

2000

# Cynthia Millen's *The Right to Privacy In the United States and Ireland*

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## Recommended Citation

Robert P. Lawry, *Cynthia Millen's The Right to Privacy In the United States and Ireland*, 32 Case W. Res. J. Int'l L. 163 (2000)

Available at: <https://scholarlycommons.law.case.edu/jil/vol32/iss1/6>

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## BOOK REVIEWS

### THE RIGHT TO PRIVACY IN THE UNITED STATES AND IRELAND

THE RIGHT TO PRIVACY IN THE UNITED STATES AND IRELAND. BY CYNTHIA MILLEN. [DUBLIN, IRELAND: BLACKHALL PUBLISHING CO.] 1999. Pp.164 \$45.00 ISBN 1-901657-10-8.

Cynthia Millen's *The Right to Privacy in the United States and Ireland* is two big books inside one small one. Although the fit is not exact, the result is rich and stimulating, even if it leaves the reader feeling there is much more to be done.

The first big book, which corresponds to chapters 1-6, is an intellectual history of two natural law traditions in the West, culminating in the writing of two separate constitutions, one in the U.S. in 1789, the other in Ireland in 1937, each inspired by one of the two traditions. The basic ideas in natural law thought were worked out, beginning with Plato and Aristotle, maturing with the Stoics and culminating with the work of Cicero in the first century B.C. It is from the Ciceronian systemization that Millen sees the split occurring, roughly in the first few centuries A.D.<sup>1</sup> One tradition grew from the Roman jurists, practical men, who "were employed to draft statutes and record various laws and legal customs in the late Roman empire."<sup>2</sup> One of these jurists, Ulpian, is a key figure in Millen's analysis. It was he who dominated the mind-set of those who put together the immensely influential *Corpus Juris Civilis*, which, in turn, had so great an effect on law and jurisprudence throughout the Middle Ages. This tradition reached its apex of influence in the 17th and 18th centuries, and became the strand of the natural law tradition that culminated in the thought of John Locke. Locke, in turn, was the intellectual father of that tradition, as it became embodied in The American Declaration of Independence and the U.S. Constitution.<sup>3</sup>

The second tradition began with the work of the Church Fathers and reached its apex in the *Treatise on Law* of Thomas Aquinas, a section of Aquinas' *Summa Theologica*, published in the middle of the 13th century.<sup>4</sup> It is the Thomist theory of natural law that Eamon de Valera, the chief architect of the 1937 Irish constitution, brought to bear on the drafting of that document.<sup>5</sup> Not that there were not other, important influences on the drafting of the Irish Constitution, including much that had been "borrowed from the U.S. Constitution and various

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<sup>1</sup> CYNTHIA MILLEN, *THE RIGHT TO PRIVACY IN THE UNITED STATES AND IRELAND* (1999).

<sup>2</sup> *See id.* at 8.

<sup>3</sup> *See id.* at 52.

<sup>4</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA*, (Fathers of the English Dominican Province, trans., Christian Classics) (1948).

<sup>5</sup> *See supra* note 1, at 72-75.

Anglo-American notions of justice.”<sup>6</sup> For Millen, the differences between the United States Constitution and the Irish Constitution are “greater and more significant than the similarities” because “[t]he Irish Constitution is first and foremost a product of the Thomistic natural law tradition.”<sup>7</sup> Simply put, the key difference is the individual rights center of the Lockean tradition as against the common good tradition of Aquinas. To understand how this key difference plays itself out, first in the language of the documents, then, and centrally for Millen’s major concern, in the interpretive history of the “right to privacy” in both countries, the intellectual history of natural law in the West must be examined.

Cicero’s achievement in articulating and systematizing the Stoic philosophy of natural law together with its Greek progenitors is well-recognized by scholars. Indeed, its rhetorical brilliance can be seen in a famous passage, quoted by Millen, which summarizes the main thrust of the underlying theory of natural law. In, *DE REPUBLICA* III, Cicero says this:

True law is right reason in agreement with nature, diffused among all men; constant and unchanging, it should call men to their duties by its precepts, and deter them from wrong-doing by its prohibitions ... To curtail this law is unholy, to amend it illicit, to repeal it impossible; nor can we be dispensed from it by the order either of senate or popular assembly; nor need we look for anyone to clarify or interpret it; nor will it be one law at Rome and another at Athens, nor otherwise tomorrow than it is today; but one and the same Law, eternal and unchangeable, will bind all peoples and all ages; and God, its designer, expounder and enacter, will be as it were the sole and universal ruler and governor of all things.<sup>8</sup>

