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Constitutional Memories

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CONSTITUTIONAL MEMORIES

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INTRODUCTION

Many arguments in constitutional law invoke collective memory. Collective memory is what a group—for example, a religion, a profession, a people, or a nation—remembers and forgets about its past.[1] This combination of remembering and forgetting helps constitute the group's identity and structures its values and its commitments. Precisely because memory is selective, it may or may not correspond to the best account of historical facts.

The literature on memory uses several different terms—collective memory, cultural memory and social memory—more or less interchangeably, as I will in this Article.[2] However, some scholars treat cultural memory as a special case of collective memory.[3] Cultural memory refers to the narrative memory of now distant events that help constitute a group's identity but that most people in the group did not live through.[4] People commemorate or refer to these events—and the persons and stories connected to them—in cultural artifacts, documents, monuments, and artistic representations.[5] The collective memory of the Founding and Reconstruction, for example, is cultural memory. People recall or invoke cultural memory in public rhetoric, art, and social rituals—and, most important for our purposes, in law and politics.[6]

The use of collective memory in constitutional argument is constitutional memory. It shapes people's views about what the law means and why people have authority. Lawyers and judges continually invoke and construct memory; judicial decisions both rely on constitutional memory and produce constitutional memory.

What is remembered and what is erased has powerful normative effects. It shapes our understanding of who we are and how things came to be; what is traditional and

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[1] MAURICE HALBWACHS, ON COLLECTIVE MEMORY 38 (Lewis A. Coser ed. & trans., Univ. of Chi. Press 1992) (1925).

[2] *See, e.g.*, Michael Schudson, *Journalism as a Vehicle of Non-Commemorative Cultural Memory*, *in* JOURNALISM AND MEMORY 85 (Barbie Zelizer & Keren Tenenboim-Weinblatt, eds., 2014).

[3] Jan Assmann, *Collective Memory and Cultural Identity*, 65 NEW GERMAN CRITIQUE 125, 125 (1995).

[4] *Id.* at 126.

[5] *Id.* at 129.

[6] *Id.*

what is an innovation; who has committed wrongs and who has been wronged; what we owe to others and what they owe to us. Memory provides resources for understanding the world around us and assigning praise and blame. What is erased from memory, by contrast, can make no claims on us.

Collective memory—and forgetting—affect all types of constitutional interpretation. All of the standard forms of constitutional argument may make use of collective memory, and lawyers and judges often use history in stylized ways.[7] Arguments from collective memory take sides in historical events and often identify heroes and villains, positive and negative examples.[8] In American constitutional culture, originalist arguments are often hybrids that invoke collective memory.[9] They combine appeals to national ethos, political tradition, and honored authority with other modalities of argument.[10]

Many of the most important forms of constitutional interpretation—arguments from precedent, arguments from tradition, and arguments from original meaning or understanding—involve a mixture of memory and erasure. They emphasize certain elements of the past while effacing others. Yet the selectivity and erasure of constitutional memory can have ideological effects and can bestow on constitutional claims a legitimacy that they do not always deserve.

The scope of constitutional memory matters to legitimacy because many features of constitutional legitimacy depend, whether directly or indirectly, on implicit notions of societal consensus, majority opinion, and the consent of the governed. But if the consensus is not real, if the majority is artificially constructed, and if the consent of the governed is not genuine, this undermines assumptions about legitimacy.

At stake in constitutional memory is which historical figures and movements will count as makers of constitutional meaning for the present. If the memory of the adoption of the Constitution and its amendments features only a small group of white men as the central actors, the American constitutional tradition belongs to them and it is their views that matter. Women and racial minorities have constitutional rights only because these white men allowed them to have them.

Such a narrow account offers a false portrait of the country's history. When we engage in constitutional construction therefore, we should embrace an expansive conception of collective constitutional memory. The constitutional tradition in the United States is a dialectical tradition full of disagreements and multiple perspectives from many different people and groups, from every period in the nation's history, and from every part of society. It constitutes a rich source of competing ideas that later participants can draw on. These include the views and experiences of people left out of formal constitution-making, as well as the claims of social and

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[7] Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 679–82 (2013).

[8] *Id.* at 681–82.

[9] *Id.* at 700.

[10] *Id.* at 700–01.

political movements that have shaped our constitutional tradition. These groups can provide both positive and negative examples for the present.

The makers of constitutional meaning in the American political tradition are much broader than the Constitution's Framers and adopters, or even those who influenced the Framers and adopters. In constitutional construction, we may look to the ideas of people whose views were unpopular or minority positions in their own time, but whose constructions of the Constitution turned out to be far wiser than the dominant opinions of their day.

Not all of the lessons of constitutional memory are positive. Not everyone in the past was heroic, and even people and groups that we celebrate today had serious flaws and failings. Some of the lessons of constitutional memory are deeply ambivalent. But all can be grist for the mill of constitutional construction. When we implement and apply the Constitution in our own time, many different groups and many different people can be makers of constitutional meaning. What matters is what their ideas and experiences mean for the present, and whether they can serve as positive or negative examples for us today.

Part I of this Article describes the phenomenon of collective memory, the ideological effects of remembering and forgetting, and the role of memory entrepreneurs in telling stories about the past. Part II explains how constitutional memory shapes constitutional interpretation, and how arguments from precedent, original meaning, and tradition rely on combinations of memory and erasure. Part III argues that, in constitutional construction, we should employ an expansive conception of memory, attending to the ideas and experiences of persons and groups left out of formal constitution making, as well as social and political movements that have shaped the American constitutional tradition.

I. THE POWER OF MEMORY AND ERASURE

Memory concerns what people remember about the past and how they remember it. Memory is not the same as an accurate record of events.[11] The memory of the American Civil War, for example, may be different from what actually happened in the Civil War.

Collective memory is a set of stories, icons, symbols and events that help constitute members of a social group as a group, and that help constitute the group's identity and its sense of shared values.[12] Collective memory shapes group members'

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[11] EVIATAR ZERUBAVEL, TIME MAPS: COLLECTIVE MEMORY AND THE SHAPE OF THE PAST 2 (2003) ("[N]ot everything that happens is preserved in our memory, as many past events are actually cast into oblivion. Even what we conventionally consider 'history' . . . is not a truly comprehensive record of everything that ever happened, but only a small part of it that we have come to preserve as public memory.").

[12] Chris Weedon & Glenn Jordan, *Collective Memory: Theory and Politics*, 22 SOC. SEMIOTICS 143 (2012) ("Collective memory and the institutions and practices that support

understanding of their past and how they reason about the present in light of the past. In this way, collective memory grounds and shapes people's practical reasoning in politics, in policy debates, and in their relationships with others.[13]

Collective memory is a distinctively social phenomenon.[14] It is different from the sum of individual memories about the group or the nation. Some individuals may know things about the past that other people do not, but they live together in societies with shared memories and symbols of the past and shared associations and meanings about people and events from the past.[15] A great deal of what people know about the past comes from the memory and recounting of others, so that memory becomes a sort of shared resource.[16] Even *how* people remember is shaped by the cultures in which they live.[17] Moreover, people not only have their own sense of the past and its meaning, but they also have a sense of what other people in their group believe about the past. Thus, they recognize that they and others have *shared* memories, symbols, and narratives.[18]

Collective memory is embodied in the stories people tell each other about the past and in the cultural references and allusions they make in everyday speech.[19] It is preserved and propagated socially in everyday expressions, in political rhetoric, in religion, in popular culture, in memes, in museums, in schoolbooks, in historical scholarship, in legal opinions and so on.[20] Collective memory is also embodied in

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it help to create, sustain and reproduce the 'imagined communities' with which individuals identify and that give them a sense of history, place and belonging.") (citing BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 2006)).

[13] *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J. L. & PUB. POL'Y 19, 21 (2022) (defining constitutional memory as a "form of collective memory forged through constitutional interpretation"); *id.* at 21 ("The Constitution's interpreters are continuously producing constitutional memory . . . as they tell stories about the nation's past experience to clarify the meaning of the nation's commitments, to guide practical reason, and to help express the nation's identity and values.").

[14] HALBWACHS, *supra* note 1, at 38.

[15] ZERUBAVEL, *supra* note 11, at 2–4; *see also* ERNEST RENAN, *What Is a Nation?*, *in* WHAT IS A NATION? AND OTHER POLITICAL WRITINGS 247, 261 (2018) ("A nation is a soul, a spiritual principle. Two things that, in truth, are but one constitute this soul, this spiritual principle. . . . One is the possession in common of a rich legacy of memories; the other is present consent, the desire to live together, the will to perpetuate the value of the heritage that one has received in an undivided form.").

[16] HALBWACHS, *supra* note 1, at 38.

[17] ZERUBAVEL, *supra* note 11, at 4 ("The difference between what Americans and Indians tend to recall from wedding ceremonies, for example, is a product of their having been socialized into different *mnemonic traditions* involving altogether different mental filters commonly shared by their respective mnemonic communities.").

[18] *Id.*

[19] Assmann, *supra* note 3, at 126–27. Assmann distinguishes these forms of collective memory as "communicative memory," which he distinguishes from cultural memory.

[20] *Id.*

the central or sacred texts of a culture like the Declaration of Independence or the Bible, in works of art, in architecture, in monuments, and in rituals.[21] Thus, rather than simply being a collection of individual memories, the collective memory of the past is embedded in social life, institutions and artifacts.[22] The more often a historical event, person, or epoch is referred to or institutionalized in texts, art, monuments and rituals, and the more often people draw on it and tell stories about it, the more likely it is to become part of the group's collective memory even if people don't remember all the details or even get them wrong.[23]

The fact that members of a group share collective memory does not require that everyone in the group remembers the same things, or remembers them in the same way.[24] For example, Americans have very different memories of the American Civil War and why it was fought. Indeed, features of a group's collective memory are often simultaneously shared *and* contested.[25] These contests often reflect or correspond to present-day differences and struggles within the group. Memories of a group's past, in other words, may be contested *because* they are shared and constitutive.

Shared memory is less about historical accuracy and more about a common set of cultural resources for making claims in the present. The civil rights activist Rosa Parks is now a part of the collective memory of the United States.[26] But that does not mean that everyone in the United States knows who Rosa Parks is or what she did.

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[21] *Id.* at 128–30. Assmann calls these forms of collective memory "cultural memory," while others use the terms collective memory and cultural memory more or less interchangeably.

[22] *See generally* PIERRE NORA, *Conflicts and Divisions*, *in* 1 REALMS OF MEMORY: THE CONSTRUCTION OF THE FRENCH PAST (Arthur Goldhammer trans. (1996)) (theorizing the locations of memory in various material and non-material sites and practices).

[23] *See, e.g.*, SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (rev. ed. 2018) (explaining how commemorative monuments are employed to shape collective memory); YAEL ZERUBAVEL, RECOVERED ROOTS: COLLECTIVE MEMORY AND THE MAKING OF ISRAELI NATIONAL TRADITION 5–6 (1995) (explaining that commemoration is "central to our understanding of the dynamics of memory change"); PAUL CONNERTON, HOW SOCIETIES REMEMBER (1989) (emphasizing the role of commemoration and performance in constructing social memory).

[24] ZERUBAVEL, *supra* note 11, at 2.

[25] *See, e.g.*, Barbie Zelizer, *Reading the Past Against the Grain: The Shape of Memory Studies*, 12 CRITICAL STUD. MASS COMMC'NS 214, 214 (1995) ("By definition, collective memory . . . presumes activities of sharing, discussion, negotiation, and, often, contestation."); *see also* Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices*, 24 ANN. REV. SOCIO. 105, 126–28 (1998) (reviewing the literature on the social contestation of memory); LEVINSON, *supra* note 23 (describing how public monuments become the occasion for continuing controversies in political and social life).

[26] *See* Barry Schwartz, *Collective Forgetting And The Symbolic Power Of Oneness: The Strange Apotheosis of Rosa Parks*, 72 SOC. PSYCH. Q. 123, 123 (2009) (explaining how, through processes of commemoration that produce collective memory, Rosa Parks became remembered as the singular example of the courage of civil rights protesters).

Some people may know little about her other than her name, and their views about her may be quite hazy and ill-informed. When people are arguing a point or defending themselves from potential criticism, they may invoke Rosa Parks or the meme that she refused to give up her seat and move to the back of a bus, and they may do so in creative and even tendentious ways.

In short, people continually use collective memory as a rhetorical resource for reasoning with others. People reinterpret or appropriate elements of the past and the meaning of the past to persuade others about what is happening in society and what we should or should not do. This rhetorical use of memory is especially important and powerful in legal argument.

Subcultures and subcommunities, such as the African-American community or the American Jewish community, can have a different collective memory about events, stories and persons, one that is connected to their experiences and constitutive of their distinctive identities. These memories may overlap with the historical memories of other groups but may also be at odds with them.[27]

Moreover, specific professional or institutional communities, such as the community of lawyers or academics, may have different and more detailed shared memories and stories than those held in the general public. The collective memory of American lawyers is shaped by their legal education and by the opinions, briefs, and legal writings that they encounter. Important cases like *Lochner v. New York*[28] or *McCulloch v. Maryland*[29] will have meanings and resonances for American lawyers that will mostly be lost on the general public. For professions and academic disciplines, what is collectively remembered is often closely connected to what is canonical.

Thus, collective memory refers to a very complex social phenomenon: the distribution of partly similar and partly different shared beliefs about the past by different people and groups in society, and the way those beliefs are preserved, contested, and altered through rhetoric, social interaction, art, institutions, and rituals.[30]

A. The Normative Power of Memory

Memory is important to politics and to law because of its normative power. Memory has normative power because it helps constitute the identity, values, and

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[27] *See, e.g.*, ZERUBAVEL, *supra* note 23, at 11 ("Countermemory challenges . . . hegemony by offering a divergent commemorative narrative representing the views of marginalized individuals or groups within the society."); Katherine M. Franke, *The Uses Of History In Struggles For Racial Justice: Colonizing The Past And Managing Memory*, 47 UCLA L. REV. 1673, 1679 (2000) ("For most racial and ethnic groups in the United States, the memory of 'their' treatment in the past is relevant to the present insofar as it plays a fundamental role in the constitution of present group identity."); Olick & Robbins, *supra* note 25, at 126–27 (discussing counter-memories).

[28] Lochner v. New York, 198 U.S. 45 (1905).

[29] McCulloch v. Maryland, 17 U.S. 316 (1819).

[30] *See* ZERUBAVEL, *supra* note 23, at 5; Assmann, *supra* note 3, at 130.

reasoning assumptions of a group and its members.[31] A group's collective memory helps explain who members of the group are, what things mean, and how things got to be the way they are.[32] A group's collective memory includes the group's past achievements and failures, stories about its previous struggles, triumphs, and defeats, and the injustices or humiliations the group suffered or righted along the way.[33]

In this way memory undergirds common sense and practical judgment. It tells members of the group who they are and what they stand for, what they regard as just and unjust, what they value and do not value.[34]

People understand themselves through the stories they tell about themselves, and they understand the groups and nations to which they belong through stories about the emergence and history of their group or nation.[35] Through these stories about how things came to be (and what these stories make salient or forget), people get a sense of how society should be ordered, what needs to preserved and defended, and whether and how society needs to change.

In this way, memory shapes understanding because it offers narratives that a group's members can use to understand current events. These stories give people a sense of how social and political life works, how things came to be the way they are, and how events are likely to unfold. Memory also provides examples to reason with and argue with, to judge situations and persons with, and to compare and contrast with the present.

What people think happened in the past shapes their views about the present and future. If you think that Reconstruction was a period of political corruption in which Black people were thrust unprepared into citizenship and unscrupulous northern carpetbaggers invaded and took advantage of a defeated South, you will have a different view about race relations and federalism than if you believe that Reconstruction was a crucial period of reform, constitutional renewal, and Black empowerment

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[31] Eviatar Zerubavel, *Social Memories: Steps to a Sociology of the Past*, 19 QUALITATIVE SOCIO. 283, 290 (1996).

[32] *Id.* ("*[S]ociobiographical memory* . . . accounts for the sense of pride, pain, or shame we sometimes experience with regard to events that had happened to groups and communities to which we belong long before we joined them.").

