Robert Cover’s ‘Nomos and Narrative’: The Court as Philosopher King or Pontius Pilate?

John Alder*
Robert Cover’s ‘Nomos and Narrative’: The Court as Philosopher King or Pontius Pilate?

John Alder

Abstract

This paper suggests that Robert Cover’s project of distancing courts from state violence is doomed to failure. Disagreements between the nomoi postulated by Cover are matters of incommensurable value judgements, in relation to which legal rationality is inappropriate. Disagreement between nomoi is more plausibly regarded as a matter of feeling rather than rationality and expressed by the notions of the sublime and the beautiful as advanced by Edmund Burke. Furthermore, according to Cover’s premise, the nomos of a community can be externally evaluated only from the perspective of another nomos so that the notion of an objective standpoint apparently represented by Cover’s ‘imperial community’ seems to be contradictory. The notion of a court with a ‘committed constitutionalism’ of its own but having no privileged status also seems contradictory since it allows judges to wash their hands of responsibility for their decisions (in a manner reminiscent of Pontius Pilate). If this is so, then the court is not the most appropriate mechanism to make choices between competing value systems and violence may be avoided only by appealing to sentiment as the basis for a modus vivendi. This approach reflects Cover’s insistence that a community is held together by non-rational factors and may provide the basis for a more vibrant democratic political process.
Introduction: Cover’s Claims

In *Nomos and Narrative* Cover’s argument is bold and tantalisingly ambivalent. Cover apparently accepts the uncontroversial proposition that everyone looks at the world from the standpoint of a particular set of culturally determined values. Thus general laws (in common with all communications) cannot be applied directly but are filtered through the prism of different cultural perspectives. He illustrates this by reference to the extreme example of fundamentalist religious groups. There may be irreducible disagreement between these groups and the state either as to the interpretation of a norm or, perhaps more importantly, as to the moral significance of a norm. Moreover, there is no Archimedian position from which we can compare the narratives of different groups.

Cover’s basic position is straightforward. Indeed it forms part of the traditional battleground between positivists and natural lawyers. He claims that there is a radical and, in his view, disturbing dichotomy between the idea of law as power, by which he appears to mean violence both physical and epistemological, and law as meaning. According to Cover the decision of a court derives its authority from state power and is binding irrespective of the meaning the court gives to a law.

Cover’s aim appears to be to reconfigure the function of the court so that its legitimacy depends on meaning divorced from power. He wishes to distance the courts from state violence while preserving the notion of an elite priesthood handing down wisdom. This casts the courts in a messianic role. For judges can, on Cover’s analysis, adopt the independent standpoint of ‘constitutional commitment’ and offer overarching principles of justice untainted by state violence. But Cover goes further than this. He asserts that the decisions of the courts are not ‘privileged.’ On the one hand, therefore, Cover offers the court the grandiose role of the wise, knowledgeable, and just philosopher king arbitrating between competing groups. On the other hand, he dilutes this by distancing the court from state violence. He thus places judges in the role of Pontius Pilate, the Roman governor of Judea. Pilate presided over the trial of Jesus and found no fault with him. But, while washing his hands of the affair by referring it back to the Jewish mob, he signed the final death warrant that issued in Jesus’

---

2 Id. at 18
3 Possibly Cover exaggerates the dichotomy between force and meaning since a regime based on force is likely to be highly unstable unless underpinned by meaning accepted by at least a substantial proportion of the subject population.
Crucifixion. Thus Pilate adopted a stance that has become a byword for ambivalence.

Cover’s language is emotive, baroque and opaque leaving many questions open. The main purpose of this article is to address some of these questions. I shall also suggest that, because foundational disagreements between interpretive communities depend on feelings rather than reason, feelings that can be expressed in the form of Edmund Burke’s categories of the ‘sublime’ and the ‘beautiful,’ a court is an unsuitable institutional mechanism for resolving them.

Cover’s main argument seems to be as follows. He postulates (presumably as a fact, supported by empirical evidence drawn from various fundamentalist religious groups) the existence of irreducible disagreement between different cultural groups (paedeic communities) as to how to interpret legal texts. Each cultural group generates its own normative world (nomos) generated by a received historical ‘narrative’ about itself.4 The nomos of a paedeic community is constituted by an interpretive commitment to interpersonal obligations and generated by feelings, and experience as much as by reason. A community might be ‘insular’ (claiming only to be left alone) or ‘redemptive’ (wishing to impose itself on others). There is no reason why the narrative and interpretation of a text from the perspective of any particular nomos should be superior to that of any other. Here, Cover’s argument in Nomos and Narrative is at its most relativistic.

Cover assumes that we are all members of (one or more) paedeic communities and that anyone who asserts an individualistic value system is mad.5 This seems

4 As Cover acknowledges, a nomos is not static and a given narrative may have ever multiplying and controversial interpretations capable of generating competing values and interpretive assumptions. Here Cover talks of ‘jurisgenesis’ (‘the creation of legal meaning’). See id., at 11. Cover’s discussion of ‘Babel’ is also relevant here. See id., at 17 n. 45 (where Cover states that “Babel … suggests not incoherence but a multiplicity of coherent systems and a problem of intelligibility among communities”). Cover’s notion of “Babel” bears some similarities to a “heterotopia” as described in Richard Mullender, ‘Two Nomoi and a Clash of Narratives: the Story of the United Kingdom and the European Union’, ISSUES IN LEGAL SCHOLARSHIP (2006), n. 349 (and associated text) (discussing M. Foucault, DES ESPACE LAUTRES 4 (1984), http://foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html). While Cover’s analysis is richly suggestive, he fails to pay sufficient attention to some rather obvious points. For example, individuals may participate in multiple communities with a different blend of interpretive perspectives depending on the context. See Brigitte Berger, Peter Berger, and Hansfried Kellner, THE HOMELESS MIND: MODERNISATION AND CONSCIOUSNESS (1974) (arguing that few of those who live in modern societies inhabit a ‘single life world’; instead they divide their time between a ‘plurality of life worlds’).

5 Robert M. Cover, supra note 1, at 10, n. 28 (arguing that ‘[t]he warranty of sanity is worth only as much as the social processes that generate it’).
speculative. Indeed, each individual may embody a unique mixture of the various nomoi with which he or she engages. But, certainly, we are all embedded in value systems (typically, more than one) – sometimes through choice and sometimes through contingencies (most obviously, place of birth and socialisation). To this extent, Cover’s hypothesis is plausible if possibly exaggerated. There may be more agreement between different interpretive communities than Cover suggests, even if this takes the form of, at best, Rawls’s ‘overlapping consensus’ or, at worst, a pragmatic *modus vivendi*.6

The possibility of irreducible disagreement between nomoi generates tension between paedeic communities and state law since each community might interpret a state law in a different and, according to Cover, equally valid way. Cover’s main worry is that the state court’s interpretation is backed by state violence whereas he seems to think that it should carry conviction by virtue of its intrinsic merits. He does not explain why a community that buys into the state system should not accept the interpretation of the court as its designated referee. No one could reasonably think that a court has any claim to objective ontological or epistemological truth. This being so, the interpretation of a court merely fulfils the Hobbesian role of providing a peaceful method of dispute resolution to stave of a worse (disordered, unpredictable, violent) alternative.

Cover distinguishes between paedeic communities and what he calls imperial communities. The latter seem to be essentially legal systems. Both are ideal types that have no direct correspondence to the real world. In this respect, they are similar to the *homo economicus* postulated by market economists. Real world communities may comprise a mixture of both (paedeic and imperial) types, although it is not clear whether Cover’s typology is offered as exhaustive of all communities. According to Cover an imperial community, which he describes as ‘world maintaining,’ regulates the spontaneously generated paedeic communities within its territory according to a system of norms claimed to be objective, universal, and independent of any particular discourse.7 Cover does not commit himself to stating whether such claims can possibly be true. However, if his notion of nomos is taken seriously, any such claim can only be false since any given nomos can be interpreted from the perspective of any other nomos and so on *ad infinitum*. Here, the relativist strand in Cover’s argument comes back to haunt him.

---

The norms of an imperial community are applied impartially and backed by force. It does not matter how they are learned so long as they are effective. Cover thinks that the nation-state, apparently typified by the USA, is representative of an imperial community. Imperial communities are presumably always redemptive since their personnel wish to interfere with others. It is not clear what substantive principles an imperial community is supposed to apply although in practice the substantive norms of the relevant paedeic communities are likely to filter into the imperial system. However, by stressing the element of pluralism, Cover links imperial communities to the particular nomos of liberalism.

Not surprisingly this leads him to identify a radical dichotomy in the US constitution. By virtue of its freedom of expression and religion provisions, the Constitution does not privilege any particular discourse. And, yet, the Supreme Court and other courts impose their own interpretations of the Constitution on the various paedeic (most obviously, religious) communities regulated by the law. Moreover, judges use state violence to privilege their discourse over other discourses. Thus the courts are Janus-faced. They try to resolve disputes by appealing to reasoned argument. But, in the end, they rely on brute force. Cover is, therefore, concerned that the authority of the law depends on violence rationalised (in his view implausibly) by resorting to the Hobbesian fiction of the social contract or to question-begging ideologies such as welfarism. This is, of course, a well known internal contradiction of liberalism and can be met with the response that, since human nature is not necessarily internally consistent, there is no a priori reason why a practical political philosophy should not contain contradictions.

