A Comparative Look at The Rule of Law in the European Constitution, by Maria Luisa Fernandez Esteban, and The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration by J.H.H. Weiler

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How unified is Europe today? How unified will Europe become? These questions underlie two recent books, *The Rule of Law in the European Constitution* by Maria Luisa Fernandez Esteban and *The Constitution of Europe: Do the New Clothes Have an Emperor? and Other Essays on European Integration*, by J.H.H. Weiler. Together these books examine three general points: the idea of an European Constitution, the unity that it brings to Europe, and the threats posed to that unity.

Esteban’s book, *The Rule of Law*, focuses on the rule of law as traditionally viewed by member states and currently perceived by the European Commission. Esteban defends the view that the formative Treaties of the European Union provide the necessary elements of a functional constitution. She devotes much of her book to the development and legitimization of the idea of a *de facto* European Constitution. According to Esteban, a constitution is a system of meta-norms that specify how legal norms are produced, interpreted and applied. Constitutions manifest three characteristics: written-ness, entrenchment, and supremacy. Thus, a functional European Constitution exists because the Court of Justice—the highest court in the European Union—interprets and entrenches constitutive treaties as the supreme law.

*The Rule of Law’s* main weakness is it lacks a thoughtful discussion of subsidiarity, a principle that many considered essential in the E.U.’s establishment. This principle states that the lowest competent level of government, alone, should resolve any particular conflict. For example, a French province should resolve any internal provincial issues rather than turning to the national government or the Court of Justice. Since many scholars view subsidiarity as limiting the very supremacy of the Court of Justice which Esteban advocates, her lack of analysis on this matter weakens her argument.

Unlike Esteban’s project, *The Constitution of Europe* is not a theoretical justification of the European Constitution’s existence, but an analysis of the changing power dynamics within the European Union. The book focuses on the idea of supremacy within the European Union. By using the issue of human rights, Weiler seeks to illustrate that room exists for varying standards on human rights among the member states, even though the supremacy of the instruments setting an inviolable
core of protected rights is essential. In Weiler's view, because the European Union is not a traditional federation, E.U. law and the Court of Justice should only enforce a baseline of rights while allowing desiring member states to provide higher levels of protection. Weiler thus views supremacy as an important but limited principle.

This raises a question: given that the supremacy of the Court of Justice is, and needs to be, limited in its scope, can the Court be trusted to limit itself? Weiler acknowledges that some external body may be necessary to protect and balance the spheres of competence of the Court of Justice, the Commission, and the member states. He proposes a Constitutional Council made up of members of the Court of Justice and representatives of member state courts. The Constitutional Council, similar to the one in France, would decide which issues would be the providence of the Court of Justice and which would belong to the member states. Such a proposal highlights Weiler's innovative solutions to the problems the Union faces, making this book particularly appealing to practitioners and readers interested in the E.U.'s development.

The authors of these two books have written for different audiences. *The Rule of Law* is written for a specialized audience with pre-existing knowledge about the European Union. Thus, readers without knowledge of the E.U.'s structural formation and certain specialized terminology will be at a disadvantage in understanding Esteban's work.

In contrast, *The Constitution of Europe* is accessible to a general legal audience. Written by a highly regarded E.U. expert, each chapter stands alone and addresses subjects such as the creation of the E.U., challenges to member state's domestic sovereignty, and dual citizenship of both the Union and one's home country. *The Constitution of Europe* blends an introduction to the E.U.'s formation with a discussion of the subtle relationships between the European Union, its member states, and individual citizens. Taken together, the chapters examine the Union's structural changes over time and suggest interesting possibilities for the Union's future.

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