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## AKHIL AMAR'S UNUSABLE PAST

Gregory Ablavsky\*

THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840. By *Akhil Reed Amar*. New York: Basic Books. 2021. Pp. xiv, 817. \$40.

### INTRODUCTION

Akhil Amar's<sup>1</sup> doorstep of a constitutional history, *The Words That Made Us: America's Constitutional Conversation, 1760–1840*, appeared in spring 2021 to both scholarly<sup>2</sup> and popular acclaim.<sup>3</sup> Amar's "love letter to America" (p. 702), the first of a projected three volumes, offers a sweeping narrative of the creation of the United States and the U.S. Constitution from the beginning of the American Revolution through the Jacksonian era (p. 697). At a moment when Americans are sharply divided over how to narrate the nation's history, Amar seeks to offer a "common core" by returning to "constitutional basics" (p. 676). The book hopes to meet the needs of a stormy present by providing the "usable past" that historians have been unable to give us (p. xii).

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1. Sterling Professor of Law and Political Science, Yale College and Yale Law School.
2. *E.g.*, John O. McGinnis, *Akhil Amar's 1789 Project*, L. & LIBERTY (Apr. 29, 2021), <https://lawliberty.org/book-review/akhil-amars-1789-project> [perma.cc/62LA-3R2P] (reviewing *The Words That Made Us*).
3. *E.g.*, Adam Cohen, *The Constitution Is More Than a Document—It's a Conversation*, N.Y. TIMES (May 4, 2021), <https://www.nytimes.com/2021/05/04/books/review/the-words-that-made-us-akhil-reed-amar.html> [perma.cc/7MFC-RQB6] (reviewing *The Words That Made Us*); Joel Seligman, *Context and Consequences: On Akhil Reed Amar's "The Words That Made Us."* L.A. REV. BOOKS (Aug. 3, 2021), <https://www.lareviewofbooks.org/article/context-and-consequences-on-akhil-reed-amars-the-words-that-made-us> [perma.cc/82L7-83AC] (reviewing *The Words That Made Us*); Mark G. Spencer, *'The Words That Made Us' Review: Constitutionally Speaking*, WALL ST. J. (June 23, 2021, 6:26 PM), <https://www.wsj.com/articles/the-words-that-made-us-review-constitutionally-speaking-11624487214> [perma.cc/5QJY-Y5GK]. For subtly critical takes, see Annette Gordon-Reed, *Writing About the Past That Made Us: Scholars, Civic Culture, and the American Present and Future*, 131 YALE L.J. 948 (2022) (reviewing *The Words That Made Us*); Kenneth W. Mack, *How a Decades-Long Conversation Shaped the Young United States*, WASH. POST (May 14, 2021), [https://www.washingtonpost.com/outlook/how-a-decades-long-conversation-shaped-the-young-united-states/2021/05/12/044cf530-a484-11eb-85fc-06664ff4489d\\_story.html](https://www.washingtonpost.com/outlook/how-a-decades-long-conversation-shaped-the-young-united-states/2021/05/12/044cf530-a484-11eb-85fc-06664ff4489d_story.html) [perma.cc/RZ5W-5ZLE] (reviewing *The Words That Made Us*).

It fails. Likely few books could restore a common historical narrative amidst the current moment's fractiousness. But Amar's account provides a surprisingly unusable past, in large part because he misreads the challenge. The problem is not, as Amar diagnoses, that we lack a purportedly fair-minded observer to sit in judgment on—and ultimately vindicate—the Founders. Rather, the difficulty is that such conventional narratives of the “Founding” strain to accommodate the complex and pluralist nation that the United States always was, a reality that a more capacious constitutional history might allow us to see. As a result, Amar's defense of the Constitution's legitimacy by repackaging some very old, shopworn arguments and evidence will do little to settle our ongoing fights over the past.

Lawyers conceive of a usable past as a historical account that they can deploy in current legal fights.<sup>4</sup> Amar claims that this is his aim (p. xii), but his familiar and abstract interventions are unlikely to shape present-day law: few court decisions will shift because Amar proclaims secession unconstitutional. His truer aim, as he reveals at the book's end, reflects a different meaning of the usable past: a version of history that addresses present-day exigencies more broadly.<sup>5</sup>

For Amar, the crisis of the moment is a partisan battle over the Founders' moral authority, with those on the right insisting that “America's founders never did anything wrong” while those on the left claim they “never did anything right.”<sup>6</sup> We need, Amar suggests, a fair-minded scorekeeper who will offer “facts and analysis” in place of partisan rancor (p. 677). He volunteers.

What follows is a panoramic tour through the early republic starring the familiar men whom Amar calls the “Big Six” Founders.<sup>7</sup> Amar commentates along the way, offering readers a running tally of who among them (and among scholars) was right or wrong and why, all the while defending the Constitution's democratic legitimacy. The excursion is often entertaining—Amar can be an opinionated and incisive guide.

But the result is decidedly not the “fresh story of America” Amar promises (p. 678). On the contrary, much of what Amar peddles is very old indeed, ignoring generations' worth of scholarship to parrot a centuries-old nationalist hagiography. Perhaps Amar's oldest and most tired assumption is that constitutional history must be, at core, a referendum on the handful of powerful men

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4. See Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995). A similar use of the phrase appears in Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 96 (2017).

5. Pp. 675–98. This was the meaning of one of the phrase's earliest recorded uses. See Van Wyck Brooks, *On Creating a Usable Past*, 64 THE DIAL 337, 337 (1918) (“[T]he past experience of our people is not so much without elements that might be made to contribute to some common understanding in the present . . .”).

6. See p. 677.

7. According to Amar, the “Big Six” are John Adams, Benjamin Franklin, Alexander Hamilton, Thomas Jefferson, James Madison, and George Washington. P. 304.

dubbed the Founders. One senior scholar piquantly summarized this historical approach to me years ago as, “Was Andrew Jackson a son of a bitch?”<sup>8</sup> (Amar says no: pp. 585–623). For Amar, the history of the Constitution’s creation necessarily requires debating, yet again, which of a small circle of drafters was most praiseworthy or deserves the most credit for its best ideas.

If the central function of constitutional history is to arbitrate the legitimacy of what these men wrote and did, then we are ultimately faced with a dichotomy: good or bad? Amar seeks to introduce complexity and nuance in his response, pointing out where various people got things wrong or right, but his core commitment is never in doubt: he is on Team Good. But his efforts to blunt various criticisms levied against the Founding, picking up where the abortive 1776 Commission left off,<sup>9</sup> paint him into some difficult corners—especially when he endorses some dubious exculpatory narratives around the exclusion of women, African Americans, and Native peoples in early America.

Yet Amar’s own framing points in a different, more promising direction. He focuses much of the book around the idea of a “constitutional conversation,” a cacophonous and capacious dialogue that encompassed many Anglo-Americans. Unfortunately, his account of that conversation quickly collapses to the views of a handful of too-familiar figures—a cramped vision that reads backward our own sometimes narrow constitutional conversation privileging a clubby legal elite oriented around the Supreme Court. Democracy, “America,” and “the people” all feature prominently here, but only as abstractions that get seen but not heard. This is a notably undemocratic history of democracy.

For over a generation, historians have offered a different version of the constitutional conversation—one that is fuller and more inclusive, highlighting the many ways that the actual people accessed and shaped constitutional law.<sup>10</sup> A host of scholars, including many in law schools, have explored these conversations among groups and in places far outside the familiar confines of *The Federalist Papers* and the *U.S. Reports*.<sup>11</sup> Even intellectual histories focused

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8. Conversation with Professor Peter Onuf, Thomas Jefferson Memorial Foundation Professor Emeritus in the Corcoran Department of History at the University of Virginia.

9. PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [perma.cc/A7RU-DVXD].

10. The canonical pronouncement of this approach appears in Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013 (1987). By 2013, legal historians were describing this methodological effort to explore the “lived constitutional experiences of laypeople” as the dominant approach of the field. Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2322 (2013) (book review). Some historians even characterized this methodology as a set of well-established principles that the field had “internalized” and expanded on. Kenneth W. Mack, Response, *Civil Rights History: The Old and the New*, 126 HARV. L. REV. F. 258, 259 (2013).

11. This category is enormous and includes most junior and midcareer legal scholars writing constitutional history today. For some recent key examples, see Maggie Blackhawk [published as Maggie McKinley], *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018); Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037 (2020);

on current doctrinal questions have increasingly drawn on a more expansive range of sources and voices.<sup>12</sup> The point of this approach is not more inclusiveness to serve current sensibilities; it is that a diverse range of actors and arguments mattered. They shaped law. Often, the “Big Six” were reacting more than acting.

