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## BRIDGES OF LAW, IDEOLOGY, AND COMMITMENT

*Steven L. Winter\**

### ABSTRACT

Law has a distinctive temporal structure—an ontology—that defines it as a social institution. Law knits together past, present, purpose, and projected future into a demand for action. Robert Cover captures this dynamic in his metaphor of law as a bridge to an imagined future. Law’s orientation to the future necessarily poses the question of commitment or complicity. For law can shape the future only when people act to make it real. Cover’s bridge metaphor provides a lens through which to explore the complexities of law’s ontology and the pathologies that arise from its neglect or misuse. A bridge carries us to a destination; but sometimes, as when there are no crossings for miles, it can take us very much off course. Ideology is a bridge of that sort: It serves, Václav Havel explains, as a bridge of excuses between the individual and the system.

Law lives in the traffic between these two bridges. Sometimes legal actors take up the burden of law’s ontology in a way that honors law as a social institution. Other times, they engage in artifice to obscure the interpretive decisions that arise from the changes in meaning and circumstance that inevitably occur. Close readings of *Bostock v. Clayton County* and *Brnovich v. Democratic National Committee* reveal the pathologies of contemporary textualist and formalist methodologies. Rather than orienting us to a better, more effective future, these approaches serve as rationalizations that mystify and mollify. The opinions in these cases distort law’s delicate ontology in a manner that—irrespective of the decisions on the merits—systematically subvert the functions and operations of law. They are, in a profound sense, jurispthic.

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## I. ON BUILDING BRIDGES

Lon Fuller argues that one cannot construct a bridge piecemeal by adjudication.<sup>1</sup> “There are rational principles for building bridges,” he explains, but “[o]ne cannot construct a bridge by conducting successive separate arguments concerning the proper angle for every pair of intersecting girders.”<sup>2</sup> But if, as Robert Cover says, law is “a bridge linking a concept of a reality to an imagined alternative,”<sup>3</sup> then the common law proceeds in exactly the way that Fuller denies. Judges decide case by case in a molecular movement, even when they reach for larger systemic reform. College students in Madison, Wisconsin, successfully withhold rent for a furnished house in shoddy condition, and the implied warranty of habitability is born.<sup>4</sup> A speeding car runs off the road causing injury, and an innovative judge begins the unraveling of *caveat emptor* and the development of modern products liability law.<sup>5</sup> Sometimes, the judges in these cases have a larger vision of where the law should go. Other times, they lack a realistic picture of the consequences.<sup>6</sup> In either event, law is a kind of prophecy.<sup>7</sup>

There are many ways to put Fuller and Cover in conversation. Fuller’s argument is prescriptive. For him, “adjudication is . . . a device which gives formal and institutional expression to the influence

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<sup>1</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

<sup>2</sup> *Id.* at 403; but see Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 40 (1979) (“One is left to wonder why adjudication must proceed on the basis Fuller suggests — angle by angle. . . . [R]eason . . . need not proceed angle by angle, but can encompass whole structures.”).

<sup>3</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

<sup>4</sup> *Pines v. Persson*, 111 N.W.2d 409, 412 (Wis. 1961); see also *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969); *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969); *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>5</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

<sup>6</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). No one at the time foresaw the era of massive resistance. It would take until *Green v. County School Board of New Kent City* for the Court to insist on *Brown’s* enforcement. See 391 U.S. 430 (1968). *Id.* at 439 (“The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”).

<sup>7</sup> Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”); *id.* at 459 (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”).

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of reasoned argument in human affairs” and, as such, “assumes a burden of rationality not borne by any other form of social ordering.”<sup>8</sup> Cover’s understanding of law, in contrast, is sociological. He sees law as unavoidably contingent on social values and beliefs.<sup>9</sup> Law, for Cover, is not a domain separate from the larger normative realm. “Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”<sup>10</sup> Law, in his distinctive characterization, is but one part of a *nomos*.

But the difference between Fuller and Cover is less about theories of system-design than about the nature of the proper materials. For Fuller, law must be built on principles; it must satisfy the test of “a too exigent rationality . . . that demands an immediate and explicit reason for every step taken.”<sup>11</sup> Accordingly, “adjudication finds its normal and ‘natural’ province in judging claims of right and accusations of fault.”<sup>12</sup> The piecemeal nature of common law adjudication works, according to Fuller, only to the extent that it is guided by an overarching principle of individual autonomy: “The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that they should promote the free exchange of goods in a polycentric market.”<sup>13</sup>

For Cover, on the other hand, “it is the character of that bridge that determines whether it will hold the vision steady.”<sup>14</sup> Law is sustained not by principle, but by commitment.<sup>15</sup> “[A] legal

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<sup>8</sup> Fuller, *supra* note 1, at 366; *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”).

<sup>9</sup> Cover, *supra* note 3, at 18 (“Precepts must ‘have meaning,’ but they necessarily borrow it from materials created by social activity . . .”).

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> Fuller, *supra* note 1, at 371.

<sup>12</sup> *Id.* at 370.

<sup>13</sup> *Id.* at 403-04. Fuller’s view is, then, a primary example of what Unger calls “rationalizing legal analysis”—an approach to law “that reaches toward comprehensive schemes of welfare and right.” ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 36, 46 (1996).

<sup>14</sup> Cover, *supra* note 3, at 27.

<sup>15</sup> *Id.* at 27-28, 44-53.

interpretation,” Cover observes, “cannot be valid if no one is prepared to live by it.”<sup>16</sup>

Cover’s metaphor of law as a bridge to an imagined future emphasizes the forward-facing and community-building character of law. But the pragmatic orientation to the future is often obscured by law’s backward-looking practice.<sup>17</sup> In seeking the meaning of a text or precedent, we ask not “who do we want to become?” but “what did previous lawmakers say?” So, too, law’s forward-facing character is obscured by the conventional sense of law as maintaining social order. Our sense of law *as* law, moreover, requires that it remain relatively stable if it is to be fair and effective: A law that changed with each new case would not be law at all. Law is identified with stability and maintenance of the status quo.

The forward- and backward-looking dimensions of law necessarily coexist. They can be complementary, in tension, or in direct conflict. This paper uses Cover’s bridge metaphor as a lens through which to explore the complexities and pathologies of this two-sided relation. A bridge carries us to a destination; but sometimes, as when there are no crossings for miles, it can take us very much off course. Ideology is a bridge of that sort: In *The Power of the Powerless*, Václav Havel describes ideology as “a bridge of excuses between the system and the individual.”<sup>18</sup> Law lives in the traffic between these two bridges. Contemporary textualist and formalist methodologies obscure and distort the functions and operations of law. Rather than orienting us to a better, more effective future, they serve as rationalizations that mystify and mollify.

## II. A BRIDGE TO “ALTERNITY”

Cover famously situates law in the grand narratives that supply it with substance and significance: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a

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<sup>16</sup> *Id.* at 44.

<sup>17</sup> See Steven L. Winter, *Without Privilege*, 139 U. PA. L. REV. 1063, 1063 (1991) (noting the error of reducing Cover’s insight to a mere pragmatism).

<sup>18</sup> VÁCLAV HAVEL, *The Power of the Powerless*, reprinted in OPEN LETTERS: SELECTED WRITINGS 1965-1990, 135 (Paul Wilson ed., 1992). This essay was written in October 1978 and first published and distributed in Eastern Europe in May 1979.