Although Millen claims that Cicero was the “last common denominator in the formulation of both” the Lockean and the Thomist theories, she clearly sees that Cicero had a “common good” underpinning that is more Thomist than Locke<sup>9</sup>; but she does not stress this because it is also the case that Cicero recognized certain “rights” such as self-defense, prohibitions against cheating or causing harm, and protecting others from harm. There is no doubt, however, that these rights were subordinate to the common good in Cicero’s scheme, so it seems to me that “the last common denominator” label will not stick. Indeed, something did seem to have happened when Ulpian and the other Roman jurists began to expound natural law theory in the context of working out legal concepts in the actual world of Roman law; however, that something may have been a form of “positivism” that contradicted the basic premises of natural law thinking, rather than something intrinsic to the theory. Millen actually discusses this in another section of her book, but does not see the implication that I am noting. Here is the

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<sup>6</sup> See *id.* at 73.

<sup>7</sup> See *id.* at 74.

<sup>8</sup> See *id.* at 13, citing CICERO MARCUS TULLIUS, *DE REPUBLICA* III 22 (Clinton Walker Keyes, trans. Harvard Press) (1977).

<sup>9</sup> See *id.* at 15.

crux of it. Famously, the Roman jurists separated law into three categories, the law of nature (*jus naturale*), the law of all peoples (*jus gentium*) and the law of the state (*jus civile*).<sup>10</sup> At some point, the natural law (eternal and unchanging for Cicero) got confused with law designed to work for all peoples (read “foreigners,” and natural law became identified with “the pedestrian practical working-out of a body of Roman rules suitable for application to foreigners.”<sup>11</sup> The only exception was the recognition that slavery was a violation of the natural law, though not of the law of most of the nations of the earth at that time. Nevertheless, what was crucial was that it made no difference. When the natural law collided with the Roman law, the latter prevailed, even in the case of slavery. Interestingly, this is precisely what happened when natural law principles collided with the positive law of slavery in the ante-bellum United States, as Robert Coover so brilliantly described in his book, *Justice Accused*.<sup>12</sup> However characterized, the result of the work of the Roman jurists was a split in the tradition, so that the Ulpian strand emphasized the natural law as “secular, instinctual, man-centered,” dealing with “everyday commerce” and emphasizing order rather than the common good.<sup>13</sup> Moreover, there was an emphasis on private property that was absent in the Thomist tradition, and which was to play so crucial a role in the natural rights theory of John Locke.

In contrast stands the religiously based tradition of the Church Fathers and Aquinas. In addition to the centrality of the common good, the emphasis on the idea that natural law descended from God to man rather than originating in man is crucial in distinguishing the two traditions.<sup>14</sup> This, ultimately, is what accounts for its bindingness. Although chaos may ensue if natural laws are broken in the secular tradition, in the religiously-based tradition individuals had a moral obligation to obey the natural law. Admitting much cross-fertilization between the two theories, nevertheless Millen put together a “simplified” chart<sup>15</sup> that is useful in understanding the similarities and differences between the two traditions. Here is where the difficulties of trying to map the vast intellectual history of natural law thinking in eighty-eight pages of text becomes almost insurmountable. Particularly troublesome is the inability to even sketch the complex and subtle theory of Thomas Aquinas in what amounts to a few pages. Aquinas absorbed Ulpian and the Roman jurists as much as the Church Fathers in creating his multifaceted theory. Although there is a God-centered attitude in Aquinas, so well has he understood the best thinking about natural law and its practical application in the world that his most important 20th century exponent in the Anglo-American world, Oxford’s John Finnis, could say both that the

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<sup>10</sup> *See id.* at 39.

<sup>11</sup> *See id.* at 41.

<sup>12</sup> ROBERT COOVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>13</sup> *See id.* at 42.

<sup>14</sup> *See id.* at 43.

<sup>15</sup> *See id.* at 44.

Thomist natural law theory can be utilized without a belief in God or any theological ideas at all<sup>16</sup>, and that in modern formulations, the language of rights can capture all the variety and depth of the Thomist theory as that language has been perfected over the years.<sup>17</sup> Despite these concerns, however, Millen does a credible job with the first big book within her one small book. There clearly does seem to be a different spirit animating the U.S. Constitution and the Irish Constitution, and Locke and Aquinas, while sharing much, are also philosophers who diverge in the area that Millen wants to focus our attention: privacy rights and their meaning as interpretive matters of constitutional law. That subject, of course, is the second big book crammed into Millen's one small book.

