

REVIEW OF AKHIL REED AMAR'S BORN EQUAL: REMAKING AMERICA'S CONSTITUTION, 1840-1920

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Born Equal: Remaking America's Constitution, 1840-1920 is the second volume of Akhil Amar's grand trilogy, a constitutional history of the United States.¹ This is a bold and ambitious project. As Amar, who is the Sterling Professor of Law and Political Science at Yale University, stated in his first volume, *The Words that Made Us: America's Constitutional Conversation, 1760-1840*, we have multitudes of books on this and that constitutional issue, narrow monographs that never see beyond their particular subject or particular period.² But we have precious few treatments of our constitutional history that are wide-angled and multigenerational and that sweep over the entire exciting 250-year history of our constitutional struggles.³

Amar rightly believes that our constitutional conversation that chugs along in courtrooms, classrooms, newsrooms, family rooms and everywhere in between needs a better historical foundation than it has at present. And who could quarrel with that? He hopes that his trilogy will unite history and law in a broad and multigenerational narrative that seeks both to understand the past and to evaluate it using proper historical and legal tools of analysis.

This second volume deals with the eighty-year period between 1840 and 1920, a period of immense change including a civil war, a period in which the United States became a modern nation resembling the other nations of Europe.

The scale of Amar's trilogy—the entire constitutional history of the United States—poses all kinds of organizational and writing problems that I believe he is solving in the most imaginative and persuasive ways. He can't include everything, but he can't omit too much, or his readers might complain.⁴ He doesn't want his history to be merely a description of a series of constitutional events—this happened, and this happened, and this happened.⁵ He wants to have a narrative and yet be able to stop periodically and engage in rich and deep analyses of persons

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¹ AKHIL REED AMAR, *BORN EQUAL: REMAKING AMERICA'S CONSTITUTION, 1840-1920* (2025).

² AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840* (2021).

³ See AMAR, *BORN EQUAL*, *supra* note 1, at 612 ("This book features original legal analysis and new historical conceptualizations based on deep immersion in primary sources. The preceding pages routinely present arguments and facts not found in any other modern work.").

⁴ See *id.*

⁵ See *id.* at 613 ("Should I have narrated the detailed blow-by-blow . . . ? I thought it better to narrate.").

and events.⁶ Most important, he wants his book to be exciting and accessible to a readership that he hopes will range from high-school students to Supreme Court justices.⁷

Amar's history is certainly accessible. He writes with extraordinary clarity and makes his many characters come alive. His history is necessarily selective, and his criterion of selection is the constitutional importance of the person or the event.⁸ His technique for handling a multitude of events and characters is brilliant. Rather than simply moving from one constitutional event after another seriatim, he develops his narrative by selecting one important event or person, filling out and enriching that constitutional subject, and then using that event or person to expand outward, both backward and forward, to illuminate other events and developments connected with the original subject.⁹ With such a technique he can combine both narrative movement and deep analysis.

For example, he opens his book with a detailed description of the first World Anti-Slavery Convention held in London in 1840.¹⁰ It was open to activists around the globe, and a number of Americans attended.¹¹ In its first meeting the convention voted to categorically deny the female delegates, all eight of whom were American, the right to vote or speak, even if they had credentials to attend.¹² These attendees included Lucretia Mott and the newly married Elizabeth Cady Stanton.¹³

Amar brilliantly uses this event, which he spends a considerable amount of time on, to explore the tensions involved in men being opposed to slavery and yet at the same time unwilling to allow women the right to speak against it.¹⁴ Amar uses the London convention setting to reach back to Philadelphia in 1787 and the Americans' discussion of slavery in relation to the Constitution.¹⁵ Once that is completed, he then reaches forward and fills in what happened in America regarding slavery and antislavery up to the 1840s.¹⁶

In a like way, Amar uses the presence of Elizabeth Stanton and Lucretia Mott at the London Convention as a basis for understanding the meeting for women's rights at Seneca Falls in 1848, a meeting which Frederick Douglass attended.¹⁷ Amar sets the Seneca Falls Declaration of Sentiments on behalf of women alongside the Declaration of Independence and reveals the clever

⁶ See *id.*

⁷ *Id.* at 611 ("The book aims at Supreme Court justices and high school students and everyone in between.").

⁸ See *id.* at 614 ("Why are some decades [and persons] given much more attention than others? Because they were much more important *constitutionally*.").

⁹ See *id.* ("To tell his complete story—both history and historiography—I must occasionally zigzag, either by going back in time or by foreshadowing later events and storytelling.").

