The Constitution of Europe: the new *Kulturkampf* ?

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Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions. Edited by Christian Joerges and Navraj Singh Ghaleigh with a prologue by Michael Stolleis and an epilogue by JHH Weiler. Hart Publishing, 2003. ISBN 1-84113-310-8[**]

A.

Deliberation over the proposed constitution of the European Union has rekindled debate about the nature of the political project underpinning the original treaty arrangements. The idea of creating a federal "United States of Europe" might today be spoken only in the softest of tones. Yet, other than in the most trivial sense, talk about a constitution suggests that the EU is not simply an endeavor of nation states deploying treaty-making powers but also involves the building of new relationships between the peoples of Europe and their institutions of government. Debate over its constitution thus raises the question of whether the EU might be transformed into a constitutive project of the most basic kind: that of forging a unitary governmental framework rooted in a common identity of the European people.

We get some sense of the difficulties this type of question raises once it is appreciated that discussion of these constitutional issues invites us to look beyond the structure of modern constitutional documents and reflect on the source of governmental authority in the contemporary world. Do governments commend themselves simply by virtue of their achievements in delivering security or

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[**] Previously published in 29 EUROPEAN LAW REVIEW 557 (2004)

prosperity or must they be anchored in certain basic values? If the authority of a constitutional text stems from the fact that it explicates a set of common values, where are we to find such values? Are they rooted in theology or, if not in a religious source, then in some customary or traditional ways of acting? Or are we able to make a more rationalistic claim that the authority of a constitution rests on the fact that, in some sense, it has been "author-ized" by "a people"? And if we are inclined to find a solution in popular authorization, are we obliged (in the EU context) to ask whether there exists such a thing as a European people and, if so, to identify what values they share?

Although most contributors to the EU constitutional debate suggest that we must look beyond the principle of governmental effectiveness, there is less consensus over the source of the authorizing values. Official discourse tends to promote the conviction that the peoples of Europe are united around the tenets of "liberal democracy". There is plenty of evidence to support this belief; after all, adherence to liberal democracy is a criterion of EU membership, as is demonstrated in the cases of Spain and Portugal, and more recently with respect to the countries of central and eastern Europe. But we are also obliged to concede that "liberal democracy" is a rather general (and, some might say, self-serving) label, and it does little to acknowledge the significance of various elitist, corporatist and authoritarian strains in European practices of government.

Official discourses also imply that liberal democratic values are ones that have been (or can be) embraced through deliberative processes leading to rational agreement. But some might argue that even if we accept this common core of liberal democracy, these beliefs are rooted in the European religious traditions of Christianity. At least since Montesquieu,[1] the tension between west and east - between Christianity and Islam – has been a central motif of European political discourse, one that finds its contemporary expression in the status of Turkey's bid for accession to the EU. From this "thicker", cultural perspective, the idea of a European constitution receives its basic values not so much from some universal principles of equal respect but from a traditional, religiously derived core of (exclusionary) substantive values. And from this perspective, constitutional authority is bolstered not so much by the precepts of universalism but by a form of historical particularism and, ultimately, by a belief in the superiority of the European way.

[1] The opposition between west and east was also an important theme in ancient Greek writing: see Anthony Pagden, *Europe: Conceptualizing a Continent* in THE IDEA OF EUROPE FROM ANTIQUITY TO THE EUROPEAN UNION, ch.1, (Pagden ed., 2002)

Lurking beneath the surface of the debate over the constitution of Europe, then, lies a set of contentious issues concerning the question of European identity. The volume under review, edited by Christian Joerges and Navraj Singh Ghaleigh, can be read as a challenging contribution to the debate, especially since its objective is to draw attention to some of the shadier aspects of European governmental practices during the twentieth century. The preamble to the draft Treaty establishing a Constitution for Europe informs us that Europe "brought forth civilization" and "developed the values underlying humanism: equality of persons, freedom, respect for reason".[2] Perhaps, though there are other stories to be told. *Darker Legacies of Law in Europe*, which assesses the influence of National Socialism and Fascism on the legal traditions of member states, is one of these. Most provocatively, the study raises the question of whether the structure and values of the European project owes much to these darker legacies of this "dark continent".[3]

In reviewing this volume, my argument will be that this is an interesting and thought-provoking contribution, but that it is too uneven in its treatment of the range of issues it raises and ultimately seems misconceived. Suggestive though a number of the contributions are, the volume itself is too sprawling and diffuse, and requires a clearer statement of the questions it poses (and the answers it offers) to be able significantly to advance our understanding of the institutional arrangements of the EU and the constitutional values that anchor that project. It would appear that the formulation of the constitutional issues that *Darker Legacies* touches on has been significantly influenced by a specifically German debate known as the *Historikerstreit* (the quarrel amongst historians), and this has caused it to skew the issues at stake in the European constitutional debate.

