

BOOK REVIEW

“CLOTHED WITH THE LEGITIMATE AUTHORITY OF THE PEOPLE”[†]

America’s Constitution: A Biography. By Akhil Reed Amar. Random House, 2005.

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FOR the dogged reader who makes it through this long book yet remains uncertain as to what exactly it was all about, Professor Akhil Amar provides a fair description of the book in a postscript: “[A] comprehensive account of America’s Constitution, introducing the reader both to the legal text (and its consequences) and to the political deeds that gave rise to that text.”¹ *America’s Constitution* patiently walks the reader through the text of the U.S. Constitution, from the Preamble through the Twenty-Seventh Amendment, omitting nary a clause. Amar is a chatty guide, pausing at each turn of the text to tell the story of how each part of the Constitution came to be and why it takes the form that it does. The writing is lucid, and the history informative. Amar does not shy away from forcing his reader to take a good look at some of the more technical and obscure provisions of the Constitution, and he succeeds admirably in making those provisions clear and accessible. He might have been forgiven for skipping lightly over, say, the jurisdictional grants of Article III or the implications for state sovereign immunity of the Eleventh Amendment. Instead, he seizes the opportunity to show how these legalistic details fit within the logic of the overall constitutional scheme. It may not make for

[†] The Federalist No. 38, at 200 (James Madison) (Clinton Rossiter ed., 2d prtg. 1999).

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¹ Akhil Reed Amar, *America’s Constitution: A Biography* 465 (2005) [hereinafter Amar, *America’s Constitution*]. It is not a particularly good sign when a book includes (and needs) a postscript explaining its method and substance, but Professor Amar includes just that, posing the question that he thinks might still be on the reader’s mind: “What have I been trying to prove in the preceding pages?” Id.

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gripping reading, but even the uninitiated should find that it makes sense. In the process, readers are likely to gain a new appreciation for the difficulty of the Founders' task and the intricacy of their accomplishment. This resolute march through the text also gives Amar a chance to pull together points that he has developed over the past decade in his numerous and wide-ranging articles. Although there are refinements here and there, much of the content of this book will be familiar from his previous writings, including his much-praised book on the Bill of Rights and reaching back to his early articles on popular sovereignty and federal jurisdiction.²

Part I of this Review will provide an overview of the book and its central themes. Part II will consider critically Amar's approach to telling the story of the Constitution, which has some virtues but also some distinct limitations. Amar's resolute textualism provides a clear guiding thread through the book, but it ultimately proves too constraining to tell adequately the story of the life of the Constitution.

I. THE STORY OF THE CONSTITUTIONAL TEXT

Given his textualist approach to this constitutional biography, Amar starts, appropriately, with the Preamble.³ In his first chapter, as he does throughout the book, he offers a few sentences of introduction before identifying the piece of text that will concern him for the next several pages. These snippets of text are rarely complete clauses—the full text of the Constitution is included as an appendix—but rather they single out a word or phrase that will occupy Amar's attention. Interestingly, he does not choose to begin the book with the famous words that provide his colleague Professor Bruce Ackerman with the title of his complementary projects, "We the People."⁴ Instead, Amar offers his readers a phrase carved

² Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) [hereinafter *Amar, The Bill of Rights*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. Chi. L. Rev.* 1043 (1988) [hereinafter *Amar, Philadelphia Revisited*]; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *Boston U. L. Rev.* 205 (1985).

³ Amar, *America's Constitution*, *supra* note 1, at 3.

⁴ Bruce Ackerman, *We the People: Transformations* (1998) [hereinafter *Ackerman, Transformations*]; Bruce Ackerman, *We the People: Foundations* (1991).

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from the text: “We . . . do”⁵ The Preamble is given the first chapter to itself, with pride of place occupied by these words of commitment and action. This choice also establishes a central theme of the book, already familiar from Amar’s previous work. For Amar, the Constitution is fundamentally about republicanism, democracy, and popular sovereignty.⁶ The emphasis is on that New World innovation of a written constitution, drafted by convention and made into law through the deliberate action of the citizens and their elected representatives. The origins of that Constitution are not lost or hidden in the mists of time. Our Constitution “started with a bang” in an identifiable place and time.⁷ Amar is as drawn to this moment of founding as any conservative originalist. Unlike many conservatives, however, Amar is not especially enthralled with the particular genius of the Founders or dumbstruck by the apparent “miracle at Philadelphia.”⁸ What attracts and inspires him is that “this was the most democratic deed the world had ever seen.”⁹ Although individual figures are unavoidable parts of the story, Amar does not present the text as the particular brainchild of James Madison or some other preferred “father of the Constitution” (indeed, Amar seems to find Madison overrated).¹⁰ While he will necessarily quote from Madison or James Wilson or other members of that “special conclave” that made the constitutional “proposal,” he first calls our attention to the “countless ordinary American voters” who sought to “govern themselves” by rules of their own making.¹¹

⁵ Amar, *America’s Constitution*, supra note 1, at 5 (“We, the People of the United States, . . . do ordain and establish this Constitution [for the United States of America].” (emphasis added)).

⁶ Amar dismisses Madison’s careful separation of republicanism from democracy as idiosyncratic. *Id.* at 276–77, 587 n.57.

⁷ *Id.* at 5.

⁸ Catherine Drinker Bowen, *Miracle at Philadelphia*, at vii (1966).

⁹ Amar, *America’s Constitution*, supra note 1, at 5. For an effort to ground originalism in a similar emphasis on popular sovereignty, see Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999).

¹⁰ Amar points out that while modern Americans obsess over Madison’s *Federalist* No. 10, it was John Jay’s and Alexander Hamilton’s earlier essays that were most widely read during the ratification debates. Moreover, he highlights James Wilson as an intellectual equal to Madison and someone with greater sympathy for popular sovereignty and less complicit in the perpetuation of slavery. Amar, *America’s Constitution*, supra note 1, at 43–44, 467.

¹¹ *Id.* at 5.

