



2022

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### Recommended Citation

White, John Valery (2022) "Nomos and Nation: On Nation in an Age of “Populism”,” *Touro Law Review*. Vol. 37: No. 4, Article 15.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol37/iss4/15>

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## NOMOS AND NATION: ON NATION IN AN AGE OF “POPULISM”

*John Valery White\**

*The nomos . . . requires no state. And . . . the creation of legal meaning—“jurisgenesis”—takes place always through an essentially cultural medium. Although the state is not necessarily the creator of legal meaning, the creative process is collective or social.*

*-- Robert Cover*

### ABSTRACT

Robert Cover’s *Nomos and Narrative* points to the need to recognize a second, novel dimension for understanding rights. His concept of nomos, applied to competing notions of nation in pluralistic societies, suggests that the current dimension for understanding rights, which conceives of them fundamentally as protections for the individual against the state, is too narrow. Rather a second dimension, understanding rights of individuals against the nation, and aimed at ensuring individuals’ ability to participate in the development of an idea of nation, is necessary to avoid “a total crushing of the jurisgenerative character” of nomoi by the state, or by ascendent national groups. This need is underscored by the rise of populist nationalist movements that seek to capture the state to impose on their fellow citizens a particular vision of the nation. Such groups, like the segregationist Bob Jones University that *Nomos and Narrative* addressed, pose a problem for rights regimes by underscoring the limits of a state neutrality in the face of illiberal visions of the nation. This second dimension of rights builds on and ultimately revives the revolutionary elements of Cover’s seminal article – a fitting tribute to his brilliance.

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**INTRODUCTION**

Gauging the legacy of a long-lost colleague becomes more complicated with each passing year. For most of us, the passage of time will eat away at whatever we have become known for: those who built on our work will no longer remember it; those who recognized something great in us will forget; and those who know us will increasingly become inactive. Most important, perhaps, future generations will not know or appreciate our insights. Our legacy will be minimal, brief, and will die with our close friends. If we are fortunate, we will leave behind a signature work that takes on a life of its own and far surpasses our brief time on this earth. Robert Cover's legacy defies the path most of our legacies will follow. In his all too brief life, he gifted us several still influential works; he left behind colleagues who continue to honor his contributions. And there are many like me who arrived in New Haven after his passing, and who found inspiration in his intellectual contributions and saw unique insight in his work. As life marches on, one can marvel at the prescience of Cover's works and regret that he was never able to help teach us today. But that nostalgia buries that work in a remote grave. The harder but more lasting legacy of his work, of anyone's contributions, is that it provides insights into today's problems.

I mean to honor Robert Cover by connecting his Foreword in the Harvard Law Review, *Nomos and Narrative*,<sup>1</sup> to events newly resonant presently. My intention is to extend Cover's idea of *nomos* and *jurisgenesis* to the concept of "nation," revealing a need to nurture an additional, novel perspective on rights aimed at ensuring individuals' ability to participate in the development of an idea of nation. In *Nomos and Narrative*, Cover describes the creation and destruction of legal meaning in a way that positions the state as a destroyer of community-created legal meaning in the interest of social stability.<sup>2</sup> This observation provides an especially valuable way of thinking about national identity and its relationship to the state. Like legal meaning, national identity is often taken as given but is created through complex social and cultural processes. And though the state has a privileged position in aiding those processes, it is not necessarily the creator of national identity and, more often than not, operates to

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<sup>1</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>2</sup> *Id.* at 11-19.

promote aspects of one vision over others, frequently destroying competing visions of nation in the process.

This way of thinking about nation is all the more critical given the rise of “populist nationalism” here and around the world, along with the privileged position populist nationalist claim in defining a “true” national identity.<sup>3</sup> Indeed, much discourse on national identity has tended to take a national identity in the nation state for granted, has often presumed a long-existing (and static) national identity,<sup>4</sup> or has vested in the leaders of states privileged roles in articulating national values and identities.<sup>5</sup> Popular nationalists seek to exploit the lack of a formal place for nation in law and generally claim to be working to preserve a long-standing, static national identity, often by using nation to claim legitimate authority to run the state and impose their vision of nation on their fellow citizens. Per Cover, “Authoritative precept may be national in character—or at least the authoritative text of the authoritative precepts may be. But the meaning of such a text is always ‘essentially contested.’”<sup>6</sup> Cover’s observations about law suggests a role for the nomos of distinct groups in developing national narratives. Following from this analogy, development of national ideals can be understood to be organic, dynamic, social processes largely independent of state control yet subject to special state influence and, ultimately, the state’s jurispatic tendency. I here deploy this extension of Cover’s observations to introduce an additional dimension for thinking about rights, a dimension made more significant by technological developments that permit significant

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<sup>3</sup> See *infra* note 67 (explaining the importance of a clear definition of “populist nationalism” which distinguishes it from both populism and nationalism).

<sup>4</sup> ANTHONY D. SMITH, *THE NATION IN HISTORY: HISTORIOGRAPHICAL DEBATES ABOUT ETHNICITY AND NATIONALISM* 27 (2000) (“In the past, many scholars and most of the educated public assumed that nations and nationalism were, if not primordial, at least perennial. Nations could be found everywhere in the historical record, even if they were not part of nature or the human condition per se.”).

<sup>5</sup> E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780* 80-100 (Cambridge Univ. Press eds., 2d ed. 1992) (1990). Hobsbawm describes states invoking nationalism after the Age of Revolution to shore up their legitimacy; but Hobsbawm notes: “While governments were plainly engaged in conscious and deliberate ideological engineering, it would be a mistake to see these exercises as pure manipulation from above.” *Id.* at 92. Efforts to invoke national identity “were . . . most successful when they could build on already present unofficial national sentiments, whether of demonic xenophobia or chauvinism . . . or . . . nationalism among the middle and lower middle classes.” *Id.*

<sup>6</sup> Cover, *supra* note 1, at 17.

cultivation of identities and greater development of normative visions of right.

*Nomos and Narrative* is a popular and heralded article. It is cited for a number of its central principles. However, many who cite it seem to avoid truly exploring the implications of the article. They consign it to a grave of distant nostalgia, depriving it of a life in the present. They seem afraid to consider its implications. Here, I seek to build on two. First, if discrete, organized communities like religious communities can develop normative meaning through social and cultural processes on which legal understandings are built, why limit this understanding to discrete, organized communities? For Cover this made sense because he was examining religious communities' objections to IRS rules before the Supreme Court.<sup>7</sup> The entities under examination were in fact discrete and organized, many with centuries-old traditions, lending support to this focus. Moreover, an examination of how the Supreme Court should resolve a difficult question would not truly benefit from discussion of culture and society creating meaning from which legal understanding might emerge. But Cover's *nomoi* do suggest that, in the background of legal meaning, an array of cultural and social institutions that might have sufficient organization and structure to create meaning (*nomi*) on which legal understandings can emerge, are being developed. I do not mean to try to trace these processes. Rather, I assume their existence to engage the question of how to deal with increasingly contested visions about nation and collective identity that, in recent years, seem at least as important as efforts to distill legal meaning from different groups whose narratives might inform judicial interpretation.

Second, *Nomos and Narrative* suggested that the judge's and law's role in mediating different normative understandings, was inescapably destructive and that courts serve this role best when they limit such destruction and serve as neutrals of sorts, to the extent possible while serving the interests of the imperial virtues.<sup>8</sup> The idea of the *nomos* is troubling to the extent it suggests a war of all against

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<sup>7</sup> See *id.* Indeed, Cover envisions a dynamic process that likely is not limited to organized communities but at least requires "commitment." *Id.* at 101. "In the normative universe, legal meaning is created by simultaneous engagement and disengagement, identification and objectification. Because the *nomos* is but the process of human action stretched between vision and reality, a legal interpretation cannot be valid if no one is prepared to live by it." *Id.* at 44.

<sup>8</sup> See Cover, *supra* note 1, at 48-53.

all in an unbounded battle for supremacy of juridical meaning. But Cover suggests that there is a way out of this fate.

It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it. Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.<sup>9</sup>

Narrative serves as a bridge between nomoi and the state whose judges' legal interpretations and actions on these narratives resolve disagreements about the meaning of legal texts.<sup>10</sup> Such interpretation is jurispatic, to be sure, but its “imperial” function provides stability in society.

My application of *Nomos and Narrative* to competing visions of the nation must operate without the shared text for judges to interpret as national ideals generally lack memorialization in authoritative texts even if narratives of nation link national identity to ethnic, historical, and ideological legacies. Even where written, accounts of the nation tend not to have the kind of legal implications that constitutions possess. Ideas like we are a “nation of immigrants,” or we are a “nation of free people” do not demarcate approaches to immigration law or make slavery verboten. The contest over who we are as a nation is nonetheless significant and eventually affects how we approach law, informs what we believe appropriate (even legitimate),

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<sup>9</sup> *Id.* at 16.

<sup>10</sup> See Brett Scharffs, *Creation and Preservation in the Constitution of Civil Religion*, 41 GEO. WASH. INT'L L. REV. 985, 994-97 (2010) (“[C]ourts respond to jurisgenesis, the ‘too fertile’ proliferation of multiple meanings of a single text or symbol, with an authoritative voice that chooses which meaning will be given official sanction and which will enjoy the coercive imprimatur of the state.”).

and frames our interpretation of the Constitution. Consequently, the role of law and therefore narrative, interpretation, and judicial decision making is more indirect than the constitutional interpretation and judicial decision making that occupied Cover in *Nomos and Narrative*. However, the role of the state remains the same: to prevent an unbounded war of all against all over the meaning of the national identity.<sup>11</sup> Only now the role is to facilitate individual participation in that process. Cover's vision of the state as secondary in creating legal meaning<sup>12</sup> and striving to be neutral<sup>13</sup> suggests a different way of thinking about rights that the battle over national identity, understood in light of Cover's *nomoi*, reveals.

This article proceeds in four parts. Part I seeks to reclaim the inspirational and revolutionary aspects of *Nomos and Narrative*, identifying its importance in the face of illiberal populist nationalist movements. Part II defines the particular movements I define as populist nationalist and highlights their similarity to some *nomoi* Cover discusses. Part III examines how *Nomos and Narrative* seeks to address conflicting *nomoi*. Part IV scrutinizes how Cover's approach for mediating between conflicting *nomoi* might be used to address contests over the meaning of nation; by focusing on Cover's suggestion that courts avoid "a total crushing the jurisgenerative character" of *nomoi*,<sup>14</sup> it suggests a basis for adopting an additional dimension for understanding rights. This new dimension would add to the longstanding approach of protecting individuals from the excesses of the state by also focusing on protecting the individual from the excesses of the nation with the goal of ensuring that all can participate in developing a shared national identity.

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<sup>11</sup> Cf. Cover, *supra* note 1, at 55 ("The rule of *Walker v. City of Birmingham* subordinates the creation of legal meaning to the interest in public order. It speaks to the judge as agent of state violence and employer of that violence against the 'private' disorder of movements, communities, unions, parties, 'people,' 'mobs.'").

<sup>12</sup> *Id.* at 11 ("[T]he state is not necessarily the creator of legal meaning, the creative process is collective or social.").

<sup>13</sup> *Id.* at 48-53.

<sup>14</sup> *Id.* at 62.

## I. RECOVERING THE RESONANCE OF NOMOS AND NARRATIVE

*Nomos and Narrative* is among the more influential law review articles of all time.<sup>15</sup> The article, and Cover's work more generally, have inspired a generation of law professors who for years maintained a Robert Cover meeting in conjunction with the Association of American Law Schools Annual Meeting.<sup>16</sup> Though his scholarship in general focused on slavery, emancipation, civil rights protections, and constitutional law, he found inspiration and insight in Jewish religious study and traditions; *Nomos and Narrative* is cited in an interesting mix of studies on religion, native American sovereignty, L.G.B.T.Q.+ rights, and difference more generally.<sup>17</sup> Naturally, as an article associated with the then rising law and literature movement, the article is cited in those kinds of studies,<sup>18</sup> though perhaps less frequently than we might imagine. *Nomos and Narrative's* popularity and influence seems to have extended well beyond Cover's own work and apparent interests.

Aside from its popularity, *Nomos and Narrative* is an article whose influence is peculiar. The article is influential, inspiring, and for many eye-opening. At the same time, it is singular in that it introduces an idea that many acknowledge and find inspiration in and yet often have not really built upon. It is as if readers see *Nomos and Narrative* and the ideas in it as complete when introduced. While some will include *Nomos and Narrative* along with citations to other articles

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<sup>15</sup> See, e.g., Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012) (being the 16th most cited law review article as of 2012). A recent Westlaw search shows 1,657 law review articles citing *Nomos and Narrative* on September 21, 2021. See Cover, *supra* note 1.

<sup>16</sup> See, e.g., Soc'y Am. Law Tchr., Robert M. Cover Workshop at Golden Gate University Law School held in conjunction with the Association of American Law School Annual Meeting (Jan. 7, 2017).

<sup>17</sup> See, e.g., Valerie J. Phillips, *Parallel Worlds: A Sideways Approach to Promoting Indigenous-Nonindigenous Trade and Sustainable Development*, 14 MICH. ST. J. INT'L L. 521, 529-30 (2006) (quoting Cover, *supra* note 1) (invoking Cover's idea of a nomos to explain Indian law and its relationship with American law more generally); Lani Guinier, Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757-58 (2014) (discussing critical race theory).

<sup>18</sup> See, e.g., Marie Ashe, *Beyond Nomos and Narrative: Unconverted Antinomianism in the Work of Susan Howe*, 18 YALE J.L. & FEMINISM 1, 2 (2006) (acknowledging contribution and offering criticism).



on narrative and the law,<sup>19</sup> most just cite *Nomos and Narrative* standing alone to invoke the idea of the nomos that he introduces and the legal system's interaction with the normative traditions and the jurisprudential thinking of those traditions.<sup>20</sup> No other sources seem necessary. For some citing *Nomos and Narrative*, the citation is a "see, e.g., citation" for some aspect of the nomos as though there were countless other articles on the topic, but in fact there are but few that develop its ideas further. Many who cite *Nomos and Narrative* do not seem to know what to do with it; they honor its insight and erudition with citations while avoiding engaging its perhaps frightening implications.

*Nomos and Narrative*, like its author, is associated with efforts to produce a just world in a country with a less than stellar history, particularly on race questions. Both the article and its author were influential in explaining and justifying the law's early interventions to dismantle Jim Crow segregation.<sup>21</sup> Yet the article turns forty years old next year and Cover passed away thirty-five years ago. A new law professor today seeking to engage any of the fields associated with civil rights, the legacy of racial segregation, and efforts to recognize and protect marginalized groups is arguably more likely to cite and find inspiration in Kimberlee Crenshaw's groundbreaking work setting out the intersectional experience of violence and discrimination, *Mapping the Margins*,<sup>22</sup> than any of Cover's publications. *Nomos and Narrative*, like all scholarly work, is a product of its time and reflects the assumptions, challenges, and issues extant when it was authored. So as time has gone by, the work of others has gained prominence and influence. Yet *Nomos and Narrative* continues to be cited and to exert influence, though the nature of that influence is not particularly clear.

That is, the revolutionary and inspirational implications of *Nomos and Narrative* are not necessarily readily apparent today. The revolutionary aspect of the article may be hard to fully appreciate today because of the inverted character of the article. A major part of what

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<sup>19</sup> See, e.g., Phillips, *supra* note 17, at 529-30.

<sup>20</sup> See, e.g., Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91, 96 n.30 (2018) (citing Cover's *Nomos and Narrative* for "jurisgenerativity"). This is discussed later in the article with only brief reference toward the end of it. *Id.* at 112 nn.118-20.

<sup>21</sup> E.g., Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

<sup>22</sup> Kimberlee Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

was revolutionary in the article, the introduction of the nomos, turned on expressing a kind of sympathy for the discriminatory Bob Jones University.<sup>23</sup> Its “sympathetic” treatment is directed more at the Mennonite and Amish briefs in support of Bob Jones University than at the university itself; however, this sympathy is central to the article’s project.<sup>24</sup> *Nomos and Narrative* is an article about recognizing disagreement even as right and justice must be pursued, an approach perhaps at odds with our times.<sup>25</sup>

Moreover, that “sympathy,” however indirect, might seem strange unless one knew that Cover was one of many college students who trekked south to participate in the civil rights movement, launching him on a lifelong focus on civil rights and their protection

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<sup>23</sup> Cover, *supra* note 1, at 26-29.

<sup>24</sup> *Id.* at 25-35 (discussing Mennonite and Amish briefs). *See also id.* at 62 (connecting to Bob Jones University by stating: “The University, in effect, claimed for itself a nomic insularity that would protect it from general public law prohibiting racial discrimination.”).

<sup>25</sup> It should be said that what I am calling “sympathy” for Bob Jones University is found in a complex argument of Cover’s, connected to setting up nomoi’s jurisgenerative capacity but running through much of the article. Cover’s “sympathy” is expressed in a complicated way. Cover describes part of his project in *Nomos and Narrative* as describing “the ways insular communities establish their own meanings for constitutional principles through their constant struggle to define and maintain the independence and authority of their *nomos*,” Cover, *supra* note 1, at 25, giving significance to the constitutional principles he assumes Bob Jones University stands for. Then, in discussing “The Origins of Legal Meaning of Interpretive Communities,” *id.* at 26, he examines the briefs in support of Bob Jones University submitted by the Mennonites, *id.* at 26-29, and Amish, *id.* at 29-30, and then argues that these and related groups possess a vision of law rooted in their nomoi, *id.* at 30-34. This extended examination is aimed at establishing that sectarian communities establish their “own meaning for the norms to which it and its members conform.” *Id.* at 34. Such groups, he then argues, often seek to change the world through a “redemptive” practice. *Id.* at 34-35. Garrisonian abolitionism is his example of these elements. *Id.* at 35-40. Though Cover is no fan of Bob Jones University’s segregationist position, his extended foray into the creation of legal meaning demonstrates his belief in taking their views seriously, albeit through the claims of amici. Eventually, he brings these together by stating that: “The University, in effect, claimed for itself a nomic insularity that would protect it from general public law prohibiting racial discrimination.” *Id.* at 62. In ultimately criticizing the Burger Court’s failure to engage the conflict between the constitutional values of integration and the insular values of Bob Jones University and “throwing the claims of the protected insularity to the mercy of public policy,” Cover declares: “The insular communities deserved better.” *Id.* at 67.

in law.<sup>26</sup> That is, there is no doubt about his disapproval of Bob Jones University's segregationist positions and racist worldview. He had put his life on the line in opposition to such views. This background informs his ultimate resolution of the problem exposed by his inversion of the focus in *Nomos and Narrative*; if a community has a racist nomos, it is not enough for the Court to just reject it.<sup>27</sup> It should declare the redemptive constitutional value that requires that rejection, understanding that what it is doing is destroying that competing normative vision. At the time that *Nomos and Narrative* was written, the pushback on civil rights legalism was gaining steam and influence on the Supreme Court. Considering this growing abandonment of efforts to dismantle vestiges of the Jim Crow era, Cover's complaint that the Court's support for ending Bob Jones University's tax-exempt status because of the university's discriminatory behavior was weak and halfhearted<sup>28</sup> takes on added significance, as does his centering of the jurisgenerative capacity of nomoi that he here nevertheless sanctions destroying. He understood that a decision in favor of Bob Jones University would represent a repudiation of the desegregation project of *Brown v. Board of Education*<sup>29</sup> given the "segregation academies" that had emerged throughout the South.<sup>30</sup> Therefore, he wanted more from the Court.

<sup>26</sup> Robert A. Burt, *Robert Cover's Passion*, 17 YALE J.L. & HUMAN. 1, 2 (2005) (discussing Robert Cover's Civil Rights Work and commitment).

<sup>27</sup> In ultimately criticizing the Burger Court's failure to engage the conflict between the constitutional values of integration and the insular values of Bob Jones University and "throwing the claims of the protected insularity to the mercy of public policy." Cover, *supra* note 1, at 67.