¹⁰ *Id.* at 19–20.

¹¹ *Id.*

¹² *Id.*

¹³ See *id.* at 21, 27.

¹⁴ *Id.* at 22, 37.

¹⁵ *Id.* at 39 ("While Britons were playing host to an ambitious new convention in London, Americans were paying heed to an ambitious old convention in Philadelphia. Early in 1840, fresh tales and details emerged about what had happened and what had not happened in the drafting of the US Constitution behind closed doors in the City of Brotherly Love back in the summer of 1787.").

¹⁶ See *id.* at 61–75.

¹⁷ See *id.* at 77, 81–82.

way in which Stanton exploited the great Declaration of 1776.¹⁸ According to Amar, no other historian has ever made this side-by-side comparison of the two documents in just this manner.¹⁹

This then is his technique. In other words, Amar's book is no simple narrative with one thing happening after another. It is the most extraordinary kind of history that I have read, using key events, key dates, and maps, especially maps, to illuminate the history of the nation.²⁰ No other historian, as far as I know, has ever used colored maps so successfully to illustrate and illuminate developments in the nation's history.

He drew a distinction between ordinary historians like me and legal historians who have formal legal training, as he does.²¹ He understands correctly that ordinary historians simply seek to understand the past in its own terms. We run-of-the-mill historians don't usually get involved in making normative judgments about the participants in the past, although at present that seems to be changing as a new generation of historians wants to condemn the past for not sharing our present values and sensibilities. But for older historians like me, it would be a strange history of seventeenth-century Massachusetts, for example, if we spent a great amount of time indicting John Winthrop and his fellow Puritans for their bigotry and their narrow-minded prejudices on religious matters. Most of us ordinary historians do not purposefully write our history in order to teach lessons for us in the present. We don't, for example, write about the Puritans so that we can better appreciate our separation of church and state.

Yet because Amar has been legally trained, he needs to find what was legally right and what was legally wrong in the past.²² He says lawyers, judges, and lawmakers necessarily approach the past differently from ordinary historians.²³ They need to make judgments about constitutional issues in the past because past legal behavior has important constitutional implications for us in the present.²⁴

Unlike many ordinary historians, he also uses counterfactual history to illuminate what might have happened, a dangerous but sometimes helpful technique that ordinary historians rarely use.²⁵ Had there been no Mexican-American War and California had never joined the Union, he

¹⁸ *Id.* at 81 ("The first document came to be labeled a 'Declaration of Sentiments.' Cleverly modeled on the Declaration of Independence, it proudly proclaimed the 'self-evident' truth 'that all men *and women* are created equal.'" (emphasis in original)); *id.* at 84–89 (side-by-side textual comparison).

¹⁹ *See id.* at 621 ("By placing the 1776 Declaration and the 1848 Declaration side by side and highlighting the key word changes, Chapter 3 does what Elizabeth's text obviously invites. Oddly, none of the major works on Seneca Falls does this.").

²⁰ *Id.* at 13 ("[The Gettysburg] address tied [Lincoln's] themes to the specific spot on which he then stood In this Lincolnian spirit, this book uses its words, pictures, and maps to remind readers not just what happened, but where things happened, and why the *where* often mattered." (emphasis in original)); *see id.* at 618.

²¹ *Id.* at 621 ("Lacking formal legal training, most historians have not tried to refute [the Court's] rulings, as I try to do here.").

²² *See id.* at 12 ("Much of this book tells the detailed story of the[] four glorious equality amendments—how they happened and what they *meant*." (emphasis added)); *see, e.g., id.* at 624 ("[Chapter 16] repeatedly contrasts the Court's rulings with what (I claim) the Constitution itself *really* says, properly read.").

²³ *Id.* at 621 ("Lacking formal legal training, most historians have not tried to refute [the Court's] rulings, as I try to do here.").

²⁴ *See, e.g., id.* at 623 ("Although I wrote [Chapter 15] long before President Trump issued his January 2025 executive order aiming to decitizenize wide swaths of persons born in America to noncitizen parents, my central claims in this section—and in this book more generally—have deep and decisive implications for President Trump's doomed pronouncement.").

