BOOK REVIEW

"ALAS"

BORN EQUAL: REMAKING AMERICA'S CONSTITUTION, 1840–1920. By Akhil Reed Amar. New York, N.Y.: Basic Books. 2025. Pp. viii, 726. $40.00.

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Maps have potency. . . . For better or for worse.

— Alan Moore & Eddie Campbell[1]

INTRODUCTION

Whether written or unwritten, young or old, constitutions can't compel the construction of institutions or the enforcement of norms any more than maps can create fences, checkpoints, or border patrols. And yet constitutions are powerful; they produce effects.[2] Constitutional power may take the form of physical force;[3] directions that are regarded as legitimate;[4] or concerted action by members of a political community.[5]

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[1] FROM HELL ch. 4, at 19 (Knockabout Comics 2001) (1999) (emphasis added).

[2] *See* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 259–60 (2010). In defining power as the production of effects, I follow Loughlin in following Benedict de Spinoza. For further discussion on the distinction, see SANDRA LEONIE FIELD, POTENTIA: HOBBES AND SPINOZA ON POWER AND POPULAR POLITICS 17–18 (2020). Field distinguishes between Spinoza's concepts of *potentia operandi* — the "power of producing effects of whatever sort, for better or for worse," *id.* at 18 — and *potentia agendi*, which is the power to produce effects through one's "own nature" alone, *id.* at 17. The latter is normatively desirable, while the former is normatively neutral.

[3] *See* Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1606 (1986) ("Great issues of constitutional interpretation . . . clearly carry the seeds of violence (pain and death) at least from the moment that the understanding of the political texts become embedded in the institutional capacity to take collective action."); *id.* at 1607 n.17 (noting that "[o]ur constitutional law, quite naturally enough, provides for the calibrated use of ascending degrees of overt violence"); *see also, e.g.*, MARK HAUGAARD, THE FOUR DIMENSIONS OF POWER: UNDERSTANDING DOMINATION, EMPOWERMENT AND DEMOCRACY 41 (2020) (describing the structural dimensions of the Iraqi and Spanish central governments' using force to prevent recognition of regional independence movements).

[4] *See* HAUGAARD, *supra* note 3, at 41–42; JOSEPH RAZ, THE AUTHORITY OF LAW 28–29 (1979).

[5] *See* HANNAH ARENDT, ON VIOLENCE 44, 52 (1970); AMY ALLEN, THE POWER OF FEMINIST THEORY: DOMINATION, RESISTANCE, SOLIDARITY 75 (Routledge 2d ed. 2025) (1999) (quoting ARENDT, *supra*, at 52).

It may rarely register at all, as people define the politically possible with reference to constitutions without realizing it.[6]

Akhil Amar's *Born Equal* is an effort to perpetuate the power of the Constitution of the United States. Amar describes his book as a "continu[ation of] a narrative" (p. 15) that will span three volumes (p. 612), and he never leaves his readers in doubt about why he thinks this story is worth telling. Amar believes that people in the United States would be better off following the Constitution — as he understands it — than doing something else (pp. 611–12). He also believes that those who revere the Constitution and advance arguments grounded in its original meaning and purpose are more likely to win the day (p. 620). It's fitting that Amar's book is full of maps (p. 618), as Amar's project resembles that of leading nineteenth-century mapmakers: the forging of a national identity.[7] For Amar, that identity is, and ought to be, grounded in what he labels "originalism" (p. 2).

Amar is an engaging writer and a splendid storyteller. Alas — to borrow one of Amar's favorite interjections — even at 726 pages, *Born Equal* omits too much of importance. The result of Amar's attempt to fit an entire century's worth of American constitutionalism into a coherent narrative is never boring. But, ultimately, it reveals more about the mapmaker than the territory.

Born Equal is organized geographically (pp. vii–viii). Each chapter names one or more sites of constitutionally significant events (pp. vii–viii). And geography plays an important role in Amar's narrative. It informs the constitutional decisionmaking of the central characters, and it embeds those characters and their decisions in the reader's memory.

