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KEEPING FAITH WITH *NOMOS*

*Steven L. Winter**

I. INTRODUCTION

Around election time, I sometimes see a bumper sticker or sign enjoining the observer to “vote biblically.” I chuckle because I am pretty sure there is not much voting in the Bible. The Almighty, as I remember it, was none too pleased when the Jewish people asked for a king like the other nations.¹ Imagine if they had insisted on a democracy. Both in that request and in the parallel passage in *Deuteronomy*, the appointment of a king is indicated by the verb שים, to “set” or “place.”² There is one passage in the Christian Bible where the Apostles, who want to be free to focus on their work, suggest that congregants choose officials to take over ministering to the widows.³ But, other than that, no voting. Nothing. Even more confusing to me is the election-time sign that asks how Jesus would vote. For one thing, I always understood him as a “render unto Caesar”⁴ kind of guy whose kingdom was “from another place.”⁵ For another, I don’t see why he would bother to vote when, presumedly, he has a direct line.

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¹ 1 *Samuel* 8:4-8 (Soncino ed. 1964).

² *Deuteronomy* 17:14-15 (J.H. Hertz ed. 1936) (“When thou art come to the land which the Lord our God giveth thee . . . and shalt say ‘I will set a king over me, like all the nations that are about me. . . .’”). This is almost exactly the same language used in 1 *Samuel* 8:5. *See also Deuteronomy* 1:13-15 (“Get you, from each one of your tribes, wise men, and understanding, and full of knowledge, and I will make them heads over you. . . . So I took the heads of your tribes, wise men, and full of knowledge and made them heads over you. . . .”).

³ *Acts* 6:3-4 (“Brothers and sisters, choose seven men from among you who are known to be full of the Spirit and wisdom. We will turn this responsibility over to them and will give our attention to prayer and the ministry of the word.”).

⁴ *Matthew* 22:21. Paul goes further, insisting that submission to authority is obedience to God. *Romans* 13:1 (“Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God.”).

⁵ *John* 18:36.

The point of these musings is that democracy and theology are distinctive systems that work on very different principles. Comparative study of American and Jewish law must, therefore, attend to the fundamentally different assumptions that animate these distinct legal systems. One of the strengths of Professor Levine's work is his care not to overgeneralize the similarities, instead noting critical differences in their assumptions and approach.⁶ For example, in his discussion of the rules-versus-standards debate, he explains that only some of the arguments in the American debate are germane to Jewish law; the claim that rules better promote autonomy and democracy is simply inapplicable in the religious context.⁷

I want to push this point further: Among the different assumptions that underlie theocratic and democratic systems are profoundly different conceptions of law. One is top-down, the other bottom-up. One understands the law as authority; the other holds out the prospect of a law that is the product of public participation and communal action.⁸ The Greeks who invented democracy had a name for this latter conception: They called it *nomos*.

More is at stake than the scholarly integrity of comparative legal studies. Fundamental aspects of our legal system—including the meaning of the rule of law ideal—turn on which of these basic conceptions we embrace.

II. WHEN LIGHTNING STRIKES

The Czech philosopher Jan Patočka offers the provocative thesis that politics and history begin with the emergence of philosophy.⁹ For prehistorical humans, he explains, religion and the

⁶ See, e.g., SAMUEL J. LEVINE, 1 JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY 147-60 (2018) (comparing American and Jewish law on confessions). Suzanne Stone observes that the earlier scholarship “pointing out the similarities between the two traditions,” which was superficial and self-referential, “often made for rather dull scholarship.” Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 816 (1993).

⁷ LEVINE, *supra* note 6, at 198-201.

⁸ Cf. *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 873 (2005) (noting that the objective “observer would find that the [Ten] Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives ‘from the consent of the governed.’” (citation omitted)).

⁹ JAN PATOČKA, *HERETICAL ESSAYS IN THE PHILOSOPHY OF HISTORY* 139-44 (Erazim Kohác trans., James Dodd ed. 1996). Patočka was a student of Husserl and Heidegger. He was a founding member of Charter 77 and friend and mentor to Václav Havel; he died under interrogation by the Communist regime in Czechoslovakia in 1977. Edward F. Findlay,

natural world present life as “self-evident and given.”¹⁰ Only with Socratic questioning of the nature of things does “the radical question of meaning based on the shaking of the naive, directly accepted meaning of life” arise.¹¹

As long as events were understood as the product of fate, divine plan, or the natural order of things, there could be no politics and no history. This is not to say that humans did not act to affect their world. But the relevant response to the gods or to fate was not an action, but propitiation. Nor is to say that there were no histories. History as a chronicle or sequence of events was practiced throughout the Middle East and elsewhere. But, while these early narrative histories understood “the past as something important for the successful future,” their function was to provide “ritualistic writings, cultomatic records, observations of what is fortunate and unfortunate in events and acts.”¹² These narrative histories also preserved and transmitted the normative values of their cultures.¹³ And the Bible introduced a clear vision of the nation as the bearer of history.¹⁴ But, these histories still worked “as a drama that unfolds before our eyes.”¹⁵ The idea of history as the product of the choices and actions of human beings, rather than the result of divine intervention or a natural order, had yet to arise.

Philosophy gives rise to politics and history, according to Patočka, because it opens up “the realm of human possibilities” in which freedom is understood “explicitly as something that is to be *carried out*, as a possibility we can *accomplish*, never just accept.”¹⁶ Politics entails taking responsibility for the consequences of our actions and, at the same time, recognizing and respecting the responsibility of others. And that can happen “only in a *community* of equals. For that reason, the beginning of history in a strict sense is the *polis*.”¹⁷ As Ellen Meiksins Wood explains:

Classical Ethics and Postmodern Critique: Political Philosophy in Václav Havel and Jan Patočka, 61 THE REVIEW OF POLITICS 403, 415-16 (1999).

¹⁰ PATOČKA, *supra* note 9, at 141.

¹¹ *Id.* at 143; *see id.* at 61 (“[T]his discovering of meaning . . . is the meaning of Socrates’s existence. The constant shaking of the naive sense of meaningfulness is itself a new mode of meaning.”).

¹² *Id.* at 29.

¹³ *Id.* at 28. *See* discussion *infra* notes 19, 93.

