**Liberal Theory**

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This chapter is about the most familiar theory of global constitutionalism. Many of the best-known scholars in the field *may* be regarded as liberal theorists. And I say that with due caution. For in such a hotly contested and endlessly debated field of political and legal thought, as global constitutionalism surely is, it is important not to be too strident when categorising theoretical work (see Schwöbel 2010).[[1]](#footnote-1) Some of the theorists described in this chapter as ‘liberals’ may bristle at the suggestion. For when they describe themselves it is often as cosmopolitans. In textbook surveys of global theory, cosmopolitanism is generally considered a branch of liberalism (see Browning 2011; Rengger 2000). Yet the word ‘liberal’ is notable for its absence in the main works reviewed here.[[2]](#footnote-2)

There are several possible reasons for this. Perhaps the crucial one is that liberalism, today, is seen as carrying a great deal of imperial and ideological baggage (see Brown 2009; and also Friedman et al. 2013). In the view of Judith Shklar, liberal thought has supported an especially flawed kind of modern politics. Flaws visible to us now only with the benefit of a late modern hindsight[[3]](#footnote-3).

Overly concerned with the threats to personal freedom posed by tyrannies of various kinds, liberal thinking has long operated in the shadow of fear, says Shklar. This has reduced liberalism, in her view, to a mode of instrumental reasoning that supports the least bad form of government. This ‘liberalism of fear’ hardly makes for an attractive reference point when thinking about the constitution of global order in the twenty-first century. However, it does serve as useful shorthand for the negative or cautious disposition to liberal thought. We could do with another label to cover the more optimistic, and some might say, utopian disposition to liberalism that pulls in the opposite direction. Between these two poles or charges is the full range of contemporary liberal thought. For some commentators the enormous diversity of positions that can be accommodated between these extremes is so great that liberal theory has come to mean far too much [[4]](#footnote-4).

Clarity of thought is prized in the academy, and especially among theorists. Overused and overextended concepts and theories lose their value fast. While most (but not all[[5]](#footnote-5)) of today’s cosmopolitan thinkers can be said to belong within the broad church of liberal thought, they advance a very specific theory of global constitutionalism.

The foundations of this theory, and the story of how it has emerged as one of the dominant ways of thinking about global constitutional order, is the subject of the first part of this chapter. The second part looks at the on-going debate over the promise and limits of this liberal theory. It is organised around two critical issues that have animated the debate over global constitutionalism in recent years. These are referred to as the pluralist critique of Western universalism and the sceptic’s critique of global reform. Taken together, these criticisms present a major challenge to a liberal theory of global constitutionalism. So far, this challenge has not met with a fully articulated response from cosmopolitan liberals.

The Evolution of Liberalism and Constitutionalism

The difficulties in the way of giving a general account of liberalism are formidable, as has been noted by liberal thinkers themselves. Joseph Raz, for instance, writes: ‘It is probably true to say that no political cause, no one vision of society nor any political principle has commanded the respect of all liberals in any given generation, let alone through the centuries’ (Raz 1986, p. 1). Jeremy Waldron agrees: ‘If we examine the range of views that are classified [as liberal]’, he writes, ‘we are unlikely to find any set of doctrines or principles that are held in common by all of them, any single cluster of theoretical and practical propositions that might be regarded as the *core* or the *essence* of the ideology in question’ (Waldron 1987, p. 127, emphasis in the original).

This is all true to a point. Waldron is right that the liberal tradition has changed over time, discovering and creating new commitments along the way. But according to Duncan Bell (2014), there has been a particularly significant change in liberal thought in the twentieth century that has resulted in the emergence of global aspirations and a search for new global foundations for liberalism.

The ground shifts around the time of the peace settlement that brings an end to the First World War. A renewed and globalising liberalism develops over the subsequent century as the United States moves to build a new world order. Under America’s global leadership, liberalism becomes what Bell refers to as the ‘constitutive ideology of the West’ (Duncan 2014, p. 683).[[6]](#footnote-6) In the struggle between Western liberal democracy and totalitarianism in Europe, liberal politics provides an overall direction to the Western history of the Cold War and its aftermath. According to this history, liberalism scores an ideological and material ‘victory’ for the West over other forms of politics and other competing doctrines of political order.