Maps never fully describe the world,[8] and they're made to serve human purposes.[9] Neither the geographical maps that fill Amar's pages nor his own map of a century's worth of constitutional territory are drawn from normatively neutral vantage points. Accordingly, neither is my own map of Amar's map. Part I focuses on place-situated discussions that illustrate Amar's understanding of American constitutionalism as well as my misgivings about it. Part II critiques Amar's map by following his geographical organization and showing readers just how

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[6] *See* HAUGAARD, *supra* note 3, at 203; STEVEN LUKES, POWER: A RADICAL VIEW 25 (2d ed. 2005) (contending that "the bias of [a] system can be mobilized, recreated and reinforced in ways that are neither consciously chosen nor the intended result of particular individuals' choices").

[7] *See generally* SUSAN SCHULTEN, MAPPING THE NATION: HISTORY AND CARTOGRAPHY IN NINETEENTH-CENTURY AMERICA (2012) (finding that mapmaking in colonial America flourished as a method of tracing national development).

[8] *See* JORGE LUIS BORGES, *On Exactitude in Science*, *in* COLLECTED FICTIONS 325, 325 (Andrew Hurley trans., 1998) (Borges describes a fictional empire in which cartographers "struck a Map of the Empire whose size was that of the Empire." Future generations then abandon it in the desert.).

[9] *See* DENIS WOOD WITH JOHN FELS & JOHN KRYGIER, RETHINKING THE POWER OF MAPS 20 (2010).

much constitutional territory he fails to cover — and how complex, conflictual, and confounding to Amar's narrative it is.

I. Mapping Amar-ica

A. Philadelphia

Amar has little patience for depictions of the Constitution as a "coup" by political-economic elites.[10] But he has long insisted that the 1788 Constitution contained proslavery elements.[11] *Born Equal* uses James Madison's notes from the Philadelphia Convention to illustrate a consensus in favor of congressional noninterference with slavery (p. 45). Amar also describes how the Three-Fifths Clause and the Electoral College bolstered the power of enslaving states (pp. 49–51).

Still, Amar distances himself from abolitionists William Lloyd Garrison and Wendell Phillips, who described the "Constitution as a proslavery compact" (pp. 37, 67). And he doesn't discuss several provisions that he has previously identified as proslavery, including Article I, section 9's prohibition against head taxes on slaves or the fruits of slave labor;[12] the same provision's bar against congressional interference with the international slave trade prior to 1808;[13] and Article V's prohibition against amending the Constitution to eliminate the latter bar.[14] Finally, there's nothing resembling Amar's 2005 claim that "the Founders' failure to put slavery on a path of ultimate extinction would lead to massive military conflict on American soil."[15] *Born Equal*'s Constitution didn't fail — it was failed, by enslavers.

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[10] *Contrast* Akhil Reed Amar, America's Constitution: A Biography 14–16 (2005) [hereinafter America's Constitution] (rejecting the claims of a "coup," *id.* at 14, and emphasizing the democratic nature of the Constitution and ratification), *and* Akhil Reed Amar, The Words That Made Us: America's Constitutional Conversation, 1760–1840, at 14–29 (2021) [hereinafter The Words That Made Us] (emphasizing the democratic nature of the ratification process and debates), *with, e.g.*, Charles A. Beard, An Economic Interpretation of the Constitution of the United States 324–25 (1913) (arguing that the Constitution served the economic interests of the elites who drafted and voted to ratify it), Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 522 (2d ed. 1998) (describing the antifederalist view that the new government would be composed of elites with interests divergent from "ordinary men['s]"), Woody Holton, Unruly Americans and the Origins of the Constitution 22–23 (2007) (pushing back on Beard's interpretation of the Framers' motivations but finding nonetheless they constructed a national government less democratically responsive than that of the states), *and* Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 606–09 (2016) (arguing the Framers "designed the federal government to be insulated from the populist politics" then active in the states, *id.* at 606).

[11] *See* America's Constitution, *supra* note 10, at 20.

[12] *See id.* at 405–06.

[13] *Id.* at 20.

[14] *Id.* at 21.

