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AMAR'S WORDS THAT MADE US

*Michael J. Gerhardt*¹

INTRODUCTION

Our generation's preeminent constitutional scholar, Professor Akhil Amar of the Yale Law School, is, like the Constitution itself, a national treasure. His most recent book, *The Words that Made Us*, is another masterpiece of constitutional and historical exegesis, the first of three volumes that illuminate in what ways the American Constitution has defined, energized, united, and divided the nation and its people through constitutional conversations and engagements over its meaning throughout our history. The book is awash with stories about the incremental broadening of "We the People," the hero, authority, casualty, and beneficiary of the words that made us. It is an intricate tale, but Professor Amar's book is ultimately a celebratory tale. Fully aware of and appropriately sensitive to the dark detours of our history and laws, the words that made us, as Professor Amar explains, uplift and challenge the nation to understand and aspire to implementing the great promises of a governing document that belongs to all of us, even though none of us has had the opportunity to sign, approve, or amend it.

In this Essay, I focus on three big questions that Amar's book tries to answer. First, I consider whose voices count in this grand tale of the words that made us. I commend Professor Amar for uncovering the different conversations heard in each era, but we cannot ignore the suppression and deliberate exclusion of some voices at different times and the ramifications of such tragedy and imperfection. Next, I consider what kinds of conversations matter in the construction of the Constitution and its meaning over time. There are formal dialogues that are part of the story of the words

1. Burton Craige Distinguished Professor of Jurisprudence, University of North Carolina at Chapel Hill. I am grateful to both the Dean of the University of Illinois College of Law and Jason Mazzone for the opportunity to participate in a terrific conversation with Professor Amar about his excellent new book.

that made us, but there are also informal ones among the public. Lastly, I examine the normative framework shaping the narrative. The triumph of the Constitution is a triumph of reason. Reasoned elaboration is, or should be, the lifeblood of the law, but I am less confident and optimistic than Professor Amar that it has been the hallmark of our constitutional conversations. Just as economists should not ignore irrational behavior and preferences in their analyses, Americans, particularly American legal scholars, cannot ignore the fact that the irrationality and imperfections of our dialogues—both in what is said and not said—say at least as much about who we are as a people and our Constitution as the more rarified discussions that play an arguably outsized role in the inspiring and inspired story that Amar tells.

I. WHOSE WORDS COUNT?

Professor Amar's scholarship grapples with the biggest and hardest questions of constitutional law, and *The Words that Made Us* is no exception. He is deft at both recognizing the questions that need to be asked and the patterns of argumentation and events that illuminate the answers.

The first big question raised in *The Words that Made Us* is whose words count. At the very least, we know that the words of the Declaration of Independence, the Preamble, and the Constitution are central to this inquiry. The drafters of these seminal documents feature prominently in Professor Amar's narrative—the language, learning, and experience that drove Thomas Jefferson to draft and John Adams and Benjamin Franklin and a few others to finalize the draft of the Declaration of Independence, the 39 delegates who signed the Constitutional Convention (though not all with the same impact), the handful of men who played the most significant roles in drafting the Constitution and its Preamble, and, perhaps most importantly, the men who participated in the ratification conventions, all unquestionably matter in the construction of the words that made us. Their intentions or expectations hardly matter more than the words themselves, because the words themselves are more widely and better known to the people who count—the generations of Americans who followed the Founders. I am less confident that there is a fixed construction, found through a linguistic or other kind of exegesis later, that can stand for the original public meaning because it aims at displacing the formal language that

actually best reflects the objectives of the Constitution's creators and meaning—the text of the Constitution itself. To his credit, Professor Amar makes those words the primary focus of his narrative.

The conventional wisdom is that the drafters of these documents were great statesmen and political thinkers, while, in Amar's narrative, a more complex picture emerges, as it should. He is concerned, as he says in his Preface, with questions such as, "What was the basic structure of the nation's [constitutional] conversation? Who participated, how, where, and why?" (p. xii). He shares "a panoramic story of America itself, a story of how various widely scattered New Worlders first became Americans and then continued to debate and refine what being American meant, legally, politically, militarily, diplomatically, economically, socially, ideologically, institutionally, and culturally—what being American meant constitutionally" (p. xiii).

