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Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law

DANIEL HALBERSTAM

The Transformation of Europe,[1] the foundational article that we justly celebrate with this volume in honour of Joseph Weiler, is deeply bound up with an important development that reaches far beyond the European Union: the transformation of constitutional law.

This chapter pursues that idea in three parts. Part I reviews the key contributions of *The Transformation of Europe*. Part II takes us back for a critical analysis of the idea of 'constitutionalism' as first developed by Eric Stein and then deployed by Joseph Weiler. On closer inspection, we shall see here that *The Transformation of Europe* may have neglected a core element of constitutional law, something this chapter terms a 'generative space' for law and politics. As this part further explains, recognising this generative element of constitutionalism lies at the heart of the struggle to make sense both practically and conceptually of European integration to this day. Part III then briefly outlines an emerging response to this challenge, and relates this response more broadly to the transformation of constitutional law.

I *The Transformation of Europe*

The Transformation of Europe lays down a unified theory of the law and politics of European integration. It proposes a comprehensive theory for making sense of important developments over long stretches of time. It also teaches. It provides the reader with much history, law, and politics of European integration, allowing us to make up our own mind about all these events as we take in Weiler's path-breaking ideas.

At its core, the article mediates an interdisciplinary tension – Weiler called it a 'paradox'[2] – that had existed in scholarship about the European

[1] J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1991), 2403.
[2] Ibid., at 2411.

Union. Especially in the first two decades of the Community, political scientists had become disillusioned with the project of integration. Predictions based on Ernst Haas's neo-functionalism had not materialised.[3] Functional spillover had promised an increase in European powers as interconnected areas of economic life would be drawn into Jean Monnet's technocratic decision-making machine in Brussels. But political scientists saw just the opposite: Member State governments reasserting their national voices and watering down supposedly supranational majoritarian institutions. European integration was thought to be in peril.[4]

Lawyers, by contrast, emphasised the great strides towards a supranational legal framework.[5] They emphasised the advances on the legal side of the enterprise by pointing to the European Court of Justice, its creation of supremacy and direct effect, and the strengthening of these doctrines over time. Where political scientists complained about the Community sliding back towards 'inter-governmentalism', lawyers noted the success of Europe's 'supranational' endeavour.

Reminiscent of the rabbi in that old joke,[6] Joseph Weiler hears the two sides of the dispute and concludes, 'You're both right.' To show why, Weiler develops an equilibrium theory of the law and politics of European integration.[7] On the one hand, Member States increased their demands for a veto because the law as developed by the ECJ would hold them to the policies Brussels passed. On the other hand, the existence of a veto made Member States agree to an expansive use of central powers that suited each of their separately determined preferences. The equilibrium thesis thus dissolved the supposed paradox and the interdisciplinary squabble.[8]

Weiler's article does not end with the founding period. He shows that Member States became willing over time to weaken their veto powers to

[3] See E. B. Haas, *Beyond the Nation State* (Stanford, CA: Stanford University Press, 1964).

[4] See, e.g., N. Heathcote, 'The Crisis of Supranationality', *Journal of Common Market Studies*, 5 (1966), 140.

[5] E.g., A. Wilson Green, *Political Integration by Jurisprudence* (Leyden: A. W. Sijthoff, 1969).

[6] Two people bring a case to the rabbi. After listening to the first, the rabbi says, 'You're right.' After listening to the second, the rabbi says, 'Yes, you're right.' At that point, the rabbi's spouse intervenes: 'Dear, but they can't *both* be right.' Whereupon the rabbi thinks hard, and answers, 'Yes, my dear, you're right, too.'

[7] Drawing on A. O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge, MA: Harvard University Press, 1970).

[8] C.f. J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism', *Year Book of European Law*, 1 (1981), 267.

get important things done in an expanding union in which unanimity could not easily be reached.[9] Weiler points out that even the ambitious Single European Act formally preserved the balance between binding Member States and allowing them to escape from a European rule that threatened their core interests.[10] He also provides an early critical assessment of the democratic deficit by analysing formal and social legitimacy of European integration.[11] And he predicts the emergence of left/right politics in the Union after 1992.[12] Perhaps most important, he lays out two competing visions for the future of the Union – one, of a tolerant, pluralist 'community', and another, of a more traditionally conceived federal 'unity'.[13] The article closes with a passionate argument in favour of community over unity.

