

## Book Review

### European Exceptionalism? — A Response to Alexander Somek's *The Cosmopolitan Constitution*

By Signe Rehling Larsen\*

#### Abstract

A major contemporary shift in constitutionalism is manifest in that domestic constitutions, to an unprecedented degree, submit themselves to legal regimes and agencies beyond the state. This is epitomized in national courts taking into account foreign precedent within the system of the European Convention on Human Rights and the government of the Eurozone crisis by the executive apparatus of the European Union (EU). Alexander Somek's *The Cosmopolitan Constitution* is one of the most important monographs that endeavors to conceptualize this contemporary shift in constitutionalism. This response, however, highlights that the EU plays an uneasy role in the tale of *The Cosmopolitan Constitution*. The argument presented is that there are reasons to question the Eurocentrism that posits European post-WWII constitutional developments as the epitome of contemporary global constitutional developments. These reasons relate to the particularity of the European post-WWII political and constitutional experiences and developments. In contrast to what is maintained by Somek, this response argues that contemporary European trends in constitutionalism do not point in the direction of a universal cosmopolitanism but express a distinct European particularity.

---

\* Signe Rehling Larsen has a PhD in Law from the London School of Economics and Political Science, a master's degree in Politics from the New School for Social Research and a bachelor's degree in Philosophy from the University of Copenhagen.

Alexander Somek's *The Cosmopolitan Constitution* is an impressive attempt to conceptualize contemporary shifts in constitutionalism—the strengthening of international human rights regimes and the rise of strong transnational executive powers—within a broader theory of the transformations of modern constitutionalism. This emerging form of constitutionalism, “the cosmopolitan constitution” or “constitutionalism 3.0” in Somek’s terms, refers not to a global constitution, but to *domestic* constitutions that, to an unprecedented degree, submit themselves to legal regimes and agencies beyond the state.<sup>1</sup> This is manifest, *e.g.*, in national courts taking into account foreign precedent within the system of the European Convention on Human Rights (ECHR) and the government of the Eurozone crisis by the executive apparatus of the European Union (EU).<sup>2</sup>

This new form of constitutionalism based on the denationalization of government stands in contrast to two other forms of constitutionalism described by Somek. “Constitutionalism 1.0” is the modern revolutionary constitution authorized by the constituent power of “We, the People” and epitomized by the American Revolution.<sup>3</sup> In 1.0, the constitution is understood as a charter of powers that strictly adheres to a distinction between public and private that is secured by strong negative liberties.<sup>4</sup> The purpose of government in constitutionalism 1.0 is to secure the blessed natural liberty of civil society and formal equality in the pursuit of happiness. It is not meant to realize any particular understanding of what liberty and happiness mean in substantive terms.

“Constitutionalism 2.0”, by contrast, is the post-fascist constitution in which a substantive value order centered on the notion of human dignity is prioritized over the procedural aspects of the constitution or even—as in the German Basic Law—granted the status of “super legality” via an eternity clause.<sup>5</sup> In this version of constitutionalism, the constitution is understood as “the ultimate final program of politics”<sup>6</sup> and the authority of government relies on its implementation.<sup>7</sup> Whereas constitutionalism 1.0 demarcates the powers of

---

<sup>1</sup> See ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 179 (2014).

<sup>2</sup> See *id.* at 17–18, 23, 179–80.

<sup>3</sup> See *id.* at 1–2.

<sup>4</sup> See *id.* at 1, 65–66, 79–80.

<sup>5</sup> See *id.* at 92, 95, 109–10.

<sup>6</sup> See *id.* at 16.

<sup>7</sup> See *id.* at 16–17, 82–84.

government based on what is permissible, governmental authority in constitutionalism 2.0 is limited with reference to what is reasonable or proportionate.<sup>8</sup>

While these three forms of constitutionalism are clear and concise, the nature of the concepts, their scope and internal relations become less clear as Somek's narrative unfolds. The three forms of constitutionalism can, in principle, be understood in the spirit of Max Weber as competing ideal types of constitutions. Nevertheless, Somek's terminology of constitutionalism 1.0, 2.0, and 3.0, and the Hegelian fashion in which the book unfolds in the spirit of dialectics, suggest that the three ideal types reflect different stages in the historical evolution of constitutionalism.<sup>9</sup> It is, however, not a linear story of either continuous decline (conservatism) or constant progress (liberalism). In Somek's view, if there is a highpoint in constitutional development, it is neither the modern revolutionary constitution of 1.0 nor the cosmopolitan constitution of 3.0. *The Cosmopolitan Constitution* is a "cautionary tale."<sup>10</sup> For Somek, the highpoint in the development of constitutionalism seems to be constitutionalism 2.0, manifested, most significantly, in the German Basic Law.<sup>11</sup>

