

SHARED MEMORIES AND CONSTITUTIONAL FOUNDATIONS

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It is significant that the first word in the title of Jack Balkin's new book is "memory."¹ A repeated theme of the book is that what binds a nation—or a constitutional order—together is shared memories around which diverse individuals can gather together and therefore establish themselves as a community.² Balkin refers to an impressive array of sources with regard to the topic of "public memory,"³ but I want to concentrate on one of them, which is cited but not extensively discussed.⁴ That is Ernest Renan's famous speech, delivered at the Sorbonne in Paris on March 11, 1882, under the title, *Qu'est-ce qu'une nation?* ("What Is a Nation?").⁵

Renan's speech has become a classic text for anyone interested in the phenomenon of nationalism, not least because he systematically eviscerates most of the standard indicia used to identify some entity as "a nation."⁶ One might consider Renan's critique orthogonal to the topic of "constitutionalism," save that as lawyers, we focus almost exclusively on documents related to given countries, often defined as "nation-states." Mark Graber has written an excellent essay on the drafting of the constitution of his Long Island high school,⁷ but, rightly or wrongly, we almost never look at "non-national" constitutions; that is true, much to our detriment as American lawyers, even of the constitutions of American states.

It may be worth noting, though, that many supporters of federalism might well base their support on the presumptive fact that it offers a way by which a richly diverse country can take cognizance of the reality that different subnational groups

* This is a revision of remarks first prepared for the marvelous *William & Mary Bill of Rights Journal* Symposium on Memory and Authority on March 29–30, 2024, that focused on Jack Balkin's book *Memory and Authority*. BALKIN, *infra* note 1. I am very grateful to the organizers of the conference for allowing me to present my thoughts and for the opportunity to be part of the published record. And, as always, I have benefitted from the multi-year (and, indeed, decade) conversations with Jack Balkin, Mark Graber, and, now, Jonathan Gienapp about what is remembered and forgotten in our public historical narratives.

¹ JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* (2024).

² *See, e.g., id.* at 6.

³ *Id.* at 324–30.

⁴ *See, e.g., id.* at 324 n.5, 327 n.35.

⁵ Ernest Renan, *What Is a Nation?*, Speech at Sorbonne University, Paris (Mar. 11, 1882) (Ethan Rundell trans., 1992) (transcript available at http://ucparis.fr/files/9313/6549/9943/What_is_a_Nation.pdf [<https://perma.cc/M754-RTKZ>]).

⁶ *Id.* at 4.

⁷ Mark A. Graber, *Young Jeffersonians and Adult Marshallians: Constitutional and Regime Transitions in Public Schools and Nation-States*, 1 CONST. STUD. 5, 10, 31 (2016).

may have quite different notions of what constitutes wise governance. Relatively rare are defenses of federalism that presume a genuinely unified national populace. The Declaration of Independence is, at best, fatally ambiguous about the ontological status of the “united States of America.”⁸ It is not irrelevant that some original texts capitalized “States” but not “united.” And the 1783 Treaty of Paris, recognizing the success of the Americans’ secession from the British Empire, spoke quite clearly of independent nation-states rather than one genuinely united country.⁹ “His Brittanic Majesty,” i.e., King George III, now “acknowledge[d] the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be *free sovereign and Independent States; that he treats with them as such.*”¹⁰ To be sure, these “free, sovereign and Independent States” had, by 1781, jointly agreed to the Articles of Confederation, but “confederation” is a wholly different notion from “federation,” precisely because, under eighteenth-century political theory, the states joining in a “confederation” had most definitely *not* lost their status as “independent” entities save for specific purposes, usually involving mutual defense or economic relationships.¹¹ There is no such ambiguity about the country’s largest state in area (at least within the “lower 48”) and second largest in population: Texas was an independent country before its constitutionally dubious annexation by the United States in 1845.¹²

⁸ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁹ Treaty of Paris, Gr. Brit.-U.S., art. 1, Sept. 3, 1783, T.S. No. 104.

¹⁰ *Id.* (emphasis added).

¹¹ *Id.*

¹² See Mark Graber’s marvelous essay, *Settling the West: The Annexation of Texas, The Louisiana Purchase, and Bush v. Gore*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898*, at 83, 83 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005), which notes that Texas’s entry, given that it was a foreign country and *not* a U.S. territory, was initially (and correctly) predicated on the Treaty Clause. That, of course, required the approval of two-thirds of the Senate, which was not forthcoming given the (accurate) perception that it was a boon to what was known as the Slavocracy. *Id.* at 88. John Tyler (who would, as an ex-President, support Southern secession in 1861) decided to change the rules and to treat Texas as if it were an ordinary territory that could be admitted simply by majority approval of each house of Congress. *Id.* at 93. Justified criticism, by eminent constitutionalists of the time, as a bait and switch, was unavailing, and the Republic of Texas became the Lone Star State (and, of course, attempted to secede in 1861). *Id.* at 102–03. Texans are encouraged to “Remember the Alamo,” but rarely, if ever, to recall the circumstances of their entering the Union. Although less dramatic with regard to future American history, one might also note that Vermont, a secessionist breakaway from New York and New Hampshire, was not allowed into the Union until 1791 and, therefore, could also be treated as an independent country prior to its admission to the Union. See Sanford Levinson, *The 21st Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate, or Serious Arguments to Be Wrestled With?*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT* 10, 33 (Sanford Levinson ed., 2016). Perhaps this helps to explain why a contemporary secessionist movement in Vermont titles itself the “Second Vermont

Before returning to Renan's speech, however, consider John Jay's contribution to *Federalist* No. 2, in which he proclaims his "pleasure" at taking "notice that Providence has been pleased to give this one connected country to *one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, [and] very similar in their manners and customs.*"¹³ I quote this passage with some frequency, usually to make the point that Jay, a very smart man, had to know that this profession of "one united people" was basically preposterous. For starters, he surely knew that the text of the Constitution had been quickly translated into German and Dutch in order to be understandable to the one-third of Pennsylvanians who spoke the former and the former grandees from Holland (who created "New Amsterdam") but were now living north of Manhattan along the Hudson River.¹⁴

So why did he write what he did? The best explanation, I believe, is that he believed that the acceptance of such assertions was necessary to his overarching aim of persuading doubters that it made sense to ratify the brand new Constitution that was indeed crafted, as many of its critics alleged, to destroy the "confederation" and to create in its place a remarkably more consolidated government with vastly enhanced powers relative to the what Alexander Hamilton, in *Federalist* No. 15, would proclaim the basically "imbecilic" government created by the Articles of Confederation.¹⁵ Indeed, one might add that Jay believed not only that it was necessary to exaggerate the actual unity of Americans but also that it was altogether proper for him to do so, given his presumptively meritorious aim. *Federalist* No. 2, like all of the other essays in the total of 85, is an example of motivated reasoning in which skilled rhetoricians, including two well-trained lawyers, Jay and Hamilton, are zealously representing their "client"—in this case, a presumed singular "We the People" much in need of constitutional reform in order to survive. But on this occasion, I will accept, *arguendo*, Jay's dubious assertions about common descent and similarity of language, religion, principles of government, and "manners and customs."¹⁶ For the point of Renan's speech is that, in a profound sense, it wouldn't really matter.