Amar is acutely aware the Founders themselves were also something else, something we should not ignore in constructing the meaning of the Constitution: In a reversal of John Rawls's veil of ignorance,² these people knew, or had good reason to know, which roles they would likely have once the Constitution actually went into effect. The drafters and ratifiers had some sense beforehand what roles they wanted to play in the system they were establishing. George Washington, who presided at the constitutional convention, had more than an inkling that he might be called upon to be the President, and others, such as James Madison, Oliver Ellsworth, John Adams, Alexander Hamilton, John Randolph, James Wilson, James Iredell, and John Marshall, who participated in the drafting or ratification of the Constitution, had previously served in positions of power in the colonies or the Continental Congress, or in politics, and therefore had reason to believe, or expect, that they would be eligible for and had realistic chances to attain the highest ranking federal and state offices. It is one thing for the drafters and ratifiers of a social compact to know nothing about their positions in society and government before drafting said social compact, quite another if those players were already planning for or could expect to be called upon or aspire to serve the new federal government they were creating, as was true for many if not all of them.

2. JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999).

This should make later generations skeptical of all that these players said at the convention and later, though, to their credit, they had no plans to publicize their conversations when creating the Constitution. While they expected the ratification conventions to be the principal authorities in putting the Constitution into effect, we ought to ask for whose purposes were these documents drafted—or, in other words, who benefitted? The Founders largely did. Thus, actors, who later derived their special authority from the Constitution, had a hand in creating the governing documents of the nation; the people who became our presidents, members of Congress, and the Supreme Court matter to the construction of these documents because the documents allow them to do so. And these people, too, for all their great attributes, were not naïve statesmen. They well understood the nature and ramifications of the enterprise they were undertaking, even if they could not perfectly foresee or predict the future.

Left out of the equation so far, as Amar reminds us, are all the people who would be subject to the rule of law in America. Indeed, I agree with him (and other scholars) that the most important people in the formation of our governing documents were “We the People,” who were represented in the ratification campaign, the signal event for formalizing the adoption of the Constitution. Yet, these people may be the most unknown of the Founders; how many names do constitutional scholars know, much less how many do the American people know? Moreover, we do not have all *their* words, only some of them. Here, too, the words we have are the expressions of the advocates on either side of the ratification question. Yes, we should pay attention to what James Madison and Alexander Hamilton argued in *The Federalist Papers*, though that historic document is nonetheless an advocate’s brief, albeit on the winning side of ratification.

Put differently, what we have from the years covered in Amar’s first volume, 1760–1840, from the beginning of the republic through most of the Jacksonian era, is a collection of imperfect people who created an imperfect document and an imperfect record of what the words have meant to some but not all the people of the United States at any given time. These imperfections cannot and should not be ignored. Similarly, Amar stresses the importance of newspapers in that era, though, as he well knows, they were partisan mouthpieces, that is, advocates on one or the other side of great debates. Anyone who cares to

understand what the Founders created should look at the circumstances of our Founding from both their and these Founders' perspectives. Everyone has an interest in that debate, and, if we smooth over their self-interest or leave that conveniently out of an inquiry into the origins of who we are as a people and nation, then we will be creating a fictional, or lionized account as the foundation for our system of law.

Amar's perspective is always insightful, interesting, and profound, but he knows as well that people who had different perspectives, say, Luther Martin, who was an ardent anti-Federalist, would tell a very different story about the words that made us. John Marshall and Joseph Story tell the story another way, as do Andrew Jackson and Chief Justice Taney later on, to fast-forward to our present era, contemporary leaders such as Barack Obama and Donald Trump, and Supreme Court Justices, such as Antonin Scalia and Clarence Thomas, who purport to rigidly hew to the original meaning of the Constitution. What we are considering when we track different conversations is their traction, or influence, over time, which depends on the extent to which subsequent winners invest in those earlier dialogues.

The words that made us did not, therefore, launch one, but many stories, and many are included in *The Words that Made Us*, including such diverse voices and (largely amorphous) groups as "the countless scribblers in and out of government" in the 1760s (p. 41), "the Massachusetts town halls" (p. 84), the "committees of correspondence" (p. 85), "Colonists north and south" and "multiple colonial assemblies, acting in concert" (p. 45), prominent lawyers involved in the controversies covered, "American newspapers" (p. 70); and "members of the Sons of Liberty" (p. 75), just to name a few who helped to report, write, and shape the conversations early in that era.

My point is not to argue that the task of reconstructing constitutional dialogues from that era is pointless or overly partisan. Instead, it is that, as Professor Amar recognizes, the stories that receive the most attention are those told by the political winners in each phase of that era. Discounted are the stories that the disenfranchised, or the losers, have told about the Founding. Yet, all their voices cannot be silenced forever, thank goodness. Many may not have been heard during their lifetimes, maybe ever, but their stories, when uncovered or retold as Professor Amar has done, resonate with profound meaning

throughout our collective history. To be sure, when we assemble all these stories, we still may not know which words made us or how they did so. In fact, we cannot nail down any meaning for certain because the story is not over. In the novel *East of Eden*,³ John Steinbeck recounts the story of Croesus, a powerful man, who asks a wise man if he is lucky, and he is told that no one could say until he died. The same logic holds for the words that made us; we might be able to track what they have been making us into, but we will not know for sure until the Constitution—and we—finally cease to be, and then, who will be left to tell their story?

