The time of law:
Europe’s crisis and the future of post-national constitutionalism

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Abstract: This dissertation develops a theory of post-national constitutional law, sovereignty, and solidarity that draws on conceptions of identity and time from across Anglo-American legal theory, continental political and social thought, and European jurisprudence. It attends to how post-national law might gather together texts, discourses, practices, and institutions in a shared effort to transform the modernist logic of nationalistic sovereignty as it thus far remains reflected in juridical forms and political life. It approaches this central task along two parallel paths: how law can retain democratic legitimacy beyond the nation-state, and how law can inform a transfigurative post-national politics responsive to diversity and to the excluded other.

Taking the constitutional development of the European Union as a point of departure and main object of inquiry, I argue that post-national law’s legitimacy and motivating power turn on its attunement to time. It is through sensitivity to the dimensions of time and to the narrative structure of constitutional claims that post-national law holds together its seemingly divergent ambitions: shared commitment and self-decentering plurality. Law’s narrative illuminates both the heterogeneity and contingency of political identity inherited from the past and the particular possibilities open for politics in the future. Because law makes intelligible both self-insufficiency and political imagination, it yields a critical distance from one’s established political community without too quickly abstracting from the ties of belonging needed for situated political judgment. Law thereby traces over time a particular form of creative freedom essential for making sense of the post-national project and its emancipatory demands.

Grounding my argument is the concern, developed in the introductory chapter, that contemporary functionalist and technocratic modes of Europe’s supranational integration pose the danger of ‘thin constitutionalism’: of law unable either to affirm the democratic political autonomy of citizens or to disclose the broader social, normative, and symbolic stakes of post-nationality as a political project. The second chapter is framed by the pressing need—in light of the crises in austerity Greece and Europe’s failure to respond to the claims of refugees—for reviving post-national solidarity as a legal principle and offers an integrated critique of Habermas’s discourse theory of law and his ‘constitutional patriotism’ as a rich but
ultimately inadequate framework within which to realize such a principle. The proceduralism and fallibilism Habermas imagines law to enact do not persuasively ground reflexive civic identities and instead achieve solidaristic relations at the price of fixing the existing constitutional order in place. This shortcoming suggests we must consider more directly post-national law’s relation to history, culture, and to time. In response, chapter three draws on the work of American legal theorist Robert Cover to reimagine cosmopolitan constitutional law as ‘cosmopolitan legal narrative’, emphasizing the diachronic temporality of law and the importance of law’s internal narrative form for constitutional learning and reflexive critique. The theory offers a corrective to less time-sensitive understandings of legal rationality—traditionalism, functionalism, and universalist public reason—and recommends to supranational courts the methodology of analogical reasoning as a needed counterpoint to the presently ubiquitous proportionality review. In so doing, the theory also clarifies the counterintuitive, perhaps paradoxical importance of law’s rhetorical, affiliative, and affective dimensions for cosmopolitan political practice at a time when consideration of substantive political belonging has mistakenly been ceded to a reactionary politics of xenophobic, nativist retrenchment. The fourth chapter utilizes this narrative understanding of law alongside contemporary political theory to reconstruct the normative basis of Europe’s elusive model of ‘shared sovereignty’ in terms of a narrative agency among peoples. Inspired by readings of Seyla Benhabib, Jacques Derrida, and Hannah Arendt, I not only outline a vision for post-national democratic authority but also show why legal reasoning and higher courts remain vital to the success of such authority—thereby linking sovereignty, democracy, and law anew and formulating an innovative relationship of constituent power to the constituted legal order. Chapter five demonstrates the versatility of this theory through concrete interventions into European case law, exploring the limits and possibilities in contemporary European fundamental rights jurisprudence, citizenship law, and asylum law. Chapter six concludes by connecting these investigations to today’s fragile task of rebuilding a common political will for international solidarity across core and periphery and for global justice. In responding to questions of democratic legitimacy, historical responsibility, and transnational norm-internalization over time, the dissertation—while focusing in the first instance on the European Union—offers more broadly a set of considerations to revitalize the philosophy and institutions of a presently stalled international human rights movement.
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Chapter 2
‘Solidarity as a post-national legal principle, or what is it to be a cosmopolitan constitutional patriot?’

