

FOLLOW THE BLOODY BRICK ROAD: BLEEDING KANSAS AND THE EMANCIPATION PROCLAMATION

Margaret Hu*

INTRODUCTION

In *Memory and Authority: The Uses of History in Constitutional Interpretation*,¹ Jack Balkin unmasks a method for understanding both American constitutional idealism and political realism. *Memory and Authority* asks who possesses the authority to construct and preserve the narratives that guide the evolutionary relationship of not only historical interpretation within American constitutionalism, but also its revolutionary relationship to democratic constitutionalism and American democracy.² Balkin's inquiry, therefore, moves inside and outside of U.S. courts and the Supreme Court.³ It sweeps the broader arc of constitutional adaptation and democracy's underlying principles: its principal commitments to equity and fair governance, and the rule of law. Constitutional gatekeeping transforms not only how we enforce constitutional values under the law, but also has the potential to revolutionize how we see ourselves and our role as citizens.

Memory and Authority invites us to consider how the intersection of constitutional law and history is consequential not only as a matter of constitutional interpretation, but also as a matter of American constitutional identity.⁴ Building upon his prior work, we see Balkin's contentions in *Memory and Authority* involve the construction and preservation of collective memory as a project of self-governance,

* Taylor Reveley Research Professor and Professor of Law, and Director, Digital Democracy Lab, William & Mary Law School. Very grateful for the collegueship of Jack Balkin and for the many other mentors who have inspired my research; and for the conversation and feedback of Chinmayi Arun, Jess Bravin, Jack Chin, Paul Finkelman, Mark Graber, Sandy Levinson, Steve Miskinis, Derek Webb, and others. I am indebted to the research support of the excellent team at the William & Mary Wolf Law Library, including Fred Dingley and Michael Umberger, and the dedication of my Research Assistant, Katie Smart. Finally, deepest appreciation for the editorial leadership and care of the *William & Mary Bill of Rights Journal*, including Caroline Olsen, Alexandra Reilly, Shannon Roy, and Katherine von Schaumburg.

¹ See JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 4–5 (2024).

² *Id.* at 7–8.

³ *Id.* at 231–33.

⁴ See, e.g., Michel Rosenfeld, *Constitutional Identity*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 756, 758–59 (Michel Rosenfeld & Andras Sajo eds., 2012).

rights-preservation, and democratic experiment redemption.⁵ In shaping the meaning of the U.S. Constitution, and its limiting and expanding parameters, who are the memory gatekeepers?⁶ How are they designated in these roles?⁷ How do constitutional gatekeepers deploy their power in claiming historical authority?⁸ Importantly, *Memory and Authority* interrogates how this power is conferred and exercised by cultural and legal signifiers, governance structures, influence and deference, and other methods.⁹ Even more importantly, Balkin theorizes how collective memory and constitutional identity through historical reflexivity may operate as a check on constitutional history gatekeeping power exercised by the judiciary.¹⁰

Critical theory is necessary to understand a core aspect of Balkin's argument in *Memory and Authority*. As a philosophical approach to society and culture, it critiques and deconstructs knowledge and power formation. Yet, although critical theory may help to answer why *Memory and Authority* is animated by a critique of knowledge and power formation, there remains the question of how: How does one operationalize Balkin's theory of deconstructing constitutional history gatekeeping and American constitutional identity? Operationalizing Critical Race Theory alongside *Memory and Authority* offers one potential path. This Essay accepts the complex challenge of deconstructivism in *Memory and Authority* through a Critical Race Theory lens and its emphasis on storytelling.

To help illuminate Balkin's project of *Memory and Authority*, this brief Essay considers a slice of American memory from Kansas' historical archives and other primary sources, and examines its unique role in the Civil War. Specifically, it excavates the influence of Kansas' leaders as advisors to President Abraham Lincoln. Prior to and during the Civil War, Lincoln relied upon the guidance of senior leaders from Kansas on matters ranging from guarding the White House,¹¹ war strategies,¹² the recruitment of former enslaved persons to the war effort,¹³ and the issuance of the Emancipation Proclamation as a part of an effective war mobilization campaign.¹⁴ This process of examining these tensions—idealism and realism—through

⁵ See generally JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 463 (2007); JACK M. BALKIN, LIVING ORIGINALISM 60 (2011).

⁶ See BALKIN, *supra* note 1, at 236.

⁷ *Id.* at 235–36.

⁸ *Id.* at 237–38.

⁹ *Id.* at 6.

¹⁰ *Id.* at 7–8.

¹¹ See, e.g., JAMES P. MUEHLBERGER, THE 116: THE TRUE STORY OF ABRAHAM LINCOLN'S LOST GUARD 18–19 (2015).

¹² See, e.g., Craig Miner, *Lane and Lincoln: A Mysterious Connection*, 24 KAN. HIST. 186, 188 (2001).

¹³ *Id.*

¹⁴ *Id.*

first-person narrative further unmasks interferences and obstacles to fulfilling fundamental constitutional aspirations, such as the compromises and conflicts that gave rise to the Civil War.

This Essay proceeds in three Parts. Part I excavates the memory of Isaac Goodnow, one of the founders of Manhattan, Kansas, and Kansas State University, and his relationship with Lincoln. It contextualizes the bond between Goodnow and Lincoln within the historical era referred to as “Bleeding Kansas” or “Bloody Kansas.” Bleeding Kansas describes years of bloodshed resulting from violent conflicts between warring anti-slavery and pro-slavery factions within Kansas and at the Kansas-Missouri border. Part II discusses the memory of Senator James Lane, the first Kansas Senator, and Lincoln’s reliance on Lane’s counsel during the Civil War. Part III explores historical records and memories of Lincoln and Kansas, and the Emancipation Proclamation.

This Essay concludes that *Memory and Authority* is especially significant in understanding constitutional evolutions and revolutions, and an ethos of violence that underscores the self-narrative of the nation, including contemporary challenges.¹⁵ The collective memory of Bleeding Kansas and the Emancipation Proclamation is critical to recognizing these processes of constitutional decision-making, democratic and political reckoning, and constitutional redemption. Throughout the examination of Bleeding Kansas and the Emancipation Proclamation is the influence of war and violence, and our explicit recognition of it, in grappling with historical narratives and their constitutional impact.

I. GOODNOW, LINCOLN, AND BLEEDING KANSAS

Kansas was admitted to the Union on January 29, 1861, as a free state.¹⁶ What had been called Bloody and Bleeding Kansas in the national press joined the Union after years of violent conflicts, terrorizing of communities, cold blooded murder, pillaging and raids.¹⁷ Less than 3 months after Kansas joined as the 34th state, and 1 month after Lincoln was sworn in as the 16th President of the United States, the opening shots were exchanged between the Union and the Confederacy at Fort Sumter off the coast of Charleston, South Carolina, initiating the Civil War on April 12, 1861.¹⁸

¹⁵ See Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1549–50 (2022).

¹⁶ See *Kansas Statehood, January 29, 1861*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/kansas> [<https://perma.cc/D37J-6ERN>] (last visited Nov. 27, 2024).

¹⁷ See, e.g., JAMES A. RAWLEY, *RACE & POLITICS: “BLEEDING KANSAS” AND THE COMING OF THE CIVIL WAR* 158–60 (1969).

