

REVIEW ESSAY

EUROPE'S DARKER LEGACIES? NOTES ON "MIRROR REFLECTIONS," THE "CONSTITUTION AS FETISH," AND OTHER SUCH LINKAGES BETWEEN THE PAST AND THE FUTURE DARKER LEGACIES OF LAW IN EUROPE.

THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS EDITED BY CHRISTIAN JOERGES & NAVRAJ SINGH GHALEIGH (OXFORD: HART, 2003).¹

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EUROPEAN CONSTITUTIONALISM BEYOND THE STATE EDITED BY J.H.H. WEILER & MARLENE WIND (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2003).²

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| I. | INTRODUCTION | |

Darker Legacies and *European Constitutionalism* will doubtless remain timely reading for quite a while to come, despite the fact that they were published in 2003—a date that has only relative value in the fast-moving world of academic publications. The contributions to *Darker Legacies* engage in a sensitive inquiry into the structural, semantic, political, and—hélas!—legal heritage in European member states and unfold a

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² [*European Constitutionalism*].

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highly complex history and historiography of Europe's past. The nineteen contributions to the volume, framed by a prologue by German Legal Historian and Director of the Max-Planck-Institute for European Legal History in Frankfurt, Michael Stolleis, and an epilogue by European and International Law Scholar and Director of the Jean Monnet Program at New York University Law School, Joseph Weiler, impressively succeed in making important voices heard in a European discussion that has taken on—for some time now—an evermore multifaceted and complex direction. With the European Union (EU) long arrived on the daily news, on all levels of policy making, and in curricular programs from high school to university, a book that calls attention to the troubled histories of member states, their *façon de vivre avec ses histoires sombres*, their capacity to identify, remember, and grapple with their history, can be expected to make some noise. The editors themselves point to the skeptical reactions that the volume's research project received while being undertaken⁴—and still: noisy it was. A follow-up project swiftly followed,⁵ bringing together some of the authors of the first volume, and altogether deepening the research agenda to include the particular links between historical and contemporary national memory discourses, and the ongoing search for the constitutional foundations of the EU.⁶

The eight chapters in *European Constitutionalism* are co-edited and introduced by Marlene Wind, a professor of European Integration in the Political Science Department at the University of Copenhagen, and by Joseph Weiler, both of whom have also authored an article in the volume. *European Constitutionalism* is an important contribution not only to today's internal European discussion over the adequate pathways to constitutionalizing the European integration process into the twenty-first century, but also to the contemporary transnational inquiry into the

⁴ Navraj Singh Ghaleigh, "Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'" in Joerges & Ghaleigh, *supra* note 1, 43.

⁵ See Cristian Joerges, "Introduction to the Special Issue: Confronting Memories: European 'Bitter experiences' and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts" (2005) 6 German L.J. 245.

⁶ See e.g. Bo Stråth, "Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community" (2005) 6 German L.J. 255; Fabrice Larat, "Presenting the Past: Political Narratives on European History and the Justification of EU Integration" (2005) 6 German L.J. 273; Matthias Mahlmann, "Constitutional Identity and the Politics of Homogeneity" (2005) 6 German L.J. 307; Matthias Kumm, "The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History" (2005) 6 German L.J. 319; Alexander Somek, "Constitutional Erinnerungsarbeit: Ambivalence and Translation" (2005) 6 German L.J. 357; Stefan Seidendorf, "Defining Europe Against its Past?—Memory Politics and the Sanctions Against Austria in France and Germany" (2005) 6 German L.J. 439; Vivian Grosswald Curran, "Law's Past and Europe's Future" (2005) 6 German L.J. 483.

legitimacy of political and legal order in the “postnational constellation.”⁷ The contributors approach the evolution and the making of constitutions from historical, doctrinal, and structural perspectives, but the overriding theme in their assessments of European constitutionalism is, when speaking of its form, its fundamentally procedural and incremental character, and, when speaking of its substance, its transnational nature. The EU’s hybrid nature and its dramatic weight of decisions taken in Brussels, Strasbourg, and Luxembourg on the one hand, and the continued decentralized administration in the EU’s member states on the other,⁸ invites its constitutional assessment.⁹ It is this challenge that is aptly taken up by the authors in *European Constitutionalism*. Both volumes, as much as they might appear to be written against different time horizons—the one directed towards the past, the other towards the future—are in fact complementary. Both books underscore the contemporary challenge of legitimate governance in a dramatically changing political, legal, and economic environment.