[33] *See* RENAN, *supra* note 15, at 261 ("Where national memories are concerned, grief is of more value than triumphs, for it imposes duties, it requires a common effort. A nation is therefore a vast solidarity, constituted by the sentiment of the sacrifices one has made and of those one is yet prepared to make.").

[34] *Cf.* ZERUBAVEL, *supra* note 11, at 3 ("[A]cquiring a group's memories and thereby identifying with its collective past is part of the process of acquiring any social identity, and familiarizing members with that past is a major part of communities' efforts to assimilate them.").

[35] J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 203–05 (1998) (discussing the functions of group narratives); Michael Schudson, *Dynamics of Distortion in Collective Memory*, *in* MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 355 (Daniel L. Schacter ed., 1995) ("To pass on a version of the past, the past must be encapsulated into some sort of cultural form, and generally this is a narrative, a story . . . with a protagonist and obstacles in his or her way and efforts to overcome them.").

that was tragically undermined by white Southern resistance and terrorist violence.[36] If you think that Franklin Roosevelt's court packing plan was a failure that was rejected by politicians of both parties and that undermined his domestic agenda for the rest of his presidency, you will have a different view of court expansion today than if you believe that Roosevelt's plan failed only because of the sudden death of the Senate Majority leader and that Roosevelt actually achieved his most important goals.[37] If you believe that the Senate filibuster has always existed, you will have a different view about reforming or abolishing it than if you believe that the Senate's voting and debate rules have changed repeatedly throughout the country's history and that current practices imposing a sixty-vote requirement for most legislation are a relatively recent innovation.[38]

Thus, memory does not merely recollect or describe. It also grounds practical judgment and imposes a normative order on the world. Memory has normative power because it structures common sense.

First, what we remember (and do not remember) offers a sense of what is normal, natural, traditional, or to be expected, and conversely, what is abnormal, unusual, deviant, or unexpected.[39] Memory helps generate the sense that certain features of a situation are representative or expected, while others appear extraordinary or unusual; memory helps identify certain features as salient while placing others in the background.

Second, memory of what is normal serves as a template for norms, both descriptive and normative.[40] As a descriptive matter, memory of how things happened is a template for comparing or contrasting what will happen this time. As a normative matter, memory shapes political and moral authority because it shapes what we regard as natural, normal, or appropriate. "It has always been this way," or "it has never been this way," "this is the way it happened before," or "this has never happened" are not merely descriptions of events. They are also rhetorically powerful normative arguments.

Third, memory provides an origin story for us and for other groups and persons that we interact with. It provides a template and a ready set of expectations for our interactions with others on which we can improvise.[41]

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[36] *See* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 (1935); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

[37] *Court Packing as History and Memory*: *Testimony Before the Presidential Commission on the Supreme Court of the United States* 1–3, 21–22 (June 30, 2021) (statement of Laura Kalman, Distinguished Research Professor, U.C. Santa Barbara), https://www.whitehouse.gov/wp-content/uploads/2021/06/Kalman-06.25.2021.pdf [https://perma.cc/6LT4-Z54K].

[38] *See* Tara Subramaniam, *Fact-Checking Manchin's Claim the Senate Filibuster Has Not Been Changed in 232 Years*, CNN (Jan. 13, 2022, 4:40 PM), https://www.cnn.com/2022/01/13/politics/manchin-filibuster-fact-check/index.html [https://perma.cc/EA78-D9FH].

[39] BALKIN, *supra* note 35, at 191–93, 210.

[40] *Id.*

[41] *Id.* at 208, 210–12.

Fourth, narrative memory tells us what our current situation is and therefore what, if anything, we should do about it. In this way, memory can either rationalize or condemn existing social relations.[42]

Fifth, the narratives in collective memory provide historical and social scripts for social analysis and social interaction. People fit current social relations into examples of existing stories, using the latter to understand how to behave in the present. A group's stories create scripts—the story of the Boston Tea Party, the story of Prohibition, the story of the Vietnam War—that suggest how things happened and how they are likely to happen in the present. Historical scripts are normatively powerful because they suggest how people are likely to behave and how they should behave.[43] These scripts also have normative power because they are bound up with associations and judgments of success and failure, wisdom and folly, good and evil, justice and injustice.

Sixth, memory gives a trajectory to events.[44] It tells us that we are in decline or at a stage of upward progress. It tells us whether the arc of history bends toward justice or disappointment. It offers a list of things left undone, promises to be fulfilled, wrongs to be righted, or injuries to be revenged.

Seventh, memory shapes who and what we identify with and who and what we disidentify with, who we root for in a conflict and who we oppose. It offers examples of endeavors that succeeded (World War II) and those that failed (Prohibition). Memory offers associations of good and bad characteristics to events, things, and persons. By telling stories, people assign praise and blame and diagnose justice and injustice. Stories about the past allow people to express grievance and excuse. They give people examples of heroes and villains (and of ambiguous characters in between), just actions and unjust actions, triumphs and disasters, things to be done and things never to do again.[45] For example, from the memory of the Civil Rights movement Americans get Rosa Parks and Martin Luther King as paradigmatic heroes, segregated water fountains and police turning firehoses on civil rights demonstrators as paradigmatic injuries, and so on.

B. Remembering and Forgetting: The Power of Erasure

Memory involves selective remembering and forgetting.[46] One cannot remember everything and remembering too many things may undermine a coherent narrative.[47]

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[42] *Id.* at 210–11.

[43] *Id.* at 212–15.

[44] *Id.* at 200, 204, 214–15.

[45] *Id.* at 203–04.

[46] *See* RENAN, *supra* note 15, at 251 ("The act of forgetting, I would even say, historical error, is an essential factor in the creation of a nation."); *id.* ("[T]he essence of a nation is that all individuals have many things in common, and also that they have forgotten many things.").

[47] SCOTT A. SMALL, FORGETTING: THE BENEFITS OF NOT REMEMBERING 43–44 (2021)

So, in memory, some features of the past receive emphasis and others recede into the background or are not mentioned at all. In other words, memory is an economy of what is remembered (or misremembered) and what is not remembered or forgotten. Therefore, whenever we speak about memory we must also speak about erasure.

What is remembered may be normatively powerful, but what is erased may be even more powerful.[48] Like what is remembered, erasure has both descriptive and normative effects. If memory offers accounts of past injury, failure to remember erases the recognition of injury; it erases both the assignment of blame and the recognition of credit and praise. If memory tells us a story of how things came to be, erasure occludes origins, disguises causes, hides defeats and falsifies achievements. If the memory of the past tells us that current arrangements are the result of previous injustices that people contested and resisted, erasure of the past makes the present appear legitimate and the result of consent and free choice.

Whatever is erased from memory loses its power to shape meaning. Forgotten injustices lead people to assume that the present is more or less justified. The power of tradition, or of what has always been done, depends on people not remembering that things have been done differently in the past or that past practices were contested and diverse. The belief that things have always been this way depends on people not remembering the conflicts and struggles that resulted in the status quo.

Erasure amplifies the moral meaning of what is remembered, while evaporating the moral meaning of what is erased. If we did not remember the Civil Rights Movement, its moral authority—and its ability to shape our views of paradigmatic cases of justice and injustice—would disappear.

That is why erasure—what is not remembered—is as important to the normative significance of the present as remembering. To gain legitimacy or moral authority, therefore, it is important to have control over memory.[49] Hence fights over memory are never-ending, because what is at stake in remembering the past is the moral high ground of the present. The meaning of the past is the terrain on which battles over the present are fought.

C. Memory Entrepreneurs

Although some elements of a group's memory are long lasting, other parts change over time. In fact, what people remember about their past is always changing as one generation succeeds another. The transformation and transvaluation of memory is not merely a passive process. Memory and historical narratives are always in motion

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(explaining that forgetting is necessary to forming the generalizations necessary for accumulating knowledge); JORGE LUIS BORGES, COLLECTED FICTIONS 137 (Andrew Hurley, trans.) (1999) ("To think is to ignore (or forget) differences, to generalize, to abstract.").

[48] Zelizer, *supra* note 25, at 220.

[49] *Cf.* GEORGE ORWELL, 1984, at 37 (Everyman's Library ed. 1987) ("'Who controls the past,' ran the Party slogan, 'controls the future: who controls the present controls the past.'").

through education of the next generation, and through public contestation, assertions and representations made in institutions such as journalism, religion, politics, and art.

Changes in how we remember things often result from the efforts of people and institutions who want people to remember the past differently or remember different things. These people and institutions are memory entrepreneurs.[50] Just as norm entrepreneurs attempt to change people's norms, memory entrepreneurs try to change memory and narratives of the past.[51] And since memory has normative power, these two tasks are often closely linked.

Because memory is an economy of remembering and forgetting, memory entrepreneurship attempts to alter this economy, offering a different mixture of what we remember and what we forget in order to produce an altered set of meanings and inferences about the normal and the unusual, the natural and the constructed, the legitimate and the illegitimate, the just and the unjust. Memory entrepreneurship attempts to restructure identity, obligation, and common sense through selective emphasis and de-emphasis, remembering and forgetting.[52]

Uncovering old history and publicizing it is an example of memory entrepreneurship. So too is telling the story of the past differently, reframing origin stories, placing familiar historical figures in different lights, recasting honored authorities as deeply flawed or familiar villains as newly sympathetic characters, and recovering and promoting forgotten people, movements, and claims. Just as the origin stories of literary characters and comic book heroes and villains are revised from time to time, so too are narratives of a group's history and the cultural associations of the figures, movements, and communities within them. One need only witness the continual rise and fall—and the continuing historical transformations—of the reputations of founders like Thomas Jefferson and Alexander Hamilton over the course of American history.[53]

To be sure, this reshaping of the past and characters from the past can be propagandistic and in the service of state power. Politicians may bury inconvenient events and offer fabricated accounts designed to avoid recognition of injustices and place their party and themselves in the best possible light. There is a saying attributed to

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[50] *See* ROBYN AUTRY, DESEGREGATING THE PAST: THE PUBLIC LIFE OF MEMORY IN THE UNITED STATES AND SOUTH AFRICA 27 (2017); ELIZABETH JELIN, STATE REPRESSION AND THE LABORS OF MEMORY 33–34 (2003); FRANCESCA LESSA, MEMORY AND TRANSITIONAL JUSTICE IN ARGENTINA AND URUGUAY: AGAINST IMPUNITY 19 (2013) (summarizing Jelin's concept of memory entrepreneurs); *see also* GARY ALAN FINE, DIFFICULT REPUTATIONS: COLLECTIVE MEMORIES OF THE EVIL, INEPT, AND CONTROVERSIAL 63 (2001) (offering the related concept of "reputational entrepreneurs").

[51] JELIN, *supra* note 50, at 33.

[52] *Id.* at 33–35; AUTRY, *supra* note 50, at 27–29.

[53] R. B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 116 (2009) (noting that Jefferson's and Hamilton's reputations "have risen and fallen almost in complementary historical cycles, suggesting that their struggles with one another when alive continue by proxy long after their deaths.").

Milovan Diljas, the former Yugoslavian revolutionary (and later critic of communism), that "the hardest thing about being a Communist is trying to predict the past."[54] History had been constantly revised by the communist regime's propagandists to fit the party's current needs.

But much memory entrepreneurship is less morally troubling. Indeed, it is an almost inevitable feature of political and social life. Retelling the story of the past and reconfiguring its meaning for the present is a familiar feature of our lives.[55] One reason for this is that the past continually looks different to us as we move into the future.[56] Historical episodes, some remembered, some forgotten, become newly relevant and salient as our situation changes.[57] The pandemic of 2020 caused people to pay attention to and reinterpret the history of previous pandemics and public health emergencies, for example.[58] And each generation, if it learns of the past at all, must learn of it from where that generation sits in time and experience.

Not only is memory entrepreneurship ubiquitous, it is difficult to imagine the work of the historical profession without it. Accuracy is surely important to historians, but so too are fresh perspectives that help us understand lost worlds. A historian who revealed nothing new that was not in previous historical accounts, who made no fresh discoveries of persons, places, and events, who offered no new perspectives on the past or new ways of telling or highlighting different elements in familiar narratives, would likely be regarded as undistinguished or routine. Historians are honored not only for remembering but also for remembering differently, in ways that can successfully resonate with, enlighten, and persuade their audiences. Memory entrepreneurship is not alien to their professional norms; it is part of them.

Memory entrepreneurship is also a key feature of politics and legal change.[59] As social and political movements seek to gain legitimacy and influence, these movements turn to history to retell and reconfigure familiar stories about the past, and to offer new stories about people forgotten, marginalized, or previously condemned.[60]

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[54] PHILIP J. COHEN, SERBIA'S SECRET WAR: PROPAGANDA AND THE DECEIT OF HISTORY 134 (1996).

[55] Schudson, *supra* note 35, at 351–55 (noting the many ways that memory is instrumentalized for present-day purposes).

[56] *Cf.* Carl N. Degler, *Why Historians Change Their Minds*, 45 PAC. HIST. REV. 167, 184 (1976) ("[I]f historians did not change their minds about the past as the values of the society shifted, their history would cease to be part of the culture and therefore incapable of illuminating present with the light of the past.").

[57] JAN ASSMANN, MOSES THE EGYPTIAN: THE MEMORY OF EGYPT IN WESTERN MONOTHEISM 9–10 (1997) ("Events tend to be forgotten unless they live on in collective memory. . . . The reason for this living on lies in the continuous relevance of these events. This relevance comes not from their historical past, but from an ever-changing present in which these events are remembered as facts of importance.") (internal quotations omitted).

[58] *See, e.g.*, JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19 (2022).

[59] JELIN, *supra* note 50, at 33–37.

[60] Timothy Kubal & Rene Becerra, *Social Movements and Collective Memory*, 8 SOCIO.

Lawyers on opposite sides of a dispute have reasons to shape memory differently because of the normative conclusions they want decision makers to reach. Although both lawyers and historians can be memory entrepreneurs, how they attempt to retell the story of the past is shaped by their different professional norms, leading to familiar conflicts and tensions between them.[61]

D. Memory Wars, Mobilization, and Status Conflicts

Just as we can speak of memory entrepreneurs, we can speak of *memory wars*—struggles over how to remember the past, which parts of the past to emphasize and which parts to de-emphasize and even forget.[62] Eastern European countries have fought memory wars about who is responsible for atrocities in World War II, and countries have passed memory laws to try to control what people remember about the past.[63] In the United States, politicians have sought to pass laws limiting what children can be taught about race, slavery, and other "divisive" subjects.[64]

Perhaps the most common occasion for struggles over memory is in political and legal disputes. "Disputes about forging a common future," Reva Siegel explains, "are . . . expressed as claims about a shared past."[65] People struggle over what to do in the present by making claims about what happened in the past and what it means. When people fight over what they should do in the future, they often fight about what happened in the past. This means that political and social conflicts are also often conflicts over memory, and memory itself becomes an important terrain of struggle.

When social movements seek to persuade others to adopt reforms, they often attempt to remind people about past injustices and their current effects.[66] But in order to persuade people outside the movement that the movement's claims are just, they also often invoke shared features of a common political culture that have normative authority.[67] In the antebellum era free Black people invoked the Declaration of

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COMPASS 865, 868 (2014); *cf.* JELIN, *supra* note 50, at 36 ("The role of memory entrepreneurs is central to the dynamics of the conflicts that surround public memory.").

[61] Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 382–83 (2020).

[62] NIKOLAY KOPOSOV, MEMORY LAWS, MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA (2018).

[63] *Id.* at 1–8.

[64] Timothy Snyder, *The War on History Is a War on Democracy*, N.Y. TIMES (June 26, 2021), https://www.nytimes.com/2021/06/29/magazine/memory-laws.html [https://perma.cc/UXU4-TCS6].

[65] Reva B. Siegel, *2005–06 Brennan Center Symposium Lecture, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1350 (2006).

[66] *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1756–58 (2000) ("[F]raming injustice is about social memory.").

