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Comparative Constitutional Epics

Penelope Pether*

Abstract. This essay takes up Robert Cover's account, in "Nomos and Narrative" of *Constitutional Epics*. Ranging across legal and literary texts including Toni Morrison's *Beloved*, David Malouf's *An Imaginary Life*, the Canadian Arar Commission Report, and *Bringing Them Home*, the Report of the Australian Human Rights and Opportunity Commission's *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, it concludes that what comparative study of Constitutions and their Epics might yield are brutal truths and the judgments of history, but also insights into how we might make of that unpromising material a nomos and a narrative of redemptive Constitutionalism.

Keywords: Robert Cover, "Nomos and Narrative," discursive construction of national identity, Constitutional narratives, Constitutional Epics

[L]ooking forward as though into unmarked space upon which history will be created results in recreating history.¹

So writes the University of Waikato scholar of law and national identity Nan Seuffert, rendering diagnosis and uttering jeremiad, all in the scope of the lyric's confessional brevity. Why do I call her address confessional? Seuffert's lesson from Constitutional history insistently gathers "us," about whom Virginia Woolf asked her most poignant question: "What's an age, indeed? What are 'we'?"² Summoning inheritors of nations forged from violent dispossession, institutionalized racism, and lies in the form of laws to recognize our shared history, she betrays hope that we can make something other than the past of the future citizens inhabit with others.

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But perhaps she hopes against her better judgment. Seuffert's unpacking of Benedict Anderson's epigrammatic definition of the nation indicts:

Nations are imagined political communities . . . , which need boundaries, and enemies. Law is integral to the construction and maintenance of these boundaries, and the identification of enemies. . . . This part of the fiction [that imagines nations as communities] typically masks various forms of inequality, exclusion and exploitation. . . .³

And her acute eye and sharp pen reveal the satirist's tutelary disgust at the populist discursive construction of national identity that kills an inadequate and belated attempt by New Zealand's highest court to redress the dispossession of the Maori: "the 'Kiwi way of life,' an articulated-on-the-spot collective imagination of golden summers spent camping and barbecuing at the beach, swimming, walking and wading, fishing for meals and messing about in boats."⁴ She is equally appalled by the vacuous rhetoric with which the elected government's Attorney-General ushered in the legislation that put a stop to common law native title to foreshore and seabed: "it is almost innate to being a New Zealander that you have a right to the foreshore and the sea."⁵

Seuffert is not alone among thoughtful scholars of (Constitutional) Law and Literature in documenting the bleakness of the story that she reads as rewritten, with a repetitive ethical blindness that mimics compulsion, in post-colonial nations like New Zealand, her native United States, and the present writer's native Australia. In a contribution to one in a series of collective *homages* to Robert Cover's "Nomos and Narrative,"⁶ Robert Post writes with characteristic acuity of Cover's faith in plural human communities to make meaning, and thus generate laws that somehow escape the jurisprudential violence Cover holds to be a constitutional quality of nation-states.

Chastened by the estrangement of students in his popular Constitutionalism seminar from Cover's seminal text on what many read as a paean to "redemptive communal life,"⁷ a romance of the "jurisgenerative potential of non-statist communities,"⁸ Post recognizes in those students, inheritors of Guantánamo rather than the Vietnam that left him and Cover with no public life that we could trust,⁹ a (civic) republican sensibility. This leads Post's students to conceive of institutions of law and government as amenable to persuasion or constraint, through the performance of "public reason,"¹⁰ from

their potential to do violence, their capacity to destroy any law worth normative commitment. Post himself has less faith:

Even in the face of the shocking arrogance and rampant intolerance of those who presently dominate America, a belief in the potential of public reason seems the only path forward. Unlike my students, however, who assume that they can bestride this path with confidence, I myself can never quite shake the nagging fear that Cover may have seen more deeply than I care to acknowledge.¹¹

What foreboding intimation was it that rereading Cover's complex meditation on Constitutional Law and Literature revealed to Post? That "there is a radical dichotomy between the social organization of law as power and the organization of law as meaning";¹² that the law of the texts that constitute the nation, and of legal institutions, is "itself incapable of producing the normative meaning that is life and growth";¹³ that too often adjudication privileges "the hierarchical ordering of authority," over the "interpretive integrity"¹⁴ that might create new normative communities, somehow actual rather than imagined. And, relatively anodyne, this: that the best one can hope of the state is a (benign) imperialism, enabling the flourishing of the communities that make benevolent laws by offering them state protection, and "pursu[ing] [weak constitutional] 'virtues that are justified by the need to ensure the coexistence of worlds of strong normative meaning.'"¹⁵

While Post discerns both Cover's failure to register that every *nomos* is jurispathic of others, and his "skept[ic]ism of a jurisgenerative politics" of public reason,¹⁶ he does not perceive that if indeed Cover's¹⁷ romantic hope is for a heteroglossic republic of *nomoi*, as some among Cover's glossators have held it to be,¹⁸ it is blood kin to his own students' contemporary civic republicanism. Such is the horizon of the inheritors of the death of law, the faithful of popular Constitutionalism. Solipsism, of course, is a risk run in the imaginative, interpretive, and critical business of "invite[ing] new worlds"¹⁹ into being, perhaps especially if we are so situated that we can make a virtue of our "embeddedness," Richard Mullender's apt term for the premise and ethos of communitarian political philosophy,²⁰ or if we can render it invisible. Post knows this: the gap between his bleak vision, formed at the heart of "the last nation" and in neo-Imperial times, and the confidence of his students is constituted by Post's abiding consciousness of his own alienation.