²⁵ *See, e.g., id.* at 61–62 ("Had mighty Virginia in the 1790s or early 1800s in fact followed the gradual-emancipation lead of Pennsylvania and New York, then Virginia's neighbors Delaware and Maryland and its spinoff state Kentucky would likely

asks, would the southern states have seceded?²⁶ Amar concludes that they would still have left the Union.²⁷

He then makes judgments that most ordinary historians would likely not make. The southern political leaders, he says, were so stupid that they would have found some pretext or another to justify their secession.²⁸ He goes on to tell us what the South should have done if it were not so burdened by its stupid leaders.²⁹ The South, he suggests, should have paid more attention to the northern arguments against slavery instead of gagging them.³⁰ But like George III and his ministers in the 1760s and early 70s, they refused to listen to any sensible constitutional arguments.³¹ “Slavery, he writes, “had made the slavocracy stupid.”³² Didn’t South Carolina know that it had no legal or constitutional right to leave the Union?³³

This kind of writing usually makes ordinary historians uneasy. That is not what a standard, run-of-the-mill historian would say. But legal historians write a different kind of history, and judgments about the behavior of the participants in the past come easy to them. I don’t think the southern leaders were stupid, but I do believe they saw the Western world pressing in on them, and beneath their bravado, they were bewildered and desperate, believing rightly that their entire way of life was threatened by the antislavery movement. That is why they left the Union so suddenly when Lincoln was elected.

Of course, with Amar’s technique of highlighting and exploring particular events, he has to leave out some nineteenth century history, and thus readers will sometimes have to have some prior contextual knowledge to fully understand the constitutional discussions. Although we have no account of the Mexican war itself, we do learn why it occurred and what the great territorial consequences were.³⁴ But I don’t believe that anything of importance is omitted from the narrative, and certainly no constitutional issue is missed. Because the Texan Revolution has constitutional significance, we get a fairly full account of it, including Texas’s constitutional integration into the nation.³⁵

have followed suit. In this alternative universe, perhaps thirteen of America’s seventeen states would have been free or trending free when Napoleon offered to double the landmass of the United States in 1803.”).

²⁶ *Id.* at 232.

²⁷ *Id.* at 233 (“[H]ad no such war taken place between 1846 and 1848—the mind-bending counterfactual—the South (we can conjecture soberly, but cannot prove conclusively) would probably have picked some *other* set of issues, some other pretexts circa 1860, as South Carolina had in fact done in the Nullification Crisis of 1832, long before the Mexican-American War, and as South Carolina had in fact been threatening to do, quite literally, since July 1776.”).

²⁸ *Id.* (“[D]ecades of slavery and a political system that gave slaveholders extra clout had made the South’s leading men, bluntly, both arrogant and stupid, unwilling or unable to properly converse with the North or with the rest of the civilized world, which was moving against slavery, fast.”).

²⁹ *Id.* at 234 (“A truly farsighted south would have made adjustments and drafted plans to eliminate slavery gradually and with minimal disruption to its most vital interests.”).

³⁰ *Id.*

³¹ *Id.* at 254 (“Much as George III had ill-served his won long-term best interests back in the 1770s when he refused even to hear the petitions streaming out of Boston, and instead answers words with gags and guns, so, too, with the slavocrats of the 1830s through the 1850s.”).

³² *Id.*

³³ *See id.* at 382–384.

³⁴ *See id.* at 225–229.

³⁵ *See id.* at 211–221, 223–225.

Amar is interested in some issues that are not technically constitutional. He includes, for example, a fascinating exploration of the historical importance of a good death and the significance of death paintings, which were stimulated by Benjamin West's famous 1770 painting of the death of General Wolfe.³⁶ This subject allows him to have many marvelous illustrations in the book, lots of great deaths.

Amar is very interested in the Adams family, and he devotes a considerable amount of space to the Adamses.³⁷ In that discussion he reveals his often-conversational style of writing that allows him to make several personal and often sarcastic insertions, which he labels one of his several "eccentricities." He describes John Adams's severe lecture to his son John Quincy, at the time a young man in his twenties, "if you do not rise to the head not only of your Profession but of your Country it will be owing to your own Laziness, Slovenliness and Obstinacy."³⁸ Here Amar injects a parenthetical comment in italics "(Thanks for the pep talk, Dad.)"³⁹ This kind of snarky insertion is perhaps not to everyone's taste, but they are very revealing of Amar's sweet and pixyish personality.⁴⁰

Amar spends a lot of time with John Quincy Adams, especially focusing on his later career as a congressman tormenting the South over its attempts to gag the spread of antislavery literature in the southern states, and on his dramatic collapse in the Congress in 1848, followed by his death several days later.⁴¹

