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Cosmopolitan law and time: Toward a theory of constitutionalism and solidarity in transition

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Abstract: This article seeks to confront the contemporary condition in which cosmopolitan law – meant to resonate as something citizens across borders author and live together – instead is increasingly a source of detachment, confusion, and alienation. Taking the European Union's twin crises of democratic legitimacy and social solidarity as its starting point, the article offers a critique of existing approaches to supranational constitutionalism that are insufficiently responsive to this disenchantment. The article's purpose, in turn, is to present 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 article's central claim is that time – as a seldom-examined, yet essential dimension of law – is closely linked to law's cosmopolitan potential and, concurrently, to the motivational resources for cosmopolitan solidarity. It is through a sensitivity to time – our awareness of the past passing into the present in anticipation of a future – that citizens can meaningfully hold together cosmopolitan law's dual, ostensibly divergent hopes: shared commitment and self-decentring plurality. Drawing on Seyla Benhabib's 'democratic iterations' and its roots in the work of Jacques Derrida and Robert Cover, the article elaborates the following two concepts: 'cosmopolitan promise-making', a diachronic form of cosmopolitan political agency; and 'cosmopolitan legal narrative', a set of plural, evolving constitutional interpretations open to mutual engagement over time. These concepts, in temporalizing our understanding of political identity and constitutional law, together serve to underwrite a cosmopolitan legal order without also thinning solidarity's social and democratic foundations. The article concludes with a critique of the contemporary role of European courts and a concrete vision for the cosmopolitan development of EU jurisprudence. Reinterpreting Article 4(2) TEU as the right to constitutional narrative, the article advances new modalities and normative aspirations for constitutional interpretation beyond the nation-state.

Keywords: constitutional law; cosmopolitanism; democratic iterations; European Union; time

> Never shall we pass from the closed society to the open society, from the city to humanity, by any mere broadening out.
>
> Henri Bergson, *The Two Sources of Morality and Religion*

> This is the radical question of justice, too: not, 'How much do I get?' but 'Who are we to each other?' What place is there for me in your universe, or for you in mine? Upon what understandings, giving rise to what expectations, do we talk? What world, what relations do we make together? These are the questions we ask our law to answer.
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> James Boyd White, 'Translation, Interpretation, and Law'

Introduction

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] For Havel, the efficient integration 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'.[2] Havel's hope was to begin to square the hyper-rationalized, legalistic 'machinery' of EU integration with its broader social dimensions: normative, political, cultural, symbolic, and spiritual. 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.[3] It is a task that continues to confront Europeans today. While it may seem a 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

[1] Václav Havel, Speech in the European Parliament, Strasbourg, 8 March 1994, <http://www.vaclavhavel.cz/showtrans.php?cat=projevy&val=221_aj_projevy.html&typ=HTML>, accessed 12 January 2015.

[2] Ibid.

[3] Ibid. For an important account of law's expressive symbolism, a broader framing to which I am very much indebted, see J Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Ashgate, Aldershot, 2007).

integration's current juridical path is a deeper emotional resonance, a sense of belonging in common and of common purpose.

As Havel long knew, while modern political community partially inheres in legality and in the provision of rights under the rule of law, communal legitimacy also entails distinctly social and ethical responsibilities. In other words, a European polity would require its own form of supranational, cosmopolitan solidarity: a concerted willingness of fellow citizens to deepen and enlarge, across previously drawn borders and divisions, those shared responsibilities for one another that are demanded by any meaningful project of communal self-legislation. It is this form of solidarity that is today in the European Union fragile and confused. Europe's 'functional' constitutional structure[4] has overstepped and increasingly detached itself from the normative, social, and symbolic commitments that formerly marked national constitutional democracies. In the formalist jurisprudence of the European Court of Justice and executive-led intergovernmental negotiations, European law engages citizens not as authors of the law of which they are ultimately subjects but rather as the juridified objects of a new, if increasingly harmonized, regulatory apparatus.[5] In the end, we might say that Europe confronts a crisis in the deeper solidaristic relation of its citizens to law. Indeed, the EU's contemporary legitimation deficits are deeply 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.[6] 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.[7]

By way of illustrating the limitations of neo-functionalism and intergovernmentalism in European integration, consider the approach of the European Court of Justice to broadening national social welfare

[4] See, eg, T Isiksel, 'On Europe's functional constitutionalism: towards a constitutional theory of specialized international regimes' (2012) 19(1) *Constellations* 102.

[5] 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'. H Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT Press, Cambridge, MA, 2005) 172.

[6] See Z Bauman, *Liquid Times: Living in an Age of Uncertainty* (Polity Press, Cambridge, 2006).

[7] I draw in parts of this introductory section on my, 'The Spirit and Task of Democratic Cosmopolitanism: European Political Identity at the Limits of Transnational Law' (2012) 8 *Croatian Yearbook of Law and Policy* 176–7.

provisions to non-nationals. In its landmark 1998 *Decker* decision, the ECJ subjected national healthcare to the logic of the internal market, ruling that national pre-authorization procedures for medical treatment abroad violated the principle of free movement of services.[8] Member States, citing the delicate finances behind social welfare schemes, vigorously opposed such rulings and engaged in fiery debates that threatened to weaken public support for supranational social responsibility.[9] National systems that previously nurtured a polity's commitment to communal assistance were instead reframed as sites of struggle among European consumers. From across the border, national systems appeared parsimonious, uncaring, and defensively postured. In short, the Court defended supranational individual rights but at the cost of social citizenship, as the solidarity inaugurated by European membership was afforded no determinate or persuasive foundation. Indeed, despite the laudable intent of these and similar rulings, their lamentable result is to commodify social solidarity as the market provision of consumer goods.[10] This is a sharp, particular example of the 'thinning' of the supranational imaginary; but its logic is broader and reinforces the dim contemporary suspicion that solidarity can either be robust or it can be cosmopolitan, but it cannot be both.[11]

Given the need for social solidarity within supranational law, it is all the more regrettable that cosmopolitan solidarity as a concept and ideal has received comparatively little or disappointingly shallow treatment in politics and in philosophy.[12] A growing literature in comparative constitutional law, political theory, and European law advances cosmopolitan political commitments, legal/constitutional pluralism, disaggregated sovereignties, and civic nationalist identities as conceptual remedies for the

[8] See Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831. See also Case C-158/96, *Kohll v Union des caisses de maladie* [1998] ECR I-1931.

[9] See J Gobrecht, 'National Reactions to Kohll and Decker' (1999) 5(1) *Eurohealth* 17; see generally Willy Palm *et al.*, 'Implications of recent jurisprudence on the co-ordination of health care protection systems' (Association Internationale de la Mutualité, Brussels, 2000).

[10] See C Newdick, 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *Common Market Law Review* 1645.

[11] See, eg, Case C-438/05, *The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line ABP & Oü Viking Line Eesti* [2007] ECR I-10779; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767; Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.

[12] Brunkhorst's work, it must be noted, is an important exception. See Brunkhorst (n 5). Nevertheless, while his critiques of European integration are compelling, Brunkhorst's articulation of a thicker strand of solidaristic thinking in the end departs little from a Habermasian discourse theory of law and constitutional patriotism.

age of post-sovereignty.[13] I take Jürgen Habermas's work on 'constitutional patriotism' (*Verfassungspatriotismus*)[14] to be emblematic of such approaches, which seek to disassemble and reassemble core functions of the state on supranational levels and to reorient communal bonds toward principles of human rights under transnational law.

While attachment and political affect are obliquely mentioned in these accounts, they are deflected as undesirable remnants of parochial nationalisms to be tamed by the rule of law or vaguely cabined as distinct from and secondary to democratic legal procedures. Rarely is solidarity explicitly thematized as a fundamental element of supranational political citizenship and, when it is, it is largely subsumed under 'thin' universalistic (liberal) principles or rationalized as dialogic respect.[15] In these accounts, the coordinating powers of law are assumed to recreate *themselves*, quite apart from the deeper motivating reservoirs of culture, symbolic memory, and affect on which legal orders nevertheless in reality depend. Habermas's recent lectures on the European crisis, for example, explicitly recognize the salience of political solidarity among European nations but develop hardly any theoretical account for how such solidarity might emerge from current conditions.[16] In the past, Habermas has expressed a nebulous expectation

[13] See generally S Benhabib, *Dignity in Adversity. Human Rights in Troubled Times* (Polity Press, Cambridge, 2011); S Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (2009) 103(4) *American Political Science Review* 691; J Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos' (1999) 14(3) *International Sociology* 245; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; see also M Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351; M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262; A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397.

[14] See J Habermas, 'Political Culture in Germany since 1968' in *The New Conservatism: Cultural Criticism and the Historians' Debate* (SW Nicholsen ed and trans, MIT Press, Cambridge, MA, 1989); J Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 1; J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' (1995) 1 *European Law Journal* 303; J Habermas, *The Inclusion of the Other: Studies in Political Theory* (C Cronin and P de Greiff eds, MIT Press, Cambridge, MA, 1998); J Habermas, 'The Postnational Constellation and the Future of Democracy' in J Habermas, *The Postnational Constellation: Political Essays* (M Pensky trans, MIT Press, Cambridge, MA, 2001). See generally JW Müller, *Constitutional Patriotism* (Princeton University Press, Princeton, NJ, 2007).

[15] See, eg, P Markell, 'Making Affect Safe for Democracy?: On "Constitutional Patriotism"' (2000) 28(1) *Political Theory* 39.

[16] J Habermas, 'Democracy, Solidarity and the European Crisis', Lecture delivered at KU Leuven, 26 April 2013, <http://www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/democracy-solidarity-and-the-european-crisis>, accessed 12 January 2015.

that the lifeworld meet his theory 'halfway' (*Entgegenkommen*), that the forms of attachment he envisions as systemically possible be met with appropriate, corresponding movements emerging from civil society.[17] Similarly, perhaps the most comprehensive vision of cosmopolitan constitutionalism – offered recently by Mattias Kumm – outlines how domestic legal orders already comprise certain minimal constitutionalized cosmopolitan commitments to transnational norms but dedicates comparatively limited discussion to how the deeper socio-political imaginary of the nation-state – through which citizens continue to live out their basic political relationships – might be transformed alongside positive law.[18]

If these visions are normatively compelling, they are therefore also broadly unresponsive to existing political loyalties, psychological commitments, and the violent and exclusive transitions inherent in any cosmopolitan legal projection. What the Habermasian account continues to leave unanswered is why people should be interested, in the first place, in living out his vision. Without pre-existing commitments to stir them – commitments to values, perceived commitments to one another – it remains unclear how the 'reassembling' project begins.[19] In liquid times, as people strain and struggle just to make their private lives minimally stable, what hope is there, under conditions like these, for the kind of self-generating solidarity on which Habermas seems to rely?

