

### **Re-Imagining the Cosmopolitan Constitution: A Comment on Alexander Somek's *The Cosmopolitan Constitution***

*By Marco Dani\**

#### **Abstract**

This comment engages with Somek's account for the cosmopolitan constitution for two distinct purposes. It first builds on its inherent ambivalence to argue that hitherto Europe has experienced at least two different versions of the cosmopolitan constitution. Whereas in the formative period of the process of European integration, the cosmopolitan constitution manifested itself prevalingly in its more benign and democracy-enhancing political face, since the end of the 1970s it has developed a more controversial and democracy-inhibiting administrative profile. Secondly, the comment rejects as potentially regressive the proposal of redressing the biases inherent in the contemporary legal and political order by reviving the idea of a Machiavellian mixed constitution. To fulfill the promise of emancipation inspiring constitutionalism, the cosmopolitan constitution cannot segregate in separate institutions ordinary citizens and a market elite. Rather, the cosmopolitan constitution should be re-imagined with a view to reassert its original democracy-enhancing spirit and adapt it to the evolving circumstances of economic and political interdependence.

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We live in an era of cosmopolitan constitutions, that is, national constitutions under conditions of international engagement.<sup>1</sup> This, according to Alexander Somek, is the most accurate way to characterize contemporary public law arrangements in Europe.<sup>2</sup> The finding is not meant to be reassuring: in Somek's rendering, the cosmopolitan constitution—in his language, also Constitutionalism 3.0—does not amount to the global triumph of the ideals inspiring liberal and democratic constitutionalism, respectively Constitutionalism 1.0 and 2.0. Cosmopolitan constitutions generate highly ambivalent legal and political orders challenging those ideals and, in particular, the promise of emancipation associated with modern constitutions across their history.

As portrayed by Somek, the cosmopolitan constitution is Janus-faced.<sup>3</sup> On one side, it shows a political face. Here, the engagement of democratic constitutions with international organization reinforces their commitment to human rights via peer group pressure.<sup>4</sup> This type of international engagement originates a form of legality centered on the idea that each site of authority involved in the protection of human rights should yield to the authority of the other as long as the latter respects a threshold level of constitutional decency.<sup>5</sup> This notion is visible in the context of the European Convention of Human Rights where both the Court of Strasbourg, with the margin of appreciation doctrine, and national constitutional courts, with their particular doctrines on the relationship with the Convention, are invited to consider as *prima facie* valid the solutions formulated by their judicial interlocutors. This sort of constitutional pluralism<sup>6</sup> does not exhaust the political face of the cosmopolitan constitution. The latter also offers a form of collective self-determination that is not grounded on the fashionable idea of having the interests of outsiders represented within a national polity.<sup>7</sup> According to Somek, the political face of the cosmopolitan constitution offers to foreigners only functional substitutes to political rights<sup>8</sup> in the form of a strong protection against discrimination.

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<sup>1</sup> See ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 25 (2014) (explaining that the cosmopolitan constitution can be defined in slightly different terms as “a national constitution that submits its operation to the supervision of international peer institutions.”).

<sup>2</sup> Somek has confessed his Eurocentrism. See A. Somek, *A proposito di “The Cosmopolitan Constitution” di Alexander Somek*, 4 *RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO* 927 (2017).

<sup>3</sup> SOMEK, *supra* note 1, at 245.

<sup>4</sup> *Id.* at 176–89.

<sup>5</sup> *Id.* at 19–20.

<sup>6</sup> *Id.* at 191–201.

<sup>7</sup> See *id.* at 248–57 (mocking this argument as the “darling dogma of bourgeois Europeanists”).

<sup>8</sup> *Id.* at 251.

Moreover, foreigners also benefit from virtual representation: while as foreigners they remain disenfranchised, their views may be deemed as virtually represented by means of the political participation of like-minded citizens.<sup>9</sup>