This opening chapter demonstrates the democratic quality of the Constitution through a series of moves that will be rehearsed again when Amar turns to the body of the text. Though there may be a long gap between our present ideals and practice of democracy and those at the birth of the republic, Amar emphasizes that that gap is nothing compared to the gulf that separated the founding generation from any that had come before or that lived anywhere else in the world during the late eighteenth century. He quotes approvingly from James Wilson's 1788 Independence Day oration, "You have heard of Sparta, of Athens, and of Rome; you have heard of their admired constitutions, and of their high-prized freedom. . . . But did they, in all their pomp and pride of liberty, ever furnish, to the astonished world, an exhibition similar to that which we now contemplate?"¹² Unlike the vast majority of the state constitutions up to that time and certainly unlike its predecessor the Articles of Confederation, the U.S. Constitution had to face a popular process of ratification before it could go into effect. Moreover, Amar emphasizes the extent to which the ratification process was exceedingly democratic by the standards of the time. Some states waived their normal rules that limited the class of citizens eligible to serve in legislative assemblies so that a broader swath of the population could stand for election to the ratification conventions. Most states adopted special rules for voting in those elections, throwing open the decision of whether to ratify the Constitution to citizens who were not normally granted suffrage.¹³

The act of drafting and ratifying the new Constitution also represented a conceptual leap, carrying revolutionary principles into the future. Amar notes that "[p]reamble-style popular sovereignty was an ongoing principle."¹⁴ Where the Declaration of Independence had asserted the self-evident truth that "it is the Right of the People to alter or to abolish" the government "whenever any Form of Government becomes destructive" of liberty, the Constitution claimed even more for the people.¹⁵ It was their right to undo an existing government simply in order to establish a "more perfect" one. Again Amar finds that James Wilson struck the right tone:

¹² Id. at 10.

¹³ Id. at 7.

¹⁴ Id. at 10.

¹⁵ The Declaration of Independence para. 2 (U.S. 1776).

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“The people may change the constitutions whenever and however they please.”¹⁶ The later amendments to the Founders’ Constitution will highlight Amar’s observation that “[p]erhaps the most important aspect of the document’s tail end is that at any given moment it is merely provisional, awaiting a future amendment The document has no final resting place—it started with a bang and keeps going.”¹⁷ The true “teleological end” of the Constitution, he asserts, is “to secure to every generation of Americans the blessings of liberty, including our public liberty to govern ourselves and make amends.”¹⁸ Touching lightly on his thesis of non-Article V constitutional amendments (a thesis he develops more thoroughly elsewhere), Amar also observes that “the Preamble by its very deed implicitly affirmed that the people’s right to amend ultimately required only a simple majority vote”¹⁹ The U.S. Constitution,

¹⁶ Amar, *America’s Constitution*, supra note 1, at 13. Later, however, Amar complicates this easy image. To salvage the legality of the Constitution supplanting the Articles and to close the door on any future right of secession, he outlines the Federalists’ “breached-treaty argument” which justified redoing the existing governmental arrangements not on the grounds that the people assembled may do whatever they want but on the grounds that the actions of misbehaving states had voided the old compact and left the individual states free to form a new one on different terms. See *id.* at 31. These two contrasting visions of the underlying principle of revolutionary change represented by the founding are never reconciled in the book.

¹⁷ *Id.* at 458.

¹⁸ *Id.* While careful to count the “public liberty” of self-governance as among the “blessings of liberty,” he says essentially nothing about what else might be in that list. In keeping with his civic-republican emphases, Amar celebrates Benjamin Constant’s “liberty of the ancients” and a kind of related process constitutionalism. See Benjamin Constant, *The Liberty of the Ancients Compared with that of the Moderns* (1819), in *Political Writings* 309 (Biancamaria Fontana ed. & trans., 1988); Daniel J. Hulsebosch, *Civics 2000: Process Constitutionalism at Yale*, 97 *Mich. L. Rev.* 1520, 1520–22 (1999). In sharp contrast to either conservatives who would argue that “in the beginning” were the eternal verities referenced in the true founding document of the Declaration of Independence or libertarians who would find the limitations on public power to be the distinguishing feature of American constitutionalism, Amar downplays the substantive commitments of the Founders and the Constitution. Cf. Mortimer J. Adler, *We Hold These Truths: Understanding the Ideas and Ideals of the Constitution* (1987) (arguing that the Constitution embodied particular substantive commitments); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004) (arguing that the Constitution embodied libertarian commitments).

¹⁹ Amar, *America’s Constitution*, supra note 1, at 12. For Amar’s argument for majoritarian constitutional amendments, see Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 458 (1994); Amar, *Philadelphia Revisited*, supra note 2, at 1044. It is a curious feature of the book that, given its emphasis on the possibility of textual amendments as an indi-

by its own terms, claimed to limit the powers of the states, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁰ By ratifying the U.S. Constitution by a narrow majority, the Massachusetts convention in effect amended its own constitution, despite the state constitution’s requirement that amendments needed a two-thirds majority.²¹ The example of constitutional rebirth represented by the direct appeal to “We, the people,” Amar concludes, conveys the democratic message of the Constitution as much, or more, than anything in the text itself.²²

Two chapters are dedicated to elaborating the contents of Article I, with one focusing on issues of apportionment and representation and the other focusing on issues of legislative power. As would now be expected, the theme of the democratic character of the Constitution is further detailed in the first of these.²³ Here Amar’s close attention to each provision of the Constitution is particularly effective in drawing our attention to myriad ways in which the basic design of Congress reinforced American commitments to popular government. British history, and to a lesser degree colonial and state practice, provide particular leverage both for explaining why the drafters built these specific requirements into the Constitution and for demonstrating the ways in which the plan of the Constitution marked a distinct democratic advance on many fronts over what had preceded it. Our own later experience may emphasize to us the ways in which the constitutional drafters seemingly erred or neglected to fully realize democratic ideals. The Constitution, however, looks better when illuminated by the lamp of history with which the Founders were working in 1787: The lack of property requirements for officeholding in either legislative chamber; the real,

cator of the democratic character of the Constitution, it gives far more attention to the speculative possibility of non-Article V amendments than to the real obstacles that Article V has created to the passage of constitutional amendments and what that has meant for American constitutional development. His chapter on “Progressive Reforms,” for example, makes no room for the long and intense struggle over the child labor amendment and the significance of the New Deal and the Supreme Court’s 1937 retreat in making its failure irrelevant. On the relative difficulty of amending the U.S. Constitution, see Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *Am. Pol. Sci. Rev.* 355, 364, 367–69 (1994).