¹⁸ See, e.g., *Kansas Statehood*, *supra* note 16 (establishing Kansas as a state on January 29, 1861); see also MUEHLBERGER, *supra* note 11, at 7 (discussing President Lincoln’s inauguration on March 4, 1861); DAVID DETZER, *ALLEGIANCE: FORT SUMTER, CHARLESTON, AND*

Tragic Prelude is how artist John Steuart Curry titled his masterpiece mural, referencing years of bloodshed in Kansas and foreshadowing the years of bloodshed in the Civil War.¹⁹ As a precursor to the Civil War, Kansas' guerilla warfare was characterized as a "mini-civil war between free-state 'Jayhawkers' and pro-slave[ry] 'Border Ruffians.'"²⁰ From 1854 to 1856, and in the years leading up to the Civil War, historians document that at least 56 died in Kansas from conflicts between opponents and proponents of slavery.²¹ The sacking of Osceola, Missouri, on September 23, 1861, by Senator Jim Lane of Kansas, appointed by Lincoln as brigadier general of volunteers during the Civil War,²² significantly escalated the hostilities. During the Civil War, Confederate William Quantrill's raid on Lawrence, Kansas, led to the deaths of between 150 and 200 men and boys on August 21, 1863.²³ The violent skirmishes in Kansas and at the Kansas-Missouri border continued throughout the Civil War.²⁴

A. Memory and Narrative

Within minutes of meeting Balkin almost fifteen years ago, we learned we both had a connection to Kansas and Missouri. I was born and raised in Manhattan, Kansas. He was born and raised in Kansas City, Missouri, across the Missouri River from Kansas. My parents were born and raised in China, and as children, together with their families, escaped to Taiwan during the Communist Revolution. While studying engineering in Taiwan, my father received a full scholarship to pursue his PhD in Civil Engineering at Kansas State University. At graduation, my father was offered a faculty position at Kansas State University and, as part of the academic appointment, received permanent resident sponsorship, that then provided a pathway

THE BEGINNING OF THE CIVIL WAR 272–73 (2001) (examining the attack on Fort Sumter on April 12, 1861).

¹⁹ *The Tragic Prelude* (1937–1942) is the title of the Kansas State Capitol building mural painted by John Steuart Curry, depicting abolitionist John Brown holding a Bible in one hand and a rifle in another hand, with Union and Confederate soldiers, and a prairie fire and tornado in the background. See *The Tragic Prelude* (photograph), in M. SUE KENDALL, RETHINKING REGIONALISM: JOHN STEUART CURRY AND THE KANSAS MURAL CONTROVERSY 69 (1986).

²⁰ Julie Courtwright, "A Goblin That Drives Her Insane": Sara Robinson and the History Wars of Kansas, 1894–1911, 25 KAN. HIST. 102, 104 (2001) (citations omitted).

²¹ See Dale E. Watts, *How Bloody Was Bleeding Kansas? Political Killings in Kansas Territory, 1854–1861*, 18 KAN. HIST. 116, 123 (1995).

²² See Miner, *supra* note 12, at 194.

²³ See ALBERT CASTEL, CIVIL WAR KANSAS: REAPING THE WHIRLWIND 128–32 (1997).

²⁴ See, e.g., MICHAEL FELLMAN, INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR 231 (1989) (noting the guerrilla fighting ended alongside the Civil War); see also ULYSSES S. GRANT, THE ANNOTATED MEMOIRS OF ULYSSES S. GRANT 882–84 (Elizabeth D. Samet ed., 2019) (discussing the surrender of General Lee at Appomattox Court House on April 9, 1865).

for U.S. citizenship through naturalization. I was born in Kansas shortly after my father commenced his professorship. My birthright citizenship was made possible by the Civil War and the ratification of the Fourteenth Amendment, which granted citizenship to those born or naturalized in the United States.

Auspiciously, my father's academic appointment, my parents' U.S. citizenship through naturalization, and my birthright citizenship, all coincided with the Civil Rights Movement of the 1960s and 1970s. In addition to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the third pillar of landmark legislation that anchored the Civil Rights Movement was the passage of amendments to the Immigration and Nationality Act of 1965.²⁵ The civil rights reforms to the Immigration and Nationality Act brought a conclusion to the National Origins Act, the Chinese Exclusion Act, and other eugenics- and race-based immigration restriction laws.²⁶

The State of Kansas embeds within the State flag the State motto: "Ad Astra per Aspera."²⁷ The English translation for this Latin phrase is: "to the stars through difficulties" or "starward with difficulty."²⁸ John James Ingalls, former Senator of Kansas—second cousin to Charles Ingalls, father to Laura Ingalls Wilder, author of *Little House on the Prairie*²⁹—was the author of the State motto and designer of the State seal.³⁰ Senator Ingalls explained that "the aspiration of Kansas is to reach the unattainable; its dream is the realization of the impossible."³¹ The Office of the Governor of Kansas added, "This motto refers not only to the pioneering spirit of the early settlers, but also the difficult times Kansas went through before becoming

²⁵ See, e.g., Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 276 n.5 (1996) (citing Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911–12). See generally Gabriel J. Chin & Paul Finkelman, *The "Free White Person" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047 (2024); Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021).

²⁶ Chin, *supra* note 25, at 279–82. The Immigration and Nationality Act Amendments of 1965 repealed the Immigration Restriction Act of 1924 and other immigration and race-based exclusion acts. *Id.* at 279–80 nn.18–24 (internal citations omitted); see also Kenneth M. Ludmerer, *Genetics, Eugenics, and the Immigration Restriction Act of 1924*, 46 BULL. HIST. MED. 59, 61 (1972) (contending that the Immigration Restriction Act of 1924 "was the greatest triumph of the American eugenics movement in national affairs").

²⁷ See *Seal of Kansas*, KAN. HIST. SOC'Y (Oct. 2020), <https://www.kshs.org/kansapedia/seal-of-kansas/18266> [<https://perma.cc/U39X-9TQ7>].

²⁸ *Id.*

²⁹ LAURA INGALLS WILDER, *THE SELECTED LETTERS OF LAURA INGALLS WILDER* 175 (William Anderson ed., 2016); Tim Hrenchir, *Early Politician Credited with Coining State Motto*, TOPEKA CAP.-J. (Jan. 1, 2020, 3:46 PM), <https://www.cjonline.com/story/news/politics/government/2020/01/01/history-guy-early-kansas-politician-credited-with-coining-state-motto/1975132007/> [<https://perma.cc/X4US-LFYJ>].

³⁰ Hrenchir, *supra* note 29.

³¹ Christy Davis, *Constellation of Liberty*, 2019 SYMPHONY FLINT HILLS FIELD J. 42, 46.

a state. The anti-slavery forces and slavery proponents waged battles in the electoral process as well as on the battlefield.”³²

The controversy over slavery in Kansas extended to the drafting of two competing state constitutions: the Wyandotte Constitution,³³ a free state constitution drafted in 1859, and the Lecompton Constitution,³⁴ a pro-slavery constitution drafted in 1857. Senator Ingalls participated in the formation of the Wyandotte Constitution, an anti-slavery and free state constitution that remains the constitution for the State of Kansas to the present day.³⁵

B. Authority and History

Lincoln consulted with Kansas’ leaders as advisors before and during the Civil War.³⁶ In following the conflicts in Kansas, Lincoln became a student of the successes of the abolitionist leaders’ guerilla warfare-type strategies and the strength of their moral convictions, underwritten by their blood. Consequently, “Bleeding Kansas” provided an influential cast of pioneer warriors and abolitionist war heroes who played a central role in shaping the future of the Civil War and a post-Civil War America that pushed the nation’s borders westward.

