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Jean Monnet Working Paper 1/19

Paul Linden-Retek

History, System, Principle, Analogy: Four Paradigms Of Legitimacy In European Law

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

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ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Paul Londen-Retek 2019
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

HISTORY, SYSTEM, PRINCIPLE, ANALOGY:
FOUR PARADIGMS OF LEGITIMACY IN EUROPEAN LAW

Paul Linden-Retek*

Abstract

The constitutional dimension of European Union law promises—in its most ambitious forms—reflexive structures of post-national democratic community. But this ambition poses profound philosophical challenges for how we think about the legitimacy of European judiciaries—the relation between legal decision-making and the ideal of post-national self-authorship. European constitutional law not only coordinates new forms of public power, but its jurisprudence also normatively justifies (or fails to justify) that power in what must be similarly reflexive discourses of legitimation.

This article argues that theorists of European law have thus far paid too little attention to this legitimation and, specifically, to the thicker socio-cultural registers through which it occurs. They have thereby settled with an overly narrow legalistic or procedural view of constitutionalism, which restricts analysis of the 'constitutional imaginaries', or interpretive paradigms, underpinning divergent legitimations of law.

* Lecturer, Department of Political Science, Yale University; Schell Center Visiting Human Rights Fellow, Yale Law School. Email: paul.linden-retek@yale.edu. I am particularly grateful to Gráinne de Búrca, Joseph Weiler, Jan Komárek, Jiri Priban, Michael Wilkinson, Damjan Kukovec, Kalypso Nicolaïdis, Jan Broulik, John Morijn, Karen Solveig Weidmann, Massimo Fichera, Mona Pinchis-Paulsen, and participants of the Emile Noël Fellows Forum, New York University School of Law, and of the conference, *EU Constitutional Imagination*, iCourts, Faculty of Law, University of Copenhagen, for their generous and helpful comments on earlier drafts. I am also indebted to my colleagues for the year at the Jean Monnet Center for countless conversations that helped to illuminate and refine the themes of this work.

Utilizing a cultural study of law and strands of American constitutional theory, this article develops a framework for just such an analysis. The article's main aim is to formulate a typology of interpretive paradigms presently at work in European law and to trace their relation to the normative hopes of reflexive constitutionalism. The argument articulates four distinct paradigms in European legal thought, namely those structured by *history*, *system*, *principle*, and *analogy*. While the former three paradigms comprise the predominant coordinates of contemporary European legal rationality, they also remain unhelpfully tied in crucial respects to the Westphalian sovereigntist mode of legal authority. Only the last paradigm—grounded in analogical reasoning—offers the seldom-seen but essential bearing, I argue, of transformative post-national constitutional law. As claims made analogically, concerns become interdependent and one's autonomy becomes tied to the interpretations of others. Analogical thinking thereby offers unexplored resources for reviving post-sovereign, non-hierarchical practices of political life.

Introduction: A constitutional culture of reflexivity

The project of post-national constitutionalism in Europe—in its normatively most ambitious form—appeared to unveil a transformative kind of constitutional reflexivity, or 'reflexive constitutionalism'.[1] That is, it changed the relation of citizens to what had been their own constitutional law—a change that promised new understandings of sovereignty, legitimacy, and self-authorship. The reflexive constitutional order promised an ongoing task in which, as Joseph Weiler put it, a European polity would be 'fated to live in an

1 See Neil Walker, *EU Constitutionalism and New Governance, in* GRÁINNE DE BÚRCA AND JOANNE SCOTT (EDS), LAW AND NEW GOVERNANCE IN THE EU AND THE US 15-37 (Oxford: Hart Publishing 2006). *Cf.* Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood, in* MARTIN LOUGHLIN AND NEIL WALKER (EDS), THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 9-27 (Oxford: Oxford University Press 2007). *See also* Michael W Dowdle and Michael Wilkinson, *On the limits of constitutional liberalism: in search of a constitutional reflexivity*, WORKING PAPER SER., 2015/009 National University of Singapore, Faculty of Law, Singapore (2015).

uneasy tension with two competing senses of [itself], the autonomous self and the self as part of a larger community'.[2] This is an essential normative value.

European Union law on such a vision aspired not merely to any form of integration or state-building; but an integration based on self-critique, mutual learning, and new forms of civic solidarity beyond national membership.[3] This new enlargement of solidarity thus emerged not only among states but also among citizens participating in new, less exclusionary forms of democratic life responsive to the many forms of interdependence in a deterritorialized world.[4] This vision was novel precisely because it remained conscious not to resolve the tension between autonomy and community in the more facile way other federative frameworks might. If sovereignty was shared or pooled across supranational institutions, the underlying civic orientation to one's own sovereign agency—to what legitimized public life and gave authority to public action—would change, as well. Far more than merely instantiating a contemporary form of Kantian cosmopolitan right,[5] European law in this ambitious form takes seriously both the internal contradictions of the nation-state[6] and the enduring aporetic structure of cosmopolitan right itself—the always unsteady, indeterminate relation between host and guest, between citizen and alien.[7]

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2 Joseph Weiler, *The Transformation of Europe,* 100 YALE L. J. 2403, 2480 (1991). *See also* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH, Preface, vi (Oxford: Oxford University Press 1999).

3 *See generally* JOSEPH WEILER, THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?' AND OTHER ESSAYS ON EUROPEAN INTEGRATION (Cambridge: Cambridge University Press 1999). Needless to say, I am deeply indebted to Joseph Weiler's nuanced critique and defense of the European legal order, especially his influential conceptions of ', supranationalism' and the principle of 'constitutional tolerance'. The task of at once inhabiting a post-national sensibility without neglecting the values of national political community seem enormously difficult today, yet all the more necessary.

4 *See generally* Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society,* 15(4) CONSTELLATIONS 444 (2008); Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times,* 11(1) CITIZENSHIP STUD. 22 (2007).

5 *See, eg,* Alec Stone Sweet, *A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe,* 1(1) GLOB. CONST. 53-90 (2012). See generally IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 78-92 (D Clocasure trans, New Haven: Yale University Press 2006 [1795]).

6 Hannah Arendt, *The Aftermath of Nazi Rule: Report from Germany* and *Dream and Nightmare* in ESSAYS IN UNDERSTANDING, 1930–1954 (J Kohn ed, New York: Harcourt 1994) 250-2, 416-7.

7 *See generally* JACQUES DERRIDA & ANNE DUFOURMANTELLE, OF HOSPITALITY 135 (R Bowlby trans, Stanford: Stanford University Press 2000); JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS (London: Routledge 2001) 16. *See also* Bonnie Honig, *Another Cosmopolitanism? Law*

But such ambitions place new expectations and pressures on the legitimacy of European judiciaries—the supranational legal apparatus, most of all. Indeed, if European integration is to remain a constitutional *politics*—and not merely a form of depoliticized, juridified rule—the new constitutionalism must take care to define and defend its own similarly reflexive culture of thought and practice: its own constitutional imaginary. Constitutional texts and judgments order public power, but (in so doing and *in order to do so*) they also project self-understandings of public meaning; they structure how citizens come to understand and participate in the shared, if heterogeneous, terms of their political world. The persuasiveness of a legal opinion requires an imaginative frame. To consider the needed post-national revision of *this* dimension of democratic constitutional law is a formidable task.

European law's legitimation perhaps uniquely combines in equilibrium the legitimacy of public international institutions grounded in the consent of states (the Member States as 'Masters of the Treaty') with the democratic consent of a nascent European citizenry. To address these dual sources of legitimation without yielding to ways they might always mutually undermine one another prompts inquiry into the semantic and sociological dimensions of legal decision-making. Once the legitimacy of European law is severed from any merely mechanical transmission of 'consent' from democratic authority, legal *interpretation* in particular cases assumes a privileged place in constitutional politics.[8]

The many early visions of constitutional pluralism offered first approximations of such a task.[9] Yet these visions and their practical expression in European jurisprudence never quite came to satisfactory terms with the full force of constitutional reflexivity as predicated on redefining the constitutional imaginary. The full reach of that redefined imaginary entails a mode not simply of jurisprudential technique or institutional

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and Politics in the New Europe in ANOTHER COSMOPOLITANISM: HOSPITALITY, SOVEREIGNTY AND DEMOCRATIC ITERATIONS 106 (R Post ed, Oxford: Oxford University Press 2006).

8 Compare here INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS (Oxford: Oxford University Press 2012).

9 In contemporary European legal theory, the voluminous literature on constitutional pluralism has attempted to sketch the resulting heterarchical character of constitutional authority and the course of 'meta-constitutional justification' or dialogue. See generally Neil Walker, *The Idea of Constitutional Pluralism,* 65(3) MODERN L. REV. 336, 358 (2002); Neil Walker, *Constitutional Pluralism Revisited,* 22(3) EUR. L. J. 334, 340ff (2016). I cannot address this literature here in detail, but it will figure in my analysis at various points below.

positioning but also a transformation of the material and symbolic dimensions of constitutional politics.[10]

For if there is a pluralism of constitutional authority, there is also a pluralism of underlying constitutional imaginaries, with cross-cutting histories, political psychologies, material presumptions, and normative anticipations of their own. Beneath constitutional norms we find deeply rooted conceptions of how to judge, who belongs, how the economy should work, and from where legitimate exercise of public power derives. When constitutional norms come into conflict, these imaginaries do so, as well. And negotiation of these matters lends itself poorly to a narrow legalistic view of constitutionalism and constitutional adjudication that reduces legal inquiry primarily into the harmonization of rules or norms and the distribution of jurisdictional claims or competencies.

This article argues that theorists of European law have thus far paid too little attention to these socio-cultural registers of legal discourse through which reflexive legitimation must occur. They have thereby settled with an overly narrow legalistic or procedural view of constitutionalism, which restricts analysis of the 'constitutional imaginaries' underpinning divergent legitimations of law. Prevailing emphasis in post-national constitutional theory on meta-methodological principles of harmonization (principles of universalizability or 'best fit', for example)[11] is less helpful in either diagnosing the underlying grounds of disagreement or, conversely, conceiving a 'shared sense of predicament'[12] among differently situated citizens. This is a problem because it tends to formalize the interpretive work of courts, avoiding the need for more substantive inquiry into the socio-historical meaning of legal principles and the consequences of policy. Judgment becomes superficial, often conclusory, and thinly-argued.

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10 See, eg, Jan Komárek, *European constitutionalism and the European arrest warrant: in search of the limits of "contrapunctual principles,* 44(1) COMMON MARKET L. REV. 9 (2007); Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination,* 9(1) EUR. L. J. 14 (2003); Marco Goldoni and Michael Wilkinson, *The Material Constitution,* 81(4) MODERN L. REV. 567 (2018).

11 *See* Miguel Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N WALKER (ED.), SOVEREIGNTY IN TRANSITION 501-537 (Hart 2003); Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty,* 11 EUR. L. J. 262 (2005).

12 *See* JONATHAN WHITE, POLITICAL ALLEGIANCE AFTER EUROPEAN INTEGRATION 5ff (Palgrave Macmillan UK 2011).

Existing pluralist visions here become inadequate precisely when they are needed most—in times of crisis when deeply held political values (like ordo-liberal mandates for austerity and solidaristic commitments to economic recovery;[13] or free market access and the rights of labour[14]) come into conflict. Far from connecting citizens to 'their' law in reflexive, self-critical ways, this instead widens the gap between law and transformative politics. To understand the limitations and remaining possibilities of a plural, decentered constitutionalism, one must therefore parse with greater sensitivity the competing imaginaries of law at work dynamically beneath the structures of institutional authority that may overlap or align formally at any one point in time.[15]

Utilizing a cultural study of law,[16] this article develops a theoretical framework for just such an analysis. The article's main aim is to formulate a typology of constitutional imaginaries at work in European law and to understand their relation to the 'uneasy' normative hopes of constitutional reflexivity. The argument articulates four distinct constitutional imaginaries in European legal thought, namely those structured by *history*, *system*, *principle*, and *analogy*. While the former three imaginaries comprise the most predominant coordinates of contemporary European legal thought, they also remain unhelpfully tied in a crucial respect to the Westphalian sovereigntist mode of legal authority that denies law's reflexivity. Only the last imaginary—grounded in analogical

13 *See* Case C-62/14, Peter Gauweiler and others v Deutscher Bundestag [16 June 2015] EU:C:2015:400; 2 BvR 2728/13 (14 January 2014, 21 June 2016).

14 *See* Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others [2007] ECR I-11767. 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

15 *See* Neil Walker, *Out of Place and Out of Time: Law's Fading Co-ordinates*, Inaugural lecture, Edinburgh, 18 November 2008; Neil Walker, *The Place of European Law*, *in* G DE BÚRCA AND JHH WEILER (EDS), THE WORLDS OF EUROPEAN CONSTITUTIONALISM (Cambridge University Press 2012) 57–105. *See also* Judith Resnik, *Law as affiliation: 'Foreign' law, democratic federalism, and the sovereigntism of the nation-state,* 6(33) INT. J. CONST. L. 33 (2008); Julio Baquero Cruz in M Avbelj & J Komárek (eds), *Four Visions of Constitutional Pluralism* 2 EUR. J. LEG. STUD. 333 (2008).

16 *See generally* Paul W Kahn, *Freedom, Autonomy, and the Cultural Study of Law,* 13 YALE J. L. HUM. 141 (2001); PAUL W KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (Chicago: University of Chicago Press 1999). For Kahn, law is never merely a set of normative regulations backed by a coercive state apparatus, 'not just a set of rules to be applied to an otherwise independent social order'. Rather, law engages citizens at the levels of culture, imagination, symbolism, and ideology, as much as through the procedures of rational deliberation and factual coercion. Indeed, law is 'constitutive of the self-understanding of individuals and communities', reflecting and producing conceptions of the self (personal and collective). Kahn, *supra* note 16, at 141.

reasoning—offers a seldom seen but essential promise, I argue, of a more thoroughly transformative post-national constitutional law.

The article is divided into the following Parts:

Part I develops the typology of constitutional imaginaries that characterize prominent strands of European constitutional discourse: history, system, principle. Each imaginary orients citizens to constitutional politics with reference to distinct utopian aspirations, each structured by a particular temporal heading of law and its corresponding set of political psychologies, conceptions of equal citizenship, and its privileged social actors. In history, we find the particularistic enclosure of historically-rooted identities drawn from a national democratic community of will; in system, the commercial functionalism of an impersonal market administering evolving constellations of present interests; and in principle, the abstract norms of communicative reason that unite a future (*à venir*) community of bearers of universal rights. Drawing on recent developments in European economic governance and the protection of fundamental rights, Part I offers a critical assessment of how these imaginaries have marked European Union jurisprudence, the nature and intent of judicial dialogue, and thereby the reflexive possibilities for mutual public learning.

Part II formalizes this critique as the contrast between the 'coherence' of legal order and what I term law's 'intelligibility'. In conceiving constitutional law in the frames of history, system, and principle, there is, I argue, a common fault—the continued investment in the Westphalian coherence of law's rule. Coherence betrays inattentiveness to the *tension* between utopia and ideology in law: that is, how utopian aspirations implicate their own ideological presumptions and partialities. Because the imperative for coherence negates reflexive resources within law for bridging competing worldviews and disparate conditions of social life, it stiffens legal discourse into worn ideological channels of sovereigntist thinking—merely transposed to different levels, spheres, and forms of governance. Drawing on recent developments in European citizenship law, I illustrate this connection between coherence and an underlying fragmentation of public value.

'Intelligibility', by contrast, characterizes law as an object whose normative commitments are open-ended and must be re-interpreted over time. By remaining sensitive to these

always partial transitions from utopian anticipations to ideological entrenchments, intelligibility reveals how legal reasoning can better express a reflexive ethic of legitimation, in which citizens come to understand their polities and worldviews differently. Specifically, intelligibility discloses the temporality of political attachment—the way present commitments are embedded in a connection from past to future over which one does not exercise sovereign control. Acknowledging this temporal dependency becomes a key structural feature for legal thought that aims to hold EU law's dual sources of legitimacy in critical, productive equipoise. If coherence conceals this reflexive ethic—along with its ambitions for political agency and legal authority beyond Westphalian sovereignty—intelligibility restores it.

Part III turns to develop the fourth imaginary—*analogy*—as a framework of legal thought that reflects these virtues of intelligibility and that might remedy tendencies toward fragmentation in EU law. Drawing on the work of American legal theorist Robert Cover, I see utopia and ideology as respective elements of what he calls the 'jurisgenerative' and the 'jurispathic' dimensions of law. Cover's innovative conception of legal narrative holds these dimensions together, I argue, through the work of analogical reasoning. Narrative secures commitment to legal precepts, but narratives are inevitably plural. They are open to what they at present ignore or exclude. To tell a story about law's development and possibility is to lay an open-ended claim to the analogical resonance of legal meaning across domains of democratic life.

The analogical judgment of legal narrative thereby places constitutional reasoning at the hinge of utopia and ideology. Unlike previous imaginaries, analogy is a heterarchical form of thought;[17] and it remains sensitive to how utopian, jurisgenerative elements in law always threaten in their concrete expression to entrench partial, jurispathic conceptions of public value. In its attentiveness to the particular comparison among the strands of history and imagined possibility, analogy acknowledges forthrightly the limitations of any claim to legal authority. Because the strength of analogy depends on the persuasiveness of situated, contextual judgments, analogical reasoning thus replaces the drive toward closure and abstraction with the more time-bound sensitivities of intelligibility. Through

17 *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 78ff (London: Verso 1996).

analogical reason, constitutional judgment relates divergent imaginaries across a plurality of both national and supranational legal orders so as to construct new forms of self-understanding and commitment.