Cover’s response to this internal contradiction in liberalism is far from satisfactory. Supreme Court justices are handed a starring role, setting out principles on the model of philosopher-kings. But, at the same time, Cover distances the Supreme Court from state violence. He does this in two ways. Firstly, by identifying the Court’s perspective as that of an independent ‘committed constitutionalism’ - a standpoint from which the Court does not merely review the decisions of other branches of government but pursues outcomes that are (in some sense) just to all affected parties. Secondly, Cover

---

8 Id. 13.
9 Id. 16. (A significant feature of Cover’s perspective is that it seems to take the particular arrangements of the USA, including its relatively unusual constitution, as axiomatic. This is, of course, not surprising in an article which focuses on the Supreme Court. Nevertheless, Cover’s basic arguments have more general implications.)
10 Id. 16.
11 Id. 13, n. 36.
12 Id. 44 and 54.

http://www.bepress.com/ils/iss8/art4
emphasises that the Court’s decisions are not privileged. In staking out this position, Cover leaves much unexplained. He does not tell us what the Court is committed to. And he fails to explain precisely how the Court can stake out authoritative positions that are not privileged.

Cover makes two assumptions that deflect attention from these difficulties with his position. Firstly, he assumes that there is enough common ground between the various nomoi that co-habit within the USA that all will accept the Constitution as a legitimate field of interpretation, albeit possibly only for prudential reasons. Secondly, Cover seems to assume that the courts will advance the perspective of one particular faith or nomos, that of liberal pluralism which privileges the virtue of accommodating or at least tolerating other value systems. These assumptions are, of course, linked if liberalism is contingently embedded in the constitutional document which Cover seems to accept a priori.

Cover suggests that the courts should partly extricate themselves from the violence of the state by reference to a `constitutional commitment` of their own, apparently independently of the law of the state that creates them rather than act as the agent of the state: `the insider looking out.` While pursuing this theme, Cover describes:

`the counterclaim of constitutional redemption. Such a response would pose no general threat to the insular community, no threat that rests on anything save the kind of commitment that goes with the articulation of the constitutional mandate.`

However, such a threat might be quite substantial depending upon what is comprised in Cover`s `constitutional mandate,` which presumably would have to take sides on controversial matters such as abortion. Unless Cover thinks that constitutional commitment can produce a harmonising synthesis of the perspectives of different nomoi, a kind of Rawlsian overlapping consensus, it is difficult to see why judicial intervention under the banner of constitutionalism is any different from any other kind of statist intervention.

There is probably sufficient common ground between different nomoi for each to be able to communicate with and understand the views, circumstances, and narratives of those in other normative worlds. However this amounts only to

---

13 Id. 43.
14 Id. 49, 55, 59, and 67.
15 Id. 66.
16 John Rawls, supra note 6.
ontological or epistemological common ground and has no necessary bearing upon value pluralism. There is, for example, no rational basis for those who believe that there are revealed objective values to accept liberal mechanisms for dispute resolution.

Cover’s imperial community resembles the notion of a `civil association` proposed by the conservative philosopher Michael Oakeshott. This is a kind of `moral` association the main characteristic of which is that it is an end in itself, constituting a system of rules, practices and adjudication.\(^\text{17}\) The corresponding obligation of the citizen is to obey whatever rules are made and enforced according to established procedures (\textit{respublica}).\(^\text{18}\) A civil association has no instrumental purpose of its own, its function being to regulate dealings between individuals according to principles of the rule of law, each person being as far as possible free to pursue their own goals in their own way. Civil associations can be contrasted with `enterprise associations` which exist to pursue instrumental goals whatever these may be.\(^\text{19}\)

Oakeshott regards politics as a conversation between different types of understanding and rejects the possibility of a universal normative truth. He denies that a successful political system can be generated by \textit{a priori} ideologies such as those to which the founding fathers of the US Constitution aspired. According to Oakeshott, rationalism distorts political life, at best providing an \textit{ex post facto} commentary on events. Political behaviour is generated by feelings in response to problems as they arise in a world substantially beyond human understanding and is manifested in practices of a kind that cannot be reduced to explicit norms. Oakeshott maintains that the political world has no unified or hierarchical system of ideas but is composed of a diversity of worlds each separate and distinctive, each with its own peculiar characteristics which cannot be brought under the roof of any single concept or category.

Unlike Cover, Oakshott emphasises that a civil community is not neutral since `the prescriptions of the law should not conflict with a prevailing educated moral sensibility capable of distinguishing between the conditions of “virtue”, the conditions of moral association (“good conduct”), and those which are of such a


\(^{19}\) See Michael Oakshott, \textit{supra} note 18, at 203. (Oakshott’s `enterprise association’ would presumably be similar to Cover’s paedeic community.)
kind that they should be imposed by law ("justice").20 This sensibility derives from the custom and practice of the particular community which cannot be embodied in explicit rules. Similarly, according to Isaiah Berlin (who from an individualistic stance advocates liberal pluralism) the best we can hope for is a solution within the range of choices available to our particular culture: "to follow the course of conduct which least obstructs the general pattern of life in which we believe" - a position that bears similarities to Cover's paedeic community.21

Oakeshott seems to give the law and the courts a more modest role than does Cover, namely the Hobbesian role of enforcing non-instrumental rules which provide a framework within which individuals can pursue their own projects. Oakeshott rejects grand substantive legal principles of the kind often invoked by American constitutional lawyers and increasingly echoed in the UK such as bills of rights, universalist notions of self-determination, and the invocation of 'founding fathers.' He adopts a proceduralist notion of the rule of law quite different from Cover's apparently substantive notion: 'rules not secret or retrospective, no obligations save those imposed by law, all associates equally and without exception subject to the obligations imposed by law' and an independent judiciary whose role is confined to interpretation of the given 'lex.'22

The Role of the Courts

According to Cover the US Constitution is not what it would appear (as a matter of fact) to be, namely the product of a particular dominant nomos, that of the European culture from which the founding fathers came. Rather, it is, on Cover's analysis, the patrimony of all nomoi within the state - apparently whether they like it or not. Having staked out this position, Cover has to wrestle with an inconsistency: the liberal pretensions of the Constitution are hard to square with the courts' reliance on state violence when imposing meaning on the law.

This leads Cover to criticise what he considers to be a craven tendency of Supreme Court judges to take refuge in jurisdictional devices that distance them from the violence of the state. Such devices include exercising discretion based on pragmatic considerations in relation to equitable remedies, treating politically charged issues as non-justiciable, reliance on a hierarchy of authority and (when reviewing state action) giving the state a wide margin of discretion or deference.23

20 Id. ch. 2.
'Judges are surely right that the issue of power will rarely be in doubt if they pursue the office of jurisdictional helplessness before the violence of officials. The meaning judges thus give to the law, however, is not privileged, not necessarily worth any more than that of the resister they put in jail. In giving the law that meaning they destroy the worlds that might be built upon the law of the communities that defer to the superior violence of the state, and they escalate the commitments of those who remain to resist.'

Cover’s examples concern minority religious groups who claim immunities or tax and other state benefits and whose practices are, among other things, regarded as discriminatory. In these examples, the Supreme Court seeks to distance itself from the violence that is the outcome of its decisions by using doctrinal devices that justify deference to the enforcement arm of the state. But the Court cannot disavow responsibility for the violence it authorises. For its power to determine its own jurisdiction is, in itself, a manifestation of state force.

The various doctrinal devices examined by Cover are, of course, familiar features of the legal landscape representing the tension between democratic and judicial decision-making. Indeed, although Cover does not explain what he means by constitutionalism, one possible version of constitutionalism is that of checks and balances based on a separation of powers between the different branches of government. From this perspective, the courts’ traditional attitude of bounded deference is an assertion of (rather than a denial of) ‘committed constitutionalism.’

According to Cover, however, the Supreme Court acts, wrongly - as an ‘insider looking out’ - if it does not apply constitutional values of its own. For example,
in *Bob Jones University v USA*, the Supreme Court held that the Bob Jones University could not rely on its religious beliefs against interracial marriage to claim immunity from federal laws against racial discrimination. Cover apparently supports this outcome but is concerned that the Court’s rationale was secondary and context-specific - based on deciding that decisions taken by other state authorities were within constitutional limits rather than a strong and general assertion, on its own authority, of anti-racist principle.

Cover’s solution is to reject limited judicial review. He argues that the judges should raise their game by detaching themselves from the state and apparently from all other nomoi so as to create an ‘independent hermeneutic.’ Cover argues that the Court should adopt its own independent imperial standpoint based on claimed objective standards of ‘justice, truth and peace’ so as to distance itself from the violence of the state. However, if this is so Cover would equally have to accept the validity of a racist outcome in cases such as *Bob Jones* unless his ‘independent hermeneutic’ is predicated on the Court agreeing with his own political views.

Although he does not draw this analogy and there is at least one major difference (below), Cover’s preferred approach to adjudication calls to mind Plato’s philosopher kings – a group qualified to make decisions by virtue of their special training, high ability, and disinterested approach to practical life. On the other hand (and unlike Plato who assumed that there was a single overriding nomos of a hierarchical character), Cover seems to suggest either that the courts can free

---


31 Robert M. Cover, supra note 1, at 67. Cover distinguishes between ‘insular’ and ‘redemptive’ communities in this respect apparently on the ground that the Supreme Court can plausibly use a jurisdictional screen to protect the negative freedom of an insular community but a stronger commitment is required to engage with a positive claim by a redemptive community (id., 60). However, even in the case of an insular community the redemptive ambitions of another community may be frustrated if the insular community is to be protected. Contemporary English courts have sometimes been less deferential to other state agencies: see, for example, *Anismiinc v Foreign Compensation Commission* [1967] 2 AC 147, *M v Home Office* [1983] 3 All ER 537, and *A v Secretary of State for the Home Dept* [2004] Times Dec 17.

