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Introduction
Constitutional Justice and Collective Memory

> He will now remember their iniquity and visit their sins.
>
> —Jeremiah 14:10

> Now, the essence of a nation is that all individuals have many things in common, and also that they have all forgotten many things.
>
> —Ernest Renan (1882)

> [T]he past must be forgotten if it is not to become the gravedigger of the present.
>
> —Friedrich Nietzsche (1874)

I. Introduction

Modern polities are constituted in two fundamental ways: legally, through the Constitution; and culturally, through collective memory.[1] Inevitably, the former invokes the latter. Every constitution is a memorial of sorts. As Robert Cover put it, "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic."[2] Constitutions perform a crucial part of their constituent work by harnessing the power of a common past and giving it legal form.[3] Appealing to the past is part

[1] On the power of memory to underwrite national identity, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (rev. edn., Verso 1991) 1–46, 155–62, 187–206; John R. Gillis (ed.), *Commemorations: The Politics of National Identity* (1994); Jan-Werner Müller (ed.), *Memory and Power in Postwar Europe* (Princeton University Press, 2002); Eric Hobsbawm, "Introduction: Inventing Traditions" in Eric Hobsbawm and Terence Ranger (eds.), *The Invention of Tradition* (Cambridge University Press, 1983) 1–14.

[2] Robert M. Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative" (1983) 97 *Harvard Law Review* 4 (1983).

[3] For an extended reflection on constitutionalism and national narratives, see Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011). On narratives and memory in constitutional adjudication more broadly, see Daphne Barak-Erez, "History and Memory in Constitutional Adjudication" (2017) 45 *Federal Law Review* 1; Andreas von Arnauld, "Norms and Narrative" (2017) 18 *German Law Journal* 309. On the broader uses of history in constitutional adjudication, see Pierre de Vos, "A Bridge Too Far?: History as Context in the Interpretation of the South African Constitution" (2001) 17 *South African Journal on Human Rights* 1; Richard H. Fallon, Jr., "The Many and Varied Roles of History in Constitutional Adjudication" (2015) 90 *Notre Dame Law Review* 1753.

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of the constitution's bid for legitimacy. Memory supports the constitution's claim to speak for the people. By invoking memory, the Constitution asserts its claims on citizens' hearts and hands. Its "mystic chords of memory"[4] intone a canticle of allegiance.

Such mnemonic appeals to allegiance, of course, were common long before the modern constitutional era.[5] But the Constitution provides a particularly powerful pulpit—an unusually resonant site of memory.[6] It retains that resonance through constitutional justice. Constitutional courts in many nations invoke the ethos of a national epic and claim the mandate of a common past. Constitutional judges around the world seek to bolster their decisions by frequent appeals to constitutional memory.

Many observers have highlighted how the spread of constitutional justice since the Second World War has been fueled by the memory of authoritarian regimes. Less attention—including less *comparative* attention—has been paid to the role of historical memory in constitutional adjudication and of constitutional courts as mnemonic actors.[7] This book examines constitutional decisions as historical monuments—as jurisprudential "sites of memory."[8] It explores the work of constitutional courts as carriers of a common past,[9] as agents of collective memory.

More specifically, this is a book about constitutional justice and the memory of historical evil—about how constitutional judges justify present decisions by drawing "lessons" from dark pasts. I focus on three case studies: the United States after slavery, Germany after Nazism, and South Africa after apartheid.

These three countries are illuminating for many reasons. First, and most obviously, each has a powerful and influential constitutional court that has frequently and prominently invoked an evil past. In each, moreover, the Constitution itself is a powerful source of constitutional identity. The phrase "constitutional patriotism" was coined in Germany, but the phenomenon is evident in all three lands, and for similar reasons. As Dieter Grimm has observed, the Constitution provided an alternative basis of identity in postwar West Germany where traditional

[4] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in James D. Richardson (ed.), *A Compilation of the Messages and Papers of the Presidents, 1789–1917*, vol. 6 (Bureau of National Literature, 1897) 5–12, 12.

[5] See Jeffrey K. Olick et al., "Introduction" in Jeffrey K. Olick et al. (eds.), *The Collective Memory Reader* (Oxford University Press, 2011) 3–62, 3 ("Priests and politicians before and [after Moses] have intuitively understood the cultic powers of the past to underwrite solidarity and motivate action.").

[6] The term "sites of memory," or "*lieux de mémoire*," is most closely associated with the work of the French historian Pierre Nora. See Pierre Nora, "Between Memory and History: Les Lieux de Mémoire" (Spring 1989) 7 *Representations* 7 (discussing "the problem of the embodiment of memory in certain sites where a sense of historical continuity persists").

[7] For an important step in this direction, see Kim Scheppele, "Constitutional Interpretation after Regimes of Horror" in Susanne Karstedt (ed.), *Legal Institutions and Collective Memories* (Hart Publishing, 2009) 233–58.

[8] See Jay Winter, *Sites of Memory, Sites of Morning* (Cambridge University Press, 1995); Pierre Nora and David P Jordan (eds.), *Les Lieux de Mémoire*, 3 vols. (Gallimard, 1984–1992).

[9] Cf. Aleida Assmann, *Das kulturelle Gedächtnis* (CH Beck, 1999) 54.

sources of identity, for various reasons, were unavailable: history, because it was tainted and burdened by the Holocaust; the nation, because it was divided; and culture, because it was needed as the last remaining link with fellow "Germans" in the East.[10] Constitutionalism—and, by extension, constitutional justice—filled the gap. Similarly, Bruce Ackerman has written of the American context that, "because Americans differ so radically in other respects, our constitutional narrative constitutes us a people." If Americans failed "to try to discover meaning in our constitutional history, we would be cutting ourselves off from each other in a way that could not be readily replaced by television talk shows or even Melville, Twain, and Faulkner."[11] The Constitution performs a similar, identity-grounding, community-forging function in post-apartheid South Africa.

The three countries also feature a first-generation constitution (the United States), a second-generation constitution (Germany), and a third-generation constitution (South Africa), with all the attendant differences of emphasis, scope, and conception of fundamental rights.[12] The three constitutions also have very different origins. They represent, in terms coined by Michel Rosenfeld, a revolution-based constitution (the United States), a war-based constitution (Germany), and a pact-based constitution (South Africa).[13] And they represent, finally, two constitutional regimes shaped by racial apartheid and a third shaped by ethno-racial fascism—a helpful comparative triangulation. All of this will allow us to see and compare how courts invoke memory in connection with very different constitutional traditions.

All three countries face the problem of historical evil—the challenge of grounding a common identity, including a common constitutional identity, in the shadow of towering past crimes. They, and especially their apex courts, have responded to that challenge in very—and illuminatingly—different ways.