The basic error, in other words, is to take as already accomplished precisely what must be actively grounded and recreated in the supranational solidaristic relationship; indeed, to not worry enough that a great deal might be lost in the course of an all-too-quick constitutional transformation. Specifically, we might identify two concurrent deficiencies in these accounts: they neglect the processes of transition; and they undervalue or collapse the richer normative and social dimensions of constitutional law.[20]

[17] See J Habermas, 'The Postnational Constellation and the Future of Democracy' (n 14).

[18] M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009).

[19] Sharon Krause has interpreted this 'motivational deficit' in terms of the too sharp division in Habermas's work between the moral and the ethical. See S Krause, 'Desiring Justice: Motivation and Justification in Rawls and Habermas' (2005) 4(4) *Contemporary Political Theory* 363.

[20] Craig Calhoun helpfully distinguishes between *constitution as legal framework* and *constitution as the creation of concrete social relationships*, each of which is necessary for a fully developed constitutional-democratic system. C Calhoun, 'Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere' (2002) 14(1) *Public Culture* 152–3.

Civic affiliation is at once a matter of formal democratic legitimation procedures that might be reconstructed analytically by political theorists, but also a question of the much deeper social *habitus* of shared normative commitments (on which, it should be said, those same legitimation procedures ultimately depend). What the theory of constitutional patriotism thereby lacks is an adequate accounting of the relation of determinate means to proscribed ends in the context of supranational constitutional law and politics. Not only are the ends (the European structures of law) largely posited as static points along which simply to align political action but the ongoing relationship between such political action and those ends – that is, how cosmopolitan law motivates, undermines, and depends upon certain forms of politics – is not adequately considered. Put simply, the processes are insufficiently temporalized.

My own hope, therefore, is to revive (1) a certain understanding of the deeper demands of cosmopolitan solidarity in Europe (how European nationals might embrace the political commitments of a new cosmopolitan community) and (2) a vision of law that is responsive to such solidaristic demands (how we might conceive of law in ways distinct from the current formalism of European law). What I wish to emphasize is that cosmopolitan theory ought attend to the *process* of how we become European or cosmopolitan citizens, and not just project the principles to which we might agree once we already are such citizens. It is through such a process that the European project can preserve its cosmopolitan promise.

To consider the European project aligned with cosmopolitan solidarity is thereby also to deny it as merely a state-building enterprise, with an EU super-state – its borders redrawn but ever more strongly reinforced – as its *telos*. Rather, the European Union is most promisingly conceived and most responsibly evaluated as an effort to create robust ties of supranational commitment, of arrangements that democratize those symbolic and political spaces previously passable only to those with nationalist bonds.[21] To be clear, this is not to presume the EU a realized or self-sufficient cosmopolitan space; on the contrary, it is to focus European efforts on precisely that continual process of interrogating political obligation beyond the nation-state and, indeed, beyond each subsequent delineation. As Jacques Derrida believed, the consciousness of Europe is nothing less than the possibility of thinking Europe anew, of the exposure of its identity to the 'nonegocentric'. He asks, '[W]hat if Europe were this: the opening onto a history for which the changing of the heading […] is experienced as always possible? An opening and a non-exclusion for which Europe would

[21] See, eg, J Derrida and J Habermas, 'February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Heart of Europe' (2003) 10 *Constellations* 291.

in some way be responsible?'[22] As such, the European Union is only one instantiation, a partial realization of cosmopolitan politics; but a rather developed one, in which state sovereignty is today openly challenged in the name of supranational norms, and citizenship admits concrete concern for the world and for humanity.

The lingering questions remain, however, in what ways can this politics be rendered productive and thoughtful; in what languages, in what terminologies, and through what institutions can cosmopolitanism in Europe both continually expose identities to otherness and yet simultaneously nurture their place in the world, rendering them coherent and sheltered amidst the change. Which philosophical and legal perspectives might restore law's social integrative ambitions in this cosmopolitan, supranational frame? We seek not only cosmopolitan justice for those across and beyond national boundaries, but also an account of how we might retain our sense of civic belonging as we work for such justice. Such an account is indispensible if cosmopolitanism is to remain viable as a political undertaking with a future. Another way of expressing this is simply to emphasize the relationship between the dual dilemmas discussed above: the contemporary fear of alienation, of being left behind as the world changes, and the hope for a meaningful, more genuinely democratic political community. This article is meant to respond to such fears and such hopes; it is structured as follows.

Part I introduces what I consider the most promising theoretical intervention to ameliorate the preceding deficits in Habermas's thought: Seyla Benhabib's concept of 'democratic iterations'. In framing our fundamental task as one of 'how to trust again in liquid times', I present a distinctly temporal, diachronic reading of Benhabib's approach. My central claim throughout is that the register of time enables us to hold in equipoise the two hopes of cosmopolitan law apparently pulling in opposite directions (shared belonging, mutual commitment, and solidarity, on the one hand; and the self-decentring pull of plurality and diversity, on the other). Time allows us to understand how solidarity can function, can be perceived as meaningful, precisely *because of* and not despite the plural character of political life. Attending to the dimension of time can thus help fortify our currently brittle cosmopolitan commitments and disclose new possibilities for supranational solidarity.

Utilizing two concepts important to Benhabib's exposition of democratic iterations, the subsequent parts extend this temporal thread along two parallel lines of thought: philosophical and legal-theoretical. Drawing on

[22] J Derrida, *The Other Heading: Reflections on Today's Europe* (PA Brault and M Naas trans, Indiana University Press, Bloomington, IN, 1992) 17.

Jacques Derrida's 'iterability' and a recent powerful interpretation given by Martin Hägglund, Part II develops a diachronic form of cosmopolitan political agency that I term *cosmopolitan promise-making*. Part III, in turn, uses Robert Cover's 'jurisgenerativity' to reread supranational law as *cosmopolitan legal narrative*: a set of plural, complex, and evolving constitutional commitments, a hermeneutic well for enlarging solidaristic self-understanding over time. Together, cosmopolitan promise-making and cosmopolitan legal narrative constitute core theoretical concepts to orient and inspire richer forms of solidarity beyond the nation-state.

In light of these theoretical interventions, Part IV concludes with a critique of the contemporary role of European courts and a concrete vision for the prospective cosmopolitan development of EU jurisprudence. Specifically, I detail how the European Union's Article 4(2) TEU can be reformulated: not as a right to national identity, statically conceived, but as the right to (an always temporalized) constitutional narrative. By illustrating existing possibilities for jurisgenerative iterations, I hope to narrow what often appears an insurmountable normative and practical distance between democratic politics, cosmopolitan solidarity, and the domain of law.

I. Democratic iterations and the movement of political meaning

In her work on cosmopolitan inclusion and democratic legitimacy, Seyla Benhabib has introduced the concept of 'democratic iterations': 'those complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and repositioned, throughout legal and political institutions, as well as in the associations of civil society'.[23] Democratic iterations is meant to respond to the dual injunction in constitutional democracies to protect human rights, on the one hand, and to preserve sovereign self-determination, on the other. The need for iteration and for alteration arises due to an incongruence in the injunction itself: that is, when law's authority extends to those not yet included fully in the law-making *demos*.[24] Indeed, as I hope to make clear, the paradox of

[23] S Benhabib, *The Rights of Others: Aliens, Citizens and Residents* (Cambridge University Press, Cambridge, 2004) 179. See also ibid 19–24; Benhabib, *Dignity in Adversity* (n 13) 129. See also J Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry' (2006) 115 *Yale Law Journal* 1564.

[24] See S Benhabib, 'Democratic Exclusions and Democratic Iterations: Dilemmas of "Just Membership" and Prospects of Cosmopolitan Federalism' (2007) 6(4) *European Journal of Political Theory* 449.

constitutional democracy is in this way directly related to the motivations for the cosmopolitan project and, with it, for the European Union. Both an enlarged conception of moral responsibility and the growing recognition of vast global externalities have prompted a reappraisal of national borders as critical determinants of citizenship and democratic sovereignty.

In such a confrontation, democratic iterations are conceived as mechanisms for the mediation of 'moral universalism with ethical particularism' and 'legal and political norms with moral ones'.[25] Democratic iterations invoke certain rights in order to reinterpret the reach of their legal meaning, to reinvigorate and enlarge those rights in new contexts of legitimation. They are claims made even (or especially) by those not immediately recognized as full, equal participants within a particular democratically constituted community. Democratic iterations mediate, therefore, 'between a collectivity's constitutional and institutional responsibilities and the context-transcending universal claims of human rights and justice to which such a collectivity is equally committed'.[26] In the European Union, citizens of other European states, third-country nationals, regional courts, and transnational human rights organizations all are brought into the orbit of this process in order to resist the democratic closure of the nation-state, as such. It is to this context that the concept of democratic iterations proves so apposite. National laws are challenged, interpreted, and judged by individuals and institutions spanning national borders. The interpretation of democratic legitimacy can no longer be considered a simply national affair. It is now fully exposed to its 'cosmopolitan moment'.

Much has been written in response to Benhabib's work, focusing on salient questions such as the precise scope of our moral obligations, the normative or empirical nature of 'democratic iterations',[27] the justification of certain exclusions,[28] and the emancipatory realities of the dialectic between universal and particular that Benhabib's theory promises.[29] I do not wish to rehearse such discussions here. Instead, my intention is to offer a shift in theoretical perspective and to open a new line of inquiry into the concept's possible normative reach.

[25] Ibid 451.

[26] Ibid 455.

[27] See R Baubock, 'The Rights of Others and the Boundaries of Democracy' (2007) 6(4) *European Journal of Political Theory* 398; TA Aleinikoff, 'Comments on the Rights of Others' (2007) 6(4) *European Journal of Political Theory* 424.

[28] See Aleinikoff, 'Comments on the Rights of Others' (n 27).