Alienation, the condition of the dwellers on the margins of national life, resonates with the thematic return of “*Nomos* and Narrative” to instability. The redemptive potential of intertextualism recurs in Cover’s text, from its opening invocation of Wallace Stephens on the identity of order and chaos, to the meditation on the “subversive force”²¹ located in the gap between the biblical narratives that gloss biblical laws and the dictates of such laws considered in isolation.²² For Cover, world-building law, the law of “commitment, resistance, and understanding,”²³ is always in unstable relations with state power, and even authoritative texts always find their meaning “‘essentially contested.’”²⁴ This is true for even the most etiolated of thin Constitutions, shorn of the complexities instantiated by the claims of its intertexts, “natural law, the Declaration of Independence, the Articles of Confederation . . . the Revolution,”²⁵ the sources marshaled by the “radical constitutionalists” of the antislavery movement,²⁶ “for primacy in the [nation’s] narrative tradition.”²⁷ “The uncontrolled character of meaning,” Cover wrote, “exercises a destabilizing influence upon power.”²⁸

I will return to that insight later in this essay, but for now want to focus on Cover’s special pleading for Constitutional Law and Literature. The law and its texts of judgment are always critical sites for constituting the nation. Kwame Anthony Appiah writes with excoriating insight of the states of inequality that literature has forged.²⁹ Law and Literature scholar Drucilla Cornell registers that laying down the law negotiates “the relationship between the past, embodied in the normative conventions which are passed down through legal precedent, and the projection of future ideals through which the [imagined juridical and national] community seeks to regulate itself.”³⁰ Or, as Cover puts it, “[l]aw may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative.”³¹ Of explicitly Constitutional literature, Cover writes that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,” and thus that “[f]or every constitution there is an epic.”³²

If Cover’s theme is instability, his subject is (redemptive) Constitutionalism,³³ the fragile promise of the creation of integrative³⁴ redemptive law, in a nation constituted with “a fault line in . . . [its] normative topography,” slavery, and slavery’s legacy, other forms of “violence of racial exclusion.”³⁵ His method entails negotiation of “the ultimate question of authority versus meaning,”³⁶ and the organizing metaphor for that question, which Marianne

Constable frames as the “traditional concerns of jurisprudence—law and its relation to justice,”³⁷ is the unstable textual dyad of *nomos* and narrative, in the genre of Constitutionalism become Constitution and Epic.³⁸

What is a Constitutional Epic? The epic is, of course, traditionally a narrative about imagined communities and their times. Peter Goodrich’s suggestive answer, which aptly serves my purposes here, is that epics tell truths:

The relation of literature to law is a question of genre. . . . [T]he status of the legal genre is predicated upon a paradox. Law is a literature which denies its literary qualities. It is a play of words which asserts an absolute seriousness; it is a genre of rhetoric which represses its moments of invention or of fiction; it is a language which hides its indeterminacy in the justificatory discourse of judgment; it is a procedure based upon analogy, metaphor and repetition and yet it lays claim to being a cold or disembodied prose, a science without either poetry or desire; it is a narrative which assumes the epic proportions of truth; it is, in short, a speech or writing which forgets the violence of the word and the terror or jurisdiction of the text. Law, conceived as a genre of literature and as a practice of poetics, can thus only be understood through the very act of forgetting, through the denial, the negation, or the repression by means of which it institutes its identity, its life, its fictive forms.³⁹

Goodrich also suggests here that the literature constituted by law’s own texts is chronically incapable of telling the truth about itself.

What truths might we learn from Constitutional Epics? And where might we find them? I have recently made a case for legal “factions,” “artful representations of the real, . . . hav[ing] an especially strong claim to be law’s narrative supplements,” positing that:

their inhabiting of the borderlands of fact and fiction, law and literary journalism, make them generic doubles for the texts of judgment. Both genres—faction and what Australians call judgments and Americans legal opinions—make coherent and thus satisfactory narratives out of the messy contingency of evidence and the everyday, at the same time unwittingly drawing attention to the author’s editorial legerdemain and normative vision. *In Cold Blood* exemplifies Cover’s insight that the complex contested meanings that we make from our engagement with narrative have a peculiar aptitude to unsettle law’s totalizing claims to normative authority and interpretive orthodoxy: there is more than one way to read the law, and thus to make it.⁴⁰

Capote told the nation and its people a story of the pathology constitutive of their nation and the law that was made and administered in their name: the constitutional violence and radical uncertainty of life in a nation peopled with insular *nomoi* and state laws that discriminate oppressively between “us” and “others.” At the same time he manifested both the allure and the risks of an advocate getting “too close to the client.” Writing from a nation where the most recent appointee to the Supreme Court fawningly touted his conservative credentials when seeking an Executive government appointment early in his career,⁴¹ and where the paradigmatic client of the (Constitutional) lawyers who constitute a significant number of the federal appellate bench is the government, that latter truth offered to “us”—lawyers and citizens alike—by *In Cold Blood* is a species of cautionary tale.

Worse than that can happen to constitutionalism, of course. Texts that gesture towards what that worst might be include the “torture memos” written by Jay Bybee and John Yoo,⁴² then both of the increasingly inaptly-named Justice Department, now a federal appellate judge and Boalt Hall law professor respectively, lawyers far too close to their client, executive government, with little awareness of being servants of the law. In the Australian constitutional context, one might look to the contention of the Solicitor-General of the Australian government in submissions he made to the Australian High Court in *Kartinyeri v. Commonwealth (Hindmarsh Island Bridge Case)* that the Australian government could make racially discriminatory laws to the detriment of Australia’s indigenous peoples because the history of the passage of the constitutional provision authorizing the Australian legislature to make “special laws” for “the people of any race”⁴³ had a “direct racist content” which “infected . . . [the constitutional grant of legislative power] with a power of adverse operation.”⁴⁴

Australia’s postcolonial circumstances are complicated ones. This is in part because, as the foregoing suggests, the appeal to address the nation’s “ghosts” and to “enlarge the [nation’s] spirit”⁴⁵ emerges as strongly—perhaps more strongly—from inside the nation’s borders as from without, as a result of the violent dispossession and institutionalized genocide practiced by the British, colonial, and later Australian states, and their peoples, under color of state laws, against Australian indigenous peoples. It is also because Australia has engaged in neocolonial practices in the “postcolonial” period, for example in fashioning the “Pacific Solution” to the claims of asylum seekers in 2001, which involved using the Navy to prevent intending asylum seekers

reaching Australia, and to land them in any Pacific nation that would agree to take them.