B.

Darker Legacies began life as a conference on perceptions of Europe in legal scholarship during the Nazi/fascist era, and this conference work was extended to "explore the continuities and discontinuities in legal thought from the 1920s to the post-War reconstruction of the constitutional state and the legal design of the European integration project."[4] The resulting volume contains a number of instructive contributions on aspects of these totalitarian regimes, including fascist

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[2] European Convention, Draft Treaty establishing a Constitution for Europe (submitted to President of the European Council, 18 July 2003), CONV 850/03, Preamble.

[3] MARK MAZOWER, DARK CONTINENT: EUROPE'S TWENTIETH CENTURY (1998)

[4] Preface to DARKER LEGACIES OF LAW IN EUROPE, x, (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

notions of "honor" (Whitman, Neuman), theories of contract (Monateri and Somma), aspects of criminal policy and eugenics (Lustgarten), judicial methodologies (Curran, Mahlmann) and perceptions of Nazi law in contemporary Anglo-American scholarship (Fraser). My interest in the volume is quite limited: I intend to examine the contribution it makes to our understanding of the constitutional thought of Nazism and fascism, and to ask whether this body of thought offers any insights into the nature of the present integration project.

> My starting point can be presented bluntly. Nazism was a rhetorical, manipulative ideology that preyed on man's most base instincts and was motivated by a lust for power. Because of this, Nazism was entirely tactical in its mode of operation. As a consequence, it was incapable of sustaining a set of beliefs about its governing framework of sufficient stability and coherence to justify the designation of a "constitutional theory". There is nothing in these essays that causes a revision of these views.

The topic is most directly addressed by Oliver Lepsius, who asks: "was there a constitutional theory of National Socialism?" There was a unifying impetus – the bringing together party and state, movement and people, in some indefinable "blood and soil" idea of *Volksgemeinschaft* through which racist language often surfaced. But even this idea was subservient to the *Führerprinzip* (leader principle), which meant that the *Führer's* orders – even those that were entirely informal - had primacy over all other sources of law. Lepsius shows how under the Nazis "there was no longer any constitution, and its ruling order could not be grasped by legal categories"[5], and that constitutional theory lost not only its object (the state in a traditional sense) but also its categories. He concludes that "there was objectively no constitutional law or theory" and "no longer any area of law deserving of that name."[6] Some lawyers, such as Huber, Koellreutter, Eckhardt and Höhn (the last being dealt with separately in an essay in this volume by Hueck) did attempt the

[5] Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, in DARKER LEGACIES OF LAW IN EUROPE, 19, 28 (Christian Joerges, Navraj Singh Ghaleigh eds., 2003)

[6] *Id.*, 30. Neil Walker therefore writes too loosely when referring to "the relentless Nazi emphasis on the primacy of the political". See Neil Walker, *From Großraum to Condominium*, in DARKER LEGACIES OF LAW IN EUROPE, 193, 199 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003). Since Nazism was unable to generate a sustainable dynamic between "the people" and their institutions of government, it is better characterized as a regime marked by the absence of politics rather than the primacy of the political.

exercise, but they were essentially apologists who have left nothing of value to the stock of juristic knowledge.[7]

But this assessment does not end the discussion. The fascist governments of Italy, Spain and Dollfuss' Austria were not identical to Nazi Germany, and the study of these regimes may still prove instructive. In a discussion of the legal theories of fascist Spain, for example, Agustín José Menéndez indicates how such theories were rooted in notions of organicism and decisionism. He also notes, significantly, that "the most outstanding members" of the regime's intelligentsia "were liberal republicans who adopted fascism at relatively short notice".[8] This suggests an interesting line of inquiry: a sociological analysis of the way in which eminent law professors, proclaiming scholarly values but also seeking to keep close to power-wielders, became co-opted by such regimes. Two questions therefore present themselves. Are there any variants of inter-war fascist regimes whose constitutional ideas remain of current significance? What, if anything, can we learn from the work of constitutional scholars who connived with these regimes? I will address each in turn.

C.

The most interesting fascistic model for our purposes is that of the "authoritarian constitutionalism" of the Austrian state, 1934-38. Building on Eric Voegelin's pioneering 1936 study,[9] Alexander Somek presents an account of a regime that accepted many of the precepts of constitutionalism – the rule of law, protection of basic rights, and rudimentary elements of a separation of powers - but excluded the most basic element of constitutional democracy: the election of governments and their control by popular assemblies.

