
A Review of Samuel V. LaSelva, The Moral Foundations of Canadian Federalism

Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood*. Montreal: McGill-Queen's University Press, 1996. Pp. xv, 264 [Cloth \$49.95 (Cdn.); paper \$19.95 (Cdn.)].

Reviewed by John D. Whyte*

Political stability is the chief object in constructing the basic framework of the state. All constitutionalism proceeds on the assumption that a flourishing national economy and the social well-being of citizens depend on a stable political order. Economic and social success is the result of human investment and commitment, and the conditions under which citizens are most likely to make these sorts of society-building choices are those that provide more-or-less fixed expectations.

Political stability is also related to the achievement of a certain level of social solidarity — of a state of reasonable harmony between the people, or the peoples, of the nation. Without that degree of common commitment and mutual concern, selfless action by citizens is unlikely, and community interests will not flourish. Yet selflessness (for instance, contributing to the payment of the social costs of others) is not possible without a stable political environment in which social investments can be counted on to produce predictable goods that flow to predictable ends. The good society is the product of personal choices — choices of commitment, investment and sacrifice — and the condition for making these choices is that one's social contributions will not be pirated through conditions of revolutionary changes in the political order, or by those who sponsor such change.

Stability, however, is not the whole story of modern statecraft. The other goal of the political order is not to imprison citizens in a fixed state. The trends of the modern age toward a greater sharing of political authority and toward greater respect for each individual's dignity and autonomy reflect a moral sense of persons as self-determining. While this sense might be translated into a regime of anarchy, commonly it has been translated into creating political orders (binding and coercive political orders, certainly) that permit social change and that allow persons' situations to rise and

* Faculty of Law, Queen's University.

© McGill Law Journal 1997

Revue de droit de McGill

To be cited as: (1997) 42 McGill L.J. 189

Mode de référence : (1997) 42 R.D. McGill 189

fall according to processes that, in good political societies, are transparent, knowable, predictable and stable.

Social dynamism, then, is the hope, not the bane, of constitutional order. Beyond the now widely constituted respect for individual autonomy, a capacity for dynamism plays an instrumental role in the maintenance of stable states. Absorbing social change within the basic state framework obviates the need for periodic revolutionary reordering.¹

The formation of the Canadian state in the mid-nineteenth century was grounded in these concerns of stability and dynamism. The story of the search in Canada for resolution of this tension does not, of course, precisely track the liberal-democratic abstractions that have been described above. The preoccupations of the confederating process in Canada were, first, to incorporate the French nation in Canada and the English nation in Canada in a single political structure in a way that lessened (or even eradicated) intercommunity hostilities and, second, to make possible the development of a national government capable of providing effective administration of the whole of British North America.²

Notwithstanding the apparent incontrovertibility of the view that the birth of the narrative of the Canadian state lacks a revolutionary genesis, Canada is, in fact, the product of a revolutionary change in the political order. Prior to 1867 there existed in British North America neither harmonious relations between English and French nor a single domestic government exercising authority over the whole of the territory. More significantly, it was realized that neither of these goals would ever likely be reached under the contemporary colonial governing regimes. As a consequence, those regimes were terminated, and a new regime (and, I would say, a radically new regime) was adopted for the Canadian context. The new regime's *raison d'être* was precisely to achieve stability and dynamism — stability in the relations between deeply suspicious and hostile communities, and dynamism that would see a national consciousness grow and, with it, national legitimacy and national political capacity. And somehow the latter goal was to occur without triggering the ancient and destructive fears of assimilation.

Goals like stability and dynamism are not easily made compatible. But Canada, like most nation states, is an expression of the hope that conflicting historical forces and conflicting conceptions of the future can be mediated — can be held in a peaceful and constructive tension. Under this notion of Canadian confederation, the goal was not to render history obsolete, nor to reach a definitive resolution of Canada's conflicting goals, but rather to produce the virtues of stability and dynamism that would

¹ The relationship between revolutionary change, maintaining political stability and channelling the urge for political reform is explored in B. Ackerman, *We the People: Foundations* (Cambridge: Belknap Press, 1991) c. 7.

