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## Writing About the Past That Made Us: Scholars, Civic Culture, and the American Present and Future

*The Words That Made Us: America's Constitutional Conversation, 1760-1840*

BY AKHIL REED AMAR

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**ABSTRACT.** In *The Words That Made Us: America's Constitutional Conversation, 1760-1840*, Akhil Reed Amar writes of the parlous state of democracy in the United States. He argues that our problems are due, in part, to citizens' failure to understand their responsibilities. The quality of our "constitutional conversation," in which we talk about the nature of our government and our aspirations for it, is extremely poor. This is, in large measure, due to scholars'—historians' and law professors'—unwillingness to create a "usable past" that would help Americans understand their duties to the country and to one another. He sees his book as a means of starting an enriched "constitutional conversion." Along with his diagnosis of American malaise, Amar presents his own version of the origins of the Revolution (winding the clock back to 1760, before the more traditional starting period of 1763-1765), discusses the politically volatile 1790s, and creates portraits of the most well-known figures of that period. Amar's presentation should start a vivid conversation about the nature of American civic life, past and present.

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## INTRODUCTION

Writing the history of the formation of the United States of America began almost as soon as the country was established. It is not surprising that people at the time would quickly seek to make a record of and, if possible, explain the events that had disrupted the operations of one of the world's great powers—Great Britain—while also involving its perennial rival, the second great power—France. In 1776, the American colonists had declared their right to take their place “among the powers of the earth,” putting a new country on the map.<sup>1</sup> However, some of the leading lights of the era were skeptical of efforts to capture what had happened during the conflict. Writing to John Adams in August of 1815, Thomas Jefferson said: “You ask who shall write [the history of the American Revolution]? who can write it? and who ever will be able to write it?”<sup>2</sup>

As he addressed the question of future writing on the Revolution, Jefferson cited one historical work on the Revolution that he considered to be marred by the author's tendency to “put his own speculations and reasonings into the mouths of persons whom he names, but who, you & I know, never made such speeches.”<sup>3</sup> Despite his criticism of this particular book, Jefferson was realistic about the prospects of future historical accounts of the Revolution. Though they would inevitably contain imperfections, histories of so momentous a thing would have to be written. In the end, Jefferson pronounced the work he referenced “a good one, more judicious, more chaste, more classical and more true than the party diatribe of Marshall,”<sup>4</sup> referring to Chief Justice John Marshall's biography of George Washington.<sup>5</sup>

David Ramsay's *The History of the American Revolution* (1789) is considered the first complete history of the conflict.<sup>6</sup> Ramsay had served in the South Carolina Assembly and had been a soldier in the Continental Army.<sup>7</sup> It was while representing South Carolina in the Confederation Congress, at the beginning of

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1. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
  2. Letter from Thomas Jefferson to John Adams (Aug. 15, 1815), in THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION (James P. McClure & J. Jefferson Looney eds., 2008-2021), <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=TSJN-chron-1810-1815-08-10-1&mode=deref> [<https://perma.cc/JPU6-NQLX>].
  3. *Id.*
  4. *Id.*
  5. JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (Philadelphia, C.P. Wayne 1804-1807).
  6. See 1-2 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION (Philadelphia, R. Aitken & Son 1789).
  7. FRANCIS D. COGLIANO, THOMAS JEFFERSON: REPUTATION AND LEGACY 47 (2008).

the 1780s, that he began to work on the book.<sup>8</sup> Ramsay's experiences put him at an important vantage point to view how the Revolution and its immediate aftermath had unfolded. Like all historians, he was writing in a context that shaped his understanding of how to present the story he wished to tell and what he thought his fellow Americans needed to hear at that particular moment.

In *Whose American Revolution Was It?: Historians Interpret the Founding*, historians Gregory H. Nobles and Alfred F. Young commented on this aspect of writing history, noting that, “[i]nvariably, the historian’s life exists within history itself.”<sup>9</sup> Citing English historian Edward Hallett Carr, they continued, “The historian, before he begins to write history, is the product of history.”<sup>10</sup> While it is also true that some moments are more “historic” than others, one can say that the history people are living is more present and discernible to them. Ramsay was in a singular moment: a new citizen in a fledging republic comprising thirteen separate colonies precariously stitched together.<sup>11</sup> Not surprisingly, he decided to present the Revolution as a heroic struggle against a British Empire that had trampled upon the constitutional rights of people who had been loyal British subjects.

Not long after Ramsay's effort, Mercy Otis Warren wrote her own history of the Revolution, similarly heroic in tone. Warren was the sister of James Otis, a member of the Massachusetts General Court and a well-known supporter of the American patriot cause. Otis was most famous for arguing *Paxton's Case* against the use of writs of assistance that allowed British customs officials, seeking to combat smuggling, to search anywhere at any time, a practice so reviled that the

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8. *Id.* at 47-48. Cogliano notes that Jefferson played “literary agent for Ramsay” and another man who wished to write a history of the Revolution, William Gordon. *Id.* at 47. Gordon, who had been born in England, immigrated to Massachusetts and became “a pastor in the Third Church in Roxbury and took an active interest in public affairs.” *Id.* Jefferson supported Ramsay and Gordon because he believed that “[b]oth men were sound politically – they had been unwavering supporters of American independence – each was a skilled writer, and, most important, they were well placed to observe the people and events which were central to the Revolution in their locales.” *Id.*
  9. GREGORY H. NOBLES & ALFRED F. YOUNG, *WHOSE AMERICAN REVOLUTION WAS IT?: HISTORIANS INTERPRET THE FOUNDING* 6 (2011).
  10. *Id.* (citing EDWARD HALLETT CARR, *WHAT IS HISTORY? THE GEORGE MACAULAY TREVELYAN LECTURES DELIVERED IN THE UNIVERSITY OF CAMBRIDGE, JANUARY-MARCH 1961*, at 34-38 (Alfred A. Knopf ed., 1967)).
  11. *See generally* PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787* (1983) (demonstrating the precarious nature of the early union of American states, as they battled over boundaries among themselves and with rebellious factions within their own borders).

Framers of the American Constitution created the Fourth Amendment to prohibit the use of these types of “general warrants.”<sup>12</sup> Mercy Warren was influenced by her brother’s example and that of her husband James Warren, who was also involved in politics and the Revolution.<sup>13</sup> Mercy Warren was a close friend of Abigail Adams and her husband John Adams.<sup>14</sup> So, like Ramsay, she had a personal involvement with the Revolution that colored the history that she published in *History of the Rise, Progress, and Termination of the American Revolution*.<sup>15</sup>

Contexts change, however, and the study of history is the study of change over time. As the Revolution receded beyond the lifetimes of would-be historians who had lived through it, new schools of thought about the causes and nature of the conflict came to the fore. Focusing on “the scholarship of the last three quarters of the twentieth century,” Nobles and Young delineated the “successive schools of interpretation” in which historians have sought to explain the American Revolution and the constitutional order that arose after it.<sup>16</sup> Young identified five major interpretive schools that dominated writing about the Revolution for most of the twentieth century:

the Progressive interpretation[,] more or less dominant to about 1945; the consensus or counter-Progressive view, sometimes called the ideological interpretation of the Revolution, which emerged in the 1950s and ’60s to dominate the field; the “new social history,” which accelerated in the 1970s and ’80s, devoted to long-range trends in early American society; the “New Left” history that ran parallel with it, arguing for examining the Revolution as a whole from the bottom up; and the diverse efforts in the 1980s and early ’90s to synthesize the many strands of what had become very large bodies of scholarship.<sup>17</sup>

Expanding on that list of historical interpretations, historian Michael D. Hattem has dubbed our present moment the “Neo-Progressive . . . Founders Chic” Era,

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12. ROSEMARIE ZAGARRI, *A WOMAN’S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION* 33-34 (2d ed. 2015).

