

## BOOK REVIEW

# A Bellicose Founding Charter: The U.S. Constitution and Providing for the “Common Defence”—A Book Review of Akhil Reed Amar: *The Words That Made Us: America’s Constitutional Conversation, 1760–1840* (Basic Books, New York, 2021)

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### INTRODUCTION

Akhil Reed Amar’s magisterial *The Words that Made Us: America’s Constitutional Conversation, 1760–1840*, breaks new ground, delivering an original account of the historical foundations of the U.S. Constitution.<sup>1</sup> Its methodology is fresh, analysis rigorous, and many of its conclusions startling.<sup>2</sup> This volume should be required reading not only for legal scholars, practitioners, and jurists but also non-lawyers, who would find an accessible civics lesson on the Founding; in a nation divided like few times in its history,<sup>3</sup> this could not have come at a better time.<sup>4</sup> It tells a story that all of us should come to know better.<sup>5</sup>

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1. AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840* (2021) [hereinafter *WORDS THAT MADE US*].

2. Consider just two examples. Who was the author of the Declaration of Independence? According to Amar, Thomas Jefferson isn’t the correct answer. *Id.* at 126–27. Who was the “father” of the Constitution? If your answer was James Madison, wrong again. *Id.* at 194–96, 202–17.

3. See, e.g., *A House Divided: The Splintering of America*, *ECONOMIST*, Sept. 3, 2022, at 16, 19 (citing DAVID FRENCH, *DIVIDED WE FALL: AMERICA’S SECESSION THREAT AND HOW TO RESTORE OUR NATION* (2020)) (describing the nation’s worrisome divide into two antithetical political camps).

4. American Presidents take an oath to “preserve, protect, and defend, the Constitution of the United States,” U.S. Const. art. II, § 1, cl. 8, and Amar urges that a better understanding of that oath is essential:

For this system to work, an oath-taking president – and We Americans who pick that oath-taking president – must understand the basic outlines of our Constitution. What does it say and why does it say that? How has it been implemented over the years by prior presidents and other leading government actors? Which of our past presidents did this job well, and which did not? These and related civics questions form the spine of this book. Thus, this is a book for my fellow citizens.

*WORDS THAT MADE US*, *supra* note 1, at 677 (emphasis added).

5. Indeed, Amar has succeeded in his goal to create a “handy” one-volume history of the Revolution, the drafting and ratification of the Constitution, and the early republic. *Id.* at xii.

A good review could have been written that considered this work's broader themes, but this article offers a narrower perspective, arguing that the through-line in Amar's book is national security. If our government, borrowing from the Gettysburg Address, was established "of the people, by the people, and for the people,"<sup>6</sup> Amar seems to argue that its Constitution was written of, by, and for a people who were concerned, first and foremost, with their country's protection – or to put it more direly, with its very survival.<sup>7</sup> National security, then, lay at the core of America's Founding.

Amar is both hedgehog and fox.<sup>8</sup> He knows many things, some of which are skipped over here, and he knows one big thing—that national security was *the* reason for the Constitution. This review considers his methodology and then presents evidence supporting the claim that national security was the rationale for the Constitutional Convention, the key to ratification. Lessons from the Revolutionary War, post-war vulnerabilities, and how the Constitution was fashioned as a solution to problems with the Articles of Confederation are discussed. There is also a digression considering another threat that preoccupied Americans, one that profoundly affected their willingness to unify under a strong national government, which this book, uncharacteristically, fails to connect to the constitutional debate. But this vignette only strengthens Amar's thesis that national security lay at the foundation of the Constitution.

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6. See Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), reprinted in FAMOUS SPEECHES BY EMINENT AMERICAN STATESMEN 103, 103 (Frederick C. Hicks ed., 1929).