Judging by the pages of law reviews, then, many in the legal academy have already moved beyond Amar’s narrow account. Yet Amar’s readers might not realize this. Syntheses by prominent scholars like Amar play an important role: they depict the state of the field for nonspecialists and translate scholarship to a general audience; they get space and attention. Prior big, thoughtful, well-sourced volumes have helped us better grasp the Constitution’s creation and ratification.<sup>13</sup> Yet those works, summarizing a prior generation of scholarship, predate the extensive new work in legal and constitutional history that has embraced more sweeping, capacious reconstructions of the constitutional conversation. Amar’s behemoth is thus a double-missed opportunity—both because current constitutional history is bigger, more varied, and more interesting than his tired story, and because such histories, in my view, best speak to current struggles over history’s meaning.

In making this case, this Review proceeds in three parts, each centered around one of Amar’s major interventions. In Part I, I explore Amar’s critique of historians and consider his methodological alternative. In Part II, I consider two of Amar’s key frames, “constitutional conversation” and “geostrategy,” arguing that both of these echo, but distort, some of the key recent findings from historians. And in Part III, I explore what is perhaps the most significant addition from Amar’s prior works—an examination of the exclusion of women, Native peoples, and African Americans from constitutional debates—but ultimately find his insights lacking. I conclude by suggesting a way forward using works that *have* effectively adopted the broader approach to constitutional history.

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Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006); and Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559 (2020). For a recent symposium exemplifying some of these approaches, see Symposium, *The Federalist Constitution*, 89 FORDHAM L. REV. 1669 (2021).

12. See, e.g., JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397 (2019); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

13. See, e.g., RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (2009); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

## I. HISTORIANS AND THE PURPOSE OF THE PAST

One of the reasons we need his book, Amar argues, is because historians have fallen short. At core, the problem seems to be that historians have failed to offer the kind of opinionated takes on prominent Founders that dominate Amar's book. But his criticisms are not only ill-informed, they also fail to build a more usable past. His fundamental argument—an aggressive assertion of the constitutional brilliance of George Washington—rehashes some of the oldest strands in American historiography.

Amar's volume opens with three critiques of historians' shortcomings in examining constitutional history: historians have abandoned institutions and the law in favor of a focus on reconstructing the lives of "common folks"; they have adopted overly narrow periodizations and overspecialized focuses; and they merely report, rather than assess, past legal claims (pp. x–xi).

The first two criticisms are very familiar to historians. Indeed, they parallel prominent debates *among* historians, with some echoing Amar's laments.<sup>14</sup> Of course, it is not clear why these limitations are problems for constitutional history. After all, "common folks" had something to say about the Constitution, as I'll discuss later.<sup>15</sup> And it has primarily been historians pushing lawyers to adopt a broader chronological frame around the Constitution rather than vice versa.<sup>16</sup>

As critiques go, these are also pretty shallow. The primary hallmark of current historical scholarship is not parochialism; it is overabundance. As in any scholarly field, many historians produce targeted work based on a careful, close reading of evidence. But these monographs routinely become the basis for the much more sweeping syntheses that historians have *also* churned out of late. Jill Lepore's single-volume history of the United States is merely the most prominent and successful of a whole host of recent volumes in this vein—including a couple that Amar himself cites, although he ignores most of them.<sup>17</sup> Meanwhile, rumors of the death of institutional, or legal, or political

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14. For a critique of the narrow temporal scope of most historical works, see JO GULDI & DAVID ARMITAGE, *THE HISTORY MANIFESTO* (2014). On the purported neglect of political history, see Steven Pincus & William Novak, *Political History After the Cultural Turn*, PERSPECTIVES ON HIST. (May 1, 2011), <https://www.historians.org/publications-and-directories/perspectives-on-history/may-2011/political-history-after-the-cultural-turn> [perma.cc/XG2L-UQ55].

15. See *infra* Section II.A.

16. See, e.g., DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 4 (2005) (footnote omitted) (arguing that the "founders looked backward as well as forward"); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 1–2* (2010) (critiquing lawyers for viewing the Constitutional Convention as "time zero").

17. JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* (2018); see also *infra* notes 108–16.

history are greatly exaggerated. On the contrary, all these fields have had a resurgence of late. At his own university,<sup>18</sup> and even his own law school,<sup>19</sup> Amar would discover many historians doing precisely this work. Indeed, serious intellectual and institutional histories of the Constitution of the sort Amar seems to favor continue to be produced apace, although they receive scant attention in this volume.<sup>20</sup>

Amar's third critique—that historians are unwilling to adjudicate past legal claims—has more substance.<sup>21</sup> It echoes longstanding debates between historians and lawyers—made especially acute by the ascension of originalism—over how to interpret the past. Historians insist on the pastness of the past, the gap between present understandings and the worldview of prior eras.<sup>22</sup> Originalists and others counter that the questions that they are asking—the past semantic meaning of text, for instance, or the content of prior law—closely resemble the sort of workaday legal questions that law routinely resolves.<sup>23</sup> Lawyers thus push for a version of history that can offer insights and legal principles for adjudicating current legal controversies.

Amar's book is at once related and orthogonal to this debate. Though Amar, unlike historians, has no hesitation about adjudicating past legal debates, he is not really siding with the originalists either. Originalists claim that the current content of constitutional law stems from the law of the past; that

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18. Yale's history department lists twenty people working on legal history, while Joanne Freeman is among the most prominent early American political historians writing today. *Faculty, Department of History*, YALE UNIV., <https://history.yale.edu/people/faculty> [perma.cc/V95H-UQ7W].

19. Scholars at Yale Law School researching legal history include Sam Moyn, Nick Parrillo, Claire Priest, James Whitman, John Witt, and Taisu Zhang. *Our Faculty*, YALE L. SCH., [https://law.yale.edu/faculty?combine=&field\\_type\\_value=Faculty](https://law.yale.edu/faculty?combine=&field_type_value=Faculty) [perma.cc/4C2C-CMJ5].

20. For examples of such works, see MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); GIENAPP, *supra* note 12; David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003); LACROIX, *supra* note 16; and ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* (2014).

21. *But see* Gordon S. Wood, *History in Context*, WEEKLY STANDARD (Feb. 23, 2015), <https://web.archive.org/web/20181215002256/https://www.weeklystandard.com/gordon-s-wood/history-in-context> (arguing that recent historians have been *too* eager to make judgments about the past).

22. *See, e.g.*, Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969 (2015).

23. *See, e.g.*, William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015).

is, the meaning or legal content of the past continues to bind today.<sup>24</sup> These claims emerge in, for instance, the intense, ongoing battles over the Founding-era roots of the nondelegation doctrine<sup>25</sup> or the original meaning of the Second Amendment.<sup>26</sup> But Amar's book does not share this project of explicating past law to resolve current constitutional controversies. Ultimately, the source of law for Amar's assessments of past legal disputes is not prior positive law but Amar's own theory of legal interpretation. And his interest seems less in speaking to current law than in deciding who was right in the past.<sup>27</sup>

In this sense, parsing constitutional law seems incidental to Amar's larger project, which is more focused on definitively assessing not ideas but powerful men. Amar's primary focus is on judging the "Big Six Founders"—John Adams, Benjamin Franklin, Thomas Jefferson, Alexander Hamilton, James Madison, and George Washington—as well as a handful of other familiar figures, including Andrew Jackson, James Otis, and John Marshall. The result is a *U.S. News & World Report* list for the Founding, as Amar opines at length about whether various figures should rise or fall in "our cultural rankings" (p. 525); he elsewhere speaks of a constitutional "pantheon" (p. 560).

Amar's assessment of this imagined historical leaderboard is clear. He has little patience for Adams, whom he dismisses as self-absorbed and ineffectual. Hamilton gets praise, though only to the extent that he echoed the incomparable Washington. Jefferson gets condemned as a liar and a hypocrite, a "proto-secessionist" unable to move beyond the Declaration of Independence, even as Amar admires his tenacious defense of freedom (pp. 520–23). Though hardly languishing in obscurity, Marshall "rises" as a constitutional expounder (p. 527).

But the two primary targets of Amar's reassessments are Madison and Washington. The book's notes reveal Amar's battle with a host of Madison biographers as he seeks to knock Madison from what seems to Amar an undeservedly lofty perch. Chief among these honors is Madison's status as purported "father of the Constitution," as Amar dismisses the significance of Madison's constitutional contributions (pp. 181–207). Amar then seeks to undermine Madison's purported authorship of the Bill of Rights, a document

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24. See generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

25. Compare, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), with Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

26. Compare, e.g., Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007), with Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511 (2008).