The other side of the cosmopolitan constitution reveals a more worrisome administrative face. The latter makes its appearance when national constitutions engage with international entities entrusted with risk regulation and crisis intervention.<sup>10</sup> In these circumstances, the political face of the cosmopolitan constitution is eclipsed by an institutional setting operating in the mode of problem-solving.<sup>11</sup> The world of problem-solving, according to Somek, is a world in which the legacy of liberal and democratic constitutionalism is either displaced or evacuated. The quest for pragmatic policy-making erodes the separation of powers and, more broadly, the organizational part of constitutions. If what really matters are outcomes, it is indifferent or less important what institution delivers them.<sup>12</sup> When rationality prevails over authorship, it is entirely acceptable to shift authority to transnational networks of executive governance. Policy-making ends up being disconnected from territory,<sup>13</sup> and also citizenship is depoliticized because problem-solving is the contrary of political struggle.<sup>14</sup> From this administrative side, the cosmopolitan constitution privileges market citizenship over political agency. Insulated individuals are not keen on undertaking collective projects of collective self-determination. If their lives revolve essentially around private practices such as consumption, mobility, and access to benefits, what they really want is just an external state enabling those conducts.<sup>15</sup>

Despite this aura of neutrality, the reality of the cosmopolitan constitution is by no means pacified. Somek alerts us that behind this administrative façade lurk serious social conflicts. Drawing from the most recent work of Streeck,<sup>16</sup> he identifies the existence of a conflict between market people—or ‘the smart few’—and citizens—‘the powerless many’.<sup>17</sup> Whereas the former benefit from a world of rational bureaucracies and administrative

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<sup>9</sup> *Id.* at 258–59.

<sup>10</sup> *Id.* at 234.

<sup>11</sup> *Id.* at 231.

<sup>12</sup> *Id.* at 202.

<sup>13</sup> *Id.* at 270–71.

<sup>14</sup> *Id.* at 231.

<sup>15</sup> *Id.* at 160–61.

<sup>16</sup> *Id.* at 240–41.

<sup>17</sup> *Id.* at 282.

networks operating alongside a multilevel system of fundamental rights protection,<sup>18</sup> the latter struggle to fulfil their needs and articulate democratic opposition.<sup>19</sup> This invites a discussion on the democratic qualities of the cosmopolitan constitution, and Somek does not abstain from exploring its possibilities. In this regard he does not seem persuaded by proposals aimed at giving a voice to the economically disenfranchised within ordinary democratic circuits. In his view, a solution to the core constitutional challenge emerging from Constitutionalism 3.0 could be found in the Machiavellian idea of a mixed constitution.<sup>20</sup> Accordingly, market people and citizens should be represented in separate institutions legitimating their opposite aspirations to, respectively, market and social justice.<sup>21</sup> This should result in a mixed constitution in which the economically disenfranchised, thanks to a veto position, could start to exercise real political power.<sup>22</sup>

This comment engages with this rendering of the cosmopolitan constitution for two distinct purposes. It first builds on its inherent ambivalence to argue that hitherto Europe has experienced at least two different versions of the cosmopolitan constitution: whereas in the formative period of the process of European integration the cosmopolitan constitution manifested itself prevalently in its more benign and democracy-enhancing political face, since the end of the 1970s it has developed a more controversial and democracy-inhibiting administrative profile. Secondly, the comment rejects as potentially regressive the proposal of redressing the biases inherent in the contemporary legal and political order by reviving the idea of a Machiavellian mixed constitution. To fulfil the promise of emancipation inspiring constitutionalism, the cosmopolitan constitution cannot segregate in separate institutions ordinary citizens and a market elite. Rather, the cosmopolitan constitution should be re-imagined with a view to revive its original democracy-enhancing spirit and adapt it to the evolving circumstances of economic and political interdependence.

#### **A. The Original Cosmopolitan Constitution**

Somek's account for the evolution of constitutionalism follows apparently a rather neat periodization. The origins of Constitutionalism 1.0 date back to the American and French revolutions; the birth of Constitutionalism 2.0 is located in the aftermath of World War II. The starting date of Constitutionalism 3.0 is more difficult to pinpoint. The phenomenology described in the two chapters devoted to it can be easily traced back to the most recent

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<sup>18</sup> *Id.* at 23.

<sup>19</sup> *Id.* at 241.

<sup>20</sup> *Id.* at 242–43.

<sup>21</sup> *Id.* at 242.