13. *See generally id.* (describing the life of Mercy Otis Warren).

14. *Id.* at 87.

15. 1-3 MERCY OTIS WARREN, *HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION: INTERSPERSED WITH BIOGRAPHICAL, POLITICAL AND MORAL OBSERVATIONS* (Boston, Manning & Loring 1805).

16. NOBLES & YOUNG, *supra* note 9, at 8 (discussing Alfred F. Young, *American Historians Confront “The Transforming Hand of the Revolution,”* in NOBLES & YOUNG, *supra* note 9, at 13, 13).

17. *Id.*

in which sharp critiques of the motives of the men dubbed “Founders” coexist with celebratory accounts of these figures written for the general public.<sup>18</sup>

Into this rich progression comes Akhil Reed Amar, Sterling Professor of Law and Political Science at Yale University and one of the most acclaimed scholars of his generation. Significantly, Amar writes not only for his fellow academics, but for general audiences. He is particularly well suited to take on the subject matter of his latest very lively and provocative work, *The Words That Made Us: America’s Constitutional Conversation, 1760-1840*, which is specifically designed to reach the American public.<sup>19</sup>

Two firm opinions drive the arguments in *The Words That Made Us*: first, that historians have a responsibility to provide a “usable past” for the general public that will help inform their civic participation; and second, that historians, in the most recent decades, have failed to fulfill that responsibility, with calamitous results for the country’s civic health. There has been much justifiable hand-wringing of late about the current state of American democracy. The extreme polarization of the American electorate, the fact that one of the major parties has made itself over in the image of a man who is no friend of republican government, and the Fourth Estate’s seeming enchantment with the whole spectacle indicate that Amar is exactly right to be worried: the country is in a perilous position. So, what is to be done? Amar believes that history, if written the right way, can play an important role in putting things right.

This Book Review assesses Amar’s description of our current state and his prescription for dealing with this moment of civic decay. It analyzes both Amar’s critique of the current state of the historiography of the American Revolution, as well as his book’s substantive contributions to the historical account of that event. Part I addresses Amar’s vision for the book—namely, to help provide a usable past for the American public—and interrogates the utility and desirability of the concept. Part II analyzes Amar’s approach to constructing a usable past, including his criticism of historians and legal scholars. Part III turns to Amar’s historical contribution overall, which illuminates the “constitutional conversations” that took place at the Founding. It assesses Amar’s discussion of the origins of the Revolution, along with his treatment of the Articles of Confederation,

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18. Michael D. Hattem, *The Historiography of the American Revolution*, J. AM. REVOLUTION (Aug. 27, 2013), <https://allthingsliberty.com/2013/08/historiography-of-american-revolution> [<https://perma.cc/THX9-3URV>] (listing historical interpretations (some more obscure than others) and the dates of their currency, in order of ascendancy including: “Revolutionary Interpretation,” “Loyalist Interpretation,” “Whig Interpretation,” “Imperial Interpretation,” “Progressive Interpretation,” “Consensus Interpretation,” “Neo-Whig/Ideological Interpretation,” “New Left/Neo-Progressive Interpretations,” and “Founders Chic”).

19. AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760-1840* (2021).

the “constitutional conversation” surrounding the Philadelphia Convention, and the most prominent participants in the dialogue. Finally, the Review concludes with an assessment of the place that *The Words That Made Us* might occupy in the ongoing historiography of early America.

### I. WHY THIS BOOK?

In the preface to *The Words That Made Us*, Amar asks a somewhat startling question: “[D]o we really need yet another American history book—and a long one at that?”<sup>20</sup> (*The Words That Made Us* is around 700 pages of text, with 85 pages of notes.) Amar’s answer is, of course, “yes, we do,” and he explains why<sup>21</sup>:

While history books abound, precious few are wide-angled and multi-generational treatments of the American constitutional project. In recent decades, many great American historians have turned away from institutional and political history and toward social history, exploring the daily lives of our common folk more than the deep logic of our common law or the basic features of our constitutional government. Also, many of the best works of history are period pieces that illuminate a decade or two but do not even try to trace the analytic and narrative threads across the generations. If an exceptionally ambitious modern volume does seek to sweep across three-quarters of a century or more, it typically does so not panoramically but with a tight focus on a single issue—say, chattel slavery or western expansion or sex equality or presidential power.<sup>22</sup>

Amar is well-known for his willingness to state his opinions forthrightly, sometimes to the point of being combative. That trait is on full view in this book as he tackles, sometimes with humor, the crisis in American civic identity as he sees it. This crisis was the impetus for writing *The Words That Made Us*, but the problem came home to him in even fuller force during the summer of 2020, as he was finishing the book. It led him to write a postscript to a work that was already something of a *cri de coeur*:

Every week this summer, as I sat in my family room, I saw scholars and pundits on cable TV saying silly things. On C-SPAN, distinguished Civil War historians airily opined that the Constitution of 1787-1788 was indeterminate on the secession question. *Nonsense*. On MSNBC, radical-chic intellectuals proclaimed, with barely suppressed smirks, that Americans

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20. *Id.* at x.

21. *Id.*

22. *Id.* at x-xi.

revolted in 1776 mainly to protect slavery, which the British government was seeking to abolish. *Ridiculous*. On Fox News, pundits told viewers that the founders loathed “democracy” as a word and as a concept, and embraced only “republics,” which were always and everywhere sharply contradistinguished from “democracies.” *Baloney*.

Today’s Hillsdale graduates say that America’s founders never did anything wrong, and today’s Harvard graduates say that America’s founders never did anything right. (Okay, okay – that’s a gross oversimplification, but it felt good to blow off some steam.)<sup>23</sup>

Amar decided to join the fray to tell the story of the Founding of the United States in a way that he thinks would be the most beneficial. He desires a “usable past” for Americans.<sup>24</sup> That phrase, “usable past,” was coined by Van Wyck Brooks, a literary scholar from the early twentieth century.<sup>25</sup> Given the country’s great diversity, Brooks believed, there was a need to create a coherent culture that could bind Americans together. In his view, as described by historian Jeffrey K. Olick, historians should “construct a ‘usable past’” using “a set of historical referents that could give shape to contemporary efforts. A ‘usable past’ is thus an invention or at least a retrospective reconstruction to serve the needs of the present.”<sup>26</sup> That definition explains why today’s historians may pause over the phrase, for it suggests that the past is not to be taken on its own terms, whether it imparts lessons or not, but is valuable chiefly for how it helps us with current issues, for example, how to be an effective citizen, which Amar wants historians to help produce.

