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RESEARCH ARTICLE

Confucian Constitutionalism: From Top to Bottom

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Sungmoon Kim's book is an important contribution to constitutional scholarship. It is as important for what it does as much as for what it says. The book is amongst the first to combine Asian and Western meditations on state governance. Kim has a deep and broad understanding of both Confucian traditions and liberal traditions, in particular, that centered around John Rawls. His book is an object lesson in the value of exchange between traditions. For those within Western constitutional traditions, Kim's book proves how much there is to learn from Confucianism—and, indeed, from other Asian traditions too. For those within Confucian traditions the converse may be true; each has something to learn from the other. Kim's willingness to engage and combine these differing approaches guides us toward a form of constitutional scholarship that is unafraid of, and draws strength from, cross-cultural engagement.

There are at least two modes of engagement a scholar can undertake with a philosophical tradition. First, she can reason within that tradition, presenting her work as a development of it. The scholar treats the tradition as broadly correct, and uses resources from within it to refine and clarify its implications. In recent years constitutional scholars have drawn on traditions as diverse as Kantianism, republicanism, and utilitarianism to articulate distinct theories of constitutionalism. Second, the scholar can draw from a tradition without claiming to occupy that tradition. Few would wish to locate their work within the doctrines of the divine right of kings or the mixed constitution, but there is still much to be learned from them, even if they are, at base, mistaken. The title of Kim's work indicates that he sees the book as occupying the first mode, as a contemporary reworking of Confucian philosophy, but his argument seems closer to the second, in that the work draws from Confucianism, rather than

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reasoning within a Confucianist frame. The placement of Confucianism in the argument of the book supports this reading.

Moving from the top down, Kim's model of constitutionalism does not start with Confucian values but with two assumptions that are more commonly associated with liberal constitutional thought: the recognition of pluralism and the insistence that collective decisions be made through democratic processes (110). The assumption of pluralism plays an equivocal role in the book. It is not clear whether this is an empirical constraint within which the model of constitutionalism must operate, something we might regret but cannot change, or a positive feature of modern society, something we are glad is present in our communities (64). In either case, it is hard to see how Confucianism connects to pluralism. Kim writes about the "unity of the three teachings," the longstanding and comfortable interaction of Confucianism, Daoism, and Buddhism in East Asian thought (89–90). This is captured in the famous image of the Vinegar Tasters, depicting Confucius, Buddha, and Laozi reacting differently to the vinegar's taste. One interpretation of the image is as a celebration of pluralism: the reactions of the three scholars capture different elements of the vinegar's essence. None of them is wrong, and yet none sees the complete truth. But though the image invites observers outside of the tasting to recognize the value of diversity, it does not follow that the sages, trapped inside the picture, can appreciate its merits. Each of the vinegar tasters thinks they are right, and can only acknowledge the merits of the other's reaction if their own philosophies permit this recognition.

There are two possible paths from Confucianism to the embrace of pluralism (99–100). First, Confucianism could have a pragmatic dimension. Like utilitarianism, Confucianism might accommodate features of the world within its moral prescriptions: pluralism would then be an empirical matter, like the mountains or the rivers, that the philosopher must navigate in her prescriptions (82). Secondly, like some forms of liberalism, Confucianism could endorse pluralism and treat these differences as desirable. This could be because of the value of choice. It may be (morally) better to allow people to select among options and pick wrongly, than impose the right option on them (66–67). Or maybe there are a great many values that manifest in the options before us, and a consequence of choosing some of these options is that we then find it hard to see the value in the other possibilities. Any of these strategies could explain how Confucianism could accommodate pluralism, but it is not clear from Kim's book which strategy can be grounded in the Confucian tradition, a tradition often presented as radically non-pluralist (97–98).

The requirement that decisions be made democratically, another foundational commitment in the book, also has an uncertain relationship with Confucianism. Confucianism is commonly taken as opposed to democratic processes, focusing instead on hierarchies grounded in merit and on the occupancy of social roles. Whilst there may be a foundational recognition of the moral significance of all people in Confucianism, in the sense that every person is a unit of moral import, this is an entry requirement for any moral theory, and it is hard to see how an argument for democratic processes could be grounded in such a thin equality claim (25–26). The commitment to democratic processes at the top of

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Kim's argument plays a crucial role and at times it seems that the subscription to democratic structures is a starting point from which Confucian ideas are then engaged rather than a product of those ideas (21, 100). The move would then echo that of Jürgen Habermas in his work on constitutional patriotism, which starts with an argument grounded in rationality, requiring that decisions be made through democratic processes that respect the moral equality of participants, and then allows in cultural considerations at the second stage to shape and inform the products of this deliberation. In Kim's work, Confucianism appears to be introduced at this second stage, tailoring the products of the democratic process (118, 148).

Approaching the argument from the other direction, from the base looking upwards, if Confucianism is correct it will run all the way down, from grand questions of constitutional order to intimate questions of family life. What Kim describes as civic Confucianism has "no desire to dictate the internal affairs of freely formed communities and associations, unless their guiding comprehensive doctrines are critically at odds with the constitutional values of public equality and basic freedoms" (93). Confucian constitutionalism is presented as a theory of how we should reason about collective action, but one which leaves space for a private realm in which people can behave as they choose (67, 71, 116). This limitation needs an explanation if it is to be justified and, if the theory is to be Confucianist, that explanation would be grounded in Confucian reasoning. This could be because Confucianism recognizes some divide analogous to that sometimes mooted between the right and the good, with the right lying in the domain of the public and the good being a question for the private. Or, to return to the discussion earlier in this review, it might be because Confucians think the state should create space for a diversity of social forms because this diversity is of value. Either of these paths would allow Confucianism to run down to the base: the theory would contain an explanation of its own limits. But given that one of the core beliefs of Confucianism is commonly taken to be the central importance of family relations and the ways in which familial relations factor up into, and provide a model for, relationships with public office holders, it might be difficult to ground such an argument within Confucian materials. Indeed, it might be argued that amongst the most important lessons we should draw from Confucian philosophy is found in this connection: the rejection of a simplistic division between the public and private, and a recognition of the constitutional role and public significance of private groups, including the family. Indeed, a singular strength of Kim's work is that he, in contrast to Habermas, recognizes a need for the cultural grounding for constitutional norms, rationality is not enough to motivate (114).

Kim's book is a powerful engagement with Confucian thought, and an impressive attempt to show that Confucianism provides answers to contemporary constitutional problems. By distancing his work from some of the less plausible constitutional claims sometimes associated with Confucianism—such as the bold suggestion China should embrace hereditary monarchy—Kim has shown that modern constitutional scholars have much to learn from Confucianism. It remains to be seen, though, if it is possible to produce a form of

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constitutionalism within the Confucian tradition or, in contrast, if Confucianism is a tradition from which we should draw. Kim's book may be an example of the second form of engagement rather than the first: a book strengthened by its engagement with Confucian ideas, but whose animating principles come from outside that tradition.

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