Renan can be read as suggesting that adoption of views like Jay's "lends itself to the most dangerous misunderstandings" if they reinforce a belief that homogeneity is central to nationality.¹⁷ Instead, he insists that "human society," which of course includes those entities we label "nations," "are of the greatest variety."¹⁸

Republic," manifesting its memory of an earlier—and, presumably, happier—moment in Vermont history. *See id.* at 36–37, 47–48.

¹³ THE FEDERALIST NO. 2 (John Jay). Emphasis very definitely added!

¹⁴ *See* Sanford Levinson, *What One Can Learn from Foreign-Language Translations of the U.S. Constitution*, 31 CONST. COMMENT. 55, 55–56 (2016).

¹⁵ THE FEDERALIST NO. 15 (Alexander Hamilton).

¹⁶ THE FEDERALIST NO. 2 (John Jay).

¹⁷ Renan, *supra* note 5, at 1.

¹⁸ *Id.*

More to the point, perhaps, “nations are something rather new in history.”¹⁹ To be sure, “Classical antiquity had its republics and its municipal kingdoms, its confederations of local republics, [and] its empires”²⁰ Indeed, Madison devoted three full essays in *The Federalist* to ancient and medieval confederations and alliances and tried to discern lessons from their repeated failures.²¹ However, says Renan, none was “a nation in the sense that we understand it” at the end of the nineteenth century.²² Some were merely “cities with relatively restrained territory,” such as Athens, which exemplified certain styles of politics and, indeed, what we call patriotism—think of Pericles’s funeral oration.²³ Others, including Gaul, Spain, and Italy were “assemblages of peoples,” but lacked central institutions or dynasties.²⁴ Nor, he proclaims, did “the Assyrian, Persian, and Alexandrine Empires . . . constitute fatherlands.”²⁵ The Roman Empire, of course, was famous for its notion of relatively inclusive “citizenship,” but “an empire twelve times the size of present-day France does not constitute a state in the modern sense of the word.”²⁶ Renan is writing as a modernist, trying to understand the world that had come into being sometime prior to—but, in fact not too many centuries before—the nineteenth century. For better or worse, we continue, by and large, to inhabit the world Renan is speaking about, a world substantially divided among the 193 members of the United Nations, each claiming a status of “sovereign” equality and nationhood within the international system. Attempts at transnational or, even more certainly, world government seem still to take a distinct second place to the realities of what politicians and lawyers continue to call “sovereign states.”

So, Renan is addressing a “modern” reality, the division of the world into what we have come to call “nation-states.”²⁷ The task is to figure out what entitles us to recognize the phenomenon. In analyzing this question, Renan might immediately seem to be our true contemporary; his relentless theme is plurality and diversity as the actual reality of modern states (and, therefore, “nations”). Modern states, he argues, require “the fusion of the *populations* that comprise them.”²⁸ I emphasize the

¹⁹ *Id.*

²⁰ *Id.*

²¹ See THE FEDERALIST NOS. 14, 18, 43 (James Madison); see also SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE 21ST CENTURY 68–75 (2015).

²² Renan, *supra* note 5, at 1–2.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Perhaps it is telling that perhaps the most distinguished series of synoptic histories of the United States was published under the collective title “The New American Nation.” See the listing at *The New American Nation Series*, THRIFTBOOKS, <https://www.thriftbooks.com/series/the-new-american-nation-series/38867/> [<https://perma.cc/H46L-JSQ2>] (last visited Nov. 27, 2024).

²⁸ Renan, *supra* note 5, at 2 (emphasis added).

word “populations” advisedly. One suspects that Renan would properly be skeptical of, assuming he did not outright ridicule, the claim in the first sentence of the American Declaration of Independence that those wishing to secede from the British Empire were “one people,” instead of a congeries of quite remarkably diverse populations stretching from what is now Maine to the southern border of Georgia.²⁹ This, of course, is especially questionable if one includes the Indigenous Nations who populated these areas, many of whom had altogether understandably supported the British because of their fear of rapacious “American” settlers.³⁰ Consider in this context Renan’s assertion that “Switzerland, which has three languages, two religions, and three or four races,” *is* a nation.³¹ He takes silent issue with Montesquieu’s assertion that homogeneity is a prerequisite for (at least republican) nationhood.

Renan might well be attracted to the original motto of the United States, *e pluribus unum*—out of many, one—but not, most certainly, because of any illusions either that such unity comes easily or that it is often, if ever, achieved, simply by those who would require that everyone speak the same language or join the same religion (as after Westphalia).³² He equally ridicules the idea that there are singular “racial” identities that allow us to identify with confidence a particular nation.³³ Once again, he sounds remarkably contemporary as he notes that “[r]ace as it is understood by us historians is therefore something that is made and unmade.”³⁴ We today might use the term “socially constructed.” More to the point, he asserts, “It has no application whatsoever to politics. . . . [T]he most important nations of Europe are those in which the blood of different peoples is the most mixed.”³⁵ Were he aware of contemporary controversies about immigration, he might say that whatever the salience of claims of preserving “racial purity” to actual political controversies, they rest on essentially bogus understandings of the actualities of historical development.

“[T]he essence of a nation,” he says, “is that all of its individual members have a great deal in common and also that they have forgotten many things” that underscore what they most definitely do not have in common.³⁶ All presumed nations are the product of complex historical realities that play uncertain roles in the actualities of public memory. He reminds us, for example, that “[u]nity is always brutally established. The reunion of northern and southern France was the result of a campaign of terror and extermination that continued for nearly a century.”³⁷ There is a reason that the distinguished American historian Bernard Bailyn titled one of his last

²⁹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

³⁰ *Id.* para. 30.