Surveying the American scene, Amar writes:

I am frankly worried about the widespread constitutional illiteracy that surrounds [us], illiteracy of the young and old, left and right. A nation that does not understand its history is like a person who suffers amnesia. Without a strong memory of one’s past, how can a person live a meaningful life? Without a deep understanding of our collective constitutional past, how can Americans live together?<sup>27</sup>

This ignorance impairs the quality of what Amar calls Americans’ “constitutional conversation,” the mechanism for discussing and making decisions about how

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23. *Id.* at 677.

24. *Id.* at xii.

25. Jeffrey K. Olick, *From Usable Pasts to the Return of the Repressed*, HEDGEHOG REV., Summer 2007, at 19.

26. *Id.*; AMAR, *supra* note 19, at xii.

27. AMAR, *supra* note 19, at 675.



our system should work.<sup>28</sup> Better-constructed history would help release us from this predicament.

## II. SCHOLARLY FAILURES: DIVERSE VIEWS OF THE PAST

### A. *Political History v. Social History and a Usable Past*

Amar sees political history, as opposed to the social history that has been in vogue for several decades now, as offering the best chance to give Americans a usable past. The book's complaint about the supposed death of political history should be seen in this light. This lament has been raised for some years now, even as books and articles about the political history of the early United States continue to roll off the presses of both academic and trade publishers. At the same time, however, a new generation of historians has sought to broaden the definition of what constitutes "politics" and show how the "common folk," who did not wield electoral political power, nevertheless influenced society.<sup>29</sup> Think of historians in a future field of history, say a century from now, purporting to write the history of the early twenty-first century by focusing only on people who were Presidents, secretaries of state or treasury, Chief Justices of the Supreme Court, and a handful of other politicians. That would not do justice to the

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28. *Id.* at xii.

29. For a lament about the state of political history in the academy, see Frederik Logevall & Kenneth Osgood, *Why Did We Stop Teaching Political History?*, N.Y. TIMES (Aug. 29, 2016), <https://www.nytimes.com/2016/08/29/opinion/why-did-we-stop-teaching-political-history.html> [<https://perma.cc/6Q4J-YWTP>]; and BEYOND THE FOUNDERS: NEW APPROACHES TO POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher eds., 2004) (back cover), which argues,

In pursuit of a more sophisticated and inclusive American history, the contributors to *Beyond the Founders* propose new directions for the study of the political history of the republic before 1830. In ways formal and informal, symbolic and tactile, this political world encompassed blacks, women, entrepreneurs, and Native Americans, as well as Adams, Jeffersons, and Jacksons, all struggling in their own ways to shape the new nation and express their ideas of American democracy.

*But see* Roy Rogers, *The Strange Death(?) of Political History*, JUNTO (Sept. 9, 2016), <https://earlyamericanists.com/2016/09/09/the-strange-death-of-political-history> [<https://perma.cc/63YV-UXSA>] (discussing some negative responses and reactions to the Logevall and Osgood piece). The late political historian of the Early American Republic, Joyce Appleby, described the "collection of essays" in *Beyond the Founders* as demonstrating "the intellectual curiosity, fresh findings, and interpretive skills of a new generation of American political historians." *Id.* In addition, with the rise of the internet, Americans get their history not just from books, but from a plethora of podcasts, blogs, and other fora. *See, e.g., The Political History of the United States: A Podcast Dedicated to the Political History of the United States*, <https://uspoliticalpodcast.com> [<https://perma.cc/AK7B-TT6H>].

varied and rich nature of the political landscape of our time. Similarly, limiting the story of early America to the lives and actions of the men – and they were almost all men – who held official power leaves far too much out of the story and would result (as it did for many years) in endless reworkings of the lives, thoughts, and actions of just a handful of people.

Academic historians are not typically given to “analytic and narrative threads” that sweep “across the generations” for the very sound reason that it is well-nigh impossible to develop truly in-depth expertise in multiple historical contexts that span many decades. Still, a number of historians writing today have done histories that cross time periods and generations.

But, for entirely practical reasons, these works are usually done *in addition* to the scholars’ other, more specialized scholarship – the particular historical events or persons that interest them enough to make them want to lose themselves in the archives, perhaps for years at a time.<sup>30</sup> What they produce when they focus on their specialized topics are works that others, usually nonacademic popular historians, invariably mine to write the kind of broad narratives that Amar favors. And while sweeping narratives can definitely be attractive, particularly when they are as engaging as this volume, there is the question of just how many of them are needed in any given period.

Relatedly, must the “sweeping” history be done by one person? The scholars involved in the renowned series the *Oxford History of the United States* are in the process of telling the story of the land that became the United States, starting from precolonial times up through the twentieth century. True, these volumes, which have been appearing steadily since the 1980s, cover periods in thirty- to forty-year increments. The overall project itself is, in fact, sweeping, with the great advantage of having each era covered by historians who are unquestioned authorities on the eras of which they write. With such rich material from which to draw – so many important details and stories – it is of enormous benefit to readers to have an expert pause over particular topics and write about them in enough depth to inspire confidence in their scholarly presentations. In sum, the situation with respect to broadly based narrative history is not so dire as Amar suggests.

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30. Notable examples of this trend include JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* (2018), which presents the history of the United States from Christopher Columbus to Barack Obama; ALAN TAYLOR, *AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES, 1783-1850* (2021), which explores the history of the United States from 1783 to 1850; and ELIZABETH VARON, *DISUNION!: THE COMING OF THE AMERICAN CIVIL WAR 1789-1859* (2010), which engages in an interdisciplinary review of American history from the Founding to the Civil War.

*B. Plural Pasts*

Amar is undoubtedly right about the state of Americans' "collective" understanding of our "constitutional past." But many Americans *do* have a memory and a "deep understanding" of some salient features of the country's earliest constitutional order. Many of these understandings would not necessarily serve to bind our diverse citizenry together, even if Americans knew more of the things about which Amar writes.

To take just one example, every American school child is taught, at one point or another, that the Constitution ratified in 1789 was the result of a compromise over the issue of race-based chattel slavery. As a result, the final document contained a Fugitive Slave Clause<sup>31</sup> and a Three-Fifths Clause,<sup>32</sup> both of which protected slavery. It took the breakdown of that first constitutional order—a war—to fix the moral problem the Founders' compromises caused. What came next was an amended Constitution, with the Thirteenth,<sup>33</sup> Fourteenth,<sup>34</sup> and Fifteenth Amendments<sup>35</sup> put in place to do away with slavery and bring four million formerly enslaved African Americans into full citizenship. Many Americans, understandably, find the Framers' treatment of slavery alienating. To others, the exclusion of the interests of Blacks from the original constitutional compact reinforces the idea that African Americans were never meant to be equal members of American society at all and that this fact should determine what rights they enjoy today. It seems unlikely that a "constitutional conversation" about the events of 1787 to 1789, focused solely on the actions of the Founding Fathers as traditionally defined, would bind these disparate groups together.

