

VOLUME XXII, NUMBER 4, FALL 2022

CLAREMONT

REVIEW OF BOOKS

A Journal of Political Thought and Statesmanship



William Voegeli:
Is Inequality Our Fault?

Colin Dueck:
Tom Cotton's Only the Strong

Douglas A. Jeffrey:
Merle Haggard

Jeffrey H. Anderson:
"Our Democracy"

Myron Magnet
Bradley C.S. Watson:
Clarence Thomas

Barry Strauss:
Julius Caesar

Charles Murray:
Is Diversity Our Strength?

Peter Berkowitz:
Walter Russell Mead on Israel

Christopher Caldwell:
The Death of Rock'n'Roll



A Publication of the Claremont Institute

PRICE: \$6.95

IN CANADA: \$9.50

Book Review by Sidney M. Milkis

TALKING ABOUT THE CONSTITUTION

The Words That Made Us: America's Constitutional Conversation, 1760–1840,
by Akhil Reed Amar. Basic Books, 832 pages, \$40



Cartoon from an editorial by Benjamin Franklin in the *Pennsylvania Gazette*, 1754, urging colonial unity during the French and Indian War.

A KHIL REED AMAR'S *THE WORDS THAT Made Us* arrives at a crucial time, when American politics are plagued by bellicose polarization, when Left and Right have come to view each other as a threat to the American way of life. A celebrated scholar, the Sterling Professor of Law and Political Science at Yale University is eager to provide a "usable past," as he puts it. His highly ambitious telling of the early republic's fierce conflicts over the meaning of the American Revolution and the Constitution is intended not just for fellow academics but also for a public distressingly ignorant of its heritage. "Without a strong memory of one's own past," he asks, "how can Americans live together?"

Amar has always been a strong advocate of employing originalist language for liberal ends, and here he once again pays close attention to the words of the Constitution. But his nearly 900-page tome comes alive when he pits the leading founders against each other, arbitrating their disputes with original, decisive judgments: George Washington, not James Madison, is the "Father of the Constitution"; Alexander Hamilton, not Thomas Jefferson, is the principal theorist and practitioner of the country's new republicanism; and, in a provocative take on the polarizing 1800 election, John Marshall, not Jefferson or John Adams, was the worthiest dignitary to lead the nation.

The Words That Made Us is dedicated to Lin-Manuel Miranda, the creator of the astonishingly successful musical *Hamilton*; Vanessa Nadal, Miranda's wife; Ron Chernow, on whose biography Miranda based his mega-hit; and Khizr Kahn, the gold-star father and Pakistani immigrant who held aloft a pocket-sized copy of the Constitution at the 2016 Democratic National Convention. Indeed, the book is especially laudatory of Hamilton, whom Amar credits with imagining a Constitution for the ages—a grand experiment in extending self-government to a large, diverse society. As a champion of nationalizing institutions—the presidency and judiciary—Hamilton is the principal theorist of a "muscular" and energetic Americanism; and as "America's greatest immigrant," he celebrated a "continentalism" that would be an asylum for opportunity and a bulwark against foreign threats to it.

BUT IT IS WASHINGTON WHOM AMAR celebrates as America's First Citizen, who embodied and brought into being the world's first republican executive. "I am a Hamilton man," Amar writes, "because Hamilton, on most issues, was a Washington man, and Washington, on most issues, was the Constitution man." Serving in the first administration as Treasury secretary, Hamilton "cleverly crafted and constitutionally defended

a set of interlocking institutions and structures of national power to secure the new constitutional system from external attack and internal implosion."

In contrast with Hamilton's repeated "holistic and purposeful constitutional interpretation," Amar characterizes Jefferson and Madison as political opportunists "prone to spout constitutional gibberish," a slight which downplays just how significant and enduring the struggle between these constitutional contenders was in the development of American democracy.