<sup>28</sup> Cover, *supra* note 1, at 66. He concludes the article bitterly:

[T]he force of the Court's interpretation in *Bob Jones University* is very weak. It is weak not because of the form of argument, but because of the failure of the Court's commitment—a failure that manifests itself in the designation of authority for the decision. The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional. The grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong.

*Id.*

<sup>29</sup> 347 U.S. 483 (1954).

<sup>30</sup> Thomas B. Edsall, *Abortion Has Never Been Just About Abortion*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/15/opinion/abortion-evangelicals-conservatives.html>. Indeed, commentators today link the rise of the anti-abortion movement as a signal issue for conservatives as a way of taking the

Cover's disappointment with the Court's approach perhaps reflected his recognition of the rapid erosion of the Court's support for robust implementation of *Brown* that the opinion represented. Cover's impatience with the Court's weak approach might seem out of place since *Nomos and Narrative* was written when the liberal ideal that underlays the post-World War II rights regime in both civil and human rights law was still vital.<sup>31</sup> The push-back on civil rights was to be resisted and perhaps seemed manageable; in any case debates like that in the Bob Jones case were still about how to address racial segregation, inequality, and the rights of individuals in the plural society of 1980s United States. But Cover seems to understand the implications of the Court's weakness. Despite all this, *Nomos and Narrative* is sympathetic to the idea that religious communities like Bob Jones University might have a different vision of right and the constitutional order. Sympathy for the Mennonite and Amish positions in support of Bob Jones University was not too much of a step to take. But today, after a relentless, more than forty-year streak of successes for opponents of the civil rights movement,<sup>32</sup> the balance Cover is trying to strike in the article might seem to give civil rights opponents too much credit for acting in good faith.

But the analysis of the Supreme Court's treatment of Bob Jones University was never the inspirational part of the article. Rather, many found in Cover's introduction of the nomos a new, thrilling way of thinking about the law.<sup>33</sup> Legal institutions and rights that had become

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anti-desegregation sentiment of white, Christian southerners and directing it toward a more effective organizing message. *Id.*

<sup>31</sup> See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* xvii (1990) ("Ours is the age of rights").

<sup>32</sup> See, e.g., *THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVE ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S.* 3 (Lynda G. Dodd ed., 2018); SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUST AND THE POLITICS OF JUDICIAL RETRENCHMENT* 1, 2-12 (2015).

<sup>33</sup> James Grey Pope's summary of *Nomos and Narrative* is characteristic:

In his pathbreaking article, *Nomos and Narrative*, Robert Cover argued that the legal thought and practice of outsiders to the official court system can be just as important to the study of law as that of insiders. Cover distinguished jurisprudence, the analytic science of law, from jurisgenesis, the creation of legal meaning. In contrast to the technical language of jurisprudence, jurisgenesis thrives on narrative. Legal and popular culture are linked through storytelling. Cover argued that legal rules and principles take on meaning by virtue of their location in socially resonant narratives. Although elites might control the technical discourse of law, they do not and cannot control the generation of narratives about law. All

so central to the pursuit of civil rights, equality, and justice, and had consequently attained a mythic character, were reduced in *Nomos and Narrative* to necessary but violent institutions that quashed some traditions to promote others. Importantly, Cover introduced an intellectual space to consider the competing traditions of not just organized religion in the contest over rights, equality, and justice (the arguably strange part of his sympathy for Bob Jones University), but of all kinds of communities and groups.<sup>34</sup> And, by introducing the *nomoi*, he avoided bombastic, corrosive, or slippery concepts like race, nation, or culture. Since the focus of the article was on the nascent legal traditions created by *nomoi*, he also valuably avoided normative judgments about any particular *nomoi*. In this way, *Nomos and Narrative* inspired one to think of the many ways law emerged, how it was connected to the dynamic cultural and social processes in any community, and how those processes might support an alternative way of thinking about justice. Right and justice was no longer the monopoly of opaque, indeed mystical, common law traditions or authoritative and final Supreme Court pronouncements but instead a part of a vibrant negotiation among social groups of equal standing.

Already in 2005 though, Robert Post noted that the vitality of *Nomos and Narrative* had been lost on his students. Having introduced the article in a seminar he was teaching on popular constitutionalism he notes that his “students were virtually indifferent. They found *Nomos and Narrative* eloquent, but curious and antique, informed by a sensibility that seemed distant and indecipherable.”<sup>35</sup> Post explains this indifference as rooted in his students’ interest in the state apparatuses that Cover diminishes.

I believe that the [explanation of their indifference] lies in Cover's belief that “there is a radical dichotomy

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Americans share a constitutional text, but we do not share an authoritative historical account. Even if we did, “we could not share the same account relating each of us as an individual to that history.”

James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 944 (1997).

<sup>34</sup> Caleb J. Stevens, *Nomos and Nullification: A Coverian View of New York's Habitual Offender Law, 1926 to 1936*, 56 AM. CRIM. L. REV. 427, 428-29 (2019) (“Cover's normative universe is inclusive of not only legal institutions and prescriptions in well-known sources of law, such as statutes, regulations, and judicial decisions, but also the narratives that inform how we interpret (or resist) prescriptions and even inhabit and navigate legal institutions.”).

<sup>35</sup> Robert C. Post, *Who's Afraid of Jurispathic Courts?: Violence & Public Reason in Nomos and Narrative*, 17 YALE J.L. & HUMAN. 9, 9 (2005).

between the social organization of law as power and the organization of law as meaning.” The law that interests my students, the law of the state, is for Cover merely a hollow instrument of violence, “itself incapable of producing the normative meaning that is life and growth.” In *Nomos and Narrative* the law of the state carries no republican imprimatur. It is not the result of citizens working together in public to produce a government that embodies common civic values. Composed just before the Republican revival and the renaissance of Rawlsian public reason, *Nomos and Narrative* is strikingly uninterested in the normative possibilities of constitutional politics. My best guess is that the students in my seminar could not relate to *Nomos and Narrative* because they regarded these forms of civic engagement as essential to their life's work.<sup>36</sup>

Post's students suggest that *Nomos and Narrative* had arguably already attained its peculiar, singular status as an inspirational text that opened possibility but had lost some of its inspiration.

When I encountered *Nomos and Narrative* in 1989, I felt the power and vigor Post attributes to it. Arriving from the rural deep south where my civil rights attorney father labored under the threat of violence while he attacked the citadel of law as a protector of segregation, inequality, and oppression, Cover's perhaps too cynical view of judges and their justice-achieving capacity rang true, even as his faith in *nomoi* to generate alternative visions of justice liberated me from thinking that my view of right, my father's view of justice, was somehow illegitimate and destined to always be on the margins of the world I was hoping (as a twenty-two year old law student) to shape. Before *Nomos and Narrative* I knew of law as either a procedural maze guarding access to substantive principles that somehow supported, or were at least indifferent to, the segregation that was only being dismantled (begrudgingly for many) during my youth, *or* a countervailing set of inspirational decisions starting with *Brown* that I had found faith in, but also saw denigrated as something less than true

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<sup>36</sup> *Id.* at 9-10.

law.<sup>37</sup> The article's inspiration was in its opening of possibility for understanding justice, right, and law.

While Post is likely correct that his 2005 students desired more about how constitutional politics could shape the world and how judges might be more than just jurispatic, <sup>38</sup> I would venture that much of what was powerful to me seemed neither novel nor groundbreaking by 2005, as the recognition of multiple visions of justice in a plural society has worked its way into other arguments about law and justice.<sup>39</sup> Like the tantalizing kernel of information on celebrities that one discovered in an old magazine at an acquaintance's home before the internet, *Nomos and Narrative* provided a vision of law and community that many students like me were starved for. However, just as celebrity trivia is today readily available on the Internet and social media, the novelty of *Nomos and Narrative* is lost in the wave of writing in intervening years that centers communities and individuals' experience of their identities in those communities. Is it not precious, nor is it any longer consigned to be transmitted through whispers as a treasured insight fortuitously discovered? To some extent, *Nomos and Narrative* pointed the way for the intervening

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<sup>37</sup> Unsurprisingly, perhaps, I am still working to make sense of civil rights law as something less than law. John Valery White, *Civil Rights Law Equity: An Introduction to a Theory of What Civil Rights Has Become*, 78 WASH. & LEE L. REV. 1000 (2022).

<sup>38</sup> Post, *supra* note 35, at 11 (“Although Cover does not explicitly deny the possibility that judges can create *nomos*, he does conclude that ‘the commitment of judges’ is ‘to the hierarchical ordering of authority first, and to interpretive integrity only later.’ And he does suggest that ‘the commitment to a jurisgenerative process that does not defer to the violence of administration is the judge's only hope of partially extricating himself from the violence of the state.’ It is of course the very possibility of such extrication that Cover subsequently denies in *Violence and the Word*.”). See also *id.* at 13-14 (“I do not fully understand the emphasis that Cover places on the jurispatic nature of courts. . . . The problem with courts is not that they are jurispatic, but rather that they are violent, and it is the connection to the organized violence of the state that most deeply troubles Cover and leads him to doubt the possibility of a true *statist paideia*.”).

<sup>39</sup> In addition to the focus on identity and the intersectionality of identity that Crenshaw introduced, recognition has emerged since Cover's death as a significant way of understanding social justice where “assimilation to majority or dominant cultural norms is no longer the price of equal respect.” NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 7 (Nancy Fraser & Axel Honneth eds., Joel Golb et al. trans., 2003). See AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (Joel Anderson trans., 1995).

scholarship,<sup>40</sup> particularly in its characterization of the juridical process as violent and opposed to nomos-based jurisgenesis, and in its recognition of the value of narrative to convey competing visions of justice that might not be recognized by formal judicial processes. But it neither stands out nor is it necessarily predominant.

What Nomos *and Narrative* does do, however, is point to difficult arguments about how rights might be justified in a world consisting of many nomoi.<sup>41</sup> This is what I hope to explore about Cover's work here. Post sees Nomos *and Narrative* as envisioning a sterile state<sup>42</sup> with limited ability to create values that "express the nomoi of its population."<sup>43</sup> Despite the intense disputes of the post-9/11 political order, Post can still conceive of political institutions much less cynically than Cover. But today, Cover's worry about the state—which Post commended, stating that "[t]he state's sterility is a good thing . . . because a government that sought to impose 'a statist paideia' would be positively dangerous. It would use violence to crush and displace the autonomous communities where nomos is actually

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<sup>40</sup> Jack Chin argues that Cover was in effect a Critical Race Theorist, given the nature of his commitments. Jack Chin, Remarks at the Life and Work of Robert M. Cover Conference at Touro College Jacob D. Fuchsberg Law Center (Oct. 4 & 5, 2021).

<sup>41</sup> William Eskridge suggests this reading of Cover. See William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2413 (1997).

<sup>42</sup> Post, *supra* note 35, at 11-12 ("The most to which the state can aspire is what Cover calls an 'imperial' or 'world maintaining' attitude toward nomoi. The state can embody 'the universalist virtues that we have come to identify with modern liberalism,' which are 'essentially system-maintaining weak forces.' In this mode the state can shelter and protect the communities that produce paideic nomos; it can pursue 'virtues that are justified by the need to ensure the coexistence of worlds of strong normative meaning.' But these virtues enact 'an organizing principle itself incapable of producing the normative meaning that is life and growth.'").

<sup>43</sup> Against Cover, Post is significantly more optimistic about courts and the state:

Much contemporary work in public law begins with a radically different premise than *Nomos and Narrative*; it begins with the notion that the state can express the nomoi of its population, forged through public discussion and dialogue. It is not afraid of jurispthic courts, because it regards the judiciary as voicing narratives in which we believe, and it understands all narratives to be jurispthic. Contemporary public law scholarship recognizes that reason has limits, that the law of the state inflicts violence, and that all law ultimately requires commitment. But it regards these facts as boundary conditions, true in extremis but not descriptive of the everyday workings of the liberal state.

*Id.* at 15.



forged”<sup>44</sup>—seems arguably warranted. The rise of populist nationalism makes the state today potentially the dangerous, non-sterile threat Post described as fortunately neutered. Advocates of such nationalism increasingly seek to capture the state for the very purpose of imposing a vision of the nation on the population, rendering some permanent outsiders where not seeking to exclude some communities from the “nation” and state.<sup>45</sup> The dangerous capacity of the state as violent leveler of identities makes Cover’s sterile mediator of *nomoi* ever more attractive.

My work here is an attempt to “theorize how [the] plural worlds [of Cover’s *nomoi* and the *nomos* of the liberal state] can continue to co-exist, apart from the ‘weak’ virtues of a ‘system-maintaining’ empire.”<sup>46</sup> I believe that Cover’s *Nomos and Narrative*, though limited by its terms to the relationship between the juridical traditions of *nomoi* and the competing tradition of the state, points to how to manage the growing animosity between competing visions of nationalism suddenly resurgent in recent years.<sup>47</sup> To do so, I hope to extend the vision of competing *nomoi* to competing visions of nation that, unfettered, become “unstable and sectarian in their social

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<sup>44</sup> *Id.* at 11-12.

<sup>45</sup> At the extreme are “calls for an end to all immigration and [insistence on] sending immigrants and their children back to their countries of origin.” Norimitsu Onishi, *The Man Behind a Toxic Slogan Promoting White Supremacy*, NY TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/world/europe/renaud-camus-great-replacement.html> (describing French author Renaud Camus, creator and promotor of the “great replacement” theory and recounting the platform of the French political party he formed, “l’Innocence”).

<sup>46</sup> The concern here is what Post sees at Cover’s undertheorizing about the role of the liberal state:

It is possible that Cover’s refusal to acknowledge the distinctive *nomos* of liberalism follows from a dilemma in which he was ensnared: If liberalism is its own *nomos*, and if liberalism is necessary in order to preserve the small autonomous communities that Cover finds so appealing, then the *nomos* of liberalism acquires a special kind of logical priority. But Cover is unwilling to recognize this priority, because he is concerned to insist upon plural worlds of equal *nomoi*. The price of this insistence is that Cover cannot adequately theorize how these plural worlds can continue to co-exist, apart from the “weak” virtues of a “system-maintaining” empire. The potential *nomos* of liberalism is thus reduced to “an organizing principle itself incapable of producing the normative meaning that is life and growth,” and courts are concomitantly characterized as merely “jurispathic.”

Post, *supra* note 35, at 13.

<sup>47</sup> See *infra* Part II.

organization, dissociative and incoherent in their discourse, wary and violent in their interactions”<sup>48</sup> and to build on the tools that Cover articulated to deal with this world: “[t]he sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.”<sup>49</sup>

## II. ON POPULIST NATIONALISM

Recent years have seen a proliferation of “populist” movements in western democracies.<sup>50</sup> These movements are characterized by anti-globalism, such as in the rejection of the European Union’s transnational governance<sup>51</sup> in England’s Brexit vote.<sup>52</sup> They also reject a perceived rule by elites at the expense of the “working man” as evidenced in France’s “Gilets Jaunes” movement,<sup>53</sup>

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<sup>48</sup> Cover, *supra* note 1, at 16.

<sup>49</sup> *Id.*

<sup>50</sup> Andrea Kendall-Taylor & Erica Frantz, *How Democracies Fall Apart: Why Populism Is a Pathway to Autocracy*, FOREIGN AFFS. (Dec. 5, 2016), <https://www.foreignaffairs.com/articles/2016-12-05/how-democracies-fall-apart> (arguing that election of populist parties has replaced coup’s as means of authoritarians coming to power).

Populism is gaining ground. Around the world, economic hardship and growing unease with globalization, immigration, and the established elite have propelled such movements into power, leading to a groundswell of public support for parties and leaders viewed as capable of holding the forces of cultural and social change at bay.

*Id.*

<sup>51</sup> James Bohman, *Constitution Making and Democratic Innovation: The European Union and Transnational Governance*, 3 EUR. J. POL. THEORY 315 (2004); Timothy Garton Ash, *It’s the Kultur, Stupid*, N.Y. REV. OF BOOKS, Dec. 7, 2017 (reviewing Melanie Amann & Finis Germania, *ANGST FÜR DEUTSCHLAND: DIE WAHRHEIT ÜBER DIE AfD: WO SIE HERKOMMT, WER SIE FÜHRT, WOHIN SIE STEUERT [ANGST FOR GERMANY: THE TRUTH ABOUT THE AfD: WHERE IT COMES FROM, WHO LEADS IT, WHERE IT IS HEADED]* (2018), and ROLF PETER SIEFERLE, *THE END OF GERMANY* (2017)) (“Typical of all European populisms is a negative attitude toward the EU in general and the euro in particular.”).

<sup>52</sup> See Matthias Matthijs, *The Right Way to Fix the EU: Put Politics Before Economics*, FOREIGN AFFS. (May/June 2020), <https://www.foreignaffairs.com/articles/2020-04-13/right-way-fix-eu> (linking Brexit to concerns with EU).

<sup>53</sup> *France protests: The Voices of the ‘Gilets Jaunes’*, BBC (Dec. 8, 2018), <https://www.bbc.com/news/world-europe-46480867>. The gilets jaunes movement is cited here because the movement perhaps reflected a populist uprising that was not

and are consistent with an embrace of authoritarianism, as in the rise of “populist” parties in support of “strongman” leaders in Poland, Hungary, and Turkey.<sup>54</sup> These movements tend to be anti-immigrant where they are not simply xenophobic or racist. Naturally, the “populist” support of President Trump and the related “Trumpism” has been characterized in these terms,<sup>55</sup> especially after the January 6th insurrection.<sup>56</sup> The focus here is on what I am calling “populist nationalist” movements to distinguish them from populism more generally, and to highlight that theirs is a particular kind of nationalist

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necessarily linked to populist nationalism as discussed here. The movement was a mass movement, a populist protest, in opposition to the policies of a center-right government in a country with populist nationalist parties (on the left but especially the right) but which generally avoided close associations with those parties. *See, e.g.,* John Lichfield, *Just Who Are the Gilets Jaunes?*, GUARDIAN (Feb. 9, 2019), <https://www.theguardian.com/world/2019/feb/09/who-really-are-the-gilets-jaunes> (“[M]ixture of supporters explains in part the heterogenous character and demands of the movement, which point both left and right”).

<sup>54</sup> Turkey, Hungary, and Poland have become exemplars of authoritarian regimes that have come to power in democratic systems then set to undermining democratic institutions and the rule of law.

Turkey’s political trajectory [under President Recep Tayyip Erdogan] is an exemplary case of a country permanently rolling back democratizing reforms, but it’s not the only one. Hungary’s Viktor Orbán and Jarosław Kaczyński’s Law and Justice party in Poland are undermining the rule of law, democratic values, and human rights in the service of what they define as authenticity and security. These are developments that predate the migrant crisis that is buffeting Europe, though the large number of people from Africa and the Middle East seeking refuge in the European Union has made Orbán’s and Kaczyński’s message more politically potent, and thus the undoing of democratic institutions and liberal values politically acceptable, for large numbers of Hungarians and Poles.

Steven A. Cook, *Strongmen Die, but Authoritarianism is Forever*, FOREIGN POL’Y (July 5, 2018), <https://foreignpolicy.com/2018/07/05/strongmen-die-but-authoritarianism-is-forever>.

<sup>55</sup> See Foreign Affairs’ special edition on populism *The Power of Populism*, FOREIGN AFF’S (Nov./Dec. 2016), <https://www.foreignaffairs.com/issue-packages/2016-10-17/power-populism>, especially Fareed Zakaria, *Populism on the March: Why the West is in Trouble*, FOREIGN AFFS. (Nov./Dec. 2016), <https://www.foreignaffairs.com/articles/united-states/2016-10-17/populism-march> (linking American populism associated with President Trump with populist movements throughout the West).