If read as a historically grounded story of the transformation of constitutionalism, the question of whose story is told needs to be asked. Is this a story of global tectonic shifts in our understanding of what a constitution is and does or is the scope somewhat narrower? Despite occasional references to India and South Africa, the book is primarily concerned with the transformation of Western, and arguably mostly European, constitutionalism. The Eurocentric perspective manifests itself, *e.g.*, in the limited discussion of the transformation of American constitutionalism, despite the Constitution of the United States epitomizing constitutionalism 1.0.<sup>12</sup> Are we to believe, as Somek hints at in some passages, that constitutionalism 1.0 is alive and well in the United States?<sup>13</sup> Or does the constitutional transformation occasioned by the New Deal<sup>14</sup> signify a shift from

---

<sup>8</sup> See *id.* at 7–8, 16–17, 81–84, 106–07.

<sup>9</sup> See *id.* at 1, 282.

<sup>10</sup> See *id.* at vii.

<sup>11</sup> See *id.* at 86.

<sup>12</sup> Marco Dani, *Una traiettoria teorica del costituzionalismo modern*, 4 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 887, 890–91 (2017) (raising a similar critique).

<sup>13</sup> SOMEK, *supra* note 1, at 9.

<sup>14</sup> BRUCE ACKERMAN, *WE THE PEOPLE II: TRANSFORMATIONS* 279–311, 383–422 (1998).

constitutionalism 1.0 to 2.0? That is, a shift from a formal or legislative liberal state to a regulatory or governmental welfare state?<sup>15</sup> Or, because 2.0 primarily describes a “jurisdiction state”<sup>16</sup> characterized by judicial supremacy,<sup>17</sup> does the strong role of the executive branch of government manifested in the US presidency<sup>18</sup> make it incomprehensible from the perspective of the ideal types of 1.0, 2.0, and 3.0? Somek does not tell us. Apart from occasional anecdotes of why the cosmopolitan citizen would rather live in New York than Sioux City,<sup>19</sup> the examples used to illustrate constitutionalism 2.0 and 3.0 are mainly drawn from post-WWII Europe. Does this mean that *The Cosmopolitan Constitution* is a tale of contemporary European constitutional developments?

In a response to earlier critics, Somek acknowledges his avowed Eurocentrism.<sup>20</sup> At the same time, however, he seems to suggest that constitutionalism 3.0 is much broader in scope: “The final state of constitutionalism [constitutionalism 3.0] could be taken anywhere in the world.”<sup>21</sup> The work, therefore, is not merely about Europe; rather, it aims to capture the essence of a broader paradigm shift in constitutionalism. In the traditions of cosmopolitanism from Immanuel Kant<sup>22</sup> to Jürgen Habermas,<sup>23</sup> from which Somek wants to distance himself, *The Cosmopolitan Constitution* seems to interpret Europe as a (dystopic) model for the world. The question, however, is whether the relationship between cosmopolitanism and Europe is a much more uneasy one than Somek suggests.

There are reasons to question the Eurocentrism that posits European post-WWII constitutional developments as the epitome of contemporary global constitutional developments, regardless of whether they are portrayed in a euphoric or dystopic light.

---

<sup>15</sup> See, e.g., CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 255–314 (1948).

<sup>16</sup> SOMEK, *supra* note 1, at 17, 94–97; CARL SCHMITT, LEGALITY AND LEGITIMACY 4–5, 8, 53 (Jeffrey Seitzer trans., 2004).

<sup>17</sup> SOMEK, *supra* note 1, at 87.

<sup>18</sup> BRUCE ACKERMAN, WE THE PEOPLE I: FOUNDATIONS 67, 75, 80, 83–85, 105 *et seq.* (1991); ACKERMAN, *supra* note 14, at 18, 25, 279–311, 383–422; see also ROSSITER, *supra* note 15, at 211–314.