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scripture.”<sup>19</sup> But Cover’s deeper insight is that law is situated in and necessarily contingent on social practices, processes, and beliefs. “Precepts must ‘have meaning,’ but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.”<sup>20</sup> The practices of narrative—what Cover identifies as “mythos”<sup>21</sup>—may be the most salient of those complex social practices. Narratives provide “paradigms for behavior” or serve as “models through which we study and experience [normative] transformations.”<sup>22</sup> But law, for Cover, is not a two-dimensional dynamic reducible to doctrine and mythos: It is “a doing.”<sup>23</sup> As Cover elsewhere explains, “the thrust of *Nomos* was that the creation of legal meaning is an essentially cultural activity . . . .”<sup>24</sup>

Cover’s understanding of law as anchored in the values and commitments of those who would live by it is close to the historical usage of the term *nomos* in ancient Greek political life. The original Greek word for law was *thēsmos*, which signifies “something imposed by an external agency, conceived as standing apart and on a higher plane than the ordinary . . . .”<sup>25</sup> At the time of the democratic reforms of Cleisthenes around 508-07 B.C., *nomos* superseded *thēsmos* as the Greek term for law. *Nomos*, as this usage emerged, implied an obligation “motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it.”<sup>26</sup>

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<sup>19</sup> Cover, *supra* note 3, at 4.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* at 9-10.

<sup>23</sup> *Id.* at 6 n.10 (drawing an explicit parallel to Thomas Kuhn’s pragmatic account of science).

<sup>24</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1602 n.2 (1986) [hereinafter *Violence and the Word*]; see also Cover, *supra* note 3, at 11 (“[I]t is the thesis of this Foreword that the creation of legal meaning—“jurisgenesis”—takes place always through an essentially cultural medium . . . . [T]he creative process is collective or social.”).

<sup>25</sup> MARTIN OSTWALD, *NOMOS AND THE BEGINNINGS OF THE ATHENIAN DEMOCRACY* 55 (1969).

<sup>26</sup> *Id.* at 158-60. Cover’s use of the term *nomos* in the more general sense of a normative world is more directly related to the earlier Greek sense of the word to signify culture or norms in contradistinction to *physis* or nature. See Steven L. Winter, *Keeping Faith with Nomos*, 36 TOURO L. REV. 345, 360-61 (2020).

For Cover, too, law is “held together by the force of interpretive commitments . . . .”<sup>27</sup> But Cover highlights the heterogenous commitments of varied actors across a legal system and how law is made in the interplay among them.<sup>28</sup> These commitments include those of the officials who enforce and interpret the law, but also those who obey, acquiesce, tolerate, mock, or resist it. And the range of these attitudes and commitments are radically ungoverned: The “patterns of commitment, resistance, and understanding . . . that constitute the dynamic between precept and material universe” are “subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence.”<sup>29</sup>

When compliance is habitual and unthinking, the law feels solid, stable, and *objective*.<sup>30</sup> But disagreement exposes the contingency of the law. It opens the questions of what the law is *for* and whether it ought to be reformed in one or another preferred direction. At that point, law’s role as a bridge between “what is and what might be . . .”<sup>31</sup> becomes unavoidable; it requires *choice*.<sup>32</sup> “A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.”<sup>33</sup>

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<sup>27</sup> Cover, *supra* note 3, at 7.

<sup>28</sup> *Id.* at 44-60 (discussing the civil rights protests against the segregation laws); see also Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 826-32 (1996) (elaborating the parallels between Cover’s dynamic understanding of protest and Foucault’s conception of power).

<sup>29</sup> Cover, *supra* note 3, at 17.

<sup>30</sup> That is, it feels both objective in the conventional sense of the term and in the sense that it is perceived as an object that is detached and stable. See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE* 53-61 (1966); Cover *supra* note 3, at 45 (“Creation of legal meaning entails, then, subjective commitment to an objectified understanding of a demand.”).

<sup>31</sup> Cover, *supra* note 3, at 39.

<sup>32</sup> The more extreme example is when regime change lays “bare the contingency of the foundations of legality.” MAURICE MERLEAU-PONTY, *HUMANISM AND TERROR: AN ESSAY ON THE COMMUNIST PROBLEM* 37 (John O’Neill trans., 1969) (describing the effects of the Nazi Occupation and the formation of the Vichy government). “For the first time in ages every officer and official, instead of living in the shadow of an established state, found himself invited to question himself on the nature of the social pact and to reconstitute the state through his choice.” *Id.*

<sup>33</sup> Cover, *supra* note 3, at 9.

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One might think that the contingency of law on the commitments of its addresses is a peculiar feature of the insular and redemptive legal movements, such as the Anabaptists and abolitionists, examined by Cover.<sup>34</sup> But these are only the limit cases that help us see the dynamic at work in every case.<sup>35</sup>

Take the mundane example of the speed limit. Surely some drivers are punctilious about compliance. But most of us most of the time treat it as an inconvenience—necessary in theory, but obviously addressed to other less capable, less responsible drivers—that we adapt to depending on time and circumstance. We drive faster when we are late for class and slow down when we see a patrol car; most drivers go five-to-ten miles over the posted limit because they know that is the usual tolerance for enforcement purposes. Driving around the rural South as a young lawyer for the Legal Defense Fund, I sometimes found myself stuck behind an older African American driving at a speed resolutely below the posted limit—a hard-won, practical accommodation to the realities of a racist era. In all these cases, the different “patterns of commitment, resistance, and understanding” of the varying legal actors—whether Southern sheriff, casual white driver, cautious African American motorist, or the Freedom Riders who pressured the Kennedy Administration into enforcement of federal law prohibiting discrimination in interstate transportation<sup>36</sup>—“do determine what law means and what law shall be.”<sup>37</sup> In all these cases, different commitments enact different dynamic links—different bridges—between legal rule and material reality.

So, too, one might think that the idea of law as a bridge to an imagined future—to “alterity”<sup>38</sup>—is particular to insular and

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<sup>34</sup> *Id.* at 11-40.

<sup>35</sup> Thus, in the previously quoted passage from *Nomos and Narrative*, Cover notes that “the concept of a *nomos* is . . . neither utopia nor pure vision. A *nomos*; as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures.” *Id.* at 9. See *Violence and the Word*, *supra* note 24, at 1604, for a discussion on the use of the extreme case to illuminate the ordinary ones: “Precisely because it is so extreme a phenomenon, martyrdom helps us see what is present in lesser degree whenever interpretation is joined with the practice of violent domination.”

<sup>36</sup> See RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 2 (2006) (“Deliberately provoking a crisis of authority, the Riders challenged federal officials to enforce the law and uphold the constitutional right to travel . . .”).

<sup>37</sup> Cover, *supra* note 3, at 7.

<sup>38</sup> *Id.* at 9.



redemptive legal movements. Not so, of course. Much legislation is a response to a problem in the hope of building a better future. At the turn of the twentieth century, adulterated food, phony “patent” medicines, and innocent-sounding palliatives such as Mrs. Winslow’s Soothing Syrup that peddled opiates for colicky babies were a common feature of American life.<sup>39</sup> The Pure Food and Drug Act of 1906 created a modern world in which Americans could trust that the food and drugs on the market were reasonably safe, suitable, and effective.<sup>40</sup> The same is true of basic laws such as those against homicide, robbery, and assault. We know humans can be violent and rapacious; we create a legal system—criminal laws, police, prosecutors, courts, and prisons—to dissuade such actions so that we can live in a safer, more secure world. The legal system even in its most mundane aspects necessarily builds bridges from a current, discordant situation to make the world conform to some expected vision of social order.<sup>41</sup> Law’s pragmatic function, however inadequate it may be, is necessarily forward-facing. As Peter Gabel remarks, law is “intended to solve the problem of contingency by pretending that the next moment can be colonized in advance.”<sup>42</sup>

Gabel’s remark is sardonic. He does not think “we could produce a quantity of movement and then freeze it in stone, and then another and freeze that in stone, until we had the right to everything we wanted.”<sup>43</sup> It is naïve to think that reification of a right in a text (that is, freezing it “in stone”) is sufficient to effect or preserve its realization. The Roberts Court’s dismemberment of the Voting Rights Act, which we will return to in Part IV, is a dreadful contemporary example. A law can shape the future only when the ongoing commitments of legal actors make it real. “Law connects ‘reality’ to

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<sup>39</sup> See generally UPTON SINCLAIR, *THE JUNGLE* (1906) (describing the horrid practices and conditions in the meatpacking industry).

