

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

A Dissertation
Presented to the Faculty of the Graduate School
of
Yale University
in Candidacy for the Degree of
Doctor of Philosophy

by
Paul P. Linden-Retek

Dissertation Director: Seyla Benhabib

May 2018

Abstract

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

Paul P. Linden-Retek

2018

This dissertation examines the constitutional development of the European Union from the perspective of democratic self-authorship and post-national political community, attempting to detail the significance of a temporal view of law and politics for reviving constitutionalism beyond the nation-state. Drawing on continental political and social thought, Anglo-American legal theory, and European jurisprudence, I argue that post-national law's legitimacy and motivating power turn on its attunement to time. This research demonstrates how post-national law holds together its seemingly divergent aspirations—shared commitment and self-decentering plurality—through sensitivity to the narrative structure of constitutional claims. In so doing, it posits a broader normative importance of narrative agency as the structure of post-national constitutional authority.

Despite the centrality of time in suturing communal solidarity and national legal culture—in particular, in reference to founding moments and mythical national histories, the register of time is notably absent in recent theories of post-national politics and constitutional law. Indeed, scholars of European Union law have made little use of systematic analyses of how political identities endure across time to understand how post-national law might differently inform political learning and post-national solidarity. Theories of constitutional pluralism, for example, have been met with significant skepticism, especially concerning their ability to account for the constitutional project as an expression of political belonging and commitment. The question of constitutional 'hard cases' and how these might be resolved in a pluralistic framework is seldom discussed as a matter for the political and social imaginary of the democratic state.

My dissertation claims these approaches are conceptually fraught and normatively insufficient. 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 an emancipatory political project. Absent a reevaluation of post-national law's time, I show how supranational juridical structures (those grounded in market functionalism or communicative ethics, for example) inadvertently threaten to re-inscribe the very exclusionary relations they seek to overturn. In response, I offer a theory of post-national constitutionalism centered on three elements: (1) a solidaristic principle of civic integration, (2) an account of constitutional order and modes of constitutional interpretation, and (3) a conception of post-national sovereignty. Each of these elements is the subject of a chapter as follows.

Chapter 2 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 a 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 the reasons and ways we must better attend to post-national law's relation to history, culture, and to time.

Chapter 3 draws on the work of American legal theorist Robert Cover to reimagine cosmopolitan constitutional law as 'cosmopolitan legal narrative', emphasizing the importance of law's internal narrative form for constitutional learning and reflexive critique. Law's narrative illuminates both the heterogeneity and contingency of political identity inherited from the past and the concrete possibilities open for politics in the future. 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.

Finally, Chapter 4 utilizes this narrative understanding of law alongside contemporary political theory to reconstruct Europe’s elusive model of ‘shared sovereignty’ in terms of a narrative agency among peoples. Inspired by readings of Jacques Derrida and Hannah Arendt, I argue for a vision of post-national constituent power that institutionalizes the narrative character of political action as an alternative to sovereign decisionism. This view of agency maintains that meaningful self-authorship can indeed proceed without negating the reflexive openness of the subject to the other—and thereby to the plurality of politics. Concurrently, I show why legal reasoning and higher courts remain vital to the endurance of such power—thereby linking sovereignty, democracy, and law anew and formulating an innovative relationship of constituent power to the constituted legal order.

The concluding chapter connects these investigations to today’s fragile task of rebuilding a common political will for international solidarity across core and periphery and for global justice. I develop critical readings of three exemplary moments in EU law’s engagement with international human rights, noting the extent to which they undermine or reflect the elements of post-national constitutionalism outlined previously. Returning to the right of asylum and to the European Union’s policy on migration, in particular, I explore their import for the future of the European project—indeed, why Europe’s contemporary failure to secure refugee rights is such a significant betrayal not only of its international legal obligations but also of its own post-national ambitions.

Table of Contents

Acknowledgments	vi
1. Introduction: Crisis of spirit in European law	1
a. The idea of European crisis and the time of law	2
b. Excursus: Three modes of supranational integration and constitutional change	15
i. Neofunctional juristocracy: Constitutional transformation through judicial review	
ii. The new supranational governance: Treaty revision, referenda, and the anxieties of constitutional reform	
iii. Neoliberal intergovernmentalism: Emergency economic governance of the Eurozone crisis	
c. Ghosts of Westphalia: The dilemmas of constitutional pluralism in Europe	35
i. Minimalism	
ii. Rights-formalism	
iii. Normative nihilism, or the decline of public virtue	
d. The spectre of 'thin constitutionalism'	53
e. On method: A critical theory of post-national legal culture	57
i. Deficits of solidarity	
ii. In the course of time	
f. Chapter organization	69
2. Solidarity as a post-national legal principle, or what is it to be a cosmopolitan constitutional patriot?	72
a. Prologue: Europe dreaming in 'liquid times'	73
b. Introduction: Post-nationality, solidarity, and law	79
c. Constitutional attachment beyond the nation-state: Two moments of legal solidarity	93
d. Constitutional patriotism I: Constitutional culture and post-national acknowledgment (a different proceduralism)	100
i. The emptiness of formal discourse	
ii. The emptiness of historical progression	
iii. Assuming a temporal posture in law	
e. Constitutional patriotism II: The possibility of creative legal judgment (a different fallibilism)	142
i. The European Stability Mechanism and the interpretation of fundamental rights	
f. Conclusion: Sketches of a temporal paradigm of cosmopolitan law	158
3. Cosmopolitan legal narrative: Commitment to a law not merely one's own	165
a. Introduction: What is cosmopolitanism to law, or law to cosmopolitanism?	166