The 1920 constitution had declared Austria a democratic republic whose laws issued from the people. The preamble to the 1934 constitution, by contrast, declared: "In the name of God the Almighty, from whom all laws proceed, the Austrian people receives this Constitution for its Christian, German federal

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[7] See MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945, ch.8, Thomas Dunlap trans. (2004); R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE, 103-30 (2002)

[8] Agustìn José Menéndez, *From Republicanism to Fascist ideology under the Early Franquismo*, in DARKER LEGACIES OF LAW IN EUROPE, 337, 359 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[9] ERIC VOEGELIN, COLLECTED WORKS VOL. 4. THE AUTHORITARIAN STATE: AN ESSAY ON THE PROBLEM OF THE AUTSTRIAN STATE, Ruth Hein trans. (1999)

corporatist state".[10] In its distinctive authoritarian form, the 1934 arrangements were presented as offering an alternative to the perceived instability of parliamentary democracy. Having made the transition from legitimation through the monarchical principle to that of popular sovereignty, a recurrent concern of conservative scholars was that, once the unifying principle of "the people" became divided as a result of the emergence of disciplined political parties, the state would be unable to maintain its authority. It was therefore only a matter of time before a ruling party – through lawful means – made the change to a new non-parliamentary constitutional form.[11]

Although authoritarian, however, the Dollfuss regime, was – because of its constitutional form – not totalitarian. Fascist regimes do not easily accept any limitations to the range of their functions, and they do not acknowledge a distinction between public and private. The fascist state seeks to permeate the individual will and to discipline the total person. For the Fascist, notes Voegelin, "everything is within the state; nothing can have value that exists outside it".[12] And it is through this distinction between the authoritarian and the totalitarian that we see the relevance of this history for present day purposes.

In a compelling account, Somek argues that the governing arrangements of the European Union can best be understood as a contemporary form of authoritarian constitutionalism. Should we not, he asks, talk about an "authoritarian network of national and European bureaucrats" rather than of "deliberative supranationalism"?[13] And rather than assuming that the "democratic deficit" is a deficiency that can be remedied as a result of evolutionary change, might it not be the case that this "deficiency" is a structural aspect of these institutional arrangements and a condition of its effective operation? The EU institutional form,

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[10] Cited in VOEGELIN *Id*., 22

[11] See, e.g. CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffrey Seitzer trans., 2004). In case this concern seems foreign to British scholars, it might be pointed out that, as a standard practice, the British conferred parliamentary constitutions on their former colonies throughout the twentieth century only to see that within relatively short periods these were invariably transformed into presidential systems, and often in conjunction with the formation of a one-party state.

[12] VOEGELIN (supra, note 9), 74. See Mussolini's famous phrase: "Everything for the state, nothing outside the state, nothing against the state", cited in Julius Stone, *Theories of Law and Justice of Fascist Italy*, 1 MODERN LAW REVIEW 177, 193 (1937)

[13] Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, 361, 383 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

Somek suggests, is "the mode in which the authoritarian component of constitutional law has re-asserted itself in Europe after the Second World War."[14]

Within this frame, European government is to be viewed as an elaborate network of executive arrangements operated by an authoritarian ruling elite of ministers, commissioners, judges and officials, most of whom have only a tangential connection with democratic legitimacy. During the post-war era, authoritarianism thus entered a new phase as national governments, for the purpose of escaping the grip of democratic responsibility, institutionalized regulatory responsibilities at the European level and fostered the culture of "national blame avoidance."[15] The parallels with the Dollfuss regime are instructive,[16] and the contemporary Euro-rhetoric of "multi-level governance", "policy networks" and "meta-constitutionalism" does little to mask the essentially authoritarian form of EU arrangements.

> The difficulty for the organizers of this project is that, by focusing on fascism rather than authoritarianism as a strain in European constitutional thought, their continuity/ discontinuity theme is overstrained, and this distorts the overall analysis. I will return to this issue in the concluding section, though I will also argue that this limitation is replicated with respect to the second question.

D.

The second theme of investigation concerns the continuing influence during the post-war era of certain constitutional lawyers who were, to varying degrees, associated with these totalitarian regimes. Does association with fascism taint their intellectual legacy? In an obvious sense it must. It will certainly cause us to read their work as a product of their times and in a particular, rather jaundiced light. On the other hand, if we are altogether incapable of distinguishing the work from the individual, there seems little hope of advancing knowledge.

This undoubtedly causes difficulties, as is illustrated by the case of Karl August Eckhardt who became one of the most learned medieval legal historians of the

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[14] *Id.*, 383

[15] *Id.*, 384

[16] It might also be noted that the Austrian model garnered some support from PIUS XI's, QUADRAGESIMO ANNO encyclical (1931), which not only promoted the idea of the corporative organization of society but also (80) recommended the principle of subsidiarity.