For Millen, interpreters of both the U.S. Constitution and the Irish Constitution would do well to apply Lockean principles to the first and Thomist principles to the second. If this is done in a straight-forward and conscious way, Millen asserts, the adjudication of constitutional privacy rights would be much more predictable and "fair," at least in terms of non arbitrariness.<sup>18</sup> The secular natural law has two tenants that should guide decision-making. The first is that government is instituted to protect life, liberty and property. The second is that one should live honorably, do no harm to others and give everyone his or her due.<sup>19</sup> In working these principles out, the "harm" principle, as expounded best by John Stuart Mill, would seem to be the crucial test as to whether the "right" is to be upheld or not.<sup>20</sup> (Curiously, Millen does not refer to Mill, basing her position solely on Locke and the Founding Fathers understanding of the Lockean natural law tradition.) Thus, for Millen the *Griswold v. Connecticut*<sup>21</sup> decision was clearly correct because sexual relations between a married couple is a private matter that infringes no one else's rights.<sup>22</sup> *Roe v. Wade*<sup>23</sup> is wrong because "much more weight would have to be given to the life or 'potential life' of the fetus."<sup>24</sup> Millen continues, "[w]hen weighing the preservation of a life, which, all semantics aside, the embryo/fetus is human life, as distinguished from a tree or a diseased gallbladder, one cannot logically argue that the inconvenience to a woman in any way could outweigh the death of another's life."<sup>25</sup> The assisted suicide cases were rightly decided but for the wrong reason. Since Locke's natural law position decrees that an individual may not take even his/her own life, the

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<sup>16</sup> See John Finnis, *Natural Law and Natural Rights* 49 (1980).

<sup>17</sup> See *Id.* at 198.

<sup>18</sup> See MILLEN, *supra* note 1, at 92.

<sup>19</sup> See *id.* at 106.

<sup>20</sup> JOHN STUART MILL, *ON LIBERTY*, reprinted in JOHN STUART MILL, *UTILITARIANISM* 135 (1962).

<sup>21</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1964).

<sup>22</sup> See *supra* note 1, at 109.

<sup>23</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>24</sup> See MILLEN *supra* note 1, at 113.

<sup>25</sup> *Id.* at 113.

Supreme Court should have simply stated this and made an end of it.<sup>26</sup> There is a little more to Millen's arguments that I have reported, but not a whole lot. It seems she believes the application of the abstractions of the natural law theory and the positions held by Locke on specific matters (suicide) are relatively simple and straight-forward. Here is her conclusion:

In summary, it is contended that the open recognition of the secular natural law basis of the U.S. Constitution and Bill of Rights, as best exemplified by the writings of John Locke, and its utilization via the Ninth Amendment to enunciate and protect necessary rights which were not specifically expressed, especially those pertaining to privacy, would best serve the spirit and intent of the U.S. Constitution. In addition, uniform adoption of the parameters of secular natural law, an independent and eternal standard of right and wrong, would provide the predictability and stability so greatly needed to prevent arbitrary decision-making in adjudications pertaining to fundamental rights of life, liberty and property.<sup>27</sup>

I am not convinced. Moreover, I am reasonably sure most readers, not already convinced before reading this book, will be convinced by it. That is mostly because Millen does not try very hard to convince. She simply asserts. Nowhere is the reasoning that moves from principle to conclusion set forth. And what it perhaps most valuable about a natural law tradition - and Millen sees this and applauds it - is its objective standards of morality that give large room for changing applications in concrete circumstances. Even if one agrees that Lockean natural law principles have been constitutionalized in the U.S. Constitution - and that subject requires lots of argument as well, not forthcoming here either - the movement from abstract principle to concrete case must be spelled-out in some detail at least.

A similar critique can be made about Millen's application of Thomistic natural law to concrete cases decided under the Irish Constitution. Millen does make a clear and convincing case for the proposition that the Irish Constitution did not incorporate the teachings of the Catholic Church, as opposed to the Thomistic natural law.<sup>28</sup> However, here again, the author simply asserts conclusions about the way in which these principles would be applied in concrete cases. Of course, the Irish Constitution does use the language of the "common good" quite often, and one should expect different conclusions to come from such a choice of words, particularly because there is no doubt that Aquinas' theory animated the drafting of the Constitution. Nevertheless, the reasoning as to why the Irish Courts initially got it right regarding privacy rights, but now have begun to get it wrong, is explained simply in terms of different "sources" for argument rather than in a setting forth of the arguments and counter-arguments themselves.

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<sup>26</sup> *See id.*, at 107-19.

<sup>27</sup> *See id.* at 119.

<sup>28</sup> *See id.* at 72-83.

Cynthia Millen has taken on an enormous task in *The Right to Privacy in the United States and Ireland*. Indeed, I suggested at the outset that she has crammed two big books into one small one; and the small one is, at best, a primer. It is worth reading, however, for the overview it gives to the separate natural law traditions that have had direct effects in constitution-making in the West; and for the provocative suggestion that consistent natural law reasoning by judges in both the U.S. and in Ireland would make for a less arbitrary and more satisfying jurisprudence. The larger task remains of making the arguments that would convince the as yet unconvinced that this is so.