b.	Rules of law: Cosmopolitan justice as coherence?	174
i.	Particularistic rationality	
ii.	Functionalist rationality	
iii.	Communicative rationality	
iv.	Coherence or intelligibility? The question of legal time	
c.	Robert Cover's constitutional theory and the post-national imagination	202
i.	Narrative rationality: Time, possibility, and the open shape of civic commitment	
d.	Resisting legal violence	217
i.	The temptations of neoliberal judgement: Proportionality review in a cosmopolitan legal order	
e.	The jurisgenerative potential of supranational courts	234
f.	Conclusion: Cosmopolitan freedom in law's time	247
4.	Cosmopolitan constituent power: On narrative agency and the transformative freedom of 'shared sovereignty'	251
a.	Introduction: Post-nationality, memory, and narrative	252
b.	Reconstructing popular sovereignty in Europe	257
i.	Strands of an inherited and an emerging debate	
ii.	<i>Pouvoir constituant mixte</i>	
iii.	You, the living? On presentism and the polity 'ready-to-hand'	
c.	Iterability and the political meaning of time	279
i.	Acts of iteration and the deconstructed self	
ii.	The 'trace' structure of post-national sovereignty	
d.	'Shared sovereignty' as narrative agency: Hannah Arendt on authority, judgment, and political action	295
i.	Loss of authority as loss of world and the recovery of judgment	
ii.	Between actor and spectator, between promising and forgiveness	
iii.	The narrative structure of mixed constituent power	
e.	Toward post-national constitutional democracy	320
5.	Conclusion: The 'play of the world'	325
a.	Political imagination and the rescuing critique of cosmopolitan right	326
b.	Return to Melilla: The principle of 'mutual trust' in European asylum law	331
c.	From Dublin to Beirut: <i>X and X v Belgium</i>	338
i.	Opinion of Advocate General Mengozzi	
d.	Europe's agenda: 'Time for honesty, unity, and solidarity'	349
e.	'That things are not so ill with you and me'	360
	References	364

For my grandparents,

Bohumil Ježek, Jarmila Ježková, and Robert J Osborn

There is something about 'Europe' which we don't decide, something which, by the way, no one has decided, something that, by contrast, one needs to be capable of welcoming. Perhaps Europe, or the 'essence' of Europe if one can still speak in this way, is first and foremost more of the order of a *birth* than a project. Undoubtedly, the projects of Europe that have been in the works for more than forty years have played their determinate role, and they will continue to do so. But Europe is *born* as well—or to put differently, it *arrives* with everything unpredicted, unpredictable, if not improvident, incomplete, inchoate, and unfinishable. One ought not to ask (*vouloir autour*) too much of a new born.

Jean-Luc Nancy, 'La naissance continuée de l'Europe'

It is part of morality not to be at home in one's home.

Theodor Adorno, *Minima Moralia: Reflections from Damaged Life*
fragment 18, 'Refuge for the homeless'

Law, say the gardeners, is the sun,
Law is the one
All gardeners obey
To-morrow, yesterday, to-day.

Law is the wisdom of the old,
The impotent grandfathers feebly scold;
The grandchildren put out a treble tongue,
Law is the senses of the young.

Law, says the priest with a priestly look,
Expounding to an unpriestly people,
Law is the words in my priestly book,
Law is my pulpit and my steeple.

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

Yet law-abiding scholars write:
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good morning and Good night.

Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more,
Law has gone away.

And always the loud angry crowd,
Very angry and very loud,
Law is We,
And always the soft idiot softly Me.

If we, dear, know we know no more
Than they about the Law,
If I no more than you
Know what we should and should not do
Except that all agree
Gladly or miserably
That the Law is
And that all know this
If therefore thinking it absurd
To identify Law with some other word,
Unlike so many men
I cannot say Law is again,

No more than they can we suppress
The universal wish to guess
Or slip out of our own position
Into an unconcerned condition.
Although I can at least confine
Your vanity and mine
To stating timidly
A timid similarity,
We shall boast anyway:
Like love I say.