The article became an instant classic – and rightly so. Even the redoubtable Henry Schermers, who along with Eric Stein had served on Weiler's dissertation committee back in Florence, could find 'no fundamental mistakes in the piece'.[14] Several of the concerns anticipated in the piece, such as those regarding the emergence of left-right politics, proved prescient. Most impressive, the structure of analysis regarding the equilibrium of the founding era and the democratic deficit has defined mainstream thinking of the discipline ever since.

II The Challenge: Constitutionalism and European Union

Let us focus on the challenge that 'community' versus 'unity' poses for the discipline of constitutional law. Despite the changes occasioned by real-world developments that may make Weiler's insistence on 'community' sound dated, the principal divide between these two conceptions of European integration is still very much alive. What is more, this challenge has begun to transform our understanding of constitutional law in and beyond Europe. To understand the challenge, however, we must first understand how *The Transformation of Europe* itself treats one of the key elements of constitutionalism.

[9] Weiler, 'The Transformation of Europe', *supra* note 1, 2431–53.
[10] Ibid., at 2458–9.
[11] Ibid., at 2468.
[12] Ibid., at 2476–8.
[13] Ibid., at 2479.
[14] H. G. Schermers, 'Comment on Weiler's *The Transformation of Europe*', *Yale Law Journal*, 100 (1991), 2525.

A Constitutionalism in The Transformation of Europe?

There is a deep tension in *The Transformation of Europe*'s discussion of constitutionalism. Although Weiler seems to embrace the idea of constitutionalism in Europe, he might also be read as explaining it away. Put differently, Weiler's account may well amount to a denial of the very constitutionalism he purports to explain.

This is where Eric Stein comes into – or, rather, precedes – our current story. As is well known, Stein pioneered the legal study of European integration. He wrote the first English-language article on the European Court of Justice decisions in 1955,[15] taught the first law course on European integration in 1956, and published the first casebook on the subject in 1963.[16] More important for present purposes, in 1981, Eric Stein transformed that field again with his article *Lawyers, Judges, and the Making of a Transnational Constitution*.[17] In that piece, Stein coined the concept of 'constitutionalisation' and thereby changed the way legal scholars – and many others – have thought about European integration ever since.

Stein inaugurated what is now a dominant legal perception of European integration, as some kind of 'constitutional' entity. Stein also cut a path for European lawyers beyond the consideration of formal legal doctrine in understanding the legal aspects of integration. Stein's project was eclectic in that it included consideration of the surrounding professional, institutional, and social dynamics that contributed to the creation of what he termed 'a constitutional framework for a federal-type structure in Europe'.[18]

Joseph Weiler's *Transformation of Europe* builds on this work of our mutual colleague, mentor, and dear late friend. Following Stein's article, Weiler presents the classic elements of direct effect, supremacy, implied powers, and human rights as forming the core principles of constitutionalism.[19] Weiler elaborates, in particular, on an institutional element that Stein had discussed only in passing: the preliminary reference action under what was then Article 177.

[15] E. Stein, 'The European Coal and Steel Community: The Beginning of Its Judicial Process', *Columbia Law Review*, 55 (1955), 985.
[16] See *supra* note 6 and accompanying text.
[17] E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 75 (1981), 1.
[18] Ibid.
[19] Weiler, 'The Transformation of Europe', *supra* note 1, 2413–19.