² But see P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press, 1993) at 23-33 and R. Cook, *Canada, Quebec and the Uses of Nationalism*, 2d ed. (Toronto: McClelland & Stewart, 1995) at 214-17 for descriptions of just how diverse the motives and aspirations of the confederation players were.

forestall the need for further revolution — the need for the disruptions of tyranny and oppression, or of civil war and secession.

Samuel LaSelva's book, *The Moral Foundations of Canadian Federalism*,³ explores these postulates of the Canadian state. Its contribution to our understanding of them is immense. It traces the political narrative of confederation in terms of the actual conflicts and expressed aspirations of the confederation debates, but, more importantly, also in terms of conceptions about how the new state would (and should) operate in order to justify the new experiment in political ordering. LaSelva calls these conceptions of how Canada would function "moral foundations", and that label is accurate and illuminating. Confederation debates in Canada, both at the time of confederation and in the thirteen decades following, address questions of the relationship between the founding communities and the nation, the political entitlements of indigenous peoples, the right level of accommodation for racially, ethnically and religiously diverse communities, the appropriate reach for national projects, the degree of personal autonomy due to citizens, and so forth. These debates are expressed in terms of how political authority should be organized and what political roles should be played by which political bodies. But behind these claims about the proper organization of things are moral visions — ideas, specifically, of what people and communities are entitled to as a matter of being granted due respect. Describing what we owe to people in light of their humanity, or identity, specialness, vulnerability, needs, or whatever, is undoubtedly a moral discourse. LaSelva rightly has pointed out that when the Canadian federation has debated its structure, it has conducted an examination of moral entitlement; the claims that result are moral claims. There is, in short, a moral foundation to the way we have become constitutionally organized.

The question is what should be the consequences of this connection between state organization and moral vision. For LaSelva, the answer has two parts. First, recognizing that the fundamental structure of Canada is the consequence of an ongoing search for good means that we should value what we are. A nation engaged in the project of expressing due respect for its people and communities is itself to be respected. Of course, from such an answer could flow claims of strident Canadian nationalism. For instance, we could say that it is wrong for a country like Canada to be dismissed lightly by those who are frustrated by the continuing irresolution of basic issues, or whose visions of good government are not being fully realized. But LaSelva's book is not that sort of exercise in Canadian nationalism and, although he would lament the failure "to sustain a country that enabled people with different ways of life to live, in addition, a common life",⁴ he makes no specific claims for national loyalty.

The second answer, on the other hand, contains a stronger normative purpose. LaSelva asks us not just to admire the fact that moral discourse has shaped our constitutional structure. (As I indicated earlier, that claim could be made, at some level, for all serious efforts of nation constructing.) He asks us to pay attention to the substantive moral content in the debate and to recognize both that there are quite different

³ (Montreal: McGill-Queen's University Press, 1996) [hereinafter *Moral Foundations*].

⁴ *Ibid.* at 195.

(and conflicting) moral views and that some are better reflections of the historic realities behind the making of Canada. It is these that need to be remembered and honoured.

LaSelva's choice of the superior moral foundations is not purely an act of prescription. While he has a definite view of the right way to conceive of Canada, he does not defend it (at least, explicitly) on the basis of its match with his own hopes for Canada, but on the basis that this moral view of the Canadian state provides the most coherent account of the actual constitutional order that was created. In this way, LaSelva's argument is descriptive, or originalist;⁵ we ought to honour a particular moral vision of Canada because it is the moral vision that informed the original political accommodation that produced confederation. (There is, however, nothing to suggest that LaSelva is opposed to reconstitutionalization or that he is insufficiently republican to recognize that a self-determining population can choose a new basic political order for itself. But in the absence of political consensus that would legitimate constitutional change, LaSelva believes that we should strive to honour both the original constitutional accommodation and the moral spirit that gave it birth.)