[67] Siegel, *supra* note 65, at 1357 ("[A]dvocates must defend their interpretation of the

Independence's claim that "all men are created equal" to argue for their civil rights.[68] The Seneca Falls Declaration of 1848 arguing for women's rights is also modeled on the text of Declaration.[69]

It does not matter that the historical purpose of the Declaration was not to secure sex equality, undermine slavery, or give Black people equal rights, but to justify a revolt of white colonists—many of whom owned slaves—against the British empire.[70] Nor does it matter that many if not most of the Declaration's signers would have opposed claims of race and sex equality. What mattered was that, by the early nineteenth century, the Declaration had become an honored object of collective memory in the United States that could be mobilized to claim that equality—however imperfectly realized at the Founding—was always at the heart of American values and commitments.

Disputes over memory may also form part of larger conflicts over social status as an existing status order is changing. Conflicts over status are struggles over who is more (or equally) important, moral, worthy of respect, central to the nation's identity, or exemplary of its values, virtues, and character.[71] Societies such as the United States have multiple status hierarchies of race, ethnicity, religion, immigrant status, sex, sexual orientation, and so on. As status relations change, some group members who fear losing their comparatively higher status may resist these changes, often bitterly, and sometimes even violently. They may resist because—in the short run at least—changes in status relations tend to be zero-sum: any gain in status for a formerly subordinate group is felt as a comparative loss of status for higher-status groups.[72]

One way that people resist changes in status relations is through assertions about memory and attempts to control what is remembered and forgotten about the past. For example, during the establishment of Jim Crow, and again during the Civil Rights Revolution, White Southerners reasserted their status through monuments and histories that celebrated the Confederacy as Southern heritage.[73] Today, as white

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Constitution as vindicating principles and memories of a shared tradition"); *id.* at 1358 ("[I]n attempting to persuade men outside its ranks to enfranchise women, the [suffrage] movement emphasized the principles and memories that united citizens into a community rather than the values and interests that divided citizens in the community.").

[68] SIMON J. GILHOOLEY, THE ANTEBELLUM ORIGINS OF THE MODERN CONSTITUTION: SLAVERY AND THE SPIRIT OF THE AMERICAN FOUNDING 73 (2020).

[69] LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848–1898, at 12 (2014).

[70] KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 35–38 (2022).

[71] *See* Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2326–32 (1997).

[72] *Id.* at 2328–29.

[73] Ryan Best, *Confederate Statues Were Never Really About Preserving History*, FIVE THIRTYEIGHT (July 8, 2020, 7:00 AM), https://projects.fivethirtyeight.com/confederate-statues/ [https://perma.cc/AU4P-NDKY]; *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy [https://perma.cc/4FKU-7DAT]; Becky Little, *How the US*

people slowly approach a numerical minority in American society, racially conservative white people fight over school curricula, and whether students will be taught "divisive subjects," which include materials (history books, novels, and other forms of art) that call attention to the role of slavery, Jim Crow, and racism in American history.[74] Although these materials were previously part of school curricula, they have become newly controversial because the politics of race has changed in the United States in the past decade and a half.[75]

Emphasizing the deeds, arguments and even existence of people and of communities with comparatively lower status symbolically raises the status of groups that identify with them today. An apparent change in status occurs because members of these groups—and their voices, arguments, and accomplishments—now appear to matter more to the history of the country.[76]

Increased attention to the accomplishments of women and racial minorities in historical accounts may feel like a status injury to groups who previously dominated the canon of historical memory. Thus, racially conservative white people may object to increasing attention to non-white people and the concerns of non-white people in history and memory.[77] That is because attention—and even attention in memory—is a scarce commodity. Moreover, attention is linked to status, and status, in turn, is linked to cultural and political power. Those who are remembered, and by proxy, those who identify with them today, gain higher status because they gain a larger share of attention.[78] A similar although not identical effect occurs when minority groups gain a greater share of attention in movies, television shows, or advertisements. The shift of attention toward minority characters alters cultural meanings and social status by redefining what is normal, expected, and natural in social life. The balance of who is seen and heard, and therefore whose concerns are salient, reshapes, however subtly, who counts in social life.

The controversy over the 1619 Project, which argued that the country's origins cannot be separated from its maintenance of chattel slavery, and the related debate over the extent to which the Constitution actually accommodated or protected slavery, are fights about memory with obvious connections to contemporary anxieties about who Americans really are and the values America holds today.[79] These controversies

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Got So Many Confederate Monuments, HISTORY.COM (Sept. 8, 2021), https://www.history.com/news/how-the-u-s-got-so-many-confederate-monuments [https://perma.cc/5X2T-YB85].

[74] Ruth Terry, *Teaching About Racism*, 32 CQ RESEARCHER 1 (2022), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2022012100 [https://perma.cc/YF2M-EFCS]; Snyder, *supra* note 64.

[75] Snyder, *supra* note 64.

[76] Balkin, *supra* note 71, at 2333–35 (noting the "paradox of status hierarchy," in which status conflicts become increasingly bitter as subordinate groups gain any degree of status or recognition).

[77] *See, e.g.*, Terry, *supra* note 74.

[78] Balkin, *supra* note 71.

[79] Jake Silverstein, *The 1619 Project and the Long Battle Over U.S. History*, N.Y. TIMES

arose following the election of the nation's first Black president, Barack Obama, which sensitized many white people to questions of race and their own racial identity,[80] and the election of a racist demagogue, Donald Trump, immediately following the Obama Presidency.[81] President Trump's creation of a "1776 Project" to rebut the 1619 Project is an unsubtle example of a fight over memory.[82] It is a dispute about the American story and how America became the country it is today.[83] Similarly, historical arguments about whether the Constitution was really pro- or anti-slavery reflect contemporary concerns about the nature of the country and the story of how our present world came to be. These debates are exercises in memory entrepreneurship that struggle over what America means, what is good and bad about it, what needs to be preserved and honored, and what needs to be denounced and changed.

II. CONSTITUTIONAL MEMORY

When people make arguments about the proper interpretation of the Constitution, they call on features of the past to gain authority for their arguments (or to undermine the authority of their opponents' arguments). Following Reva Siegel, we might call the invocation of memory in constitutional argument the use of constitutional memory.[84] Constitutional memory organizes our views about what the law means and why people have authority, what is normal and what is abnormal, usual or unusual, and what arguments about the Constitution are plausible and implausible.

MAG. (Nov. 12, 2021), https://www.nytimes.com/2021/11/09/magazine/1619-project-us-history.html? [https://perma.cc/6NWM-V5VC]; *The 1619 Project*, https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [https://perma.cc/4758-87BH] (last visited Dec. 8, 2022).

[80] MICHAEL TESLER, POST-RACIAL OR MOST-RACIAL: RACE AND POLITICS IN THE OBAMA ERA 146–49, 163–64 (2016).

[81] German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2020*, VOX (Aug. 13, 2020, 7:00 PM), https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history [https://perma.cc/H3EE-SJK8]; Peter Baker et al., *Trump Employs an Old Tactic: Using Race for Gain*, N.Y. TIMES (July 20, 2019), https://www.nytimes.com/2019/07/20/us/politics/trump-race-record.html [https://perma.cc/F6G9-NB43]; Thomas B. Edsall, *The Deepening 'Racialization' of American Politics*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/opinion/trump-obama-race.html [https://perma.cc/Q9BV-5JJ2].

[82] *See* 1776 Commission Takes Historic and Scholarly Step to Restore Understanding of the Greatness of the American Founding, WHITEHOUSE.GOV (Jan. 18, 2021), https://trumpwhitehouse.archives.gov/briefings-statements/1776-commission-takes-historic-scholarly-step-restore-understanding-greatnessamerican-founding/ [https://perma.cc/8JNX-PQDA].

[83] *Id.*

[84] Siegel, *supra* note 13, at 21; *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1032 (2002) [hereinafter Siegel, *She the People*] ("We invoke the aspirations, values, choices, commitments, obligations, struggles, errors, injuries, wrongs, and wisdom of past generations of Americans as we make claims about the Constitution . . . . Collective memory thus plays a central role in constitutional reason.").

In constitutional disputes, different parties often invoke different accounts of memory. They attempt to reshape memory through persuasive narratives and redescriptions. They emphasize certain aspects of the past while leaving out others, offer new examples and historical research, and re-characterize existing stories, people, events, and understandings to support their arguments. Lawyers and judges continually invoke and construct memory, and judicial decisions both rely on constitutional memory and produce constitutional memory.[85] Thus, constitutional interpreters, including lawyers and judges, are often memory entrepreneurs. And, as we will see shortly, many uses of constitutional memory involve significant forms of erasure.[86]

The legitimacy of public and private power is at stake in these dueling claims. Constitutional interpreters use memory to bestow authority on their arguments, invoking the kinds of memory that they hope will buttress their claims.[87] Meanwhile, their opponents attempt to deconstruct and complicate these claims of memory, offering counter-narratives and examples.

Lawyers draw on both what they know as citizens and what they know as members of a legal profession educated in the law. Therefore, the constitutional memory of lawyers and judges may be different and, in some ways, more specialized than the constitutional memory of the public as a whole because the constitutional canon is different for lawyers and judges than it is for ordinary citizens, who have not studied the history of the American Constitution and its development.[88]

Supreme Court opinions construct the professional memory of constitutional lawyers and judges.[89] These opinions, in turn, are tutored by lawyers making arguments,

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[85] *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 3–4 (2011) ("[B]ehind every constitutional interpretation there lies a narrative, sometimes hidden and sometimes overt, a story about how things came to be, injustices fought or still to be rectified, things 'we' (the People) did before, things we still have to do, things that we learned from past experience, things that we will never let happen again."); *cf.* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.").

[86] *See, e.g.*, Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 269–70 (2019) (arguing that the Supreme Court often engages in "parenthetical" uses of memory, which treat past evils "as exceptional—a baleful aberration from an otherwise noble tradition"); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015) ("[W]hat is especially remarkable about the contemporary framing of the United States as a civic polity is how it erases, almost entirely, the colonial structure of the American past.").

[87] *See* BALKIN, *supra* note 85, at 3 ("Often constitutional principles are doctrines are justified by stories about decisions and actions taken (or not taken) in the past. We do this now because we did that then. . . .").

[88] *See generally* Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 975 (1998) (describing the differences between pedagogical, cultural literacy, and academic theory canons).

[89] Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 173

by amicus briefs that provide historical quotes, events, and contexts, and by law review articles and legal scholarship that other lawyers read, quote, and cite.[90] Judicial opinions both depend on and amplify conceptions of constitutional memory, and thus the ideological effects of what is remembered and what is forgotten.[91]

A. The Canon and Constitutional Memory

Constitutional memory has deep connections to the constitutional canon. Sanford Levinson and I argue that the constitutional canon consists not only of key decisions, statutes, and conventions, but also widely shared constitutional narratives.[92] To a large extent learning American constitutional law also involves learning a set of stories about American constitutional development and especially the work of the Supreme Court. In other words, education in constitutional law is education in constitutional memory. It follows that disagreements about constitutional interpretation, and even over constitutional theory, are often fights over what counts as canonical. These fights are not only about which decisions and opinions are or should be viewed as canonical, but also about which stories and memories of the creation and development of the Constitution are or should be canonical. Fights over constitutional interpretation, in other words, are often fights over constitutional memory.

Take, for example, the constitutional memory associated with *Lochner v. New York*,[93] a 1905 decision that struck down a maximum hour law for bakers. For many years *Lochner* was regarded as a central example of the anti-canon—that is, famous decisions that exemplify how not to interpret the Constitution.[94] *Lochner*'s anti-canonical status is embedded in a canonical narrative about the lessons of the constitutional struggle over the New Deal. Lochner symbolizes the Old Court and its jurisprudence that was overthrown in the "constitutional revolution of 1937" and the New Deal settlement.[95] But in the past thirty years, *Lochner*'s anti-canonical status has begun to shift. These days many legal intellectuals—primarily conservatives and

(2006) ("Courts play an important role in developing and transmitting narratives and images of constitutional history.").

[90] *See* Balkin, *supra* note 61, at 349, 364.

[91] Another key intersection of law and cultural memory, beyond the scope of this Article, is the role of criminal trials and tribunals in constructing and propagating memory. *See, e.g.*, MARTHA MINOW ET AL., BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR (2009); CARLOS NINO, RADICAL EVIL ON TRIAL (1996); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1997).

[92] Balkin & Levinson, *supra* note 88, at 970, 986–91 (describing the role of canonical narratives as a form of "deep canonicity").

[93] 198 U.S. 45 (1905).

[94] BALKIN, *supra* note 85, at 185–98; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244–45 (1998); Balkin & Levinson, *supra* note 88, at 1018.

[95] BALKIN, *supra* note 85, at 189–91.

libertarians—argue that the case is not so wrong or perhaps is even correctly decided.[96] This shift in *Lochner*'s anti-canonical status reflects the increasing power and influence of the conservative legal movement.[97] But it is also connected to a dispute over memory, as conservative intellectuals have attempted to retell the story of the Progressive era and the New Deal in a much less flattering light.[98] In other words, canons change as memory changes, and vice versa.

Changing generational attitudes about judicial review also reflect changing understandings of constitutional memory.[99] Liberals and conservatives have changed their minds about strong judicial review not once but twice between the beginning of the twentieth century and the present.[100] These changes in attitude correspond to changes in constitutional memory that reflect the different perspectives of succeeding generations.[101]

For example, consider the generational transformations in the constitutional memory of liberals and progressives. Progressives who came of age during the first decades of the twentieth century were generally hostile to judicial review.[102] In the stories they told about the Constitution, judges were out of touch with the needs of society and mostly served the interests of big business. These views were shaped by memories of *Lochner v. New York*, *Hammer v. Dagenhart*,[103] which struck down a federal ban on child labor, the *Pollock* decision that struck down the federal income tax,[104] and the use of labor injunctions to stifle and destroy unions.[105] Liberals who came of age in the middle of the century had a very different understanding of judicial review because their constitutional memories were shaped by *Brown v. Board of Education* and the Civil Rights Revolution.[106] Finally, progressives who came of age in the last years of the twentieth century and the first decades of the twenty-first are increasingly skeptical of judicial review;[107] their memories have been shaped by many years of conservative dominance on the Supreme Court and decisions like

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[96] *Id.* at 193–95.

[97] Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 531 (2015).

[98] *E.g.*, RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION (2007).

[99] JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 81 (2020).

[100] *Id.*

[101] *Id.* at 97 ("[C]onstitutional theories are shaped by the living memory of the theorists who create them.").

[102] *Id.* at 99–100.

[103] 241 U.S. 251 (1918).

[104] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

[105] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930) (describing and criticizing judges' use of injunctions against organized labor).

[106] BALKIN, *supra* note 99, at 101–02.

[107] *Id.* at 110–11.

Citizens United v. FEC[108] and *Shelby County v. Holder*,[109] which progressives believe have weakened democracy.

B. Memory, Erasure, and the Legitimation of Authority

Disputes about constitutional memory are disputes about which voices, which experiences, and which history should count in how we interpret and construct the Constitution. We can restate this point in terms of three related questions.

First, which history and whose experiences will be emphasized or deemed relevant to the meaning of the Constitution today and which history and whose experiences will be forgotten or deemed irrelevant?

Second, which claims about the Constitution and its adoption, amendment or interpretation, will be heard today and which will be de-emphasized or ignored?

Third, which people and which groups count as "constitutional meaning makers"—that is, as people whose opinions and experience should matter to how people interpret the Constitution today?

The American constitutional tradition is a dialectical tradition of arguments and responses to those arguments. Different accounts of constitutional memory highlight some persons and their arguments, while leaving other persons and their arguments out of view.[110] If arguments are forgotten or not even considered, they vanish from the tradition. They are lost to memory, so that we do not even consider them in thinking about our current situation and how the Constitution applies to it. At best we must reinvent these arguments without knowing that others once had similar views and advocated for them. Therefore, if you want power over the interpretation and construction of the Constitution, and over which pathways of constitutional development appear possible or even thinkable, it is useful to gain control over constitutional memory.

Every approach to constitutional interpretation is also implicitly an account of constitutional memory. And because memory involves both what we remember and what we forget, different theories and practices of constitutional interpretation pose different problems of erasure.

We often judge rival approaches to interpretation in terms of how they legitimate judicial review. But if legitimacy is our concern, we must pay careful attention to the kind of constitutional memory each method presumes or fosters.