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**THE CONSTITUTION OF EUROPE, "DO THE NEW CLOTHES HAVE AN  
EMPEROR?" BY JOSEPH H. H. WEILER**

THE CONSTITUTION OF EUROPE, "DO THE NEW CLOTHES HAVE AN  
EMPEROR?". BY J. H. H. WEILER. [CAMBRIDGE, UNITED KINGDOM:  
CAMBRIDGE UNIVERSITY PRESS] 1999. Pp.356 \$64.00  
ISBN 0521585678.

INTRODUCTION

The European Union nears the end of the century and the end of the first half-century of its life. Up to now, the integration of law in Europe has clearly been successful. It is equally clear that, to put it tritely, the Union is at a crucial point in its history. Though the integration of national fiscal policies is being achieved through the creation of the European Monetary Union, it is not at all certain that economic and political union is on a smooth track. Most observers concede that the Maastricht Treaty<sup>1</sup> skirted disaster, but that it failed to resolve fundamental challenges facing the Union then and now. Since Maastricht, matters have not improved. Presently, the fifteen Member States do not hold a common vision of what kind of legal order the Union is or what kind of legal order it should become. The strong leadership that forged political, economic, and social cooperation in the European Communities and the European Community, the Union's predecessors, does not appear on the scene. A common vision and effective leadership are now sorely needed.

In the next few years, the viability of the Union will be severely tested. Along with the need to coordinate Members' monetary policies, there is the universally conceded need to address concerns over the Union's legitimacy, its "democratic deficit," and the lack of transparency of its governance structures. There is also the growing pressure to deal with a dozen applications for membership from countries, many of which have not reached the political or economic stage of development of the present Members. Given the lackluster performance that produced the Maastricht Treaty, there is doubt that the serious problems facing the Union will be successfully addressed.

There is need for newer legal institutions, procedures, and policies, in short, for a newer concept of the European legal order. To fashion new institutions, a new vision of the Union, and new approaches to the Union's problems, there must first be substantial changes in the conventional wisdom concerning these matters. This is what Professor Joseph H. H. Weiler has given us.

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<sup>1</sup> Treaty on European Union and Final Act, Feb.7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty].



Professor Weiler has written a splendid book, *The Constitution of Europe*,<sup>2</sup> interestingly subtitled, "Do the New Clothes Have an Emperor?" and Other Essays on European Integration. Weiler is the Manley Hudson Professor of Law and Jean Monnet Chair at Harvard University Law School. He is also Co-Director of The Academy of European Law at the European University Institute, Florence, and the Editor of the European Journal of Law. With Professors Cappelletti and Seccombe, he is co-editor and co-author of the respected, multi-volume *Integration Through Law*,<sup>3</sup> the first volume of which appeared in 1985. I mention his positions and publications for those not aware of the considerable talent and experience Weiler brings to his present work.

*The Constitution of Europe* is a collection of Weiler's essays written over the past ten years. Weiler has judiciously selected, revised, and supplemented these essays, resulting in a clear, comprehensive picture of the process by which the Member States of the European Union are becoming integrated. The central essay, "The Transformation of Europe," Chapter 2 in the collection, was originally published in the Yale Law Journal in 1991.<sup>4</sup> This lengthy, highly regarded essay, as well as the book's final essay, "To be a European Citizen: Eros and civilization,"<sup>5</sup> Chapter 10, set forth the main lines of Weiler's thought. Weiler believes the European Community has succeeded in achieving its historical goals. It has maintained peace in the post-war era and brought about enviable European prosperity. However, in the process, it has disempowered its citizens and strayed from its founding ideals, putting its future at great risk.

In an unusually helpful "introduction," he provides the background against which his book is to be read. This brief introductory chapter contains an elegant sketch in which Weiler contradicts the conventional characterization of the present European legal order. He does not see it as one operating constitutionally, but without a formal constitution.<sup>6</sup> Precisely the opposite. He sees it as a constitutional legal order whose constitutional theories have not yet been worked out, whose basic values are not clear, and whose legitimacy is not solidly rooted.<sup>7</sup> Weiler is not a Union "basher." His mission is to make clear that, nine years after Maastricht, the European

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<sup>2</sup> *ee* J. H. H. WEILER, *THE CONSTITUTION OF EUROPE, "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999).

<sup>3</sup> *See* MAURO CAPPELLETTI ET AL., *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (1985).