The structure at the heart of Canadian confederation is federalism and, according to LaSelva, we should remember not only why federalism was thought to serve our needs but also the specific idea of federalism that attracted support at the originating moment. Generally, federalism's purposes are threefold.⁶ The first is to protect minority communities, especially those communities that were already established at the time of confederation, from the tyranny of national majorities — from the wilful eradication of those communities by the nation. The second is to check the tendency of local governments to exploit their membership in the larger political unit through exporting social costs to neighbouring local governments. In other words, the allocation of legislative powers is designed to control the political desire to externalize costs and capture benefits. Finally, at heart, the purpose of federalism is to create a nation where none has existed (or, I suppose, to perpetuate an existing nation when it is tending to fall apart). For instance, federalism in Canada was designed, above all else, to empower the national government sufficiently to ensure the formation of a Canadian nation.

⁵ Originalism is a manner of textual interpretation that pays special need to the intention of those who created the text. It has two modes. The first, much discredited (see *e.g.* L. Levy, *Original Intent and the Framers' Constitution* (New York: MacMillan, 1988); R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 134-37), is to ask what the creators of the text thought, or would have thought, about the precise current social issue for which the resolution is now being sought in the text. The text should be seen as an expression not merely of concepts — efficiency or dignity, for example — but of specific conceptions of social organization.

The second mode seeks the text's meaning through learning the creators' intentions in creating the text. In other words, the text's meaning is, at least in part, discoverable through understanding the project behind the creation of the text. LaSelva is an originalist, although not self-described as such, in this second sense.

⁶ These purposes are implicit in LaSelva's description of the preconfederation contest over the nature of Canadian federalism (see *Moral Foundations*, *supra* note 3 at 37-42).

But, again, this description of federalism's purposes is abstract, and abstraction is not LaSelva's style. For him, it is grasping the actual situation, the actual choices and the actual moral choices that will most likely produce a political sensibility that will allow Canadians to see the path to national survival. Our condition in 1867 produced our moral purposes, and the embedding of those purposes in the constitutional arrangement created commitments between the Canadian societies that we should not forget and should not ignore.

LaSelva begins his book with the startling conception of Canada as tragic — tragic because while it was born of the aspiration to replace a governing structure mired in subordination and enmity with a new conception of intersocietal relations based on division between, and the liberation of, communities, this conception is not embraced widely enough, or strongly enough. It is constantly liable to being swamped by other, perhaps less appropriate, conceptions of what comprises a good state — enthrallment with the logic of equality, with the idea of undifferentiated political membership and with the dream of "one Canada". Tragedy is not the consequence of evil; it is the result of pursuing notions of the good blindly and without regard to the demands imposed by the context in which the tragic hero (or tragic nation) must act.⁷ LaSelva's mission is to remind Canada that its context requires acceptance of intransigent division and difference and that it can avoid a tragic result only through holding at bay those other alluring, but destructive, bold visions of a strongly unified Canadian nation.

For LaSelva, it is only consistent resistance to those bold visions that can prevent "destruction for admired ways of life and the imposition of alien values on unwilling people".⁸ Instances of this resistance can be seen throughout Canadian history, from the repudiation of Lord Durham's assimilation policies to the current insistence on recognition of the right of Aboriginal peoples to self-government.⁹

⁷ For an examination of how tragedy is used (unsatisfactorily in Engel's view) to explore the mystery of error, or fault, in human relationships, see S.M. Engel, *The Problem of Tragedy* (Fredericton: Brunswick Press, 1960).

⁸ *Moral Foundations*, *supra* note 3 at 6.

⁹ This sense of pluralism and political division as the saving conditions of Canada is not, of course, shared by all theorists of the Canadian state. See *e.g.* G.S. Vano, *Neo-Feudalism: The Canadian Dilemma* (Toronto: Anansi, 1981). Vano states:

One must not assume ... that [in Canada] liberalism will win out over rampant pluralism as it did elsewhere in the West. It is altogether conceivable that Canada may be the first Western land to turn away consciously from the age of progress. Should that occur, Canada must not expect to survive for long, having given full rein to its disintegrating and self-negating ideology (*ibid.* at 137).