7. That America has a "fighting Constitution", one that grants the federal government "the power to wage war successfully", isn't a new idea. See Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 1, 9, 18 (1917) (reprinting the former Supreme Court Justice's famous 1916 speech defending Woodrow Wilson's exercise of war powers and coining the phrase the "fighting Constitution" often repeated in the literature); see also WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 10–13 (10th ed., 1864) (arguing that war powers sufficient for self-preservation are inherent in the Constitution). And historians have long connected the government's mishandling of Shays's Rebellion with the impetus for a constitutional convention. See Robert A. Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, at 388 n.1 (1969) (listing 10 works starting in 1883 linking the rebellion and the Constitution). Yet not all would agree that the U.S. Constitution is so bellicose, either as to its origins or in the war-making authorities that it affords. Though some maintain that the Constitution is "accommodative" in times of crisis, others claim it remains "rigid". See, e.g., Saikrishna Bangalore Prakash, *The Sweeping Domestic Powers of Congress*, 113 MICH. L. REV. 1337, 1343–44, 1374 (2015) (observing that the Constitution's text does not clearly support the idea that the federal government enjoys sufficient power to ensure self-preservation). Indeed, one of the longest-running debates concerns whether "the Constitution [was] designed to be optimally capable of waging war" or its "system of checks and balances accept[s] certain friction – even friction that dangerously undermines wartime effectiveness – as the price of safeguarding other values[.]" Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 625 (2017). In his seminal work on the exercise of military powers under the U.S. constitutional order, Samuel P. Huntington takes the latter view. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 167–69 (1967).

8. See ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 1 (Henry Hardy ed., Princeton Univ. Press 2013) (1953).

## I. METHODOLOGY

Two features of Amar's approach are noteworthy. First, his coverage is panoramic. Second, it is ambidextrous, displaying the signal virtues of both historical research and legal analysis.

His coverage is panoramic in that it covers a wider period than do most historical works about the drafting and ratification of the U.S. Constitution.<sup>9</sup> It is wider on both front and back ends. On the front end, it starts three years earlier than most books about the Revolution, and his rationale for this inclusion is significant. Whereas most such books begin in 1763, when the Treaty of Paris ending the French and Indian War was signed, Amar's account commences in 1760, with the fall of Montreal.<sup>10</sup> The significance, he explains, is that imperial geopolitics was the driving force behind the Revolution: once the colonists no longer feared the French, they began to chafe about paying for British protection.<sup>11</sup> On the back end, Amar's account extends later than studies of the founding era usually do, and this yields several benefits. For example, he is able to provide a better understanding of later constitutional debates about nullification and secession that are often misunderstood because historians of the antebellum and Civil War eras are rarely familiar with these earlier materials.<sup>12</sup> This book, he notes, is *ambitious*.<sup>13</sup> It represents original scholarship at its finest.<sup>14</sup>

Amar's treatment of America's founding charter is ambidextrous in that it is interdisciplinary. In a word, "Too few law professors know history, and too few history professors know law."<sup>15</sup> With deft skill, he juxtaposes these two fields and enriches our understanding. He thus delivers an accessible summary of our constitutional conversation during its formative years, providing the sort of "useable past" that lawyers, jurists, and lawmakers crave.<sup>16</sup> One hopes that this book will not be the last to employ this methodology so skillfully.

Something further must be said about Amar himself. As Justice Elena Kagan said during her confirmation hearing, we are all originalists now.<sup>17</sup> Yet rather

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9. WORDS THAT MADE US, *supra* note 1, at x–xi.

10. *Id.* at 34–36, 59.

11. *Id.* at 679.

12. *Id.* at xi (explaining, "many of the right legal answers to the burning issues raised by the South Carolina Nullification Ordinance of 1832 and the secession crisis of 1860–1861 do in fact reside in the relevant legal materials of 1787–1788"). Regarding South Carolina's attempt to nullify federal law, see *id.* at 599–04, 667–70.

As for secession crisis, see *id.* at 229–31, 260–61, 264, 688–89.

13. *Id.* at 678.

14. His postscript begins: "The biggest news is that a book such as this now exists, as it did not before – a book that brings together between a single set of covers the main constitutional episodes of the fateful era in which America became America." *Id.* at 675. That rings true.

15. *Id.* at 677. The preface explains that the reason for this lacuna is that law professors are often unfamiliar with the appropriate historical materials and that historians for their part lack the tools of legal analysis necessary to understanding the import of the relevant jurisprudence. *Id.* at x–xii.

16. *Id.* at xii.

17. See *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of

than settling disputes over interpretation, this new consensus actually recenters the debate on the history and original meaning of Constitution: constitutional history becomes partisan and, thus, potentially even more politically fraught.<sup>18</sup> In these perilous waters, we are fortunate to have Amar at the helm.