²⁰ U.S. Const., art. VI, cl. 2.

²¹ See Amar, *America’s Constitution*, *supra* note 1, at 12.

²² *Id.* at 460–62.

²³ Later, Amar takes equal pains to show the “populism of Article II.” *Id.* at 154.

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but not too high, hurdles of citizenship, residency and age; the provision of salaries from the national treasury; the requirement of a reapportionment based on a regular census; and the requirement of regular elections, among other provisions, are all favorably compared to then-contemporary practice.²⁴ Beyond the republican sympathies evidently held by those who met in Philadelphia, Amar also takes note of the incentives built in to their plan for popular ratification as the delegates reminded themselves that in structuring their proposed Constitution, they would eventually need to sell the product of their deliberations to the average American voter.²⁵ Drafting a plausibly democratic constitution was just good politics.

The new rules of representation for Congress bring out a second broad theme of the book as well—the manner in which slavery is rooted in the heart of the original Constitution. Amar quickly affirms some points made by those who would defend the Founders from the taint of slavery.²⁶ The Three-Fifths Clause was about apportionment and taxes, not about the relative humanity of slaves and masters, and the Constitution left open pathways for both anti-slavery legislative action and constitutional amendment. But he is unrelenting in exposing the “radical vice” that rendered the “very foundation” of the Constitution “tilted and rotten.”²⁷ Since the emigration of free blacks out of a state would likely follow any emancipation, the Three-Fifths Clause gave slave states incentives to keep existing slaves and expand their numbers in order to maintain their weight in national politics. As he notes in later chapters, the three-fifths compromise not only tilts the makeup of the House of Representatives, but also tilts the presidency (through the electoral college), the cabinet (through patronage and electoral calculation), and ultimately the judiciary (through statutes and custom).²⁸ The democratic deviations associated with the compromises between the small and big states appear to cause Amar little concern. The real interests that drive politics cut across those lines and

²⁴ Id. at 64–87.

²⁵ See, e.g., id. at 66–68.

²⁶ Id. at 89–90. Cf. Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 1–36 (1997) (defending the Constitution from charges that it was unduly accommodating to slavery).

²⁷ Amar, *America’s Constitution*, supra note 1, at 97.

²⁸ See, e.g., id. at 97–98, 156–59, 214.

minimize the importance of those concessions to the audaciousness of the small states.²⁹ The compromises with slavery were the ones that had consequences and are the ones that concern Amar. Versions of the federal Three-Fifths Clause were subsequently adopted within the slave states to strengthen the grip of the slavocracy on southern state legislatures as well.³⁰ Amar even deviates from his historical story at this point to mount a primarily normative argument against the compromise. He argues that the inclusion of slaves in the apportionment of legislative seats is distinguishable from the inclusion of other non-voters (such as women and the propertyless) and less justifiable from the perspective of theories of representation. He also speculates on what compromises could have been adopted in Philadelphia that would have had less corrosive effects over the long term.³¹ To Amar, the Founders did not merely punt the slavery question to future generations; they skewed the playing field to make it more difficult for future generations to achieve the goal of abolition.

A third theme is introduced in the discussion of the powers delegated to Congress and is significantly expanded in the discussion of the presidency. If republicanism qualified by slavery defined the form of government created in Philadelphia, geostrategic calculations defined its purposes and powers. In contrast to those who would emphasize domestic economic and social troubles as providing the motive force for the Constitution, Amar takes note of the ways that the Constitution created an active and powerful national government capable of becoming a presence on the world stage. Amar reads the Constitution as creating a Hamiltonian president to go along with the ample powers given to Congress. The powers of the national president far outstripped those of any of the executives created by the state constitutions. These powers could expand to support, for example, a Lincoln struggling to fight a civil war and remake America. Amar sees significance in the fact that the office

²⁹ No party, he points out, sought to balance its presidential tickets with small-state candidates, but all parties (until the Republican Party) took care to balance slave and free states. *Id.* at 149–50.

³⁰ *Id.* at 97–98.

³¹ *Id.* at 92–97.

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of secretary of state was the stepping stone to the presidency in the early republic.³² Foreign policy defined the presidency.

Amar likely would agree with Alexander Hamilton that Article III created the “least dangerous” branch.³³ Tellingly, the judiciary receives only one chapter of discussion rather than the two chapters each devoted to the legislature and the executive.³⁴ Though illustrated with a front-piece portrait of John Marshall, the chapter is pointedly entitled “Judges *and* Juries.”³⁵ Amar emphasizes the ways in which judges are subordinated to the first two branches, with limited powers and numerous institutional checks directed towards them. The Supreme Court of 1787 was to be the “faithful servant” of the other branches, not their “muscular overseer.”³⁶ Amar joins those who see judicial review as a real but minor feature of the early Constitution. Judicial “supremacy” extended no further than over lower court judges. Rather than being a distinctive power of the courts, judicial review merely reflected a requirement of constitutional adherence that was to permeate the government. Judges might interpret the Constitution and refuse to be complicit in its violation, but legislators, presidents, and jurors were all expected to do the same, and to greater consequence. Amar prefigures his later discussion of the Bill of Rights with his emphasis on juries in Article III, noting that when Article III mandates that “*all* Crimes, except in Cases of Impeachment, *shall* be by Jury,” it effectively inserts a populist element into the federal machinery of enforcement.³⁷ It requires that a subset of the popular sovereign not only must agree with the interpretation and application of any federal law to an individual citizen but also must sit in judgment of the powerful who might exercise inordinate influence over mere judges.³⁸

³² Id. at 143.

³³ The Federalist No. 78 (Alexander Hamilton).

³⁴ Article III also tempts Amar into a more free-ranging discussion, increasingly departing in this and later chapters from a focus on the text and its historical background and entering into abstract musings on the implications of the text or alternatives to it. See, e.g., Amar, *America’s Constitution*, supra note 1, at 224 (describing alternatives to life tenure for judges).

³⁵ Id. at 205 (emphasis added).

³⁶ Id. at 214.

³⁷ U.S. Const. art. III, § 2, *quoted in* Amar, *America’s Constitution*, supra note 1, at 236 (alteration in original).