A “factional” text I have recently proposed⁴⁶ as an Australian Constitutional Epic is David Marr and Marian Wilkinson’s *Dark Victory*, which relentlessly documents that epic tragedy of repetitive and unredeemed neocolonial violence, telescoped into the weeks immediately before and after September 11, 2001. Banking (in the event prudentially) on John Howard’s ruthlessly un-sentimental vision of “white Australia’s” intolerance of “others” and enthusiastic embracing of the use of state violence against “weak, vulnerable, and desperate”⁴⁷ others, in this case Muslim refugees from Iraq, Iran, and Afghanistan, fleeing “some of the most brutal and repressive regimes on earth, so brutal we were going to war to crush them”⁴⁸ and seeking asylum in Australia, the Howard government shored up its electoral fortunes by using the navy to drive intending asylum-seekers out of Australian waters, theoretically back to Indonesia, in some cases to their death at sea, in others to “holding” destinations including Christmas Island, en route to destinations including detention camps in the Pacific Island nations of Nauru and Papua New Guinea.

As Maher and Wilkinson frame Australia’s state law in the wake of 9/11:

The xenophobia of Australians was to be shown democratic respect. To contest the prevailing fear of boat people was simply unpatriotic. Howard had found a perfect issue in border protection: tough but popular, crude racism combined with genuine concern for the security of the country, a concern intensified by the terrorist attacks on America. It was race wrapped in a flag.⁴⁹

They also, however, document evidence of redemptive Constitutional Narratives, infused with the jurisgenerative ethics of “commitment, resistance, and understanding”⁵⁰:

[E]loquent voices on the front line were now telling their stories. On polling day [in the November, 2001, Federal elections] the *Australian* reported the response of a senior officer on the [Australian Navy vessel] *Tobruk* ferrying boat people to Nauru. “In the middle of the night I looked down from the bridge”, said the officer. “There’s two hatches open and it’s hot. Through one, I could see a hundred people lying there on stretchers. I thought, ‘It’s like a slave ship’. I thought, ‘Jesus, I thought we were Australians. I thought we were a good bloody country.’ On board, they don’t like to use the word prisoners, but they are. At Ashmore Reef it hit me—shit we’re going like South Africa. If Australia

continues down this political path, it will be like apartheid here. And people will think that's what we do here. But it's not what we should do here." The unnamed officer reported divisions in the navy between those who supported Operation Relex and those who thought the government was turning the service into "legally sanctioned people-traffickers". Having decided these people were refugees, the officer concluded he could take no further part in the operation. "They're fleeing the governments the Americans are trying to destroy, for Christ's sake. They're fleeing persecution."⁵¹

Maher and Wilkinson's "faction," then, speaks narrative truth to public legal power, presents telling stories that deny state law denial of its jurispatic violence, makes it remember its repetitive histories of racist persecution.

How much of this epic constitutional reach derives from what I have argued is a peculiarly destabilizing narrative genre? Other scholars of Law and Literature have made special claims for the privileged status of canonical fictional literary texts; Robin West makes the case like this: that one can "find in canonical works of literature philosophical insights about the meaning of law and the promise of justice."⁵² What of Cover himself on the subject of redemptive narratives? He suggests that Constitutional Epics with redemptive power must tell a story about the Constitution "close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation."⁵³ Too utopian, and visionary narratives "risk the failure of the conversion of vision into reality, and thus, the breaking of the tension."⁵⁴ Paraphrasing Cover, at this point "they may be [narratives], but they are no longer [narratives] of the law."⁵⁵ Further, "[b]ecause the *nomos* is but the process of human action stretched between vision and reality," for "interpretation" to become "legal meaning"⁵⁶ requires two acts of faith. The first "entails a commitment to projecting the understanding of the norm at work in our reality through all possible worlds unto the teleological vision that the interpretation implies."⁵⁷ That is, it requires putting oneself "on the line."⁵⁸ The second derives from Cover's insight that "[n]arrative is the literary genre for the objectification of value."⁵⁹ Once again deploying the trope of destabilizing *différence*, Cover reasons,

[c]reation of legal meaning entails . . . subjective commitment to an objectified understanding of a demand. It entails the disengagement of the self from the "object" of law, and at the same time requires an engagement to that object as a faithful "other." The metaphor of separation permits the allegory of dedication. This objectification of the norms to which one is committed frequently,

perhaps always, entails a narrative—a story of how the law, now object, came to be, and more importantly, how it came to be one's own.⁶⁰

My own suggestion is that both canonical texts and what I will call quasi-legal texts, exemplified⁶¹ by the Commonwealth genre of the Royal Commission Report, characteristically the documentary product of inquiries by eminent lawyers on behalf of government and community into crises that the law itself is unequal to addressing—both genres of epic texts, in Goodrich's sense, as in others⁶²—share with factions their capacity to exercise a peculiarly⁶³ “destabilizing influence upon power.”⁶⁴ Legal factions in the vein of *In Cold Blood*, *Dark Victory*, Mailer's *The Executioner's Song*, and Australian novelist and lawyer John Bryson's *Evil Angels*—his account of the wrongful conviction of Lindy Chamberlain of the murder of her baby daughter Azaria, in what is sometimes called “the Dingo Baby Case”—are fertile ground for Constitutional Narratives. Their generic quality as the Janus face of the contingent texts of judgment invite interrogation of legal texts' claims to produce fact and not fiction. Canonical “legal fictions” have such power because they have no truck with the positivists' Benthamite dogma: law always involves questions about the *nomos* as well as the letter of the texts of state power.

As to the quasi-legal genre exemplified by the Royal Commission Report, it destabilizes the claims of those texts of state power to speak “the whole truth,” because it attempts to rewrite legal discourse so that it is capable of doing justice to alternative jurisprudences,⁶⁵ compelling an audience for the voiceless. More than this, too, such documents typically are the products of inquiries forced onto the state, frequently into its own action or inaction, by a populace that does not believe the “authorized truth” the state has told them.