<sup>4</sup> *See* Joseph H. H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991), reprinted in JOSEPH H. H. WEILER, *THE CONSTITUTION OF EUROPE*, *supra* note 2, at 10-101.

<sup>5</sup> *See* Joseph H. H. Weiler, *To Be a European Citizen: Eros & Civilization*, London School of Economics Jean Monnet Lecture (1997), in *THE CONSTITUTION OF EUROPE*, *supra* note 2, at 324-57.

<sup>6</sup> *See* WEILER, *supra* note 2, at 8.

<sup>7</sup> *See id.*

Union finds itself in a situation which demands that its old legal order and its constitution be thoughtfully reexamined.<sup>8</sup>

In the opening paragraphs of his preface, Weiler offers several dictionary definitions of “constitution” and poses a question each definition invites: (1) “the way in which a thing is composed... [its] makeup or composition; What is the makeup of the European Union?” (2) “the act or process of [establishing or of] constituting” something; How did the Union evolve? (3) “the physical character of the body as to regard strength and health” Is the Union viable, politically healthy? (4) “the system of fundamental principles according to which a nation, state, corporation, or [other institution] governs;” If the Union is neither a nation or state, what are its fundamental governing principles? and (5) “the document embodying these [fundamental] principles;” Are the Treaties of Paris, Rome, Maastricht, the Single European Act, and the Treaty of Amsterdam the Union’s constitutional charter?<sup>9</sup> Weiler makes all these definitions and questions relevant to his inquiry. In *The Constitution of Europe*, he delivers on his promise to deal with each of them carefully and critically.

#### I. MAASTRICHT AS A GREAT CONSTITUTIONAL “MOMENT”

The Treaty of Maastricht is for Weiler the most significant constitutional moment in the process of Europe’s integration, more significant than the Treaty of Rome, or the European Court of Justice’s decision on supremacy.<sup>10</sup> What makes it significant is not the Treaty’s content establishing an economic and monetary union, nor the symbolism of creating a “European Union” and European citizenship, nor the ratification and entry into force of the Treaty. Weiler explains why Maastricht is a great constitutional “moment:”

It is the public reaction, frequently and deliciously hostile, and the public debate which followed which almost sunk Maastricht which count in my book as the most important constitutional “moment” in the history of the European construct. For four decades European politicians were spoiled by a political class which was mostly supportive and by a general population which was conveniently indifferent. That “moment” has had a transformative impact: public opinion in all Member States is no longer willing to accept the orthodoxies of European integration, in particular the seemingly overriding political imperative which demanded acceptance, come what may, of the dynamics of Union evolution.<sup>11</sup>

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<sup>8</sup> *ee id.*, at 8-9.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *See id.*, at 4.

<sup>11</sup> *See id.* at 4.

Weiler believes there was never a serious, open debate by the public about the Schuman Plan, the Treaty of Paris, or even the Treaty of Rome.<sup>12</sup> Although the political classes were committed to the formative idea of a union, the public had been favorably indifferent until Maastricht. The public was not shocked by the content of what the Maastricht Treaty was proposing, but by what the public discovered was already in place. The public turned around and shocked the treaty makers with a surprising display of skepticism and defiance. Although it contained little new and nothing drastic, Maastricht barely survived the debate that took place at the public level.

There was much that was healthy in this debate. It served as reminder to the political elite that the interests of legitimacy and of popular empowerment should not be ignored in the pursuit of "an ever closer union among the peoples of Europe."<sup>13</sup> Nonetheless, the debate posed a danger, a risk that Europe's successful integration was itself being called into question. It can only be hoped that the debate will produce a reassessment and redirection of Europe's constitutional legal order and not its rejection.

Weiler believes that the European Community has been a success, but that its very success has weakened its appeal.<sup>14</sup> France and Germany no longer need to be reconciled. In fact, reconciliation says nothing to the new generation. There is also no serious debate about prosperity. The problem now is how to redistribute economic wealth, not how to acquire it. Therefore, the current debate must do more than explain the present legal order. The debate must also redefine that legal order and provide it with meaning for those entering the next century.

## II. AN ANALYSIS OF THE EUROPEAN UNION

Conventional analysis of the European Union begins by defining the nature of the Union and classifying its system of governance. Scholars typically seek to determine whether the Union is best likened to a state, a federation, a confederation, or merely a group of nation-states bound together by a system of treaties, albeit an elaborate and complex system. Once the determination is made that the Union is, for example, a confederation, the institutions of the Union are compared to those of a model (or typical) confederation and then found either to conform to, or fall short of, that model.