This chapter begins with the entwined European crises of democratic legitimacy and social solidarity beyond the nation-state and their relation to an underlying crisis in the paradigm of post-national legal order. European law has not yet afforded a medium for Europeans to live out relations of social commitment beyond neoliberal market integration, of social citizenship and the vigorous protection of fundamental rights as part of that commitment. While theorists have attempted to clarify how dimensions of cosmopolitan solidarity result from the normative and practical requirements of European freedoms of movement and the EU’s multi-level system of governance, the meaning of solidarity as a legal principle in EU law remains underspecified and controversial.

European law’s compromising entanglement with neoliberal individualism—and increasingly the punitive use of legalism in addressing social conflicts—makes it necessary to consider more carefully how to differently conceive solidarity’s place as a structuring principle of post-national constitutional law, which would accordingly guide public interpretations of state competencies, shared civic obligations, determinations of jurisdiction and standing, and the scope of legal rights. Post-national legal solidarity would, in particular, recast the manner in which a polity understands itself to act and, therefore, the image it has of its sovereignty—the project to insulate oneself, asymmetrically and at the expense of others, from the shared vulnerability and Arendtian plurality of the world.

To this end, I develop a critique of what remains the most prominent philosophy of European law and post-national citizenship: articulated most comprehensively by Jürgen Habermas, the concept of ‘constitutional patriotism’ under whose heading law is meant to negotiate the relationship of universal norms to particular contexts of democratic self-governance. My aim is to expand our understanding of constitutional patriotism, following Walter Benjamin, as a new mode of constitutional belonging and legal practice with important resources for supranational politics: a ‘method of seeing the world in a new way’ that might better inform and inspire cosmopolitan solidarity.

The chapter first outlines (Part II) those elements of constitutional patriotism most relevant to this hope of legal possibility, especially as they have been emphasized in the recent account offered by Jan-Werner Müller. I focus specifically on the question of constitutional patriotism’s relationship to memory and to the challenge posed by law’s closure around concrete, exclusionary images of community, what I term ‘constitutional fixity’.

Then, situating constitutional patriotism within Habermas’s discourse theory of law, Parts III and IV analyse two distinct moments of democratic constitutional engagement meant to creatively expand or affirm the inclusive character of the demos as a civic body: (a) the deliberative discourse of democratic self-legislation and (b) constitutional adjudication in which public norms must be interpreted in the context of a particular case. In the former, Part III assesses Habermas’s proceduralism with regard to its capacity to disclose, in time, the politics of the dividing line: whether
it succeeds in bringing law to bear upon politics and identity so as to establish certain emancipatory relations among a polity's past, present, and its future. In the latter, Part IV addresses Habermasian adjudication as a mode of judgment and with regard to its particular brand of fallibilism; that is, what kind of knowledge about oneself and one's own principles—and their finitude—is sought by legal judgments and whether such epistemic aspirations are indeed conducive to cosmopolitan solidarity.

In each of these moments, I develop an account of existing limitations within the Habermasian model; and accordingly, in the positive, I provide preliminary blueprints for how legal possibility might be better protected in the service of post-national solidarity. I argue that post-national solidarity entails a more substantial coming to terms with reflexive political identities and an assumption of historical responsibility across borders. This demands we rework our understanding of post-national law’s relationship to time.

Part V concludes by sketching the broad contours and implications of solidarity as a post-national legal principle, specifically with regard to considering a more time-sensitive theory of law and sovereignty that might dispel the deeper civic desire for mastery and control.

Chapter 3
‘Cosmopolitan legal narrative: Commitment to a law not merely one’s own’

In response to the preceding chapter’s critique, I draw upon perspectives from philosophy and legal theory that might promisingly recast, in this new cosmopolitan frame, our thinking about law as a mode of social integration. Specifically, the chapter develops in greater detail the central argument that it is through an awareness of time that citizens can meaningfully hold together cosmopolitan law’s dual, ostensibly divergent hopes: shared commitment and self-decentering plurality.