II. THE PRIVATRECHTSGESELLSCHAFT—A LEGACY FOR THE EU?

It soon becomes apparent how investigations into Europe’s past and future might teach us more than just something about Europe. Both the scope of their theoretical exploration and the range of materials relied upon by the authors in both volumes emphasizes the open-naturedness of contemporary constitutional inquiries.¹⁰ As such, Europe offers itself as a laboratory of postnational democracy while it is burdened with the danger of experimenting with many untested materials. The answer to this

⁷ Jürgen Habermas, *The Postnational Constellation: Political Essays*, trans. by Max Pensky (Cambridge: MIT Press 2001).

⁸ See e.g. Renaud Dehousse, “Beyond representative democracy: Constitutionalism in a polycentric polity” in Weiler & Wind, *supra* note 2, 135 at 143; see also Karl-Heinz Ladeur, “Conflict and Cooperation between European Law and the General Administrative Law of the Member States” in Karl-Heinz Ladeur, ed., *The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures* (Aldershot: Ashgate 2002) 1.

⁹ The negative outcomes of the French referendum on 28 and 31 May 2005 will inevitably dramatize and radicalize this process.

¹⁰ See e.g. Neil Walker, “Postnational constitutionalism and the problem of translation” in Weiler & Wind, *supra* note 2, 27; Navraj Singh Ghaleigh, “Looking into the Brightly Lit Room: Braving Carl Schmitt in ‘Europe’” in Joerges & Ghaleigh, *supra* note 1, 43; Vivian Grosswald Curran, “Formalism and Anti-Formalism in French and German Judicial Methodology”, in Joerges & Ghaleigh, *supra* note 1, 205.

conundrum lies in broadening the picture.¹¹ The strength of both volumes follows from the quality of analysis presented by the authors and, inseparably, the farsightedness of the editors in convening and encouraging them in the undertaking. Joerges and Ghaleigh brought together authors from Austria, Germany, Great Britain, Italy, Norway, and the United States and asked them to explore the historical debts that arguably underlie and influence the European integration project.

It is not only the prominent role that Carl Schmitt, a German constitutional and administrative law scholar, played in the ubiquitous struggle to understand the nature of law and government in the Third Reich, that ties many of the contributions of *Darker Legacies* together. Schmitt continues to ignite and inspire contemporary journeys into law's fragile foundations¹² because the abyss into which the rule of law and its weak defenders had been sucked during the Third Reich still seems to haunt our legal workings today. Whether or not Nazi law was "law,"¹³ whether or not the Nazi state amounted to the "total state"¹⁴ or, rather, whether it ought to be depicted as a complexly intertwined network of corporatist public-private governance,¹⁵ seemed to matter greatly after the

¹¹ See Neil Walker, "The Idea of Constitutional Pluralism" (2002) 65 Mod. L. Rev. 317, rightly placing Europe's constitutional question against the background of post-Cold War and post-colonialist state and democracy building, and against increasingly complex challenges of identity and participation politics. See also J. H. H. Weiler, "In defence of the status quo: Europe's constitutional *Sonderweg*" in Weiler & Wind *supra* note 2, 7, stressing the importance of drawing on Europe's integration history when struggling with the adoption of a formal constitution.

¹² See e.g. David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism*, (Toronto: University of Toronto Press, 2001) 22; Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003); and Peer Zumbansen, *Carl Schmitt und die Suche nach politischer Einheit*, (1997) 30 Kritische Justiz 63.

¹³ See e.g. Matthias Mahlmann, "Judicial Methodology and Fascist and Nazi Law" in Joerges & Ghaleigh, *supra* note 1, 229; Oliver Lepsius, "The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?" in Joerges & Ghaleigh, *supra* note 1, 19; and David Fraser, "The Outsider Does Not See All the Game ...: Perceptions of German Law in Anglo-American Legal Scholarship, 1933-1940" in Joerges & Ghaleigh, *supra* note 1, 87. See also Vivian Grosswald Curran's discussion of Gustav Radbruch's famous thesis of the Weimar lawyers' formalism's defencelessness against the arbitrariness of Nazi Law, in Curran, *supra* note 10. See also the debate between H.L.A. Hart and Lon Fuller: H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593; and Lon L. Fuller "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630.

¹⁴ Ernst Forsthoff, *Der totale Staat* (Hamburg: 1933).

¹⁵ Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism* (London: V. Gollancz, 1942).