There are, of course, many differences among the three case studies, the most important of which for our purposes is that the U.S. Constitution is not a post-slavery constitution in the same sense in which the German Basic Law is a post-Nazi constitution or the Constitution of the Republic of South Africa is a post-apartheid constitution. The U.S. Constitution lived alongside slavery for nearly eighty years. It tolerated the peculiar institution, even strengthened it. It looked back to an

[10] See Dieter Grimm, "Integration durch Verfassung" (2004) 32 *Leviathan* 448.

[11] Bruce A. Ackerman, *We the People: Foundations*, vol. 1 (Harvard University Press, 1991) 36–37.

[12] The U.S. Supreme Court was the dominant, and long the only, constitutional tribunal of Generation I; the German Constitutional Court has been the most influential tribunal of Generation II; and the South African Court has been a prominent and much-admired figure in Generation III. The three courts also provide at least a measure of geographical representation, including as they do one North American court, one continental European court, and one court from the "global South." It would be fascinating to expand the search to other parts of the planet—particularly to the post-Soviet constitutional tribunals of Eastern Europe or post-colonial and post-authoritarian tribunals elsewhere. I hope that others will do so. I simply lack the space and the expertise—especially the linguistic expertise—to make that inquiry here.

[13] See Michel Rosenfeld, "Constitutional Identity" in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 756–76, 766–69.

epic of struggle and liberation that didn't apply to the millions of Americans in bondage. That glaring disjuncture has always complicated Americans' efforts to come to terms with their past. Their identity is powerfully linked to a document that condoned and in some respects abetted the evil. This surely goes some way toward explaining why the mnemonic jurisprudence of the U.S. Supreme Court is, as will become clear, a startling outlier among the three courts studied.

I should stress at the outset that by focusing on the three evils of slavery, Nazism, and apartheid, I am not saying anything about their relative wickedness: I am asserting neither that they are comparable nor that any one of them is irreducibly singular. Suffice it to say that all three were regimes of colossal injustice whose violence and brutality victimized millions. That they represent dramatic instances of historical evil is, I hope, uncontroversial. I should also stress that, by focusing on these three evils, I am not denying or discounting the existence of other historical evils within these three jurisdictions. I am simply focusing on the three evils about which the three courts have had the most to say. Important work remains to be done regarding other judicial narratives about other historic evils.

II. Modes of Judicial Memory

When courts invoke the past, they are making a conscious rhetorical move. The past is part of the judicial arsenal, and different courts deploy it in different ways to different ends. At the most general level, courts often invoke the past either to justify some exercise of judicial power or to explain why they have chosen to stay their hand. Sometimes this is simply a question of proper interpretation. Courts invoke the past in order to construe a constitutional provision and apply it to a concrete case. This can occur at either a low level of generality, as courts ask what framers or ratifiers intended or understood, or at a high one, as courts inquire after general principles, underlying values, or animating spirit.[14]

In a much broader sense, however, judicial memory is about more than interpretation or the legitimacy of a given judgment. Almost always, exercises in judicial memory aim to legitimate the court and its work. They also aim to legitimate the constitutional order writ large. Judicial memory is thus a subset of what Philip Bobbitt calls *ethical* constitutional argument: argument from the national ethos.[15]

[14] Jack Balkin has written that originalist argument "involves many different kinds of argument, and it often appeals to ethos, tradition, or culture heroes." Jack Balkin, "The New Originalism and the Uses of History" (2013–2014) 82 *Fordham Law Review* 641, 652. Other leading students of originalism have characterized originalism as just one variety of ethical argument. See Jamal Greene, "On the Origins of Originalism" (2009) 88 *Texas Law Review* 1, 64, 82–5; Richard Primus, "The Functions of Ethical Originalism" (2009) 88 *Texas Law Review* 79, 80 ("[T]he deeper power of originalist argument sounds in the ethos of national identity."). Originalism, however, is only one strand of mnemonic argument.

[15] See generally Phillipp Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982).

In the case of historical evil, courts invoke the past both to distance themselves from that past and to associate themselves with the constitutional response to it. Insofar as that response is a revolutionary one—whether the revolution be the product of popular mobilization or the handiwork of expert elites[16]—courts can thus pose as the revolution's heirs and guardians. In any case, the past is a potent reservoir of legitimacy, and judges often try to tap it. They feel, it seems, an urgent need to explain why the legacies of historical evil require—or do not require—them to act in certain ways.

To that end, they generally employ one of two basic frameworks, which I call the *parenthetical* and the *redemptive* modes of constitutional memory.

A. The Parenthetical Mode of Memory

Begin with the *parenthetical* mode. The parenthetical framework views the evil era as exceptional—a baleful aberration from an otherwise noble and worthy constitutional tradition. I take the term "parenthesis" from Benedetto Croce, who described fascism as a "*una parentesi*" in Italian history.[17] Parenthetical jurisprudence looks beyond (i.e., *before*) the evil era to more stable and enduring values. It sees constitutional provisions adopted in the aftermath of historical evil not as revolutionary, but as restorative—a return to and a reaffirmation of an older tradition. Parenthetical jurisprudence is often, in this sense, conservative. Sometimes it takes the form of silence and elision; other times, of generalization. It treats the constitutional text as historically neutral. It highlights an alternative, nobler tradition in which the condemned period or practice plays a limited, exceptional role. It deploys the resources of a broader past to tame the iniquities of a particularized past.

The godfather of parenthetical jurisprudence is Edmund Burke, who believed devoutly in the power of memory and tradition to secure social order. His most famous reflection on this power was itself an act of memory. In damning France's revolution of 1789, he extolled England's of 1688. The difference between the two was that England preserved continuity with the past, while France presumed to make the world anew. The English placed a close parenthesis around the incorrigible House of Stuart; the French declared a new dispensation of Liberty, Equality, and Fraternity.

[16] On the distinction between constitutions inspired by revolutionary charisma and those crafted by technocratic elites, see generally Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press, 2019).

[17] See Benedetto Croce, "La libertà italiana nella libertà del mondo" in Benedetto Croce, *Scritti e discorsi politici, 1943–1947*, vol. 1 (Laterza, 1963) 49–58, 56–7. On Croce's political opposition to the Fascist regime, , see Fabio Fernando Rizi, *Benedetto Croce and Italian Fascism* (University of Toronto Press, 2003).

In Burke's view, the French should have learned from the English. They should have learned, as the English had learned, from their own past. "All the reformations we have hitherto made," Burke wrote, "have proceeded upon the principle of reference to antiquity: and I hope, nay I am persuaded, that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example."[18] Because England's revolutionaries had "[a]lways act[ed] as if in the presence of canonized forefathers, the spirit of freedom, leading in itself to misrule and excess," had been "tempered with an awful gravity."[19] Liberty avoided license by maintaining continuity.