<sup>40</sup> The Pure Food and Drug Act of 1906, P.L. 59-384, was superseded by the Food Drug and Cosmetic Act of 1938, 21 U.S.C. § 301 (2018). I say “reasonably safe” because there are many products, especially cosmetic products, that contain endocrine disruptors and petroleum-based ingredients that remain unregulated.

<sup>41</sup> ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8 (1986) (“[E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.”).

<sup>42</sup> Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *TEX. L. REV.* 1563, 1569 (1984).

<sup>43</sup> *Id.* at 1598.

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alternity constituting a new reality with a bridge built out of committed social behavior.”<sup>44</sup> We may think of law as solid and stable but, as Cover elsewhere says, law is always becoming.<sup>45</sup>

Earlier I observed that conflicts between commitments reveal the contingency of law and implicitly ask us to choose a future. The relation is reciprocal. A focus on the forward-facing dimension of law—that is, law’s *purpose*—poses the question of one’s commitment. Am I willing to participate in *this* ongoing construction and to underwrite *this* particular future? The question may appear discretionary, but the choice of commitment or complicity is obligatory.

Commitment, as I have elaborated elsewhere,<sup>46</sup> is a precondition of all interpretation: Every text—whether statute or story—invites us to be co-authors and participants. Each asks the reader to enter its world and view that world in a particular way; indeed, every text requires the reader to construct that world in order just to enter it. If I say, “no running in the halls,” you must immediately conjure up the scene (something like a high school with lockers lining the walls) just to make sense of the proscription.<sup>47</sup> Imagination of this sort is the *sine qua non* of interpretation. Which is why literature that pushes the boundaries such as Vladimir Nabokov’s *Lolita* or Philip Roth’s *Sabbath’s Theater* is so disturbing.<sup>48</sup> Interpretation always entails a degree of ethical commitment because, in Paul Ricoeur’s words, “what is interpreted in a text is the proposing of a world that I might inhabit and into which I might project my ownmost powers.”<sup>49</sup>

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<sup>44</sup> Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 179, 181 (1985).

<sup>45</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6, 123-25 (1975).

<sup>46</sup> STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, & MIND* 122-23, 206-10, 343-44 (2001).

<sup>47</sup> Given the literal scope of the words, the prohibition might—in another context—mean no campaigning in the halls of the White House or some other Executive Branch department. See *The Hatch Act of 1939*, 5 U.S.C. §§ 7321–7326 (2012).

<sup>48</sup> See generally VLADIMIR NABOKOV, *LOLITA* (50th anniv. ed., 1989); PHILIP ROTH, *SABBATH’S THEATER* (1995).

<sup>49</sup> 1 PAUL RICOEUR, *TIME AND NARRATIVE* 81 (Kathleen McLaughlin & David Pellauer trans., 1984).

### III. THE BRIDGE OF EXCUSES

In *The Power of the Powerless*, Václav Havel explains how the communist regime operated as a “post-totalitarian” system.<sup>50</sup> Compliance and participation were obtained not by terror, but through a semiconscious complicity.<sup>51</sup> Ideology worked not as justification, but as the treacherous bridge between the subject and the system.

The engine of his account is the parable of the greengrocer. The greengrocer dutifully puts in his shop window a sign proclaiming Workers of the world, unite! “Obviously,” Havel observes, “the greengrocer is indifferent to the semantic content . . .” of the sign.<sup>52</sup> The sign was delivered to him along with the onions and carrots; he understands that he is expected to include it in his window display, as do all the other shopkeepers. The greengrocer complies solely to express his conformity and obedience and thereby purchase immunity from potential informers and respite from the regime. The sign thus has a latent meaning that differs from its manifest ideological content. If the performative message of the sign were made express in its semantic content—that is, if the sign said “I am afraid and therefore unquestionably obedient” or “I am obedient and therefore have the right to be left in peace”—the greengrocer would be ashamed at his self-degradation. The manifest ideological content of the sign serves “to conceal from himself the low foundations of his obedience, at the same time concealing the low foundations of power.”<sup>53</sup>

The greengrocer does not actually care about the workers of the world. He has not given “more than a moment’s thought to how such a unification might occur and what it would mean[.]”<sup>54</sup> Rather, the manifest ideology of the sign serves a latent psychological function. It allows the greengrocer and his customers to comply with the expectations of the system and still maintain “the illusion of an identity, of dignity, and of morality while making it easier for them to part with them. As the repository of something suprapersonal and objective, it enables people to deceive their conscience and conceal

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<sup>50</sup> HAVEL, *supra* note 18.

<sup>51</sup> *Id.* at 131 (“[W]hat we have here is simply another form of the consumer and industrial society, with all its concomitant social, intellectual, and psychological consequences. It is impossible to understand the nature of power in our system properly without taking this into account.”).

<sup>52</sup> *Id.* at 132.

<sup>53</sup> *Id.* at 133.

<sup>54</sup> *Id.* at 132.

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their true position and their inglorious *modus vivendi*.”<sup>55</sup> In this way, ideology creates “a bridge of excuses between the system and the individual . . . .”<sup>56</sup> But, “the moment he steps on to this bridge,” the individual becomes just another component of the system.<sup>57</sup> If ideology operates as an excuse for his ritual performance of obedience, “then from the moment that excuse is accepted, it constitutes power inwardly, becoming an active component of that power.”<sup>58</sup>

The symbols of this complicity are everywhere: There are comparable signs posted on lampposts, buildings, bulletin boards, office corridors, and in the windows of apartments and other shops. They form the backdrop or “panorama” of everyday life which “reminds people where they are living and what is expected of them. It tells them what everyone else is doing, and indicates what they must do as well . . . .”<sup>59</sup> The office worker who patronizes the greengrocer’s shop may ignore the semantic content of his sign; when the greengrocer goes to her office, he may disregard the one that she has hung in the corridor. They are nevertheless complicit. “Both are objects in a system of control, but at the same time they are its subjects as well. They are both victims of the system and its instruments.”<sup>60</sup>

Ideology, on this view, is not the causal agent of behavior. It is, rather, a subsidiary element that contributes to the system’s reproduction and maintenance by providing excuses for action. By way of analogy, ideology is to a social system what rationalization is to neurosis in psychoanalytic theory: It is a conscious analogue that is produced by the underlying pathology as a defense mechanism. It is, at the same time, productive in that it serves as a contributor to or enabler of that very same neurotic behavior. In this way, as Havel

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<sup>55</sup> *Id.* at 133.

<sup>56</sup> *Id.* at 135.

<sup>57</sup> *Id.* at 137.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 141-42.

<sup>60</sup> *Id.* at 143. Cf. MICHEL FOUCAULT, *Two Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, 98 (Colin Gordon ed., 1980) (“The individual is an effect of power, and at the same time, or precisely to the extent that it is that effect, it is the element of its articulation.”). It is unknown whether Havel had read these lectures; but we do know that, by 1983, Havel was familiar with Foucault’s *Discipline and Punish*. Jonathan Arac, *Foucault and Central Europe: A Polemical Speculation*, 21 *BOUNDARY* 197, 203 (1994).

understands, “individuals confirm the system, fulfill the system, make the system, *are* the system.”<sup>61</sup>

Havel’s genius lies in a deep understanding of how social systems function and maintain themselves. Indeed, he offers his critique as a simultaneous indictment of the contemporary capitalist West.<sup>62</sup> The signs that *we* put in the window may say Coca-Cola, Bud Light, or Michelob; they may lack the overt ideological content of Workers of the world, unite! But, as made clear by the emptiness of their accompanying advertising slogans—“It’s the real thing,”<sup>63</sup> “The difference is drinkability,”<sup>64</sup> or “How to give spaghetti an unexpected twist”<sup>65</sup>—their semantic content is absolutely beside the point. The real message is that we are expected to participate enthusiastically in the consumer economy. We may see the Coca-Cola or Bud Light sign and realize that we are thirsty; but it does not matter whether we instead purchase a Gatorade or a Guinness. The panorama of advertising forms a backdrop that, to paraphrase Havel, reminds us what is expected, what everyone else is doing, and what we should want as well.<sup>66</sup>

The neoliberal ideology of freedom, individualism, and choice provides the bridge of excuses that links us as individual consumers to this system of consumption. We think that we are acting in the name

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<sup>61</sup> HAVEL, *supra* note 18, at 136.