A similar view is reflected in the work of F.R. Scott (see F.R. Scott, "The Special Nature of Canadian Federalism" in *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 175). Scott writes:

[W]e should at least be sufficiently aware of our own history not to be misled into thinking that the maintenance of an enlarged provincial autonomy is part of an original agreement or treaty between the confederating provinces. We should realize that its acceptance means a definite departure from the clear intentions of the Fathers ... The

Competition over the basic character of the Canadian federation is not new. Certainly John A. Macdonald felt that the reasons for forming the Canadian nation — defence, a larger and wealthier trading bloc and establishment of a governing capacity that could both manage the development and incorporation of the West and the North and legitimate greater national independence — were compelling enough to warrant strong federal powers. Although the actual constitution of 1867 contains plenty of textual support for the Macdonaldian view, it is not without equally strong textual indication that existing political societies were to be continued without diminution of their essential character.¹⁰ Most notably, conferral of jurisdiction over “property and civil rights”, the linchpin of provincial autonomy, provided an undoubted check against assimilation into the national entity;¹¹ the particularities of Canadian societies are as forcefully expressed through their laws as they are anywhere. Although we tend to see legal relationships as peripheral (or as part of a social pathology) and not as instruments of cultural expression, the surest expression of cultural distinctiveness (whether of Aboriginal communities, religious minorities or provinces) is authority over shaping the legal order that governs the relations between the people of that society.

The tension in the 1867 constitution has been reflected in an ongoing struggle to define Canada — a struggle marked by an irrepressible provincial campaign in the form of constitutional challenges, promotion of the compact theory of confederation, constant advancement of provincial legal rights, perennial resistance to ambitious federal market regulation, opposition to unilateral constitutional amendment and to the *Canadian Charter of Rights and Freedoms*,¹² the search for a means to control the federal spending power, and so forth. In this struggle, there is no hero, no villain, no defining moment and no manipulative outside force.¹³ Instead there is a deep political imperative that reflects an original moral vision of Canada — as a nation that respects differences through division.

technical meaning [of the word “federal”] never hampered the framers of Canada’s federal system in their purpose of creating a strong national government free from the doctrine of ‘states’ rights’ which had so largely contributed to the American Civil War. While we have fortunately avoided any armed conflict between federal and provincial authorities, we have not avoided and we are entering again upon, the frustrations and dissensions which a wrong understanding of our own type of federalism in both the courts and in sections of the public perpetuates and foment (ibid. at 189).

¹⁰ See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91-95 (formerly the *British North America Act, 1867*).

¹¹ See *ibid.*, s. 92(13).

¹² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹³ As I have argued elsewhere, the Judicial Committee of the Privy Council did not dictate the nature of Canadian federalism (see J. Whyte, “Constitutional Aspects of Economic Development Policy” in R. Simeon, ed., *Division of Powers and Public Policy* (vol. 61, Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada) (Toronto: University of Toronto Press, 1985) 29 at 34-35).

LaSelva describes the pressures that continue to be brought to see Canadian division as unfortunate, or destructive. First, the growth of government has increased the likelihood of interprovincial interference: the opportunity for conflicting regulation has increased as regulation of markets, the environment and conditions for interpersonal equity have all increased. It is felt that far greater national co-ordination is required and, indeed, signs of this felt need are present in the new internal trade agreement¹⁴ and the attempt to develop common federal-provincial principles for social policy. Another version of this pressure is the sense that there must be centres of significant political power, as well as powerful national regulatory instruments to respond to the modernized economy — an integrated economy conducted on the back of electronic information.

Another pressure for a more unified Canada is the changed nature of Quebec nationalism. The old nationalism stood as a bulwark against culture-destroying interference from the national government. The new nationalism has changed both its ambition and its means. The Quebec state's project is to create a competitive and progressive society. Power is wanted not to defend an historic society, but to enable the flowering of a new society. Furthermore, the new society, at least in the mind of many Quebec nationalists, is marked by social pluralism. Hence, cultural integrity is replaced as a goal by cultural, social and economic dynamism. Quebec's claim for political authority becomes more naked. These are changes under which difference loses its innocence and its allure and division is seen as opportunism.¹⁵

Finally, the old accommodation is threatened by liberalism and its thorough commitment to equal opportunity. This is a program rooted in transnational and transcultural assumptions, and is sometimes considered, by its promoters, to be beyond politics. It therefore tends to undercut the political force of identity and the particular elements of social consciousness. Of course, liberalism can never be far below the surface of the modern political mind no matter what the situation and it would be foolish to rail against its influence.¹⁶ LaSelva, with his usual nuanced sense of political value, does not deny the virtues of liberalism or human rights, nor does he deny the concerns over special political authority — concerns of unfair advantage on the one hand, and weakened legitimacy, on the other. Nor does he ignore the possibilities of

¹⁴ See First Ministers of Canada, the ten provinces and the two territories, *Agreement on Internal Trade* (Ottawa, 18 July 1994).