twentieth century but who also had served as a *Sturmbannführer* in the SS.[17] We encounter similar dilemmas in this volume in the cases of Reinhard Höhn and Hans Peter Ipsen. The former, the subject of an essay by Ingo Hueck, was not only a prominent academic lawyer during the Nazi regime but also a senior SS officer. Höhn promoted extreme *völkisch* (folkish) ideas about the priority of community to state which, even within the regime, "ran into a phalanx of jurisprudential opponents".[18] The latter, discussed in Christian Joerges' essay, wrote his *Habilitation* thesis in 1937 on the non-justiciability of certain sovereign acts, including arrest by the Gestapo. Michael Stolleis has observed that Ipsen "was fully aware of the political nature of his theses and their direct relevance for the measures of the Gestapo" and noted that "[o]nly a person who affirmed the new state would approve of the results of his arguments".[19] Of this "bad book", Joerges comments: "I am not aware of any theoretical and methodological standard which would provide us with a defense of [this] type of thinking"[20]

Höhn and Ipsen are of interest, however, mainly because of their post-war careers. Though stripped of his university post, Höhn founded an influential management school after the war, and in later life (he died in 2000 at the age of 95) was feted as a management expert. Ipsen remained in his chair, went on to develop his career as a specialist in European Community law, and eventually retired as the doyen of the subject in Germany. These are essentially cases of a "reluctance to glance in the mirror"[21], specific illustrations of the politics of memory and forgetting,[22] and, in this context, of little general constitutional significance.

Of greater interest is the analysis of such constitutional scholars as Costantino Mortati and Carl Schmitt. Massimo La Torre notes that Mortati was a leading critic of legal formalism and founder of "the concept of the 'material constitution', a

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[17] See VAN CAENEGEM (*supra*, note 7), 120-6. He asks, rhetorically: "am I having a hallucination or were there in fact two different men with the same name?" (121)

[18] STOLLEIS (*supra*, note 7), 346.

[19] *Id*., 356.

[20] Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167, 184 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[21] Michael Stolleis, *Prologue: Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945*, in DARKER LEGACIES OF LAW IN EUROPE, 1, 1 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[22] See, e.g., RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000)

notion that enjoyed a successful career in post-fascist republican Italy."[23] Mortati conceives the relationship between formal and material constitution "not in Marxian terms as the dynamics between a superstructure and a structure, but as a functional relationship driven by the need for a rationalization of power".[24] The formal constitution, he argues, is necessarily incomplete and needs some authoritative value to render the constitution coherent. This is supplied by the values of the "ruling party". Of Mortati's conceptualisation of government, La Torre comments: "The necessity of going beyond the liberal and formal theory of separation of powers, replacing the liberal technique of separation with a communitarian art of ruling, points to the emergence of a new fourth power which is typical of *governing*, the power by which the various State activities get their unifying direction and sanctioning needed to be effective".[25]

Mortati appears to be offering a positive theory of public law that engages in an insightful manner with the tension between fact and norm, one which has obvious analogies to Gramsci's idea of the new prince. But this La Torre labels a fascist theory. It is acknowledged that there "are no racist tones" in his work[26], and there is clear recognition of the official, and therefore representative, nature of governmental roles. In evidence La Torre cites[27] the following statement from Mortati's work: "The very concentration of a huge quantity of powers in the Head of Government presupposes that the person invested with that office possess *superior political capacity*". This is an unexceptional statement of, for example, the position of the prime minister in the British system. For La Torre, however, it indicates that Mortati "defends a version of the *Führerprinzip*".[28] This, to say the least, is unconvincing, and I am reassured by Giacinto della Cananea's commentary on La Torre's essay, which challenges the designation of Mortati's work as fascist.

La Torre's treatment of Mortati is symptomatic of a growing intolerance by normativist thinkers of the functionalist style in public law. Labeling such a theory

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[23] Massimo La Torre, *The German Impact on Fascist Public Law Doctrine – Constantino Mortati's Material Constitution*, in DARKER LEGACIES OF LAW IN EUROPE, 305, 305 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[24] *Id.*, 313

[25] *Id.*, 316

[26] *Id.*, 313

[27] *Id.*, 319

[28] *Id.*, 319

"fascist" does nothing to advance the cause of scholarly understanding. And such difficulties are heightened when we come to assess the work of Carl Schmitt.

E.

The contributors do not speak with one voice on the subject of Schmitt. Ghaleigh asks rhetorically: "Do we have anything to learn from this staggeringly objectionable man and his patchwork quilt of interventionist, often opportunistic, writings?" Lest we are in doubt, he immediately offers an answer: "the reader who looks for consistent thought in Schmitt is doomed to disappointment."[29] La Torre argues that Schmitt's attitude cannot be dismissed as "the moral weakness of a dubious character" but – and here we get closer to the point – he is also a theoretical failure.[30] Unfortunately, La Torre's explanation - that Schmitt should ultimately been seen, *malgré lui*, as a political romantic - is wrapped up in a generalized assessment of fascism. By contrast, whilst acknowledging that Schmitt "flirts with fascism", Somek classifies him as an advocate of "authoritarian constitutionalism."[31] And Peter Burgess suggests that "[m]ore than any other legal thinker of the twentieth century, his categories and concepts, queries, incoherencies and paranoia expose the irreducible problems of late modernity, both in historiographical and juridical terms."[32]

