnosis of the post-war realignment of relations between labor and capital, does this account for the present state of constitutionalism?

Streeck’s thesis begins with the claim that the 2008 financial crisis was not a “one off” event. Rather, he maintains, “the present crisis can only be fully understood in terms of the ongoing, inherently conflictual transformation of the social formation we call ‘democratic capitalism’.”³⁸ This is not the place to debate the macroeconomic aspects of Streeck’s thesis. I will, however,

38. Streeck, *supra* note 36, at 5.

observe that both in the hands of Streeck and Somek, the thesis starts to lose plausibility once one moves beyond the borders of Continental Europe.

First, consider the Nordic countries.³⁹ Does the IMF tell Norway what to do with its oil riches? Is the Swedish welfare state not thriving?⁴⁰ And what of unemployment in Denmark and Finland? None of these economies seems to be under the control of the IMF, the ECB, or anyone else. Their welfare states are doing just fine. They do not confirm Streeck's thesis.

Outside of Europe, one finds more than a few counterexamples to Streeck's thesis. The Canadian banking system felt little of the ill effects of the Lehman meltdown.⁴¹ India's economy is booming, as is China's. The United States saved the banks and made billions in the process.⁴² Australia, Russia, Mexico, Korea and Japan all seem to fall outside the confines of Streeck's narrative.⁴³

Does Streeck explain what is going on in the Eurozone? Up to a point, yes. But, as Ulrich Beck has pointed out,⁴⁴ the principal ideologue in setting austerity policy is Germany. As of the time of this writing, the new Greek government is withering in its attempt to throw off the yoke of austerity. It isn't only bond yields that are putting pressure on the Greeks: it is Berlin. The reasons are ideological and not fiscal. Merkel and Schauble are not pressing

39. The evidence is found in accessible form in an issue of *The Economist* devoted to the Nordic countries. See *The Next Supermodel*, THE ECONOMIST (Jan. 31, 2013), <http://www.economist.com/news/leaders/21571136-politicians-both-right-and-left-could-learn-nordic-countries-next-supermodel>.

40. For informed discussion, see SVEN STEINMO, *THE EVOLUTION OF MODERN STATES: SWEDEN, JAPAN, AND THE UNITED STATES* (2010).

41. See David Cho, *U.S. Take If It Sells Its Citi Stake To Settle Cost of Bailout: \$8 Billion*, WASH. POST (Mar. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604938.html>.

42. The U.S. government banked 15 billion dollars on its bailout stake in Citicorp. See Stephen Gandel, *Government Banks \$15 Billion on Citigroup Bailout*, FORTUNE (Sept. 10, 2013), <http://fortune.com/2013/09/10/government-banks-15-billion-on-citigroup-bailout/>.

43. At least two of the states mentioned in this paragraph are controversial: China and Russia. The obvious objection is that neither is "democratic." There is an obvious sense in which this is true. But I think Fukuyama had it right when he said that we have seen "the end of history" when it comes to the triumph of democracy over fascism and communism. Going forward, there is no alternative. See Francis Fukuyama, *The End of History?*, THE NAT'L INTEREST, Summer 1989. Travel and education are two metrics for democracy. In this regard, it is interesting to note the great expansion in the number of students from Russia and especially China travelling to the U.S. and the U.K. for university and post-graduate education. See *Special Report—Universities: "Excellence v Equity,"* THE ECONOMIST (Mar. 26, 2015), <http://www.economist.com/news/special-report/21646985-american-model-higher-education-spreading-it-good-producing-excellence>.

44. See ULRICH BECK, *GERMAN EUROPE* (2013).

their case because they are the puppets of global capital. They are doing it because they think it is deontologically required. That's ideology, not finance.

What about the connection between transnational regulators and global finance? Here the link seems even more tenuous. Somek rails against the Basel Committee, the Codex Alimentarius Commission, the World Health Organization and the IMF because they are "relatively immune to political challenge and operate on the basis of their own functional specifications and institutional culture" (p. 274). For Somek, the only form of legitimacy for organizations dealing with transnational or global challenges is democracy. As he correctly states, the claim of such organizations "is based on the generation and implementation of expertise" (p. 274). But Somek rejects expertise as a ground of authority or legitimacy.⁴⁵ He seems to prefer his authority and legitimacy the old-fashioned way: through democratic participation in a nation-state. That is why he never wavers in his belief that the nation-state is central to the future of constitutionalism.

Somek's argument depends a great deal on the strength of Streeck's analysis. As I have suggested, Streeck's thesis faces some strong explanatory headwinds as the Northern part of continental Europe does not confirm his thesis. Additionally, there are just too many states in the world today that do not fit the narrative.

Ironically, if Somek is correct about the state of world affairs, then there is no way to rehabilitate nation-state democracies to the extent that they can actually deal with the issues he discusses. The irony is that he must either give up constitutionalism or the nation-state (the two things he likes most), and embrace either of the things he disdains, the wishful thinking of global constitutionalism or the impotency of nation-state constitutionalism.

45. Somek considers and rejects Joseph Raz's Service Conception of Authority. He writes:

The application of this 'service conception' of authority presupposes not only that people would find it easy to distinguish between what they confidently know themselves and what is better for them to have known by others, but also that the meaning and scope of the conception could be easily ascertained. The roughly 40 densely argued pages that Raz recently wrote elaborating the conception must make this appear doubtful (p. 280, citation omitted).

CONCLUSION

My criticisms notwithstanding, this is an engaging and important book. Somek's diagnosis of the current state of constitutional theorizing is at once compelling and provocative. What is truly remarkable about this book is the way Somek links debates about constitutionalism to global forces in a way no one else does. This is an extraordinary achievement. Even if one disagrees with the thesis, the arguments must be taken seriously. No one else in constitutional or legal theory is writing anything like this. Quite simply, this is a book no one can ignore.