

**Europe's Darker Legacies? Notes on 'Mirror Reflections', the 'Constitution as Fetish' and Other Such Linkages between the Past and the Future**

*By Peer Zumbansen\**

**Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions (Christian Joerges & Navraj Singh Ghaleigh eds.) (Oxford and Portland/OR: Hart Publishing, 2003). XVI, 416 pp., ISBN: 1-84113-310-8; BP 55,--**

**European Constitutionalism Beyond the State (JHH Weiler & Marlene Wind eds.) (Cambridge: Cambridge University Press, 2003). VIII, 244 pp., ISBN: 0 521 79671 7 (Pb.); 0521 79225 8 (Hb.); \$ 23,--/\$ 65,--**

**A. 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 fastmoving world of academic publications. The contributions to *Darker Legacies* engage in a sensitive inquiry into the structural, semantical, conscious, political and – *helas!* – legal heritage in European member states and unfold a highly complex history and historiography of Europe's past. The nineteen contributions to the volume, framed by a prologue by German

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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 a range of voices heard in a European discussion that has taken on – for some time now – an ever-more multifaceted and complex direction. With the EU long arrived on the daily news and minds, 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 in its course.<sup>1</sup> And still: noisy it was. A follow-up project swiftly followed suit<sup>2</sup>, bringing together some of the authors of the first volume, and altogether deepening the research agenda to the particular links between historical and contemporary national memory discourses and the ongoing search for the constitutional foundations of the EU.<sup>3</sup>

The eight chapters in *European Constitutionalism*, the other volume under review here, 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*, as I will argue in the following, should be seen as a very insightful book to read together with *Darker Legacies*. Both volumes address the challenges to contemporary political imagination, stemming from the EU's complex nature, its historical Post-War legacy, coupled with its functionalist heritage and its own no less than striking constitutional history. Both books, read together, allow us to recognize the necessity of imagining the "past future" of a project such as that of the EU.<sup>4</sup> In order to understand a present that continues to unfold upon the ruins

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<sup>1</sup> Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'*, in: DARKER LEGACIES OF LAW IN EUROPE, 43 (Joerges/Ghaleigh eds., 2003), this theme is also picked up by Martti Koskeniemi (in this volume of the German Law Journal).

<sup>2</sup> See GERMAN LAW JOURNAL, *Special Issue: Confronting Memories: European 'Bitter Experiences' and the Constitutionalization Process* (1 February 2005) (Guest Editors: Christian Joerges and Paul Blokker, with Chris Engert), available at: [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>3</sup> See Bo Stråth, Fabrice Larat, Matthias Mahlmann, Mattias Kumm, Alexander Somek, Stefan Seidendorf and Vivian Grosswald Curran, in 6 GERMAN LAW JOURNAL 2 (1 February 2005), available at [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>4</sup> For an exposition of the concept of the 'past future', see Reinhart Koselleck, *Vergangene Zukunft der frühen Neuzeit*, in: KOSELLECK, VERGANGENE ZUKUNFT. ZUR SEMANTIK GESCHICHTLICHER ZEITEN 17 (1979) [previously published in EPIRRHOSIS. FESTGABE FÜR CARL SCHMITT 549 (Hans Barion/Ernst-Wolfgang Böckenförde/Ernst Forsthoff/Werner Weber eds., 1968, vol. 2)]. For an illustration of this concept in the context of Public International Law, see Peer Zumbansen, *The Past Future of International Law*, in

and the wasteland of a past put to rest, for the description and utopia of which we are always employing concepts borrowed from other times and other places, it should make perfect sense to bring together the only at first sight exclusively retrospect explorations of *Darker Legacies* with the future looking constitutional inquiries in *European Constitutionalism*.

*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 legitimacy of political and legal order in the "postnational constellation."<sup>5</sup> 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 with the dramatical weight of decisions taken in Brussels, Strasbourg and Luxembourg<sup>6</sup> demands constitutional assessment. 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.