To be sure, Amar is a man of the left. At the same time, he is every thoughtful conservative's favorite liberal law professor.<sup>19</sup> If you didn't take his classes at Yale, you wish that you had. Harvard Business School's Arthur Brooks has said the left and the right need not to disagree less but to disagree better.<sup>20</sup> Amar is a living embodiment of that sentiment, showing a capacity to hear and understand opposing views and then to engage in a serious and respectful fashion. What is more, he is not afraid to break with his side's orthodoxies. This is a man who has written passionately about why *Bush v. Gore* was decided wrongly,<sup>21</sup> but who has also taken a contrarian view on *Dobbs v. Jackson Women's Health Organization* — arguing that *Roe v. Wade* was bad law and that *Dobbs* rightly overturned it, notwithstanding his deeply felt views on abortion.<sup>22</sup>

Amar applies the same impeccable manners and scrupulous rigor here. In a rare polemical remark (that is still, somehow, fair), he disdains Harvard graduates who think everything is wrong with America as much as Hillsdale graduates who think everything is right with America.<sup>23</sup> He is unsparing on the Founders who defended slavery, especially those whose backsliding in later years should disappoint us (Madison, Jefferson),<sup>24</sup> and on their mistreatment of native peoples.<sup>25</sup> This is not sloppy hagiography. Amar sees the Founders with clear eyes and calls them out when their conduct was unbecoming. Yet this book was also written, unironically, as a “love letter to America.”<sup>26</sup>

## II. LESSONS FROM THE WAR OF INDEPENDENCE

America's Revolutionary War was a close-run thing.<sup>27</sup> The Continental Army lost 25,000 men, or 1% of the population, a greater ratio than any conflict save

Elena Kagan (“[W]e apply what [the Founders] say, what they meant to do. So in that sense we are all originalists.”).

18. See *The Supreme Court: History Test*, ECONOMIST, Aug. 20, 2022, at 24, <https://perma.cc/3X2M-35A9> (quoting the University of Michigan Law School's Richard Primus, who says originalism has now become a “surname of a family of approaches to constitutional law” that may not recognize each other at the dinner table).

19. See, e.g., Advisory Opinions with David French and Sarah Isgur, *Akhil Amar Talks Liberal Originalism*, THE DISPATCH (July 19, 2022), <https://perma.cc/3X2M-35A9>; Jay Nordlinger, *A Professor and the American Heritage*, NAT'L REV. (May 22, 2022), <https://perma.cc/ZZD3-Y4MY>.

20. Arthur C. Brooks, *Our Culture of Contempt*, N.Y. TIMES (Mar. 2, 2019), <https://perma.cc/SHX9-89AU>.

21. See Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009).

22. See Akhil Reed Amar, *The End of Roe v. Wade*, WALL ST. J., (May 14, 2022), <https://perma.cc/J7BM-D9VZ>.

23. WORDS THAT MADE US, *supra* note 1, at 676.

24. *Id.* at 660–72.

25. *Id.* at 136, 139–42, 380–81, 592, 634, 636–40.

26. *Id.* at 702.

27. *Id.* at 187.

the Civil War.<sup>28</sup> This had a profound impact on all Americans,<sup>29</sup> but those on the front lines gained insights that those who remained at the periphery lacked. Amar draws a familiar yet valuable distinction between Founders from the former camp (Washington, Hamilton, Marshall)<sup>30</sup> and those from the latter (Jefferson, Madison, Adams).<sup>31</sup> who did not understand America's vulnerabilities in the same way the veterans did.<sup>32</sup> Such men knew in their bones that blood and treasure had been wasted, in part because of a fragile central government.<sup>33</sup> It has been said that weakness is provocative.<sup>34</sup> No one understood better than Washington how such weakness imperiled the nation,<sup>35</sup> during and after the war.<sup>36</sup> From his perspective, the early republic's single greatest imperative was survival.<sup>37</sup>

One of the contributions of Amar's book is to restore Washington's primacy, not only as to martial cunning or political leadership or as America's Founding Father,<sup>38</sup> but also as to the creation of the Constitution itself – its conception, ratification, and implementation. Although Washington had some misgivings about returning to the public stage and had to be coaxed, the Constitutional Convention met at his behest.<sup>39</sup> The delegates drafted a charter that was designed to answer Washington's purposes.<sup>40</sup> When this document was circulated, it was accompanied by a letter from Washington personally endorsing the proposal, explaining its purposes, and advocating its ratification.<sup>41</sup> Then America spoke: the people not only ratified this new Constitution but then unanimously chose to elect him, *twice*.<sup>42</sup>

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28. *Id.* at 391.