<sup>56</sup> *See, e.g.,* Zack Beauchamp, *Call it Authoritarianism*, VOX (June 15, 2021), <https://www.vox.com/policy-and-politics/2021/6/15/22522504/republicans-authoritarianism-trump-competitive> (suggesting that Republican party behavior since January 6 reflects authoritarianism).

claim whose anti-pluralist nature and illiberalism is inherent to their view of the state's obligations to them and their ilk.

The “populism” of many of these movements is a bit of an incongruity, however. As Mark Tushnet and Bojan Bugarić importantly distinguish, there are many manifestations of populism only some of which would pose conflicts with constitutionalism or liberalism.<sup>57</sup> They “agree that some variants of populism are incompatible with modern liberal constitutionalism but argue that the tension between populism as such and constitutionalism as such, though real, is significantly narrower than much commentary suggests.”<sup>58</sup> David Fontana similarly seeks to distinguish “unbundled” and “bundled populism.”<sup>59</sup> Thus, “[p]opulism generally refers to arguments pitting a large number of average people unjustly disempowered relative to and against some power elite.”<sup>60</sup> But,

[t]his unbundled version of populism is simply insufficient to explain our current political moment. Something else--something more--is happening now that was not happening previously. Scholars have therefore bundled into the definition of populism a number of other criteria. In bundled populism, antiestablishment views are now also bundled together with conceptually distinct authoritarian and xenophobic worldviews.<sup>61</sup>

Thus, former state department official Fiona Hill argues that populism is a strongman strategy:

The essence of populism is creating a direct link with “the people” or with specific groups within a population, then offering them quick fixes for complex problems and bypassing or eliminating intermediaries such as political parties, parliamentary representatives,

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<sup>57</sup> Mark V. Tushnet & Bojan Bugarić, *Populism and Constitutionalism: An Essay on Definitions and Their Implications* (Harv. Pub. L., Working Paper No. 20-17, 2020).

<sup>58</sup> *Id.* at 1; see also MARK V. TUSHNET & BOJAN BUGARIĆ, *POWER TO THE PEOPLE: CONSTITUTIONALISM AFTER POPULISM* (2021). As Tushnet and Bugarić note, there are many competing definitions of populism that cast the concept differently, often loading it with political commitments that other populist movements would not embrace. Tushnet & Bugarić, *supra* note 57.

<sup>59</sup> David Fontana, *Unbundling Populism*, 65 *UCLA L. REV.* 1482 (2018).

<sup>60</sup> *Id.* at 1486.

<sup>61</sup> *Id.* at 1494.

and established institutions. Referendums, plebiscites, and executive orders are the preferred tools of the populist leader . . . .<sup>62</sup>

She notes that this strategy is deployed effectively in recent years through use of social media,<sup>63</sup> which she contends has been weaponized by Russia<sup>64</sup> to destabilize western democracies.<sup>65</sup> In any event, hers is an example of a now popular combination of tenets of populism with authoritarianism in description of the current threat to western democracies.

Indeed, the groups and movements advocating what I am calling populist nationalism are typically plurality movements whose use of populism is strategic, meant to suggest a “true” segment of the national population.<sup>66</sup> In this sense, these are “nationalist” movements which directly and indirectly lay claim to their countries’ “true” identity and argue that this true national identity is being undermined by foreign forces: generally, the suggestion is that a traitorous elite has betrayed the true nation in favor of a globalized economy, immigrants, and other dangerous elements in the country that undermine traditional

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<sup>62</sup> Fiona Hill, *The Kremlin’s Strange Victory: How Putin Exploits American Dysfunction and Fuels American Decline*, FOREIGN AFFAIRS (Nov./Dec. 2021), <https://www.foreignaffairs.com/articles/united-states/2021-09-27/kremlins-strange-victory>.

<sup>63</sup> *Id.* (“American-made [social media] technology has magnified the impact of once fringe ideas and subversive actors around the world and become a tool in the hands of hostile states and criminal groups. Extremists can network and reach audiences as never before on platforms such as Facebook and Twitter, which are designed to attract people’s attention and divide them into affinity groups.”).

<sup>64</sup> *Id.* (“Putin has weaponized this technology against the United States, taking advantage of the ways that social media undermines social cohesion and erodes Americans’ sense of a shared purpose.”).

<sup>65</sup> *Id.* (“Many [democratic U.S. allies], especially in Europe, find themselves in the same political predicament as the United States, as authoritarian leaders and powers seek to exploit socioeconomic strife and populist proclivities among their citizens.”).

<sup>66</sup> Jan-Werner Müller defines populism as “a particular moralistic imagination of politics, a way of perceiving the political world that sets a morally pure and fully unified—but, I shall argue, ultimately fictional—people against elites who are deemed corrupt or in some other way morally inferior.” JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 19-20 (2016). See also William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 J. DEMOCRACY 5, 12 (2018) (“Populism understands the elite as hopelessly corrupt, the people as uniformly virtuous—meaning that there is no reason why the people should not govern themselves and their society without institutional restraints. And populist leaders claim that they alone represent the people, the only legitimate force in society.”).

values.<sup>67</sup> They reject a pluralist vision of nationalism and seek to claim priority for themselves to the perquisites of their country.<sup>68</sup> The power of these claims come from the ability of the movements to commandeer the symbols and legacy of the nation to advance a narrow, albeit often traditional vision of national identity.<sup>69</sup>

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<sup>67</sup> Comparing German populist nationalism to French and American versions, Timothy Garton Ash notes:

Like all contemporary populisms, the German version exhibits both generic and specific features. In common with other populisms, it denounces the current elites (Alteliten in AfD-speak) and established parties (Altparteien) while speaking in the name of the Volk, a word that, with its double meaning of people and ethno-culturally defined nation, actually best captures what Trump and Le Pen mean when they say “the people.”

Ash, *supra* note 51. Ash also notes the importance of anti-immigrant sentiment to the rise of German populist nationalism:

The dramatic influx of nearly 1.2 million refugees in 2015–2016 is the single most direct cause of the Alternative’s electoral success. Its leaders denounce Merkel for opening Germany’s frontiers in September 2015 to the massed refugees then being made thoroughly unwelcome in Viktor Orbán’s xenophobic populist Hungary. Following last year’s Islamist terror attack on a Christmas market in Berlin, in which twelve were killed, one AfD leader tweeted: “these are Merkel’s dead.”

*Id.*

<sup>68</sup> Ash is also instructive here; when discussing the strength of German populist nationalism in the former East Germany, he notes that populist nationalist sense being ignored while others, typically undeserved immigrants, “get everything,” by which they mean generous welfare benefits. *Id.* He states poignantly: “In explaining the populist vote in many countries, the inequality of attention is at least as important as economic inequality.” *Id.* See also ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY 168 (Pelican, 2018) (populist nationalists assert “a greater right to rewards: consider people who fought for their nation in wars, or who paid taxes all their lives, compared to someone who just arrived in the country as an economic immigrant.”); *id.* at 169 (“Large-scale immigration can . . . threaten the unwritten contract between different generations, whereby people are willing to pay higher taxes for the benefit of those who follow” but not necessarily new immigrants).

<sup>69</sup> Alexander Cooley & Daniel H. Nexon, *The Real Crisis of Global Order: Illiberalism on the Rise*, FOREIGN AFFS. (Jan./Feb. 2022), <https://www.foreignaffairs.com/articles/world/2021-12-14/illiberalism-real-crisis-global-order>. Arguing the reduction of international economic and social barriers have facilitated authoritarian, populist nationalist leaders, Alexander Cooley and Daniel Nexon describe “traditional values and national culture as central to those regimes’ success.” *Id.* The international order, they contend, “now favors a diverse array of illiberal forces, including authoritarian states, such as China . . . , as well as reactionary populists and conservative authoritarians who position themselves as

Authors broadly sympathetic to aspects of the populist nationalist movement recognize these movements as contests over the control of the state apparatus in the name of the “nation.” For example, Roger Eatwell and Matthew Goodwin suggest that what they call “National Populism” is likely to be an enduring movement because it represents genuine grievances worthy of redress in modern democracies: “National Populism prioritizes the culture and interests of *the nation*, and promises to give voice to a people who feel that they have been neglected, even held in contempt, by distant and often corrupt elites.”<sup>70</sup> Though they argue that its “supporters are more diverse than the stereotypical ‘angry old white men,’”<sup>71</sup> it is notable that they take “the nation” as settled in their argument that National Populist “are part of a growing revolt against mainstream politics and liberal values.”<sup>72</sup>

In a statement that seems quaint after the January 6th revolt, Eatwell and Goodwin argue that the National Populist

challenge to the liberal mainstream is in general not anti-democratic. Rather, national populists are opposed to certain aspects of liberal democracy as it has evolved in the West. Contrary to some of the hysterical reactions that greeted Trump and Brexit, those who support these movements are not fascists who want to tear down our core political institutions. A small minority do, but most have understandable concerns about the fact that these institutions are not representative of society as a whole and, if anything, are

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protectors of so-called traditional values and national culture as they gradually subvert democratic institutions and the rule of law.” *Id.*

<sup>70</sup> EATWELL & GOODWIN, *supra* note 68, at ix (emphasis added).

<sup>71</sup> *Id.* at x.

<sup>72</sup> *Id.* at xi. In their extended chapter on “destruction,” *id.* at 131-175, Eatwell and Goodwin argue “that national populism partly reflects deep-rooted public fears about how a new era of immigration and hyper ethnic change could lead to the destruction of their wider group and way of life.” *Id.* at 132. Yet, throughout this discussion they take the “nation” as a set entity contrasted with demographic change. This passage is typical: Demographic fears flow from a belief that the scale and pace of immigration put the longer-term survival of the national group at risk, amounting to intense concern about its possible *destruction.*” *Id.* at 147.

becoming evermore cut adrift from the average citizen.<sup>73</sup>

Part of what makes their statement quaint after January 6 is the evident contempt for political processes of majoritarianism reflected in the “stop the steal” arguments that fueled the January 6 revolt. But another part is that Eatwell and Goodwin’s references to the “average citizen” in association with their national populists appears to assert that theirs is the only legitimate national identity and seems to imply that nation is relatively static, not transforming with demographic, cultural, and other social change—the “society as a whole” seems to be tantamount to the national populists they discuss. Consequently, they seem to suggest that “the people” are ignored in service of others who are not of the nation without establishing why others are not of the nation.

Many have expressed concern with these movements and the cramped vision of national identity they project. So much has this been the case that some of these commentators have struggled to advance other ways of thinking about national identity, uncorrupted with the stain of “nationalism.”<sup>74</sup> These commentators join a long line of liberal writers who are uneasy with “nationalism,” perhaps due to its vague similarities with racism and, above all, the use of nationalist rhetoric in support of the fascist movements of the early twentieth century that culminated in the Holocaust and the Second World War.<sup>75</sup> Nationalism seems inconsistent with pluralistic, liberal democracies,

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<sup>73</sup> *Id.* at xi. Generally, Eatwell and Goodwin suggest that national populist movements are not anti-democratic. They concede that “[s]ome national-populist leaders, like Hungary’s Victor Orban, speak of creating a new form of ‘illiberal democracy’ that raises worrying issues about democratic rights and the demonization of immigrants,” but they suggest that this is not reflective of larger national populist movements. *Id.* See also Galston, *supra* note 66, at 11 (“[Populism] is skeptical . . . about constitutionalism, insofar as formal, bounded institutions and procedures impede majorities from working their will. It takes an even dimmer view of liberal protections for individuals and minority groups.”).

<sup>74</sup> Patriotism is a popular alternative. See Michael Lind, *Jill Lepore Argues for American Patriotism*, N.Y. TIMES, May 28, 2019 (reviewing JILL LEPORE, *THIS AMERICA: THE CASE FOR THE NATION* (May 28, 2019)).

<sup>75</sup> The late Tony Judt summarizes these tendencies among Marxist and liberal thinkers in the second half of the 20th century. Tony Judt, *The New Old Nationalism*, N.Y. REV. OF BOOKS (May 26, 1994), <https://www.nybooks.com/articles/1994/05/26/the-new-old-nationalism> (reviewing WALKER CONNOR, *ETHNONATIONALISM: THE QUEST FOR UNDERSTANDING* (Princeton Univ. Press eds., 1994)).



given that the advancement of a national identity seems to necessarily exclude groups within a country that do not share the history, experience, or perspective of the dominant group.<sup>76</sup>

There has been an explosion of writing on “nation” starting around 1980, proliferating in the aftermath of the fall of the Soviet Union, and reemerging with a particular focus on populism in recent years. Tony Judt summarized Walker Conner’s succinct claim that “a nation is a group of people who entertain a belief in their common ancestry, what he calls a ‘myth of common descent.’ It has nothing to do with a state, which may or may not be a ‘nation-state,’ although it usually isn’t . . . .”<sup>77</sup> Hobsbawm’s claim that nation is a modernist development highlights that nation was bound to the state in the revolutionary period at the end of the 18th century and was largely undertheorized by writers, like John Stuart Mill, when thinking about rights and state legitimacy.<sup>78</sup> Generally, nation was viewed as an archaic concept, expected to be bound into civic pluralism if not abandoned by liberal individualism.<sup>79</sup> Hobsbawm is among a diverse

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<sup>76</sup> This kind of distinction between real and unreal citizens made an appearance recently in the French presidential campaign where center right French presidential candidate, Valérie Pécresse, embraced the conspiratorial “great replacement” theory, drawing “a distinction between ‘French of the heart’ and ‘French of papers’—an expression used by the extreme right to disparage naturalized citizens.” Norimitsu Onishi, *In France, a Racist Conspiracy Theory Edges Into the Mainstream*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/world/europe/france-elections-pecresse-great-replacement.html>.

<sup>77</sup> Judt, *supra* note 75.

<sup>78</sup> HOBBSAWM, *supra* note 5, at 24 (“[M]uch of the liberal theory of nations emerges only, as it were, on the margins of the discourse of liberal writers.”). *See also id.* at 14-45.

<sup>79</sup> Tony Judt summarizes this sentiment:

In Michael Ignatieff’s words, there has been widespread “cosmopolitan disdain and astonishment” at the ferocity of peoples’ demands for their own nation-state. For a long time, the conventional wisdom was that such “tribal,” ideological allegiances were passé, at least in Europe. For liberals and Marxists alike, national attachments and their attendant emotions made no rational sense in the contemporary world. For liberal scholars the era of nation-state-making was the necessary prelude to a world of constitutional states and equal citizens. It therefore made sense that liberalism and nationalism were intertwined in nineteenth-century European politics. Traditional liberal thinkers, however, could not sympathize with the later problem of smaller communities within or between such states, such as the Slovaks or the Flemish, seeking a distinctive national and international identity in preference to, and often instead of, civic equality and democratic rights. Rightly regarding these demands as a threat to the liberal state, historians and political theorists

group of theorists writing in the last quarter of the twentieth century that gave serious attention to the concept of nation. These “modernists” tended to view nation (and nationalism) as recent and novel, developing in conjunction with the nation state and dating, with the nation state, to no earlier than the Treaty of Westphalia in 1648.<sup>80</sup> By the end of the twentieth century a “perennialist critique” of this modernist account had emerged, contending that present day nations find their origins in the distant past, or at least that the concept of nation is “a category of human association found everywhere throughout human history” where particular national identities come and go but the form persists.<sup>81</sup> Whether nation is either the social construct of the modernist or a construct conditioned by the real historical references or inherent human associations of the perennialist, the content of any particular nation is not set. For any given nation, its content is contested, however much the detail of that content might be circumscribed by the finite set of historical, linguistic, and mythic commitments of a particular community. The community of communities of the nation state contains diverse, overlapping, and divergent contributors to the idea of nation.<sup>82</sup> These communities are not unlike Cover’s *nomoi*, suggesting that the terrain of competing *nomoi* that Cover suggests<sup>83</sup> is, like any vision of the nation itself in a particular state, critical to the formation of the nation once we cease thinking of nation as a set, inherited identity for any given nation state.

Recently, a liberal communitarian case for the nation has proliferated.<sup>84</sup> Liberal communitarians emphasize the importance of

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grew unsympathetic to nationalism, treating its presence as a pathological condition of incomplete “modernity.”

Judt, *supra* note 75.

<sup>80</sup> See ANTHONY D. SMITH, *THE NATION IN HISTORY, HISTORIOGRAPHICAL DEBATES ABOUT ETHNICITY AND NATIONALISM* 27-34 (Univ. Press of New England eds., 2000).

<sup>81</sup> *Id.* at 34-35 (describing theory of “recurrent perennialism”). See also *id.* at 36-51.

<sup>82</sup> See ANTHONY D. SMITH, *NATIONALISM: THEORY, IDEOLOGY, AND HISTORY* 20-23 (Polity Press eds., 2d ed. 2010) (arguing that it is possible to distinguish these kinds of identity from national and other collective identities and thus recognize a concept like nation that is dynamic but still coherent enough to analyze).

<sup>83</sup> Cf. Cover, *supra* note 1, at 16 (“It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis.”).

<sup>84</sup> See Alan Ryan, *Whose Nationalism?*, N.Y. REV. OF BOOKS, Mar. 26, 2020 (reviewing AMITAI ETZIONI, *RECLAIMING PATRIOTISM* (2019), YAEL TAMIR, *WHY*

nationalism even as they seek to situate it in the liberal tradition. What Amitai Etzioni seeks to exalt is a form of patriotism that respects individual rights, without those rights acting as trump cards when they come into conflict with the public interest.<sup>85</sup> Necessarily, these authors take up the challenge suggested by numerous *nomoi* competing to influence or set a national identity. As Alan Ryan suggests in his assessment of liberal communitarianism of Yael Tamir and Etzioni, they have done so with only limited success in the face of populist nationalism.<sup>86</sup>

The difficulty for both Tamir and Etzioni is that nationalism in practice, both in the United States and in Europe, has recently tended to be xenophobic, illiberal, and a version of the “ethnonationalism” described by Liah Greenfeld.<sup>87</sup> Since both Etzioni and Tamir want a liberal nationalism, one reasonably expects to see a proposal or two for securing it that has some chance of success. Etzioni looks for compromise between a rights-based individualism and a communal search for the common good,<sup>88</sup> but it is not obvious that the enthusiasts for making America great again have any interest in the rights of anyone other than themselves. The moral conversations on which he relies seem all too likely to become shouting matches. It is only fair to acknowledge that he recognizes this, but then we are left with nothing much beyond the hope that members of a fractious public will recover a willingness to listen attentively to one another.

Tamir takes a different tack by looking to economic remedies for the sense of alienation felt by the so-called left behind.<sup>89</sup> However, it is not clear that Make American Great Again (“M.A.G.A.”) foot soldiers will find economic remedies satisfactory, so much as their view is about grievance against others and seems to require vanquishing of those they believe are unjustly part of their America. That is, finding a way to resolve the conflict between competing ideas of nation seems unavoidable yet difficult.

Early liberal unease with nation seems to have been rooted in the now largely abandoned view that nation was static and bound with

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NATIONALISM (2019), and LIAH GREENFELD, NATIONALISM: A SHORT STORY (2019)).

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

the state,<sup>90</sup> according to which notions of national identity were rightfully to be guided by those in control of the government,<sup>91</sup> subject to a limit on advancing identities wholly inconsistent with some fundamental national ideal.<sup>92</sup> That is, government leaders get to say what the “nation” is, even as their vision of nation must comport with a broader, accepted vision of nation.<sup>93</sup> Though such a view of national character promised to ensure individual equality for citizens, it also seems to support authoritarianism and justify suppression of dissident views to the extent that dissident individuals and groups rejected the nation and state that governed them.<sup>94</sup> The increasing recognition of nation as an extant, legitimate, and perhaps necessary part of the identity of citizens of the nation state has prompted a difficult

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<sup>90</sup> HOBBSAWM, *supra* note 5, at 20 (arguing that in the revolutionary period, nation is equivalent to government because for the revolutionaries in France at least, nation was equivalent to citizen); SMITH, *supra* note 80, at 17 (“Too often, theorists see the state as dominant, with the nation as a kind of junior partner or qualifying adjective. Little attention is then given to the dynamics of the nation.”).