On the other hand, would not the constitutional events that took place in the 1860s be a better historical basis for stimulating a conversation to bind together our fractious polity? This would seem particularly so given that African Americans' place in the United States is at the heart of so many of our current conflicts, just as it was at the time of the Founding. Indeed, Amar has written eloquently and persuasively about the need to pay more attention to the so-called "second founding" of the United States that took place in the aftermath of the American Civil War. When writing of the tendency to focus so much on America's eighteenth-century Founders, Amar explains that "many of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to James

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31. U.S. CONST. art. IV, § 2, cl. 3.

32. *Id.* art. I, § 2, cl. 3.

33. *Id.* amend. XIII.

34. *Id.* amend. XIV.

35. *Id.* amend. XV.

Madison and not enough to John Bingham.”<sup>36</sup> Likely, few Americans know the names of Bingham and the other nineteenth-century “Founders,” what they tried to accomplish during those years, and what an amazing thing it was to attempt to create a multiracial democracy after all that had taken place in North America from the time the first Africans arrived there.

Amar answers the question about the relative usefulness of the two eras near the end of the book, where he reveals that *The Words That Made Us* is really just the first part of a trilogy. The second book in the series, *The Words That Made Us Equal: America’s Constitutional Conversation, 1840-1920*, will cover “the era in which non-Whites and women transformed America’s constitutional conversation and won astonishing constitutional victories.”<sup>37</sup> After that will come *The Words That Made Us Modern, 1920-2000*, which will cover, among other things, the Cold War, the civil-rights movement, second-wave feminism, and originalism. With these two proposed sequels to *The Words That Made Us*, “a more demographically diverse cast of characters will be stepping onto center stage.”<sup>38</sup>

This information casts a different light on *The Words That Made Us*. The very instructive titles of the trilogy raise questions. First, who is “[u]s”? The titles of the second and third volumes make clear that the “[u]s” in the first volume is of a different character than that of the coming books. *The Words That Made Us* nods to a public that was active in the conversation that took place in the years before the Revolution. But the interest in the thoughts of the ordinary people is overtaken, as happens in most what-could-be-called traditional narratives of the Founding, by a focus on the words and deeds of the most powerful people who lived in the country during this time: George Washington, Alexander Hamilton, Thomas Jefferson, John Adams, James Madison, John Marshall, and Andrew Jackson. Indeed, most of the book is devoted to these men as individuals and their often very contentious relationships with one another. Given the roles they played, that these men should figure prominently in Amar’s account makes perfect sense. But there is the problem of asking current-day Americans whose ancestors were excluded from power, and indeed who were under the power of (and in some cases actually mistreated and enslaved by) these men—women, enslaved people, and Indigenous people—to see these men and their actions as the prime informers of our civic virtue.

This brings us back to the current style of history writing in the academy. What historians who have abandoned traditional narratives of the Founding in

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36. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 293 (1998). John Bingham is recognized as the principal author of the Fourteenth Amendment. *Id.* at 181 (describing Bingham as the “principal draftsman” of Section 1 of the Fourteenth Amendment).

37. AMAR, *supra* note 19, at 697.

38. *Id.* at 698.

favor of writing about more obscure people and communities have been trying to do is to write such people into the national narrative. They are saying, “These people, too, were a part of the Founding,” for the express purpose of creating an “us” coherent enough, and inclusive enough, for all segments of society to feel connected to it. Ironically, the very thing that would help the first volume of Amar’s proposed trilogy be more effective at the task he sets for it is the very form of history writing that he criticizes in *The Words That Made Us*.

### C. Instrumentalism and Civic Life

Amar voices other, more particular, concerns about the shortcomings of present-day chroniclers of the Founding:

Many of the best history books of late have also shied away from offering anything that might resemble an emphatic authorial opinion on a once contested legal issue. This hesitation may reflect the fact that most historians lack formal training in legal analysis. If asked, many historians today would say they simply seek to understand the past on its own terms. These scholars do not wish to opine on who was legally “right” and who was legally “wrong” in days gone by, or what the “lessons” of the past are for today’s law and politics. (The scare quotes around the words *right*, *wrong*, and *lessons* reflect the diffidence of the typical modern historian.)<sup>39</sup>

Amar notes how different this posture is from the way that “lawyers, judges, and lawmakers approach the past.”<sup>40</sup> He notes that, on a daily basis in the country,

[c]onstitutional principles and judicial precedents from long ago carry weight today, even though the world has undoubtedly changed in the interim. In the case now pending, the court must give judgment—and soon—to either the plaintiff or the defendant. The president must either sign or veto—within a few days—the bill that currently sits on his desk. Today’s legal decision makers thus crave a usable past to guide them in the here and now.<sup>41</sup>

It is not just the failures of historians that draw Amar’s attention: “[L]egal scholars have failed to fill the void left by historians. Some constitutional scholars openly mock those who rely heavily on history, while most other leading lawyers

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39. *Id.* at xi-xii.

40. *Id.* at xii.

41. *Id.*

and legal academics simply ignore the appropriate historical materials or offer only superficial accounts.”<sup>42</sup>

To one who has a foot in the world of historians and a foot in the world of law professors, Amar’s impatience with the way historians operate and his concerns about law professors are familiar. But the comparison between historians, law professors, lawyers, and judges does not quite work because the people in each of these roles are doing very different and specific things. They may all engage with the past, but not in the same way and, decidedly, not for the same purposes.

That is as it should be. It is true that lawyers and judges must often make decisions using their understandings of the past—and, in some cases, their knowledge of the Constitution—but that does not mean they are “doing history.” Few things are more annoying to historians than what they call “law office history”—in which lawyers and judges scan history books looking for material to support positions that they are, in many cases, already inclined to take. When the lawyers and judges do so, they are acting well within their roles. What they are doing in those situations, however, cannot be offered as an effective criticism of historians’ disinclination to mine the past to help win an argument about some present-day equivalent of a case, problem to be decided, or deal to be struck. Historians and legal scholars have different roles and functions than lawyers and judges.

Still, Amar is right to suggest that historians and legal scholars have a role to play, whether they specifically want to or not, in the civic life of our nation. Over the past several years Jill Lepore and Jane Kamensky, both historians at Harvard University who write about the Revolution and the early American republic, have made this point in books and articles.<sup>43</sup> Kamensky, in fact, has written poignantly about how she felt when a student in her class, who in his spare time had been a Minuteman reenactor, told her that he had stopped this activity after taking her class.

*I quit*, he mumbled, looking as if he might cry. When I asked why, he said something like, *because it’s all shit and lies. Like, who could be proud of that? That’s what I learned this semester.*

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42. *Id.*

43. See, e.g., JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* 17 (2010) (describing the political implications of how history is taught in schools); LEPORE, *supra* note 30; Jane Kamensky, *Two Cheers for the Nation: An American Revolution for the Revolting United States*, 47 *REV. AM. HIST.* 308, 308-18 (2019) (discussing the implications of the historical framing of the Revolution for Americans’ understanding of our national heritage).