<sup>19</sup> SOMEK, *supra* note 1, at 271.

<sup>20</sup> Alexander Somek, *Replica*, 4 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 927, 927 (2017).

<sup>21</sup> *Id.*

<sup>22</sup> IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795).

<sup>23</sup> JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (Ciaran Cronin trans., 2012).

These reasons relate to the particularity of the European post-WWII political and constitutional experiences and developments. In this response, I focus on a double critique highlighting the uneasy role that the EU plays in *The Cosmopolitan Constitution*. The argument, in short, is that the EU is given both too much and too little deference for the tale of *The Cosmopolitan Constitution* to be entirely convincing. On the one hand, if *The Cosmopolitan Constitution* is the tale of Europe, it is puzzling that the EU is conspicuous mostly for its absence. On the other hand, if this is not merely the story of Europe, then many of the general principles of the cosmopolitan constitution drawn from EU law, particularly those relating to EU citizenship, are unconvincing.

If *The Cosmopolitan Constitution* indeed is about the transformations of post-WWII European constitutionalism, it seems problematic that the project of the European Economic Community/European Union (EEC/EU)—the project that arguably has led to the most significant constitutional transformation of its member states—plays such a minor role. The main case study for constitutionalism 3.0, in Somek's account, is not the EU but the ECHR. Nevertheless, to show the truly deplorable neoliberal character of 3.0, Somek throws in a couple of examples relating to the emergency government of the Eurozone crisis and the hollow nature of EU citizenship. As has been pointed out by one commentator already, the relationship between these examples is unclear.<sup>24</sup> The EU and the ECHR, though undoubtedly intertwined and interrelated, are not the same thing. This is not merely a problem of the coherence of 3.0 as an ideal type. It also raises the question of what Somek considers to be the relationship between the EU and constitutionalism 3.0: Is the EU *eo ipso*, or merely parts of it, a manifestation of constitutionalism 3.0? If the EU is indeed a manifestation of constitutionalism 3.0, has this been the case from the beginning?

It is certainly the case that the member states of the EU govern themselves through legal regimes and institutions beyond the state and, as such, they seem to fit the ideal type of constitutionalism 3.0. But this is not a new phenomenon. As argued by Christopher Bickerton in *European Integration: From Nation-State to Member States*:

European integration corresponds to the shift from one form of state—the nation state—to another, the member state. Central to this process of

---

<sup>24</sup> Giulio Itzcovich, *Libertà sociale e stato nazione: una relazione problematica*, 4 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 919, 923 (2017).

transformation is the way the state–society relationship has been relativized, becoming only one relationship amongst others constitutive of statehood. In contrast to traditional nation states, national governments of member states understand their power and identity as dependent upon their belonging to a wider group or community.<sup>25</sup>

This process of state-transformation that, following Bickerton, has characterized the EEC/EU from the 1970s onwards<sup>26</sup> sounds similar to constitutionalism 3.0: “[T]he cosmopolitan constitution [is] a national constitution that submits its operation to the supervision of international peer institutions.”<sup>27</sup> Is this a manifestation of a shift from 2.0 nation state to 3.0 member state? Or does this shift really take place much earlier?<sup>28</sup> Following Alan Milward, European integration was a key element in the reassertion of the project of the political autonomy of the state in the immediate post-WWII era because the new political consensus on which the post-WWII states relied required European integration and the transfer of sovereign powers to the Community<sup>29</sup>: “Without it, the nation-state could not have offered to its citizens the same measure of security and prosperity which it has provided and which has justified its survival.”<sup>30</sup> The post-WWII regimes, following this interpretation, could only emerge because of European integration. The question then is whether constitutionalism 2.0 and 3.0 can be separated from one another in European history? More than that, are they inherently linked to one another as constitutional projects in Europe?

In Somek’s account, constitutionalism 2.0 signifies a shift from 1.0 with regard to how the origins of the constitution are envisioned. This is manifest in a “remarkable alteration in

---

<sup>25</sup> CHRISTOPHER BICKERTON, EUROPEAN INTEGRATION: FROM NATION-STATES TO MEMBER STATES 12 (2012).

<sup>26</sup> *Id.* at 13, 74–112.

<sup>27</sup> SOMEK, *supra* note 1, at vii.