Like love we don't know where or why,
Like love we can't compel or fly,
Like love we often weep,
Like love we seldom keep.

WH Auden
September 1939

Introduction: Crisis of spirit in European law

These are difficulties the man from the country has not expected;
the Law, he thinks, should surely be accessible at all times and to everyone.

Franz Kafka, 'Before the Law'

'Je est un autre.' ('I is someone else.')

Arthur Rimbaud, Letter to Georges Izambard, 13 May 1871

I. THE IDEA OF EUROPEAN CRISIS AND THE TIME OF LAW

In a speech before the European Parliament on 8 March 1994, Václav Havel reflected on the difficult relationship of European citizens to the legal order of the European Union. Reading Europe's supranational laws, Havel expressed doubt that citizens could 'genuinely experience this complex organism as their native land or their home'.¹ The treaties of European integration were 'undoubtedly a respectable piece of work', Havel emphasized, even 'a remarkable labor of the human spirit and its rational capacities'.² But, less exuberantly, Havel feared they failed to express the ethical and emotional vision of the still nascent political undertaking they represented. '[The treaties] addressed', Havel said, 'my reason, but not my heart'.³ For Havel, the efficient alignment of prominent institutions could not straightforwardly translate into the commitments of a new European polity, in the full and rich sense of the word. 'More than a set of rules and regulations', Havel urged, '[European law] must embody, far more clearly than it has so far, a particular relationship to the world, to human life and ultimately to the world order'.⁴

Havel's hope was to begin to square the hyper-rationalised, legalistic 'machinery' of EU integration with its broader social dimensions: normative, political, cultural, symbolic, and spiritual.⁵ It was this appeal to 'make the spirit of the European Union more vivid and compelling, more accessible to all' that Havel considered 'the most important task' facing the European project, if it was to retain its serious and deep cosmopolitan aspirations.⁶ It is a task that continues to confront Europeans today. While it may seem commonplace to observe that the European public sphere is weak and underdeveloped, it nevertheless remains the case that Europe has yet either to find or to found the democratic community for which various EU institutions stand as poor placeholders. Absent along European integration's current juridical path is a deeper emotional resonance, a sense of belonging in common and of common purpose.

1 Václav Havel, 'Speech before the European Parliament, Strasbourg, March 8, 1994' in *Toward a Civil Society: Selected Speeches and Writings 1990-1994* (P Wilson et al trans, Prague: Lidové Noviny 1995) 291-303, 301.

2 *ibid* 296.

3 *ibid*.

4 *ibid* 301.

5 Havel proposed the drafting of a charter that would 'clearly define the ideas on which [the European Union] is founded, its meanings and the values it intends to embody'. *ibid* 302.

6 *ibid* 301-2. For an important account of law's expressive symbolism, a broader framing to which I am very much indebted, see Jirí Pribán, *Legal Symbolism: On Law, Time and European Identity* (Aldershot: Ashgate 2007).

Havel here extended, if only implicitly, a line of thought and critique drawing back to the famous Vienna lecture Edmund Husserl delivered in May 1935, entitled ‘Philosophy and the Crisis of European Humanity’ and later published as his last great work, *The Crisis of European Sciences and Transcendental Phenomenology*.⁷ Husserl there inquired into the crisis of European reason. He considered its apotheosis in the scientific rationality that had flourished since the Renaissance but since then, so Husserl argued, had led Europe into the murderous misery of the Great War and, as Husserl in 1935 already witnessed, the catastrophic rise of National Socialism – the most horrific violence of which was yet to come and he would mercifully not live to see.

Husserl saw fault, specifically, in the unfortunate success of positivism: its reduction of all things in the world into mere objects to be assessed according to the rigors of ‘systematic approximations, in terms of its unconditionally universal elements and laws’.⁸ Positivism could indeed grasp a ‘clear and distinct’ knowledge, but this knowledge had only the most inadequate and uncritical bearing on questions of human meaning.⁹ Husserl, too, sought elements of universal law and judgment, but these were for him universal only insofar as they remained rooted in the lifeworld consciousness of human beings. Resisting positivism’s timelessness, Husserl hoped to recover a ‘faith in the meaning of history’ and thereby to resist the sense that the facts of the world and the facts of history ‘have nothing more to teach us than that all the shapes [of the world] form and dissolve themselves like fleeting waves, that it always was and ever will be so’.¹⁰ In the end, to counter Europe’s ‘estrangement from its own rational sense of life’,¹¹ Husserl even envisioned, if only vaguely, a ‘European supranationality’, a union of ‘nations bound together as Europe’, which would aim at ‘a new sort of humanity, one which living in finitude, lives towards poles of infinity’.¹²

It is apposite to remember Husserl’s warnings, however rooted they are in a particular historical moment and its philosophical traditions, for their profound resemblance to Havel’s own apprehensions about the state of contemporary European politics and law. Just as Husserl expressed concern for European science and philosophy, Havel attempted in his speeches to breathe life into the question of Europe’s political and constitutional crisis, a crisis Havel understood to be borne of a similar reliance on economic and positivistic thinking about human values. The positivistic orientation to the world also became a kind of political and legal orientation – of functionalism, technocracy, juristocracy, and a general deformation of the relationship of public law to democratic politics, of law to the authorship of a polity over time.