<sup>62</sup> Thus, Havel argues that:

[T]he traditional parliamentary democracies can offer no fundamental opposition to the automatism of technological civilization and the industrial-consumer society, for they, too, are being dragged helplessly along by it . . . . [T]he omnipresent dictatorship of consumption, production, advertising, commerce, consumer culture, and all that flood of information . . . can only with great difficulty be imagined as the source of humanity’s rediscovery of itself . . . . In a democracy, human beings may enjoy many personal freedoms and securities that are unknown to us, but in the end they do them no good, for they too are ultimately victims of the same automatism.

*Id.* at 208.

<sup>63</sup> Jeff Chang, *What Coke Taught the World*, SLATE (May 18, 2015, 12:27 PM), <https://slate.com/culture/2015/05/coca-colas-its-the-real-thing-ad-how-the-mccann-erickson-ad-changed-american-advertising-and-america.html>.

<sup>64</sup> *50\$ Million Bud Light Ad Campaign Launches*, NBC NEWS (Oct. 2, 2008), <https://www.nbcnews.com/id/wbna26995940>.

<sup>65</sup> *Michelob – Give Spaghetti an Unexpected Twist (1975)*, VINTAGE AD BROWSER, <https://www.vintageadbrowser.com/search?q=michelob&page=2> (last visited Jan. 3, 2022).

<sup>66</sup> See *supra* text accompanying note 59.

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of those values because it is safer than accepting the fact that the system has already coopted us. The values of freedom, individualism, and choice are—in Havel’s words—but the repository of “something suprapersonal and objective.”<sup>67</sup> Just as they work for Fuller to rationalize the cacophony of common law contract decisions, they enable us to rationalize our complicity in a system not of our choosing. Once we step on that bridge, we paradoxically surrender our autonomy; for the excuse of consumer preference operates, as Havel says, by pretending that “the requirements of the system derive from the requirements of life.”<sup>68</sup>

The strength of Havel’s critique comes from its deep phenomenological underpinnings.<sup>69</sup> Like Cover, Havel understands the social world as the ongoing production of conscious actors engaged in (and with) collective processes, practices, institutions, and beliefs—in Cover’s words, “a doing.”<sup>70</sup> But from the perspective of a dissident

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<sup>67</sup> See *supra* text accompanying note 55.

<sup>68</sup> HAVEL, *supra* note 18, at 135.

<sup>69</sup> Havel’s friend and mentor, the Czech philosopher Jan Patočka, was a student of Husserl and Heidegger. Edward F. Findlay, *Classical Ethics and Postmodern Critique: Political Philosophy in Václav Havel and Jan Patočka*, 61 *REV. OF POL.* 403, 415-16 (1999). *The Power of the Powerless* is dedicated “[t]o the memory of Jan Patočka” who died under interrogation by the Communist regime in Czechoslovakia in 1977. *Id.*; see also Arac, *supra* note 60, at 204 (noting “Havel’s heritage from Heidegger” is something that “he shares with Foucault”).

<sup>70</sup> The question of Cover’s influences is an intriguing one. Ronald Garet speculates that Cover was influenced by Existentialism. Ronald R. Garet, *Meaning and Ending*, 96 *YALE L. J.* 1801, 1801 n.5 (1987) (noting similarities to Kierkegaard and Sartre). There is an important parallel to the Existentialists, as I have previously noted. Winter, *supra* note 26, at 361 n.88. But though Cover draws on Sartre in his discussion of “texts of resistance,” he questions Sartre’s conceptualization as too individualist and “contractarian.” Cover, *supra* note 3, at 50 n.137. So, too, Cover evokes Nietzsche while carefully disclaiming the implications. *Id.* at 44 n.123. To my eye, the arguments and references in *Nomos and Narrative* suggest a stronger phenomenological influence. Cover’s account of world-making and the objectification of meaning within nomic communities owes much to the work of Berger and Luckmann. *Id.* at 16 n.42, 45-46; see also *id.* at 4 n.2, 35 (citing BERGER & LUCKMANN, *supra* note 30; PETER BERGER, *THE SACRED CANOPY* 29 (1967)). Moreover, Cover explicitly describes his understanding of the role of commitment in interpretation as a weak version of Heidegger’s view. *Id.* at 45 n.125 (quoting MARTIN HEIDEGGER, *BEING AND TIME* 188 (John Macquarrie & Edward Robinson trans., 1962)). The passage he quotes from Heidegger—which begins “Dasein projects its Being upon possibilities”—is echoed in Cover’s statements that “narratives that are the trajectories plotted upon material reality by our imaginations” and that “[t]o live in a legal world requires that one know not only the precepts, but

living under a communist regime, the questions necessarily looked different. For our purposes, the chief differences are three.

First, the question of commitment took its most urgent form in the daily challenge of complicity as in the example of the greengrocer. “Patočka used to say that the most interesting thing about responsibility is that we carry it with us everywhere.”<sup>71</sup> Second, the hypocrisy of the regime called legality itself into question. “If an outside observer who knew nothing at all about life in [communist] Czechoslovakia were to study only its laws, he would be utterly incapable of understanding what we were complaining about.”<sup>72</sup> Faced with the outright manipulation of the legal process, the implications of the divergence of the constative and the performative in law were unmistakable.

[I]f our observer had the opportunity to study the formal side of the policing and judicial procedures and practices, how they look “on paper,” he would discover that for the most part the common rules of criminal procedure are observed: charges are laid within the prescribed period following arrest, and it is the same with detention orders. Indictments are properly delivered, the accused has a lawyer, and so on.<sup>73</sup>

Why, then, is it there at all? “For exactly the same reason as ideology is there: it provides a bridge of excuses between the system and individuals . . . .”<sup>74</sup> Observance of the legal forms “wraps the base exercise of power in the noble apparel of the letter of the law; it creates the pleasing illusion that justice is done, society protected, and the exercise of power objectively regulated.”<sup>75</sup> In short, law serves as the “suprapersonal and objective” thing that justifies manipulation, subjugation, and oppression.

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also their connections to possible and plausible states of affairs. It requires that one integrate . . . the ‘is,’ the ‘ought,’ and the ‘what might be.’” *Id.* at 5, 10.

<sup>71</sup> HAVEL, *supra* note 18, at 195.

<sup>72</sup> *Id.* at 187.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 188. Consequently, in an account that resonates with Cover’s account of nomic communities, Havel describes the development by dissidents of a “parallel polis” with “parallel structures,” “a parallel information network,” “parallel education,” and an “independent life of society.” *Id.* at 192-94.

<sup>75</sup> *Id.* at 186-87.

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Third, the lessons of that era made theoretical concepts and abstract solutions (including liberal legalism) suspect. The dissident movements, Havel explains, “do not shy away from the idea of violent political overthrow because the idea seems too radical, but, on the contrary, because it does not seem radical enough. For them, the problem lies far too deep to be settled through mere systemic changes, either governmental or technological.”<sup>76</sup> The divergence between law’s presentation and its actual performance exposed why legality was an insufficient solution “even in the most ideal case.”

By itself, the law can never create anything better. Its purpose is to render a service and its meaning does not lie in the law itself. Establishing respect for the law does not automatically ensure a better life for that, after all, is a job for people and not for laws and institutions. It is possible to imagine a society with good laws that are fully respected but in which it is impossible to live. Conversely, one can imagine life being quite bearable even where the laws are imperfect and imperfectly applied. The most important thing is always the quality of that life and whether . . . the laws enhance life or repress it, not merely whether they are upheld or not.<sup>77</sup>

Havel presciently warns that, “without a moral relationship to life [legality] will sooner or later come to grief on the rocks of some self-justifying system of scholastics.”<sup>78</sup>

#### IV. OUR CRUMBLING INFRASTRUCTURE

And, so, to the present and its pathologies.