Consider the recent example of the massive, three-volume public version of the *Report of the Events Relating to Maher Arar*, produced by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar,⁶⁶ a Canadian national of Syrian birth who was, with the cooperation of the Canadian authorities, arrested and detained by the United States in New York while lawfully in transit through Kennedy Airport, and “extraordinarily rendered,” to Syria, where he was imprisoned, tortured, and otherwise mistreated, even though, as the Commissioner reported, “there is nothing to indicate that Mr. Arar committed an offense or that his activities constitute a threat to the activities of Canada.”⁶⁷ The Commissioner records that the “public inquiry” he conducted was instigated by the Canadian government

in response to “mounting public pressure.”⁶⁸ Not only are the Commission’s recommendations replete with insistence on the accountability of Canadian law enforcement and intelligence-gathering agencies to the public and to robust democratic norms, but the *Report* itself explicitly resists the jurispathic claims of state law:

It should be noted that there are portions of this public version [of the Report] that have been redacted on the basis of an assertion of national security confidentiality by the Government that the Commissioner does not accept. Some or all of this redacted information may be publicly disclosed in the future after the final resolution of the dispute between the Government and the Commission.⁶⁹

If Constitutional Epics, then, have a privileged capacity to “bespeak the range of . . . [“our”] commitments” and “resources for justification, condemnation, and argument” that enable us to “struggle to live [“our”] law,”⁷⁰ that capacity derives in significant part from their supplementarity, and the practice of intertextual reading of the texts of state law “against the grain.” This suggests—as do the dual conventional cases made for studying comparative Constitutional law, generating profound insights about constitutionalism, including those that come from estranging the familiar, and enabling the “bringing home” of material constitutional change—that a study of comparative Constitutional Epics has a special utility for the redemptive⁷¹ Constitutionalist.

This essay has already inaugurated an inquiry into Comparative Constitutional Epics under cover of comparison—intertextuality by another name. What emerges from a self-conscious comparison of the Constitutional Epics *In Cold Blood*, *Dark Victory*, and the *Arar Commission Report*? Some confirmation, at least, of Seuffert’s thesis that nations need enemies, that imagined communities imply “inequality, exclusion and exploitation,” and that this can occur at home as well as abroad; that while citizenship may be partial, “the alien,” like “the criminal” or the “suspected terrorist,” is especially vulnerable; and that post- or supra-national formations, like the Empire, or globalization, may paradoxically extend the reach of the violence of the nation-state. Acts of lawlessness under cover of state power give rise to others: if Guantánamo Bay first operated as a holding camp to block the passage of Haitian refugees to the United States,⁷² later became the paradigmatic “jurisdiction of exception” in the “War on Terror,” and prompted the Australian government to use

a Nauruan detention camp as the geographical location of the “Pacific Solution,”⁷³ it was because in each of these cases the camps were “designed as much to keep [detainees] . . . out of the legal system as the territory” of the United States or Australia.⁷⁴ Thus the legislative excisions of parts of Australian territory, like Christmas Island, explicitly predicated on denying refugees who landed or were brought there for processing access to refugee status under Australian law, because to the Australian courts.⁷⁵

Comparative study of Constitutional Epics might also suggest the price even “we” could pay for the violence of the jurispathic state, the jurisdiction of “pain and death”:⁷⁶ Maher Arar, after all, was someone much like many of the readership of this essay: middle class, university-educated, a citizen of a first world democracy.⁷⁷ And as Duncan Wallace, the Australian Naval Reserve officer and psychiatrist who had served on the *Arunta*, an Australian Navy vessel that saw action in “Operation Relex,” the vector for the “Pacific Solution,” wrote to the Australian press of the violent intervention to block the Islamic refugees’ access to asylum rights under international and Australian law:

Not only are these actions physically dangerous to members of the [Australian Defence Forces], but it is my expert opinion, as a senior consultant psychiatrist to the Royal Australian Navy, that they are highly likely to be harmful to the psychological health and moral development of all members involved. Nearly everyone I spoke to that was involved in these operations knew that what they were doing was wrong . . . the hardhearted who speak loudly about the need for stern deterrent actions to solve this problem have not seen the faces of the boat people in their miserable conditions, imploring us for help.⁷⁸

A similar insight is pressed home, albeit in more metaphysical vein, by David Malouf’s *An Imaginary Life*, a candidate for the title of “great Australian Constitutional novella.” Exiled beyond the end of the “civilized” world for reasons that were not publicly revealed, the dying poet Ovid, whose greatest work was the subversive epic of love and transformation, the *Metamorphoses*, found in Malouf’s imagined exile the regard for and of another—the feral abandoned Child whom he persuaded his hosts to take in, and saved from those hosts when they turned against him—that generated in him “a capacity for belief that is nowhere to be found in his own writings.”⁷⁹ Negotiating the passage between self and other, foreign and domestic, exile and community, Malouf’s Ovid mused:

For these people it is a new concept, play. How can I make them understand that till I came here it was the only thing I knew? Everything I ever valued before this was valuable only because it was useless, because time spent upon it was not demanded but freely given, because to play is to be free. Free is not a word that exists, I think, in their language. Nothing here is free of its own nature, its own law.

But we are free after all. We are bound not by the laws of our nature but the ways we can imagine ourselves breaking out of those laws without doing violence to our essential being. We are free to transcend ourselves. If we have the imagination for it.