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[108] 558 U.S. 310 (2010).

[109] 570 U.S. 529 (2013).

[110] *Cf.* Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing that the Rehnquist Court justified its federalism revolution by elevating the memory of the Founding and forgetting the memory of Reconstruction); *cf.* Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 HARV. L. REV. F. 109, 110 (2013) (arguing that in hobbling the Voting Rights Act, the Roberts Court failed to understand the meaning of Reconstruction).

The scope of constitutional memory matters to legitimacy because many features of constitutional legitimacy depend, whether directly or indirectly, on implicit notions of societal consensus, majority opinion, and the consent of the governed. But if the consensus is not real, if the majority is artificially constructed, and if the consent of the governed is not genuine, this may undermine assumptions about legitimacy.

Suppose that the practices of constitutional interpretation have an unduly constricted account of constitutional memory, selectively describe past events, or severely limit the class of relevant constitutional meaning makers. Then these practices will create the false appearance of majority opinion, of a consensus of values, and of consent to existing social and political arrangements, some of which may be very unjust. As Reva Siegel explains, when constitutional memory is constricted in this way, it "can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance."[111]

Therefore, one way to think about the pros and cons of different theories of constitutional interpretation is in terms of the forms of memory *and* erasure they encourage or produce. What a theory discards or forgets is as important as what it encourages us to remember, because what is erased from memory can have no possible claim on authority or legitimacy.

C. Doctrine and Memory

Consider three familiar approaches to constitutional interpretation: one that focuses on doctrine and past judicial decisions, one that focuses on original meaning, and one that focuses on tradition.

If the central method of constitutional interpretation is doctrinal, then the key articulators of constitutional meaning and the key speakers of the constitutional tradition are current and former Supreme Court Justices, a group that is very select, and demographically and culturally very narrow. Put another way, in doctrinal argument, no one else's interpretation of the Constitution is remembered unless that person or group happened to influence the arguments of some current or former Justice.

To be sure, the Justices sometimes cite dissenting opinions—especially their own. They may also cite dissenting opinions that have since won out or even become canonical, like the dissents of Justice Oliver Wendell Holmes, Jr. and Justice Louis Brandeis in free speech cases.[112] But this very example shows how much doctrinal argument tends to narrow the scope of constitutional memory. Holmes and Brandeis had important things to say about why freedom of speech is important. But they did not write in a vacuum. Before Holmes and Brandeis—and indeed contemporaneous

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[111] Siegel, *supra* note 13, at 24; *see also* Rana, *supra* note 86, at 269 (describing the forgotten critique of American colonialism by Black radical activists in the 1960s).

[112] *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting); *cf.* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

with them—is a huge collection of arguments about freedom of speech by Americans who were not Supreme Court Justices.[113] These include arguments by free black people and white abolitionists before the Civil War, suffragists, advocates of reproductive rights in the early years of the twentieth century, and especially labor union activists.[114] For example, the Industrial Workers of the World (Wobblies), like other radical labor groups, pushed for the right to collectively bargain during the early 1900s and drew widespread attention in a series of Free Speech Fights, which used direct action and civil disobedience to secure the right to speak on the public streets.[115] These groups, and many others beside them, had different accounts of why free speech is important and the interests it protects that did not penetrate into the arguments of Holmes and Brandeis.[116] They are not part of the constitutional memory that doctrinal argument invokes. (Indeed, during the 2010s, the Roberts Court used the First Amendment to undermine labor unions).[117]

D. Originalism and Memory

Next, consider originalist arguments. Originalist arguments come in many forms. They can be arguments from the original intention of the Framers, the original understanding of the adopters, or the original public meaning of the text.[118] In what follows, I will focus on the most widely used versions of original public meaning originalism employed by conservative lawyers today. But the points I make about memory can easily be applied to other varieties of conservative originalism.

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[113] *See, e.g.*, AN INDISPENSABLE LIBERTY: THE FIGHT FOR FREE SPEECH IN NINETEENTH-CENTURY AMERICA (Mary M. Cronin, ed., 2016); STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008); MICHAEL KENT CURTIS, FREE SPEECH, 'THE PEOPLE'S DARLING PRIVILEGE': STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920 (1997); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).

[114] FELDMAN, *supra* note 113, at 5 ("[W]omen, indigents, African Americans, and Native Americans."); LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY (1997) (suffragists); RABBAN, *supra* note 113, at 68–71 (advocates of contraception and labor advocates); PATRICK RAEL, BLACK IDENTITY AND BLACK PROTEST IN THE ANTEBELLUM NORTH 45–46 (2002) (free Black people).

[115] David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1062 (1994).

[116] *E.g.*, RABBAN, *supra* note 113, at 23 (describing "[t]he lost tradition of libertarian radicalism obscured by post-war civil libertarians"); Rabban, *supra* note 115, at 1157 (noting that the IWW argued that governments had an "obligation . . . to provide forums for effective speech to those who lack them," and that "the First Amendment [applied] to private action").

[117] *See* Janus v. Am. Fed'n of States, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (holding unconstitutional state laws that allowed public sector unions to collect fees from non-members).

[118] *See* Balkin, *supra* note 7, at 649–50.

Originalism is more than a theory of constitutional interpretation. It is also a theory of constitutional memory, because it has a distinctive view about who matters in the creation of constitutional meaning. It has its own economy of remembering and forgetting, and its own combination of emphasis and erasure.

For most conservative originalists, the relevant constitutional meaning makers are the people who framed the Constitutional text or who participated in the debates over its adoption. In order to understand the public meaning of the words they chose and the concepts they employed, however, one may also look to anyone whose arguments might have influenced the Framers and adopters. One may also look to the events that led to or were roughly contemporaneous with the production of the Constitution's text. So, for example, if the Framers and adopters relied on Blackstone, English law, the memory of the Glorious Revolution, or the language of contemporary state constitutions in choosing particular constitutional language, one should also pay attention to these sources and events because they contributed to the public constitutional meanings produced by the Framers and adopters.

Thus, originalism is both a theory of constitutional meaning and a theory of constitutional memory because it tells us which kinds of memory matter to constitutional interpretation. Originalism tells us what we should remember and what we need not remember in order to interpret and apply the U.S. Constitution faithfully.

The originalism employed by the conservative legal movement almost inevitably involves a significant amount of forgetting. That is because conservative originalists want the Constitution's original meaning to resolve as many legal questions as possible. Ideally, conservative originalists want the study of the original meaning to converge on a relatively limited set of possible answers that, in turn, will resolve most important constitutional controversies.

In contrast, my own theory of living originalism does not assume that original meaning can resolve most constitutional controversies; it has a broad zone for constitutional construction in which many different kinds of history might be relevant.[119] Hence living originalism demands a far more expansive conception of constitutional memory, and a far broader view about who might count as a maker of constitutional meanings.

Because conservative originalists maintain that original meaning can usually decide most contested constitutional questions, their originalist arguments tend to focus on the views of a small number of key Framers, Founders, and adopters, as well as the law of the states at the time of adoption and English law before the American Revolution.[120] With respect to the Reconstruction Amendments, originalist arguments care about the people who debated, drafted, and ratified these amendments, as well as any antebellum or contemporaneous law that sheds light on the

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[119] *See* Jack M. Balkin, *The Construction of Original Public Meaning*, 26 CONST. COMMENT. 71, 92–93 (2016).

[120] *See* Balkin, *supra* note 7, at 691–97.

legal meaning of the words the Framers and adopters chose. These people, sources, and events are the central focus of originalist constitutional memory. Conversely, those persons who did not participate in the framing and adoption of the Constitution, including those who could not have participated, like women and enslaved people, are not constitutional meaning makers. To interpret the Constitution correctly it is not especially important to remember their views or their experiences, except, of course, to the extent that these contributed to the understandings of the Framers and adopters.

Thus, originalist argument creates authority through a selective remembering—foregrounding some people, positions, and events and not others. Conservative originalism is a practice of erasure, because it finds large portions of the American experience (and the American population) irrelevant to the Constitution's original public meaning.[121]

This remembering and forgetting are opposite sides of the same coin. On the one hand, originalist methodology focuses our attention on a relatively small set of historical persons, events and legal texts. On the other hand, it downplays or effaces the constitutional views and experiences of other persons and events in American history. Although these persons, and their opinions and experiences, may be quite relevant to American *political* memory, originalists might concede, they are not relevant to *constitutional* memory, which is the memory we need to interpret the Constitution correctly.

Accordingly, those employing originalist legal arguments encourage their own distinctive form of memory entrepreneurship. Originalist lawyers vie with each other to discover ever new information about the Founding era and subsequent periods of constitutional adoption in order to reshape constitutional memory and make persuasive arguments. Just as originalism promotes a certain type of constitutional memory, it also constructs a particular type of constitutional tradition in which originalist inquiry is central while other aspects of history recede. Conservative originalism is a form of memory entrepreneurship that promotes its own economy of remembering and forgetting.

Originalism's conception of constitutional memory, in turn, reinforces its claims to authority as the sole correct method of constitutional interpretation.[122] Because only some events and persons matter to constitutional meaning, constitutional interpretation should focus on them and not on other persons or events. Hence the kind of history worth studying is the kind of history that originalists study, because it is the kind of history that properly generates legal authority.

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[121] *Id.* at 655–57.

[122] *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at *8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179622 ("Originalism turns to the past in search for authority whose claim on the collective imagination is powerful enough to displace—and ultimately to kill off—rival claims on the collective imagination.").

It is naïve, therefore, to think of originalism as merely a theory about the meanings of words. Originalism is also a construction of constitutional memory and of the constitutional tradition. It is an account of whose voices matter and whose may be forgotten, an account which, in turn, buttresses the authority of its particular vision of constitutional interpretation.

E. Tradition and Memory

Finally, consider how arguments from tradition shape constitutional memory. Traditions may involve arguments, practices, customs, or laws.

As a preliminary matter, let me distinguish between two different ideas of tradition. The first is a *dialectical* tradition. The second is a *unitary* tradition.

By a dialectical tradition, I mean the collection of different views that people have expressed, different practices they have engaged in, and different laws they have enacted or interpreted over the course of the history of a country, nation, people, or group.[123] A dialectical tradition may have common themes, but it is full of disagreements and features multiple perspectives and approaches. It resists closure and finality and is always in a process of becoming. The Talmud is an example of a dialectical tradition; it includes multiple voices and many disagreements that appear next to each other on which later readers can draw. (Of course, the Talmud is not comprehensive. It offers a skewed picture of the Jewish tradition, because it also excludes many dissident views as heretical.)

There is also a dialectical tradition of arguments, practices, and laws relevant to the U.S. Constitution produced by many different people, from many different groups, of high and low status, and from all walks of life. This dialectical tradition also has common themes, and it does not include every conceivable view about the Constitution. Nevertheless, it too offers a rich source of competing ideas and examples that later participants can draw on.

When lawyers and judges make arguments from tradition, by contrast, they are seeking a unitary tradition. A unitary tradition is a single viewpoint or continuous course of conduct, whether imagined or real, that stretches in a relatively unbroken line from the distant past to the present.

Lawyers and judges often prefer a unitary tradition to a dialectical tradition because they want tradition to have normative authority in present-day argument. For lawyers and judges, tradition has normative authority because it announces how things have always been done or asserts viewpoints that have long been held. At the very least, invoking a unitary tradition presupposes a dominant viewpoint or practice with only minor deviations that either do not matter or are normatively dis-preferred.

Thus, arguments from tradition are not simply an interpretive method. They also involve memory work. People hypothesize unitary traditions and assert as a social

[123] Jack M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 915 n.19, 938–42, 953 (1988).

fact that this is how things have always been done, and therefore how they should be done. To have normative force, these arguments must tell the story of the past as one of relatively unbroken continuity and consensus. Hence these arguments will downplay or disguise the existence of rupture, revolution, dissent, lack of consensus, or counter-tradition. Arguments from tradition may obscure or omit the fact that dominant practices and understandings developed without real consent, as the byproduct of domination, or through the subordination of groups too weak or diffuse to resist. Because claims of tradition offer an official story of the past, they may suppress the history of resistance and non-conforming practices by people and communities with less prestige, authority, and status.

To be sure, precisely because arguments from tradition portray memory selectively, critics of these arguments will offer alternative accounts of memory. They will attempt to combat the erasure by trying to get people to remember things differently.[124] First, one can draw different normative lessons from a tradition by describing it more abstractly or more narrowly. Second, one can show that the tradition is not unitary and does not reflect a single dominant view or practice that is continuous through history. Third, one can demonstrate that the tradition is an invented tradition that was concocted by later authors. Fourth, one can explain why elements of the tradition are not honorable, are morally compromised, unjust, or have become oppressive.

Two recent Supreme Court cases exemplify the use of tradition. They show how when lawyers and judges argue about tradition, they employ a combination of memory and erasure to bestow legitimacy on their arguments.

Dobbs v. Jackson Women's Health Organization[125] overruled *Roe v. Wade*[126] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[127] and held that there was no federal constitutional right to abortion. *New York State Rifle & Pistol Association, Inc. v. Bruen*[128] built on earlier decisions in *District of Columbia v. Heller*[129] and *McDonald v. City of Chicago*.[130] It held that the Second Amendment protected "an individual's right to carry a handgun for self-defense outside the home."[131] Although *Dobbs* and *Bruen* make many different kinds of arguments, they primarily rely on arguments about tradition.

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[124] *Cf.* Primus, *supra* note 89, at 192 ("Checking the judiciary's power to shape the resources of argument in constitutional history therefore calls on constitutional interpreters who are not judges to make affirmative efforts to foreground aspects of constitutional history different from those that are familiar from judicial opinions.").

[125] 142 S. Ct. 2228 (2022).

[126] 410 U.S. 113 (1973).

[127] 505 U.S. 833 (1992).

[128] 142 S. Ct. 2111 (2022).

[129] 554 U.S. 570 (2008).

[130] 561 U.S. 742 (2010).

[131] *Bruen*, 142 S. Ct. at 2122.

1. *Dobbs* and the Creation of a Worthy Tradition

In *Dobbs*, Justice Alito invokes a doctrinal test, taken from *Washington v. Glucksberg*,[132] to decide whether the Constitution protects fundamental rights under the Due Process Clause of the Fourteenth Amendment.[133] The test is whether a right is "deeply rooted in our Nation's history and traditions."[134] This test requires courts to tell a story about what the nation's tradition is. Alito reaches back to thirteenth-century England to argue that abortion after quickening (roughly sixteen to twenty weeks into a pregnancy)[135] was a crime under the common law; therefore, there was no tradition of protecting it.[136]

Alito's historical account immediately faces a problem. Before quickening, the common law did not consider abortion a crime,[137] and that might suggest that there actually was a common law tradition of not interfering with women's decision to have an abortion before quickening.

Alito solves this difficulty in two ways. First, Alito points to Hale and Blackstone's view that those who attempted a pre-quickening abortion that resulted in a woman's death could be punished.[138] But the purpose of this doctrine seems to be protecting the life of pregnant women rather than protecting unborn life prior to quickening. After all, if the woman was not harmed, there was no crime.

Second, Alito argues that beginning in the decades before the Civil War and through the middle of the nineteenth century, there was a successful campaign to criminalize abortion throughout pregnancy.[139] This second claim sounds like an originalist argument, because it appears to make the meaning of the Due Process Clause turn on what the people who adopted the Fourteenth Amendment intended or expected. But if one tried to apply this argument more generally, it would undermine a great deal of contemporary constitutional law.[140] So instead Alito presents

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[132] 521 U.S. 702 (1997).

[133] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[134] *Glucksberg*, 521 U.S. at 721.

[135] *Quickening in Pregnancy*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy#:~:text=Quickening%20is%20when%20a%20pregnant,feel%20it%20sooner%20or%20later [https://perma.cc/R7PD-9HJ2].

[136] *Dobbs*, 142 S. Ct. at 2236, 2249.

[137] *Id.* at 2324; *id.* at 2324 n.2 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129–30 (7th ed. 1775); E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1644)) (stating the common-law rule); JAMES MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 3–4 (1978) (noting that the common-law rule was adopted in the United States); Brief for Am. Hist. Ass'n et al. as Amici Curiae at 5–11, in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (No. 19-1392) [hereinafter Brief for Am. Hist. Ass'n].