<sup>22</sup> *Id.* at 243.

developments of European public law.<sup>23</sup> But the analysis of the cosmopolitan constitution also includes more remote processes such as, for instance, the establishment of a European system of protection of human rights under the ECHR or the early stages of European integration. A similar finding may be puzzling since the genesis of both the ECHR and the European Economic Communities coincides temporally with the formative period of national democratic constitutions, Constitutionalism 2.0.<sup>24</sup> Thus, sticking to Somek's periodization, one could argue that in Europe after World War II constitutionalism underwent two concurring processes of transformation, Constitutionalism 2.0 and 3.0. But that is a problematic and misleading claim. It is problematic because it entails difficult and, possibly, arbitrary distinctions between certain phenomena classified under Constitutionalism 2.0 and other making up Constitutionalism 3.0. It is also misleading in that it overlooks that international engagement—the distinctive element of Constitutionalism 3.0—is already a key aspect of the constitutions included in Constitutionalism 2.0.<sup>25</sup> We are apparently left in a quandary: Are Constitutionalism 2.0 and 3.0 really distinct? Is there a way to preserve their conceptual autonomy?

A positive answer to these questions is possible if we regard Somek's illustrations of Constitutionalism 2.0 and 3.0 as different instantiations of the cosmopolitan constitution. As said, both paradigms refer to constitutions operating in conditions of international engagement. Yet, their type of engagement is remarkably different and it is precisely this difference should that accounts for their distinction. Arguably, we have had in Europe a first cosmopolitan constitution—Constitutionalism 2.0—emphasizing its political face. Here, international engagement enhanced the democratic and social potential of national constitutions. And then we have second cosmopolitan constitution—Constitutionalism 3.0—with a more pronounced administrative profile. Here, international engagement seems to inhibit the democratic and social qualities of national constitutions.<sup>26</sup>

Let's try to explore more in detail this alternative rendering of the cosmopolitan constitution. In the central chapters of his book,<sup>27</sup> Somek offers a passionate illustration of the nature of the democratic constitutions adopted in Europe post World War II. These constitutions articulate an ambitious notion of human dignity. To our eyes, human dignity

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<sup>23</sup> See *id.* at chs. 4–5.

<sup>24</sup> At least in the founding six member states. A similar point is raised in another comment included in this issue. See S. REHLING LARSEN, EUROPEAN EXCEPTIONALISM? – A RESPONSE TO ALEXANDER SOMEK'S *THE COSMOPOLITAN CONSTITUTION*.

<sup>25</sup> See P. Faraguna, *Costituzione senza confini? Principi e fonti costituzionali tra sistema sovranazionale e diritto internazionale*, in *IMMAGINARE LA REPUBBLICA. MITO E ATTUALITÀ DELL'ASSEMBLEA COSTITUENTE* 63 (F. Cortese et. al., eds., 2018).

<sup>26</sup> The democracy-enhancing and democracy-inhibiting character of multilateral international arrangement is discussed in: R. Keohoane, S. Macedo & A. Moravcsik, *Democracy Enhancing Multilateralism*, 63 *INT'L ORG.* 1 (2009).

<sup>27</sup> See SOMEK, *supra* note 1 at chapters 2–3.

is a principle evoking the inherent worth of each individual<sup>28</sup> and rich catalogues of fundamental rights.<sup>29</sup> It is a notion strongly influenced by the experience of the Holocaust, although Somek tells us that originally this was not its primary driver.<sup>30</sup> In its original conceptualization, human dignity emerges as an attribute of persons embedded in a particular community and a specific social environment.<sup>31</sup> This environment refers to the complex and dense net of political, social, and economic relations of the industrial society. Within this framework, human dignity is a principle evoking ambitious policies and tangible achievements. It promises emancipation and, therefore, it entails a legal and political order reacting not only against political autocracies, but also against economic tyranny.<sup>32</sup> Democratic constitutions have been drafted with a vivid memory not only of the interwar totalitarian regimes, but also of the Great Depression. As a consequence, they are not afraid of promising a second step in emancipation, namely negative freedom from unregulated markets.<sup>33</sup> Constitutionalism 2.0 is the legal and political order sustaining the social state.

Now, all of this is persuasive and beautifully told in Somek's book. What is missing is the international context in which all these developments take place. Admittedly, Somek refers in his analysis to the Universal Declaration of Human Rights and to the fact that national constitutions, with their commitment to human dignity and emancipation, can be read as instantiations of that project.<sup>34</sup> But the argument could have developed further. Already at this stage democratic constitutions engage with international organizations with a view to strengthen their basic commitment to human rights, democracy and social justice. By doing this, they reveal the political face of the cosmopolitan constitution.

The ECHR is the clearest example of an international organization reinforcing the identity of national constitutions.<sup>35</sup> But the membership in the European Economic Communities substantiates this notion, although in a more sophisticated way. In its formative phase and,

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<sup>28</sup> M. Mahlmann, *Human Dignity and Autonomy in Modern Constitutional Orders*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 371 (M. Rosenfeld & A. Sajó eds., 2013).