## B. 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 only emphasizes the open-naturedness of contemporary constitutional inquiries.<sup>7</sup>

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PROGRESS IN INTERNATIONAL ORGANIZATION (Russell Miller/Rebecca Bratspies, eds., 2006, *forthcoming*) [previously published as *Die vergangene Zukunft des Völkerrechts*, 34 KRITISCHE JUSTIZ 46 (2001)].

<sup>5</sup> Jürgen Habermas, *THE POST-NATIONAL CONSTELLATION AND THE FUTURE OF DEMOCRACY* (Max Pensky, Transl. and ed., 2001).

<sup>6</sup> See Renaud Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135, 143 (Weiler/Wind eds., 2003); see also the astute observations by Karl-Heinz Ladeur, in *Id.*, *The Europeanisation of Administrative Law* 1, 13 (2002).

<sup>7</sup> See Neil Walker, *Postnational constitutionalism and the problem of translation*, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27 (Weiler/Wind eds., 2003); Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'*, in: DARKER LEGACIES OF LAW IN EUROPE 43

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 conundrum lies in broadening the picture.<sup>8</sup> 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 underly 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 foundations<sup>9</sup> because the abyss into which the rule of law and its weak defenders had been sucked in the Third Reich still haunts our legal workings today. Whether or not Nazi *law* was "law"<sup>10</sup>, whether or not the Nazi state amounted to the "total state"<sup>11</sup> or, rather, ought to be depicted as a complexly intertwined network of corporatist public-private governance<sup>12</sup>,

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(Joerges/Ghaleigh eds., 2003); Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, *Id.*, 205.

<sup>8</sup> See Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN LAW REVIEW 317 (2002), rightly placing Europe's constitutional question against the background of post-Cold War and post-colonialist state and democracy building and increasingly complex challenges of identity and participation politics. See also Joseph Weiler, *In defence of the status quo: Europe's constitutional Sonderweg*, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 7 (J.H.H. Weiler & Marlene Wind eds., 2003), stressing the importance on drawing on Europe's integration history when struggling with the adoption of a formal constitution.

<sup>9</sup> See David Dyzenhaus, *The Permanence of the Exception*, in: *The Permanence of the Temporary: Can Emergency Powers be Normalized?*, in: THE SECURITY OF FREEDOM. ESSAYS ON CANADA'S ANTI-TERRORISM BILL, 21-37, 22 (R J Daniels/P Macklem/K Roach eds. 2001, repr. 2002); JAN-WERNER MÜLLER, A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT (2003); Peer Zumbansen, *Carl Schmitt und die Suche nach politischer Einheit*, 30 KRITISCHE JUSTIZ 63-79 (1997).

<sup>10</sup> See the contributions by Matthias Mahlmann, Oliver Lepsius and David Fraser, in: DARKER LEGACIES OF LAW IN EUROPE (Joerges/Ghaleigh eds., 2003); 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: 6 GERMAN LAW JOURNAL, *Special Issue: Confronting Memories: European 'Bitter Experiences' and the Constitutionalization Process* (Guest Editors: Christian Joerges and Paul Blokker, with Chris Engert), available at: [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>11</sup> ERNST FORSTHOFF, DER TOTALE STAAT (1933).

<sup>12</sup> MASTERFUL FRANZ L. NEUMANN, BEHEMOTH. THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM (1942).

seemed to matter greatly after the Second World War and still does so today.<sup>13</sup> It also comes as no surprise then, that Schmitt figures prominently in the contemporary assessments of the changed state of international law, human rights and security law since September 11<sup>th</sup>.

That there allegedly was an extremely troubling influence of German administrative thinking of technical governance of a administered (*verwaltete*) and controlled social sphere on the European integration project, is impressively argued by Christian Joerges.<sup>14</sup> 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?”<sup>15</sup> 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 and practical approach to applying economic expertise.<sup>16</sup> The background to this discussion is provided by the early conceptualizations of a *Privatrechtsgesellschaft*, forwarded predominantly by Franz Böhm<sup>17</sup> and later taken up by influential German private lawyers such as Ernst-Joachim Mestmäcker.<sup>18</sup> 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 and as such all-encompassing, *constitutional* and civil rights analogous, while being framed and enforced by the

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<sup>13</sup> See the contribution by David Fraser, in: DARKER LEGACIES OF LAW IN EUROPE 87-111 (Joerges/Ghaleigh eds., 2003), 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?”