Second World War and still does today.¹⁶ That there allegedly was an extremely troubling influence of German administrative thinking of technical governance of an administered (*verwaltete*) and controlled social sphere on the European integration project is impressively argued by Christian Joerges.¹⁷ One central thrust of his contribution clearly lies in the identification of the pervasiveness of this technocratic model of an economic European sphere—something that Joerges has at one point aptly depicted by use of the idiom: “The Market without a State—States without a Market?”¹⁸ His investigation into the nature of political regulation of market processes contributes to a better understanding of the problems arising from a political order that would assume market regulation as following from a merely technical approach to applying economic expertise.¹⁹ The background to this discussion is provided by the early conceptualizations of a *Privatrechtsgesellschaft*, forwarded predominantly by Franz Böhm²⁰ and later taken up by influential German private lawyers such as Ernst-Joachim Mestmäcker.²¹ Central to this concept is the idea of a self-contained, private law based on market freedoms and competition. The law of the ‘private law society’ is conceived as private while being framed and enforced by the state. Premeditating much of Europe’s regulatory dilemma today,²² the concept of the *Privatrechtsgesellschaft* is primarily based on the separation of the state and the market, ultimately de-politizing market processes and private law while, simultaneously, labeling all political intervention into the market as basically an unjustified curtailment of an otherwise “natural” process of self-regulation. The

¹⁶ See Fraser, *supra* note 13 at 87: “If we cannot distinguish law before and after Auschwitz, what does that say about our ability, as a theoretical or principled matter, to characterise the rule of law as ‘good’ or desirable?”

¹⁷ Christian Joerges, “Europe a *Großraum*? Shifting Legal Conceptualisations of the European Integration Project” in Joerges & Ghaleigh, *supra* note 1, 167 at 177, with reference to Carl Schmitt’s 1941 notion of the “valueless rationality of technology driven developments, which further the ‘dictatorship of technicity’ [*Technizität*].”

¹⁸ Christian Joerges, “The Market without a State? States without a Market?” (1996) [working paper, European University Institute—Economics Department in its series “Papers”], online: <<http://ideas.repec.org/p/fth/euroin/96-2.html>>.

¹⁹ Joerges, *supra* note 17 at 180.

²⁰ See Franz Böhm, “Privatrechtsgesellschaft und Marktwirtschaft” (1966) 17 *Ordo* 75.

²¹ Ernst-Joachim Mestmäcker, “Der Kampf ums Recht in der offenen Gesellschaft” (1989) 20 *Rechtstheorie* 273; Ernst-Joachim Mestmäcker, “Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts” (1991) 10 *Rechtshistorisches Journal* 177.

²² See e.g. Christian Joerges & Jürgen Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology” (1997) 3 *Eur. L.J.* 273; Fritz Scharpf, *Governing Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).

disputes that have been provoked by the concept span over several decades and have still not come to rest.²³

While the discussion over the *Privatrechtsgesellschaft* has occupied private lawyers in their assessment of the EU's legal and economic order for the longest time, Joerges' contribution to *Darker Legacies* reaches out even to administrative and constitutional law and illuminates the shared presuppositions among public and private lawyers towards Europe's "market without a state."

His reconstruction of Carl Schmitt's theorizing of the rise of the "administrative state"²⁴ to the work of Hans-Peter Ipsen, the prominent German Public and European Law Scholar during and after the Second World War, does much to elucidate the continuity of post-war German personality and thinking. For Joerges, "[Hans Peter Ipsen's] *vita* and academic career illuminate the intellectual continuity/discontinuity *problématique* and Germany's 'reluctance to glance in the mirror' ... in an exemplary way."²⁵ In Joerges' perception, the study of Ipsen helps to study in-depth "the continuities and discontinuities of legal concepts, on the necessity and difficulty to grasp a new situation conceptually, and, in so doing, to differentiate between discredited, undamaged and renewable elements of a complex legal heritage."²⁶

The central importance of Joerges' contribution lies in the combination of a critique of the private law-originating theory of ordoliberalism and the post-war mainstream public law-conceptions of the