There are scholars who question whether the victory for liberalism at the end of the Cold War is absolute or irreversible (see Gray 2010, pp. 217-223). But I do not believe they would disagree that liberalism has done far better in the new world of global markets, increasing democracy and multilateral decision-making than any other truly global idea. The Cold War ‘victory’ may not have established anything so definitive as a set of core, global principles upon which all liberals can agree. And to that extent Waldron and Raz are right. Yet, contemporary liberal theorists do share a basic commitment to preserve what has been won in the name of liberal politics in the twentieth century, namely: the kind of personal freedoms denied in Europe by the totalitarian regimes of Nazi Germany and the Stalinist Soviet Union. These regimes prevented the flourishing of individuals and their moral agency.

In Judith Shklar’s assessment, the ingrained fearfulness of the liberal tradition means that liberal theorists tend to draw the same basic lesson from the battle with totalitarianism in World War II and the Cold War. As she puts it: ‘some agents of government will behave lawlessly and brutally in big or small ways…unless they are prevented from doing so’ (Shklar 1989, p. 21).

Clearly, it follows that the best way of preventing ‘lawless’ government is to bind the public authority of government to the rule of law. This is by no means a new liberal idea. From the great liberal thinkers of the Enlightenment, such as Montesquieu, Bentham and Kant, up to some of the most noted liberal thinkers today the best government is a government of laws, not of men. But this commitment to the rule of law is where liberal politics connects most clearly with more recent ideas of constitutionalism.

To secure a realm of personal freedom, liberals generally favour constitutional forms of government, with the separation of powers and representative (but not usually direct) democracy. Given their fears about the abuse of power, liberals tend to be broadly sceptical of accounts of politics that are based around the promotion of any particular conception of the Good.[[7]](#footnote-7)

At a minimum, a liberal constitutional framework of government is one in which the moral agency of persons is publically acknowledged and protected, with equality before law and enforceable basic rights. In Alexander Somek’s account (2014), the modern constitutional project has evolved from this basic framework through a fusion of new ideas of liberalism and constitutionalism. ‘Constitutionalism 1.0’, as he describes it, conceives of a commitment to a liberal idea of personal freedom in a negative or sceptical sense, as freedom *from* coercive interference from the state. With the enlargement of liberalism in the twentieth century, the modern project of constitutionalism has also grown into something more positive and comprehensive. Somek identifies the constitutional order imposed in post-Nazi Germany as the key event in which the first age of constitutionalism ends, and a second more far-reaching stage begins. In this moment, constitutionalism as a way of ensuring the institutionalised restraint on public power gives way to a second form of constitutionalism (‘Constitutionalism 2.0’) that aims at ensuring the dignity of individuals and especially their human rights within political institutions bound by law.

The most recent stage in the history of the mutual influence between liberalism and constitutionalism, according to Somek, is the emergence of the ‘cosmopolitan constitution’ – the fragile achievement of the latest, and perhaps the last, stage of this modernising project. This is defining feature of ‘Constitutionalism 3.0’[[8]](#footnote-8)

What is striking about Somek’s three-stage narrative of modern constitutionalism is how it becomes increasing sceptical in tone as it moves up to the present day. The story he tells does not have a happy ending. This is not a celebration of the progress of freedom or a series of better and bolder achievements in constitutional order, as per the liberal historiography mentioned earlier. Liberal sceptic that he is, Somek points to what he describes as the new threat to personal freedom posed by the ‘cosmopolitan constitution’. The autonomy of persons that constitutional government has sought to enrich and protect is, in his judgement, endangered by the governance of an ‘administered world’ (Somek 2014, p. 242) that cosmopolitan constitutionalism has helped to create in contemporary Europe.

The Liberal Commitments of Cosmopolitan Constitutionalism

Somek’s gloomy tone and conclusions about cosmopolitan constitutionalism are highly unusual among his contemporaries. Most prominent writers on the topic, such as Matthias Kumm (2009b; 2013) and Garrett Brown (2009), offer a far brighter prognosis about the project’s global present and its future.

Their optimism rests on a set of liberal commitments they argue are necessary to ensure the collective exercise of self-government in an age of global challenges to personal freedom and the rule of law that states, and state-centric constitutionalism, simply cannot deal with. These global liberal commitments orient around two key ideas that provide a normative framework for developing a liberal theory of global constitutionalism. What follows is a brief account of these ideas.