<sup>14</sup> Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the European Integration Project*, in: *Id.*, DARKER LEGACIES OF LAW IN EUROPE 167, 177 (Joerges/Ghaleigh eds 2003), with reference to Carl Schmitt’s 1941 notion of the “valueless rationality of technology driven developments, which further the ‘dictatorship of technicity’ [*Technizität*].”

<sup>15</sup> Christian Joerges, *The Market without a State – States without a Market?*, European UNIVERSITY INSTITUTE WORKING PAPER, ECONOMICS 1996/2, available at: <http://ideas.repec.org/p/fth/euroin/96-2.html> (last visited 5 February 2005).

<sup>16</sup> *Supra* note 14 at 180.

<sup>17</sup> See Franz Böhm, *Privatrechtsgesellschaft und Marktwirtschaft*, 17 ORDO 75 (1966).

<sup>18</sup> Ernst-Joachim Mestmäcker, *Der Kampf ums Recht in der offenen Gesellschaft*, 20 Rechtstheorie 273 (1989); Ernst-Joachim Mestmäcker, *Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts*, 10 Rechtshistorisches Journal 177 (1991).

state. Premeditating much of Europe's regulatory dilemma today,<sup>19</sup> the concept of *Privatrechtsgesellschaft* is primarily based on the separation of the state and the market, ultimately de-politizing the market processes and private law while, simultaneously, labelling all political intervention into the market as basically an unjustified curtailment of an otherwise "natural" process of self-regulation. The disputes that have been provoked by the concept span over several decades and have still not come to rest.<sup>20</sup>

While the discussion over the *Privatrechtsgesellschaft* has occupied 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." Joerges' reconstruction of Schmitt's theorizing of the rise of the "administrative state"<sup>21</sup> 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 complex heritage of post-war German personality and thinking.<sup>22</sup> 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."<sup>23</sup> 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

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<sup>19</sup> See Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 Eur. L.J. 273 (1997); FRITZ SCHARPF, GOVERNING EUROPE: EFFECTIVE AND DEMOCRATIC? (1999).

<sup>20</sup> See already the skepticism by Böhm's Chair Successor at the University of Frankfurt, Rudolf Wiethölter, *Art. Bürgerliches Recht* in: *HANDELEXIKON ZUR RECHTSWISSENSCHAFT* 47 (Axel Görlitz ed., 1972); Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* 210 (2000); for a revival of the concept see FRANZ BYDLINSKI, *DAS PRIVATRECHT IM RECHTSYSTEM EINER "PRIVATRECHTSGESELLSCHAFT"* (1994); Peter-Christian Müller-Graff, *Europäische Verfassungsrechtspolitik für Wirtschaft und Union: Europäische Privatrechtsgesellschaft und überstaatliche Autorität* in: *PERSPEKTIVEN DES RECHTS IN DER EUROPÄISCHEN UNION* 183 (Peter-Christian Müller-Graff ed., 1998); Ernst-Joachim Mestmäcker, *Wirtschaftsordnung und Geschichtsgesetz* in: *WIRTSCHAFTSORDNUNG ALS AUFGABE. ZUM 100. GEBURTSTAG VON FRANZ BÖHM* 111 (Ludwig-Erhard Stiftung ed., 1995).

<sup>21</sup> See Carl Schmitt, *Legalität und Legitimität*, in: *Id.*, *VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1945*, 265-293 (1973); now available in English: CS, *Legality and Legitimacy* (Transl. and ed. by Jeffrey Seitzer, with a foreword by John McCormick, 2004).

<sup>22</sup> See the masterful study by RUDOLF WIETHÖLTER, *RECHTSWISSENSCHAFT* (1968).