Senator Stephen Douglas, Democrat from Illinois, authored the Kansas-Nebraska Act of 1854, legislatively advancing the concept they referred to as “popular sovereignty.”³⁷ Popular sovereignty concerned the status of slavery in the territories during the territorial phase. Under popular sovereignty, the territories west of the Mississippi could decide whether to become a free state or slave state through the ballot box.³⁸

³² *Campus Frequently Asked Questions*, UNIV. KAN., <https://union.ku.edu/campus-faq> [<https://perma.cc/54KZ-85V7>] (last visited Nov. 27, 2024) (quoting the Office of the Governor of Kansas).

³³ See Tony O’Bryan, *Wyandotte Constitution*, KAN. CITY PUB. LIBR.: CIV. WAR ON THE W. BORDER, <https://civilwaronthewesternborder.org/encyclopedia/wyandotte-constitution> [<https://perma.cc/R8UK-8SZL>] (last visited Nov. 27, 2024); see also Gabriel J. Chin & Paul Finkelman, *Race at the Foundings: How the Congress Imposed White Supremacy as it Created States* (Nov. 7, 2024) (unpublished manuscript) (on file with author) (“Territorial governance generally led to the establishment of racial restrictions in most of the states admitted into the Union after the ratification of the Constitution.”).

³⁴ See NICOLE ETCHESON, *BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR* 168–81 (2004) [hereinafter ETCHESON, *BLEEDING KANSAS*] (citing KENNETH M. STAMPP, *AMERICA IN 1857: A NATION ON THE BRINK* 323–25 (1990)); *id.* at 168 n.1.

³⁵ See JOHN JAMES INGALLS, *THE WRITINGS OF JOHN JAMES INGALLS* 37–38 (1902) (recalling his appointment and service at the Wyandotte Constitutional Convention); see also O’Bryan, *supra* note 33 (explaining the Wyandotte Constitution remains the Constitution of Kansas today).

³⁶ See Miner, *supra* note 12, at 188, 196.

³⁷ ETCHESON, *BLEEDING KANSAS*, *supra* note 34, at 14–21.

³⁸ *Id.*

In 1855, hundreds of armed pro-slavery Missourians, named “Border Ruffians” in the popular press, poured into Kansas to temporarily vote, casting ballots to turn Kansas into a slave state.³⁹ Settlers and pioneers poured into Kansas by the thousands and were identified in three groups: pro-slavery advocates, abolitionists, and free staters.⁴⁰ Some settlers in Kansas were not aligned politically with the abolitionists, as their emigration aspirations were more economically motivated.⁴¹

Some free staters wished to ensure small farmers and tradesman would not compete against slave owners who would impose a plantation economy on Kansas. Many free state migrants were not concerned with the morality of slavery, but, rather, were concerned that the employment of mass slave labor could undermine wages and sustainable income by skilled labor and family farming.⁴² Although free staters and abolitionists in Kansas were distinct groups, some politicians, such as Southern Democrats, did not distinguish the two groups.

Throughout 1855 and 1856, the national press covered the violence raging in Kansas. “[I]n 1856 . . . ‘Bleeding Kansas’ was on the front page of every newspaper and was the great theme for debates in the United States [S]enate”⁴³ The *New-York Tribune*, one of the most influential newspapers at the time, founded and headed by influential editor and politician Horace Greeley, is credited with coining the phrase “Bleeding Kansas” to describe the increasingly violent and destructive conflicts of the region.⁴⁴ On May 19 and 20, 1856, Senator Charles Sumner, a Republican from Massachusetts, and one of the most strongly anti-slavery members of Congress, gave a speech on the Senate floor titled, “The Crime Against Kansas.”⁴⁵

³⁹ See, e.g., Nicole Etcheson, *The Goose Question: The Proslavery Party in Territorial Kansas and the “Crisis in Law and Order,”* in BLEEDING KANSAS, BLEEDING MISSOURI: THE LONG CIVIL WAR ON THE BORDER 47, 50–51 (Jonathan Earle & Diane Mutti Burke eds., 2013) [hereinafter Etcheson, *The Goose Question*]; ETCHESON, BLEEDING KANSAS, *supra* note 34, at 153–54.

⁴⁰ See ETCHESON, BLEEDING KANSAS, *supra* note 34, at 142; Etcheson, *The Goose Question*, *supra* note 39, at 50–56.

⁴¹ See ETCHESON, BLEEDING KANSAS, *supra* note 34, at 1.

⁴² For an example of how a plantation economy was deployed for manufacturing rather than agriculture in Virginia, see CHARLES B. DEW, BOND OF IRON: MASTER AND SLAVE AT BUFFALO FORGE 63–82, 241–63 (1994) (documenting from primary sources the daily operations of iron manufacturing and production plantations in Virginia before, during, and immediately after Civil War).

⁴³ See Lloyd Lewis, *The Man the Historians Forgot*, 8 KAN. HIST. Q. 85, 92 (1939).

⁴⁴ See Lydia Maria Child, *Bleeding Kansas*, WOMEN & AM. STORY, <https://wams.nyhisstory.org/a-nation-divided/antebellum/bleeding-kansas/> [<https://perma.cc/8KAP-Z7GR>] (last visited Nov. 27, 2024).

⁴⁵ See, e.g., MICHAEL F. HOLT, THE FATE OF THEIR COUNTRY: POLITICIANS, SLAVERY EXTENSION, AND THE COMING OF THE CIVIL WAR 117 (2005) [hereinafter HOLT, THE FATE OF THEIR COUNTRY]; MICHAEL F. HOLT, THE POLITICAL CRISIS OF THE 1850S, at 194–95 (1983) [hereinafter HOLT, THE POLITICAL CRISIS OF THE 1850S]; DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 209 (1963).

Sumner accused Senators Stephen Douglas of Illinois and Senator Andrew Pickens Butler of South Carolina, coauthors of the Kansas-Nebraska Act, of causing the violence in Bleeding Kansas.⁴⁶ Although Senator Butler was absent from the floor, his cousin, Representative Preston Brooks, Democrat from South Carolina, was reported to be present.⁴⁷ On May 22, 1856, Representative Brooks approached Senator Sumner with a walking stick and beat him on the head and shoulders until he was bloodied and unconscious, falling to the U.S. Senate Chamber floor.⁴⁸ The caning was so severe that it required three years of recovery, with Sumner returning only intermittently to the floor of the Senate during his multi-year convalescence.⁴⁹

After passage of the Kansas-Nebraska Act in 1854, abolitionists in the East organized Emigrant Aid Companies to support settlers and pioneers in their efforts to relocate to Kansas and the western territories and to cast ballots to keep the state free.⁵⁰ Against this backdrop was the arrival of abolitionist Isaac T. Goodnow and his family in 1855 as part of an Emigrant Aid Company in Boston.⁵¹ Goodnow selected a site at the Blue River of the Kanza prairie, named by and for the Kanza people of the Kaw Nation. He named the new township Boston, Kansas,⁵² signaling to pro-slavery settlers that the new colony would be free. Later, another group of settlers arrived from the East Coast, explaining to Goodnow that their aid company was comprised of patrons in New York City and that they had pledged to call their abolitionist colony Manhattan.⁵³ Goodnow and the Boston Town Association agreed to switch the name of the newly formed town to Manhattan.⁵⁴

Goodnow next founded Bluemont College, advocating for a system of higher education as a method to reinforce abolition.⁵⁵ In 1861, Goodnow traveled to the

⁴⁶ See HOLT, *THE FATE OF THEIR COUNTRY*, *supra* note 45, at 117; HOLT, *THE POLITICAL CRISIS OF THE 1850S*, *supra* note 45, at 194–95; POTTER, *supra* note 45, at 210.