27. Although Amar usually sides with the Federalists, he goes out of his way to highlight his open-mindedness by emphasizing issues where he agrees with the Jeffersonian Republicans. E.g., pp. 417–27.



that mostly echoed provisions elsewhere, and underscores Madison's compromises and prevarications on slavery, with which, Amar argues, his biographers have never fully grappled (pp. 312, 696).

In Madison's place, Amar seeks to elevate Washington as the Constitution's "real father" (p. 525) and its "embodiment" (p. 390). Washington's position as a "towering, if taciturn, constitutionalist" stems in Amar's view from his powerful commitment to the indestructible union, his republicanism, and his geostrategic savvy,<sup>28</sup> all of which Amar believes were reflected in the new Constitution (pp. 277–303, 526). Moreover, Washington, unlike Madison and Jefferson, redeems himself, per Amar, from his status as an enslaver because he emancipated his human property after his death.<sup>29</sup>

It is unclear why Amar thinks this reranking offers a more usable past. Lawyers, for instance, rely on the arguments of Madison and Hamilton not because of these men's goodness but because they wrote, and spoke, a lot about law. Denigrating Madison will not end the steady stream of *Federalist Papers* quotations in legal briefs and originalist arguments. Washington, by contrast, is much less quotable; it is hard to define a Washingtonian constitutionalism. The Washington constitutional virtues that Amar identifies—"energetic," "republican"—amount to an argument that we should be governed by stateswomen and men (p. 283).

In truth, the usable past that Amar wants to establish is not primarily practical but symbolic, and, rather than being new, it is quite old. The personality-driven account of *Words That Made Us* resembles the recent popular-historical biographies asserting the primacy of one or another Founder, what historians dismissively call "Founders Chic."<sup>30</sup> But Amar's aims smack more of the nineteenth century than of David McCullough or Ron Chernow. In the nation's early, tentative years, the excellence of the Founders—especially George Washington—not only epitomized and stood in for the greatness of America, but also provided a moral exemplar for future generations.<sup>31</sup> Such efforts were particularly rife and significant as the fledgling country explicitly sought to construct a national identity. The proliferation of Washington iconography, expressed in statutes, paintings, monuments, prints, and even crockery, provided a key symbolic bond for a fractured country.<sup>32</sup>

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28. See *infra* Section II.B.

29. See pp. 648–52. Here, as elsewhere, Amar confusingly blends internalist and externalist critiques. From an internalist perspective, it is unclear why Amar believes Madison's and Jefferson's moral shortcomings undercut the merits of their thought. From an externalist perspective, it is not clear that Washington was the most morally praiseworthy of the "Big Six"—compared to, say, Adams, the only one who was never an enslaver, or Franklin, the strongest abolitionist.

30. H.W. Brands, *Founders Chic*, THE ATLANTIC (Sept. 2003), <https://www.theatlantic.com/magazine/archive/2003/09/founders-chic/302773/> [perma.cc/7PE4-Y6VK].

31. On this role of Washington in particular, see BARRY SCHWARTZ, *GEORGE WASHINGTON: THE MAKING OF AN AMERICAN SYMBOL* (1987), and PAUL K. LONGMORE, *THE INVENTION OF GEORGE WASHINGTON* (1988).

32. See generally SCHWARTZ, *supra* note 31; LONGMORE, *supra* note 31.

Amar's latter-day apotheosis of Washington represents the clearest break between his approach to the past and historians'. Very few historians view their job as trying to inculcate a sense of American excellence and virtue. (Nor, despite the claims of their critics, do most current historians seek to do the opposite, to preach a kind of anti-American exceptionalism). Amar, by contrast, views reestablishing the interrelated greatness of Washington and the Constitution as the key to creating a renewed historical consensus.

This seems unlikely to succeed. The powerful nineteenth-century cult of Washington failed to prevent disunion, and Washington's symbolic star is much dimmer today. Some of this reevaluation is about Washington personally: Amar's narrative of Washington's "redemption" on chattel slavery sidesteps countervailing accounts, like works unearthing Washington's "relentless" efforts to reclaim people who fled his enslavement, that show the first president in a less flattering light.<sup>33</sup> But, to the (very limited) extent that people are tearing down statues of Washington,<sup>34</sup> it owes mostly to the conflation between Washington and the United States that Amar seeks to heighten. Like Amar, these critics see Washington as the embodiment of the nation and the Constitution—but they associate him with the evils committed in the name of both.

As the following sections explore, Amar attempts to offer a broader defense against these critiques, too. But his flawed arguments prove no more persuasive than his attempt to reinvest us all in Washington's greatness.

## II. A ONE-SIDED CONVERSATION

Alongside Amar's purported methodological innovations, he makes two central interpretive claims. One is foregrounded in the book's subtitle: the concept of an ongoing American "constitutional conversation" in which newspapers and print shops played a starring role.<sup>35</sup> The other is the importance of what Amar terms "geostrategy" in the creation and interpretation of the Constitution, a term he uses especially when lauding Washington.<sup>36</sup>

Neither frame is new: in both instances, Amar seems to have absorbed (largely unwittingly, based on the absence of citations) some of the main themes of recent historical literature on the early republic. But in both instances, Amar's fixation on a handful of Founders obscures the potential of

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33. ERICA ARMSTRONG DUNBAR, *NEVER CAUGHT: THE WASHINGTONS' RELENTLESS PURSUIT OF THEIR RUNAWAY SLAVE*, ONA JUDGE (2018). A recent book also challenges the claim that Washington's emancipation of his slaves reflected moral opposition to slavery. BRUCE A. RAGSDALE, *WASHINGTON AT THE PLOW: THE FOUNDING FARMER AND THE QUESTION OF SLAVERY* (2021).

34. David Williams, *Protesters Tore Down a George Washington Statue and Set a Fire on Its Head*, CNN (June 19, 2020, 1:06 PM), <https://www.cnn.com/2020/06/19/us/portland-george-washington-statue-toppled-trnd/index.html> [perma.cc/2SRU-A3R5].

35. See *infra* Section II.A.

36. See *infra* Section II.B.

these perspectives to offer a broader constitutional view, one underscored by historians' recent work.

#### A. *The Constitutional Conversation*

Amar uses some of the most soaring prose in *Words That Made Us* to describe the expansiveness of early American constitutional conversation. “For the first time in world history,” Amar recounts of the American Revolution, “countless scribblers” across multiple social classes and continents “directly engaged each other in spirited back-and-forth discourse”—the “first global constitutional conversation” (pp. 41–42). He goes on to lay out a powerfully democratic vision of how “Americans high and low participated . . . by *conversing* with each other, pro and con, up and down the continent, in newspapers and elsewhere” (p. xiii). Indeed, for Amar, newspapers play a starring role from the Stamp Act through ratification and into the partisan rancor of the early republic.

Amar here is reiterating one of the key moves of what was called the “new political history”—or even the “newest political history”—of the 1990s and 2000s.<sup>37</sup> This approach sought to reexamine political history by “emphasiz[ing] the ubiquity and the importance of popular politics,” including the “proliferation of print.”<sup>38</sup> The result was an expansive reimagining of early American politics, as scholars explored how “ordinary” people routinely engaged in politics not just through voting but through a raucous political culture of mass mobilization.<sup>39</sup> Apropos of Amar, much of this early work focused on debates over constitutionalism.<sup>40</sup> Amar also did not discover the significance of print culture, his contrary claims notwithstanding.<sup>41</sup> Scholarship mining newspapers is a staple of the new political history,<sup>42</sup> with scholars continuing to produce major new contributions.<sup>43</sup>

Yet there is a key distinction between this literature and Amar’s work. For Amar, the relevant conversation narrows very quickly to the small coterie of men who interest him. Law and politics, in his view, occur “in the room where

37. Chris Beneke, *The New, New Political History*, 33 *REVS. AM. HIST.* 314, 314–24 (2005).

38. *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC 11–12* (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher, eds., 2004).

39. *E.g., id.* at 10.

40. *See, e.g.,* SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999); WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009).

41. *See, e.g.,* p. 682 (arguing that the “most recent historians” have neglected the tie between the Stamp Act and newspapers).