Part IV offers a concrete example of analogical reasoning at work: the remarkable Opinion of Advocate General Mengozzi in *X and X v Belgium* (CJEU, Case C-638/16 PPU) on the provision of humanitarian visas under EU law. I argue that not only does Mengozzi's intervention better accord with international and European human rights law than the judgment of the European Court of Justice in the case, but also that the rhetorical and interpretive work we find in his opinion demonstrates the ambitions and key methodologies of creative analogical jurisprudence.

I. Imaginaries of European law

The concept of legal imaginaries draws inspiration from social theoretical accounts of imaginaries, more broadly. These denote the symbolic collections of self-understandings—carried in images and stories and ways of thinking—that reflect crucial facts of social life and also normative expectations about how that social life ought to be lived.[18] Derived foremost from the work of Cornelius Castoriadis, an imaginary 'gives specific orientation to every institutional system, which overdetermines the choice and the connections of symbolic networks, which is the creation of each historical period, its singular manner of living, of seeing and of conducting its own existence, its world, and its relations with this world'.[19]

Legal imaginaries, specifically, identify ideal-typical modes of legal thinking that structure both doctrinal thinking and broader civic commitments to the rule of law. These imaginaries include both utopian and ideological forces—'the basis for articulating what does matter and what does not'.[20] And legal imaginaries thus open onto the law's normative ambitions while at the same time constraining one's thinking about those ambitions. Imaginaries project our imagination but also 'capture' and restrain it, just in the way Ludwig Wittgenstein suggested: 'A *picture* held us captive. And we could not get

18 *See* CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES (Durham: Duke University Press 2003).
19 CORNELIUS CASTORIADIS, THE IMAGINARY INSTITUTION OF SOCIETY 145 (K Blamey trans, Cambridge: Massachusetts Institute of Technology Press 1987).
20 *Id.*

outside it, for it lay in our language and language seemed to repeat it to us inexorably'.[21] Indeed, as we will see, the tension between the utopian and the ideological in legal imaginaries holds one of the keys to the post-national, reflexive legitimation of law.

To begin, I follow the helpful lead of Robin West, who posed the question whether certain forms of legal justice might themselves push in the direction of cosmopolitan commitments. Here, I broaden her approach philosophically while narrowing the implications to legal imaginaries of European law, in particular.[22] I develop these imaginaries into a typology (reproduced in Table 1 below) that will guide the subsequent discussion. I consider how each imaginary affirms a particular temporality of law, its own political psychology and sociology, its own way of reasoning through legal materials—and thus its own conception of post-national politics. These today form the conceptual coordinates of European legal thought: for examining questions of how we know and understand justice, how we imagine political community, and thereby how we grasp the transformative potential of post-national integration.

a. 'History'

The imaginary I term 'history' draws its image of law from a political community's inherited traditions. Citing Anthony Kronman's seminal essay on stare decisis, West in her study of 'rules of law' stresses that this traditionalism treats the preservation of 'continuity with past generations and past traditions' as an 'intrinsic good' and affirms 'a conception of human identity defined by those traditions'.[23] To West, this conception of law is 'not simply non-cosmopolitan, [but] anti-cosmopolitan'; its purpose is to 'forge a cultural or national identity separate or distinct from undifferentiated humanity'.[24] When citizens turn to law, one important (Burkean) function they expect it to perform, irrespective of content, is to sustain them 'as social entities that survive particular instantiations across time'.[25]

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21 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1958) ¶ 115.
22 *See* Robin West, *Is the Rule of Law Cosmopolitan?* 19 QUINNIPIAC L. REV. 259 (2000).
23 *Id.* at 268. See Anthony T Kronman, *Precedent and Tradition* 99 YALE L. J. 1029 (1990).
24 West, *supra* note 22, at 269.
25 *Id.* at; see also JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (New Haven: Yale University Press 2001).

The 'historical' imaginary of law bears its own 'particularistic rationality'. On this view, legal judgment is set within the limits of a bounded society; it is embedded and expressed within the particular language, traditions, and shared history of a unified 'people'. Some theorists[26] have interpreted this to mean that legitimate law depends on ethnic or other pre-communicative requisites, suspiciously echoing the organicist, homogenous ties of spirit (*Volksgeist*) celebrated by von Moser, Herder, Savigny, Fichte,[27] and, later, darkly by Schmitt.[28] But more explicitly exclusionary or populist renderings[29] need not exhaust the historical imaginary. The more challenging, relevant conception emphasizes a community of common language, not ethnicity. Here, language is a medium for shared democratic *praxis*, but one that operates as such only within a particular community constituting a 'public'.

This second interpretation seems to inform Dieter Grimm's claim that the European democratic deficit derives in largest part from the absence of a common language. For Grimm, national languages are to date the only linguistic media able to sustain democratic legitimation and to mobilize a public in the direction of social justice.[30] The European public sphere falters because it has yet to develop a shared language by which citizens have direct, equal access to communication; that is to say, a common hermeneutic background of everyday lifeworlds. This limits the post-national openings constitutional law can sustain.

The structure of language does not illuminate for speakers the idealizing 'pragmatic presuppositions' of moral rules;[31] it instead reflects a historically and culturally specific body of knowledge and meaning. The idea of particularistic rationality entails, in fact, that

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26 *See, eg*, Josef Isensee, *Staat und Verfassung* [State and Constitution] in J ISENSEE & P KIRCHHOF EDS, HANDBUCH DES STAATSRECTHS DER BUNDESREPUBLIK DEUTSCHLAND, BAND I: GRUNDLAGEN VON STAAT UND VERFASSUNG [HANDBOOK OF THE STATE LAW OF THE FEDERAL REPUBLIC OF GERMANY, VOL I: FUNDAMENTAL ELEMENTS OF STATE AND CONSTITUTION] (1987) 634.

27 *See* Jiri Priban, *Symbolism of the Spirit of the Laws: A Genealogical Excursus to Legal and Political Semiotics,* 22(2) INT. J. SEMIOTICS L. 185-7 (2009).

28 CARL SCHMITT, CONSTITUTIONAL THEORY (J Seitzer ed and trans, Duke University Press 2008 [1928]).

29 *See, eg,* Paul Blokker, *Populism as a constitutional project* INT. J. CONST. L., forthcoming.

30 *See* Dieter Grimm, *Does Europe Need a Constitution?,* 1(3) EUR. L. J. 282-302, 295 (1995) ('Communication is bound up with language and linguistically mediated experience and interpretation of the world. Information and participation as basic conditions of democratic existence are mediated through language'.)

31 JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 49-50 (Ciaran Cronin trans, Cambridge, UK: Polity Press 1993).

there is no one universal language, at all, but a plurality of languages, each with its own form of life and inherited interpretations, senses of self, and modes of thought. Politics operates within a deeper web of implicit assumptions, orientations, and customs on which (at least in part) consent to the ongoing conduct of discourse and to its outcomes is predicated. And because constitutional law speaks with the meanings of these particular lifeworlds, it is no straightforward matter to transpose principles across legal systems without also compromising their normative content and legitimacy.

This historical quality of language tethers the particularistic rationality of constitutional law to what Paul Kahn categorizes as the political-psychological domain of 'will'.[32] A community of will carries the meaning of its founding across generations through the structure and practice of its law. Legal commitment expresses loyalty to that past community: the community as it has been, as it has developed its own form of political life. The authority of the past is due acknowledgment precisely because we reason from a particular world, into which we are born and do not individually choose, but from which nevertheless come the tools we use to make sense of our community and ourselves. Kronman, citing Hannah Arendt, stresses that this world requires a commitment to practices of preservation, without which the shared world would decline and its system of meaning would slip gradually away.[33] Law's historical imaginary affirms the past as present, in each subsequent present. And historical law thereby yields a 'project'[34] authored by a political subject and understood to be the product of intentional collective action with origins and history.

In European constitutionalism, this historically grounded image of law informs the so-called 'no demos thesis' and continuing scepticism among numerous national apex courts over the primacy of EU law and the transfer of key competencies to European institutions.[35] These interventions are often framed explicitly as defenses of the 'self-

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32 For Kahn's three-part schema of political psychology (reason, interest, and will), see PAUL W KAHN, PUTTING LIBERALISM IN ITS PLACE (Princeton: Princeton University Press 2004) Part II.

33 Kronman, *supra* note 23, at 1053.

34 *See* Paul W Kahn, *Paris lecture*, June 2016, manuscript on file with author.

35 *See, eg,* Case C-105/14, Taricco ECLI:EU:C:2015:555; Case C-42/17, Criminal proceedings against M. A. S. ECLI:EU:C:2017:936; Case C-441/14, Dansk Industri v Rasmussen ECLI:EU:C:2016:278; Danish Supreme Court, Case 15/2014, Dansk Industri, acting on behalf of Ajos A/S, Judgement of 6 December 2016; Hungarian Constitutional Court, Case 22/2016, Judgment of 30 November 2016; Joined Cases C-643 to 647/15, Slovak, Hungary, Poland v Council ECLI:EU:C:2017:631; Acórdão do

identity' found in a 'historical constitution'[36] or implicitly as part of broader, strongly identitarian reactions to intrusions against a 'distant' ruler.[37]

Still exemplary here is the German Federal Constitutional Court's [GFCC] 1993 judgment in the *Brunner* case on the constitutionality of the Treaty of Maastricht's implementing statutes.[38] Despite its formal approval of Maastricht (thereby permitting German ratification), the GFCC affirmed in stark terms the historical horizon of legal reasoning. While its surface argumentation centered on a defense of democratic rights in the spirit of its *Solange* case law, the Court defended the national polity as the exclusive source of democratic legitimation. The historical horizon of legal reasoning thus affirmed a utopia of its own: the assertion of national popular sovereignty. The Court's conclusions evaluate any development of competency at the European level with reference the mediating power of national democratic structures, as the only sphere in which legitimating authority operates. Once this logic was read into the Treaty, it could be then paradoxically approved, notwithstanding the fact that its new institutions were deemed democratically insufficient on their own terms.

But the utopian projection rests upon ideological underpinnings. The Court's nominally universalist defense of democracy is nevertheless premised on insular conceptions of peoplehood, membership, and authority. The national democratic state becomes a self-sufficient community of judgment, pushing the claims of others to a mediated secondary consideration, one taken after national principles and preferences have already been fully formed. But this in fact excludes non-national citizens from what matters most in the search for post-national community.

Tribunal Constitucional 187/2013, Judgment of 22 April 2013, Diário da República 78/2013, Série I de 2013-04-22; Greek Council of State, Case 668/2012; Case C-399/11, Melloni ECLI:EU:C:2013:107; Tribunal Constitucional, Sentencia 26/2014, Melloni, 13 February 2014, BOE 60 Sec. TC. P. 85 (recalling judgment 1/2004); Czech Constitutional Court, Judgment of 31 January, Pl. ÚS 5/12, Slovak Pensions XVII (declaring for the first time a CJEU ruling ultra vires); R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport [2014] UKSC 3.

36 *See* Gabor Halmai, *National(ist) constitutional identity? Hungary's road to abuse constitutional pluralism*, EIU WORKING PAPER LAW 2017/08 (2017).

37 *See* Mikael Madsen, Henrik Palmer Olsen, Urška Šadl, *Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation,* 23 EUR. L J. 140 (2017).

38 Brunner v European Union Treaty [1993] BVerfGE 89, 155 (12 October 1993), translated in English at [1994] 1 CMLR 57 and [1994] 33 ILM 388.

Joseph Weiler for this reason powerfully accused the Court of embracing a regressive conception of democratic community and thus of flirting with the 'organic cultural homogeneous terms' of *ethnos* that guided so much violent exclusion in the past.[39] Forms of post-national government are here denied what emergent emancipatory potential they might have to reconceive the boundaries of peoplehood and democratic law-making. They are cast instead as emanations under the continuing sovereign control of national peoples understood in discrete, mutually exclusive, and self-sufficient terms.[40] Even as it might approve delegations of power, the national state is postured defensively against what might always potentially threaten the grounding source of legitimation: national peoplehood.

Many years have now passed since the *Brunner* decision. Yet the GFCC's constitutional imaginary broadly endures, even if the Court rarely acts on the basis of that imaginary in final instances of confrontation, preferring to 'bark' more often than 'bite'. Consider the tenor of the more recent saga concerning the legitimacy of Outright Monetary Transactions (OMT) in 2014.[41]

There, in its opening salvo of the case (which would go to the European Court of Justice and back to Karlsruhe again before concluding), the GFCC scrutinized the OMT programme for compatibility not only with European Treaties but more decisively with the German Basic Law. It ruled that the OMT programme, as it was then conceived by the European Central Bank, would be declared *ultra vires* as a transgression of the ECB's proper competencies. The Court specified new conditions for limiting the extent of bond purchasing, ruled out debt restructuring, and mandated the avoidance of market interference.[42] But more important for our purposes than the GFCC's proposed limitations—which would indeed jeopardize the efficacy of the programme—was the legal basis on which the Court rested its judgment. The Court emphasized the violation of German 'constitutional identity': namely, the OMT violated the budgetary autonomy of the Bundestag and thus infringed the German citizen's right to vote and the 'democratic

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39 Joseph HH Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision,* 1 EUR. L. J. 219-58, 240 (1995).
40 *See* Walker in Avbelj and Komárek, *supra* note 15, at 334.
41 See generally Case C-62/14, Gauweiler [16 June 2015] EU:C:2015: 400; 2BvR2728/13 (14 January 2014, 21 June 2016).
42 2BvR2728/13, para 100.

discourse' of German society.[43] It further claimed that the core of German constitutional identity is exclusive and non-negotiable, exempt from any balancing against other interests and also at the sole discretion of the GFCC's own interpretation.[44] This insular reading, in which constitutional identity is 'not to be assessed according to Union law but exclusively according to German Constitutional Law',[45] confirms the historical imaginary as the orienting point for legitimate judicial reasoning.

Historical continuity creates enduring path-dependency in the constitutional process. And this of course has restrictive consequences for post-national politics. The GFCC in *Gauweiler* replicated its questionable approach in *Brunner* insofar as it remained guided by an understanding of constitutional principle narrowly defined by the reach of discrete and mutually exclusive national institutions. Indeed, the OMT saga subsequently confronted the European Court of Justice with a crucial dilemma: a real material struggle between continuing austerity or a functional work-around for fiscal solidarity across Eurozone states.[46] This is an extremely complicated matter, but the GFCC's reasoning hardly registered the contours of this complexity.

The ideological bearings of the Court's historical imaginary concealed a fundamental issue of post-national justice: the reality that a German ordo-liberal constitutional militancy (when fiscal consolidation becomes effectively a 'reason of state') was proving increasingly incompatible with the protection of constitutional democratic rights elsewhere in the Eurozone. The Court was thereby unable to conceive a way for German legal reasoning—as an interaction between German Basic Law and European Union law—to affirm (creatively, no doubt) not just Germans' democratic rights but the responsibilities of German citizens in availing Greek citizens of precisely those same rights. As Franz Mayer wrote in stark terms: '[C]oncepts the German Constitutional Court invokes quite naturally such as self-determination, budgetary autonomy, etc., are not available to other Member States anymore […]'.[47] These ideological concerns resurface

43 *Id.* at paras 26-30, 48.
44 *Id.* at paras 103, 29.
45 *Id.* at para 103.
46 *See* Michael Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, ARENA WORKING PAPER 7/2017 22 (2017).
47 Franz Mayer, *Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference* 15 GERMAN L. J., 111-46, 143 (2014).

alongside the discourse of national sovereignty: the continuing investment in the self-identity and self-sufficiency of the national state as the basis for judgment concerning the future of the European economy; without recognition of the voices and concerns of others,[48] and to the neglect of Europe's social and political heterogeneity. These views and this heterogeneity, where they are acknowledged, are conceived as a source of potential deprivation of freedom—a deviation from the course of the national project.

The limitations in constitutional adjudication here are of both a diagnostic and prognostic nature: a reluctance or failure first to generate comparative sensibility to either systemic consequences for peripheral economies or the democratic decision-making of fellow European parliaments; and second to prospectively address rival claims to economic justice. Revealing here is the candid dissenting opinion in *Gauweiler* of Justice Gertrude Lübbe-Wolff, in which she writes, 'The democratic legitimacy which the decision of a national court may draw from the relevant standards of national law (if any) will not, or not without substantial detriment, extend beyond the national area'.[49] The two available courses forward envisioned here echo those the *Brunner* Court imagined, as well: either the assertion of national democratic sovereignty or legal disengagement; that is, deference to majoritarian institutions as they exist, negating as in *Brunner* those limited strands of emancipatory potential in European law and politics, a withdrawal from the space of legal interpretation. Some view the latter as salutary, giving due space for majoritarian decision-making,[50] but might it not be instead (or perhaps at the same time) an abdication of legal responsibility and legal imagination? Might it not ratify an insularity, a solipsism of perspective that does a disservice to the promise of post-national constitutional law?

As ideology brings concealment and disengagement, the historical imaginary not only obscures comparative perspectives but also inhibits the creative application of law to

48 *See* Damien Chalmers, *Crisis reconfiguration of the European constitutional state* in D CHALMERS, M JACHTENFUCHS, AND C JOERGES, *THE END OF THE EUROCRATS' DREAM: ADJUSTING TO EUROPEAN DIVERSITY* 284 (Cambridge, UK: Cambridge University Press 2016).

49 Dissenting Opinion of Justice Lübbe-Wolff on the Order of 14 January 2014, Case 2 BvR 2728/13, para 28.

50 *See, eg,* Christian Joerges, *From Integration through Law to the De-legalisation of Europe: An exercise in sociological jurisprudence and economic sociology*, presented at EU CONSTITUTIONAL IMAGINATION: BETWEEN IDEOLOGY AND UTOPIA, iCourts, University of Copenhagen, 1-2 November 2018, working draft.

center these perspectives as matters for adjudication. The result is a form of constitutional discourse ill able to mediate the politics of the European economy and, in turn, to secure the equal sovereignty of states in the constitutional system.