⁴⁷ See HOLT, *THE FATE OF THEIR COUNTRY*, *supra* note 45, at 117–18; POTTER, *supra* note 45, at 210.

⁴⁸ See, e.g., WILLIAMJAMES HULL HOFFER, *THE CANING OF CHARLES SUMNER: HONOR, IDEALISM, AND THE ORIGINS OF THE CIVIL WAR* 1–2 (2010); Senate Hist. Off., *Senate Stories: Charles Sumner: After the Caning*, U.S. SENATE (May 4, 2020), <https://www.senate.gov/artandhistory/senate-stories/charles-sumner-after-the-caning.htm> [<https://perma.cc/EK6N-HVDB>].

⁴⁹ Senate Hist. Off., *supra* note 48; see also HOFFER, *supra* note 48, at 3.

⁵⁰ See, e.g., ROBERT K. SUTTON, *STARK MAD ABOLITIONISTS: LAWRENCE, KANSAS, AND THE BATTLE OVER SLAVERY IN THE CIVIL WAR ERA* 8–9, 12–13 (2017); Julia Louisa Lovejoy, “*Letters from Kansas*,” 11 KAN. HIST. Q. 29, 30 (1942).

⁵¹ See Samuel A. Johnson, *The Emigrant Aid Company in Kansas*, 1 KAN. HIST. Q. 429, 433 (1932).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *Did You Know?*, TOPEKA CAP.-J. (Apr. 18, 2009, 11:37 PM), <https://www.cjonline.com/story/entertainment/local/2009/04/19/did-you-know/16427701007/> [<https://perma.cc/3SCA-L3WC>].

East Coast to successfully seek financial support from Lincoln and others for Bluemont College.⁵⁶ The Morrill Land Grant College Act of 1862 was signed into law by Lincoln on July 2, 1862, allocating federal land for the establishment of colleges and institutions of higher education to “benefit the agricultural and mechanical arts.”⁵⁷ In 1863, as a result of the Land Grant College Act, Bluemont College eventually transitioned into what is now Kansas State University.⁵⁸ Lane, as Senator of Kansas, supported multiple federal laws aimed at securing westward expansion and infrastructure support, including the Homestead Act and the Pacific Railroad Act to secure land grants in Kansas to support railroad construction through the state.⁵⁹

The Land Grant College Act and Homestead Act were viewed as laws that aimed to ensure equality of opportunity and advancement.⁶⁰ The Land Grant College Act, Homestead Act, and Pacific Railway Act reinforced post–Civil War values, guaranteeing citizen access to educational and land resources.⁶¹ The Land Grant College Act and creation of public university systems in the West were seen as particularly critical in ensuring that communities west of the Mississippi could compete educationally as well as economically.⁶²

⁵⁶ See Isaac T. Goodnow, *Personal Reminiscences and Kansas Emigration, 1855*, KAN. ST. HIST. SOC’Y (Jan. 17, 1888), <https://de.originaldll.com/personal-reminiscences-and-kansas-emigration-1855.html> [<https://perma.cc/S2P7-N4PY>]; *Did You Know?*, *supra* note 55, at 1.

⁵⁷ See *The Civil War: The Senate’s Story, Morrill Land Grant College Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/civil_war/MorrillLandGrantCollegeAct_FeaturedDoc.htm [<https://perma.cc/U9U5-WXGT>] (last visited Nov. 27, 2024).

⁵⁸ See *Did You Know?*, *supra* note 55, at 1; SUTTON, *supra* note 50, at 28.

⁵⁹ See Christopher Phillips, *Lane, James Henry*, KAN. CITY PUB. LIBR.: CIV. WAR ON THE W. BORDER, <https://civilwaronthewesternborder.org/encyclopedia/lane-james-henry> [<https://perma.cc/BT9F-XM8V>] (last visited Nov. 27, 2024); see also Paul Finkelman, *The Summer of ’62: Congress, Slavery, and a Revolution in Federal Law*, in CONGRESS AND THE PEOPLE’S CONTEST: THE CONDUCT OF THE CIVIL WAR 81, 101–03 (Paul Finkelman & Donald R. Kennon eds., 2018). Multiple legislative initiatives during the Civil War complemented the effort to bring slavery to its conclusion. Historian Paul Finkelman explains that “in the summer of 1862, Congress created the Department of Agriculture, passed the Homestead Act, upgraded public education in the District of Columbia, passed legislation for the creation of the transcontinental railroad, and passed laws to create land grant colleges.” Finkelman, *supra*, at 101–03 (internal citations omitted).

⁶⁰ See *Morrill Act (1862)*, NAT’L ARCHIVES (May 10, 2022), <https://www.archives.gov/milestone-documents/morrill-act> [<https://perma.cc/ZSD6-NAGZ>]; *Homestead Act (1862)*, NAT’L ARCHIVES (July 7, 2022), <https://www.archives.gov/milestone-documents/homestead-act> [<https://perma.cc/3CNB-QD9T>].

⁶¹ See generally *Morrill Act (1862)*, *supra* note 60; *Homestead Act (1862)*, *supra* note 60; *Pacific Railway Act (1862)*, NAT’L ARCHIVES (May 10, 2022), https://www.archives.gov/milestone-documents/pacific-railway-act?_ga=2.260699726.2135247251.1726343194-655689246.1726343194 [<https://perma.cc/2PK2-ACXS>].

⁶² See *Morrill Act (1862)*, *supra* note 60.

II. LANE, LINCOLN, AND THE EMANCIPATION PROCLAMATION

In the decades following Bleeding Kansas, the Kansas “history wars” raged well into the start of the twentieth century. Historian Julie Courtwright explains that the Kansas “history wars” hardened bad blood between both political and historian rivals.⁶³ The battles over the keeper of the state and national narrative included how to portray the leaders of Bleeding Kansas historically, the role of Kansas in preserving the republic, the consequence of Kansas’ leaders, and their influence and impact in securing Kansas as a free state.⁶⁴ “Historian Lloyd Lewis in his 1939 speech . . . ‘The Man the Historians Forgot,’ explained Lane’s poor reputation in Kansas history by saying that ‘where a man stands in history depends upon who keeps the record; more than that, it depends upon who lives to keep the record.’”⁶⁵

According to Lewis: “[I]t was really [Jim] Lane, who did more than any other one soul to make Kansas free.”⁶⁶ Yet, by the early twentieth century, he was relegated to the footnotes of history as the caricature of a violent, mentally unstable eccentric, having committed suicide on July 11, 1866.⁶⁷ The first Governor of Kansas, Charles Robinson, Lane’s political enemy, wrote in 1863 that Lane was corrupting Lincoln: “[T]he President is a poor weak man used by demagogues of the most worthless & corrupt character,” referring to Lane.⁶⁸ After Lane’s death, Robinson and his wife Sara Robinson, and other powerful figures in the Kansas community, worked diligently to shape a madman narrative around both Lane and famous abolitionist John Brown.⁶⁹

Lane was born on June 22, 1814, in Lawrenceburg, Indiana.⁷⁰ Lincoln was born on February 12, 1809, in Larue County, Kentucky, before relocating to Indiana and then Illinois.⁷¹ Lane served as Lieutenant Governor of Indiana from 1849 to 1853;⁷² and then served as a U.S. Representative for one term, from 1853 to 1855.⁷³ He then relocated to Kansas and switched parties, and switched positions on slavery. Historian Craig Miner points to the argument that “like late converts . . . Lane’s zeal for the [abolitionist] cause was all the greater because he had once been a sinner. That

⁶³ See Courtwright, *supra* note 20, at 105.