42. JEFFREY L. PASLEY, “THE TYRANNY OF PRINTERS”: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC (2001).

43. *See, e.g.,* JOSEPH M. ADELMAN, *REVOLUTIONARY NETWORKS: THE BUSINESS AND POLITICS OF PRINTING THE NEWS, 1763–1789* (2021); ROBERT G. PARKINSON, *THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION* (2016).

it happened”<sup>44</sup> (quoting the musical *Hamilton*), which for Amar means the Founders’ correspondence (pp. 217–18) and, later, the decisions of the Supreme Court.<sup>45</sup> The sprawling constitutional conversation becomes a backdrop to illustrate the political skill of the Big Six, whom he describes as “newspaperm[e]n” for their forays into print and praises for their “media savvy” (pp. 283, 304–06). But we get only the barest snippets of what actually happened in the pages of early American newspapers: Amar provides capsule printing histories of Franklin’s well-known “Join or Die” snake (pp. 98–103) and of a widely distributed image depicting the states as constitutional columns (pp. 231–38). The “countless scribblers” remain off stage, mere props for the key historical actors.

This approach is antithetical to the aspirations of the new political historians, who sought to reject what they saw as an overly narrow account of politics: the key text of this historiographical turn, after all, is entitled *Beyond the Founders*.<sup>46</sup> Amar’s book is full of paeans to “popular sovereignty” and the “people”; he even floats the romantic idea that “America” was the truest author of both the Declaration and the Constitution (pp. 127, 312). But these remain mere platitudes and abstractions. Other than the Founders, *actual* people never speak in Amar’s conversation.

The point of the newest political history, though, is that lots of people *did* speak, constantly and voluminously, and had a lot to say—about politics, law, and the Constitution. Moreover, this literature suggests, their views mattered: mass mobilization profoundly shaped the course of early American law, whether during the debates over the Constitution or the partisan battles afterward.<sup>47</sup>

Exploring rather than merely celebrating the constitutional conversation would yield a different constitutional history. For one, a deeper inquiry would challenge Amar’s blithe assertion that women, Native peoples, and African Americans were simply excluded from that conversation.<sup>48</sup> For another, this approach might question Amar’s virulent opposition to the “neo-Beardian” interpretations of the Constitution that emphasize its antidemocratic quality.<sup>49</sup> Amar insists that ratification was the result of a “truly American constitutional conversation” that ultimately approved the resulting document (p. 39). But, regardless of how we assess the democratic nature of the process, it is incontrovertible that many of the Constitution’s drafters and advocates were deeply worried by the very boisterousness and expansiveness of the early

44. See p. 364.

45. See pp. 484–99.

46. *BEYOND THE FOUNDERS*, *supra* note 38.

47. See, e.g., BENJAMIN H. IRVIN, *CLOTHED IN ROBES OF SOVEREIGNTY: THE CONTINENTAL CONGRESS AND THE PEOPLE OUT OF DOORS* (2011); Alfred F. Young, *The Framers of the Constitution and the “Genius” of the People*, *RADICAL HIST. REV.* Fall 1998, at 8.

48. See *infra* Section III.B.

49. P. 689 (“Almost everything that Charles Beard and his modern-day debunking followers have said about the Constitution’s launch is either dead wrong or more wrong than right.”).

American constitutional conversation. As the decided non-Beardian Gordon Wood put it, the central issue during ratification was “whether a professedly popular government should actually be in the hands of, rather than simply derived from, common ordinary people.”<sup>50</sup> In this debate, the Constitution’s proponents were unquestionably the more suspicious of democratic control.

Taking the constitutional conversation seriously yields a different account of law, too. For Amar, law was crafted by a small circle of men, whose views determined what counted as constitutional; they were the principal speakers in the constitutional conversation. But in the early republic, the idea of “popular sovereignty” and the “people” were not mere abstractions.<sup>51</sup> Actual people took their status as lawmakers seriously, both through ordinary mass politics and then at times through the mass mobilizations that elites demonized as rebellions—Shays’s Rebellion, the Whiskey Rebellion, Fries’s Rebellion.<sup>52</sup>

Whether this literal interpretation of popular constitutionalism was correct was one of the most hotly debated legal questions of the period. But Amar presents these events only briefly, depicting them not as an intense argument over constitutional interpretation and authority but as a series of challenges that only the Big Six could solve. As a result, Amar’s constitutional conversation is remarkably one-sided, obscuring how these “common folks” made claims to which Amar’s Founders had to respond.

There is an irony in defending the Constitution’s democratic legitimacy while silencing most actual people. But this was an irony that the Constitution’s crafters, who thought that too much popular control threatened their experiment in popular sovereignty, would have appreciated.

### B. *Geostrategy*

Another core theme of Amar’s constitutional story is geostrategy. Amar particularly associates the term with George Washington, whom Amar repeatedly describes as “geostrategically” gifted and especially focused on the “geostrategic problem” that the United States confronted (pp. 212–14, 285).

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50. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 516 (1998).

51. This is the central theme of LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

52. On this legacy, see RONALD P. FORMISANO, *FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION TO THE 1850S* (2008), and CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008).

“Geostrategy” is a mid-twentieth-century neologism closely associated with the rise of the national security state.<sup>53</sup> But Amar links the term with another word that Washington routinely deployed: “continental.”<sup>54</sup> For Amar, the most praise-worthy thinkers and approaches are “continental” in scope. Washington, for instance, is the nation’s “most truly continental person” (p. 298), while Publius embraced the need for the United States to become “one continental nation-state” (p. 229).

As with the concept of constitutional conversation, Amar here both echoes and distorts a large body of historical scholarship. Over the past couple decades, “continental” has become an important term for historians to try to describe a capacious view of the events and peoples of North America.<sup>55</sup> Alan Taylor’s multivolume history of early America, for instance, is explicitly billed as a set of continental histories.<sup>56</sup> Meanwhile, Max Edling has done important work on the role of the Constitution in empowering the United States in the contest for the continent, though he uses the historiographical term “fiscal-military state” in place of Amar’s “geostrategy.”<sup>57</sup>

The goal of this decade of work is twofold. For one, it challenges claims that the United States was a “continental” nation at its Founding, given that the nation consisted of a tiny band of Anglo-American settlement. Instead, a truly continental focus helps turn attention to what historians have labeled Vast Early America, underscoring how much of “America” was owned and governed by others—mostly Native nations, but also a complex blend of French, British, Spanish, Russian, and later Mexican peoples.<sup>58</sup> Second, this work challenges the inevitability of the U.S. rise by underscoring just how unsettled, uncertain, and contested much of North America was. There were, these scholars argue, many possible continental futures, not all of which ended with U.S. hegemony.<sup>59</sup>

53. Among the first uses of the term “geo-strategic” is Frederick L. Schuman, *Let Us Learn Our Geopolitics*, 2 *CURRENT HIST.* 161, 164 (1942), where he describes it as “the art of combining geography and strategy on a world scale.”

54. See generally JAMES D. DRAKE, *THE NATION’S NATURE: HOW CONTINENTAL PRESUMPTIONS GAVE RISE TO THE UNITED STATES OF AMERICA* (2011) (describing late eighteenth-century uses of the term “continental”).

55. See Michael Witgen, *The Native New World and Western North America*, 43 *W. HIST. Q.* 292, 293 (2012) (“[I]magine a Native New World would require scholars to take a continental approach to North American history.”).

56. ALAN TAYLOR, *AMERICAN COLONIES* (2001); ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804* (2016); ALAN TAYLOR, *AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES, 1783–1850* (2021).

57. EDLING, *supra* note 20, at 130–44, 219–28.

58. See Alan Taylor, *Continental Crossings*, 24 *J. EARLY REP.* 182 (2004); Eliga Gould & Rosemarie Zagari, *Situating the United States in Vast Early America*, 78 *WM. & MARY Q.* 189 (2021).

59. See CLAUDIO SAUNT, *WEST OF THE REVOLUTION: AN UNCOMMON HISTORY OF 1776* (2014); François Furstenberg, *The Significance of the Trans-Appalachian Frontier in Atlantic History*, 113 *AM. HIST. REV.* 647 (2008).

This long imperial struggle for North America, especially in the region early Americans called the West, is what Amar means by the nation's "geostrategic problem." But calling it "geostrategy" provides a badly distorted view on this history. When historians speak about continental history, their goal is to shift attention *away* from familiar stories about national politics by emphasizing the diversity and complex pasts of what became the United States. Amar's geostrategic focus, by contrast, recenters anxious Anglo-American policymakers, who sought to solidify their uncertain authority and control over vast amounts of space. The book gazes at the continent from Dr. Strangelove's War Room, with North America up on the "big board."

One problem with this blinkered focus is that it leads Amar to embrace these policymakers' often dubious beliefs. Washington and others, for instance, felt so entitled to continental supremacy that they regarded any threat to their expansion as a challenge to American independence and security. Steeped in anti-British paranoia, they attributed any impediment blocking their continental greatness to European intrigue, including the resistance of Native peoples whom the United States sought to subordinate.<sup>60</sup> Amar uncritically accepts the accuracy of this view. "[T]he grand-strategy key to the East (Britain)," he pithily summarizes, "was the West (Indians)" (p. 380). That Native peoples might resist U.S. colonialism other than as mere British dupes—or have their own valid fears about their nations' independence and security—doesn't enter Amar's perspective much more than it entered Washington's.