<sup>28</sup> See Michael A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?* 23 EUR. L.J. 213 (2017); Michael A. Wilkinson, *The Reconstitution of Postwar Europe*, in CONSTITUTIONALISM BEYOND LIBERALISM 38 (Michael W. Dowdle & Michael A. Wilkinson eds., 2017).

<sup>29</sup> ALAN MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE 4 (1992).

<sup>30</sup> *Id.* at 3.

the nature of the constituent power.”<sup>31</sup> Whereas the 1.0 constitution is born out of a pure act of will of the constituent power only constrained, if at all, by natural law,<sup>32</sup> the 2.0 constitution comes into being with an act of the constituent power recognizing the authority of human rights and human dignity.<sup>33</sup> Taking the German Basic Law as the example, Somek argues that the authority of the constituent power stems from the constitution being a concrete manifestation of universal principles. Human dignity, Somek argues, is thus “prior” to the constitution. But, one might add, as is clear from the Preamble of the German Basic Law, so is the wish for a united Europe: “Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.”<sup>34</sup> This is also acknowledged by the German Constitutional Court in the *Lisbon Ruling*:

After the experience of devastating wars, in particular between the European peoples, the Preamble of the Basic Law emphasises not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner in a united Europe. This willingness is lent concrete shape by the empowerments to integrate into the European Union.<sup>35</sup>

The constitution of a united Europe is part of the concrete order that the Basic Law is meant to realize. Following the reasoning of the German Constitutional Court, a united Europe is therefore part of the constitutional mandate of the Basic Law: “The Basic Law calls for European integration and an international peaceful order.”<sup>36</sup> It seems difficult, therefore, to ignore the influence of membership in the EEC/EU for the emergence of post-WWII constitutionalism in Germany. The openness towards international and

---

<sup>31</sup> SOMEK, *supra* note 1, at 84.

<sup>32</sup> *Id.* at 1.

<sup>33</sup> *Id.* at 78, 96. Somek stresses the passive nature of the constituent power in this shift. While this arguably is the case for Germany, it is not the case for many other states belonging to the ideal type of 2.0. On the contrary, many of the states belonging to the ideal type of 2.0 have been the most active and inclusive constitution making process. See ANDREW ARATO, *POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY* (2016).

<sup>34</sup> GRUNDGESETZ [GG] [BASIC LAW] pmbI.

<sup>35</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], June 30, 2009, 2 BvE 2/08, para. 222 [hereinafter *Judgement of June 30, 2009*].

<sup>36</sup> *Id.* at para. 225.

European law—together with human dignity—is arguably part of what grants authority to the German constituent power.<sup>37</sup> Furthermore, in Somek’s account, the shift from liberty in constitutionalism 1.0 to dignity in constitutionalism 2.0 is associated not so much with the experience of the Holocaust, but with the conviction that the roots of authoritarianism and totalitarianism were economic insecurity and dependence.<sup>38</sup> This account makes it even more surprising that Somek ignores the role played by European economic integration in providing the conditions for overcoming economic insecurity during the *Trente Glorieuses* and thus creating the material conditions for the emergence of new constitutional settlements centered on human dignity.

Jan-Werner Müller’s account of the rise of post-WWII constitutionalism in Europe presents an argument for an inherent link between the domestic constitutionalism of “militant” or “constrained democracy” and the project of European integration. The post-WWII “constitutional ethos” is, in Müller’s account, not just evident in the rise of strong domestic constitutional courts but also in the transfer of powers to independent institutions and administrative agencies subject to judicial oversight.<sup>39</sup> An important way of constraining populism—which poses a perpetual threat to the substantive value order of the constitution based on human dignity—was, according to Müller, the transfer of powers to both the EEC and the ECHR:

European integration—this is crucial—was part and parcel of the new “constitutionalist ethos”, with its inbuilt distrust of popular sovereignty and the delegation of tasks to agencies that remained under the close supervision of national governments. Member countries consciously delegated powers to unelected domestic institutions and to supranational bodies, in order to “lock in” liberal-democratic arrangements and prevent any backsliding towards authoritarianism.<sup>40</sup>

---

<sup>37</sup> *Id.* at paras. 219–25. With reference to the Italian Constitution, Andrea Guazzarotti has raised a similar critique, see Andrea Guazzarotti, *Rafforzare il costituzionalismo al di là della geopolitica*, 4 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 907, 909 (2017).