[29] See B Honig, 'New Facts, Old Norms: Response to Benhabib's "Reclaiming Universalism"' in S Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty and Democratic Iterations* (R Post ed, Oxford University Press, Oxford, 2006).

In proposing our fundamental task as one of reviving solidarity in 'liquid times', I wish to read Benhabib's account in an atypical manner: not along the universal/particular axis, as most commentators read it, where universal norms are contextualized by iterative democratic discourses in particular cases; but rather in terms of its potential to generate and regenerate solidarity in contexts of transition. Indeed, the current prominent interpretations often serve to conceal rather than elaborate the ways in which Benhabib's most promising innovation is to articulate a mediation of difference across time, thereby responding to the predicament of 'liquid times' in the appropriate modality. I thus argue for an amplification of the distinctly temporal, diachronic elements of Benhabib's approach: that is, the time-sensitivity of democratic iterations, its recurrent balancing of the continuity/discontinuity of political meanings over time that at once anticipates future solidaristic commitments while doing justice to past identities. Democratic iterations constitute processes that occur not only across space – movements across porous national borders that are the most prominent objects of Benhabib's writing – but also through time, as new interpretations of legal meanings slowly emerge as authoritative. A more precise examination of time, in addition to space, is crucial to this account.[30]

As I will argue, this temporal dimension, made explicit, directly introduces the cosmopolitan, utopian element into democratic politics, even that national politics conducted in quotidian debates by figures who may never feel their own membership to be in doubt. That is to say, even when the spatial boundary is left uncrossed, democratic iterations remain the hallmark of democratic life. Any constitutional democracy – as it exists through time – recreates and redraws the boundaries of its own legal world and, therefore, the character of its democratic legitimacy. A question of birth and death, of coming and going, of contingent events and experiences, the legal contours of the democratic state – however they are conceived (territorially, ethnically, culturally, morally) – always by necessity are

[30] Benhabib herself often uses spatial metaphors or a principally spatial vocabulary in discussing the conceptual contours of democratic iterations. Time is seldom thematized directly in her recent work. For example: '[D]emocratic iterations signal a *space* of interpretation and intervention between transcendent norms and the will of democratic majorities'. Benhabib, 'Democratic Exclusions and Democratic Iterations' (n 24) 455 (emphasis added). However, it should be noted that Benhabib's early, pivotal engagement with critical theory incorporated temporal insights more avidly: for example, one can read her exploration of norm and utopia as in some ways analogous to my emphasis on the proportion of continuity or discontinuity over time. It is this temporal dual movement between the 'politics of fulfillment' and the 'politics of transfiguration' – and its recurrence in each moment of meaningful cosmopolitan politics – that concerns me here. See S Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (Columbia University Press, New York, NY, 1987) 13, 328.

exposed to the flux of time and to change. This, in the end, is the central link between constitutional democracy and the cosmopolitan impulse. The more characteristic and conspicuous instances of democratic iterations (the claims of immigrant groups, for example) belong to this broader process of negotiating political meaning over time.

To emphasize the temporality of democratic iterations is therefore to pinpoint the hermeneutic dimensions of political discourse, as well as the necessary but always only provisional and temporary closure of the political community. Benhabib's work does not resist democratic closure *per se* but rather posits a normative critique of the terms on which any particular closure has been secured.[31] The settled meanings of any community – its 'closure' broadly defined – are always only the beginning for political contestation, through which laws are refined and reformed. What interests me here is the temporal element of such a contestation, and how this temporal element in the end is critical to securing the continuation of critical mediations, as Benhabib imagines them.[32] Indeed, it is, I wish to argue, precisely the process through which democratic iterations occur that makes the original paradox of democratic legitimacy bearable for democratic citizens, that prevents the paradox from being perceived as merely violative of democratic freedom.[33] To foreground the temporality of political discourse is thereby also to protect the 'virtuosity' of the hermeneutic circle, to prevent it from slipping into vicious circularity.

In this regard, an essential element of democratic iterations is its retention of the citizen as both subject and author of the laws, even as those laws must change over time.[34] As Benhabib writes, 'When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of western paternalism often associated with them'.[35] To this I would simply add that the contextualization and resignification of human rights occurs not only as a spatial movement 'from the outside in' (interpretations of international or regional treaties in national politics), or 'from the inside out' (reassessments of regional human rights conceptions in light of national political experience), or even 'from the inside in' (revisions of national laws with reference to competing national norms); but also as a temporal movement from the past in view of the future. Reinterpretations revive the past insofar as they reaffirm it or mark an intelligible break with the past insofar as they reform it; but only

[31] Benhabib, 'Democratic Exclusions and Democratic Iterations' (n 24) 448.
[32] Ibid 451.
[33] See, eg, J Rubenfeld, *Freedom and Time* (Yale University Press, New Haven, CT, 2001).
[34] See Benhabib, 'Democratic Exclusions and Democratic Iterations' (n 24) 454.
[35] Benhabib, *Dignity in Adversity* (n 13) 88.

in such a transition can the law continue to be experienced by citizens *as law*.

This is the context in which we can speak of the recurrent balancing of the continuity/discontinuity in political meanings over time. It is the specific form of this temporal movement that enables citizens to see new laws – new iterations of old legal meanings – to nonetheless remain *their own*. Democratic iterations thereby respect the received self-understandings of identity from which we must inevitably emerge and act collectively, all the while pushing those self-understandings into the future, reconstituting them with reference to the always newly conceived demands of justice. Democratic iterations make possible a polity's critical introspection without forgetting 'the distinct traditions, voices and memories' that inspire communal attachment in the first place.[36] In short, the concept of democratic iterations takes seriously the degree to which political legitimacy and political meaning are intertwined. This kind of reflexivity is therefore not a simple alignment to a 'broader' moral univeralism but rather a process of negotiation and appraisal, an understanding and a 'coming to terms' with difference over time.

My underlying point here is that this time-sensitivity enables us to appreciate more clearly how practices of understanding and commitment proceed and what is at stake in them politically, namely the creation of a felt sense of solidarity among citizens even as polities change. Time-sensitivity – our awareness of the past passing into the present in anticipation of a future – becomes a condition for rebuilding the motivational resources for cosmopolitan practice. If cosmopolitanism asks citizens to renegotiate identities – to let go, so to speak, of their past selves, to loosen their hold on who they were, in order to invite who they might be – then time-sensitivity is inscribed into its very logic. In other words, more closely focusing on the temporal, diachronic register of democratic iterations – that is, casting iteration as a distinctively temporal process – might illuminate what kinds of political subjectivities, sensibilities and orientations would support cosmopolitan justificatory discourses through time. It might illuminate what a cosmopolitan form of solidarity would be, what it would demand of us, and how it would support the discourse of international human rights, more generally.

Specifically, time-sensitivity brings the theoretical frame into closer contact with thinkers who inspired the concept of democratic iterations, in the first place: Jacques Derrida and Robert Cover. Derrida's 'iterability'[37]

[36] Benhabib, 'Democratic Exclusions and Democratic Iterations' (n 24) 447.

[37] J Derrida, 'Signature Event Context' in J Derrida, *Limited, Inc.* (Northwestern University Press, Evanston, IL, 1988).

and Cover's 'jurisgenerativity'[38] capture the two salient features of the democratic process Benhabib envisions: (a) the reformulation and reinterpretation of established political meanings and (b) the productive reintegration of those new meanings into law. In this way, democratic iterations preserve both the democratic legitimacy and the creative potential of justificatory discourses. It is to an excavation of these two concepts inherited from Derrida and Cover and to their importance to the European cosmopolitan project that I now turn in succession.

II. The cosmopolitan promise: supranational solidarity as temporal trace

The concept of 'iterability' captures, if this can be said, perhaps the critical insight illuminating Derrida's work, and I consider it to lie at the heart of deconstruction as a method and as an idea. Stated simply, iterability refers to that constitutive capacity of signs and meanings to repeat themselves in new contexts and, in so doing, to produce novel interpretations. Repetition occasions revision and (re-)creation. As such, iterability gives expression to how we change over time but also to how a coherent 'we' can be said to endure such change. Iterability identifies two related though ostensibly contradictory movements that ultimately comprise the ontological conditions of life itself. As I noted in the Introduction, these same differential movements generate modernity's difficult hope of cosmopolitan law. I intend in this section to clarify why political meaning has such qualities and then to elaborate the resulting possibilities for cosmopolitan politics. The relation between iteration and cosmopolitan solidarity, I argue, lies in a concept of the *cosmopolitan promise*, a form of political agency holding together a plurality of meanings over time.

Though she does not dwell on these points, Benhabib is deeply aware of them. Consider her concise account of norm interpretation and iteration: 'Every act of iteration involves making sense of an authoritative original in a new and different context through interpretation […]. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well'.[39] Here, iteration not only evolves a norm's semantic meaning but also predicates the norm's continued existence. A norm – its meaning, its authoritative presence – only functions insofar as it is iterated, as it sets the proportion of continuity and

[38] R Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4. See also F Michelman, 'Law's Republic' (1988) 97(8) *Yale Law Journal* 1493.

[39] Benhabib, *Another Cosmopolitanism* (n 29) 48.

discontinuity through time. Let us explore more closely why and how this might be the case with reference to Martin Hägglund's recent important work on Derrida[40] and by elaborating two key terms: (1) autoimmunity, and (2) the trace.

Iterability first marks the dislocation of self-identical, self-present meaning. Resisting essentialist identity-logic, Derrida invokes successive images of autoimmunity, vulnerability, and contamination as conditions of temporal life. In *Rogues*, Derrida writes that the root of this autoimmunity 'is located in the very structure of the present and of life'.[41] The nature of the present, as it is lived, requires its own internal division. While we experience and think time only through the present, this present must already be non-identical to itself so that it may yield to time, to *another* present. Without this internal exposure, nothing could ever 'happen' or change, since, as Hägglund notes, 'what is indivisible cannot be altered'.[42] Life, the succession from past to future, in this sense requires that the integrity of any self be breached by time from its inception, exposed to what is not contained within *at* present. For our purposes, autoimmunity identifies the necessary point of discontinuity in being: a gap, an incompleteness, and an opening resulting from the movement of time.