In contrast, Weiler asks not what the Union is, but rather how the Union works. He focuses on power, how it is exercised, how it is controlled, and how it is made accountable. He sets out three modes of governance, which in turn suggest three approaches for describing and

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<sup>12</sup> See *id.* at 8.

<sup>13</sup> *Id.* at 93 n.212 (quoting Maastricht Treaty, *supra* note 1, at preamble.).

<sup>14</sup> See WEILER, *supra* note 2, at 8-9.

analyzing how Europe is being governed. He calls them the International (or intergovernmental), Supranational, and Infranational modes.<sup>15</sup> Weiler's three modes, when used together, provide a sound way to evaluate the operation of the Union.

In explaining his international-supranational-infranational approach, Weiler emphasizes that the particular mode to be adopted depends on (a) the Union decision-maker, (b) the context or forum in which Union governing is taking place, and (c) the nature of the political and legal issues being decided.<sup>16</sup>

In the International mode, the principals are the Member States and their governments. The context is the Union, though the setting resembles an international arena. The process is one of "negotiation...bargaining, and diplomacy."<sup>17</sup> The focus is almost always on issues of high politics, treaty revision, and the making of fundamental Union rules, matters lying "outside" the Treaty.<sup>18</sup>

In the Supranational mode, the principal actors are again the Member States, including the legislative and judicial branches. The executive branch is still the major State player. The Community – the European Commission, Council, and to an increasing extent the Parliament – is both a principal player and the forum in which critical decisions are made. The work is more structured and hemmed in by rules. There is bargaining and negotiation, but these resemble the familiar coalition-building of the domestic legislative process. The subject dealt with is almost always primary legislation, that is, provisions of the Treaties.<sup>19</sup>

The Infranational mode is mostly about regulatory governance and management. The roles of the Community and the Member States are downplayed. The principal actors tend to be Community and Member State mid-range or lower-level administrators, "departments, private and public associations, and certain ... interest groups," chiefly corporate.<sup>20</sup> The arena for decision is largely the Union, while technical expertise, lobbying, and administrative turf battles characterize the process. The chief business is implementing executive and legislative decisions and setting standards. A wide range and a considerable number of policy decisions are made in this mode.<sup>21</sup>

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<sup>15</sup> *See id.* at 271.

<sup>16</sup> *See id.* at 271-278.

<sup>17</sup> *Id.* at 273.

<sup>18</sup> *See id.* at 273-74.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*

To show how this inter-supra-infra approach works, Weiler assesses the distribution of power and the accountability of Union governance at the three levels. The lack of democratic participation in the Supranational mode is known to all. The Parliament has a small role in the legislative process, primarily consultative. Its substantive and procedural activity is little understood and hardly visible. Europe's citizens have no input on legislative proposals. Lacking relevant information about the Parliament members' responsibilities and actions, the electorate cannot hold them accountable.

At the International or Intergovernmental level, given the importance of its decisions, democratic accountability would seem to be very important. Transparency and open access to the process of treaty making for all Member States is about all that can be hoped for. In theory, the executive branches of the national governments are held accountable through their national parliaments. However, experience shows that national parliaments are quite willing to leave treaty negotiation to their executive branches. As a result, the only democratic control is in the form of a national *ex post facto* referendum. Weiler believes this is a poor substitute for effective citizen participation.<sup>22</sup>

The challenge to democracy is quite different at the Infranational level. A summary of Weiler's arguments makes this point very well. Technical and managerial decisions conceal ideological influences not visible to the public or to other affected interests. Typically, participation in the process is limited to a few; some are privileged to play, others are excluded. The process is lacking in transparency and its highly informal procedure creates a risk of unequal treatment. Judicial review is usually limited to questions of fair access and not fairness of outcome. The weaknesses in democracy associated with infranationalism, lack of control and accountability, are not corrected or much affected by elections or changes in governments.<sup>23</sup>

Weiler's demonstration of the inter-supra-infra approach to the Union's democratic deficit produces a better understanding of that problem than could be gathered from conventional analysis. The conventional approach sees improvement primarily in reforms that increase Parliament's legislative power relative to that of the Council and Commission, and that make the Parliament accessible and accountable to the electorate. While he agrees these reforms are necessary, Weiler argues persuasively that the Union must swiftly address the serious flaws in its infranational mode of governance weaknesses.<sup>24</sup>

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<sup>22</sup> See *id.* at 277.

<sup>23</sup> See *id.* at 284-285.

<sup>24</sup> See *id.* at 277-78, 283-85.