If an attempt to evaluate the work through the man is to be made, Stolleis' assessment in his magisterial study of the history of German public law surely cannot be bettered.[33] Stolleis notes that Schmitt's "brilliant writings" were "read by philosophers, theologians, historians, sociologists, and political scientists", and scholars of public law "were certain that they were dealing with an outstanding mind". While they "admired his acuity and style", however, they "were suspicious of his constitutional deductions". One problem was that Schmitt "had a tendency to impart a sharply pointed, one-sided emphasis to his theorems, not only to advance a particular thought and in a sense test it at its breaking point, but also from the intellectual's sheer pleasure at playing with antitheses, pithy-sounding concepts,

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[29] Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'*, in DARKER LEGACIES OF LAW IN EUROPE, 43, 45 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[30] La Torre (*supra*, note 23), 307

[31] Somek (*supra*, note 13), 381-2

[32] J Peter Burgess, *Culture and the Rationality of Law from Weimar to Maastricht*, in DARKER LEGACIES OF LAW IN EUROPE, 143, 144 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[33] Stolleis (*supra*, note 7), 169-173

and polemical formulas." Schmitt's line was anti-liberal and anti-parliamentarian, and when it came to the Weimar crisis he "opted for the Reich president as the 'guardian of the constitution'." There is no doubt that prior to 1933 he "was not aiming for a *völkisch* Führer-state". But it was his decision ultimately to throw in his lot with the Nazis "that pulled him into the maelstrom of later moral condemnation". And "his hectic participation in the Nazi state … [was] pursued with the zeal of the convert who senses deep down that he is doing the wrong thing but cannot bring himself to stop".

Schmitt was anti-Semitic, conceited and exhibited a strong attraction to power. His rejection of bourgeois rights and security thinking and his insistence on existential opposites had obvious psychological dimensions; Stolleis tactfully comments that these traits "may have been based on certain phobias and idiosyncrasies" and he recognizes that behind the political disagreements Schmitt "may have even seen an eschatological religious battle between a world determined by God and a world emptied of meaning".[34] For many, Schmitt's behavior from March 1933 places him beyond the pale. This period of intense activity on behalf of the Nazi regime "lasted only until 1936, when he was attacked by the SS, lost his party offices, and even had his right to administer the *Staatsexamen* revoked", and thereafter his life was "while not comfortable, not exactly dangerous".[35] This does not excuse his actions.[36] But we also cannot avoid the point that Schmitt's academic work is essentially that of a Weimar jurist whose penetrating and provocative writing addressed central issues of law and state in an original manner. Notwithstanding the faults of the man, we ignore his Weimar writing only at the cost of diminishing the discipline itself.

One of Schmitt's later ideas that could be of specific relevance to the question of the status of the EU is that of his *Großraum* (sphere of influence) concept. First proposed in a lecture in 1939, Schmitt was, it would appear, attempting to negotiate a middle ground between universal, natural law inspired conceptions of international law (which Nazism rejected) and an aggressive, *völkisch* belief that empires are based on warfare in which the superior race ruled and imposed "international" law on its peoples (which could gain no resonance outside Germany). The *Großraum* concept was rooted in a conviction that empires rather than sovereign states shaped the world order. Utilizing this idea, Schmitt argued that western Europe had been

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[34] *Id.*,172

[35] *Id.*, 264

[36] His despicable behavior includes that of chairing of an infamous conference on "Jewry in Legal Studies" in 1936, which called "for a 'cleansing' of minds and libraries" (*Id.*, 257) and the publication of a paper, "The *Führer* Protects the Law" (1934), which "gave its blessing to a piece of gangsterism and ruined the moral reputation of its author" (*Id.*, 335).

absorbed into the US sphere of influence and, in John McCormick's words, he "brilliantly exposes the hypocrisies of the League of Nations and the Monroe doctrine".[37] Schmitt countered US hegemony with the argument that Germany's sphere of influence was expanding in east-central Europe, and that this was required in order to oppose the Bolshevik threat.