¹⁴ *Id.* at 139.

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 142.

¹⁷ *Id.* at 148 (emphasis in original).

In order to question the existing arrangements, there must, at the minimum, be some belief in humanity's ability to control its own circumstances, some sense of the separation of human beings from an unchangeable natural order, and of the social from the natural realm. There must be . . . an idea that history involves conscious human effort to solve human problems. . . . Such a view . . . [is] associated with some direct experience of social change and mobility, some practical distance from the inexorable cycles of nature, which . . . come[s] with urban civilization.¹⁸

I want to note two caveats before moving on: First, I am not suggesting that the Greeks “discovered” human agency or that earlier religious thought lacked a concept of free will. Rather, the nature of free will is understood differently within a religious worldview that assumes the truth of divine authority and human duty. The faculty of choice is exercised with respect to obedience or transgression. There are, too, commandments of worldly engagement—notably the command in *Genesis* 1:28 to “replenish the earth and subdue it” and the duty “to repair the world in the kingdom of God” or *tikkun olam*.¹⁹ But, as Wood points out, “nowhere else had the emphasis on human agency took center stage in intellectual life” as it did in Greece.²⁰ What changes in Greek thought is an understanding of freedom and meaning as themselves the product of human action, aptly summed up in Protagoras’s famous aphorism: “Man is the measure of all things.”²¹ In religious thought, the idea of equality derives from the understanding that we are all made in God’s image.²² In classical Greek thought, as Hannah Arendt observes, “men were by nature

¹⁸ ELLEN MEIKSINS WOOD, *CITIZENS TO LORDS: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM ANTIQUITY TO THE LATE MIDDLE AGES* 43 (2008).

¹⁹ See *Mishnah Gittin* 5:3. Moreover, as Levine elaborates, my teacher the great Talmudic scholar, philosopher, and theologian Rabbi Joseph B. Soloveitchik expounded on the Genesis story as a command both that man is to partner with God in the work of creation and, more fundamentally, that he follow the principle of *imitatio Dei* in doing so. 2 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 26-27 (2018).

²⁰ WOOD, *supra* note 18, at 43-44.

²¹ *Id.* at 57-58; see also PATOČKA, *supra* note 9, at 148 (“bestowing meaning on life out of freedom and for it”).

²² *Genesis* 1:27.

(φύσει) not equal, and needed an artificial institution, the *polis*, which by virtue of its νόμος [*nomos*] would make them equal.”²³

Second, I do not think that Patočka’s claim about the priority of philosophy is, strictly speaking, a factual one. For one thing, the chronology is off; Athenian democracy emerged before the philosophers Protagoras and Socrates and before the historians Herodotus and Thucydides. For another, Patočka’s own account explains the emergence of the *polis* as a contingent response to external military threats and internal political struggles.²⁴ Rather, Patočka’s point is in the nature of a parable or thought experiment. It reveals the conceptual architecture of politics and history as requiring the recognition of the constructed-ness and contingency of human knowledge and action. As Patočka says (and this quote will give you some sense of the poetry of his writing): “It is like a landscape illuminated by lightning, amid which humans stand-alone, with no support, relying on solely that which presents itself—and that which presents itself is everything.”²⁵

III. WHEN VOCABULARY MATTERS

Democratic politics, then, is a politics of another order. It is not simply a matter of majority rule or consent of the governed. Democracy is the politics of collective self-rule, the sense that *we* construct the social order that will govern us. As Pericles says in the Funeral Oration, “we Athenians decide public questions for ourselves.”²⁶ The Constitution that “We the People” adopted may set the ground rules. But, we, the current people, are free to amend it; we are free to decide via public debate and elections the rules that will govern social life. This understanding of democracy entails a

²³ HANNAH ARENDT, ON REVOLUTION 30-31 (1965). See also PATOČKA, *supra* note 9, at 43 (arguing that for Heraclitus, “Humans . . . become wise only when they themselves act, accomplishing their deeds in the atmosphere of freedom ensured by the laws of the *polis*.”).

²⁴ PATOČKA, *supra* note 9 at 41-44 (“the genesis of the *polis* is not a process that can be precisely localized, attributed to these or those individuals; anonymous assumptions, contingencies of particular situations play a role. . . ; the *polis* arises and sustains itself amid internal and external struggles, . . . *inter arma*”).

²⁵ *Id.* at 40. Cf. MAURICE MERLEAU-PONTY, SIGNS 109 (Richard C. McCleary trans. 1964) (“Superficially considered, our [historical] inherence destroys all truth; considered radically, it founds a new idea of truth.”).

²⁶ Quoted in WOOD, *supra* note 18, at 37 (from THUCYDIDES, THE PELOPONNESIAN WAR, Book 2.37.1 and 40.2-3).

distinctive notion of “law” that, correspondingly, gives the-rule-of-law ideal a very particular cast.

The original Greek word for law was *thēsmos* (θεσμός). From the Greek *tithemi* “to put” or “place,” *thēsmos* signifies “something imposed by an external agency, conceived as standing apart and on a higher plane than the ordinary.”²⁷ It thus shares with the English word “law” a common sense and conceptual etymology. The Oxford English Dictionary defines “law” as a “rule of conduct imposed by authority” and traces the term to the Old Norse *lagu* for “something laid or fixed.”²⁸ This is the sense of law conveyed by the colloquial expression “following the rules laid down.”²⁹

The poet Wallace Stevens says: “A new meaning is the equivalent of a new word.”³⁰ The Greeks, apparently, did not think so. As Martin Ostwald tells us, *nomos* (νομός) abruptly replaced *thēsmos* as the Greek word for law, and this occurred at the time of the democratic reforms of Cleisthenes around 508-07 B.C. *Nomos*, Wood says, “suggests something held in common, whether pasture or custom.”³¹ As applied to legal directives, it expresses a duty of obedience “motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it.”³² The relation between *nomos* and democracy was foundational: “Cleisthenes himself seemed to describe the new political order as *isonomia*.”³³

A compound of *isos*, meaning “equal,” and *nomos*, *isonomia* was the most prominent and popular of a trio of cognate terms for democracy and its institutions that included *isēgoria*, the equal right of poor and working people to address the assembly, and *isokratia*,

²⁷ MARTIN OSTWALD, *NOMOS AND THE BEGINNINGS OF THE ATHENIAN DEMOCRACY* 55 (1969).