32 R.M. Cover, supra note 1, at 58-9. Quite what Cover means by an ‘independent hermeneutic’ is never made clear. It might be taken as suggesting an aspiration to apprehend practical disputes *sub specie aeternitatis* or to take up the view from nowhere as described in Thomas Nagel, THE VIEW FROM NOWHERE (1989).

33 Robert M. Cover, supra note 1, 53, et seq.

34 On the philosopher kings, see Plato, THE REPUBLIC, Books 1 to 5. See also Alasdair MacIntyre, A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY (1998, 2nd edn), ch. 5.
themselves from the interpretive restraints set by their own nomos or that their own nomos, contingently liberal, happens to coincide with some universal a priori liberal value system. This is akin to Sir John Laws’ suggestion in the context of the UK Constitution, that by virtue of their independence and reliance on reason, common law judges are especially suited to identifying a priori philosophical principles.  

Cover’s ‘committed constitutionalism’ seems to depend upon quasi-natural law notions of ‘general jurisprudence’ embodying the very objective overarching principles that he seems to reject. He does not make clear whether his ‘general jurisprudence’ is substantive in the sense that he believes that there are objective moral principles or procedural in the sense developed by Fuller, that commitment to law embodies certain moral claims about fair procedures.

In a liberal society, the most widely accepted notion of constitutionalism includes the establishment of an independent court as a referee, usually with guidelines specified by an elected lawmaker capable in principle (albeit in practice often not so) of representing all the affected groups. Some regimes, conspicuously that of the USA, do not trust the lawmaker to be sufficiently liberal and authorise courts to override the legislature on the basis of predetermined standards and values. Subject to the problem of violence, Cover seems to be sympathetic to this latter approach. Other jurisdictions (for example, the United Kingdom) leave the matter to the legislature with the courts perhaps having a strong interpretive bias in favour of the protection of fundamental interests.

In both cases the decision of the court can be accepted without assuming that it represents objective truth except from the (contingent) internal point of view of the legal system. Subject to constraints imposed by the nature of the judicial process itself (which is arguably liberal in tendency), the court’s decision can be

36 Robert M. Cover, supra note 1, at 47 and at 58-59.
38 This seems to be the basis of Cover’s apparent rejection of deliberative, majoritarian solutions: see Robert M. Cover, supra note 1, at 48-9 and at 57.
39 Human Rights Act 1998, s. 3 (which provides that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with … [European] Convention rights’). See, for example, *R v Secretary of State ex parte Pierson* [1997] 3 All ER 577, 603. For a helpful account of the ‘interpretative obligation’ referred to in the text, see J. Wright, *TORT LAW AND HUMAN RIGHTS* (2001), 20-22.
anything that those controlling the system wish to translate into law. It might or
might not adopt, for example, Dworkinian notions of integrity or rely on
conventional morality or adopt wholesale some religious or economic doctrine. It
is not clear whether Cover’s view that the courts can seek allegedly universal
principles is derived from a belief that the relevant constitutional documents
mandate this or whether he thinks that there is some free floating meta-
constitution. Certainly, some passages of Nomos and Narrative lend plausibility
to the latter interpretation. Cover states, for example, that ‘[i]t is possible to
conceive of a natural law of jurisdiction that might supplant the positivist
version.’

The latter view is analogous to claims made by some UK commentators and
judges for the common law. The English common law constitutionalists present
the courts and in particular the common law as exhibiting special insight into the
fundamental values of society. Indeed, in Cover’s terms the common law appears
to constitute a paedeic community par excellence since it embodies (i) a common
body of precept and narrative, (ii) a common and personal way of being educated
into this corpus and (iii) a sense of direction or growth as the individual and
community work out the implications of their law. However, some versions of
common law constitutionalism take on a distinctly imperial appearance. They
claim that the judiciary are, by virtue of their independence, entitled to
philosophise in the form of declaring society’s fundamental values. This seems
to be similar to Cover’s position.

Others, less immodestly, depict the courts as participants in a republican dialogue
apparently searching for a unitary concept of the public interest – a position
which Cover rejects. Perhaps not surprisingly, since it happens to be the

---

41 Robert M. Cover, supra note 1, at 58.
42 Id. 123-13.
43 See, for example, Sir John Laws, supra note 35 and Sir John Laws, Beyond Right, 23 OXFORD
JOURNAL OF LEGAL STUDIES 265 (2003), Jeffrey. Jowell, Beyond the Rule of Law: Towards
Constitutional Judicial Review, PUBLIC LAW 621 (2000), Sir Steven Sedley, The Sound of
Silence: Constitutional Law Without a Constitution, 110 LAW QUARTERLY REVIEW 270
(1994); Peter. Cane, Theories and Values in Public Law, in Paul Craig and Richard. Rawlings eds,
LAW AND ADMINISTRATION IN EUROPE: ESSAYS IN HONOUR OF CAROL HARLOW
(2003); for critique, see Martin Loughlin, Theory and Values in Public Law: An Interpretation,
PUBLIC LAW 48 (2005), Thomas. Poole, Back to the Future? Unearthing the Theory of
Common law Constitutionalism, 23 OXFORD JOURNAL OF LEGAL STUDIES 435 (2003), and
Jonathan Morgan, Law’s British Empire, 22 OXFORD JOURNAL OF LEGAL STUDIES 729
(2002).
44 R.M. Cover, supra note 1, at 48, Trevor Allan, CONSTITUTIONAL JUSTICE: A LIBERAL
THEORY OF THE RULE OF LAW (2001), Francesca Klug, VALUES FOR A GODLESS AGE
(2000), Dawn Oliver, The Underlying Values of Public and Private Law’ in Mike Taggart (ed.),
contemporary political orthodoxy in the UK, the wisdom generated by the courts has turned out to be based on liberal individualism albeit not precisely defined.

In common with Cover, the English constitutionalists offer a return to Enlightenment ideals, thus challenging the traditional orthodoxy of the 'political constitution' as it has developed in the UK since the mid-Nineteenth Century, namely that constitutional law is primarily a functional means of delivering the kind of government envisaged by whichever group holds political power. According to this perspective, in a society based on limited government and the separation of powers, the courts' job is to apply rules made by others and certainly not to decide what the fundamental values of society should be. Thus Harris refers to Alistair MacIntyre's assertion that the notion of human rights as legal norms is akin to belief in witches or unicorns and is, hence, dangerous. By proclaiming fundamental values as 'rights,' a spurious claim to objectivity and authority is given to a contestable value judgement and 'the lawyers not the philosophers are the clergy of liberalism.' It might be assumed that Cover would have some sympathy with this sentiment. But, as we have seen, his approach seems to embody Macintyre's concerns.

Cover's approach is in one sense more sophisticated and ambitious than that of the English common law constitutionalists and exposes some of the weaknesses of the latter, in particular their faith in legal rationality as a means of resolving fundamental disagreements. The common lawyers appear to assume that there is a coherent set of community values based apparently on cherry picking from liberal and republican traditions. Cover, by contrast, seems to accept the irreducible nature of disagreement between the nomoi of different interpretive communities. Cover also emphasises that different nomoi may be generated by non-rational factors. For he states that 'interpersonal faith' and 'experience' (as mediated by interpersonal faith) are 'as much “reason” … constitutive of our understanding of normative worlds.' These are powerful points. And it is

---

[47] Robert M. Cover, supra note 1, at 49.
curious that Cover should apparently forget them when he places the courts in the impossible role of neutral arbiters.

Cover appeals apparently with approval to Coke’s stand against the King in 17th Century England. This involved a claim that the common law judges commanded a higher standard of reason than the King, a claim famously challenged by Hobbes. However, a modern English court, in a manner to which Cover apparently objects, reviews government action on the grounds of compliance with statute, rationality, or proportionality but does not directly endorse or criticise its merits. Arguably this is the appropriate role for a court in a democracy.

Constitutional Commitment: Three Problems

‘In our own complex nomos, however, it is the manifold, equally dignified communal bases of legal meaning that constitute the array of commitments, realities, and visions extant at any given time.’ I accord no privileged character to the work of the judges. I would have judges act on the basis of committed constitutionalism in a world in which each of many communities acts out its own nomos and is prepared to resist the work of the judges in many instances.’ ‘The commitment to a jurisgenerative process that does not defer to the violence of administration is the

---

48 Id., 58 (where Cover suggests that Coke’s resistance to King James 1st might be understood as involving appeal to ‘a natural law of jurisdiction’ that supplants ‘the [less rational] positivist version’). Cf Gerald.Postema, BENTHAM AND THE COMMON LAW TRADITION (1986), chs. 1 and 2.