As Hamilton's ally during the ratification fight, Madison played a leading role in crafting the new government's system of federalism and separation of powers as a guard against the kind of "pure democracy" that would encourage a raw, disruptive factionalism, ultimately leading to majority despotism. He saw the president, with institutional power and the political will to enforce the law, as an important part of this scheme. But Hamilton's centralizing ambitions later focused Madison's concerns on the mischief of *minority* factions. A detached, listless citizenry, he came to see, was vulnerable to the machinations of an oligarchic minority that had captured the presidency. To suggest, as Hamilton did during the 1790s, that the president had prerogative power in foreign affairs and national emergencies was to imply that the executive has a free-standing legislative power.



“In theory, this is an absurdity—in practice a tyranny,” Madison insisted. Although he may have underestimated the need for a powerful executive in a large republic, his concern about Hamilton’s sweeping defense of executive prerogative should hardly be dismissed as gibberish.

FORMING THE DEMOCRATIC-REPUBLICAN Party to mobilize opposition to Hamilton’s program, Jefferson and Madison forged a top-down, bottom-up movement that resulted in a resounding rejection in the 1800 election of Hamilton and his Federalist allies’ constitutional vision. And yet, as Amar shows, though Jefferson and Madison sought to recast the executive office as a more democratic institution, neither abandoned the idea that the president was essential, as Madison had written in *The Federalist*, “to refine and enlarge the public views.” Only the president, Jefferson insisted in his First Inaugural Address, could “command a view of the whole ground.” Indeed, the Jeffersonians even made peace with the national bank championed by Hamilton, especially after the War of 1812 revealed how such an institution might be a necessary evil to maintain a sound currency. The “conversation,” then, between Jeffersonian and Hamiltonian ideas could be

fruitful—a lesson for the partisan contenders of our own time. Indeed, despite the personal dislike and political rivalry that polarized the country during the late 1790s and roiled the 1800 election, Jefferson and Hamilton both made a vital contribution to perhaps the most important outcome of that bitter campaign: the first peaceful transition of power in the United States, and perhaps the world. Amar briefly recounts the well-known mix of machinations and statesmanship that characterized the dangerous course of events that almost destroyed the constitutional republic in its very first decade: how the Electoral College resulted in a tie between Jefferson and his vice-presidential running mate, Aaron Burr, so that, according to the Constitution, it then fell to the lame-duck Federalist majority in the House of Representatives to decide which Democratic-Republican—Jefferson or Burr—would become president. Federalist leaders in Congress saw an advantage to making Burr president. In their view, he was less principled, and, therefore, a more pliable politician than the “fanatic,” Jefferson. On cue, the unprincipled Burr refused to take the honorable steps required to correct the results of the Electoral College, even though everyone understood that Jefferson was the head of the ticket. A perilous dead-

lock ensued through 35 ballots, with serious talk of violence both within and outside the capital. The Jeffersonian governors of Pennsylvania and Virginia were already mobilizing their state militias in case the Federalists should deny their man the presidency, a threat of force Amar condemns as “unhinged.” Jefferson himself privately approved it, noting that such preparation was justified because “no usurpation, even for a single day, should be submitted to.” **I**NTO THE BREACH STEPPED HAMILTON, who warned his party that it would be imprudent and immoral to choose Burr, the very sort of demagogue he had warned against in *The Federalist*. For all his faults, Jefferson was the safer bet. He was neither an enemy of executive authority nor a slave to his principles. He was also incapable of being corrupted, unlike Burr, whom Hamilton called “the most unfit man in the United States for the office of the President.” Upon taking the oath of office, Jefferson sounded a conciliatory tone in his inaugural address, insisting that the Federalists and Democratic-Republicans, though engaged in a heated “contest of opinion,” shared a commitment to “the rules of the Constitution,” which required the settling of differences through the regular course of elec-

Become a multi-year subscriber and save!