### III. DEVELOPMENTS IN THE TRANSFORMATION OF EUROPE

In his analysis, Weiler explores certain ironic developments in the transformation of Europe. These developments are not mere curiosities puzzling academics. Rather, when understood, they represent dangers facing those who labor to form a “newer” legal order for Europe. According to Weiler, the success of European integration has ironically (1) weakened the ideals upon which the Union was founded; (2) left unsolved, if not worsened, the Union’s democratic deficit; and (3) created a super-state of size and economic power capable of abuses greater than any its Member States singly could inflict.<sup>25</sup> Weiler’s analysis of these developments heightens his warning that now is the time for a thorough reassessment and reconstruction of the constitution of Europe.

#### A. Ideals

In the formative period of the Union, three ideals mobilized the nation-states of Europe to establish a Community whose goals were to prevail against war, poverty, and extreme nationalism. These ideals — Peace, Prosperity, and Supranationalism — supplied the inspiration instrumental in forming a unique regime, the European Union.<sup>26</sup> For the people who had faced the horrors of World War II, the intense desire for Peace served as a mobilizing force, commanding surrender of sovereignty and demanding loyalty in ways unthinkable in earlier times. Today, there is a generation that has lived only in an era of a reconciled France and Germany, a generation for whom a war between States of Western Europe lies beyond its collective imagination. For many, the desire for peace has become a passive thing, reflecting not the fear of war, but the desire not to be disturbed. Peace has changed its meaning; witness a European Union’s remaining uninvolved in Bosnia when involvement might well have shortened a terrible war. In the future, when divisive issues arise in the Union, Peace — in its current intension — will not serve as an ideal with binding force.

Similarly, Prosperity, the second instrumental value in establishing the Community, has seen its altruistic meaning replaced. In the beginning, it signaled a desire to rebuild Europe and to eradicate the poverty caused by the war’s destruction. The ideal of Prosperity had dignity. It implied the collective responsibility of the Member States to constrain the unchecked pursuit of economic prosperity of one state at the expense of the other members. Weiler asks pointedly, “Are we not here [now] in the presence of pure self-interest, something to be almost ashamed of — the very antithesis of altruism, challenge, and sacrifice . . . ?”<sup>27</sup> The question answers itself.

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<sup>25</sup> See *id.* at 94.

<sup>26</sup> See *id.*, at 239-58.

<sup>27</sup> *Id.*, at 245.

Prosperity is now more a synonym for avidity and greed; it no longer implies collective social responsibility. It no longer serves as a rallying cry for the solidarity essential to a strong Union.

Weiler believes the ideal of Supranationalism may also be losing the inspirational character it possessed in the formative stages of European integration. The citizens of Europe now face high unemployment rates, a widening gap between those who have and those who don't, and a distancing from the "foreigners" who govern them. They can hardly feel inspired to transfer power over their lives from national to supranational legislators. Weiler makes a good case that achieving a closer union of European peoples is no longer the means to realize the ends of Peace, Prosperity, and Supranationalism, but instead has become an end in itself. If he is right, there is a serious risk that nationalistic politics may replace law in the process of European integration.

The peoples of Europe already feel burdened by laws enacted by lawmakers they do not know, whose workings they do not understand, and over whom they lack the semblance of control. These peoples already exhibit the angst of modernity stemming from "isms" like individualism, materialism, and consumerism. They already live in a western world suffering from "ations" like bureaucratization, human commodification, and depersonalization, words as ugly in their sound as in their meaning. In the future, Europeans may come to see themselves as living in a hostile, indifferent world or society. They may develop defeatist, cynical attitudes, and a sense of futility and oppression. Should this happen, then the force and appeal of nationalism could rise to challenge the existence of the Union. Will the Europe Weiler sees as no longer possessed of ideals be able to withstand the challenge of *ressentiment*? Will the Europe, whose highest value has seemingly become technological and economic efficiency, see its experiment in integration fail for want of fundamental, inspiring reasons for being?

### *B. The Democratic Defecit*

The standard solution to the generally acknowledged "democratic deficit" in Union governance is to increase the legislative power of the European Parliament. But, no increase in legislative power of the European Parliament alone will fully address the problem of the deficit. A feature of the democratic process within the Member States is that the executive branch of their government is under parliamentary control. To some extent, the electorate holds the power to replace one pack of governors with another. It can "throw the rascals out" to demonstrate its disapproval of national policies. There is no comparable control at the European level. Weiler points out that no transnational political parties have ever emerged. Equally significant, as Parliament's powers have increased, there has been a decrease in voter turnout to European elections. At present, no one who votes in a European election believes that voters have any effect on policy

decisions at the Union level. Moreover, under a doctrine of implied powers, legislative competence over important subject matter has been steadily shifting from national legislatures over which there is popular control to the Parliament over which there is none. Although increasing the Parliament's power is a sound idea, in the short run the democratic deficit will worsen. Should the members of the Parliament turn out to be scoundrels, there is no way the electorate can "throw them out."<sup>28</sup>