<sup>23</sup> Joerges, *Europe a Großraum?*, op. cit., at 182-3, with reference to the prologue by Michael Stolleis, *id.*, at 1-18.

situation conceptually, and, in so doing, to differentiate between discredited, undamaged and renewable elements of a complex legal heritage."<sup>24</sup>

The central importance of Joerges' contribution lies in the combination of a critique of the private law-originating theory of ordoliberalism with the Post-War mainstream public law-conceptions of the European market building project, the latter of which are shown to encompass the challenges to the international law concepts of the Community.<sup>25</sup> Building on earlier studies<sup>26</sup>, 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 internally depolitized, "technical" market sphere (while certainly being under last instance control 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<sup>27</sup> and thus must eventually fail to recognize the immanent connections between public and private law thinking in the context of political intervention and market (self-)regulation,<sup>28</sup> we are immediately thrown back onto our very own – and very present – struggles over the adequate relationship between political legitimacy, social justice and private ordering.<sup>29</sup>

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. While his contribution is clearly making the argument of an intellectual influence by German

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<sup>24</sup> *Id.*, at 186.

<sup>25</sup> The latter is excellently analyzed by Neil Walker, *From Großraum to Condominium. A Comment*, in: DARKER LEGACIES OF LAW IN EUROPE *supra* note 1 at 193, 196-197.

<sup>26</sup> See Joerges, *A Market without a State*, *op. cit.*; *Id.*, *The Science of Private Law and the Nation-State*, in: *The Europeanization of Law* 47-82 (Francis Snyder ed., 2000).

<sup>27</sup> See KNUT-WOLFGANG NÖRR, *DIE REPUBLIK DER WIRTSCHAFT. TEIL I: VON DER BESATZUNGSZEIT BIS ZUR GROßEN KOALITION* (1999).

<sup>28</sup> Hereto, see, Rudolf Wiethölter, *Art. Wirtschaftsrecht*, in: *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT* 531-539 (Axel Görlitz ed., 1972); PEER ZUMBANSEN, *ORDNUNGSMUSTER IM MODERNEN WOHLFAHRISSTAAT. LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG* (2000), 93-136.

<sup>29</sup> See Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. Miami L. Rev. 727 (2003); Duncan Kennedy, *The Disenchantment of Logically Formed Legal Rationality*, 55 Hastings L.J. 1031 (2004) at 1034-47.

conservative thinkers such as Ipsen and Schmitt on the Community's early structure, it might not be the only one. As carefully extrapolated by Neil Walker's comment on Joerges' paper<sup>30</sup>, the establishment of "connections" between a distinct political, legal, socio-economic and ideological past and a just as much definable present is an activity unfolding in the realm of ideas. These may be very powerful and influential, and their very availability, their identification and association with a distinct 'past', one that matters for the understanding of what followed, signifies their fluid character. Walker contrasts one possible reading of Joerges' text, whereby certain German thinkers and the state's authoritarian, executive-centred, regulatory experience cast a strong ideological, structural influence on the early constitutional design of the Community, with that of political ideas and values between "periods and contexts that have certain features in common"<sup>31</sup>, being appropriated, reflected upon and constantly made to enter into the legal and political imagination. In this post-traditional sphere, ideas travel as do regulatory experiences and constitutional aspirations, informing struggles over political identity, belonging and sovereignty in radically pluralized contexts.<sup>32</sup> Yet, this realm of ideas is not insulated from the historical context in which actors offer and dispute, fight for or reject ideas. With reference to Ralf Dahrendorf, Walker highlights the disintegration and uncoupling of three *Eigenvalues*, 'economic well-being, social cohesion and political freedom'<sup>33</sup>, that he (with Dahrendorf) recognizes to lie at the outset of contemporary political thought. Yet, with their disintegration, in a radically pluralized regulatory context, which is marked by new actors engaged in transnational relationships and exchanges, the tendency to stress one value at the expense of the other is exacerbated by the very processual character of a polity in becoming. Ultimately, in order to generate answers to "the complex political puzzle which lies at the core of the European Union, as of any multi-level polity, means that in the final analysis all the relevant values must be held equally in focus."<sup>34</sup> Walker recognizes Joerges' project as contributing to the necessary study of how to reflect adequately on political utopia while building institutions out of their dystopian pasts.

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<sup>30</sup> Neil Walker, *From Großraum to Condominium. A Comment*, in: DARKER LEGACIES OF LAW IN EUROPE *supra* note 1 at 193-203, at 195.