Let me crystallize the argument thus far: Law has a distinctive temporal structure—an ontology—that defines it as a social

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<sup>76</sup> *Id.* at 184.

<sup>77</sup> *Id.* at 191. Compare Cover’s reference to “the surreal epistemology of due process” and his invocation of Grant Gilmore’s admonition that: “In Hell there will be nothing but law, and due process will be meticulously observed.” Cover, *supra* note 3, at 8-9 n.25 (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977)).

<sup>78</sup> HAVEL, *supra* note 18, at 192.



institution.<sup>79</sup> Law takes up situated, historical ways of doing (common or civil law system, written or unwritten constitution, formalistic or utilitarian modes of thought, adversarial or negotiated means of proceeding), confronts a current problem, and commits to a certain set of transformations to construct a better world.<sup>80</sup> Law knits together past, present, purpose, and projected future into a demand for action.<sup>81</sup> “Thou shalt not kill” describes a world—very different from our own—in which intractable human conflict is mediated through reason, tolerance, compromise, and compassion rather than violence. The injunction works not through the force of its command, but only by the grace of our accumulated actions.

Neglect one element of the complex dynamic of past, present, purpose, and projected future and distortion will inevitably ensue.<sup>82</sup> It is not a matter of a decision being wrong or mistaken: Inattention to law’s intricate equilibrium necessarily disrupts its complex mechanism. Misjudge the value of the past, misapprehend the nature or scope of the problem, distort or neglect purpose, misread or ignore the politics of reception and the complex social dimensions of

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<sup>79</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 18 (1934) (noting that law as an institution “involves not patterns of doing (or of inhibition) merely, but also accompanying patterns of thinking and of emotion”).

<sup>80</sup> Cf. Cover, *supra* note 3, at 9.

By themselves the alternative worlds of our visions—the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away—dictate no particular set of transformations or efforts at transformation. But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millen[n]ium.

*Id.*

<sup>81</sup> See HEIDEGGER, *supra* note 70, at 401 (“The future is *not later* than having been, and having been is *not earlier* than the Present. Temporality temporalizes itself as a future which makes present in a process of having been.”). As Wheeler explains, “in authenticity, the constraints and possibilities determined by Dasein’s cultural-historical past are grasped by Dasein in the present so that it may project itself into the future in a fully authentic manner.” Michael Wheeler, *Martin Heidegger*, STAN. ENCYCLOPEDIA PHIL. (Fall 2020), <https://plato.stanford.edu/archives/fall2020/entries/heidegger>.

<sup>82</sup> Cf. BERGER & LUCKMANN, *supra* note 30, at 61 (describing the social world as a three-way dialectic of externalization, objectivation, and internalization and warning that “an analysis that leaves out any one of these three moments will be distortive”), discussed in WINTER, *supra* note 46, at 215 (recharacterizing Berger and Luckmann’s three-way dialectic as “a reflexive relation between experience, imagination, and meaning”).

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compliance and the result will be a law that is inauthentic, scholastic, reified, ineffectual, or ideological. Disturb the intricate balance and the bridge to an imagined future becomes a bridge of excuses.

We are now positioned to examine closely the complexities and pathologies of the two-sided, temporal structure of law. The forward-facing dimension of law, what law is trying *to accomplish*, necessarily coexists with its backward-looking practice. Those who make the law expect their successors to pay attention to what they have said and follow through on that command. Conversely, subsequent legal actors (not just judges, but officials and ordinary citizens) may look back in good faith, assay the intent of the earlier lawmakers, and take up their commitments as their own. In this sense, the two dimensions are complementary.

The fact that law works over time, however, means that much can go awry. Law's ontology folds back on itself. The forward- and backward-looking dimensions of law represent the same process in a nested series: Subsequent legal actors take up *their* past—including the law they are interpreting—apply it to a current problem and affirm a set of transformations to achieve a desired end. They, too, knit together past, present, purpose, and projected future into a mandate for action that depends on their commitment. As Ricoeur might say, to interpret or apply a legal text is to propose a world that we should inhabit and into which we must, therefore, project our ownmost powers.<sup>83</sup> But the second act of interpretation includes the first; the second set of commitments can, therefore, incorporate, clash with, cancel, or pervert the first.

The most obvious way in which this twofold structure can go wrong is when subsequent legal actors do not share the commitments—that is, the values, politics, or policy goals—of their predecessors. These are the cases that, conventionally, draw the lion's share of our professional attention. For judges and other officials, these cases raise the problem of role fidelity. For other legal actors, they present the questions of accommodation or resistance, compliance or civil disobedience. In one sense, these limit cases are less interesting because the conflict is evident and the dynamic clear. In these situations, the forward- and backward-looking dimensions of law directly conflict.

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<sup>83</sup> See *supra* text accompanying note 49.

When subsequent legal actors choose candor about their commitments, they take up the burden of law's ontology in a way that honors law as a social institution. Such cases produce our most famous and inspiring judicial pronouncements. Prominent examples include *Brown v. Board of Education*,<sup>84</sup> *New York Times Co. v. Sullivan*,<sup>85</sup> *West Coast Hotel Co. v. Parrish*,<sup>86</sup> and *West Virginia State Board of Education v. Barnette*.<sup>87</sup> These decisions bear their commitments on their sleeves, so to speak; they engage in little or no pretense about their break with the past and provide strong justifications for the future they envision.

More often, decisionmakers are reluctant to acknowledge law's essentially contested content. To make the law seem seamless, they engage in artifice. They construct a bridge of excuses.

We can best expose the architecture of these mystifications by examining the run-of-the-mill case where the variable is not politics but time. "All words (that is, linguistic symbols) and all rules composed of words continuously change meaning as new conditions

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<sup>84</sup> 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The *Brown* Court declared: "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.*

<sup>85</sup> 376 U.S. 254 (1964). This case affirmed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *Id.* at 270.

<sup>86</sup> 300 U.S. 379 (1937) This case rejected freedom of contract and affirmed: Measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition . . . [It also affirmed that] exploitation of a class of workers who are . . . relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.

*Id.* at 398-99.

<sup>87</sup> 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). The famous dissents work in much the same way. The difference is that the dissenting judge, on one hand, is freer to stake out his or her position and, on the other, carries a stronger burden of persuasion. Classic examples include Justice Brandeis's famous concurrence in *Whitney v. California*, 274 U.S. 357, 372 (1927), and Justice Brennan's eloquent dissent in *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987).

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emerge.”<sup>88</sup> When circumstances, practices, and meanings change, subsequent legal actors face an interpretive decision: How does one “apply” the terms of the law to a world that differs from that of the original lawmakers? Does one “update” it? Ignore it? Apply it literally or mechanically regardless of context or result?<sup>89</sup>

Commitment becomes crucial. The subsequent legal actor stands poised before divergent bridges. She must choose both the direction and manner of proceeding. Does she acknowledge her commitments to build a future different from the one—perhaps now moot—proposed by the original lawmakers? Or, does she step onto a bridge of excuses?<sup>90</sup> Note that she can do this in good faith, believing that she is making the best decision, all things considered, or that it is the decision most of her fellow citizens would endorse. But either way, our subsequent legal actor faces a conflict between the past and the present that must be formulated into a demand for future action. Law’s ontology can be gamed, but it cannot be avoided.<sup>91</sup>

How does one knit together past, present, purpose, and projected future purpose into a demand for action when the parts do

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<sup>88</sup> KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 83 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

<sup>89</sup> This explains why changed circumstances in the most conventional and familiar reason for overruling precedent or modifying the law. And this is why it is invoked by weak or ideological judges even when the argument from changed circumstances is unpersuasive. Compare *Shelby Cnty. v. Holder*, 570 U.S. 529, 540 (2013) (“We also noted that ‘[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.’”), *with id.* at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

<sup>90</sup> This, of course, was the classic Legal Realist account of formalist decision making. Cf. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 812 (1935).

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.