⁶⁴ See *id.* at 102.

⁶⁵ *Id.* at 123 (quoting Lloyd Lewis).

⁶⁶ See Lewis, *supra* note 43, at 87.

⁶⁷ See Phillips, *supra* note 59.

⁶⁸ See Miner, *supra* note 12, at 188.

⁶⁹ See generally Courtwright, *supra* note 20.

⁷⁰ See Phillips, *supra* note 59.

⁷¹ See *Today in History—February 12*, LIBR. CONG., <https://www.loc.gov/item/today-in-history/february-12/> [<https://perma.cc/MH2S-K5PN>] (last visited Nov. 27, 2024).

⁷² See Phillips, *supra* note 59.

⁷³ *Id.*

was *his* explanation.”⁷⁴ Lane described the institution of slavery as “an emanation from hell.”⁷⁵

A. Memory and Narrative

Lincoln met Lane “during Lincoln’s campaign tour” in Kansas from December 1 to 7, 1859.⁷⁶ Lincoln understood that Bleeding Kansas was a defining conflict for the nation. Famed abolitionist John Brown, who had spent three years violently engaged in the bloody conflict in Kansas, was hanged for the failed Harper’s Ferry Raid on December 2, 1859.⁷⁷ On the same day of Brown’s hanging, Lincoln was visiting and campaigning in the Kansas Territory.⁷⁸

On January 5, 1859, Lincoln, former U.S. Representative of Illinois from 1847 to 1849, lost his bid for the U.S. Senate to Stephen Douglas.⁷⁹ Lincoln expressed concerns about whether he was “fit for the Presidency.”⁸⁰ Yet, after his Senate defeat, he commenced what some perceived as an unofficial presidential campaign and it appears his potential aspirations were understood at the time of his visit to Kansas.⁸¹ In the months leading up to the 1860 Republican convention where he ultimately succeeded in securing the presidential nomination, Lincoln visited all states and territories in the Midwest save Minnesota.⁸² He expressed regret in declining the August 1859 invitation of the Republican Party Chair of Minnesota to visit due to a lack of time and funds.⁸³

⁷⁴ Miner, *supra* note 12, at 192.

⁷⁵ *Id.* at 193 (citation omitted).

⁷⁶ *Id.* at 187.

⁷⁷ See generally THE TRIBUNAL: RESPONSES TO JOHN BROWN AND THE HARPER’S FERRY RAID (John Stauffer & Zoe Trodd eds., 2012).

⁷⁸ Alan W. Farley, *When Lincoln Came to Kansas Territory*, in ABRAHAM LINCOLN IN KANSAS TERRITORY: DECEMBER 1 TO 7, 1859, at 1, 3 (1963).

⁷⁹ *Abraham Lincoln in Illinois: A Selection of Documents from the Illinois State Archives*, OFF. ILL. SEC’Y STATE, https://www.ilsos.gov/departments/archives/teaching_packages/abraham_lincoln/doc32.html [<https://perma.cc/U3B8-67DT>] (last visited Nov. 27, 2024).

⁸⁰ *With Malice Toward None: The Abraham Lincoln Bicentennial Exhibition*, LIBR. CONG. (citing Letter from Abraham Lincoln to Thomas J. Pickett (Apr. 16, 1859) [hereinafter Letter from Lincoln to Pickett], in UNIV. MICH. LIBR. DIGIT. COLLECTIONS, <https://quod.lib.umich.edu/l/lincoln/lincoln3/1:101?rgn=div1;view=fulltext> [<https://perma.cc/B2M4-JHMU>]), <https://www.loc.gov/exhibits/lincoln/the-run-for-president.html> [<https://perma.cc/PV8M-QKQZ>] (last visited Nov. 27, 2024) (responding to Pickett’s letter dated April 13, 1859); see also Letter from Lincoln to Pickett, *supra* (“As to the other matter you kindly mention, I must, in candor, say I do not think myself fit for the Presidency. I certainly am flattered . . .”).

⁸¹ *Id.*

⁸² Letter from Abraham Lincoln to Daniel Rohrer (Aug. 19, 1859), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 397, 397 (Roy P. Basler ed., 1953).

⁸³ Letter from Abraham Lincoln to Hawkins Taylor (Sept. 6, 1859), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 82, at 399–400.

On December 3, 1859, Lincoln addressed an audience at Stockton Hall in Leavenworth, Kansas, conveying themes that would later be echoed in the Lincoln-Douglas Debates and his famous Cooper Union speech in New York on February 27, 1860.⁸⁴ Lincoln's speech in Stockton Hall revealed that he understood that the cloud of violence and war was hanging over not only the Kansas Territory, but also the republic. Abolitionist Parker Pillsbury wrote in his correspondence that John Brown, Jr., shared with him that "only force and fire-arms kept slavery out of Kansas."⁸⁵

After Kansas entered the Union in 1861, Lane traveled to Washington, D.C., to serve as Senator of Kansas, a position he held from 1861 until his suicide in 1866, just a little over one year after Lincoln's assassination on April 14, 1865.⁸⁶

After the opening shots of Fort Sumter, Lane rushed to the White House to protect Lincoln with his "Frontier Guard."⁸⁷ Lane wrote to Lincoln on April 20, 1861, stating that the coup required immediate action.⁸⁸ His Jayhawker men numbered 116, and they were deployed to D.C., functioning like a round-the-clock Secret Service protective detail, to prevent a breach of the White House and thwart attempts at assassination.⁸⁹

Lewis writes: "Many of the Jim Lane men, fresh from the battles with Border Ruffians, went to Washington, D.C., in April, 1861 . . . to gather around Lincoln in the White House and protect him from the threats of the Virginia mob."⁹⁰ He continues, explaining that when Lincoln "was unarmed and practically alone . . . with secession breaking like a surf around the White House, it was nobody but Jim Lane and a crowd of his war-hardened Kansas Jayhawkers who moved into the executive mansion and sat with their rifles."⁹¹

B. Authority and History

With the outbreak of hostilities in April 1861, Lincoln made the unusual decision to appoint Lane, a sitting Senator, as brigadier general of volunteers,⁹² giving Lane the authority to raise volunteer regiments.⁹³ He assembled the "Kansas Brigade" and

⁸⁴ Farley, *supra* note 78; see also HAROLD HOLZER, LINCOLN AT COOPER UNION: THE SPEECH THAT MADE ABRAHAM LINCOLN PRESIDENT (2004).

⁸⁵ Parker Pillsbury, *Letter from Parker Pillsbury*, ANTI-SLAVERY BUGLE, Oct. 8, 1859, at 2.

⁸⁶ Miner, *supra* note 12, at 193, 198.

⁸⁷ Lewis, *supra* note 43, at 92.

⁸⁸ James H. Lane's Letter to Abraham Lincoln (Apr. 20, 1861), in LIBR. CONG., <https://www.loc.gov/resource/mal.0927200/?r=-0.803,-0.62,2.607,1.38,0> [<https://perma.cc/SE55-9396>].

⁸⁹ MUEHLBERGER, *supra* note 11, at 21.

⁹⁰ Lewis, *supra* note 43, at 92.

⁹¹ *Id.*

⁹² Miner, *supra* note 12, at 193.