It was then that I realized that the twenty-first century version of the American Revolution, not unlike the United States itself, has some serious work to do. The latest, best scholarship on the subject has been brave and fresh and true, all of which is necessary. But it is not, in the end, sufficient. What might it mean to craft a pedagogy of the American Revolution that is at once faithful to the past and useful to our fragile democracy?<sup>44</sup>

Like Amar, Kamensky speaks of the ongoing conversation that Americans have had about the nature of our society from the beginning and is interested in making that conversation better, but without leaving the innovations, insights, and concerns of modern scholarship behind.

Make no mistake: I am glad that the American Revolution as scholars understand it in 2019 is not our (founding) fathers' revolution, and indeed proud to have contributed to rewriting that super-sad true love story. But I am also concerned about the portrait we historians, collectively, have painted. Not because it's a poor likeness; warts and all, it's faithful and vivid. And not because it's dark. Some of the most enduring art provokes tears. My worry, to the contrary, is that our current scholarly synthesis renders our students – rising voters all – passive: frozen with shame rather than prostrate in awe, but docile just the same. Shame and veneration are but opposite sides of the same coin. Neither cultivates action, which lies at the core of democratic citizenship.

When scholars and schoolteachers and public historians in the United States fight about the American Revolution, we are modeling the work of the republic. When we bring that fight to our students, we mold what would, in quainter times, have been called the national character. We are not yet doing everything we can, using the tools of our profession, to make that character better. How might we study and teach the Revolution with the deliberate purpose of building civic capacity? As democracies around the world tremble under the stubby thumbs of would-be tyrants propped up by low-information voters who cannot or will not safeguard the prerogatives of their own citizenship, it behooves us all to ask the question.<sup>45</sup>

So, Professor Kamensky shares Amar's concern about the role historical writings – and teaching – have to play in helping everyday citizens understand, cri-

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44. Kamensky, *supra* note 43, at 310.

45. *Id.* at 314-15.

tique, and take into account the complexities of what has been called the American Experiment. But she appears more appreciative than he of the necessary changes that have taken place in writing about the Revolution over the past few decades.

### III. TALKING ABOUT A REVOLUTION: CONSTITUTIONAL CONVERSATIONS

*The Words That Made Us* is not simply a critique of the histories of America's origins. Amar presents his own version of these events, and the word "conversation" is critical to his project and methodology. He describes the ferment that led the American colonists to break with Great Britain as a "constitutional conversation" that began long before the Framers met in Philadelphia in 1787, indeed before Concord and Lexington. This territory has been plowed before in John Phillip Reid's magisterial four-volume *Constitutional History of the American Revolution* and Jack P. Greene's *The Constitutional Origins of the American Revolution*, as well as others.<sup>46</sup> While general readers may read these works and easily understand them, Amar's writing style, as well as his use of popular references and humor, may well make his work even more appealing to the larger public he hopes to reach.

Amar "aims to trace the main thread of America's constitutional conversation and pay special attention to the nature of the conversation itself. What was the basic structure of the conversation? Who participated, how, where, and why?"<sup>47</sup> Reflecting this aim, *The Words That Made Us* is divided into three parts that describe the content of the conversations that were going on in the United States between 1760 and 1840, beginning with "Revolution," then going to the "Constitution," and ending with "Consolidation."

#### A. Early Origins

##### 1. Amar's Starting Point: Paxton's Case and the British Triumph at Montreal

It is no surprise that Amar would see the conversation that led to the American Revolution as beginning with a legal case and lawyers. For him, the year

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46. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (1986-1993); JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011).

47. AMAR, *supra* note 19, at xii.



1761 was pivotal. That was the year of *Paxton's Case*,<sup>48</sup> which he posits was “the opening event” of the conflict and was, thus, “of epic import”<sup>49</sup> as “the episode reveal[ed] the profound passions, the deep tensions, and the underlying forces that would eventually rip the British Empire apart in 1776.”<sup>50</sup> The case involved writs of assistance, which allowed for searches without specifying exactly what, when, or why the search was to be conducted.<sup>51</sup> The young John Adams witnessed, and helped make famous, James Otis’s argument against this practice.<sup>52</sup> Adams kept notes of the proceedings and reflected upon them in his later years. He reproduced the culmination of Otis’s claim partly in all capital letters, issuing words that would, as Amar says, “prove prophetic”<sup>53</sup> :

“Had this writ been in any book whatever it would have been illegal. ALL PRECEDENTS ARE UNDER THE CONTROUL OF THE PRINCIPLES OF LAW . . . No Acts of Parliament can establish such a writ.” Even had Parliament authorized a general writ in the clearest and most purposeful language imaginable, “it would be void, AN ACT AGAINST THE CONSTITUTION IS VOID.”<sup>54</sup>

Amar gives a lesson in English constitutional history, referencing the Glorious Revolution of 1688 and the establishment of the preeminence of Parliament.<sup>55</sup> He describes “the unwritten British Constitution,” perhaps a touch dismissively, as “a mélange of institutions, customs, principles, and understandings that had evolved and shifted over the centuries.”<sup>56</sup> Written or not, the constitution was important to the colonists, and Otis’s argument previews the preoccupation that they would come to have with protecting their rights as Englishmen as they saw them under the British Constitution.

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48. 1 Quincy 51 (Mass. 1761).

49. AMAR, *supra* note 19, at 8.

50. *Id.*

51. *Id.* at 12.

52. *Id.* at 14-15.

53. *Id.* at 19.

54. *Id.*

55. *Id.* at 20.

56. *Id.* at 19-20.

As for Adams's famous late-in-life statement that it was in the *Paxton* courtroom that "Independence was born,"<sup>57</sup> Amar correctly pegs the statement as hyperbole.<sup>58</sup> In 1761, the colonists were nowhere near to seeking independence from Great Britain. Amar suggests, however, that this event, combined with the British triumph in Montreal in 1760, created a new atmosphere in Massachusetts, the colony that Amar makes the representative of the American colonies during this very early period for this argument.<sup>59</sup> On Montreal, he cites Thomas Hutchinson, the last royal Governor of Massachusetts, who after the British triumph detected a new spirit aborning:

"Whilst the French remained upon the continent, the English [that is, British Americans] were apprehensive lest, sooner or later, they should be driven from it. But as soon as they [the French] were removed, a new scene opened." After the fall of Montreal, "there was nothing to obstruct a gradual progress of [British North American] settlements, through a vast continent, from the Atlantic to the Pacific Ocean."<sup>60</sup>

With these two events, the three ingredients that fueled the conversation in the pre-Revolutionary period were in place: personal passion (as expressed in Otis's argument), military confidence (with the French vanquished, the colonists felt freer), and a legal argument (Great Britain, in the form of Parliament, was infringing upon the constitutional rights of colonists, as Otis had argued).<sup>61</sup>

## 2. *A More Complete Story*

As Amar writes, 1763 is more typically cited as the starting date for the American Revolution because that was the year the Seven Years War (called the French and Indian War in the United States) formally ended with the signing of the Treaty of Paris.<sup>62</sup> The war between Great Britain and France was conducted in many parts of the world and, as Amar correctly notes, that conflict can really be described as the first world war.<sup>63</sup> As scholars have come to see the American

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57. *Id.* at 14 (quoting Letter from John Adams to William Tudor, Sr. (Mar. 29, 1817), in NAT'L ARCHIVES' FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-6735> [<https://perma.cc/SA5N-TCMH>]).