[15] *Id.*

B. Texas and California

Amar claims that enslavers recognized by the 1830s "that they were running out of votes and running out of room" (p. 211).[16] The Three-Fifths Clause had ceased to be a reliable guarantor of slave-state control of the House, in part because — contrary to the Framers' expectations — the population in the free-soil Northwest grew more quickly than that of the enslaving Southwest (p. 212). The Constitution's guarantee of noninterference with slave importation lapsed in 1808, and Congress preemptively enacted a prohibition that took effect as soon as constitutionally permissible (p. 124). Finally, the 1820 Missouri Compromise provided that all territory north of the 36°30' latitude line would remain free prior to statehood (p. 213).

In 1836, proslavery rebels declared the independence of a new state of Texas from Mexico.[17] The United States annexed Texas in 1845.[18] Democratic President James K. Polk then provoked a war by positioning U.S. troops on disputed ground.[19] He wanted more than Texas — he wanted central and southern Mexico, and likely for slavery.[20] The Treaty of Guadalupe Hidalgo[21] paved the way for California's admission into the Union and made possible an 1850 "[c]ompromise" that overwhelmingly favored enslavers.[22] It opened all new federal territories to slavery;[23] assumed debts incurred by Texas;[24] and created a new Fugitive Slave Act.[25]

The Fugitive Slave Act of 1850[26] (FSA) empowered federal commissioners to resolve fugitive-slave disputes with little regard for due process.[27] "[S]lavecatchers and accusers could submit testimony," but the Act prohibited alleged fugitives from doing so (p. 248).[28] It didn't require the appointment of lawyers or the convening of juries (p. 248). And it encouraged commissioners to rule against alleged fugitives by doubling their compensation if they did so (p. 248).

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16 Emphasis has been omitted.

17 AMERICA'S CONSTITUTION, *supra* note 10, at 217–18.

18 *Id.* at 224.

19 *Id.* at 225.

20 *Id.* at 226.

21 Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

22 *See* Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 850, 856–57 (2011).

23 *Id.* at 878.

24 *Id.* at 857.

25 *Id.* at 878. *See generally id.* at 879–82 (describing the Act and its effects in detail).

26 Ch. 60, 9 Stat. 462.

27 *See id.* § 6.

28 The alleged fugitives also lacked the right to cross-examine witnesses. Douglas A. Lee, *"Ten Dollar Judges": The Fugitive Slave Act of 1850 and the Origins of the Federal Magistrates Act*, 15 FED. CTS. L. REV. 1, 39 (2023).

Amar proclaims the South "stupid" to press for the FSA, war on Mexico, the imposition of increasingly harsh "gag" rules that prevented the presentation of abolitionist petitions in the House, and countless other efforts to "bully," "brutalize," and silence antislavery advocates, which ought to have been seen as counterproductive (p. 254). A South that had enough leverage to secure such a one-sided compromise ought to have used its diminishing power "to get more valuable concessions — say, massive cash infusions and huge western land grants to subsidize a long-term project of gradual and sustained southern emancipation" (p. 254).

C. Boston

Amar's emphasis on the importance of place to constitutional history is exemplified by his account of freedom seeker Thomas Sims's 1851 arrest in Boston (pp. 251–53). Boston was "the birthplace of the American Revolution and the cradle of liberty," and Amar contends that Sims's arrest stoked the embers of the revolutionary spirit (p. 251). He then lauds the work of abolitionist Harriet Beecher Stowe, whose *Uncle Tom's Cabin* "hit America as no novel had ever done before or has ever done since" (p. 260).

But Amar has little positive to say about most avowed abolitionists. Discussing another Boston-based effort to liberate an alleged runaway, Anthony Burns (pp. 302–03), Amar accuses abolitionist Wendell Phillips of creating "chaos" by urging Boston to "redeem herself of the stain for allowing Sims to be carried back" (p. 303).[29] Amar says that "[m]inutes later, anti-slavery men rioted and a federal guard was killed," and to no useful end, as "Burns was quickly . . . sent back to the land of bondage" (p. 303).