I hasten to add that this dynamic does not make Professor Amar's project futile, far from it. His scholarship shows otherwise, as, he and I and many other scholars believe, the Constitution has a life of its own, which we can try, as we do in our lives, to seek to find meaning where and when we can. We should remember that telling the stories of the words that made us is an ongoing, arguably endless project of sifting through dialogues and conversations to understand what it means to be distinctly American. Everyone wants to own the Constitution's meaning, but no one can own it for long.

II. WHICH MEANINGS MATTER?

The next big question is which constitutional words have settled meanings? The formal words themselves, enshrined as constitutional text, are fixed unless or until constitutional amendments change them, though Americans disagree about which other words or conversations should count, how much they matter, and even when they are relevant. Disagreement, at least as much as consensus, is the American way.

Where you start, however, often shapes where you end. A tough thing for any scholar is to know where to start a book. Professor Amar chose 1760, as is his right to do so. Yet, in this period, both before and after 1760, there were salient events that shaped the Founders' determination to create a constitution that protected judicial independence. One such event occurred in the years 1776–1788 in my home state of North Carolina. The state legislature charged various state judges, including Chief Justice Samuel Ashe, of various kinds of misconduct, but, when Ashe refused to appear to address the charges, he was singled out for

3. JOHN STEINBECK, *EAST OF EDEN* ch. 34 (1952).

additional punitive action. After he appeared and furiously refuted the charges, the legislature eventually failed to punish him, and his subsequent acquittal was a significant event in the Founders' growing determination to prioritize judicial independence,⁴ a priority they codified in the protections provided for federal judges and justices in Article III of the Constitution. There were influential teachers of the law in the early years of the Republic, none more influential than the first law professor, Virginia's George Wythe, who taught John Marshall, Thomas Jefferson, John Tyler, and James Monroe. Another student, Henry Clay, the great orator and later model for Abraham Lincoln, said near the end of his life, "To no man was I more indebted by his instructions, his advice, and his example."⁵ Clay said he learned his life-long opposition to slavery from Wythe.⁶

The words that get bandied about and passed down by these and other seminal figures in our history are important, though Americans are bound to give some actors more credit than others. For many scholars, these words take on greater gravitas when the Supreme Court latches onto them, but that begs the question of why do *its* words count more than those expressed in public debates in Congress and legislatures around the land about the meaning of the Constitution? If the answer is that this is because the Court says so, that just begs the question again.

This question leads to others, one being about whether any meaning, once disputed, is settled. The dialogues that Amar tracks in *The Words that Made Us* move forward, in the sense that time moves forward, but their movement is rarely perfectly linear. If we let time be our guide, some things appear settled, even if they are not settled to everyone's satisfaction, matters such as that the Supreme Court has the power of judicial review, some questions are non-justiciable, the Constitution forbids race-based classifications that are directed at racial minorities, and the Constitution does not allow for secession.⁷ Interestingly, these are not settled simply because the Court says so. They are settled, as

4. See Michael J. Gerhardt, *What's Old Is New Again*, 86 B.U. L. REV. 1267, 1291 (2006).

5. MICHAEL J. GERHARDT, *LINCOLN'S MENTORS* 27 (2021) (citation omitted).

6. *Id.*

7. On the extent to which these issues are firmly settled, see generally MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 177–98 (2008) [hereinafter, GERHARDT, PRECEDENT].

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Amar repeatedly demonstrates, when the federal government coalesces over time around the answer(s).

Even the Court itself is made by others. It is a political construct. The Constitution vests the powers for constructing the Court itself, along with lower article III courts, in national political authorities. While the Constitution directs that “The judicial power of the United States, shall be vested in one Supreme Court,”⁸ there would be no Court without Congress establishing the numbers of seats, the compensation for justices, and the scope of the Court’s appellate jurisdiction. National political leaders, from the very beginning of our republic, have vied to shape the composition and direction of the Supreme Court. It is they, not the Court, that are placed by the Constitution in a position in which they, not the Court, make significant choices about which matters to keep settled and which not to. The Court, by virtue of the constitutional structure, is the last player to come onto the constitutional field, and, even then, may not have the last say, given that, because of shifts in the composition of the Court and culture, it has overruled more than two hundred of its constitutional opinions.⁹