The folly of France, by contrast, was the revolutionaries' failure to build on enduring foundations. The proper response to corruption and evil was not to start the world over but to restore the good that had gone before. There was much of ancient good in France, but the Jacobins had spurned it. "You had all these advantages in your antient states," Burke chided; "but you chose to act as if you had never been moulded into civil society, and had everything to begin anew. You began ill," he concluded, "because you began by despising everything that belonged to you."[20] Rather than rhapsodize like the infatuated Wordsworth about a dawn of redemption and renewal ("Bliss was it in that dawn to be alive, / But to be young was very heaven!"), the French should have taken a parenthetical approach. They should have ended the abuses of the *ancien régime* by restoring the virtues of regimes more ancient still:

> Would it not, my worthy friend, have been wiser to have thought, what I, for one, always thought you, a generous and gallant nation, long misled to your disadvantage by your high and romantic sentiments of fidelity, honour, and loyalty; that events had been unfavourable to you, but that you were not enslaved through any illiberal or servile disposition; in your most devoted submission, you were actuated by a principle of public spirit, and that it was your country you worshipped, in the person of your king? Had you made it to be understood, that in the delusion of this amiable error you had gone further than your wise ancestors; that you were resolved to resume your ancient privileges . . . you would have given new examples of wisdom to the world.[21]

Reference to antiquity. Canonized forefathers. Resume your ancient privileges. These Burkean shibboleths are the watchwords of the parenthetical mode. The response to historical evil, in this mode, is to assert historical good—to clear away corruption

[18] Edmund Burke, *Reflections on the Revolution in France* (Oxford World's Classics—Oxford University Press, 1999) 31.
[19] Ibid. 34.
[20] Ibid. 36.
[21] Ibid. 36–37.

and decay by restoring the ancient edifice to its pristine glory. The impulse is one of restoration and resumption, not redemption and renewal.

This is not to say that the parenthetical mode posits an actual return to earlier times. The parenthetical mode accepts the need for change and to respond to evil. But the change is often marked—at least rhetorically—by a maximum of continuity, and the response must proceed upon the platform of "analogical precedent, authority, and example."

The attractions of this mode, for judges, are obvious. Precedent, authority, and gradualism, after all, form the heart of the judicial craft. The parenthetical mode allows judges to hew close to the judicial role, traditionally understood. But it also does more. It allows them to preserve the past—purged, now, of its corrupting evils—as a reservoir of legitimacy. This is important for judges who derive much or all of their legitimacy and authority from tradition. It is even more important, perhaps, for constitutional judges—such as those in the United States—whose constitutions coexisted with the (now bracketed) evil. Preserving the past can be crucial for a polity's unity and identity. The parenthetical mode helps keep the past useful and available as a force for constitutional and societal integration.

This comes at a cost, however. The great liability of the parenthetical mode is its tendency to soft-pedal the pernicious past and to dilute and weaken the constitutional (and jurisprudential) response to it.

B. The Redemptive Mode of Memory

The redemptive mode of memory, by contrast, is always aggressive in its response to the evil past. Its aim is not to resume ancient privileges but to reverse recent ills.[22] Its animating spirit is not restoration but antithesis. It seeks not to restore the *ancien régime*'s predecessors but to establish its opposite. It seeks not to revive the faith once delivered to the saints but to invert the heresies of the late apostates. Its aim is not continuity with deeper pasts but a redemptive future stemming from a stark, complete, and vivid rupture. The redemptive framework views the moment of constitutional founding (or refounding) as a kind of "zero hour"—a *Stunde Null*, in the famously controversial German phrase. The zero hour is a special kind of constitutional moment—a time when the wicked past is repudiated unequivocally, and the world begins anew.

Its godfathers are not Danton, Marat, and Robespierre, but Burke's great antagonist, Thomas Paine. In Burke's unfriendly view, at least, the Jacobins' madness lay

[22] In using the term "redemptive," I am of course following in the tradition of Robert Cover, Jack Balkin, and others, though my use of the term will vary from theirs in some particulars. Cf. Cover (n. 2); Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011).

not simply in adopting the *wrong* mode of memory but in eschewing memory altogether. They remembered nothing and wished to remember nothing, as evinced by their adopting a new calendar and resetting the historical clock. Paine, by contrast, articulated the credo of redemptive memory in the most forceful and influential rebuttal to Burke's long tract.

Paine began by asserting that the earth belongs to the living, that the present need never feel bound by hoary precedents or venerable tradition. "Every age and generation must be as free to act for itself, *in all cases*," he wrote, "as the ages and generation which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies."[23] In acting for itself, Paine continued, the present must be free to combat past evils and to repudiate them thoroughly. Of the French revolutionaries, he wrote:

> It was not against Louis XVI, but against the despotic principles of the government, that the nation revolted. These principles had not their origin in him, but in the original establishment, many centuries back; and they were become too deeply rooted to be removed, and the Augean stable of parasites and plunderers too abominably filthy to be cleansed, by anything short of a complete and universal revolution.[24]

For Paine, the work of national regeneration—of constitutional redemption—was the work of identifying the *principles* that underlay past evils, and of replacing and reversing them. In this work, there could be no recourse to tradition. Indeed, Paine went so far as to suggest that tradition was antithetical to constitutionalism. "A constitution," he wrote, "is a thing *antecedent* to a government, and a government is only the creature of a constitution."[25] Accordingly, Paine continued, England had no constitution because its people had never engaged in an act of constitutional redemption. "The English government is one of those which arose out of a conquest," he wrote, "and not out of society, and consequently it arose over the people; and though it has been much modified from the opportunity of circumstances since the time of William the Conqueror, *the country has never yet regenerated itself, and is therefore without a constitution*."[26] For Paine, then, the redemptive impulse was the *sine qua non* of true constitutionalism.

In the redemptive mode, repudiating and repairing dark pasts are core constitutional values—values that inform constitutional interpretation writ large. Judges who operate within the framework invoke the evil past to justify

[23] Thomas Paine, "The Rights of Man" in *Two Classics of the French Revolution* (Doubleday, 1989) 277–8.
[24] Ibid. 283.
[25] Ibid. 309.
[26] Ibid.

aggressive present-day enforcement of constitutional values. As Robert Cover put it, "Redemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other."[27] Redemptive jurisprudence is "never-again" jurisprudence. Its persistent refrain goes something like this: "The provisions we are called upon to enforce were adopted against the backdrop of the horrors of [slavery, Nazism, fascism, apartheid, etc.]. In response to that historical experience, the framers gave particularly strong weight to the value of [free expression, religious freedom, equality, the rule of law, etc.]. Accordingly, restrictions on this value call for particularly exacting judicial scrutiny." And then, as often as not, the axe falls. The challenged law, which breathes (however indirectly) the spirit of the *ancien régime*, is repudiated, and the redemptive provisions of the constitution vindicated. Such jurisprudence is rarely squeamish about the niceties of liberal legalism. Redemptive jurisprudence is often activist jurisprudence motivated—or justified—by the specters of the past.