29. *Id.* at 683.

30. *Id.* at 569.

31. *See, e.g., id.* at 409, 423, 569–71.

32. *Id.* at 380.

33. *Id.* at 254, 391, 535.

34. *See, e.g.,* Jim Rutenberg, *In Farewell, Rumsfeld Warns Weakness Is 'Provocative'*, N.Y. TIMES (Dec. 16, 2006), <https://perma.cc/F85F-7C4Q>.

35. "Washington more than anyone knew just how precarious America's geostrategic situation truly was." WORDS THAT MADE US, *supra* note 1, at 187.

36. *Id.* at 379, 392–93.

37. *Id.* at 379.

38. Contrary to the portrayal of Washington as a taciturn dunce in HBO's *John Adams* – which was consistent with the loquacious second President's views on his predecessor's intellectual faculties compared with his own, as described in David McCullough's eponymous Pulitzer Prize-winning biography the series was based on – Amar recasts Washington, describing his deliberate communication style and shrewdness. For example, if he rarely spoke at the Constitutional Convention, that is because he did not need to: the delegates knew his objectives and gave him precisely what he wanted. *Id.* at 213–14, 686. And although often reserved in public, he was a keen listener, a voracious newspaper reader, and more open when alone with intimates. *Id.* at 303–06, 352–53. Further, his private correspondence was prolific – especially after his military retirement, when he "became America's correspondent in chief, carrying on a more robust and geographically dispersed series of conversations, by letter, than anyone else, with the possible exception of Jefferson." *Id.* at 298–99.

39. *Id.* at 270–71.

40. *Id.* at 213–14.

41. *Id.* at 252, 686.

42. *Id.* at 214, 691.

Amar makes a convincing argument that, far more than Madison,<sup>43</sup> Washington was the true father of the Constitution.<sup>44</sup>

Consider the import of Washington's supreme influence over the making of the Constitution: Imagine if our present constitution had been rewritten at the insistence of a war hero who sought to refashion our system of government based on lessons learned from the last war – say, if it were rewritten to suit the tastes of Grant, Eisenhower, or Schwarzkopf. And then the people not only ratified his preferred constitution, but also unanimously elected him President soon thereafter. That would say something remarkable about the character of that new charter – and lead us to study closely the man in whose image it was written.<sup>45</sup> This is one of Amar's most valuable insights.<sup>46</sup>

### III. POST-WAR VULNERABILITIES

Amar observes that hindsight is a double-edged sword: we see things that contemporaries would have missed, but because we know how history unfolded, we miss things they would have thought important.<sup>47</sup> Early Americans saw “alternative histories that did not materialize but that might have materialized, or at least that [they] thought might well materialize.”<sup>48</sup> Three potential histories loomed.

Chief among these were threats posed by Europe's hegemony: England, France, and Spain.<sup>49</sup> By various strategies — some active, others passive<sup>50</sup> — old-world powers sought to prevent America's westward expansion and, where possible, even to retake some of their territories.<sup>51</sup> In 1787, America was frightfully outmatched by Europe, both collectively and individually. Not only were their standing armies and navies much larger, so also were their populations: England was three times the size of America, and France, in turn, three times larger than England.<sup>52</sup> Americans justly feared recolonization.<sup>53</sup>

Native Americans were the second perceived threat to the fledgling nation.<sup>54</sup> Amar concedes that this threat was never existential,<sup>55</sup> with colonial Americans east of the Appalachians outnumbering native peoples between the mountains the

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43. Amar faults historians who give Madison too much credit based on his posthumous and self-serving account, *Notes of Debates in the Federal Convention of 1787*. *Id.* at 203–06, 525–26, 583, 686–87. One is reminded of the quip perhaps misattributed to Winston Churchill: “History will be kind to me, for I intend to write it.” See MICHAEL S. NEIBERG, *WARFARE AND SOCIETY IN EUROPE: 1898 TO THE PRESENT* 124 (2004).