²⁸ OXFORD ENGLISH DICTIONARY, <http://www.oed.com.proxy.lib.wayne.edu/view/Entry/106405?rskey=6Dr4XC&result=1&isAdvanced=true - firstMatch> (“[I]n many other languages the word for ‘law’ is derived from roots meaning ‘to place’; compare, e.g., English DOOM n., Greek *θέμις*, *θεσμός*, Latin *statutum*, German *gesetz*”).

²⁹ For an extended discussion see STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, & MIND* 206-16 (2001).

³⁰ WALLACE STEVENS, *Adagia, in OPUS POSTHUMOUS* 159 (1957).

³¹ WOOD, *supra* note 18, at 36.

³² OSTWALD, *supra* note 27, at 158-60.

³³ WOOD, *supra* note 18, at 36.

equality of power.³⁴ Not only did *isonomia* precede the coinage of the term “democracy” (a compound of *demos* “the people” and *kratos* “power”), but it provided the normative force for the democratic ideal. “*Dēmokratia* does no more than describe a fact,” Gregory Vlastos explains, “*Isonomia* expresses an idea, indeed a whole set of ideas by which the partisans of democracy justified the rule of the people.”³⁵ Victor Ehrenberg tells us that, by the time of Cleisthenes’s reforms, *isonomia* had come to mean “not . . . a state of equal law for everybody” but “the ideal of a community in which the citizens had their equal share.”³⁶ *Isonomia*, Vlastos elaborates, “designates a political order in which the rule of law and responsible government are maintained by the equal distribution of political power.”³⁷

It is easy to see how revolutionary the Greek idea of democracy actually was. And, from a modern perspective, it is also easy to see that ideal as hypocritical. Only certain classes of people were understood to be within its ambit; women, slaves, and other dependents, the non-native born, were excluded. As Vlastos elsewhere points out, the equality on which the ancient Greeks “prided themselves was the club-privilege of those who had the good judgment to pick their ancestors from free Athenian stock of the required purity of blood.”³⁸ Perhaps these two are connected: The perception and acceptance of equality may come more easily among the homogeneous. But the idea of ordinary people ruling themselves through direct participation in lawmaking was nevertheless radical.³⁹ And it required a completely different conception of law—not as an authority, but as a common possession and entitlement.

³⁴ GREGORY VLASTOS, *Isonomia*, in 1 STUDIES IN GREEK PHILOSOPHY: THE PRESOCRATICS 105 (Daniel W. Graham ed. 1995) (originally published in 74 AMER. J. OF PHILOLOGY 337 (1954)). See also WOOD, *supra* note 18, at 39.

³⁵ VLASTOS, *supra* note 34, at 96.

³⁶ Victor Ehrenberg, *Origins of Democracy*, 1 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 530-31 (1950).

³⁷ VLASTOS, *supra* note 34, at 107.

³⁸ Gregory Vlastos, *Justice and Equality*, in THEORIES OF RIGHTS 42 (Jeremy Waldron ed., 1984).

³⁹ “Civic identity, the jurisdiction of the polis and the rule of *nomos* in Athens all tended toward a kind of equality set against the aristocratic principle of rules and hierarchy.” WOOD, *supra* note 18, at 66.

IV. WHEN LAW BECOMES RULE

We take the rule of law as a basic democratic principle. The conventional understanding is that the rule of law serves to protect liberty by imposing constraints on official action. This is Justice Jackson's characterization in *Youngstown Sheet & Tube*: "The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law."⁴⁰ "A government of laws and not of men" is one in which official action is governed by preexisting rules of sufficient clarity and generality to preclude the arbitrary whim of individuals or the brute impositions of power. So understood, the rule-of-law ideal is closely entwined with law's traditional tendency toward formalism. And, as such, law is hypostasized as an impersonal force. Lost is the sense of law as a *nomos* that represents the collective force of democratic decision-making.

The rule-of-law ideal has thus come to signify a lesser idea of law as an authority. This is how former Attorney General Jeff Sessions used the term in his official announcement of the Trump Administration's "zero tolerance" policy that separated migrant families at the border in the Spring of 2018.⁴¹

The transition from *isonomia* to this desiccated view of law as authority "turned a profound idea into a shallow dogma."⁴² Anglicized and imported into England from Italy at the end of the sixteenth century, "isonomy" expressed the idea of "equality of laws to all manner of persons." By the seventeenth century, it was largely displaced by the phrases "equality before the law," "government of law," or "rule of law."⁴³ The phrase "a government of law and not of men" was coined by James Harrington in the late seventeenth century.

⁴⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J. concurring).

⁴¹ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL ANNOUNCES ZERO-TOLERANCE POLICY FOR CRIMINAL ILLEGAL ENTRY, DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>:

To those who wish to challenge the Trump Administration's commitment to public safety, national security, and the rule of law, I warn you. . . . To the Department's prosecutors, I urge you: promoting and enforcing the rule of law is vital to protecting a nation, its borders, and its citizens.

Id.

⁴² VLASTOS, *supra* note 34, at 105.

⁴³ FREIDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 164 (1978).

For him, the phrase represented the rule of virtue over the corrupt—that is, self-interested—rule of men.⁴⁴ John Adams would immortalize this phrase in Article XXX of the Massachusetts Declaration of Rights,⁴⁵ and Chief Justice John Marshall would invoke it to support his assertion of the power of judicial review in *Marbury v. Madison*.⁴⁶ The rule-of-law idea was, thus, dramatically transformed: What began as a democratic ideal of self-governance only by those rules adopted by the people themselves evolved into a notion of constitutional authority pursuant to impersonal rules enforced by an unelected and unaccountable judiciary.