49 See, for example, R (Alconbury) v Secretary of State [2001] 2 All ER 929, 981, R v Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 All ER 244, R v Somerset County Council ex parte Fewings, [1995] 1 All ER 513. In recent years, however, judges in England have begun to adopt an approach to adjudication in the sphere of public law that bears similarities to the approach favoured by Cover. They have, for example, begun to advance what they call fundamental constitutional principles: see, for example, R v Lord Chancellor ex parte Witham [1997] 2 All ER 779, R v Secretary of State ex parte Simms [1999] 3 All ER 400, R v Secretary of State ex parte Daly [2001] 3 All ER 433, and Re A, THE TIMES 17 December 2004. There is an issue as to whether fundamental constitutional principles are anything more than a smokescreen for a judge’s personal preferences. (Cover’s approach is at odds with the conventional English position described in the text. But it does, at least, have the merit of bringing a judge’s prejudices into the open.)

50 Robert M. Cover, supra note 1,4, n. 195

51 Id. 57, n. 158
In light of these points, Cover recommends that courts adopt an ‘imperial’ posture of ‘committed constitutionalism’ in their own right. There are three problems with Cover’s notion of a non-privileged constitutional commitment. Firstly, it implies some legitimate basis for the activities of judges. Even if there are objective and universal values waiting to be discovered, Cover offers no reason to suppose that courts are in a good position to identify them. A court’s legitimacy derives from the fact that, as a matter of positive law, it is the designated referee in a dispute internal to the legal system and secondly that its judges are respected as having the qualities and training that equip them for this role, namely an understanding of how to identify and apply the positive law of the legal system whatever that happens to be, as opposed to offering their personal opinions about the good life. Moreover, Cover’s insistence that a commitment to our own nomos, to a particular way of looking at the world, blunts our imagination, making us insensitive to other worlds, is an implausible basis for his apparent belief that lawyers, a group with a strong nomos of their own, have a special claim to imaginative insight.

Cover seems to base the legitimacy of the judiciary on nothing more than a hope that the claims to commitment and independence offered by the Supreme Court might persuade competing groups to accept their judgements. In this context, Cover may be adopting the familiar liberal proceduralist standpoint according to which the requirement of universality can be satisfied by fashioning decision-making processes that different interpretive communities regard as ‘fair.’ Just this sort of position is defended by Rawls. He argues for an ‘overlapping consensus’ – a framework, establishing requirements of justice, on which the members of many different communities can converge. But while the framework

---

52 Id. 59.
53 A particular legal system (as is arguably the case in the USA) might as a matter of positive law permit judges to do just that. On this point, see Robert M. Cover, supra n 1, 17, n. 45 (arguing that ‘openness’ in the process of adjudication is ‘tantamount to the preconditions for the Babel’ he posits in the text of his essay).
54 Cf Ronald Dworkin, LAW’S EMPIRE, (1986), where Dworkin gives the courts a privileged role which appears to come unashamedly from a single nomos which aspires to an internally consistent set of values. Cover regards Dworkin as failing to accommodate the problem of competing narratives, (Robert M. Cover, supra note 1, at 17, n 45). See also Ronald Dworkin, Do Liberal Values Conflict?, in R. Dworkin, M. Lilla, and R.B Silvers (eds), THE LEGACY OF ISAIAH BERLIN (2001), 73.
55 Robert M. Cover, supra note 1, at 43 and 53
56 For example, Brian Barry, JUSTICE AS IMPARTIALITY (1998).
described by Rawls seems to underwrite diversity, it presupposes that all those within it are ready to adopt liberal democratic decision-making methods.\(^{57}\)

Even if a framework of the sort described by Rawls could be fashioned, it is by no means clear that the judiciary are well placed to undertake the task. For the question as to the judiciary’s role in determining constitutional standards is acutely controversial in Britain and in the USA and is inherently susceptible to interrogation from the distinct standpoint of particular nomoi. Moreover, it is not possible to separate procedure from substantive outcomes since the procedures we set up reflect the type of outcome we wish to achieve, tipping the scales in favour of whatever nomos establishes the procedure. For example, neither a strongly communitarian nomos nor a search for Rawls’s overlapping consensus would be likely to favour an adversarial court process, and the republican debate between equals (which, according to the common law constitutionalists is manifested in the courts\(^{58}\)) has no legitimacy in a nomos that relies on revealed religious doctrine.

Moreover, it is curious that Cover should believe that the essentially non-rational cultural phenomena of group identity and values can be successfully addressed by the kind of rationality in which lawyers engage with its dependence on narrowing meaning, formal hierarchy and internal linguistic consistency. The strength and legitimacy of a court as an institution lies in applying conventional canons of rationality and internal consistency to agreed texts or other formal sources within a closed authoritative system. Judges do not seem to have any special claim to wisdom when it comes to choosing between competing nomoi. Indeed, their training, which is primarily in the law of a single jurisdiction, might be said to be unhelpful in this respect. In other words, rule-application is a predominantly rational activity whereas rule-creation is not. Indeed, Cover seems to reject the notion that courts have special technical expertise or claims to truth, thereby contradicting the philosopher king analogy (described above).\(^{59}\) Where does this leave Cover? This is not a question that can be easily answered.

Turning to our second problem, Cover is equally hard to pin down when we address the question as what judges are or, at least, should be committed. Cover constantly refers to ‘constitutional commitment’ or ‘committed constitutionalism.’ Neither concept seems to carry substantive meaning. The former seems to mean only commitment to a particular constitution telling us nothing about what kind of constitution; the latter seems to mean commitment to

\(^{57}\) John Rawls, \textit{supra} note 6.

\(^{58}\) For example, Trevor Allan, \textit{supra} note 44.

\(^{59}\) Robert M. Cover, \textit{supra} note 1, at 19 and at 42-3.
a vague idea of limited government. Unfortunately, Cover does indicate (with any degree of precision) the kind of constitutionalism to which his judges are committed. He rejects generalised claims based on social contract, welfare, the straightforward positivism outlined above, the Hobbesian idea that an authoritative decision maker, however inexpert, is better than chaos, and republican notions of participation. As regards substantive principles, to repeat the most fundamental difficulty with Cover’s approach, if, as Cover seems to suggest, there is no Archimedean point from which to compare different nomoi and narratives so that one nomos can be assessed only through the filter of another, then it seems to be impossible for a court or any other decision-making body to present credible substantive principles other than such as would amount to preaching to the converted.

Cover seems to make the assumption, convenient to his argument, that the Supreme Court’s commitment will be of a liberal variety which tries to accommodate the diverse interests of different nomoi on the implausible assumption that all nomoi internalise the US Constitution which has liberal pluralism embedded in it. This is oddly at variance with his insistence on the variety of nomoi and the absence of common interpretative ground between them. Moreover, although universalist claims are sometimes made for it, liberalism is merely the nomos which the narrative of Western European culture has produced. In common with other faiths, it has many internal variations. For example liberal individualism might comprise an emphasis on negative freedom or on positive freedom – the latter stressing opportunity and equality. Liberalism might be perfectionist in the sense used by Raz which presupposes a range of objective values centred on the notion of autonomy which (in principle) the state is entitled to foster or impose. Alternatively, it might be based on Mill’s version of utilitarianism which blurs the distinctions between positive and negative liberty and perfectionist and non-perfectionist ideas. According to Mill, although some ways of life may be objectively better than others, the sum of human happiness is maximised only if the individual is free to choose and experiment with an unlimited array of possible goods, subject only to the (liberty-limiting) harm principle.

---

60 Id. 48-9 and 54-5
63 John Stuart Mill, ON LIBERTY (1859).
In the present context Cover is primarily concerned with group liberalism or liberal pluralism which of course may conflict with individualism.\textsuperscript{64} For example, in the much criticised \textit{Otto Preminger} case,\textsuperscript{65} the European Court of Human Rights (ECtHR) resorted to the jurisdictional device of deference to the democratic government when it endorsed an Austrian law that permitted the seizure of a film on the ground that it insulted the feelings of a religious group (the Austrian Tyrol’s Roman Catholic majority). The case, therefore, had to do with two compelling liberal values: firstly, freedom of expression and, secondly, the desirability of toleration with respect to the deeply held beliefs of others. Both from (i) the legal-rational perspective and (ii) the liberal perspective, opposite outcomes could equally have been justified and it is questionable whether the involvement of the ECtHR added anything to help resolve the issues other than in a Hobbesian sense as referee.

To this a further point must be added: liberal principles do not necessarily make state violence problematic. Rawls, Raz and others offer versions of liberalism that permit a political decision maker to impose value judgements by force, thereby privileging liberalism itself. Rawls does so by virtue of his foundational assumptions that reasonable people are individualists within the American tradition and presumably that ‘unreasonable’ nomoi can be overridden.\textsuperscript{66} Raz does so by virtue of a perfectionist approach which, in a somewhat frightening manner, values autonomy instrumentally as a way of realising designated goals.\textsuperscript{67} Both are, therefore, embedded in specific local value systems according to which a legal text would be approached with a finite range of interpretive assumptions.