³⁸ Amar, *America’s Constitution*, supra note 1, at 237.

Article IV, with its provisions regulating the relations among the states, providing for the governance of territories, and guaranteeing republican government in the states, brings Amar back to the pervasiveness of slavery in the constitutional scheme. The Taney Court is a frequent target of criticism here, misunderstanding citizenship and its privileges and immunities, the Fugitive Slave Clause and its limitations, and the territories and their provenance.³⁹ At the same time, the Founders again are subjected to criticism for not looking harder for ways to set slavery on the road to extinction. Though bearing responsibility for having launched the ill-fated “footrace between free-soilers . . . and slave owners,” the Founders “got lucky,” for their “legacy would have been far darker had American history unfolded differently, as for all they knew it might have. Instead of unfurling due west from its original Atlantic coastline, nineteenth-century America could instead have curled southward into a vast slavocratic empire”⁴⁰ Rather than simply being responsible for a cataclysmic civil war, the Founders could have been responsible for the continuing horrors of slavery that might not have reached their end for generations more.

After a quick trip through the remaining articles of the original Constitution, Amar dedicates his final four chapters to the constitutional amendments. Here, Amar sees the fortunate decision of the First Congress to append amendments to the end of the Constitution rather than follow Madison’s preference of rewriting the text to make it “uniform and entire”⁴¹ as encouraging “the Constitution’s readers to attend to the document’s history and trend line” with “[e]ach discrete amendment bear[ing] a precise date that locates its message within the broader saga of American history.”⁴² Noting that successful efforts to amend the U.S. Constitution have not been smoothly distributed across American history, but rather have come in flurries, he groups the amendments by historical era, taking up the early republic, Reconstruction, the Progressive era, and the modern period in turn.

In two chapters, he partly reprises his argument from *The Bill of Rights*, framing the early amendments as republican and lo-

³⁹ Id. at 253–54.

⁴⁰ Id. at 266–67.

⁴¹ 1 Annals of Cong. 735 (Joseph Gales ed., 1834).

⁴² Amar, *America’s Constitution*, supra note 1, at 459.

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calistic in character and the Reconstruction Amendments as the real departure, what Amar terms “A New Birth of Freedom.”⁴³ Amar is intrigued by the “self-denial” apparently represented by the limitations on federal power contained in the Bill of Rights passed by the First Congress, and he explains how such a political wonder could have come about.⁴⁴ He points out the various factors that might have encouraged Congress to lash itself to the constitutional mast, not the least of which was the pressure of the not-quite-dead anti-Federalists who posed an electoral challenge to then-Representative James Madison, among others, and threatened a larger political challenge if their calls for a second constitutional convention were to gain traction and if North Carolina and Rhode Island continued to refuse to join the new constitutional union.⁴⁵ Substantively, he gives particular attention to his “republican reading” of the Second Amendment, a populist approach to the Ninth Amendment, and the jury-enhancing implications of the middle amendments.⁴⁶ Even more extended is an explanation of the Eleventh Amendment that emphasizes a goal of uniform application of state law rather than state sovereign immunity per se, and an explication of the Twelfth Amendment that draws out its implications for increasing the importance of the representation structure of the electoral college (since fewer contests were now likely to go into the House for resolution), reducing the stature of the vice presidency (since the vice president would no longer be the presidential runner-up but someone chosen to be second banana), and encouraging the rise of party government with the president as the party leader.⁴⁷ His chapter on the Reconstruction Amendments spends some time on the substantive meaning and implications of those “new beginnings,” but it also dedicates significant space for an intramural debate with Bruce Ackerman on the legality of those amendments under Article V.⁴⁸ At this

⁴³ Id. at 349; see also Amar, *The Bill of Rights*, supra note 2, at xii–xiv.

⁴⁴ Amar, *America’s Constitution*, supra note 1, at 315–16.

⁴⁵ Id. at 317–18.

⁴⁶ Id. at 323–24, 327–32.

⁴⁷ Id. at 335–35, 342–44.

⁴⁸ Id. at 364–80. Professor Ackerman has argued that the Reconstruction Amendments were not passed in a manner formally consistent with Article V and should be

point, he returns to the republican Guarantee Clause and its implications for black voting rights in the South.⁴⁹

The final two chapters review the twelve most recent constitutional amendments, all ratified in the twentieth century. To Amar, these efforts at constitutional reform are indicative of “an imperfect work in progress.”⁵⁰ But he is heartened by the “grand arc of constitutional history” inscribed in the text, one in which “democracy has swept forward across the centuries” but with plenty of “vast creative white space” still available.⁵¹ From the Sixteenth Amendment’s aim “to reduce antirepublican extremes of wealth and want” through the tardy Twenty-Seventh Amendment’s ban on one particular form of congressional self-dealing, Amar briefly describes each amendment and its contribution to deepening and refining the democratic commitments of the Constitution.⁵² At the same time, he also notes that many of these later amendments also further expand national and congressional power. Some, such as the Income Tax and Prohibition Amendments, do so fairly directly and with substantive aims. Others do so less directly—for example, by severing the Senate’s last ties with the state governments and by repeating the now-familiar clause from the Reconstruction Amendments granting Congress “the power to enforce this article by appropriate legislation,” a delegation of power that Amar sees as far more robust than did, say, the Rehnquist Court.⁵³

understood as a precedent for future unconventional methods of constitutional change. See Ackerman, *Transformations*, *supra* note 4, at 205–06.

⁴⁹ Amar, *America’s Constitution*, *supra* note 1, at 395.

⁵⁰ *Id.* at 433.

⁵¹ *Id.* at 459–60. Having identified “this strong vector,” one almost expects Amar to conclude with his thoughts on where this trajectory will take us next, or at least with his thoughts as to what should next be written into that white space at the end of the Constitution. *Id.* at 460. If that was a temptation, he thankfully refrained from yielding to it. But this leads instead to a discordant note, in which Amar’s references to the future are sprinkled in the endnotes and primarily take the form of recommendations about how the Supreme Court should make new constitutional law—less the people writing on the blank page than the judges scribbling in the margins.

⁵² *Id.* at 405.