The year prior to his address to the European Parliament, Havel gave a ‘Vienna lecture’ of his own to the 1993 gathering of the Council of Europe in that city. Havel described the civic disinterest and disenchantment that had befallen European politics, and he found a common cause: ‘the erroneous belief that the great European task before us is a purely technical, purely administrative, or purely systemic

7 Edmund Husserl, *The Crisis of the European Sciences and Transcendental Phenomenology* (D Carr trans, Evanston 1970). See also Paul Valéry, ‘The Crisis of the Spirit’ in *Paul Valéry: An Anthology* (JR Lawler ed and trans, London: 1977) 94-107.

8 Husserl, *The Crisis of the European Sciences and Transcendental Phenomenology* (n 7) 295.

9 *ibid.* See also *ibid* 7, 270; Jacques Derrida, *Rogues: Two Essays on Reason* (PA Brault and M Naas trans, Stanford: Stanford University Press 2005) 124ff.

10 Husserl, *The Crisis of the European Sciences and Transcendental Phenomenology* (n 7) 13, 7.

11 *ibid* 299.

12 *ibid* 276-7.

matter'.¹³ Havel argued that 'Europe today lacks an ethos; it lacks imagination, it lacks generosity, it lacks the ability to see beyond the horizon of its own particular interests, be they partisan or otherwise'. And, in particular, Havel felt European politics could not yet offer 'a genuine identification with the meaning and purpose of integration ... a genuine and profound sense of responsibility for itself as a whole, and thus for the future of all those who live in it'.¹⁴ Havel's call, then, was a plea in search of a public philosophy, a plea to reconsider the forms of solidarity, constitutional law, and sovereignty that had thus far resulted in great degrees of political alienation and mistrust.

As Havel knew from his long struggles to build the institutions of a post-communist Central Europe, while modern political community partially inheres in legality and in the provision of rights under the rule of law, communal legitimacy also entails social and ethical responsibilities. In other words, a European polity would require its own form of post-national solidarity: a concerted willingness of fellow citizens to deepen and enlarge, across previously drawn borders and divisions, those shared responsibilities for one another that any meaningful project of communal self-legislation demands. It is this form of solidarity that is today in the European Union fragile and confused.

Europe's 'functional' constitutional structure¹⁵ has increasingly uncoupled from the normative, social, and symbolic commitments that formerly marked national constitutional democracies. In the jurisprudence of the European Court of Justice and executive-led intergovernmental negotiations, European law too often engages citizens not as authors of the law of which they are ultimately subjects but as the juridified objects of a new, if increasingly harmonised, regulatory apparatus.¹⁶ Indeed, the EU's contemporary legitimation deficits are intertwined with the broader decline of social solidarity in what Zygmunt Bauman terms 'liquid times', when globalized powers—unmoored from socially intelligible influence—create alarming levels of insecurity, class division, uncertainty, and fear.¹⁷ The symbolic relationship of the democratic citizen to the rules and values that order her life, perhaps give meaning to it as a free endeavour, is increasingly frayed.¹⁸

Europe's crisis speaks to us as—it is, indeed, an example and an effect of—a challenge posed by the dissociation of what Hannah Arendt referred to as the 'old trinity of state-people-territory',¹⁹ which had previously come apart in the face of the crisis of statelessness in the twentieth century and has again

13 Václav Havel, 'Speech at the Council of Europe Summit, Vienna, October 8, 1993' in *Toward a Civil Society* (n 1) 240-5, 241.

14 *ibid* 242.

15 See, eg, Turkuler Isiksel, 'On Europe's functional constitutionalism: towards a constitutional theory of specialized international regimes' (2012) 19(1) *Constellations* 102.

16 Hauke Brunkhorst cites the following deficiencies in the EU legal framework: 'discrimination of residents, potential deportation of EU citizens out of individual countries, democratically insufficient rights to participation, privileging of the executive and the state apparatus'. Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, MA: Massachusetts Institute of Technology Press 2005) 172.