As we saw, the extension of constitutional law beyond the nation-state challenges foundational concepts of legitimacy, popular sovereignty, and social solidarity. Cosmopolitan law seems to imply and require—more than a set of legal rules applicable across borders—a novel mode of democratic self-authorship, a usefully ambivalent modulation of the modernist voice of law, and a new basis for civic belonging and public authority.

If post-national law is to rescue the virtue of ambivalence from the violence and commodification of neoliberal fragility, it must give shape to identities and polities as they change. Absent a persuasive means to support these demands of a new cosmopolitan political project, law beyond the nation-state reduces to an administrative regime that—while perhaps effective—reproduces few elements of consciously-held ‘public’ concern. This law might coordinate forms of action or resolve specialized problems, but it seldom sustains a democratic, participatory political space nor in fact succeeds in crucial moments to protect fundamental human rights. The virtue of ambivalence in such conditions is experienced understandably as a challenge to democratic political life and a source of ongoing crisis in constitutional authority. What, then, are the implications for how cosmopolitan law speaks, for its form or methodology, for its purposes, and for its status as an object of civic commitment? Can legal commitment attach to a law that admits its ambivalence, that is not merely ‘our own’? If so, what
form would it take? These are the questions that a theory of ‘cosmopolitan legal narrative’ seeks to answer.

My thesis is that we can reimagine the character of cosmopolitan constitutional law by turning to the diachronic temporality of law, by amplifying the importance of law’s internal narrative form. The intention is not to provide a substantive narrative to compete with the constitutional myths of a national popular sovereign. It is rather to disclose the formal means by which law exists and develops over time, the way it frays at its edges and contains creative possibilities for a culture of political learning and transformation. Cosmopolitan legal narrative gives shape and temporal arc to the otherwise fragmenting work of post-national ambivalence and reflexive critique. It does so with conceptual resources and modes of argument often unfamiliar in international legal discourse: practices of translation, rhetoric, and persuasion; the relationship of law to culture and society; the interpretation of historically inscribed texts; the value of precedent; the play of continuity and discontinuity, of disclosure and concealment; and the surrounding work of memory, mourning, authorship, and imagination. These dimensions reveal at once how creativity and freedom can be deeply constitutive of post-national constitutional law while citizens can yet find a durable place within the rich, evolving worlds of meaning that the law creates. These ideas are instructive for thinking through needed reforms in the structure and role of supranational courts and institutions.

The chapter develops this argument in the following parts. Part II outlines a number of common understandings of legal rationality and their relationship to cosmopolitan law: particularistic (Grimm, Kronman), functionalist (Luhmann, Teubner), and communicative (Habermas, Rawls, Kumm). Each approach, while bearing some relation to cosmopolitan ethics and the problems identified above, retains ‘coherence’ as the structuring principle of law and thereby leaves intact key modernist Westphalian presumptions. Each insufficiently captures law’s temporality and thereby introduces dynamics of fragmentation and retrenchment, as examples from contemporary European citizenship law illustrate. What cosmopolitan law requires is not coherence but a more time-sensitive criterion I term ‘intelligibility’.

Part III turns to the work of Robert Cover for an alternative framework and a remedy. Drawing on Cover’s constitutional theory, I develop the concept of ‘cosmopolitan legal narrative’: the idea that cosmopolitan law derives legitimacy and the unique capacity to sustain constitutional ambivalence from the narrative structure of its claims. Constitutional law ought be understood as a pluralistic process of world-creation in time, for which the narrative form is constitutive. Cover’s theory is exemplary in internalizing this temporal perspective directly into the formal properties of law.

Part IV develops Cover’s penetrating account of ‘jurispathology’ and its relevance for understanding the normative limitations of contemporary European jurisprudence, namely its ubiquitous doctrinal practice of proportionality analysis. I outline the limitations of this practice as a mode of cosmopolitan democratic self-authorship and warn of the underappreciated kinds of legal violence it conceals. Such limitations and such violence curtail the form of legal commitment EU law can inspire.