For more than 20 years, our editors have been proud to bring you the most intelligent and engaging periodical in America. As our publication has grown significantly in terms of content and production cost, beginning in 2023, annual subscriptions will increase to \$29.95—our first price increase in more than a decade, and still a bargain (if we say so ourselves)!

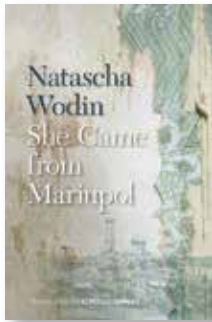
Sign-up today for a multi-year subscription to lock in the current rate of \$19.95 for up to three years!

1 YEAR 4 issues	2 YEARS 8 issues	3 YEARS 12 issues
\$19.95	\$37.95	\$55.95

CLAREMONT REVIEW OF BOOKS

Find a new favorite read

Natascha Wodin



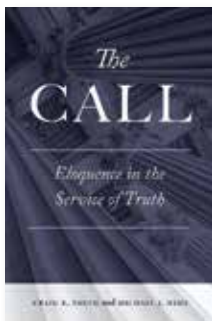
SHE CAME FROM MARIUPOL

"The unexpected and surprising revelations are structured like a crime thriller: the tension increases with every detail, and chance generates a spectacular, wide-screen story."

—From *Die Zeit* (Hamburg, Germany)

978-1-61186-423-6 ■ 272 pgs. ■ paper ■ \$27.95

Craig R. Smith and
Michael J. Hyde



THE CALL

"A fervent and timely defense of Ralph Waldo Emerson's dictum that 'eloquence is the power to translate truth into language perfectly intelligible to the person to whom you speak.'"

—Stephen E. Lucas, University of Wisconsin

978-1-61186-409-0 ■ 314 pgs. ■ paper ■ \$44.95

Kevin Musgrave



PERSONS OF THE MARKET

"This engaging work provides an alternative route through rhetoric, power, and personhood, and is a must-read for all those interested in crafting new political economic futures."

—Catherine Chaput, University of Nevada, Reno

978-1-61186-433-5 ■ 292 pgs. ■ paper ■ \$44.95

MICHIGAN STATE
UNIVERSITY PRESS
msupress.org



tions. On that matter, Jefferson proclaimed, "We are all Republicans; we are all Federalists."

Perhaps if he had completed *The Words That Made Us* in the winter rather than the summer of 2020, Amar might have dwelled on this story of how Hamilton's statesmanship and Jefferson's forbearance ensured that America's constitutional conversation would continue, sustained in no small measure by the peaceful transition of power—setting a precedent that endured, with the dramatic exception of the South's unwillingness to accept the 1860 election. Instead, Amar focuses his attention on the maneuvers of John Marshall, the "last Founder" who "stayed in public life longer than anyone else in his generation," serving as Chief Justice of the Supreme Court for 34 years. Amar reminds us that, before he was appointed to the Court in the last days of John Adams's administration, Marshall had the ambition to exploit the 1801 impasse in order to become president himself. When the deadlock looked like it might remain unbroken beyond March 3, when prior to the 20th Amendment a new president would be inaugurated, Marshall is thought to have authored a pair of newspaper essays under the name Horatius, urging the Congress to change the line of succession (should the presidency and the vice presidency become vacant) from the president pro tempore of the Senate as first in line to fill the executive office, inasmuch as it would be unconstitutional for him to hold a Senate seat and the presidency simultaneously. Without explicitly stating which officer should fill the slot, readers of Horatius's essays recognized that the argument implied the secretary of state, which, except for the treasury secretary, was considered the highest-ranking cabinet member. And who, as Amar enthuses, "just happened to be the Federalists' most popular and able politician, John Marshall!" Horatius's intervention was "a political and legal stroke of genius—evil genius from a Jeffersonian perspective." "If our own minds run to whimsy," Amar concludes his tale, "we might imagine an alternative universe in which Marshall, in his capacity as chief justice, administered the oath to himself." But how, one must wonder, does this intrigue provide a "usable past" in a time when mischievous legal maneuverings already jeopardize free and fair elections?