Having embraced Stein's elements of 'constitutionalism', Weiler pauses to justify the use of that term, especially as a way to distinguish all this from the classic workings of public international law. Weiler explains:

> The combined effect of constitutionalization and the evolution of the system of remedies results … in the removal from the Community legal order of the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and countermeasures.[20]

As a result, 'there can be no argument', according to Weiler, 'that the Community legal order as it emerged from the Foundational Period appeared in its operation much closer to a working constitutional order' than to an entity functioning under public international law.[21]

Then follows Weiler's signal contribution – the unified theory of law and politics based on equilibrium. Weiler shows in terms of voice and exit how Member States gave up their prerogative of exclusive state responsibility and crossed over into this brave new world where constitutionalism reigns. Moving beyond the founding period, Weiler argues that constitutionalism has more recently come under attack because the equilibrium between voice and exit – although formally preserved – has, in practice, been 'shattered' by the introduction of majority voting in the Single European Act.[22]

An important aspect of this account is that it equates 'constitutionalism' with the hardening and broadening of European law. The danger, as Weiler points out, is that the hardening and broadening once took place in the service of the Member State government interests, but no longer does. Hence, on Weiler's account, constitutionalism has come under attack.

This account, however, raises a question about constitutionalism itself. Is the account of 'constitutionalism' in *The Transformation of Europe* complete? If we take constitutionalism – in contrast to, say, a simple understanding of delegation or administration – as the lens through which to understand European integration, would we not expect more?

B Constitutionalism and the 'Generative Space' of European Governance

A 'constitutional' vision of European integration suggests the creation of something we might call a 'generative space' of governance at the

[20] Ibid., at 2422.
[21] Ibid.
[22] Ibid., at 2460.

European level. In a constitutional – as opposed to, say, a simple administrative – vision of European integration, the European level of governance provides a distinct space in which political and legal decisions can be *created*, not merely carried out. Europe, on this view, is not merely an agent of Member States who reach their political decisions back home. The concept of a 'generative space' of European governance is meant to capture this fact, i.e., that political and legal decisions can be generated at the European level in the first instance.

Without using this terminology, Weiler does address something similar in the second part of his article. But he presents this development *as a threat to*, not *as an element of*, constitutionalism in Europe. Recall Weiler's discussion of the Single European Act.[23] The most significant element of this change was then-Article 100a (now Art. 114 TFEU), which introduced qualified majority voting for measures aimed at improving the functioning of the common market. As Weiler notes, the fourth paragraph of that provision formally restored what the opening provision had given up: the Member State veto. Article 100a(4) authorised any Member State dissenting from a particular approximation measure to file an objection and preclude application of that provision in its territory. On its face, then, this provision seemed to preserve the equilibrium of the foundational era. And yet, as Weiler explains, Article 100a did not play out that way. Member States soon found that invoking the exception was politically difficult and only feasible as an option of last resort. Negotiations were now conducted, as Weiler says, 'under the shadow of the vote' as opposed to the way they had been in the past, 'under the shadow of the veto'.[24] The Commission became more empowered as an independent actor setting the agenda, and Member States lost more control than the treaty language suggested. Weiler expressly warned that this loss of control threatened the constitutionalisation of the founding era.[25]

I suggest, by contrast, that constitutionalisation of the Union critically depends on just this loss of Member State control. In addition to the hardening and broadening of the law, constitutionalism of the European Union lies in the emancipation of the Union from Member State political (and legal) processes. We need not invoke any grand ideas of EU sovereignty or insist on some formal idea of complete autonomy or complete independence of the European level of governance. Those rather unhelpful

[23] Ibid., at 2456–74.
[24] Ibid., at 2461.
[25] See, e.g., ibid., at 2465.

concepts have proven fluid, not binary, even in more conventional federal systems. Nor is the suggestion here that the Union has become as independent from the Member States as the central government in a classic modern federal system (such as the United States). But we need to recognise that an essential part of constitutionalism in Europe lies in the shift away from, say, a principal-agent model of the relationship between the Member States and the European Union. If we take the account of 'constitutionalism' in *The Transformation of Europe*, however, the existence of any such generative aspect of European governance is not part of, but a threat to, European constitutionalism.

Focusing on the existence of a *generative space* of law and politics at the supranational level as core to constitutionalism, then, means that shattering the equilibrium between voice and exit is part and parcel of introducing constitutionalism in the Union. Weiler's threat to constitutionalism turns out to be the core of constitutionalism itself. And any story that focuses on the 'exit' and 'voice' options of Member States, Member State governments, or Member State polities taken as abiding and cohesive units of governance with exogenously determined preferences does not really explain the existence of constitutionalism; instead, it explains constitutionalism away.