²³ See already the skepticism by Böhm's Chair Successor at the University of Frankfurt, Rudolf Wiethölter, "Art. Bürgerliches Recht" in Axel Görlitz ed., *Handlexikon zur Rechtswissenschaft* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1972) 47; Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (Baden-Baden: Nomos Verlagsgesellschaft, 2000) 210; for a revival of the concept see e.g. Franz Bydlinki, *Das Privatrecht im Rechtssystem einer "Privatrechtsgesellschaft"* (Vienna: Springer, 1994); Peter-Christian Müller-Graff, "Europäische Verfassungsrechtspolitik für Wirtschaft und Union: Europäische Privatrechtsgesellschaft und überstaatliche Autorität" in Peter-Christian Müller-Graff ed., *Perspektiven des Rechts in der Europäischen Union* (Heidelberg: C.F. Müller, 1998) 183; Ernst-Joachim Mestmäcker, "Wirtschaftsordnung und Geschichtsgesetz" in Ludwig-Erhard Stiftung ed., *Wirtschaftsordnung als Aufgabe. Zum 100. Geburtstag von Franz Böhm* (Krefeld: Sinus-Verlag, 1995) 111.

²⁴ See Carl Schmitt, "Legalität und Legitimität" in Carl Schmitt, ed., *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1945* (Berlin: Duncker & Humblot, 1973) 265; available in English, Carl Schmitt, *Legality and Legitimacy*, ed. & trans. by Jeffrey Seitzer (Durham: Duke University Press, 2004).

²⁵ Joerges, *supra* note 17 at 182-3, n.92, with reference to Michael Stolleis, "Prologue: Teluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945" in Joerges & Ghaleigh, *supra* note 1, 1.

²⁶ Joerges, *ibid.* at 186.

European market-building project. Building on earlier studies,²⁷ Joerges traces the developments by which conceptions of the “organised economy,” in Schmitt’s words, a “healthy market,” understood as a practically autonomized and as such depoliticized, “technical” market sphere (controlled by a “strong state”) survived the regime’s defeat in 1945, only to reflower during the post-war Bonn Republic and eventually finding their way into the theoretical conceptualization of the European Economic Community. It is here that the thrust of the research project finds powerful expression. Through Joerges’ underscoring of the fact that contemporary private law histories of Post-War Germany omit the writings and influence of Ernst Forsthoff,²⁸ and thus must eventually fail to recognize the immanent connections between public and private law thinking in the field of political intervention and market (self-) regulation,²⁹ we are thrown back onto our very own—and very present—struggles over the adequate relationship between political legitimacy, social justice, and private ordering.³⁰

Far from establishing a simple or otherwise crude line of causality between Nazi Germany and Europe, Joerges calls our attention to the continued blindness in our perception of the interdependencies between the state and the market. Joerges’ contribution might well be read in the context of contemporary studies on the “varieties of capitalism”³¹ and the different trajectories of political economy in the face of a deafening shareholder value discourse.³² Furthermore, the inquiry into the forgotten

²⁷ See *supra* note 18; Christian Joerges, “The Science of Private Law and the Nation-State” in Francis Snyder, ed., *The Europeanization of Law* (Oxford: Hart 2000) 47.

²⁸ See Knut-Wolfgang Nörr, *Die Republik der Wirtschaft. Teil I: Von der Besatzungszeit bis zur Großen Koalition* (Tübingen: Mohr Siebeck, 1999); for a reconstruction of Forsthoff’s influence on post-war German administrative law thinking see e.g. Zumbansen *supra* note 32 at 33-86; Ernst Forsthoff “Der introvertierte Rechtsstaat und seine Verortung” (1963) 2 *Der Staat* 385; Ernst Forsthoff “Von der sozialen zur technischen Realisation” (1970) 9 *Der Staat* 145; Ernst Forsthoff, *Der Staat der Industriegesellschaft* (Munich: C.H. Beck, 1971).

²⁹ See also Rudolf Wiethölter & Art. Wirtschaftsrecht, in: Axel Görlitz ed., *Handwörterbuch der Rechtswissenschaft* (Darmstadt: Wissenschaftliche Buchgesellschaft 1972), 531-539; Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (Baden-Baden: Nomos 2000) at 93-136.

³⁰ See e.g. Kerry Rittich, “Enchantments of Reason/Coercions of Law” (2003) 57 *U. Miami L. Rev.* 727; Duncan Kennedy, “The Disenchantment of Logically Formed Legal Rationality” (2004) 55 *Hastings L.J.* 1031 at 1034-47.