³¹ Renan, *supra* note 5, at 4.

³² *See id.* at 7.

³³ *Id.* at 6.

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.* at 3.

³⁷ *Id.*

books on what we today call America during the seventeenth century *The Barbarous Years: The Peopling of British North America: The Conflict of Civilizations, 1600–1675*.³⁸ Bailyn portrayed nearly a century of unrelenting, often brutal and genocidal, warfare, especially directed against Indigenous Nations whose lands were being “settled” by Europeans (though it would be a mistake to overlook warfare between and among the Indigenous Nations themselves).³⁹ Renan would certainly approve of Bailyn’s efforts as a historian. “Historical inquiry,” Renan writes, “in effect, throws light on the violent acts that have taken place at the origin of every political formation, even those that have been the most benevolent in their consequences.”⁴⁰ An obvious question is how national “unity”—or a singular national identity—can emerge out of this formative violence.

The answer is deceptively simple, according to Renan: “Forgetting, I would even say historical error, is an essential factor in the creation of a nation”⁴¹ There are, perhaps, more important things than devotion to “truth” if we wish to forge a nation. Truths, after all, can often entail bringing forth corrosive memories and generating what might even be deserved animosities and outright hatred. A common motif in much drama is the disclosure of such memories—these days often involving sexual abuse—and the destruction of the self-serving (and false) “memories” on which family amity had been predicated. To forestall such possibilities, one must take refuge in what some might dismiss as “just-so stories,” whose purpose is to reassure and, ultimately, provide the basis for a shared existence (so long as one doesn’t ask overly embarrassing questions). As set out in John Ford’s classic *The Man Who Shot Liberty Valance*, “When the legend becomes fact, print the legend.”⁴² Texas author Larry McMurtry paraphrased this as “when you had to choose between history and legend, print the legend. And so I’ve done.”⁴³ The foundational Texas political memory, “Remember[ing] the Alamo”, features brave and selfless Texas patriots sacrificing their lives against a ruthless Mexican oppressor.⁴⁴ The story does not include the fact, for example, that the Mexican Constitution of 1826, written after the overthrow of Spanish hegemony, outlawed slavery and that the white Texanos were vigorously defending their own right to enslave Blacks (and, along the way, to displace any and all Indigenous Nations that might stand in their way of colonizing

³⁸ BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600–1675* (2012).

³⁹ See generally *id.*

⁴⁰ Renan, *supra* note 5, at 3.

⁴¹ *Id.*

⁴² See *THE MAN WHO SHOT LIBERTY VALENCE* (John Ford Productions 1962).

⁴³ M. Bijman, *The Mystery of the Misquoted Quote from “The Man Who Shot Liberty Valance,”* SEVEN CIRCUMSTANCES (June 15, 2018), <https://sevendcircumstances.com/2018/06/15/the-mystery-of-the-misquoted-quote-from-the-man-who-shot-liberty-valance/> [https://perma.cc/VY37-MFNS].

⁴⁴ See, e.g., STEPHEN HARRIGAN, *BIG WONDERFUL THING: A HISTORY OF TEXAS* 163 (2020).

the Lone Star Republic).⁴⁵ And so, Balkin argues, many lawyers when describing the origins and development of the American constitutional order, similarly present dubious, highly sanitized, reconstructions of American history in the service of their lawyering goal of achieving desirable outcomes.⁴⁶

Exemplary in this regard is the statement by Chief Justice Earl Warren in *Loving v. Virginia*,⁴⁷ which invalidated Virginia's ban on interracial marriage in 1967. "Over the years," Warren proclaimed for the Court, "this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"⁴⁸ He cited as support for this assertion *Hirabayashi v. United States* (1943).⁴⁹ Perhaps it depends on what one means by "over the years," since it is more than a bit difficult to forget a quite systematic history throughout the nineteenth and into the twentieth century of decisions that cannot possibly be understood in terms of the proclaimed "free people whose institutions are founded upon the doctrine of equality."⁵⁰ Even the cited precedent is a 1943 case that in fact upheld an ancestry-based curfew during World War II and then was used to justify the "ethnic cleansing" that took Japanese resident aliens and their often American-citizen children to what one Justice described as "concentration camps."⁵¹ Warren might be especially expected to remember this "odious" history inasmuch, as Attorney General of California at the time, he scarcely expressed "even the slightest sympathy for the injustices being visited upon Japanese nationals (because American law prohibited them from becoming citizens) and their native-born Japanese-American children (like Gordon Hirabayashi and Fred Korematsu themselves)."⁵² But, of course, any even barely knowledgeable reader can summon up many other cases that invalidate Warren's confident assertion about what constitutes the American constitutional tradition with regard to racial equality.⁵³ Even if we ignore, for example, *Dred Scott*,⁵⁴ consider the aptly named *Chinese Exclusion Case*.⁵⁵ American judges were altogether comfortable

⁴⁵ See *id.* at 120.

⁴⁶ BALKIN, *supra* note 1, at 29–30.

⁴⁷ 388 U.S. 1, 12 (1967).

⁴⁸ *Id.* at 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Hirabayashi*, 320 U.S. at 83, 104; *Korematsu v. United States*, 323 U.S. 214, 230 (1944) (Roberts, J., dissenting).

⁵² Sanford Levinson, "This Is (Not) Who We Are": Reflections on 1619 and the Search for a Singular Constitutional Identity, in *DECIPHERING THE GENOME OF CONSTITUTIONALISM: THE FOUNDATIONS AND FUTURE OF CONSTITUTIONAL IDENTITY* 179, 187 (Ran Hirschl & Yaniv Roznai eds., 2024).

⁵³ I explore this further in "This Is (Not) Who We Are": Reflections on 1619 and the Search for a Singular Constitutional Identity. *Id.* at 187–90.

⁵⁴ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

⁵⁵ *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889).

with “invidious” distinctions based exclusively on ancestry or race.⁵⁶ Warren, of course, ignored this history. And to this story, of course, one must add the lamentable treatment of Indigenous Nations and their members, also surely known to anyone familiar with California’s history.