1848, what a year! And Amar makes the most of it: republican revolutions throughout Europe, the Seneca Falls declaration of women's rights, the end of the Mexican war, and the discovery of gold in California.⁴² 1848 was also the year in which Abraham Lincoln was serving his single term as a congressman alongside John Quincy Adams.⁴³

Amar pays a lot of attention to Harriet Beecher Stowe's great novel, *Uncle Tom's Cabin*, arguing persuasively that Stowe was among the most important women in American constitutional history.⁴⁴ She was, as he says, certainly the first American woman to hold center stage in national political discourse.⁴⁵

Amar finds connections in our past that other historians have missed, and his statements are often electrifying. "No nation in modern history," he writes, "had grown this much, this fast, in either population or landmass."⁴⁶ Those kinds of bold statements wake up the reader.

The prevalence of his use of originalism will probably be quite controversial. Americans in the antebellum period, he says, possessed "a profoundly originalist culture, almost idolatrous in

³⁶ See, e.g., *id.* at 477 (good death); 105 (death paintings).

³⁷ See, e.g., *id.* at 101–192.

³⁸ *Id.* at 104.

³⁹ *Id.*

⁴⁰ See *id.* at 619 ("I couldn't resist.").

⁴¹ See *id.* at 58, 112–118, 135–158.

⁴² See *id.* at 197, 77–99, 199–230.

⁴³ See *id.* at 119–120, 156.

⁴⁴ See, e.g., *id.* at 258–269; *id.* at 621 ("Harriet surely stands among the most important women in American constitutional history."); HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (London ed. 1852).

⁴⁵ AMAR, *BORN EQUAL*, *supra* note 1, at 621–622.

⁴⁶ *Id.* at 271.

its founding worship.”⁴⁷ Amar mounts a massive amount of evidence to show how much Americans worshipped their founding and its founders. The Constitution was everything to everyone. Even the dozens of presidential vetoes during this period rested on constitutional objections.⁴⁸

He doesn’t mention Wesley Frank Craven’s book of 1956, *The Legend of the Founding Fathers*.⁴⁹ Craven, who was a professor of history at Princeton, claimed that for many Americans the founders before the 1840s were the seventeenth-century founders, John Smith, John Winthrop, William Penn, and so on.⁵⁰ Martin Van Buren in the New York constitutional convention of 1820 told his colleagues that the men who drafted the Constitution of 1787 had nothing to tell us. They were aristocrats, said Van Buren, and we are democrats. The antislavery movement changed everything, including changing the meaning of the founders for Americans. It was left to Abraham Lincoln to clinch the modern meaning of the founders once and for all.⁵¹

Amar tells us which political leaders interpreted the Constitution correctly and which got it wrong.⁵² When he does this, Amar speaks as a lawyer or jurist, not as a run-of-the-mill historian. Ordinary historians would probably not make those kinds of confident normative judgments about the nature of the Constitution; instead, they would simply describe the different views of the Constitution by people at the time.

Lincoln is Amar’s hero. According to Amar, no one worshiped the founders more, no one was more of an originalist, and no one interpreted the Constitution more correctly than Lincoln.⁵³ Lincoln, he says, incorporated in himself the best of each of the leading founders.⁵⁴ I agree with Amar that Lincoln was a superb politician, the best of his time, surely, and maybe the best of the entire century. According to Amar, Lincoln was the “preeminent originalist,” and he was constitutionally correct on every issue, even on those issues that some scholars have questioned.⁵⁵ Amar seems to apply the term originalist to anyone who looked solely to the Constitution (including the Declaration of Independence) for an understanding of constitutional issues.

⁴⁷ *Id.* at 271.

⁴⁸ *Id.* at 276.

⁴⁹ WESLEY FRANK CRAVEN, *THE LEGEND OF THE FOUNDING FATHERS* (1965).

⁵⁰ *See id.* at 6–7, 15, 47–49.

⁵¹ *See* AMAR, *BORN EQUAL*, *supra* note 1, at 279–280.

⁵² *See, e.g., id.* at 282 (“Webster said (quite wrongly) that acquiring New Orleans and the entire western Mississippi River watershed had been unconstitutional; in 1850 he said (quite rightly) that this port and these river lands were essential to the Union.”); *id.* at 277 (“Calhoun[’s] . . . constitutional claims were routinely and often howlingly wrong.”); *id.* at 409 (“Buchanan . . . quite correctly denied that the Constitution permitted secession.”).