³¹ See in particular Peter Hall & David Soskice eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

³² See the illuminating study by John Cioffi & Stephen Cohen, “The state, law and corporate governance: The advantage of forwardness” in Stephen Cohen & Gavin Boyd eds., *Corporate Governance and Globalization: Long Range Planning Issues* (Cheltenham: Edward Elgar, 2000) 307.

historical and political implications of private ordering ideologies should invite fruitful synergies with current work on the “New Constitutionalism”³³ or with the ongoing investigations into the political economy of the knowledge society.³⁴ Today’s often still unreflective application of public-private dichotomies, when speaking of states and markets or of political and private ordering,³⁵ would greatly benefit from revisiting earlier work by Polanyi, Shonfield, Galbraith, or Veblen who drew our attention to the constructed and conditioned nature of markets and to the fallacy of equating society with the market.³⁶

Taking a broader perspective on an allegedly “historically” oriented project—such as Joerges’ and Ghaleigh’s—might help to unfold hitherto hidden agendas of current academic debates, which are often confined to boundaries sternly defended by the expert gate keepers of epistemic communities. In contrast, by trying to identify the motivation and underlying source of the researchers’ curiosity, we can hope to establish links between their themes and yet unconnected discussions in parallel worlds. Bringing together investigations into Europe’s past with inquiries into its future, however, should not be a far stretch. After all, both are concerned with Europe—or are they? This indeed deserves closer inspection. Taking, for example, a very prominent work on the state of the art of EU law research in an overwhelming number of fields,³⁷ we can find a striking example of the preoccupation that EU scholars have with a

³³ See e.g. David Schneiderman, “Investment Rules and the New Constitutionalism” (2000) 25 L. & Soc. Inquiry 757; Rittich, *supra* note 30.

³⁴ Alan Burton-Jones, *Knowledge Capitalism: Business, Work, and Learning in the New Economy* (Oxford: Oxford University Press, 1999); Nico Stehr, *Wissen und Wirtschaften. Die gesellschaftlichen Grundlagen der modernen Ökonomie* (Frankfurt: Suhrkamp, 2001). From this perspective it might be worth looking at the parallel discourses during and after the publication of works such as Ernst Forsthoff’s “*Der Staat der Daseinsvorsorge*” and James Landis’ “*The Administrative Process*”, both published in 1938.

³⁵ For a powerful critique see A. Claire Cutler, *Private Power and Public Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003); Alfred C. Aman, Jr., *The Democracy Deficit: Taming Globalization through Law Reform* (New York: New York University Press, 2004).

³⁶ Andrew Shonfield, *Modern Capitalism: The Changing Balance of Public and Private Power* (London: Oxford University Press, 1965); John Kenneth Galbraith, *The Affluent Society* (New York: Houghton-Mifflin, 1958); John Kenneth Galbraith, *The New Industrial State* (New York: Houghton-Mifflin, 1967); Thorstein Veblen, *The Theory of the Leisure Class* (New York: Macmillan, 1902); an excellent example of revisiting the work of the preceding authors is the collection of essays published by Colin Crouch & Wolfgang Streeck eds., *Political Economy of Modern Capitalism: Mapping Convergence and Divergence* (London: Sage, 1997).

³⁷ Paul Craig & Gràinne de Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999).

Europe *in becoming* and a Europe *in practice*. With few exceptions,³⁸ EU scholarship focuses on the EU, and surely that is what it should do. Yet, it is through the sensitive assertions of the *before*—the subtext of the integration program³⁹—that we are alerted to the difference between the European constitutional project and that of, say, another western nation-state—let alone a post-conflict transition state.⁴⁰ The connections between inquiries into Europe’s past and its constitutional future are clearly visible after drawing up a list of similarities and differences between the European integration project, nation-state constitutionalization projects and emerging discussions regarding “constitutional analogies,”⁴¹ and comparative constitutional law in a transnational perspective. The inquiry into postnational constitutionalism is itself postnational, decentralized, and transnational in spirit and nature.⁴² At the same time, it is ultimately this core message that, in the reviewer’s perception, is presented most clearly by both books: the postnational inquiry into the foundations of governance, with a view to both the history leading up to today and the unknown lying beyond tomorrow must always build on a careful assessment of where it all came from.⁴³

³⁸ See e.g. the magnificent contributions by Paul Craig “The Nature of the Community: Integration, Democracy, and Legitimacy” in *ibid.*, 1; and Carol Harlow, “European Administrative Law and the Global Challenge” in *ibid.*, 261.