<sup>91</sup> See BENEDICT ANDERSON, *IMAGINED COMMUNITIES, REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2006).

<sup>92</sup> This is the fundamental observation of Benedict Anderson, who argues that nation is a creation of elites to bind together a people, typically drawing on a common vernacular language and piecing together a tradition from shared references. Anderson notes that government leaders adopted this approach to nation formation to consolidate and preserve their authority. See *id.* at 83-113. See also SMITH, *supra* note 80, at 11 discussing ERNEST RENAN, *QU’EST-CE QU’UNE NATION?* (Calmann-Levy eds., 1882) and his political definition of the nation. “But politics is not enough. The state as such cannot function as a social cement or a bond between its citizens. For Renan, that can be provided only by ‘history,’ or rather by historical memories and the ‘cult of the ancestors.’” *Id.*

<sup>93</sup> Judt, *supra* note 75 (“Nationalist intellectuals may well invent a tradition, but they cannot invent just any tradition—it must fit within some recognizable continuum of distinctive local features.”).

<sup>94</sup> This is especially the case for ethnocultural nationalism, which might be said to subordinate[] individual and collective liberties to the demand of cultural homogeneity and national unity. It is not concerned with the liberties and prosperity of the citizens in a well-ordered, law abiding republic, nor does it engender a caring compassion for fellow-citizens. Nationalism’s overriding concern with unity and homogeneity inevitably breeds and exclusive and narrow love of the nation.

SMITH, *supra* note 80, at 17. But Smith notes that an apparently attractive distinction between ethnocultural nationalism and civic nationalism is not as sharp as one might believe. The distinction between civic and cultural nationalism, he argues, assumes “a secular trend from ethnic toward civic nationalism, with cultural nationalism as a kind of halfway house along the road. But the evidence for such a trend, even in the West, is dubious.” *Id.* at 19. See generally *id.* at 5-25.

challenge: how to manage disagreement over what the nation is or ought to be. This is what the liberal communitarians have taken up and it seems critical to the preservation of liberal pluralism. Recent events have forced us to recognize developments that were apparent twenty-five years ago, already:

For many people today, nationalism tells the most convincing story about their condition—more realistic than socialism, more immediately reassuring than liberalism. One reason for this is that nationalists acknowledge, indeed thrive upon, the apparent incompatibility of competing claims and values. They make a political virtue out of what, for many desperate peoples, may seem to be an existential necessity. If we wish to counter such views we have to begin by acknowledging that they contain a kernel of truth. There *are* incommensurate goals and unresolvable problems, and the unequal and conflicted division of the world into nations and peoples is not about to wither and shrivel or be overcome by goodwill or progress. The revolutions of 1789 and 1917 were born of the benevolent illusion that such untidy and unpleasing features of our world are transient and of secondary importance in the great scheme of things. The revolutions of 1989 and their aftermath offer a timely opportunity to think again.<sup>95</sup>

Following Judt, it seems necessary that we resolve not just how communities with different national visions might be brought together in the increasingly fragile nation state, but how the liberal nation state might contend with the national vision of specifically illiberal groups.

It is not accidental that populist nationalists seek to capture the state and deploy it in service of a cultural mission,<sup>96</sup> typically restoring a supposedly lost era on which their nationalist vision is based.<sup>97</sup>

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<sup>95</sup> Judt, *supra* note 75.

<sup>96</sup> Sometimes this mission is expressly racist, such as arguments aimed at resisting the “great replacement” articulated in conspiracy theories. See Onishi, *supra* note 45.

<sup>97</sup> Galston, *supra* note 66, at 8-9 (“Many citizens, their confidence in the future shaken, long instead for an imagined past that insurgent politicians have promised to restore. As popular demand for strong leaders grows, rising political actors are beginning to question key liberal-democratic principles such as the rule of law,

Cover seems to anticipate just this kind of view within nomoi. “People associate not only to transform themselves, but also to change the social world in which they live. Associations, then, are a sword as well as a shield. They include collective attempts . . . to change the law or the understanding of the law.”<sup>98</sup> Nomoi are in an unsteady state between seeking control and accommodating to the lack of control. So,

[a]lthough [nomoi have] a place in their normative worlds for civil authority, and although some would transform civil authority into an intolerant arm of their own substantive vision when the chance arose, all, finding themselves within a state not under their control, [seek] refuge not simply from persecution, but for associational self-realization in nomian terms.<sup>99</sup>

With this understanding, Cover envisions what we would today think of as progressive activism in a description meant to imply the fight against segregation but its structure might be taken as a description of illiberal populist nationalists.

[A] transforming association has its own vision, which it fits together with its conception of reality and its norms to create an integrated whole. The discontinuities between the respective visions, constructions of reality, and norms posited by some such associations and by the state’s authoritative legal institutions may be considerable. I shall use “redemptive constitutionalism” as a label for the positions of associations whose sharply different visions of the social order require a transformational politics that cannot be contained within the autonomous insularity of the association itself.<sup>100</sup>

Populist nationalist can thus be seen as nomoi, whose sharply different vision of the social order requires transformational politics, except their politics are almost expressly at the expense of others who they define outside of the rightful political community.

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freedom of the press, and minority rights. The door seems to be opening for a return to forms of authoritarianism written off by many as relics of the past.”).

<sup>98</sup> Cover, *supra* note 1, at 33-34.

<sup>99</sup> *Id.* at 31.

<sup>100</sup> *Id.* at 34.

At stake for populist nationalist is the loss of a tradition connecting their community to greatness and by extension, a loss of greatness in the present. In this structure, alternative visions of the nation, but particularly pluralistic visions that imagine incorporation of other communities into the national identity, are treasonous.<sup>101</sup> Again, Eatwell and Goodwin are instructive. Before conceding that “some national populists veer into racism and xenophobia, especially toward Muslims”<sup>102</sup> they list “legitimate democratic issues”<sup>103</sup> that their nationalist populist raise, including the capacity of western democracies to “rapidly absorb rates of immigration and ‘hyper ethnic change,’”<sup>104</sup> which they regard as unprecedented, the creation of highly unequal societies and whether “the state should not accord priority in employment and welfare” for certain people, and “whether all religions support key aspects of modern life in the West,” such as women’s and L.G.B.T.Q. rights.<sup>105</sup> The nature of liberalism suggests, of course, that debate about these issues is legitimate and fair. But the claims of Eatwell and Goodwin suggest something different—that the grievances of national populists deserve to be the policy of the state, despite how “liberal democracy as it has evolved in the West”<sup>106</sup> and

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<sup>101</sup> The “great replacement” is in France conceived expressly as a counter to multiculturalism, see Onishi, *supra* note 45 and, more recently “wokisme.” Onishi, *supra* note 76.

<sup>102</sup> EATWELL & GOODWIN, *supra* note 68, at xii.

<sup>103</sup> *Id.* They go on in full:

[National Populists] question the way in which elites have become more and more insulated from the lives and concerns of ordinary people. They question the erosion of the nation state, which they see as the only construct that has proven capable of organizing our political and social lives. They question the capacity of Western societies to rapidly absorb rates of immigration and “hyper ethnic change” that are largely unprecedented in the history of modern civilization. They question why the West’s current economic settlement is creating highly unequal societies and leaving swathes of people behind, and whether a state should accord priority in employment and welfare to people who have spent their lives paying into the national pot. They question cosmopolitan and globalizing agendas, asking where these are taking us and what kind of societies they will create. And some of them ask whether all religious support key aspects of modern live in the West, such as equality and respect for women and LGBT communities. . . .

*Id.*

<sup>104</sup> *Id.*

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

<sup>106</sup> *Id.* at xi. See also *id.* at xi-xii (“[M]ost national-populist want *more* democracy—*more* referendums and *more* empathetic and listening politicians that give more

the objections of others in the state, particularly those who view such positions as xenophobic, chauvinistic, racist,<sup>107</sup> and even anti-democratic represent hysterical responses to these movements.<sup>108</sup>

All populist nationalists are illiberal in that they claim, in the name of “the people,” that the state ought to operate primarily or exclusively in the interest of some citizens. That is, the “nationalist” views common to populist nationalism seek to exclude. They claim that some citizens in their country are not real members.<sup>109</sup> Generally, they accept that the elite they despise are members of their national identity but see them as betrayers of that nationalism.<sup>110</sup> However, many citizens are not “true” citizens.<sup>111</sup> The exclusion of large swaths of the polity from legitimate standing in the community is not new; indeed, domestic and international law has anticipated this troubling aspect of nationalism and worked to provide protection for “minorities” of various types within nation states.<sup>112</sup> In the face of the rise of robust “populist nationalist” movements and the demands they place on political leaders, it is useful to see how Cover would deal with competing *nomoi* before turning to how rights-talk conceives of nationalism and the role of minorities within national communities.

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power to the people and less power to established economic and political elites. This ‘direct’ conception of democracy differs from the ‘liberal’ one that has flourished across the West . . .”).

<sup>107</sup> Eatwell and Goodwin complain that “Although most national populist in Europe do not hold office . . . [t]hey are dismissed as extremists whose authoritarian and racist policies pose a serious threat to liberal democracy and minorities.” *Id.* at xv-xvi.

<sup>108</sup> *See, e.g., id.* at xi (“Contrary to some of the hysterical reactions that greeted Trump and Brexit, those who support these movements are not fascists who want to tear down our political institutions.”).

<sup>109</sup> *Id.* at 47 (“right wing populists stress the need to limit immigration and preserve national identity”).

<sup>110</sup> For example, Eatwell and Goodwin point to Marie Le Pen’s argument that elites’ support of globalization sets the conditions for “Islamic fundamentalism” and that hers are not uncommon views. *Id.* at 71.

<sup>111</sup> This is the import of the French far right’s distinction between the French of heart and French of papers. *See Onishi, supra* note 76.

<sup>112</sup> *See infra* Part IV.C.2. for a discussion of the League of Nations Minorities system.



### III. DOES NOMOS AND NARRATIVE SUPPORT POPULIST NATIONALISM?

In one sense *Nomos and Narrative* seems to point us toward conceding ground to populist nationalist without really indicating how to respond to the presence of illiberal nationalism. The signal innovation of the article is its focus on the *nomos* and its jurisgenerative power. From this perspective, *Nomos and Narrative* seems to suggest embracing the *nomos* of populist nationalism. And when the article ultimately focuses on the *Bob Jones University* case, it seems to abandon the carefully constructed respect for *nomoi*, to demand the Supreme Court be clearer in its decision making, that it embrace the redemptive constitutionalism that led to the difficult dispute in the first place. That resolution points us away from the difficult question of mediating conflict between *nomoi* and seems to offer little that would help address the problem of nation as conceived by the liberal communitarians. Ultimately, however, *Nomos and Narrative* does offer a framework for addressing the conflict between *nomoi* that might help us manage the growing conflict with illiberal populist nationalism.<sup>113</sup>

#### A. The Centrality of Cover's Sympathy in *Nomos and Narrative*

In *Nomos and Narrative*, Cover underscored that the segregationists at Bob Jones University and others with discriminatory religious beliefs might live in a normative universe that generated notions of right and justice that would be at odds with those extant in the federal government, that they might read the same constitution differently.<sup>114</sup> In a statement that echoes his position in *Violence and*

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<sup>113</sup> See Cover, *supra* note 1, at 40-53, 60-61.

<sup>114</sup> See *id.* at 46 (“In Part II, I wrote of the proliferation of legal meaning—the impossibility and undesirability of suppressing the jurisgenerative principle, the legal DNA. I have suggested that the proliferation of legal meaning is at odds, however, with the effort of every state to exercise strict superintendence over the articulation of law as a means of social control. Commitment, as a constitutive element of legal meaning, creates inevitable conflict between the state and the processes of jurigenesis.”).

*the Word*,<sup>115</sup> Cover begins from the view that deciding against these communities was an act of destruction. *Nomos and Narrative* has inspired many who hold progressive views because it offers a broader way of thinking about law and community in which communities can affirm their vision of justice even if not (currently) recognized by law.

However, Cover's "sympathy" for Bob Jones University, expressed indirectly through sympathy for the Mennonite and Amish briefs in support of Bob Jones University, is not incidental to his article. Cover laments at one point that the reader had likely tired of his "insistence upon dignifying the internal norms, redemptive fantasies, briefs, positions, or arguments of various groups with the word 'law'"<sup>116</sup> for by then he had devoted some twenty pages to that project. Though he does not condone Bob Jones University's racism, Cover's treatment of their position as rooted in sincere belief and related to more defensible concerns in the Mennonite and Amish briefs is a tacit recognition that neither *Brown*, the Supreme Court's increasingly aggressive enforcement efforts of the late 1960s and early

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<sup>115</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>116</sup> Cover, *supra* note 1, at 40.

1970s,<sup>117</sup> nor the civil rights legislation of the civil rights era<sup>118</sup> had magically eliminated segregationist sentiment. However much the signaling function of Supreme Court opinions might have pushed some to change their views, many who believed in segregation still believed in it more than twenty-five years after *Brown*. But in the structure of the article, Cover's "sympathy" for Bob Jones University is meant to do more than just acknowledge this fact. It is a recognition of Bob Jones University's right to have its view,<sup>119</sup> even if Cover believed that the Court should not affirm those views.<sup>120</sup>

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<sup>117</sup> The ramping up of enforcement of *Brown* is reflected in the Supreme Court's self-conscious description of its efforts in *Swann v. Charlotte-Mecklenburg School District*, where it furthered that more aggressive view in 1971:

By the time the Court considered *Green v. County School Board*, 391 U.S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. In *Green*, the Court was confronted with a record of a freedom-of-choice program that the District Court had found to operate in fact to preserve a dual system more than a decade after *Brown II*. While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that:

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"The burden on a school board today is to come forward with a plan that promises realistically to work now until it is clear that state-imposed segregation has been completely removed."

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This was plain language, yet the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), restated the basic obligation asserted in *Griffin v. County School Board*, 377 U.S. 218, 234 (1964), and *Green*, that the remedy must be implemented forthwith.

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The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts.

402 U.S. 1, 13-14 (1971).

<sup>118</sup> See, e.g., Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437 (1965); 52 U.S.C. § 10301; Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 81 (1968).

<sup>119</sup> Cover, *supra* note 1, at 62 ("The University, in effect, claimed for itself a nomic insularity that would protect it from general public law prohibiting racial discrimination.").

<sup>120</sup> *Id.* at 66 ("Precisely because the school is the point of entry to the paideic and the locus of its creation, the school must be the target of any redemptive constitutional ideology.").

The Bob Jones University litigation presented what seemed a simple question of whether government support, through tax exemptions, ought to be extended to a university with racially discriminatory policies.<sup>121</sup> Behind this narrow question was a broader but still straightforward issue of whether opponents of *Brown* would be allowed to circumvent its call for integration. In response to *Brown* and as a legacy of the massive resistance movement, white southerners created private “academies” to permit their children to continue to attend segregated schools.<sup>122</sup> Many of these schools conceived of themselves as Christian academies.<sup>123</sup> Bob Jones University, though not a secondary school, shared these school’s efforts to root their segregation desires in religious belief. Simultaneously, given the American tradition of deference to religious belief, many in the South had sought to justify segregation as a part of their religious beliefs.<sup>124</sup> In response, courts rejected these religious arguments for discrimination and the Court, increasingly frustrated with the slow pace of desegregation of schools had, for a while, rejected various privatization efforts aimed at continuing public support for private education.<sup>125</sup> Though the momentum behind aggressive enforcement of *Brown* was fading by the time the Bob Jones University controversy emerged, it was very much of a piece with these efforts to confront segregation academies and the privatization of public goods to avoid desegregating them.

*Nomos and Narrative* is an exercise in demonstrating that the question in the *Bob Jones University* litigation is a difficult one, particularly if one took seriously people’s competing vision of right and justice. *Nomos and Narrative* focuses very much on the law-

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<sup>121</sup> *Id.* at 62.

<sup>122</sup> See *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1441 (1973).

<sup>123</sup> See, e.g., Ashton Pittman, *Mississippi’s ‘Seg Academies’ Creating National Dialogue*, JACKSON FREE PRESS (Dec. 21, 2018), <https://www.jacksonfreepress.com/news/2018/dec/21/mississippi-seg-academies-creating-national-dialo/> (“Segregation academies, which claimed to be Christian from their outset, have also long provided limited information on scientific concepts such as evolution, the reason for southern secession into the Civil War (slavery) and the full range of American history.”).

<sup>124</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 578-79 (1983).

<sup>125</sup> See, e.g., *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Norwood v. Harrison*, 413 U.S. 455 (1973), *Coit v. Green*, 404 U.S. 997 (1971).

making elements of communities,<sup>126</sup> apropos for introducing how a religious community's racial discrimination ran afoul of *Brown's* developing (or fading) anti-discrimination norms. Cover chides the Court for cowardice; rather than declaring a "redemptive" value, rather than defending and extending *Brown*, the Court avoided what was difficult in the case.<sup>127</sup> However, the article really does not tell us how the Court should have gone about reaching that decision. It tells us that Bob Jones University had a view of the world we should recognize (and perhaps respect), even if we found the view repellent and had no intention on embracing its view as constitutional law. But the failure to tell us exactly when a court should invoke redemptive values over deference to the jurisgenerative capacity of *nomoi* proves troubling today with a reactionary Supreme Court and advancing populist nationalist movements afoot.

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<sup>126</sup> *E.g.*, Cover, *supra* note 1, at 44 ("In the normative universe, legal meaning is created by simultaneous engagement and disengagement, identification and objectification. Because the *nomos* is but the process of human action stretched between vision and reality, a legal interpretation cannot be valid if no one is prepared to live by it.").

<sup>127</sup> Cover observed:

[T]he force of the Court's interpretation in *Bob Jones University* is very weak. It is weak not because of the form of argument, but because of the failure of the Court's commitment—a failure that manifests itself in the designation of authority for the decision. The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional. The grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong.

*Id.* at 66. Rather than declaring a "redemptive" constitutional principle—upholding *Brown's* antidiscrimination principle and declaring the Congress cannot constitutionally grant tax exemptions to discriminatory institutions—the Court upholds the IRS's policy judgment. Cover is disappointed that all the actors in the saga lack "commitment."

Bob Jones University seemed uncommitted and lackadaisical in its racist interpretation—unwilling to put much on the line. The IRS ruling was left shamefully undefended by an administration unwilling to put anything on the line for the redemptive principle. The Justices responded in kind: they were unwilling to venture commitment of themselves, to make a firm promise and to project their understanding of the law onto the future. Bob Jones University is a play for 1983—wary and cautious actors, some eloquence, but no commitment.

*Id.* at 67.

## B. Illiberal Nomoi

The successors of the Bob Jones University position have reemerged under the banner of populism. In an organized political rebellion against globalism, liberalism, and perhaps even representative democracy, some Americans have increasingly redefined much of the contemporary American legacy in terms that are chauvinistic, nativistic, and patriarchal<sup>128</sup>—and often racist. Studies of these Americans highlight high degrees of racial animosity, particularly directed at black Americans, as a defining feature of this populist nationalism. In the view of some, this movement is directly tied to the Bob Jones University litigation and the demise of segregation academies which linked segregation thinking with a view of Christian fundamentalism.<sup>129</sup> Globally, what has come to be called populism represents a vision of nationalism that is constructed in contrast to globalism, the economic system of liberalized trade and interconnected economies, but also in contrast to the system of liberal rights in domestic and international law and which support plural democratic societies. The populist nationalist movements' similarity to the nomoi of *Nomos and Narrative* is implied in Cover's definition of "[a] *nomos* [as] a present world constituted by a system of tension between reality and vision."<sup>130</sup> The movements are paideic in that we are observing a common body of precept and narrative promoted through social media and more traditional avenues to generate a community dedicated to claiming a central place in an anti-pluralist society.<sup>131</sup> They aspire to an imperial function also as their goal is to

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<sup>128</sup> This is the import of David Barton's books, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION AND RELIGION* and *THE JEFFERSON LIES*, where Barton advances the "forgotten history" that the United States was founded to be a Christian country run on Christian principles. See Tara I. Burton, *Understanding the Fake Historian Behind America's Religious Right*, VOX (Jan. 25, 2018, 12:00PM), <https://www.vox.com/identities/2018/1/25/16919362/understanding-the-fake-historian-behind-americas-religious-right>.