Indeed, *Loving*’s immediate predecessor was *Naim v. Naim*,⁵⁷ in which an appeal from a Virginia Court of Appeals opinion upholding Virginia’s anti-miscegenation law, tellingly named “An Act to preserve racial integrity,” was ultimately dismissed on the entirely spurious grounds that the record was inadequate to demonstrate the existence of a substantial federal question necessary to trigger the then-mandatory review by the Court. Sixty years later, the patent dishonesty of the Court’s response still rankled a distinguished professor of federal jurisdiction at Harvard. Interestingly enough, Chief Justice Warren apparently vociferously disagreed with the Court’s ultimate disposition of *Naim* and would have had the Court decide the case on the merits—one assumes against Virginia—but Justice Felix Frankfurter, a former Harvard Law School professor and ostensible specialist in federal jurisdiction, was able to prevail and get the case dismissed because of the view that such a decision, even if “merited” on legal grounds, would prove injurious to the Court as an institution and its ability to implement the scarcely uncontroversial *Brown v. Board of Education*.⁵⁸

Alexander Bickel, who had clerked for Frankfurter, subsequently used *Naim* to illustrate the “passive” virtues by which the Court could manipulate its docket to avoid deciding potentially embarrassing and institutionally threatening doctrinal issues.⁵⁹ It may be completely understandable that Warren chose to ignore this history of the specific issue under consideration in *Loving*, even if his own position, from our own perspective, seems far more admirable than that of the Court. But it was far more important, institutionally, to present a far more self-serving portrayal of the Court and of American constitutional development more generally. Warren, of course, ignored this history.

So what, for Renan, ultimately constitutes or explains the existence of “nations”? His answer is that “[a] nation” is best conceived of as “a great solidarity constituted by the feeling of sacrifices made and those that one is still disposed to make. It presupposes a past but is reiterated in the present by a tangible fact: consent, the clearly expressed desire to continue a common life.”⁶⁰ Perhaps the best known sentence in Renan’s speech is that “[a] nation’s existence is (please excuse

⁵⁶ See, e.g., *Dred Scott*, 60 U.S. at 407–08, 411; *Chinese Exclusion Case*, 130 U.S. at 606–08.

⁵⁷ 87 S.E.2d 749, 750–51, 756 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *reinstated and aff’d*, 90 S.E.2d 849 (Va. 1956), *appeal dismissed for want of a properly presented federal question*, 350 U.S. 985 (1956).

⁵⁸ David Wolitz, *Alexander Bickel and the Demise of Legal Process Jurisprudence*, 29 CORNELL J.L. & PUB. POL’Y 153, 181–83, 186 (2019).

⁵⁹ See *id.* at 184–94.

⁶⁰ Renan, *supra* note 5, at 10.

the metaphor) a daily plebiscite, just as an individual's existence is a perpetual affirmation of life."⁶¹ Perhaps this is one way of understanding Abraham Lincoln's (unsuccessful) effort to stave off secessionists in 1861 by referring to the "mystic chords of memory" that should continue to bind us together.⁶²

So Balkin's book is ultimately about the crucial presence of (and need for) "memory entrepreneur[s]" who are able to fashion such chords of memory, mystical or otherwise, that work to make successful the ongoing "plebiscite" that is necessary to keep the constitutional order together.⁶³ But there is a tension—not, perhaps, a fatal one, but a tension nonetheless—between his emphasis on the need for such entrepreneurs and his decidedly unsentimental recognition that the American story is complex and contains much in it that is problematic and, of course, some that is out-and-out repulsive. How, indeed, can we, as academics committed to some workable notion, even in a "post-modernist" age, of historical truth, also happily join in weaving stories, one of whose purposes is to forge the kind of benevolent unity that Renan is describing through selective, but ideologically loaded, forgetting and the privileging of "legends" that by definition suppress the actual facts of historical events?⁶⁴ Can we, at one and the same time, point out, for example, that the Supreme Court has rarely, in its 235-year history, served to protect the vulnerable against those with power and, nonetheless, inculcate in our students a deep "respect" for the Court and a willingness to accept in some deep sense an "obligation" to comply with decisions that are rightly thought to be illegitimate either as honest interpretations of the law—as with *Naim*—or, even if accurate legally, unjust or even evil.⁶⁵ One might always advise students (and others) that it is simply prudentially advisable to comply with what one may well believe are tendentious readings of legal materials in the service of an oppressive status quo. But this scarcely would evoke an enthusiastic endorsement in the daily plebiscite!

Even more fundamental, though, is the ongoing daily plebiscite about the Constitution. What if one agrees with William Lloyd Garrison that the 1787 Constitution was a "covenant with death, and an agreement with hell" regarding the protection accorded the enslavers of other human beings?⁶⁶ Does *that* Constitution deserve the "veneration" that James Madison advocated in *Federalist* No. 49?⁶⁷ Is it sufficient to stand with Stephen A. Douglas, at least as described by Abraham Lincoln, and proclaim that the Constitution was fundamentally indifferent toward slavery, allowing

⁶¹ *Id.*

⁶² Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

⁶³ See BALKIN, *supra* note 1, at 262.

⁶⁴ See *id.* at 82–93.

⁶⁵ See *id.* at 11.

⁶⁶ "A Covenant with Death and an Agreement with Hell," MASS. HIST. SOC'Y (July 2005), <https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01> [<https://perma.cc/5L9W-S9AF>].

⁶⁷ THE FEDERALIST NO. 49 (James Madison).

enslavement or freedom depending on the vagaries of what Douglas valorized as “popular sovereignty”?⁶⁸

But, one might say—and many are saying today—there was a “Second Founding” after the Civil War (and its 750,000 deaths).⁶⁹ One might again quote Lincoln and his expressed hope for a “new birth of freedom” that would, in substantial ways, replace the 1787 Constitution and its indifference to the freedom of *all* residents within the United States.⁷⁰ Justice Thurgood Marshall made headlines in 1987 when he explained his reluctance to celebrate the Bicentennial of the 1787 Constitution and announced in effect that *his* Constitution was the one created in 1865, 1868, and 1870 with the addition of the so-called Reconstruction Amendments.⁷¹ There are many who wish to valorize Reconstruction and to promote to the rank of honored creators of what is best in the American constitutional tradition such figures as Charles Sumner, Thaddeus Stevens, or John Bingham.⁷² Eric Foner’s book *The Second Founding* has become the equivalent of an academic best seller, helping to solidify an important meme.⁷³ But a meme it is, and it is subject to all of the considerations mentioned above, whether drawn from Renan or from *Liberty Valance*.