17 See Zygmunt Bauman, *Liquid Times: Living in an Age of Uncertainty* (Cambridge: Polity Press 2006).

18 See generally Jürgen Habermas, 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship' (1998) 10(2) *Public Culture* 397.

19 Hannah Arendt, *The Origins of Totalitarianism* (rev 3rd ed, New York: Harcourt Brace Jovanovich 1973 [1951]) 282.

unraveled in conditions of contemporary globalization.²⁰ The European project sits astride these periods as a site of transformation in the sovereignty of states. Contemporary nations have largely lost the capacity to retain sovereignty over matters of national importance, be they nuclear proliferation, climate change, mass migration, multiculturalism, or the pace and cruelties of global capitalism. It is a problem of necessity, the structural demands on governance in a globalised world. But it also is a matter of contingency and of choosing to accept the moral imperatives that come from the many arbitrary exclusions and dividing lines of privilege derived merely from the status of national citizenship.²¹ This, too, is a lesson of globalization.

Europe's troubles thereby intersect pressingly with broader debates concerning the provenance and political dimensions of international human rights.²² The question of post-national solidarity, in a sense, is another way of posing the questions explored decades ago by Arendt herself: how can supranational claims to human rights be implemented and lived meaningfully by historically-constituted political communities? That is, how can the idea of human rights be more responsive to her crucial insight: 'We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights'?²³ As Seyla Benhabib reads Arendt's reflections, the task of a democratic community, constituted self-consciously as democratic with the full emancipatory meaning of the term, requires an 'ongoing process of transformation and reflexive experimentation with collective identity'.²⁴ I consider this focus on the mutual imbrication of civil and human rights, 'the right to have rights', the complex process by which the human being can live fully only in the light of concrete political institutions,²⁵ to be the charge of the European Union and of its law.

20 Jürgen Habermas argues that the achievements of the modern period, when 'the phenomena of the territorial state, the nation, and a popular economy constituted within national borders formed a historical constellation in which the democratic process assumed a more or less convincing institutional form', has now been disrupted by 'developments summarized under the term "globalization"'. Jürgen Habermas, 'The Postnational Constellation and the Future of Democracy' in J Habermas, *The Postnational Constellation: Political Essays* (M Pensky trans, Cambridge, MA: Massachusetts Institute of Technology Press 2001) 58-112, 61, 62. The new 'postnational constellation' now puts into question whether 'the unified citizens of a democratic community are able to shape their own social environment and can develop the capacity for action necessary for such interventions to succeed'. *ibid* 61.

21 See generally Joseph Carens, 'Aliens and citizens: the case for open borders' (1987) 49(2) *Review of Politics* 251-73; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press 2009); Stan van Hooff, *Cosmopolitanism: A Philosophy for Global Ethics* (Montreal: McGill/Queen's University Press 2009) 5 (rejecting 'all forms of discrimination that arise from the victim's being of a different nationality, ethnicity, religion, language, race, or any other form of identity that is used to classify people into discrete groups').

22 See, eg, Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University 2010).

23 Arendt, *The Origins of Totalitarianism* (n 19) ch 9; Seyla Benhabib, 'Citizens, Aliens, and Residents in a Changing World: Political Membership in a Global Era' (1999) 66(3) *Social Research* 709-44; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge, UK: Cambridge University Press 2004) 49ff. See also Frank Michelman, 'Parsing "A Right to Have Rights"' (1996) 3(2) *Constellations* 200.

24 Benhabib, *The Rights of Others* (n 23) 64.

25 See, eg, Étienne Balibar, '(De)Constructing the Human as Human Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy' (2007) 74(3) *Social Research* 727.

Already imagined in the immediate post-war period,²⁶ European supranationalism sought to tame and reorient the sovereign will of the nation-state beneath the rule of law.²⁷ It aimed to restore protections of basic individual rights in ways the nation-state – all too compromised by its homogenizing ethnic consciousness – was proven unprepared to do. And its chosen means were to expand the structure of constitutional law to a higher level beyond the state: to correct for ‘the constitutional limits of national political communities’²⁸ by enforcing legal obligation to non-nationals through the rule of supranational law. Constraining sovereignty would entail a transformation not just in the relation of peoples to one another but in the very meaning of sovereign authority, as well – what Étienne Balibar calls a ‘radical recasting of the relations between people and sovereignty, citizenship and community’.²⁹ European supranationalism would inaugurate a new paradigm of democratic legal thought and a new time of law’s rule.