⁵³ U.S. Const. amends. XIII–XV, XIX, XXIII, XXIV, XXVI.

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II. FINDING THE REAL CONSTITUTION?

It is no easy task to embark “on an interpretive journey through the document, from its first words to its last clause.”⁵⁴ For those familiar with Amar’s work, it almost goes without saying that the writing is elegant. He has a knack for making complicated ideas clear and bold ideas disarmingly commonsensical. He is sure-footed in navigating the text and the history. The book includes such fun facts as Tennessee being the only former state of the Confederacy to vote to ratify the Twenty-Third Amendment granting presidential electors to the District of Columbia,⁵⁵ and Vice President John Adams encouraging the Senate to devise a more distinguished title when addressing George Washington than the too-common title of president. “[T]here were presidents of fire companies and of a cricket club,” he sniffed.⁵⁶

The joined themes of democracy and slavery help give some coherence and momentum to the book. As one would expect, he is persuasive that these have been real themes of the American constitutional experience. Less expectedly, they provide him with a great deal of analytical leverage for explaining the content and importance of large portions of the constitutional text. They allow him to delve below the constitutional surface to explore the details of constitutional design without losing the reader in minutiae. They also provide an effective means for uniting a discussion of the text as a whole. Amar has long been refreshing in his emphasis on constitutional structure, going so far as to reconceptualize the Bill of Rights as primarily structural. The Constitution that he wants to introduce to the general reader is one that structures and empowers government. This is no piece of parchment. This is a text that does something, a text that *constitutes*. The Constitution in this rather

⁵⁴ Amar, *America’s Constitution*, supra note 1, at xii.

⁵⁵ *Id.* at 441.

⁵⁶ John Adams, in *Journal of William Maclay*, United States Senator from Pennsylvania, 1789–1791, at 24 (Edgar S. Maclay ed., 1890), *quoted in* Amar, *America’s Constitution*, supra note 1, at 133. Alas, Amar does not mention that Adams had the previous day also suggested to the Senate that it provide a throne for Washington to sit upon (and behind which “we must seek for shelter and protection”) when he communicated in person with the Senate. The suggestion seems to have met with some embarrassment—“Seeing the House look blank, he said, ‘I throw these things out for gentlemen to think of’”—before one senator weakly offered that perhaps the proposed seat should have “a canopy for the President.” *Id.* at 21.

massive book consists of more than just a few majestic generalities behind which judges can work their magic and limit the power of the people. It is a “clever combination of New World gears and gadgets,” a machine built by the people themselves to help make their way in a dangerous world.⁵⁷

Even so, Amar’s fundamental choice to structure the book as a nearly clause-by-clause journey through the text is unavoidably awkward, and it leaves *America’s Constitution* uneasily sitting between different genres. The organization of the book suggests a treatise on the meaning of the Constitution. Readers looking for an introduction to the Constitution might welcome a book pegged to individual articles and provisions. But Amar steadfastly refuses to provide a modern perspective on the Constitution—this is no *The Constitution and What It Means Today*.⁵⁸ In 1920, constitutional scholar Edward Corwin, in part to rescue the popular reputation of the Constitution from critics such as Charles Beard,⁵⁹ wrote a short clause-by-clause introduction to the Constitution. Like Amar, Professor Corwin prefaced his book by observing that though “the Constitution can be read through in twenty minutes, comparatively few people undertake the task nowadays.”⁶⁰ Amar offers no explanation for why “[m]ost citizens have declined the invitation” to read “one of the most important texts in world history,” and unfortunately therefore provides no explanation as to why citizens might read his book either (it assuredly cannot be read in the thirty minutes that Amar estimates for “the earnest citizen” to get through the Constitution itself).⁶¹ Corwin the Realist did have an explanation for the apparent lack of interest in the original and for the need for his primer. The neglect “consists in the fact that in the course of 130 years the real constitution of the United States has come to be something very different from the document” adopted by the Founders.⁶² “The Constitution is the People’s Law,” but for

⁵⁷ Amar, *America’s Constitution*, supra note 1, at 87.

⁵⁸ Edward S. Corwin, *The Constitution and What It Means Today* (2d ed. 1921).

⁵⁹ E.g., Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913).

⁶⁰ Corwin, supra note 58, at ii.

⁶¹ Amar, *America’s Constitution*, supra note 1, at xi.

⁶² Corwin, supra note 58, at i. In this context, Amar offers a somewhat bizarre spin on the old joke that constitutional law professors “often neglect to assign the document itself. The running joke is that reading the thing would only confuse students.”

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the citizen to “perform his task intelligently,” Corwin thought he needed “a considerable measure of familiarity with its provisions and their meaning to-day.”⁶³ Since the brief document drafted in Philadelphia had been effectively supplanted by over a century of “actual practice” and “hundreds” of Court decisions, the average citizen needed a “small volume” that boiled it all down.⁶⁴ In just over one hundred pages, Corwin sought to make the Constitution both accessible and meaningful to the average twentieth-century citizen.⁶⁵

For the most part, Amar stays away from current controversies over the correct interpretation and application of constitutional requirements. Readers will learn little about how these constitutional provisions have been interpreted over time or what the current “best” reading of the Constitution might be. At the same time, the book provides neither the detail nor the argument of, say, Justice Joseph Story’s *Commentaries on the Constitution of the United States*, on which lawyers, students, and lay readers in the early republic could rely to get the Marshallian understanding of every textual feature.⁶⁶ Sometimes dubbed a liberal originalist, one might think Amar is seeking to establish in *America’s Constitution*, with its emphasis on choice of textual language and historical background of its drafting, an authoritative original meaning of the Constitution.⁶⁷ He sometimes encourages that view, as in his discus-

Of course the joke to Corwin and to most modern law professors is precisely that the constitutional text would only confuse students because modern constitutional law departs so severely from it. Amar instead replies earnestly that the “important truth” that is captured in the joke is that the students also would need “background materials placing the Constitution in context.” Amar, *America’s Constitution*, supra note 1, at xi.

⁶³ Corwin, supra note 58, at iii.

⁶⁴ Id. at ii–iii.