My little flowerpots are as subversive here as my poems were in Rome. They are the beginning, the first of the changes. Some day, I know, I shall find one of our women stopping as she crosses the yard with a bag of seed to smell one of my gaudy little blooms. She will, without knowing it, be taking a first step into a new world.⁸⁰

What more might we learn if we read generic like against like, two quasi-legal Constitutional Epics: the first, the *Arar Commission Report*; the second from Australia rather than Canada, and preceding the events of 9/11: *Bringing Them Home*, the Report of the Australian Human Rights and Opportunity Commission's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families?⁸¹ And if we read them in turn against the texts of positive law with which they share a subject? First, such a comparison brings home the inadequacy of the institutions, discourses, and texts of positive law to do justice to state violence, visited on the powerless, of the magnitude that each report documents with relentless exhaustiveness: *Arar v. Ashcroft*⁸² is a monument to narrow legalism, finding every opportunity to deny Maher Arar a forum in which his claims of state violence might be done justice to.⁸³

In *Kruger v. Commonwealth (Stolen Generations Case)*⁸⁴ the Australian High Court denied the claims of members of the stolen generations that had challenged the constitutionality of the *Aboriginals Ordinance 1918 (NT)*, one of the legislative acts of Australian state and territory governments that had authorized the forced removal of indigenous children from their families, and had sought damages for that alleged constitutional breach. While the Court's justices came to differing doctrinal conclusions about the applicable Constitutional law, what each had in common—with the possible exception of Justice Toohey, who, while denying the relief sought on the basis that the

Aboriginals Ordinance was not unconstitutional on the grounds of unequal treatment on its face, insisted on reading *Leeth v. Commonwealth*⁸⁶ as embodying a constitutional guarantee of substantive equality⁸⁶—is positivist narrowness. Rejecting the possibilities offered by a nascent jurisprudence of “thick” judicial power implied by Article III of the Australian Constitution, instantiated by Justices Deane and Toohey in *Leeth*,⁸⁷ Justice Gaudron made the Court, the Stolen Generations, and the nation hostages to history:

It would not appear that [a doctrine of substantive equality] . . . was adopted in the drafting of the Constitution. . . . In *Leeth* Deane and Toohey JJ expressed the view that such a doctrine had been adopted in the Constitution by necessary implication by reason of its conceptual basis and because it is “implicit in the Constitution’s separation of judicial power from legislative and executive powers and the vesting of judicial power in designated ‘courts.’”

In referring to the conceptual basis of the Constitution, Deane and Toohey JJ had in mind the preamble and covering cl 3 of the Commonwealth of Australia Constitution Act which refer to the agreement of the people of the various colonies to unite in a Federal Commonwealth. Their Honors took the view that “[i]mplicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact”. It may be observed that a degree of equality was lacking in the free agreement of which their Honours spoke, in that the referendum expressing that agreement excluded most women and many Aboriginals. But the important thing is that the Constitution to which the people agreed plainly envisages inequality in the operation of laws made under it. Moreover, those who framed the constitution deliberately chose not to include a provision guaranteeing due process or equal protection of the laws and it was with those omissions that the people agreed to the Constitution. It is not possible, in my view, to read into the fact of agreement any implications which do not appear from the document upon which agreement was reached. Not only does a doctrine of equality . . . not appear from the Constitution, but the very basis on which it was drafted was that matters such as that were better left to parliament and the democratic process.⁸⁸

Bringing Them Home both undermines the authority of the *Kruger* majority’s decision to read the Constitution and the history of its drafting in the narrowest and most literal of ways and is a forceful adjunct to Seuffert’s warning about the price of repeating history. The Commission—headed by Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner, and Sir Ronald Wilson, a retired High Court justice and the President

of the Human Rights and Equal Opportunity Commission—opened its report with an address to history and to nation, concluding by quoting the then Australian head of state, Governor-General Sir William Deane, yet another retired High Court justice:

The histories we trace are complex and pervasive. Most significantly the actions of the past resonate in the present and will continue to do so in the future. The laws, policies and practices which separated Indigenous children from their families have contributed direction to the alienation of Indigenous societies today.

For individuals, their removal as children and the abuse they experienced at the hands of the authorities or their delegates have permanently scarred their lives. The harm continues in later generations, affecting their children and grandchildren. . . .

The truth is that the past is very much with us today, in the continuing devastation of the lives of indigenous Australians. . . .⁸⁹

Bringing Them Home went on to quote from the Governor-General's description of the "past dispossession, oppression and degradation of Aboriginal peoples," "done . . . in the name of the community or with the authority of government," which had produced "[t]he present plight, in terms of health, employment, living conditions and self-esteem" of Australia's indigenous peoples, insisting on the recognition "of the extent to which present disadvantage flows from past injustice and oppression."⁹⁰

That "present disadvantage" stems from the individual, familial, community and transgenerational effects of the widespread forcible separation of indigenous Australian children from their families in the period between the early nineteenth century and the early 1980s. Under color of successive policies of colonization, the euphemistically labeled "protection" and segregation of indigenous from white Australians, the absorption of the black race into the white, assimilation of those who survived these earlier genocidal practices into white society, and "child welfare" that was much more likely to consider a black child as a candidate for separation from her parents in the interests of her welfare than her white peer, black children were hunted down; often literally ripped from their mothers' arms; institutionalized in the grimmest of circumstances; pressed into servitude that bore the hallmarks of chattel slavery; subjected to sexual violence and coercion; lied

to about their race, their identity, and families, including about long histories of fruitless attempts by their distraught parents to find them; taught to believe that they were worthless.

The “disadvantage” that results includes low educational achievement and stratospheric levels of unemployment; endemic poverty and disease, including high incidence of diseases that would normally be found in the fourth world and not in the heart of a wealthy Western democracy; overrepresentation in the criminal justice system and in correctional facilities; horrifying levels of addiction and substance abuse; widespread community cultures of violence, especially violence to intimates and family members, and self-harm (including, most notably, petrol-sniffing and suicide); and short life expectancy, especially among young black men, who die violently, at high rates. Even among such a transgenerationally impoverished group, those indigenous children forcibly removed from their families do much worse. To take just a few examples from the devastating statistics reproduced in *Bringing Them Home*, indigenous children “removed in childhood” from their families are “twice as likely to report having been arrested by police and having been convicted of an offence”; “three times as likely to report having been in gaol”; “twice as likely to report current use of illicit substances”; and “much more likely to report intravenous use of illicit substances” as those “who were raised by their families or in their communities.”⁹¹

Such are the “dangerous supplements” that *Bringing Them Home*’s Constitutional Epic brings home to the High Court’s account of what the constitution does and does not provide. Even more telling tales emerge from its use of survivor testimony, which breaks the text of legal analysis to devastating effect. Take, for example, this testimony from a woman from the same Australian state as, and at most a few years older than, me:

The thing that hurts the most is that they didn’t care about who they put us with. As long as it looked like they were doing their job, it just didn’t matter. They put me with one family and the man of the house used to come down and use me whenever he wanted to . . . Being raped over and over and there was no-one I could turn to. They were supposed to look after me and protect me, but no-one ever did.