Although Schmitt proposed the development of a German-dominated sphere of influence, one in which all states would no longer possess an equality of status, as Joerges notes "he himself remained largely silent as to the *internal order* of the *Großraum*".[38] The *Großraum* concept was in fact little more than "a toolkit for the regime"[39], as became evident when it was taken up by other Nazis who argued that German aggression was not a striving for world domination but amounted only to the consolidation of *völkisch* land by the incorporation of all racially related peoples into the Reich.[40] *Großraum* would probably not deserve further consideration but for the fact that the concept animated the discussions of "an astonishingly large number" of German jurists of international law in the early 1940s, "among them a majority of those who were later active in the Federal Republic".[41] And Joerges argues that Ipsen's treatment of the EC as a purposive association operating a third way between state law and international law was not so far removed from the *Großraum* concept.[42]

This analogy can, however, be over-stretched. McCormick suggests that in certain obvious ways the EU is not a Schmittian *Großraum*: "It is (1) a *Großraum* without a centre, (2) a *Großraum* with affection towards the West, and without imperial ambitions in the East, and (3) a *Großraum* that embraces equanimity among European peoples".[43] In a formal sense, McCormick is right, though after enlargement and adoption of a new constitutional form, certain geopolitical questions of influence will need to be closely investigated. And although Neil Walker also makes pertinent points in his commentary on Joerges, the *Großraum*

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[37] John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, in DARKER LEGACIES OF LAW IN EUROPE, 133, 138 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[38] Joerges (*supra*, note 20), 171

[39] *Id.*, 177

[40] See Stolleis (*supra*, note 7), 421-2.

[41] *Id.*, 421

[42] Joerges (*supra*, note 20), 190-1

[43] Mc Cormick (*supra*, note 37), 140

concept may come to play a greater role than simply that of "a relevant dystopia for the European Union".[44]

Nonetheless, if Schmitt's ideas remain of interest to contemporary European debates, it is mainly because of his earlier work. Schmitt's constitutional theory was essentially state-centered and, as Ghaleigh notes, his conception of the nation is an entirely political one and cannot be assimilated to that of the *Volk* as an ethnic group.[45] At the heart of his constitutional theory lies the distinction between the constitution as a way of being and the constitution as a text, the positive law which provides a formal expression of that existential foundation. In its most basic meaning, "constitution" is the irreducible essence of a thing, and in relation to the constitution of the State this is "the political unity of a people".[46] In this ontological sense, the constitution is an expression of the constituent power of a people, with "people" here standing as the representation of a unified political will. For Schmitt, this yields the "absolute concept" of a constitution, or a constitution in its "concrete" mode of existence.[47] And this absolute concept is to be contrasted with the "relative concept", the rules and regulations of the norm-based constitutional text – the constitution in its "formal" sense.[48]

Schmitt's distinctions are elaborated in Peter Burgess' essay, which explains that for Schmitt the unity and order of a political system lies "not in its legal system, nor in the rules and laws or normative dictates, but in the political *being* of the State".[49] The state is thus not simply an administrative agency charged with a range of political and economic tasks. While this "legislative" conception of the state has assumed an enhanced importance as the range and complexity of its tasks has extended, "legality" cannot entirely subsume the question of "legitimacy".[50] This normative order must maintain a relationship with a sense of political unity.

The parallels with Mortati's distinction between the formal and material constitution should be evident. But, contrary to the conviction expressed in some of

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[44] Walker (*supra*, note 6), 195

[45] Ghaleigh (*supra*, note 29), 51

[46] CARL SCHMITT, VERFASSUNGSLEHRE, ch.1 (1928). I am using the French translation: THEORIE DE LA CONSTITUTION, 131 (Lilyane Deroche trans., 1993)

[47] *Id.*, 132.

[48] *Id.*, ch.2.

[49] Burgess (*supra*, note 32), 155

[50] This is the main theme of CARL SCHMITT, LEGALITY AND LEGITIMACY (*supra*, note 11)

these papers, the critical division is not between fascism and liberalism; it is between normativism and functionalism as styles of public law thought.[51] Legality is, without doubt, today a powerful source of legitimacy. But, as Voegelin expressed it, "the requirement of 'legality' in the sense of behavior having to conform to the norm establishes a relationship between act and norm that is based on the tacit understanding that the norm's legitimacy in turn is founded upon the ethical order of life in society".[52] And when this tacit understanding is lost sight of "there develops the formalized faith in legality, empty of any substance".[53] This faith in legality is the key characteristic of normativist thought. For many, it amounts to an evasion of the most basic issues of public law, which require some form of inquiry into the legitimacy of legality, or the constitutionality of the constitution. That this mode of inquiry – a key characteristic of the functionalist style – raises methodological and juridical difficulties is evident. But (peculiar though it may seem to have to state this) there is nothing in this mode of inquiry that leads inevitably to totalitarianism or fascism. Those who raise this type of question are seeking to excavate the most basic foundations of constitutional understanding, and are raising questions that constitutional theory cannot sensibly avoid. On the contrary, a constitutional doctrine that is unable to offer an explanation of these foundational matters is at risk of deviating into a form of "authoritarian constitutionalism".[54]

F.