Moving on to our third problem, the idea of a court that is not privileged is obscure if not contradictory. Indeed, the processes of a court (including the mystical ritual surrounding its proceedings) encode the message that legal rationality is in some sense privileged. Nevertheless, in order further to distance the courts from violence, Cover repeatedly emphasises that the decisions of the courts are not privileged and no more authoritative than those of anyone else.\textsuperscript{68} This is in one sense attractive since it helps to explain the apparent contradiction between Cover’s relativism in relation to nomoi and the Supreme Court’s imperial claims. From this perspective, the Court is merely speaking as a

\textsuperscript{64} George Crowder, \textit{ISAIAH BERLIN: LIBERTY AND PLURALISM} (2004), ch. 6.
\textsuperscript{65} (1994) 19 EHRR 34
\textsuperscript{67} ‘[T]he autonomy principle is a perfectionist principle. Autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships. The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones’: Joseph. Raz, \textit{supra} note 62, at 417.
\textsuperscript{68} Robert M. Cover, \textit{supra} note 1, at 28-9, 44, 54, 57, and 59-60.
participant in the marketplace of ideas and its decision will be accepted by both
sides if it is sufficiently persuasive. On the other hand, the main social function
of the Court as a referee is undermined. And it might be questioned why, if
compulsion is excluded from the picture, a court, as opposed to say a panel of
representatives from the communities involved, should be entrusted with this role.
Cover does not deal adequately with this difficulty. But he does, at least,
recognise that the use of courts, as opposed to some other mechanism for
resolving disputes, is a contingent matter of positive law.69

Cover does not make clear what he means when he talks about judicial decisions
not being privileged. He may mean only that judges have no claim to be the
repositories of objective truth. However, no serious commentator would make
such a claim. And, when it comes to the impact judicial decisions should have
not just on litigants but on other addressees of the law, Cover’s analysis is, again,
rather murky. But at least this much is clear. He does not suggest that Supreme
Court decisions should bind only the parties without any wider normative
implications. To stake out such a position would be, as Cover recognises,
patently unrealistic.70 Perhaps Cover simply means that the Court’s decisions in
constitutional matters should not be enforceable but only declaratory (as is the
case with a Declaration of Incompatibility in English Law when the courts decide
that primary legislation cannot be reconciled with the European Convention on
Human Rights).71 If this is indeed Cover’s position, then he seems to be arguing
for the Supreme Court to occupy a less prominent role in the constitutional life of
the USA. For Declarations of Incompatibility on the English model give the
courts the modest role of a participant in a constitutional ‘dialogue.’72

Nor does Cover explain what the outcome of a non-privileged court ruling would
be. The cause of non-violence does not seem to be advanced and the court seems
to be placed in the role of Pontius Pilate. If the losing party is not persuaded by
the court’s reasoning then presumably it is free to ignore the court’s decision.
Thus there may be nothing to prevent state force being used on behalf of or
against a community. An insular community might well require the protection of
state force against an official who seeks to interfere with its practices. Others
may need the protection of state force against a redemptive community that
insists on imposing itself on them, for example by distributing religious tracts. A

69 Id. 23, n. 66.
70 Id 54, n. 146 (noting, inter alia, that ‘[s]ome decrees project consequences of interpretive
processes into the future’ in ways that cannot be tightly circumscribed).
71 Human Rights Act 1998, section 4
72 See Thomas Hickman, supra note 44.
community might also be grateful for a privileged court decision to secure benefits and exemptions refused by the executive.\footnote{A distinction could be drawn between interference with the freedom of a paedeic community (for example, by banning certain of its practices) and the refusal to give such a community a state benefit. In the latter case, it could be argued that the community must engage with the state on the state’s own terms. Cover rightly doubts the validity of such a distinction since any state action might be intended as a way of pressuring its subject to behave in a way favoured by officials. See Robert M. Cover, supra note 1, at 64.}

Finally, Cover claims that there is some onus on dissenters to justify any rejection of the court’s decision by creating `a jurisprudence that orders the forms and occasions of confrontation, a jurisprudence of resistance that is necessarily also one of accommodation.`\footnote{Id. 52.} This conditional right of resistance seems to require the approval of some functionary although Cover does not explain who this might be. It would clearly be inappropriate for it to be either a body within the resister’s own nomos or the very court whose decision is rejected. Cover does not make clear whether resistance can be validated entirely from the point of view of the nomos in question or whether there is some independent principle of dissent such as that postulated by Locke, albeit from the perspective of Protestant Christianity.\footnote{John Locke, TWO TREATISES ON GOVERNMENT, Peter Laslett, ed., (1960), paras 221-243. (Locke’s right of rebellion is collective and is not subject to any earthly judge. See D. Miller, ed., THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL THOUGHT (1991), 294-295 (entry by Jeremy Waldron.).} An imperial court on Cover’s model could try to decide whether a claim (for example to an immunity from a state rule) is genuine and authoritative according to the community’s own criteria. But this would necessarily be unsatisfactory. For it would be examined through the prism of the court’s nomos. Moreover, Cover suggests that an individual who claims to exercise a right of dissent independently of some collective nomos would be regarded as mad. Cover makes this point even though nomoi can exist only in the consciousness of individuals – each consciousness being unique.\footnote{Robert M. Cover, supra note 1, 10, n. 28.}

I shall argue in the rest of this essay that the legal rationalistic technique that lies at the heart of the legitimacy of a court is not appropriate to disputes between rival nomoi. For this purpose, I shall draw upon Isaiah Berlin’s warning against rationalist attempts to prescribe overarching principles and Edmund Burke’s account of the ‘sublime and the beautiful.’\footnote{Isaiah Berlin, THE CROOKED TIMBER OF HUMANITY: CHAPTERS ON THE HISTORY OF IDEAS (2003), Henry Hardy, ed.; Edmund Burke, A PHILOSOPHICAL INQUIRY INTO THE ORIGINS OF OUR IDEAS OF THE SUBLIME AND THE BEAUTIFUL (1757, 1st ed.), (2nd ed., 1759).} The link between Berlin and Burke...
is that both emphasised the problem of political disagreement between different nomoi and warned against rationalistic attempts to impose unifying principles. According to Berlin, the resolution of foundational disagreements between different value systems cannot safely be entrusted to rationalistic top-down mechanisms such as courts but must be embedded in community practices. According to Burke, emotional appeals are more conducive to agreement between different nomoi than are rationalist solutions. This last point is, moreover, echoed by some contemporary proponents of human rights.\(^7\)

**Incommensurability**

Foundational disputes between Cover’s paedeic and imperial communities raise the problem of incommensurability in acute form. Cover seems to acknowledge incommensurability but without drawing on its literature.\(^7\) In this section, I shall argue that the implications of incommensurability are such that Cover’s court-based approach is inappropriate. This is because the rationality on which the legitimacy of a court depends cannot deal with incommensurables. Moreover, any claim that courts have some special insight into the non-rational elements of paedeic communities is patently false.

Proponents of incommensurability (among whom, from a liberal perspective, Sir Isaiah Berlin was prominent) claim that human values are not always susceptible to rational adjudication and inevitably conflict at a foundational level.\(^5\) Human nature is many-faceted with contradictory needs and interests. These needs and interests cannot be weighed or compared against any common measure or general principle. Therefore, it cannot be said of two incommensurable values that one is either better or worse than the other nor even that they have equal value. Incommensurable values cannot be rationally compared or ranked so that any choice or accommodation between them must be based on non-rational factors. Thus Berlin asserted that:

\[^{78}\text{Michael Ignatieff, HUMAN RIGHTS AS POLITICS AND IDOLATORY (2003).}\]

\[^{79}\text{On this point, see Richard Mullender, supra note 4, n. 99 (and associated text).}\]

Since some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false a priori view of what the world is like. Conflicts of value may be an intrinsic, irremovable element in human life. To admit that the fulfilment of some of our ideals may in principle make the fulfilment of others impossible is to say that the notion of total human fulfilment is a formal contradiction, a metaphysical chimera.

Berlin did not claim that there are unlimited possibilities of disagreement. He believed that the menu of values deriving from human needs is finite although open to many different permutations. For example, we each desire both to be left alone and to co-operate with others, different individuals (and communities) possessing these impulses in different permutations. Such common ground as there is serves as a bridge between different nomoi.

Similarly, Sunstein defines incommensurability as occurring where the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterised. This acknowledges that (prescriptively) the law can attach a common measure to anything, for example by placing a relative money value on goods, as some environmental regulators seek to do. However, by doing so in the search for rationality and objectivity, we might violate deeply held beliefs. Sunstein emphasises that valuation includes such matters as 'love, affection, respect, wonder and worship.' Sunstein also argues that we can make choices based on qualitative experience and self-understanding in the light of 'narrative continuity within [a] life or a society.' This is hardly a cue for the judiciary to enter the stage.

Incommensurables may sometimes be combined pragmatically. But, where this is not possible, the choice between them may be tragic: i.e., something good must inevitably be sacrificed. The burden of judgement between incommensurables is evaded by claims that an overarching principle can bring harmony. Particularly germane in relation to Cover's position, Raz identifies the notion of a

81 Isaiah Berlin, LIBERTY, supra note 80, 35. See also at 234 et seq.
82 Id. 213.
83 See George Crowder, supra note 64, chs 6-8.
84 Cass Sunstein, supra note 80, at 796.
86 Cass Sunstein, supra note 80, at 784.
87 Id. 856.
‘constitutive incommensurable.’ By this he means a value or interest which is central to our sense of identity within the practices of the community in which we find ourselves and the violation of which we experience as especially agonising.88

The concepts of positive and negative freedom provide examples of foundational incommensurables. Positive freedom is the claim that rationality enlarges human choice, thus freeing us from our animal instincts.89 Negative freedom is the freedom of an individual or an insular community to be left alone and is not subject to any test of rationality.90 Cover’s notion of a non–privileged court seems to be an attempt to combine the incommensurables of positive and negative freedom.91 The idea of positive freedom can be used by Cover’s court (or the members of a redemptive community) to disguise incommensurability and to impose its own preferences on the basis that, being rational, the positions staked out work to enlarge freedom. But, here, we must pay heed to Berlin’s warning against the danger that a decision-making body will become a tyrant by attempting to impose its own values on others under the guise of ‘rationality’ as ‘true freedom’ - perhaps using force as a means to this end by claiming that it is making the subject ‘free.’92 To this Cover might respond by pointing out that his court is not privileged. Hence, it is not (on his analysis) a threat to negative freedom.