This embrace of Anglo-Americans' self-serving narrative underscores a much more serious omission caused by Amar's geostrategic frame: violence. Solving Amar's "geostrategic problem" involved seizing control of other peoples and lands—in other words, imperialism. This process proved long and brutal. Some of the resulting violence came from Native resistance, as Anglo-Americans were keen to point out, establishing a story of white victimhood.<sup>61</sup> But much of the violence came from newly minted U.S. citizens. As numerous scholars have shown, many in the new nation held a virulent hatred of Native peoples, with many Anglo-Americans concluding that the "solution" to the

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60. See, e.g., ALAN TAYLOR, *THE DIVIDED GROUND: INDIANS, SETTLERS, AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION* 116 (2006) ("Unable to recognize Indian initiative, Americans reflexively blamed both the buffer zone and the post retention on malicious Britons reneging on their peace treaty by ventriloquizing docile Indians.").

61. Peter Silver calls this print culture that emphasized "a horror-filled rhetoric of victimization, intent on the damage that Indians had done to colonists' bodies and families" the "anti-Indian sublime." PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA*, at xix–xx (2008). Amar invokes this rhetoric to explain colonists' reference to "merciless Indian savages" in the Declaration of Independence. P. 143.

“problem” of Native persistence was extermination.<sup>62</sup> These citizens’ geostrategy consisted of repeated genocidal massacres of unresisting Native villages.<sup>63</sup>

Washington was not only keenly aware of this violence; he also participated in it, earning the Haudenosaunee (Iroquois) sobriquet “Town Destroyer” by ordering the destruction of Six Nations villages during the Revolution.<sup>64</sup> His role in the post-revolutionary violence was more complicated. Amar quotes at length what he calls Washington’s “grand-strategy letter” that accurately captures the President’s dismay at anti-Native violence, much of which occurred in defiance of federal law.<sup>65</sup> But, as scholars have underscored, neither Washington nor the early federal government were helpless bystanders in the violence of continental dispossession. On the contrary, they actively turned the expansive resources of the new federal government toward placating white settlers’ demands for violence. Most notably, in the Northwest Indian War, Washington and other federal officials spent nearly half the new nation’s budget on a scorched-earth campaign that successfully forced Native peoples to cede much of the present Midwest.<sup>66</sup>

Even at the time, white Americans had deep doubts about what this violence meant for the “national character,” as Washington called it.<sup>67</sup> Many condemned the Northwest Indian War as an effort “of the United States to obtain lands to which they have no just claim.”<sup>68</sup> Amar’s tone is different. Sometimes, he conveys resignation: of wars against Native nations, he writes, “countries on occasion ruthlessly pursue their self-interest” (p. 635). Other times, he is more triumphalist. Indigenous defeat in the Northwest Indian War and white

62. See generally PARKINSON, *supra* note 43; *id.* at 263–92; David J. Silverman, *Racial Walls: Race and the Emergence of American White Nationalism*, in ANGLICIZING AMERICA: EMPIRE, REVOLUTION, REPUBLIC (Ignacio Gallup-Diaz, Andrew Shankman & David J. Silverman eds., 2015).

63. See JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS (2019); Rob Harper, *Looking the Other Way: The Gnadenhütten Massacre and the Contextual Interpretation of Violence*, 64 WM. & MARY Q. 621, 621–44 (2007); Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 AM. HIST. REV. 98, 98–139 (2015).

64. See COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION 235–59 (2018).

65. GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 109–37 (2021).

66. On the Northwest Indian War, see COLIN G. CALLOWAY, THE VICTORY WITH NO NAME: THE NATIVE AMERICAN DEFEAT OF THE FIRST AMERICAN ARMY (2015). See also CALLOWAY, *supra* note 64, at 422–50; Jeffrey Ostler, *Locating Settler Colonialism in Early American History*, 76 WM. & MARY Q. 443 (2019). On the war’s expense, see ABLAVSKY, *supra* note 65, at 149.

67. George Washington, Address to the United States Senate and House of Representatives, in 15 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 157, 157–58 (Christine S. Patrick ed., 2009).

68. Letter from Tobias Lear to George Washington, in 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 556, 558 (Robert F. Haggard & Mark A. Mastromarino eds., 2002)



settlement of Ohio become, in his telling, part of a string of “brilliant diplomatic and geostrategic achievements” (p. 382).

In one sense, Amar is right: U.S. success in a continental contest that few expected the nation to win *was* an achievement that many Anglo-Americans lauded at the time.<sup>69</sup> But we don’t have to share their celebratory attitude. Indeed, our keener awareness of the costs of U.S. “geostrategy” makes uncritically endorsing their views appear as an apology for inhumane violence. Yet Amar—otherwise so insistent on the need to sit in judgment on past people, ideas, and laws—is here not simply silent but congratulatory.

### III. EXCLUSION

Though he praises the Constitution’s democratic character, Amar also acknowledges that the Founding vision of “the people” was profoundly circumscribed. The book’s preface flags slavery and the status of “[w]omen,” “[f]ree Blacks,” and “Indian tribes” as among the “urgent new constitutional questions” that confronted the nation (pp. ix–x). Though these topics end up featuring less than this introduction might suggest, Amar returns to them at three or four points in the volume.

There is a perfunctory feel to these discussions—as if Amar, recognizing that lily-white narratives of the past no longer go unchallenged, sought to stave off such criticism. Yet Amar’s examinations of marginalized communities represent a step backward, not forward. The problem is that, to explain his decision not to devote more space to this history, Amar asserts that these groups were not meaningfully part of the constitutional conversation. This is a factually questionable claim, as I explore below. But in defending it, Amar can’t quite distinguish *reconstructing* past exclusionary rationales from *validating* them: he regularly shades from explanation into apology. Here, Amar’s eagerness to judge and vindicate the Founders steers him dangerously wrong. He seems incapable of reporting on their thoughts and actions—even those most troubling to present-day audiences—without leaping to their defense.

#### A. *Explaining—and Validating—Exclusion*

In Amar’s gestures toward inclusion, he treats marginalized groups’ histories quite differently. He sidelines women, ritually castigates slavery, and blames Native peoples.

Women appear least often in the volume. One of the few discussions of women concerns Abigail Adams’s famous exchange with John admonishing him to “[r]emember the [l]adies” (p. 138). Amar explains away John’s dismissive response by observing that American men “plausibly saw themselves as virtual representatives of the women in their lives” and those women were “not—not yet!—claiming otherwise” (p. 137). Amar then largely shunts

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69. See, e.g., *Cincinnati, October 18*, CENTINEL NW. TERRITORY (Cincinnati), Oct. 18, 1794, at 4 (“congratulat[ing] the federal army upon their brilliant success . . . against the whole combined force of hostile savages” at the Battle of Fallen Timbers).

women off to the mid-nineteenth century—the subject of a future volume (pp. 697–98)—when, Amar suggests, they first began to enter the political sphere.

Though free Black people similarly arrive only briefly at the volume's end, slavery appears throughout. Amar adopts what we might call a “stain” model of chattel slavery—he describes the institution as the Constitution's “fatal flaw, an Achilles' heel,” as Amar underscores that, supposedly unlike for women, masters could not claim to represent the interests of their enslaved property (pp. 143–44, 594). For Amar, slavery becomes a moral litmus test for powerful white men. Admirable people, like Franklin, and even governments, like early Massachusetts, sought to expunge slavery's stain through abolition (pp. 643–48, 632–33). Less praiseworthy Founders, like Madison and Jefferson, refused to prevent slavery's spread westward, thereby failing to “preserv[e] the virginity of America's West” (p. 595).

Native peoples also receive a fair amount of attention, but Amar's attitude toward Indigenous dispossession at U.S. hands is exculpatory, not castigatory. Some of this takes the form of whataboutism: “On matters of Indian affairs,” Amar notes, “Americans were essentially no better and no worse than the British” (p. 140). But understanding this history, he argues, also requires acknowledging Native “agency,” as Native peoples “made fateful and not always farsighted choices when confronting hard realities” (p. 635). Among those choices was the Shawnee leader Tecumseh's lack of a “grand strategy” in contrast to Washington and Franklin (p. 635); Amar points, too, to Native peoples' failure, as compared to the United States, to construct an “indivisible continental union” and adopt newspapers, elections, and constitutional law (p. 636). Amar also highlights the “massive cultural impasse” between Native and Anglo-American understandings about, for instance, property (p. 141). Ultimately, Amar concludes, there was only one way that Native peoples could join “the American constitutional conversation”—“full assimilation” (p. 640).