Before considering the implications of this analysis for deliberations over the constitution of Europe, we might first reflect briefly on a debate that emerged within West Germany during the late-1980s over the extent to which Germans might once again turn to history as a source of national identity. After forty years of evolution of a Federal Republic anchored in liberal democratic constitutional values and orientated to the west, was it not time to put the experience of Nazism into a broader historical frame? Were Germans forever to be burdened with the atrocities of that regime? Must this twelve-year period cast a shadow over the entire modern history of German achievement? Is not a more positive image of the national past

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[51] See MARTIN LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY (1992)

[52] VOEGELIN (*supra*, note 9), 216-7.

[53] *Id*., 217

[54] On this issue, we might note the similarities between the authoritarian liberalism of Hayek and Schmitt, which are well drawn in RENATO CRISTI, CARL SCHMITT AND AUTHORITARIAN LIBERALISM ch.7 (1998)

needed to enable today's Germans to play a more constructive present and future political role?

Swirling through these debates, which became known the *Historikerstreit*, were undercurrents of revisionist history. This revisionism took the form of a challenge to the idea of the German *Sonderweg*, the argument that modern Germany had followed an erroneous path of development, and that Nazism was rooted in deeper structural continuities. The thesis that the entire trajectory of modern German development had become distorted by dreams of imperial expansion, by the perpetuation of authoritarian rule and by the correlatively weakened nature of parliamentary and democratic forms was thus challenged by the claim that until 1933 there was nothing much distinguishing Germany's development from that of the European mainstream. The "crime" of Nazism – the annihilation of the Jews and other peoples and the waging of aggressive war – was therefore to be seen as a singular outburst of irrationalism fuelled by the strains of the Depression.

The essence of this debate did not really concern technical issues of historical interpretation. The stance adopted on history was, as Geoff Eley has noted, tied "to a larger statement of principle, because taking a position on the origins of Nazism means simultaneously placing oneself in a present-related discourse about the bases of legitimacy in contemporary Germany".[55] By focusing on Nazism's anti-Semitism, revisionists sought to shift the discussion onto the plane of prejudice and persecution, leading to the suggestion that the seizure of control by this bunch of ideological fanatics resulted not only in the oppression of the Jews but also, in a sense, of the German people themselves. By presenting the twelve years of Nazism as an aberration, the revisionists hoped to restore a healthier sense of national identity.

The revisionist argument thus carried with it a powerful political message, especially since a nation's collective identity can shape the character of the constituent power of a people, which in turn drives constitutional development. In the words of Hagen Schulze: "A nation can confuse itself with a society aiming at the highest possible gross national product for only so long … For individuals just as for peoples, there can be no future without history; and what is not worked through in the memory will re-emerge as neurosis or hysteria."[56] One difficulty

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[55] Geoff Eley, *Nazism, Politics and the Image of the Past: Thoughts on the West German Historikerstreit, 1986-1987*, 121 PAST AND PRESENT 171, 172 (1988)

[56] Cited in ELEY (*supra*, note 55), 193. Eley also cites the Orwellian language used by Michael Stürmer: "In a land without history, whoever fills the memory, defines the concepts and interprets the past, wins the future." (*Id.*, 194)

with the revisionist case, however, is the way it has been harnessed to a neo-conservative agenda. Echoing Schmitt's *Großraum* concept, the neo-conservative message has been that Germany's geo-political role has been to maintain stability in central Europe. Viewed in this light, not only were Nazi Germany's foreign policy objectives necessary to counter the Bolshevik threat to Europe,[57] but also the "Final Solution" itself should not be conceived as a singular atrocity; rather, it was an "Asiatic deed" which the Nazis had learned from the Bolsheviks.[58]

This revisionism met with a robust response from Jürgen Habermas, who has been a determined opponent of attempts to return to national themes in German political life. Having had a liberal democratic constitution imposed by the Allies after the war, the challenge for the Federal Republic was that of developing a political culture that could sustain the institutional framework. And this, Habermas argues, has been the greatest German achievement of the post-war period.[59] For Habermas, there can be no going back. Since Auschwitz, the only German patriotism compatible with western values is what he calls "constitutional patriotism", a collective identity based on respect for the general principles of human rights and democratic procedures incorporated in the Basic Law.

The strands of this debate are complicated. Geoff Eley has, for example, argued that a re-evaluation of the case of German exceptionalism does not lead automatically to conservative revisionism: "revisionism and apologetics in this context are not automatic couplets".[60] And some on the left in Germany doubt whether democracy can be strongly anchored by the appeal to universal principles of morality. For our purposes, however, the *Historikerstreit* is significant for two main reasons. First, it helps us to see how, by placing the spotlight on Nazism when examining the "darker legacies" of national European systems, the issue of continuity/discontinuity is obscured. If the lens had focused more broadly on the various authoritarian traditions of modern European government (including the general trajectory of modern German development), and on the extent to which they rest on a Christian inheritance that has treated "the east" as "the other", the sense of continuity of practice within the EU (as a form of reconstructed

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[57] See, e.g., Carl Schmitt, *The Age of Neutralizations and Depoliticizations*, 96 TELOS 130, 130 (1993): "We in Central Europe live under the eyes of the Russians."