In relation to Cover’s claims on behalf of courts, lawyers have no special qualifications for choosing between incommensurable values. Indeed, the practices to which Cover objects, namely jurisdictional devices that distance judges from the outcomes they produce, might be regarded in a more favourable light as due recognition of the limits of the judicial process. These jurisdictional devices include drawing a distinction between law narrowly conceived and broader ethical issues,93 the margin of appreciation/discretion doctrine which enables a court to defer to value judgements made by others (whether a

88 Jospeh Raz, supra note 62, at 345-353.
89 George Crowder, supra note 64, at 64-68.
90 Id.
91 Id., 78-79 (on positive and negative freedom as incommensurables).
93 See, for example, R (Pretty) v DPP [2002] 1 All ER 1, 17, 30, and 38, and Airdale NHS Trust v Bland [1993] 1 All ER 821, 884-5.
democratic body or an expert), distinguishing between legislation and interpretation or application, using binary oppositions such as that between the public and the private spheres to create a procrustean bed and resorting to procedural solutions rather than adjudicating directly on the substantive issues.

Courts sometimes acknowledge their limitations. For example in *Airdale NHS Trust v Bland*, the court was faced with the agonising decision whether to authorise life-support to be withdrawn from a patient in an irreversibly vegetative state. Lord Mustill said:

'[W]hen the intellectual part of the task is complete, and the decision-maker has to choose the factors which he will take into account, attach relevant weights to them and then strike a balance, the judge is not better equipped, though no worse than anyone else.'

By contrast, in *A (Re) (Children) (Conjoined Twins: Surgical Separation)*, Ward LJ, in deciding to override religious objections to the taking of a life, remarked (possibly ironically) that, in life and death cases, a decision is:

`invariably eventually made with the conviction that there is only one right answer and that the court has given it.`

---

94 There is a contested doctrine of deference (based on separation of powers-related concerns and questions related to judicial expertise): see, for example, Lord Steyn, *supra* note 28, and Murray Hunt, `Why Public Law needs “Due Deference”’, in Nicholas Bamforth and Peter Leyland, *supra* note 45. See also Lord Hoffmann and Lord Walker in *R (Pro Life Alliance) v BBC* [2003] 2 All ER 977, [74]-[76], and [144].

95 See *Ghaidan v Mendoza* [2004] 3 All ER 411.

96 *Aston Cantlow and Wilmcote with Billersley Parochial Church Council v Wallbank* [2003] 3 All ER 3413.


98 Airdale NHS Trust v Bland, *supra* note 93, at 886. See also Hoffmann LJ at 851-852, and at 854-855.

99 [2000] 4 All ER 961.

100 Id. 968. Ward LJ’s use of the term ‘conviction’ seems significant. It suggests that he is making a point about the phenomenological ‘feel’ of adjudication (a deliberative process that involves judges in striving to stake out a position that will make ‘the best of what is interpreted’ [the law]. On this ‘constructive’ approach to interpretation, see R. Dworkin, *supra* note 54, at 61. (Dworkin is, of course, strongly associated with the claim that processes of adjudication can yield one, and only one, right answer. See R. Dworkin, *A MATTER OF PRINCIPLE* (1985), 119. Cf the criticism of this view offered in C.L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 *YALE LAW JOURNAL* 997 (1994), 1103 (invoking, *inter alios*, Berlin is support of the conclusion that the thesis of ‘One Right Answer’ is ‘utopian’ and contrary to ‘the individual’s everyday experience’).)
Among UK writers and judges there have been hubristic claims for legal rationality. For example, in relation to the ‘balancing’ exercise embedded in human rights adjudication, Greer asserts that the task for legal theorists is to make jurists, judges, and lawyers more aware of its hidden inherent logic, and to try to ensure that it is applied more appropriately and consistently.\textsuperscript{101} Oliver proposes a list of higher order ‘values’ which courts should impose on other branches of government and private actors.\textsuperscript{102} Cane, seems to suggest that the courts can select from the \textit{smorgasbord} of political values those which are fit to be incorporated into law and stipulate determinate interpretations of them.\textsuperscript{103} Hunt suggests that the courts should announce the fundamental values to which society is committed and decide whether other branches of government have earned the right of ‘due deference’ when applying them.\textsuperscript{104} Sir John Laws suggests that rationality is a defining feature of the common law – and one that makes the common law superior in moral status to a democratic legislator.\textsuperscript{105} Cover does not identify himself with these claims. For he denies that courts have a privileged voice. But he does seem to cast the courts in a role similar to that proposed by Laws – a role that (as we have already noted) bears similarities to that of a philosopher king.

Incommensurability provides a ground on which to challenge these rather hubristic sounding claims. But before seeking to do this, it must be conceded that incommensurability cannot be proven either empirically or logically. This being so, incommensurability might itself be attacked as only one among a range of possible claims to truth. Recognising this, Berlin argued that incommensurability is at least consistent with the thrust of human history. Moreover, he supported liberal individualism not because it made overarching claims to truth but because it acknowledged the value pluralism that developed from the Sixteenth Century as a pragmatic means of keeping the peace between contending religious factions. Even though liberal individualism is nothing more than a secular faith (and one with many competing dogmas within itself), it can, at least, be taken as a \textit{modus vivendi} for the time being in our corner of the world.

\begin{itemize}
\item\textsuperscript{101} Steven Greer, \textit{Balancing} and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate, 63 CAMBRIDGE LAW JOURNAL 434, 413 (2004).
\item\textsuperscript{102} Dawn Oliver, \textsc{Common Values and the Public Private Divide} (1999).
\item\textsuperscript{104} In Nicholas Bamforth and Peter Leyland, \textit{supra} note 45.
\item\textsuperscript{105} \textit{Supra} note 35.
\end{itemize}
How do these points (concerning some rather hubristic analyses of the common law and Berlin’s liberal political philosophy) relate to Cover? Well, Cover’s emphasis on judges as the (philosopher king-like) architects of imperial community certainly sounds a hubristic note. But against this must be set two points that have to do with padeic communities. First, these communities are, as Cover notes, constituted by feelings and traditions as much as they are by reason. Secondly, it can be suggested that a deliberative body comprising representatives of those affected by particular practical decisions is a more appropriate mechanism than a court for arbitrating between the incommensurable interests of different communities. These are points that merit development. To this end, Burke’s notions of the sublime and the beautiful may help to identify what kind of community feelings are in issue and how they might be addressed in practically useful ways.

The Sublime and the Beautiful.

Edmund Burke claimed that emotional responses rather than reason explain the emergence of our values. His notions of the sublime and the beautiful are ostensibly concerned with aesthetics and experience of nature but are also importantly connected with his political philosophy. Burke’s political philosophy favours customary values embedded in community sentiment and distrusts grand rationalising monist principles of a kind embodied in written constitutions. The ‘sublime’ deals with the fundamental impulses of fear of the unknown and the constitutive identity and vulnerability of the person.

---

106 In light of the point made in the text, we might see Burke as making a contribution to moral anthropology to rival those of, inter alios, Aristotle (who argued that sound moral education works to inculcate a readiness to act in morally appropriate ways), Kant (who argued that reason is the source of moral motivation) and Nietzsche (who argued that people first engage in certain sorts of behaviour and, then, develop principles to ‘justify’ (or, more accurately, to rationalise) their earlier conduct). Burke argued that our feelings are mediated by a ‘second nature’ that people acquire as a result of being embedded in particular communities. On this ‘second nature’, see Richard Mullender, supra note 4, at ns 262-264 (and associated text). See also Ian Ward, The English Question, the English Constitution, and the English Mind, ISSUES IN LEGAL SCHOLARSHIP (2006), ns 49-52 (and associated text) (on Burke’s account of the ‘the English mind’). See also n. 45 (and associated text) (discussing the account of English identity set out in Robert Colls, THE IDENTITY OF ENGLAND (2002), 7-8, 13-14, and 18-19).

107 Edmund Burke, supra note 77. For a helpful introduction to Burke’s philosophical thought and his approach to practical reasoning, see the entry on him in THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/burke/


109 ‘The sublime’ is a subject that has been the subject of extended analysis since, at least, the first century A.D., when ON THE SUBLIME (a text ascribed to Longinus) appeared. In the seventeenth century, Nicolas Boileau revived the question of the sublime. Following the
'beautiful' represents our softer impulses of sociability, empathy and compassion. Both attempt to capture what is essential or irreducible in human nature since most of us feel empathy with others of our species while at the same time valuing what appears to be our core of identity.

Apart from Burke, a broadly emotional approach to political values has been supported prominently by Adam Smith, David Hume, and J.S. Mill who referred to:

(a political philosophy) which takes into account the whole of human nature not the ratiocinative faculty only.... which holds feeling at least as valuable as thought, and poetry not only on a par with, but the necessary condition of, any true and comprehensive philosophy.