*The subject of freedom in a global polity*

Matthias Kumm describes this liberal idea as the ‘holistic foundational’ (Kumm 2009b, p. 321) principle of cosmopolitan constitutionalism. It springs from a belief that all persons are free and equal, and should be recognised as such by the institutions that govern them. In a world where states share the duties of governance with non-state actors of various kinds, most notably global institutions like the United Nations and the World Trade Organisation, the scope of application of a constitutional framework necessarily enlarges beyond the nation-state. What the ‘global polity’ means, exactly, cosmopolitan theorists do not tend to say in any great detail (see Corry 2013, pp. 1-41). What it is not, however, is fairly clear. It is not a model of political order underpinned by the state, or by the state system, or by notions of political space that are inextricably tied to statist claims to territorial sovereignty. This is an imagined global political community that embraces Kant’s idealism about the interconnectedness of all of mankind. And it invokes a common governance object for a common subject of governance, humanity as a collective ‘we’.

But who or what is at the centre of this image of global order? The liberal subject, if we follow Kantian reason, as Garret Brown suggests, only comes into existence when formerly disengaged selves discover a common subjectivity. This cosmopolitan liberal subject is the creation of a common will, born at that moment when individuals discover universally agreeable principles of justice that bring them together in some kind of global community of values.

Controversially, for reasons I will say more about shortly, human rights have come to fill out the value-based content of this liberal subjectivity (see Brown 2009, pp. 55-85 and 198-202; Kumm 2009b, pp. 303-310; and Somek 2014, pp. 171-175 and 258-266). Defending and promoting human rights becomes a way of encouraging the emancipation of individuals in conditions where their freedom is systematically denied by some form of overweening political power. In embracing human rights, cosmopolitan theorists can still claim that personal freedom is the supreme value in global constitutionalism, as it should be in any liberal theory. But the issue is whether a certain degree of the liberal subject’s autonomy and individuality is lost in the process. There is at the very least a tension between the desired liberal goal of personal freedom and this cosmopolitan means of achieving it through a normatively infused, collective politics of human rights.

*A global rule of law*

Our picture of the global polity becomes increasingly abstract and complex when we introduce the cosmopolitan idea about the rule of law. The space within the global polity is a zone of overlapping and competing claims to legal authority. Nation states and international institutions can and do make distinctive and ultimate claims about legality. And in the absence of an overarching sovereign authority that can arbitrate on matters of global law, these claims appear to be equally legitimate and very difficult to reconcile. Hence the emerging legal configuration within the global polity is indeterminate. And this raises several questions about what a global rule of law actually means and whether a higher order of law can emerge to resolve these conflicts of legality.[[9]](#footnote-9)

Cosmopolitan theorists argue it is possible to create this higher order of law. And to do so requires the agents of the global polity to gather together under an ‘umbrella’ of cosmopolitan liberal norms (Walker 2014, pp. 58-85). A Kantian rule of global law assumes some kind of convergence and consensus on what makes law ultimately authoritative in the global polity. As with discussions on global law more generally, there is an assumption that this new cosmopolitan law can have a universal warrant that transcends state borders. There can be no restrictions to its jurisdiction in terms of physical boundaries. This is a basic procedural requirement of all forms of global law. But cosmopolitan law goes further than this. There is a substantive content to its planetary authority, in that there are certain moral (indeed liberal) values that this rule of law is expected to embrace. Matthias Kumm spells these out as the ‘foundational commitments to democracy, human rights and the rule of law,’ itself (Kumm 2009a, p. 403).

There is a blurring of the lines here between a procedural and a substantive understanding of global law. Advocates of cosmopolitan constitutionalism present a case for global rule of law as being procedural, and thereby in some sense neutral on moral questions of legality. But in the next breath, cosmopolitan liberals refer to substantive standards of legality that are expected to provide a global rule of law with its legitimate, planetary authority.