To see why, let us turn back briefly to Eric Stein. Recall Stein's account in *Lawyers, Judges, and the Making of a Transnational Constitution*. In going through the foundational legal battles, Stein showed that the European Court of Justice defied the wishes of the Member State governments by ruling in favour of direct effect, supremacy, implied powers, and foreign affairs powers of the Community. In each case, as Stein points out, the Court ruled against the submitted filings of the Member State governments.

What should we make of this supposed defiance of Member State government wishes?[26] An equilibrium story focused on Member State governments' options of exit and voice sets out to show how the supposed supranational 'autonomy' worked, in fact, to further the interests of the Member State governments. That is, after all, the punch of the equilibrium idea. The perception of autonomy, so the equilibrium theory holds, was an illusion. In hardening and broadening the law, the Union was acting in the service of the Member State governments all along. Purporting to

[26] Even in Stein's story, the defiance of Member State wishes was not highlighted as an essential part of constitutionalism – only the hardening of the law was. So we must build beyond Stein as well.

explain constitutionalism, the equilibrium theory thus destroys constitutionalism along the way.

My point here is not merely semantic. Indeed, it has taken on greater significance since the writing of *The Transformation of Europe*. An account of 'constitutionalism' as hardening and broadening of the law sounds not all that different from the international relations story of pooling and delegation that other scholars have elaborated since then.[27] Such an 'intergovernmental' account is often suggested as an antidote to constitutional conceits. The intergovernmental argument holds that because something like the equilibrium that Weiler set out with regard to the founding period has largely continued beyond that period, the Union should still not properly be viewed as constitutional.

A host of significant corollaries flow from the rejection of a constitutional vision. It changes, for example, whether we view the Union as democratically problematic. If the Member State governments continue to get what they want, most democratic deficit claims dissolve. This is a simple but counterfactual consequence.

More important, if Member State governments are not getting what they want, the different perspectives call for different paths to reform. If Member State governments have lost some control over EU governance, a constitutional vision would focus on making Union processes and politics more accessible to individuals and to the various European publics affected by those decisions. An intergovernmental vision, by contrast, would seek to address this concern by tightening the Member State governments' grip on their wayward agent.

A difference in perspective would also change the interpretive approach of a variety of actors as they consider and deploy the foundational treaties for normative action. An intergovernmental vision would, for instance, have counselled the Court against taking a number of decisions in the way it did – from granting the European Parliament powers that were not specifically defined in the Rome Treaty[28] to the expansion of European citizenship beyond what might have been originally contemplated by the signatories to the Maastricht Treaty.[29] Whether we view these decisions as

[27] See, e.g., A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies*, 31 (1993), 473; G. Tsebelis and G. Garrett, 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union', *International Organization*, 55 (2001).

[28] See, e.g., Case C-302/87 *Parliament v. Council* [1988] ECR 5615.

[29] See, e.g., Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi (ONEm)* [2011] ECR I-01177; Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004]

right or wrong often depends on whether we consider the Union to be a constitutional or an intergovernmental entity.

Note that the anti-constitutional account of international relations theory does not negate the hardening and broadening of EU law. It comfortably accepts all the rule-of-law features that Weiler claimed as evidence of constitutionalism back in 1991. But the intergovernmental account ultimately explains these rule-of-law features (much as Weiler did back then) in non-constitutional terms. The commitment to a binding system of law (the hardening and broadening of law at the European level), according to the international relations account, merely serves the separate Member States' preferences as these preferences emerge from the various national processes of aggregation.

To account for constitutionalism as including a *generative space* for governance, as I argue here, we must take up the story where the equilibrium is shattered. Better yet, we must reach back into the founding era to see how the equilibrium slowly eroded and constitutionalism emerged. We need an account, then, of how supranational governance successfully outpaced the equilibrium, i.e., how supranational governance challenged, changed, shaped, or even ignored Member State preferences over time.

