Book Review

Blindness and Hindsight

By Alexander Somek[*]

A. Introduction

My book claims that constitutionalism is about constraining the exercise of public power in a legal manner.[1] What it studies are different renderings of this idea and how one can arrive move from one to the next. What is essential to the success of the enterprise is, first, elaborating the relevant ideal types; second, analyzing how the transitions are made from one to the other;[2] and third, taking public law as a way of conceiving of human practice, namely as activity that is essentially amenable to normative guidance and constraint. The people working and thinking in the world of public law use language that betrays ontological commitments to conspicuous entities such as "powers," "values," or "conventions."

The book is specifically interested in public law as a way of thinking, or imagining, of the world of politics constrained by law.[3] It uses specific constitutional experiences, ranging from the English revolutions to current European public law, in order to explore how this way of thinking has been molded, not only by external forces, but also by how it has replied to the impact of such forces on its own terms. The interest in history is, evidently, a very peculiar one. The book studies "virtual history," or history as it could have happened had history taken an intelligible course. What the project thereby seeks to accomplish is to salvage the universally relevant from the concrete and to sever ways of thinking from the circumstances that have helped to bring them about. It suggests, that studying transformations of thinking gives us the true story of modern constitutional law, provided that one agrees with what in my view everyone has to agree with, namely, that modern constitutional law is essentially a way of thinking.

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[1] *See* ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION 1 (2014).

[2] *See* Robert Pippin, *You Can't Get There from Here: Transition Problems in Hegel's Phenomenology of the Spirit, in* THE CAMBRIDGE COMPANION TO HEGEL 52–85 (Frederick C. Beiser ed., 1993).

[3] *See* Martin Loughlin, *The Constitutional Imagination*, 78 MOD. L. REV. 1, 1–25 (2015).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

The major challenge for writing a book of this type is to avoid burying the major ideas underneath comparative studies that might be added in order not to offend those who might feel that they have been ignored, let down, left out, or in any event have been treated as "others." Indeed, this book has "othered" many respectable constitutional traditions, ranging from Italy to India and from France to Australia, and it focused instead basically on two, each of which is distinguished by one particular characteristic: One is to have been the first and the other is to be the most philosophical. That Anglo-America has made the first significant foray into modern constitutionalism is something that I am taking for granted; and that Germany is most philosophical should at least emerge beyond reasonable doubt once one has delved into—as I have done in the book—the perplexing relation between the elaboration of and the interference with fundamental rights.

Reduction is essential. Writing is all about pruning and discarding preliminary drafts. Yes, the book has a regional focus, but this focus is surprisingly accidental. What matters, at the end of the day, are the ideas.

Once again, I have received encouraging comments.[4] Even though some of them are hard-hitting, they are also respectful of the risky nature of the enterprise. The many perceptive and challenging comments are rewarding, not least because they force me to state my ideas more clearly and, more importantly, to rethink some of the more salient claims that I have made in the book.

Basically, the commentators address four issues. First, they concern the method of my approach, that is, the commitments to a certain way of analyzing the phenomenon in question. The second issue is whether it is truly accurate to distinguish between 2.0 and 3.0 from a historical perspective. Do they not appear in tandem? The third concerns the seemingly perplexing fact that someone who has the guts to write an avowedly "Eurocentric" book can pay so little attention to the European Union. The fourth is about whether we have reason to turn our back on constitutionalism altogether and to embrace the mixed constitution. What this issue boils down to, indeed, is whether this is a normative question.

B.

The first topic is Hegelianism. Tschorne brings it up in his comment.[5] In the several questions that he asks of me, he wonders how a Hegelian can be so pessimistic and, worse, possibly even moralistic. Tschorne observes that the book leaves the reader "with a

[4] For a first round, see 4 REVISTA TRIMESTRALE DI DIRITTO PUBLICO, 67 (2017) (It.).

[5] *See* Samuel I. Tschorne, *Thinking Normatively Without Moralizing? Constitutional Theory—Somek's Style*, 19 GERMAN L.J. 1519 (2018).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

discomforting cognitive dissonance." The "darker colours" with which the book "portraits the constitutional world we live in" seem to portend a doomsday scenario, while in fact the impression of darkness is owed to the fact that the book offers an overly optimistic account of the constitutional past.
Since Tschorne places this observation in the context of the methodological question, I would like to address the apparent gloominess against this backdrop.