Abolitionists hurt the antislavery cause because they "routinely condemn[ed] the Constitution" (p. 278) and refused to "work[] within the system" (p. 316). Then-candidate Abraham Lincoln was wise to avoid a label associated with people who "scoffed at the dominant cult of founder worship" (p. 278). Lincoln was also right that abolitionist doctrines "'tend[ed] to increase' the 'evils' of slavery" (p. 295)[30] by triggering backlash and "ced[ing] hallowed ground to slavocrats" (p. 295).

D. New York

President Abraham Lincoln is to *Born Equal* what President George Washington is to *The Words That Made Us*: an exemplar of

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[29] The author quotes *The Boston Fugitive Slave Case*, RICHMOND WHIG & PUB. ADVERTISER, May 30, 1854, at 2 (on file with Readex, America's Hist. Newspapers).

[30] The author quotes Abraham Lincoln, Protest in Illinois Legislature on Slavery (Mar. 3, 1837), *in Abraham Lincoln, Protest on Slavery to the Illinois Statehouse, March 3, 1837*, HOUSE DIVIDED: CIV. WAR RSCH. ENGINE AT DICKINSON COLL., https://hd.housedivided.dickinson.edu/node/40419 [https://perma.cc/BK3B-8LU2].

(constitutional) virtue.[31] He is faithful to the Constitution's original meaning and purpose, "warts and all," and he redeems the Constitution from the sin of slavery *because of* his grasp of its meaning and purpose (p. 301).

Lincoln's 1860 speech at New York's Cooper Institute showcases these constitutional virtues (p. 368).[32] Amar labels it "originalist" because Lincoln appealed to the understanding of the Constitution's Framers in contending that slavery could be excluded from federal territories (pp. 368–69). But Lincoln didn't claim that the Constitution required the exclusion of slavery from federal territories, as prominent abolitionists and Republicans did, nor did he question the constitutionality of the FSA.[33] And he denounced John Brown's attempt to lead a general slave rebellion at Harper's Ferry.[34] Amar claims that "[a]lthough a hairsplitting critic might quibble about this detail or that one in the address," (p. 369), on the whole, Lincoln "was a brilliant originalist" (p. 271).

Of course, the war came anyway.

E. Antietam

In two lengthy chapters dedicated to then-Representative John Quincy Adams's late-career congressional stand against slavery, Amar charts a striking evolution in Adams's constitutional thought about the wartime emancipation of slaves (pp. 101–58). When serving as a diplomat in the aftermath of the War of 1812, then-Ambassador Adams castigated the British for refusing to either return American slaves, whom British forces had emancipated, or provide compensation (p. 125). Two decades later, Congressman Adams contended that Congress had the power to make treaties of peace with enslaved people who had emancipated themselves.[35] Amar claims that President Lincoln followed President Adams's insistence on wartime emancipation (p. 125) but waited for a constitutionally opportune wartime moment to proclaim emancipation (p. 443). He chose mere days after the bloodiest day of the Civil War: the Battle of Antietam (pp. 438, 443).[36]

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[31] *See* THE WORDS THAT MADE US, *supra* note 10, at 525 (describing Washington as the "real father" of the Constitution). On the role of Washington in Amar's narrative, see Gregory Ablavsky, *Akhil Amar's Unusable Past*, 121 MICH. L. REV. 1119, 1126 (2023) (reviewing THE WORDS THAT MADE US, *supra* note 10).

[32] *See Address at Cooper Institute*, LINCOLN PRESIDENTIAL FOUND., https://www.lincolnpresidential.org/Resources/63732619-5fa2-4b57-926d-e5010fofc5ac/Cooper%20Union%20Speech%20Feb%2027%201860.pdf [https://perma.cc/29C5-UB5M].

[33] *See id.*

[34] *See id.*

[35] *See* JAMES OAKES, THE SCORPION'S STING: ANTISLAVERY AND THE COMING OF THE CIVIL WAR 152–53 (2014).

[36] *See also* WILLIAMSON MURRAY & WAYNE WEI-SIANG HSIEH, A SAVAGE WAR: A MILITARY HISTORY OF THE CIVIL WAR 240 (2016) (ranking September 17, 1862, during the Battle of Antietam, as the deadliest day in American military history).