44. Compare WORDS THAT MADE US, *supra* note 1, at 202–06, with *id.* at 212–17.

45. One of Amar's refrains is that the Constitution was Washington's two-dimensional counterpart, *id.* at 395, 691–95, and Washington its three-dimensional embodiment. *Id.* at 692.

46. “These key *historical* facts,” he argues, “have *legal* significance.” *Id.* at 692.

47. *Id.* at 276–78.

48. *Id.* at 277–78.

49. *Id.* at 278.

50. *Id.* at 233, 300–01, 380–84.

51. *Id.* at 380–81, 635–36.

52. *Id.* at 163.

53. *Id.* at 186, 328–29.

54. *Id.* at 278.

55. *Id.* at 381.

Mississippi by a ratio of 20 to 1.<sup>56</sup> Yet they constituted a genuine danger when coupled with more substantial worries about Europe, with the latter encouraging Indian attacks on settlers to further their interests.<sup>57</sup> Washington understood that forcing the British to relinquish the Northwest Territory in per their treaty obligations required the defeat of their Native American allies. Not until a resounding defeat at the Battle of Fallen Timbers in 1794 did the British decamp.<sup>58</sup> Not coincidentally, soon after the Spanish at granted Americans navigation rights on the Mississippi, signing the Treaty of San Lorenzo in 1796.<sup>59</sup> If Americans overestimated this threat, they considered violence by native peoples not merely defensive but linked to ongoing geostrategic competition among European powers for control of North America.<sup>60</sup>

Unusually for a volume whose coverage is so comprehensive, Amar omits a story that weighed heavily on the minds of delegates to the Constitutional Convention. This third danger was that of the Barbary pirates. The significance of this threat to delegates who represented the interests of a seafaring and (then) mostly coastal nation, whose economy depended on foreign trade, is vividly portrayed in Michael Oren's *Power, Faith, and Fantasy: America in the Middle East, 1776 to Present*.<sup>61</sup>

Oren's account provides a useful summary of concerns that were familiar to Americans during the ratification debates. Madison<sup>62</sup> and Hamilton<sup>63</sup> each wrote essays later included in *The Federalist Papers* advocating for a strong national government to defend the nation from the likes of the North African pirates. John Jay, the third author of this collection, observed that "the more we are ill-treated abroad the more we shall unite and consolidate at home." He thus welcomed the dangers posed by the "Algerine Corsairs and the Pirates of Tunis and Tripoli"

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56. *Id.* at 140.

57. *Id.* at 171, 301–02.

58. *Id.* at 380–81, 384.

59. *Id.* at 382.

60. *See id.* 171, 301–02, 381, 635.

61. MICHAEL B. OREN, *POWER, FAITH, AND FANTASY: AMERICA IN THE MIDDLE EAST, 1776 TO PRESENT* 17–32 (2007) [hereinafter, OREN]. Borrowing heavily from Oren, I have written about this story and why it still resonates in the U.S. federal procurement system legal culture down to the present. *See* Daniel E. Schoeni, *On the Non-tariff Barriers Obstructing Free Trade in the Transatlantic Defense Procurement Market*, in *JOINT PUBLIC PROCUREMENT AND INNOVATION: LESSONS ACROSS BORDERS* 419, 428–32 (Gabriella M. Racca & Christopher R. Yukins eds., 2019). Two recent volumes provide the authoritative accounts; neither, however, explains in so much detail the significance of the captive American sailors for the Constitutional Convention or the ratification process. *See* ROBERT J. ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD 1776–1815* 16–17, 35 (1995) [hereinafter ALLISON]; FRANK LAMBERT, *THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD* 65–7, 69 (2005) [hereinafter LAMBERT].

62. Madison argued that a strong central government was required for the "maritime strength" that would protect U.S. shipping from the "rapacious demands of pirates and barbarians." *THE FEDERALIST* No. 41, at 212 (James Madison) (George W. Carey & James McClellan eds., 2001).