C The Emergence of Constitutionalism in European Governance

This is not the place to spell out a complete theory that accounts for the creation of a *generative space* of supranational governance in Europe. Elsewhere, I have taken more sustained aim at developing this aspect of constitutionalism in the European Union.[30] Briefly, however, some of the argument runs along the following lines.

Several institutional features of the European system of governance – not least the unanimity among Member State governments required to change the capacious treaties as interpreted by the Court – allow for a certain degree of decisional autonomy of actors at the European Union level of governance. The Court of Justice has exploited this decisional space, as have the European Parliament, the European Commission, and many other actors, including private economic actors and ordinary citizens. But

ECR I-09925; Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-85/96, *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.

[30] See D. Halberstam, 'The Bride of Messina: Constitutionalism and Democracy in Europe', *Eur. L. Rev*, 30 (2005), 775.

they have often done so in a principled manner. With the Court of Justice often in the lead, these various actors have exploited their strategic space for action to 'recalibrate' the European enterprise away from Member States as the exclusive locus of normative concern. This means the Court, the Parliament, and others have interpreted the treaties to recognise individuals (and groups of individuals) as bearers of legal interests that are not necessarily mediated by Member State governments.

This 'democratic recalibration'[31] began long before the Single European Act. A host of decisions, actions, and processes systematically lifted individuals out of their national confines by providing access to a generative arena of law and politics at the European level of governance. We find national actors redirecting their interests and forging communities – even if only thin ones – across Member State lines. Supremacy and direct effect (and the formal recognition of individuals alongside Member States as rights-bearers within the Union) are just the beginning of this democratic recalibration. At the European Court of Justice (now the CJEU), other dimensions of this democratic recalibration involve the substantive conception of human rights as pan-European (as opposed to honouring exclusively Member-State-specific conceptions of rights), the creation of European citizenship beyond what Member States seem to have imagined, and the development of various social aspects of economic freedoms. Especially the Court's recognition of the European Parliament as a self-standing institution in supranational governance reveals the broad nature of this normative recalibration. Here, the Court moved beyond legal claims of individuals and recalibrated the institutional architecture to allow for the possibility of genuinely supranational politics.[32]

The Parliament's own emancipatory actions have contributed to this democratic recalibration as well. Through negotiations in successive stages of Treaty reform, bold public action challenging the existing or proposed composition of the European Commission, as well as the emergence of left-right politics in the Parliament itself, that institution has bootstrapped itself into a forum for European politics that is not controlled by the Member State governments.

All this is only the beginning of a story that involves the actions and the self-conceptions of a host of actors from judges, parliamentarians, and other officials to citizens over time.[33]

[31] E.g., ibid., at 777.
[32] For the five dimensions of this recalibration, see ibid. at 782–5.
[33] Ibid., at 785–8.

Understanding the constitutionalisation as including this kind of democratic recalibration in the creation and use of a generative space of supranational governance provides the legal counterpart to various political and sociological accounts that emphasise the genuinely transnational aspects of European integration.[34] It comes, perhaps, as no surprise that these theories chiefly developed after 1992 (and, in countless ways, owe their own debt to Weiler's writings). At the same time, the new claims we find here are not limited to describing a category shift that only began with the Single European Act or in a post-Maastricht world. They present a more comprehensive and gradual picture that reaches well back into the founding era.

III The Transformation of Constitutional Law

Is this generative space of Union governance, along with its normative recalibration, legal or legitimate? How can all this coexist with the constitutional law of the Member States? Returning to Joseph Weiler's concern in *The Transformation of Europe*, we might ask: how is the emergence of a 'constitutional' Union (which we shall now take not only in Weiler's rule-of-law sense, but in the generative sense just laid out) compatible with the vision of 'community, not unity'? Recognising constitutionalism at the level of European governance to include a *generative space* of supranational governance, and at the same time insisting on the continued existence of Member State constitutional law, seems at first blush rather incoherent – a hodgepodge of legality run wild.