<sup>38</sup> Somek, *supra* note 1, at 10, 155–57.

<sup>39</sup> JAN-WERNER MÜLLER, *CONTESTING DEMOCRACY: POLITICAL IDEAS IN TWENTIETH-CENTURY EUROPE* 148 (2013).

<sup>40</sup> Jan-Werner Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 39, 43 (2012).



Following Müller, there is thus an inherent link between the constitutional ethos of the post-WWII European states—again with Germany as the ideal typical example—and the project of European integration. If we take Müller’s account into consideration, the most important aspects of constitutionalism 3.0 are already present in 2.0. The implication is that many, if not most, member states belonging to the ideal type of 2.0 have constituted themselves with a view of being members of a united Europe and understood their membership in the EU as being integral to realizing the aspirations of their constitutional orders.<sup>41</sup>

The intertwined nature of post-WWII constitutionalism and state-building, on the one hand, and European integration, on the other, is perhaps most striking for the Founding Six and especially for Germany whose sovereign statehood was re-established only as part of the process of European integration.<sup>42</sup> The inherent relationship between the emergence of constitutionalism 2.0 and membership in the EEC/EU, however, is broader in scope. A similar argument can be advanced with regard to the three post-dictatorship states that joined the EEC as part of the so-called “Mediterranean enlargements”—Greece in 1981 and Spain and Portugal in 1986. These three states definitely belong to the ideal type of constitutionalism 2.0 with dignity prominently figuring in all three constitutions.<sup>43</sup> Membership in the EEC and the Council of Europe was an integral part of the consolidation of the new liberal-democratic regimes for these states.<sup>44</sup> For Greece, Portugal, and Spain,

<sup>41</sup> The main exceptions are arguably the Scandinavian countries and the United Kingdom, neither of which seem to fall within Somek’s 2.0 ideal type.

<sup>42</sup> EDWARD FURSDON, *THE EUROPEAN DEFENCE COMMUNITY: A HISTORY* 41–47, 64–5, 81–99 (1980).

<sup>43</sup> See SYNTAGAMA [SYN.] [CONSTITUTION] art. 2(1) (Greece) (“Respect and protection of the value of the human being constitute the primary obligations of the State.”); CONSTITUTION OF THE REPUBLIC OF PORTUGAL, art. 1 (“Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people, and committed to building a free and fair society that unites in solidarity.”); C.E., B.O.E. n. 1, Dec. 29, 1978 (Spain) (“The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.”).

<sup>44</sup> Sebastián Royo, *Lessons from Spain and Portugal in the European Union After 20 Years*, 26 *PÔLE SUD* 1 (2007); Laurence Whitehead, *Democracy by Convergence and Southern Europe: A Comparative Politics Perspective*, in *ENCOURAGING DEMOCRACY: THE INTERNATIONAL CONTEXT OF REGIME TRANSITION IN SOUTHERN EUROPE* 45–61 (Geoffrey Pridham ed., 1991); Dusan Sidjanski, *Transition to Democracy and European Integration: The Role of Interest Groups in Southern Europe*, in *ENCOURAGING DEMOCRACY: THE INTERNATIONAL CONTEXT OF REGIME TRANSITION IN SOUTHERN EUROPE* 195–211 (Geoffrey Pridham ed., 1991); Geoffrey Pridham, *The Politics of the European Community, Transnational Networks and Democratic Transition in Southern Europe*, in *ENCOURAGING DEMOCRACY: THE INTERNATIONAL CONTEXT OF REGIME TRANSITION IN SOUTHERN EUROPE* 212–245 (Geoffrey Pridham ed., 1991); Eirini Karamouzi, *A Strategy for Greece: Democratization and European Integration, 1974-1975*, in 90 *CAHIERS DE LA MÉDITERRANÉE: DEMOCRATIC TRANSITION / ARDENGO SOFFICI* 1, 4–6, 8–9 (2015).