This autoimmune division by time, or temporalization, is thereby also a certain threat, a 'contamination', and a risk. But the point Hägglund stresses is that one cannot avoid this threat if time's succession is to proceed, if one's life is to go on. The threat is therefore not simply a threat; the contamination not simply a contamination: '[t]hreat is chance; chance is threat', Derrida writes.[43] Our vulnerability to threat is the only occasion we have to live on; it is the structural basis of any opportunity to endure as temporal beings. And this is the core provocation of iterability: affirmation is possible only in the form of a temporal repetition that cannot deny its own alteration. It is not simply that meaning can be reinterpreted but that is *must* be reinterpreted in order to exist at all. The endurance of ideas, peoples, identities, or principles is inseparable from their exposure to difference. And the condition of autoimmunity becomes one to 'work through' rather than deny.

However, this 'working through' prompts the question: if contamination and dislocation in fact constitute the course of life, how could any identity endure over time, in the first place? What does it actually mean to live with

[40] See M Hägglund, *Radical Atheism: Derrida and the Time of Life* (Stanford University Press, Stanford, CA, 2008).

[41] J Derrida, *Rogues* (PA Brault and M Naas trans, Stanford University Press, Stanford, CA, 2005) 127.

[42] Hägglund, *Radical Atheism* (n 40) 16.

[43] J Derrida, 'Nietzsche and the Machine' (1994) 7 *Journal of Nietzsche Studies* 56.

continuity in light of and through temporal division? Here, Derrida introduces iterability's second element: the 'trace', an aporetic synthesis of the dividing present through the process of 'spacing' (*espacement*), by which Derrida means both the 'becoming-space of time' and the 'becoming-time of space'.[44] It is this dual spacing character of the trace that, precisely as with 'democratic iterations', specifies the negotiation of continuity and discontinuity over time.

Hägglund characterizes this difficult concept first as a material, spatial 'inscription' that multiplies present meaning in non-coincident moments and 'enables the past to be retained for the future'.[45] This inscription, this 'tracing', consists in those acts of writing, drawing, remembrance, intersubjectivity that 'carry forward' a present always ceasing to be. Such marks evoke a physicality, a materiality of communication.[46] It is through this tracing that we can continue on, not as static remnants but as active re-presentations, re-affirmations, and re-collections, a 'flow' of experience: the 'becoming-space of time'. But, secondly, and crucially, because this inscription is also the 'becoming-time of space', the trace is itself temporalized and, as such, retains its own autoimmunity. Why? Because the inscription is always left for an unpredictable future, in which it must be reinterpreted, in which it might be embraced or neglected, perhaps forgotten. 'A trace', Hägglund explains, 'can only be read after its inscription'.[47] And this temporality admits the same moments of threat and chance. As Derrida puts it, 'Traces thus produce the space of their inscription only by acceding to the period of their erasure'.[48] Taken together, the trace's dual movements of spacing capture the image of how identity can meaningfully engage with its own differential ontology over time, which is to say, its 'iterability'. Hägglund recapitulates, 'If the spatialization of time makes the synthesis possible, the temporalization of space makes it impossible for the synthesis to be grounded in an indivisible presence'.[49]

[44] J Derrida, *Margins of Philosophy* (A Bass trans, University of Chicago Press, Chicago, IL, 1982) 13.

[45] M Hägglund, 'Radical Atheist Materialism: A Critique of Meillassoux' in L Bryant, N Srnicek and G Harman (eds), *The Speculative Turn: Continental Materialism and Realism* (re.press, Melbourne, 2011) 119. Consider, on this note, how we speak everyday of something having 'taken *place*', taken its place in time.

[46] For Derrida, this inscription consists in those visible and invisible 'marks' that unify and distinguish ideas, the 'arche-writing' that is the transmission belt of signification, its parcelling and distribution across time. See J Derrida, *Of Grammatology* (G Spivak trans, reprint edn, Johns Hopkins University Press, Baltimore, MD, 1998) 107–8.

[47] Hägglund, *Radical Atheism* (n 40) 18.

[48] J Derrida, *Writing and Difference* (University of Chicago Press, Chicago, IL, 1978) 226.

[49] Hägglund, *Radical Atheism* (n 40) 18 (emphasis omitted).

Therefore, the manner in which the past is left for the future is not simplistically self-identical; it is not merely a message to be read off, its meaning uncontroversially and plainly understood. Rather, the trace extends meaning temporally in such a way that does not supersede its characteristic openings to difference and to erasure. Indeed, as Benhabib's earlier quotation indicated, even the original authoritative norm is not free from iterability and time; it itself is nothing other than a trace. And, as a trace, it is always generative of new meaning. Far from demanding mere repetition, a norm properly understood inaugurates a deeply creative process of reappraisal and reinterpretation. A received norm in this sense can answer little for us in practical terms on its own; it comes alive only when it is interpreted anew in the contexts in question, interpretations which of course may or may not preserve its original principles, for the simple reason that we can meaningfully inherit no truly 'original', timeless (that is to say, indivisible) principles as such. But what *is* meaningful is the common process that brings together continuity and discontinuity in acts of interpretation, that 'creative appropriation' of norms, inherited identities, histories, and so on. This, I believe, is the spirit behind Benhabib's 'democratic iterations'. And what this spirit indicates, in the end, is that endurance of identity requires its own decentring; the continuity of any meaning its own discontinuity. It is the trace, as co-implication of time and space, that holds both elements in equipoise.

Because the trace in this way preserves (an already temporal) identity over time, it offers a key motivational reservoir for engaging in a distinctly cosmopolitan and solidaristic form of public discourse. By allowing subjects to remain in whatever provisional way themselves – to retain their felt sense of identity even as they open themselves to *non-identity* – the structure of the trace cultivates ongoing participation in decentring discursive exchanges. It opens paths toward mutual understanding within a field of difference or resistance. Hägglund refers to this motivational reservoir in the language of 'survival', that is, our desire for a distinctly temporal existence.[50] It is this desire to live on as mortal that provides a clue to the deeper reasons for cosmopolitan engagement. When we seek to 'go on', we cannot mean to say we seek to endure indefinitely without loss or limitation. The infinite projection of immortality would undermine exactly the ontological structure of iterability elaborated above; in renouncing autoimmunity, it would deny life itself. Rather, our desire for survival is a desire for the continuation of an always mortal, finite being, in danger of being forgotten or abandoned, but where this danger is also the possibility of being remembered and of enduring. It is because survival

[50] Ibid 121–2.

is inseparable from the threat of loss that Derrida writes movingly, '[O]ne does not survive without mourning'.[51] There is no invincibility, no sovereignty. What this reveals is that our desire is temporal. '[N]onassurance,' Hägglund writes, 'belongs to the essence of desire'.[52] Desire itself contains alterity over time; put simply, it is a desire *for the trace*.[53] And thus precisely insofar as the trace rejects boundless self-identity, it remains life-affirming. It provides the only coherent means by which a self can 'live on'. And it is for this reason that iteration and cosmopolitan movement are not experienced as merely violative, even as they admit exposure to self-decentring and to the entry of the other.

This internal link between cosmopolitanism, solidarity, and time is further elucidated in reference to Derrida's aporetic double bind between unconditional and conditional hospitality. In seeking to receive the foreigner justly, two ethical injunctions arise. First, 'absolute, hyperbolical, unconditional hospitality' demands we open borders irrespective to whom and to what ends, that we extend a 'welcome without reserve and calculation'.[54] This ethical radicalism, however, provokes a concurrent fear that we might lose ourselves, that self-exposure will result in the dissolution of the self and, with it, of the possibility of justice, as well. Consequently, Derrida pairs the unconditional with the second obligation attuned to this risk: 'conditioned and conditional' hospitality, those laws and rights enacting concrete responsibilities for concrete communities, thereby enabling those communities to aspire to just demands but to do so intelligibly and coherently *as* communities.[55] In their conditionality, such laws – whether regulating asylum, refugee status, lawful detention, or access to social assistance – are always provisional inscriptions of commitment made in time. They take the form, in other words, of the trace. And, like the trace, conditional hospitality preserves the project of justice only insofar as it remains sufficiently temporalized; that is, responsive to future reappraisal before an 'unconditional exposure to *what happens* – to whatever or whoever comes'.[56] The insight here is not only that justice is always deferred, 'to-come', but also that the means by which we pursue justice are themselves necessarily temporal: negotiations over time of those aporetic demands that, in any one present, exceed a given identity. In this way, just as the trace is the efficient explanatory

[51] J Derrida, *The Politics of Friendship* (G Collins trans, Verso, London, 1997) 13.

[52] Hägglund, *Radical Atheism* (n 40) 115 (emphasis omitted).

[53] See ibid 157.

[54] J Derrida, *Of Hospitality* (R Bowlby trans, Stanford University Press, Stanford, CA, 2000) 135; J Derrida, 'The Principle of Hospitality' (2005) 11(1) *Parallax* 6.

[55] Derrida, *Of Hospitality* (n 54) 77.

[56] Hägglund, *Radical Atheism* (n 40) 29 (emphasis in original).

concept in Hägglund's rereading of deconstruction, so too, I argue, is it the formal core of cosmopolitanism and cosmopolitan solidarity. The trace becomes the structural form of cosmopolitan political agency.

But in what, more specifically, would such a cosmopolitan, temporal form of political agency consist? My main submission is to see a homology between the structure of the trace and the structure of what I term *cosmopolitan promise-making*. The cosmopolitan promise is how we experience intersubjectively the spacing of political time; it is, I argue, the exemplary political trace.

A promise, of course, is not a synchronic exchange but a diachronic opening from the passing present to a future, in which the promise's terms must be reappraised. The promise marks a dual temporal projection: into the future (to uphold our commitments) but always into the past, as well (to remember the meaning of the promise itself). As Hägglund writes, a promise requires an 'inscription of memory in order to be at all'.[57] Promising requires the re-presentation of meaning in time, a fragile (autoimmune) commitment to which we must return, which is our responsibility to recreate. 'A promise must be breakable in order to be a promise'[58]: breakable not only in the sense of being always potentially unfulfilled but also in that the meaning of its terms necessarily changes over time. Like the trace, a promise can be 'read' (fulfilled, broken, affirmed) only after its inception, at times when we are different than we were when the promise was made. A promise's breakability, then, is a condition for the enduring intersubjective space of mutual understanding that a promise can generate. Indeed, this is why I tie the promise to a temporal, sustained *practice* of 'promise-making'. Structurally decentred, the promise extends immediately but coherently beyond itself, calling forth a much broader intersubjective relation.