I have always thought that what makes Hegelian thinking great is that it is decidedly not methodological. This means that a subject matter is not externally submitted to some methodological rigor or recast on the basis of some conceptual grid; rather, the idea underlying Hegel's first major work, the *Phenomenology of the Spirit*, is that knowing and doing always either implicitly or explicitly harbor certain expectations of themselves. It happens, however, that when confronted with hard cases, the application of a certain way of orienting, knowing, or doing realizes that it either fails to live up to its own ideal or that this ideal has been confused and indeterminate all the while. Once knowledge and doing—or "consciousness" in Hegelian parlance—make this experience, they have to reconstruct themselves, that is, redefine the ideal that they aspire to live up to. They have to reconstruct their own operation to understand better what it is all about and how they can validate their claims.

More precisely, it is a common characteristic of practices of knowing and doing that they develop conceptions of themselves. They are what Dworkin would have called "interpretive."[6] Their operation is informed by divining their relevant purposes and point. Moreover, they also comprise interpretations as to what it is that explains their authority. Hegel called this phenomenon "spirit" or, in German, *Geist*. As Terry Pinkard explains, spirit stands for a self-conscious form of life. Such a form of life develops "various practices for reflecting on what it takes to be authoritative for itself in terms of whether these practices live up to their own claims and achieve the aims they have set for themselves."[7] The basic premise of any Hegelian exploration of human knowing and doing is that all the investigating mind needs to do is to "lean back" and to observe how instances of spirit compose and, indeed, decompose themselves. Abstaining from applying a method is—to be sure—a method of its own. It invites casting human phenomena as always prone to crisis and subject to frequent supersession.

Constitutionalism is an instance of *Geist,* and the book is about capturing its *Geist*. What Tschorne and, to a lesser extent, Dani[8] appear to find disturbing about the exploration of

[6] *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

[7] *See* TERRY PINKARD, HEGEL'S PHENOMENOLOGY: THE SOCIALITY OF REASON 8–9 (1994).

[8] *See* Marco Dani, *Re-imagining the Cosmopolitan Constitution: A Comment on Alexander Somek's The Cosmopolitan Constitution*, 19 GERMAN L.J. 1543 (2018).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

the spirit of constitutionalism is the negative element—its tendency to negate itself up to a point at which I observe that it may even have already run its course.

The book claims that, since its inception, constitutionalism had to embrace a tension. It is the tension between sovereignty (*actio*) and being bound by constraints (*jurisdictio*). The tension can be best expressed with an eye to Jellinek's idea that a constitution—public law, generally—is nothing but sovereign power tying itself to normative commitments.[9] All constraints are self-imposed. If the sovereign is supposedly represented within the constitution—for example, in a national assembly—it is up to the sovereign to decide what it means to observe a constraint that is of its own making. A different ontology of sovereign power is required, by contrast, to regard the democratic legislature bound by the principal—*i.e.,* the people themselves speaking through the constitution.

This basic tension can be resolved only by taking the constitutional authority out of the hands of the sovereign. This is what constitutionalism 2.0 tries to accomplish by viewing the authority of the fundamental rights part of the constitution as derivative of an act of reasonable recognition. Fundamental rights are therefore regarded to be testament to a self-denying ordinance of sovereign power. Although this promises to resolve the tension, the problem returns with a vengeance. Within the context of constitutionalism 2.0, it remains an open question how the constitutional limits drawn to state interference with fundamental rights can be determined given that the legislature has to have the power to elaborate the normative significance of these rights. Constitutionalism 3.0 addresses the problem through the lens of the margin of appreciation and leaves the determination of the power of the people to the free play of judicial accommodation in a "pluralist" setting. And yet, constitutionalism 3.0 alters the picture dramatically by delinking constitutional authority from the people. As constitutionalism loses its mooring in popular sovereignty, collective self-determination no longer plays a central role. We are hence forced to explore alternative forms, such as the pure cosmopolitan self-determination that I sketch in the book.[10]

At the end, popular sovereignty becomes a casualty of constitutionalism. What we arrive at, however, is not the dialectical integration of constitutionalism in a new key but rather its disassembly into a constitutionalism that is tailor-made to the status of a foreigner—the "bright" side—and practices that simply reflect what happens to the political world when people turn their back on it. Thus, the dialectic is indeed a 'negative' one because it defies any synthesis.[11] Moreover, it gives rise to a form of irrationalism that is no less dangerous

[9] *See* GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 386 (3d ed. 1929).