*Id.*

<sup>91</sup> Cover, *supra* note 3, at 5 (“Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose.”).

not fit? If one cannot be candid, the only strategy is to fudge one or more of these elements. One can pretend the past was more like the present—that their worlds, words, and commitments were all along the same as our own. *District of Columbia v. Heller*<sup>92</sup> is a decision of that sort. One can ignore purpose, reify the language of the law, and pretend there is no choice. *Bostock v. Clayton County*<sup>93</sup> is an example. One can act as if the future is simply determined by a suprapersonal past—the formalist dodge.<sup>94</sup> *Brnovich v. Democratic National Committee*<sup>95</sup> is such a case. People will pretend along if they agree with the result and denounce it if they do not.<sup>96</sup> Either way, the decision will be reductive because it leaves out or ignores one or more elements of law’s ontology. The resulting distortions will include inconsistent or abstruse logic, wooden or mechanical reasoning, and patently mistaken semantics.<sup>97</sup>

Consider *Bostock*. Justice Gorsuch’s majority opinion reasons that “an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”<sup>98</sup> A version of this argument has, for

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<sup>92</sup> 554 U.S. 570 (2008); see *infra* note 97 and accompanying text.

<sup>93</sup> 140 S. Ct. 1731 (2020).

<sup>94</sup> See COVER, *supra* note 45, at 234.

If the law is clear and its operation mechanical, then once the position of judicial subordination to law is accepted, keeping the faith seems easy. . . . The more mechanical the judge’s view of the process, the more he externalized responsibility for the result. This phenomenon I call the retreat to formalism.

*Id.* This formalist move of self-abnegation is not inherently conservative or liberal. Compare *Heller*, 554 U.S. at 636 (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”), with *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”).

<sup>95</sup> 141 S. Ct. 2321 (2021).

<sup>96</sup> Because the outcomes in *Bostock* and *Brnovich* have opposite political valences—if you agree with one, you are likely to disapprove of the other—they provide a focus on the current Court’s methodologies in isolation from one’s substantive commitments.

<sup>97</sup> Steven L. Winter, *Does Justice Have a Syntax?* 69 J. OF LEGAL EDUC. 200, 202-09 (2019) (dissecting *Heller*’s disingenuous semantics).

<sup>98</sup> *Bostock*, 140 S. Ct. at 1740.

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years, been offered by those advocating gender and LGBTQ equality.<sup>99</sup> One may find it persuasive, as I do. The problem is that, though the Court claims otherwise, it simply is not true that when Title VII was enacted in 1964 “the ordinary public meaning” of “discrimination because of sex” included discrimination against LGTBQ persons.<sup>100</sup> Indeed, the Supreme Court did not even think that discrimination on the basis of sex included pregnant persons.<sup>101</sup> When Title VII was enacted, heteronormative assumptions were so deeply entrenched that it was not yet conventional to distinguish between “sex” (as biological difference) and “gender” (as culturally constructed roles and behaviors).<sup>102</sup> Justice Gorsuch admits that extending coverage to gay and transgender people is “unexpected.”<sup>103</sup> He even concedes it is an “elephant.”<sup>104</sup> But he insists, incongruously, that this “elephant . . . has been standing before us all along.”<sup>105</sup>

Justice Gorsuch recognizes that interpretations of Title VII have changed over time. Initially, the EEOC allowed sex-segregated

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<sup>99</sup> See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

<sup>100</sup> See *Bostock*, 140 S. Ct. at 1738. Justice Gorsuch says:

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

*Id.*

<sup>101</sup> See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976), *superseded by statute*, 42 U.S.C.S. §§ 2000ee-2000ee-3 (Westlaw 2018).

<sup>102</sup> See Charlene L. Muehlenhard & Zoe D. Peterson, *Distinguishing Between Sex and Gender: History, Current Conceptualizations, and Implications*, 64 SEX ROLES 791, 792 (2011) (tracing the history of the distinction in psychology and sociology). The distinction emerged in feminist and progressive circles in the early 1970s influenced by Kate Millett’s ground-breaking work. See KATE MILLETT, *SEXUAL POLITICS* (1970).

<sup>103</sup> *Bostock*, 140 S. Ct. at 1750.

<sup>104</sup> *Id.* at 1753 (“We can’t deny that today’s holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant.”).

<sup>105</sup> *Id.*

job listings but soon reversed itself.<sup>106</sup> In *Phillips v. Martin Marietta Corp.*,<sup>107</sup> the Court reversed the lower court and held that Title VII barred a policy against hiring mothers of small children (but not fathers of small children).<sup>108</sup> In *Meritor Savings Bank v. Vinson*,<sup>109</sup> the Court first recognized that sexual harassment created a hostile work environment.<sup>110</sup> According to Justice Gorsuch, these applications emerged not because anything about society's practice or understanding of gender equity changed, but because "the breadth of the statutory language proved too difficult to deny."<sup>111</sup> For him, the statute's command is simple and self-evident (again, even if hardly anyone saw it at the time).<sup>112</sup> "Title VII's legal analysis . . . asks simply whether sex was a but-for cause."<sup>113</sup>

There are at least two problems with this characterization. First, the statute in fact asks not whether sex (or race, nationality, etc.) was a but-for cause, but rather whether the adverse employment action was "because of" a forbidden trait such as race or sex.<sup>114</sup> In a later section addressing mixed-motive cases, the statute focuses specifically on whether race or sex was a "motivating factor."<sup>115</sup> Second, the Court had earlier split over the meaning of this supposedly simple inquiry. In *Price Waterhouse v. Hopkins*,<sup>116</sup> the plurality said that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."<sup>117</sup> Justice O'Connor disagreed,<sup>118</sup> and Justice White thought it was "not necessary to get

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<sup>106</sup> *Id.* at 1752.

<sup>107</sup> 400 U.S. 542 (1971). Though surprising by today's standards, the *per curiam* opinion in *Phillips* held out the possibility that the existence of such family obligations might constitute a bona fide occupational qualification.

<sup>108</sup> *Id.* at 544.

<sup>109</sup> 477 U.S. 57 (1986).

<sup>110</sup> *Id.* at 66.

<sup>111</sup> *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1752 (2020).

<sup>112</sup> *Id.* Justice Gorsuch acknowledges, in fact, that both of these readings "hotly contested for years following Title VII's enactment." *Id.*

<sup>113</sup> *Id.* at 1745.

<sup>114</sup> 42 U.S.C.A. § 2000e-2(a)(1) (West Law 2012).

<sup>115</sup> *Id.* § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

<sup>116</sup> 490 U.S. 228 (1989).

<sup>117</sup> *Id.* at 240.

<sup>118</sup> *Id.* at 262-63 (O'Connor, J., concurring).

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into semantic discussions.”<sup>119</sup> All agreed, however, that application of the burden-shifting scheme under Title VII required the employer to “show that its legitimate reason, standing alone, would have induced it to make the same decision.”<sup>120</sup> In other words, a plaintiff who shows that race or gender was a contributing factor will win *unless* the employer shows that it did not contribute to the adverse employment decision.<sup>121</sup> Impermissible motivation, not but-for causation, is the linchpin of a Title VII claim.

To be sure, the thrust of Justice Gorsuch’s argument in *Bostock* is that, when it discriminates against a person who chooses same sex partners, the employer is necessarily motivated by “sex” because it “necessarily and intentionally applies sex-based rules.”<sup>122</sup> But this rather strains the meaning of “motivated,” which is precisely why Justice Gorsuch must invoke but-for causation. It is easy to say that a decision turning on a sex-based rule (here: whom one should be attracted to) could not occur “but for sex.” But even Justice Gorsuch concedes that, in ordinary English, when asked why they were fired, a person in Mr. Bostock’s position would say “because I’m gay.”<sup>123</sup> Justice Gorsuch responds that this point “rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case.”<sup>124</sup> But that is circular: The “kind of cause” he cites is his own reformulation from the statutory language “because of” to the more legalistic “but for.”<sup>125</sup> So much for text. So much for ordinary public meaning.

A straightforward opinion might start by acknowledging the massive (and still ongoing) changes in gender norms, gender expectations, and gender equity since 1964. It would recognize that the Court’s prior cases had focused not on but-for causation, but on the

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<sup>119</sup> *Id.* at 259 (White, J., concurring).