<sup>29</sup> In particular when applied to the economic and social sphere, see K. Ewing, *Economic Rights* in Rosenfeld & Sajó, *supra* note 28, at 1039–40.

<sup>30</sup> SOMEK, *supra* note 1, at 154–55.

<sup>31</sup> *Id.* at 124.

<sup>32</sup> *Id.* at 155–56.

<sup>33</sup> *Id.* at 158.

<sup>34</sup> *Id.* at 156–57.

<sup>35</sup> A. Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *INTERNATIONAL ORGANIZATION* 217 (2000).

in particular, in the period coinciding with the *Trente Glorieuses*, the Community articulates a form of economic integration enabling the pursuit of emancipation underlying democratic constitutions. Embedded liberalism is the term conventionally used to define a similar economic regime.<sup>36</sup> Unlike the ECHR, however, the Community does not simply reinforce the normative claims underpinning national democratic constitutions. Supranational institutions are established to build a common market, a regulatory project complementing national constitutions. As a consequence of this, the original cosmopolitan constitution manifests itself as a dual polity grounded on the synergy between two different projects: at a national level, redistributive policies aimed at emancipation are pursued in democratic constitutions; at a supranational level, intergovernmental and technocratic institutions operate in the light of economic rationality to promote a system of open markets and undistorted competition.<sup>37</sup> It is in this context that we encounter another distinctive trait of the political face of the cosmopolitan constitution. This emerges in the understanding of economic freedoms prevailing under Embedded liberalism.<sup>38</sup> Due to the difficulties in actively pursuing market integration by means of positive harmonization under the Luxembourg Compromise, the European Court of Justice favors a prudent construction of economic freedoms as a concretization of the principle of non-discrimination on the basis of nationality.<sup>39</sup> A decentralized model of market integration<sup>40</sup> prevails in which economic multilateralism is not inimical to interventionist industrial<sup>41</sup> and social policies.<sup>42</sup> The common market allows the development of social government, its only concern being contrasting state excesses such as protectionism and discrimination.

This embedded notion of market integration as well as the complimentary relationship established with national democratic constitutions, however, is built on shaky ground. First, the boundary between non-discrimination and obstacle-based interpretations of economic freedoms is by no means a clear-cut one.<sup>43</sup> This emerges in *Cassis de Dijon*,<sup>44</sup>

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<sup>36</sup> J. G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 26 *INTERNATIONAL ORGANIZATION* 393–98 (1982).

<sup>37</sup> C. Joerges, *Sozialstaatlichkeit in Europa? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation*, 10 *GERMAN L.J.* 341 (2009).

<sup>38</sup> A. J. Menéndez, *The Existential Crisis of the European Union* 14 *GERMAN L.J.* 473 (2013).

<sup>39</sup> *Id.*

<sup>40</sup> M. MADURO, *WE, THE COURT. THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION* 143–49 (1999).

<sup>41</sup> G. L. Tosato, *La disciplina comunitaria degli aiuti tra economia di mercato ed interessi generali*, in C. Pinelli & T. Treu, *La costituzione economica: Italia, Europa* 252–53 (il Mulino 2010).

<sup>42</sup> *See, e.g.*, Case C-263/86, *Belgian State v. Humbel & Edel* (Sept. 27, 1988), <http://curia.europa.eu/>.

<sup>43</sup> G. De Búrca, *Unpacking the Concept of Discrimination in EC and International Trade Law*, in *THE LAW OF THE SINGLE EUROPEAN MARKET. UNPACKING THE PREMISES* 188–91 (C. Barnard & J. Scott eds., 2002).

where the Court of Justice promotes a key shift towards an obstacle-based interpretation of free movement of goods and a competitive model of market regulation.<sup>45</sup> Moreover, also the distinction between economic and social spheres is precarious. Already in the formative period, for instance, the Community introduces pieces of social legislation under the guises of market making policies.<sup>46</sup> This arises as an ambivalent achievement: on the one hand, the efficiency of the market is improved by removing distortions on competition and, arguably, social dumping; on the other hand, the Community nourishes the idea that intervention on social issues is possible not for its contribution in terms of individuals' emancipation, but as long as it responds to economic rationality.<sup>47</sup> Both of these dynamics, at any rate, erode Embedded Liberalism. The latter will be replaced by a more problematic institutional regime in which multilateral economic cooperation, rather than strengthening or complementing national democratic constitutions, operates to transform them. In other words, the demise of Embedded Liberalism opens the door to an alternative version of the cosmopolitan constitution that contradicts the normative claims underpinning Constitutionalism 2.0.