58. *Id.* at 31 (quoting John Adams).

59. *Id.* at 34-36.

60. *Id.* at 35-36 (alteration in original) (emphasis omitted).

61. *See id.* at 33-39.

62. Off. Historian, *Treaty of Paris*, U.S. DEP'T STATE, <https://history.state.gov/milestones/1750-1775/treaty-of-paris> [<https://perma.cc/RHW2-KL6F>].

63. AMAR, *supra* note 19, at 42.

Revolution in less nationalistic, more global terms, they have moved away from portraying the conflict as just a matter of Great Britain—King George and Parliament—suddenly deciding to harass the thirteen American colonies for no good reason. Having fought and won a costly war, Great Britain assessed its situation and decided to embark upon an effort to reform the empire. This involved enacting laws that affected all British colonies, not just the ones on the eastern seaboard of North America.

There is a tendency to write as if the thirteen colonies in the 1760s were the known-superpower United States in the making. How silly of King George and the British Parliament not to recognize with whom they were dealing! The task is to try to see things as they appeared to the people of the time—not just to one or two people—and not to proceed as if anything was inevitable. When the American colonists declared independence in 1776, there were twenty-six colonies in the British Empire, the richest and most important being Jamaica, the one “whose loss the British could have least afforded.”<sup>64</sup> Of those twenty-six, only the thirteen in North America decided to break away from the Empire out of anger over the attempts at imperial reform.

The North American colonists particularly resented Parliament’s imposition of direct taxes on the colonies, a move they thought unconstitutional.<sup>65</sup> Important to locating the start of the Revolutionary period somewhere between 1763 and 1765 is the fact that the British reform measures affected *all* thirteen colonies, which created a connection between the colonies that did not previously exist. That connection, in turn, provided a basis for mobilization. Revolutions can be said to be underway when people *begin to do things, to act*—not simply imagine things or talk amongst themselves about things. We would be in a permanent state of revolution if such things were the measure of that type of event, for people always talk and imagine.

The American colonies were not a single entity, although we tend to write about them as if they were. The historian Robert G. Parkinson and others have shown that it took a great deal to bind them together. Parkinson emphasizes that these were thirteen independent entities whose people actually did not care so much for one another.

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64. T.G. Burnard, ‘Prodigious Riches’: *The Wealth of Jamaica Before the American Revolution*, 54 *ECON. HIST. REV.* 506, 506 (2001); see ANDREW JACKSON O’SHAUGHNESSY, *AN EMPIRE DIVIDED: THE AMERICAN REVOLUTION AND THE BRITISH CARIBBEAN* 260-61 n.68 (Richard S. Dunn ed., 2000).

65. See generally Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 870 (1978) (explaining the colonists’ constitutional objections to direct taxation).

After all, the catalog of forces acting against American unity was impressive. Previous attempts at colonial union had been abortive, most famously at Albany in 1754. Long-standing provincialism and jealousies, running simultaneously along both north-south and east-west axes, abided. Accusations that backcountry settlers were even more “savage” than Indians redounded from Atlantic settlements while frontiersmen countered that they, in fact, were the true representations of masculine courage and pure liberty. Internal conflicts surfaced throughout the continent. Clashes over land rights, political access, religious toleration, and good government flared up during the 1760s and 1770s in New York, New Jersey, Virginia, and the Carolinas. Disadvantaged men and women in Philadelphia, Boston, and New York City demanded economic and political reforms. Border controversies and jurisdictional tensions sometimes devolved into violence and threatened relations between Pennsylvania and Virginia, New York and New Hampshire, and Connecticut and Pennsylvania.<sup>66</sup>

Gordon S. Wood also discusses the galvanizing effect that the Stamp Act had across the colonies, “[f]rom Newport, Rhode Island, to Charleston, South Carolina,”<sup>67</sup> not just Massachusetts.

When word reached America that Parliament had passed the Stamp Act without even considering any of the colonial petitions against it, the colonists reacted angrily. Merchants in the principal ports formed protest associations and pledged to stop importing British goods in order to bring economic pressure on the British government. Newspapers and pamphlets, the number and like of which had never appeared in America before, seethed with resentment against what one New Yorker called “these designing parricides” who had “invited despotism to cross the ocean, and fix her abode in this once happy land.” At hastily convened meetings of towns, counties, and legislative assemblies, the colonists’ anger boiled over into fiery declarations.<sup>68</sup>

None of this is to suggest that the events that Amar cites are unimportant. But the thoughts and feelings that Adams, Otis, and Hutchinson had about the writs of assistance, and the psychological effect that the British victory over the French in Canada had on the American colonists, cannot be imputed to the people of

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66. ROBERT G. PARKINSON, *THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION* 2 (2018).

67. GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 29 (2002).

68. *Id.* at 28.

the thirteen colonies. On the other hand, the fact that, after 1763, the British government began to do things that prompted individuals across the colonies to mobilize – draft petitions, come out into the streets, gather in discussion groups, and riot – would seem the most reliable sign of a turning point in the relationship between the colonists and the mother country. Americans were still not ready for independence. But a deep fissure was beginning to form and the constitutional conversation about which Amar and others have written was underway.

*B. Post-Revolution: The Early American Republic*

*1. Life Under the Articles*

After striking out on their own, the American colonists set about forming a government, an act that certainly required a conversation. What things from the old British system did they wish to keep, and what did they wish to discard? Amar homes in on the central questions about how the states would constitute themselves (before declaring independence, the Continental Congress had instructed the colonies to write their own state constitutions),<sup>69</sup> what was to be done about the West, and what Amar calls “America’s First Draft,”<sup>70</sup> the ultimately doomed Articles of Confederation. That document, Amar writes, “avoided many of the worst features of the British Empire while pioneering several admirable principles and introducing several clever practices.”<sup>71</sup> He refers to the Articles’ “relatively egalitarian vision,” noting that the document “said nothing about interstate fugitive slaves,” a silence that he says “favored the cause of freedom.”<sup>72</sup> In addition, the Articles did not employ a “racial test in defining the rights that citizens of each state could expect in sister states,” although the word “white” was used when “setting the quota of soldiers each state should provide.”<sup>73</sup>

The Articles were, famously, too weak to deal with the reality in which the now knitted-together thirteen states found themselves. Amar succinctly recounts the new government’s weakness.<sup>74</sup> It did not provide an effective system of tax-

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69. PETER CHARLES HOFFER & WILLIAM JAMES HULL HOFFER, *THE CLAMOR OF LAWYERS: THE AMERICAN REVOLUTION AND CRISIS IN THE LEGAL PROFESSION* 132 (2018).