63. "[I]f we mean to be a commercial people, or even to be secure on our side of the Atlantic, we must endeavor as soon as possible to have a navy." *Id.* No. 34, at 164 (Alexander Hamilton); *id.* No. 11, at 51–52 (Alexander Hamilton) (warning that absent a "federal navy" of "respectable weight," "the genius of the American merchants and navigators . . . would be stifled and lost").

that would rally voters to support the creation of government strong enough to defend their interests.<sup>64</sup> One historian even quipped that “the brutal Dey of Algiers was a Founding Father of the [U.S.] Constitution.”<sup>65</sup>

The history of the early republic’s commercial ventures in the Mediterranean is instructive. Until independence, American merchants sailed under the protection of the Royal Navy.<sup>66</sup> The Continental Navy protected them during the Revolutionary War, but at the war’s end its ships had either been sold, stolen, or sunk.<sup>67</sup> Merchant ships were outmatched by the pirates roving off the coast of North Africa.<sup>68</sup> Lord Sheffield scoffed: “The Americans cannot protect themselves [from the Barbary pirates]; they cannot pretend to have a Navy.”<sup>69</sup> Such a navy could not be built without a strong national government, which America lacked under the Articles.<sup>70</sup> Worse came to worse when three vessels were captured — first the *Betsy* in October 1783, then the *Dauphin* and the *Maria* three months later.<sup>71</sup> America found itself saddled with war debts, with access to the trade that would enable their repayment hindered by mercantilist European powers and North African pirates alike.<sup>72</sup>

So much did the imprisonment of American sailors weigh on the delegates in May 1787 that Washington urged that the subject *not* be discussed.<sup>73</sup> Although

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64. See THOMAS A. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 65 (1958).

65. *Id.*

66. OREN, *supra* note 61, at 19–20.

67. *Id.* at 20; LAMBERT, *supra* note 61, at 29.

68. LAMBERT, *supra* note 61, at 15, 28.

69. OREN, *supra* note 61, at 20. Because their commercial interests were served by the Barbary pirates keeping Americans out of the Mediterranean, it appears that the British and French supported them in various ways, either actively or passively. See ALLISON, *supra* note 61, at 3, 14; LAMBERT, *supra* note 61, at 42, 47–48, 54–55. This of course corresponds with Amar’s account of Britain’s cynical manipulation of native peoples to harass American colonists in the Northwest Territory during the 1780s. See WORDS THAT MADE US, *supra* note 1, and text accompanying notes 57–58.

70. See OREN, *supra* note 61, at 20; LAMBERT, *supra* note 61, at 7, 12–13, 28, 49, 69, 71–72, 213; ALLISON, *supra* note 61, at 7, 12, 126.

71. OREN, *supra* note 61, at 22. The seizures of these three ships are often lumped together under the heading of the Barbary Wars. Yet there is an important distinction between the *Betsy* and the latter two. The former was captured by the emperor of Morocco not so much as piracy but as an act of statecraft. Morocco had been among the first nations to recognize America’s independence, and it later sought a trade agreement. When America dithered, the emperor captured the *Betsy* to expedite negotiations. It worked. Once a treaty was signed, the ship and her prisoners were promptly returned. See LAMBERT, *supra* note 61, at 52–60. The *Dauphin* and the *Maria* were captured by Sidi Muhammad, the dey of Algiers, following a declaration of war. He was not easily appeased, demanding tribute that was 50 times greater than what Morocco had asked for. The Algerine threat “exposed the inadequacies of the American Confederation as the Moroccan captures had not,” Allison explains, “[w]ith no taxing authority of its own and its credit in disarray, America could fund neither an expensive treaty with Algiers nor a navy to fight pirates.” *Id.* at 60. Two dozen Americans languished in captivity until 1793, when another 100 American prisoners were added to their number. *Id.* at 127.