Many would include, for understandable reasons, Frederick Douglass as one of the gestational figures of this Second Founding. But that is precisely where Renan’s emphasis on the importance—and, for historians, the problem—of forgetting should be remembered. Consider only that Stevens, Sumner, and Bingham were important members of the U.S. House of Representatives and Senate. They shared one important feature with every other member of the House and Senate: they were white males. To be sure, they were undoubtedly commendable in many ways from our own perspectives, and they are worthy of the honor paid them. But the point—which should not in fact be forgotten—is that those with constitutional authority to amend the Constitution—and later, as judges, to interpret the amendments—were exclusively white males. There can be no doubt that Stevens and Sumner especially were extraordinarily attentive to the pleas of Black people, but the word “extraordinarily” is key. Few indeed were those in the law-making institutions of the United States who were remotely so attentive as they. And, even more to the point, as a key legislator, Stevens especially had to be equally attentive to getting the votes of his fellow

⁶⁸ Stephen A. Douglas, Speech at Chicago (July 9, 1858), in 3 THE WRITINGS OF ABRAHAM LINCOLN 14, 17–18 (Arthur Brooks Lapsley ed., 1905).

⁶⁹ See generally ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

⁷⁰ Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) [hereinafter Gettysburg Address], <https://www.loc.gov/resource/rbpe.24404500/?st=pdf> [<https://perma.cc/7B93-LT8J>].

⁷¹ See Thurgood Marshall, *The Constitution’s Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1337–42 (1987).

⁷² See, e.g., Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 CLEV. ST. L. REV. 115, 173, 176–77, 179 (2010).

⁷³ FONER, *supra* note 69.

Representatives who most certainly did not share his enlightened views. Compromises would be necessary (whether or not proper). To be sure, the situation might change for a very few years following the passage of the Reconstruction Amendments, as some of the “reconstructed” states, some with Black majorities, in fact sent some African Americans to the House and Senate, but even then it can scarcely be said that any of the members had much more actual authority than that provided by their single vote.⁷⁴ There was, for example, no “Black Caucus,” nor did any have realistic aspirations to become, say, the designated leader of their party. And, alas, it goes without the necessity of saying that no woman or Native American was part of these deliberations. Susan B. Anthony would be prosecuted for attempting to vote in the 1872 election.⁷⁵

As Balkin rightly emphasizes, it is vitally important that the stories told about American constitutional development move beyond focusing only on “official” leaders,⁷⁶ with legal authority and presence in what Lin-Manuel Miranda has taught his fans to identify as the “room[s] where [legislation and key compromises] happened.”⁷⁷ One must surely include individuals like Anthony and Douglass, and the movements for which they stand, in any comprehensive narrative. Dan Carpenter has made us all aware of the importance of petition movements in the nineteenth century, whose signatories included women and many others, including Black people, who were formally excluded from voting or governance,⁷⁸ just as Kate Masur has emphasized the active role that many Black people, along with white supporters, played in constructing an important politics of “civil rights” even before the Civil War.⁷⁹ Still, it is a comforting mistake, which I certainly don’t believe that Balkin makes, to believe that all participation is equal in effect, especially when one turns to the law and those who formally make it and later interpret it.

One will rarely find, among “official” leaders—i.e., persons elected to high office or ambitious for high office—advocates of illegal conduct, whether an almost gentle “civil disobedience” or, even more certainly, the killings of federal officials enforcing the Fugitive Slave Law or the invasion of the federal arsenal at Harper’s Ferry, Virginia in order to provoke a rebellion by enslaved Black people and their white supporters. Abraham Lincoln, for example, was always an advocate of law and

⁷⁴ See *id.* at 124.

⁷⁵ *Featured Document Display: Courting Confrontation: The Arrest of Susan B. Anthony*, NAT’L ARCHIVES MUSEUM, <https://museum.archives.gov/featured-document-display-courting-confrontation-arrest-susan-b-anthony> [<https://perma.cc/W43C-X7R2>] (last visited Nov. 27, 2024).

⁷⁶ See BALKIN, *supra* note 1, at 226–27.

⁷⁷ LIN-MANUEL MIRANDA, *The Room Where It Happens*, on HAMILTON: AN AMERICAN MUSICAL (Atl. Recs. 2015).

⁷⁸ DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790–1870*, at 26–27 (2021).

⁷⁹ KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION*, at xi–xvi (2021).

order. He had advocated in 1838 that fidelity to law be made a “political religion,” even as he acknowledged that some laws were unjust.⁸⁰ He would probably have agreed with President Biden today when he thunderously proclaimed that “[p]olitical violence is never, ever acceptable in the United States political system—never, never, never.”⁸¹

It is easy enough to applaud Biden’s statements in the context that he delivered them—a thoroughgoing attack on Donald Trump for promoting insurrection on January 6, 2021.⁸² But one should acknowledge that Biden’s statement is wildly off the mark for anyone who would actually try to understand the realities of American political (and constitutional) development. It requires a remarkable display of historical amnesia to take it seriously. One might add “for better or worse,” but the important reality is the amnesia. “Civic education” as taught by “civic leaders,” whether presidents or Supreme Court Justices, is rarely likely to conform with the understandings of professional historians or other scholars,⁸³ not to mention ordinary folk who might simply be discontented with the status quo almost inevitably defended by political elites.

Our history is rife with violence that distinguished people found acceptable, beginning, most obviously, with the violent secession from the British Empire that we call the American Revolution.⁸⁴ Frederick Douglass, who has become an almost benevolent avatar even among political conservatives,⁸⁵ wrote a striking essay, published in *Frederick Douglass’ Paper* on June 2, 1854, “Is It Right and Wise to Kill a Kidnapper?”⁸⁶ The answer was yes, even if (or perhaps especially if) the

⁸⁰ Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 108, 112 (1953) (emphasis omitted). This is, no doubt, the most thoroughly analyzed speech by a then-unknown 29-year-old possibly in the history of the world. But it *does* repay close reading in assessing the terms and limits of the career that would ultimately take him to the White House.

⁸¹ Joseph Biden, Remarks on the Third Anniversary of the January 6th Attack and Defending the Sacred Cause of American Democracy (Jan. 5, 2024) (transcript available at <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/01/05/remarks-by-president-biden-on-the-third-anniversary-of-the-january-6th-attack-and-defending-the-sacred-cause-of-american-democracy-blue-bell-pa/> [<https://perma.cc/94L2-7ZVV>]).

⁸² See *id.*

⁸³ See Sanford Levinson, *Civic Education in Critical Times*, 10 CONST. STUD. 1, 8, 11, 14 (2024).

⁸⁴ See the essential article by Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1550–52 (2022).