[138] *Dobbs*, 142 S. Ct. at 2250–52.

[139] *Id.* at 2252–53.

[140] See JACK M. BALKIN, LIVING ORIGINALISM 8–13 (2011) (arguing that an originalism

the history primarily as an argument for why there was no deeply rooted tradition of protecting women's right to abortion.[141] He argues that there was no support for a right to abortion until the latter part of the twentieth century.[142]

To use tradition as a source of legitimacy, however, the relevant tradition of recognition (or non-recognition) must be worthy of respect, or at the very least not unworthy. An important reason why we look to traditional practices, and why these practices have normative authority for us, is that we think that tradition reflects the accumulated wisdom of many generations. Therefore, if there was a tradition of protecting a right, past generations must have thought it important to protect, and so should we. Conversely, if there is no tradition of protecting a particular right, past generations must not have thought it especially important to protect, and so we need not protect it either. In both cases we defer to the judgments of the past.

But suppose that past practices developed because of morally unjust or unworthy reasons.[143] For example, suppose that the law did not protect a certain activity—or even criminalized it—in order to buttress slavery or Jim Crow. Then it is not clear why the judgment of the past is worth deferring to today.

This is where the concept of memory comes in. First, a tradition is not the past. It is a story about the past—a story about what people did and why they did it that has normative lessons for the present. But human conduct is diverse and occurs in many different times and places. Therefore, invoking a unitary tradition means condensing a complicated history of human activity and presenting the past as featuring a more or less unitary set of practices and meanings. One must shape the diverse and conflicting elements of the past into something that can have normative authority for us today.

Second, memory (and erasure) are important to the construction of tradition because they affect how much we actually remember about the past. If we describe a tradition only in general or abstract terms, or if we know nothing about its origins, it has the presumption of moral authority. But as soon as we begin to remember distasteful facts about how and why past practices developed and continued over time, the moral authority of the past threatens to evaporate.

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based on original expected applications is inconsistent with the American constitutional tradition); Balkin, *supra* note 7, at 649 ("If original meaning is as thick as some conservative originalists believe, most of contemporary constitutional practice will be inconsistent with the originalist model of authority.").

[141] *Dobbs*, 142 S. Ct. at 2253–56.

[142] *Id.* at 2254 ("Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period.").

[143] This paragraph and the next are adapted from Jack M. Balkin, *More on Text, History, and Tradition—Discussion Questions for Dobbs, Part One*, BALKINIZATION, July 8, 2022, https://balkin.blogspot.com/2022/07/more-on-text-history-and-tradition.html.

The mid-nineteenth century campaign in the states to criminalize pre-quickening abortions did not arise merely from a desire to protect innocent life.[144] It arose for many different reasons. Sensational stories about seduced women dying from botched abortions led to calls to outlaw the procedure.[145] Male doctors wanted to wrest control of childbirth from (female) midwives.[146] Nativists such as Dr. Horatio Robinson Storer, who spearheaded the campaign to criminalize abortion, were concerned that the country would soon be overrun with Catholic immigrants who had more children than white Protestants and that Protestant women were shirking their duties to become mothers—duties for which they were "physiologically constituted" and "destined by nature."[147]

Alito mentions some of these facts in passing but dismisses them.[148] He argues that "[t]his Court has long disfavored arguments based on alleged legislative motives"[149] and that "it is quite a leap"[150] to assume that traditions of regulation developed for prejudicial or unjust reasons. "Are we to believe," he exclaims, "that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?"[151] One might compare Alito's shock at the possibility of pervasive anti-Catholic and anti-immigrant bigotry in the nineteenth century with his extensive discussion of it in his concurrence in *Espinoza v. Montana Department of Revenue*, where he invokes this history to justify striking down laws banning state aid to parochial schools.[152] In that case, Alito recognized that the historical background could undermine respect for a tradition of practice.

In any case, there is a deeper problem in Alito's construction of tradition.[153] The historical periods he describes—going back to the thirteenth century—were not

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[144] Brief for Am. Hist. Ass'n, *supra* note 137, at 14–18; MOHR, *supra* note 137, at 30–85, 147–59.

[145] Brief for Am. Hist. Ass'n, *supra* note 137, at 15–16; MOHR, *supra* note 137, at 46–85.

[146] MOHR, *supra* note 137, at 30–39; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 283–84 (1992).

[147] Brief for Am. Hist. Ass'n, *supra* note 137, at 20 (quoting HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 64, 75–76 (2d ed. 1868)); Siegel, *supra* note 146, at 293–97 (describing arguments based on women's moral and biological duties to reproduce). On the mid-nineteenth century campaign to criminalize abortion, see MOHR, *supra* note 137, at 147–59; FREDERICK N. DYER, THE PHYSICIANS' CRUSADE AGAINST ABORTION (2005); Siegel, *supra* note 146, at 282–86. In contrast, some suffragists opposed abortion because they saw it as the almost inevitable result of women's complete lack of freedom in marriage. Their reasons were almost the opposite of the reasons given by the dominant forces in the movement to criminalize abortion; *see id.* at 307–14.

[148] *Dobbs*, 142 S. Ct. at 2255.

[149] *Id.*

[150] *Id.* at 2256.

[151] *Id.*

[152] 140 S. Ct. 2246, 2267–70 (2022) (Alito, J. concurring).

[153] This paragraph is adapted from Balkin, *supra* note 143.

periods in which women enjoyed very much liberty or equality. Quite the contrary, regulations of abortion were part of more general features of law and social practices that kept women subservient, denied them equal opportunities, and regulated their sexuality and autonomy. In nineteenth-century America, women had very few rights. Under the common-law coverture rules, married women could not own property, make contracts in their name, or sue in court.[154] Married women were subject to their husbands' physical discipline and had no recourse if their husbands raped them.[155] Women could not vote or hold office; and this was justified on the theory that men adequately represented their interests.[156] So the same tradition that denied women control over their reproductive lives was part of a larger tradition of male dominance.[157] Alito's failure to reckon with the deep connections between the history of abortion regulation and the subordination of women generally is an example of how judges engage in historical erasure when they construct a constitutional tradition.

A doctrinal test that asks whether a right is deeply rooted in our Nation's traditions invites this kind of erasure, because it treats tradition as presumptively legitimate and not reflecting a history of subordination or mistreatment of any relevant group. But in the case of abortion, as in the case of sexual freedom generally, this erasure matters greatly. When applied to questions of women's sexual freedom and sex equality, the *Glucksberg* test of constitutional liberty grounds the inquiry in deeply unjust and inequitable practices. Thus, a good reason why women's reproductive rights are unlikely to be deeply rooted in our Nation's traditions is that traditionally the United States was committed to keeping women from having very many rights. Conversely, it is no accident that reproductive justice claims start to get taken seriously as soon as women start to win a broad range of equal rights in American society. When women mobilized for equal rights in the 1970s, among their key demands were access to contraception and abortion.[158] The *Glucksberg* approach is designed to overlook all of this history.

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[154] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11–12 (2000); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 99–100 (2000).

[155] Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389–95 (2000).

[156] *See* Siegel, *She the People*, *supra* note 84, at 981–84 (describing theory of virtual representation).

[157] *See* Siegel, *supra* note 122, at 59 (explaining that abortion opponents in the nineteenth century "often embedded arguments about protecting unborn life in arguments that criminal bans were needed to enforce women's maternal and marital duties, and to protect the ethno-religious character of the nation. Claims about protecting unborn life were not free-standing as Justice Alito claims, but instead were deeply entangled in these constitutionally offensive arguments.") (footnote omitted).

[158] JANE J. MANSBRIDGE, WHY WE LOST THE ERA 99–100 (1986) (describing women's movement demands); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1988–90 (2003) (describing women's movement demands).

2. *Bruen* and the Lawyerly Creation of Memory

Justice Thomas's approach in *Bruen* is perhaps even more overt in its techniques of constructing historical memory. Thomas argues that the people have a presumptive right to bear arms for their self-defense;[159] therefore government can only regulate this conduct if doing so is "consistent with this Nation's historical tradition of firearm regulation."[160] Thus, Thomas makes the test of consistency with original meaning turn on how we construct tradition. He does not specify whether courts should measure this tradition as of 1791 (when the Second Amendment was adopted) or 1868 (when the Fourteenth Amendment, which applies the Second Amendment to the states, was adopted).[161] Rather, his opinion runs the two periods together, assuming that they constitute a single unbroken tradition.[162] He argues that there was no tradition "of broadly prohibiting the public carry of commonly used firearms for self-defense . . . [or of] limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."[163] Therefore New York's statute (which actually dated back over a century to 1911) was not consistent with the nation's historical tradition of firearm regulation and was therefore unconstitutional.[164]

Arguments from tradition are stories we tell each other about what the past must have been like based on our normative values in the present. But, as noted above, human behavior over a wide range of places and times may not fit neatly into a simple cohesive narrative that confirms and vindicates these values. So, judges must fashion a narrative that is selective—one that overlooks or excludes certain features of the past as not really counting or as exceptions. In other words, they must tell a story that massages the past so that it fits what the judge believes the tradition was and always should have been.

And this is precisely what Thomas does with the history of gun regulation that does not fit his views about the Second Amendment. He invents a tradition that conforms to his judicial philosophy. As the historians who contributed to amicus briefs pointed out, there is considerable evidence of regulation of carriage of weapons in England, in the colonial period, in the early Republic, and especially in the years surrounding Reconstruction.[165] But Thomas, relying on a different set of amici, bobs

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[159] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2135 (2022).

[160] *Id.* at 2126.

[161] *Id.* at 2137–38.

[162] *Id.*

[163] *Bruen*, 142 S. Ct. at 2138.

[164] *Id.*

[165] *See, e.g.*, Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 83 LAW & CONTEMP. PROBS. 73 (2020); Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11 (2017); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1 (2012).

and weaves to avoid or re-characterize this evidence, so that he can produce a story in which regulation of carriage in public was rare or exceptional.[166] This practice of beating history into shape, so that it provides a coherent and unitary story that, in turn, allows him to draw a clear and satisfactory legal conclusion, is memory work.

Justice Thomas acknowledges that contemporary legislatures responding to contemporary problems may pass laws that may not be identical to those existing at the time of adoption.[167] Therefore judges will sometimes have to reason by analogy to decide "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[168] What is "comparable" and "comparably justified," of course, may look different to a person generally skeptical of gun regulation and a person who believes guns pose a significant threat to public safety. It will also depend on how we construct the relevant memory of the past.

Bruen is a celebration of the lawyerly construction of memory in the face of history. Justice Breyer's dissent complains that judges are not professionally trained as historians and are not well suited to the task of historical research: "Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems."[169] Justice Thomas agrees, but in his view, it does not matter.[170] His explanation is remarkably candid. Judges and Justices do not have to be professionally trained historians to make historical judgments about tradition and original meaning, because they can rely on the briefs submitted by the parties and amici. As Thomas explains, "'[i]n our adversarial system of adjudication, we follow the principle of party presentation.'. . . Courts are thus entitled to decide a case based on the historical record compiled by the parties."[171]

Thomas argues that judges can rely on the parties and amici to construct the relevant historical memory that will constitute the constitutional tradition that, in turn, will determine the scope of permissible regulation under the Second Amendment.

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[166] *See Bruen*, 142 S. Ct. at 2140–42 (emphasizing the importance of *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B. 1686) in order to negate the importance of the Statute of Northampton, which regulated the right to carry weapons); *id.* at. 2143 (discounting evidence of colonial regulations); *id.* at 2146–48 (discounting and distinguishing early antebellum statutes and decisions); *id.* at 2148–50 (discounting the relevance of surety statutes); *id.* at 2153 (discounting Texas's statute); *id.* at 2154 (discounting laws in western territories); *id.* at 2155–56 (discounting regulations in Kansas and Arkansas).

[167] *Id.* at 2133.

[168] *Id.*

[169] *Id.* at 2177 (Breyer, J., dissenting).

[170] *Id.* at 2130 n.6.

[171] *Id.* The case Thomas cites for this proposition, *United States v. Sineneng-Smith*, has nothing to do with historical fact-finding. Rather, it concerns a different point; that, in general, judges should allow the parties to develop the issues and arguments that they will present before the court rather than assigning amici to develop the best arguments. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

This system is far superior, Thomas explains, to having judges engage in scrutiny rules that weigh the contemporary costs and benefits of gun regulation:

> [R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field.[172]

Thomas's reliance on advocates to tutor him on history, however, is not significantly more legitimate or objective. There is no guarantee that counsel and amici will not read history selectively—and even occasionally tendentiously—to push the normative views they would like to prevail. After all, lawyers make arguments before courts in order to win cases for their clients and the causes they represent. Contemporary academic historians work under professional norms that restrain them far more than legal advocates; but they, too, are required to explain their research under the strictures of legal brief writing for an audience that eschews complication and seeks easily citable answers.

Because judges can simply look to the briefs for historical information, they are also free to choose which parties and which amici they trust and write the history accordingly. In *Bruen* itself, Thomas accepted the version of history offered by the parties and amici who supported gun rights, many of whom were associated with the conservative legal movement. These were sources he trusted most. Conversely, Thomas mostly rejected the version of history offered by the parties and amici arguing for regulation, many of whom represented movements, academics, and legal networks he trusts less.[173]

Precisely because judges are not historians, the question of whom they trust to provide accounts of history is especially important to how they construct constitutional memory. One of the most significant contributions of the conservative legal movement has been the production of amicus briefs and research aimed at informing and influencing judges who are part of the same movement and who are connected to conservative legal and policy networks.[174] It is hardly surprising that judges like

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[172] *Bruen*, 142 S. Ct. at 2130.

[173] *See id.* at 2132 ("[W]e find no such tradition [of gun regulation] in the historical materials that respondents and their *amici* have brought to bear on that question."); *id.* at 2143 ("Respondents, their amici, and the dissent all misunderstand these statutes.").

[174] AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 25–26 (2015) (describing the multiple pathways—including amicus briefs, professional relationships, and clerks—through which the conservative legal movement and conservative legal networks influence conservative judges); *id.* at 45–57 (describing the role of amicus curiae briefs by Federalist Society members in *Heller v. District of Columbia* and *McDonald v. City of Chicago*).

Justice Thomas are more likely to trust historical claims made by other members of the conservative legal movement. Hence, they will be more likely to construct constitutional memory in ways that advance conservative legal claims.[175]

Judges' reliance on parties and amici for historical research, and their ability to pick and choose the sources they most trust mean that judges have considerable leeway to construct a version of historical memory that buttresses their ideological and philosophical priors. And because judges produce precedents that later courts must work with and follow, their work imposes and solidifies a particular version of historical memory in law, even if that history is incorrect.[176] Justice Thomas insisted that it was better to ground constitutional doctrine in historical research than in traditional rules of judicial scrutiny, because judges are ill-equipped to balance real-world costs and benefits.[177] But Thomas's conception of how judges should engage in historical research does not produce a greater degree of constraint, much less a greater degree of objectivity. And by allowing judges to retreat into a historical memory that they themselves partly create, Thomas absolves judges from reckoning with the real-world consequences of their constitutional doctrines.

III. EXPANDING CONSTITUTIONAL MEMORY

A. The Loss of Constitutional Memory Impoverishes Constitutional Meaning

So far, I've described how doctrinal arguments, originalist arguments, and arguments from tradition determine which voices, histories, and experiences matter in interpreting the Constitution. This selectivity is important because of its consequences for legal authority. If we tell the story of the formation of the Constitution and its amendments with white men as the central actors, then the American constitutional tradition belongs to them. It is due to their achievements that women and racial minorities have rights. In other words, women and racial minorities have constitutional rights because white men allowed them to have them. These rights then appear as acts of magnanimity or beneficence on the part of the white men who

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[175] *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 148 (2019) ("[T]he strongest sources of influence on the Justices from outside the Court are the various elites with which Justices are connected. Justices are drawn toward the values of those elites, and they are likely to see the world from the perspective of the elites that are most important to them.").