It is no accident that *Marbury's* assertion of impersonal authority is expressed in a formalist and imperious rhetorical style. Marshall's argument is categorical, consisting of a series of dichotomous alternatives between which "there is no middle ground."⁴⁷ The amenability of the Secretary of State to the courts' process turns on whether his responsibilities are discretionary and, thus, "only politically examinable" or a matter of legal duty and, thus, "examinable by the courts."⁴⁸ Jurisdiction is either original or appellate.⁴⁹ Any reading of Article III that leaves it to Congress to reapportion the Supreme Court's jurisdiction would render the text "mere surplusage."⁵⁰ The Constitution is either judicially enforceable

⁴⁴ JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 35 (J.G.A. Pocock ed. 1992) ("And as a commonwealth is a government of laws and not of men, so is this the principality of the virtue and not of the man; if that fail or set in one, it riseth in another. . . ."). Earlier, Harrington asked: "seeing as they that make the laws in commonwealth are but men, the main question seems to be how a commonwealth comes to be an empire of laws and not of men? or how the debate or result of a commonwealth is so sure to be according to reason. . . ." *Id.* at 20-21. To which he answered that: "if the interest of popular government come the nearest unto the interest of mankind, then the reason of popular government must come the nearest unto right reason." *Id.* at 22.

⁴⁵ MASS. CONST. art. XXX.

⁴⁶ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

⁴⁷ *Marbury*, 5 U.S. at 177. Contrast Marshall's rigid, categorical approach in *Marbury* with the more nuanced understanding of language as susceptible to and expressive of differences in degree and the dependence of meaning on context and usage that he later expresses in *McCulloch v. Maryland*, 17 U.S. 316, 414-15 (1819).

⁴⁸ *Id.* at 165-67. So, too, the question whether mandamus will lie turns on whether the duty is—in familiar doctrinal terms—ministerial or discretionary. *Id.* at 170-71.

⁴⁹ "[T]he plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original." *Id.* at 175.

⁵⁰ *Id.* at 174.

or it is not written, paramount law.⁵¹ Any other view is, simply, “too extravagant to be maintained.”⁵²

Marshall’s impersonal authority, it turns out, is all too personal. The ostensibly logical, all-or-nothing quality of Marshall’s reasoning conceals a series of tendentious choices. Consider three decisive junctures in Marshall’s argument.⁵³ First, Marshall presents his reading of Article III as compelled, but the language is susceptible to other interpretations: Article III could be read as setting an irreducible minimum for the Court’s original jurisdiction, allowing Congress to

⁵¹ *Id.* at 176-77 (“Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.”).

⁵² *Id.* at 179. The high-handed, even sarcastic tone is a repeated motif. In disclaiming any political dimension to the case, Marshall declares:

[I]t is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment.

Id. at 169-70. In asserting judicial review of legislation as axiomatic in a system with a written constitution, Marshall proclaims:

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.

Id. at 177. So, too, in considering whether delivery of the commission was essential to Marbury’s appointment, Marshall characterizes it “as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.” *Id.* at 160. And, of course, Marshall is repeatedly “emphatic” in asserting his authority to rule in the case. *See id.* at 163 (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”); *Id.* at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁵³ Even the routine question of when Marbury’s commission took effect is treated in a high-handed fashion. Marshall cites no authority and fails to consider questions of policy or function. *Id.* at 155-62. Jefferson, himself a well-educated and able lawyer, thought this ruling clearly contrary to law. *See* William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 9 (also pointing out that Marshall located “the point of ‘vesting’ in a fairly mechanical fashion”).

add to it later.⁵⁴ Or it could be read as making only a provisional allocation of jurisdiction to be revised by Congress in light of further experience.⁵⁵ Either alternative would be more consistent with the Exceptions Clause. From a practical and historical point of view, moreover, the provisional reading would seem the most sensible. After all, the convention had failed to resolve whether there would even *be* lower federal courts. And, there had never been *any* federal courts; at the time, Article III was drafted, no one had any way to gauge whether its division of the Court's workload would be too much, too little, or otherwise adapted to the needs of a new and unforeseeable system. Marshall's wooden textual analysis is a far cry from his later admonition that this is "a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."⁵⁶

Second, Marshall asserts that constitutionalism necessary entails judicial review, but this implication is by no means compelled. It is a commonplace that the substantive question of whether the Constitution is paramount to ordinary legislation is separate from the institutional question of who determines whether there is a conflict.⁵⁷ And it is a familiar response that, in a democracy, this question should be decided by the people in the political process.⁵⁸ Again, from a functional or policy perspective, it makes little sense to give the final say in a democracy to the *least* accountable branch. Marshall says that between judicial review and constitutional irrelevance, "there is no middle ground." But, of course, there is; it can be found straight away in Marshall's more deferential stance in *McCulloch v. Maryland*.⁵⁹ Its

⁵⁴ Van Alstyne discusses the first of these two possibilities. He concludes that Article III could be read to allow Congress to except some cases from the Court's appellate jurisdiction by adding them to its original jurisdiction: "This construction of the whole clause is sensible and leaves nothing as mere surplusage." *Id.* at 31.

⁵⁵ See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLIN, *CONSTITUTIONAL LAW* 34 (8th ed. 2018) (noting both alternatives). As all the casebooks note, the Supreme Court subsequently rejected *Marbury's* reading of Article III's jurisdictional grants as exclusive—holding that Congress has the power to give the lower federal courts concurrent jurisdiction over cases specifically assigned to the Court's original jurisdiction. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

⁵⁶ *McCulloch*, 17 U.S. at 415 (emphasis in original).

⁵⁷ Van Alstyne, *supra* note 53, at 22.

⁵⁸ See *id.* at 24.

⁵⁹ *McCulloch*, 17 U.S. at 423 (contending that "to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground").

modern form is the rational basis test.⁶⁰ And, if James Bradley Thayer is correct, it was the preponderant view in the early Republic.⁶¹

Third, Marshall's reading of the statute as conferring original jurisdiction over mandamus is doubly flawed. On the one hand, the statute says no such thing: The Court's power to issue writs of mandamus is plainly in the appellate section of the statute.⁶² On the other hand, as any well-educated lawyer of Marshall's era would have known, mandamus had, from its inception, been understood as a form appellate review. Thus, Marbury's counsel former Attorney General Charles Lee argued that: "The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for Congress to prescribe the forms of the process by which the Supreme Court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one."⁶³

Mandamus, as we know it, arose in the early seventeenth century. "Lord Coke . . . appears to have invented mandamus, if not out of whole cloth then at least out of a few rags and tatters."⁶⁴ Together with certiorari, it was the "formal embodiment of 'the rule of law.'"⁶⁵ Both writs were used to superintend the actions of various public officers and commissions, constituting the earliest version of

⁶⁰ United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938).