## B. The Neoliberal Drift

If this evolutionary trajectory is correct, the shift from Constitutionalism 2.0 to Constitutionalism 3.0 could be more explicitly located at the end of the 1970s. It is in this phase that globalization and, notably, increased capital mobility begin to undermine the ability of national governments to perform their ordinary tasks in industrial, economic, fiscal, and social policy.<sup>48</sup> Destabilized in one of its key elements, Embedded Liberalism leaves room for a new international regime developing an entirely different relationship with national social states and constitutional democracies. The dual polity developed in the formative period morphs into a broader and more complex institutional framework. The cosmopolitan constitution reveals its administrative face and a more pronounced neoliberal connotation.

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<sup>44</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (Feb. 20, 1979) <http://curia.europa.eu/>. In this case the Court departs from a non-discrimination construction of Article 34 TFEU in order to review indistinctly applicable regulatory measures hindering free movement. The very same outcome could have been achieved by arguing that the measure at hand was discriminatory in that it imposed a dual burden on imported goods. See S. Weatherill & P. Beaumont, *EU Law* 608–99 (1999).

<sup>45</sup> Maduro, *supra* note 40 at 126–43.

<sup>46</sup> C. Barnard, *EU "Social" Policy: from Employment Law to Labour Market Reform*, in *THE EVOLUTION OF EU LAW* 647 (P. Craig & G. de Búrca eds., 2011) (referring to health and safety and collective redundancies directives).

<sup>47</sup> *Id.* at 645; see also F. de Witte, *The Architecture of a Social Market Economy* 7–9 (LSE Law, Soc'y and Econ. Working Papers no. 13, 2015).

<sup>48</sup> J. G. Ruggie, *Globalization and the Embedded Liberalism Compromise: The End of an Era?* (MPIfG Working Paper 97/1), available at <<http://www.mpifg.de/pu/workpap/wp97-1/wp97-1.html>>.



To be sure, a similar account for the evolution of the process of European integration is likely to disappoint many European constitutional lawyers. For a rather long period we have been encouraged to think that precisely in this phase supranational law begins its conversion to constitutionalism and, more accurately, to a type of constitutionalism entirely in line with the Constitutionalism 2.0.<sup>49</sup> Somek's cautionary tale<sup>50</sup> alerts us precisely against a similar superficial reading and reveals implicitly how manipulative the use of constitutional language beyond the nation state can be.

Many developments regarding the EU policies and institutional framework support the claim that Constitutionalism 3.0 is neoliberal and administrative in nature. First of all, in the referred period, the European Court of Justice reframes economic freedoms with the result of facilitating regulatory and tax competition in the single market. The solution experimented in *Cassis de Dijon* is consolidated<sup>51</sup> and extended to the other factors of production.<sup>52</sup> Home control arises rapidly as the main criterion governing free movement<sup>53</sup> and inspires the competitive model of market regulation introduced by the White Paper on the completion of the single market<sup>54</sup> and the Single European Act (SEA). Once applied to free movement of capital,<sup>55</sup> this more intrusive notion of economic freedoms ends up overturning the relationship between markets and social government. No longer capable to govern markets with a view to emancipation, the structures of the social state are

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<sup>49</sup> This narrative is grounded on significant constitutional developments, such as the shift to qualified majority voting, the expansion of EU competences, the increased power of the European Parliament, and the adoption of the iconography of Constitutionalism 2.0 (fundamental rights, social values inserted in EU horizontal clauses, and European citizenship). What is probably missing in this account is the persisting influence of the original identity traits of supranational law and, in particular, its enduring regulatory profile. For a more elaborate version of this argument see M. Dani, *The Rise of the Supranational Executive and the Post-Political Drift of European Public Law* 24 IND. J. GLOBAL LEGAL STUD. 399–427 (2017).

<sup>50</sup> Somek, *supra* note 1, at vi.

<sup>51</sup> Its more extreme applications, however, have been partially curbed. See Case C-267/91, *Keck & Mithouard* (Nov. 24, 1993), <http://curia.europa.eu/>.