<sup>129</sup> See, e.g., Edsall, *supra* note 30 (discussing KATHERINE STEWART, *THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM* (Bloomberg 2020)).

<sup>130</sup> Cover, *supra* note 1, at 9.

<sup>131</sup> *Id.* at 12-13 ("[There are] two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, . . . is world-creating, I shall call 'paideic,' because the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of being

“reclaim” control of government and cultural institutions impose their “true” vision of nation on the community.<sup>132</sup> Supporters of this populism often support authoritarianism, which is seen as necessary to defend the true citizens of the country from both betrayal by disloyal elites and incursions by foreigners, both immigrants and “foreign” residents of the country. They also link their national ideal to specific religions that are seen as natural to the nation.<sup>133</sup> Both domestically and internationally, this populist nationalism has eschewed the narrow constitutional question (can the IRS do this or that in support of *Brown*) for the broader inquiry over what the nation is. But the answer to what is the nation both begets answers to specific constitutional questions and informs a broader interpretative frame for understanding constitutional and statutory questions.

Given the respect for competing nomoi that is central to *Nomos and Narrative* and the article’s lack of direction on how to decide when to embrace one nomos over another in constitutional disputes, could it be that *Nomos and Narrative* supports these illiberal developments of recent years that seem antithetical to Cover’s life work? Or perhaps it just envisions a world where populist nationalist might capture the

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educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”).

<sup>132</sup> *Id.* at 13 (“The second ideal-typical pattern, which finds its fullest expression in the civil community, is ‘world maintaining.’ I shall call it ‘imperial.’ In this model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective.”).

<sup>133</sup> Kenneth Townsend captures these sentiments:

Liberalism is in decline in the West. Past political divides that pitted classically liberal conservatives against moderate to progressive political liberals are giving way to a new landscape in which a liberal consensus simply cannot be assumed. From the left, socialist and identity-based critiques of liberalism have called into question core liberal assumptions regarding procedural justice, the division between public and private realms, and the rights of individuals. From the right, an increasingly vocal group of conservatives is questioning classical liberalism’s commitment to limited government, a free market, and individual rights in favor of a vision of political community where the state advances certain religious, traditional, or nationalist views.

Kenneth L. Townsend, *Why Liberalism Persists: The Neglected Life of the Law in the Story of Liberalism’s Decline*, 94 ST. JOHNS L. REV. 457, 457 n.2 (2020) (citing PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2019); Sohrab Ahmari et al., *Against the Dead Consensus*, FIRST THINGS (Mar. 21, 2019), <https://www.firstthings.com/web-exclusives/2019/03/against-the-dead-consensus>; Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy>)).

state apparatuses and rightfully impose their illiberal view on others. Indeed, since Nomos *and Narrative* argues that “the proliferation of legal meaning is at odds, . . . with the effort of every state to exercise strict superintendence over the articulation of law as a means of social control,”<sup>134</sup> one might assume that Nomos *and Narrative* supports the state articulating a national ideal either through fiat or by just choosing one narrative over others. Cover acknowledges that the close relationship between the state’s claims over legal meaning and imperfect monopoly over the domain of violence makes resistance often unpalatable, with the consequence that “[o]ur overriding temptation in the absence of substantial, direct, and immediate violent resistance to official law is to concede the state’s principal claim to interpretation and to release the jurisgenerative processes of associations, communities, and movements to a delegated, secondary, or interstitial status.”<sup>135</sup>

Do these observations suggest that the battle over nation ought to be fought for control over government apparatus with the loser conceding that government has had a traditional, nonexclusive role in defining nation and permit the winner to implement its national vision?<sup>136</sup>

I think not. Still, the change of focus from discrete constitutional questions to an unbounded inquiry into what the nation is leaves some doubt on this issue. Cover’s *Nomos and Narrative* only addressed the former where the constitutional text, precedent, and judicial tradition provide limits on the kinds of juridical traditions that can be effectively translated from *nomoi* to judicial interpretation through the bridge of narrative.<sup>137</sup> Given the quite different nature of

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<sup>134</sup> Cover, *supra* note 1, at 46.

<sup>135</sup> *Id.* at 52.

<sup>136</sup> This is perhaps why Paul Kahn sees Cover’s constitutionalism as anarchistic. See Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 *YALE L.J.* 1, 55 (1989).

<sup>137</sup> Cover, *supra* note 1, at 16 (“In the world of the modern nation-state - at least in the United States—the social organization of legal precept has approximated the imperial ideal type that I have sketched above, while the social organization of the narratives that imbue those precepts with rich significance has approximated the *paideic*.”). Consequently,

[t]he precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance, and understanding—patterns that constitute the dynamic between precept and material universe—are radically uncontrolled. They are subject to no



the question presented by competing visions of nation, alongside the significant, illiberal implications of adopting the populist nationalists' vision of nation, much weight is placed on Cover's imperial role of judges and how they should deal with the competing juridical interpretations of *nomoi*. There Cover suggests a mediating role for the state, but a limited one dedicated to a particular approach.

### C. Regulating *Nomoi* and Promoting Jurisgenesis

Cover partially addresses the state's role in contending with competing *nomoi* by suggesting that the role of judges should be circumscribed by leaving most substantive issues to the private sphere.<sup>138</sup> Building on Justice Brandeis's concurrence in *Whitney v. California*,<sup>139</sup> where Brandeis

would have attacked the problem of the law's violence by constitutionalizing the principles of an uncoerced politics, a free public space, which would generate a law legitimated even in its coercive dimensions by its uncoerced origins. Free speech was to be the linchpin of this legitimation—free speech conceived of as all the components of deliberative public life.<sup>140</sup>

But Cover recognizes that this solution is not entirely successful because modern “American political life no longer occurs within a public space dominated by common mythologies and rites and occupied by neighbors and kin.”<sup>141</sup> Without a shared national ethos, law's violence cannot be mitigated, suggesting that efforts to impose a national identity would produce more difficult questions, thus resulting

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formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence. Such is the radical message of the first amendment: an interdependent system of obligation may be enforced, but the very patterns of meaning that give rise to effective or ineffective social control are to be left to the domain of Babel.

*Id.* at 17. That is, meaning is left to the private realm. This is where nation is constructed, debated, and modified. However, our current battle over nation seeks to make it distinctly public, formal, and subject to the imperial ideal type.

<sup>138</sup> *Id.* at 44-60.

<sup>139</sup> 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); see also Robert Cover, *The Left, the Right, and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 385-87 (1981).

<sup>140</sup> Cover, *supra* note 1, at 48.

<sup>141</sup> *Id.* at 49.

in judicial violence that was more lamentable as it was more significant.

It seems that for Cover, the hollowing out of shared national identities makes *nomoi* more central to developing meaning in the shared community. If the formal institutions of state cannot produce a truly shared *nomos*, the violence of courts' jurispathic character is magnified and there is ever more reason to defer to *nomoi* where real meaning in a shared community can be formed. As such, we should note that these very communities seem to be in decline, presently.<sup>142</sup> Community creation could be viewed as increasingly virtual. While it is unclear whether virtual communities have the depth of commitment to be *nomoi*, it seems that populist nationalism has been facilitated by social media, permitting access to precept and narrative, education in its tenets, and development of its meaning through crowd-sourced engagement. And if a virtual populist nationalism is a *nomos* in a time when the state's ability to develop a *nomos* is undermined and its violence is therefore magnified, then can the state just leave nation formation to the private sphere? Perhaps Cover anticipated a version of this problem in his reluctant rejection of Brandeis' solution.

Cover's larger solution to the problem of contested meaning from *nomoi* is found in his review of challenges to school curricula:

The weakness of the state's claim to authority for its formal [umpiring] between visions of the good is evidenced by the state's willingness to abdicate the project of elaborating meaning. The public curriculum is an embarrassment, for it stands the state at the heart of the paideic enterprise and creates a statist basis for the meaning as well as for the stipulations of law. The recognition of this dilemma has led to the second dimension of constitutional precedent regarding schooling—a breathtaking acknowledgment of the privilege of insular autonomy for all sorts of groups and associations. . . . [T]here must, in sum, be limits to the

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<sup>142</sup> ROBERT PUTNAM BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 107-08 (2000) (noting a loss of informal social interaction); *see, e.g.*, Sarah P. Bailey, *Church Membership in the U.S. Has Fallen Below the Majority for the First Time In Nearly a Century*, WASH. POST (Mar. 29, 2021, 6:03 PM), <https://www.washingtonpost.com/religion/2021/03/29/church-membership-fallen-below-majority> (showing surveys that reflect a sharp decline in religious affiliation and the related community created by church attendance).

state's prerogative to provide interpretive meaning when it exercises its educative function. But the exercise is itself troublesome; thus, the private, insular alternative is specially protected. Any alternative to these limits would invite a total crushing of the jurisgenerative character. The state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.<sup>143</sup>

Cover seeks to limit the jurispathic capacity of judges, going beyond judges' own resort to jurisdiction to deflect and obscure their jurispathic tendencies,<sup>144</sup> by committing them to privatizing many disputes and, in the realm of education, limiting the state's role in umpiring between visions of good by specifically limiting the state's prerogative to provide interpretive meaning.

We might extract from this approach a response to disputes over the nature and content of the nation with two parts. First, the state should avoid deciding the content of the national identity, relegating such debates to the private sphere, limiting its umpiring between conceptions of the nation, and limiting its prerogative to provide interpretive meaning in defining the nation itself. Second, these efforts should be guided by Cover's emphasis on facilitating the jurisgenerative capacity of *nomoi*. Cover emphasizes a role for courts that is instructive. It derives not from the need to create law or even defend the system of laws, but from the necessity to maintain minimum conditions for the creation of legal meaning in autonomous interpretive communities:

By exercising its superior brute force, however, the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. The question, then, is the extent to which coercion is necessary to the maintenance of minimum

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<sup>143</sup> Cover, *supra* note 1, at 61-62.

<sup>144</sup> *Id.* at 54 (“In the face of challenge, the judge—armed with no inherently superior interpretive insight, no necessarily better law—must separate the exercise of violence from his own person. The only way in which the employment of force is not revealed as a naked jurispathic act is through the judge's elaboration of the institutional privilege of force—that is, jurisdiction.”).

conditions for the creation of legal meaning in autonomous interpretive communities.<sup>145</sup>

Taken together, this multifaceted privatization of the nation building process, guided by an effort to promote the development of legal meaning in *nomoi*, presents a promising approach to dealing with encroaching populist nationalism. Defining the nation, however, is not the same as private education, which is part of the *paideic* process, and whatever faith Cover has in these limits on the judicial power, he seems to back away from them in the end.<sup>146</sup>

As *Nomos and Narrative* turns to the Supreme Court decision under consideration, *Bob Jones Univ. v. United States*,<sup>147</sup> Cover's limits on the judicial power seem to disappear. He argues that the "redemptive" constitutional ideology should guide resolution of the dispute:

Precisely because the school is the point of entry to the *paideic* and the locus of its creation, the school must be the target of any redemptive constitutional ideology. Through education, the social bonds form that give rise to autonomy, to the *jurisgenerative* process. In education are the origins of the processes in which "law" is given meaning. Were there a single, statist corpus, a state school, a state understanding—Spartan *eunomia*—we might imagine a rather simple participation-protecting rule to guarantee universal access to the process. 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. The judge must resolve the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other.<sup>148</sup>

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<sup>145</sup> *Id.* at 44.

<sup>146</sup> Cover wants courts to show "commitment." *Id.* at 66 ("The grand national travail against discrimination is given no normative status in the Court's opinion, [no deference to the *paideic* process].").

<sup>147</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983).

<sup>148</sup> Cover, *supra* note 1, at 66.

Though we might view the foregoing statement as rooted in his exhortation of judicial coercion as “necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities,”<sup>149</sup> *Nomos and Narrative* does not really emphasize that role in its treatment of *Bob Jones University*. Ultimately, it does not tell us how courts should go about deciding when it is necessary to apply redemptive constitutional principles for the purpose of promoting the creation of legal meaning in autonomous interpretive communities, nor when it is necessary to do so while rejecting the juridical interpretation of a *nomos*.

Thus, we could imagine the state granting a larger role for itself in determining the national identity than it seems to have granted itself in education. Notwithstanding the threat of this larger role, the theme of neutrality from Brandeis’s concern through Cover’s interest in facilitating *jurisgenesis* suggest a means of navigating the fight over the nation. Beyond this, Brandeis’s and Cover’s neutrality approach invites a way of thinking about rights in light of the fight over national identity, which seems most attractive—if individuals are to have access to the kinds of communities and groups that engage in *jurisgenesis*, then those individuals need to be protected from the excesses of any extant national identity. That is, just as individuals are guaranteed participation in government through rights that limit the excesses of the state, individuals ought to be guaranteed participation in the nation through limits on the excesses of the nation.

#### IV. RECOGNIZING NORMATIVE DIFFERENCE IN THE BATTLE FOR NATION

In *Nomos and Narrative*, Cover seeks to promote *jurisgenesis* by limiting the state’s role in education debates.<sup>150</sup> Despite expressing doubts about Brandeis’s efforts of privatization in *Whitney*, he expands on Brandeis’s approach, suggesting that the state should largely privatize the disputes to create greater room for *nomoi* to develop.<sup>151</sup> He cites approvingly the Court’s jurisprudence permitting private education as an example<sup>152</sup> but does not apply the constraint of

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<sup>149</sup> *Id.* at 44.

<sup>150</sup> *Id.* at 60-61.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 61-62.

privatization on the Supreme Court in *Bob Jones University*.<sup>153</sup> Instead, he envisions redemptive constitutionalism being invoked as a justification for the state's jurispathic rejection of Bob Jones University's racist policies—"there is . . . a powerful response to the insular claim—the counterclaim of constitutional redemption."<sup>154</sup> We are forced to speculate on what limits there might be to this counterclaim of constitutional redemption, how they derive from the education cases, and how they might apply to an open-ended debate that goes to the heart of our shared existence such as the definition of the nation. The brief discussion below<sup>155</sup> shows that efforts to privatize the debate might prove ineffective and do not seem to address the threat of populist nationalist movements. Expanding on Cover's resolution of *Bob Jones University*, however, provides another potential approach to the debate over nation and the threat of populist nationalist. But that approach proves similarly unsatisfying, appearing to be indeterminate and circular. Last, I suggest expanding on *Nomos and Narrative's* general call to promote jurisgenesis as a basis for developing a new justification for rights. This last approach provides a framework for courts to promote *nomoi* and structure debates over nation by focusing on an individual's right to express their identity as well as to form and to live in communities. This structure is, in my view, a prerequisite to ensuring the kinds of robust communities that can become *nomoi*, to permitting those communities to effectively contribute to a polity's concept of nation, and to recognizing the nation as a concept formed by members of the communities within the nation state in an always evolving, fluid, and participatory process.

#### A. Problems with Privatizing the Content of the Nation

Extending *Nomos and Narrative's* conception of the *nomos* to the battle over what the nation is suggests that one way to contend with competing *nomoi* on the question of the nation is to wholly privatize that question. As the liberal communitarians suggest, national identity is central, respecting "the importance of our attachments to place and

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<sup>153</sup> He wants the Court to stand up for its redemptive principles instead of deferring to public policy without justification; he wants the Court to invoke redemptive constitutionalism. *Id.* at 66.

<sup>154</sup> *Id.*

<sup>155</sup> *Infra* Part IV.A.

the indispensability of possessing a culture we can call our own.”<sup>156</sup> The kinds of attachments we possess and the culture we have are among the kind of identity-forming traits normally guaranteed in rights systems through the rights of free expression, association, and worship. As Brandeis’s concurrence in *Whitney* suggests, robust protection of these values through the First Amendment and parallel rights in other systems, creates room for individuals and the groups to which they belong to exist.<sup>157</sup> But such libertarian rights would prove unsatisfactory to liberal communitarians as it was for Cover. Cover’s approach, however, informed by the belief that the plural state in the United States lacked the content to support a state nomos, emphasized a more radical assignment of the role for developing substantive values to the private sphere, almost certainly more than the liberal communitarians would.

Extending Cover’s observations to debates about nation, the state should avoid declaring what nation is. This entails not only relegating debates over what the nation is to the private sphere but avoiding umpiring between competing conceptions of the nation and eschewing the state’s prerogative to articulate the content of nation. Cover’s argument to privatize debates concerning the nomos is familiar to us and largely reflected in American constitutional law. It is also, to a large degree, what International Human Rights calls for. However, given our divisive political climate and the specific insistence of some to have government institutions declare the national identity, a comment seems necessary, especially because government neutrality on nation seems unusual.

To avoid declaring what nation means, the state should not prohibit private efforts to comment on and declare the nature of the national identity and spirit. It would be inappropriate for the state to prohibit, for example, the New York Times 1619 Project (“1619 Project”).<sup>158</sup> The propriety of such projects is for private debate and

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<sup>156</sup> Ryan, *supra* note 84.

<sup>157</sup> *Whitney v. California*, 274 U.S. 357, 375-76 (Brandeis, J., concurring).

<sup>158</sup> *The 1619 Project*, N.Y. TIMES (Aug. 18, 2019), [https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html?mc=aud\\_dev&ad-keywords=auddevgate&gclid=Cj0KCCQjwqp-LBhDQARIsAO0a6aKzhYYzsY-pL\\_TICcO68\\_MkafWPK2da2SG71E67TuxDq4GHmhB3irIaAo1VEALw\\_wcB&gclidsrc=aw.ds](https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html?mc=aud_dev&ad-keywords=auddevgate&gclid=Cj0KCCQjwqp-LBhDQARIsAO0a6aKzhYYzsY-pL_TICcO68_MkafWPK2da2SG71E67TuxDq4GHmhB3irIaAo1VEALw_wcB&gclidsrc=aw.ds).

the temptation to produce a response<sup>159</sup> should be resisted. This example illustrates precisely how conventional this approach is. Despite the conservative criticism of the 1619 Project and suggestions that the New York Times should not have undertaken it,<sup>160</sup> few suggested that it be banned.<sup>161</sup> Of course, the Trump Administration did not eschew the opportunity to respond with the 1776 Project, but nothing in Cover's approach suggests a prohibition on the government attempting to create a national nomos, even as he expresses concerns about the state doing so and suggests such efforts would be unsuccessful.<sup>162</sup> Likewise, it explains the discomfort many had with these particular dualling presentations of American history. Also, it shows the challenge of today: supporters of the 1776 Project see the project as central to preserving national values they see as being under attack,<sup>163</sup> and they perceive government involvement as critical to their national project.<sup>164</sup> Moreover, they proceed from the view that others

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<sup>159</sup> E.g., *The 1776 Report*, PRESIDENT'S ADVISORY 1776 COMMISSION (Jan. 2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>.

<sup>160</sup> See generally Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, ATL. (Dec. 23, 2019, 7:35 PM), <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093> (discussing the dispute between scholars and authors of Project represents fundamental disagreement over trajectory of American society). That criticism is specifically about the project's departure from "an interpretation of American national identity that is cherished by liberals and conservatives alike." *Id.* Serwer's review of the debate also shows how criticism by historians was transformed into political arguments by conservatives to engage a debate about what the nation is that would eventually lead to the 1776 Project.

<sup>161</sup> See generally Adam Serwer, *Why Conservatives Want to Cancel the 1619 Project*, ATL. (May 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/why-conservatives-want-cancel-1619-project/618952>.