⁶¹ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893):

[H]aving regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.

This was the view adopted by Holmes in his celebrated *Lochner* dissent. *Lochner v. New York*, 198 U.S. 45, 73-74 (1905) (Holmes, J., dissenting).

⁶² Section 13 of the Judiciary Act of 1789 provides, in relevant part:

The supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

⁶³ *Marbury v. Madison*, 5 U.S. 137, 148 (1803) (argument of counsel).

⁶⁴ LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462 (1965) (discussing *James Bagge's Case*, 11 Coke 93b, 98a, 77 Eng. Rep. 1271, 1278 (K.B. 1615)).

⁶⁵ *Id.* at 333.

what we now call administrative law. In *The Cardiff Bridge Case*,⁶⁶ Lord Holt extended certiorari and mandamus to exercises of “jurisdiction,” which, as Maitland explains, was understood as any “application of the law to a particular case.”⁶⁷ The idea was that, when an officer, commission or corporation acted contrary to law, it was acting “quasi-judicially” in misapplying the law to the facts of the case before it.⁶⁸

Lee, then, was correct on both counts. Mandamus lay because in refusing to deliver the commission despite it having been signed and sealed, Madison misapplied the law (at least as Marshall saw it) governing Marbury’s entitlement to that office.⁶⁹ Perhaps this blackletter doctrine seemed too much a legal fiction for Marshall.⁷⁰ But it remains true that a “competent” Congress could well have thought—as Lee argued—that giving the Supreme Court the power to issue writs of mandamus “to any courts appointed, or persons holding office, under the authority of the United States” was a proper exercise of appellate jurisdiction as it had been understood for nearly a century. All the more so if, as Marshall says in *McCulloch*, “the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution.”⁷¹

⁶⁶ *Rex v. Glamorganshire Inhabitants*, 1 Ld. Raym. 580, 91 Eng. Rep. 1287 (1700) (review of raise of taxpayer rates for the repair of the Cardiff Bridge); *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 469, 91 Eng. Rep. 1202, 1212 (1699) (all agencies empowered to affect property rights are “courts” from which lie an appeal to the Kings Bench).

⁶⁷ JAFFE, *supra* note 64, at 351 (quoting Frederick William Maitland, “The Shadows and Silences of Real Life,” in 1 THE COLLECTED PAPERS 467, 478 (1911)) (http://if-oll.s3.amazonaws.com/titles/871/Maitland_0242-01_EBk_v6.0.pdf). See also STANLEY ALEXANDER DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 375-85 (3d ed. 1973) (“Local government bore a judicial aspect. . . . It was assumed that the writs of certiorari and prohibition, by which [local governments] were controlled in their capacity as courts of summary jurisdiction, were equally appropriate devices for superintending the exercise of their multifarious governmental functions.”) (final edition edited by de Smith); see also DE SMITH, WOOLF, & JOWELL, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 624, 632 (5th ed. 1995) (by Mansfield’s time, mandamus was used “to compel inferior tribunals to exercise jurisdiction and discretion according to law.”).

⁶⁸ For a nineteenth century American example, see *People, ex rel. Case v. Collins*, 19 Wend. 36, 58 (N.Y. 1837).

⁶⁹ *Cf. Marbury v. Madison*, 5 U.S. 137, 167 (1803) (“The question whether a right has vested or not, is, in its nature, judicial. . .”).

⁷⁰ Indeed, Marshall offers a strikingly realist, functional analysis of Marbury’s writ. *Marbury*, 5 U.S. at 175-76 (“To issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction.”).

⁷¹ *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

Marshall's assertion of law as authority in *Marbury* is formalist in all three senses of the term.⁷² It is conceptualist in its deceptive all-or-nothing reasoning; it is mechanical in its abstraction from context, function, and policy; and it is duplicitous in pretending to decide the case according to logic and "law without ever acknowledging that the law [he is] 'following' is in actuality a product of [his] own interpretive acts."⁷³ Marshall's performance in *Marbury* is a rhetorical *tour de force*, but his presentation of the rule of law is sheer *ipse dixit*.

There is, however, a certain inevitability to this attitude once one abstracts the rule of law from its democratic origins. To paraphrase Marshall, those who expound the law must of necessity insist on the incontestability of their authority.⁷⁴ This is the common lesson of *Walker v. City of Birmingham*⁷⁵ and the Talmudic story of the *Oven of Achnai*.⁷⁶

In *Walker*, the Court upheld the criminal contempt convictions of civil rights organizers, including Dr. King, who disobeyed an *ex parte* injunction they believed unconstitutional. (This was the arrest that led to King's famous *Letter from a Birmingham Jail*.) It was not that Dr. King and the others were mistaken; in a later case, the Court agreed with them on the merits.⁷⁷ It was, rather, because they had failed to challenge the underlying injunction through the ordinary procedures. "This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets."⁷⁸ As Robert Cover says, *Walker* stands for a strong view of equity in which the judge "must have nearly absolute authority. . . . *Walker* tells [the judge] that the Court's authority is greater than its warrant in the interpretation of the Constitution or the

⁷² On the different senses of the term and the conceptual relationship between them, see Steven L. Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 501, 501-07 (2009).

⁷³ *Id.* at 506-07.

⁷⁴ As Justice Jackson famously quipped: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

⁷⁵ See 388 U.S. 307 (1967) (holding that the underlying unconstitutionality of an injunction is not a defense to a subsequent contempt citation when the defendants failed to avail themselves of state court processes to challenge the injunction directly).

⁷⁶ Tractate *Bava Metzia* 59a-b. Suzanne Stone provides a thorough vetting of the story and the extensive and multi-valent traditional Jewish commentary on it. Stone, *supra* note 6, at 540-65. For an instructive analysis that mines the traditional sources for additional insight, see Nachman Levine, *The Oven of Achnai Re-Deconstructed*, 45 HEBREW STUDIES 27 (2004).