The basic concern derives from the fact that constitutions are traditionally taken to stand for legal hierarchy and settlement. In a common narrative,[35] the modern tradition of constitutionalism begins in England where law is used to temper and ultimately frame politics. From there constitutionalism travels to the United States and revolutionary France where constitutionalism becomes radicalised. Politics there ground the

[34] See, e.g., T. Risse, 'Social Constructivism and European Integration', in A. Wiener and T. Diez (eds.), *European Integration Theory* (Oxford: Oxford University Press, 2004), 159; N. Fligstein and A. Stone Sweet, 'Constructing Polities and Markets: An Institutionalist Account of European Integration,' *American Journal of Sociology*, 107 (2002), 1206–43; T. Christiansen, K. E. Jørgensen, and A. Wiener, 'The Social Construction of Europe', *Journal of European Public Policy*, 6, 4 (1999), 528-43; L. Hooghe and G. Marks, *Multilevel Governance and European Integration* (Lanham, MD: Rowman & Littlefield, 2001).

[35] See, e.g., D. Grimm, 'Verfassung II', in O. Brunner, W. Conze, and R. Koselleck (eds.), *Geschichtliche Grundbegriffe* (Stuttgart: Klett, 1990), at 859.

supreme and foundational law, which comes to be seen as 'antecedent' to the exercise of all legitimate public authority.[36] But in terms of internal institutional hierarchy and judicial review, the United States and France are seen as still stuck in various states of incompletion. And, so, according to this story, constitutionalism comes to fruition only in the rationalised Kelsenian systems of continental Europe.[37]

Especially in Europe, where this narrative of constitutional progress has great appeal, constitutionalism seems to leave little room for Weiler's 'separate actors who are fated to live in an uneasy tension with two competing senses of the polity's self, the autonomous self and the self as part of a larger community, and committed to an elusive search for an optimal balance of goals and behavior between the community and its actors'.[38] Instead, the traditional understanding of constitutional law as hierarchy and settlement suggests that a constitutional understanding of the Union inevitably favours the idea of 'unity' over that of 'community'. The traditional view, then, would counsel for either ratcheting back European integration to preserve inter-governmentalism, or for seeking to unify the system under a more traditionally understood, federal constitutional umbrella.[39]

A different tack, sympathetic to the idea of community-not-unity, or to what Weiler a decade later called the idea of 'constitutional tolerance',[40] has been to make sense of the European Union in constitutional terms despite the apparent tension that this creates. One of the initial contributions came from Neil MacCormick:

> Where there is a plurality of institutional normative orders, each with a functioning constitution … it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another.[41]

But even Homer nods. MacCormick soon shied away from the radical nature of his initial thought and ultimately subsumed the relationship

[36] T. Paine, *The Rights of Man* (London: Watts & Co., 1937), 36.

[37] Cf., e.g., A. Stone Sweet, 'Why Europe Rejected American Judicial Review: and Why It May Not Matter', *Michigan Law Review*, 101 (2003), 2744.

[38] Weiler, 'The Transformation of Europe', *supra* note 1, at 2480.

[39] Cf. P. Leftheriadis, 'The Idea of European Constitution', *Oxford Journal of Legal Studies*, 27 (2007), 1.

[40] J. H. H. Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*', in K. Nicoalidis and R. Howse (eds.), *The Federal Vision* (Oxford: Oxford University Press, 2001), 54.

[41] N. MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 104.

between European Union law and Member State law under the rules of public international law.[42] In the end, pluralism, constitutional tolerance, and the idea of 'community-not-union' seemed to have lost out here as well. In MacCormick's vision, public international law served as the overarching legal system that would control both the Member States and the European Union.

A new generation of scholars, more insistent on the plural and constitutional character of European integration, has forged ahead by re-examining the idea of constitutionalism itself.[43] These advances come in several varieties, and are beyond the scope of this chapter to consider in depth. Suffice it to say that they share an underlying appreciation for (a) the generative space of law and politics beyond the state; and (b) a turn, in that realm of governance, to the individual (and the multiple communities she inhabits) as a locus of normative concern. What is more, they see European governance as challenging us (c) to develop a more nuanced understanding of the practice of constitutional law – even within the state – questioning traditional notions of hierarchy and settlement.