All three discussions are deeply flawed in their own way. In his sparse discussions of women, for instance, Amar once again blurs the line between reporting and validating past justifications for exclusion: recall his assertion that men “plausibly” virtually represented women, a point he reiterates when he argues that John Adams had “good reason” to think he could speak for his wife (p. 138). Plausible based on what standard? Though Amar presumably does not mean to defend coverture, his logic points inescapably in that direction.

On chattel slavery, Amar mercifully avoids the historiographical quagmire of whether the Constitution itself was pro- or anti-slavery.<sup>70</sup> But his emphasis on slavery as primarily a personal moral shortcoming diminishes slavery's insidious institutional reality. The ideological demands of turning people into property profoundly warped early American politics, law, governance, and

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70. For recent entries in a vast literature, see GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010); WALDSTREICHER, *supra* note 40; and SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING* (2018).

economy, as many at the time themselves recognized.<sup>71</sup> This perspective, too, leads Amar to embrace an emancipatory reading of the Revolution, in which northern states slowly realized the contradiction between bondage and their liberatory rhetoric. Yet this account is partial at best. Recent scholarship has underscored how virulent anti-Black racism ascended in the early republic in *both* the North and South.<sup>72</sup> Moreover, northern gradual emancipation notwithstanding, slavery remained politically, economically, and culturally a *national* institution that ensnared *all* Americans regardless of formal legal borders.<sup>73</sup>

Amar's discussion of Native "agency" is also troubling. His choice of the word is likely deliberate; it echoes an effort by scholars over the past few decades to depict Native peoples, along with other subordinated groups, as agents.<sup>74</sup> Historians have used the concept to counter narratives of inevitable Native decline and highlight the persistence of Indigenous power across much of North America.<sup>75</sup> By contrast, for Amar, Native communities exercised agency by choosing not to become white, in the parlance of the time.<sup>76</sup> Amar repeatedly emphasizes what Native peoples "lacked" when compared to Anglo-Americans (pp. 142, 634). At one point, for instance, Amar examines the Declaration of Independence's description of Native peoples as "merciless Indian savages" (pp. 139–40). He recounts the scientific, literary, and legal accomplishments of the British colonists, which made them, in his view, "not 'savages'" (pp. 141–42). This inartful wording is bizarre: it seemingly suggests that Amar agrees that Native peoples *were* savages.

But the underlying interpretive moves are more significant—and more troubling. By cataloging Native peoples' purported shortcomings, Amar repurposes, barely prettied up, racist nineteenth-century claims that regarded Native difference as evidence that white people were more civilized than, and therefore superior to, their "savage" neighbors.

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71. Such warping appears most famously, of course, in THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162–63 (William Peden ed., 2006).

72. See, e.g., JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780–1860 (1998); PARKINSON, *supra* note 43; JOHN WOOD SWEET, BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730–1830 (2003). Even Gordon Wood, who shares Amar's emancipatory reading, acknowledges that the Revolution's aftermath helped prompt growing anti-Black racism throughout the United States. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 538–42 (2009).

73. E.g., Sven Beckert & Seth Rockman, *Introduction* to SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 1, 1–13 (Sven Beckert & Seth Rockman eds., 2016).

74. For a summary and critique of this focus, see Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113 (2003). For an examination of the concept in Native history, see JEFFREY OSTLER, THE PLAINS SIOUX AND U.S. COLONIALISM FROM LEWIS AND CLARK TO WOUNDED KNEE 2–5 (Frederick Hoxie & Neal Salisbury eds., 2004).

75. See, e.g., KATHLEEN DUVAL, THE NATIVE GROUND: INDIANS AND COLONISTS IN THE HEART OF THE CONTINENT (2006); PEKKA HÄMÄLÄINEN, THE COMANCHE EMPIRE (2008).

76. See, e.g., H.R. Doc. No. 29-128, at 2 (1846) (recording a petition from Stockbridge Indians asking that they not be forced "to become citizens and whites").

In embracing this approach, Amar takes Anglo-Americans at their word: had Native peoples overcome the “cultural and conversational chasm” between Indigenous and European cultures, he suggests, and had they embraced the “dominant American model of newspapers and constitutional law,” then they might have preserved more of their land and their sovereignty (pp. 142, 636). At core, this replicates another nineteenth-century trope: that of the “vanishing Indian,” depicting a noble race too proud to adapt to the modern world, too different from Anglo-Americans, and so doomed to disappear.<sup>77</sup>

This was self-justifying poppycock. Amar himself notes the “leading exception” of the Cherokee Nation,<sup>78</sup> which adopted many aspects of Anglo-American political culture to resist white southerners’ demands for ethnic cleansing.<sup>79</sup> Amar argues that the Cherokee effort to “join the American conversation fared poorly” (p. 624), but he is wrong: the Cherokees played the conversational game arguably better than their opponents. They assembled a cross-racial coalition of allies, pushed the question of Removal into the forefront of constitutional debate, and won a seminal U.S. Supreme Court decision endorsing their legal position.<sup>80</sup> What Amar really means is that the Cherokee Nation still *lost*, as the U.S. nonetheless violently deported the Cherokees westward.

Amar offers various unpersuasive, unsupported explanations for this outcome: It was too late, he argues—“the die was cast”—and besides, whites could not distinguish among different Native nations (p. 634). He overlooks the most obvious reason, likely because it would trouble his account of American innocence: most whites refused to accept that “their” land could be owned and governed by a Native nation, no matter how fluently and effectively the Cherokees spoke the language of U.S. constitutionalism. And those whites had the political clout to enforce their will. Removal was not a tragic collision of incompatible cultures; it was a conflict over greed, power, and violence.

As this history underscores, Native peoples like the Cherokees did confront choices—primarily a difficult, constrained one on how to resist a nation that sought to end their existence and take their lands.<sup>81</sup> They argued fiercely over that question, which divided and scarred many Native nations, including the Cherokee. But the idea that they chose their own destruction by failing to become white was and remains a pernicious, racist lie intended to soothe U.S. consciences.

77. On this trope, see JILL LEPORE, *THE NAME OF WAR: KING PHILIP'S WAR AND THE ORIGINS OF AMERICAN IDENTITY* 191–226 (1998); JEAN M. O'BRIEN, *FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND* (Robert Warrior & Jace Weaver eds., 2010).

78. P. 636. In fact, the Cherokee were not so exceptional; they were merely the most prominent among a number of Native nations that underwent similar transformations.

79. OSTLER, *supra* note 63, at 206–14.

80. See generally WILLIAM G. MCLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* (1986).

81. OSTLER, *supra* note 63, at 4–46, 267–74.

Amar's efforts at inclusion, however halting, may seem of the moment. But white women, enslaved people, and Native peoples have always appeared in our national histories: their presence and significance were too obvious to ignore. The trick for these older accounts was to explain why these groups didn't appear *more*—why they were, and deserved to remain, minor adjuncts in the narrative of American greatness. And so these works justified, and naturalized, exclusion. In attempting to explain his similar interpretive choices, Amar comes worryingly close to recreating these earlier accounts—and their ideological baggage.

### B. A Fuller Constitutional Conversation

Though Amar's discussions of women, slavery, and Native peoples each have their own shortcomings, they also share one common flaw: Amar's repeated insistence that none of these groups participated in the early U.S. constitutional conversation. "White men were the ones whose voices and votes most counted," he laments, "whose political preferences invariably prevailed," even as he looks forward to future volumes in which women and Black people will play a greater role (p. 697).

Given Amar's narrow reconstruction of the constitutional conversation, this conclusion is unsurprising. It is also wrong. Had Amar looked, he might have found sources in which women, African Americans, and Native peoples had lots to say about the constitutional conversation. (He wouldn't even have to do the digging himself, since there has been an explosion of literature on this topic of late).<sup>82</sup> But their views were largely sidelined or ignored in the narrow set of texts that Amar examines. By conflating this *silencing* with *silence*, Amar naturalizes the absence of their voices.

Unlike Amar, for instance, historians have not found "apparent quiescence" from early American women (p. 137). Some women in the early republic demanded the vote, which they briefly enjoyed in New Jersey; many others routinely participated as both writers and readers in the expansive print culture of early American politics that Amar lauds.<sup>83</sup> The early United States was rife with discussions over "women's rights," including key debates and judicial

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82. For important examples of this work, see SAM ERMAN, *ALMOST CITIZENS* (2019); MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); KELLY KENNINGTON, *IN THE SHADOW OF DRED SCOTT* (2017); ANNE TWITTY, *BEFORE DRED SCOTT* (2016); KIMBERLY M. WELCH, *BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH* (2018); and Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 56–71 (2019).