³⁹ See J. H. H. Weiler, “The Transformation of Europe” (1991) 100 Yale L.J. 2403; J. H. H. Weiler, “In defence of the status quo: Europe’s constitutional *Sonderweg*” in Weiler & Wind, *supra* note 2, 7 at 20.

⁴⁰ See the brilliant study by Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); compare with Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building*, (Princeton: Princeton University Press, 2004), in particular with regard to the impact of international law on the nation building project, c. 2 at 52 ff.

⁴¹ Laurence Helfer, “Constitutional Analogies in the International legal System” (2003) 37 Loy. L. Rev. 193; Mark Tushnet, “Transnational/Domestic Constitutional Law” (2003) 37 Loy. L. Rev. 239; Russell A. Miller, “Lords Of Democracy: The Judicialization Of ‘Pure Politics’ In The United States And Germany” (2004) 61 Wash. & Lee L. Rev. 587.

⁴² See e.g. the contributions in Michael Th. Greven & Louis W. Pauly, eds., *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (Toronto: University of Toronto Press, 2000); see also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Peer Zumbansen, “Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law” (2004) 15 E.J.I.L. 197.

⁴³ History itself, however, has come to be seen as a contested narrative that prohibits us from merely “looking.”

III. THE EU IN SEARCH OF ITSELF

With European Union continuing to change since its inception in 1957—through the *Single European Act* 1986, the *Maastricht Treaty* 1992, the subsequent *Amsterdam* and *Nice Treaties* 1996 and 2000, the *Laeken Declaration* that preceded the inauguration of the *Constitutional Convention* in 2001 to the presentation of the Convention's results between 2003 and 2004,⁴⁴ and the signature of the *Constitutional Treaty* on 29 October 2004 in Rome—it is clear to all that this development does not in itself offer all the answers.⁴⁵ Instead, the EU is, and remains, a needy target for investigation and inquiry, for concern and critique, and for puzzle and ascertainment. In this respect, the EU and its continued search for itself, and its political and legal nature, might just become another historical artifact, such as the Bastille, Philadelphia, Prague, or Berlin.

The assessment of the EU's historical genealogies, however, posits the EU at a point that is not frozen in time. Instead, speaking about the EU necessitates that we take a position vis-à-vis its future and, so we are led to believe by both books under review, its past. Soon after ten new states joined the EU on 1 May 2004, the Constitutional Treaty was signed in the very location of the 1957 Rome Treaties. Now the buzz of today's "EU talk" is all about the future, the chances of seeing the *Constitutional Treaty* ratified by the national parliaments, the prospects of a further consolidation of a European *political* Union, and the concerns about the EU's capacity to appropriately address international and internal challenges, such as terrorism, war, trade conflicts within the new EU states, legitimacy, and political apathy in the western nations.

Even in light of this forward-directedness, both books under review stunningly succeed in arguing for the necessity of engaging in a process of reflection. A reflection that must be seen by many as untimely, unnecessary, or even impossible—as the EU is trying to deal with the future and might be less well equipped with an unsettling knowledge of the past, which would, of course, have to be *Europe's* past. At a time where it is adequately being discussed what this Europe really is, it is just as challenging to state what this Europe *was*. It is here where the reader of each book is provided with

⁴⁴ For an overview see Johannes Jarlebring, "Taking Stock of the European Convention: What added value does the Convention bring to the Process of Treaty Revision?" (2003) 4 German L.J. 785, online: German Law Journal <<http://www.germanlawjournal.com/article.php?id=305>>.

⁴⁵ See e.g. Alexandra Kemmerer, "Like Ancient Beacons: The European Union and the International Criminal Court—Reflections from afar on a Chapter of European Foreign Policy" (2004) 5 German L.J. 1449, online: German Law Journal <<http://www.germanlawjournal.com/article.php?id=525>>.

a breathtaking discovery of the inner connections between the historical and constitutional research agendas.

The authors of *European Constitutionalism* courageously and convincingly argue for both an EU specific and, at the same time, a much wider and different constitutional perspective on the very issue of a European constitution. With this we begin to uncover the underlying motivation that brings them to their specific approaches. The EU presents a radical challenge that Joseph Weiler and Neil Walker have depicted as being one of *translation*. Issues of translation have come to the fore in other multi-level governance examples as well, one being the challenge of bringing traditional state understandings to the governance phenomena of a globalized world.⁴⁶ But, in addressing the difficulty in translating, the focus perceptively shifts to embrace both the process as well as the element of translation. Engaging in a process of translating the learned language of legitimacy from the nation-state level to that of Europe, urges the translator to reflect on the viability and security—on the very nature—of the allegedly well-known and securely attained legitimacy of a given legal system. Flying to the moon allows, for the first time perhaps, a clearer vision of the earth.