[176] The American Historical Association and the Organization of American Historians emphasized this problem in the context of *Dobbs*. *See* History, the Supreme Court, and *Dobbs v. Jackson*: Joint Statement from the AHA and the OAH (July 2022), https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022) [https://perma.cc/M7FC-WHHW] ("These misrepresentations are now enshrined in a text that becomes authoritative for legal reference and citation in the future.").

[177] *Bruen*, 142 S. Ct. at 2130.

adopted the Constitution rather than the result of a struggle for democracy in which dominant groups only surrendered power because of a protracted struggle, a struggle which, in fact, is not finished to this day.[178]

Once we pay attention to it, the erasure of the role of women and minorities in creating constitutional rights is particularly striking. As Reva Siegel notes, American lawyers today reason about the meaning of the Fourteenth and Nineteenth Amendments innocent of the role of women in transforming the constitutional order. "Women seeking to vote faced deep and entrenched resistance in contests beginning before the Civil War, spanning several constitutional amendments and countless state and local laws and ordinances, and continuing into the late twentieth century," Siegel explains.[179] "Yet despite this intergenerational struggle, no Supreme Court opinion has named—much less quoted—the leaders of women's quest for political voice in our constitutional order, except Justice Stevens's passing mention of Susan B. Anthony in his flag-burning dissent."[180] In particular, "[t]here is no mention in the United States Reports of Elizabeth Cady Stanton, Sarah Grimke, Sarah Parker Remond, Lucretia Mott, Lucy Stone, Sojourner Truth, Frances Ellen Watkins Harper, Mary Church Terrell, Alice Paul, Crystal Eastman, Florence Kelley, Ida B. Wells, or Mary McLeod Bethune."[181] Although "[m]en's personal letters and post-ratification reflections are regularly quoted," the Justices do not quote the works of the key players who fought for women's civil and political equality.[182] "The erasure is so fundamental it passes without notice."[183]

Why does this erasure matter? If you want to know what a constitutional provision should mean in practice, and how we might apply its principles today, it might be good to consult the views of those who fought for its adoption over many decades. A constitutional memory composed only of the opinions of men who supported (or acceded to) woman suffrage is quite different from the constitutional memory of the women who sought to be included as part of "We the People." For men, the question was whether women would gain the formal right to vote. But for the suffragists themselves, the issues ran far deeper.

For the women who fought for the right to vote, the point of suffrage rights was to democratize the family and alter unequal relations of political, economic, and sexual power between men and women.[184] This meant ending the rule of men in the

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[178] Siegel, *supra* note 13, at 27 ("This silence reflects understandings that continue to shape women's authority in politics, law, the academy, the household, and other social spheres. Constitutional memory depicts a world in which men speak for women; women lack political voice and have yet to exercise authority to lead.").

[179] *Id.* at 26.

[180] *Id.*

[181] *Id.* at 25–26.

[182] *Id.* at 27.

[183] *Id.* at 26.

[184] Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L. J. FORUM 450, 452–53 (2020); Siegel, *supra* note 13, at 32–33, 45.

family. It meant ending women's relegation to an inferior status in civil society because of their sex-assigned roles within the family.[185]

At the Founding, and at common law, men were the governors of their households.[186] They were assumed to virtually represent the interests of the women who lived under their governance just as we think that parents represent the interests of their minor children today.[187] Women had no voice in political governance, and they were subordinate in civil society because of their assigned place in the family under the rule of men.[188]

If women became full participants in democratic governance, this also meant that they had to be liberated from forms of domination of family life. This required not only women's economic independence and the redistribution of power within the family but also women's ability to control their sexual and reproductive lives. Democratization of political power meant democratization of the family.[189]

The erasure of women's arguments about the Constitution is also the erasure of the wide range of issues and concerns that motivated the struggle for woman suffrage.[190] These concerns involved far more than the mere demand for a formal grant of the right to vote, which is how constitutional doctrine has understood the Nineteenth Amendment—if doctrine pays it any attention at all.[191]

The loss of this constitutional memory impoverishes constitutional meaning. Because women lacked the right to vote, or the right to serve in Congress or in the state legislatures that adopted the Fourteenth and Nineteenth Amendments, their views are not part of the memory that informs the interpretation of the Constitution. Yet if we recover what has been erased from constitutional memory, we discover buried constitutional treasure: an argument that for America to truly be a democracy, family life must also be democratized; an argument for the reorganization of work and economic life that does not depend or build on the traditional gender roles of the family; and an argument for voluntary motherhood and reproductive freedom.[192]

B. Who Makes Constitutional Meaning?

One might object to this argument in the following way: it does not matter that the views of groups shut out of constitution-making (or those of post-adoption social movements) are not part of constitutional memory. If these groups played no part in the framing and adoption of the Constitution, their views have no relevance to the production of the Constitution's legal meaning. The argument that constitutional memory

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185 Siegel, *supra* note 13, at 45.
186 *Id.* at 32–33.
187 *Id.*; Siegel, *supra* note 184, at 457.
188 Siegel, *supra* note 13, at 32–33; Siegel, *supra* note 184, at 457.
189 Siegel, *supra* note 184, at 456–57; Siegel, *supra* note 13, at 36–38, 45.
190 Siegel, *supra* note 13, at 26–27.
191 *Id.*
192 *Id.* at 45, 53–58.

is impoverished assumes that those excluded from framing and adoption—or who lived later on—should somehow count as makers of constitutional meaning. But this assumption is unjustified.

This objection shows that what is at stake in the construction of constitutional memory is which historical figures and movements may serve as makers of constitutional meaning for the present. It is therefore worth responding to this objection in some detail.

As a preliminary matter, it is important to emphasize that actual practice does not justify such a narrow conception of constitutional memory. Lawyers and judges do not restrict constitutional memory to the words, acts, and deeds of constitutional Framers and adopters. They invoke many different kinds of constitutional memory outside of adoption history, and they treat as honored authorities people who were not Framers and adopters or who lived many years later. In particular, even self-described originalist judges often ignore the Founding when it is convenient, focusing instead on later events and precedents.[193] Indeed, lawyers and judges, including originalist lawyers and judges, have no consistent practices about which kinds of constitutional memory count or which people or groups count as relevant makers of constitutional meaning.[194] Rather, they invoke whatever memories of the past they think will make their arguments persuasive to their intended audiences.[195] The actual practices of lawyers and judges suggest that the class of constitutional meaning makers is far larger than the Framers and adopters of the Constitution and its amendments, just as the class of constitutional meaning making events is far greater than the events that led up to the Constitution's framing and adoption.[196]

Lawyers and judges regularly invoke the memory of events that happened long after the adoption of the Constitution or particular amendments. These might include the memory of wars, international conflicts like the Cold War, natural disasters, political and social movements, and economic, technological and social transformations. They also invoke the memory of past injustices like religious or racial discrimination or acts of censorship. They point to the spirit of past judicial decisions that have become canonical and to the memory of other decisions that have been rejected and are now invoked primarily as negative examples.[197] The memory of all of these events clearly has constitutional meaning for lawyers and judges. It shapes how they

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[193] For a recent bill of particulars, see ERIC J. SEGALL, ORIGINALISM AS FAITH 4 (2018).

[194] Siegel, *supra* note 13, at 23, 47–50.

[195] *Id.*

[196] *Id.* at 50 ("[W]hen the Court's originalists debate the meaning of the Constitution's liberty and equality guarantees, they make no pretense of employing originalist methods. Instead, they offer all manner of reasons and draw on all manner of resources, including post-ratification history, dissenting opinions, and social-movement arguments.").

[197] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (denouncing *Korematsu v. United States*, 323 U.S. 214 (1944), as "gravely wrong the day it was decided," and "overruled in the court of history"); *id.* at 2435, 2447–48 (Sotomayor, J., dissenting) (comparing the majority decision to *Korematsu*).

believe the Constitution should be interpreted and applied today. Moreover, lawyers and judges use arguments from memory of these events to persuade other people about how the Constitution should be interpreted and applied.

Thus, when lawyers and judges argue about constitutional equality, they invoke the memory of Jim Crow, *Plessy v. Ferguson*, the Civil Rights Movement and *Brown v. Board of Education*,[198] the *Korematsu* case and the Japanese Internment.[199] When they argue about religious liberty, they invoke the memory of nineteenth century Protestant oppression of Catholics.[200] When they discuss freedom of speech, they invoke the canonical dissents of Justices Holmes and Brandeis.[201] When they warn about the dangers of substantive due process, they invoke memories of cases like *Dred Scott v. Sandford*[202] and *Lochner v. New York*.[203] None of these are invocations of the memory of the Founding or of the words and deeds of the Founders.

Arguments from tradition, which are a staple of constitutional argument, are arguments from memory, but not necessarily about adoption history. Sometimes the tradition developed later on, or, as with claims of traditional morality, is not connected to the Founding at all.[204]

Arguments from tradition or from traditional practice purport to describe the history of political or social practices, often in a highly abbreviated fashion. Although some legal scholars might reject appeals to "bottom-up" social history as irrelevant to constitutional argument, arguments from tradition *are* arguments from social history. They are simply a highly stylized form of social history that dispenses with most of the messy details. If arguments from tradition are relevant to constitutional meaning, then so too should be the experiences and opinions of those dissenters and counter-traditions that have been effaced and disregarded by gauzy and overbroad claims of our country's unbroken moral and political traditions.

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[198] *E.g.*, Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 705, 746–48 (2007) (plurality opinion of Roberts, C.J.); *id.* at 748–50, 763, 770, 772–82 (Thomas, J., concurring); *id.* at 788, 793 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 799–803 (Stevens, J., dissenting); *id.* at 803–04, 842, 866–68 (Breyer, J., dissenting).

[199] *E.g.*, United States v. Husayn, 142 S. Ct. 959, 992–93 (2022) (Gorsuch, J., dissenting); *Trump*, 138 S. Ct. at 2423; *id.* at 2435, 2447–48 (Sotomayor, J., dissenting).

[200] *E.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268–73 (2020) (Alito, J., concurring); Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 8–11 (1947).

[201] *E.g.*, United States v. Alvarez 567 U.S. 709, 727–28 (2012); Holder v. Humanitarian L. Project, 561 U.S. 1, 38 (2010); *id.* at 45, 52, 54 (Breyer, J., dissenting); Morse v. Frederick, 551 U.S. 393, 438, 448 (2007) (Stevens, J., dissenting).

[202] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party). *E.g.*, Gamble v. United States, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting) (invoking the memory of *Lochner*, *Dred Scott*, and *Korematsu*); Obergefell v. Hodges, 576 U.S. 644, 694–96 (2015) (Roberts, C.J., dissenting).

[203] 198 U.S. 45 (1905). *E.g.*, *Obergefell*, 576 U.S. at 694, 696–98 (Roberts, J., dissenting).

[204] *E.g.*, *Obergefell* 576 U.S. at 687 (Roberts, C.J., dissenting) ("[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?").

In making arguments about what is traditional and canonical, or about what is honored and dishonored in American history, lawyers and judges also invoke the memory of figures who were not Framers and adopters. Justice Clarence Thomas, an originalist, has invoked the memory of Frederick Douglass in his opinions,[205] even though Douglass, as a Black man, could not, because of the *Dred Scott* decision, become a citizen—much less a Framer or adopter of the Fourteenth Amendment. Nevertheless, Thomas treats Douglass as an authority whose views matter to the proper interpretation of the Constitution. Similarly, in debates over race and affirmative action, the Justices invoke the memory of civil rights advocates in America's fraught racial history.[206] But if Frederick Douglass is a constitutional meaning maker, it is not clear why Elizabeth Cady Stanton is not. And if Martin Luther King and Robert Carter (who was part of the NAACP's challenge against segregated schools) are constitutional meaning makers, it is not clear why Black people before the Civil War, the suffragists, or the Wobblies are not. People who discuss social history or social movements are not the only ones engaged in memory entrepreneurship. Originalist lawyers and judges are engaged in it too.

C. Constitutional Memory and a Usable Past

Who counts as a relevant maker of constitutional meaning is not settled, therefore, by who had official authority to adopt the Constitution or its subsequent amendments. Rather, it is the question of who constitutional interpreters in the present—including citizens, lawyers, and judges—find relevant to the interpretation and application of the Constitution. Frederick Douglass is a constitutional meaning maker for Justice Thomas because he thinks Douglass deserves to be, and he believes that Douglass's positive reputation will resonate with others that Thomas wishes to persuade.

Put another way, the question of who counts as a constitutional meaning maker is the question of how we construct a usable past and, in particular, which figures from the past are usable for us today. Historical figures become relevant makers of constitutional meaning because people in the present believe that these figures can

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[205] McDonald v. City of Chicago, 561 U.S. 742, 849–50 (2010) (Thomas, J., concurring in part); Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part); Zelman v. Simmons-Harris, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). Justice Elena Kagan has also cited to Douglass. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2352 (2021) (Kagan, J., dissenting). The only previous citation to Frederick Douglass before 2000 is in Justice William O. Douglas' concurrence in Jones v. Alfred H. Mayer Co. 392 U.S. 409, 446 (1968) (Douglas, J., concurring).

[206] Shelby Cnty. v. Holder, 570 U.S. 529, 581–82 (2013) (Ginsburg, J., dissenting) (invoking Bloody Sunday in Selma and King's march from Selma to Montgomery to call for passage of the Voting Rights Act); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (plurality opinion of Roberts, C.J.) (citing oral argument of Robert Carter of NAACP in Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

tutor us about the best interpretation of the Constitution—because of their experiences, wisdom, or vision. Even if people were not powerful officeholders in their own day, or advocated positions rejected by a then-existing majority, their constitutional vision might still speak to us in the present.

This expansion of constitutional memory does not mean that everyone's views are equally valuable. The whole point of a usable past is its selectivity.[207] Some figures are useful to remember because we think that they were wrong, misguided, or evil. Even figures whose views seem loathsome to us today might still instruct us as negative examples.

Conversely, many figures and social movements that we celebrate today were not uniformly heroic. For example, "beginning in the late 1860s, some white woman suffragists turned to racist and nativist arguments in support of their cause."[208] Instead of papering over their faults, we should be willing to recognize and learn from their compromises and limitations.

Although retelling stories about the Framers and adopters is part of a usable past for American constitutional law, it is far too narrow a use of history.[209] In fact, Van Wyck Brooks' original conception of a usable past did not focus on the most celebrated figures in American history.[210] Rather, he argued that in order for Americans to create a usable past, they should remember figures who had been forgotten and discarded by history, the "limbo of the non-elect."[211] These were people whose genius had been stifled or limited by the society around them, and therefore had been lost to memory. American culture, Brooks argued, would not be renewed by rehashing tales of canonical authors and works, but rather by recovering and remembering those left out of the canon who had been unfairly disregarded by the dominant culture, and taking inspiration from their values and their vision.[212] In like fashion, there may be sources of constitutional renewal in the experiences, voices, and views of those who were legally excluded from constitution making, but who

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[207] *See* Van Wyck Brooks, *On Creating a Usable Past*, 64 DIAL 337, 339 (1918), http://www.archive.org/stream/dialjournallitcrit64chicrich#page/337/mode/1up [https://perma.cc/D9ZB-5P8J] ("The past is an inexhaustible storehouse of . . . adaptable ideals . . . it yields up, now this treasure, now that, to anyone who comes to it armed with a capacity for personal choices.").

[208] *See* Serena Mayeri, *"A Common Fate Of Discrimination": Race-Gender Analogies in Legal And Historical Perspective*, 110 YALE L.J. 1045, 1053 (2001); *see also* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 123–29 (1984); ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848–1869, at 54–55, 94–98 (1978) (describing Elizabeth Cady Stanton's and Susan B. Anthony's alliance with racist politicians to promote woman suffrage); *id.* at 174 (describing Stanton and Anthony's objections to the Fifteenth Amendment as "simultaneously feminist and racist.").

[209] Balkin, *supra* note 61, at 397–400.

[210] Van Wyck Brooks, *supra* note 207, at 340–41.

[211] *Id.* at 340.

[212] *Id.* at 340–41.

expressed their views through dissent, protest, and petition. If this is true of the free speech tradition in the United States, how much more might it be true with respect to other parts of the Constitution?