⁹³ Christopher Phillips, *Lane, James Henry*, KAN. CITY PUB. LIB., <https://civilwaronthe>

the 1st Kansas Colored Volunteer Infantry Regiment.⁹⁴ Between 1861 and 1862, Lane was among the first to arm Black soldiers, including fugitive slaves and freed-people, to serve in combat.⁹⁵ Historian Christopher Phillips detailed Lane's experiment, as arming Black regiments at the time was controversial:

[Lane] was one of the first Union leaders to recruit [B]lack soldiers into the federal army. Acting as recruiting commissioner for Kansas in summer 1862, Lane raised the 1st Kansas Colored Volunteers, one of the first [B]lack regiments. Comprised mainly of fugitive slaves from Missouri and Arkansas, it was the first [B]lack regiment that saw action in the war (at Island Mound in Bates County, Missouri, on October 27–29, 1862). The regiment was officially mustered into the U.S. Army on January 13, 1863.⁹⁶

The “Kansas Brigade” raided property of Missouri slaveholders and freed those whom they enslaved.⁹⁷ Historian Craig Miner described Lane's influential role as Lincoln's advisor at the start of the Civil War. “Lane early advised Lincoln to arm and recruit [B]lack soldiers, issue the Emancipation Proclamation, and institute a ‘total war’ policy”⁹⁸ The “total war” policy included economic targets and exploiting other nonmilitary assets.⁹⁹ In the sacking of Osceola, Missouri, on September 23, 1861, Lane and his brigade destroyed the entire town, an estimated 800 buildings, and pillaged the food, and raided anything else of tangible value.¹⁰⁰ Among the structures destroyed was the home of Missouri Senator Waldo P. Johnson, who joined the Confederate Army and later the Confederate Congress as one of Missouri's senators.¹⁰¹

“Lane may be said to have been President Lincoln's political viceroy in Kansas, and sometimes, perhaps, in the whole regions west of the Mississippi river.”¹⁰² Lewis explains that Lane and Lincoln were bound together by multiple strands: both six feet tall or over, thin and wiry, and “inexhaustible frontier types.”¹⁰³ Lewis continues:

westernborder.org/encyclopedia/lane-james-henry [https://perma.cc/7CUK-RW64] (last visited Nov. 27, 2024).

⁹⁴ *Id.*

⁹⁵ Miner, *supra* note 12, at 196.

⁹⁶ Phillips, *supra* note 59.

⁹⁷ *Id.*

⁹⁸ Miner, *supra* note 12, at 188.

⁹⁹ *Id.*; Phillips, *supra* note 59.

¹⁰⁰ Scharla Paryzek, *Sacking of Osceola*, KAN. CITY PUB. LIBR., <https://civilwaronthe-westernborder.org/encyclopedia/sacking-osceola> [https://perma.cc/EW86-BKHA] (last visited Nov. 27, 2024).

¹⁰¹ Phillips, *supra* note 59.

¹⁰² Lewis, *supra* note 43, at 93.

¹⁰³ *Id.* at 94.

“Lane went to ‘Bleeding Kansas’ in 1855 and rode the storm to . . . the [S]enate. Lincoln bestrode the Kansas issue in 1858 and rode the storm to the White House . . .”¹⁰⁴ He further points out that they were both “cunning” politically and elaborates that “Lane was the keynoter for Lincoln” at the Baltimore Convention in 1864 where Lincoln invited Andrew Johnson to be his running mate.¹⁰⁵ According to Lewis, Lincoln most likely sent Lane in “to engineer the delicate deal” of adding a Southern Democrat, Andrew Johnson, to a National Union ticket, representative of both the Republican and Democratic parties after the end of the Civil War.¹⁰⁶

After the Civil War and Lincoln’s assassination, Lewis speculates that Lane lost his way politically, as he became a revolutionary without a revolution.¹⁰⁷ He wished to stay in the political favor of Southern Democrat Andrew Johnson for political expediency; but, the policies of Johnson did not align with his political beliefs or the commitments of his constituents.¹⁰⁸ Thus, he appeared as though he could not decide on his position on the 1866 Civil Rights Act.¹⁰⁹ Lane publicly supported Johnson’s veto of the Civil Rights Act even though he had voted for it, “and, to his dismay, Kansas shunned him for it.”¹¹⁰ Phillips writes, “He then voted against overriding the president’s veto. His changed stance brought almost universal condemnation . . .”¹¹¹ Miner explains:

Lincoln was dead, and remaining loyal to the office [of the President], as Lane did in supporting President Andrew Johnson, was not the same as obeisance to a great and powerful man. . . . [and] he found himself struggling for his reputation and political life, with only a president himself on the verge of impeachment to defend him.¹¹²

A critical aspect of Lane’s legacy, however, is his role in championing emancipation as a war strategy.¹¹³ In several speeches delivered toward the end of 1861, over a year before the issuance of the Emancipation Proclamation, Lane pronounced the necessity of it as core to the success of the war effort.¹¹⁴ For example, in a speech

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 93.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 102.

¹⁰⁸ *Id.* at 101.

¹⁰⁹ Miner, *supra* note 12, at 198 (citation omitted).

¹¹⁰ *Id.*

¹¹¹ Phillips, *supra* note 59.

¹¹² Miner, *supra* note 12, at 198. For a discussion of Reconstruction politics, see generally MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (2023).

¹¹³ See, e.g., IAN M. SPURGEON, MAN OF DOUGLAS, MAN OF LINCOLN: THE POLITICAL ODYSSEY OF JAMES HENRY LANE 188–89 (2008).

¹¹⁴ *Id.*

delivered in Springfield, Missouri, on October 31, 1861, Lane encourages Congress to pass legislation compelling Lincoln to issue a proclamation of emancipation.¹¹⁵

[Lane] had found what Lincoln had not accepted at the time . . . and would not embrace for another year: that an official move against slavery was ‘an indispensable necessity’ for preserving the Union. Lane believed that emancipation would end the biggest threat to national unity overall.¹¹⁶

Lane forcefully advocated for the Emancipation Proclamation, asserting that the war effort needed a moral compass to serve as effective war propaganda for mass mobilization of political support, and that recruitment of the formerly enslaved persons would be dependent upon a promise of freedom.¹¹⁷ Lincoln questioned whether he had the constitutional authority to sign the Emancipation Proclamation.¹¹⁸ Lane, also a lawyer like Lincoln, respected Lincoln’s concerns of a legal challenge to the document.¹¹⁹ Historian Paul Finkelman explains that Lincoln drafted the text of the Emancipation Proclamation to serve a national security purpose and, to the extent possible, to inoculate it from being overturned by a Supreme Court that might prove to be hostile to the Proclamation as executive overreach.¹²⁰ Finkelman contends: “[I]n framing its constitutionality, Lincoln argued simultaneously that emancipation grew out of military power—that is, his power as commander-in-chief—and that as commander-in-chief he could do whatever necessary to win the war and thus preserve the Union.”¹²¹

¹¹⁵ *Id.* at 225–26.

¹¹⁶ *Id.* at 226.

¹¹⁷ Miner, *supra* note 12, at 196.

¹¹⁸ *Id.*

¹¹⁹ Lewis, *supra* note 43, at 92; Miner, *supra* note 12, at 196.

¹²⁰ Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 360–62, 381–83. For additional historical context, see generally ALLEN C. GUELZO, *LINCOLN’S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA* 153–61 (2004). See generally JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963); LOUIS P. MASUR, *LINCOLN’S HUNDRED DAYS: THE EMANCIPATION PROCLAMATION AND THE WAR FOR THE UNION* (2012).

¹²¹ Finkelman, *supra* note 120, at 381; see also, e.g., Henry L. Chambers, Jr., *Lincoln, the Emancipation Proclamation, and Executive Power*, 73 MD. L. REV. 100, 100 n.1 (2013) (citing Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional?: Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1148–49) (noting that Levinson argues “three options regarding the constitutionality of the Emancipation Proclamation: it was constitutional because its scope was limited; it was constitutional because Lincoln had nearly unlimited power to issue it; or it was unconstitutional”).