member-statehood of the EEC has generally been understood as being vital to the realization of their post-dictatorship democratic constitutions centering on the recognition of human dignity. In Spain, both the creation of a new democratic constitution and the accession to the EEC were articulated as interlinked in the process of “returning to Europe.”<sup>45</sup> This slogan of a “return to Europe” was also widely used in the transition to the new democratic regimes in Central and Eastern Europe after the fall of the Berlin Wall.<sup>46</sup> The process of constitution-making and state-building in the 1990s was strongly influenced by the political wish of accession to the EU and generally understood as a way of restoring the political autonomy and identity of these states.<sup>47</sup> The revolutions in Central and Eastern Europe have been articulated as “rectifying revolutions”<sup>48</sup> in that they allowed the states to “return” to the European political traditions they felt they belonged to before the Soviet occupations.<sup>49</sup>

Most member states have understood the EEC/EU (constitutionalism 3.0) as integral to the realization and consolidation of their domestic constitutions and liberal-democratic regimes (constitutionalism 2.0).<sup>50</sup> Because of this intertwined relationship of the emergence of the liberal-democratic regimes and membership in the EEC/EU throughout the post-WWII period in Europe, constitutionalism 2.0 and 3.0 are difficult to separate from one another, both historically and theoretically. Not only are they more or less coeval, they are also inherently linked. Therefore, the tale of the rise of a new neoliberal, depoliticizing, and erosive constitutionalism may not be entirely convincing in a European context.

Although the distinction between constitutionalism 2.0 and 3.0 seems problematic in the context of Europe, such a distinction may, however, be more plausibly stated as a

---

<sup>45</sup> Cristina Blanco Sío-López, *Reconditioning the “Return to Europe”: The Influence of Spanish Accession in Shaping the EU’s Eastern Enlargement Process*, in *THE CRISIS OF EU ENLARGEMENT: SPECIAL REPORT 26* (2013).

<sup>46</sup> JIŘÍ PŘIBÁŇ, *LEGAL SYMBOLISM: ON LAW, TIME AND EUROPEAN IDENTITY* 94 (2007); Marise Cremona, *Introduction to THE ENLARGEMENTS OF THE EUROPEAN UNION 2* (Marise Cremona ed., 2003); MILADA ANNA VACHUDOVA, *EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM* (2005).

<sup>47</sup> PŘIBÁŇ, *supra* note 46, at 94.

<sup>48</sup> Jürgen Habermas, *What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left*, 1/183 *NEW LEFT REV.* 3 (1990).

<sup>49</sup> Whether this was actually the case is irrelevant. The point is that the emergence of 2.0 was intrinsically linked to 3.0 in the constitutional imagination of these states.

<sup>50</sup> With the notable exception of the UK and Scandinavia.

diagnosis of broader global tectonic shifts in the understanding of constitutionalism. There are, after all, many constitutions that can be categorized under the ideal type of constitutionalism 2.0 that are not part of the EU, *e.g.*, the South African Constitution. Outside Europe, the separation of constitutionalism 2.0 and 3.0 may be more convincing. The problem, however, is that many of the defining features of Somek's ideal type of constitutionalism 3.0 are distinctively *European* and arguably do not apply outside of the EU. This is particularly the case for "cosmopolitan citizenship," which Somek models primarily on EU citizenship.<sup>51</sup>

EU citizenship allows the citizens of the Union to move, reside, and seek employment within all EU member states<sup>52</sup> and not be discriminated against on the basis of nationality.<sup>53</sup> This, following Somek, is a manifestation of one of the main trends of constitutionalism 3.0: The disassociation of constitutional authority from the nation resulting in the narrowing of the gap between citizens and non-citizens.<sup>54</sup> Following Somek, cosmopolitan citizenship manifested in European supranational citizenship thus reflects a loss of the political core of citizenship and the expansion of a private polity; European citizenship is "bourgeois" citizenship and establishes a "market people."<sup>55</sup>

The problem with this argument is that the rights of EU citizenship only apply to citizens of EU member states and, accordingly, are neither global nor cosmopolitan. That is, whereas EU citizenship law forbids its member states to discriminate on the basis of nationality between their own citizens and resident citizens from other member states, this only applies to EU citizens and their families. EU citizenship is therefore not a reflection of universalism or cosmopolitanism, but of Europeanism. If EU citizenship truly reflected cosmopolitanism as Somek seems to suggest, why would third country nationals have a fundamentally different status than the citizens of the Union? For example, why would the principle of non-discrimination on the basis of nationality apply to Greek citizens but not South African citizens in Germany? Notwithstanding the limited political rights of EU citizenship, the fundamental discrimination between European citizens and third country

---

<sup>51</sup> SOMEK, *supra* note 1, at 202.