⁸⁵ See, for example, the response of the Trump Administration to the 1619 Project, THE WHITE HOUSE, THE 1776 REPORT 20 (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [<https://perma.cc/QT4Z-376T>]. See generally Jack M. Balkin & Sanford Levinson, *Frederick Douglass as Constitutionalist*, 83 MD. L. REV. 260 (2023).

⁸⁶ Frederick Douglass, *Is It Right and Wise to Kill a Kidnapper?*, FREDERICK DOUGLASS’ PAPER (June 2, 1854), reprinted in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS & SPEECHES 76, 76 (Nicholas Buccola ed., 2016) [hereinafter THE ESSENTIAL DOUGLASS].

“kidnapper” in question was a U.S. Marshal aiding in the return of a fugitive slave back to the plantation of his legally recognized “master.”⁸⁷ Douglass can be said to have had what might be termed an “ambivalent” relationship with the Constitution prior to the Civil War;⁸⁸ he would never have endorsed Lincoln’s call for a “political religion” predicated on the duty to obey the law.⁸⁹ Although he resisted entreaties to join John Brown in his attack on Harper’s Ferry, almost certainly because of altogether justified prudence rather than any “principled” objection to violence, he was sufficiently implicated in the venture that he also thought it prudent to leave the United States and spend basically the next two years in Great Britain lest he be charged with what today we would call “material support” to Brown’s effort to generate insurrection.⁹⁰

Douglass was (properly) appalled by Lincoln’s first Inaugural address, which emphasized his acceptance of the “federal consensus,” by which slavery was fully tolerated, as a constitutional matter, in the states where it already existed.⁹¹ Lincoln also pronounced his willingness to continue enforcing the Fugitive Slave Law.⁹² Where he drew the line was extension of slavery into the territories. To put it mildly, this did not satisfy Douglass, though he later became a friend and admirer of Lincoln upon the issuance of the Emancipation Proclamation.⁹³ Still, when speaking at the dedication of a memorial to Lincoln in 1876, Douglass took care to describe him basically as “the white man’s president, entirely devoted to the welfare of white men.”⁹⁴ Perhaps anticipating Derrick Bell’s “convergence thesis,” Douglass allowed that Lincoln’s devotion led him to become the Great Emancipator who manifested his undoubtedly sincere hatred of slavery.⁹⁵ But that did not make him a denizen of what many considered the full meaning of the “new birth of freedom” declared in the Gettysburg Address.⁹⁶

After Lincoln’s death, Douglass promoted a far more radical notion of what was necessary to achieve a true “reconstruction” than was in fact achieved, and we have no good reason to believe that Lincoln himself would have come close to satisfying Douglass’s views.⁹⁷ It may be Lincoln’s historic good fortune that he in fact exited the stage before he had to confront the dilemmas posed by Union victory and the

⁸⁷ See *id.* at 76, 78–79.

⁸⁸ See Balkin & Levinson, *supra* note 85, at 264, 267–68.

⁸⁹ *Id.* at 267–68.

⁹⁰ *Id.* at 265, 269–72.

⁹¹ *Id.* at 268–69.

⁹² *Id.* at 267.

⁹³ *Id.* at 268.

⁹⁴ Frederick Douglass, Oration of Frederick Douglass Delivered on the Occasion of the Unveiling of the Freedmen’s Monument in Memory of Abraham Lincoln (Apr. 14, 1876), in *THE ESSENTIAL DOUGLASS*, *supra* note 86, at 239, 241.

⁹⁵ See Balkin & Levinson, *supra* note 85, at 269.

⁹⁶ Gettysburg Address, *supra* note 70.

⁹⁷ Frederick Douglass, *Sources of Danger to the Republic*, ST. LOUIS MO. DEMOCRAT (Feb. 8, 1867), reprinted in *THE ESSENTIAL DOUGLASS*, *supra* note 86, at 199, 204–06.

concomitant necessity to decide exactly what the (achievable) war aims actually were.⁹⁸ We are allowed to treat Lincoln as the equivalent of a Thematic Apperception or even Rorschach Test, projecting onto him any one of a potential set of conflicting stories whose principal purpose might well be to make us feel better. As we move beyond the wracked individual who was Abraham Lincoln, we must confront the reality that there never was a genuinely consensus answer to such questions, which might, among other things, make it especially difficult to discern any “original public meaning” especially to what Justice Robert Jackson called the “majestic generalities” of the Constitution.⁹⁹ Balkin notes, moreover, that Douglass was also part of a lonely group that advocated, entirely unsuccessfully, for a “new birth of freedom” for America’s women, including the right to vote.¹⁰⁰

Eric Foner’s extraordinarily influential book *The Second Founding*, which focuses, unlike his magnum opus *Reconstruction*, on Congress and Reconstruction Amendments, itself displays considerable tension within its pages.¹⁰¹ The title suggests close to a brand-new Constitution that did indeed overcome the fatal flaws of the 1787 version, the product of dreadful compromises with what would later be called the “slavocracy.” But the chapters themselves within the book, as one would expect from such a meticulous historian as Foner, convey a far more mixed story. Yes, the Amendments might reflect genuine progress over the Constitution of 1787. But, at the same time, all of them, including even the Thirteenth Amendment with its formal abolition of slavery yet mysterious affirmation that slavery might be acceptable as a means of punishing criminals,¹⁰² were less ambitious—less audacious rewritings of our fundamental document—than might have been the case had it not been felt necessary and proper to work within the political system established in 1787. As already suggested, this required engaging in multiple compromises with those who were unsympathetic to anything that might genuinely be regarded as “radical” reform of the Constitution.

One of the reasons that such compromise was necessary was simply the fact that the amendments were treated, at least formally, as standard-form Article V revisions that required, first, that two-thirds of both the House and Senate agreed with given proposals and then, even more importantly, that three-quarters of the states had to ratify whatever Congress proposed.¹⁰³ Bruce Ackerman has brilliantly reconstructed, as it were, the actual circumstances of the “constitutional moment” of Reconstruction,

⁹⁸ See Sanford Levinson, *The Ten Year War: What if Lincoln Had Not Exited After Four Years?*, 51 TULSA L. REV. 313, 328 (2016) (reviewing GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015); GEORGE KATEB, LINCOLN’S POLITICAL THOUGHT (2015); LOUIS P. MASUR, LINCOLN’S LAST SPEECH: WARTIME RECONSTRUCTION AND THE CRISIS OF REUNION (2015)).