A hallmark of Amar’s constitutional scholarship has been his keen recognition of the importance of the Constitution outside the Court. He thus (rightfully, in my view) devotes substantial portions of his book to many important issues the Court does not second-guess, such as the scope of the President’s veto power and the persistent efforts of presidents and senators to change the Court’s direction by changing its composition. That recognition fills the pages of his newest book, as, I believe, it should. These portions of his treatise will help readers to better appreciate the constitutional impact of presidents and members of Congress who, after all, have devised, over the course of our history, the most important and enduring policy decisions in our history, including social security, Medicare, Medicaid, the Clean Air Act, and the Clean Water Act, to name but a few. The intense fights over these landmark bills in Congress illuminate its substantial but frequently discounted role in constitutional decision-making.

8. U.S. CONST., art. III, § 1.

9. *See generally* GERHARDT, PRECEDENT, *supra* note 7, at 206–45 (reviewing the more than 133 Supreme Court cases overruling more than 200 constitutional precedents of the Court). *See also* BRANDON J. MURRILL, CONGRESSIONAL RESEARCH SERVICE, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT (2018).

Similarly, Amar's discussion of the transformation of the veto under President Andrew Jackson (pp. 608–11) aligns with my own understanding, that it deviated from prior presidential exercises of the veto, but has been accepted and followed by subsequent presidents.¹⁰

Yet, even in the period covered by *The Words that Made Us*, there are key questions not firmly settled or mentioned. These are, among others, such questions as whether the Constitution is a suicide pact (raised in every era of constitutional history, even in the present one in the form of Americans insisting they can defy the law and engage in conduct that threatens the lives of others and that the government cannot do anything about that¹¹); whether individuals' free exercise of religion trumps communities' efforts to fight pandemics;¹² and whether constitutional dialogues must be linear or reasonable.

Whether issues appear settled or not, we should follow Amar's lead in tracking the arguments in contention until some resolution or equilibrium is reached. Even then, we should be aware that there are relatively few areas of constitutional law that fluctuate over time,¹³ principally including Congress's power to regulate interstate commerce, due process, equal protection, criminal procedure, and the First Amendment. Indeed, the precedents overturned in these five areas of constitutional law represent nearly 50% of the cases overruled by the Court.¹⁴

And yet the Court is not singularly responsible for keeping some issues unsettled. Presidents and the political composition of the Senate have a lot to do with this. For instance, President Donald Trump vowed to appoint justices who would overturn the Court's decision in *Roe v. Wade*.¹⁵ Thus, once his three nominees were confirmed by a Republican-controlled Senate, it should have been no surprise that they did.¹⁶ The ongoing political

10. See GERHARDT, PRECEDENT, *supra* note 7, at 130.

11. See Jan Hoffman, *Many Rush to Get Boosters as Vaccine Refusers Dig In*, N.Y. TIMES, Oct. 12, 2021, at A1, A15.

12. See generally Scott Bomboy, *The Constitutional Issues related to Covid-19 Mask Mandates*, NAT'L CONSTITUTION CTR. (Aug. 13, 2021), <https://constitutioncenter.org/blog/the-constitutional-issues-related-to-covid-19-mask-mandates>.

13. GERHARDT, PRECEDENT, *supra* note 7, at 40, 45.

14. See GERHARDT, PRECEDENT, *supra* note 7, App'x. Tbl. 2, at 246.

15. 410 U.S. 113 (1973).

16. See, e.g., Dan Mangan, *Trump: I'll Appoint Justices to Overturn Roe v. Wade Abortion Case*, CNBC, (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill->

controversies over *Roe* have underscored the fact that dissenters, or losers, on some questions of constitutional law can keep those issues alive in the political arena and, with enough support over time, can begin to help like-minded justices dismantle what was once settled, or at least seemingly so.

I dare say that Amar likely agrees on the give-and-take of constitutional dialogues. By carefully tracking the debates on politically volatile questions of constitutional law, he demonstrates the remarkable ebbs and flows of constitutional conversations. This first volume features early debates over the federal government's power to regulate slavery within the States or territories. These began outside of the courts, eventually shaped them, and then the Court's horrific decision in *Dred Scott v. Sandford*¹⁷ left the brutality of slavery to the battlefield. Subsequently, the Union prevailed and enacted Reconstruction, which in turn the Court, dominated by justices appointed by Republican presidents, stymied. This was followed by the era of Jim Crow and another disastrous Supreme Court opinion, in *Plessy v. Ferguson*,¹⁸ which prompted an eventual backlash in the form of a grand litigation strategy of the Legal Defense Fund to dismantle state-mandated segregation in the public sphere. The success of their strategy led to fierce state resistance, the Congress's belated but historic enactment of the 1964 Civil Rights Act and the 1965 Voting Rights Act,¹⁹ and the Court's later decisions making it harder to prove racial animus in the absence of a state or federal law expressly manifesting it.²⁰ Direct results of these debates manifested in the instability in the Court's affirmative action doctrine,²¹ and the Court's subsequent gutting of the Voting Rights Act based on concerns about states' sovereignty,²² which has become a principle nowhere defined as such in the Constitution but found, by a majority of justices appointed by Republican presidents, as an implicit rule

appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html. See also *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022) (overturning *Roe v. Wade*).