IT MAY BE UNFAIR TO DWELL ON A RELATIVELY small part of this prodigious book. Amar's fanciful interludes are part of his charm. He devotes many more pages to Marshall's brilliant statecraft, which navigated the thorny constitutional path of a regime remade by the rise of a mass party system. His beguil-

ing defense of judicial review in *Marbury v. Madison* (1803), in which the Chief Justice sided with President Jefferson on the facts of the case (William Marbury did not get his appointment), but only on the condition that the president concede the Court's power to judge the constitutional validity of acts of Congress. Similarly, his sweeping defense of the necessary and proper clause, echoing Hamilton's defense of the national bank, was balanced by *Barron v. Baltimore* (1833), which ruled that the Bill of Rights only applied to the national government, thereby defending a decentralized feature of the Constitution that tilted toward a Jeffersonian reading. Amar thus shows that Marshall reasoned and acted institutionally: he understood that establishing the authority of the judiciary amid the rising storm of party conflicts required avoiding a direct confrontation with a popular president. Similarly, he recognized that, given the polarizing struggle of the ratification contest—renewed by the partisan struggles of the 1790s—establishing the Court as a legitimate interpreter of the complex system of checks and balances required some accommodation of federalism even as the Marshall Court nurtured the national features of the Constitution.

What I find puzzling about Amar's brilliant romp through the origins and development of the Constitution is that he doesn't give a clear account of how the rise of partisanship affected the document's interpretation. *The Words That Made Us* passes over several passionate partisan conflicts that have roiled—and rejuvenated—the Constitution.

NO ISSUE THREATENED TO PRODUCE schism more than slavery. The Philadelphia Constitution "had a fatal flaw, an Achilles heel," Amar laments: "slavery was not merely tolerated but privileged." During the Revolution and early republic, he rightfully points out, geopolitical considerations loomed large. Amar strongly denounces, however, the 1619 Project's claim that the Revolution was fought to protect slavery, arguing instead that the Constitution's compromises with slavery were a Faustian bargain the framers had to make in order to keep the Southern states in the Union. One of his favorites among the many telling images in the book is Benjamin Franklin's 1754 cartoon "Join or Die"—a sinuous snake divided into eight sections (then the number of North American colonies)—warning quite early in the game that the colonies could only survive if they held together.

Amar sees Andrew Jackson's presidency, the final act in his story of constitutional conversation in the early republic, as a "criti-

cal turning point.” Neither the Federalists nor the Democratic-Republicans had taken a strong position against slavery—Amar’s portrayal of Washington and Hamilton as better on the issue than Jefferson and Madison ignores the fact that neither team made a strong public statement nor proposed a course of action that would condemn slavery to ultimate extinction. Nevertheless, although all the leading founders, as Amar points out, “were deeply embarrassed by slavery; Jackson was not.” The first “outsider” president representing the western frontier, Jackson not only didn’t limit the expansion of slavery, he took aggressive action to protect slavery where it existed, including efforts to squelch the abolitionist movement, which began to agitate American politics during the late 1820s. Jackson deserves some credit, Amar acknowledges, for showing that the Constitution could continue without someone of the founding generation at the helm. What’s more, his strong stance against John C. Calhoun in the nullification crisis, prompted by the 1828 “tariff of abominations,” taught fellow Democrats the difference between states’ rights (which Jackson favored) and secession (which Jackson abhorred), setting a precedent Republican Abraham Lincoln would invoke in his defense of the Union.