⁷⁷ See generally *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

⁷⁸ *Walker*, 388 U.S. at 321.

law. Even when wrong, the judge is to act and is entitled to be obeyed.”⁷⁹

So, too, in the *Achnai* story, the view of the majority of the *Sanhedrin* (the Great Assembly or rabbinic Court) prevailed over Rabbi Eliezer’s various miraculous proofs that included a *bat kol* (literally, “daughter of a voice” or “echo”) from Heaven affirming the correctness of his position. The *Oven of Achnai* story has many interpretations—perhaps the most interesting is as a dispute between the authority of *Masora* or tradition, represented by Rabbi Eliezer, and that of the contemporary rabbinic majority.⁸⁰ But, the conventionally-understood lesson is that even Divine Truth must yield to the authority of the *Sanhedrin*. After all, the *Sanhedrin*’s response to Rabbi Eliezer’s stubborn attempt to substantiate his views was to *excommunicate him*. Thus, Professor Stone appropriately analogizes the lesson of the *Achnai* story to Owen Fiss’s provocative declaration that “in legal interpretation there is only one school and attendance is mandatory.”⁸¹

For the rabbis, it is the exclusive province of the *Sanhedrin* to interpret the law just as, for Marshall, it “is emphatically the province and duty of the judicial department to say what the law is.”⁸² But, in an actual democracy—that is, in a society of self-governing citizens—that responsibility lies with the people.

V. WHEN RELATION APPEARS

Robert Cover radicalizes our understanding of law as *nomos* in large part by subverting the conventional antinomies of obedience and

⁷⁹ Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 55 (1983). As Cover points out, the key precedent relied on by the *Walker* Court—*Howat v. Kansas*, 285 U.S. 181 (1922)—was an instance of the infamous labor injunction.

⁸⁰ See Stone, *supra* note 6, at 856-57; Nachman Levine, *supra* note 76, at 34, 38 (and the sources cited at 34 n.28). This nicely parallels the contemporary debate between originalists and those who understand the Constitution as the product of complex, ongoing processes of interpretation. Cf. Robert Burt, *Precedent and Authority in Antonin Scalia’s Jurisprudence*, 12 CARDOZO L. REV. 1685 (1991), discussed in Stone, *supra* note 6, at 839-43.

⁸¹ Stone, *supra* note 6, at 860 (quoting Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982)). Stone is careful to note, however, that the Talmud was deeply ambivalent about Rabbi Eliezer’s excommunication. *Id.* at 857. Nachman Levine, *supra* note 76, develops this theme in great depth.

⁸² *Marbury*, 5 U.S. at 177. This is the common refrain whenever the Court asserts its authority in the face of democratic processes. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

disobedience, legal precept and social meaning, nature and nurture. Cover's analysis of each of these oppositions works an *aufhebung*—an overcoming that simultaneously destroys and preserves the antinomy by transforming it into a new synthesis.⁸³ Indeed, he plainly announces this dialectical methodology in the epigraph of *Nomos and Narrative*, which quotes the first stanza of a poem by Wallace Stevens: “A. A violent order is disorder; B. A great disorder is an order. These/ Two things are one. (Pages of illustrations).”⁸⁴

Despite his use of Jewish religious texts, Cover's primary influence is Greek. This is clear in his choice of the terms *nomos* and *paideia* as the framework for his analysis.⁸⁵ For the pre-Socratics, “the distinction between *physis* (nature) and *nomos* (law, custom, or convention)” was a “preoccupation” that would become their “central intellectual problem.”⁸⁶ For Cover, the opposition of *physis* and *nomos* is transformed into inherent, parallel conditions of existence:

This *nomos* is as much “our world” as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world. Just as the development of increasingly complex responses to the physical attributes of our world begins with birth itself, so does the parallel development of the responses to personal otherness that define the normative world.⁸⁷

⁸³ Cf. LEVINE, *supra* note 19, at 40-41 (“Cover’s depiction of the relationship between *nomos* and narrative transcends the notion of integrating two apparently distinct concepts representing distinct intellectual disciplines, to arrive at a better understanding of each. . .”).

⁸⁴ Cover, *supra* note 79, at 4 (quoting WALLACE STEVENS, *Connoisseur of Chaos*, in THE COLLECTED POEMS OF WALLACE STEVENS 215 (1954)). Tom Grey observes that Stevens’s thought is characterized by a dialectical perspectivism that avoids the closure of a Hegelian synthesis, “a poetic practice that exemplifies a way to live with, and through, the practical paradox of perspectivism.” THOMAS C. GREY, THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY 73-75 (1991); see also WINTER, *supra* note 29, at 65-67 (discussing this poem and Stevens’s dialectical understanding of metaphor and reality). Cover’s thought, as we shall see, is often dialectical in this same paradoxical (that is, post-Hegelian) way.

⁸⁵ *Paideia* refers to the ancient Greek practice of education and socialization of the person into the world of the *polis*.

Indeed, Cover acknowledges that some might question his application of “a distinctly Greek concept to the very different Jewish civilization of the ancient world.” Cover, *supra* note 79, at 13 n.34.

⁸⁶ WOOD, *supra* note 18, at 53.

⁸⁷ Cover, *supra* note 79, at 5.

Here, Cover's dialectical move is to take an antithesis of the necessary (that is, physical nature) and the contingent (that is, the normative world of law and culture) and—in a move reminiscent of the Existentialists—transpose the two in a new synthesis in which what appeared contingent emerges as necessary *for us*.⁸⁸

Cover makes an analogous dialectical move with respect to law and narrative. On the one hand, “every narrative is insistent in its demand for its prescriptive point.”⁸⁹ On the other, law cannot be understood without the narratives that give it history, purpose, and meaning: “For every constitution there is an epic, for each decalogue a scripture.”⁹⁰ Moreover, the relation between legal precept and social meaning is entirely circular. Law may appear to stand above and organize the social according to its command. But, for Cover, formalism of this sort is an illusion. “[P]rescription, even when embodied in a legal text, [cannot] escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.”⁹¹

In Cover's thought, law and narrative form a dialectical relation in which each frame and change the meaning of the other. Perhaps his strongest example comes from the fight over slavery. He notes that the abolitionist Wendell Phillips “agreed” with Chief Justice Taney's interpretation that the Fugitive Slave Clause “dictated the return of runaway slaves.”⁹² But, Phillips renounced any obligation under the Constitution while Taney, of course, enforced it. Because abolitionists like Phillips and establishment jurists like Taney operated within different constitutional narratives, they “could only be said to agree on the meaning of the document abstracted from any need or desire to act