IV. LINKING THE PAST TO THE UNKNOWN AND UNPREDICTABLE FUTURE

In his epilogue to *Darker Legacies*, Joseph Weiler places the contributions in the book against the background of a discourse that is generally not part of the lively discussions on the origins, nature, and future prospects of Europe. Without attempting to retell the respective stories of the member states' often troubled pasts or their individual ways of having achieved or failed to address them, Weiler's concluding text is a thoughtful recommendation to carefully consider the ambiguity of the pre-union *pasts* (plural, as they must be) and the ways that these pasts might cast their shadow over the ongoing integration project. Perceived as such, the volume appears in tandem and symbiosis with the literature on societal memory, reconciliation, and nations' struggles to come to terms with the past.⁴⁷

Darker Legacies is the perfect excuse to review the ordering catalogue for a common EU library. To add other volumes to the collection, it now becomes possible to re-open books that, perhaps, were overlooked

⁴⁶ See Alfred Aman, "Administrative law for a new century" in Michael Taggart ed., *The Province of Administrative Law* (Oxford: Hart 1997) 90; Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law" (2002) 8 Eur. L.J. 400 at 417-25.

⁴⁷ See *supra* note 5.

before.⁴⁸ The view into the past of individual member states is essential when considering that many among them experienced very contested political and legal regimes. The EU itself does not have merely “one history, but must bring together many histories some of which are contradictory, competing and full of violence.”⁴⁹

The other reason for the challenge to address and revisit the origins of European integration can be found in the integration project itself. Weiler almost playfully embarrasses us by calling the familiar story of the EU beginnings as an economic project that eventually grew into a political one, a “veritable Old-Wives’ Tale.”⁵⁰ Suggesting that we ought to “re-read (or perhaps read)” the Schuman declaration and the Preamble to the Treaty of Paris, he recalls the deep political nature of the EU’s early beginnings: “Europe began as a political project *par excellence* served by economic instruments.”⁵¹ The importance of this finding cannot be overestimated in light of the thesis explored and researched in Weiler’s text and throughout the rest of the volume. That there is a darker legacy, of which the lawyers of European integration ought to be aware, attains an inevitably convincing force when we are faced with acknowledging the simple and undeniable truth that every member state did have some prior life that shaped the consciousness of the nation at large and of its members.⁵² In the absence of an overriding rationale, or *meta-recit*, for a good story, we are left out on our own in building and creating, repeating, or repelling the crimes committed in our past. So, whether or not we want to, we must listen to our heart and to what our memory has to offer and, eventually, decide what to make of it.

V. THE DEMOCRATIC DEFICIT

Ah yes, the democratic deficit. The unending rumours about the EU’s democratic and other deficits reflect nothing less than wide-spread concerns with its highly fragile and sensitive basis of legitimacy. However,

⁴⁸ Among those books, we should consider Armin Höland, Csarba Varga & Volkmar Gessner, eds., *European Legal Cultures* (Dartmouth: Ashgate, 1996); Norbert Frei, *Adenauer’s Germany and the Nazi Past: the Politics of Amnesty and Integration* (New York: Columbia University Press, 2002).

⁴⁹ Ulrich Haltern, “Gestalt und Finalität, in: *Europäisches Verfassungsrecht*” in Armin von Bogdandy ed., *Europäisches Verfassungsrecht* (Heidelberg: Springer, 2003) at 832 [translated by author].

⁵⁰ J. H. H. Weiler, “Epilogue: Europe’s Dark Legacy Reclaiming Nationalism and Patriotism” in Joerges & Ghaleigh, *supra* note 1, 395 [Weiler, “Epilogue”].

⁵¹ *Ibid.*

⁵² See the contribution by Scott Veitch, “Legal Right and Political Amnesia” in Kimmo Nuotio ed., *Europe in Search of “Meaning and Purpose”* (Helsinki: Forum Iuris, 2004) 89.