*Confidential evidence 689, New South Wales: woman removed to Parramatta Girls’ Home at the age of 13 in the 1960s and subsequently placed in domestic service.*⁹²

Reflecting specifically on the transgenerational effect of removal, the same survivor also reported:

That's another thing that we find hard is giving our children love. Because we never had it. So we don't know how to tell our kids that we love them. All we do is protect them. I can't even cuddle my kids 'cause I never ever got cuddled. The only time was when I was getting raped and that's not what you'd call a cuddle, is it?⁹³

Another woman much of my age reported on the transgenerational effect removal had on her father:

The interesting thing was that he was such a great provider . . . He was a great provider and had a great name and a great reputation. Now, when this intrusion occurred it had a devastating impact upon him and upon all those values he believed in and that he put in place in his life which included us, and so therefore I think the effect upon Dad was so devastating. And when that destruction occurred, which was the destruction of his own personal private family which included us, it had a very strong devastating effect upon him, so much so that he never ever recovered from the trauma that had occurred . . .

Progressively the shattering effect continued in my father's life to the point that he couldn't see the sense in reuniting the family again. He had lost all confidence as a parent and as an adult in having the ability to be able to reunite our family.

*Confidential evidence 265, Victoria: Woman removed with her sisters from their father and grandmother in the 1960s.*⁹⁴

Both the *Arar Commission Report* and *Bringing Them Home*, then, bespeak the redemptive potential of Constitutional Epics of their type: showing how unpalatable truths about how “we” treat others, under the putative authorization of circumstances of national necessity, testify to the inadequacy of the present language of law to doing justice, and bespeak the ability of a differently constituted legal language to make it possible.

They also record the violence visited in the nation's name on those who are constructed as “different,” marginal to national identity, excessive to model citizenship. In each case, to differing degrees, they show how state law's violent intervention in the family lives of oppressed communities putatively “within” the nation is characteristic of jurispathic state law. The poignant

documentary report of Professor Stephen J. Toope, the Arar Commission's Fact Finder,⁹⁵ concludes thus:

Mr. Maher Arar was subjected to torture in Syria. The effects of that experience, and of consequent events and experiences in Canada, have been profoundly negative for Mr. Arar and his family. Although there have been few lasting physical effects, Mr. Arar's psychological state was seriously damaged and he remains fragile. His relationships with his family have been significantly impaired. Economically, the family has been devastated.⁹⁶

Likeness; difference. If *An Imaginary Life* is a candidate for the title of the Great Australian Novella, Toni Morrison's *Beloved* has been anointed the Great American Novel.⁹⁷ Cover's diagnosis of the nation's constitutional fault line makes a supplementary case for the novel as America's Great Constitutional Epic. Morrison's novel is a canonical fictional narrative on the theme of what all of "us," the nation, its paradigmatic included citizens and their marginalized others, inherit from the violent legalized destruction of the family lives of enslaved African Americans. Is Robin West right, when she makes claims for the peculiar, *philosophical* ability of canonical literature to tell epic truths?

Beloved is a meditation on the price paid for generations of "unspeakable thoughts, unspoken,"⁹⁸ and the possibility of redemption when the unlivable, intolerable, truth, the "jungle whitefolks planted in" blacks, and in themselves,⁹⁹ is outed, and made to identify itself; when women like Sethe, Baby Suggs, Denver, and the haunted, haunting ghost *Beloved* herself are "free at last to be what they liked, see what they saw and say whatever was on their minds."¹⁰⁰ Morrison's account of the work's genesis begins with her coming into the strange recognition of her freedom at the passage in her own history when she had decided to stop working for others, to write:

I think now it was the shock of liberation that drew my thoughts to what "free" could possibly mean to women. In the eighties, the debate was still roiling: equal pay, equal treatment, access to professions, schools . . . and choice without stigma. To marry or not. To have children or not. Inevitably these thoughts led me to the different history of black women in this country—a history in which marriage was discouraged, impossible, or illegal; in which birthing children was required, but "having" them, being responsible for them—being, in other words, their parent—was as out of the question as freedom. Assertions of

parenthood under conditions peculiar to the logic of institutionalized enslavement were criminal.¹⁰¹

Telling once again paradigmatic stories of what we label genocide in other places, with abundant death dealt out in briefer episodes, more obviously violent times, Morrison tells a story uncannily like that of the survivors who speak at last in *Bringing Them Home*. Wrestling every possibility from the genre of literary novel, she employs the pregnant violence of metaphor to testify to unspeakable *truths*, unspoken. The rape she submits to in order to pay for an epitaph to her murdered baby's gravestone, remembered, infects love with obscenity:

"For a baby she throws a powerful spell," said Denver.

"No more powerful than the way I loved her," Sethe answered and there it was again. The welcoming cool of unchiseled headstones; the one she selected to lean against on tiptoe, her knees wide open as any grave. Pink as a fingernail it was, and sprinkled with glittering chips. Ten minutes, he said. You got ten minutes I'll do it for free.¹⁰²

And the repetitive violence of the forced removal of children, and mothers, and fathers from families that the logic of slavery dictated—"a]ll of Baby's life, as well as Sethe's own, men and women were moved around like checkers," such that "[a]nybody Baby Suggs knew, let alone loved, who hadn't run off or been hanged, got rented or loaned out, bought up, brought back, stored up, mortgaged, won, stolen, or seized"—leaves indelible traces, rewrites itself everywhere it can:

Baby Suggs rubbed her eyebrows. "My first born. All I can remember is how she loved the bottom of bread. Can you beat that? Eight children and that's all I remember."