<sup>31</sup> Walker, *id.*

<sup>32</sup> Hereto, Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV. 317 (2002); Walker, *The Legacy of Europe's Constitutional Moment*, 11 CONSTELLATIONS 368 (2004), at 371-375, outlining different possibilities of imagining 'constitutionalizing moments'.

<sup>33</sup> Walker, *From Großraum to Condominium*, in: DARKER LEGACIES OF LAW IN EUROPE *supra* note 1 at 200.

<sup>34</sup> Walker, *From Großraum to Condominium*, in: DARKER LEGACIES OF LAW IN EUROPE *supra* note 1 at 202.

From yet another angle, Joerges' contribution might well be read as a further support for contemporary studies in the "varieties of capitalism"<sup>35</sup> and the different trajectories of political economy in the face of a deafening shareholder value discourse.<sup>36</sup> Furthermore, the inquiry into the forgotten historical and political implications of private ordering ideologies should invite fruitful synergies with current work done on the "New Constitutionalism"<sup>37</sup> or the ongoing investigations into the political economy of the knowledge society.<sup>38</sup> Today's often still unreflected application of public-private dichotomies, when speaking of states and markets or of political and private ordering,<sup>39</sup> 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'.<sup>40</sup>

Taking a broader perspective on an allegedly "historically" oriented project – such as Joerges' and Ghaleigh's – might then help to unfold hitherto hidden agendas of current academic debates, debates that are often confined to boundaries sternly defended by the 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

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<sup>35</sup> See in particular VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter Hall & David Soskice eds., 2001); see now the very insightful study by PETER GOUREVITCH/JAMES SHINN, POLITICAL POWER AND CORPORATE CONTROL. THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005).

<sup>36</sup> See the illuminating study by John Cioffi & Stephen Cohen, *The state, law and corporate governance: The advantage of forwardness* in: CORPORATE GOVERNANCE AND GLOBALIZATION: LONG RANGE PLANNING ISSUES 307 (Stephen Cohen & Gavin Boyd eds., 2000).

<sup>37</sup> See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOCIAL INQUIRY 757 (2000); Kerry Rittich, *Enchantments/Coercions of Law*, 57 U MIAMI L REV 727 (2003).

<sup>38</sup> ALAN BURTON JONES, KNOWLEDGE CAPITALISM: BUSINESS, WORK, AND LEARNING IN THE NEW ECONOMY (1999); NICO STEHR, WISSEN UND WIRTSCHAFTEN. DIE GESELLSCHAFTLICHEN GRUNDLAGEN DER MODERNEN ÖKONOMIE (2001).

<sup>39</sup> See for a powerful critique, A.CLAIRE CUTLER, PRIVATE POWER AND PUBLIC AUTHORITY. TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); ALFRED C. AMAN JR., THE DEMOCRACY DEFICIT. TAMING GLOBALIZATION THROUGH LAW REFORM (2004).

<sup>40</sup> ANDREW SHONFIELD, MODERN CAPITALISM: THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER (1965); JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958); JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (1967); THORSTEIN VEBLER, THE THEORY OF THE LEISURE CLASS (1902); an excellent example of revisiting the work of the preceding authors is the collection of essays POLITICAL ECONOMY OF MODERN CAPITALISM: MAPPING CONVERGENCE AND DIVERGENCE (Colin Crouch & Wolfgang Streeck eds., 1997).

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,<sup>41</sup> we can find a striking example of the preoccupation that EU scholars have with a Europe *in becoming*, a Europe *in practice*. With few exceptions,<sup>42</sup> 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 program<sup>43</sup>– 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.<sup>44</sup> The inquiry into postnational constitutionalism is itself postnational, decentralized, transnational in spirit and nature.<sup>45</sup> At the same time, and 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 some of our present preoccupations and concepts came from.<sup>46</sup>

### C. The EU in search of itself

With the 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

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<sup>41</sup> THE EVOLUTION OF EU LAW (Paul Craig/Grainne de Búrca eds., 1999).

<sup>42</sup> E.g. the magnificent contributions by Craig and Harlow, *id.* (preceding note).