Consider, for example, Bonnie Honig's reading of Hannah Arendt's work on revolution and founding. While Arendt highlights the reconstitution of authority 'solely by the strength of mutual promises' in her description of the Mayflower Compact,[59] Honig emphasizes that even such promises do not arise from nowhere. Rather, they presuppose a wider, pre-existing community of those willing to promise, those who have 'shared understandings of what a promise is, what it means to make a promise, and what one must do in order for one's performance to be recognizable as a promise'.[60] In other words, for a promise to be intelligible and

[57] Ibid 72.

[58] Ibid 137 (emphasis omitted).

[59] H Arendt, *On Revolution* (Penguin Books, New York, NY, 1963) 167.

[60] B Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic' (1991) 85(1) *American Political Science Review* 103.

meaningful, it cannot rest self-sufficient; it must always refer not only to its own projections but also to the past traditions and self-understandings from which it is made. The promise requires us to *care* for such conditions, to keep them in mind if we are to make sense of things. This same line of thought can be found inscribed, we might note, in the founding texts of civil and human rights, the Declaration of the Rights of Man and Citizen and the Universal Declaration of Human Rights: the former urges its addressees to keep it 'constantly present' to themselves, while the UDHR's principles will be realized only insofar as 'this Declaration [is kept] constantly in mind'.[61]

To be clear, this call cannot imply that the meanings of these traditions or legal texts and their particular communities will remain unchanging. As discussed above, meaning or identity can remain 'constantly present' *only* through its rereading in new contexts of intelligibility; that is, through its reinterpretation with and by others previously not included or imagined. The practice of promise-making thereby grounds a distinct and evolving political intersubjectivity, with its own set of ethical responsibilities to maintain that temporal bridge between past and future, between continuity and discontinuity, between self and other. When we recognize the promise as this temporal projection, we assume a new political posture: an orientation of trust, an openness to difference, an awareness of interconnection and common inheritance, empathy, and a search for mutual understanding and mutual commitment. At heart, we affirm that we live through our traces; we live through our promises.

And it is this same structural feature that constitutes the promise's cosmopolitan character. In temporalizing our view of political meaning and political identity, we begin to negotiate the previously sharp dichotomy between self-decentring and solidarity, between division and unification. Cosmopolitan promise-making illuminates how the ontological structures of iterability and the trace might translate into concrete political subjectivities sustaining cosmopolitan solidarity. By casting the promise as 'trace', we can clarify the ways in which meanings and commitments evolve over time, are exposed to difference and novelty, but also how this change can remain intelligible. Cosmopolitan promise-making in this way conforms to the spirit of 'creative appropriation', that lived, solidaristic *ethos* of democratic iterations. Absent such a mode of promise-making, the cosmopolitan project undermines its own solidaristic vision.

[61] I am indebted to Alexandre Lefebvre for this observation. See A Lefebvre, *Human Rights as a Way of Life: On Bergson's Political Philosophy* (Stanford University Press, Stanford, CA, 2013) 80.

This core potential of cosmopolitan promise-making serves to fill the untheorized gap between cosmopolitanism and constitutional patriotism. In the introductory section, I drew attention to the circularity and solidaristic deficit of constitutional patriotism, that is, to the presumption of will among constitutional patriots to participate in ever-broadening processes justifying common values, principles, and rights. The imperative task was to make sense of cosmopolitan change, to conceive of how we might commit ourselves to such an undertaking. As the preceding section sought to develop, it is through the temporal elements of promise-making that desire, commitment, social trust, and political affect find their distinctly cosmopolitan expression and, concurrently, that cosmopolitanism can retain intersubjective meaning. My claim here is that the promise's space of re-presentation allows us to disclose new possibilities and to discern our place within them.

The promise structure thus has certain bearing on the ways we think of those principles and rights in question. Namely, the mode of promise-making tasks us with translating the more static language of rights-claims into distinctly temporal claims of meaning and value, that is to say, into promises. Indeed, this is the purpose behind the UDHR's message of 'constant' commitment: to recast rights as sites of meaning-creation and interpretation, as nodes in a broader, shared political project. This is, of course, already what goes on, albeit unthematized and often surreptitiously, whenever courts are asked to meaningfully apply (frequently complex and overlapping) rights in practice. But making this 'trace' structure of rights explicit directly invokes the image of a shared intersubjective space and orients one's civic responsibilities within it: not only to preserve one's particular claims vis-à-vis others but also to see this space through as a temporal project, to care for its evolving meaning.[62]

The cosmopolitan promise is thereby the motivational configuration Habermas leaves unarticulated and a distinct dimension of constitutional patriotism. On this new reading, constitutional patriotism becomes allegiance not, as Habermas would have it, to the legal principles themselves, abstracted as they are, but to the practices of promise-making that constitutional law signifies in its textual and temporal architecture. Cosmopolitan promise-making thereby invites a revised conception of law itself, a vision of law more attuned to these temporal dimensions and to

[62] Habermas himself has expressed evocatively his fears of just this regression in rights culture: 'the transformation of the citizens of prosperous and peaceful liberal societies into isolated, self-interested monads who use their individual liberties against one another like weapons'. J Habermas, 'Prepolitical Foundations of the Cosmopolitan State?' in J Habermas, *Between Naturalism and Religion: Philosophical Essays* (C Cronin trans, Polity Press, Cambridge, 2008) 107.

the iterative processes of inscription located within them. In the end, it is because we can conceive law as the site for inscribing our evolving political promises that we can be constitutional patriots in the way Habermas imagines, opening ourselves to cosmopolitan engagement. It is to such a temporal conception of law that I now turn in detail.

III. Cosmopolitan legal narrative: the inscription of political meaning in time

It remains possible to reimagine the character of law and to offer a new, temporal vision of cosmopolitan constitutionalism. Drawing on the second strand of Benhabib's 'democratic iterations' – her invocation of Robert Cover's concept of 'jurisgenerativity' – my intention is to develop the idea of *cosmopolitan legal narrative*: a rereading of supranational law as a complex hermeneutic well for working through new forms of solidarity and justice. I argue that the structure of narrative – in echoing Derrida's logic of iterability, the trace, and the promise – is critical for preserving two main hopes of cosmopolitan law: (a) the process of motivating commitment, by which citizens come to care about law and its rule; and (b) law's creativity and openness to the singularity of the case (and therefore to cosmopolitan transformation through time). Law's narrative is the textual artefact, the inscription not only in memory but in text, of cosmopolitan promise-making.

Robert Cover wrote famously, 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live'.[63] Cover's conception of law advances a remarkable shift in the orientation of citizens to a legal system's normative structures. Reducible to neither command nor rationality nor will, the legitimacy and social consequence of Cover's legal order is mediated by the symbolized character of its common, but diverse narrative interpretations. The rule of law is not simply a body of regulations but an entire 'normative world', a *nomos* that charges a community's shared political project, its self-understanding and identity. But, crucially, the *nomos* is shaped by the work of narrative and, as such, by the temporalized and *non*-self-identical work of hermeneutics, indeed, of iteration. Cover's conception is exemplary in its rendering of law, in our terms, as a mode of promise-making: it is precisely law's

[63] Cover (n 38) 4.

narrative space for normative reinterpretation – its openness to possibility and difference – that generates the socio-normative grounds of legal commitment. As did the anti-essentialist logic of the 'trace', therefore, Cover's theory of law brings together the self-decentring push of an always open, incomplete story and the solidaristic pull of an orienting narrative thread. It is for this reason that I find Cover's account to be particularly apposite to cosmopolitan solidarity, to the task of constructing new cosmopolitan bonds of commitment and meaning. Considering all that we have asked of cosmopolitanism – to speak to one's heart, in addition to one's reason, as Havel put it; to provide a sense of place and purpose amid the frenzied rush of global capitalism, as Bauman urged; to open new possibilities for 'going on' together, as the cosmopolitan promise demands – if we seek all of this, Cover's law responds in the appropriate register.

Law is a force that gives us meaning.[64] Locating ourselves within a *nomos*, we find our normative actions intelligible; they make sense to us as part of a larger, contextual whole; we are freed from idiosyncrasy, anomie, alienation, and from arbitrariness.[65] Law performs its deep social coordinating function through its narrative structure, as normative meaning assumes the form of a narrative arc: the 'system of tension or bridge linking a concept of reality to an imagined alternative', the drawn thread between 'reality and vision'.[66] Law offers an orientation, a language, and a process, with one end firmly rooted in immediacy while the other draws itself toward unrealized or previously defeated political hopes. On the one hand, history; on the other, possibility.

Law's narrativity means, further, that law exists only as it remembers and mourns its own past, as it leaves that past behind and opens new possibilities. To repeat Derrida: '[O]ne does not survive without mourning'.[67] And, yet, in the act of remembrance and mourning, law retains the old possibilities and unredeemed hopes of the past alive. As time extends in both directions, law offers us the possibility that things might be otherwise than they are and that they *might have been* otherwise than they were.[68] Once again, the structure of narrative returns us to the

[64] See ibid 8 ('Law is a signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify.').

[65] Ibid 10.

[66] Ibid 9.

[67] Derrida, *The Politics of Friendship* (n 51) 13.

[68] Julen Etxabe has shown compellingly and with instructive clarity how Cover's legal theory reconceives the ontology of law, occupying at once the fields of 'is', 'ought', and 'might be' (what Cover, referencing George Steiner, labels 'alternity'). See J Etxabe, 'The Legal Universe after Robert Cover' (2010) 4(1) *Law and Humanities* 115, 122. See also M Goldoni, 'Robert Cover's Narrative Approach to Constitutionalism' (2010) *Italian Society for Law and Literature* 1.

idea of balancing continuity with discontinuity over time, of coming to terms with the new and the possible. Law's memory offers us an orientation, a ground from which we can begin a future; and insofar as it cradles possibility and trust, it carries the motivational resources for collective action. For Cover, 'To inhabit a *nomos* is to know how to *live* in it'.[69] He argues that the narrative of law is the formative mechanism of interpretive commitment to the law and to the community that it brings forth: the 'objectification of the norms to which one is committed frequently, perhaps always, entails a narrative – a story of how the law, now object, came to be, and more importantly, how it came to be one's own'.[70] The law – insofar as it creates meaning – interpellates the citizen into its own story, an inherited story that ultimately must resonate to that citizen as one she can imagine authoring herself.