It has been suggested that the 'moral imagination' (our capacity to feel the wrongs suffered by strangers) is a driving force of human rights. The same applies to the conflicts between the nomoi of different communities presented by Cover. One implication of this view is that the courts are not especially qualified to play a privileged role in relation to human rights and other foundational disputes. This is because judges have no special emotional insights and, in the absence of objective rationality, no claim to neutrality. The legitimacy of the courts is underpinned by their claim to mastery of a technical rationality and their position in a polity based on limited government. Legal rationality favours

---

100 CIF Schopenhauer’s argument in support of the view that the sublime and the beautiful occupy places on the same continuum and can merge into one another. See Julian Young, SCHOPENHAUER (2005), 118.
102 David Hume, A TREATISE OF HUMAN NATURE (1740).
104 See Thomas Laqueur in Michael Ignatieff, supra note 78, 131-347.
processes that can be delivered by an expert elite. Elite rationality was the basis of Coke’s claim, echoed by Cover, that the judges should be independent of the King. The courts’ claim to expertise is most plausible in the context of relatively tightly drawn rules created by other branches of government and least plausible where they apply foundational values since, at this level, reason (on the analysis offered by Berlin) runs out.

According to Burke there are two fundamental kinds of experience expressed by the ideas of the sublime and the beautiful. Neither is more important than the other. Burke thought that, since both the sublime and the beautiful derive from nature and appeal directly to our feelings there is more likely to be consensus on these qualities and our response to them than upon the doctrines of reason. Furthermore, even though, in *Bland*, Butler Sloss LJ said that judges have to ‘rid [themselves] of emotional overtones,’ rational arguments may not be capable of generating the kind of deep convictions that may help to resolve disagreements between nomoi. Indeed, a rationalistic approach may weaken the impulses of respect and concern for the subjectivity of others.

The sublime consists of ‘the strongest emotion which the mind is capable of feeling’ and goes to the core of the human condition. It is concerned with the nature of the self and with self-preservation. It is primarily an individualistic experience. It is generated by terror, power, fear of death, and deprivation or pain. It is expressed in the vast, the rugged, the sacred, and the mysterious. It generates attitudes of astonishment, fear, distress admiration, reverence, respect, awe, and wonder. Reactions to the sublime are based, in some cases, on self-preservation. In others, they have their roots in respect for what we cannot understand in other people: e.g., their religion or attitude to death. This explains why these reactions may encourage a readiness to accept non-conformity and anti-majoritarian institutions. The sublime directly engages with the ‘tragic choice’ inherent in incommensurability. It involves what Burke calls

115 George Crowder, *supra* note 64, 114 -117.
116 See note 48 (and associated text).
117 *Airdale NHS Trust v Bland*, *supra* note 93, 842
118 On this point, see the discussion of Charles Dickens, *HARD TIMES* in M. Nussbaum, *supra* note 111, at 54-55.
119 Edmund Burke, *supra* note 77, Part I, Sections VII and XVIII.
120 See T. Eagleton, *SWEET VIOLENCE: THE IDEA OF THE TRAGIC* (2003), 122 (arguing that ‘the sublime throws the limits of our understanding into stark relief, while yielding us in the process an oblique sense of infinity’).
121 Edmund Burke, *supra* note 77, Part II, Sections I to VII.
‘terrible uncertainty.’ The position staked out by Burke here has a significant corollary: a clear idea is another name for ‘a little idea.’

In Cover’s terms, the sublime provides a link between the nomoi of different interpretive communities since, as a species, all humans are likely to have similar reactions to grave dangers. Thus, the sublime helps to establish common ground including terror of unrestrained power, respect for the incomprehensible nature of life (resulting in toleration of different value systems), and a readiness to unite so as to prevent concentrations of power. The sublime is also relevant to Raz’s notion of a constitutive incommensurability. As noted earlier, such an incommensurability is the expression of an identity which it would be agonising to surrender.

The sublime is engaged when we protect negative freedoms in respect of matters that are at the heart of human agency, not only against tyranny (most obviously, on the part of the state) but also against well meaning attempts to impose rationality. However, it must be emphasised that the sublime also has an unpleasant aspect. This is because it is bound up with the mystique of authority associated, for example, with reverence for Supreme Court judges. Rulers who disguise the use of force by appeals to religion, ritual, and mysticism invoke the sublime. To take an English example, Walter Bagehot attempted (in the nineteenth century) to justify the importance of mystery, passion, and awe in relation to what he called the English Constitution. His purpose in doing so was apparently to ensure the deference of the people to established authority. Similarly, officials may take advantage of the sublime by stirring up elemental fears (e.g., of attack by outsiders or natural disasters) in order to reinforce their hold on power. The courts themselves harness the sublime by means of ritual and symbolism. Responses to misuse of the sublime include requiring openness in government as a way of combating the sublime quality of ‘obscurity,’ and invoking the notion of the beautiful.

---

122 Id. 58. See also Terry Eagleton, THE IDEOLOGY OF THE AESTHETIC (1990), 54 (emphasis added) (noting that, on Burke’s view ‘[t]he very conditions which guarantee social order also paralyse it’, with the result that ‘men of affairs become effete and enervated’).

123 See supra note 88 (and associated text).

124 Edmund Burke, supra note 77.


126 Reason-giving as a feature of legal culture might be taken as indicating a commitment to values (most obviously, openness) associated with the beautiful. On reason-giving in law, see Frederick Schauer, Giving Reasons, 47 STANFORD LAW REVIEW 633 (1995). See also Karl Llewellyn,
Beauty is a social feeling generated by affection and empathy. It involves the softer and more intimate qualities: the small, the smooth, the diverse, the delicate, the gradual, the moderate, and the regular. Its values are kindness, compassion, tolerance, 'the soft green of the soul.' It concerns social relationships. Hence, it might engage aspects of privacy and respect for family life and group life. Moreover, it might generate the feeling of wrong described by Hoffmann LJ in *Airdale NHS Trust v Bland*. This feeling can arise where, for example, people are humiliated, perhaps as a result of racism or where their form of life is treated intolerantly. Beauty, therefore, reinforces Cover’s notion of paedieic community and complements the sublime in calling for tolerance. Its role is also to temper the adverse aspects both of the sublime and rationalism by appealing to 'local' values of community.

According to Burke, beauty is not linked to perfectionist ideas but favours accommodation, compromise, and empathy with the feelings of others. These qualities seem far removed from Cover’s notion of an independent hermeneutic. Here, Cover’s analysis seems weaker than that of Isaiah Berlin. For Berlin puts stress on ‘belonging’ to a community of broadly shared values which are at least capable of providing peaceful ways of accommodating disagreement.

---

127 Edmund Burke, *supra* note 77, Part 3. (The point made in the text, reveals another interface between the beautiful and legal culture. For gradualism, moderation, and regularity are values associated with processes of reasoned elaboration (or incremental development) in the law. On reasoned elaboration, see Frederick Schauer, *supra* note 126, at 633.)

128 Edmund Burke, *supra* note 77, Section X. While the point cannot be pursued in detail here, some the values associated by Burke with beauty (kindness and compassion, most obviously) feature in the account of ‘slave morality’ offered in Friedrich Nietzsche, THE GENEALOGY OF MORALS (1887). For a helpful account of Nietzschean moral and political philosophy, see Brian Leiter, ‘Nietzsche’s Moral and Political Philosophy’, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, [http://plato.stanford.edu/entries/nietzsche-moral-political/](http://plato.stanford.edu/entries/nietzsche-moral-political/)

129 Relevant here is Tony Tanner’s introduction to Jane Austen, *MANFIELD PARK* (1966), 13-17. Tanner argues that Jane Austen presents the context in which her heroine, Fanny Price, lives (Mansfield Park) as a ‘world’ in which the values of regularity, propriety, harmony, and beauty are prized. See also A. MacIntyre, *AFTER VIRTUE: A STUDY IN MORAL THOERY* (1985, 2nd edn), arguing that Austen’s fictive nomos, Mansfield Park, is a surrogate for ‘the Greek city-state and the medieval kingdom’.

130 *Airdale NHS Trust v Bland*, *supra* note 93, 851. For an example of the sort of wrong Hoffmann LJ appears to have in mind, see *Campbell v MGN* [2004] 2 All ER 995.

131 Edmund Burke, *supra* note 107, Part 3. Section IX.

132 See George Crowder, *supra* note 64, at 12, 35-42, and at 183-7. See also *supra* note 21 (and associated text).
broadly similar vein, Burke himself relied on familiarity in the form of custom as a way of handling the unpleasant aspects of the sublime.133

The case of R (Pretty) v DPP 134 serves to illustrate the significance of the sublime and beautiful in legal contexts. The Court of Appeal was required to decide in the light of the European Convention on Human Rights (ECHR) whether to authorise the assisted suicide of a patient enduring great suffering. The Court took a specifically rationalistic route to its decision, emphasising the distinction between law as an independent discourse and ethics. The right to life (as protected by Article 2 of the ECHR) was interpreted literally and narrowly as being a right not to be killed as opposed to the wider right, associated with the sublime, of control over one’s manner of death. It was emphasised that the aims of the ECHR were relatively modest, being confined to rights that commanded substantial consensus between the nomoi that made up the membership of the Council of Europe. A right to choose to die was not among these entitlements. A similar approach was taken to other articles of the Convention, notably Article 8 (respect for privacy and family life). The Court of Appeal held that this right did not include the mode of death. Moreover, the Court held that, even if Article 8 did apply, the controversial nature of the issues and the risks involved meant that there should be a legislative margin of discretion. This had not been exceeded since the purpose of the law was a legitimate one, namely to protect the vulnerable against exploitation, even though the claimant herself was not vulnerable in this respect.