<sup>162</sup> Cover, *supra* note 1, at 61-62 ("[D]isputes over educational issues raise the question of the character of the paideia that will constitute the child's world"); *id.* at 17-18 ("[E]ven if we had a national history declared by law to be authoritative—we could not share the same account relating each of us as an individual to that history").

<sup>163</sup> Marie-Rose Sheinerman, *Princeton Historians Condemn Trump Administration's 1776 Commission Report*, DAILY PRINCETONIAN (Jan. 24, 2021, 8:58 PM), <https://www.dailyprincetonian.com/article/2021/01/princeton-historians-trump-1776-commission-report-1619-project>. Historian David Bell said of the 1776 Report, "[m]ost immediately, the motivation was to sort of counteract the 1619 Project . . . particularly since many school districts have decided to use the 1619 Project in their curriculum." Bell is quoted in the article noting that historians who led the criticism of the 1619 Project also rejected the 1776 Report. *Id.*

<sup>164</sup> See *The 1776 Report*, *supra* note 159.



are already using the government to promote their view of the nation—their efforts are conceived as corrective, perhaps even to the neutrality of liberal pluralism that calls for such neutrality. For them, there is no neutral position in these debates.

Cover's approach suggests that the state should avoid umpiring debates over what the nation is. This second step in support of privatization of the nation debate suggests that judging the propriety of the content of private debates about the nation is off limits. This is certainly the extant approach in the United States, but the problem with this approach is illustrated by the trouble in determining what to do with hate speech and, harder still, determining the propriety of regulating speech aimed at recruiting individuals to hate groups.

Most generally, *Nomos and Narrative* suggests that states should limit their prerogative to provide interpretive meaning,<sup>165</sup> it should avoid weighing in on the nation. This suggests that while the 1776 Project is not appropriate from this perspective, it is not prohibited. The harder question is presented by the French approach to laïcité,<sup>166</sup> illustrating that the state's own definition of its core values might make withdrawal from discussions of the nation difficult, for sure in France and likely more generally. At some level, the state cannot completely withdraw from this sphere in any case as state's support for public education and regulation of elementary and secondary education puts it in the position of building curriculum. But a state might avoid weighing in on nation by ensuring that its school curriculum should be bland and *not* transformative, perhaps leaving room for teachers to interject their views into the curriculum. Almost certainly such a school curriculum would be unappealing to many in our divided polity.

An advantage of the foregoing attempts to promote privatization of nation debates is that they would likely aid in turning down the heat on the culture wars in the United States today. It is also apparent that such an approach is unlikely to appeal to the participants

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<sup>165</sup> E.g., Cover, *supra* note 1, at 62 (“There must, in sum, be limits to the state's prerogative to provide interpretive meaning when it exercises its educative function. But the exercise is itself troublesome; thus, the private, insular alternative is specially protected.”).

<sup>166</sup> See, e.g., Silvio Ferrari, *Civil Religions: Models and Perspectives*, 41 GEO. WASH. INT'L L. REV. 749, 759-61 (2010) for a discussion of laïcité in the context of a broader assessment of “civil religions” in France, Italy, the United States, and the European Union.

in our culture wars. For them, the privatization of nation avoids critical issues about who we were, are, or ought to be. The very point of debates over the nation is to ensure that one's vision of nation, presumably the true vision, is reflected in the national ethos to the extent that it does not become the national ethos. The state is supposed to promote a view of the nation in these accounts and promote the right one.

More generally, this kind of privatization approach has recently come under criticism, specifically as it involves human rights and religion. Madhavi Sunder has complained about how privatization is unsatisfying.<sup>167</sup> His complaints about how human rights law treats religion could be applied with equal force to privatization of debates about what the nation is.

Premised on a centuries-old, Enlightenment compromise that justified reason in the public sphere by allowing deference to religious despotism in the private, human rights law continues to define religion in the twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the “other” of international law. Today, fundamentalists are taking advantage of this legal tradition. Yet, contrary to law's centuries-old conception, religious communities are internally contested, heterogeneous, and constantly evolving over time through internal debate and interaction with outsiders. And this has never been so true as in the twenty-first century. Individuals in the modern world increasingly demand change within their religious communities in order to bring their faith in line with democratic norms and practices.<sup>168</sup>

Sunder's concerns with the privatization of religion seem to apply equally to the proposed privatization of debates about the nation. Often assumptions about how the individual was a member of the nation-defining religious community, where reason retreated to

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<sup>167</sup> Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

<sup>168</sup> *Id.* at 1402-03.

passion and irrationality, are justifications for leaving questions about the nature of nation to private debate. Few still think of the nation as a static concept since the serious study of nation emerged in the 1980s. The nation, like religious communities, “are internally contested, heterogenous, and constantly evolving over time through internal debate and interaction with outsiders.”<sup>169</sup> And the illiberalism of populist nationalism mirrors the internal religious intolerance that Sundar seems concerned with. However, we have generally relegated debates about nation to the private sphere, creating the dilemma the liberal communitarians face, generating the crisis liberal societies have in dealing with populist nationalist, and roughly duplicating the problem Sundar identifies with respect to religion.

But Sundar’s analysis appears to labor under the extant frame of thinking about rights as specifically aimed at government action: the public/private distinction is assumed and critical here. At the same time, abandoning the distinction would seem to grant the state sovereignty over our individual minds, to introduce a kind of intolerable intrusion in individual freedom that makes the benefits of doing so seem so small in comparison. Sundar has, I think, highlighted the limits of our existing approach to rights in a way that is parallel to how communitarians have cast a spotlight on the individualistic excesses of some approaches to rights. This is all to say that privatization of the nation question seems unsatisfying and, if Sundar is to be believed, might make worse the battle between *nomoi* on the nature of nation, especially considering populist nationalists.

### **B. An Interstitial Resolution: Ensuring Peace as a Redemptive Value**

Another aspect of Cover’s “sympathy” for *Bob Jones University* is that it emphasizes that the litigation involved was not so much about *Brown* or desegregation, as it was about how to deal with *nomoi* that are at odds with the prevailing national ethos. Though the Supreme Court was beginning its retrenchment on civil rights and had arguably already transformed *Brown* from an anti-segregation decision to an anti-discrimination one, *Brown* was the prevailing national and

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<sup>169</sup> *Id.*

juridical ethic of the country.<sup>170</sup> *Nomos and Narrative* tells us how we should deal with outliers from that definitional vision of the country.

One answer—the one Cover offers in *Nomos and Narrative*—is that the state rightly subordinates divergent *nomoi* to “redemptive constitutionalism.”<sup>171</sup> In doing so, the Court should be respectful of *nomoi* in the way that Cover models with his “sympathy.” The article devotes most of its pages to discussing the challenge presented by *nomoi* and insisting how the judicial process is jurispathic, however necessary the imperial function might make it. He devotes very few pages to saying what the Court should have done in *Bob Jones University* because it should be apparent to the reader by then: utilize its imperial function resolutely in service of redemptive values it can and should defend.<sup>172</sup> This is a violent function, but it is a necessary one, and the Court should not pretend it is anything otherwise—nor should it shy away from what needs to be done.

This is what the Court had already been doing albeit at the expense of *Brown’s* desegregation goals by announcing “Our Federalism” as a judicial principle in *Younger v. Harris*,<sup>173</sup> then extending *that* redemptive value in *O’Shea v. Littleton*<sup>174</sup> and *Los Angeles v. Lyons*.<sup>175</sup> These decisions nominally present different constitutional and procedural questions but are united in preserving Our Federalism. That police abuse and discrimination in the operation of the criminal justice system were critical issues during the civil rights movement and remain so today is part of the price we have paid in service of Our Federalism. But this kind of constitutionalism reflects, it seems, what Cover had in mind, albeit with extension of *Brown* as his goal.

The “redemptive constitutionalism” approach suggests that courts dealing with disputes involving the definition of the nation or a national ideal might identify in our Constitution critical, nation-defining values and enforce them in appropriate cases. The battle

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<sup>170</sup> See, e.g., OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 86-89 (1978) (describing how *Brown* changed courts’ approach to equitable remedies).

<sup>171</sup> See Cover, *supra* note 1, at 60 (“The courts may well rely upon the jurisdictional screen and rules of toleration to avoid killing the law of the insular communities that dot our normative landscape. But they cannot avoid responsibility for applying or refusing to apply power to fulfill a redemptionist vision.”).

<sup>172</sup> *Id.* at 66.

<sup>173</sup> 401 U.S. 37, 44 (1971).

<sup>174</sup> 414 U.S. 488, 499 (1974).

<sup>175</sup> 461 U.S. 95, 135 (1983).

between groups might contest different aspects of our nation, but the Court is equipped, and perhaps expected by Cover, to intervene and take a side, inasmuch as these disputes involve foundational constitutional values. It is not possible to say, at least ahead of time, what those values are; however, the Constitution, documents like the Federalist Papers, and certain historical understandings of the country's history provide sources for identifying foundational constitutional values. "Nationalist intellectuals may well invent a tradition, but they cannot invent just any tradition—it must fit within some recognizable continuum of distinctive local features."<sup>176</sup> Those features are part of our constitutional tradition, however much that tradition might be contested. To the extent that nomoi threaten to destroy the order, the imperial character of courts is justified in suppressing them to avoid the Constitution becoming a suicide pact.<sup>177</sup>

The difficulty that should be apparent with a redemptive constitutionalism approach is that populist nationalists are asserting broad claims about what the nation is that converts this solution into a circular one. If populist nationalists' illiberal position says, for example, that only white men can be citizens, one cannot answer that question "outside" of their reading of the Constitution and its history. Moreover, we have recently come to recognize that our political order is much less instantiated in binding documents, as opposed to informal tradition, than we thought.<sup>178</sup> So, as Cover noted, even agreement about foundational texts do not produce accord on the meaning of those texts. And it should also be evident that the current textualism dominating constitutional interpretation proves less than helpful in addressing questions put at this level of abstraction. Populist nationalists are insisting that the texts and history of the country should be read as designed by people like them, for them, and in their interest.<sup>179</sup>

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<sup>176</sup> Judt, *supra* note 75, at 8.

<sup>177</sup> See Cover, *supra* note 1, at 16.

<sup>178</sup> See, e.g., David Frum, *The Seven Broken Guardrails of Democracy*, ATL. (May 31, 2016), <https://www.theatlantic.com/politics/archive/2016/05/the-seven-broken-guardrails-of-democracy/484829>; but see Elaine Kamarck, *Did Trump Damage American Democracy?*, BROOKINGS (July 9, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/09/did-trump-damage-american-democracy>.

<sup>179</sup> Linda Greenhouse notes that Katherine Stewart, in her book *The Power Worshipers: Inside the Dangerous Rise of Religious Nationalism*, argues that the goal of "religious nationalist" is dismantling the

Cover is useful here is one important aspect. His call for “commitment” means that he would likely have not worried about rejecting the illiberal populist nationalist views. *Nomos and Narrative* does tell us that

[m]aintaining the world is no small matter and requires no less energy than creating it. Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.<sup>180</sup>

From this we can infer an overarching imperial value of tolerance and peace that would inform rejection of illiberal nomoi like populist nationalist communities. Indeed, we can read this back into Cover’s criticism of the Court’s lack of commitment. The sense that its abandonment of *Brown*’s redemptive values in favor of bureaucratic values, reflected an abandonment of the key imperial value of world maintenance when it was needed. Segregation needed to be put to bed in *Bob Jones University*, but the court had only decided that the I.R.S. had been given power by Congress.<sup>181</sup>

My speculation about Cover’s position reveals that *Nomos and Narrative* ultimately only suggests as much as the liberal communitarians do: liberal nationalism requires an approach for deciding how to deal with competing visions of nation (different nomoi) that neither capitulates to illiberal groups nor disparages the centrality of the nomos to individuals. Cover’s tacit argument that

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secular state itself, the obstacle to establishing God’s kingdom on earth. According to Stewart . . . the goal is “dominionism,” a word all but unknown in secular society but very familiar on the religious right, which she defines as “the fundamental idea that right-thinking Christians should assume power in all spheres of life.”

Linda Greenhouse, *Grievance Conservatives Are Here to Stay*, N.Y. REV. OF BOOKS (July 1, 2021), <https://www.nybooks.com/articles/2021/07/01/grievance-conservatives-are-here-to-stay> (book review).

<sup>180</sup> Cover, *supra* note 1, at 16.

<sup>181</sup> *Id.* at 66. *See id.* at 64 n.188 (“The only support in legislative history for the Bob Jones University result was Congress’ behavior after the IRS’ 1970 ruling.”). *See also* *Bob Jones Univ. v. United States*, 461 U.S. 574, 598-602 (1983).

courts should act to *promote* jurisgenesis arguably provides that approach.

### C. Promoting Jurisgenesis Through a New Justification for (Some) Rights

The final suggestion Cover implies for states dealing with nomoi emphasizes courts facilitating the jurisgenerative capacity of nomoi by avoiding “a total crushing of the jurisgenerative character.”<sup>182</sup> Because this component is not an express tactic for dealing with conflicting nomoi in *Nomos and Narrative* and because Cover never says what it means to avoid crushing the jurisgenerative character of nomoi outside of the privatization he observes in the education cases, this approach is both an enticing and vague response to nomoi, and to nation. Perhaps it is not really an independent response to competing nomoi. It seems subsumed in the approaches Cover enumerates for privatizing questions of content in education disputes, providing only an explanation of the goal of such privatization. In this case it would offer little guidance on how we might deal with competing visions of the nation but we can imagine what I will call “promoting jurisgenesis” as an independent approach to dealing with dueling nomoi in ways that could help us think about competing visions of nation.

#### i. Some Ways of Promoting Jurisgenesis

Promoting jurisgenesis is no less vague for separating it from the privatization of education approach that Cover highlighted. Promoting jurisgenesis might be understood to be as narrow as a judicial attitude, suggesting a demeanor for courts contending with disputes involving competing nomoi to bring to such disputes. In difficult cases of competing nomoi, courts would use the goal of promoting jurisgenesis to tip the outcome in one direction or another. This approach seems at odds with the way Cover reviewed the cases of states seeking to set public education curricula and with his resolution of the *Bob Jones University* dispute. In the first instance he sees courts responding to conflicts between the public curriculum and nomoi leading to “a breathtaking acknowledgment of the privilege of

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<sup>182</sup> Cover, *supra* note 1, at 62.

insular autonomy for all sorts of groups and associations.”<sup>183</sup> In the latter case, he calls for the Court to “resolve the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other”<sup>184</sup> by embracing the redemptive constitutionalism at the expense of the protection of association. *Nomos and Narrative* itself seems to suggest that promoting jurisgenesis requires more than just a judicial attitude.

“Promoting jurisgenesis” might suggest direct government support for nomoi but this reading also runs afoul of how Cover read the education cases in the very passage from which I have derived promoting jurisgenesis. In *Nomos and Narrative* Cover is concerned that such a centralized approach is not possible.

The state's extended recognition of associational autonomy in education is the natural result of the understanding of the problematic character of the state's paideic role. There must, in sum, be limits to the state's prerogative to provide interpretive meaning when it exercises its educative function. But the exercise is itself troublesome; thus, the private, insular alternative is specially protected. Any alternative to these limits would invite a total crushing of the jurisgenerative character. The state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.<sup>185</sup>

Promoting jurisgenesis is thus unlikely to mean government articulation of a nomoi, even (or particularly) around what is the nation.<sup>186</sup>

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<sup>183</sup> *Id.* at 61.

<sup>184</sup> *Id.* at 66.

<sup>185</sup> *Id.* at 61-62. And earlier Cover notes that: “[E]ven were we to share some single authoritative account of the framing of the text - even if we had a national history declared by law to be authoritative—we could not share the same account relating each of us as an individual to that history.” *Id.* at 17-18.

<sup>186</sup> Eskridge, *supra* note 41. Of course, states have molded nation, as William Eskridge notes in critique of Scalia’s use of Kulturkampf, to describe efforts to recognize L.G.B.T.Q. rights:

The first Kulturkampf, the campaign that gave rise to the term, was German Chancellor Otto von Bismarck’s program between 1871 and 1887 to yoke the Roman Catholic Church to ideological state control. Roman Catholic practices were demonized as fit only for “womanly peoples” and



One might read promoting jurisgenesis in line with the current argument of some religious rights advocates to suggest that courts should prioritize religious belief and practice over the rights of individuals when they conflict.<sup>187</sup> So groups in general might have primacy over individuals to emphasize their jurisgenerative potential. Apart from whether such an approach is feasible, there is nothing in *Nomos and Narrative* to support it. Indeed, part of what is bracing about the article is its clear-eyed understanding that nomoi do not just attend to internal concerns. Some seek to transform the world in their own image. “People associate not only to transform themselves, but also to change the social world in which they live. Associations, then, are a sword as well as a shield. They include collective attempts . . . to change the law or the understanding of the law.”<sup>188</sup> And the world they would create would not likely be tolerant one.

Although all of these groups had a place in their normative worlds for civil authority, and although some would transform civil authority into an intolerant arm of their own substantive vision when the chance arose, all, finding themselves within a state not under their control, sought a refuge not simply from persecution, but for associational self-realization in nomian terms.<sup>189</sup>

*Nomos and Narrative* seems particularly opposed to any one nomos automatically winning disputes and seems at odds with nomoi exceptionalism: though nomoi create meaning they remain throughout subject to the state’s jurispathic tendencies.

Cover’s early discussion of freedom of association suggests that it facilitates nomoi in a way that could stand in for “promoting jurisgenesis.”

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inconsistent with the centralized, homogenous, nation-state that Bismarck was building. To reconcile the goals of state centralization and cultural homogeneity with the deviant Catholic nomos, Bismarck asserted state control over the education, appointment, and speech of parish priests; dismantled church institutions; and expelled religious resisters. Unlike later Nazi policies, *Kulturkampf* was (is) a campaign of domestication and conformity, not genocide and annihilation. Nonetheless, when the state acts as aggressively as it does in a *Kulturkampf*, judicial acquiescence is jurispathic and scarcely neutral, contrary to Scalia.

*Id.* at 2414.

<sup>187</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

<sup>188</sup> Cover, *supra* note 1, at 33-34.

<sup>189</sup> *Id.* at 31.

Freedom of association is the most general of the Constitution's doctrinal categories that speak to the creation and maintenance of a common life, the social precondition for a *nomos*. From the point of view of state doctrine, the simplest way to generalize the points that I have made concerning the ways in which various groups have built their own normative worlds is to recognize that the norm-generating aspects of corporation law, contract, and free exercise of religion are all instances of associational liberty protected by the Constitution. Freedom of association implies a degree of norm-generating autonomy on the part of the association. It is not a liberty to be but a liberty and capacity to create and interpret law—minimally, to interpret the terms of the association's own being.<sup>190</sup>

But Cover introduces this language in the process of juxtaposing “insular” and “redemptive” *nomoi*. For the insular *nomoi* rights protections like the associational rights above seem adequate.<sup>191</sup> “When groups generate their own articulate normative orders concerning the world as they would transform it, as well as the mode of transformation and their own place within the world, the situation is different—a new *nomos*, with its attendant claims to autonomy and respect, is created.”<sup>192</sup> The existence of such “redemptive” *nomoi* and their potential to conflict with other *nomoi* and with the state presents an issue not adequately addressed by association rights as we understand them. This is the problem *Nomos and Narrative* is built around addressing. Consequently, “promoting jurisgenesis,” if anything, must mean something different from just promoting association rights that protect individuals and indirectly the groups to which they belong from the state’s jurispathic tendencies. It implies something more than the kind of individual rights we have come to associate with the Constitution and human rights regimes. It suggests a different perspective on rights aimed specifically at promoting jurisgenesis.

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<sup>190</sup> *Id.* at 32.

<sup>191</sup> *Id.* at 34 (“Commonality of interests and objectives may lead to regularities in social, political, or economic behavior among numbers of individuals. Such regularities, however, can be accommodated within a framework of individual rights.”).