This narrative dimension of law – too often ignored by contemporary European jurisprudence – responds to some of the most moving images Europe has of itself, as the site of a deeply normative inheritance from the past. Derrida argues that Europeans, *as* Europeans, must take responsibility for their history and for their heritage. He writes, 'We bear the responsibility for this heritage, right along with the capitalising memory that we have of it. We did not choose this responsibility; it imposes itself upon us'.[71] Derrida insists that our identity, our being, is intertwined with the degree to which we affirmatively recognize our inheritance: 'inheritance is never a given, it is always a task'.[72] Indeed, this is no blind traditionalism, as affirming an inheritance might involve or even require its radical transformation. As Hägglund eloquently puts it, 'To inherit is not simply to accept what is handed down from the master; it is to reaffirm the legacy in order to make it live on in a different way'.[73] Thus, for Europe, the affirmation of inheritance as task signifies the perpetual responsibility to reflect on European identity itself, to leave identity open to alterity and to reappraisal. As such, responsibility to inheritance consists in a double command of being committed to 'an idea of Europe, [and to] a difference of Europe, [to] a Europe that consist precisely in not closing itself off in its own identity'.[74]

What is remarkable about Derrida's reading of inheritance and its application to the European project is that it contains exactly the tension

[69] Cover (n 38) 6 (emphasis in original).
[70] Ibid 45.
[71] Derrida, *The Other Heading* (n 22) 28.
[72] J Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (P Kamuf trans, Routledge, New York, NY, 1994) 54.
[73] Hägglund, *Radical Atheism* (n 40) 12.
[74] Derrida, *The Other Heading* (n 22) 29.

identified by Cover, the arc between reality and vision, Janus-faced law. What gives inheritance this temporal dynamism is that it is not inscribed into frozen rules or principles beyond alteration. Rather, the inheritance in question is one that is immediately open to interpretation, inaugurating the hermeneutic circle in which various communities struggle over the 'proper' meaning of the sacred texts and sources informing a people's inherited identity. In homology with the preceding analysis of iterability, law as narrative is an *inscription* of political memory in time. As such, it, too, can never be *in* itself: returning to Derrida, it is 'always already engaged in the "movement" of the trace, which is to say in the order of "signification"'.[75] The narrativity of the political community – its thrownness into time – thereby marks its time-consciousness and its status as a practice of promise-making. Narrativity delivers a legal text over to the interpretation of new possibility into the future.

For law to take on such a role, it cannot be solely the law of public administration, the system of commands by which a polity is bound by force. Law's authority does not rest on coercion or 'imperatives'. Rather, related to the practice of promise-making, law as narrative is a web of reciprocal speech and persuasion, a product of communicative power, as Arendt writes, 'the interconnected principle of mutual promise and common deliberation'.[76] However, in keeping with Arendt, neither is Cover's law in this sense a solely rationalized law. The extension of the concept of time-sensitivity into the realm of law prompts us to see law not simply as a Kelsenian pyramid of higher-order rules of recognition and a hierarchical system of adjudication among competing claims to legality.[77] Kelsen's vision of purified law is of a law fully rationalized, that is, fully scrubbed of its capacity for meaningful play. This indivisible order, synonymous with a singular and identical sovereignty, is the victory of truth's hierarchy over the critical reappropriation of meaning. In its abstraction and decontextualization, the law of ordered universal principles irons out our ability to 'think the other' – the other of law and the other within law, the alternative possibilities conserved inside. And it is precisely this capacity, this source of semantic energies and political motivations, that is the difficult but essential work of cosmopolitan solidarity, the temporal *process* by which communities come to see a change in law to be their law nonetheless. Indeed, this is why constitutional patriotism – focused

[75] J Derrida, *Speech and Phenomena* (DB Allison trans, Northwestern University Press, Evanston, IL, 1973) 85.

[76] H Arendt, *On Revolution* (Penguin, London, 1990) 206.

[77] See H Kelsen, *The Pure Theory of Law* (M Knight trans, University of California Press, Berkeley, CA, 1967).

as it is, presently conceived, on comprehending and assenting to the order of constitutional procedures – threatens slowly and unknowingly to close the openings of cosmopolitan promise-making.

Constitutional narrativity, by contrast, conceives law as the material expression of a polity's self-understanding through time that retains the promise of redemptive possibility *in our time*. Law – and most of all, constitutional law – signifies political meaning's capacity to endure through time but also to change, to 'begin anew'.[78] Law contains within it its own *iterability*, for its multiplicity and multiplication of meanings.[79] As Drucilla Cornell writes, 'The deconstructibility of law [means] that law cannot *inevitably* shut out its challengers and prevent transformation, at least not on the basis that the law itself demands that it do so'.[80] Within the rich texture of law, there is an inner openness to proliferation, and this proliferation rejuvenates the semantic materials from which law can be remade and refashioned. In seeing law as a temporal trace, we more clearly understand why the existence of competing and contradictory sets of norms – far from destabilizing the *nomos* – is precisely what allows the *nomos* to endure through time. To reiterate Hägglund, 'The traces that retain the past for the future *can only be inscribed by being exposed to erasure*'.[81] Here, the openness of law to a multiple alterity is a constitutive feature of its narrativity; this is the nature of its realistic utopia, its midpoint between history and possibility. The *nomos* lives between past and future, not only 'between facts and norms'. Indeed, were law to move excessively in either the direction of pure fixity or pure fluidity, it would no longer produce the narratives necessary either for interpretation or for commitment. As Cover writes, 'If law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavour that brings them into temporary or partial reconciliation'.[82] Cover's law is thereby always in a process of renewal, of revaluation and becoming. Any fixity remains fixed only for a moment before being dislodged by alternative interpretations. Law's narrativity and its interpretive play, therefore, exhibit what Cover terms 'jurisgenerativity': the capacity to tender multiple and competing interpretations of the realistic utopia to which a community is attached. Meaning is never stable; it is always overdetermined by the multitude of law's normativity.

[78] See Arendt, *On Revolution* (n 76).

[79] See J Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919.

[80] D Cornell, 'The Violence of the Masquerade: Law Dressed up as Justice' (1990) 11 *Cardozo Law Review* 1047, 1059 (emphasis in original).

[81] Hägglund, *Radical Atheism* (n 40) 73 (emphasis added).

[82] Cover (n 38) 39.

Cover's *nomos* is in this sense already a cosmopolitan universe of plural *nomoi* to be discovered, engaged, deepened. To sharpen the point, we might say that law's cosmopolitan moment stems directly from its original capacity to motivate commitment, in the first place, that is, from its narrative, temporal structure. These two things, again, become one. My term for this instance of equipoise – a variant of the iterated trace – is *cosmopolitan legal narrative*: a legal project spanning time that invariably exposes itself to reinterpretation with reference to sources and texts not immediately contained within.

This plurality of meanings, of course, presents certain dilemmas for law and for the coherence of the *nomos*. The equipoise must, after all, be cultivated. There always exists an unsteady tension in the play of meanings and the exercise of law, a disorder in the centrifugal interpretations and centripetal (institutional) judgments that 'speak' the law, that say what the law *means* in any one instance. Courts and judges, Cover emphasizes, are perpetually caught between such competing tendencies. Courts are pressed by the fecundity of law and by the absence of a single truth from which objective interpretations might be made. They are asked 'to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another'.[83] In this context of plurality and hermeneutic contestation, courts play a distinctly 'jurispathic' role, he writes.[84] Courts foreclose some normative worlds in order to ensure that others can survive. This violence, anticipated and brought into being by the judge, is unavoidable; it is built into the structure of living together in a pluralistic legal order, that is, in a legal order that can be considered at once pluralistic and coherent *as an order*. There remains the need 'to suppress law, to choose between two or more laws, to impose upon laws a hierarchy'.[85]

However, while jurispathic violence is unavoidable and unavoidably tragic, its extent, severity, and inflection are not. Cover is careful to emphasize that courts must question 'the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities'.[86] The work, therefore, of courts is to salvage meaning from the death of law; their responsibility is to preserve the resources for law's hermeneutic openness into the future. The suppression of law, in other words, must be understood in the context of law's broader temporal constitution. It matters a great deal, after all, that suppression not be time-less and indefinite, as well as not unjustified. It is in this sense that Cover's entreaty for (a distinctive

[83] Ibid 44.
[84] Ibid 40.
[85] Ibid.
[86] Ibid 44.

form of) judicial activism promises a *lesser violence* even within the field of jurispathology. Even should courts deliver broad judgments in the direction of what Cover terms 'redemptive constitutionalism' against the norms of 'insular' communities, Cover paradoxically maintains that such 'aggressive' judicial review leaves those communities better situated than would judicial 'quietism'.[87] They are positioned to respond, to recover the terms of their own *nomoi* in reaction to the court's ruling. Because the boundary inscribing them *as* insular normative communities of responsibility and judgment is left undisturbed, even a deeply challenging 'redemptive' ruling recognizes these communities as distinct interlocutors with, crucially, an affirmed jurisgenerative capacity. Such affirmation is absent, on the other hand, when courts fail to articulate the legal field with any depth of 'normative status': when, for example, jurisdiction is used simply to defer to state authority; or when courts rule political decisions 'not unconstitutional' while offering no normative reading of the law's meaning itself.[88] In such cases, the *nomos* closes in on itself, exposed to the naked power of 'mere administration'[89] and state violence. What Cover's emphasis on normative framing and on law's narrativity elucidates is that courts ought resist veiling their interventions as mere 'clarifications' of law, that they ought resist implying that the only salient concern is that of indeterminacy and final authority. Indeed, we fear jurisdictional deference for the potential cowardice it conceals and for the deployment of state power that it might thereby surreptitiously permit.