72. See LAMBERT, *supra* note 61, at 9, 24, 43; ALLISON, *supra* note 61, at 14.

73. OREN, *supra* note 61, at 29–30. Imprisoned sailors would not let Congress forget them, sending lawmakers a steady stream of letters pleading for their rescue. LAMBERT, *supra* note 61, at 73. Americans also learned about these pirates from sailors returning from the Mediterranean. *Id.* at 45. Not least, in another striking parallel with one of Amar’s themes, Americans learned about the pirate menace from *newspapers*. Compare *id.*, with WORDS THAT MADE US, *supra* note 1, at 682–84, 690–91

his request was mostly honored, this silence was not observed during the ratification debates, where the Algerine threat buttressed the case for unifying under a strong government with a navy that could defend maritime traders.<sup>74</sup> This emphasis on unification for purposes of national defense is consonant with Amar's account of the state ratification debates, so it is surprising that he fails to make this connection.<sup>75</sup> This omission is, however, a minor quibble about a book that is otherwise so comprehensive.

#### IV. SOLUTIONS TO PROBLEMS WITH THE CONFEDERATION

When the Constitutional Convention convened in 1787, delegates had a specific remit: they were sent to Philadelphia to address problems with the Articles of Confederation.<sup>76</sup> These problems are well known.<sup>77</sup> Inexplicably, until Amar's book came along, most scholars had ignored what he calls the "elephant in the room".<sup>78</sup> Namely, that the new Constitution comprised a direct and logical response to the previous constitution's defects.<sup>79</sup> The Articles mentioned the "common defence" three times,<sup>80</sup> and yet it was in this regard that this original charter failed most conspicuously.<sup>81</sup> The government lacked taxation powers, had only a puny army and navy, and was unable to defend western lands from foreign interference; and Americans smarted from the injury these weaknesses did to their respectability abroad.<sup>82</sup> Delegates, then, were tasked with solving something like an algebraic formula; they were to "solve for  $x$ ".<sup>83</sup> Defense was the central purpose of the Articles, but they did not answer that.<sup>84</sup> Some say that the U.S. Constitution is a mere hodgepodge of compromises,<sup>85</sup> but Amar shows that there is a coherent inner logic.<sup>86</sup> Delegates were sent to the Convention to create a

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(emphasizing that one of the recurring themes throughout the book was the importance of *newspapers* to the ongoing constitutional debates during this period).

74. OREN, *supra* note 61, at 30; LAMBERT, *supra* note 61, at 67–70.

75. Amar mentions the Barbary pirates just once. WORDS THAT MADE US, *supra* note 1, at 187. And he fails to connect the significance of the imprisoned sailors either to his discussion of the Constitutional Convention, *id.* at 182–85, 217–20, 685–86, or to the state ratification debates. *Id.* at 225–71. I find it surprising that he omits this story because it fits so neatly with his narrative both about the purposes of the Constitutional Convention and the reasons adduced for Americans' decision to ratify the Constitution. Compare *id.* at 193–94, 212–13 with LAMBERT, *supra* note 61, at 65–66.

76. WORDS THAT MADE US, *supra* note 1, at 162–65, 169–74.

77. See, e.g., 1 THE FOUNDER'S CONSTITUTION 147–83 (Philip B. Kurland & Ralph Lerner eds., 1987); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 150, 168, 170, 175 (1985).

78. WORDS THAT MADE US, *supra* note 1, at 683.

79. *Id.* at 185–86.

80. See ARTICLES OF CONFEDERATION OF 1781, art. III, art. VII, and art. VIII.

81. In Amar's telling, the common defense was the Articles of Confederation's *raison d'être*, WORDS THAT MADE US, *supra* note 1, at 182, yet in this regard America's first constitution was an utter failure. *Id.* at 170–73.

82. *Id.* at 170–73, 186–87.

83. *Id.* at 187.

84. *Id.* at 687.

85. *Id.* at 194.

86. *Id.* 193–94, 380, 685.

government strong enough to win the next war,<sup>87</sup> and that is exactly what they did.<sup>88</sup> To that end, the Constitution's "single most distinctive feature" was the "breathtakingly strong chief executive," who would be empowered to defend the nation.<sup>89</sup> Washington sought this authority so that he and his successors could address the geostrategic challenges of their day.<sup>90</sup> To repeat, the Founders drafted exactly the sort of document he had asked for, which the people duly ratified, and then they unanimously elected him as President, *twice*.<sup>91</sup> Why? According to Amar, for reasons of national security "above all else".<sup>92</sup>

#### CONCLUSION

This review has been at pains to emphasize that Amar's book is original and eminently worth the reader's time.<sup>93</sup> But what are the ramifications of a book that covers so much ground and revitalizes our understanding of both the Constitution and our nation's heritage?