A distinction between procedural and substantive values is often made in discussions of legal and political authority (Flathman 1980, pp. 2-27). Procedural values are supposed to regulate the pursuit of substantive values, helping to settle conflicts over ultimate claims in law as in politics. But in cosmopolitan constitutionalism, this distinction between the substantive and the procedural is complicated by the fact that the appeal to rule of law is comprehended from a normative position not to be surpassed. There is ultimacy to the way the process of a global rule of law is depicted. Ultimacy that is asserted in terms of what is authoritative in global law, about what global law should be ruling for. This reduces the space for any conflict-resolving processes of adjudication in the global polity. And it begs the question: what kind of rule of law is there without adjudication?

There are difficulties with the basic commitments, or foundations, to the cosmopolitan liberal theory of global constitutionalism. Critics argue these commitments demand too much conformity to a common agenda – the agenda of ‘Constitutionalism 3.0,’ to use Somek’s phrase.

These critics fall into two camps. There are those who challenge the liberal foundations of this constitutional project in terms of where it comes from i.e. as an invention of the West. And there are those who challenge these commitments in terms of where they go to i.e. the sites of global authority they help to institutionalise. I wish to call the first set of critics, pluralists. As this is often how they describe themselves. They champion the ethical commitments of pluralism as an alternative (albeit weaker) foundation to liberalism in thinking about where global constitutionalism ought to come from. The second set of critics I refer to here as the sceptics. This is a more amorphous grouping. As one might expect, sceptics are too circumspect to present an alternative set of foundations for global constitutionalism, no matter how weak these may be. Rather than focussing on what ought to underpin the constitutional project in today’s global age, sceptics concentrate their attention on where the constitutional project is ultimately heading. They cast doubt on whether cosmopolitan constitutionalism can fulfil the most limited (and negative) liberal ideal of restraining the abuses of power in global governance because of its determination to support some kind of higher authority.

The Pluralist Critique of Western Universalism

Many readers will be familiar with the debate over ‘constitutional pluralism’ (for a survey of the debate, see Walker 2016). This subject is explored more fully in Neil Walker’s contribution to this volume. Instead, what I wish to explore here a longer running dispute about whether liberalism and pluralism are compatible. My suggestion is that this older debate prefigures the disagreement in the literature on global constitutionalism over whether it is possible to square two ideas – constitutionalism and pluralism – that are distinct and, for some pluralists (I am thinking especially of Nico Krisch, see Krisch 2010), fundamentally at odds.

This pluralist critique of liberalism centres on its claims to neutrality (Kekes 1993, pp. 199-218). As noted earlier, liberalism has an origin. It has providence, an intellectual history that is bound up with the making of the modern West. Such Western or Eurocentric origins are inconvenient for advocates of cosmopolitan constitutionalism, since they imply that beneath the universal appeals to justice for a common humanity is a prejudice for the values of one particular community.

‘Constitutionalism 1.0’ supplied a legitimate legal foundation and framework for government in a single, bounded and indivisible polity, the modern European state. The pluralist critique is that the scaling up liberal constitutionalism to a planetary size involves making universal demands to conformity in law and politics that are inimical to cultural pluralism.

To be a pluralist is to be committed to a multiplicity and diversity in ways of life. Accordingly, pluralists are resistant to any claims about the common good in politics and law assuming precedence. For Krisch (2010), this monistic presumption is inherent in the modern constitutional project. He argues that constitutionalism has always been understood in unitary and hierarchical terms. With ‘Constitutionalism 3.0’ this agenda extends far beyond its cultural origins in the West.

Lurking behind the apparent cultural neutrality of a global rule of law is a particular history of the expansion of Western ideas and practices of civilisation (see Koskenniemi 2004). Pluralists argue this politics of international and now global law is irreducibly a liberal project and a project that cannot escape its roots in Western identity and moral intuitions. And they suggest there may be unwillingness, or simply an inability, of proponents of a cosmopolitan rule of law to address this issue of cultural particularism in their universal project.

This line of critique calls for a deeper reflection from advocates of cosmopolitan constitutionalism about the extent to which their procedural argument for global rule of law is underpinned by a substantive commitment to Western values. Pluralists argue that, perhaps without really knowing it, cosmopolitan constitutionalism asserts a global politics of identity that is prior to the law.