Part V, attempting to formulate an adequate doctrinal response, puts forward a vision of legal discourse responsive to such deficits, which I term ‘narrative doctrinalism’. Drawing on Cover’s suggestive work alongside that of Paul Kahn, James Boyd White, and others, I argue the legitimacy of
cosmopolitan constitutional authority depends upon practices of analogical reasoning and translation across diverse jurisdictions.

Chapter 4
‘Cosmopolitan constituent power: On narrative agency and the transformative politics of mixed sovereignty’

This chapter uses the perspective of time-sensitivity to reimagine the recently elaborated model of a European ‘mixed sovereignty’ in terms of narrative agency among peoples. Inspired by readings of Hannah Arendt, Seyla Benhabib, and Jacques Derrida, this not only offers a vision of post-national constituent power but also elucidates the particular salience of constitutional law and of constitutional legal judgment in supporting this revised form of sovereignty. I thereby seek to link sovereignty, democracy, and law anew, and to sketch a corrective to the presently functionalist and technocratic overtones in European public discourse.

The construction of European citizenship in the past decades has conceived a novel source of legitimation alongside more traditional sources of modernist Westphalian sovereignty long coveted by national citizens. Recent scholarship on European politics and law has given theoretical accounts of this dualist configuration of European constituent powers. Most prominently, Habermas – drawing on Franzius and von Bogdandy – has developed the concept of a *pouvoir constituant mixte*: the EU constitution-building project derives from individual citizens acting in two competing roles at once – that is, as members of a supranational *demos* and as members of their nation-state *demoi*. European integration thereby draws, in equal parts, on the European citizenry and national peoples. The concept has been expanded in recent treatments (Patberg, Niesen), as well as applied to more general questions concerning global constitutionalism (Kumm).

But such accounts, for their considerable merit as rational reconstructions, neither adequately capture nor develop the transformative potential of post-national democratic politics. The existing dualist accounts set an opposition with an asymmetry: a nascent supranational citizenry anticipates future political community, while national *demoi* are a conservative force, in Habermas’s view, defending past achievements of national polities in terms of welfare, social justice, and democracy. While this account succeeds in ‘pluralizing’ constituent power in the Arendtian sense, it says too little about the transformative practices a post-national, post-sovereign order is meant to engender. And, without elaborating how the *pouvoir constituant mixte* can as such act, the account risks splintering post-national politics from older forms of national democratic legitimation. It is thereby ill-equipped to respond to the EU’s many contemporary crises of legitimacy, distributive justice, and refugee rights. Indeed, without further elaboration, the *pouvoir constituant mixte* seems to ratify a populist trap for the post-national project.

The reason, I argue, is that – despite surface appearances to the contrary – such accounts continue to conceive ‘the people’ as an object and actor of the present. If the future and past are indeed categories of concern, they are catalogued as politically and ethically salient only through their value for citizens today. Presentist accounts leave ‘the people’ full discretion to embrace or discard the decisions of the past or various hopes for the future, according to whether they serve present benefit. History and
possibility are left dormant as political forces in their own right. But presentist accounts therefore easily reduce constitutional politics to a conflict among present constellation of interests, while failing to theorize the way fidelity to the past and commitment to the future might be elements necessary for transformative higher-lawmaking beyond the nation-state.

This chapter aims to respond to such deficits by introducing the dimension of time directly into constituent authority: what citizens owe one another with respect to their past(s) and future(s). Constituent authority itself requires an internal understanding of certain obligations that are distinctly temporal in nature. This is meant not merely in the grander sense of popular founding and retroactive legitimation. Rather, the time-sensitivity of constituent power refers to new contours of political obligation, centered on a polity’s awareness of its own finitude, evolution, and learning in time. Thinking more time-sensitively about constituent power is important if we are to understand, critique, and perhaps remedy current developments in the EU and, indeed, elsewhere in the world’s democracies caught in the grip of globalization.