<sup>43</sup> See JHH Weiler, *The Transformation of Europe*, 100 YALE L J 2403 (1991); *id.*, *In defence of the status quo: Europe’s constitutional Sonderweg*, in: *European Constitutionalism Beyond the State* 7, 20 (J.H.H. Weiler & Marlene Wind eds., 2003),.

<sup>44</sup> Hereto, see the brilliant study by RUTI TEITEL, *TRANSITIONAL JUSTICE* (, 2000); in contrast, see NOAH FELDMAN, *WHAT WE OWE IRAQ* (2004), in particular Chapter 2, pages 52 ff, with regard to the impact of international law on the nation building project.

<sup>45</sup> See the contributions in *DEMOCRACY BEYOND THE STATE?* (Michael Th. Greven & Louis W. Pauly eds., 2000); see also JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995); Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 197 (2004).

<sup>46</sup> History itself, however, has come to be seen as a contested narrative that prohibits us from merely “looking.”

Convention's results between 2003 and 2004,<sup>47</sup> 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 answers.<sup>48</sup> Instead, the EU is, and remains, a needy target for investigation and inquiry, for concern and critique, 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 just as challenging to state what this Europe *was*. It is here, where the reader of each book is provided with a breathtaking discovery of the inner connections between the historical and constitutional research agendas.

The authors of *European Constitutionalism* courageously and convincingly arguing for both a EU specific and, at the same time, a much wider and different constitutional perspective on the very issue of a European constitution, 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

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<sup>47</sup> See for an overview Johannes Jarlebring, *Taking Stock of the European Convention: What added value does the Convention bring to the Process of Treaty Revision?*, 4 GERMAN LAW JOURNAL 785 (2003), available at: <http://www.germanlawjournal.com/article.php?id=305>.

<sup>48</sup> See, Alexandra Kemmerer, *Like Ancient Beacons: The European Union and the International Criminal Court – Reflections from afar on a Chapter of European Foreign Policy*, 5 GERMAN LAW JOURNAL 1449 (2004), available at: <http://www.germanlawjournal.com/article.php?id=525>.

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.<sup>49</sup> 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.

#### **D. 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 and 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* (as plural they must be) and the ways in which 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' struggle to come to terms with the past.<sup>50</sup>

*Darker Legacies* is the perfect excuse to review the ordering catalogue for a common European Law library. To add other volumes to the collection, it now becomes possible to re-open books that, perhaps, were overlooked before.<sup>51</sup> The view back into the past of individual member states is particularly essential when considering that many among them experienced very contested political and legal regimes. The

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<sup>49</sup> See Aman, *Administrative law for a new century*, in: THE PROVINCE OF ADMINISTRATIVE LAW 90 (Michael Taggart ed., 1997); Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUROPEAN LAW JOURNAL 400 (2002), , 417-425.

<sup>50</sup> See the contributions in GERMAN LAW JOURNAL, 1 February 2005: *Special Issue: Confronting Memories: European 'Bitter Experiences' and the Constitutionalization Process* (Guest Editors: Christian Joerges and Paul Blokker, with Chris Engert), available at: [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>51</sup> Among those books we should consider ARMIN HÖLAND, CSARBA VARGA & VOLKMAR GESSNER EDS., EUROPEAN LEGAL CULTURES (1996); NORBERT FREI, ADENAUER'S GERMANY AND THE NAZI PAST: THE POLITICS OF AMNESTY AND INTEGRATION (, 2002) [orig. published as VERGANGENHEITSPOLITIK (1996)].

EU itself does not have merely “one history, but must bring together many histories some of which are contradictory, competing and full of violence.”<sup>52</sup>

The other reason why 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 which eventually grew into a political one, a “veritable Old-Wives’ Tale”.<sup>53</sup> Suggesting that we ought to “re-read (or perhaps read)” the Schumann declaration and the Preamble to the Treaty of Paris, he recalls the deep political nature of the Union’s early beginnings: “Europe began as a political project *par excellence* served by economic interests.”<sup>54</sup> 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 as such undeniable truth that every member state did have some prior life that shaped the consciousness of the nation at large and of its members.<sup>55</sup> In the absence of an overriding rationale, or *meta-récit*, 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.