⁶⁵ He did so with great success, but after the constitutional revolution of 1937, he nearly doubled the size of the book. It had ballooned to well over 300 pages by the time of the twelfth edition in 1958, the last before his death. He performed the same service for the members of Congress in 1952, but with much more detail, requiring nearly 1400 pages. *The Constitution of the United States: Analysis and Interpretation* (Edward S. Corwin ed., 1953). Updated versions of both remain in print.

⁶⁶ Joseph Story, *Commentaries on the Constitution of the United States* (Boston, Hilliard, Gray, & Co. 1833).

⁶⁷ See also Akhil Reed Amar, Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, too), *Slate*, Sept. 21, 2005, at <http://www.slate.com/id/2126680>.

sion of the Eleventh Amendment which concludes with a brief rebuke of the modern Supreme Court for getting its meaning wrong.⁶⁸ But his content is not primarily interpretive, and Amar says essentially nothing about the possible relationship between the stories he tells and what the Constitution should be taken to mean.

Other aspects of the book suggest a constitutional history. This was once a common genre. While the modern standard has long been *The American Constitution: Its Origins and Development*, first written by Professors Alfred Kelly and Winfred Harbison in 1948, it now occupies an intimidating and dense two volumes.⁶⁹ Earlier standards were likewise penned by some of the leading constitutional historians of their day, such as Professors Carl Swisher and Andrew McLaughlin, the latter of whom won a Pulitzer Prize for his.⁷⁰ In the late nineteenth century, the story of America was often understood *to be* the story of the Constitution, and large-scale integrative histories proliferated.⁷¹ Many of these works were primarily concerned with the first part of the nineteenth century, reflecting in part the historian's sensibility that a decent interval is needed before the scholar can gain an adequate perspective on events. Even McLaughlin's *A Constitutional History of the United States* trailed off with the events of the Gilded Age though it was published in 1935. Probably in part for that reason, the Supreme Court and its interpretations of the Constitution played a relatively small role in these stories. Constitutional history was the history of presidential elections and vetoes, party platforms and legislative statutes, guns and generals, with the familiar themes of democracy, slavery, and union.⁷² In the twentieth century, however, the Supreme Court

⁶⁸ Amar, *America's Constitution*, supra note 1, at 336.

⁶⁹ Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution: Its Origins and Development* (7th ed. 1991).

⁷⁰ Andrew C. McLaughlin, *A Constitutional History of the United States* (1935); Carl Brent Swisher, *American Constitutional Development* (1943).

⁷¹ See, e.g., George Ticknor Curtis, *Constitutional History of the United States: From Their Declaration of Independence to the Close of Their Civil War* (New York, Harper & Bros. 1896); Hermann von Holst, *The Constitutional and Political History of the United States* (Chicago, Callaghan & Co. 1881); Francis Newton Thorpe, *A Constitutional History of the American People: 1776-1850* (New York, Harper & Bros. 1898).

⁷² Beginning his constitutional history, Professor McLaughlin observed:

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seemed to take center stage, and a new generation of constitutional historians, expert in constitutional law, including Edward Corwin, emerged.⁷³ Constitutional history became a more technical, more specialized, and less popular field (often with liberty rather than democracy as its theme).

Certainly Amar’s subtitle—*A Biography*—suggests that *America’s Constitution* might fall within that genre, that it will tell the story of the life of the Constitution from its birth to the present.⁷⁴ And Amar seems to think that is what he has done. But it is a very odd way to conceptualize the life of the Constitution. Amar may better capture what he has in mind in his postscript when he says

The most significant and conclusive constitutional decision was not rendered by a court of law but delivered at the famous meeting of General Grant and General Lee at Appomattox. This is only an illustration of the fact that, not judicial pronouncements, but great controversies, discussed and rediscussed by statesmen and the common people, are, or may be, the crucial matters.

McLaughlin, *supra* note 70, at vii–viii.

⁷³ See Michael Les Benedict, *Expanding the Scope of American Constitutional History*, at http://www.h-net.org/~law/teaching_legal_history/benedict.htm (last accessed Aug. 25, 2005).

⁷⁴ Amar’s is not the first effort at a constitutional biography. Professor Edward Elliott offered a *Biographical Story of the Constitution* that traced the “growth of the American union” through the lives of prominent statesmen who shaped the Constitution over time. Edward Elliot, *Biographical Story of the Constitution*, at i (1910). Professors Broadus Mitchell and Louise Pearson Mitchell’s *A Biography of the Constitution of the United States: Its Origin, Formation, Adoption, Interpretation* followed through on the promise of its subtitle (with an additional chapter, “Afterthoughts,” covering constitutional amendments), seeking to “compress[] the life story of the Constitution[] . . . in a single handy volume” while recognizing that the “[c]onstruction of the Constitution has been in two phases—framing and adoption of the document, followed by its interpretation in statutes and court decisions.” Broadus Mitchell & Louise Pearson Mitchell, *A Biography of the Constitution of the United States: Its Origin, Formation, Adoption, Interpretation*, at v (1964). Likewise, journalist Burton Hendrick’s *Bulwark of the Republic: A Biography of the Constitution* began with the premise that the “Constitution, like everything else, is first of all biography. It was made by men; it was made for men; it has succeeded and failed to the extent that it has fulfilled human aspirations.” Burton Hendrick, *Bulwark of the Republic: A Biography of the Constitution* 7 (1937). Thus, its “biography” included both “the story of the instrument itself, its formation, the causes that brought it to life, its struggles for survival, its triumphs and failures” and “a survey of the men most identified with its progress.” *Id.* For Hendrick, treating the Constitution as a “living thing” necessitated getting past “a succession of court decisions” in order to get at the “really vital influences in its survival,” the “flesh and blood and nervous system” that give “vitality to what had previously been little more than a skeleton of government.” *Id.* at 6–7. That “biography and history” were to be found in legislatures, the White House, and the battlefield. *Id.*

he wants to offer a “portrait” that reflects the “personality” of its subject. A good portrait might not capture the subject’s movement through time, but it can display “her deep convictions and contradictions.”⁷⁵ Fair enough. And yet, Amar is unwilling to abjure an interest in the temporal dimension; he contrasts his efforts with those who would “organize their narrative around Philadelphia.” “The real constitutional drama, as I see it, began when the Philadelphia Convention ended” and “the ensuing process of popular conversation, contestation, and amendment” unfolded.⁷⁶