⁸⁸ See MERLEAU-PONTY, *supra* note 25, at 109 (“Since we are all hemmed in by history, it is up to us to understand that whatever truth we may have is to be gotten not in spite of but through our historical inherence.”). Thus, for Merleau-Ponty, the objective and the subjective are supplanted by the historical, and the necessary and the contingent are *aufgehoben* in the situated. Similarly, for Sartre, humanity is that “which escapes contingency by being its own foundation.” JEAN PAUL SARTRE, *BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY* 615 (Hazel Barnes trans. 1956). Although Cover's dialectical move here closely parallels that of the Existentialists, there is no direct evidence in his writings that they were an influence. Cf. Ronald R. Garet, *Meaning and Ending*, 96 *YALE L.J.* 1801, 1801 n.5 (1987) (observing that the “idea of *nomos* enjoys in Bob's writing somewhat the same status as the idea of ‘existence’ in the writings of Kierkegaard or Sartre,” but providing no references).

⁸⁹ Cover, *supra* note 79, at 5.

⁹⁰ *Id.* at 5-6.

⁹¹ *Id.* at n.109.

⁹² *Id.* at 37.

upon it. . . . And no two people can be said to agree on what the text requires if they disagree on the circumstances in which it will warrant their actions.”⁹³

The Jewish tradition recognizes two parallel sources that together comprise the Oral Law: the *halacha* (laws) and the *aggada* (stories and parables).⁹⁴ Although there is a superficial resemblance, the relation between *nomos* and narrative is not analogous to that between *halacha* and *aggada*. First, the terms or elements of the analogy do not align. *Nomos* does not map onto *halacha*. *Nomos*, rather, is the third term or output function of a dialectic of law and narrative. “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.”⁹⁵ If one were to draw this analogy, one might say that just as the complex relations of law and narrative constitute a *nomos*, *halacha* and *aggada* together comprise the Torah.⁹⁶

But, second, even that analogy is not quite apt because the relation between the elements is fundamentally different. *Halacha* and *aggada* are complementary elements of a single tradition. Thus, Levine quotes Hayim Nahman Bialik as saying that the two “are really one—two sides of the same shield.”⁹⁷ But, this is not a view that

⁹³ *Id.* at 37 n.109. For an analysis of this passage, see WINTER, *supra* note 29, at 343-44.

⁹⁴ LEVINE, *supra* note 19, at 20-22. *Halacha* includes the religious laws both ritual (such as the rules governing *kashrut* and the Sabbath) and civil (such as those governing contract and tort). *Aggada* refers to the body of stories, including the *Midrash*, that complement the *halacha* and encode moral lessons. Cf. Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2267-68 (1989) (“The entire Jewish tradition of *midrash*, of interpretive storytelling, is a tradition of lawmaking.”) Levine notes that *halacha* can also be used more broadly to refer to the religious way of life as in Rabbi Soloveitchik’s *Halakhic Man*. JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN (Lawrence Kaplin trans. 1983). He argues that because the word *halacha* (from the Hebrew verb הלך “walk”) connotes the proper path in life, its use parallels Cover’s concept of *nomos*. As noted in passing, see text accompanying note 29 *supra*, many of the basic words for law in multiple languages derive from the metaphoric conception RULES ARE PATHS. WINTER, *supra* note 29, at 206-09. The word *halacha* for law shares this same conceptual basis, as in *Deuteronomy* 28:14, “and thou shalt not turn from the words that I command you today, neither right nor left, to walk after other gods to serve them.” See also *Leviticus* 26:3 (“If you walk in my statutes.”).

⁹⁵ Cover, *supra* note 79, at 4-5.

⁹⁶ Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1604 (1986) (referring to “the normative universe —of Torah, *Nomos*”).

⁹⁷ LEVINE, *supra* note 19, at 36. The metaphor of a shield is, in one sense, curious. A shield has an outer and inner face, which does not correspond to any obvious mapping of *halacha* and *aggada*. The shield metaphor does make sense if one thinks of Judaism as an example of what Cover calls an insular *nomos*. On this view, *halacha* and *aggada* might represent two

Wallace Stevens would endorse; in a later stanza, he dismisses such monism as “squamous.”⁹⁸ For Bialik, the relation between the two elements is fixed: *halacha* crystallizes *aggada*, while *aggada* refines *halacha*. But Cover, as we have seen, understands law and narrative as existing in a mutually transformative, dialectical relation.

One could, of course, take such a dialectical view of *halacha* and *aggada*. Thus, Cover gives the example of the law of primogeniture stated in *Deuteronomy* 21:15-17 which is embedded in a series of biblical narratives about the patriarchs in which the normal order of succession is overturned. Cover reads this as a case (similar to the slavery example) in which the story’s deviation from the legal rules signifies an exceptional quality of divine destiny.⁹⁹ But, Levine takes issue with this layered interpretation. He argues, alternatively, that *Deuteronomy*’s later rule of primogeniture did not yet apply to the earlier normative world of the patriarchs and that the rule was, anyway, qualified by exceptions that explain the patriarchs’ actions.¹⁰⁰ This dispute between Professors Levine and Cover underscores the profound difference between *halacha* and *nomos*. Religious law typically prizes formal consistency.¹⁰¹ Cover’s account in *Nomos and Narrative* prefers the redemptive *nomos* over the insular version and the juris-generative power of diverse communities over the juris-pathic function of the courts.

Third, and relatedly, Cover’s anti-formalist understanding of law is at odds with the notion of law at work in *halacha*. For Bialik,

layers of protection from the outside world. But this only complicates the analogy between *halacha* and *aggada*, on one hand, and *nomos* and narrative, on the other. Cover’s theory not only encompasses, but explicitly favors non-insular *nomoi* such as those he identifies under the rubric of redemptive constitutionalism. Cover, *supra* note 78, at 67-68 and note n.195.

⁹⁸ STEVENS, *Connoisseur of Chaos*, in THE COLLECTED POEMS, *supra* note 84, at 215:

After all the pretty contrast of life and death
Proves that these opposite things partake of one,
At least that was the theory, when bishops’ books
Resolved the world. We cannot go back to that.
The squirming facts exceed the squamous mind,
If one may say so. And yet relation appears . . .