Europe should not strike us as being much different from any post-modern society; a large number of today's societies find themselves constantly engaged in more or less explosive integration and consolidation processes.⁵³ The EU is faced with the same challenge inherently embodied in bringing together a most varied people for a continuing engagement in political, economic, and cultural deliberation. Certainly, this task is not made any easier by the drastic lack of precedent.⁵⁴ The integration process is not only a "study in becoming" but is also an on-going practice and reality. It lives from the daily, tireless input by way of political debate and compromise, economic bargaining, cultural acknowledgment and endless—yes, endless—academic debate.⁵⁵ Revisiting the trajectories of theory and practice of a country's political organization during this study is the natural and necessary ingredient and prerequisite to its future development.⁵⁶ So, there is some value in studying the parallels between the EU's "study in becoming" and a Nation's unceasing intro- and retrospection in its search to better understand its past and the conditions for its future.

The "European construct" may be of recent post World War II vintage, but, want it or not, the history of its Member States and of its peoples is Europe's history. The memory of a marriage goes back to courting, engagement and subsequent matrimonial life. But the identity of the couple who make up the marriage will also be determined by the previous pasts and memories of each of the partners. Europea is not only a phenomenon of historical European integration but of an integration of European history.⁵⁷

What the EU *is*, is often discussed by way of arguing what the EU should *become*. The discussion over a European Constitution, then, might offer yet another welcome opportunity for a fruitful exploration of the EU's nature. Again, we are coming at it from all sides: as statisticians, as

⁵³ See e.g. Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 54 Mod. L. Rev. 588; Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983) at 31-42, 48-61.

⁵⁴ See Joseph Weiler, "Federalism and Constitutionalism: Europe's Sonderweg" (2000) 10 Jean Monnet Paper, online: NYU School of Law, Jean Monnet Center <<http://www.jeanmonnetprogram.org/papers/00/001001.html>>; Haltern, *supra* note 49 at 832.

⁵⁵ See e.g. the report on the deliberations taking place at the constitutional forum, Jesse Scott, "The Culture of Constitution Making: 'Listening' at the Convention on the Future of Europe" (2002) 3 German L.J., online: German Law Journal <<http://www.germanlawjournal.com/article.php?id=193>>; Jarlebring, *supra* note 44.

⁵⁶ See Louis W. Pauly, "Introduction: Democracy and Globalization in Theory and Practice" in Greven & Pauly, *supra* note 42, 1 at 3-4; Klaus Günther, "The Legacies of Injustice and Fear" in Philip Alston, ed., *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 117; Anne Orford, "Critical Intimacy: Jacques Derrida and the Friendship of Politics" (2005) 6 German L. J. 31, online: German Law Journal <<http://www.germanlawjournal.com/article.php?id=534>>.

⁵⁷ Weiler, "Epilogue," *supra* note 50 at 394-95.

communitarians, as international relationists, as international public lawyers, federalists, supranationalists, and so on.⁵⁸ Our obvious reliance on premeditated experiences in social and political organization should make us aware of the thrust of those theories. These theories are all in competition to give the “beast” a fitting name. Yet, a beast is what it is. Thus, it cannot be the long awaited “answer to the problem of achieving democracy, protecting human rights or establishing the rule of law within our societies.”⁵⁹ “Its originality and deepest value, constitutional tolerance,” is in constructing a different relational matrix that transcends and recasts the boundaries among its member states and its constitutive peoples.⁶⁰

In conclusion (and overture)⁶¹ Weiler sketches an alternative program to the EU’s theoretical, less normative, struggle in defining what the EU itself is. Citing Carl Schmitt’s *Roman Catholicism and Political Form*, one of Schmitt’s most poignant and brilliant works,⁶² Weiler wishes to denote Schmitt’s simplifying bi-polar value system of friends and foes (and their *Aufhebung* in the Roman Catholic Church’s *complexio oppositorum*) and instead to herald a European patriotism of love. In loving our neighbours we understand ourselves, and in that humbleness we continue on the EU’s quite astonishing way of integrating without forcing the sacrifice of identity. If you love somebody, set them free—or invite them to join the EU.

⁵⁸ For a concise overview of the positions see Armin von Bogdandy, “Beobachtungen zur Wissenschaft vom Europarecht” (2001) 40 *Der Staat* 3 at 25.

⁵⁹ Weiler, “Epilogue,” *supra* note 50 at 394-95.

⁶⁰ *Ibid.*

⁶¹ See J. H. H. Weiler, *Ein christliches Europa*, (Salzburg: Anton Pustet Verlag, 2004).

⁶² Carl Schmitt, *Römischer Katholizismus und Politische Form*. Originally published with *Theatiner Verlag*, (Munich: Theatiner Verlag, 1923).