Brooks' point is that a usable past is not simply given by history, nor is it determined by current conceptions of who is canonical, essential, or important. Rather, a usable past is creatively uncovered, retold, and reinterpreted by people in the present who need to solve problems in their own time. People who invoke memory in their political and social disputes decide who it is useful to remember, and thus who counts a maker of constitutional meanings.

To be sure, what makes a past usable for creating an American culture, which was Brooks' concern, may be different than the kind of constitutional memory that is useful for interpreting and applying the U.S. Constitution in today's world. The forms of memory—and the people and events remembered—may be different.

Accordingly, I now turn to reasons that are distinctive to legal theory and legal argument. Why should the opinions and concerns of those left out of formal constitution-making be part of what my colleague Akhil Amar has called America's "constitutional conversation,"[213] and, conversely, why does their erasure in constitutional memory create a problem of constitutional legitimacy?

As a shorthand, I will call this the question of why we should *expand constitutional memory*, and I will offer four central reasons:

(1) Many people formally left out of constitution making actually participated in and shaped the agendas of lawmaking through dissent and petition.
(2) Non-adoption history is an integral part of constitutional construction.
(3) People left out of formal constitution-making may nevertheless edify and tutor people in the present about how best to implement the Constitution in today's world.
(4) The Constitution's contemporary legitimacy depends on the claim that it is "our law"—that we are the same transhistorical "We the People" who created it.

But the people who created it excluded and oppressed the ancestors of many of the people who now live under it. Expanding constitutional memory allows members of historically subordinated or excluded groups to recognize the Constitution as also belonging to them and to make claims for its eventual redemption.

D. Participation

First, even people who were formally excluded from framing and adoption often played an important role in setting agendas and shaping public debates.[214] That is

[213] AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 (2021).

[214] DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION,

one reason why Justice Thomas regularly invokes Frederick Douglass in his dissents. Especially in the period before the Civil War, petitions directed to government officials were a crucial means for people who did not have the right to vote or hold office to draw attention to their issues and concerns.[215] Petitions by women and free Black people, and special conventions that produced these petitions, were important parts of the constitutional culture of the antebellum period.[216]

Even beyond the practice of petitioning, women and free Black people continuously protested and agitated for recognition of their rights.[217] Because these people were active in the politics of their time and because of their influence on the agendas of constitutional politics, they can justly be considered makers of constitutional meaning, and their work should be part of constitutional memory.

E. Construction

Second, the opinions and experiences of people shut out of formal adoption—as well as those who came afterward—may be especially important in constitutional construction. The Constitution's language is not self-applying. It contains rules, standards and principles whose scope and application must be applied in ever changing circumstances.[218] Constitutional construction is the task of applying the Constitution's often vague and general language in our own time through creating, developing, or implementing doctrines, practices, and conventions.[219] All forms of history, including post-ratification history, are important to constitutional construction.[220]

When we engage in constitutional construction, therefore, we may look to the ideas, experiences, struggles, concerns, and opinions of people who were shut out of the formal ability to frame and adopt the Constitution. We can look to the ideas of people whose views were unpopular or minority positions in their own day, but whose understanding of the proper application of the Constitution turned out to be far wiser than the dominant opinions of their time. We can also learn from constitutional claims made by people and movements after adoption—such as the Civil

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1790–1870 (2021) (describing how women, Black people, and others excluded from formal participation in politics made their voices heard through petitions stating political grievances); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021) (describing the work of free Black people in pushing for civil and political rights through petitions and conventions).

[215] CARPENTER, *supra* note 214.

[216] *See, e.g.*, *id.*; MASUR, *supra* note 214; James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1245 (2009) (describing the role of Black conventions in advocating for rights).

[217] ELLEN CAROL DUBOIS, SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE (2021); MASUR, *supra* note 214; Fox, *supra* note 216.

[218] BALKIN, *supra* note 140, at 14–16.

[219] *Id.* at 4–5.

[220] Balkin, *supra* note 7, at 650–52.

Rights Movement—whose examples and accomplishments have become part of our constitutional traditions.

In constitutional construction, many different people, and not just Framers and adopters, can contribute to the making of constitutional meaning. They are makers of constitutional meaning because they offered constructions of the Constitution that we can use today. This is true even if their proposed constructions were not accepted or were even ignored in their own time. What matters is whether they can serve as positive or negative examples for us today.[221]

F. Edification

Third, the expansion of constitutional memory can tutor the present. The expansion of constitutional memory can do more than merely complicate history.[222] It can also provide additional sources of authority.[223]

The memory of groups excluded from constitution-making can serve as a negative precedent. The memory of these groups and their struggles stands "as a record of past wrongs that the nation strives to remedy and against which the nation defines itself."[224] The memory of past injustices can also illuminate similar or analogous injustices in our own day. It shines a light on injuries, dangers, and temptations that we must remedy, prevent, or forestall. By understanding how people in these movements understood, diagnosed, and criticized injustices in their world, we are better able to critique our existing arrangements, and perceive how elements or the effects of these past wrongs are still with us in contemporary life.[225]

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[221] Siegel, *supra* note 13, at 54; Balkin, *supra* note 7, at 682–85.

[222] *See* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 413 (2018) ("[D]istorted interpretations can also occur if a present-day interpreter primarily looks at how the Constitution was understood by a subset of the public and mistakenly concludes that the views of the subset accurately represent the views of the majority or even the whole.").

[223] *See id.* at 412–28 (arguing for "Identifying Diverse Historic Speakers" excluded from formal participation who interpreted the Constitution and giving multiple examples). In a series of articles James Fox has argued for a "counterpublic" originalism that looks to the constitutional views of excluded groups. *See* James W. Fox Jr., *The Constitution of Black Abolitionism: Reframing The Second Founding*, 23 U. PA. J. CONST. L. 267 (2021) (arguing for the inclusion of the work of Black conventions in interpreting the Reconstruction Amendments); James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675 (2016) (arguing for the importance of including counterpublics).

[224] Siegel, *supra* note 13, at 54; *see also* Kim Lane Scheppele, *Constitutional Interpretation After Regimes of Horror*, *in* LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES 233, 255 (Susanne Karstedt ed., 2009) (describing how new constitutions are written and interpreted to ensure that past injustices do not occur again); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*. 1 INT. J. CONST. L. 296, 300 (2003) ("*Aversive constitutionalism* . . . calls attention to the *negative models* that are prominent in constitution builders' minds.").

[225] Siegel, *supra* note 13, at 54, 55–57 (explaining how the history of the suffrage movement

In addition, constitutional interpreters can also incorporate this history as a positive precedent. We can remember figures and movements from the past "who model constitutional virtues."[226] The history of previous struggles for constitutional rights can highlight key figures and movements who embody important constitutional values and whose commitments we should recognize and strive to redeem in our own time. We can look to their experience and wisdom just as Americans look to the wisdom and experience of famous Framers and famous historical figures like Abraham Lincoln or Martin Luther King. The memory of these figures and groups can be a source of forgotten constitutional claims and arguments that have renewed salience today. In this sense quoting wisdom from Washington or Hamilton is no different than quoting the petition of a convention of free Black people before the Civil War, or a speech by Susan B. Anthony or Sojourner Truth.[227]

Once we expand constitutional memory beyond the relatively small group of Framers and ratifiers, we may get a different account of what past generations thought the Constitution should mean, the injustices they rebelled against, and the problems they believed the Constitution should address. For example, when we exclude the memory of women and minorities from our constitutional conversation, we miss out on why the Constitution and proposed amendments were important to them, what they wanted these texts to do, and what features they found wanting. The relatively small group of white men who framed and adopted these provisions understood these issues only as refracted through their own limited experiences.

Consider, for example, the Thirteenth Amendment, which ended "slavery [and] involuntary servitude,"[228] and gave Congress the power to eradicate the "badges and incidents of slavery."[229] If one wants to know what slavery actually consists in, how slavery limits human freedom, enables arbitrary power, and injures the spirit, the best source of this information would be the slaves themselves, and the conventions of free Black people before the Civil War.

To understand what freedom is, one might want to understand what slavery was. To understand what citizenship is, one might want to listen to the views of those denied it.[230] The testimony of slaves and the conventions of free Blacks petitioning

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can guide judicial scrutiny with respect to a wide range of issues including pregnancy discrimination and sexual violence); see also JELIN, *supra* note 50, at 35 ("A human group can remember an event . . . in an *exemplary* way. . . . [W]orking through analogy and generalization, the recollection turns into an example that leads to the possibility of learning something from it, and the past develops into a guide for action in the present and in the future.").

[226] Siegel, *supra* note 13, at 54.

[227] *See*, *e.g.*, Brief of ACLU as Amicus Curiae at 15–17, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) (brief authored by Ruth Bader Ginsburg quoting a speech by Sojourner Truth and excerpts from the Seneca Falls Declaration of Sentiments).

[228] U.S. CONST. amend. XIII.

[229] The Civil Rights Cases, 109 U.S. 3, 20–21 (1883).

[230] *Cf.* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470 (2012) ("Perhaps the most basic reason for the Thirteenth

for redress of grievances might inform the construction of all three Reconstruction Amendments. The experience of Black citizens whose rights to vote were slowly strangled and snuffed out by decades of Jim Crow politics might be useful testimony for the construction of the Fifteenth Amendment. As Kate Masur notes in her book *Until Justice Be Done*,[231] it was free Black people, many of whom had escaped from slavery, who placed the question of Black civil and political equality on the agenda of antebellum politics. Their concerns were often quite different from those of the white Abolitionists with whom they allied, especially because the latter often supported decolonization rather than full equality.[232]

A key element of chattel slavery was sexual domination.[233] Black women lacked control over their reproductive lives.[234] Slaves were forced to bear children for the benefit of those who owned them.[235] Enslaved women's lack of control over how and when they became pregnant—often at the direction or at the hands of their masters—was a central attribute of their slavery.[236]

Amendment's neglect, . . . is that . . . it is so potentially far-reaching that it might justify a truly radical transformation of the American social and political order.").

[231] MASUR, *supra* note 214.

[232] *Id.* at 33–37.

[233] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 23 (1998) ("Black women bore children who belonged to the slaveowner from the moment of their conception. This feature of slavery made control of reproduction a central aspect of whites' subjugation of African people in America."); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1941–42 (2012) (arguing that sexual domination of Black women was a paradigmatic feature of chattel slavery).

[234] ROBERTS, *supra* note 233, at 24–33; *see* Koppelman, *supra* note 233, at 1938–39 ("Slave women's capacity to bear children was integral to their value and status from the earliest beginnings of the New World slave system, but it became crucial after the slave trade was abolished in 1808. . . .Slave women faced constant, coercive inducements to bear children.").

[235] ROBERTS, *supra* note 233, at 24, 27, 30–31; *see* Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 401–02 (2000) (recounting slave owners' practices of breeding enslaved women for profit as part of a Thirteenth argument for equal reproductive autonomy for women and men, and for Black women and white women); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 508 (1990) ("[M]andatory motherhood and loss of control over one's reproductive capacities were partially constitutive of slavery for most black women of childbearing age, whose principal utility to the slaveholding class lay in their ability to reproduce the labor force. Unlike (unmarried) white women, they had no right even in theory to avoid pregnancy through abstinence; they were often raped with impunity, by their masters and others.").

[236] ROBERTS, *supra* note 233, at 24, 27, 30–31; RACHEL A. FEINSTEIN, WHEN RAPE WAS LEGAL: THE UNTOLD HISTORY OF SEXUAL VIOLENCE DURING SLAVERY 16–28 (2018); *see* Koppelman, *supra* note 233, at 1942 (arguing that compulsory pregnancy is a paradigmatic example of chattel slavery—"a badge of slavery, a practice that signifies the inferiority of the victim, and an incident, a legal consequence of the status of being a slave"); Jill Elaine

Another important feature of slavery was the precariousness of family relationships.[237] Slaves could not officially marry and had no rights to their children.[238] Slave owners could keep enslaved people from forming families, from living as families, and from raising their own children.[239] Couples, parents, and children lived in perpetual fear of separation, because slave masters could separate and sell enslaved people at will.[240]

Black and white abolitionists decried the outrages of separated families, the destruction of parental relationships, and the forced pregnancies of enslaved women.[241] "[M]embers of the Thirty-eighth Congress debating the Thirteenth Amendment repeatedly acknowledged the fundamental and inalienable character of rights of family,"[242] Peggy Cooper Davis has shown, and "anti-slavery members of Congress repeatedly acknowledged that freedom required restoration of rights of family. In debates over the Reconstruction Amendments and related legislation, speaker after speaker denounced slavery's abrogation of family rights."[243]

Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1332–33 (1998) ("Slaves had no legal protection against rape, and slave women were sold into concubinage or prostitution at 'fancy girl' markets devoted specifically to that purpose.").

[237] PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 31–35 (1997).

[238] DAVIS, *supra* note 237, at 38–39; Peggy Cooper Davis, *Neglected Stories and the Sweet Mystery of Liberty*, 13 TEMPLE POL. & C.R. L. REV. 769, 783 (2004) ("Enslaved people were precluded not only from claiming the protection of laws governing marriage and parenting, but also from arguing the applicability or inapplicability of the laws to their situations, and from challenging the laws' terms in formal exercises of civil freedom."); Hasday, *supra* note 236, at 1329–30 ("American slaves had no right to marry and no legal claim to their children. Every slave state permitted the forced separation of slave families, and the best evidence suggests that approximately one in six slave marriages ended in involuntary separation.").

[239] DAVIS, *supra* note 237, at 90–93.

[240] *Id.* at 31–35; FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 118 (1892 rev. ed.) ("One word of the appraisers, against all preferences and prayers, could sunder all the ties of friendship and affection, even to separating husbands and wives, parents and children.").

[241] Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 318 (1993) ("The human claim to family independence and integrity and the devastating effect of slavery upon the African-American family were paramount concerns of the anti-slavery movement."); HARRIET BEECHER STOWE, A KEY TO UNCLE TOM'S CABIN 133 (1853) ("[T]he worst abuse of the system of slavery is its outrage upon the family; and . . . it is one which is more notorious and undeniable than any other.").

[242] DAVIS, *supra* note 237, at 113.

[243] DAVIS, *supra* note 237, at 379 (quoting extensively from congressional debates); *see also* David Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 SMU. L. REV. 191, 203 (2022) ("The through line in the debates over the Freedman's Bureau Act, the Civil Rights Act of 1866, and the Fourteenth Amendment was the idea that true freedom would be impossible without securing those freed from enslavement the right 'to be protected in their homes and families.'").

Nevertheless, despite the valuable work of scholars detailing this history, the constitutional memory of the Reconstruction Amendments does not emphasize these features of slavery. It does not reflect the perspectives of enslaved women,[244] and it does not recognize that, for women, denials of sexual autonomy and reproductive freedom were among the greatest harms of slavery.[245] And for this reason, the rights of marriage, family formation, child rearing, and control over sexual reproduction do not appear as central to the original meaning of the Thirteenth and Fourteenth Amendments, and the denial of these rights does not appear as part of the paradigmatic harms that these amendments sought to prevent.[246]

Instead, in the standard account, the Framers and adopters of the Thirteenth and Fourteenth Amendments sought to protect the rights of property ownership, the freedom to make contracts, rights to sue and give testimony in the courts, and equality of treatment in the civil and criminal justice systems.[247]

Yet the men who framed and adopted the Civil Rights Act of 1866 and the Thirteenth and Fourteenth Amendments, thought of the rights of marriage and family formation as part of what we now think of as purely economic rights of contract and property.[248] The right to marry, as a special case of contractual freedom, was understood to be an aspect of civil liberty,[249] and "[m]ainstream nineteenth-century legal theory understood a man's right to control and protect his wife and children as a property right."[250]

To be sure, the Framers and adopters of the Amendments, all white men, thought of these rights primarily in terms of men's interests. Therefore, it is probably not surprising that they did not devote much attention to women's rights to control their own sexuality or women's freedom from involuntary pregnancy. After all, the Framers and adopters of the Reconstruction Amendments sought to maintain their own control over the sexual freedom of their wives and daughters.[251] But

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[244] *E.g.*, HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 64 (Nellie Y. McKay & Frances Smith Foster eds., W.W. Norton & Co. 2001) (1861) ("Slavery is terrible for men, but it is far more terrible for women").