This mode's attractions are also obvious. The greatest is that it takes the evil past seriously and responds to it aggressively. It is much more effective than the parenthetical mode at addressing the lingering effects of former wrongs—the persistent residues of evils not yet extinguished. It also offers a compelling justification for sweeping judicial power. The redemptive judge poses as the agent of society's rejection of monstrous injustices. He or she must act forcefully. The redemptive mode wields both sword and shield. It links judicial power to the crushing of past evils and the prevention of their return. It is a very natural framework for a court commissioned to enforce a new constitution in the aftermath of great oppression.

But here, too, there is a cost. The redemptive mode sits uncomfortably with traditional understandings of law and the judicial role. It often underwrites departures from liberal legalism. It offends against neutral principles. Such departures and offenses might well be necessary to respond adequately to an evil past. But the redemptive mode has a self-perpetuating logic from which courts struggle to retreat. Courts that invoke an evil past to justify expansive judicial power are often loath, later on, to lay that power aside. And although the redemptive mode provides a powerful legitimating resource, it precludes other sources of legitimacy. It is difficult, after all, to found a polity and ground an identity in purely negative terms. Opposition to an evil regime can unite a group for only so long. As the evil regime recedes from lived experience, the need for other points of integration grows.

[27] Cover (n. 2) 34.

C. Variations and Hybrids

Both the parenthetical and the redemptive mode operate at varying levels of generality. At one extreme, the parenthetical mode can operate as a kind of willful forgetting—even as a resumption of evil in altered guise. This, indeed, will be my reading of several U.S. Supreme Court decisions culminating in *Plessy v. Ferguson*. But the parenthetical mode can also invoke older traditions, not in a reactionary bid to revive them, but in a reformatory effort to rehabilitate those traditions by radically reinterpreting them.[28] In this way, the parenthetical mode asserts a new and alternative tradition. It seeks to establish new heroes, to uncover new lights, to resurrect authorities and precedents long neglected or forgotten. It responds to historical evil by invoking a tradition that preceded (or was contemporaneous with) the evil, but which in its time was not regarded as a tradition at all. This is a fascinating strand of the parenthetical mode—one with a deep irony at its core: it treats the evil epoch as an aberration from an asserted tradition that was, in its own day, recognizably aberrational.

The redemptive mode also takes various forms. Its narrowest form is its most particular. It focuses on the specific evils of the national past and responds to them with vigor. But it can also be quite general, even cosmopolitan—*general* in the sense of invoking the evil past, not merely to underwrite a mandate to reverse and redress past evils but to justify a sweeping enterprise to transform society; and *cosmopolitan* both in the sense of grounding in the past an appeal to universal values and in the sense of universalizing the past and its lessons. In South Africa, for instance, the Constitutional Court's redemptive jurisprudence is sometimes general in that it has invoked the apartheid past to buttress its reading of the post-apartheid Constitution as a wide-ranging charter of social transformation and cosmopolitan in that the Court (as the Constitution expressly permits it to do) has often looked to other jurisdictions for guidance in grappling with South Africa's own past. Constitutional memory can also be cosmopolitan in the sense that courts sometimes invoke historical evils that happened outside their particular jurisdiction in order to derive from those experiences universal lessons. In a famous 1995 opinion for the Israeli Supreme Court, for instance, the Court's president, Aharon Barak, characterized the global human rights movement in the twentieth-century's latter half as a universal response to particular historical evils. Israel, he wrote, had

> become part of the human rights revolution that characterizes the second half of the twentieth century. *The Lessons of the Second World War, and at their center the Holocaust of the Jewish people, as well as the suppression of human rights in totalitarian states, have raised the issue of human rights to the top of the world agenda*.[29]

[28] I am indebted to Matthias Kumm for this insight.
[29] Bank Mizrahi v. Migdal Cooperative Village, CA 6821/93 (November 9, 1995).

Some historians have referred to such gestures as part of a "universalization of memory."[30] This book focuses, however, on the ways in which courts recall evils that happened at home. Of the three courts studied, only the South African has exploited the transformational strand of redemptive memory or appealed to foreign models and universal values to any considerable extent.

III. The Modes and the Courts

All three of the courts studied in this book have employed both the parenthetical and redemptive modes at different times and for different reasons. The warp and woof of such mnemonic work will emerge in detail in the pages that follow. I hope to do justice to the nuances of three rich jurisprudences and to evade the trap of shoehorning the evidence to fit my modes. But for the purposes of this introduction, one can hazard two generalizations that I think the body of this book will sustain. The first is that, across the three jurisdictions, the parenthetical mode has often accompanied formalist and originalist approaches to constitutional interpretation, whereas the redemptive mode has accompanied realist and purposivist approaches. The second is that, within the three jurisdictions, the parenthetical mode of memory has consistently predominated in American constitutional jurisprudence; the redemptive mode in South African jurisprudence; and a hybrid, parenthetical–redemptive mode in German constitutional jurisprudence.

These trends have consequences. They have affected each country's efforts at what German writers call *Vergangenheitsbewältigung*—coming to terms with, or even *mastering*, the past. The parenthetical mode's dominance in the United States has often crippled the country's efforts to come to terms with its past. Sometimes it has cloaked the absence—perhaps the calculated absence—of such effort. The parenthetical mode predominated not only during the Gilded Age through the unholy trinity of the *Slaughterhouse Cases*, the *Civil Rights Cases*, and *Plessy v. Ferguson*, but in various ways across the first half of the twentieth century, and, in startling ways, in the early twenty-first century as well. In the latter half of the twentieth century, the parenthetical and redemptive modes clashed swords in the Court's major race decisions, with each prevailing at times and succumbing at others. But even the Court's major redemptive advance—the incorporation of the Bill of Rights against the states through the Fourteenth Amendment—constitutes a peculiarly parenthetical gesture, linking the constitutional response to slavery with the wisdom of

[30] See Klaus Neumann and Janna Thompson, "Introduction: Beyond the Legalist Paradigm" in Klaus Neumann and Janna Thompson (eds.), *Historical Justice and Memory* (University of Wisconsin Press, 2015) 3–24, 12 (using the phrase to describe an essay in the same volume by Andreas Huyssen) ; Aleida Assmann and Sebastian Conrad, "Introduction" in Aleida Assmann and Sebastian Conrad (eds.), *Memory in a Global Age: Discourses, Practices and Trajectories* (Palgrave Macmillan, 2015) 1–16, 8, 10, 11.

the original founding. On the whole, one might conclude that the Court has tended to graft the Reconstruction Amendments onto the structure of the original constitution rather than revisit the original document in light of those Amendments.