Indeed, Bruce Ackerman's recent diagnosis of the ongoing travails of the European crisis suggests that not only does the historical imaginary challenge the legitimacy of law without a *demos* but it also hinders the ability of diverse constitutional traditions to address problems collectively, no matter how systemically-shared such problems might in fact be.[51] Distinct historical experiences with constitutional revolutions, Ackerman argues, yield correspondingly divergent social understandings of constitutional legitimation. The particularistic rationality captured in the historical development of constitutional culture thus constrains the political possibilities available to citizens in the present. This is why 'history' sustains in the first instance only a parochial[52] form of post-nationalism, in which solidarity toward non-citizens remains one of charity, not of right; and the law itself offers few tools to overcome this state of affairs.

b. 'System'

Second, there is the legal imaginary of 'system'. Tied to the efficacy of law, this view valorizes the individual in her 'capacity for choice': a sovereign consumer or producer craving the 'ordered liberty' and 'predictability' of the law of contract.[53] West notes this view is plausibly post-national, for the autonomy of choice 'does not presumably stop at the border'.[54] The individual contractor has neither desire for continuity with a particular community nor respect for bonds that might hinder freely agreed exchange.[55] Yet this individualism yields something rather limited, what West criticizes as a 'thin cosmopolitanism': thin in the citizenship it engenders and the political or normative commitments it sustains.

51 Bruce Ackerman, '*Three Paths to Constitutionalism—and the Crisis of the European Union*' 45(4) BRITISH J. POL. SCI. 705 (2015).
52 *See, eg*, RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 191 (Cambridge, UK: Cambridge University Press 1989).
53 West, *supra* note 22, at 270.
54 *Id.*
55 *Id.* at 271.

'Systemic' law works with a predominantly functionalist rationality. This is the familiar logic of systems theory—most extensively developed by Niklas Luhmann—that conceives law as a self-referential social system, the function of which is to maintain consistent and stable normative expectations among social actors.[56] Because it is a system's function that determines its rationality, Luhmann insists systems are 'operationally closed' or 'autopoetic'. A hard formal line separates them from extra-systemic communication in the environment, and they reproduce exclusively through their own operations.[57] A system cognitively registers external inputs in its own specialized binary coding: the contraposition of lawful and unlawful in the case of the legal system.[58] Characteristic here is Michal Bobek's assertion that the touchstone for legitimate European-level adjudication is simply 'the practicability or feasibility of the Court's pronouncements on what national courts should do with respect to EU law in the national judicial domain'.[59] 'Clear and transposable'[60] instruction is the required mode of reasoning—one satisfied even by the Court's much-criticized 'cryptic, Cartesian style'.[61]

But law's 'systemic' integrity is a questionably narrow criterion both for scrutinizing the exercise of public authority and for ensuring law's reflexivity. The notion that communication from the surrounding lifeworld must first be systematized before it can influence systemic operation—and that this systematization can then sustain legitimate legal interpretation—has the following consequences with regard to, first, law's democratic legitimacy and, second, its resources for social transformation.

First, systemic law coordinates the consequences of action; it does not express shared normative meanings among political subjects.[62] Its purpose is not deliberation or the exercise of public reason but systemic stabilization. Systems integration in effect takes

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56 NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM, ch 3 (F Kastner et al eds, K Zeigert trans, Oxford: Oxford University Press 2004 [1993]).

57 *Id.* at 465.

58 *See id.* at 93.

59 Michal Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts* in MAURICE ADAMS ET AL (EDS), JUDGING EUROPE'S JUDGES. THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 204 (Oxford: Hart 2013).

60 *Id.* at 207.

61 *See* Joseph Weiler, *Epilogue: The Judicial Après Nice* in GRÁINNE DE BÚRCA AND JOSEPH WEILER (EDS), THE EUROPEAN COURT OF JUSTICE 225 (Oxford: Oxford University Press 2001).

62 *See* SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY 230 (New York: Columbia University Press 1987).

place, as Habermas put it, 'behind the backs of individuals'.[63] This marks an instrumentalist, impersonal shift in the explanatory perspective of judicial reasoning, in which the functional significance of speech acts is independent from the truth or contextual meaning of their content. Systemic legal analysis finds in law not an authored project but an internal principle of order. If 'history projects the insular self-identification of a polity, system achieves functional stability with reference to a 'background teleology'.[64]

Systemic law abides by the mechanism of a market, corresponding in Kahn's political psychology to the domain of 'interest'. The impersonal hand of steering media coordinates action only by first individualizing, objectifying, and aggregating the range of human needs and values. The voluntarism systemic law protects is thereby not the political will of collective self-authorship under the historical legal imaginary. It aims not to express the consent of citizens but to gratify the interests of 'stakeholders', whose collective concerns are reduced to what can be delivered by systemic coordination and market exchange.[65] Indeed, Kahn notes that democratic politics in this domain becomes a 'distrusted form of action' insofar as it always risks interfering with the gains of market efficiency.[66] Because its task is to 'secure the conditions under which markets can flourish',[67] politics is simply better performed by—and thereby better left to—the maintenance of technocrats with systemic expertise.

Second, 'systemic' imaginary account of legal reasoning offers a limited, evolutionary account of law's reflexivity. Luhmann writes that individual legal cases provide inputs of 'variation,' after which judicial decisions serve again to 'stabilize' the system.[68] He conceives this as the system's internalization of 'irritations' or 'disturbances'.[69] But note the defensive posture of Luhmann's suggestive terms of art. Change and learning are possible—Luhmann emphasizes they are necessary, even—but only as steps in a

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63 JÜRGEN HABERMAS, ON THE LOGIC OF THE SOCIAL SCIENCES 77 (Cambridge, MA: Massachusetts Institute of Technology Press 1988 [1970]). *See also* BENHABIB, *supra* note 62, at 231.
64 *See* Paul Craig, Pringle *and the nature of legal reasoning,* 21 MAASTRICHT J. EUR. AND COMP. L. 205, 214 (2014).
65 KAHN, *supra note* 32, at 168.
66 *Id.* at 171.
67 *Id.* at. 169
68 LUHMANN, *supra* note 56, at 259.
69 *Id.* at 383.

development on the system's own terms.[70] The implication is that systemic change is restricted to a settled range of policy objectives and normative values already rooted in the functional purposes given by the system itself. The meaning and normative charge of legal commitments are here indexed in light of present interests: a 'conversion'[71] that drains both past and future, as Drucilla Cornell writes, of their 'critical, redemptive, and utopian potential'.[72] Systemic law thereby narrows public freedom to the successive exercise of contractual choice reproduced on systemic terms.

While invocation of background teleology can itself be viewed as a 'flexible solution' to save the system in times of crisis, it projects the utopia of a self-correcting system without need for public contestation over the terms by which the system is saved. The teleology according to whose logic the system is maintained increasingly becomes circular, mechanical, and self-referential. Insofar as systemic imperatives are not posed as legal interpretations open to public contestation and instead as presumptions read authoritatively into the Treaties, for example, this background teleology becomes an ideological fixture in legal reasoning disjointed from democratic legitimation. They thereby inhibit one from identifying—as the historical imaginary did, albeit on different grounds—alternative possible states of affairs.

But, crucially, this same impersonal, market-based evolution of authority is the key to a systemic imaginary's claim to post-nationalism. In the interests of greater operative efficacy, corresponding specialized subsystems from different nation-states interconnect and merge transnationally. As the EU case suggests too well, such alignments per market integration are the *conditio sine qua non* of a functionalist post-national legal order, for the law is predicated upon citizens' continuing willingness to draw from (and thereby amplify) systemic benefits.[73] The empirical literature on European integration overwhelmingly focuses on post-national cooperation as a means to compensate

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70 *See* Gunther Teubner, *Introduction to Autopoetic Law* in *AUTOPOETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 7-8 (G Teubner ed, Berlin: Walter de Gruyter 1987).

71 *See* NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY (New York: Columbia University Press 1984 [1982]) 276 ('All temporal structure relate to some sort of present'.).

72 Drucilla Cornell, *Time, Deconstruction, and the Challenge to Legal Positivism* 2(2) YALE J. L. HUM. 267, 270ff (1990).

73 *See generally* TURKULER ISIKSEL, EUROPE'S FUNCTIONAL CONSTITUTION: A THEORY OF CONSTITUTIONALISM BEYOND THE STATE (Oxford: Oxford University Press 2016).

functionally for the diminishing capacity of individual states to govern either in isolation or through traditional intergovernmental agreements among sovereigns.[74]

Consequently, post-national law is organized according to specific *teloi* to be achieved—whether public security, wealth maximization, or environmental protection. Despite the expansion of policy competences over time, the exemplary hallmark 'output legitimacy'[75] of this approach remains the efficiency boon of an integrated and competitive marked for the exchange of goods, services, and capital. This same logic forms the bedrock of the EU's classic integration through law arguments[76], where post-nationalism appears as a 'mechanical necessity imposed by the logic of integration'.[77]

But the effectiveness of systemic functions relies on an ideological underpinning such systems themselves do not directly disclose.[78] Remember that the purpose of systemic law is to secure implementation, not to underwrite ongoing public deliberation about its aims. The functionalist understanding of equality under contract therefore by definition conflates legitimacy with strategic *modus vivendi.*[79] It is the familiar commercial cosmopolitanism of certain, though by no means all, readings of Kantian cosmopolitan right that rely on the surface pretensions of *doux commerce.*[80] Systemic law substitutes the contractualism of sovereign states under modern international law for that of economically active individuals and firms.[81] The imaginary of 'system' thereby narrows

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74 *See* Anand Menon and Stephen Weatherill, *Transnational Legitimacy in a Globalizing World: How the European Union Rescues its States,* 31 EAST EUR. POL. 397 (2008).

75 FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE OR DEMOCRATIC? 6 (Oxford: Oxford University Press 1999).

76 *See generally* PIERRE PESCATORE, LAW OF INTEGRATION (Sijthoff 1974); M CAPPELLETTI, M SECCOMBE, AND J WEILER (EDS), INTEGRATION THROUGH LAW: EUROPEAN AND THE AMERICAN FEDERAL EXPERIENCE (de Gruyter 1985).

77 Miguel Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, REPORT FOR THE EUROPEAN PARLIAMENT, RCSAS POLICY PAPER 2012/11, 5 (2012).

78 *See* UNGER, *supra* note 17, at 124 ('The functional explanations would lack their distinct character and controversial force if they were not associated with the deep-structure assumptions'.)

79 *See* JOHN RAWLS, POLITICAL LIBERALISM 147ff (New York: Columbia University Press 1993).

80 *See, eg,* B SHARON BYRD AND JOACHIM HRUSCHKA, KANT'S DOCTRINE OF RIGHT: A COMMENTARY (Cambridge, UK: Cambridge University Press 2010); cf. BRIAN MILSTEIN, COMMERCIUM: CRITICAL THEORY FROM A COSMOPOLITAN POINT OF VIEW (Rowman & Littlefield International 2015).

81 *See* Stephen Gill, *New constitutionalism, democratization and global political economy*, 10(1) PACIFICA REV.: PEACE, SEC. & GLOB. CHANGE 23 (1998).

and distorts the terms by which civic legitimacy is reproduced in the course of judicial reasoning.[82]

Consider in this regard the transition from a common market to a single market. While rhetorically conceived as an evolutionary step necessary for the 'completion of the internal market' as ordained by the founding Treaties, the single market heralded a profound shift in public policy and the structure of European governance. This rupture had several dimensions exemplified by the ruling of the CJEU in *Cassis de Dijon*[83] and the terms of the Single European Act: the earlier symmetry between political and economic integration was supplanted by emphasis on negative integration postured defensively against national regulatory and social policies; decision-making was rebalanced away from democratic polities toward the agency of private actors defending their economic interests now enshrined as fundamental economic rights; and finally the qualified majority voting in the Council was introduced for a widening array of policy fields related to realizing the market programme.

These are in fact quite radical reorientations in European political economy and democratic legitimation. Indeed, Agustín José Menéndez notes the radical asymmetry in the far less demanding decision-making requirements for market-making norms in comparison to those required for policies aiming to correct the market's distributional consequences.[84] But this reorientation is not admitted as such in the account given by law, as systemic legal judgments are constructed in the tenor of teleological evolution. This is precisely the approach of the European Court of Justice, for example, as it

82 For this reason, contemporary liberal constitutional scholars like Mattias Kumm have rejected systems-theoretical conceptions of constitutionalism insofar as they 'do not participate in the project of working out the implications of a shared normative commitment to the idea of free and equals governing themselves through law'. Mattias Kumm, *Constitutionalism and the Cosmopolitan State,* NYU PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES, Working Paper 10-68, 5n9 (2013).

83 Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] ECLI:EU:C:1979:42.

84 *See* Agustín José Menéndez, *Constitutionalisation without Democratic Constitutional Law: The Founding Paradox of European Law*, presented at EU CONSTITUTIONAL IMAGINATION: BETWEEN IDEOLOGY AND UTOPIA, iCourts, University of Copenhagen, 1-2 November 2018, working draft.

generalized newfound conceptions of economic freedom from the scope of the movement of goods to that of services, establishment, capital, and labor.[85]

A consequence of the systemic imaginary is increasingly a kind of shallow commercialism in the European project, yes; but also the loss of depth of historical judgment, attentiveness to shifting socio-economic imbalance among member states, and little awareness of possibilities for alternative developments that might otherwise sustain reflexivity. The result then, too, is a kind of developmental determinism whose progression smoothly unfolds—and thus a tendency toward viewing integration, as Menéndez critiques, in the vein of a triumphalist Whig interpretation of history—a 'false impression that integration proceeded according to a more or less coherent frame'.[86]

This is a substantive concern for the character of the European project in its social and political registers. But it is also a concern for jurisprudential methodology. In particular, it prompts one to view the ubiquitous use of proportionality analysis by the European Court of Justice with greater skepticism, precisely insofar as it reflects and ratifies these deficits of the systemic imaginary.

Consider here once again the OMT saga, but this time from the perspective not of the German Federal Constitutional Court but of the ECJ. In *Gauweiler* the European Court of Justice used a variant of proportionality analysis to reject the conclusions of the GFCC and instead to affirm the legality of the ECB's bond buying programme as necessary to the achievement of the its monetary policy mandate. But the Court's interpretive work here is distinctive—and distinctly 'systemic'. The Court assessed the programme's suitability and necessity with reference to the objectives of monetary policy found in the Treaties in broad deference to the technical expertise of the ECB itself to interpret the requirements of those objectives.[87] The ECJ invoked the background teleology of general economic stability in place of giving a substantive interpretation of what stability entails and for whom.

85 Cases C-76/90, Säger, ECLI:EU:C:1991:331, C-55/94, Gebhard, ECLI:EU:C:1995:411, C-415/93, Bosman, ECLI:EU:C:1995:463, and after the entry into force of Directive 88/361, in C-163/94, Sanz de Lera, ECLI:EU:C:1995:451.

86 Menéndez, *supra* note 84.

87 *See* Judgment in Case C-62/14, Gauweiler [16 June 2015] EU:C:2015:400, paras 68-90.

One can already see how the logic of functionalist reasoning risks self-referential circularity and fails to justify the meaning given to law. Proportionality analysis here tends toward an overtly consequentialist approach, in which rights and interests are balanced against one another with reference to the consequences of their infringement but not in light of an interpretation of their meaning. The objectives and consequences of actions pursued determine the meaning of rights implicated. In this sense, systemic thinking seems usefully flexible in moments of crisis—as was the case in the OMT saga—but also as rather unprincipled. We see this clearly if we compare the ECJ's decision to its mirror image in the same Court's 2012 judgment in *Pringle*, which held the purchase of government bonds by the European Stability Mechanism to fall outside monetary policy and thus not to infringe the mandate of European Union institutions.[88]

Reliance on the act of balancing in proportionality analysis scrutinizes the *relation* between means and ends, but subjects neither means nor ends to extensive interpretive review. Imported from the German system, proportionality balancing might work well in national democratic jurisdictions where such substantive interpretations are already available, having been developed and stabilized. But in a pluralistic, highly reflexive legal order, interpretive deference under the mantle of balancing amplifies the systemic imaginary's ideological pressures. It conceals highly subjective and contested assessments of public value behind the veil of superficial neutrality premised on the need to maintain the system itself.[89] Here, proportionality analysis is liable to crudely instrumentalist, motivated applications. As in the famously criticized rulings in *Viking* and *Laval*, balancing can promote fundamental freedoms of market integration over fundamental rights affirmed in national social regulation while neglecting substantive interpretations of both. This is not to say that the outcomes in these cases were themselves necessarily wrong; but their mode of reasoning belied the legitimation discourses post-national law requires.

If the systemic imaginary has guided the evolution of the European legal order—and in these present cases the evolution of the EMU from a rules-based order to a more flexible

88 *See* Case C-370/12, Thomas Pringle v Government of Ireland, Ireland, The Attorney General [2012] EU:C:2012:756, para 45.