What the European Union promises – as a defined, if flawed attempt³⁰ – is to fashion political forms able to connect levels of democratic participation and social solidarity with those new supranational ties of mutual concern. This task is delicate, and it poses the particular challenge of a post-national constitutional structure, a theory of how the modern constitutionalism of national democratic states begins on the path of supranational integration. Its dangers lie in navigating the fine and difficult line between ‘post-national membership’ and what becomes simply a ‘devaluation of citizenship’³¹ – and doing

-
- 26 See, eg, Jean Monnet, ‘Speech to the Common Assembly of the ECSC, Strasbourg, 12 January 1953’ in Jean Monnet, *The United States of Europe Has Begun: The European Coal and Steel Community Speeches and Addresses 1952-1954* (Pans 1955, Archive of European Integration, University of Pittsburg). Some even predated the war’s conclusion; see Altiero Spinelli and Ernesto Rossi, ‘The Manifesto of Ventotene for a Free and United Europe’ (1941).
- 27 See, eg, David Edward, ‘Nations, states, people and commerce’ 1992 Napier Memorial Lecture, reprinted in G Prince (ed), *A Window on Europe* (Edinburgh Canongate 1993).
- 28 Miguel Poiars Maduro, ‘Sovereignty in Europe: The European Court of Justice and the creation of a European political community’ in M Volcansek & J Stack, Jr (eds), *Courts Crossing Borders Blurring the Lines of Sovereignty* (Durham, NN: Carolina Academic Press 2005) 57.
- 29 Étienne Balibar, *We, the People of Europe?* (Princeton: Princeton University Press 2003) 110.
- 30 In this regard, I consider the EU not as an exemplary model of post-national legal order but rather, precisely due to its defined institutional development, as a site of instructive failures and points of contradiction. My approach takes its cue from post-colonial studies in revealing European integration as a political, partial, and contested project: acknowledging economic and political inequalities between core and peripheral states, especially eastern post-socialist countries; colonial pasts continuing to structure economic relationships across the Mediterranean in the form of ‘Eurafrica’; historical understandings equating Europe with, first, Christendom and, later, secularization; and the broader questioning of culture’s boundedness and homogeneity. See Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London and New York: Bloomsbury Publishing 2014); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press 2000). While I hope to inform the future of the European project, this necessarily means opening Europe – as part of its own political self-understanding – to what it presently displaces or denies. Indeed, greater responsiveness to the charges of historical responsibility and transnational norm-internalization connects European politics to the global project of cosmopolitanism. And it offers considerations to revitalize the philosophy and institutions of a stalled movement for international human rights in a pluralistic world.
- 31 Compare Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press 1994); David Jacobson, *Rights Across Borders: Immigration and the*

so without producing relations of exclusion and domination anew. One must address the problem of political community, as Havel said, with an awareness of one's responsibility to the rest of the world. Is it possible to rethink forms of solidarity, constitutional law, and sovereignty, without recourse either to the old abstractions that have failed to realize democratic rights anew or to the old concrete ties that have proven violent in their exclusions?

This unstable possibility – expectant yet precarious – is the central conceptual crisis around which turn the EU's many concrete political and social failures: the sustainability and justice of Greece's imposed austerity,³² the unimpeded rise of 'autocratic legalism' in Hungary and Poland,³³ the rise of right-wing populism across the continent, the drowning of thousands of refugees in their passage across the Mediterranean Sea,³⁴ and the affirmative referendum decision in the United Kingdom to leave the EU.³⁵

Decline of Citizenship (Baltimore: Johns Hopkins University Press 1996) 9; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books 1983) ch 2; Peter H Schuck and Rogers M Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (New Haven: Yale University Press 1985).

- 32 The ongoing sovereign debt crisis in Greece posed the question to Europeans whether they would consider Greeks first and foremost market participants who had broken their contract within the single currency and single market, or whether they were instead also fellow citizens who deserved a basic respect for their own democratic institutions and social fabric; whether possible alternatives to the ordoliberal hard line of market liberalization and fiscal consolidation might have been tested, or executive intergovernmentalism and technocratic governance nevertheless would hold sway. See Adam Tooze, 'A Modern Greek Tragedy' *New York Review of Books*, March 8, 2018, <http://www.nybooks.com/articles/2018/03/08/yanis-varoufakis-modern-greek-tragedy>.
- 33 See, eg, Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2013) 23 *Journal Of Democracy* 138-46; Kim Lane Scheppele, 'Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight)', lecture at the University of Toronto, November 2016, http://www.law.utoronto.ca/utfl_file/count/documents/events/wright-scheppele2016.pdf. Governing parties in Hungary and Poland have to varying degrees captured state institutions and entrenched exclusionary, xenophobic views of nationhood and peoplehood. These anti-liberal developments have been countered by European institutions with only weak challenges, which have failed to attend to the deeper historical and social frustrations fueling populism in the region and in turn have implicated the Union's own democratic and legal deficits. See Joseph HH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in *Reinforcing Rule of Law Oversight in the European Union* (C Closa and D Kochenov eds, Cambridge, UK: Cambridge University Press 2016) 313.
- 34 Tens of thousands have died since the early 2000s attempting the crossing from North Africa and the Middle East. The 'Missing Migrants' Project' of the International Organization of Migration submits an estimate of '46,000 fatalities since 2000' in what it calls an 'epidemic of crime and victimization'. Missing Migrants, 'Latest Global Figures', available at: <http://missingmigrants.iom.int/latest-global-figures>, accessed 15 December 2017. Many more have been subject to unlawful detention, mistreatment, and *refoulement*. Attempts to more fairly share across Member States the responsibilities of securing the right of asylum have failed, indeed, have been met with mutual resentment and mistrust. See generally Tamara Last and Thomas Spijkerboer, 'Tracking Deaths in the Mediterranean' in T Brian and F Laczko (eds), *Fatal Journeys. Tracking Lives Lost During Migration* (Geneva: International Organization for Migration 2014) 85-106; Jorgen Carling, 'Migration control and migrant fatalities at the Spanish-African Borders' (2007) 41(2) *International Migration Review* 316-343; Stefanie Grant, 'Recording and identifying European frontier deaths' (2011) 13(2) *European Journal of Migration and Law* 135-156; European Union Agency for Fundamental Rights (FRA), *Fundamental Rights at Europe's Southern Sea Borders* (Luxembourg/Vienna: FRA 2013).