[58] See ELEY (*supra*, note 29), 173

[59] Jürgen Habermas, *A Kind of Settlement of Damages: the Apologetic Tendencies in German History Writing*, in FOREVER IN THE SHADOW OF HITLER?, 30, 43 (James Knowlton/Truett Cates trans., 1993): "The unconditional opening of the Federal republic to the political culture of the West is the greatest achievement of the postwar period."

[60] Eley (*supra*, note 55), 204

Christendom[61]) might be more clearly revealed. Secondly, we see how the faith that Habermas places in the universalistic morality of liberal normativism is bound up with an explicit political stance that he adopts – for understandable reasons – with respect to a specifically German debate. But if we are to treat the debates over the constitution of Europe as an extension of a particular German quarrel over history, is there not a danger that that debate might itself be skewed? And might not the focus on the extreme totalitarian case also, in its own way, be a means of avoiding the critical issues?

G.

Notwithstanding these various limitations, *Darker Legacies* does have the singular advantage of offering a range of perspectives on the European legal heritage that are in danger of being overlooked when we contemplate the future shape of the European project. The critical issue it poses is whether such politico-cultural legacies are carried forward into the constitution of the European Union or whether we are able to overcome national traditions in the forging of this "post-national constellation".

On this European question, Habermas has also been an influential participant. He argues, in effect, that the German case does indeed offer some guidance. Unlike the Federal Republic, the case of the EU does not involve the imposition of a constitution by a foreign power, but it is nonetheless unusual. The European venture has been driven by certain functional requirements of nation-states,[62] with the discussion of constitutional legitimacy following far behind.[63] The "constitutional" project thus presents itself as an unusual "modernist" variant of the species. Deliberation over constitutional form does not precede the formation of the entity; rather (to borrow the Bauhaus adage) form follows function. For Habermas, the functional challenge is presented by the phenomenon of globalization.[64] He argues that globalization not only challenges the supremacy of the nation-state as a model of governmental organization, but also the dominance of national cultures as the source of individual identity. In a world of global

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[61] Compare McCormick (*supra*, note 37), 140: "Certainly the view of Europe as reconstructed Christendom had resonance in Adenauer's and Monnet's understanding of what animated the post-war Community". And see CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM (G.L. Ulmen trans., 1996), discussed by McCormick 134-6.

[62] See, e.g., ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE (1994)

[63] See, e.g., FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999)

[64] Habermas, *Learning from Catastrophe?*, in POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS, 38, esp. 53-57 (Max Pensky trans., 2001)

economic interdependencies and world-wide communication networks, there can be no alternative to the adoption of a universalistic value orientation.[65] It is globalization that constitutes the break and which requires a shift away from those values rooted in particular national historical traditions and towards universal ideas of justice, democracy and rights.

Habermas' analysis raises many rudimentary questions. Is the nation state really being superseded or are these European-level arrangements better understood as aspects of state strategy? Do we even have the tools to be able to conceptualize political order without the idea of the state?[66] Can a constitutive process be set in train at the European level without the emergence of the "European people" who are capable of forming a political unity? And is not the distinction between particularistic tradition and universalistic reason presented in a highly polarized form?

When we closely examine Habermas' answers to these questions, it is noticeable that his argument becomes more nuanced and less universalist in tone. He accepts that the nation-state will not easily be transcended and that European governing arrangements are needed for the cultural purpose of protecting "the European way of life". And while criticizing the belief that "a people" is "a community of fate shaped by a common descent, language and history" he recognizes the need to locate collective civic identity within a common political culture.[67] Once these modifications are made, it becomes apparent that the debate of the constitution of Europe can take place on a common plane. For what Habermas must be taken implicitly to be acknowledging is that the meaning and significance that general constitutional principles have within the European social imaginary is a product of particular struggles within actual historical traditions of governing. The debate is not one of transcendent reason versus embedded culture, but that of the type of reason that is shared across the political traditions of a group of related historic communities. While the themes that *Darker Legacies* brings to the surface cannot be eliminated from the continuing debate, discerning this shared tradition requires a much broader-based cultural analysis; after all, from a British perspective, the dynamic between traditional practices and rationalist forms is played out in very different ways. There is nonetheless one message that we can draw from the volume that seems clearly correct, and this is that such constitutional matters will ultimately be resolved not by principle but (if we are lucky) in accordance with the precepts of prudence.

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[65] See Jürgen Habermas, *The Limits of Neo-Historicism*, in AUTONOMY AND SOLIDARITY, 238 (1992)

[66] See JENS BARELSON, THE CRITIQUE OF THE STATE (2001)

[67] Jürgen Habermas, *Why Europe needs a constitution*, 11 NEW LEFT REVIEW 5, 5 (2001)