89 For a sustained critique of proportionality analysis, see Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 INT. J. CONST. L. 468 (2009).

policy-based one—then at stake is the persuasiveness of such an evolution. If systemic thinking attempts justification only by neglecting extra-systemic considerations—the role of solidarity or a rebalancing of European political economy, for instance—then persistent, perhaps intractable disagreement and misunderstanding among European polities are likely to remain.

c. 'Principle'

In the end, West herself finds more promise in what she terms an 'egalitarian and communitarian' understanding of the rule of law.[90] Here, treating like cases alike under law aims to 'ensure the preconditions for a community of equal individuals'.[91] It addresses the shared humanity of all persons, their capacities, needs and vulnerabilities, their equal moral worth. The individual is neither reduced to an agent of rational choice nor determined by culture or tradition. This form of legal justice expresses the universal cosmopolitan injunction that 'all humans should be equally regarded'.[92]

The basis for this claim to equality lies in what I refer to as the imaginary of 'principle'. This imaginary reflects an internal logic of 'communicative rationality': the idea—associated most prominently with Habermasian discourse ethics[93]—that all individuals share a capacity for reason-giving language through which normative agreement on matters of common concern is possible. Habermas's rational reconstruction of the formal preconditions of communicative action reveals a set of 'universal capabilities'[94] and therefore a universal basis for political inclusion. Indeed, Habermas employs this same method to conceptually reconstruct a system of rights as 'co-original' preconditions for the democratic legitimacy of modern positive law.[95] A similar kind of rational reconstruction also informs Habermas's most recent critique of contemporary European

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90 West, *supra* note 22, at 275-6.
91 *Id.* at 276.
92 *Id.* at 278.
93 *See generally* Jürgen Habermas, *What is Universal Pragmatics?* [1976] in ON THE PRAGMATICS OF COMMUNICATION 21–103 (M Cooke ed, Cambridge, MA: Massachusetts Institute of Technology Press 1998).
94 JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 14 (T McCarthy trans, Boston: Beacon Press 1979), emphasis removed.
95 *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (W Rehg trans, Cambridge, MA: Massachusetts Institute of Technology Press 1996); Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29(6) POL. THEORY 766 (2001).

politics, where he defends the concept of shared sovereignty by excavating the core of communicative rationality from EU legal practice read in discourse-theoretical terms.[96] And in the field of public international law, the rational reconstruction of constitutional principles underpinning supranational legal agreements is common. This is the approach taken by Mattias Kumm, for example, in developing the foundational principles of 'cosmopolitan constitutionalism' according to political liberalism: human rights, democracy, and the rule of law.[97]

'Principle' is the archetypical logic, in Kahn's schema, of the domain of 'reason'. Aiming to express the reasonable foundations of political life, principled legal judgment seeks the universal perspective of the sciences in its search for justice.[98] Habermasian pragmatic presuppositions, while rooted in the 'observed practices' of social reality, share with the formal device of Rawls's 'original position' the counterfactual form of moral reasoning.[99] The context-transcending element of Habermasian validity claims takes this future consensus as an 'independent standard of evaluation',[100] a point of reference and regulative ideal from which to judge existing political life. Critique is thus drawn from the forward-looking counterfactual movement, which bears the pedigree, if not the transcendental metaphysics, of natural law.

'Principle' thereby differs from 'history' insofar as the normative validity of speech acts depends not on background lifeworld meanings but on their accordance with universal-pragmatic argumentation. Reasoned critique is a movement of self-distancing and abstraction—the distancing from particular (prejudicial) forms of ethical life in favor of moral-discursive rules,[101] whose purpose is to dissolve the 'accidents of place and time'.[102]

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96 *See* JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE 41 (Cambridge, UK: Polity 2012).

97 *See* Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (J Dunoff & J Trachtman eds, Cambridge, UK: Cambridge University Press 2009).

98 *See* KAHN, *supra* note 32, at 172-3.

99 HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 95, at 132 ('The basic rights reconstructed in our thought experiment are constitutive for every association of free and equal consociates under law'.)

100 Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Have an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, in EUROPE: THE FALTERING PROJECT 149 (C. Cronin trans, Cambridge, UK: Polity Press 2009).

101 *See* Jürgen Habermas, *Moral Development and Ego Identity*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY, supra note 94, at 69-94.

102 KAHN, *supra* note 32, at 175.

Future agreement is imagined by the work of reason alone, freeing itself both of the past and of history and of the present body and its interests, and thus extending in principle to everyone.

Communicative rationality in legal theory bears this same basic structure. Habermas has developed his discourse theory of law in later work as a sophisticated 'sluice-gate' model: no longer the site of a tenuous 'siege' against the system's colonization of the lifeworld,[103] the law instead mediates the two social domains by serving as a conduit between them.[104] Principled law on this account assumes a fundamentally 'future-oriented character' that 'tap[s] the system of rights ever more fully'.[105] Now, this is surely a thicker principle of post-nationality than market functionalism, but does it offer a sufficiently thick foundation for commitment to the work of constitutional reflexivity? There are causes for hesitation—and to think that Habermas's balance between rights and democratic legitimacy is here not set quite right.

First, the formal-pragmatic reconstruction in the imaginary of principle departs too quickly from the forms of life—concrete experiences, historical meanings, and shared self-understandings—that orient moral and political judgments. Citizens are understood foremost as the bearers of rights, not as members of a political community in which judgments are made. Communicative rationality's formal criterion for argumentation here risks discrediting or fragmenting the 'integrity of forms of life' on which it depends for semantic content and motivational energies, thereby exposing itself to the same critique made by Hegel of Kantian moral psychology.[106]

If history remains parochial in its orientation to questions of justice, 'principle' commits the opposite error; it is insufficiently attentive to the rootedness of rights as political achievements in particular cases. Because legal commitment indeed reflects not only an

103 *See generally* HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, *supra* note 93, at 358ff.
104 HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 95, at 356ff.
105 Habermas, *Constitutional Democracy*, *supra* note 95, at 776.
106 See BENHABIB, *supra* note 62, at 317ff ('The *interest* in rational discourse is itself one which *precedes* rational discourse, and it is *embedded* in the contingency of individual life histories and in collective patterns of memory, learning, and experience'.). See also HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 95, at 490 (admitting that '[t]he fact that everyday affairs are necessarily banalized in political communication…poses a danger for the semantic potentials from which this communication must draw its nourishment', and suggesting that 'identity-forming religious traditions, and … the negativity of modern art' must mitigate this by opening the 'trivial and everyday…to the shock of what is absolutely strange, cryptic, or uncanny'.)

abstract future but also an experienced past and urgent present—not merely reason but also will and interest—the achievement of equality in law cannot be left to the domain of egalitarian thought alone.[107]

A second reason for skepticism is that the neglect of context and historical experience yields a constrained account of social transformation. Emphasizing its formal-pragmatic terms, Habermas locates collective moral development at a higher structural level of society. Social systems—the system of rights under a rule of law, for example—and not political actors register the work of moral change. The difficulty is that communicative rationality offers no richer account of how citizens transform the norms, institutions, and traditions they inherit and participate in. History offers Habermas evidence that universal claims have in practice been implemented; it is not, however, a reservoir of experiences and perspectives *through* which moral values might be known or further understood.[108] Habermas thereby reduces political reform to a process of acquiring 'competences [that] have no history but a development'.[109] The principled form of post-nationalism here remains abstract. It leaves citizens without a properly participatory mode of self-authorship and without the institutional tools and practices to motivate cosmopolitan learning. Communicative rationality's abstraction thereby contributes to its own forms of ahistorical determinism and anti-political moralism, in which 'principled' normative questions have been answered and only await instantiation in practical politics.

Let me return here to EU law—for the task of grounding the legal imaginary in principle is arguably a main purpose of the EU Charter of Fundamental Rights. But the record of how the Court has interpreted the meaning of Charter provisions reveals the limitations of 'principle' as a way to conceive post-national legitimacy—for here remains precisely this same enduring gap between 'principle' and the transformative potential of rights as matters of self-authorship and political belonging.

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107 This is again how I read Ackerman's intervention into the European crisis and his explanation for its intransigence. See ACKERMAN, *supra* note 51.

108 See MEILI STEELE, HIDING FROM HISTORY: POLITICS AND PUBLIC IMAGINATION 20 (Ithaca: Cornell University Press 2005).

109 JÜRGEN HABERMAS, ZUR REONSTRUKTION DES HISTORISCHEN MATERIALISMUS 217 (Frankfurt am Main: Suhrkamp 1976).

Under EU law, the Charter is conceived not merely as a floor to the human rights standards adopted by states—as are provisions of the European Convention on Human Rights—but as a crystallization of the core meanings of rights.[110] Its ambition is the harmonization of binding normative standards. The Charter in this sense is not a rights-protecting minimum but a symbolic articulation of shared value—a means to construct and legitimate the European polity.[111] Its common interpretation and application thereby also require certain justification.

Crucial in this respect is the Court's consideration of the basis from which the content of fundamental rights is derived. As Advocate General Maduro wrote in his Opinion in *Kadi*, 'Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them'.[112] But to understand the meaning of fundamental rights as an instantiation of common values is a delicate matter—and a great deal hinges on the manner by which this commonality is ascertained.

A set of shared values surely can be identified in Article 2 TEU, the Charter's Preamble, and it substantive chapters codifying 'the indivisible universal values of human dignity, freedom, equality and solidarity'.[113] But it is equally clear that such formal codification in itself neither represents nor achieves a shared understanding of how such values are to be interpreted, implemented, or qualified vis-à-vis one another in concrete legal applications. One must here distinguish the broad values that might guide a political organization from instantiations of those values as rights in constitutional systems that structure social and political power. While the latter is the aim of the Charter and of the 'principled' constitutional imaginary, realization of this aim seems to entail a great deal more. Rendering the Charter applicable in this way requires substantive comparative

110 Case C-399/11 Melloni v Ministerio Fiscal, ECLI:EU:C:2013:107.

111 Gráinne de Búrca and Jo Beatrix Aschenbrenner, *The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights*, 9 COL. J. EUR. L. 355, 364-5 (2003); Julio Baquero Cruz, *What's Left of the Charter? Reflections on Law and Political Mythology*, 15(2) MAASTRICHT J. EUR. COMP. L. 65 (2008).

112 Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 in Joined Cases C-402/05P and C-415/05P, Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities [2008] ECR I- 6351, para 44.

113 EU CHARTER OF FUNDAMENTAL RIGHTS [2010] OJ C 83/389, Preamble.

engagement with national legal commitments, which is precisely what the imaginary of 'principle' in its abstraction resists.

The Court has long declined to undertake such an analysis in its case law. Consider the Court's methods of evaluation, for example, in matters concerning the horizontal effect of non-discrimination and social rights, which have profound implications for the ordering of public and private power in Europe.[114] In *Mangold* and *Kücükdeveci*, the Court derived protections against age discrimination from the EU-wide commitment to equality.[115] Although Member State practice did not then suggest a long-held view that equal treatment required protections against discrimination on grounds of age,[116] the Court asserted the commonality of equality as a general principle of EU law able to be invoked broadly against Member States and private actors alike. This application of equality in the context of age was questionable with respect to comparative constitutional analysis[117] but likewise offered little independent substantive interpretation of that common meaning ascribed to equality itself. The Court elaborated no particular rendering of the right in the given case.

Notable in the comparison of *Mangold* to *Kücükdeveci* is how little difference the Charter's post-Lisbon entry into force has made in the Court's abstract reconstruction of rights. Indeed, reasoning in subsequent cases similarly resists direct interpretation of the Charter's provisions and instead relies on the prior, pre-Lisbon existence of general principles of law as precondition for the exercise of Charter rights.[118] The Charter's political dimension—a political genesis of a commitment to rights and values that requires

114 *See generally* Eleni Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, 21(5) EUR. L. J. 657 (2015).

115 Case C-144/04, Mangold v Helm [2005] ECR I-9981; Case C-555/07, Kücükdeveci v Swedex GmbH [2010] ECR I-365.

116 *See* Paul Craig, *The ECJ and* ultra vires *action: A conceptual analysis,* 48(2) COMMON MARKET L. REV. 395 (2008).

117 *See* 2 BverfG 2661/06, Honeywell, paras 61, 68.

118 *See* Case C-282/10, Dominguez v Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre, EU:C:2012:33; Case C-176/12, Association de Médiation Sociale v Union Locale des Syndicats CGT Hichem Laboubi Union Départementale CGT Des Bouches-du-Rhône Confédération Générale Du Travail (CGT), EU:C:2014:2; Case C-447/09, Prigge and Others v Deutsche Lufthansa, EU:C:2011:573, para 48; Case C-69/10, Samba Diouf v Ministre Du Travail, De l'Emploi Et De l'Immigration [2011] I-07151 para 49.

its own interpretive work—is here subsumed beneath the imaginary of 'principle' and the idealized presumption that the harmonization of European principle already exists.

The Court's hermeneutic short circuit in its fundamental rights jurisprudence—the broad confluence of judicial minimalism and abstraction[119]—bears regrettable consequences for the legitimacy of its constitutional politics. First, it obscures and thus depoliticizes EU law as a site of salient conflicts in the ways national constitutional orders define substantive interpretations of rights. In place of pluralism, it inserts the moral standing of European principle severed from ongoing processes of political legitimation. Such moral standing positions EU law intrusively to mistrust the choices made by national constitutional politics, leaving them primed for replacement by a European-wide consensus.[120]

Secondly, not only the EU's political legitimacy but also its socio-economic legitimacy suffers. For the Court's hermeneutic reticence privileges the protection of certain fundamental rights over others, tending specifically to deny horizontal direct effect to those rights under the Charter's solidarity chapter, for example.[121] Reticence in these latter cases no doubt stems in part from how contested these provisions were politically in the drafting of the Charter, as they typically entail more pronounced systematic redistributive consequences. But potential for political conflict neither excuses nor necessarily warrants hermeneutic silence.[122] For this imbalance not only belies emphasis in the Charter's preamble on the 'indivisibility' of its values of 'human dignity, freedom, equality, and solidarity',[123] but more to the point also contributes to the asymmetry in European economic power discussed above, where corrections for the market's social distributive consequences are given comparatively far lesser standing in EU law.[124]

Finally, and relatedly, a 'principled' discourse remains insensitive to the embeddedness of rights in socio-historical contexts that are both plural and diachronic. Interpretation of

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119 *See* Laurent Pech, *Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in* Römer *and* Dominguez, 6 COMMON MARKET L. REV. 1841 (2012).
120 *See* Floris De Witte, *The Architecture of a Social Market Economy*, LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 13/2015, 20ff (2015).
121 See, eg, the rights to information and consultation within the undertaking and to paid annual leave considered in *AMS* and *Dominguez*, *supra* note 118, respectively.
122 *See again* Pech, *supra* note 119.
123 EU CHARTER OF FUNDAMENTAL RIGHTS [2010] OJ C 83/389, Preamble.
124 *See infra* note 84 and surrounding text.

the meaning of rights cannot move too quickly over such contextual considerations without presumptively homogenizing the lived experiences and aspirations of citizens across European polities.[125] As with Habermas's emphasis on the acquisition of competency, the conceptual terms of 'principle' misleadingly imply a common set of histories and a shared manifestation of social problems—and thereby an equally shared catalog of possibilities and solutions.

Recall here Franz Mayer's admonition to the German Federal Constitutional Court that it could not see in *Gauweiler* how its own invocations of self-determination predicated a reality in which those same values simply were not available for sister courts to similarly invoke—and thus that it was blind to the (mal)distributions of the social and political world that made these rights for some mere formalities without the potential for realization. Such a distribution of course has a history; it comes into being from a set of political and legal decisions and through dynamic systemic relations. Blindness to it thereby can come in several forms: a blindness first to the lack of present realization across jurisdictions; but second to the historical genealogy and systemic interactions through which this lack is produced. But the 'principled' imaginary fails to make such connections in its reasoning; it seems instead to sanction such blindness.

Taking these shortcomings together, the imaginary of 'principle' contributes far too little to the reflexive, transformational potential of law and legal thought—to illuminating concrete paths for transformation and mutual support that a discourse of European fundamental rights might otherwise promise.

Here we glimpse how 'principled' justification might conceive post-national constitutionalism to be driven primarily by the defense of rights understood narrowly, individually, and incrementally. Although considered in a concrete case, the image of rights elaborated openly by the European Court of Justice remains paradoxically abstract—removed from politics, social context, and from history. To be sure, this tendency in the logic of European rights jurisprudence results in part from the technical

125 For trenchant criticism precisely along these lines in relation to the *AMS* case, consider Eleni Frantziou, *Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union*, 10 EUR. CONST. L. REV. 332, 347 (2014).

nature of exchanges in the preliminary reference procedure.[126] But 'principle' nevertheless performs a tendentious kind of political subjectification: in Joseph Weiler's telling turn of phrase, it 'places the individual in the center but turns him into a self-centered individual'.[127] 'Principle' as a 'proxy for governance'[128] imagines the post-national citizen as a bearer of rights. But these foremost comprise a defense against others, a defense of 'personal, private interest against the national public good'.[129] As a defense, they form only with great difficulty a fabric that again links one to others anew—to the possibilities of shared transformative political action. Reluctance by the ECJ to embrace more robust, comparative forms of adjudication risks failing the political and normative demands of fundamental rights-protection itself.[130]

Imaginary / Modality	History (Grimm, Kronman)	System (Luhmann, Teubner)	Principle (Habermas, Rawls, Kumm)
Rationality	Particularistic	Functionalist	Communicative
Temporality	Past	Present	Future
Political Psychology	Will	Interest	Reason
Sociological Domain	Lifeworld (project)	System (maintenance)	Lifeworld-System (harmonization)

126 On necessary reforms to the procedure, consider Jan Komárek, 'In the court(s) we trust? on the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) 32(4) *European Law Review* 467-491.
127 Joseph H. H. Weiler, *The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12(1) INT. J. CONST. L. 94, 103 (2014).
128 *Id.* at 98.
129 *Id.* at 103.
130 See Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20(2) MAASTRICHT J. EUR. COMP. L 168 (2013).