"That's all you let yourself remember," Sethe had told her, but she was down to one herselfóone alive, that is, the boys chased off by the dead one, and her memory of Buglar was fading fast. Howard at least had a head shape nobody could forget. As for the rest, she worked hard to remember as close to nothing as was safe.¹⁰³

Morrison's epic poetry has a peculiar power to render the wholeness of truth. But perhaps it yields its deepest truths, meriting the generic label

philosophy, or jurisprudence, when it is read against its companion pieces, *Dark Victory* and *Bringing Them Home*. Reading *Beloved* in this way can lead us “to recognize . . . a pattern that reveals a meaning.”¹⁰⁴

The epic truth of these constitutive fictions of national identity is that “constitutional inequality [is] the other self of the rule of (Constitutional) law, always imminent, always encroaching, always requiring vigilance to discern when it comes constitutional.”¹⁰⁵ In the aftermath of originary violence, so such a Law and Literature project might insist, the nation responsible for that violence must reimagine, envision, dream itself into being, but if it does so without insistently remembering its origins and its history, it will be at a considerable price.

Perhaps redemptive Comparative Constitutionalism, then, requires restoring our Constitutional Epics to historical contexts: texts like the literary history that is Stephen Weisenburger’s *Modern Medea: A Family Story of Slavery and Child-Murder from the Old South*, which marshals and reads the texts that tell the story of Morrison’s muse, Margaret Garner, a fugitive slave who killed one child and tried to kill the others when recaptured by the slave master who was in all probability the murdered child’s father; and Pamela Bridgewater’s powerful legal history, “Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence.”¹⁰⁶ Bridgewater documents the slave-breeding economy in which Margaret Garner existed, arguing that “reproductive exploitation via forced sex and forced reproduction”¹⁰⁷ was as constitutive of slavery as forced labor. The nation-forging she seeks to supplement, however, is that presently constituted by the doctrine that gives such life to the Reconstruction Amendments as they have, at this point in the history of “our” Constitution.

What comparative study of Constitutions and their Epics might yield, then, are brutal truths and the judgments of history, but also, if we choose, insights into how we might make of that unpromising material a *nomos* and a narrative of redemptive Constitutionalism. Cover’s rich text is uncharacteristically plain about what the path to such redemption entails:

[T]hose who write a nation’s epic make choices about the ancestors they invoke, as do constitutional courts. “The normative universe,” of the nation, he observes, “is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what the law means and what law shall be.”¹⁰⁸

Constitutional judges must choose interpretive integrity over hierarchy,¹⁰⁹ peace over violence.¹¹⁰ That which is capable of moving them to such a choice, to “fac[ing] the commitments entailed in their judicial office and their law,”¹¹¹ is “the stories the resisters tell, the lives they live, the law they make.”¹¹²

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1. Nan Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Aldershot and Burlington, Vermont: Ashgate, 2006), 138.
2. Virginia Woolf, *Orlando* (San Diego, New York, and London: Harcourt Brace & Company, 1928), 205.
3. Seuffert, *supra* note 1, at 2–3.
4. *Id.* at 136.
5. *Id.* at 5, quoting the Rt. Hon. Helen Clark, “Post-Cabinet Conference: 23 June 2003,” *cited in* Seuffert, *supra* note 1, at 136.
6. These include contributions to the “Tribute to Robert Cover,” 96 *Yale Law Journal* 1699 (1987); the “Tribute to Robert Cover,” 7 *Journal of Law and Religion* (1989); the “Series on Robert Cover,” 8 *Cardozo Studies in Law and Literature* (1996); the “Symposium—Rethinking Robert Cover’s *Nomos* and Narrative,” 17 *Yale Journal of Law and the Humanities* (2005); and *Issues in Legal Scholarship 2006: Robert Cover’s Nomos and Narrative*, <http://www.bepress.com/ils/iss8/art3> [hereinafter “*Issues 2006: Cover*”].
7. See, e.g., Robert A. Burt, “Robert Cover’s Passion,” 17 *Yale Journal of Law and the Humanities* 1, 5 (2005).
8. *Id.*
9. Robert C. Post, “Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in *Nomos* and Narrative,” 17 *Yale Journal of Law and the Humanities* 9, 14 (2005).
10. *Id.* at 16.
11. *Id.*
12. Robert M. Cover, “The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative,” 97 *Harvard Law Review* 4, 18 (1983), quoted in Post, *supra* note 9, at 9–10.
13. Cover, *supra* note 12, at 16, quoted in Post, *supra* note 9, at 10.
14. Cover, *supra* note 12, at 58, quoted in Post, *supra* note 9, at 11.
15. Cover, *supra* note 12, at 12, quoted in Post, *supra* note 9, at 12.
16. Post, *supra* note 9, at 14.
17. I do not take this to be Cover’s resting place in “*Nomos* and Narrative,” as this essay will go on to suggest. Registering that communities may be “redemptive or insular,” Cover counsels “[i]t is not the romance of rebellion that should lead us to look to the law evolved by social movement and communities. Quite the opposite. Just as it is our distrust for and recognition of the state as reality that leads us to be constitutionalists with regard to the state, so it ought to be our recognition and distrust for the reality of the power of social movements that leads us to examine the nomian world they create. And just as constitutionalism is part of what may legitimate the state, so constitutionalism may legitimate, within a different framework, communities and movements,” Cover, *supra* note 12, at 68.