[10] *See* Somek, *supra* note 1, at 32, 247.

[11] For an introductory statement, see THEODOR W. ADORNO, VORLESUNG ÜBER NEGATIVE DIALEKTIK 16 (2003).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

than the irrationalism of national loyalty.[12] This is the consequence that I wanted to explore.

My liberal friends often sneer at patriotism as the last refuge of the scoundrel. Living administered lives and losing control of one's fate is no less of a refuge and at least equally morally reprehensible.

C.

Both Dani and Larsen[13] object to my narrative. In their view, it seemed not to have occurred to me that historically 2.0 and 3.0 appear in tandem. Both versions of constitutionalism emerge in a post-war setting and are associated with a commitment to human rights. Actually, their development coincides with a period of European integration when the Community was still committed to embedded liberalism.

From one angle, I am inclined to treat these objections as friendly amendments to my story. This concerns, in particular, Dani's excellent sketch of the makeup of European integration prior to the Single European Act (1986), in which the Union appeared to be perfectly consistent with, and indirectly supportive of, the European welfare state. Larsen even contends, quoting Jan-Werner Müller, that there is an inherent link between the constitutional ethos of "post-WWII European states" and the project of European integration. Reading their informative historical sketches, I began wondering whether I could not have told a story about a transformation that was taking two steps in one. Indeed, the German value based constitution must have heeded the Universal Declaration. On this point, I am entirely indebted to Rensmann and his study.[14] And, yes, Larsen is right that the commitment to European integration goes back to the founding, too.

Nevertheless, I persist on drawing a line for both substantive and historical reasons.

Substantively, constitutionalism 2.0 has a different orientation. The focus rests on transforming the constitution into an instrument for the protection and realization of fundamental rights. This project can be pursued in splendid isolation, and it has been pursued in Germany with great confidence that Germany is the global hub of fundamental rights. Constitutionalism 2.0 perceives the constitution as a national project. Its most

[12] *See* Somek, *supra* note 1, at 276–79.

[13] *See* Signe Rehling Larsen, *European Exceptionalism? — A Response to Alexander Somek's The Cosmopolitan Constitution*, 19 GERMAN L.J. 1529 (2018).

[14] *See* THILO RENSMANN, WERTORDNUNG UND VERFASSUNG: DAS GRUNDGESETZ IM KONTEXT GRENZÜBERSCHREITENDER KONSTITUTIONALISIERUNG (2007).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

fundamental norms are standards for assessing the rationality and reasonableness of government action. By contrast, the most fundamental norm of constitutional law for constitutionalism 3.0 is the margin of appreciation. At its final stage, constitutionalism cedes constitutional authority, however uneasily, to members of a peer group. By contrast, in its predecessor format, it preserved the old idea that the "rights of man" require republican governments for their realization.

Some may find this to amount to a hair-splitting exercise, but I submit that this view is correct also from a historical perspective. Locating the beginnings of constitutionalism 3.0 in the aftermath of the Second World War ignores the fact that until to the 1970s the convention was lying dormant like a "sleeping beauty" and did not pick up any speed until then. It is also oblivious to the original "variable geometry" of the convention system. The participating states were free to pick and choose their level of obligations. All of this is different now, but the difference is owed to more recent historical developments. They go back to achievements made in the aftermath of 1989.[15] And yet, I am also told, by Larsen, that there is this inherent link between the constitutionally driven mindset of post-war Europe and European integration. She quotes from Jan-Werner Müller, yet the quote reveals that neither Müller nor Larsen have a sufficiently nuanced understanding of European integration.