This article's treatment of Amar's book is, again, narrow. It seeks to highlight a key point: that the U.S. Constitution's predominant orientation is toward national security. Paraphrasing a well-known maxim, it is often said that the Constitution is not a suicide pact.<sup>94</sup> Amar teaches us, however, that far from being a suicide pact, the Constitution's purpose was the polar opposite; its nature and character were *martial*. Indeed, rather than a suicide pact, the Constitution would be more accurately styled a *military compact*, whose object was mutual self-preservation by pledging allegiance to a government strong enough to protect the states from foreign aggression. This is not the only lesson to be drawn from Amar's book, but it is one that deserves close attention.

What, then, are the ramifications? Readers' priors will affect their views on the fact that defense figures so prominently in the Constitution.<sup>95</sup> Doves may find this

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87. *Id.* at 187–88, 213.

88. *Id.* at 193–94, 212–13.

89. *Id.* at 212–13.

90. *Id.* at 213, 252–53, 284–85.

91. *Id.* at 212–14, 691.

92. *Id.* at 536.

93. I disagree with Amar on some points. For example, he is too dismissive of Daniel Webster, failing to credit his role in promulgating America's constitutional heritage and in forestalling a constitutional crisis in 1832 so that the union could grow strong enough to resist the South's succession three decades later. Compare WORDS THAT MADE US, *supra* note 1, at 626–27, with ROBERT REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 317–31 (1997). And he is surely correct that John Adams's character flaws were manifold, but he is too hard on him; Adams is treated as a foil to more inspired Founders and a punchline ("old Adams"). See WORDS THAT MADE US, *supra* note 1, at 664–66, 695–96, 712. To be sure, Adams's record was not unblemished, and perhaps he is undeserving of a Broadway musical singing his praises. Even so, Amar does not give him his due.

94. See *Terminiello v. Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

95. My research interests center on U.S. federal procurement. Following George Washington University's Joshua Schwartz, see Joshua I. Schwartz, *The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law*, GW LAW FACULTY PUBLICATIONS & OTHER WORKS, Paper 1077 (2004), at 52, <https://perma.cc/ZW88-NS8Q> (arguing that "it would require a willful blindness to the main currents of United States history to miss the fact that military and defense contracting has played the central role in development of both the

fact problematic and lament that amending the Constitution is so hard; hawks relish that the primacy of national defense is not a mere Cold War relic but can be traced to the Founding. Proponents of subsidiarity may emphasize that the federal government should be (mostly) limited to national security; those favoring a wider remit may analogize from its vast war-making powers to other fields of endeavor. Et cetera. Amar's book makes a convincing argument that our founding charter was bellicose. But far from ending debates about the Constitution or the proper ends of a free government, this insight should reinvigorate our ongoing constitutional conversation. Amar's book invites us to "disenthrall ourselves" of past misunderstandings about the Constitution and will enable us to "think anew."<sup>96</sup> It should be on every bookshelf.

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United States system of public procurement and the development of a regulatory structure therefor"), I have argued that *the* distinguishing feature of the U.S. federal procurement system is its inordinate concentration on defense. *See, e.g.,* Daniel Schoeni, *Differing Perspectives on Defence Procurement: The Relative Composition of Purchases as a Barrier to Transatlantic Understanding and Trade Liberalisation*, 30 PUB. PROCUREMENT L. REV. 45 (2021). Although I have speculated about various reasons for this orientation, *see, e.g.,* Daniel E. Schoeni and Christopher R. Yukins, *Principles of Public Contracts in the United States of America*, in LES PRINCIPES DES CONTRATS PUBLICS EN EUROPE 97, 104–06, 114–15 (Stéphane de La Rosa & Patricia Valcárcel Fernández eds., 2022), Amar's book provides a better explanation: U.S. federal procurement is defense oriented because America's *Constitution* is so defense oriented. His insights are a welcome corrective to my understanding of the orientation of U.S. procurement law; I can only imagine how it may affect other fields.

96. Abraham Lincoln, Second Annual Message to Congress (Dec. 1, 1862) *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953).

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