<sup>120</sup> *Id.* at 252 (plurality opinion).

<sup>121</sup> *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254 (1981). Strictly speaking, the employer carries only a burden of production, and the burden of persuasion always remains with the plaintiff. *Id.* at 255-56.

<sup>122</sup> *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1745 (2020).

<sup>123</sup> *Id.* (“If asked by a friend (rather than a judge) why they were fired, even today’s plaintiffs would likely respond that it was because they were gay or transgender, not because of sex.”).

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* (“You can call the statute’s but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.”).



role of sex stereotypes in maintaining a system of gender hierarchy.<sup>126</sup> Thus, in *J.E.B. v. Alabama. ex rel. T.B.*,<sup>127</sup> Justice Blackmun explained that decisions based on gender stereotypes are suspect under the Equal Protection Clause both because they “are likely to stigmatize” and because they “perpetuate historical patterns of discrimination.”<sup>128</sup> In *United States v. Virginia*,<sup>129</sup> Justice Ginsburg warned that the State “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>130</sup> And, in *Price Waterhouse*, Justice Brennan declared that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”<sup>131</sup> The step from *Price Waterhouse* to *Bostock* would then be a small one, since assumptions about whom one should be attracted to and how one dresses or performs gender are part of this larger system of sex stereotyping that maintains a gendered hierarchy with “manly men” on top.<sup>132</sup>

But this step, however obvious, is not one that a conservative and textualist like Justice Gorsuch would be comfortable with. It

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<sup>126</sup> See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (“[P]roving broad sociological propositions by statistics . . . inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.”); *Stanton v. Stanton*, 421 U.S. 7, 15 (1975) (“[I]f the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (holding the “gender-based generalization” that men are more likely to be the primary wage-earners “cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families’ support”). See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010), for the thoughtful presentation of the thesis that this was Ruth Bader Ginsburg’s strategy all along.

<sup>127</sup> 511 U.S. 127 (1994).

<sup>128</sup> *Id.* at 139 n.11; see also *id.* at 135 (“[P]olicies that professedly are based on reasonable considerations in fact may be reflective of ‘archaic and overbroad’ generalizations about gender . . .”).

<sup>129</sup> 518 U.S. 515 (1996).

<sup>130</sup> *Id.* at 533; see also *id.* at 550 (“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”).

<sup>131</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

<sup>132</sup> Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693-94, 758-62 (1997).

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would require acknowledging that statutes are not limited to their literal terms, but have purposes and principles that animate them and give them meaning. It would require recognizing as a corollary that the meaning of words and concepts change over time.<sup>133</sup> Most importantly, it would require owning an interpretation that recognizes the full humanity of LGBTQ people. A legalistic reformulation, on the other hand, provides psychological and political cover—a bridge of excuses. Instead of affirming a right to dignity and equal treatment in the workplace, Justice Gorsuch acts as if the elephant—which so clearly makes some of his fellow conservative Justices squirm<sup>134</sup>—just happened to be standing in the room all the time.

One might ask why it matters if, on the merits, the Court got it right. The short answer is that—as with all formalisms—a reductive, but-for test is empty.<sup>135</sup> The decision lacks commitment and vision, and this destabilizes the future. There is nothing simple about the commitment to treat people with equal dignity and respect. It takes vigilance and empathy. This is especially true with respect to people who challenge previously entrenched societal norms. On the Court’s view, it is simply a matter of asking whether the employer applied a sex-based rule. But this misses everything about the mistreatment of LGBTQ people as undesirables or as second-class citizens.

A decision without vision lacks legs. To apply a rule beyond the paradigmatic cases, one needs some grasp of its purpose or the future it imagines. Does *Bostock* apply to gender non-binary people who identify as agendered (that is, null or neutral gender) or androgynous? Can they be fired “because of sex” if they don’t understand themselves as having one? Even on the most conservative reading, Title VII envisions a world in which the opportunity to work and contribute to the economy is determined by merit rather than prejudice. This benefits the individual worker, who has access to the

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<sup>133</sup> See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755-56 (Alito, J., dissenting) (“The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”).

<sup>134</sup> *Id.* at 1767-73 (canvassing at embarrassing length the history of animosity toward LGBTQ people).

<sup>135</sup> See Steven L. Winter, *John Roberts’s Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 550 (2009) (identifying the basic idea of formalism as a “conceptual operation [that] involves the external form of the relevant performance without attention to the substantive dimensions that give it meaning”).

dignity of work and the ability to support themselves. And it benefits all of us because it enables employment markets to maximize talent and ability. In its pretend simplicity, the but-for test does not even speak to the most practical economic effects of discrimination.<sup>136</sup>

Perhaps this example seems too avant-garde. If so, consider a case where everyone seems to agree: same-sex harassment as in *Oncale v. Sundowner Offshore Services*.<sup>137</sup> On one hand, the Court said that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”<sup>138</sup> On the other, it insisted that a plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination . . . because of . . . sex.’”<sup>139</sup> If the harasser is homosexual or if the harasser “in a mixed-sex workplace” treats men and women differently, the case is easy.<sup>140</sup> What if, as in *Oncale*, it is an all-male workplace and neither the harassers nor the victim identify as gay? The Court says that the plaintiff must prove that any adverse action was “because of sex.”<sup>141</sup> But, it gives no indication how one might do that. If same-sex desire is not a necessary element and the mistreatment occurs in a same-sex environment, how does one prove that it is “discrimination because of sex”? What of the equal opportunity harasser who makes demeaning sexual demands of both men and women?<sup>142</sup> Can it be a statutory violation if one harasses

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<sup>136</sup> A market-fundamentalist approach would say that economic rationality should be a sufficient corrective. But, as Bill Eskridge points out, theories of institutional rationality underscore the way in which institutions perform pursuant to more complex, less “rational” dynamics. See William N. Eskridge, Jr., *Theories of Harassment “Because of Sex,”* in DIRECTIONS IN SEXUAL HARASSMENT LAW 155, 160-61 (Catharine A. MacKinnon & Reva B. Siegal eds., 2004) [hereinafter MacKinnon & Siegal, DIRECTIONS].

<sup>137</sup> 523 U.S. 75 (1998), discussed in *Bostock*, 140 S. Ct. at 1743-44, 1747, 1749, 1751-52.

<sup>138</sup> *Oncale*, 523 U.S. at 80.

<sup>139</sup> *Id.* at 81.

<sup>140</sup> *Id.* at 80-81.

<sup>141</sup> *Id.* This ploy seems an obvious attempt to limit the scope of the decision. See *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 356 (7th Cir. 2017) (Posner, J., concurring) (“Although ‘of any kind’ signals breadth, it is narrowed by the clause that follows: ‘that meets the statutory requirements.’”).

<sup>142</sup> Compare *Holman v. Indiana*, 211 F.3d 399, 402 (7th Cir. 2000) (rejecting such a claim), with *Brown v. Henderson*, 257 F.3d 246, 254 (2d Cir. 2001) (“[T]he inquiry into whether ill treatment was actually sex-based discrimination cannot be short-circuited by the mere fact that both men and women are involved.”).

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only men or only women, but perfectly legal if the employer sexually harasses everyone? Or is it enough—shouldn't it be enough—that sexualized humiliation is “so objectively offensive as to alter the ‘conditions’ of the victim’s employment?”<sup>143</sup> Shouldn't it depend on the role of sexualized humiliation in maintaining a gendered status hierarchy?<sup>144</sup> Wasn't the assertion of masculinized dominance the point of the sexualized humiliation in *Oncale*?<sup>145</sup> Because the decision offers no vision of what the law is trying to accomplish, we cannot answer these rhetorical questions. A legal rule that projects no clear future leaves judgment unmoored. It is a bridge to nowhere.