⁹⁹ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

¹⁰⁰ BALKIN, *supra* note 1, at 210–15.

¹⁰¹ See generally FONER, *supra* note 69.

¹⁰² See U.S. CONST. amend. XIII, § 1.

¹⁰³ See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 110–11 (1998).

and it is easy to agree with him that constitutional formalities were not always observed.¹⁰⁴ Still, even if guns and the threat of continued refusal to seat representatives and senators from recalcitrant states that had attempted to secede and join the Confederate States of America help to explain the ratification of the Fourteenth Amendment, those states, though “necessary,” certainly were nowhere near “sufficient” to add the new language to the Constitution. There remained the problem of gaining the assent of “loyalist” states that might have agreed that the Union should be preserved and even that slavery should formally be abolished but were certainly unsympathetic with any genuinely inclusionist vision of a bi- or multi-racial America that Douglass, for example, propounded.¹⁰⁵

Some of these debates are relevant to the ongoing controversies about the role that “originalism,” however defined, should play in giving meaning to the Constitution today. Originalists themselves, ironically or not, have some special incentive to tell comforting stories, with happy endings, about the American past inasmuch as less benign narratives will force them, for example, to deny the legitimacy of *Brown v. Board of Education* (for starters).¹⁰⁶ That conclusion has become unthinkable to contemporary lawyers, and “originalist” history has been written (or rewritten) to avoid any such discomfiting conclusions. One can understand—and perhaps even applaud—such developments without, at the same time, commending them as necessarily reliable narratives about the American past.

But, as Balkin suggests, that may be holding them to a false standard.¹⁰⁷ They are, like all lawyers, engaged in motivated argument, devoted either to advocating on behalf of specific clients or more general causes to which the lawyer may be devoted (such as civil rights). As such, their statements should always provoke a certain “hermeneutics of suspicion” inasmuch as they are playing a very different role from that occupied by more disinterested historians or social scientists. It is *not* that the latter are occupying some Olympian role free of the influence of their own priors. But we *do* expect a certain kind of self-discipline—and, perhaps more importantly, the felt pressures imposed by membership in an academic discipline that stands ready to engage in critique of arguments that patently ignore contrary evidence or push agreed-upon evidence unmercifully. Richard Rorty famously said that interpretation involves “beating” texts into the shapes that conform with one’s own goals.¹⁰⁸ There is much truth to that; save around the seminar table, though, most of us distinguish between the all-out motivated advocacy we might legitimately expect of the skilled lawyer and the more nuanced presentations of academics subject to the constraints of what are accurately called their “disciplines.” And should we distinguish those

¹⁰⁴ See *id.* at 160–62.

¹⁰⁵ See, e.g., Frederick Douglass, *Our Composite Nationality*, BOS. DAILY ADVERTISER (Dec. 8, 1869), reprinted in THE ESSENTIAL DOUGLASS, *supra* note 86, at 216, 216–31.

¹⁰⁶ 347 U.S. 483 (1954).

¹⁰⁷ BALKIN, *supra* note 1, at 253.

¹⁰⁸ RICHARD RORTY, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, in CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972–1980) 139, 151 (1982).

“idea entrepreneurs” who are simply fixated on their own idiosyncratic ideas, whether the design of a perpetual motion machine or an altogether merited critique of the injustices they see around them, and a quite different “entrepreneur” who is self-consciously participating in what Holmes called the “marketplace of ideas” and who desires, by whatever means necessary, to triumph in that marketplace?¹⁰⁹

Lawyers, after all, are trained to be sophists, skilled in the rhetorical arts by which the “lesser” arguments can be made to prevail against the “greater.”¹¹⁰ It is a deep irony that law professors love to invoke the “Socratic method” inasmuch as there is little, if any, devotion to the pursuit of some transcendent “truth,” even if one is not a “post-modernist” who is skeptical about the meaning of “truth.” Lawyers have a duty to promote forgetfulness when it is in the interest of their client—or, for that matter, remembrance when *that* serves the client’s interest. But those seeking to undergird the legitimacy of existing institutions or ways of looking at the world are far more likely to agree with the great American songwriter Johnny Mercer that one should “ac-cent-tchu-ate the positive [and] E-lim-i-nate the negative.”¹¹¹

The daily “plebiscites” depend for their success on repeated affirmation. But what if one doesn’t wish to affirm either one’s general national identity—based, it appears, on “mystic chords of [debatable] memory”—or, more particularly, the particular Constitution that many would say is the basis for such American identity as may exist?¹¹² For better or worse, most of my later career over the past several decades has involved increasingly critical assessments of the U.S. Constitution. I am in a very small minority, especially among my generally progressive cohort, that supports a new constitutional convention that would engage in what Alexander Hamilton in *Federalist* No. 1 described as “reflection and choice” about how we should be governed in the twenty-first century.¹¹³ That would, I believe, entail significant changes from the Constitution we now have, even as amended, which I increasingly believe in its own way constitutes a clear and present danger to our national welfare and, perhaps, even our continued existence as a nation.¹¹⁴ My “loyalty” to the Constitution might be questioned by some.¹¹⁵ There is a reason, after all, that I refused to “sign the Constitution” as invited to do so at the conclusion of a visit to the National Constitution Center in Philadelphia.¹¹⁶

¹⁰⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹¹⁰ *See, e.g.*, PLATO, GORGIAS 9–10 (Bos., Gonzalez Lodge ed., Ginn & Co. 1890).

¹¹¹ JOHNNY MERCER, AC-CENT-TCHU-ATE THE POSITIVE (Capitol Recs. 1944).

¹¹² Lincoln, First Inaugural Address, *supra* note 62.

¹¹³ THE FEDERALIST NO. 1 (Alexander Hamilton).

¹¹⁴ *See, e.g.*, Sanford Levinson, *The Constitution Is the Crisis*, THE ATLANTIC (Oct. 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/the-constitution-is-the-crisis/598435/> [<https://perma.cc/UH3Z-A8N8>].

¹¹⁵ *See* Sanford Levinson, *Loyalty to the Constitution*, in THE VIRTUE OF LOYALTY 196, 204 (Troy Jollimore ed., 2024).

¹¹⁶ *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 249–50 (2011).