Agents	Citizens	Stakeholders	Rights-bearers
Post-nationalism	Parochial	Commercial-Evolutionary	Abstract

II. Westphalian coherence and the fragmentation of legal orders

What emerge from this preceding typology of legal imaginaries (summarized in Table 1 above) are segmented conceptions of constitutional order that each foreshorten the reflexive potential of legal claims. Most notable in this parsing of different 'rules' of law is that, despite their divergent content, they share an underlying formal structure: they aim to reconstruct law's 'coherence', according to past history, the present market, or future morality, respectively. Coherence implies smoothing contradicting tendencies in legal discourse; it seeks the integration up and down of the law's parts under the rubric of a unifying purpose.[131] The imposition of law becomes a mode of stabilizing normative commitment, an internally consistent space of thought operating according to its rules of development. But my argument is that coherence is inadequate to the task of situating post-national politics, for its ideological force erases precisely the productive space of constitutional reflexivity.

Each imaginary described above involves a distinct mapping of societal time. Each entails its own political psychological ordering, which defines will, interest, and reason as distinct yet delineated with reference to one another. As such, history privileges the embedded perspectives of traditional lifeworlds as the bases from which to adjudicate constitutional meaning. System substitutes instead the commercial logic of the market consumer. And principle affirms the individual human being, the universal bearer of rights, as its legitimating image.

Because the utopian dimension of each imaginary orders the proper relations among the psychological and sociological domains, it also entails an ideology of the respective ways

131 *See, eg,* Neil MacCormick, *Coherence in Legal Justification,* in THEORY OF LEGAL SCIENCE (A Peczenik et al, eds, Dordrecht 1984); Joseph Raz, *The Relevance of Coherence,* 72 BOSTON UNIV. L. REV. 273 (1992).

these relations might be corrupted. History's particularism resists the disembedding from culture whereby markets and morality disrupt legitimate politics; systemic functionalism resists interventions that would advance values incompatible with market access and efficiency; and the principles of communicative rationality treat political experience or commercial interest as always potentially prejudicing the moral purity of valid reasons. Each utopia and ideology thereby privilege their own forms of post-national commitment and institutional solutions to the ethical demands of post-national law: whether intergovernmental cooperation, globalized market integration, or a regime of international human rights.

Insofar as these imaginaries affirm the coherence of their legal ordering, they also obscure spaces of constitutional reflexivity. This short-circuits the project I presumed at the outset to be fundamental: constitutional transformation and mutual learning. It not only diminishes the resources within law for bridging competing worldviews but in fact locks legal discourse more deeply into the worn ideological channels of Westphalian sovereignty. Consider, for example, the persistent ideological framing of legal discourse under European constitutional pluralism: between the republicanism of (historical) national constitutional law; the (systemic) European regulatory state of the single market; and the (principled) European regional human rights system. As Marco Dani observes, the frameworks judges employ to comprehend the legal issues before them depends upon the legal rationality of the system they inhabit: 'Whereas in national constitutionalism the relevant facts and interests are defined in the lexicon of fundamental rights through constitutive principles, in the EU the same dispute may be treated with regulatory principles and common market categories'.[132] It is unsurprising, then, that when such rationalities make contact or conflict, the result is not mutually transformative learning

132 Marco Dani, *Intersectional litigation and the structuring of a European interpretive community,* 9(3-4) INT. J. CONST. L. 722 (2011). For a particularly clear example of such a hermeneutic disjunction, see Case C-292/89, R v Immigration Appeal Tribunal, ex p Antonissen [1991] ECR I-745 (finding Article 48 TFEU free movement provisions to protect all workers, including those still actively seeking employment). As Craig and de Búrca note, the ECJ's non-textualist, instrumentalist jurisprudence is on full display: 'The ECJ examined the Article and identified its purpose: in this case, to ensure the free movement of workers. It then concluded that a literal interpretation of its terms would hinder that purpose'. PAUL CRAIG AND GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS (5 ED) 727 (New York: Oxford University Press 2011).

but instead segmentation, cursory dialogue or avoidance, and ideological retrenchment.[133]

Contemporary developments in European citizenship law illustrate with poignancy the consequences of this dynamic for the post-national project. The introduction in the 1990s of EU citizenship afforded non-national citizens the rights of nationals in the service of protecting labor mobility in the common market. But since then, the Court of Justice of the European Union (CJEU) has gradually expanded the scope of EU citizenship law to progressively cover non-economic categories: from certain workers, to all workers, to certain non-workers (students, retirees), and then tentatively and vaguely to all citizens irrespective of cross-border movement.[134] Yet this 'emancipation of Community rights from their economic paradigm' did not itself mean they were no longer yoked to systemic-functionalist rationality.[135] Indeed, the expansion beyond economics was justified not by the mutual recognition of uniform basic rights among post-national citizens, as Advocate General Sharpston had sought unsuccessfully in *Ruiz Zambrano*,[136] but upon the need for 'proper functioning of the EU legal order'.[137] And the most recent jurisprudence demonstrates that such grounds remain unsettled, with reverse discrimination ruled again to fall outside the scope of EU law.[138] Advocate General Kokott in that latest case hoped to resolve the residual gaps in rights protection not by re-reading the political commitments of the European Union but instead by punting fundamental rights review to the European Court of Human Rights.[139] This marks a disjunction in the plane of adjudication: equal protection now depends not on political obligations under the European treaties but on minimum standards of regional human rights law. The move

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133 *See generally* Daniel Sarmiento, *Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice, in* MONICA CLAES ET AL (EDS), CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES (Cambridge, UK: Intersentia 2012) 13-40; Monica Claes, *Negotiating Constitutional Identity or Whose Identity is It Anyway?* in *id.* at 205-234.

134 *See* Willem Maas, *European Union Citizenship in Retrospect and Prospect*, *in* E ISIN & P NYERS (EDS), ROUTLEDGE HANDBOOK OF GLOBAL CITIZENSHIP STUDIES (Oxon: Routledge 2014).

135 Case C-158/07 Förster v. IB Groep [2008] ECR I-8507, para 54.

136 Case C-34/09 Ruiz Zambrano v Office national de l'emploi (ONEm) [2011] ECR I-1177, para 3.

137 Case C-380/05 Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni [2008] ECR I-349, para 20.

138 See Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department [2011] ECRI-3375 (opposing the more expansive reasoning of earlier case law granting EU citizenship protections despite the absence of a cross-border element).

139 *Id.* at para 60.

comes just when the systemic rationality of market integration no longer accommodates creative politics and repositions them instead as subjects for communicative rationality (principle).

One finds an analogous disjunction in the historical imaginary of law. In the same years as the CJEU expanded the scope of European citizenship, many national governments tightened their laws on naturalization and immigration.[140] Increased policy control in these areas would compensate for its loss in others under European law. And this control aimed explicitly to restore historical membership as distinct from systemic or principled alternatives.[141] Although some rhetoric appealed to fiscal stabilization of reciprocal welfare state programs, such mechanisms overwhelmingly sought to 'sacralize' the cultural-symbolic markers of national citizenship, and thereby to police the traditional bounds of the polity.[142] Governments in the United Kingdom, France, and the Netherlands, for example, each introduced measures defending 'earned citizenship', where deservingness was tied not to functional need or fundamental rights but to certain public demonstrations of cultural competency, civic character, and ideology, whether 'the British way of life', French republicanism, or Dutch cultural values.[143] The politics that systemic rationality displaced and principled rationality overshot returned with the logic of historical rationality.

The dynamics of legal coherence thereby yield a thoroughly anti-cosmopolitan result: the price of economic non-discrimination among Europeans might be discrimination against non-Europeans and, indeed, a retrenchment of cultural, exclusionary understandings of nationhood. The current state of European citizenship law suggests, broadly, a commercial cosmopolitan citizenship, filled in ad hoc by minimum standards for individual human rights, all the while eroded as a political ideal by restrictive and exclusionary national policies from below. The story is one of conflict and reaction but

140 Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?,* 2 L. & ETHICS OF HUM. RIGHTS 1 (2008).

141 *Id.* at 61 ('There is an almost rushed, overcompensating sense that "integration" will not just happen as a result of time and informal socialization, but will have to be furthered, monitored, and … sanctioned by explicit state policies, from the point of entry into the territory to that of entry into the citizenry'.)

142 *See* Friso van Houdt et al, *Neoliberal Communitarian Citizenship: Current Trends Towards "Earned Citizenship" in the United Kingdom, France and the Netherlands,* 26 INT. SOC. 410 (2011).

143 *Id.* at 417ff.

not of mutual influence as a matter of learning. And this dynamic is in fact not truly dynamic, at all, operating along the worn ridges of the respective legal rationalities I have identified.

The fault, to be clear, is not simply in the ubiquitous presence of systemic law in EU integration. The example of EU citizenship law indicates, too, how grounding cosmopolitan equality in principle—whose universalistic logic West considers most promising—in fact also fails to prevent a *de facto* static accommodation of the competing rationalities. Remember that post-national equality challenges the closure and identity of an existing political community. Without a sufficiently rich account of the imagined lifeworld transformations, however, we see the impasse resolved in two possible scenarios: (a) 'compartmentalism', where egalitarian claims are kept separate from domestic law and managed by it at the level of inter-state public law;[144] or (b) 'complementarity', where egalitarian ideals are located already within domestic law (think here of exemplary popular Enlightenment revolutions or influential domestic traditions of fundamental rights protection) and universalism is read off from the (always partial) constitutional experience of the domestic community.[145] The first reinforces an interest-based, functionalist system of international law, while the second leans once more on history—as a basis for the civic nationalism of the German *Solange* judgments[146] and even as a masquerade for liberal chauvinism and the humanitarian pretenses of asymmetrical regional governance.

Common to these patterns legal coherence generates is law's continuing investment in its magisterial authority, its continuing fantasy of mastery. In no case is the Westphalian character of law reformed; it is merely repositioned. The resulting dialogue among jurisdictions is instrumental and strategic, seeking stable policy at the expense of participatory equity, persuasion, and mutual learning. Currently stalled theories of constitutional pluralism are particularly vulnerable to this kind of impasse, as they

144 Walker, *supra* note 15, at 24-7.

145 *Id.* at 28-9. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Helsinki: Finnish Lawyers' Publishing Company 1989) (elaborating the ways provincialism masquerades as universalism in international law).

146 Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel [Solange I], BVerfGE 37, 271 [1974] CMLR 540; Wünsche Handelsgesellschaft [Solange II] Case 345/82, [1987] 3 CMLR 225.

emphasize the compatibility of outcomes, on the shared principles of legal doctrine, rather than the complex forms of reasoning and self-understanding that underpin them. These succumb to the misplaced Habermasian presumption that successfully coordinating action implies actors have also come to occupy the same social imaginaries.[147]

But this elides the more demanding process of coming to care about another's reasons or perspectives, another's lifeworld in which those reasons hold true or make sense, beyond the incidence of agreement. In this elision, political cooperation takes place through the imposition of ideology and the selective concealment of difference. Despite certain surface institutional appearances to the contrary, increasing fragmentation of constitutional authority and the retrenched continuation of national sovereignty are enduring problems in contemporary European politics and law.[148] Europe in this sense edges troublingly closer to what Foucault termed 'heterotopia', in which populations live side by side but have lost the capacity to enter into fruitful dialogue and in fact no longer comprehend the terms of their incompatibility.[149] It is to this antecedent and underlying task of mutual understanding that constitutional reflexivity is decisive as a distinctly political virtue. This is when the modern Westphalian paradigm of law is challenged, when law begins to speak less holistically and thus admits the perspectives of those previously excluded. This process would in fact form the substance of post-national law.

a. Reflexivity and time: On the ideal of intelligibility

In the distance that remains between law's coherence and its reflexivity, we return to the register of time. Reflexivity is a temporal condition, a characteristic perceived and lived only in time, through time. To this end, we must acknowledge that the temporalities in the three preceding legal logics are somewhat deceptive: while these deal in time, they are not themselves temporal. Their ordering of societal time is partial, and thereby incomplete. In the spirit of coherence, they 'anchor' time to one principal tense (past, present, or future) and then read the other tenses back through it, as a continuum of the

147 See STEELE, *supra* note 108, at 27ff.
148 See Alexander Somek, *Monism: A Tale of the Undead in* KOMÁREK & AVBELJ (EDS), CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 343 (Oxford: Hart Publishing 2012).
149 MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES xviii (1970).

same. History collapses present and future into past; system traps both past and future in the present; principle subsumes present and past beneath the future. Time appears as legal content—past meaning or present consent or future principle, for example—but not as diachronic form. This is law as mythmaking, not imagination. And this incompleteness sets the stage for fragmentation. Because Westphalian law remains insufficiently temporalized, it continues thereby to suppress, not strengthen, post-national political action and identity.

If overcoming Westphalian law's limitations means reimagining the character of law, the new paradigm must exhibit certain temporal characteristics of its own. I mean this in both the vital sense of being historical—taking sufficient into account the historical acts that have created law—and a more conceptual sense of stretching across the three temporal domains and their corresponding political-psychological modalities. The real story of post-national law—the reason why it remains a motivating, generous, and even heroic ideal for many—is its vision of a new supranational citizenship, of those committed to treat one another as equal across borders, with the acknowledgment that non-discrimination also demands sober assessment of historical injustices and practices that now contribute to inequalities unjustifiable to the post-national citizen. It is important, in short, to perceive one's legal time correctly. And because the post-national subject conceives legal coherence only in time, she thereby sees it in rather different terms.[150]

A time-sensitive revaluation of coherence invokes a novel form of legal reason, whose logic I call 'intelligibility': a quality of legal order by which law's materials and practices aid the citizen in making sense of how normative commitments change. Intelligibility 'situates' citizens in a different way than Westphalian law had previously. When social time is made intelligible in law, emancipatory transformation comes to be seen as an immanently possible and constitutive part of political life: a *demos* self-understood not as identity but as process.[151]

150 *See generally* Jack Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L. J. 116ff (1993).

151 *See* PAULINA OCHOA, THE TIME OF POPULAR SOVEREIGNTY: PROCESS AND THE DEMOCRATIC STATE (University Park: Pennsylvania State University Press 2011).

An emphasis on temporal intelligibility is significant, too, because post-national law's potential to transform background worldviews implicates the role of memory in identity-formation and legitimation. It is particularly noteworthy that the three legal imaginaries I have critiqued are silent on this question. The traditionalism of the historical imaginary, to be sure, roots itself ostensibly in memory. But, as Hannah Arendt advises, to remember the past is not simply to conform to tradition.[152] Memory entails a more complex interplay across the domains of time, from past through present to future involving acts of remembrance, anticipation, hope, guilt, responsibility, and mourning.[153] Intelligibility as a legal ideal thereby draws a certain relation of law to politics. This is not to either crudely politicize or de-politicize legal order. Indeed, intelligibility resists simplifying political and legal legitimacy to debates about their input and output variants.[154] Instead, intelligibility reveals how legal reasoning can better express a reflexive ethic of legitimation, in which citizens come to understand their polities and worldviews differently.[155]

Here, I take literary inspiration from the six-volume *My Struggle* by Karl Ove Knausgaard, whose writing, like that of Proust, aims to slow down the experience of time. The slowing of time—the painstaking recollection and reworking of memory—trains one to see and to acknowledge one's own dependence and the dependence of others. The result is not a more carefully established identity, a stable presence. To the contrary, Knausgaard's writing yields instead a more compelling perception of how each present moment is constantly 'ceasing to be'—and thus how our connection to the present always lies embedded in a connection from past to future that exceeds the present's bounds, a

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152 *See* Hannah Arendt, *What is Authority? in* BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT 93-4 (New York: Penguin 1977 [1961]) ('… the undeniable loss of tradition in the world does not at all entail a loss of the past, for tradition and past are not the same, as the believers in tradition on one side and the believers in progress on the other would have us believe…').

153 *See, eg,* JACQUES DERRIDA, THE POLITICS OF FRIENDSHIP 13 (G Collins trans, London: Verso 1997) ('[O]ne does not survive without mourning'); JACQUES DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL 54 (P Kamuf trans, New York 1994).

154 *See* Daniel Innerarity, *What kind of deficit?: Problems of legitimacy in the European Union*, 17 *Eur. J. Soc. Theory* 307, 318ff (2014).

155 Intelligibility affirms foundational insights from Joseph Weiler's vision of 'constitutional tolerance' and Kalypso Nicolaïdis's work on European 'demoicracy', in which communities re-interpret their public commitments in light of new, pluralistic structures of political authority. Intelligibility is demoicracy's counterpart in the fields of legal and constitutional discourse. *See generally* WEILER, THE CONSTITUTION OF EUROPE, *supra* note 3; Kalypso Nicolaïdis, *The Idea of European Demoicracy, in* J DICKSON AND P ELEFTHERIADIS (EDS), PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 247 (Oxford: Oxford University Press 2012).

connection over which we do not exercise control.[156] It is inherently an unsteady relation, vulnerable and ambivalent, non-sovereign. And thus if the principle that animates Knausgaard's writing is one of *attachment*—the struggle to retain hold of one's life, this becomes all the more profound because it retains fidelity precisely to the reflexivity of any such attachment.