III. LINCOLN, KANSAS, AND CONSTITUTIONAL IDENTITY

Prior to Lincoln's Inauguration, a mob gathered at the U.S. Capitol on February 13, 1861, and tried to disrupt the certification of the electoral votes.¹²² Historian Ted Widmer explains that they had "'revolution' on their minds."¹²³ "As in 1861, you do have a feeling of a country pulling apart, back then it was really a region pulling away from the rest of the country and seven states had seceded before Lincoln even got to Washington" for Inauguration.¹²⁴ Widmer explained that now "there are people who are alienated from one version of America or the other. . . . [and] it does feel similar in that there are two competing ideas about what America should stand for."¹²⁵

A. Memory and Narrative

After the attack on the U.S. Capitol on January 6, 2021, Political Scientist Robert Lieberman stated, "1860–61 is probably the best analogue for [2021]," and the U.S. Capitol attack is "the closest we've come to 1861, the one instance of a real failure of what you would call a smooth peaceful transfer of power."¹²⁶ Historian Rachel Shelden observed that, in the presidential election of 1860, the Southern Democrats "all agreed Lincoln had won. But the similarity might be, in both cases, there's a rejection of the democratic process."¹²⁷ She elaborates, "Lincoln won the election, that, to them, meant that they needed to leave the Union, which was in and of itself, a rejection of democracy. They're both rejections of the democratic process, just in different ways."¹²⁸

B. Authority and History

How is history of the present rhyming with history of the past?

When Lincoln addressed a pro-slavery crowd in Stockton Hall in Leavenworth, Kansas, on December 3, 1859, he acknowledged that there was a chance civil war

¹²² Olivia B. Waxman, 'Alarming Similar.' *What the Chaos Around Lincoln's First Inauguration Can Tell Us About Today, According to Historians*, TIME (Jan. 15, 2021, 8:00 AM), <https://time.com/5929078/lincoln-trump-capitol-history/> [<https://perma.cc/XA3G-KFSL>] (citing Ted Widmer, *The Capitol Takeover That Wasn't*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/opinion/capitol-protest-1861-lincoln.html> [<https://perma.cc/6388-5GF5>]).

¹²³ *Id.* (quoting Ted Widmer).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting Robert Lieberman).

¹²⁷ *Id.* (quoting Rachel Shelden).

¹²⁸ *Id.*

was potentially on the horizon with the coming presidential election of 1860.¹²⁹ He stated: “Do you really think you are justified to break up the government rather than have it administered If you do, you are very unreasonable; and more reasonable men cannot and will not submit to you.”¹³⁰ He also recognized that pro-slavery voters in Kansas and Southern states would potentially reject the democratic process of electing a President in the midst of an increasingly factionalized republic. He asserted that violence and war might be necessary to keep the Union intact, stating:

If we shall constitutionally elect a President, it will be our duty to see that you submit. Old John Brown has just been executed for treason against a state. We cannot object, even though he agreed with us in thinking slavery wrong. That cannot excuse violence, bloodshed, and treason. It could avail him noting that he might think himself right. *So, if constitutionally we elect a President, and therefore you undertake to destroy the Union, it will be our duty to deal with you as Old John Brown has been dealt with. We shall try to do our duty.* We hope and believe that in no section will a majority so act as to render such extreme measures necessary.¹³¹

Between December 1860 and February 1861, seven Southern states seceded from the Union.¹³² Lincoln took the presidential oath of office on Inauguration Day, March 4, 1861.¹³³ In his first Inaugural Address, Lincoln spoke of the need to consider national identity “by the better angels of our nature,” and evoked a national memory that binds the republic: “The mystic chords of memory . . . will yet swell the chorus of the Union”¹³⁴

One month later, the shots rang out in Fort Sumter, marking the start of the Civil War.¹³⁵ Lincoln contacted Secretary of War Simon Cameron in June 1861, writing:

I have . . . concluded that we need the services of such a man [Lane] out there [in Kansas] at once; that we better appoint him a brigadier-general of volunteers to-day, and send him off with

¹²⁹ Farley, *supra* note 78, at 3.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See generally Waxman, *supra* note 122.

¹³³ See generally MICHAEL F. HOLT, THE ELECTION OF 1860: “A CAMPAIGN FRAUGHT WITH CONSEQUENCES” 206 (2017).

¹³⁴ Abraham Lincoln, First Inaugural Address (Mar. 1861), in LIBR. CONG., <https://www.loc.gov/resource/mal.0773800> [<https://perma.cc/K97Q-47DP>] (last visited Nov. 27, 2024).

¹³⁵ See generally ERIK LARSON, THE DEMON OF UNREST: A SAGA OF HUBRIS, HEART-BREAK, AND HEROISM AT THE DAWN OF THE CIVIL WAR 426–28 (2024).

such authority to raise a force . . . as you think will get him into actual work quickest.¹³⁶

Almost a century after the start of the hostilities of Bleeding Kansas, in 1954, the Supreme Court decided *Brown v. Board of Education of Topeka*,¹³⁷ sometimes referred to as the Second Emancipation Proclamation,¹³⁸ bringing an end to Jim Crow, at least as a matter of constitutional doctrine. Perhaps it is not a coincidence that Topeka, Kansas, is the site of the Wyandotte Constitution of the abolitionists and free-stater Jayhawks, ratified in 1859.¹³⁹

Both the Wyandotte Constitution and the history of Kansas are fraught with racial inequality, even as Kansas fought to remain free of slavery. Lane had previously argued for the exclusion of free Blacks from Kansas in 1855.¹⁴⁰ The Wyandotte Constitution prohibited slavery, however, also prohibited Blacks from voting.¹⁴¹ *Brown v. Board of Education* and its legacy are bound to the constitutional memory of the Wyandotte Constitution and its internal contradictions. “Kansas occupied a ‘middle ground’ between the *de jure* segregation in the Jim Crow South and the relative lack of state-enforced segregation in the North.”¹⁴² Understanding how the Kansas Constitution represented both anti-slavery and Jim Crow ambitions simultaneously at the time of the state’s founding¹⁴³ is critical to exposing constitutional duplicity in theory and interpretation.¹⁴⁴ Locating this historically and interrogating it

¹³⁶ Miner, *supra* note 12 (citation omitted).

¹³⁷ 347 U.S. 483 (1954).

¹³⁸ See, e.g., Anne C. Kretsinger-Harries, *Dr. Martin Luther King Jr. 's Second Emancipation Proclamation: Reimagining Prudence Through Commemoration*, 24 RHETORIC & PUB. AFFS. 447, 448–51 (2021) (analyzing the impact of the decision).

¹³⁹ See generally O'Bryan, *supra* note 33.

¹⁴⁰ Rusty Monhollon & Kristen Tegtmeier Oertel, *From Brown to Brown*, 27 KAN. HIST.: J. CENT. PLAINS 116, 120 nn.12–13 (Spring/Summer 2004) (citing *inter alia* EUGENE H. BERWANGER, *THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY* 101, 107 (1967)).

¹⁴¹ *Id.* at 120 n.16 (first citing James N. Leiker, *Race Relations in the Sunflower State: Review Essay*, 25 KAN. HIST.: J. CENT. PLAINS 221 (Autumn 2002); then citing THOMAS C. COX, *BLACKS IN TOPEKA, KANSAS 1865–1915: A SOCIAL HISTORY* 10–15 (1982); and then citing JAMES A. RAWLEY, *RACE AND POLITICS: BLEEDING KANSAS AND THE COMING OF THE CIVIL WAR* (1969)).