<sup>192</sup> *Id.*

ii. *Promoting Jurisgenesis with a New Perspective on Rights*

Promoting jurisgenesis is not explored in *Nomos and Narrative*, yet it perhaps supplies a most attractive means of dealing with illiberal nomoi like a populist nationalist. How this might be requires recognizing the revolutionary contribution of the nomos to our thinking about law and focusing on how that contribution might change how we think about rights. That is, taking nomoi seriously demands that we reconstruct how we think about the role of rights. Specifically, I wish to introduce a second dimension for thinking about how rights protect individuals from the potential excesses of the nation state. That dimension focuses on individual's interaction with the nation and supplements the traditional focus on rights as a means of protecting individuals from the excesses of the state. While this article is not the place for a full exposition of this new way of thinking about rights, a brief summary of it demonstrates how taking nomoi seriously and focusing on facilitating the jurisgenerative capacity of nomoi can enrich our understanding of and justification for rights and protections.

The impetus for reconsidering how we think about rights has to do with the inadequacy of the associational rights for addressing conflict between nomoi that is suggested in *Nomos and Narrative*. It also derives from the need for a framework for structuring arguments among nomoi. Silvio Ferarri makes a similar suggestion, arguing that the Westphalian nation state is in crisis, particularly because the national element of states has frayed, undermining for him, the critical role of civil religion in binding a national community together:

[W]e should be aware that the Westphalian state is no longer a viable model even in its birthplace, Europe. National states are no longer the same. Moreover, the world seems to be experiencing dissociation between law and love. While the state still provides an unsurpassed legal framework for its citizens' lives, much stronger than that provided by transnational and international organizations, many states are no longer nations in the sense that they have lost the ability to create the emotional commitment that once characterized the national state. Immigration and globalization have put an end to the identification of state and nation described by Hanna Arendt at the

beginning of the 1950s. Today, states host within their borders many nations, constituted by different cultural, ethnic, religious, linguistic, and racial communities that are taking the place of the nation as the locus of belonging, commitment, and solidarity. This explains why civil religion cannot work anymore as a factor of social cohesion as long as we have the pretension of creating it at the national level.<sup>193</sup>

From this observation, Ferrari sees Cover's *Nomos and Narrative* as a beacon shining the way:

According to Robert Cover . . . everyone lives in a normative universe, which Cover defines as “a world of right and wrong, of lawful and unlawful, of valid and void.” Religious communities are a good example of these normative worlds; they are the places where new legal meanings are created through the personal commitment of the community members who apply their will to transform the “extant state of affairs” according to their “visions of alternative futures.” But, the coexistence of different legal worlds requires a system-maintaining force, which Cover identifies in the “universalist virtues” of liberalism, embodied in the modern state. Without them, these legal worlds “would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions.” In other words, normative communities cannot flourish without the state legal framework.

. . . .

Although it is difficult to fall in love with a legal framework, it is possible to recognize that its existence is a matter of common interest, as normative communities cannot flourish without it. Therefore, while states should make room within their legal systems for the communities where belonging and commitment can be found, states should also recognize that they need the legal framework because it provides

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<sup>193</sup> Ferrari, *supra* note 166, at 759-60.

the rules governing the playing field where they live and compete. This issue of rules is controversial. On the one hand, rules cannot be directly derived from the normative communities (as defined by Cover) because they would not be sufficiently inclusive. On the other hand, the rules cannot be completely detached from the normative communities, as only the normative communities are able to provide the values on which rules are based. It is important to understand that no playing field is absolutely neutral and, for this reason, the best way to deal with this dilemma is to reduce the playing field's rules to the minimum required for a fair game.<sup>194</sup>

For Ferrari, civic religions, having lost the ability to automatically bind communities together as the nation has frayed, still provide a basis for building a needed connection.

The notion of civil religion had something to do with the search for a nucleus of values able to create a cohesive group of individuals. When a particular religion or culture cannot perform this unifying role, civil religion takes its place by providing a set of values, symbols, and rituals upon which the spiritual unity and social cohesion of a nation can be rebuilt.<sup>195</sup>

This process is distinctly tied to the nation and national identity formation as civil religion provides a “cluster of historically rooted values and principles [and] constitutes the framework within which national identity is redefined, thus allowing changes to take place without breaking too sharply from the past.”<sup>196</sup> From this, a citizen can be a “full” citizen by “sharing a common narrative, partaking in some foundational myths, and developing a sense of belonging, solidarity, and commitment.”<sup>197</sup> That is, neutral rules for how civil religions (and other value forming communities and groups) come to the debate about nation can invigorate the contemporary nation state with the content that Cover believed necessary to a fulfilling life and which he believed states could not deliver through a state nomos. This

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<sup>194</sup> *Id.* at 760-61.

<sup>195</sup> *Id.* at 749.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 750.

is what liberal communitarians seek as well. *Nomos and Narrative* seems to point the way to a structure that ensures nation. But what does that look like?

Our understanding of rights, constitutional and human, focuses on the relationship between individual and state. This is the extant “dimension” for thinking about and justifying rights. Rights are limits on the state’s exercise of power, whether that power is exercised on behalf of “the people,” the greater good, tradition, or the interest of a despot. Under this dimension, individuals are predominant and their membership in communities, *nomoi*, religions are secondary, leading to various communitarian critiques of rights,<sup>198</sup> among others. I am suggesting that recognition of a second dimension for thinking about and justifying rights would focus on the relationship between individual and nation. Rights would also be conceived as a limit on the nation’s exercise of power—that is, the government acting to impose a national view but also the interaction between groups that, through that interaction forms the extant nation. This dimension still centers on the individual, but in juxtaposing the individual to the nation, it recognizes that individuals exist in groups and communities. As members of often overlapping groups, individuals contest the meaning of their world (the nation) every bit as much as citizens – as members of political clubs and parties – contest the constitution of the government. As citizens might participate in the democratic process individually or collectively, individuals might participate in the nation-forming process individually or in groups. The richness of social existence and group membership is thus not at odds with this justification of rights so much as it is assumed and, by necessity, facilitated by this justification for rights—“[p]eople associate not only to transform themselves, but also to change the social world in which they live.”<sup>199</sup> Given the state’s near monopoly on justified use of force, this dimension mostly operates as a justification of rights, changing our understanding of rights enforcement only on the margin. But it imagines an open competition over the content of nation according to rules that guarantee an open society. As opposed to an illiberal populist nationalist, there are no privileged views of nation.

a.) The Extant Dimension of Rights:

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<sup>198</sup> See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1st ed. 1982).

<sup>199</sup> Cover, *supra* note 1, at 33.

Individual versus Government

The systems of human and civil rights that gained force and significance in the twentieth century were devised to limit the incredible power of the nation state. When first envisioned in the American Declaration of Independence and the French Declaration of the Rights of Man, these rights were aimed at the state as such, given the limited conceptualization of the nation.

The primary meaning of “nation”, and the one most frequently ventilated in the literature, was political. It equated “the people” and the state in a manner of the American and French Revolutions, an equation which is familiar in such phrases as “the nation-state”, the “United Nations”, or the rhetoric of late-twentieth-century presidents.<sup>200</sup>

Thus, the rights articulated during the revolutionary period were the natural rights of man against the state. Though nation was also used in ways similar to our current conceptions, the nation was equated with state often enough that it is not surprising that human and civil rights emerged as focused on the state component of the nation-state. Rights, in any case, are naturally directed at the government which exercises a practical monopoly on justified use of force.

Through its creation, the United Nations Human Rights system evaded theoretical questions about the source of rights through a complex network of treaties and a limited number of customary international law norms that make such rights largely positivist rights. Constitutional rights have a similar positivist provenance. This positivism makes the state the specific respondent to rights (rights are against the state) and therefore, the focus of thinking about the justification of rights. The combination of a focus on the government apparatus of the state and a positivist construction of rights leads one understandably to conceive of rights as justified by the need to protect individuals from the state and treats other disputes as private (outside rights of these kinds).

Exercise of the sovereign power of the state is thus limited. States ought not summarily execute persons in their jurisdiction, disappear them, or torture them. Violations of these principles notwithstanding, there exists in rights systems an understanding that

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<sup>200</sup> HOBBSAWM, *supra* note 5, at 18.

the state should not abuse its citizens. However, rights are not unlimited and the state acting on behalf of its citizens has a tremendous range of action. Between these sharp limitations on treatment of people subject to its powers and the recognition of the state's range of rightful action lie several more difficult rights questions that, for our purposes here, I will suggest are "due process" questions. In those questions, substantive and procedural rights merge sometimes limiting government action but not always; these are rights defined by degree. Disputes between individuals, in all cases, are private and generally beyond rights protection.

#### b.) Ignoring the Nation

Even as the idea of a nation state emerged as the primary way of thinking about international political organization, the national component of that entity has not been the subject of rights. In part, this is because the national character of the state was under theorized. Little attention was paid to the national component of nation states aside from utilizing the existence of a "nation" as a justification for the state's legitimacy with jurisdiction over particular peoples. Nation was mostly assumed and, in any case, not seen as the proper subject of rights-based protections of citizens.<sup>201</sup>

Moreover, any concerns about individuals' interaction with the nation in the nation state seems easily enough addressed through regulation of the government institutions since the nation does not ordinarily act except perhaps through government institutions claiming to act in its name. Moreover, government institutions have generally exercised a key role in defining and implementing the national identity of a nation state. As nation states emerged, the states created centralized educational systems that bound nations together through literacy in a national language. States oversaw, or themselves built the transportation and communications infrastructure that made a cohesive nation possible. And the administrative apparatus of the state standardized and brought together common policies that, in working in service of the nation, advantaged some communities over others, notably in its regulation of the borders and design of immigration policies that sought in the Americas to preserve or transform the character of the national population. States also negotiated the

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<sup>201</sup> *Id.* at 24 ("[M]uch of the liberal theory of nations emerges only, as it were, on the margins of the discourse of liberal writers."). *See also id.* at 14-45.



relationship between religions, establishing national religions and often determining a role for other religious communities in their jurisdiction.

But several problems emerge if rights, naturally applicable against the state, are conceived only in reference to the individual versus the state. For our purposes, these problems coalesce around the problem of “minorities” as understood in the early twentieth-century international order.<sup>202</sup> This is the issue of equal treatment versus special treatment in the law that dates to *Plessy’s* contemptuous suggestion that black litigants sought special favor in the law,<sup>203</sup> which

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<sup>202</sup> See, e.g., *The League and the Minorities Treaties*, 5 BULL. INT’L NEWS 3, 3-10 (1929).

Under the terms of the Treaties, the signatory States undertook to ensure to all the inhabitants within their frontiers protection of life and liberty and free exercise of their religion, without distinction of birth, nationality, language, race, or religion. All nationals of the country were declared equal before the law, and enjoy the same civil and political rights.

*Id.* at 4. The treaties limited the authority of Poland (Minorities Treat, 28th June, 1919, which were used as a model for the other treaties), Czechoslovakia, Greece, and Yugoslavia (Minorities Treaties, 10th September 1919), Austria (Articles 64-69 of the Treaty of Saint-Germain-en-Laye, 20th September, 1919), Bulgaria (Treaty of Neuilly-sur-Seine, 27 November, 1919), Rumania (Minorities Treaty, 9th December 1919, extended to Bessarabia, 28th October, 1920), Hungary (Articles 54-60 Treaty of Trianon, 4th June, 1920), and Turkey (Treaty of Lausanne, 24th July 1923, replacing the earlier but unratified Treaty of Sèvres). *Id.* at 10.

<sup>203</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument . . . assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals. . . . “When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.” Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

relegated to the private sphere questions of social equality, even as it sanctioned erection of a system of enforced subordination. And in modern constitutional law, this is the problem of protecting “discrete and insular minorities” from the tyranny of the majority.<sup>204</sup> Stated broadly, if the state is to treat all citizens equally, how can it account for differences among its citizens? And, to the extent that difference takes the form of the kind of cohesive communities Cover called *nomoi* the problem of dealing with such difference amounts to dealing with nascent nationalism. In *Nomos and Narrative*, Cover saw this problem as a choice between competing *nomoi*: “The judge must resolve the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other.”<sup>205</sup> But for both, recognition by the law stands at odds with equality before the law.

Many communities resemble the minority populations consigned to newly created nation states after World War I and provided protection in the Minorities Treaties. Though popular sovereignty and self-determination are central ideas associated with the nation state and protected by international law since the formation of the United Nations,<sup>206</sup> the idea that all “nations” should have their own states has been more theoretical than real,<sup>207</sup> leaving many ostensible national groups stuck under the authority of nation states dominated by other communities. These nascent nations share with other kinds of minority populations a potentially problematic existence. Minorities are conceived as permanently outside the national polity. Rights provide protection but do not guarantee vibrancy of the community, particularly over the long run. More broadly, rights that are conceived as checks on the state’s treatment of its citizens must either ignore the community membership of the individual citizen or assume that the individual needs protection as a member of a particular community. The former minimizes the significance of the community; the latter risks essentializing the

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*Id.* at 551-52. See also Justice Bradley’s opinion in *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

<sup>204</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980), which builds on the famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938).

<sup>205</sup> Cover, *supra* note 1, at 66.

<sup>206</sup> See generally ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 19 (1st ed. 1995).

<sup>207</sup> See, e.g., IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 599 (6th ed. 2003).

community's characteristics while also undermining the possibility of multiple group memberships (intersectional identity) among individuals, including individuals of minority groups sharing or participating in the extant national identity.

This stilted choice has structured our approach to civil rights and confrontation with Jim Crow segregation and its legacy. Rights require the government to manage its treatment of minorities. A just nation state must guarantee equal citizenship as equality before the law. It must ensure the complexity of associational rights Cover emphasized in *Nomos and Narrative*: freedom of religion; freedom of speech and association; and freedom of association.<sup>208</sup> These rights belong to individuals and protect them against abuse by the state, permitting them to be the individual they are. For a member of a minority community, however, these rights do not necessarily permit their community to thrive. Individuals can find relief in a kind of assimilation. Perhaps they can integrate into a civic community that has, theoretically, no communities or groups but which might realistically be seen as dominated by one (plural republic).<sup>209</sup> Or they might fold into a more candidly dominant group identity in a state with a purportedly homogeneous nationalism.

Throughout the 20th Century, this kind of assimilation was what the American pluralist nationalism offered.<sup>210</sup> However, this assimilationist vision functioned in tandem with the formal and informal segregation of Jim Crow that, in any case, permitted systematic and severe private discrimination to further confine black Americans to second class citizenship and generally create a racial and ethnic hierarchy.<sup>211</sup> Rights were an awkward and imperfect solution to Jim Crow segregation and inequality. The whole period of Jim Crow segregation existed under the rights regime of the Fourteenth Amendment, however much *Plessey* and related cases might have limited its scope.<sup>212</sup> And as *Brown* sought to deploy post-World War II rights enthusiasm to reverse *Plessey*, it was initially viewed as

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<sup>208</sup> Cover, *supra* note 1, at 32-33.

<sup>209</sup> See the example of Jews in France as described by Smith. SMITH, *supra* note 80, at 44-45.

<sup>210</sup> See RICHARD D. ALBA AND VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* (2009).

<sup>211</sup> See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 9-11 (2010).

<sup>212</sup> See generally Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

morally correct but legally questionable with efforts to envisage “neutral principles” for ending segregation proving difficult to conceive.<sup>213</sup> Needling the rights regime was the worry about special rights for minorities.<sup>214</sup>

The Permanent Court of International Justice’s efforts to protect minority groups in newly formed states after World War I had already revealed in 1935 this problem that, in any case, was central to the reasoning of the Court in *Plessy*.<sup>215</sup> In its advisory opinion in *Minority Schools in Albania*, the Permanent Court’s efforts to extend to the Albanian complainants recognition as a distinct entity, seemed to give them special favor in the law, running up against the injunction to ensure all citizens are equal before the law.<sup>216</sup> Like other groups in the system of minority protections, the Albanian complainants struggled to preserve their language, religious beliefs, and educational institutions in face of government efforts to impose standardized programs on all citizens. The Permanent Court described the problem:

The idea underlying the treaties for protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibly of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuring special needs.

. . . .

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

. . . .

The first is the ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in

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<sup>213</sup> Naturally, this is the problem defined in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959).

<sup>214</sup> John Valery White, *The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Poverty*, 5 NEV. L.J. 6, 41-53 (2004) (discussing *Hughes v. Sup. Ct. of Cal.*, 339 U.S. 470 (1950)).

<sup>215</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896).

<sup>216</sup> See, e.g., *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at art. 48-51 (Apr. 6).

every respect on perfect equality with the other nationals of the State.

....

The second is to ensure for the minority elements suitable means for their racial peculiarities, their traditions and their national characteristics.<sup>217</sup>

The Permanent Court conceived these necessities of the treaties as closely interlocked but the respondent Greek government saw its statutes, which applied equally to all, as satisfying the first requirement and regarded the second requirement as undermining equal treatment. The majority disagreed, seeing the second requirement as necessary to equality “in law but also in fact.”<sup>218</sup>

The state defendant in *Minority Schools in Albania* saw individual equal treatment as what the treaty required. The individual versus government framework for thinking about rights suggested that recognition of distinct groups was at odds with rights as protection of individuals from government abuse.

It is surprising that these issues were already being aired some twenty years before *Brown*, and more than forty years before *Regents of Univ. of California v. Bakke*.<sup>219</sup> A similar emphasis on individual rights undermined efforts to dismantle Jim Crow and address its related inequalities through policies like affirmative action or broad remedies such as those addressed in *Martin v. Wilkes*.<sup>220</sup> The emphasis on individual rights itself had the effect of minimizing, or even erasing the history and present effects of segregation. That emphasis also tended to transfer blame onto those effected through a victim blaming, personal responsibility framework, especially when invoked as part of arguments saying that present economic and social conditions explained inequality better than the legacy of segregation.<sup>221</sup>

Indeed, we might see the frustration and impatience of the Summer 2020 Black Lives Matter protests<sup>222</sup> and their leaders’

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<sup>217</sup> *Id.* See also PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 105-111 (2013) (showing a reconstruction of the Albanian Advisory Opinion).

<sup>218</sup> ALSTON & GOODMAN, *supra* note 217, at 109.

<sup>219</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 267 (1978).

<sup>220</sup> 490 U.S. 755, 758 (1989).

<sup>221</sup> See generally WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE (1st ed. 1978).

<sup>222</sup> Larry Buchanan et. al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020),

associated rejection of civil rights litigation and constitutionalism as a response to this emphasis on the individual rights model and narrowing of the response to the condition of black Americans through an individual rights framework.<sup>223</sup> The movements associated with the Summer 2020 protests are characterized by loudly proclaiming that racism (institutional or otherwise) still exists, against the arguments that inequality is the result of present social conditions, like a culture of poverty or single parent homes, as was emphasized in the 1980s and 1990s.<sup>224</sup> The movements are insistent that change happen now, without regard to legal restrictions that have developed over the years (like the sharp limits on affirmative action-like programs). The movements have been characterized by their focus on results without any deference to limits on the ability of institutions to achieve those results.

A robust rights regime aimed at protecting citizens from the abuse of the state seems inadequate to addressing legacy inequality for groups like black Americans whose identity is tied up with the history of slavery, segregation, oppression, and inequality. The rights regime further seems to lack the capacity to respond to present inequalities created by disdain for sub-communities without such long histories of systematic isolation and discrimination, much less individuals who have only recently come to be able to express their identity in public like L.G.B.T.Q. individuals. The difficulty is that the rights regime's focus on individual versus state ignores what communitarians and advocates of recognition see as critical aspects of a person's being: who they see themselves to be and how that identity is situated in communities.<sup>225</sup> These critiques of individual rights differ but come together in worries about the limits of individual rights. These kinds of rights fail to offer adequate protection from populist nationalists who, in seeking to take over the state apparatus, view rights as part of the problem.

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<https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html?searchResultPosition=1>.

<sup>223</sup> See White, *supra* note 37, at 1004.