¹⁵ See *Moral Foundations*, *supra* note 3 at 177-80.

¹⁶ LaSelva does not ignore the entrenchment of a rights regime in Canada in 1982, nor does he disparage the moral foundations for it. LaSelva is, in fact, strongly supportive of the *Charter* (*supra* note 10) as an instrument for addressing the claims of justice that federalism cannot meet (*Moral Foundations*, *supra* note 3 at 69). Nor does he join the chorus of those who see the *Charter* as necessarily promoting an atomistic society — one that is destructive of communitarian values (*ibid.* at 74). LaSelva views the *Charter* as a legitimate instrument for discovering (and proclaiming) justice in a heterogeneous society and believes that the pursuit of justice does not divide a political society, but serves to hold it together (*ibid.* at 79). While LaSelva rejects the idea of federalism that has been promoted by the *Charter's* chief architect, Prime Minister Pierre Trudeau, he does not implicate the *Charter* in his critique of the Trudeau vision of Canada (*ibid.* at 80). In his view, the *Charter* does not reflect a mistaken conception of the moral foundations of Canada.

intolerance and group tyranny. But he does protest over the failure of modern egalitarians to remember the tensions that caused the formation of Canada and the consequent indifference to keeping alive the constructive tension between community and state. He says:

What the Fathers provided was contextual justification; they argued, among other things, that the divergent aspirations of Canadians could be accommodated within the structures of Confederation. Distinctiveness and difference were situated within Confederation, rather than opposed to it. ... [A]bsolute rejection of special status works against the contextual justification of Canadian federalism. When special status is rejected absolutely, significant differences are less easily accommodated within Confederation and federalism becomes less meaningful.¹⁷

LaSelva acknowledges that his analysis of confederation, with its emphasis on a decentralized federalism, and its reflection of Canada's "deep diversity", is akin to Charles Taylor's commitment to providing Quebecers appropriate recognition, and therefore appropriate independence.¹⁸ Taylor's concern is that failure to recognize Quebec's legitimate political aspirations can only lead to political disintegration. Yet LaSelva is, in the end, no happier with the constitutional implications of deep diversity than he is with the strong commitment to constructing Canada on universalist principles. In part, this is because there are national projects that Canada needs to continue, or undertake. At a more conceptual level, he believes that the nation state requires a common political consciousness and a general belief in its beneficial role. Central governments in federal states are unsustainable when their only constituency is those who directly participate in it. In other words, LaSelva is concerned here, as he is throughout his work, with the causes of political fragmentation and the conditions of political stability.

LaSelva's book is not designed as a set of prescriptions for conducting Canadian-unity politics. It is an historical exploration of the values that have shaped Canada, leading to largely general declarations of this sort: "Canadian federalism is about divided jurisdiction, divided loyalties, multiple identities and intersecting communities of belonging".¹⁹ Yet, there are two ways in which LaSelva's work contains concrete proposals. First, he explicitly suggests that confederation's historic commitment to protecting and preserving the existing nationalities should lead us, today, to accept the logic of asymmetrical federalism.²⁰ He recommends this, without attempting to pro-

¹⁷ *Moral Foundations*, *ibid.* at 184.

¹⁸ See C. Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, G. Laforest, ed. (Montreal: McGill-Queen's University Press, 1993). See also C. Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (vol. 33, Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada) (Toronto: University of Toronto Press, 1985) 183.

¹⁹ *Moral Foundations*, *supra* note 3 at 187.