<sup>52</sup> See Case C-76/90, *Manfred Säger v. Dennemeyer & Co.* (July 25, 1991), <http://curia.europa.eu/> (services); Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*, (December 15, 1995), <http://curia.europa.eu/> (workers); Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* (March 9, 1999), <http://curia.europa.eu/> (establishment); Case C-112/05, *Commission v. Germany* (October 23 2007), <http://curia.europa.eu/> (capital).

<sup>53</sup> P. Craig, *The Evolution of the Single Market*, in Barnard & Scott (eds.), *supra* note 43, at 35–36.

<sup>54</sup> *Commission White Paper on Completing the Internal Market*, COM (83) 310 final (June 14, 1985).

<sup>55</sup> Directive 88/361 for the implementation of Article 67 EEC, 1988 O.J. (L 178) 5 (EEC).

pressured to adapt to market forces because the latter are now in the position to decide which arrangements are affordable and which ones are instead a liability.<sup>56</sup>

A rather evident neoliberal bias emerges also in examining the expansion of Union competences. The Union does not seem to broaden its scope of operation with a view to implement Constitutionalism 2.0 at a supranational level. Tellingly, the expansion of EU powers and its constitutionalization neither give rise to a vibrant pan-European democracy nor entail a proportional increase of the size of the EU budget. Supranational policy-making, instead, seems attractive essentially for its capacity to constrain national political processes and corporatist structures; its ability to overcome national legal and political hurdles; and its promise to counter vested interests.<sup>57</sup> The expansion of EU competences is driven by an agenda aimed at the transformation of national social government. The structure of the new competences confirms this general impression. The treaties may increase the influence of the European Parliament in policy-making, but they do not enable the same degree of political latitude once existing in national democratic constitutions.<sup>58</sup> The purposive nature of Union legislative competences forecloses meaningful political contestation in fields like monetary, employment, or industrial policy.<sup>59</sup> If policy directions such as price stability, empowerment, and competitiveness are predefined in the treaties,<sup>60</sup> those furthering full employment, social emancipation, and interventionist industrial policy are left without the possibility to pursue their aspirations within the given institutional framework. Newly attributed competences enable supranational institutions to pursue only a neoliberal agenda aimed at the instauration of a market of services and capitals, the reorientation of social government towards entrepreneurship, and the empowerment of the workforce.<sup>61</sup> In particular, the Economic and Monetary Union is deployed as a strategic lever to counter vested interests and reform national social government.<sup>62</sup> In the newly acquired policy fields, the Union operates in regulatory style as a major force of transformation. By dictating the direction of national policy-making and pushing forward the reforms experimented in *avant-garde* countries, it enters in a

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<sup>56</sup> C. Offe, *The European Model of "Social" Capitalism: Can It Survive European Integration?* 11 J. POL. PHIL. 463 (2003).

<sup>57</sup> C. J. BICKERTON, EUROPEAN INTEGRATION, FROM NATION-STATES TO MEMBER STATES 99–106 (2012).

<sup>58</sup> D. Grimm, *The Democratic Costs of Constitutionalization: The European Case*, 21 EUR. L.J. 464 (2015).

<sup>59</sup> See G. Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, 21 EUR. L.J. 1 (2015).

<sup>60</sup> See Treaty on the Functioning of the European Union, arts. 127, 145, and 173, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>61</sup> N. ROSE, POWERS OF FREEDOM. REFRAMING POLITICAL THOUGHT 139–42 (2008).

<sup>62</sup> K. Featherstone, *The Political Dynamics of the Vincolo Esterno: The Emergence of the EMU and the Challenge to the European Social Model*, 9–15 (Queen's Papers on Europeanisation, Working Paper No. 6, 2001).

competitive relationship with national constitutional democracy challenging its normative claims and institutional structures.