These points relate to a human life; but they also, I believe, hold lessons for a collective life—the life of a polity. And insofar as they do, they suggest ways to understand the task of constitutional law anew. And insofar as they foretell an ethics of personal life, and thus an ethics of collective life, they might also bear the beginning of thinking through a reflexive, post-national constitutional imaginary. To trace law's intelligibility is to concede the way in which we are always losing control, so to speak, of our political meaning—and to find in that lesson a framework for post-national legal judgment.[157]

It is this more sensitive concept of memory—not a static object to isolate but the ongoing *work* of memory—that law must reflect in its structure. Post-national citizens foreground the question of memory because it is memory that allows them to participate in 'reflexive democracies' without losing a sense of who they are. This sensitivity to time, given institutional shape by law, might be enough to prevent the defensiveness and return of exclusionary sovereignty described above. In this vein, memory is a link to law's emotional, affective, affiliative, and rhetorical dimensions—generally overlooked in most European systems but increasingly integral to prominent American theories of constitutional interpretation and decision-making.[158] It seems the case that to reach the

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156 For a striking reading of this work, see Martin Hagglund, *Knausgaard's Secular Confession*, BOUNDARY2.

157 This line of thought takes inspiration, too, from what Jacques Derrida intimates as the uneasy but constitutive tension between memory and narrative, what he terms together 'mémoire'. Mémoire conveys the idea that memory can be kept alive only through the act of narrating, which—like writing—exists by inscribing only a partial meaning and, thus, is marked also by a kind of forgetting—an imaginative departure from ourselves. Mémoire expresses an aporetic double-bind: if a memory is not narrated, recorded, interpreted, it cannot live on; and yet, as it is re-told, that memory no longer can correspond entirely with itself. Because one can remember only by telling a story, to remember is also to accept an irretrievable loss of self-identity. One's grounding self is always caught—just as one's law—in the passing course of time. See Jacques Derrida, *Mnemosyne,* in MÉMOIRES FOR PAUL DE MAN (New York: Columbia University Press 1986).

158 *See generally* BRUCE ACKERMAN, WE THE PEOPLE, VOLUME ONE: FOUNDATIONS (Cambridge, MA: Harvard University Press 1991); LARRY D KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Reva B Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323

background views of judgment that might support egalitarian principles, law must engage these cultural, emotional dimensions of life.

Taking seriously the need to imagine a more temporally-sensitive character of law, I turn to one of the most notable, if idiosyncratic, authors in American legal thought. Drawing on Robert Cover's constitutional theory, I argue that the problem of motivating post-national legal commitment and legitimacy—with the virtue of reflexivity at their heart—turns on the place of narrative in law.

(2006); Robert C Post & Reva B Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 INDIANA L. J. 1 (2003); Stephen Wizner, *Passion in Legal Argument and Judicial Decision Making: A Comment on* Goldberg v Kelly, 10 CARDOZO L. REV. 180 (1988) (in which the heightened emotional registers of constitutionalism are recognized and legitimated).

III. 'Analogy' and the postnational imagination

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'.[159] Cover's conception of law, as this grand articulation suggests, seeks a remarkable shift in the scope of legal inquiry and, indeed, in the way we understand citizens to orient themselves and act within the law as a distinct form of human culture. Reducible to neither command nor rationality nor will, a legal order draws legitimacy and social consequence from the narrative character of its common, but diverse interpretations. Narrative establishes law's persuasive power by making its normative meaning intelligible across time. The legal imaginary I see Cover identifying is characterized by the analogical nature of legitimacy—the way law serves to articulate persuasive connections, always possible, among the diversity of the world. It is this imaginary of 'analogy' (included in Table 2 below) that I find most relevant to post-national legal thought.

On Cover's reading, normative commitment to law is conditioned upon imagining and shaping the law's narrative development. Located within a *nomos*, actions become intelligible as part of an enduring political project; one is freed, if only for a time, from anomie, alienation, and arbitrariness.[160] For Cover, 'To inhabit a *nomos* is to know how to *live* in it'.[161] This is perhaps the most concise definition we might find of the way law 'situates' a citizen in the world. But law is more than a mythical or historical fabric within which actions assume meaning or value. Cover's understanding of what it means to 'live in the law' is more complex than the historical imaginary—and for the following reasons more instructive for the work of post-national jurisprudence.

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159 Robert Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*,97 HARV. L. REV. 4 (1983). *Compare* Michael J Sandel, *The Procedural Republic and the Unencumbered Self*, 12(1) POL. THEORY 83, 83 (1984) ([I]nstitutions describe more than 'a set of regulative principles, [but] also a view about the way that the world is, and the way we move within it'.)

160 Cover, *supra* note 164, at 10; 8 ('Law is a signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify'.).

161 *Id.* at 6.

First, law's narrative structure makes intelligible in social life the possible pathways for concrete critique and transformation. Cover describes law's narrative arc as the 'system of tension or *bridge* linking a concept of a reality to an imagined alternative', the drawn thread between 'reality and vision'.[162] Law provides an orientation, a language, and a process that guides public life from the present constraints of the social world towards as yet unrealized or previously defeated political hopes. On the one hand, history; on the other, possibility. Law is not simply a tapestry of 'meaningful patterns of the past' into which citizens secure themselves, but a medium reaching across each register of time from past to future.[163]

To conceive legal precepts as narratives reformulates something quite fundamental about what we as citizens understand ourselves to be doing when we make legal claims or exercise our political agency through legal authorship and interpretation. To make a legal claim is to tell a story about the genealogy of a principle, for its appropriateness in the particular case, and for the possibilities of creative re-interpretation.

As a bridge in normative time, law connects three distinct domains for Cover: the 'world-that-is' (our present behaviour, including what we have inherited), the 'world-that-ought-to-be' (our normative vision), and the 'worlds-that-might-be' (our concrete sense of possibility for transforming reality toward our vision).[164] Cover's introduction of the third element, with its Aristotelian resonances,[165] is decisive. This domain enables within law the imagination necessary for situated social critique: that is, for the growth of law and for social learning. In a later essay from 1985, Cover emphasized, '[Law] *is* the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there'.[166]

Compare Cover's conception of narrative to the constitutional theory of Ronald Dworkin, with whose literary metaphors of law Cover otherwise shares much.[167] Cover's addition of

162 *Id.* at 9, emphasis mine.
163 *Id.* at.
164 *Id.* at 10; *see also* Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAPITAL UNIV. L. REV. 181 (1985).
165 See Julen Etxabe, *The Legal Universe After Robert Cover*, 4(1) L. AND HUM. 122 (2010); Marco Goldoni, *Robert Cover's Narrative Approach to Constitutionalism*, ITALIAN SOC. L. LIT. 1 (2010).
166 Cover, *supra* note 164, at 181.
167 An extended comparison with Dworkin's thought is particularly helpful because a surface reading of Cover's work on legal narrative can so easily label him as a merely another Dworkinian.

the third term—'might be'—to Dworkin's brand of Kantian teleological judgment between 'is' and 'ought'[168] means that, unlike Hercules, Cover's judge must not see in law a purposive organism, with each component part accounted for in a unitary scheme of development.[169] Law's history is shot through with imaginative potential. The metaphor of law as bridge means, too, that this judicial imagination does not simply project forward a normative ideal against whose standards one is to judge. Nor does it set the terms of an abstract evolutionary progress towards that ideal. Instead, Cover's judge reads utopia back into the fabric of the past and entwines imagination with practices of recollection and recovery. Not recovery of a tradition wholesale but recovery in the mode of Walter Benjamin's and Hannah Arendt's pearl diver, who 'select[s] his precious fragments from the pile of debris'[170] and in the sense of deconstruction's ideological critique. Recovering knowledge, for example, of how a tradition came to be and what it excluded or suppressed might in fact be grounds to reject it as persuasive or compelling. This is the genealogical import of Arendt's earlier insight that remembrance does not equate with an embrace of tradition.[171] This narrative rationality sustains instead what we might call, with Seyla Benhabib, a concrete-transfigurative mode of critique.[172]

Second, Cover's metaphor of the bridge clarifies that law *itself* assumes temporal form: the structure of law is a narrative structure. This means that law exists only in time—not just in that it has duration, but that to maintain its normative world, legal texts and legal reasoning must display their own sensitivity to time, its own time-consciousness.

Analogy is this inscription of political being in time. The rule of law is never found *in* itself but always already engaged in the dislocating movement of signification and meaning. Cover's term for this interpretive legal play is 'jurisgenerativity': the law's capacity as a

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168 IMMANUEL KANT, CRITIQUE OF JUDGMENT, First Introduction, 429 (W Pluhar trans, Indianapolis: Hackett 1987 [1790]). I draw here in parts on an illuminating discussion of reflective judgment and adjudication in ALEXANDRE LEFEBVRE, THE IMAGE OF LAW: DELEUZE, BERGSON, SPINOZA 22-36 (Stanford: Stanford University Press 2008). On the three-stage conceptual structure of Dworkinian interpretation, see also PAUL W KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 201-3 (New Haven: Yale University Press 1992).

169 See RONALD DWORKIN, LAW'S EMPIRE 165 (Cambridge, MA: Belknap Press 1986); Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1627n61 (1986) (distinguishing his own understanding of the violence of judging from Dworkin's Hercules).

170 Hannah Arendt, *Walter Benjamin*, in MEN IN DARK TIMES 200 (New York: Harcourt Brace 1968).

171 *See also* Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1623 (1990).

172 *See* BENHABIB, *supra* note 62, at 336, 328.

text to generate multiple and competing interpretations that escape the 'provenance of formal lawmaking'.[173] Within the richness of law is an inner openness to creative development, and this analogical proliferation in turn rejuvenates the semantic materials from which law is refashioned. A legal meaning that is in a proper sense shared can never be stable or monologic; it is overdetermined by the multiplicity of analogical voices in law's normative-cultural world. Cover's law is thereby cast inherently as a process of renewal, of revaluation and becoming. Post-national law aims to answer the basic question, to quote James Boyd White: 'What place is there for me in your universe, or for you in mine?'[174]

a. At the hinge of utopia and ideology

But the equipoise in law's narrative bridge must be cultivated such that commitment to law is possible. And thus any one act of legal decision-making is what Cover calls a 'jurispathic' act. Because law must make its narrative shape determinate and legible, judicial intervention requires that citizens foreclose some normative worlds at present such that others endure—before the work of reinterpretation begins anew, and the law opens itself up again. Courts sit at the tragic meeting-point of these countervailing forces: the many centrifugal interpretations and those centripetal (institutional) judgments that 'speak' the law. Playing their 'jurispathic' role, Cover writes, courts are asked 'to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another'.[175] Judicial violence in this regard arises from living together in a pluralistic legal order, that is, in a legal order at once pluralistic and intelligible *as an order*. This is the 'rhythm' of legal narrative, of 'jurisgenerativity' and 'jurispathology'.

These elements are Cover's correlates, so to speak, of law's utopian and ideological moments. Cover's innovative conception of legal narrative and its analogical mode of reason holds these dimensions together such that their necessary interplay is never concealed beneath claims to a timeless validity. Analogies construct judgments with their own limitations in view. In this sense, analogy elevates the virtue of humility in law.

173 Cover, *supra* note 159, at 18.
174 JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 233 (Chicago: University of Chicago Press 1990).
175 Cover, *supra* note 159, at 40, 44.

Analogy requires courts not just to grapple with an always fragile precedent in legal culture or with social change and difference but to foreground these as the very basis of legal reason. It asks judges to accept the situated perspectives of their office. As Roberto Unger put it, 'The analogist wears his uncertainties on his sleeve, exhibiting them as part of his business. The rationalizing legal analyst must deny his brand of arbitrariness'.[176] The uncertainties of analogy are those that reclaim a more human, self-admittedly limited form of judgment-in-the-world.

But this humility of judgment does not entail deference. We see in the work of analogy the meaning of Cover's brand of judicial activism. The task of 'making space for you in my legal world' is not achieved simply by ceding the competency to judge.[177] To the contrary, it demands activity. The space for mutual learning must be constructed from the existing legal materials and histories judges find. The humility of narrative is an urgent imaginative demand: to be attentive, to access different forms of knowledge and experience, to be mindful of the regimes of 'evidence' that enables such knowledge to appear.[178] This is why the meaning of this form of judicial activism remains important to theorize.

Even should courts deliver broad judgments in the direction of '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'.[179] They are positioned to recover the terms of their own *nomoi* in response to the articulated restrictions of the court's ruling. Because the boundary-line—the point of disagreement and rival interpretation—inscribing them *as* insular normative communities is taken seriously, even a deeply challenging 'redemptive' ruling affirms these communities as distinct interlocutors with jurisgenerative capacity. Such affirmation is absent, however, 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

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176 UNGER, *supra* note 17, at 78.
177 *See again* Dani, *supra* note 132.
178 *See, eg,* PAUL W KAHN, THE REIGN OF LAW: MARBURY V MADISON AND THE CONSTRUCTION OF AMERICA 122 (New Haven: Yale University Press 1997).
179 Cover, *supra* note 159, at 66-7; *see* Etxabe, *supra* note 165, at 138-40.

normative reading of the law's meaning itself.[180] In such cases, the *nomos* closes in on itself, exposed to the naked power of 'mere administration'[181] and state violence.

Cover's work thereby mounts a sophisticated critique of modern law's holistic embrace of 'coherence'. Cover chides 'modern apologists' who see the problem to which courts are the solution as one of indeterminacy, of unclear law rather than, as Cover prefers, 'too much law'.[182] This corrective shift achieves two things at once. First, it recognizes other forms of meaning that the legal indeterminacy thesis cannot see—and that are relevant for understanding the stakes of norm-stabilization. And second, it urges that the role of courts is not to *clarify* but to *see differently.*

The task of legal judgment is neither exhausted nor fulfilled by ruling with determinacy what the law demands. This would arrive uncritically at the cul-de-sac of ideology. *Contra* Schmitt, Cover refuses to see judicial decisions as mere clarifications of a polity's self-identity. Appreciating these stakes of 'jurispathology' allows us to understand how legal methodologies and doctrines can be destructive of the jurisgenerative practices of political communities. And, consequently, it might help rescue courts from the worst of their own violence, and to find ways for the 'jurispathic' to regain its rhythmic contact with the 'jurisgenerative'.

The essential point I glean from Cover is thus that law's plurality and its temporality are necessarily interconnected. The openness of law to alterity is a constitutive feature of its analogical narration, and law's openness remains only insofar as its analogical resources are preserved. Indeed, Cover's law affirms a vision of law familiar in the political-ethical interventions of deconstruction.[183] Legal narratives are traces in the deconstructive sense.[184] They deny access to a self-sufficient, immediately cognizable presence of legal

180 Cover, *supra* note 159, at 66.
181 *Id.* at 67.
182 *Id.* at 41-2. ('T]o state the problem as one of unclear law or difference of opinion about *the* law seems to presuppose that there is a hermeneutic that is methodologically superior to those employed by the communities that offer their own law'.)
183 *See generally* Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority", 11 *Cardozo Law Review* 919 (1990).
184 See, eg, Jacques Derrida, *The Art of Memoires*, in MEMOIRES FOR PAUL DE MAN 58 (New York: Columbia University Press 1986) ('The memory we are considering here is not essentially oriented toward the past, toward a past present deemed to have really and previously existed. Memory stays with traces, in order to "preserve" them, but traces of a past that has never been present, traces

meaning. Analogical structures yield questions about ideologically privileged positions of hierarchy and about the hidden inversions concealed by law read as coherence. In so doing, they point to the enduring possibilities of new interpretive strategies, room for manoeuvre, and to the creativity of the *nomos* as a form of life.[185] This is the subtle way Cover's category of 'might be' illuminates what is necessary to retain community without disavowing reflexivity.

As time extends toward past and future, law holds open the possibility that things might be otherwise than they are and that they *might have been* otherwise than they were. The law marks the process of transformation in the background worlds we inhabit—the imagination of possible or plausible states of affairs *for us*. In this framework, legal narrative frees a polity not only from solipsistic traditionalism but also from nihilistic disengagement, in which our norms—abstract and formal as they are—'dictate no particular set of transformations or efforts at transformation'.[186] Cover allows us to think reflexivity and the work of self-critique differently. Cover made clear that he imagined law to bridge 'two "moving worlds"'.[187] As analogy, law's imagination of possibility is plural; its web of perspectives rejects the revival of a holistic voice of the law whose aim is to stabilize.

Analogical work requires broadening the materials one considers properly legal and thereby narrowing the distance between law and politics. Analogical reason rejects—in the words of Unger—'any rigid contrast between the prospective and the retrospective genealogies of law: between law as it looks to those who struggle, in politics and public opinion, over its making and law as it looks after the fact to its professional and judicial interpreters'.[188] The purposes of analogy, Unger writes, 'must be as eclectic in character as those motivating the contestants in original lawmaking'. Analogical reasoning thereby

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which themselves never occupy the form of presence and always remain, as it were, to come—come from the future, from the *to come*'.).

185 *See generally* Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743 (1987).

186 Cover, *supra* note 159, at 9.

187 Robert Cover, *Bringing the Messiah Through the Law: A Case Study*, 30 NOMOS: RELIGION, MORALITY, AND THE LAW 201-2 (1988).

188 UNGER, *supra* note 17, at 114.

sheds the 'drive toward systemic closure and abstraction' that mars those rationalities retaining the pedigree of coherence.[189]

Seen in this light, one's national constitutional law turns itself around as an existing template for post-national political engagement. To sharpen the point, law's reflexivity stems directly from the means by which domestic law had originally motivated national civic commitment: that is to say, from its narrative structure and analogical persuasion. These two things become one. That which allowed citizens to hold the law as something shared in common is also what affirms this relationship as one of plurality. Indeed, post-national law's project of such deepening and transformation is a specific example, of what Cover refers to as 'redemptive constitutionalism'—a form of association that advances sharply different visions from present social organization and requires 'a transformational politics that cannot be contained within the autonomous insularity of the association itself'.[190]

Cover hereby retrieves the much-needed connection between 'justification' as a public process of reason-giving and the practice of 'world-disclosure' that yields, in time, new forms of self-understanding.[191] Indeed, analogy offers a more expansive, dynamic picture of reason: one sensitive to context, to the work of persuasion, to the ways meaning appears or is hidden, and to the many dimensions of experience law must illuminate for its claim to justification to take hold or for an unjust relation of power or exclusion to be exposed as such. Cover ties legitimacy to the work of narrative intelligibility.