### E. The Democratic Deficit

Ah yes, the democratic deficit. The unending rumors 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, Europe should not strike us to be much different than any post-modern society; a large number of today’s societies find themselves constantly engaged in more or less explosive integration and consolidation processes.<sup>56</sup> The EU as such is faced with the same challenge

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<sup>52</sup> Ulrich Haltern, *Gestalt und Finalität*, in: EUROPÄISCHES VERFASSUNGSRECHT 803, 832 (Armin von Bogdandy ed. 2003).

<sup>53</sup> Weiler, *Epilogue* in: DARKER LEGACIES IN EUROPE, *supra* note 1 at 395.

<sup>54</sup> *Id.*

<sup>55</sup> See the contribution by Scott Veitch, *Legal Right and Political Amnesia* in: EUROPE IN SEARCH OF “MEANING AND PURPOSE” 89 (Kimmo Nuotio ed., 2004).

<sup>56</sup> See. Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times* 54 MOD. L. REV. 588 (2004); MICHAEL WALZER, SPHERES OF JUSTICE (1983) at 31-42, 48-61.

inherently embodied in the bringing together of 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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. Europe is not only a phenomenon of historical European integration but of an integration of European history.<sup>60</sup>

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 communitarians, as international relationists, as international public lawyers, federalists, supranationalists, and so

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<sup>57</sup> See Joseph Weiler, *Federalism and Constitutionalism: Europe’s Sonderweg*, JEAN MONNET PAPER 10/2000, (available at: <http://www.jeanmonnetprogram.org/papers/00/001001.html>) (last accessed 27 December 2004); Haltern, *supra* note 52, at 832.

<sup>58</sup> See 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* 3 GERMAN LAW JOURNAL (2002), available at: <http://www.germanlawjournal.com/article.php?id=193>; Johannes Jarlebring, *Taking Stock of the European Convention: What added value does the Convention Process bring to the process of treaty revision?* 4 German Law Journal 785 (2003) (available at: <http://www.germanlawjournal.com/article.php?id=305>).

<sup>59</sup> See Louis W. Pauly, *Introduction: Democracy and Globalization in Theory and Practice*, in: DEMOCRACY BEYOND THE STATE? 1 (Michael Th. Greven & Louis W. Pauly eds., 2000), 3-4; Klaus Günther, *The Legacies of Injustice and Fear*, in: THE EU AND HUMAN RIGHTS 117 (Philip Alston ed. 1997); Anne Orford, *Critical Intimacy: Jacques Derrida and the Friendship of Politics*, in: 6 GERMAN LAW JOURNAL (2005), available at: <http://www.germanlawjournal.com/article.php?id=534>.

<sup>60</sup> Weiler, *Epilogue*, 394-5.

on.<sup>61</sup> Our obvious reliance on premeditated experiences in social and political organization should make us aware of those theories. These theories are all in competition for giving 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"<sup>62</sup> "Its originality and deepest value, constitutional tolerance," must be found in constructing a different relational matrix which transcends and recasts the boundaries among its member states and its constitutive peoples.<sup>63</sup>

In conclusion<sup>64</sup> 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,<sup>65</sup> 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.

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<sup>61</sup> For a concise overview of the positions see Armin von Bogdandy, *Beobachtungen zur Wissenschaft vom Europarecht*, in: 40 DER STAAT 3, 25 (2001).

<sup>62</sup> Weiler, *Epilogue*, 395.

<sup>63</sup> *Id.*

<sup>64</sup> See J.H.H. WEILER, EIN CHRISTLICHES EUROPA (with a foreword by Ernst-Wolfgang Böckenförde), (2004), originally published in Italian as *Un'Europa Cristiana* (2003) and also translated into Spanish: *Una Europa cristiana* (Ed. Encuentro, Madrid, 2003).

<sup>65</sup> CARL SCHMITT, RÖMISCHER KATHOLIZIMUS UND POLITISCHE FORM. Originally published with THEATINER VERLAG, (1923), and JACOB HEGNER, (1923). Subsequently published with KLETT-COTTA, several editions. In English published with GREENWOOD(1996).