⁵³ *See, e.g., id.* at 277 (“Lincoln excelled at exploring and expounding the letter and spirit of the Declaration and the Constitution. Lincoln sang the song of these founding tests as Douglas did not and could not.”).

⁵⁴ *Id.* at 279 (“[L]et us imagine, in the spirit of Mary Shelley’s 1818 *Frankenstein* novel, that a brilliant and benign early nineteenth-century American scientist named Dr. Founderson dreamed of extracting the best qualities of each of America’s top founders so that he might then splice these qualities together into one person—a perfect founding son . . . Founderson would have tried to create Abraham Lincoln.”).

⁵⁵ *Id.* at 369; *see, e.g., id.* at 277 (“Lincoln and others correctly and convincingly showed their fellow citizens that Taney and his judicial allies had betrayed the true meaning of the nation’s central founding texts: the Declaration and the Constitution.”); *id.* at 294 (“Lincoln correctly insisted that Congress had ‘the power, under the constitution, to abolish slavery in the District of Columbia.”); *id.* at 342 (“Because Lincoln was in fact correct in his claims about the Constitution’s text, history, and structure, he stood on rock-solid ground—originalist ground, founding ground. Douglas, by contrast, had only his own hot air beneath his feet, and no basis upon which to challenge the Court, having so tightly wedded himself to it in order to tickle the crowd.”).

Amar's use of originalism and his argument that Lincoln was the supreme originalist are bound to be disputed, but I like his juristic boldness.

Amar doesn't like Stephen Douglas. During his brilliant analysis of the Lincoln-Douglas debates, one of the best I have ever read, Amar points out the shiftiness of Douglas's argument, and then asks, "If you were in the audience, would you buy a used carriage from this man?"⁵⁶

Amar's command of constitutional issues is not surprising, since no scholar knows more about the Constitution. He certainly explains better than most accounts I have read how each of the three constitutional amendments enacted at the end of the Civil War were connected. Each of them, he points out, required the next in a three-part harmony.⁵⁷ He parses the five sections of the fourteenth amendment more clearly than I had ever seen before.⁵⁸ He also lucidly demonstrates how the fourteenth amendment applies most of the Bill of Rights to the states, which became the doctrine of incorporation.⁵⁹ He also shows how the language of the amendments built upon all the earlier reform movements.⁶⁰ Somehow everything was brought together by the Civil War.

Stating that the period between 1870 and 1915 was far less illuminating than the previous thirty years for those who today seek a proper understanding of the Constitution, Amar decided merely to briefly summarize the principal Supreme Court decisions of those years.⁶¹ He ends his book with the Progressive amendments and especially the nineteenth amendment granting women the right to vote, a fitting conclusion to a story that began with the frustrations of Stanton and Mott.⁶²

1840 to 1920 was an amazing period of constitutional history, and Amar has captured all the dynamism of those eighty years in this wonderfully readable volume. It is a fitting successor to his first volume *The Words That Made Us*.⁶³ In this second volume of this great trilogy, he has paid tribute to the power of equality in our political and constitutional lives as no other historian ever has. Amar understands what Herman Melville in his novel *Moby Dick* meant when he called equality "[t]he great God absolute! The centre and circumference of all democracy!"⁶⁴ The "Spirit of Equality," wrote Melville, did not merely cull the "selectest champions from the kingly commons," but it spread "one royal mantle of humanity" over all Americans and brought "democratic dignity" to even "the arm that wields a pick or drives a spike."⁶⁵ Lincoln, who used the idea of equality as no president ever had, would surely have understood why Amar titled his book *Born Equal*.

⁵⁶ *Id.* at 343.

⁵⁷ *Id.* at 502.

⁵⁸ *See id.* at 516–538.

⁵⁹ *See id.* at 516–531.

⁶⁰ *See, e.g., id.* at 531 ("[The Fourteenth Amendment's language] built on Elizabeth's Seneca Falls Declaration, in which she and many other convention participants, led by Lucretia Mott and Frederick Douglass, had demanded for women 'all the rights and privileges which belong to them as citizens of these United States.' Elizabeth and her allies thus cheered Section One's pointedly inclusive civil rights, citizenship, birth-equality language.").

⁶¹ *Id.* at 552–553; *see id.* at 557–569.

⁶² *See id.* at 603–607.

⁶³ AMAR, *THE WORDS THAT MADE US*, *supra* note 2.

⁶⁴ HERMAN MELVILLE, *MOBY-DICK; OR, THE WHALE* 128 (London ed. 1851).

⁶⁵ *Id.*