<sup>52</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 21, May 9, 2008 O.J. (C 115) 47 [hereinafter TFEU].

<sup>53</sup> *Id.* art. 18.

<sup>54</sup> SOMEK, *supra* note 1, at 202.

<sup>55</sup> *Id.* at 203–05, 260–61.

nationals makes it clear that EU citizenship cannot be understood as part of the emergence of a cosmopolitan post-national citizenship.<sup>56</sup>

As has been argued by Christoph Schönberger, EU citizenship is a form of *federal citizenship*, and thus independently of whether or not the citizens of the Union have extensive political rights in other member states, EU citizenship constitutes a political form of citizenship for a territorially bounded political community.<sup>57</sup> Following Schönberger, the two main traits of EU citizenship—the right of free movement across the Union and the right of nondiscrimination on the basis of nationality—are the two main characteristics of citizenship in all federal polities.<sup>58</sup> Furthermore, Schönberger’s research on comparative federalism refutes the critique that the (initial) restriction to economically active citizens and the primacy of economic freedoms over political rights sets EU citizenship as a uniquely shallow neoliberal and nonpolitical form of market citizenship.<sup>59</sup> In Germany, political rights in other German states were not a part of federal citizenship before 1919. Before the Weimar Constitution a “Saxon citizen living in Bavaria could not vote in a Bavarian election.”<sup>60</sup> Furthermore, federal citizenship—not only in young or emergent federal polities but also in some federal states—tends to be conditioned on the mobile citizen not being a social burden for host member states.<sup>61</sup> In the United States, it was only in 1941 with *Edwards v. California*<sup>62</sup> that the free movement of US citizens within the United States could no longer be restricted for indigent citizens constituting a social burden.<sup>63</sup> In Switzerland, the equality of indigent Swiss citizens was only fully accomplished in 1975.<sup>64</sup> The EU and its laws on citizenship are, in other words, not a manifestation of a new global neoliberal order, but a regional political community constituting rights and

---

<sup>56</sup> *Id.* at 205–10.

<sup>57</sup> CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER: EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT (2005).

<sup>58</sup> Christoph Schönberger, *Die Europäische Union als Bund*, 129(1) ARCHIV DES OFFENTLICHEN RECHTS 113, 113–17 (2004); Christoph Schönberger, *European Citizenship as Federal Citizenship, Some Citizenship Lessons of Comparative Federalism*, 19(1) EUR. REV. OF PUB. L. 63, 68–69 (2007).

<sup>59</sup> Schönberger, *supra* note 58, at 74–75.

<sup>60</sup> *Id.* at 72.

<sup>61</sup> *Id.* at 71, 74.

<sup>62</sup> *Edwards v. California*, 314 U.S. 160 (1941).

<sup>63</sup> Schönberger, *supra* note 58, at 71. See also Arthur E. Sutherland, *Commerce, Transportation and Customs*, in STUDIES IN FEDERALISM 297 (Carl J. Friedrich & Robert R. Bowie eds., 1954).

<sup>64</sup> Schönberger, *supra* note 58, at 71.

obligations between the members of the community but not vis-à-vis anyone else. Europeanism, not Universalism, is at the heart of EU citizenship.

In conclusion, this response maintains that the identification of the rise of cosmopolitan constitutionalism with post-WWII European constitutionalism is problematic because of the singularities of the latter. Somek's diagnosis of a recent rise of cosmopolitan constitutionalism is not entirely convincing in Europe because the initial emergence of the 2.0 post-fascist/post-authoritarian constitutionalism for most, if not all, EEC/EU member states has been inherently linked to the 3.0 denationalization of governmental authority manifest in EEC/EU member-statehood. For the member states of the EEC/EU, constitutionalism 3.0 is an integral part of constitutionalism 2.0 historically as well as theoretically. That is, independent of whether constitutionalism 2.0 and 3.0 are ideal types or historical stages of constitutionalism, or both, they are difficult, if not impossible, to separate from one another in Europe. Further, constitutionalism 3.0 is also not easily applied to global tectonic shifts in constitutionalism beyond Europe. Central features of constitutionalism 3.0, *e.g.*, EU citizenship, do not apply outside the EU and it is difficult to imagine that they could. The EU—in contrast to what is maintained by Somek—points interestingly towards a European exceptionalism.