President Lincoln's "Preliminary" Emancipation Proclamation was in part an effort "to convince conservative skeptics that he was no wild radical abolitionist" (p. 443).[37] The Preliminary Proclamation declared that the purpose of the war was to "restor[e] the constitutional relation between the United States, and each of the States, and the people thereof."[38] It stated that "all persons held as slaves" in rebel territory were "forever free," but it supported financial compensation for enslaving states that were willing to adopt "immediate or gradual abolishment of slavery."[39] President Lincoln even supported "effort[s] to colonize persons of African descent, with their consent, upon this continent, or elsewhere."[40]

But the final version of the Proclamation didn't mention compensation or colonization.[41] It also promised that formerly enslaved men could, as Amar describes it, "join the Union Army and Navy and thereby prove to the world their manhood and just claims to full and equal American citizenship" (pp. 452–53). Amar gives this offer "much of the credit for the Union Army's ultimate successes in 1863–1864" (p. 463).

F. Ford's Theater

President Lincoln commanded an abolitionist army to victory in a "constitutional war" (p. 458), championed the Thirteenth Amendment on the campaign trail (p. 475), and ensured that it cleared both houses of Congress (p. 476). Although Lincoln wouldn't live to see its ratification, Amar depicts the Thirteenth Amendment — and the Fourteenth, and the Fifteenth — as the fulfillment of Lincoln's vision (pp. 502–03). The Thirty-Ninth Congress wasted no time enacting, under the Thirteenth Amendment's authority, legislation defining citizenship and guaranteeing a broad array of civil rights (p. 519). The Civil Rights Act of 1866[42] (CRA) proclaimed "[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States" and vested all citizens with "the same right . . . as is enjoyed by white citizens" to enjoy certain enumerated incidents of citizenship.[43]

Amar contends that the Fourteenth Amendment was inspired by two unanticipated difficulties. The first arose, ironically enough, from the

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[37] *See* Abraham Lincoln, Preliminary Emancipation Proclamation (Sep. 22, 1862), *transcribed in Preliminary Emancipation Proclamation, 1862*, NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/exhibits/american_originals_iv/sections/preliminary_emancipation_proclamation.html [https://perma.cc/KLJ4-5XFT].

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See* Abraham Lincoln, President, Emancipation Proclamation (Jan. 1, 1863), *transcribed in Emancipation Proclamation (1863)*, NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/milestone-documents/emancipation-proclamation [https://perma.cc/3KLP-U5D4].

[42] Ch. 31, 14 Stat. 27.

[43] *Id.* § 1.

Three-Fifths Clause being rendered inoperative. Formerly enslaved people were no longer "other [p]ersons,"[44] and former Confederate states could count them to bolster their numbers in the House and the Electoral College (p. 531). But the former Confederate states continued to deny to freed people their most basic civil and political rights, like the right to vote (p. 531). The second difficulty was now-President Andrew Johnson, who would prove to be an implacable foe of Reconstruction and vetoed the CRA (p. 521).

According to Amar, section 1 of the Fourteenth Amendment was calculated to "put an end to all legal controversy" (p. 521) by "protect[ing] all rights that were truly fundamental," including some but not all of those listed in the first eight amendments to the Constitution (p. 525).[45] Sections 2, 3, and 4 of the Fourteenth Amendment didn't directly protect any individual rights. Section 2 demanded that former Confederate states enfranchise Black men or see their congressional representation reduced.[46] Section 3 prohibited all ex-rebels who had previously sworn to uphold the Constitution from returning to office.[47] Section 4 declared that the United States would never compensate enslavers for emancipation, nor Confederate states for the costs of their own treasonous rebellion.[48] Finally, section 5 delegated to Congress broad power to enact legislation "appropriate" to the enforcement of the preceding provisions.[49]

Section 2 profoundly disappointed several of Amar's constitutional heroes. Frederick Douglass was appalled that it permitted Southern states to deny suffrage.[50] And, by penalizing only the disenfranchisement of "male" citizens,[51] it outraged Elizabeth Cady Stanton and Susan B. Anthony, who had organized a national petition drive for an amendment that "would 'prohibit the several States from disenfranchising any of their citizens on the ground of sex'" (p. 534).[52] But Amar suggests that the first shortcoming was addressed as quickly as politically possible (pp. 544–46). In 1866, proponents of constitutionalizing Black suffrage didn't have sufficient White support to satisfy Article V's demanding requirements (pp. 545–46). Further — "most important of all," says Amar — "almost no Blacks could vote in those parts of the

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[44] U.S. CONST. art I, § 2, cl. 3.