¹⁴² *Id.* at 124 n.34 (first citing Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950–1956*, 5 LAW & HIST. REV. 351–52 (Fall 1987); and then citing James N. Leiker, *Race Relations in the Sunflower State: Review Essay*, 25 KAN. HIST.: J. CENT. PLAINS 225–26 (Autumn 2002)).

¹⁴³ “In effect, Congress formed the territories as White republics.” Chin & Finkelman, *supra* note 33 (manuscript at 2) (“Congress permitted racial discrimination in existing states and territories, allowed territories to pass discriminatory legislation, and granted statehood to territories with discriminatory clauses in their [state] constitutions.” (internal citation omitted)).

¹⁴⁴ See generally WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION

theoretically¹⁴⁵ underscores how and why *Memory and Authority* is a twin project of *Constitutional Redemption*.¹⁴⁶

CONCLUSION

Memory and Authority does not stop with accountability questions. Rather, it opens the door to theorization tools that are chiefly epistemological. Are we over rotating on certain methods of memory gatekeeping construction and knowledge creation, unfolding under the guise of constitutional interpretation, that require urgent re-examination? And, if so, how do we course correct? And, if we do not, will the failure to recognize false or misleading legal epistemologies generate blind spots in democratic institutions and undermine constitutional faith?

The type of collective memory project advanced in *Memory and Authority* requires a certain reverse-engineering of American constitutional identity. The reverse-engineering process demands identifying constitutional gatekeeping in a way that takes individual perspectives and maps it onto a collective identity project. Often, this is a project of trained historians or the methods occupied by other fields and experts. Judges and justices who confer this power upon themselves substitute the research methods of a historian or sociologist or anthropologist or other theorist or trained researcher. Critical Race Theory, however, with its embrace of narrative truth-seeking, offers another way to approach the collective memory project. It only requires the excavation of a story that can cast light on power and structure, and transparency.

Because the epistemological scaffolding of Balkin's theory of constitutional identity formation involves a process of collective reflexivity and deconstruction, this Essay argues that *Memory and Authority* can be better understood through a Critical Race Theory lens that embraces narrative as a form of legal truth-seeking. *Memory and Authority* presents a melody and counter melody between critique and reflexivity. Reflexivity is a process of raising consciousness through self-examination

(Jack M. Balkin ed., 2001); Jack M. Balkin & Sanford Levinson, *Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1020 n.180 (1998) (“[T]he standard narrative that emphasizes the Supreme Court’s ‘leadership’ in *Brown v. Board of Education* usually overlooks the limited impact of that opinion in the decade following it.” (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE* 39–41 (1991))).

¹⁴⁵ See Jack M. Balkin & Sanford Levinson, *Constitutional Canons and Constitutional Thought*, in LEGAL CANONS 400, 418 n.86 (Jack M. Balkin & Sanford Levinson eds., 2000) (first citing Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 25–31 (1996); and then citing Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271 (1997)).

¹⁴⁶ BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 5, at 139–43. “[I]n each era people will try to use the logics, rhetorics, and doctrines of equality to preserve power, conserve privilege, and establish greater inequality. The path of redemption is not straight, it is not clear, it is not secured.” *Id.* at 143.

and self-referential narratives. In Critical Race Theory, the citizen's story can transcend a simple story and can function as a critique of underlying assumptions of law as a power structure, laying bare the manner in which the law, formal structures of power, and legal narratives in their various manifestations can obscure truth.

Memory and Authority is a vehicle for visualizing constitutional aspiration, civil rights and equality jurisprudence, and antisubordination.¹⁴⁷ The inconsistent legacies of Bleeding Kansas show that anti-slavery and antisubordination movements are not coterminous. And the memory of this complex history is a vehicle for meditating upon the violence, both physical and legal, that led to the First and Second Reconstruction movements.

Bleeding Kansas illustrates the constant undercurrent of violence in the evolution of American constitutionalism.¹⁴⁸ The Kansas-Nebraska Act of 1854 allowed the residents of the Kansas and Nebraska territories, and other new territories west of the Mississippi, to decide their future fates by popular vote, what Senator Stephen Douglas referred to as popular sovereignty.¹⁴⁹ "As Douglas reiterated ceaselessly, through elections the western settlers would themselves decide any issue, including slavery. What could be more democratic?"¹⁵⁰

Bleeding Kansas resulted in "mayhem, destruction and psychological warfare" that transformed into "a code of conduct in Eastern Kansas and Western Missouri."¹⁵¹ The escalating violence led to murder, such as the Wakarusa War in December 1855, which resulted in pro-slavery Missouri patrols killing two unarmed Kansans returning from Lawrence, Kansas.¹⁵² The Sack of Lawrence, Kansas, in May 1856 led to the burning of parts of the town, including the Free State Hotel and abolitionist newspapers.¹⁵³ In retaliation, the Pottawatomie Creek Massacre three days later marked the killing of five pro-slavers by John Brown and his sons.¹⁵⁴ The Sack of

¹⁴⁷ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 5, at 161–63; Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 nn.1–2 (2003) (citing *inter alia* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32–45 (1987); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Reva B. Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111 (1997); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004)).

¹⁴⁸ See, e.g., Peterson, *supra* note 15, at 1549–50.

¹⁴⁹ ETCHESON, *BLEEDING KANSAS*, *supra* note 34, at 20–21.

¹⁵⁰ *Id.* at 21.

¹⁵¹ *Bleeding Kansas*, NAT'L PARK SERV. (Aug. 15, 2017), <https://www.nps.gov/articles/bleeding-kansas.htm> [<https://perma.cc/Y6T3-4WJM>].

¹⁵² ETCHESON, *BLEEDING KANSAS*, *supra* note 34, at 82–88.

¹⁵³ *Id.* at 104.

¹⁵⁴ *Id.* at 107–13.

Osceola in Missouri in September 1861 resulted in at least nine deaths of civilians and the destruction of the town.¹⁵⁵ Quantrill's Raid in Lawrence, Kansas, in retaliation for the Sack of Osceola, led to the death of an estimated 150 to 200 in August 1863.¹⁵⁶

At the end of our first conversation almost fifteen years ago, Balkin said: "I want you to write your story of growing up in Kansas. Tell the story." I responded: "No one will read it." We met at an American Constitution Society luncheon. I sat down next to Jack and introduced myself, "Hi. My name is Margaret. I'm an attorney in the Civil Rights Division of the U.S. Department of Justice." He said, "Hi. I'm Jack." "What do you do, Jack?" I asked. He replied: "I'm a teacher."

Balkin, true to his self-description, is a teacher. Constitutional identity, particularly through self-narratives and storytelling, invites each citizen to teach themselves a certain self-governance approach to constitutional history that can operate multidimensionally: the official version of history and the backstory. Necessarily, there is the political story and official story; the personal story; and the unseen story. As a matter of constitutional identity, Balkin encourages us to excavate the constitutional story of aspiration and redemption. Peering into the violent history of Kansas and the contradictions of its founding leaders, and grappling with its Civil War and civil rights impact with a critical lens, provides a way to put *Memory and Authority* into action and applicability.

¹⁵⁵ RICHARD S. BROWNLEE, *GRAY GHOSTS OF THE CONFEDERACY: GUERRILLA WARFARE IN THE WEST, 1861–1865*, at 39 (1958).

¹⁵⁶ See ALBERT CASTEL, *CIVIL WAR KANSAS: REAPING THE WHIRLWIND* 128–32 (1997).