70. AMAR, *supra* note 19, at 162.

71. *Id.* at 165.

72. *Id.* at 166.

73. *Id.* at 167.

74. *See id.* at 169-75.

ation to maintain the new nation. It was nearly impossible to amend, as it required unanimous agreement among all the member states. At a basic level, the new nation had to be able to defend itself. Without the ability to raise a national army, what would happen if individual states could refuse to contribute soldiers? The Constitution created between 1787 and 1789 was far better suited to the task of creating and maintaining a true union and a secure nation.

Amar says that his “most original thought”<sup>75</sup> in this section of the book deals with the Northwest Ordinance, which set out a plan for the development of the western part of the newly constituted United States.<sup>76</sup> He posits that this document—which he is absolutely right to suggest should be better known—“was a powerful counterpart of and precedent for the US Constitution itself.”<sup>77</sup> Amar identifies himself as “Whiggish.”<sup>78</sup> He “celebrates the strong anti-imperialist thrust of the Northwest Ordinance, which promised that western Americans could join the American constitutional project on an equal republican footing” and “highlight[s] and praise[s] the free-soil, rights-protecting, education-promoting, pro-republican, egalitarian, and tribe-sensitive aspects of the Ordinance.”<sup>79</sup> By “anti-imperialist,” he means that the eastern foundational states would share power equally with the new states, an extremely critical point for the cohesion of the Union.<sup>80</sup> Westward expansion over the territory of Indigenous people, on the other hand, was imperialist, and the degree of tribe sensitivity of the Ordinance is debatable.

## 2. *Key Participants in the Constitutional Conversation*

As one would expect, Amar’s discussion of the birth of the Constitution is learned, energetic, and admiring. The details of the process have been told many times, but Amar’s presentation is different primarily for its focus on the role of George Washington, whom he insists was the document’s prime shaper.<sup>81</sup> Amar cites the influence of historian Edward J. Larson, who has argued that the picture of Washington as the out-of-his-depth military man among intellectuals is false,

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75. *Id.* at 683.

76. AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO (1787), <https://www.loc.gov/rr/program//bib/ourdocs/northwest.html> [<https://perma.cc/6JDP-5NKK>].

77. AMAR, *supra* note 19, at 683.

78. *Id.*

79. *Id.*

80. *See id.* at 178.

81. *Id.* at 302-22.

as bringing him to this conclusion.<sup>82</sup> And he is out to set the record straight on who can best lay claim to have been the “father” of the document, taking the man most often given the title, James Madison, out of the running. This is, perhaps, the most interesting and important takeaway from *The Words That Made Us*. Amar argues that, despite much talk of Madison in the histories of the Constitutional Convention, the future President did not succeed in pressing his favored ideas and proposals.

Many of Madison’s darlings died in the summer of 1787. He argued relentlessly for a Senate that, like the House, would be apportioned by population. He lost. He advocated tirelessly for a Congressional negative over state law. He lost again. He wanted the president to be joined with leading judges in wielding the veto power. Here, too, he lost. He pleaded for broad federal power to tax exports. Yet again he lost.<sup>83</sup>

Amar clearly relishes the idea of combat and contestation, and his discussion of the competing ideas about the Constitution bear the mark of this trait. One is put in mind of litigation: Washington v. Madison, Hamilton v. Jefferson. In discussing the several men who could lay claim to the title “father of the Constitution,” Amar sets the discussion up as “the case for” / “the case against” each potential “father.”<sup>84</sup> One supposes the main civic lesson to take away from this discussion is that we are to support the idea of a unitary executive, a current day political controversy, because that is what George Washington wanted and that is what the Constitution he fathered should be interpreted as having created.

It is fair to say that from the start Amar tips his hand about where he will come down on the politics of the very volatile early American republic, which is the subject of the latter half of the book. *The Words That Made Us* is dedicated to Lin-Manuel Miranda, Vanessa Nadal (Miranda’s wife), Ron Chernow, Khizr Khan, and Neal Kumar Katyal, whom he thanks “jointly and severally, for helping me and so many others see the true meaning of America.”<sup>85</sup> Miranda, of course is the creator of the now-iconic musical *Hamilton*,<sup>86</sup> and Ron Chernow is the author of the bestselling book *Alexander Hamilton* upon which the musical

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82. *Id.* at 686; see also EDWARD J. LARSON, *THE RETURN OF GEORGE WASHINGTON 1783-1789* (2014) (telling the story of George Washington from his resignation as commander-in-chief through his inauguration as the nation’s first President); EDWARD J. LARSON, *FRANKLIN & WASHINGTON: THE FOUNDING PARTNERSHIP* (2020) (chronicling the relationship between Benjamin Franklin and George Washington and its impact on early American political development).

83. AMAR, *supra* note 19, at 196.

84. See *id.* at 202-17.

85. *Id.* at v; see *id.* at 702.

86. LIN-MANUEL MIRANDA, *HAMILTON* (2015).

was based.<sup>87</sup> Readers will thus be able to anticipate how Jefferson and Madison will fare. As in the musical<sup>88</sup> and the biography,<sup>89</sup> Hamilton and Washington emerge as the heroes in Amar's story of the 1790s. Amar does not mince words about his affinity for the pair, and he explains why: "On most issues that arose in the Washington administration, I'm a Hamilton man, because Hamilton, on most issues, was a Washington man, and Washington, in turn, on most issues, was the Constitution's man."<sup>90</sup>

Like many law professors, Amar takes very seriously *The Federalist*, now known as *The Federalist Papers*,<sup>91</sup> the series of essays written by Alexander Hamilton, John Jay, and James Madison under the name Publius. The eighty-five essays were written to convince New Yorkers to ratify the Constitution. It is safe to say that *The Federalist Papers* mean far more to current-day legal academics and judges than they did to the American people at the time. The evidence indicates that other pamphlets and writings on the subject of the proposed Constitution had far wider circulation than *The Federalist*,<sup>92</sup> but the people who authored those did not go on to become a President, Secretary of State, Secretary of the Treasury, or Chief Justice of the Supreme Court.

Historian Pauline Maier notes that *The Federalist* "had a limited circulation outside New York (and, in fact, within the state)."<sup>93</sup> In the words of another historian,

The newspaper essays we now celebrate were less widely circulated than many other Federalist and Anti-Federalist tracts, book sales were miniscule, and references to them during the extensive public debates were few. We have no indication they affected the election of delegates to the state ratifying conventions, and even at those conventions they

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87. RON CHERNOW, ALEXANDER HAMILTON (2004).

88. MIRANDA, *supra* note 86.

89. CHERNOW, *supra* note 87.

90. AMAR, *supra* note 19, at 692.

91. THE FEDERALIST (Alexander Hamilton, John Jay & James Madison).

92. See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 814-20 (2007) (describing the scope of the circulation of *The Federalist Papers*).

93. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 84 (2010) ("The most comprehensive defense and analysis of the Constitution, *The Federalist* (eighty-five essays, October 1787 through May 1788), also had a limited circulation outside New York (and, in fact, within the state) when first published.")



played no large role. The way we treat *The Federalist Papers* now, compared with how they were treated then, is a classic example of reading history backwards.<sup>94</sup>

One can only conclude that the eminence of Madison's, Hamilton's, and Jay's later careers colors the view of the essays they wrote between 1787 and 1788. Because we take seriously many of the ideas contained within them, it is assumed, without strong evidence, that they had the same effect upon people of the time and more of an effect than other writers whose works were far more popular, but who did not become famous.

Amar also attempts to take Madison's dear friend Thomas Jefferson down a peg. He insists that the people, not Jefferson, were the true authors of the Declaration of Independence.<sup>95</sup> Actually, Jefferson would likely agree with that idea. He wrote about the matter in a letter to Henry Lee in May of 1825, a little over a year before he died:

[T]his was the object of the Declaration of Independance [sic] not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject; [in] terms so plain and firm as to command their assent, and to justify ourselves in the independant [sic] stand we [were] compelled to take [ ] neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion.<sup>96</sup>

Jefferson never claimed to have invented the ideas in the Declaration and, like many published writers, he had copyeditors. But he used his intuition and talent for writing to capture and express those free-floating ideas in language that moved people at the time – in this country and around the world – and continues to do so today.

The Hamilton of *The Words That Made Us* is somewhat incomplete. For example, while Amar speaks in the text of Madison's failure to get what he wanted

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94. Ray Raphael, *The Federalist (Papers): Then and Now*, J. AM. REVOLUTION (Apr. 24, 2014), <https://allthingsliberty.com/2013/04/the-federalist-papers-then-and-now> [<https://perma.cc/KWM3-VDUW>].

95. AMAR, *supra* note 19, at 128.

96. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in NAT'L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-5212> [<https://perma.cc/S3PR-389X>].

in the Constitutional Convention, he relegates to a footnote the failure of Hamilton's push in the Convention to have the President and senators serve for life<sup>97</sup> – not a thing that people who had just overthrown a king would much care for and not a thing that would likely endear him to most Americans today. Hamilton's pull-up-the-ladder-after-I-have-reached-the-top elitism, which caused him to disdain immigrants and the working class, led the people of that time to resoundingly reject his vision of politics in 1800 when Jefferson was elected President. His excessive militarism and his embrace of eighteenth-century-style British mercantilism, the enemy of the free-market philosophy with which he is now associated, are not fully critiqued.

And then there is the question of slavery, always a trump card in the battle of Hamilton-Washington versus Madison-Jefferson, no matter the issue at hand. The latter three men were enslavers. Washington, however, is to be given a pass because he arranged for the freedom of the people he enslaved at his death. He missed a true opportunity by waiting until he died to free them. Even after the roiling dispute over the Jay Treaty, Washington had unparalleled moral capital among Americans that has never been exceeded. It would have been a salutatory thing had he spent some of that arguing for the end of slavery while he was alive. As for Hamilton, despite his membership in New York's Manumission Society, there is no doubt that he bought and sold enslaved people for members of his family. Recent evidence indicates that he may have personally owned enslaved people himself.<sup>98</sup>

Setting aside the tendency to pit these figures against one another in the way they fought during their lifetimes, it is possible to see that they all made vital contributions to the formation of the United States. Whether one thinks that Washington and Hamilton had the better of the arguments in the 1790s, the fact is that their vision of politics was rejected by the voters in 1800 and the party they represented was, as Jefferson vowed to ensure, "s[unk] . . . into an abyss."<sup>99</sup> But, as Amar shows, when Jefferson as President (and his acolytes who took office in turn) made use of some of the principles that Washington and Hamilton had expounded, they learned from one another despite their differences: a lesson which is, indeed, extremely useful for our time.

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97. AMAR, *supra* note 19, at 202 n.\*.

98. David Kindy, *New Evidence Suggests Alexander Hamilton Was a Slave Owner*, SMITHSONIAN MAG. (Nov. 10, 2020), <https://www.smithsonianmag.com/history/new-research-alexander-hamilton-slave-owner-180976260> [<https://perma.cc/3JPU-56KM>].

99. Letter from Thomas Jefferson to Levi Lincoln (Oct. 25, 1802), in NAT'L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-38-02-0513> [<https://perma.cc/GLN5-Y9NV>].

## CONCLUSION

Amar's picture of the inadequacies of current-day history writing is interesting, given that the historiography of this period—the Revolution, the early American republic, and the subject of slavery—is, perhaps, the most impressive body of scholarship about any era of history. Its richness is hard to describe. If many Americans do not know the history of early America, it is not because historians have not tried to tell them about it, and to tell them about it with great ingenuity and prowess. There is no magic bullet. No single book, not even Amar's worthy effort, can give the *complete* picture of the American story—or can even come close to doing so. If one wishes to be informed on this subject, one has to read more than one book. One has to read, period. Often when people say that they were not taught this or that thing in school, it really was just that they did not do the reading. Historians are not solely, or even primarily, at fault for the circumstances that rightfully concern Amar.

As the substantive historical contribution of the book demonstrates, constitutional conversations can be quite generative, even in the absence of a shared, motivating usable past. By elucidating the contours of America's early constitutional conversations, the book points to a way forward for the present day, in service of Amar's ultimate goal of a citizenry informed about and engaged in civic life.

To end where we started—with historical interpretations—in what school would *The Words That Made Us* fit? As noted earlier, Amar uses the term “Whiggish” to describe his view of the American expansion into the West. In the words of historian Michael Hattem, “In the Whig interpretation, the underlying and unifying theme of American History [is] a Providential march toward liberty and democracy away from the tyranny and absolutism of the Old World.”<sup>100</sup> So, the historians of the nineteenth century who followed the Whiggish predilection believed in the notion of progress. Even if things, people, and cultures were broken in the process—and that certainly happened as white Americans moved west, for many years with enslaved Africans Americans in tow—ultimately everything would “work out” in the end.

*The Words That Made Us* places Amar in league with Ramsay and Warren *and* in the Whiggish school. The two are actually related. Ramsay and Warren, writing immediately after the Revolution, did not have time to see any march of progress that would have to explain away such things as Indian Removal, the Cotton Kingdom, the aftermath of the Civil War, and all things that challenge the notion of inevitable progress. The Whig historians had seen all of that, and

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100. Hattem, *supra* note 18.

had to argue that these struggles were still leading the country to an inevitably bright future.

Amar is caught between the two schools, understanding the price that has been paid during the struggle but eager to create work that will aid the country that is now in a particularly delicate moment—as the early historians of the Revolution perceived when they sought to create a narrative that would shore up their new and fragile country. There is so much in this book to like and so much with which to argue. Amar has certainly laid the groundwork for a robust conversation about where our country should go next. We await with eagerness the second and third volumes of this trilogy.