Jackson’s own defense of the Union was severely marred by his campaign to censor abolitionist material from reaching the South. In 1835, he proposed a new federal statute that would, he said, “prohibit, under severe penalty, the circulation in the southern states, through the mail, of incendiary publications intended to instigate the slaves to insurrection.” Amar portrays the ensuing Senate debate over the bill as “a fascinating constitutional conversation about constitutional conversation itself”—the most important debate over the

right of free speech since the 1798 Sedition Act. Fearing that a national government that could proscribe abolitionism could “clothe Congress with power to abolish slavery,” Calhoun proposed an alternative to Jackson’s plan: Congress would model federal standards on state laws, so that whenever a state made it criminal to circulate a certain publication “touching the subject of slavery,” the federal mails should be closed to that publication. Daniel Webster, a member of the Whig Party opposed to Jackson, attacked both bills, not for their support of slavery but for denigrating the freedom of the press, the critical lifeline of America’s democratic debate and deliberation. “At the end of this fascinating debate,” Amar concludes, “the bills of Jackson and Calhoun had failed. For the moment, freedom of expression had prevailed—at least in Washington City.”


Amar fails to mention that the campaign to repress the voices of freedom continued in the House of Representatives, where a nine-year struggle ensued over whether to receive and debate the petitions pouring into the Congress to end slavery and the slave trade in the nation’s capital. Former president John Quincy Adams, now serving as a member of the House, stood against the Jacksonian forces of censure. Although Amar portrays the heir to the Adams dynasty as a “loser” in the contentious constitutional conversation of the 1820s and ’30s, Adams in fact distinguished himself in the House as the leading champion of the abolitionists’ liberty to exercise their First Amendment right “to petition the Government for a redress of grievances.”

ISUSPECT AMAR MISSES THIS IMPORTANT episode because his legal focus deflects attention from how constitutional conversations were both disrupted and enlarged

by partisan agitation and social activism. The “great battle,” as William Lee Miller calls the House debate in his book *Arguing About Slavery* (1996), gave impetus to the third-party insurgency of the Free-Soil Party in 1848 and the rise of the Republican Party in the 1850s, which a strong abolitionist wing infused with moral purpose.

In the final pages of *The Words That Made Us* Amar promises a sequel, *The Words that Made Us Equal: America’s Constitutional Conversation, 1840–1920*, in which he will pay more attention to the voices of outsiders, covering years when “notable crusading women and most influential African Americans...had a proper chance to stride onto center stage.” He also hopes to add a third volume, *The Words That Made Us Modern: America’s Constitutional Conversation, 1920–2000*, which will chronicle the polarizing battles aroused by the Cold War and the civil rights movement. In writing this trilogy Amar might discover that America’s most important constitutional episodes—the struggles over who “We, the People” are—are inadequately depicted as conversations. Perhaps he will revise his understanding in order to help Americans, engaged in another epic constitutional struggle, understand how they might resolve the current polarizing battles over our national identity—dubbed the “Cold Civil War”—in a way that will refresh and enliven, rather than destroy, the Constitution he so admires.

Sidney A. Milkis is the White Burkett Miller Professor in the Department of Politics and a senior fellow at the Miller Center of Public Affairs at the University of Virginia, and, most recently, the co-author (with Nicholas Jacobs) of What Happened to the Vital Center?: Presidentialism, Populist Revolt, and the Fracturing of America (Oxford University Press).



The CLAREMONT REVIEW OF BOOKS is a publication of the CLAREMONT INSTITUTE
FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY.

Subscribe to
the Claremont Review of Books

*“In my judgment, the *Claremont Review of Books* is one of the best edited and best written magazines of any kind in America, and an invaluable center of conservative thought on a rich and varied range of subjects to the discussion of which it unfailingly brings to bear the highest order of critical intelligence.”*

—Norman Podhoretz

Subscribe to the *CRB* today and save 25%
off the newstand price. A one-year
subscription is only \$19.95.

To begin receiving America's premier
conservative book review, visit
claremontreviewofbooks.com
or call (909) 981 2200.

CLAREMONT
REVIEW OF BOOKS

1317 W. FOOTHILL
BLVD, SUITE 120,
UPLAND, CA
91786

NON PROFIT ORG.
U.S. POSTAGE PAID
PERMIT NO. 504
UPLAND, CA