As disparate as these failings are in their underlying causes and severities, they place common scrutiny on the adequacy of European law in fulfilling its transformational ambitions.³⁶ They question with urgency whether national sovereignty has indeed been challenged and redefined, whether post-national solidarity has been internalized as a matter of political commitment.

In particular, they question whether the dominant jurisprudential tools—focusing as they do on the effectiveness of governance and the functional stability of Union law³⁷—are sufficiently responsive to law’s normative value as the expression of political legitimacy. These tools, no doubt, have been revolutionary in their effect over the past half-century.³⁸ The jurisprudence of courts transformed the character of Europe from an international organization like many others into a supranational community *sui generis* whose pronouncements assumed a new and direct supremacy over national law. This new period extended supranational law in truly extraordinary fashion well beyond what founding states had explicitly intended in ratifying the treaties.

But this effectiveness of law, this same success, was also the source of its failure. Law’s technocratic and functionalist virtues today seem ill-equipped to generate or reflect the discursive resources, institutional structures, and public philosophies of post-national political life. They instead

-
- 35 The decision drew, at least in part, on the inability of politicians and citizens alike to find persuasive justification for enduring commitment to the Union—of meaning and solidarity that would respond to the disenchantment and anti-establishment feeling. The UK had always forged its own path within the European Union’s institutions, had always regarded its own sovereignty in ways more guarded than its counterparts on the continent. But it was the particular context of contemporary constitutional, political, social, and economic malaise that finally aligned to put this issue of EU membership up to a referendum vote and, then, to push the nation out. Some on the left, notably Richard Tuck, welcomed the decision as the only viable way to save not only British social democracy but also any hope for reviving progressive leftist coalitions in Europe, more broadly. See Richard Tuck, ‘The Left Case for Brexit’ *Dissent*, June 6, 2016, https://www.dissentmagazine.org/online_articles/left-case-brexit. But, it must be said, even these progressive arguments flirted uncertainly with a return to nativism, protectionism, and blindness to the wartime and colonial histories marring the welfare achievements of the national state. Katrina Forrester, shortly after the decision, expressed this concern elegantly and movingly: ‘I did not want to legitimize even an ounce of the racism at the heart of Leave’s campaign. I think a Lexit was an illusion, and not because I am “anti-utopian”: I have a lot of sympathy with those who romanticize a lost British welfare state, but their dream erases too much national, and all colonial, history. The British welfare state was not simply a radical, leftist project but a *welfare* state, an imperial state, a conservative and patriarchal state where brown and black people were not welcome. We should be fighting for something better than the past, and the EU is not what stood between us and that better thing’. Katrina Forrester in ‘What Now? After Brexit’ *n+1*, June 24, 2016, <https://nplusonemag.com/online-only/online-only/what-now>.
- 36 It is worthwhile to note that these crises are connected not only insofar as they reflect a common inadequacy in the European legal order, but also by the political responses they provoke and unleash upon one another. Remember, as Adam Tooze writes, that ‘[t]he Alternative für Deutschland was founded in the spring of 2013 not as a party of anti-immigrant resentment. The “alternative” it purported to offer was an escape from Merkel’s endless compromises over the Eurozone’. Tooze, ‘A Modern Greek Tragedy’ (n 32).
- 37 Dieter Grimm, ‘Europe’s Legitimacy Problem and the Courts’ in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (Cambridge, UK: Cambridge University Press 2016) 241–65 (critiquing the anti-democratic consequences of the doctrines of *effet utile* and proportionality analysis in European Union adjudication).
- 38 See generally Joseph HH Weiler, ‘A Quiet Revolution’ (1994) 26 *Comparative Political Studies* 510; Joseph HH Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403.