In Germany, the mixing of modes has had some salutary effects—a strong response to the evils of Nazism that also harnesses the unifying force of Germany's rich legal and constitutional tradition. But the redemptive impulse that underwrites the Court's remarkable fundamental rights jurisprudence has also fostered a peculiar brand of German exceptionalism. For better or worse, the Court has been a strong defender of Germany's unique constitutional identity. The Court has been willing to buck international trends and depart from liberal norms in the name of mastering the past, and under the banner of militant democracy. Some commentators think the logic of *Vergangenheitsbewältigung* has become less persuasive over time. In recent years, there is evidence that the Court is sensible to this critique and willing to adjust its jurisprudence accordingly.

The strongly redemptive jurisprudence of the South African Constitutional Court has won it many international admirers. But it has also been subject to two kinds of criticism. The first is that the Court talks tough always but acts tough only when the costs are low—when the ruling African National Congress (ANC) party is either on the Court's side already or doesn't care enough about the matter to put up a fight. In this regard, many observers have been particularly disappointed with the Court's socio-economic rights jurisprudence, however warmly that same jurisprudence has been lauded by American progressives. In any event, for much of its early history, the Court almost never invoked the apartheid past to take on the ANC. The second criticism, hailing from very different quarters, has been that the Court's mnemonic jurisprudence is loose and undisciplined—that the Court invokes the apartheid era gratuitously and superfluously as a carte-blanche license for judicial activism. Even from a legalist perspective, this criticism is harder to sustain. The constitutional texts are themselves robustly redemptive, and they clearly instruct the Court to adjudicate in an actively redemptive way. What the Court's mnemonic jurisprudence does highlight are the limits of constitutional memory, which indeed are part of the limits of constitutional justice more broadly. Courts can only do and change so much—and in a democracy, rightly so. But the South African case also highlights how the logic of redemptive memory can be hard, perhaps impossible, to escape. This might be a good thing; or it might be merely inevitable. As Justice Edwin Cameron put it in a recent concurring opinion, for all the perils of judicial engagement with the past, redemptive judgments "remind us all … that the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice."[31]

[31] Daniels v. Scribante and Another (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017) (Cameron J, concurring) para. 154.

I hope this book will provide some small assistance to the broader project of such reckoning.

Two caveats. The first has to do with causation. I do not suggest, and think it impossible to prove, that certain memorial gestures drive specific judicial outcomes in a linear way. There is simply no way to know that given judges voted in a given way in a given case *because* they entertained a particular vision of the past. For all one knows, the causal connection might run the other way—that justices write about the past in a certain way because they think that vision of historical legacy will justify an outcome reached on other grounds—or it might run in both directions at once, or in no direction at all. What one can show, and what this book endeavors to demonstrate, is how constitutional judges have engaged with the legacy of historical evil, in what contexts, and in conjunction with what types of substantive outcomes. It is in the nature of narrative history to suggest cause and effect, but one should qualify that suggestion at the outset. The relationship I mean to suggest between memorial gestures and substantive outcomes is associational rather than strictly causal.[32]

The related caution deals with normativity. This book does not attempt put forth a general normative theory of judicial memory. It does not prescribe how constitutional courts engaging with the past can "get it right," either in terms of describing the historical facts with objective precision or in terms of invoking the past to further desirable outcomes in the present. My aim is rather to provide a thick description of how judicial memory has operated in some of the most influential and paradigmatic constitutional courts in the world, and to offer a general schema for thinking about patterns of judicial memory elsewhere. In some cases, I am overtly critical of a court's failure to take sufficient account (or any account at all) of historical evil, and in many other cases my own preferences are sure to shine through. But the central emphasis is on what judicial memory has been, and not—at least not primarily—what it ought to be.

IV. Constitutional Memory in Comparative Perspective

Before proceeding to the individual cases, it is worth saying a bit about how this comparative study relates to broader projects within comparative constitutional studies. Comparative constitutionalism is a vast, rich, and expanding field. Within that expansive terrain, I hope this book has something for everyone. But I would like to say something specific about four areas: constitutional identity, constitutional patriotism, constitutional faith, and transitional justice.

[32] It ill becomes one raised by a pair of statisticians to forget the elementary lesson of so many childhood dinnertime conversations that correlation is not causation.

A. Constitutional Identity

It might seem paradoxical that the memory of past evil should shape present identities. Most groups, after all, want their origin stories to be affirmative. They want examples to imitate and heroes to adore. But lived experience almost everywhere confirms that cultural memory—the kind of memory that grounds and shapes *identities*—comprises the past's burdens as well as its glories, one's forebears' crimes as well as their triumphs.[33] "For since we are the outcome of earlier generations," wrote Nietzsche, "we are also the outcome of their aberrations, passions, and errors, and indeed of their crimes."[34] Collective memory performs a pedagogic function, and it teaches with bad examples as well as good. As Robert Bellah and his co-authors observe:

> The stories that make up a tradition contain conceptions of character, of what a good person is like, and of the virtues that define such character. But the stories are not all exemplary, not all about successes and achievements. A genuine community of memory will also tell painful stories of shared suffering that sometimes creates deeper identities than success… And if the community is completely honest, it will remember stories not only of suffering received but of suffering inflicted—dangerous memories, for they call the community to alter ancient evils.[35]

Insofar as the collective memory of evils inflicted calls on the community to redress those wrongs, such memories can be productive as well as dangerous. This is perhaps especially true in the context of the nation and its constitution. Renan maintained that "[w]here national memories are concerned, griefs are of more value than triumphs, for they impose duties, and require a common effort."[36]

In the case of inescapable national trauma, common effort is often unavoidable. Michael Schudson describes such trauma in this way:

> Traumas … are past experiences people (or organizations or nations) cannot ignore even when they would like to, cannot divert their attention from without courting anxiety, fear, and pain. Not only must Americans confront slavery, not

[33] Sometimes, of course, the triumphs themselves are criminal.

[34] Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life" in Friedrich Nietzsche, *Untimely Meditations* (ed. Daniel Breazeale, trans. R.J. Hollingdale, Cambridge University Press, 1997) 57–124, 76.

[35] Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press, 1985) 153.

[36] Ernst Renan, "What Is a Nation?" in Homi K. Bhabha (ed.), *Nation and Narration* (trans. Martin Thom, Routledge, 1990) 8–22, 19.