<sup>224</sup> This is apparent in the policy platform of the Movement for Black Lives. See *Vision for Black Lives 2020 Policy Platform*, M4BL, <https://m4bl.org/policy-platforms/> (last visited Jan. 12, 2022).

<sup>225</sup> See also MAKAU MUTUA, *Human Rights and the African Fingerprint*, in HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 76, 82 (2002) (asserting that the "African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity").

Liberal communitarians extend worries about the narrow scope of rights to the question of the place of nation in our thinking about nation states. *Nomos and Narrative* focuses us on how nomoi may be insular or redemptive, and how those nomoi might accommodate themselves to life in the larger community or contend to influence it and impose a vision of community and law on the polity. Associational rights of individual versus the state are inadequate to structure how nomoi vie to influence the nation as those rights only create room for insular nomoi to emerge. Part of Cover's insight seems to be that those redemptive nomoi seeking to transform the world in their image go beyond the inward-looking commitments of insular nomoi.<sup>226</sup> They force the question of the conflict with the state over the meaning of law. Similarly, even liberal redemptive nomoi would push against state meaning (we want them to, don't we), forcing a choice between state and nomos. Associational rights create room for the nomos but say little about how to balance the nomos and the state. How ought the contest over nation be structured in a way that does not lead to a war of nomoi? How might we mitigate the way that criticism of rights especially as related to nation has devolved in some quarters into a justification for authoritarianism?<sup>227</sup> These questions require acknowledgement of the national component of the nation state.

c.) An Individual versus Nation Dimension  
of Rights

Focusing on the nation and individuals' interaction with the nation structures how we might promote jurisgenesis. Nation is a contested idea, disputed every bit as much as contests over control of the state apparatus for which democracy is seen as a critical requirement. If political control of the state is contested through democratic processes, control of the national identity is contested in civil society. Cover's nomoi, existing under the authority of the state,

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<sup>226</sup> Cover, *supra* note 1, at 33 ("People associate not only to transform themselves, but also to change the social world in which they live.").

<sup>227</sup> Criticism of rights has become a central part of populist nationalist complaint. See EATWELL & GOODWIN, *supra* note 68. More broadly, rights have been criticized for failing to recognize or honor the cultural or national character of the nation, a criticism that risks becoming a justification for illiberal authoritarianism. Consider objections to women's or L.G.B.T.Q. rights rooted in "national" character. See, e.g., Tracy Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 89 (1996).

must reconcile themselves to that existence but must also make peace with the existence with other nomoi and under the influence of a larger set of values, norms, and commitments. Given the opportunity, any of these nomoi would seek to impose their views on others, and many envision a world where their nomos reigns supreme. Nomoi seek to influence the idea of nation, reconciling the commitments of their insular community with the demands of existence in the nation, but also creating accounts of the nation that reconcile it to their insular commitments. Government is the tantalizing temptation. For control over local, regional, or national government institutions promises to permit a nomos to colonize the national ideal and impose itself on others: “[S]ome would transform civil authority into an intolerant arm of their own substantive vision when the chance arose[.]”<sup>228</sup>

National identity is influenced by the extant government, but the construction and maintenance of national identity has long been the substance of literary elites and their peers, who could both construct a national identity from lore and history of the society and had the influence to convince leaders of the state to embrace that identity as the defining feature of the community.<sup>229</sup> In the middle of the twentieth century, radio and television gave national leaders a perch from which to exert additional influence on the national identity of some nations, even as the proliferation of broadcasts simultaneously undermined the centrality of government leaders in developing a national identity.<sup>230</sup> Authoritarian regimes came to be characterized as much by their suppression of media and thought as by their arrest and assassination of dissidents. Today, authoritarian states are increasingly sophisticated in their efforts to control the new media of our time—social media and internet-based communications.<sup>231</sup> While arrests and detention persist, along with other mechanisms of state terror, much of

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<sup>228</sup> Cover, *supra* note 1, at 31.

<sup>229</sup> This is the principal argument of ANDERSON, *supra* note 91, at 4.

<sup>230</sup> Control of media came to be regarded as a key factor in successful coup d'état:

One of the first actions of a successful coup d'état is the seizure of broadcasting facilities. The more receiver sets in the country the easier it is for the new regime to consolidate its victory by rapid dissemination of news. This only hold true if the broadcasting facilities are relatively concentrated and accessible to seizure. If they are not taken they may be a powerful source of opposition.

Alan Wells, *The Coup d'Etat in Theory and Practice: Independent Black Africa in the 1960s*, 79 AM. J. SOCIO. 871, 879 (1974).

<sup>231</sup> Eda Keremoğlu & Nils B. Weidmann, *How Dictators Control the Internet: A Review Essay*, 53 COMPAR. POL. STUD. 1690, 1691 (2020).



the battle for control over a country plays out in the media where fights to shape the national identity are fought. Populist nationalists seek to gain control of the state<sup>232</sup> and to influence media platforms in an effort to impose their vision of the nation.<sup>233</sup>

If Nomoi are competing to influence the extant national identity every bit as much as they compete to influence the jurisprudence under which they will live, the rights adequate to restrain the nation state take on a new character. A rights regime must envision a decentralized, privatized battle for meaning with the same consequences as democratic elections with or without the episodic character, that at one point in time grants authority to a set group of people who obtain power and are subject to the limitation of (first dimension) rights. Instead, rights must protect individuals in a dynamic process where any given person might be *both* a power holder and a victim, depending on what aspect of their identity is being discussed. The individual's identity will draw meaning from historical precedent, contemporary groups, and future aspirations, as well as the interaction of all of these with one another, and with notions of the

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<sup>232</sup> Katherine Stewart, *Christian Nationalism Is One of Trump's Most Powerful Weapons*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2022/01/06/opinion/jan-6-christian-nationalism.html> (“Opposition to public education is part of the DNA of America’s religious right. The movement came together in the 1970s not solely around abortion politics, as later mythmakers would have it, but around the outrage of the I.R.S. threatening to take away the tax-exempt status of church-led ‘segregation academies.’ In 1979, Jerry Falwell said he hoped to see the day when there wouldn’t be ‘any public schools—the churches will have taken them over again and Christians will be running them.’”).

<sup>233</sup> At least one author has characterized religious support for Donald Trump as a fulfillment of religious nationalists’ engagement with popular culture.

This is the argument Kristin Kobes Du Mez, a historian at Calvin University, makes in her new book *Jesus and John Wayne*. According to Du Mez, evangelical leaders have spent decades using the tools of pop culture — films, music, television, and the internet — to grow the movement. The result, she says, is a Christianity that mirrors that culture. Instead of modeling their lives on Christ, evangelicals have made heroes of people like John Wayne and Mel Gibson, people who project a more militant and more nationalist image. In that sense, Trump’s strongman shtick is a near-perfect expression of their values.

Sean Illing, *Is Evangelical Support for Trump a Contradiction?: A religious Historian Explains Why Trump Wasn’t a Trade-off for American Evangelicals*, VOX (Jul 12, 2020), <https://www.vox.com/policy-and-politics/2020/7/9/21291493/donald-trump-evangelical-christians-kristin-kobes-du-mez>.

prevailing order. These notions might be exaggerations or misapprehensions of the world around the individual; the linchpin is fluidity.

An adequate rights regime protects individuals from abuse by the state and its governmental apparatuses and protects individuals from being sidelined in the now more expansive contest over what is the identity of the nation. Government can crush individuals through its power to act without due process in ways that disrespect individuals as citizens with diverse views of government, and by ultimately destroying the individual through torture and extrajudicial killing. But the nation, though not necessarily armed with the government apparatus, can do similar damage to individuals. And individuals must be protected, though not exclusively or necessarily from government activity that deprives them of participation in the nation formation process.

Given the non-state centered processes characteristic of the nation formation, a word is necessary on what protection of individuals from the nation might involve. Negative rights envision limits on what a state can do. Those limits are aimed at *directly* preventing government harm on its citizens through summary execution or disappearances—that is, punishments of a certain type and punishments imposed without due process.<sup>234</sup> The range of activities limited by rights are not all encompassing and much of our jurisprudence has been focused on drawing the line between when a state can act and when it cannot. In the center of such direct limits are due process disputes that ultimately turn on the degree judgments—how much process is due.

Limitations on government behavior also operate to protect individuals from state excesses *indirectly*. States' authority is limited to ensure that citizens can participate in their government. Not only are voting rights to be protected to ensure that individuals are equal before the law and can all participate in the forming of a government, but they also ensure that individuals have a say in what government policy is (albeit a small say according to public choice theorists).<sup>235</sup>

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<sup>234</sup> Consider, for example, Articles 6, 9, and 13-15 of the International Covenant on Civil and Political Rights, *adopted and opened for signature, ratification and accession* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), which guarantee a right to life and numerous due process rights, respectively.

<sup>235</sup> See generally Anthony Downs, *An Economic Theory of Democracy*, 65 J. POL. ECON. 135 (1957) (setting out what came to be known as the Downs' paradox—that

Authoritarian states seek to hold control over the state apparatus for a subset of the community, but they also seek to exclude others from having a say in what ought to be policy. Since these two aspects of authoritarianism operate together, it is easy to miss that exclusion of the individual from the polity is part of what government terror does.

An individual is generally protected *directly* from the excesses of the nation through *limits on the state's use of power*. Therefore, states cannot declare a community outside the law because of differences over what the vision of the nation is. This direct protection is critical, but it is not the only way that a national consensus can be used to marginalize a minority community. The national consensus might render a minority community marginal effectively through private behavior. For sure through lynching, but also by discrimination and institutional bias can a national consensus operate to render a community as subordinate. Immediately, it should be apparent that the dimension of individual versus nation provides a solution to the state action problem that troubled efforts to legislate prohibitions against discrimination.<sup>236</sup> Jim Crow's private segregation, discrimination, and terror were not especially better where they were accomplished without state imprimatur. A satisfactory rights regime needs to be empowered to address the private terror and impunity that the individual versus government dimension is already adequate to address, but also the wholly private bias that says certain individuals are not a part of the nation. Our current justification for reaching such behavior is, unsatisfactorily, rooted in Congress' commerce clause power, which is to say its discretion.<sup>237</sup>

If the efforts to protect the individual against the state vary from prohibited-to-permissible state behavior with degree judgments about how much process is due, efforts to protect individuals from the excesses of the nation are similarly variable. While the "national" community ought to be prohibited from lynching, terrorizing, and exiling minority communities, protection of the individual from the

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for the rational, self-interested voter the cost of voting will normally exceed the expected benefits).

<sup>236</sup> The Court flirted with abandoning the state action requirement in *United States v. Guest*, 383 U.S. 745, 764-70 (1966).

<sup>237</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 271 (1964) (Black, J., concurring) ("[T]he power of Congress to regulate commerce among the States is plenary, 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'").

nation does not mean that a national identity or national community must reflect the views and identity of all its members, as such. Between these extremes lie questions that are every bit as much degree judgments as were the “how much process is due” questions between individual and state. We currently call these questions anti-discrimination questions and we have tended to treat them as relatively absolute because we force them into and answer them as though they were questions of equal protection before the law.

This set of protections can be seen in those aspects of *Nomos and Narrative* that sought to keep competing nomoi from devolving into a battle of all against all. This important role for the state perhaps seemed unsatisfyingly narrow in *Nomos and Narrative* because of the article’s focus on courts’ role in interpreting law which required judges to select between competing jurisprudential visions of opposing nomoi. While an earnest and discerning government might theoretically perfectly reflect the competing nomoi of its citizens, the dynamic, fluid process of national identity formation is probably incapable of truly reflecting the national vision of all aspects of even the most homogeneous community. If such a state nomos did come into being, Cover suggests it would quickly collapse.<sup>238</sup> In any event, such a state nomos on nation would likely be so banal a vision that, though most might be able to identify with it, it would provide insufficient depth to be meaningful.<sup>239</sup>

Most important, however, the nation lacks an independent means of enforcing itself. A national vision is persuasive because it tells a story of the people that the people choose to accept as convincing and which they choose to accept to define themselves in some contexts.<sup>240</sup> This mostly informal process is unlikely to result in

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<sup>238</sup> Cover suggested:

But the very “jurisprudence” of such a vision threatens it. Were there some pure paideic normative order for a fleeting moment, a philosopher would surely emerge to challenge the illusion of its identity with truth. The unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary. Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters.

Cover, *supra* note 1, at 15.

<sup>239</sup> One could not “love” it in Ferrari’s terms. Ferrari, *supra* note 166, at 759-60.

<sup>240</sup> This is akin to the limited authority Cover permits states in articulating meaning: The “very disturbing” consequence is that

there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest

unanimous assent and any embrace of a national vision is also unlikely to be static, gaining and losing adherents even as it also changes itself. Thus, the *direct* role of rights protecting individuals from the nation—the role comparable to preventing torture or disappearances by the government—should be aimed at protecting individuals from both state abuse and excesses of nonstate actors in the name of nation, much more so than trying to regulate the content of the national ideal. The more important role of rights protecting the individual from the nation is *the indirect one*: ensuring that individuals can meaningfully participate in the creation and evolution of a national identity.

The indirect role of protecting individuals from the nation consist of at least three distinct projects: a libertarian project, a communitarian project, and an intersectional project. That is, ensuring indirectly that *nomoi* can flourish, ensuring jurisgenesis, turns on ensuring individuals can be who they are, form and participate in vibrant communities, and exist comfortably in different communities to the extent they choose and in ways that they choose.<sup>241</sup> Though one

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in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. The uncontrolled character of meaning exercises a destabilizing influence upon power. 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. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.

Cover, *supra* note 1, at 18.

<sup>241</sup> As Paul Kahn said of communitarian and individualism in his critique of new communitarian thinking in 1989:

Instead of a problematic relationship of part (citizen) to whole (state), in which either the part or the whole threatens to subsume the other, the new communitarians understand the relationship of the individual to the political order as that of the microcosm to the macrocosm. We create and maintain our personal identity in the very same process by which communal identity is created and maintained. Thus, the historically specific discourse, which is at the center of communitarian theory, simultaneously creates the individual and the community. Individual identity does not exist apart from the discourse that creates and sustains the community. There is no self to understand, apart from the community, just as there is no community apart from the members. Neither the community nor the individual has any priority—temporally, conceptually, or normatively. Individual and community are two perspectives on a single process of discursive particularity. Within this universe of discourse, we cannot separate the talker from the talking: Both the individual and the community exist only in the talking.

Kahn, *supra* note 136, at 5.

might object to the focus on individuals here, that is a function of my focus on rights as protections from state activity and from certain abuses from private actors. These distinct projects reflect the ways that one is an individual with distinct attributes, the importance of communities, groups, ethnicities, and even nations to one's sense of self, and the multiple ways one can exist in different identities at one time, often even contradictory identities. The aim of this thinking about rights is both to guarantee the individual's ability to be all these things while also promoting contact between communities through their constituent members that will foment and develop *nomoi*, and therefore *jurisgenesis*.

Ensuring that individuals can meaningfully participate in national identity creation and evolution requires that individuals can be who it is they think they are. This is a libertarian project. Protection of individuals' ability to form and maintain a sense of self, independent of any group with which they might be associated is critical to ensuring their ability to participate in the national identity forming project. On some level, this kind of protection has traditionally been inseparable from ideas like freedom of conscience, since those capable of influencing the national identity tend to be authors, reporters, and community activists who could command the attention of the local or foreign press. The right to "be you," so to speak, was inseparable from the freedom of press or right to free association. However, today, the ability of individuals to directly communicate their views on social media has been freed to some extent from the gatekeeping function of the publication business. It has also permitted individuals to carefully curate a public image in a way previously reserved to celebrities with publicists. True, the goal for many is to become an influencer—a contemporary pitchman for products, lifestyles, and the sort.<sup>242</sup> However, the expanded space for individuals to shout out, "here I am, and this is what I believe," has permitted many with formally marginalized identities to come to the fore and engage in civic life in a way that they could not before.<sup>243</sup> Rights must protect their ability to

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<sup>242</sup> See, e.g., Kati Chitrokor, *Influencers Get an Upgrade. Now They're in Charge*, VOGUE BUS., Nov. 17, 2021 (setting out current trends in business of fashion influencers); Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES, Mar. 1, 2019 (on lucrative opportunities for child influencers).

<sup>243</sup> See generally MARTIN GURRI, *THE REVOLT OF THE PUBLIC AND THE CRISIS OF AUTHORITY IN THE NEW MILLENNIUM* (2018).

engage with others, participate in new communities, form *nomoi*, and influence the development of the national identity. Promoting *jurisgenesis* would seem to encourage individuals to join affinity groups of all kinds, perhaps including illiberal ones.

Ensuring that individuals can meaningfully participate in the creation and evolution of a national identity requires protection of members of groups. This is a communitarian project. As *Nomos and Narrative* specifically urged, respect for groups is necessary since they are the source of normative meaning in our complex societies.<sup>244</sup> Rights must protect groups as such to ensure that they can be the vibrant sources of meaning for our complex society. At a time when membership in voluntary affiliation groups is on the wane, and association with organized religions is also declining, state and private efforts to undermine groups must be combated. Naturally, the kinds of groups that ought to be protected cannot be previously determined. However, it is even more difficult to determine how to respond to illiberal groups aimed at stopping participation of others in civil society. Ultimately, protection of the ability to participate in national identity formation likely tips the scale against protection of illiberal groups, at least insofar as they seek to undermine competing *nomoi*. As Cover noted, “[t]he sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.”<sup>245</sup> A guiding principle of the communitarian project has to be peace between *nomoi*, and therefore a skepticism about *nomoi* that claims exclusive control of the state, superiority over others, or exceptionalism freeing its members from shared obligations of citizenship. Ensuring *jurisgenesis* seems to require a kind of golden rule for groups, limiting those that seek to squelch the existence of other groups.

Ensuring individuals can meaningfully participate in national identity formation and development requires recognition of the partial and multifaceted ways individuals exist in *nomoi*. This is an intersectional project. Essentialism is the enemy of this project. Promoting *jurisgenesis* requires recognition of the role of the *paideic* “for combining corpus, discourse, and interpersonal commitment to

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<sup>244</sup> Cover, *supra* note 1, at 66 (“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.”).

<sup>245</sup> *Id.* at 16.

form a *nomos*.”<sup>246</sup> The world-creating aspect of the paideic invokes “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”<sup>247</sup> Nomoi are not formed on a whim, but by interpersonal commitment. Yet, there is nothing to bar commitment to many, perhaps even contradictory, communities. Indeed, people are, we now understand, many things at once. Protecting rights for the purpose of promoting jurisgenesis suggests that we will find people as they are, complex, contradictory, and changing. The intersectional project is aimed at ensuring that this aspect of the person is recognized.

## V. CONCLUSION

Ultimately, the promotion of jurisgenesis’ goal suggests that a fecund ground for the production of nomoi is what rights ought to promote. Such a goal does not make easy questions related to conflicts between nomoi or even individual rights and group rights. Aside from a relatively small set of protections against state action (death and exile) or extreme private behavior (lynching), this approach to rights sets many claims as questions of degree (antidiscrimination). Such protections, however, work to bring communities together, to promote interaction between them, to challenge their stability through contact with others, even as it refocuses members on the value of their communities by distinction with others. This is the value associated with diversity, and with efforts to promote it, equity and inclusion in recent years. Cover was careful to note that the existence of groups alone does not create nomoi. Instead,

[F]rom time to time various groups . . . create an entire *nomos*—an integrated world of obligation and reality from which the rest of the world is perceived. At that point of radical transformation of perspective, the boundary . . . becomes more than a rule: it becomes constitutive of a world. We witness normative mitosis. A world is turned inside out; a wall begins to form, and

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<sup>246</sup> *Id.* at 12.

<sup>247</sup> *Id.* at 12-13.



its shape differs depending upon which side of the wall  
our narratives place us on.<sup>248</sup>

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<sup>248</sup> *Id.* at 31.