I am far more inclined to tell problematic than comforting stories about our constitutional tradition. I am also increasingly inclined to challenge the “authority” of the Supreme Court to provide accurate stories. Whether the often-venerated Earl Warren or the distinctly non-venerated (at least by liberals) Clarence Thomas, neither should necessarily be taken seriously as guides to understanding the American past. If, as is common, students are forbidden from citing Wikipedia as “authority” for assertions they might make in term papers, then this should be even more true with regard to citations to anything written in the Supreme Court Reporter unless one is writing a completely “internalist” analysis devoted exclusively to trying to figure out what the justices themselves might think, as against using their thinking as a reliable guide to the “outside” world.¹¹⁷ Thus the continued relevance of the T-shirts from the 1960s: “Question Authority.”¹¹⁸

At the same time, it is necessary to agree that a society that *only* questions authority cannot long maintain itself. All of us, at all times, rely on “authorities” to provide information or advice that most of us (should) accept almost without question. And these authorities must necessarily include those who devote their lives and energies to reconstructing the American past, whether as professional historians or (perhaps we should say) gifted amateurs. To believe that one can do without authority (and authorities) is a recipe for insanity. One might believe (or even hope) that the challenge particularly to *legal* authority is localized, having to do, at least in part, with well-merited criticisms directed at those especially in recent years who have used various “originalist” accounts to justify their authority (and power). But one suspects that the phenomenon is far broader and challenging to any sense of social cohesion. We now live in a strikingly polarized society where “alternative facts,” in the words of Kellyanne Conway,¹¹⁹ seem ever more available and immune to the challenge of those who might in the past have been recognized as dispositive authorities. Think only of the challenges to the efficacy of vaccines and the required dismissal of organizations as the CDC.

As Harvard political theorist Carl J. Friedrich suggested decades ago, key to one’s being an “authority” is basically unquestioning adherence.¹²⁰ This is clearest

¹¹⁷ See the delightful article by Frederick Schauer and Virginia J. Wise, *Nonlegal Information and the Delegation of Law*, 29 J. LEGAL STUD. 495, 514 (2000), as well as the more conventionally scholarly, and even more informative, article by Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1269–70 (2012).

¹¹⁸ See Peter W. Wood, *How ‘Questioning Authority’ Gave Us Wokeness*, SPECTATOR WORLD (Apr. 4, 2022), <https://thespectator.com/topic/questioning-authority-led-to-wokeness/> [<https://perma.cc/PQ6Q-XJMJ>].

¹¹⁹ Alexandra Jaffe, *Kellyanne Conway: WH Spokesman Gave ‘Alternative Facts’ on Inauguration Crowd*, NBC NEWS (Jan. 22, 2017, 8:28 PM), <https://www.nbcnews.com/storyline/meet-the-press-70-years/wh-spokesman-gave-alternative-facts-inauguration-crowd-n710466> [<https://perma.cc/D7M2-JJ4N>].

¹²⁰ See Carl J. Friedrich, *Authority, Reason, and Discretion*, in *AUTHORITY AND SOCIAL WORK: CONCEPT AND USE* 17, 23–24, 31–33 (Shankar A. Yelaja ed., 1971).

with regard to scientific authority, where few of us have the ability to challenge the assertions being made by trained scientists whose arguments one—or at least I—quite literally cannot begin to assess. How can one challenge the authority of a climate scientist, for example, if one possesses none of the educational training and expertise attached to the role? Political authority, including law, may be at least somewhat different. There, however, one can always mount attacks based on the claim that those claiming to be “in authority” are, for one or another reason, fundamentally illegitimate, perhaps because they don’t have the imprimatur that comes from democratic selection. But much “law,” especially in the modern state, itself rests not on decisions by elected officials, but, rather, decisions made by technical experts on the basis of broad delegation by legislators. Those of us who support the “administrative state,” itself the subject of bitter contemporary debate, must necessarily place faith in the authority of technocratic experts, even if we wish to place those experts under some kind of accountability either to the White House or Congress. But it is madness to believe that a president or senator, at least without unusual technical expertise, is equipped to be “the decider” with regard to the safety of a drug or the amount of mercury that can safely be ingested in fish. The reader will recognize that this is the key issue behind the now-discarded notion of *Chevron* deference, which is precisely the degree to which judges trained exclusively in the arts of “thinking like a lawyer” should defer to the decision-making of those with expertise in given areas subject to regulation from democratic selection.

The deepest issue underlying Balkin’s excellent book is the degree to which one can take truly seriously the notion that law is a “discipline” that generates experts whose judgments should be adhered to.¹²¹ Those who believe in a “science of law” are few and far between. There are more who seem to believe that lawyer-judges can discern uniquely correct answers to legal conundrums by submitting themselves to some form of originalism that denies its “living” and “constructive” aspects or, perhaps, relying on the self-interested and highly motivated rhetorical presentations of zealous advocates arguing on behalf of clients. But Balkin does a persuasive job of demonstrating why those beliefs (or hopes) are unavailing. As former Justice Breyer emphasized, the job of judging requires “judgment,” not the application of impersonal algorithms, including those drawn from history.¹²² History is an aid to judgment; it is not a substitute. But, of course, we are nowhere close to agreement on what constitutes “good judgment.”¹²³ Nor, it turns out, do we necessarily agree even on past role models. Did the Framers, for example, exercise good judgment in compromising with slavery or accepting what James Madison called the “evil” of equal voting power in the Senate?¹²⁴

¹²¹ See BALKIN, *supra* note 1, at 252.

¹²² Interview by David F. Levi with Justice Stephen Breyer, in Durham, N.C. (Jan. 26, 2022).

¹²³ See *id.*

¹²⁴ THE FEDERALIST NO. 62 (James Madison).

One could march through all of American history and reassess the lessons to be taught by careful scrutiny of what professed “leaders” did in our collective name. It appears increasingly quixotic to believe that we can, as a society, truly share collective memories that will enable us to happily cast affirmative votes in the daily plebiscites that Renan suggests constitute the predicate condition of maintaining a working constitutional order. “Memory entrepreneurs” might arise to offer nostrums, but they will invariably have to contend with other entrepreneurs in a highly competitive marketplace who offer conflicting candidates for national memory. One might say, of course, that endless conflict is exactly what law is about, but, quite obviously, that rules out the possibility of genuine settlement.

So, I conclude with another figure roughly from the same period as Ernest Renan, writing from across the English Channel, Matthew Arnold:

And we are here as on a darkling plain
Swept with confused alarms of struggle and flight,
Where ignorant armies clash by night.¹²⁵

¹²⁵ MATTHEW ARNOLD, *Dover Beach*, in *NEW POEMS* 112, 114 (London, Macmillan & Co. 1867).