> only must Germans face the Holocaust, but they must do so repeatedly, obsessively, necessarily, whether they like it or not.[37]

As suggested earlier, the most searing national traumas are often addressed, in one form or another, at the constitutional level. If, as Cover insisted, there is an epic for every constitution, that epic has often contained, in modern times, an element of remembered evil. As Gary Jacobsohn puts it in his seminal work on constitutional identity, "a constitution acquires an identity through experience … [I]dentity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past."[38] Many, if not most, modern constitutions contain at least some provisions designed to transcend some past—"never-again" provisions aimed at redressing some historic wrong or at least preventing its repetition. In jurisdictions with constitutional judicial review, such provisions invite constitutional judges to act as guardians of memory as well as guardians of the Constitution. In such jurisdictions, constitutional adjudication often involves judicial memory.

This is particularly true of the three courts studied in this book: the Supreme Court of the United States, the German Federal Constitutional Court, and the Constitutional Court of South Africa. The decisions of these courts are rife with readings and recreations of tradition, with assertions of continuity and change. When they offer such readings and make such assertions, the courts are engaged in a central function of memory, which is myth-making—telling stories with explanatory, motivating, identity-shaping power. As Jan Assmann observes, "History turns into myth as soon as it is remembered, narrated, and used, that is, woven into the fabric of the present."[39] This is precisely what courts are doing whenever they invoke the past to justify a decision. Assmann notes that memory has both normative and narrative components, both of which forge identity or a sense of belonging. One of the functions of constitutions—and, perhaps *a fortiori*, of constitutional courts—is to make the narrative normative; to weave the past into the present as part of a statement, authoritative and binding, of the constitution's current meaning.

The effort (or lack of effort) to master the past inevitably shapes national and constitutional identities—and the relations of various peoples with their constitutions. As noted earlier, constitutional memory is crucially connected to constitutional patriotism. By engaging with the past, and by drawing implications for the present, constitutional courts have made one of their strongest contributions to

[37] Michael Schudson, "The Present in the Past versus the Past in the Present" (1989) 11 *Communication* 105–13, 110.

[38] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010) 7.

[39] Assmann, *Das kulturelle Gedächtnis* (n. 9) 14.

national and constitutional identity. On the other hand, engagement with the past has powerfully shaped constitutional justice.

Such, at least, will be a major argument of this book. In modern political communities—pre-eminently in modern nation states—one might apply to the Constitution a phrase linked elsewhere to religion: the Constitution is a "chain of memory" that links past, present, and future.[40] In the mid-1980s, Pierre Nora published as editor his massive, two-volume collection, *Les lieux de mémoire* (*Sites of Memory*). I argue that constitutions are among the most powerful sites of memory—always open, always contested, forever invoked on almost every hand. Jan Assmann has written that it is through memory that history becomes myth—not that it becomes "unreal, but rather that it becomes reality for the first time in the sense of an enduring normative and formative power."[41] A myth, Assmann explained, is simply a founding story.[42] To some degree, every constitution marks a founding, and constitutional justice represents the ongoing work of perpetual refounding. The Constitution, like other formative texts, seeks to answer the question, "Who are we?"[43] Constitutional courts, in their mnemonic capacity, are constantly answering that question anew. And they answer it with the force of law, backed by the authority of the state, and, expressly or implied, "in the name of the people."

B. Constitutional Faith

The constitutional memory of evil also nurtures and challenges constitutional faith. Here, of course, there is a huge difference between jurisdictions in which the Constitution post-dates the evil and those in which the Constitution and the evil were, for a time, contemporaries and co-travelers. Professor Sanford Levinson, who popularized the term *constitutional faith*, confronted a crisis of constitutional faith largely because of the original U.S. Constitution's cruel compromises on slavery.

Constitutional memory seeks to respond to this crisis of faith. The parenthetical mode acknowledges the evils that challenge faith but also brackets those evils from a broader tradition. It highlights older and nobler ideas—constitutional values more enduring than an evil that is, after all, now over . The redemptive mode, by contrast, calls for faith in a work in progress. It claims implicit allegiance to a constitutional order that deserves such allegiance precisely because of its endless quest to right its wrongs and redeem its wicked pasts. If a faith crisis is like an illness, the parenthetical mode responds like a surgeon: simply excise the cancer and the crisis is over. The redemptive mode is more like a shunt or a pacemaker—a permanent

[40] Cf. Danièle Hervieu-Léger, *Religion as a Chain of Memory* (trans. Simon Lee, Rutgers University Press, 2000).
[41] Assmann, *Das kulturelle Gedächtnis* (n. 9) 52.
[42] Ibid. 75.
[43] Cf. ibid. 142.

monitor that intervenes both preemptively and correctively in perpetuity. Which works better the reader will have to judge at the end of this book. Perhaps it varies from citizen to citizen, or from one regime to another.

C. Transitional Justice

Over the last generation, scholars have produced a considerable literature on transitional justice. Students of transitional justice have highlighted the role of constitutions and, to a lesser extent, of constitutional courts in the transition from authoritarianism to democratic self-government.[44] As we will see, constitutional memory is often an important part of that role. The constitutional memory of evil, indeed, shares what Ruti Teitel has called the "burning question" of transitional justice, namely, "How should societies deal with their evil pasts?"[45] The two intersect dramatically when constitutional courts are called upon to assess the constitutionality of transitional justice measures, whether criminal or otherwise, as we will see in both the German and South African cases. But there are important differences. Whereas transitional justice squarely confronts deep questions of corrective and retributive justice, constitutional memory does so only indirectly. Its focus, rather, is on the present—on deriving constitutional lessons from historical legacies, not (usually) on punishing wrongdoers or otherwise calling them to account. Additionally, whereas "the problem of transitional justice arises within a bounded period, spanning two regimes,"[46] the problems of constitutional memory know no horizons. Constitutional memory can persist for decades, even centuries—long after most observers think the transition is complete. At the same time, which mode of memory a court employs—and with what frequency and intensity—can affect the efficacy and speed of a democratic transition. The parenthetical mode, which is eager to proclaim the transition over, can in fact slow the process considerably or thwart it entirely. The redemptive mode, which is reluctant to deem the transition ended, can often hasten it—at least for a time. The trouble is that the redemptive mode tends to make the transition permanent—to make an exceptional period the rule. The parenthetical mode, by contrast, often fails to recognize that exceptional times—whether the evil epochs of the past or the transitional periods of the present—often require exceptional responses. The parenthetical mode is often too quick to call the transition complete; the redemptive mode, perhaps, too slow.