18. See, e.g., Burt, *supra* note 7, at 5.
19. Cover, *supra* note 12, at 68.
20. Richard Mullender, "Two *Nomoi* and a Clash of Narratives: The Story of the United Kingdom and the European Union," in *Issues 2006: Cover*, *supra* note 6, at 12.
21. Cover, *supra* note 12, at 24.
22. *Id.* at 19–25.
23. *Id.* at 17.
24. *Id.*, invoking W. B. Gallie, *Philosophy and the Historical Understanding* (New York: Schocken Books, 1964).
25. Cover, *supra* note 12, at 25.
26. *Id.* at 39.
27. *Id.* at 25.
28. *Id.* at 18.
29. Kwame Anthony Appiah, "Race," in *Critical Terms for Literary Study*, ed. Frank Lentricchia & Thomas McLaughlin (Chicago: The University of Chicago Press, 1990), 274–97.
30. Drucilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (New York: Routledge, 1993), 23.
31. Cover, *supra* note 12, at 9.
32. *Id.* at 4.
33. *Id.* at 34.
34. *Id.*
35. *Id.* at 51.
36. *Id.* at 35.
37. Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005), 178.
38. Cover, *supra* note 12, at 4.
39. Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London and New York: Routledge, 1996), 112.
40. Cover, *supra* note 12, at 7.
41. "As a young lawyer in the Reagan administration, Supreme Court nominee Samuel A. Alito Jr. wrote [in a successful job application for a promotion in the Meese Justice Department] that 'the Constitution does not protect a right to an abortion,' declared his firm opposition to certain affirmative action programs, and strongly endorsed a government role in 'protecting traditional values.'" Joe Becker & Charles Babington, "No Right to Abortion, Alito Argued in 1985," *The Washington Post*, Nov. 15, 2005, at A01.
42. See, e.g., John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Jan. 9, 2002, at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002, at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>
43. Commonwealth of Australia Constitution Act, § 51 (xxvi).
44. Gavan Griffith, Q.C., *Kartinyeri v. Commonwealth* (Hindmarsh Island Bridge Case), transcript of argument, High Court of Australia, February 5, 1998, *quoted in* Tony Blackshield & George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 4th ed. 1000 (2006).
45. David Marr & Marian Wilkinson, *Dark Victory* (Crows Nest, New South Wales: Allen & Unwin, 2004), 280.
46. Penny Pether, "The Prose and the Passion," 66 *Meanjin* 43, 45, 46 (2007).
47. Marr & Wilkinson, *supra* note 45, at 367.

48. *Id.* at 281.
49. *Id.* at 235.
50. Cover, *supra* note 12, at 17.
51. Quoted in Marr & Wilkinson, *supra* note 45, at 367–68.
52. Robin West, “The Lawless Adjudicator,” 26 *Cardozo Law Review* 2253, 2253 (2005).
53. Cover, *supra* note 12, at 39.
54. *Id.*
55. *Id.*
56. *Id.* at 45.
57. *Id.*
58. *Id.* at 67.
59. *Id.* at 45.
60. *Id.*
61. In the U.S. context, the Report of the 9/11 Commission is arguably the most noteworthy recent example of this genre.
62. The two quasi-legal texts discussed in this essay are epic in their scale. *Bringing Them Home* runs to 689 pages. The three volumes of the public version of the *Arar Commission Report* number 462, 822, and 373 pages, respectively.
63. There may be others: as I’ve suggested elsewhere, poetry, see Penelope Pether, “Militant Judgment?: Judicial Ontology, Constitutional Poetics, and ‘The Long War,’” 29 *Cardozo Law Review* 2279 (2008); also genre fictions, which map the iterative process of repetition and change.
64. Cover, *supra* note 12, at 18.
65. A term coined by Peter Goodrich, *supra* note 39.
66. (Ottawa: Arar Commission, 2006) [hereinafter “*Arar Commission Report*”].
67. *Id.*, Analysis and Recommendations, at 9.
68. *Id.*, Analysis and Recommendations, at 10.
69. *Id.*, Factual Background, Vol. I, at 12.
70. Cover, *supra* note 12, at 46.
71. Cover, *supra* note 12, at 33.
72. Marr & Wilkinson, *supra* note 45, at 187–88.
73. *Id.* at 138, 139–40, 141, 142–43, 158, 160, 161, 163, 200, 210, 214, 216, 222, 228, 271, 293–94, 367–68, 382, 389.
74. *Id.* at 139.
75. *Id.* at 203.
76. Robert M. Cover, “Violence and the Word,” 95 *Yale Law Journal* 1601, 1601 (1986).
77. *Arar Commission Report*, *supra* note 66, Analysis and Recommendations, at 9.
78. Marr & Wilkinson, *supra* note 45, at 367.
79. David Malouf, “Afterword: A Note on Sources,” *An Imaginary Life* (New York: George Braziller, 1978), 154.
80. *Id.* at 67.
81. (Sydney: Human Rights and Equal Opportunity Commission, 1997) [hereinafter “*Bringing Them Home*”].
82. 532 F.3d 157 (2008).
83. Thanks are due to my former student Kristin Repyneck, Villanova School of Law J.D. 2007, for this insight.
84. 190 C.L.R. 1 (1997).
85. 174 C.L.R. 455 (1992).
86. *Kruger v. Commonwealth*, *supra* note 84 at 95.
87. *Leeth v. Commonwealth*, *supra* note 85, at 483–90.

88. *Kruger*, *supra* note 84, at 66–67.
89. *Bringing Them Home*, *supra* note 81, at 3.
90. *Id.* at 3–4.
91. *Id.* at 13.
92. *Bringing Them Home*, *supra* note 81, at 168.
93. *Id.* at 225.
94. *Id.* at 212.
95. *Arar Commission Report*, *supra* note 66, App. 7, Factual Background, Vol. II, at 789–819.
96. *Id.* at 818.
97. In 2006 the *New York Times Book Review* anointed *Beloved* the best American novel of the previous twenty-five years.
98. Toni Morrison, *Beloved* (1987; New York: Vintage, 2004), 235.
99. *Id.* at 234.
100. *Id.* at 235.
101. *Id.* at xvi–xvii.
102. *Id.* at 5.
103. *Id.* at 6.
104. Steven Weisenburger, *Modern Medea: A Family Story of Slavery and Child-Murder from the Old South* (New York: Hill & Wang, 1998), 278–80.
105. Pether, *supra* note 63, at 2300.
106. 7 *Washington and Lee Race & Ethnic Ancestry Law Journal* 11 (2001).
107. *Id.*
108. Pether, *supra* note 46, at 44.
109. *Id.* at 58.
110. *Id.* at 53.
111. *Id.* at 68.
112. *Id.*