This scholarly project sees European integration as broadly connected to the changing nature of public authority in and beyond the state. For instance, the landscape of global governance is widely seen as challenging our traditional state-based understanding of public authority.[44] Here, as the non-state global actor *par excellence*, the European Union raises the question whether its position is unique or whether other institutions, organisations, or regimes of governance beyond the state might be considered 'constitutional' as well.[45]

[42] Ibid., at 121.

[43] For a recent collection, including critics, see, e.g., M. Avbej and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012) (including pluralist contributions from Xavier Groussot, Daniel Halberstam, Jan Komarek, Mattias Kumm, Miguel Poiares Maduro, Daniel Sarmiento, Robert Schütze, and Neil Walker). Defining generations is never easy. Some might argue that earlier work, such as that of Ingolf Pernice, should be seen as launching this larger project as well. See Franz Mayer and Mattias Wendel in ibid. Also, this is not intended to be a comprehensive collection. Alec Stone Sweet, Anne Peters, and several others can be seen as writing in this new tradition in connection with Europe as well.

[44] See, e.g., A. Peters, 'Membership in the Global Constitutional Community,' in J. Klabbers, A. Peters, and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 153.

[45] N. Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. deBúrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 31.

In this realm, the EU irritates conceptually by sitting uncomfortably between global and national governance in ways that scholars and officials have still not been able to digest. Consider the International Law Commission's report on fragmentation.[46] The Report places the EU rather blandly – and without analysis – in a 'constitutional' category, as if that were sufficient to cast the Union as lying beyond the scope of investigation. No effort is made to consider how the relationship among the Member States, the Union, and the realm of international law might challenge the Report's general conclusions, especially those on 'self-contained regimes' (which the Report views with great scepticism). Whether or under what circumstances other regimes or organisations could be, or come to be, considered 'constitutional' – or why the European Union is considered 'constitutional' and others are not – is left unclear.

If we glance in the other direction, i.e., into the state, national constitutional processes in recent decades remind us of the shortcomings of the traditional narrative of constitutional law understood as radical popular authorship, complete consolidation of authority, and perfect institutional hierarchy. For all the success of constitutionalism in taking over the world as the dominant framework for the legitimate (or purportedly legitimate) exercise of state power,[47] constitutionalism as it exists today has rarely followed the traditional script.

Here, too, the European Union may be of help – this time as a pointed irritant to constitutional law within the state. The practical intrusion of the European Union in its specific relations and legal claims vis-à-vis the Member States surely disrupts the traditional workings of constitutional law. What is more, the European Union also invites us to rethink broadly constitutional ideas of authorship, completion, and hierarchy around the world.

The point here, as on the international side of the ledger, is not to see the European Union in all things. But the promise is nonetheless to take from a constitutional understanding of the European Union – and from the unsettling function that such an understanding may have – important lessons for rethinking law and public authority in and beyond the state.

[46] Int'l Law Comm'n, *Report of the Study Group of the International Law Commission, Fragmentation of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[47] See D. Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism* (Oxford: Oxford University Press, 2010).

IV Conclusion

If the discourse of European constitutionalism is 'the house that Eric built' and in which 'all the new and transformative renovations take place',[48] then Joseph Weiler thoroughly remodelled the mansion. By integrating law and politics into a comprehensive critical approach to the new Europe, Weiler's transformative work has taught substance and method, and led by scholarly example.

The third-generation work outlined in this chapter builds on these achievements of Stein and Weiler. But the work discussed here does so by re-examining the foundations of the construct – the idea of constitutionalism itself. The European experience, on this view, is not representative of constitutionalism as we thought we knew it. Instead, Europe practically and conceptually challenges the traditional understanding of constitutional law.

As part of that project, it is important that we move beyond an exclusive 'rule of law' conception of constitutionalism and towards one that includes an appreciation of the 'generative space' of constitutional governance in the Union. This means that we must reconsider the various conceptions of hierarchy and settlement that traditionally accompany theories of constitutional law. In so doing, the third-generation project aims at integrating our understanding of European constitutionalism into a broader understanding of law and public authority in and beyond the state. It aims, then, at nothing less than the transformation of constitutional law.

[48] J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 225–6.