On all these issues, readers must, in the end, judge for themselves. But I hope that at the very least this book stirs conversation both within comparative

[44] See, e.g., Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000) 191–211.
[45] Ibid. 3.
[46] Ibid. 5.

constitutional studies and beyond. I hope that comparative constitutionalists will have more to say, not only about "memory laws" but also about memory jurisprudence. The latter, after all, reaches further and often lasts longer.

V. Conclusion

Courts differ from other mnemonic actors in important ways. Within the broader category of cultural memory, constitutional memory forms a special genre. Sociologists have used the term "genre memory" to describe practices of commemoration that are shaped not only by past events themselves but by earlier commemorations of those events.[47] A Fourth of July speaker in the United States, for instance, engages in a commemorative practice with a long past and established conventions. Indeed, the attributes of the genre are so deeply engrained that departures from them—such as in Frederick Douglass's famous Fourth of July speech in 1852—possess a peculiar power to shock. Attacking the conventions of the genre becomes a kind of "counter-monument" or "counter-memory."[48] But even countermemories are shaped by the conventions to which they respond. Genre memories are triply constrained: by what actually happened in the past—the "raw material"[49] from which the past can be reconstructed in the present; by earlier commemorations of that past; and by the needs of the present.

In the context of constitutional justice, such genre constraints operate in a straightforward way. Although constitutional judges might make errors of fact or interpretation, they don't often feel free to fabricate or falsify.[50] Additionally, judicial memory is almost always mediated by precedent. The constitutional meaning of the past depends, in part, on how earlier judges interpreted that past. More even, perhaps, than in other memorial genres, judicial memory is shaped and constrained by earlier judicial memory. It is, as it were, memory at some remove—the memory of memory. Often the precedents are plural, as each generation of judges wrestles anew with the meanings and lessons of the past. "The present is

[47] For an introduction to genre memory, see Jeffrey K. Olick, "Genre Memories and Memory Genres: A Dialogical Analysis of May 8, 1945 Commemorations in the Federal Republic of Germany" (1999) 64 *American Sociological Review* 381.

[48] I borrow (and adapt) the term "countermonument" from James Young. See James E. Young, *At Memory's Edge: After-Images of the Holocaust in Contemporary Art and Architecture* (Yale University Press, 2000) 90–119; James E. Young, *The Texture of Memory: Holocaust Memorials and Meaning* (Yale University Press, 1993) 27–48. For Young, countermonuments are "memorial spaces conceived to challenge the very premise of the monument." *At Memory's Edge*, 96.

[49] Cf. Philip Abrams, *Historical Sociology* (Cornell University Press, 1982) 8 ("Doing justice to the reality of history is not a matter of noting the way in which the past provides a background to the present; it is a matter of treating what people do in the present as a struggle to create a future *out of* the past, of seeing that the past is not just the womb of the present but the only raw material out of which the present can be constructed.").

[50] They have, at times, felt free to forget. See Chapters 2 and 3, following.

constituted by the past," writes Barry Schwartz, "but the past's retention, as well as its reconstruction, must be anchored in the present. As each generation modifies the beliefs presented by previous generations, an assemblage of old beliefs coexists with the new, including old beliefs about the past itself."[51] Finally, mnemonic adjudication is always motivated by the need to decide a particular case and, frequently, the need to offer guidance to future courts in other cases. Judicial memory never occurs at all unless the judges think there is something to be gained by invoking the past in a particular context.

What mnemonic judges hope to gain, most of all, is legitimacy—legitimacy for the individual judgment, legitimacy for the court itself, and legitimacy for the entire constitutional order. In many jurisdictions, including and perhaps especially the three studied in this book, constitutional courts wield enormous political power. Often that power rests on shaky, or at least complicated, democratic foundations. Constitutional scholars outside the United States have not been as fixated as their American counterparts with Bickel's "counter-majoritarian difficulty,"[52] but counter-majoritarian concerns inhere in virtually every experiment in constitutional judicial review.

Judicial memory responds to those concerns by situating the court within a narrative that tends toward equality and individual rights, dignity and democratic participation. The court thus casts itself as an *ur*-democratic actor—a guarantor of democracy's preconditions—and as an agent in a process of expanding liberty and democracy. It may be true, as has been urged, that constitutional courts are "the only institution[s] in human experience that [have] the power to *declare* history,"[53] but they also possess a parallel power to *perform* history—to enter and shape the history that they declare. Judicial memory thus becomes a kind of institutional autobiography—an autobiography of the sort that Balfour descried in Churchill's history of the First World War: "Winston's brilliant autobiography, disguised as a history of the universe."[54]

An essential function of judicial memory, then, is to legitimate the mnemonic court by inserting it within the constitutive narrative that justifies the state and underwrites society. Judicial memory situates both the individual decision, and the court as a whole, within "the narratives that locate [the Constitution] and give it meaning."[55] In this sense, once again, it makes the narrative normative, and deploys it in the service of persuasion.

[51] Barry Schwartz, *Abraham Lincoln and the Forge of National Memory* (University of Chicago Press, 2000) 302.

[52] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (Yale University Press, 1962) 16–23.

[53] William M. Wiecek, "Clio as Hostage: The United States Supreme Court and the Uses of History" (1987–88) 24 *California Western law Review* 227, 227. This might be overstated: parliaments, arguably, sometimes do the same.

[54] See Max Egremont, *Balfour: A Life of Arthur James Balfour* (Phoenix, 1998) 321.

[55] Cover (n. 2) 4.

In this respect, judicial memory presents a paradox. On the one hand, without its more aggressive forms—or without the judicial activism that those forms purport to justify—many historic wrongs might never be redressed. On the other hand, every exercise in judicial memory represents—at least from a legalist perspective—something of a distortion. Immanuel Wallerstein has written that "[p]astness is a mode by which persons are persuaded to act in the present in ways they might not otherwise act."[56] In a similar vein, judicial memory is a mode of reasoning by which judges reach (or justify) decisions they might not otherwise reach. This might often be a very good thing, but not always, and certainly not necessarily.

Students of memory have long highlighted its potential dangers as well as its obvious uses. A quarter century ago, Charles Maier reflected on the possibility of a "surfeit of memory."[57] "[W]e have in a sense become addicted to memory," Maier wrote, wondering "whether an addiction to memory can become neurasthenic and disabling."[58] Others noted that the very notion of memory was undergoing "terminological profusion,"[59] "losing precise meaning in proportion to its growing rhetorical power,"[60] experiencing "the dangers of overextension,"[61] and being "depreciated by surplus use."[62]

With these admonitions against imprecision in mind, I hope, in this study, to discuss judicial memory in a relatively precise and limited way. But the dangers of overextending memory as a concept are linked to the dangers of a surplus of memory itself. Students of memory have long been troubled by the possibility of too much memory, and the corollary risk of too little forgetting. "Forgetting," wrote Nietzsche, "is essential to action of any kind, just as not only light but darkness too is essential for the life of everything organic."[63] This was true, Nietzsche maintained, for societies as well as for individuals and organisms.