Amar’s historical narrative arc is circumscribed by the text. His Constitution lives over time through the process of amendment. This approach to thinking about and telling the story has at least two consequences. First, from a narrative perspective, it severely fragments the historical tale. Instead of telling one story of the Constitution, Amar tries to tell the multiple stories of the clauses of the Constitution, a collective portrait perhaps. Despite Amar’s facility with language, this makes for rather ponderous reading. The book is organized like a treatise, even if it is not written that way. Second, from a substantive perspective, this severely narrows our notion of what the Constitution is and how exactly it lives through time. Here again the comparison with most jurisprudential originalists does not seem far off.⁷⁷ Constitutional meaning, in this book, is found in the text, and it is elucidated by placing that text in the context of its adoption. The popular sovereign whom Amar celebrates and wants to put at the center of his story comes to life and takes action when text is drafted and ratified; the “real constitutional drama” is when the “people came onstage to say yes or no.”⁷⁸ The story cannot end in Philadelphia because the text still has to be ratified, but then it cannot end with ratification because there are *amendments* still to come, amendments that are importantly redemptive to the founding. Of course, we should grant that to be true.

⁷⁵ Amar, *America’s Constitution*, supra note 1, at 471.

⁷⁶ *Id.* at 467–68.

⁷⁷ I would exclude myself from that generalization. See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999); Whittington, supra note 9, at 195–212.

⁷⁸ Amar, *America’s Constitution*, supra note 1, at 468.

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America’s constitutional history is not just the history of the founding. But neither is it just the history of the writing of texts.⁷⁹ The Constitution is also importantly the history of contestation and struggle, a struggle not only over whether new text should be added to the old but over what the existing Constitution should be understood to mean and how it should be implemented in practice. Amar provides snippets of that later history, but often only as it becomes relevant to later amendments or in order to dismiss one side of later struggles as being simply wrong. Even these limited departures create glimpses of the open-ended quality of the text and the significance of later practice in shaping it, as in his thoughtful discussion of the two-term tradition for presidents prior to Franklin Roosevelt that provides the background for the Twenty-Second Amendment.⁸⁰ *America’s Constitution* quite rightly emphasizes the fact that there are many guardians of the constitutional order, and it refuses to privilege the Court as the ultimate interpreter of the Constitution. Perhaps this leads to a willingness to distinguish the Constitution from constitutional law and, as a result, to focus on the constitutional text rather than the later *U.S. Reports*. But the book does not give the reader much opportunity to see what these multiple constitutional interpreters *do* with the text over time, to see that one way in which the Constitution is a democratic instrument is that it has been constructed over time “by the people themselves” and by those who claim to act in the people’s name.⁸¹ Amar eventually admits that this results in only a partial constitutional history.⁸²

⁷⁹ Edward Elliot’s biographical account is of interest here, as this colleague of “living constitutionalists” Woodrow Wilson and Edward Corwin prefaced his book with a rather different starting point:

The history of the Constitution is chiefly concerned with the processes of interpretation and adaptation. The life of the nation does not stand still . . . the Constitution, too, must grow, and as the formal process of amendment is too difficult for ordinary purposes, principles of interpretation have, in large measure, taken its place.

Elliott, *supra* note 74, at v–vi.

⁸⁰ Amar, *America’s Constitution*, *supra* note 1, at 433–38.

⁸¹ See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 6–8 (2004).

⁸² Amar, *America’s Constitution*, *supra* note 1, at 470 (noting that the “largest omission is that mine has been a tale of the *written* and *enacted* Constitution”).

This raises the question of whether the resulting history is not merely partial but also misleading. When Amar considers what might be left out of such a history what comes to his mind is the possibility of “unenumerated rights above and beyond textually enumerated ones.”⁸³ The ways in which such a history might, for example, challenge his ready assumption that the ratification debates fixed the nature of union and closed off further debate, or that the conservative opposition to the federal income tax in the Gilded Age was beyond the pale, are not considered. Amar is left grasping at the Sixteenth Amendment as the text that both repudiates *Lochner* and validates the New Deal, and reducing the constitutional struggle for the Second Reconstruction—ironically referenced in the front-piece illustration to his chapter on “Modern Moves”—to the passage of the Twenty-Fourth Amendment abolishing poll taxes.⁸⁴

Finally, aspects of the book suggest a monograph that could have been. The broad themes of democracy and slavery help pull together his discussion of the various provisions of the Constitution and provide some coherence for the book. As it works its way through the Constitution, the book also makes rather strong claims about the meaning, history, or implications of specific clauses. As Amar cautions in his preface, this will be an “*opinionated* biography.”⁸⁵ It would be rather dull if it were not, so nothing wrong there. On occasion Amar pauses to address explicitly a particular competing claim offered by others, such as Bruce Ackerman’s argument on the illegality of the Reconstruction Amendments or historian Don Fehrenbacher’s argument on the essential neutrality of the Constitution in regards to slavery.⁸⁶ These scholarly clashes may put off a popular audience (Ackerman’s arguments in particular

⁸³ Id. at 477.

⁸⁴ Id. at 475 (arguing that “the Court was wrong to follow *Lochner* after 1913, the year when the American people, via the Income Tax Amendment, emphatically embraced the propriety of redistribution”); see also id. at 431 (displaying an illustration of images from the 1963 March on Washington with signs such as “We March for Integrated Schools Now!” and “We Demand Decent Housing Now!” captioned by Amar’s observation that “[t]hree of the four amendments ratified between 1960 and 1972 broadened rights of political participation”).

⁸⁵ Id. at xii.

⁸⁶ Id. at 364–79 (contradicting Ackerman, *Transformations*, supra note 4, at 99–119, 207–34); id. at 91–97 (contradicting Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery* 40 (2001)).