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189 *Id.*

190 Cover, *supra* note 159, at 34.

191 *See* NIKOLAS KOMPRIDIS, CRITIQUE AND DISCLOSURE: CRITICAL THEORY BETWEEN PAST AND FUTURE (Cambridge, MA: Massachusetts Institute of Technology Press 2006).

Imaginary / Modality	History (Grimm, Kronman)	System (Luhmann, Teubner)	Principle (Habermas, Rawls, Kumm)	Analogy (Cover)
Rationality	Particularistic	Functionalist	Communicative	Narrative
Temporality	Past	Present	Future	Past-Present-Future
Political Psychology	Will	Interest	Reason	Imagination
Sociological Domain	Lifeworld (project)	System (maintenance)	Lifeworld-System (harmonization)	*Nomos* (commitment)
Agents	Citizens	Stakeholders	Rights-bearers	Authors/ interpreters
Post-nationalism	Parochial	Commercial-Evolutionary	Abstract	Concrete-Transfigurative
Form of legal integration	*Coherence*			*Intelligibility*

IV. The discursive legitimacy of post-national adjudication: *X and X v Belgium*

Analogy as a legal imaginary advances a number of core theses concerning the form and purpose of constitutional interpretation. These together form the basis of an account of post-national judicial legitimacy. To rehearse these ideas and to show their practical application more concretely, let me consider a recent case decided by the European Court of Justice in 2017 concerning the rights of Syrian refugees to seek alternative paths to asylum: *X and X v Belgium*.[192] The legal texts of this case exemplify both the disappointing limitations of the 'coherent' rationalities I discussed above and the courageous application of analogical legal thought.

X and X v Belgium concerned a married couple from Aleppo and their three infant children. The father traveled at great risk to the Belgian Embassy in Beirut, Lebanon, where he submitted applications for humanitarian visas for his family. The stated purpose of his application was to bring his family from the inferno of Aleppo and to apply for asylum in Belgium directly. One immediately understands the salience of this application and the great saving power it would afford to the family—not only from war but also from a possible perilous crossing across the sea to Europe. The humanitarian visa was, admittedly, a kind of short-cut to the more dangerous and uncertain process thousands of other refugees contemplate each day.

The question posed to the European Court of Justice by the referring Belgian court was whether the EU Charter of Fundamental Rights imposes a positive obligation on Member States to grant humanitarian visas, if it is known that such protection is the only way to avoid exposing applicants to inhuman and degrading treatment or torture and to indirect *refoulement*, in violation of Articles 4 and 18 of the Charter.

In a terse judgment of only 14 substantive paragraphs, the Court concluded that the case fell outside the scope of EU law and thus the provisions of the EU Charter were inapplicable. The intended aim for which the family requested the visa—a subsequent application for asylum—was not a legitimate purpose covered by the EU Visa Code, and thus no human rights protections under the Charter could be activated. Discretion to grant or deny the humanitarian visa was left exclusively to the national law of Member States.

192 Case C-638/16 PPU, X and X v État belge [2017] ECLI:EU:C:2017:173.

This reasoning of the Court was, as many of the decisions I have criticized previously, marked by its formalism and by its reductive judgment. At no point does the Court wrestle with the consequences of this present case for the principles of the post-national project, even if those principles would need to be given a new interpretation. It gives no space in its opinion to an act of interpretation, only deduction. The Court's judgment works simply by clarifying the objective perspective of the state, on grounds of little more than a jurisdictional claim.

Furthermore, the Court based its conclusion on a concern—voiced explicitly—for the functionalist stability of the existing asylum system under the EU's Dublin Regulation.[193] Recall that in the Regulation's allocation criteria, responsible states of first entry are most often those at the EU's external borders, namely Greece, Italy, Bulgaria, and Spain. Although the intent of the Regulation is to prevent forum-shopping, to regulate the processing of refugees, and to prevent secondary movements, the effect is a quite pronounced burden-shifting to these peripheral states. In privileging the stability of the European asylum system's 'general structure', the Court thereby also granted the parochial, insular interests of certain Member States over others. The Court implicitly permitted and affirmed the particularistic rationalities of states wishing to guard their sovereignty—indeed, many of whom submitted briefs warning of the undesirable consequences of any change to the Dublin scheme.

These dynamics at work in the judgment illustrate how the imaginaries of system and history, each with its distinct temporal horizons, encourage the fragmentation of legal orders and not their mutual engagement over time. The Court gave no interpretation of the relation between Articles 4 and 18 of the Charter of Fundamental Rights and the EU Visa Code; that is, no interpretation of how far or near the protections of EU fundamental rights reach in the context of granting humanitarian visas. With no interpretation of these

193 *Id.* at para 48 ('It should be added that, to conclude otherwise, when the Visa Code is intended for the issuing of visas for stays on the territories of Member States not exceeding 90 days in any 180-day period, would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by Regulation No 604/2013'.).

rights or how they might be revived in the EU's present asylum policies, the Court's reasoning instead reduced the case to a clash of interests in the present.

As I have discussed above, no matter how 'public' such an interest is, a presentist turn loses the temporal horizon of political self-authorship with its attendant dependencies, limitations, and possibilities. It accepts interests as pre-existing preferences, rather than seeing them as markers of a background social-political world that can change and learn in time. And it thereby accepts that such interests can fall back to the national prerogatives of particular national sovereign states, precisely as happened with the discretion to grant humanitarian visas. The Court, putting too little faith in the law, laid no jurisprudential ground to bring the present case back within the jurisdiction of EU law—that is, back within the work of a post-national project in need of reform.

a. Opinion of Advocate General Mengozzi

But as a counterpoint, the advisory opinion written by Advocate General Mengozzi resisted the Court's formalism and sought more from the law and its jurisgenerative potential.[194] Mengozzi concluded that the Charter does apply, and that EU states do indeed have a positive obligation to issue humanitarian visas under EU law when fundamental human rights are in question. So what separated the Advocate General's reasoning from that of the Court?

From the way I have criticized the Court's judgment, one might suspect that Mengozzi simply appealed to human rights law, to the logic of principle. What makes Mengozzi's opinion interesting and valuable is that he did not simply do so. Although his opinion is constructed around the European Convention on Human Rights and human rights provisions in EU law, he does not take these as simple markers of universal status, an objective kind of value to be read off as authoritative. Indeed, were he to do this, his words would perhaps be no more persuasive than the formalistic logic of the Court itself.

Mengozzi does something more involved, more difficult, and more remarkable for it. His analysis illuminates a number of the dimensions of analogical jurisprudence and its narrative rationality. His opinion shows that this idea is not fanciful but can, at least in

194 Opinion of Advocate General Mengozzi, Case C-638/16 PPU, X and X v État belge [2017] ECLI:EU:C:2017:93.

part, be found in existing judicial practice. In what follows, let me develop a number of theses about analogical jurisprudence alongside examples from the Advocate General's opinion.

(1) *Analogical law defines legal interpretation as an inherently diachronic practice—as re-interpretation.* Legal narrative counteracts the abstract rationality of systemic analysis by emphasizing the field of legal normativity beyond the immediate outcome of the present case. The doctrinal set of rules and principles are conceived as nodal points in time, decisions with a history and a pedigree and a set of expectations that can be realized or disappointed or revised. Particular determinations of rights are singular events that both establish a narrative chain but also suggest, in their singularity, how such a narrative could have developed differently.

Engaging narrative rationality, courts elaborate both constitutional principles and the present pattern of fact with an explicit view of past genealogy and future iteration. Just as judges trace doctrinal change, they also take time to situate the many factual perspectives of the case. They illuminate not just a claim's legal import but how the claim emerged and what it represents as an event in a polity's broader historical experience. As James Boyd White writes, 'When we turn to a judicial opinion, then, we can ask not only how to evaluate its "result" but, more importantly, how and what it makes that result mean, not only for the parties in that case, and for the contemporary public, but for the future'.[195] The law draws a narrative arc from individual to polity, from past to future. If the law succeeds in preserving this temporal perspective, decisions never reduce to 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, evolving interpretations of value.

Bookending Mengozzi's opinion is the concern that EU actors—the Member States and European Commission alike in their submissions to the Court—have failed in their responsibility to interpret the values of the European Union in light of the exigencies of the present moment—to trace, in other words, the narrative possibilities of European law.

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195 WHITE, *supra* note 174, at 102.

Mengozzi in his opening paragraphs expresses a rare and valuable sensitivity to this narrative structure of judgment. 'Need it be recalled', he writes, 'that the Union "is founded on the values of respect for human dignity … and respect for human rights" and its "aim is to promote … its values", including in its relations with the wider world?'[196] Here, the values noted in the European treaties are called to mind not in any simplistic sense, as though they were always available to be applied to whatever facts might come. They are instead caught in the play of time, at risk of being forgotten, displaced, or ignored. Mengozzi is prompted to refer to them in an act of judgment because of the facts of the case at hand—in light of the suffering of those in need of international protection. In so recovering these values, he subtly reframes them, re-articulating their meaning and their relevance anew.

Mengozzi continues by noting with regret that none of the 14 Member State governments who made submissions to the Court made reference to these values. What prompts this regret is not a neglect of those values generally as a matter of respect for any timeless meaning of the Treaties. Rather, it is due to their resonance, as he writes, 'in relation to the situation into which the applicants in the main proceedings have been plunged…'.[197] Mengozzi remains guided in his reflective judgment by the relation to the facts and to the ethical exigencies of the singular case.

His motivating concern anticipates the peril of new situations in which European state power untethers itself from Charter protections. A narrow reading of the Charter's applicability would threaten to sever the 'parallelism between EU action, whether by its institutions or through its Member States, and application of the Charter'.[198] Citing the Court's decisions in *NS and others* and *Fransson*, Mengozzi argues that neither the state's discretion in applying Article 25(1)(a) of the Visa Code[199] nor the extra-territorial deployment of such discretion[200] negates the Charter's application. To the contrary, they

196 *Id.* at para 6.
197 *Id.* at para 7.
198 *Id.* at para 91.
199 *Id.* at para 82-8 (also citing judgment of 26 September 2013, IBV & Cie (C-195/12, EU:C:2013:598, paras 48, 49 and 61).
200 *Id.* at paras 91-3 (citing judgments of 26 February 2013, Åkerberg Fransson (C-617/10, EU:C:2013:105, para 21), and of 30 April 2014, Pfleger and Others (C-390/12, EU:C:2014:281, para 34).

require it—for otherwise not only would any implementation of the Visa Code likely escape the Charter's protections but such consequences 'would go beyond the field of visa policy alone'.[201]

Mengozzi's invokes the Court's case law here as a kind of inheritance to the present, against which the meaning of the EU's guiding values—as he cites from Article 3 TEU—might be again interpreted and 'given concrete expression'.[202] Mengozzi depicts in no uncertain terms the temporal dimensions of law: '[I]t is the *credibility* of the Union and of its Member States which is at stake'.[203]

(2) *Analogical law relies on the construction of situated, limited judgments of comparison across the available materials of law: on analogical constructions.* Paul Kahn writes that analogical reasoning works with a 'unique temporality' that is 'not linear but multidimensional'.[204] Analogy draws on the ontological, not chronological experience of time, with sensitivity to the constant dislocation of present meaning in the deconstructive vein. The past is perceived not as causal chain or developmental determinant but as a varied, ever present hermeneutic tradition: the past as a lived experience that involves 'always an element of freedom'.[205] The opinions and events which form the texts of the past mark a tension between authority and the free act, between order and novelty. Awareness of this temporal movement primes the dynamic play of analogical thought, generating 'new relations and new orderings'[206] even in the

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201 *Id.* at para 93, 92.

202 *See id.* at para 165 (citing, in particular, 'judgment of 17 February 2009, Elgafaji (C-465/07, EU:C:2009:94), as regards access to subsidiary protection of a national from a country where an internal armed conflict is raging which generates indiscriminate violence, judgments of 5 September 2012, Y and Z (C-71/11 and C-99/11, EU:C:2012:518), and of 7 November 2013, X and Others (C-199/12 to C-201/12, EU:C:2013:720), concerning access to refugee status for third-country nationals in relation to whom it is established that the return to their country of origin will expose them to a genuine risk of persecution because of their religious practice or their homosexuality'); Id. at para 165n82 ("I would point out that, as provided in Article 3(1) and (5) TEU 'the Union's *aim* is to promote peace [and] its *values* …', and that it 'uphold[s] and *promote[s] its values*', 'in its relations with the wider world', by contributing to 'the protection of human rights, in particular the rights of the child …' (italics added)'.)

203 *Id.* at para 165, emphasis added.

204 KAHN, *supra* note 178, at 108.

205 *See* HANS-GEORG GADAMER, TRUTH AND METHOD 281 (J Weinsheimer & D Marshall trans, Crossroad 2d rev ed 1989 [1960]).

206 KAHN, *supra* note 178, at 108.

most familiar areas of law. Remember that a text's temporality and plurality are intertwined.

Mengozzi employs analogical reasoning often. Much of his opinion concerns finer points of statutory interpretation—how to understand the meaning of various portions of secondary law, to distinguish prior cases denying jurisdiction, and to draw on case law affirming key applications of the Charter of Fundamental Rights, including those I have already mentioned.

But especially apparent from Mengozzi's exposition is how analogical reason works at a level closer to the lived experience of a legal principle's realization. For example, Mengozzi parses the claim that the application for a short-term visa with the intention of then applying for asylum is equivalent to an application for a long-stay visa under national law—a key claim that underwrites Belgium's release from obligations under the EU Visa Code and, by extension, the Charter.[207]

The legitimating power of Mengozzi's account rests ultimately on the persuasiveness of a background analogical frame: is this case more like a flawed, inadmissible application—as the Belgian Government believes—or rather like an admissible application to which the state bears a duty to respond under EU law? Mengozzi constructs his analogical answer methodically. Two elements bear mentioning here, in particular.

First, Mengozzi details the 'single harmonized application form' and discusses the many ways in which an applicant might legally indicate intent for a future asylum application.[208] Mengozzi's scrutiny of what information an applicant might in fact supply belies the 'excessively formalistic' argument of Belgium and the Commission that 'the Visa Code does not make it possible to lodge a visa application based on Article 25 of that code', which details exceptional issuance of a limited territorial validity visa on humanitarian grounds.[209]

Second, Mengozzi discusses how the anticipated humanitarian concern informs the validity of seeking a short-term visa. He writes that the intent to seek asylum—and thus

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207 Opinion of Advocate General Mengozzi, Case C-638/16 PPU, X and X v État belge, paras 44-47.
208 *Id.* at paras 64-6.
209 *Id.* at para 62.

in fact a longer-term stay in Belgium—constitutes grounds only for rejecting the application on its merits under the Visa Code, but this fact does not withdraw the application from within the Code's scope.[210] Pressing further, Mengozzi notes that even had the family's application for asylum in Belgium not been processed before their short-term visa expired, their right to further remain on that territory beyond its expiry would have 'stemmed from their status of asylum seekers, under Article 9(1) of Directive 2013/32'.[211] And in this sense the rationale of the Belgian state—in addition to most other Member States, the Commission, and ultimately of the European Court of Justice itself—misapprehends existing legal process and the interplay among relevant European legal provisions.

Mengozzi's alternative analogical frame thereby replaces the false equivalence that would deny the Visa Code's applicability. With this frame in place, the conclusion follows: the Visa Code controls, as any decision made on the merits of the application takes place at an 'advanced stage of processing' once the Member State has already applied the provisions of the Code itself.[212] Member States thereby cannot escape responsibility for respecting Charter rights. Indeed, Mengozzi in this way averts what is the most troubling, slippery implication of the ECJ's ruling for the enforcement of rights-protections under the Charter—that 'the intention of the applicants … [*could*] *alter the nature or purpose of their applications*'.[213]

Further illustrative of analogical reason's situated judgment is Mengozzi's careful acknowledgment that, while the discretion of Member States under EU law does not itself negate obligations under the Charter,[214] such obligations do not 'deprive the Member State of all discretion'.[215] Mengozzi here takes care to delimit the judgment as discrete and bounded. He contrasts the present case to others where humanitarian grounds may be lawfully deemed too weak to warrant granting entry—'a request to attend the funeral of a close relative who has died on the territory of a Member State, however painful that may

210 *Id.* at paras 50-1.
211 *Id.* at para 53.
212 *Id.* at para 60.
213 *Id.* at para 50, emphasis in original.
214 *See id.* at para 82.
215 *Id.* at para 136.

be for the person concerned', for example.[216] But the present case is different, Mengozzi maintains, because here the state threatens 'genuine risk of infringement of the rights enshrined in the Charter, particularly the rights of an absolute nature, … [or] a risk that those rights will be infringed in relation to particularly vulnerable persons, such as young, minor, children'.[217] Because Mengozzi articulates the terms of how he has made this distinction, EU state actors are thereby called to justify any such infringements—or indeed to re-interpret the bounds of these rights and principles as Mengozzi has cast them.

Finally, Mengozzi devotes much time to comparisons with the European Convention on Human Rights—most concerning the lack of the ECHR's 'jurisdictional clause' in the Charter and the status of Convention rights as forming a floor but not a ceiling on Charter-based protections.[218] But Mengozzi's analogical comparison with the ECHR is especially remarkable in the following paragraphs worth quoting in full:

> 166. One thing struck me whilst re-reading the case-law of the European Court of Human Rights for the purposes of dealing with the present case: the findings of that court relating to the situations—always horrible and tragic—[in which positive obligations have not been fulfilled] are findings made *ex post*, most often where the treatment in question has been fatal for the victims.
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> 167. On the contrary, in the present case, all hope for the applicants has not, thus far, been lost. The proposal that I have just submitted to the Court demonstrates indeed that there is a humanitarian path, within the framework of EU law, which requires the Member States to prevent manifest infringements of the absolute rights of persons seeking international protection before it is too late.[219]

216 *Id.*
217 *Id.* at para 137.
218 *See id.* at paras 96-99.
219 *Id.* at paras 166-7.