²⁰ See *ibid.* at 195.

vide a description of it,²¹ as the single most appropriate response to both the new Quebec nationalism (for whom the old goal of protection against national interference is no longer enough) and the demand by Aboriginal peoples for some level of self-government. The second proposal is concrete only in the sense that LaSelva's book is dedicated to pointing to one specific set of justifications for confederation as the surest and most constructive way to understand Canada. His book's consistent purpose is to bring back into currency the political vision of confederation held by George-Étienne Cartier.²²

Cartier should, no doubt, be honoured for his instrumental role in confederation. It was he who articulated a purpose for confederation that was neither the formation of a single legislative union nor the propping up of a dubious peace based on the faint hope that a new confederacy between the founding nations might work to forestall deep conflict. In a speech in Quebec in 1865, he presented confederation as a distinctive construct and as a way out of the impasse between the Macdonaldians and the protectors of existing political societies.

But, to LaSelva, more important now than Cartier's role in creating this constructive political moment are Cartier's actual words. First, he presented confederation as something other than assimilationist nationalism. This was, and is, the basic condition of confederation. There is, however, something else in Cartier's speech: the answer to the question of why Canadians should join together and stay together. Cartier accepts the necessity and desirability of a common national political identity and gives an explicit account of its appeal. First, it was an efficient and effective instrument to improve commercial interests and prosperity. Second, it provided assurances for the continuation of the French race in Canada that were simply not available through any other route. Third, beyond the virtues of economic growth, Canada represented the possibility of different races joining for the general welfare. To Cartier, there was something in this that transcended immediate interests and that would provide a moral purpose for Canada and a moral identity for Canadians. Canada would represent a new kind of nationality.²³

LaSelva's review of Cartier's vision of confederation is interesting for its current appropriateness. The unity debate since 1982 has focused on these same concerns — the efficiency, or the common sense, of sustaining Canada and the corresponding economic losses associated with its breakup; the preservation of Quebec's distinct society (and, now, the distinct societies of eastern and western Canada, as well as the distinct Aboriginal societies); and the strength of fraternal sentiment across Canada.

²¹ See J. Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) at 229-59 for a detailed analysis of how asymmetrical federalism might work. Webber argues (*ibid.* at 23) that in its actual constitutional practice, Canada has found innovative ways to tolerate difference and distinctiveness but that its constitutional theory is hostile to the practice. LaSelva's response is that by returning to the political discourse of the 1860s, Canada can discover the theory of diversity that would now serve it so well (*Moral Foundations, ibid.* at 193).

²² See *Moral Foundations, ibid.* at xi.

²³ See *ibid.* at 23-26.

LaSelva is right to place Cartier's vision at the centre of his book. Not only was it constructive and responsive to the actual context when articulated (and, therefore, deserving of recognition as centrally important to the founding of Canada), but it has proven to be durable as a set of principles. Cartier's principles of national order continue to speak directly to Canadian intersocietal tensions. Beyond the claims of relevance and historical importance, Cartier also deserves recognition because he realized that appeals to self-interest and to fear would not be enough to turn a political community from a state of impasse and suspicion to one of mutual trust and hope in the possibilities of accommodation. Humans have a moral instinct and it is moral justifications for action that most strongly motivate. LaSelva's book does not merely reproduce Cartier's sense of Canada: it reproduces, and advocates, the spirit behind Cartier's contribution.

Finally, a word should be said about this book as a legal text. Of course, it is not a legal text, nor is it presented as relevant to the legal culture, but there is no denying the normative force of LaSelva's account of confederation. To give meaning to our constitution it is vital to know its purposes. Its text, without connection to the concerns and hopes of the political context that produced it, is random, bizarrely particularistic and, to a considerable degree, unintelligible.²⁴ It is the national narrative that provides the moral purposes that allow us to discern principles of ordering. LaSelva's detailed study of the political environment of both confederation and the ensuing constitutional debates has given constitutional lawyers a book to treasure.

²⁴ For a detailed examination of the relationship between the meaning of legal prescriptions and their place within a historical narrative, see R.M. Cover, "The Supreme Court, 1982 Term — Foreword: *NOMOS* and Narrative" (1983) 97 Harv. L. Rev. 4.