### C. Europe as a Super State

Weiler registers deep concern that integration may be on a path that leads to Europe becoming a super-state ironically threatening non-European nations as Germany threatened the nations of Europe after two World Wars.<sup>29</sup> He believes the threat reflects ambivalence about what Europe should look like when the integration process is finally ended.<sup>30</sup> He identifies two competing visions of where the process might be headed: a *unity* vision and a *community* vision.<sup>31</sup> The unity vision sees the process moving step by step, through ever-tightening economic and monetary integration, toward something akin to a United States of Europe. It calls for the piecemeal surrender of sovereignty in matters of defense, foreign affairs, social welfare, and other non-economic areas. The unity vision establishes, in the place where the Member States have been sovereign, a federal system of governance.<sup>32</sup>

The community vision also seeks to overcome the extremes of statism, which find protection in the traditional international law conception of a legal order of independent, self-serving states. However, the community vision does not seek to eliminate nation-states. This vision requires them to share their sovereignty in a limited number of areas of common interest and concern. It seeks to tame states, not destroy them. Weiler believes it to be the original vision, and one he hopes still prevails. The community vision commits the Member States to redefine what is in their self-interest, to add the Community's interests to their own, and, with the other Member States and the Community, to maintain the difficult balance between the claims of national sovereignty and "the new discipline of solidarity."<sup>33</sup> Weiler believes this vision has enabled the European Community to make a unique contribution to transnational governance, and a model for other regional governments.<sup>34</sup> But, since 1992, he detects signs the unity vision is

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<sup>28</sup> See *id.* at 266.

<sup>29</sup> See *id.* 91, 94.

<sup>30</sup> See *id.* 90-96.

<sup>31</sup> See WEILER, *supra* note 2, at 90-96.

<sup>32</sup> See *id.* at 91-92.

<sup>33</sup> WEILER, *supra* note 2, at 93.

<sup>34</sup> *Id.*



experiencing resurgence. He is deeply concerned that the community vision is losing ground to the competing unity vision.<sup>35</sup> If the vision of unity succeeds in bringing about a politically united Europe, he fears the success will contain "the seeds of self-destruction."<sup>36</sup>

It would be more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into (super) state. It would be equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism.<sup>37</sup>

Ironic and, one could add, dangerous.

Is Weiler's concern well founded? When one considers the huge obstacles to political integration revealed post-Maastricht, one is tempted to say, "no". But behind the drive to become a United States of Europe, strange bedfellows are working together. There are idealists who see unity and supranational governance as achieving universal Justice, Harmony, and Equality. Standing beside them are practical men who see in a united Europe a regional government capable of competing successfully in the global economy. Already one hears disturbing "we-they" and "us-them" arguments in debates among European decision-makers. In a unitary legal order the size and strength of Europe, you would encounter the risks of super-nationalism. It does not have to turn out this way, but Weiler's concern that it might seems well founded.

#### IV. CONCLUSION

During the formative years of the Community, its principal actors have, for the most part, quietly acquiesced in policies that have sometimes compromised their interests. However, since Maastricht, unresolved issues have created tense divisions between Member States and other Member States, Member States and the Community, Community institutions and other Community institutions, national constitutional courts and the European Court of Justice, and the public and the Community.

Sooner rather than later, enormously difficult issues will demand the Union's attention. The list to be dealt with includes, for example (1) whether to confer real legislative power upon the European Parliament; (2) whether to eliminate the *de facto* veto held by Member States and permit significant matters coming before the Council to be decided by majority vote; (3) whether to narrow the scope of Community legislative competence to include only enumerated powers or continue living with the doctrine of implied powers; (4) whether to apply the principle of subsidiarity broadly or narrowly; (5) whether to amend the Treaty to include a bill of human

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<sup>35</sup> See *id.* at 40.

<sup>36</sup> *Id.* at 94.

<sup>37</sup> *Id.*

rights, and (6) how to persuade the citizens of the Union's legitimacy, eliminate the democratic deficit, and provide transparency in respect to all the Union's proceedings. And the list goes on.

Weiler touches upon virtually all these issues, analyzing them in depth and with considerable sophistication. He rarely tries to predict how they will be resolved or if they will be resolved, even while making strong suggestions about how he would handle them. However, it is not his treatment of the separate issues that distinguishes his work. His special scholarly contribution lies in his ability to make connections and establish relationships between issues. This is a rarer quality than one might think.

*The Constitution of Europe* offers a valuable tool to all those concerned with transnational governance issues whether at the regional or global level. As I said earlier in this essay, Professor Weiler has written a splendid book.

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