According to Müller, from its inception, European integration has embraced a "constitutionalist ethos" that is deeply distrustful of popular sovereignty. He continues that Member countries delegated powers to supranational institutions "in order 'to lock in' liberal-democratic arrangements and prevent any backsliding towards authoritarianism."[16] This view, however, lumps together two entirely different avenues of integration. The first is the European Convention system, and the second is the European Economic Community. Quite tellingly, Müller uses the language with which his colleague Andrew Moravcsik reconstructed the creation of the European Convention.[17] Arguably, "locking in" democracy must have been the core animating idea, and it is a sound one. Fundamental rights violations of a more egregious nature are adequate signaling mechanisms that alert us to the existence of "tyrannical majorities." Such majorities are likely to immunize themselves against democratic challenges and hence turn authoritarian. Never mind that those designing this regime of international human rights protection went out of their way

[15] In the 1950s and 1960s, the Convention and the European Community must have appeared quite remote, as a side show at best, in national systems. Until very recently, German constitutionalism has been a national project. In fact, Verfassungspatriotismus is the disguise under which national pride was permitted to re-enter Germany. This also explains why the European peer review system has played a highly limited role until recently.

[16] *See* JAN-WERNER MÜLLER, CONTESTING DEMOCRACY: POLITICAL IDEAS IN TWENTIETH-CENTURY EUROPE 148–49 (2011).

[17] *See* Andrew Moravcik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217–52 (2000).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

to protect sovereigns against interferences from without; this explains why the major role was to be played by the Commission and not by the Court. The ethos underpinning the Convention system is the ethos of international law, which is—by its counterfactual design—the law of equally sovereign states. It is decidedly not constitutional law, and the Convention system has never been designed to amount to it. Ironically, Müller reads the notorious German fear of democracy into the early stages of European integration and misunderstands its ethos.

If, by contrast, there was any noteworthy idea animating the creation of the EEC—and earlier the ECSC—it had arguably already been spelled out in the Schuman declaration. Economic interdependence was supposed to give rise to "une solidarité de fait."[18] There is nothing constitutional about this ethos. Again, if there is anything of legal significance to it, it is congenial to the solidarism of interwar French public international law scholarship that was spearheaded by George Scelle.[19] In any event, for both instances of European integration—and most definitely for what would turn into the European Union—the talk of an early constitutionalist ethos is historically quite inaccurate.

D.

Larsen has authored a powerfully written critique of my book. In the main, she appears to be puzzled by the fact that the European Union plays a minor role given that my work is so Eurocentric. What remains unclear, in particular, is whether such an important constitutional player like the EU is *eo ipso* a manifestation of constitutionalism 3.0.
The critique is—albeit brilliantly presented—not without flaws.

The first flaw concerns history. Larsen wrongly suggests at various points that supranational authority was supposed to be established from the outset. As is well known, this is a subsequent development requiring careful reconstruction.[20]

The second flaw may only be a slip of the pen, but she identifies "the EEC/EU" with constitutionalism 3.0. In fact, for reasons that I have already hinted at, I believe that the EU is not the most important component of it and that developing a cosmopolitan constitution would not at all require membership to the EU. Participation in the Convention System is a different story.

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[18] *See* Robert Schuman, French Minister of Foreign Affairs, The Schuman Declaration (May 9, 1950), https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_fr.

[19] *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 266–350 (2001).

[20] *See* J.H.H. Weiler, *The Transformation of Europe*, *in* THE TRANSFORMATION OF EUROPE: TWENTY-FIVE YEARS ON 1–99 (Miguel Poiares Maduro & Marlene Wind eds., 2017).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

The third flaw is more amazing. She believes that the EU does not play the important role that it ought to play in my Eurocentric extravaganza. On the contrary, it plays an important role, but it does so at a level of abstraction at which one can perceive its universal relevance. Honestly, I find it somewhat bewildering that she believes that Bickerton's observations concerning the transformation of states into member states would have something to add to the picture developed in my book. Bickerton's basic claim, which is of course true of any state committing itself to a federal system, is that, by comparison with traditional nation states, member states understand "their power and identity as dependent upon their belonging to a wider group or community."[21] Larsen then poses the question to me whether the shift to constitutionalism 3.0 does not involve such a transformation of statehood and why I failed to account for it.

I beg forgiveness, but I do not see why I have to answer a question that presupposes the merit of Bickerton's conceptualization for the purpose of constitutional theory. Outside of the rich political science context—in which he uses it very aptly—the category, honestly, does not strike me as informative enough for exploring the true significance of constitutionalism 3.0. I would even guess that, legally speaking, any state necessarily is a member state in the sense defined by Bickerton, for its rights, obligations, and identity are dependent on belonging to the international community of states. Of course, Bickerton did not have to address this consequence from a political science perspective, for his work—if I understand it correctly—is mainly interested in exploring the transformation of the Keynesian welfare state.