[245] *E.g.*, ROBERTS, *supra* note 233, at 23; DAVIS, *supra* note 237; FEINSTEIN, *supra* note 236.

[246] JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 182 (2001) (arguing that the Black Codes, which denied economic rights to Black people, are the paradigmatic case underlying the Fourteenth Amendment); *cf.* Koppelman, *supra* note 233, at 1924–25, 1942 (arguing that in addition to the Black Codes, denial of reproductive rights should also be counted as a paradigmatic case).

[247] This concern is explicitly stated in the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (protecting the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to [the] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens").

[248] Hasday, *supra* note 236, at 1341.

[249] *Id.* at 1341 n.159 ("All sides of the abolitionist debate saw the right to marry as a contractual right.").

[250] *Id.*

[251] *Cf.* Hasday, *supra* note 236, at 1333–34 ("In an era in which marital rape remained

enslaved and free women well understood the importance of these rights, even if they were shut out of formal political participation.[252]

All of these ideas, although long known to specialists, have mostly been lost to constitutional memory. One likely reason is the New Deal settlement, which divided economic and property rights from all other civil liberties and frowned on judicial protection of rights it considered outside the constitutional text. But the very failure to see these rights as implicated by the textual prohibition on slavery and the textual guarantee of the privileges or immunities of citizenship is due to the production of memory.

Because of the way that constitutional memory has been constructed (and erased), the protection of sexual and reproductive freedoms and the rights of marriage and family formation usually do not appear among the purposes behind the Reconstruction Amendments.[253] In the way the story is usually told, these rights seem to be foreign to the original meaning of the Constitution—illicit additions from the twentieth century and the Sexual Revolution.[254] Moreover, because of the constitutional memory of the New Deal, rights of marriage, sexual freedom, and family formation are classified as dubious examples of substantive due process. These rights are often treated with suspicion because they seem to have no basis in the text and therefore commit the same sin as *Lochner v. New York*—a case which, in constitutional memory, exemplifies how courts should not interpret the Constitution.[255]

But suppose that we expand constitutional memory to include the concerns of the people for whom the Reconstruction Amendments were actually created—both enslaved women and enslaved men. Suppose we were to ask what they valued about freedom and what denials of liberty they suffered. Then these rights of sexual freedom, marriage, and family formation no longer seem peripheral. They seem obvious and central.[256]

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wholly legal, many abolitionists assumed without question, and argued without hesitation, that male slaves, like free men, should control sexual access to their female relatives.").

[252] Hasday, *supra* note 236, at 1328.

[253] As reflected in the title of Peggy Cooper Davis's 1997 book, *Neglected Stories*. DAVIS, *supra* note 237.

[254] *E.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–36 (1973) (arguing that the right of privacy recognized in *Roe v. Wade* "is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure").

[255] *Id.* at 939–40 ("The Court continues to disavow the philosophy of *Lochner*. Yet as Justice Stewart's concurrence admits, it is impossible candidly to regard *Roe* as the product of anything else. That alone should be enough to damn it.").

[256] Davis, *supra* note 241, at 309 ("The idea that family rights are aspects of national citizenship was, however, unambiguously asserted in the aftermath of the Civil War; antislavery advocates were explicit in their determination that all Americans would be protected against the family violations that characterized slavery."); *cf.* Davis, *supra* note 238, at 784 (arguing that constitutional protection of the rights of gays and lesbians to marry and form

Or take the case of women—of all races—who fought for civil and political equality in the social movement for woman suffrage that lasted eight decades. The experiences and concerns of these women were often quite different from those of the men who adopted the Fourteenth and Nineteenth Amendments.[257] For the suffragists, the quest for the vote was also the quest for the democratization of the family.[258] Its goal was to end the multiple techniques by which men dominated women economically and sexually as well as politically. When they argued about the vote, they also argued about the structure of the family, and about the idea that women should not be dependent on men either politically or economically.[259]

These arguments were lost to history because the men who wrote and ratified the Constitution neither understood them nor made them.[260] But nineteenth-century women both understood and named the connections between economic dependence, sexual domination, and political subordination. These arguments are important because they show that women were arguing for reproductive freedom and for full equality in the family and in civil society not only during the 1970s but even as the Reconstruction Amendments were debated.[261]

It is hardly surprising that the men who adopted the Fourteenth and Nineteenth Amendments did not think much about these things. Consequently, the many decades of women's civil rights activism and the arguments that suffragists made about the injustices built into family and civil society have all but vanished from our constitutional memory. But when we expand constitutional memory to include the concerns, arguments, and diagnoses of the women who sought rights for themselves, we get a much richer picture, and a deeper and more sophisticated account of what sex equality is and what it requires.

In the task of constitutional construction, we are not limited to the original expected applications of the white men who framed and adopted the Reconstruction Amendments. We may, and should, consider why the people who fought for their freedoms held freedom so dear, and the kinds of oppressions and evils they sought to escape.

It is true enough that we always hear advice from the past filtered through our present-day preoccupations. So, it is not surprising that we may only see these connections following the Sexual Revolution and social movements for marriage equality. But that is how the reclamation of the past works. The past has things to teach us when we are ready to learn them.

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families makes sense "[w]hen the Fourteenth Amendment is understood in light of the history and traditions of anti-slavery.").

[257] Siegel, *supra* note 13, at 32.

[258] *See* Siegel, *supra* note 184, at 452, 458.

[259] *Id.* at 452–53, 458–65; Siegel, *She the People*, *supra* note 84, at 991–92.

[260] *See* Siegel, *She the People*, *supra* note 84, at 949 ("Today, women's struggle for enfranchisement plays no role in the ways we understand or interpret the Constitution.").

[261] Siegel, *supra* note 13, at 35–39.

G. Making the Constitution "Our Law"

Finally, if constitutional memory is conceived too narrowly, it can undermine the Constitution's present-day legitimacy. In *Living Originalism*, I argued that the legitimacy of the U.S. Constitution depends on its success as basic law, as higher law, and as our law.[262] The U.S. Constitution operates as basic law when it "provides a viable framework for governance that allocates powers and responsibilities."[263] The Constitution operates as higher law when it "serves as a source of aspiration, a reflection of values that stand above our ordinary legal practices and hold them to account."[264]

But the Constitution must also succeed as *our law*—a constitution that Americans view "as our achievement and the product of our efforts as a people, which involves a collective identification with those who came before us and with those who will come after us."[265] The Constitution's present-day legitimacy depends, in part, on the fact that the people who live under it regard it as *their* Constitution.[266] They must be able to see it as something which *they*, as part of We the American People, created through an act of popular sovereignty.

Our ability to view the Constitution as "our law" requires accepting "a constitutional story—a constitutive narrative through which people imagine themselves as a people, with shared memories, goals, aspirations, values, duties, and ambitions."[267] This constitutional story "constructs a collective subject with a collective destiny that engages in collective activities."[268] It "binds together people living in different times and different places as a single people."[269] It "allows us to see the hopes, desires, actions, ambitions, and achievements of people who lived long ago as our hopes, desires, actions, ambitions, and achievements."[270]

The success of this story depends on constitutional memory. The story is only believable if Americans think that they are part of the same "We the People" that adopted the Constitution and its amendments.[271] But if contemporary Americans see the Constitution as an alien imposition by other people, especially those who are long dead, it becomes difficult to sustain the belief that the Constitution belongs to them and is the work of their hands.

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[262] BALKIN, *supra* note 140, at 60.

[263] Jack M. Balkin, *The American Constitution as "Our Law*," 25 YALE J.M. & HUM. 113, 113 (2013).

[264] *Id.*

[265] BALKIN, *supra* note 140, at 60.

[266] *Id.* at 61.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *See* Jamal Greene, *Originalism's Race Problem*, 88 DENV. L. REV. 517, 520–21 (2011) ("[T]he authority of the ratifying generation derives from its *normative* continuity with our own . . . . On this account, originalism is best defended as a persuasive form of ethical argument; it is a normative account of national identity.").

The problem is that many Americans belong to groups whom the Framers and the adopters of the Constitution deliberately excluded from participation in drafting and ratifying the Constitution. And these groups were not only excluded from framing and ratification; they were also repeatedly subordinated and oppressed, and, in some cases, enslaved and murdered. These groups were kept outside the body of Americans who had the right to "ordain and establish"[272] the Constitution and govern the country.

This is yet another version of originalism's race and gender problem.[273] The problem is why contemporary members of formerly excluded groups—women, racial minorities and indigenous peoples—should see themselves as part of the We the People who adopted the Constitution. As Annette Gordon Reed explains,

> [This] is the problem of asking current-day Americans whose ancestors were excluded from power, and indeed who were under the power of (and in some cases actually mistreated and enslaved by) these men—women, enslaved people, and Indigenous people—to see these men and their actions as the prime informers of our civic virtue.[274]

It is no answer to say that the Reconstruction Amendments and the Nineteenth Amendment cured these problems.[275] The exclusion of women and minorities from the full rights of citizenship continued despite these amendments and was even rationalized through them.[276] In addition, these amendments did next to nothing for Native

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[272] U.S. CONST. pmbl.

[273] *See* Greene, *supra* note 271; Mulligan, *supra* note 222, at 380 ("Originalism has a difficult relationship with race and gender."); Mary Anne Case, *The Ladies? Forget About Them: A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 445 (2014) ("[N]o version of original meaning . . . holds much promise for yielding what Abigail Adams demanded of John—a constitutionally mandated code of laws more 'generous and favorable to women' than the one the Framers inherited.").

[274] Annette Gordon-Reed, *Writing About the Past That Made Us: Scholars, Civic Culture, and the American Present and Future*, 131 YALE L.J. 948, 959–60 (2022) (reviewing AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 (2021)).

[275] *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 111 (2013) ("[L]ike the exclusion of African Americans, the exclusion of women has been substantially corrected."). For a critique, see Fox, *supra* note 223, at 689–96.

[276] Plessy v. Ferguson, 163 U.S. 537, 544 (1896) ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."); The Civil Rights Cases, 109 U.S. 3, 25 (1883) (arguing that if the Constitution gave Congress the power to prevent private discrimination, it would make Black people "the special favorite of the laws"); Bradwell v. Illinois, 83 U.S. 130, 141

Americans, most of whom were only granted citizenship by statute in 1924.[277] They did nothing for Chinese immigrants, who were long excluded from citizenship,[278] or for the people of Puerto Rico and other American possessions, whose territories were deemed "unincorporated" and not fully subject to constitutional guarantees.[279]

Moreover, these Amendments do not really cure the problem of how to understand the Constitution as ordained and established by "We the People," because these amendments too were framed and adopted by a relatively small group of white men. If these men are the makers of constitutional meaning, then the story these amendments convey is that inclusion of other people is a gift from these men—the work of *their* hands—and not the achievement of those later brought into the circle of governance.

Because, as we have seen, what lives in memory shapes who has authority, the originalist account of Framers and Founders—who not only sat atop but also enforced a system of racial and sexual hierarchy—is also the story of who has authority to proclaim the Constitution's meaning for us today. And according to this story of America's origins, only a small segment of powerful, privileged white men pronounced what the Constitution meant and therefore what it still means. To understand the Constitution's meaning, we must delve into *their* ideas and opinions, and obsessively concern ourselves with *their* public speeches and private correspondence. The rest of America lives in the shade of their authority.

This version of the past is deeply corrosive of the belief in a transhistorical We the People that can bestow legitimacy on the Constitution today. It asks for a heroic deference by women and minorities. And this fact helps explain why many women and minorities have found so little to like in the originalist project.[280] The problem is not simply that most originalists are political conservatives or that originalist conclusions often conflict with the judgments of many women and minorities.[281] All of this may change over time, and in any case, the country's most prominent originalist,

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(1873) (Bradley, J., concurring) (explaining that states could prevent women from becoming lawyers because "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.").

[277] Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b) (2012)); *see also* Elk v. Wilkins, 112 U.S. 94, 102 (1884) (holding that the Fourteenth Amendment's guarantee of birthright citizenship did not apply to Native Americans who at the time of their birth were subject to tribal jurisdiction).

[278] CAROL NACKENOFF & JULIE NOVKOV, AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP 3 (2021).

[279] Balzac v. Puerto Rico, 258 U.S. 298, 313 (1922) (holding that Sixth Amendment right of trial by jury in criminal cases did not apply in unincorporated territories).

[280] Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 75 ("Almost all notions of originalism are subject to the criticism that they ask black concerns to defer to white concerns. . . . 'Defer to the past' is the implicit message. Listen to the wiser and greater (and whiter) founders.").

[281] Greene, *supra* note 271, at 517–18.

Justice Clarence Thomas, is a Black man.[282] Rather, the deeper problem is the originalist conception of who counts as a constitutional meaning maker and who matters in interpreting the American Constitution. The problem, in short, is one of constitutional memory.

It is no answer to say that the Framers and adopters made the law that we live under today, that they acted in the name of the people of the United States, and therefore their views count, and not the views of others who, however unfortunately, had no voice. This is an argument from popular sovereignty, but the argument from popular sovereignty begs the question of whether that We the People is still the same people who live under the Constitution today. For the law to be our law we must be able to identify with it as ours. Thus, some women and minorities might object as follows: What does the story of the Framers and adopters have to say to me? People like me did not count in that world. People like me had no voice. Their values, their experiences, and their strivings are legally irrelevant, flushed down the memory hole. Why should I identify with the oppressors?

That is why the expansion of memory to include constitutional claims by women and minority groups—and the work of post-adoption social movements—is important to the Constitution's contemporary legitimacy. The expansion of memory is crucial to the plausibility of the belief in a transhistorical We the People, and the allied claim that the Constitution we have today is the work of all of our hands, not just the hands of a favored few. As constitutional memory expands, and our constitutional conversation becomes larger and richer, more people can view it as *their* conversation about *their* Constitution. Gordon-Reed makes a similar point about the rise of social history by American historians: "What historians who have abandoned traditional narratives of the Founding in favor of writing about more obscure people and communities have been trying to do is to write such people into the national narrative."[283] They "are saying, 'These people, too, were a part of the Founding,' for the express purpose of creating an 'us' coherent enough, and inclusive enough, for all segments of society to feel connected to it."[284] This expansion of constitutional memory does not by itself guarantee the redemption of the Constitution. It only assists in that larger task.[285]

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[282] Mike Rappaport, *Originalism, Minorities, and Women*, L. & LIBERTY (Feb. 23, 2018), https://lawliberty.org/originalism-minorities-and-women/ [https://perma.cc/CQ99-RYV5].

[283] Gordon-Reed, *supra* note 274, at 959–60.

[284] *Id.* at 960.

[285] *Cf.* BALKIN, *supra* note 85, at 135 (arguing that the Constitution's legitimacy depends on a political faith that its promises can be redeemed in history); Paul Gowder, *Reconstituting We The People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335 (2019) (arguing that constitutional legitimacy for excluded people depends on a provisional attachment to the constitutional project in the hope that political activity can realize promises latent in the Constitution that actually produce a political system worthy of identification and allegiance).

The American constitutional tradition is not a unitary tradition. It is a dialectical tradition with many participants from many different perspectives, often in serious disagreement.[286] Some parts of this tradition will seem edifying and inspiring to us; others will seem abhorrent or unwise. But, the expansion of constitutional memory does not require us to honor all parts of our tradition equally. Quite the contrary, as we have seen, the past is full of both negative and positive precedents, and this means that we will bestow praise and blame, honor and dishonor on events and people as we try to persuade our fellow citizens. The point of expanding constitutional memory, rather, is to unlock the storehouse of the past for present-day use, and to make more of our past a usable past.

[286] The attempt to deny the constitutional tradition's dialectical character and proclaim a unitary tradition of constitutional commands is what Robert Cover once called "jurispathic." Cover, *supra* note 85, at 53. "Confronting the luxuriant growth of a hundred legal traditions," jurispathy is the attempt to "assert that *this one* is law and destroy or try to destroy the rest." *Id.* If the limitation of memory is jurispathic, asserting authority by sending competitors down the memory hole, the expansion of constitutional memory can be what Cover called "jurisgenerative," because it recognizes the possibility of multiple legal worlds. *Cf. id.* at 11 (defining "jurisgenesis" as "the creation of legal meaning").