83. ROSEMARIE ZAGARRI, *REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC* 30–37, 50–61 (2007). As if anticipatorily rebutting Amar's argument, Zagarrri observes, "Women as well as men joined in the conversations" around early American politics. *Id.* at 51. An important volume published after Amar's work also examines women's contribution to constitutional discourse. MARY SARAH BILDER, *FEMALE GENIUS: ELIZA HARRIOT AND GEORGE WASHINGTON AT THE DAWN OF THE CONSTITUTION* (2022).

decisions over women's status.<sup>84</sup> Judith Sargent Murray and Mercy Otis Warren were only the most prominent of a number of "female politicians," women who actively and vocally intervened in the national politics of the day.<sup>85</sup> During ratification, Warren published a pamphlet opposing the Constitution;<sup>86</sup> she later wrote one of the first histories of the Revolution.<sup>87</sup>

Amar knows some of this: in a footnote, he justifies ignoring Warren's writings because, in contradistinction to later advocates like Lucretia Mott, "they did not significantly influence America's constitutional conversation" (p. 790 n.57). But this unsupported assertion is questionable. Warren was prominent even among Amar's Big Six: many of them corresponded with and praised her, and she argued with John Adams over the form of the American republic and the proper interpretation of the American Revolution.<sup>88</sup> Warren's Antifederalist pamphlet was widely reprinted in newspapers, with New York Antifederalists distributing 1,700 copies in the lead-up to the vote for ratification delegates.<sup>89</sup> Her biographer calls the pamphlet "an Antifederalist classic,"<sup>90</sup> while a leading compendium of Antifederalist writings describes it as a "more philosophical" work that "penetrates deeper" than other Antifederalist critiques.<sup>91</sup> Perhaps Amar disagrees with these views. But if he is going to assert women's "quiescence" on the Constitution, he owes his readers more than a conclusory sentence in the back of the book dismissing the best-known counterexample.

Black political and legal participation in the early republic receives similar treatment. Amar notes that in northern states free Black people could vote until states began to formalize their exclusion, but he makes no effort, as historians have done, to explore their political participation.<sup>92</sup> Similarly, Black abolitionism did not suddenly arrive with Frederick Douglass, as Amar's narrative depicts. Douglass was heir to an earlier post-revolutionary generation of Black abolitionists and activists including Richard Allen, Benjamin

84. See, e.g., LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 3–47 (1998).

85. ZAGARRI, *supra* note 83, at 46–81.

86. Mercy Warren, *A Columbian Patriot: Observations on the Constitution*, reprinted in *4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 272 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

87. MERCY WARREN, *HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION* (1805).

88. ROSEMARIE ZAGARRI, *A WOMAN'S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION*, at xv–xviii (1995).

89. Warren, *supra* note 86, at 273–74.

90. ZAGARRI, *supra* note 83, at 123.

91. 4 *THE COMPLETE ANTI-FEDERALIST* 271 (Herbert J. Storing ed., 1981).

92. See, e.g., Sarah L.H. Gronningsater, "Expressly Recognized by Our Election Laws": *Certificates of Freedom and the Multiple Fates of Black Citizenship in the Early Republic*, 75 *WM. & MARY Q.* 465 (2018); Paul J. Polgar, "Whenever They Judge It Expedient": *The Politics of Partisanship and Free Black Voting Rights in Early National New York*, 12 *AM. NINETEENTH CENT. HIST.* 1 (2011).

Banneker (who corresponded with Thomas Jefferson),<sup>93</sup> James Forten, Absalom Jones, and Phillis Wheatley.<sup>94</sup> Amar lavishes attention on Franklin's 1790 antislavery petition to Congress, but he only had to look seven years later to discover the first appeal to Congress from free Black petitioners.<sup>95</sup>

Enslaved people, of course, faced even greater challenges to accessing white-dominated politics, but their actions spoke volumes. One telling example lurks just below Amar's narrative. He praises Massachusetts "judges and juries" for interpreting the state's 1780 constitution to abolish slavery, but oddly excludes discussing the enslaved plaintiffs who filed the freedom suits that prompted these decisions (p. 162). Elizabeth Freeman—known in enslavement as "Mumbet"—reportedly filed the lawsuit that won her freedom after hearing the Declaration of Independence read aloud; her attorneys included Tapping Reeve, founder of the Litchfield Law School, and Theodore Sedgwick, an early speaker of the U.S. House of Representatives,<sup>96</sup> in whose home Freeman later worked.<sup>97</sup> Though less is known about the enslaved Massachusetts man Quok Walker, his freedom suit became the iconic event that, in historical memory, prompted the state's abolition of slavery.<sup>98</sup>

As for Native peoples, a visitor to early national Philadelphia would routinely have encountered *actual* conversations between Washington, Jefferson, or Adams and Native leaders, who routinely traveled there for diplomatic meetings; one congressman joked from the capital that the first secretary of war would soon learn Cherokee "by keeping continually whole tribes of indians at this place."<sup>99</sup> Amar's claims of Native illiteracy are also inaccurate. The Founders' correspondence are full of letters from a new generation of Native leaders fluent in multiple languages and cultures—people like Alexander

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93. Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791), in 22 THE PAPERS OF THOMAS JEFFERSON, 6 AUGUST 1791–31 DECEMBER 1791, at 49 (Charles T. Cullen ed., 1986); Letter from Thomas Jefferson to Benjamin Banneker (Aug. 30, 1791), in 22 THE PAPERS OF THOMAS JEFFERSON, 6 AUGUST 1791–31 DECEMBER 1791, *supra*, at 97.

94. See generally PAUL J. POLGAR, STANDARD-BEARERS OF EQUALITY: AMERICA'S FIRST ABOLITION MOVEMENT (2019).

95. See Nicholas P. Wood, A "Class of Citizens": The Earliest Black Petitioners to Congress and Their Quaker Allies, 74 WM. & MARY Q. 109, 111 (2017).

96. Nancy Eve Cohen, *In the 1700s an Enslaved Massachusetts Woman Sued for Her Freedom—And Won*, NPR (Feb. 27, 2020, 5:00 AM), <https://www.npr.org/2020/02/27/809723362/in-the-1700s-an-enslaved-massachusetts-woman-sued-for-her-freedom-and-won> [perma.cc/G3VP-FEF8].

97. Arthur Silversmit, *Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 WM. & MARY Q. 614, 619–20 (1968).

98. Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24 (2002).

99. ABLAVSKY, *supra* note 65, at 185 (quoting Letter from Jonathan Steel to William Blount, April 1, 1792, William Blount Papers, Folder 4: 1792. Manuscript Division, Library of Congress).

McGillivray, Thayendanega/Joseph Brant, and Joseph Galphin.<sup>100</sup> Unsurprisingly, their conversations with federal officials were often intensely legal, given that they were contesting the legitimacy of dispossession. Native peoples had lots of views: on federalism, the war power, representation, and, perhaps above all, their place within the new legal order.<sup>101</sup> White officials didn't always listen, of course, but that only underscores that many conversations involve speakers who profoundly disagree.

Amar is surely right when he says that white men's voices had more weight in the early American constitutional conversation, at least when it came to formal electoral politics and law. But it doesn't necessarily follow that we need to perpetuate this imbalance when writing about law today. In fact, this history suggests one of the shortcomings of the conversational metaphor, which implies a sort of openness and equality among the participants. This account omits power, which participants routinely wielded to suppress or exclude some voices. But this inequality means neither that those excluded had nothing to say nor that their views were irrelevant.

Nor does it prove that their arguments *never* mattered. The debate over women rights, the partial abolition of slavery in some northern states, and the persistence of treaties between Native nations and the United States all partly reflected the demands from these marginalized groups themselves. Even the triumph of white supremacy was, in its own way, a perverse testament to the power of their arguments. Had women, enslaved peoples, and Native peoples actually been quiescent, there would have been no need to formalize their exclusion from politics. The use of state power to kick these groups out of the constitutional conversation shows how little confidence white men had in the force of their arguments and how much they feared what those they excluded had to say.

None of this is to fault Amar for not writing a different book. It is to fault him for failing to write the book that he claims he *did* write, about the early republic's constitutional conversation. Without much evidence, he announces his conclusory, if regretful, finding that the views of those outside the room didn't matter, thereby echoing past generations who labored so hard to ignore these voices.