I find it puzzling, to say the least, that Larsen overlooks how the constitutional significance of the EU is accounted for in my work. It is so, first, by addressing a concern that is of greater universal significance than the commonplace about a state being a member state. Second, this concern identifies the major reason why states should view themselves as parts of a larger whole. This reason is, third, even internally linked to the problem that has haunted the EU since the constitutionalization process. It says that without the EU the states would be less democratic than they are within it. The EU fixes a democracy deficit—if even at the cost of incurring another one of its own.

The whole discussion of what I have labeled the "Darling Dogma of Bourgeois Europeanists" raises a mentality widely shared among EU law scholars to a higher level of generality and demonstrates that what bourgeois Europeanists notoriously lack is a clear understanding of what they jointly believe in. One encounters the dogma today in political science circles under the name of the "all affected interests" principle or the "principle of congruence." In any event, the principle represents the democratic reason for "member statehood," for it suggests that bounded democracies are deficient from the perspective of

[21] *See* CHRISTOPHER BICKERTON, EUROPEAN INTEGRATION: FROM NATION-STATES TO MEMBER STATES (2012).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

democracy, unless they somehow remedy the adverse effects that they have on disenfranchised outsiders. Had Larsen studied any free movement law, looked into Maduro's magisterial doctoral dissertation,[22] or read some of the work by Joerges and Neyer,[23] it would have occurred to her that a quite fascinating debate has been under way for a while.

Finally, Larsen reads her interest in the EU into my work and mistakenly identifies the principle of prohibiting discrimination on the grounds of nationality with EU law and the jurisprudence on Union citizenship in particular. Nothing, however, could be of more tangential significance to my conception of the cosmopolitan constitution. Whether or not a state has a cosmopolitan constitution depends on its *own* constitutional law. Many states prohibit discrimination on the grounds of nationality out of their own accord.

E.

In conclusion, I would like to address Dani's shock about my apparent advocacy of the mixed constitution. He draws up a list of alternatives that all seem to be more reasonable than embracing a constitution of permanent conflict.

I should like to disclaim, once more, that I am not engaging in any kind of advocacy. I merely attempted to make sense of increasing signs of disintegration—yes, indeed, in the European Union. The disintegration stems from two sources: Crisis management of the Union, on the one hand, and various forms of national resistance against perceived encroachments of popular sovereignty, on the other. Such resistance can be effective only if leaders orchestrate it well. Popular tribunes (*tribuni plebis*) abound in the European Union. Some strike us as bad—Orban, Kaczyński, Klaus—others as perhaps not so bad—Tsipras and Varoufakis. Constitutional pluralism is very much alive—and lived—in the European Union. National constitutional reforms clash with what the Union imagines to be the rule of law.

What I object to is that my esteemed peers view constitutions through their normativistic lens. They suggest that we are confronted with a clash of different normative systems. But this presents us already with a sugar-coated reality. The reality is that we are confronted with conflicts between and among classes or groups. On the one hand, a growing number of people feel betrayed by modern liberalism. For want of an alternative venue and a credible social democratic alternative, they rely on the nation state and various forms of nationalism as the last remaining site and resource of resistance. On the other hand, there

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[22] *See* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998).

[23] *See* Christian Joerges & Jürgen Neyer, *From Intergouvernmental Bargaining to Deliberative Processes: The Constitutionalisation of Comitology*, 3 EUR. L. J. 272–99 (1997).

https://doi.org/10.1017/S2071832200023166 Published online by Cambridge University Press

are those who by virtue of their birth or education seem to be doing well. They despise "populists" and their voters for their xenophobia and their avarice. They are so increasingly tired of inflammatory rhetoric and mutter that, behind closed doors,[24] they would love to get rid of popular opposition if they could.

In antiquity, the two groups were called the many, on the one hand, and the wealthy on the other. If the gap between the two widens, then a republic government is about to go over the edge and turn into either a democracy or an oligarchy.

I am a professing ancient political philosopher. The idea that modern constitutionalism may already be in demise does not upset me. Hence, I do not engage in advocacy in the sense that I feel that we ought to turn the intellectual switch back from modern constitutional law to the mixed constitution; rather, it may be time to peel off the veneer of the constitutional normativity that may have misguided us from the outset.

[24] Or not so. *See* JASON BRENNAN, AGAINST DEMOCRACY (2016).

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