The managerial profile of Union policy-making is strengthened and amplified by the reforms adopted to cope with the financial crisis. Here, the administrative face of the cosmopolitan constitution finds perhaps its more explicit manifestation. Indeed, the policy measures and institutional arrangements adopted to cope with the crisis radicalize the Union commitment to neoliberal transformation. Correspondingly, national constitutional democracies are downscaled to a subservient role aggravating the neoliberal and post-political drift of European public law. Indeed, financial stability and competitiveness are policy goals prioritized and inculcated to recalcitrant member states through more stringent direction and control of national political economies.<sup>63</sup> Particularly in the countries more affected by the crisis, supranational institutions do not hesitate to intervene in core areas of national social government in order to prescribe detailed policy measures, regardless of the competence limits established in the Treaties.<sup>64</sup> What is worse, the resulting evacuation of national representative democracies is not compensated at a supranational level by an institutional framework with equivalent democratic credentials. The coordination of national economic and social policies is carried out by intergovernmental and technocratic institutions operating in a regulatory mode in the light of a web of opaque macroeconomic indicators.<sup>65</sup>

### C. Re-Imagining the Cosmopolitan Constitution

Against a similar background,<sup>66</sup> the awakening of conflicts between market elites and ordinary citizens is by no means surprising. The reality of this more recent version of the cosmopolitan constitution is only on the surface pacified. With a closer look, conflicts between market elites and ordinary people have become endemic—so much so that they are gradually reconfiguring national political systems.<sup>67</sup> Interestingly, both sides make a

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<sup>63</sup> The more rigid character of the new economic governance is the result of the introduction at a supranational level of semi-automatic sanctions in case of violation of macroeconomic indicators and, at national level, of balanced budget rules in national constitutional law, alongside mechanisms of automatic correction in case of deviations from the medium-term budget objective.

<sup>64</sup> M. Dawson & F. de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 *MODERN L. REV.* 824-286 (2013).

<sup>65</sup> D. Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 *EUR. L.J.* 685 (2012).

<sup>66</sup> And having regard to the dubious results of these policies in terms of economic growth, employment, and reduction of public and private debt.

<sup>67</sup> For a discussion, see also BICKERTON, *supra* note 57, at 182–95.

strategic use of the language of Constitutionalism 2.0 either to legitimate<sup>68</sup> or to contest the new institutional arrangements and policy measures promoted by the Union.<sup>69</sup> Somek correctly observes that these conflicts cannot be wished away and that some sort of institutionalization is required. It is at this point that he evokes the Machiavellian mixed constitution as an alternative model: only by endowing with real power the economically disenfranchised could the cosmopolitan constitution be purified from its neoliberal bias.

There is a lot in the idea of rehabilitating the Machiavellian mixed constitution that may at a first glance sound appealing.<sup>70</sup> Somek is certainly right in denouncing the excessive influence of market elites over law and policy-making—a fact that definitely may be compared with the social context generating Machiavelli institutional proposals.<sup>71</sup> He may also be correct in identifying other analogies—such as the incapacity of competitive elections and class-anonymous institutions to secure a sufficient degree of democratic accountability.<sup>72</sup> Perhaps— and this is probably the gist of his provocative idea— we all should come to terms with a social and political reality in which the very idea of a uniform sovereign people has been *de facto* undermined by increasing social inequality. If globalization and the neoliberal drift of the cosmopolitan constitutions have set the ground for the emergence of entrenched constituencies of insiders and outsiders, why not accept a return to the ancient idea of a mixed constitution? Would the economically disenfranchised not be more protected if their interests were to be represented by class-specific offices designed in the light of the Roman plebeian tribunate?

One would hope that the reality is not so bleak. One would hope that the trend described by Somek is still reversible and that the time has not yet come to resort to Machiavellian alternatives. Indeed, there are in the latter potentially regressive elements that also its more outspoken supporters are, at least in part, ready to acknowledge. First, returning to a mixed constitution could undermine the pursuit of emancipation and social mobility—the core values of Constitutionalism 2.0. Class-specific measures and, most of all, class-specific institutions are certainly capable to awake in common citizens class consciousness on their conditions of subordination.<sup>73</sup> Yet, in doing so, they are also likely to concur with neoliberal

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<sup>68</sup> See *Communication from the Commission—Establishing a European Pillar of Social Rights*, COM (2017) 250 final (Apr. 26, 2017); See *Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights*, C(2017) 2600 final (Apr. 26, 2017).

<sup>69</sup> See Menéndez, *supra* note 38, at 525–26 and W. Streeck, *Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas* 21 *CONSTELLATIONS* 219 (2014).

<sup>70</sup> For the Machiavellian constitution, see J. P. MCCORMICK, *MACHIAVELLIAN DEMOCRACY* (2011).

<sup>71</sup> *Id.* at 5–8.

<sup>72</sup> *Id.* at Chapter 2.