Which brings us, finally, to Justice Alito's opinion in *Brnovich*. At first blush, it is the uninteresting case in which the conflict in commitments is palpable and the political dynamic apparent. But the opinion is nevertheless instructive in the way that it subverts law's ontology and, by doing so, virtually eliminates the statute. It is a pirate ship sailing under a textualist flag that, once it slips into the harbor, burns all the ships.

Section 2 provides that the electoral process must be “equally open” to minority citizens and further specifies that it is a violation when members of a protected class “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>146</sup> The opinion makes a display of parsing the statutory terms “equally open,” “in that,” and “less

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<sup>143</sup> *Oncale*, 523 U.S. at 81. I suppose one could say that such predations are, in some literal sense, “because of sex.” But presumably, that is not what the *Oncale* or *Bostock* Courts mean. See David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002), for an argument that favors such an approach.

<sup>144</sup> See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1219 (1998) (“Sexual harassment helps perpetuate the workplace as a site of male control, where gender hierarchy is the order of the day and masculine norms structure the working environment.”).

<sup>145</sup> On the facts, the predatory behavior in *Oncale* had nothing to do with sexual desire or discrimination *against* a targeted group or identity. It seems obviously, rather, a display of dominance by “those whose sex or gender identity demands the abuse or degradation of others.” Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in MacKinnon & Siegal, DIRECTIONS, *supra* note 136, at 111, 118. “What happened to Joseph Oncale,” another commentator observes, was “male supremacy in action.” Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When Is Sexualized Violence Our Path to Liberation?* in MacKinnon & Siegal, DIRECTIONS, *supra* note 136, at 221, 225.

<sup>146</sup> 52 U.S.C.A § 10301 (West 2014).

opportunity.”<sup>147</sup> But it then pivots to the statute’s “totality of the circumstances” language, which it reads independent of its history as a rejection of the intent test of *Mobile v. Bolden*.<sup>148</sup> Instead, it takes the language as an invitation to qualify the terms of the statute.<sup>149</sup> In a series of five numbered paragraphs, Justice Alito redefines the test to turn on: (1) the size of the burden; (2) the departure, if any, from voting practices that were standard when § 2 was amended in 1982; (3) the size (rather than the statistical significance) of the disparate impact on minority voters; (4) the availability of alternative means of voting; and (5) the strength of the State’s interest in the challenged practice. For our purposes,<sup>150</sup> the key moves are the first two for they speak directly to the integrity of law’s ontology.

Justice Alito begins with the proposition that “because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is ‘equally open’ and that furnishes an equal ‘opportunity’ to cast a ballot must tolerate the ‘usual burdens of voting.’”<sup>151</sup> From this premise, he concludes that the degree of the burden matters. “Because every voting rule imposes a burden of some sort it is [necessary] to have benchmarks with which the burdens imposed by a challenged rule can be compared.”<sup>152</sup> For reasons that are never explained, Justice Alito chooses 1982 as the baseline: “The burdens associated with the rules in widespread use when § 2 was

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<sup>147</sup> *Brnovich v. DNC*, 141 S. Ct. 2321, 2337-38 (2021).

<sup>148</sup> 446 U.S. 55 (1980), discussed in *Brnovich*, 141 S. Ct. at 2332-33 (“The oft-cited Report of the Senate Judiciary Committee accompanying the 1982 Amendment stated that the amendment’s purpose was to repudiate *Bolden* and establish a new vote-dilution test . . .”). See also *id.* at 2362 (Kagan, J., dissenting) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (“Congress mainly added that language so that Section 2 could protect against ‘the demonstrated ingenuity of state and local governments in hobbling minority voting power.’”).

<sup>149</sup> *Brnovich*, 141 S. Ct. at 2338 (majority opinion) (“Thus, any circumstance that has a logical bearing on whether voting is ‘equally open’ and affords equal ‘opportunity’ may be considered.”).

<sup>150</sup> It would be hard to improve on Justice Kagan’s exceptional dissent. Among the telling points she makes is that neither the size of the burden nor the magnitude of the effect is a relevant consideration once one recognizes, first, that the statute is about equality of access to the ballot and, second, that closely contested elections (of which 2020 is a perfect example) are decided at the margins. *Id.* at 2362-63, 2367-68 (Kagan, J., dissenting).

<sup>151</sup> *Id.* at 2338 (majority opinion) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.)).

<sup>152</sup> *Id.*

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adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally ‘open’ or furnishing an equal ‘opportunity.’”<sup>153</sup>

Three things about this train of logic should be apparent. First, Justice Alito’s starting point is already a departure from the statutory language, which speaks not to the size of the burden (or to any impediments at all), but solely to whether voting opportunities are *equal*. At this stage of the analysis, § 2 is entirely unmoored.<sup>154</sup> Second, the fact that all voting procedures impose some burdens—one must register and either go to the polls, wait in line, fill out a ballot, or obtain an absentee ballot and mail it in—is utterly irrelevant to the statutory question whether some groups suffer disproportionate burdens that keep them from participating fully. Nothing in the statute stops a State from making voting onerous if those procedures apply to and affect all voters equally. Under the statute, it is the relative impact of those burdens and not their size that matters.

Third, having abandoned text, Justice Alito annihilates purpose. Congress ordinarily enacts a statute because existing practices present a problem needing attention. The resulting statute identifies that problem and prescribes some rule or standard that will change those practices in the desired direction. But, in Justice Alito’s hands, § 2 no longer responds to a problem; it serves instead to secure the status quo.<sup>155</sup> The measure of a § 2 claim is not equal access to the ballot, but “the degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 . . . .”<sup>156</sup> Justice

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<sup>153</sup> *Id.* at 2338-39. As Justice Kagan notes:

The oddest part of the majority’s analysis is the idea that “what was standard practice when §2 was amended in 1982 is a relevant consideration.” The 1982 state of the world is no part of the Section 2 test. An election rule prevalent at that time may make voting harder for minority than for white citizens; Section 2 then covers such a rule, as it covers any other.

*Id.* at 2363 (Kagan, J., dissenting).

<sup>154</sup> As Justice Kagan says: “The majority’s opinion mostly inhabits a law-free zone . . . . The majority instead finds its decision on a list of mostly made-up factors, at odds with Section 2 itself.” *Id.* at 2361-62.

<sup>155</sup> *Id.* at 2339 (“We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States.”).

<sup>156</sup> *Id.* at 2338.

Alito's opinion turns a remedial statute into a safe harbor.<sup>157</sup> It is as if the Food and Drug Act were read to protect Mrs. Winslow's right to peddle opiates for colicky babies because that was a popular product at the time of the statute's enactment.<sup>158</sup> It knits together past, present, and statutory demand into a mandate to preserve the inequities of the past. *Brnovich* turns law's ontology on its head. It is, in every sense of the term, jurispathic.

## V. MISSED CONNECTIONS

The central preoccupation in Cover's work from *Justice Accused* to *Violence and the Word* is the unrelenting demand for commitment that law places on its participants and the very different ways in which judges, martyrs, resisters, and other civil disobedients accommodate to the severity of that demand. Judges, in particular, face the crucible of justifying—both to themselves and others—their often violent and always consequential choices. The favored rationalizations shift over time from emphasis on the social compact to high-order generalizations like “freedom of contract” to textualism. But the common thread is the need for a bridge of excuses to stave off responsibility for controversial, contested, or politicized decisions.

The thing about responsibility, though, is that one carries it everywhere. Judging is hard, and the strain is often too much. It is easier to wrap the exercise of power in the letter of the law, create the illusion that justice is done, and offer the reassuring appearance of an authority that professes to be objectively regulated.<sup>159</sup> The question for us, both as citizens and scholars, is whether we will be complicit.

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<sup>157</sup> See *id.* at 2352 (Kagan, J., dissenting) (“Section 2 allows no ‘safe harbor[s]’ for election rules resulting in disparate voting opportunities.”).

<sup>158</sup> Imagine an opinion interpreting the FDCA that said: “We doubt Congress intended to ban soothing patent medicines that have a long pedigree and are in widespread use in the United States.”

<sup>159</sup> HAVEL, *supra* note 18, at 186-87; see *supra* note 75 and accompanying quoted text.