⁹⁹ See *Genesis* 25:23 (recounting Rebecca’s dream in which God tells her that she will bear twins and “the older shall serve the younger.”).

¹⁰⁰ LEVINE, *supra* note 19, at 13-16. See also Stone, *supra* note 6, at 835-47 (offering “to provide a framework for understanding rabbinic interpretive practice within its specific religious context”).

¹⁰¹ Cover, *supra* note 79, at 22 (“It is tempting to reconcile the stories to the rule by creating exceptions or by positing circumstances that would remove the case from the rule. These strategies may be useful to the later legist whose concern is a consistent body of precepts.”).

the dichotomy of *halacha* and *aggada* maps the conventional dichotomies of reason versus rhetoric and the objective versus the subjective. Thus, for Bialik, the arrows “of *halacha* fly straight and true, with the strength and directness imparted by a well-drawn bow” while the “shafts of *aggada*, are uncertain in their aim, and come with a swerve. . . .”¹⁰² For Cover, in contrast, the social contingency of law—the fact that it has its origin and end in experience—makes it recalcitrant to formalization and effective domestication. “The uncontrolled character of meaning,” he says, is “destabilizing.” “Precepts must ‘have meaning,’ but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.”¹⁰³

Fourth, where *halacha* and *aggada* are the handiwork of divine provenance and rabbinic authority, Cover understands *nomos* as the product of human culture and imagination. “The *community* posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law.”¹⁰⁴ The process “begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken.”¹⁰⁵ This commitment is then objectified as an external demand that is embodied in an origin story—“a story of how the law, now object, came to be, and more importantly, how it came to be one’s own.”¹⁰⁶ Law for Cover is a human creation—a *nomos* in the Greek sense—and therefore, both contingent and contestable in a way that divine law is not.

Fifth, and finally, the role of disobedience in Cover’s work has no analog in the biblical worldview. One of the singular passages of *Nomos and Narrative* is Cover’s unpacking of the civil rights sit-in movement (of which he was a part).¹⁰⁷ Cover deftly subverts the dichotomy of obedience and disobedience. The demonstrators, he

¹⁰² LEVINE, *supra* note 19, at 39.

¹⁰³ Cover, *supra* note 79, at 18. Cover’s anti-positivist argument is developed in WINTER, *supra* note 29, at 340-47.

¹⁰⁴ Cover, *supra* note 79, at 45 (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 45. Cover refers to the Amish twice in this passage, so it is clear that this account is meant to include religious *nomoi* as well as secular ones. For a discussion of this passage and the role of the personification metaphor in our basic conception of law, see WINTER, *supra* note 29, at 332-39.

¹⁰⁷ For an extended analysis of this passage, see Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 826-30 (1996).

argues, are obeying what they understand as the bona fide command of the Equal Protection Clause in the face of segregation laws they believe unconstitutional. “There is,” Cover says, “both ‘disobedience’ and ‘obedience’ in either case.”¹⁰⁸ On the one hand, the demonstrators are defying the segregation laws sanctioned by the courts. On the other hand, “only obedience to the movement’s own interpretation of the Constitution was fidelity to the understanding of law by which the movement’s members would live uncoerced.”¹⁰⁹ Conversely, the judges asked to enforce segregation face a similar dilemma. They can obey the segregation laws. Or they can disobey the law in the name of the Constitution. There are obedience and disobedience in either case. The sit-in in defiance of the segregation law thus “forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynomia of legal meaning. . . .”¹¹⁰

A great order is a disorder; a great disorder is an order. These two things are one but not in the sense that they can be reconciled. “A and B are not,” Stevens says, “like statuary, posed/ For a vista in the Louvre,” but “things chalked/ On the sidewalk so that the pensive man may see.”¹¹¹

The thrust of Cover’s *Nomos and Narrative* is to reject “the imperial mode of world maintenance” characterized by law as an impersonal authority.¹¹² Cover favors legal pluralism. He endorses a “paideic” *nomos* of law and narrative in which there is “a common and personal way” of education into and performance of the law.¹¹³ Cover’s vision of law is intimately social.¹¹⁴ It is anarchic (from the Greek *an arkhos*, “without leader”) but not lawless. On the contrary, the *nomoi* that he describes are permeated by law of the strongest sort—that is, law capable of inspiring not just obedience, but commitments spelled out “in the medium of blood.”¹¹⁵ Still, Cover’s

¹⁰⁸ Cover, *supra* note 79, at 47.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 47-48.

¹¹¹ STEVENS, *Connoisseur of Chaos*, in THE COLLECTED POEMS, *supra* note 84, at 215.

¹¹² Cover, *supra* note 79, at 16.

¹¹³ *Id.* at 13-14.

¹¹⁴ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602 n.2 (1986) (“[T]he thrust of Nomos [i]s that the creation of legal meaning is an essentially cultural activity which takes place (or best takes place) among smallish groups”).

¹¹⁵ Cover, *supra* note 79, at 47.

view is deeply anti-statist; he champions the multiplicity of law that is inevitably generated by “the too fertile forces of jurisgenesis.”¹¹⁶

Between the imperial mode of law as an authority and the polynomia celebrated by Cover, there *is* a middle ground. This is not a reconciliation, but an *aufhebung* in which we sublimate the multiplicity of our laws to the alterable outcomes of democratic self-governance. If *nomos* is the idea of law accepted as a common possession and *isonomia* the ideal of a political order founded on the equal distribution of political power,¹¹⁷ then collective self-governance consists of the sharing of authority with others under conditions of equality, mutual recognition, and respect.¹¹⁸

We live in a society more complex and more pluralist than the ancient Greeks; their resolution, no matter how instructive, cannot be ours. But, the paradigm of *nomos* offers a vision of a law that better keeps faith with our democratic heritage and aspirations.

¹¹⁶ *Id.* at 16.

¹¹⁷ See Steven L. Winter, *What a Vote Is Worth*, 19 J. OF LAW IN SOCIETY 264 (2019).

¹¹⁸ I elaborate this view in Steven L. Winter, *Down Freedom's Main Line*, 41 NETHERLANDS JOURNAL OF LEGAL PHILOSOPHY 202 (2012) (special issue).