<sup>73</sup> *Id.* at 16.

policies to the erosion of the structures of a universal welfare state. Second, class-specific institutions could place sociopsychological limits on the aspirations of advancement of market outsiders.<sup>74</sup> Third, the Machiavellian democracy presupposes that market elites will continue to rule,<sup>75</sup> although subject to more effective constraints by class-specific institutions. Besides being inherently problematic in democratic terms, this scenario appears highly inadequate to a reality in which the neoliberal transformation of the social state has already reached a well-advanced stage. Assigning a veto power on structural reforms to the economically disenfranchised now, while market elites retain a right to rule, would at best enable only a rearguard defense of the remaining vestiges of the social state. Nowadays, however, the quest for emancipation cannot be reduced to the protection of basic levels of social protection. If we want to revive the commitment to emancipation, much more is needed and, in particular, a plan for the active re-establishment of social state structures rather than a veto power on further structural reform ought to be pursued. Clearly, segregating ordinary people to a merely reactive role for an indefinite period of time is in this respect a nonstarter.

Before seeking refuge in the Machiavellian mixed constitution, we should try to re-imagine the cosmopolitan constitution and, in particular, reinvigorate its political dimension. Admittedly, the neoliberal drift of the cosmopolitan constitution has left profound scars on our legal and political orders. Yet, concluding for the ineluctability of this form of political rule seems more a self-fulfilling prophecy than the result of accurate socio-political analysis. As said, in a not so distant past, Europe has experienced a different type of cosmopolitan constitution that enhanced rather than inhibit the normative claims and the structures of liberal and democratic constitutionalism. Probably, reverting to Embedded liberalism is also an impracticable option in that it would imply a massive repatriation of Union competences and, critically, a radical reconsideration (if not the total dismantlement) ) of a series of supranational projects that either have become entangled with European integration<sup>76</sup> or are badly needed to cope with other contemporary challenges.<sup>77</sup> Nonetheless, the very possibility of a democracy-enhancing cosmopolitan constitution should encourage the definition of a more open and democratic supranational institutional framework. Increased politicization to internalize dissent should be the driving motif of proposals devised on the conviction that anti-system opposition may be disarmed when more chances of legitimate opposition are offered.<sup>78</sup> In this vein, opening up (or

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<sup>74</sup> *Id.* at 13.

<sup>75</sup> *Id.* at 15.

<sup>76</sup> This is probably the case with the EMU.

<sup>77</sup> An example on this point is offered by the need of supranational policies to deal with the refugee crisis and, more broadly, immigration.

<sup>78</sup> P. Mair, *Political Opposition and the European Union*, GOV'T AND OPPOSITION 6 (2007).

even deconstitutionalizing) Union policy objectives<sup>79</sup> and, more generally, reconsidering the tendency of Union law to operate as an agent of transformation rather than a container of political conflicts are valuable suggestions.<sup>80</sup> Politicization can also be increased through proactive and networked mobilization of national parliaments in order to provide legitimate countervailing power vis-à-vis supranational institutions.<sup>81</sup> A more sustainable engagement between the latter and national constitutional democracies could finally be attempted with a system of legislative opting-outs and differentiated integration more respectful of national constitutional diversities.<sup>82</sup>

#### D. Conclusion

In sum, re-imagining the cosmopolitan constitution away from the current neoliberal paradigm is an exercise worth pursuing. Seeking refuge in the Machiavellian mixed constitution seems a desperate scenario for the days in which the social state will be completely transformed or wiped out. But we are not already there, and the ambivalences in the cosmopolitan constitutions remain still unresolved. There is a struggle underway and, for those fighting, memory of the days in which the cosmopolitan constitution was political and emancipatory could be a source of hope and inspiration.

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<sup>79</sup> M. Dawson & F. de Witte, *From Balance to Conflict: A New Constitution for the EU*, 22 EUR. L.J. 214–17 (2016).

<sup>80</sup> *Id.* at 221–23.

<sup>81</sup> See D. Curtin, *Challenging Executive Dominance in European Democracy* 77 MODERN L. REV. 23–32 (2014); M. Goldoni, *Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale*, 22 EUR. L.J. 292–94 (2016); D. Chalmers, *Democratic Self-Government in Europe, Domestic Solutions to the EU Legitimacy Crisis* (2013) Policy Network, available at <<http://www.policy-network.net/publications/4399/Democratic-Self-Government-in-Europe>>.

<sup>82</sup> F. W. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, 21 EUR. L.J. 400–04 (2015).