The Sceptic’s Critique of Global Reform

Matthias Kumm complains that sceptics often make criticisms of global constitutionalism in bad faith. They talk up the immodesty of what he refers to as the grand schemes of ‘big C’ constitutionalism. And they ignore the reasonableness of ‘small c’ constitutional arguments for moderating and modifying the extremes of state sovereignty in a time of intensifying global interdependence (Kumm 2009b, p. 260). For reasons I shall go into now, Kumm does indeed have a point. The sceptic’s critique of cosmopolitan constitutionalism can go too far.

The elements of this critique have been touched upon already. As noted above, Somek casts doubt over whether a cosmopolitan polity – a political order that reflects a global rule of law, and the legitimacy of human rights – is a worthy end goal of the modern constitutional project. It is not just that there are question marks over whether this destination is ever likely to be reached[[10]](#footnote-10). Somek invites us to think about whether ‘we’ even want to go on this journey.

The point of his critique is similar to the objection raised by Shklar, about who, exactly, is the ‘we’ that is supposed to be on this liberal journey of modernisation? Shklar argues there is an inadequate theory of the self that underpins all collective notions of liberal subjectivity. Craig Calhoun makes a similar point in his sceptical remarks about the ‘thin conception of social life, commitment, and belonging’ (Calhoun (2012, p. 118), behind cosmopolitan notions of global citizenship.

For cosmopolitan constitutionalism to work there needs to be a demand for international law to be transformed into a law on and for the global citizen, whereby global citizens are empowered, by law, in the governing of their own affairs. Cosmopolitan constitutionalists’ turn to human rights as a way to mobilise the global citizenry and raise the consciousness of this liberal subject.

Sceptics criticise this move for supporting a top-down idea of the common good. They argue this idea of the subjectivity only serves to legitimate the authority of a supra-national or global constitutional order if citizens within national jurisdictions buy into the self-evident truth of a larger commonwealth of humanity that exists beyond the borders of their states. Perhaps this is why global institutions are amongst the most active proselytisers for human rights (see Charvet and Kaczynska-Nay 2010; Mertus 2013; and Peagram 2015). From a sceptical perspective, the danger is this idea is converted into a justification for extending the power of institutions rather than encouraging them to connect with, and be held accountable to, the people they govern.

Somek takes this line of critique to its logical conclusion. Constitutional democracy, he argues, is in danger of becoming ‘obsolete’ (Somek 2014, p. 283) in an age of supranational and global institutions. The executive bureaucracies of global governance in Brussels and New York operate in a way far removed from the general public they are supposed to serve. These forms of government are ambivalent to earlier constitutional concerns about human dignity and citizenship. And they maintain a grip on the rule of law only in the most superficial way. For Somek, the political reality of cosmopolitan constitutionalism is that liberal ideas of democracy, human rights and the rule of law are used to legitimate governmental power, not to restrain it in the interests of supporting personal freedom. With Hegellian logic, he implies that cosmopolitan constitutionalism ushers into existence its own nemesis - a machinery of governance designed to preserve order and stability at a cost to the people it is meant to serve.

I said earlier that I agree with Matthias Kumm: sceptics can take their critique of cosmopolitan constitutionalism too far. The problem is not limited to this particular theory. It characterises the limits to all varieties of post-liberal theory in the twenty-first century.[[11]](#footnote-11) Although Somek’s conclusions are illustrative of this general problem for political and legal thought at a time when liberalism faces a host of challenges to its legitimacy.

One of the virtues of a sceptical approach to theory is the ability to ask questions that the sceptic may not be able to answer definitively. But there is always a danger that the sceptic will suffer from speculative weariness. Reflecting the ultimate torment of the unanswerable, the sceptic may edge into despair. This tendency can, in part, explain the gloomy and dystopian character of Alexander Somek’s scepticism when, in the final analysis, he all but gives up on ‘Constitutionalism 3.0’, and the whole idea of global constitutionalism.

You do not need to be a proponent of the cosmopolitan constitution, like Kumm, to have some misgivings about this final, post-liberal position. It suggests that in the aftermath of liberal theory, there is little in terms of resources for thinking further about global constitutionalism or the global order.

Conclusion

Because of the importance of liberalism in modern political and legal thought, and in the theory of global constitutionalism in particular, it has been necessary to range widely in this chapter and to cover a number of issues from diametrically opposing points of view. In order to keep my undertaking down to a manageable size, I have focussed on some aspects of liberal theory and its critique, and left others aside.