Cover desires not that the court – sensing its jurispathology – retreat before the law. Rather, the court ought attune its jurisprudence to its special role in opposing the 'violence and coercion of the other organs of the state' that are invariably *more* jurispathic in their treatment of opposing narratives and normative worlds.[90] Cover writes that it is only in rejecting state-serving jurisdictional deference that 'judges begin to look more like the other jurisgenerative communities of the world'.[91] The most severe jurispathic danger posed by the court, therefore, is not that it might preserve redemptive narratives at the expense of insular ones. The greatest threat surfaces when the court rejects its own interpretive role, when it 'places nothing at risk' and retreats from engaging with other *nomoi*.[92] What we find so morally valuable and, indeed, noble in Cover's law is not that it procures consensus or diffuses dissent – which we well know it does

[87] See ibid 66–7.
[88] Ibid.
[89] Ibid 67.
[90] Ibid 57–8.
[91] Ibid 58.
[92] Ibid 66.

not – but that it prompts us to engage in a public form of justification that is *receptive* to thinking, to thinking through conflicts together over time. Such justification inheres less in the systemic criteria of (synchronic) legal uniformity, determinacy, hierarchy, or integrity – though to be sure, these are not irrelevant – and more in modes of (diachronic) narrative coherence through time. That is, cosmopolitan legal narrative extends legal meaning into the future; it seeks to anticipate and to frame intelligibly, with greater care and depth, those future conflicts of law that will surely come. Reconceived as narratives, constitutional principles are written with an explicit view of their future reiteration; they are from the beginning presented as texts to which alternative interpretations and competing normative views might respond. Here, legal decisions are never instances merely of administration or state violence but rather of normative vision and public commitment. They provide a language and structure for articulating and working through competing interpretations of value.

The responsibility of judges and courts, in other words, is to preserve as far as possible the equipoise of cosmopolitan legal narrative. Focusing on more than just validity (which the judge, to be sure, is asked to pronounce), cosmopolitan legal narrative, like the cosmopolitan promise, asks the judge to preserve the capacities of law's subjects to rearticulate their claims before the law once more, their capacity to insert themselves anew into law's narrative. Put simply, the judge must elaborate her reading of the law so as to enable us as citizens to hold ourselves accountable as its imagined authors, to feel ourselves included in the political community that this particular judgment seeks to advance. My argument has been that we do these things insofar as we can imagine participating in the temporal narrative of law, not only insofar as we assent to its most abstract principles.

IV. European courts and the right to constitutional narrative

The turn to constitutional narrative enables a more extensive assessment of the European Union on the strength of its normative character, on its status as a *nomos* in and for which people live, and a reconsideration of European courts as co-authors of cosmopolitan solidarity. In affirming mutually valid *nomoi*, Cover's plurality does not merely condone the vogue concept of constitutional pluralism, in which legal judgments proliferate and courts carve out composite spheres of authority with a residual hope for norms to harmonize among them.[93] Instead, Cover

[93] See, eg, N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart, Portland, OR, 2003); Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (n 13).

invites dialogue and confrontation of competing narratives of law, without pretending to foretell the settled end of such confrontation.[94] Practically, therefore, we might press the European Court of Justice on its recent quietism in the field of EU citizenship law[95] and its socio-economic rights jurisprudence.[96] We might scrutinize the effect of its compositional and organisational deficiencies in producing normatively 'thin' judgments.[97] 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*.[98] 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.[99]

Consider again the *Decker* case cited in my Introduction and the ECJ's application of the freedom of movement of goods to the social health sector. What is the interpretive gesture, here? The European Court of Justice, seeking to solidify the internal market, embraced systemic stabilization as the underwriting principle of European social solidarity, thus all but hollowing out the normative world on which this same

[94] There is some affinity here with Miguel Maduro's model of 'contrapunctual law', though again Cover places greater emphasis on legal narrative's diachronic integrity than on the synchronic integrity of the legal order as a whole. See M Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker, *Sovereignty in Transition* (n 93).

[95] See, eg, Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358 (holding that EU law does not prohibit Member States from restricting the access of economically inactive EU migrants to certain non-contributory social benefits and that the EU Charter of Fundamental Rights has no application in this context); see also Joined Cases C-95/99 to C-180/99, *Khalil and others v Bundesanstalt fur Arbeit* [2001] ECR I-7413 (interpreting restrictively Regulation 1408/71, on social security, in a case involving stateless persons and refugees); Case C-327/02, *Lili Georgieva Panayotova and others v Minister voor Vreemdelingenzaken en Integratie* [2004] I-11055 (interpreting restrictively the establishment provisions of the Europe Agreements).

[96] See, eg, Case C-256/01, *Allonby v Accrington and Rossendale College* [2004] ECR I-873; Case C-320/00, *Lawrence and others v Regent Office Care Ltd and others* [2002] I-7325 (interpreting restrictively Article 141 TEU on non-discrimination in remuneration).

[97] See J Baquero Cruz, 'The Changing Constitutional Role of the European Court of Justice' (2006) 34(2) *International Journal of Legal Information* 245.

[98] See, eg, T Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in J Dickinson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, Oxford, 2012).

[99] See, eg, *Mannfred Brunner v European Union Treaty* [1994] 1 CMLR 57; and, more recently, Lisbon, BVerfG, 2 BvE 2/08, judgment of 30 June 2009.

solidarity depends. Precisely because social rights are markers of certain historical achievements, they are also critical markers of a *nomos*. An expansion of this normative world must consider much deeper aspects of democratic and social legitimacy; it must work to connect past promises with those yet to be made, and it must do so intelligibly. Yet the Court articulated no such narrative of cosmopolitan solidarity; it was unprepared to see the law grow or to advance its own redemptive commitments. This, of course, would have been difficult. 'But this is as it should be', Cover writes. 'The invasion of the *nomos* of the insular community ought to be based on more than the passing will of the state'.[100] If the cosmopolitan principle of European citizenship does indeed have special status, what is it in this case? What forms of solidarity does European citizenship ask us to consider? Does it, perhaps, offer a new social mandate to reform national redistributive systems of social insurance and care, a mandate that reaches beyond free market exchange to more considered justifications for supranational fundamental rights? Perhaps, but this claim the Court did not make.[101] Instead, the cosmopolitan citizen was, and continues to be, conflated with the transnational consumer of services.

Let me develop an additional example to further elucidate not only this contemporary thinning of supranational legal discourse but also the possibility for its enrichment through exemplary, jurisgenerative iterations: the use of Article 4(2) TEU as the basis for derogation from treaty commitments under European law. Article 4(2) states, in its critical part, 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'[102] There has been varied scholarly debate over the provision's conceptual meaning,[103] its ostensible reinforcement of national sovereignty,[104] and its implications for the course of EU integration.[105] The justiciability of national identity introduces additional (though limited)

[100] Cover (n 38) 67 n 195.

[101] For a thoughtful discussion on the past and future of EU citizenship law, see W Maas, 'The Origins, Evolution, and Political Objectives of EU Citizenship' (2014) 15(5) *German Law Journal* 797.

[102] Treaty on European Union, Consolidated Version, 30 March 2010, art 4(2) [2010] OJ C83/01.

[103] See LFM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6(3) *Utrecht Law Review* 36.

[104] S Sieberson, *Dividing Lines between the European Union and Its Member States: The Impact of the Treaty of Lisbon* (Cambridge University Press, Cambridge, 2008) 98.

[105] D Chalmers, *et al*., *European Union Law: Cases and Materials* (Cambridge University Press, Cambridge, 2010) 2020.

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 4(2) falls under the ECJ's jurisdiction, 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 cosmopolitan potential.

Scholars thus far have read Article 4(2) to formalize resistance to the absolute primacy of EU law and to codify a pluralistic vision of European constitutional authority. Von Bogdandy and Schill, offering perhaps the dominant and most sophisticated analysis, consider the article 'an expression of European composite constitutionalism in which EU law and domestic constitutional law interact closely in determining the national identity clause'.[106] With explicit reference to the theories of Kumm and Maduro, von Bogdandy and Schill treat Article 4(2) as formal recognition of constitutional pluralism,[107] in effect advancing heterarchical negotiation of constitutional norms and affirming the principles of Kumm's 'constitutionalism beyond the state'.[108]

And yet, this rendering yields a surprisingly truncated transformational potential. While von Bogdandy and Schill promisingly frame Article 4(2) as a 'gateway that […] makes EU law receptive to domestic constitutional law',[109] they (a) construe national identity too formalistically as post-political principles and legal procedures and (b) curiously conclude that, in practice, the provision is adequately captured as a subsidiary element to proportionality analysis. The insufficiency of such analysis results in large part from its thin normative grounding. The heterarchical view of constitutional conflict is largely identical in its commitments to the vision of constitutional patriotism examined above, and it remains vulnerable to the same criticisms.

Article 4(2) can indeed become a coherent, codified ground from which to develop the kind of normative, iterative gestures the court failed to make in *Decker*, but it must be interpreted and applied differently than has been the case so far, in a manner not yet advanced by European jurists or scholars. In light of my foregoing critique of constitutional patriotism and my elaboration of cosmopolitan legal narrative, Article 4(2) is most

[106] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 4.

[107] Ibid 3.

[108] See Kumm, 'The Jurisprudence of Constitutional Conflict' (n 13).

[109] von Bogdandy and Schill (n 106) 15.

promisingly conceived not as a right to national identity *tout court* but rather as a *right to constitutional narrative*. To introduce the right to constitutional narrative is to advance the following two readings: first, the national identity covered by Article 4(2) is itself a temporal identity, an inscription in law whose socio-political registers remain open to cosmopolitan self-decentring; and second, the subsumption of national identity beneath proportionality review – insofar as it neglects legal narrative – is untenable. Let me elaborate each argument in turn.

The first issue concerns the complex nexus of national identity and fundamental constitutional principles. Now that Article 4(2) makes justiciable the 'respect for national identity' as expressed in fundamental state structures, what form of respect does this demand, to what specifically does it attach, and in what ways can it be expressed? One worry here is that, unless strictly delimited, the concept would become unmanageably broad so as to encompass potentially any political preference or policy choice. For this reason, von Bogdandy and Schill detach national identity under Article 4(2) from 'cultural, historical, or linguistic criteria' and construe it firmly as a 'constitutional, not a cultural concept'.[110] They emphasize its objective criteria and isolate basic constitutional structures and fundamental rights as the sole bases for justiciable norms under the provision.

But such an interpretation succeeds only by artificially severing 'entirely pre-political or pre-constitutional' self-understandings from post-political, constitutional principles. Von Bogdandy and Schill project a restrictive, static understanding of democratic constitutionalism onto the interpretation of national identity, thereby endorsing precisely the 'thinning' of constitutional identity that constitutional patriotism – and with it, European solidarity – ought to remedy. Indeed, such a reading denies exactly what Cover took pains to remind us: that constitutional principles reflect much broader and much deeper self-understandings of political communities, captured in history, culture, literature, language, and ethics. To implicate one is necessarily to implicate the other.