serve to supplant and conceal the need for citizens' judgment about the adequacy of the ends of that effectiveness, and about the possibility of other means that may be better suited. It is the same positivistic fallacy Husserl and Havel warned of, and it has enabled the gradual erosion of Europe as an ideal of political community, notwithstanding whatever economic gains market integration has brought. Whether post-national constitutionalism in the EU can yet prove to transform sovereignty, belonging, and community remains an open question. On this occasion, at this turbulent point in the history of the European Union's development, it therefore seems incumbent to revisit the nature of the European constitutional order—and to question the viability of the explanatory and normative theories that elaborate the order's basic commitments.

Here, the time of law becomes, jurisprudentially but also politically and culturally, both an analytic frame for diagnosis and a normative value. The time of law names a period with negative connotation: a time of juristocracy, an era inaugurated by a kind of legal order that is newly autonomous but alienating in its autonomy, for its own technical efficacy comes at the cost of the political autonomy of citizens. But the time of law also names a prescription, one that would sharpen law's transformative edge to move beyond this kind of legal ordering. As I shall argue, it would do so by emphasizing the *time* of law: a time-sensitive, narrative understanding of law and politics.

Jacques Derrida called the crisis of contemporary Europe a 'crisis of memory'.³⁹ Memory and temporality were critical, in his view, to disentangling Europe's caustic dual inheritance of *capitale* (understood as cultural superiority) and *capital* (as economic domination). Today, Derrida finds cultural discourse overwhelmed by Eurocentrism, the desire to create a 'cultural identity around a capital that is all the more powerful for being mobile'.⁴⁰ In other words, *capitale* is tethered to an ethos of *capital*—the hubristic 'capital point', the 'edge of progress',⁴¹ the homogenizing force of economic and administrative decision-making. In our terms, the economistic logic of functionalism has consumed the normative order of democratic citizenship.

What must replace this cultural discourse of Eurocentrism, Derrida writes, is an alternative heading, an affirmation of the other and of pluralism and of new possibility, another time of law. The new time of law, now understood in its affirmative sense, would be 'this act of memory that consists in betraying a certain order of capital in order to be faithful to the other heading'.⁴² This European law would name something else; it would relate to something not presently contained within the law read as it is—formalistically, functionalistically, in view of its effectiveness.

But systematic analyses of this sort of dislocation of political identity across time have been notably absent from recent theories of post-national politics and constitutional law. This is regrettable, as law's ability to marshal precisely this register of time—with reference to founding moments and mythical national histories—has been central to its role in suturing communal solidarity and a salient dimension of national legal culture. As such, a reevaluation of law's temporality seems essential to transfiguring the conceptions of sovereignty and state power in a manner commensurate with the hopes of post-national constitutionalism.

39 Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (PA Brault and M Naas trans, Bloomington: Indiana University Press 1992) 29-32.

40 *ibid* 47.

41 *ibid* 33.

42 *ibid* 31.

In light of the dimension of time, one can more fully comprehend why it is that contemporary supranational juridical innovations continue to inadvertently re-inscribe the exclusionary relations they seek to overturn. Europe's present time of law has not fully grasped the time of law. And absent this dimension of time, law threatens to trap citizens, to imprison them in what WH Auden called 'the present's unopened sorrow, whose limits are what we are'.⁴³ It deprives citizens a public agency to imagine a future in which they would be at home, transposed as it might be from the national spaces that once might have felt familiar.

The arguments pursued in this work are developed with particular awareness of this deficit in the European constitutional debate, and are premised on the idea that European law, temporally conceived, might yet sustain a more desirable form of supranationalism. It would support a polity whose transformative intentions are more intelligible to its citizens and more responsive to their agency. It would structure a public life whose ties of mutual concern are reflexively aware of their limitations. And it would thereby seek relations with those presently excluded on terms that are not merely one's own but that are open for the other to author and to share.

I develop this new form of post-national constitutionalism as a distinct theory of civic solidarity, of constitutional law and adjudication, and of sovereign authority. And while this study addresses the contemporary European context, its arguments also aim to have more general application not only to other transnational legal systems but to constitutional relations within national states as well. I shall begin, in the following section, by discussing how the relations of constitutional law and citizenship have evolved historically in the European project, as a way to discover in greater detail its common structural deficits thus far and the corresponding possibilities for reform.

43 WH Auden, 'In Time of War, Sonnet XX' in *Selected Poems* (E Mendelson ed, New York: Vintage International 1979) 74.