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may seem esoteric to the general reader), but Amar is effective in presenting them as natural and important issues that arise from the constitutional text, and the debate is lively (at least to this reader). More commonly, however, he leaves the postscript and the endnotes to indicate briefly that some of his claims might be “more distinctive . . . within the wider constitutional literature.”⁸⁷ It is perhaps an academic vice to wish for more. In part, one might wish for a more systematic consideration of the degree to which the Constitution was an advance for democracy, for example. Incorporating democracy as a mere narrative theme allows Amar to cherry-pick the best evidence for his case, while skipping lightly over the aspects of the Constitution that might be more troubling to its critics. Amar tells a good story in *America’s Constitution*, but a more methodical rebuttal of arguments such as those in Professor Robert Dahl’s *How Democratic is the American Constitution?* would be more persuasive.⁸⁸

The “opinionated biography” approach also allows Amar to let himself off easy. Rather than confronting conflicting evidence or recognizing contrary arguments, he can assert some claims and move on. This could just be a matter of style. Some may prefer the author to speak in a more authoritative voice, letting those who disagree write their own books. But it tends to reinforce the view that the text is close-ended, subject to only one right answer. Voices of disagreement are not even shown to be wrong; they simply are pushed off the page and ignored. Thus, for example, in discussing the status of the former states of the Confederacy under martial law and Reconstruction and the implications for the degree to which the Reconstruction Amendments adhered to Article V, Amar presents a strong form of the “republican government” argument favored by some Radical Republicans. In this view, the reconstituted states of the South were not recognizably popular governments and therefore could be subject to congressional governance and reorganization.⁸⁹ This is indeed a theoretically interesting argument and perhaps the best way to conceptualize what happened during Reconstruction, but it was at best one of several

⁸⁷ Id. at 471.

⁸⁸ Robert A. Dahl, *How Democratic is the American Constitution?* (2001).

⁸⁹ Amar, *America’s Constitution*, supra note 1, at 366–76.

theories at play during the period. Amar gives little sense of the range of thinking on the subject even within the Republican congressional majority. He is more interested in prosecuting his case than in telling the reader what was happening in the mid-1860s.

In other instances, the existing evidence is stretched to the breaking point while trying to support bold claims. Amar relies heavily, for instance, on a letter from James Madison to Alexander Hamilton during the New York ratification debates to show that secession was no longer an option after 1787 (and takes historians to task for not having emphasized the implications of the letter for the events of 1861).⁹⁰ The general anti-Federalist line during the ratification struggle was that the Constitution needed to be revised before it could be adopted. The Federalist response was to insist that appropriate amendments could always be added later through Article V. In effect, the Federalists were saying, “trust us.” Not being the trusting sort, but losing ground in the state convention, the New York anti-Federalists had proposed a conditional ratification in which the state explicitly could withdraw if their favored amendments had not been added to the Constitution by a specified date. Anti-Federalists there and elsewhere had similarly argued that any ratification vote should be regarded as qualified (for example, Virginia’s delegates specified that they “assent to and ratify the Constitution” only “[w]ith these impressions,” including that the Constitution did not include any powers that could be construed to abridge “the liberty of conscience and of the press”), and Federalists assiduously obscured the legal significance of such qualifications.⁹¹ Hamilton thought agreeing to the New York proposal might be necessary to secure enough swing votes to win a majority, but Madison urged him to hold firm, arguing “adoption for a limited time would be as defective as an adoption of some of the articles only.”⁹² Madison had confronted similar problems in the Virginia convention and had warned the delegates there that “conditional amendments” adopted by some states would only breed “uncertainty and confusion” as to the status of the Constitu-

⁹⁰ Id. at 38, 472 n*.

⁹¹ Virginia Ratifying Convention (June 25, 1788), in 2 *The Bill of Rights: A Documentary History* 766, 839 (Bernard Schwartz ed., 1971).

⁹² Letter from James Madison to Alexander Hamilton (July 20, 1788), in 2 *The Bill of Rights: A Documentary History*, supra note 91, at 923, 923.

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tion and leave unsettled whether the Constitution had in fact been ratified and a government could be formed under its terms, producing “unnecessary delays[] and . . . infinite dangers.”⁹³ The key questions for the Federalists at the moment was what constituted a vote for ratification and what would be the consequence of different states “ratifying” with different conditions attached. The cleanest way to end the debate (and quash the movement for a second constitutional convention) was to insist on unconditional ratifications and Article V amendments. In context, Madison’s call for “an adoption in toto, and for ever” says rather less about 1861 than Amar makes out.⁹⁴ One might quibble with other claims as well, such as his extremely expansive reading of the Interstate Commerce Clause based on its inclusion of Indian tribes and the plenary authority of Congress in dealing with them (Amar suggests that we start calling it the “with and among clause” so we do not get confused by that pesky “commerce” language) or his speculative but intriguing observation that the minimum age for presidents discouraged dynastic succession.⁹⁵

As Amar intends, *America’s Constitution* is a unique introduction to the Constitution. With its emphasis on the entire constitutional text and the background that gave rise to that text, the book distinguishes itself from other histories of the founding or guidebooks to the Constitution. Amar has succeeded admirably in making that short but pregnant document both accessible and sensible to the modern reader. His enthusiasm for the American constitutional project shines through every page of the book. Although his approach to the task creates difficulties as well as solutions, any reader is likely to come away from *America’s Constitution* with a

⁹³ Virginia Ratifying Convention, supra note 91, at 830.

⁹⁴ Letter from James Madison to Alexander Hamilton, supra note 92, at 923, quoted in Amar, *America’s Constitution*, supra note 1, at 38. More generally, Amar does not wrestle with the question of what significance such statements by Madison in 1788 should have for popular conventions in 1861, especially given his general emphasis on the unrestrained authority of the popular sovereign to remake constitutional arrangements.

⁹⁵ Amar, *America’s Constitution*, supra note 1, at 107–08 (commerce clause), 159–63 (age qualification). Story’s interpretation of the little-remarked-upon clause as helping to secure a certain maturity and stability in national officeholders seems the more likely motivation for its inclusion and more consistent with discussion of age elsewhere in the Philadelphia convention. For Story’s interpretation of the age requirement, see 3 Story, supra note 66, § 1472, at 332.

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new appreciation for the ingenuity of the Framers' design and the revisions that have been made to it. What the reader is not likely to gain from it is a recognition of how the Constitution that was born in 1787 (and amended thereafter) has lived in the succeeding years and the many ways in which it has been constructed and reconstructed over time as it has impinged on the political projects of those who have sought to live under and make use of it.