As I have argued above, rather than entrenching the stilted pre-/post-political binary, national identity is more productively tied to its temporal inscription in a constitutional text, as part of a distinct constitutional narrative. It is the textual nature of commitment that matters here, not its status as post-political. An inscribed narrative can never be simply post-political or thinly constitutional, for it always signals the historical, political, and social contexts out of which law emerges. But, because of its

[110] Ibid 11.

iterability, neither can it be the simple codification of pre-political values. Rather, as an inscription made in time and subject to iteration, constitutional narrative mediates between the two. This reading of national identity as constitutional narrative allows us to broaden the normative potential of Article 4(2) – bringing it into deeper contact with the legal and political histories of Member States – while also resisting unworkable appeals to the essentialist identity logic of regressive nationalisms. If Article 4(2) is reinterpreted, as I suggest, to protect the right to constitutional narrative, the object of respect becomes the integrity or coherence of national constitutional law itself. Not a right to self-identity or to unchanging principles, Article 4(2) protects the intelligibility of a legal order in transition. The right does not simply open additional grounds to counter the primacy of EU law but rather expands the interpretive responsibilities of constitutional actors. A court engaging in Article 4(2) analysis would be tasked with preserving the narrative coherence of constitutional traditions, even as those traditions may be pressed to change: either as European law introduces supranational norms into domestic constitutional orders or, alternatively, as domestic law recasts the limits and content of EU legislation.

To redefine the right under Article 4(2) is thus also to reframe the obligation to 'respect' it. In what manner ought courts recognize the salience of national constitutional identities? If identity is to be found in time and in legal narratives, respect for such narratives does not mean simply affording them absolute protection from competing principles under European law, but neither does it reduce to the plural, agonistic relationships of composite constitutionalism. While the right to constitutional narrative does not fundamentally alter Article 4(2)'s heterarchical character, this reading does change the *form* that court judgments should be expected to take. This temporally inflected respect expands the tools and modalities of analysis available to European judges: it entails the active excavation of norms, histories, social mobilizations, landmark statutes and cases, highly symbolized elections, and similarly outstanding elements of a community's legal culture. Most importantly, courts will be asked to participate in Cover's distinctive mode of judicial activism, to put something at stake in their normative interpretations of law, to speak with sufficient normative depth and temporal arc. Article 4(2) thereby requires courts to provide much richer accounts of why surface constitutional principles might harmonize or, in certain instances, warrant margins of divergence. It is only by probing the many registers of constitutional narrative that the judicial decision becomes jurisgenerative.

This reformulation of Article 4(2) makes it quite clear that recent applications by European courts in the still-nascent jurisprudence fail to

exhaust its normative potential. In *Sayn-Wittgenstein* (2011), for example, the ECJ employed national identity merely as a subsidiary clarification for the standard public policy concerns used by the Austrian state to justify restricting fundamental freedoms under EU law.[111] Similarly, in *Runevič-Vardyn* (2011), the Court did not invoke Article 4(2) alone as sufficient grounds for derogation but only more weakly as a complementary element in proportionality review.[112] As von Bogdandy and Schill conclude generally from the case law, 'Article 4(2) TEU does not constitute an independent justification for restrictions of fundamental freedoms, but feeds into the proportionality test generally applied by the ECJ to balance fundamental freedoms and conflicting rights.'[113]

What concerns me here is not Article 4(2)'s relative weakness in disposing of cases before the ECJ in favour of national constitutional law. Rather, it is the way this weakness serves to subsume Article 4(2) under the broader imaginary and well-worn methodology of proportionality analysis. Not only does this add nothing innovative to European jurisprudence, it also reinforces a thin and static interpretation of constitutional identity. It prompts no change in the form of European judgments: in their doctrine, vocabulary, their orientation to difference, or their practices of justification and interpretation.

But this is to misunderstand the nature of the right and the injunction to respect it as I have articulated them above. Indeed, if we reinterpret Article 4(2) as the right to constitutional narrative, then von Bogdandy and Schill's uncritical citation of proportionality analysis significantly narrows the imaginative horizon of European constitutional pluralism and judicial dialogue. Even Mattias Kumm's otherwise compelling work remains vulnerable to such subsumption. For example, Kumm's invocation of the 'best fit' criterion in the selection of conflict rules remains tied in the first instance not to Dworkin's account of law as (temporal) integrity but to law's ability to 'produce the best solutions to realize the ideals underlying [European] legal practice', to offer a pragmatic but presentist accounting of the European legal order at one time.[114] For all its considerable merits, Kumm's vision of cosmopolitan constitutionalism is unequivocally one in which 'the proportionality requirement play[s] a central role and [is] openly endorsed'.[115] Proportionality review certainly may be an efficient

[111] Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] ETMR 12.

[112] Case C-391/09, *Malgozata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and others* [2011] ECR I-03787.

[113] von Bogdandy and Schill (n 106) 26–7.

[114] See Kumm, 'The Jurisprudence of Constitutional Conflict' (n 13) 286.

[115] Kumm, 'The Cosmopolitan Turn in Constitutionalism' (n 18) 269.

way to operationalize constitutional rights, but the salient question is whether something like cosmopolitan legal narrative could ever be the product of such analysis.

As Mark Antaki and others have forcefully argued, proportionality review as a mode of analysis yields limited jurisgenerative potential.[116] Proportionality balancing projects an impartial, a-temporal, supra-contextual position from which to weigh competing principles, which are themselves perceived apart from their social practices, moral intentions, and historical developments. Its image of law is, in Arendt's sense, a world-less one where the iterative text, precedent, and analogical reasoning find no home. As Antaki writes, in such a methodology, the social meaning of juridical acts of judgment is highly constrained, reduced to impartial calculations, 'eliding their character as matters of belonging'.[117] But it is precisely the issue of belonging that is ultimately at stake.

To press further, proportionality review conflates self-decentring with transcendence. But self-decentring is not equivalent to the perspective of objectivity. And a court oriented toward cosmopolitan legal narrative would thereby not be engaged in rationalistic instruction based on impartiality, but rather in the mutual enlargement of national identities, introducing those supranational principles previously closed to them. But this, inevitably, relies on a temporal connection to a shared world, out of which that judgment can arise as meaningful.[118] In my terminology, it requires its place within a constitutional narrative, within law's textual, historical inscription as a marker of political community and commitment. To admit Article 4(2) as a right to constitutional narrative is therefore to fundamentally transform the terms by which proportionality analysis – in its cosmopolitan dimension – can proceed.

The judicial approach of cosmopolitan legal narrative is not limited to conceptual or doctrinal analysis but extends to the expressive symbolism, poetics, rhetoric, and social imaginaries through which we perceive our own time. Concretely, this would mean, at least in part, affirming Kumm's call for European jurisprudence to be more sensitive and courageous in invoking legal history as a vital element in thickening the concept of

[116] M Antaki, 'The Rationalism of Proportionality's Culture of Justification' in G Huscroft *et al.* (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, Cambridge, 2014) 284–308. See generally TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; J Boyd White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 *University of Chicago Law Review* 684.

[117] Antaki (n 116) 284.

[118] Ibid 297.

constitutional patriotism.[119] On my reading, this would require placing national narratives into conversation with European ones, not simply in the sense of balancing or aligning their competing abstract principles, but in actively complicating and reconstructing the socio-historical registers of law. As Kumm acknowledges, 'To some extent, the actual development of such [common, European] identities depends on and focuses on the availability of rich historical narratives that can help foster and sustain it.'[120] Recalling Cover, respecting the right to constitutional narrative would mean preserving the plural resources within both national constitutional law and European law for their mutual re-evaluation. This, in short, is the ideal of jurisgenerativity.

To view the role of courts in this way is to bring them closer to those broader democratic processes of persuasion and justification occurring in the less formal publics of civil society. This nexus of law and politics reveals that, while courts are neither the only nor the decisive actors, they are crucial co-participants in the work of democratic iterations. Indeed, if we privilege textual memory and inscription as integral to cosmopolitan promise-making and if we consider the prominent role European courts already have played in advancing supranational coordination, then reassessing the judicial ethos is a particularly important line of inquiry. While counter-majoritarian courts can so often sap democratic energies, there always remain untapped possibilities for courts to amplify, rather than curtail, emancipatory democratic discourse.[121] And, further, while many of my concluding examples focus on constitutional law and on Europe's higher courts, the point is always to read law much less formalistically and much more broadly; that is, as a domain that bears socio-normative meaning for jurists and citizens alike. With this as our orienting image of law, we can uncover those institutional features of the judiciary that underwrite democracy's iterative potential, those sites and instruments for constructing cosmopolitan legal narratives over time.

What matters is the nature of the narratives that govern the public decision: onto what normative commitments they open, what kinds of responses they encourage, and how they ask both redemptive and insular communities to see their roles into the future. Here, constitutional judgment emerges not as a consensus-forming or truth-seeking process but

[119] See M Kumm, 'The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History' (2005) 6 *German Law Journal* 319.

[120] Ibid 354.

[121] See generally R Burt, *Constitution in Conflict* (Harvard University Press, Cambridge, MA, 1992); R Bader Ginsburg, 'Speaking in a Judicial Voice' (1992) 67 *New York University Law Review* 1185.

rather as a way of 'going on' together, a way we affirm one another's political agency and our fragile, common grounds of freedom. Cosmopolitan solidarity in this most abstract sense is the hope and expectation that the suppression of difference can only ever be made in time, at one time; and that the suppressed will never be entirely rubbed out from our political memory.

My intervention has sought, above all, to restore in this new supranational frame the social integrative function of democratic law: that essential belief that those presently excluded from or marginalized within a political community can advance interpretations of its law that in time might become authoritative. What we are loyal to, in the end, is not merely what has previously been or what now is; what we are loyal to is rather an imagined future that does not yet exist but whose contours and consequence we can debate, always by reclaiming the insular and redemptive strands of our normative traditions, our many *nomoi*. But this requires more generous accounts of the promises we make, of inheritance, interpretation, narrative, and ultimately of law itself and how we might foster solidarity through it. A cosmopolitan project – to be understood as a free and meaningful endeavour by those intended to be its main actors – must learn to speak this language of constitutional 'prophecy'. While the European constitutive power is dormant and ill-formed, perhaps this will be enough to build a new normative world, and to restore the integrity of our time.

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