Given the limited nature of legal rationality, the Court’s approach was certainly defensible. However, the outcome might be criticised as avoiding confrontation with the real issues at stake in Pretty’s case. These engage, on the one hand, our feelings of the sublime in our abhorrence and fear of the deliberate taking of a life and, on the other, the beautiful, which generates compassion and empathy with the suffering of the claimant. However, the particular outcome is beside the point. The question is, rather, what is the best method of determining this kind of issue? With respect to this question, the Court did not make a particularly valuable contribution. So, how might we go about offering an answer to the question we are pondering? Well, we can at least say this: the sublime and the beautiful represent competing human impulses that have clear relevance in cases such as Pretty. Moreover, we would expect the law to attempt an accommodation between these impulses and between the emotional and the rational. But neither the sublime nor the beautiful can produce internally consistent answers to foundational clashes of value. Their role is, rather, to indicate that decisions can

133 Edmund Burke, supra note 77, at 99 and 135.
134 [2002] 1 All ER 1.
only be temporary, provisional, and based on collective feelings as well as reason. This being so, participation in the decision-making process by those directly affected is important.

Conclusion: The Choice of Forum

By emphasising the mix of experience, feelings, and tradition that, in combination, constitute a normative world, Cover makes a valuable contribution to our understanding of the law. The position he stakes out also lends support to the analyses of Burke and Berlin. For they insist on the emotional basis of social co-operation and emphasise that there are no objectively correct overarching principles. However, Cover attempts to have it both ways. On the one hand (and apparently contradicting his own premise), he identifies courts as capable of providing overarching solutions in their own right, cut off from the communities they claim to regulate. On the other hand, he denies that the courts’ solutions are ‘privileged.’

But while *Nomos and Narrative* exhibits this weakness, Cover succeeds in driving home the point that foundational values are embedded in community practices. Moreover, in his account of padeic communities, he alerts us to the fact that these values depend on emotion rather than reason. In light of this point, none of the various bases for the legitimacy of decision-making bodies inspire confidence that courts are a suitable forum for resolving disagreements concerning foundational values. These bases include education as a ruling caste, professional expertise, democratic representation, ideologies such as utilitarianism or market liberalism, and religion.

Foundational disagreement might more appropriately be resolved by direct engagement with the cultural practices of those concerned. The social needs encapsulated in the idea of beauty suggest that those involved should actively participate in the relevant decisions. Moreover, the prestige, independence and authority of a court and the rationality supposedly acquired by legal training give a misleading impression of permanence, objectivity and truth and have a tendency to freeze issues that are best left contestable and open to constant renegotiation.

---

135 In light of the criticism made in the text, we might regard Cover as having breached the principle of non-contradiction according to which one cannot simultaneously assert \( p \) (the courts can articulate overarching principles and are, therefore, privileged) and \( \neg p \) (the courts do not occupy a privileged position on practical matters). On the principle of non-contradiction, see S. Blackburn, THE OXFORD DICTIONARY OF PHILOSOPHY (1994), 264.
The most often proposed alternative to relying on courts or some equivalent elite is a republican method of decision making by deliberation or at least by voting among equal participants. For example, within a liberal democratic nomos, Jeremy Waldron bases his argument against judicial adjudication of constitutional rights on liberal republicanism. Republicanism on this model asserts that laws should be made collectively by those subject to them and that freedom requires that individuals be restricted, as far as possible, only by such laws. The case for a majoritarian process is not that a majority is likely to be `right’ on any issue. Rather, it is that a majoritarian process is fair, emotionally satisfying, and recognises the equal rights of all citizens. Thus, according to William Cobbett “[t]he great right of every man, the right of rights, is the right of having a share in the making of the laws to which the good of the whole makes it his duty to submit.” Waldron emphasises precisely this point. On his account, the familiar paternalistic argument that the courts should protect the majority against its own self-destructive excesses by protecting the pre-conditions of democracy is offensive to human dignity - in effect confining the democratic process to secondary matters.

A democratic solution is not of course acceptable to all nomoi: e.g., one that considers itself to have a monopoly on revealed truth and virtue. Moreover, as Waldron admits, because the choice of institutional mechanism relates to substantive disagreement about the best kind of outcome, resort to a democratic process is no more logically compelling than is resort to a court. However, it can at least be a default position since, in a liberal democracy (which is contingently the dominant nomos in both the UK and the USA), the onus lies on those who suggest non-democratic mechanisms. There is nothing inherently contradictory about a democracy policing itself and (as the continuing controversy over Marbury v Madison shows) no logical reason why assessments of the validity of laws must involve courts.

---


138 Jeremy Waldron, LAW AND DISAGREEMENT, supra note 136, ch. 12.

Cover rejects this form of participatory government: firstly, on the ground that the kind of decentralised decision-making processes that it involves cannot be established in contemporary conditions and, secondly, because there may only be a tenuous connection between what the majority want and the use of state force by officials. 140 As to the first of these points, some decentralisation is surely practicable in a wide range of circumstances. Moreover, it does not follow that a defective democratic process should be substituted by an even less democratic one. As to the second point, it is not in issue that a court should police the will of the people as expressed in legislation to ensure that the wielders of state violence do not exceed their powers. Until the re-emergence of the common law constitutionalists at the end of the last century this was the dominant ethos of judicial review in the UK, convenient myth though it might have been. 141 In any event, Cover does not show how a court is in a position to preserve the integrity of different communities any more than a deliberative assembly since his court can apparently decide anything to which it is sufficiently `committed.’

It cannot be claimed that the impulses of the sublime and the beautiful enable us to read off answers that will yield a consensus as between the members of different nomoi. At most, as Burke suggested, substantial agreement may be possible. Moreover, by helping us to understand the issues at stake in cases like Pretty, Burke’s account of the sublime and the beautiful throws light on the limitations of legal rationality. These limitations are important when we consider the respective roles of the various decision-making mechanisms discussed earlier. But while Burke has much to say that has relevance today, in at least one respect, his practical thought may be at variance with that commonly encountered in the contemporary USA and UK. For Burke relied on custom and tradition as evidence of agreement on practical matters. But contemporary politics in both the USA and the UK would surely favour a democratic forum.

A further consideration (which has to do with Cover’s argument in Nomos and Narrative) lends support to the view that a democratic forum is the appropriate context in which to address practical concerns in societies like the USA and the UK. Despite Cover’s insistence on the exclusivity of distinct narratives, it is plausible to assume considerable common ground between the members of different communities when feelings of sympathy, respect, etc, are engaged by direct dialogue on matters of practical concern. Moreover, the complex interpenetration of different nomoi in countries such as the UK and the USA is

140 Robert M. Cover, supra note 1, at 48-49 and at 56-58.
141 See Christopher Forsythe, Of Fig Leaves and Fairy Tales, 55 CAMBRIDGE LAW JOURNAL 122 (1996). See also Christopher Forsythe, ed., JUDICIAL REVIEW AND THE CONSTITUTION (2000).
likely both to generate such common ground and also to highlight irreducible differences. The most difficult clashes between nomoi are, therefore, likely to arise not because of different interpretations of a legal text but because the text offered by the lawmaker does not suit the interests of a particular group. In such a case, it is desirable that a solution is not embedded in the rhetoric of objectivity associated with the courts. Rather, it should recognise the temporary and provisional nature of any accommodation and, hence, keep the competing perspectives alive.

A democratic forum may, therefore, be more appropriate for producing an outcome of a kind that accommodates the claims of different paedieic communities by enlisting our feelings for the sublime and beautiful and, in particular, by recognising that accommodations between incommensurables must be negotiated, tentative, provisional and shifting. As already noted, a majority is not necessarily ‘right’. But majoritarian processes represent the basic human aspiration towards the beautiful. Those who support majoritarian processes of course recognise the possibilities of abuse: for example, by powerful vested interests or demagogues. On this topic, Waldron, for example, argues that these abuses are best dealt with directly by strengthening democratic mechanisms that engender trust in collective decision-making rather than by subjecting citizens to the indignity of paternalistic intervention by courts. Legal rationality as a device for ensuring that the wishes of the community are implemented would come into its own only when an accommodation is reached and translated into justiciable rules that are open to repeal through the process under which they were made. However, a court would inevitably have a residual discretion where it might be required, by unusual circumstances, to make a foundational choice. In these circumstances any accommodation of interests established by a court should, as far as possible, be confined to the circumstances of the particular case, thus avoiding ex cathedra generalisations of a kind apparently favoured by Cover but which close or confine the relevant debate.

Assuming that this analysis is correct, strands in Cover’s argument in Nomos and Narrative – in common with arguments advanced by Burke and Berlin – point towards practical arrangements in which the role of the courts would shrink and in which politics (an ever-shifting, provisional process) would loom more prominent. How, then, should we assess Nomos and Narrative? Well, it is a fascinating, challenging and sometimes infuriating text. Its elusive language is open to multiple interpretations. Indeed, Cover can be variously depicted as an anarchist, a conservative a communitarian, a natural lawyer and, in the context of

---

142 Jeremy Waldron, LAW AND DISAGREEMENT, supra note 136.
this paper, a liberal pluralist. Moreover, his attempt to reconcile judicial elitism with pluralism does not seem to work. But, while Nomos and Narrative is flawed, it speaks to the worlds in which we live with uncommon power.