At the beginning of the chapter, I noted the disagreements over what defines liberalism, and the question marks over whether there is a constellation of basic concepts and commitments to contemporary liberal thought, of the kind that has been understood traditionally in political theory as providing ‘foundations.’ This debate will no doubt continue for as long as there is liberal theory. And it would be foolish in the extreme to suggest this chapter has settled the matter. But it has identified two basic commitments or foundations of liberal theory that are part and parcel of the global expansion of liberal thinking that begins in the twentieth century and continues to this day. These basic commitments to liberal subjectivity and the rule of law have vivified what Somek refers to as the latest, and perhaps the last, stage in the modern constitutional project, the cosmopolitan constitution.

Critics of cosmopolitan constitutionalism have attacked these foundations, perhaps not always in a spirit of generosity. Nevertheless, these criticisms might encourage greater self-reflection among theorists of global constitutionalism about their debt to liberalism, and also to the problems associated with this as they consider the legal and political configuration of an emerging global order.

Where things stand, at moment, is at an uncertain threshold. The double critique of the liberal theory of global constitutionalism discussed in this chapter still calls for the articulation of a cosmopolitan liberal response to move the debate forward.

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1. There is a tendency to assert the intellectual debt that all the writing on global constitutionalism owes to liberal theory without being clear what one actually means by liberalism. See Schwobel (2010). [↑](#footnote-ref-1)
2. For example, the word ‘liberal’ is only mentioned in the endnotes in the opening chapter of Brown (2009, pp. 24-28). While there is some discussion of the critique of cosmopolitan liberalism in other chapters of the book (esp. chapter three, pp. 87-122), this is done only as a means to dismiss some of the imperialistic or monistic objections to Kantian thought. In other words, the author seems intent to create some distance between a liberal theory (with all its flaws) and a cosmopolitan or Kantian theory of global constitutionalism. What I suggest in this chapter is it is not so easy to extricate cosmopolitanism from the problems of liberal politics. [↑](#footnote-ref-2)
3. Her view on liberalism unfolds across her entire body of work spanning some thirty years. But it is two presentations of it in particular that I have drawn from here: Shklar (1984 and 1989). [↑](#footnote-ref-3)
4. Almost every commentator on contemporary liberal theory feels the need to comment on the sheer diversity of thinking that falls under this heading, see Shklar (1984, 1989) and Brown (2007). Others, like John Gray (2002) choose to go one step further and suggest a fundamental tension in liberal theory that threatens to make liberalism incoherent, and leads them, at least in Gray’s case, to abandon liberal theory altogether. [↑](#footnote-ref-4)
5. There is a radical element to Kant’s cosmopolitan thinking that many liberals tend to ignore. And it is why, in International Relations theory, Kant has been famously described by Martin Wight as a ‘revolutionist’ who is hostile to the state system. For an elaboration of this categorisation, see Wight (1992). [↑](#footnote-ref-5)
6. This is a point echoed by Larry Sidentrop in one of the most stimulating books on political theory to have emerged in recent year, when he argues: ‘the liberal tradition…is at the core of Western identity’ (Sidentrop 2014, p. 4). [↑](#footnote-ref-6)
7. Although for reasons that I will elaborate on later in the chapter, this sceptical disposition to liberal thought can turn against global constitutionalism. [↑](#footnote-ref-7)
8. As Somek explains, each iteration of constitutionalism is recalibrated as we move from one epoch to another (see Somek 2014, p. 9). [↑](#footnote-ref-8)
9. I strongly recommend Neil Walker’s book for a balanced and nuanced overview of the debate (Walker 2014). [↑](#footnote-ref-9)
10. This has long been the standard sceptic’s critique of ambitions for global reform. See Scheuerman (2010). He presents the post-war debate in the 1940s as revolving around the question of whether the road to a global constitutional order was realistic or utopian. [↑](#footnote-ref-10)
11. Given the restrictions on space here, I cannot go into any great detail on the problems associated with extreme scepticism in political theory, save to say that it appears to be characteristic of a turn away from the utopianism of European thought in the twentieth century. For those who are interested in exploring this topic further, I strongly recommend White (2003) and Rengger (2013). [↑](#footnote-ref-11)