The chapter plumbs critical theories of representation, membership, judgment, and political action to argue that this more propitious model for a cosmopolitan constituent power depends on a practice (inspired by Arendt, Derrida, Benhabib, and others) of narrative promise-making. These finite expressions of commitment rehearse their limits and genealogies with view of their future reiteration by those affected. Alongside, I show why legal reasoning, higher courts, and rights discourse remain vital to the success of this practice, and thereby sketch a new relationship of constituent power to the constituted legal order.

These ideas, in the end, form criteria to assess the legitimacy of constituent authority: whether a political act is indeed the product of a mixed constituent power (or whether it has slipped back into a Westphalian-federalist view of popular sovereignty and thereby lost its emancipatory novelty). On this account, constituent power names not only a basic structure of authority but an authoritative practice that relates public institutions together in particular ways. It names a more creative manner of making political claims, of speaking about identities and principles, of invoking constitutional rights, and of political mobilization. This, in my view, was the normative ideal of European cosmopolitanism all along.

Chapter 5
‘The courts of the European Union: Paradigmatic cases in time’

The concluding chapter returns to European constitutional case law to apply more concretely and directly the theoretical ideas explored previously.

Part I begins by grounding ‘cosmopolitan legal narrative’ jurisprudentially in a reformulation of the European Union’s Article 42(2) TEU: not as a right to national identity, statically conceived, but as the right to (an always temporalized) constitutional narrative. The justiciability of national identity introduces additional (though limited) grounds for Member States to scrutinize EU legislation – either to challenge its validity or to claim national exemption – and for national constitutional courts to exercise more expansive judicial review of EU law. At the same time, however, because Article 42(2)
falls under the jurisdiction of the Court of Justice of the EU, the scope and import of national identity are matters of European-level review, exposing national identity to reinterpretation by European institutions. The provision’s full significance has yet to be probed in great detail in the case law; and neither has its post-national potential.

Part II outlines a broader array of structural implications for European jurisprudence. We might press the CJEU on its recent quietism in the field of EU citizenship law and its socio-economic rights jurisprudence. We might scrutinize the effect of its compositional and organisational deficiencies in producing normatively ‘thin’ judgments. Indeed, we might propose reforming the production, attribution, and structure of European high courts’ legal opinions so that the European public can more effectively read them as legal texts. We might argue for the inclusion of dissenting opinions, for example, or see merit in further formalizing the role of judicial precedent and, even, an equivalent of stare decisis. Finally, we might push European courts not only to intervene in the minimum protection of fundamental rights but also to focus European public debates more forcefully on the process and terms of European integration, in direct review of the federal competencies of European Union organs.

The remaining parts specify a number of these in greater detail as paradigmatic cases. Part III considers the development of citizenship law, contrasting the CJEU’s timid functionalist and formalistic approaches (Ruiz Zambrano, McCarthy) to the more emancipatory visions (encouraged in several cases by Advocates General) of meaningful fundamental rights protection as the justification for broadened civic inclusion.

Part IV considers recent cases disposing of the new mechanisms of European fiscal governance in the wake of the sovereign debt crisis. I focus specifically on how the CJEU might have given greater creative weight to the EU Charter of Fundamental Rights in order to more credibly guide the emergency measures taken by post-national institutions (Pringle).

Part V turns to questions of public international law, international human rights law, and the hierarchy of norms envisioned by the EU as an ‘autonomous legal order’. Working through the CJEU’s reasoning in cases Kadi I and II, I argue that the framework of legal narrative offers untapped legal resources for dissolving the hard binary monism/dualism binary, and thereby for orienting the EU’s post-national law more adequately and productively within the international legal sphere.

Part VI considers the changing landscape of contemporary European refugee and asylum law, specifically in light of the most recent catastrophes in mobilizing an adequate response to the claims of refugees fleeing across the Mediterranean Sea. Reading a number of crucial cases together, I aim to note the salience of a historical and temporal approach in theorizing the urgent, systematic legal obligations—shared by all EU states—to refugees (Hirsi Jamma and others v Italy, Al Skeini and Others v. the United Kingdom, Al Jedda v. the United Kingdom, MSS v Belgium and Greece, NS v Secretary of State for the Home Department, X and X v Belgium).