> Cheerfulness, the good conscience, the joyful deed, confidence in the future—all of them depend, in the case of the individual as of a nation, on the existence of a line dividing the bright and discernible from the unilluminable and dark; on one's being just as able to forget at the right time as to remember at the right time; on

[56] Immanuel Wallerstein, 'The Construction of Peoplehood: Racism, Nationalism, Ethnicity' (1987) 2 Sociological Forum 373, 381.

[57] See Charles Maier, "A Surfeit of Memory? Reflections on History, Melancholy, and Denial" (1993) 5 *History and Memory* 136.

[58] Ibid. 140–1.

[59] Wulf Kansteiner, "Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies" (2002) 41 *History and Theory* 179, 181.

[60] John R. Gillis, "Memory and Identity: The History of a Relationship" in John R. Gillis et al. (eds.), *Commemorations: The Politics of National Identity* (Princeton University Press, 1994) 3–24, 3.

[61] Johannes Fabian, "Remembering the Other: Knowledge and Recognition in the Exploration of Central Africa" (1999) 26 *Critical Inquiry* 49, 51.

[62] Alon Confino, "Collective Memory and Cultural History: Problems of Method" (1997) 102 *American Historical Review* 1386, 1387.

[63] Nietzsche (n. 34) 62.

> the possession of a powerful instinct for sensing when it is necessary to feel historically and when unhistorically.[64]

Such a powerful instinct, however, can be hard to come by. And the call for forgetting—the plea to think and feel unhistorically—is often sounded by those who have the most to lose from continued remembrance. In the context of constitutional justice, the desire to move on is sometimes at odds with the persistent imperative to redress an earlier wrong.

It should also be stressed again, as noted early on by Maurice Halbwachs, who coined the phrase "collective memory," that memory is always plural. Anyone who has grown up with siblings knows that members of the same family can recall the same events in very different ways. So it is with the constituent parts of social groups. As James E. Young has written, "memory is never seamless, but always a montage of collected fragments, recomposed by each person and generation."[65] It is "never shaped in a vacuum," Young observes, and its motives "are never pure."[66] This doesn't mean, however, that memory is infinitely malleable or the product of pure construction. Barry Schwartz notes that memory is always a compound of persistence and change, continuity and newness.[67] One needn't—and in my view *shouldn't*—embrace radical historical relativism or mnemonic nihilism.[68] That memory is plural does not mean that all memories are equal, or that interpreting the past is merely a struggle for power. If pure objectivity is beyond reach—if mortals labor under inescapable epistemic limits—we can still work toward getting closer to the past, and toward getting its legacies right.

That effort is critically important in the context of constitutional justice. Constitutional courts are official mnemonic actors, and they play a central role in shaping official narratives. What is more, each commemorative narrative that a court puts forth exerts at least some precedential force on later exercises in judicial memory. Aleida Assmann has highlighted the distinction between *canon* and *archive*, with "canon" referring to "actively circulated memory that keeps the past present" and "archive" to "the passively stored memory that preserves the past past."[69] For the most part, constitutional courts operate within the realm of the canon. They both echo and construct canonical accounts. And yet the archive is always there—ready to be exploited, should judges so choose, in some future case.

[64] Ibid. 63.
[65] Young, *Texture of Memory* (n. 48) 198.
[66] Ibid 2.
[67] See, eg, Barry Schwartz, "The Social Context of Commemoration: A Study in Collective Memory" (1982) 61 *Social Forces* 374, 396; Schwartz, *Abraham Lincoln* (n. 51) 25 .
[68] See Schwartz, 'Social Context of Commemoration' (n. 67) 376–7, 396; Schwartz, *Abraham Lincoln* (n. 51) 299.
[69] Aleida Assmann, "Canon and Archive" in Astrid Erll and Ansgar Nünning (eds.), *Cultural Memory Studies: An International and Interdisciplinary Handbook* (Walter de Gruyter, 2008) 97, 98. .

There are, of course, limits to the logic of judicial *Vergangenheitsbewältigung*. Indeed, Alan Megill has argued that the limits of memory itself are especially striking in a particular legal setting:

> The limits of history and of memory are perhaps most clearly manifested in an important twentieth-century phenomenon, namely, trials of alleged perpetrators of state-sponsored brutality, when the trials are intended both to arrive at truth/justice and to help in shaping a new collective identity through the formation of collective memory. What is striking is the simultaneous necessity and impossibility of the dual project that is envisaged: how can it be done? How can it *not* be done?[70]

The context of constitutional justice, of course, is quite different from that of prosecuting war crimes and crimes against humanity. Most constitutional cases do not have the same immediate imperatives of truth and justice, and they usually do not require courts to pass judgment on any individual atrocity. And yet constitutional justice often shares a similar imperative to redress the past by doing right in the present. That imperative is felt or invoked, at least, whenever constitutional courts operate within the redemptive or the transformative modes of memory. Perhaps, in the end, the work of redemption or transcendence will always prove somewhat elusive, not least because judges cannot assess the impact of their decisions in advance. This limitation is not unique to judicial memory; it calls to mind Walter Benjamin's haunting image of the angel of history, who looks forward over the wreckage of the past while being blown inexorably backward into an unknown future.[71]

So the project of judicial memory is fraught with uncertainty and tension and paradox. An inadequate response to the past seems to strengthen the pull of that past. But an adequate response is often so forceful that the response itself becomes a kind of pull. The logic of redemption is hard to escape. Both approaches make normalcy elusive. Courts that invoke the past do so in addition to, or instead of, relying on traditional legal materials. In an ineluctably ironic way, this might undermine the aim of overcoming the past. For no past can be truly overcome until those in the present stop doing things differently on its account. The past cannot be mastered, that is, until those in the present have moved on. But to move on is, to one degree or another, to forget. And to forget is to leave the past unmastered. Even so, perhaps mastery is not memory's proper goal. Its ambition is meaning, and its dominion is yet to come.

[70] Allan Megill, "History, Memory, Identity" in Allan Megill, *Historical Knowledge, Historical Error: A Contemporary Guide to Practice* (University of Chicago Press, 2007) 58. Adapted from Allan Megill, "Memory, History, Identity" (1998) 11 *History of the Human Sciences* 37.

[71] Walter Benjamin, "Theses on the Philosophy of History" in Walter Benjamin, *Illuminations* (Houghton Mifflin Harcourt, 1969) 259–60.