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100. See, e.g., Letter from Joseph Brant to James Monroe (Nov. 27, 1784), in 2 THE PAPERS OF JAMES MONROE 139 (Daniel Preston & Marlena C. DeLong eds., 2006); Letter from Alexander McGillivray to Secretary of War Henry Knox (May 18, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 315–16 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832). See generally FREDERICK E. HOXIE, THIS INDIAN COUNTRY: AMERICAN INDIAN POLITICAL ACTIVISTS AND THE PLACE THEY MADE 13–44 (2012) (describing how Alexander McGillivray and Joseph Brant engaged with the U.S. government in the Founding era).

101. See, e.g., James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, in THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 197 (Jack P. Greene ed., 1987).



## IV. ENVISIONING A NEW CONSTITUTIONAL HISTORY

I suspect, given the polarized state of our conversations around history, that this Review will be interpreted as critiquing Amar for being insufficiently woke. This would be a lazy, if predictable, misreading. The fundamental problem with Amar's book, as I've been at pains to stress, is that it does little work and says little new. This is a particular shame at a time when both the opportunity and need for new constitutional histories are great.

Saying something new, especially about the Constitution, is hard. Amar explicitly hopes that his volume will stand alongside the canonical reinterpretations of the Constitution by scholars like Charles Beard and Gordon Wood (p. 678). But their volumes became classics because they offered novel understandings of the Constitution based on an incisive understanding of the then current literature. Beard, for instance, argued for the primacy of the drafters' economic interests in shaping the Constitution,<sup>102</sup> while Wood highlighted the significance of the state legislative threat in prompting the Constitution's creation.<sup>103</sup> Regardless of whether they were right (Amar thinks they weren't) (p. 684), they made it impossible to consider constitutional history without grappling with their interpretation.

By contrast, Amar's book is less an attempt to create something new than an effort to restore something very old. Ignoring most recent work, his volume seeks to roll back over a century of scholarly interpretation to recover a prior constitutional vision explicitly aimed at inculcating nationalism. In this view, George Washington symbolically stands in for America; the Constitution, by eliminating the shortcomings of the Articles, placed the United States on the path to continental greatness; slavery was an unfortunate stain that great men worked to overcome; and proud but doomed Indians melted before the advent of civilization. Over time, though, such transparently self-congratulatory interpretations faded. Later scholars concluded that such views offered at best a misleading take on a complex history and, at worst, a parcel of propagandistic lies.

Here, Amar's critique of historians, and his unwillingness to engage with their work, have a cost. Historians don't have all the answers, but one thing they are very good at is coming up with new ways to look at the past. Amar's knock that historians have abandoned politics and law to study ordinary people is itself a Nixon-era historical artifact, a pejorative description of the era's embrace of the "new" social history.<sup>104</sup> Since then, scholarship on the early

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102. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

103. WOOD, *supra* note 50.

104. See Charles Tilly, *The Old New Social History and the New Old Social History*, 7 REVIEW (FERNAND BRAUDEL CTR.) 363 (1984).

United States has taken a cultural turn,<sup>105</sup> an Atlantic turn,<sup>106</sup> a global turn,<sup>107</sup> a turn toward a new history of capitalism,<sup>108</sup> a turn toward borderlands,<sup>109</sup> arguably a new legal, institutional, and constitutional turn,<sup>110</sup> and others. All these shifts, historians would argue, have enriched our understanding of the United States—not by erasing old accounts but by adding new ones.

What might a constitutional history that embraced and synthesized these new approaches look like? Fortunately, we don't have to start from scratch; we have models. A host of recent historical monographs have successfully translated the sweeping scope and cacophonous voices of the new history to a broad audience: just a few examples include Woody Holton's new history of the American Revolution,<sup>111</sup> Daniel Immerwahr's broad description of American empire,<sup>112</sup> Martha Jones's work on birthright citizenship and African Americans,<sup>113</sup> Jonathan Levy's new history of American capitalism,<sup>114</sup> Kate Masur's history of Black antebellum civil rights activism,<sup>115</sup> Claudio Saunt's account of Indian Removal,<sup>116</sup> Alan Taylor's multiple volumes on early America,<sup>117</sup> David Treuer's narrative of Indigenous struggle,<sup>118</sup> Richard White's examination of the Gilded Age,<sup>119</sup> and many others. Contrary to Amar's claims, many of these works take law and institutions quite seriously. In specifically constitutional history, Saul Cornell and Gerry Leonard recently published a single-volume

105. THE NEW CULTURAL HISTORY (Lynn Hunt ed., 1989).

106. THE BRITISH ATLANTIC WORLD, 1500–1800 (David Armitage & Michael J. Braddick eds., 2d ed. 2009).

107. Rosemarie Zagari, *The Significance of the "Global Turn" for the Early American Republic: Globalization in the Age of Nation-Building*, 31 J. EARLY REPUBLIC 1 (2011).

108. AMERICAN CAPITALISM: NEW HISTORIES (Sven Beckert & Christine Desan eds., 2018).

109. Pekka Hämmäläinen & Samuel Truett, *On Borderlands*, 98 J. AM. HIST. 338 (2011).

110. Laura F. Edwards, *Sarah Allingham's Sheet and Other Lessons from Legal History*, 38 J. EARLY REPUBLIC 121 (2018); Daniel J. Hulsebosch, *Constitution-Making in the Shadow of Empire*, 56 AM. J. LEGAL HIST. 84 (2016).

111. WOODY HOLTON, *LIBERTY IS SWEET: THE HIDDEN HISTORY OF THE AMERICAN REVOLUTION* (2021).

112. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE* (2019).

113. MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

114. JONATHAN LEVY, *AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES* (2021).

115. KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* (2021).

116. CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* (2020).

117. See TAYLOR, *AMERICAN COLONIES*, *supra* note 56; TAYLOR, *AMERICAN REVOLUTIONS*, *supra* note 56; TAYLOR, *AMERICAN REPUBLICS*, *supra* note 56.

118. DAVID TREUER, *THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT* (2019).

119. RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896* (2017).

history surveying U.S. constitutional history from the 1780s through the 1830s.<sup>120</sup> Drawing on the newest political history, their book seeks to link “top-down” and “bottom-up” perspectives by encompassing non-elite actors “in the same cast of characters” as the Founders.<sup>121</sup> But their slim volume, focused on the rise of an exclusionary constitutional vision of democracy grounded in white men, offers a first step rather than a definitive account, as Leonard himself concedes.<sup>122</sup> There is much more work to be done to uncover the expansive, polyvocal constitutional conversation that marked the early republic.

Such a history would, in my view, offer a more usable past in both senses of the phrase. If what we are interested in is *legal* meaning, there is no reason to think that the “Big Six” enjoyed a monopoly. On the contrary, the ascendent interpretative idea of the text’s original public meaning<sup>123</sup> explicitly invites consideration of the *public*. Instead of conjuring up fictitious ordinary speakers of English, we could examine how *actual* ordinary people understood the document.<sup>124</sup> Perhaps such a broader perspective would reveal only cacophony, pluralism, and endless debate—arguably a more usable past for our current society than envisioning constitutionalism as the preserve of statesmen debating political philosophy. Regardless, lawyers would still do what they have always done: fight over whose constitutional meanings should prevail and why. We would just have a much broader conversation to choose from.

#### CONCLUSION

Finally, there is another, still more significant way that a broader, more inclusive constitutional history would offer a more usable past. Amar acknowledges that Americans are a “famously diverse and contentious lot,” with “myriad ethnic backgrounds and skin colors” and a “wide range of ideologies and viewpoints” (p. 676). But, he insists, there must be a “We”; otherwise, “We are Babel” (p. 676). But it seems odd that the way to achieve this unity is to double down on a set of symbols that Amar acknowledges were crafted in part to exclude and suppress that diversity.

Why not instead have a constitutional history that reflects the pluralism that Amar acknowledges? People with “myriad ethnic backgrounds” and “ideologies” were already present at the beginning, sharing a continent and a nation. They might not all have been at the Constitutional Convention or in Washington’s cabinet, but as Amar argues, “America” was: the document’s drafters were keenly aware of the complex nation that they sought to govern.

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120. GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S–1830S* (Michael Grossberg & Christopher L. Tomlins eds., 2019).

121. *Id.* at 3–4.

122. Gerry Leonard, *An Elusive Constitution*, BALKINIZATION (May 11, 2020, 1:00 PM), <https://balkin.blogspot.com/2020/05/an-elusive-constitution.html> [perma.cc/UU6C-RWWX].

123. Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1421 (2021).

124. See Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 406–28 (2018).

A grand constitutional history that captures *that* reality will be a fuller, more accurate reconstruction of the constitutional conversation. It will also offer a history better suited for a nation coming to grips with the reality that it has always been a more complex and diverse place than many were willing to acknowledge.