This comparison is grounds for inspiration and, in the end, a responsibility Mengozzi finds difficult to deny. He feels the law as it is structured today is always arriving 'too late'. What is noteworthy here is the humility with which he phrases what is in fact a quite revolutionary reorientation to the human rights possibilities of EU law. It is the work of analogy that retains the humility of the move. Mengozzi demonstrates the kind of judicial activism Robert Cover valued, precisely in that the humility of judgment does not in itself entail deference or quietism. In a pluralistic legal order, the space for mutual learning—like that achieved by Mengozzi—must be constructed from the existing legal materials and histories jurists and lawyers find, which may be demanding insofar as it aims to situate citizens in a law whose meaning is pressed to change and thus to make new claims upon us.

(3) *Analogy enhances the creative possibilities of democratic politics and facilitates new relationships among citizens and communities.*[220] The rhetorical form of analogy makes relatedness the central characteristic of politics. The law creates such relations by drafting the 'materials and methods of a discourse'[221] to which citizens are asked to respond. As White writes, the judicial opinion—just as it establishes for the court 'an ethos, or character'—does the same for the 'parties to a case and for the larger audience it addresses—the lawyers, the public, and the other agencies in government'.[222] The jurisgenerative opinion explores the meaning of roles and perspectives; it rehearses certain understandings, voices, languages, and modes of thought. It stages encounters between differing points of view, sometimes resolving them but sometimes not. It retells histories and attempts, always, to speak for others who in that moment cannot speak directly for themselves.

Taking this task seriously, judiciaries recognize their dependence on the communities from which they draw normative resources and, indeed, the very cases and controversies coming before them. Courts accordingly seek to amplify, through procedure and

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220 In this regard, analogical legal thinking aligns with other democracy-enhancing conceptions of judicial review. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that judicial review is legitimate only insofar as it enhances democratic structures of governance).

221 JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 266 (Chicago: The University of Chicago Press 1984).

222 WHITE, *supra* note 174, at 102.

substance, the standing for civil society to contest and elaborate their normative worlds. Institutionally, this is particularly relevant to the Court of Justice of the EU, which (unlike the European Court of Human Rights) does not yet accept third-party briefing, with only the European Commission, European Council, and European Parliament alongside Member States able to submit written observations.[223] But these are not automatically released to the public, and no *amicus curiae* materials from other public institutions or civil society groups are formally accepted as part of the judicial record.

The virtue of broadening the space in which civil society actors intervene as legal interlocutors is especially important in the post-national context. To construct new forms of self-understanding and attachment, a wide array of expert knowledge is needed, drawn from a variety of disciplines including history, anthropology, sociology, economics, and political science. Alongside, a wide array of non-expert civic knowledge is necessary, as well, gained from the practical experience of affected citizens.

The rationale is epistemic but also relational. In the course of engaging one another's points of view in briefing, civil society groups also establish the basis for relationships they previously did not hold, new possibilities for collaboration, mutual critique, and accommodation. More broadly, the intervention of civil society also helps ground the language of the Court in the everyday language of the citizenry. To the extent legal opinions rely too much on technical distinctions and doctrinal jargon, the law becomes a specialized discourse unable to speak intelligibly to social concerns. Interventions from civic groups transpose the legalism of doctrine into the normative values of public life. They connect matters of constitutional law to subjects of constitutional politics.

Mengozzi does this in several parts of his opinion. Again in the opening paragraphs, he writes that the 'particularly alarmist tone' taken by the Czech Government in its submissions to the Court on the possibly '"fatal" consequences for the EU' must be more soberly assessed in comparison with both the broader situation and, in particular, the possible fate of asylum seekers themselves. 'Although the European Union is going through a difficult period, I do not share that fear', Mengozzi writes. 'It is, on the contrary,

223 Consolidated version of Rules of Procedure of the European Court of Justice, 25 September 2012, Article 196, *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

as in the main proceedings, the refusal to recognise a legal access route to the right to international protection on the territory of the Member States—which unfortunately often forces nationals of third countries seeking such protection to join, risking their lives in doing so, the current flow of illegal immigrants to EU's borders—which seems to me to be particularly worrying'.[224] Mengozzi's tone here is firm but understanding, attempting to persuade Member States and their citizens that the practical concerns they might have must be contextualized.

In the concluding paragraphs of the opinion, Mengozzi does something similar, though this time he positions new actors together. He refers to the 'principle of solidarity and fair sharing of responsibility [...] between the Member States',[225] which is enshrined in Article 80 TFEU but has hardly helped thus far to correct for the Dublin Regulation's systemic imbalances. Mengozzi then brings the point home, drawing a comparison between those EU states on its external border and the applicants themselves: 'In extreme conditions such as those that the applicants have endure', he writes, 'their option to choose is as limited as the option of the Member States of the Mediterranean Basin to turn themselves into landlocked countries'.[226]

It is a powerful rhetorical move, illuminating relations of solidarity and mutual feeling that are not immediately self-evident. Mengozzi does not resolve the tension between core and peripheral states at the heart of Dublin's inequities. But he does connect this tension, quite explicitly, with the violence done to refugees. Indeed, he aligns the plight of European citizens with those who seek to find safety and shelter among them. He tables that realization; he inscribes it into the record.

Mengozzi ultimately ties these relational dimensions of law also to the concrete matter of evidentiary standards—a fundamental question of whom to believe and why. This question is posed in the first instance to the court making the preliminary referral, but it relates by extension also to the case's original parties and to the public at large. Mengozzi references here, again in a sensitive manner, the assessment of general conditions in the country of origin in order to determine the genuine risk faced by an applicant. He

224 Opinion of Advocate General Mengozzi, Case C-638/16 PPU, X and X v État belge, para 6.
225 *Id.* at para 174.
226 *Id.*

acknowledges the importance of reporting from objective sources, including UN bodies or EU institutions, non-governmental organizations and other independent international rights-monitoring associations; and he cites well-known standards for reliability tied to the author's reputation, the soundness of investigative methods, and the consistency and corroboration of conclusions.[227]

But Mengozzi continues by noting the limitations of relying too severely on such sources, given the 'many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations'.[228] In such cases, reliance on 'first-hand knowledge' may be necessary.[229] Mengozzi then goes on to provide a detailed reading of the suffering that attends the Syrian conflict—his own attempt to relate to the situation faced by the applicants in the present case. In this exercise, Mengozzi's work to reveal the set of evidence that the Belgian state—and in truth all European citizens—should know about the severity of the conflict is exemplary. He concludes in striking terms:

> 157. Frankly, what alternatives did the applicants in the main proceedings have? Stay in Syria? Out of the question. Put themselves at the mercy of unscrupulous smugglers, risking their lives in doing so, in order to attempt to reach Italy or Greece? Intolerable. Resign themselves to becoming illegal refugees in Lebanon, with no prospect of international protection, even running the risk of being returned to Syria? Unacceptable.[230]

Surely this kind of imaginative recounting belongs in a legal opinion. Consider for a moment—drawing on an entirely different European body of law—what a similar effort by the European Court of Justice or the German Federal Constitutional Court might have meant at the height of the sovereign debt crisis and the reordering of Eurozone governance—in cases such as *Pringle* or the OMT saga.

Here, what kinds of lived relations might have it been important for courts to articulate and to give voice to—just as Mengozzi attempted for the applicants in our present case? The plight of Greek citizens, certainly; but also the vastly asymmetrical sovereign

227 See *id.* at para 142.
228 *Id.* at para 143.
229 *Id.*
230 *Id.* at para 157.

capacities of states to determine their economic and fiscal relations and to thereby sustain the material dimensions of their constitutional orders. In these contexts, it indeed seems incumbent upon high European courts to account for such asymmetries and to speak about their legality. As Damian Chalmers writes, 'Sovereignty operates across a spectrum … in a post-crisis world': for some acting as a constraint on what to expect from redistribution, for others a discretionary license for how much they wish to distribute.[231]

It is tempting to see conflict in legal interpretation as occasion to shift the plane to political institutions;[232] and in a sense, so it is. But there is a danger of doing so prematurely or too quickly, before the courts have had a chance to articulate certain understandings of the shared normative worlds that might prove helpful precisely as discursive materials for democratic political contestation.

(4) *Post-national constitutional law draws normative legitimacy from the reflexivity and plurality of its judgments.* The responsibility of legal discourse for loss means that citizens' commitment to law depends on courts' ability to acknowledge forthrightly the plural grounds that can always inform their judgments. We commit to post-national law only when it invites its own revision in time. When the law fails to do so, when it retreats closer to the holistic tones of modern state law, its authority recedes, and its capacity to imbue a post-national legal order with requisite political commitment weakens. Such a task and criterion are of course demanding and 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'.[233]

As active as the mode of narrative judgment is, it presents legal judgments as situated and, as such, self-limiting. White writes, 'We can and do make judgments, but we need to learn that they are limited and tentative; they can represent what we think, and can be in this sense quite firm, but they should also reflect that all this would look quite different form some other point of view'.[234] Such claims place into the textual record not only their own background presumptions about the world; they also attempt to outline the

231 Chalmers, *supra* note 48, at 284.
232 *See* Komárek, *supra* note 10, at 24ff.
233 Cover, *supra* note 159, at 67n195.
234 *Id.* at 264.

uncertain, finite extent of their own reach.[235] They rehearse for themselves, their interlocutors, and their publics the diversity of a contested past and the semantic, cultural resources necessary to revive another possible future that might one day become authoritative. In this light, we see why the dissenting and separate opinions in courts play such a crucial rhetorical and structural role and why introducing them in the CJEU is long overdue.[236]

This kind of art in law—its admission of humility and self-limitation—is what preserves one's relationship to law as an ongoing project demanding one's participation and involvement. This connects with a very basic phenomenological sense of commitment we share. As Derrida writes suggestively in 'Force of Law', 'One cannot love a monument, a work of architecture, an institution as such except in an experience itself precarious in its fragility: it hasn't always been there, it will not always be there, it is finite. And for this very reason I love it as mortal, through its birth and its death, through the ghost or the silhouette of its ruin, of my own—which it already is or already prefigures. How can we love except in this finitude?'[237]

By linking law's legitimacy to the preservation of its reflexivity, the analogical imaginary helps make sense of the idea of 'commitment to a law not merely one's own'. Reflexivity is not a deficit of commitment; it is the only form, in fact, that legal commitment can take. Reflexivity offers us the confidence that post-national law expresses democratic freedom. As White argues, 'Is this a foolish confidence? Not at all: it is full of uncertainty but it is the only kind of confidence it is open to us to have; it is certainly less foolish than thinking that our wishes have been clearly and immutably set down in writing in such a way as to govern any future dispute. In particular, it is the only kind of confidence that the framer of a legal text can ever have'.[238] This is the insight of post-national law, and the guiding line of the European project.

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235 *See id.* at 224 ('But it might be thought that the task of the judge in writing an opinion is to expose to the reader the grounds upon which her judgment actually rests, with as full and fair a statement of her doubts and uncertainties as she can manage. Such an opinion would establish a relation of fundamental equality with the reader, who might follow the whole argument, consider himself enlightened by it, but come to the opposite conclusion'.).

236 *See* Vlad Perju, *Reason and Authority in the European Court of Justice,* 49(2) VIRGINIA J. INT. L. 308 (2009).

237 Derrida, *Force of Law*, *supra* note 183, at 1009.

238 WHITE, *supra* note 174, at 245.

In his opinion, Mengozzi is certainly unequivocal in his belief that his legal and moral interpretation is in this moment sound. But he does exhibit, too, an awareness of the limitations of his argument and the particular point of view out of which it arises. This is a more subtle dimension of his opinion, but it contributes to its persuasive capacity.

For example, Mengozzi admits that his opinion would broaden the number of persons to whom Member States would be obliged to grant humanitarian visas given the absolute protections of Article 4 of the Charter. And he notes with some earnestness the concerns of many governments that their 'consular representations [would be] overwhelmed by an uncontrolled flood of applications'.[239] But such views must be 'nuanced' and there are good reasons to believe—regrettably, he writes—that a great deal of 'practical obstacles to lodging such applications' will continue to exist, as the case of the applicants themselves illustrates.[240] Mengozzi here admits that his granting of rights is today politically acceptable only because there continue to exist unjustified limitations to make full use of them. Remarkable for its honesty, this tragic admission also serves to indicate that the solution proposed as a matter of rights protection, as much as it realizes the principles of EU law, is itself an unstable, unsatisfactory, and ambivalent one. It must, Mengozzi seems to imply, be re-evaluated and further strengthened, if it is to live up to the values he cares for.

Mengozzi also includes an interesting, subtle reference to the EU's Temporary Protection Directive, which has thus far been 'surprising[ly]' absent from debates concerning the movement of Syrian refugees.[241] The Directive was designed to accommodate precisely the kind of large-scale migration Europe currently faces, with procedures to coordinate state capacity, to apply group categorization to beneficiaries, and to secure protection more quickly.[242]

Mengozzi gives a brief but imaginative notation, pointing to an alternative route that might yet be taken. And this note perhaps points to a response still more courageous than

239 Opinion of Advocate General Mengozzi, Case C-638/16 PPU, X and X v État belge, para 172.
240 *Id.*
241 *Id.* at para 165, notes 84 and 85.
242 See Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August [2001] OJ L212/12-212/23, 2001/55/EC.

the one Mengozzi himself contemplates in the present case and whose normative logic might inform future judgments. Such a disposition to the resources of law—with both an admission of humility and of creative potential—preserves one's investment in law as a project demanding ongoing participation and interpretation.

V. Conclusion: Post-national freedom in law's time

These reflections are meant to offer a new understanding of the legal demands of the post-national state and its institutions. Paul Kahn writes that, 'to be free in [] dialogue, citizens must deny the state any privileged place'.[243] This is only partially correct, however. For there remain grounds to see in public constitutional law a necessary structure by which the desired civic dialogue can emerge as a matter of collective self-authorship. The freedom of discourse points to the 'limits of the legitimacy of state authority',[244] yes, but not to its irrelevance for that freedom. The state as a public institution can find its legitimacy insofar as it gives shape to the creativity of public meaning and accommodates mutual learning from the many discursive communities living within it. The field of post-national constitutional law offers the public the institutions, practices, and culture by which the 'time' of one's life—giving the reflexivity of our embedded political identities its due—can be secured and enriched. There are, of course, other institutions that might make a claim on this privileged status—the neoliberal market, today most prominently. But I have attempted to show above why only an analogical imaginary of public law retains the promise of 'intelligibility'.

In a context of pluralism, the analogical imaginary acknowledges that a political community accepts only with great effort a principle disjoined from the normative world in which it has grown accustomed to living. The process of enlarging one's normative world is fragile and demanding. The objects to be transformed in the course of learning are not in the first instance the endpoint constitutional principles but rather the surrounding narratives that situate and give such principles their meaning. This is why, as I discussed, the legal imaginaries of history, system, and principle each proves unsatisfactory in realizing post-national, cosmopolitan commitment to the law. Constitutional learning begins through the disclosure of this broader network of social

243 KAHN, *supra* note 168, 222.
244 *Id.*

meanings, the always partial ways in which citizens come to form perspectives about their most deeply held values. In a post-national legal order, therefore, the judicial opinion cannot claim authority on the basis of a privileged institutional position speaking the voice of a popular sovereign nor on the basis of systemic gains in output legitimacy alone nor from the truth-claims of normative principles themselves. Instead of Westphalian legal coherence, courts ought instead aim to cultivate the 'intelligibility' of law.

In drawing on Robert Cover's stirring vision and developing an account of 'analogical' law, I have attempted to sketch a more time-sensitive theory of post-national constitutionalism. It is because of the particular, perhaps peculiar virtues of narrative law that it can accommodate in the post-national legal space the conflicting demands of authority and freedom, closure and opening, tradition and novelty. Like Habermasian discourse ethics, it draws on the structural characteristics of linguistic claims and discursive self-understandings. Unlike it, however, analogical law presents a more balanced picture of legal reason as embedded in the affective, literary, historical, and self-contradictory character of legal authority.[245] It is able, because of this balance, to provide normative 'intelligibility' in the course of change in a way Habermas's structure does not.

The responsibility of judges and courts, on this account, is to preserve as far as possible the equipoise of post-national legal narratives. Focusing on more than just validity (which the judge, to be sure, is asked to pronounce), post-national adjudication asks the judge to preserve the capacities of law's subjects to re-articulate their claims before the law once more, their capacity to insert themselves anew into law's narrative that spans diverse legal traditions. The judicial role is to enrich, not to undermine or dismiss, the ability of others to re-narrate for themselves again. These are the crucial measures—within post-national law—of a legal judgment's persuasiveness and of its legitimacy: the strength of its narrative form, whether it invites new understandings of meaning and authority, and whether it situates older understandings as they are pressed to change into the new. This is captured best in Cover's closing lines of hope: 'We ought to stop circumscribing the *nomos*; we ought to invite new worlds'.[246]

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245 *See* Franz Kafka, *Before the Law* (1915); Jacques Derrida, *Before the Law, in* D ATTRIDGE (ED), ACTS OF LITERATURE 183-220 (London: Routledge 1992).

246 Cover, *supra* note 159, at 68.