17. 60 U.S. (19 How.) 393 (1857).

18. 163 U.S. 537 (1896).

19. See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2006).

20. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

21. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

22. See *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

embedded in the original Constitution (apparently little affected by the ratification of the Reconstruction amendments).

When Amar tells the stories of these developments and others, his narrative is shaped by his irrepressible optimism and towering intellect, which sets a model for all of us in prioritizing rational discourse over the Constitution. Whether or not, or to what extent, he is right to do this, is a matter to which I next turn my attention.

III. AMAR'S CONSTITUTION

As lawyers, we are trained to construct the most rational discourse possible. Moving, as Amar characteristically does, from the panoramic to the particular and the particular to the panoramic, he provides a framework for understanding the ebbs and flows of the constitutional conversations over the seven decades, 1760–1840. Above all, he finds the rationality in all this discourse.

There are, however, other values besides reasonableness that shape the narrative of the words that made us. In Amar's analysis, our conversations about the Constitution's meaning are linear but not perfectly so. Indeed, I am struck by how much irrationality there is. If we just tracked self-interest, it could explain a lot of the path towards the development of America. Yet, there is more that is not perfectly rational, as the story of America is often about the lust for power or, more precisely, who has the power to define the narrative. The object for so many interpreters of the Constitution is not rational discourse but instead winning the argument.

Hatred, bias, and tribalism do not march perfectly to the beat of rationality.²³ For example, the protection of so-called states' rights, for the sake of protecting slaves as property, is grounded not just in the economic self-interest in the so-called owners, but also in their cruelty and racial animus. Fast forward to the present, when we watch millions of Americans proclaiming that no law can force them to wear masks in public, contagion and death be damned.²⁴ Their refusal—and consequent obstruction to end the

23. See George Packer, *A New Report Offers Insights into Tribalism in the Age of Trump*, NEW YORKER (Oct. 12, 2018), <https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump>.

24. See Steven Taylor & Gordon Asmundson, *Negative Attitudes about Wearing Masks during the Covid-19 Pandemic*, PLOS ONE (Feb. 17, 2021), <https://doi.org/10.1371/journal.pone.0246317>.

pandemic—is hardly the triumph of reason. Moreover, the “big lie” of the Trump campaign and family²⁵ that the 2020 presidential election was stolen does not rest on fact or pure reason, but is grounded in the irrational lust for power.

As scholars and lawyers, our jobs entail exposing irrationality. We believe, as Louis Brandeis once said, that “Sunlight is said to be the best disinfectant.”²⁶ The framers viewed education as the salvation for our nation, because they believed it would prepare them for civic leadership.²⁷ Unfortunately, many of us reject education as an unalloyed good.

Our norms define us. The framers and our best constitutional scholars, scholars like Professor Amar, value education because it facilitates civic virtue and facilitating civic virtue is an objective of the words that made us. While it is not an objective for all of us, it is an objective that most of us, I believe, and Amar believes, is still worth striving for, still worth dying for, in a constitution, whose Preamble’s opening words, still inspiring, still challenging and still resonating—“We the People of the United States, in Order to form a more perfect Union.”

Amar’s great achievement is to assemble the conversations that have comprised the path toward that perfection. His optimism and idealism are inspiring, though there is more than one story of that development that can be told. He celebrates, as do I, the ever-increasing expansion and inclusion of “We the People,” but there is no rest for the weary. We should not celebrate too soon since the conversations are far from over.

25. See Stephen Collinson, *Trump’s Big Lie Is Changing the Face of American Politics*, CNN POLITICS (Sept. 16, 2021, 9:43 a.m.), <https://www.cnn.com/2021/09/16/politics/trump-big-lie-gop-election/index.html>.

26. Louis Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY, Dec. 20, 1913, at 10.

27. See Michael Gerhardt & Jeffrey Rosen, *How to Revive Madison’s Constitution*, ATLANTIC (Dec. 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/madison-constitution/602929/>.