[45] *See id.* amend. XIV, § 1.

[46] *Id.* § 2.

[47] *Id.* § 3.

[48] *Id.* § 4.

[49] *Id.* § 5.

[50] *See* Frederick Douglass, *Reconstruction*, 18 ATL. MONTHLY 761, 762–63 (1866); DAVID W. BLIGHT, FREDERICK DOUGLASS 483 (2018).

[51] U.S. CONST. amend. XIV, § 2.

[52] The author quotes ELIZABETH CADY STANTON ET AL., A PETITION FOR UNIVERSAL SUFFRAGE (1865), *reprinted in Petition for Universal Suffrage (1865)*, U.S. SENATE, https://www.senate.gov/artandhistory/history/resources/pdf/1865PetitionUniversalSuffrage.pdf [https://perma.cc/F4HJ-FMRJ].

country where most Blacks lived," so no legislators owed their election to them (p. 546).

Amar devotes roughly twenty pages (pp. 552–74) to the collapse of Reconstruction, which made "the civil and political rights guaranteed on paper" impossible to enforce in practice (p. 549). He primarily faults legal elites — the Supreme Court, treatise writers, and constitutional scholars (pp. 537–71). He doesn't mention the Hayes-Tilden Compromise of 1877, which saw the Party of Lincoln unambiguously trade the hope of biracial republican governance in the South for Republican control of the presidency, nor the subsequent withdrawal of federal troops from the former Confederacy.[53]

G. Indian Country

Native nations and peoples aren't the central focus of Amar's narrative. Instead, they feature in a somber and sparsely sourced subplot.

Amar spends little time investigating what the original Constitution might have to say about the relationship between the United States and Native nations. He seems more concerned with communicating that none of the heroes of his primary narrative cared much for Indians or held any respect for tribal self-governance — their sovereignty (pp. 574–75). Amar claims that President Adams, President Lincoln, and leading Radical Republican Jacob Howard "accepted the basic premises of [Indigenous] dispossession, and were not ashamed to articulate [them]" (pp. 575, 578). And he suggests that the exclusion of the children of tribal citizens from the Fourteenth Amendment's guarantee of birthright citizenship constituted a form of collective punishment for the sins of their fathers (pp. 577–78).[54]

Amar characterizes American constitutionalism as a form of "conversation" (pp. 14, 550–52) that evidently requires reverence for the Constitution. He asserts that no Indigenous leader became famous "as a great constitutionalist who carefully articulated for American citizens a vision of what the maturing nation's Constitution actually meant and/or what it should mean in a more just and more equal future" (p. 554). The best he can do is Ponca Chief Standing Bear, who, after being removed from ancestral land by federal authorities, successfully petitioned a federal court for a writ of habeas corpus on the ground that he was a "person" within the meaning of the Fourteenth Amendment (pp. 580–81).

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[53] *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR 241–45 (2015).

[54] Amar glosses President Lincoln as arguing that "[j]ust as various tribes in past eras had sided with the British against America, so now various tribes were siding with the Confederacy or using the rebellion to stab America in the back" (p. 577), even though President Lincoln said nothing about the British; Amar also stresses that "Abe's allies" excluded the children of tribal citizens from birthright citizenship (p. 578).

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I keep coming back to a map on which Amar focuses attention. It's an 1839 map, created by Samuel Augustus Mitchell (pp. 221–22). Amar cites it as evidence that "America's indigenous tribes were not in 1840, nor would they later become, full Westphalian sovereigns" (p. 222). Early nineteenth-century mapmaking was a nationalistic affair in which maps told stories in the service of a desired future for the country.[55] Amar nonetheless interprets Mitchell's map as stating "juridical facts" about the sovereignty of Native nations (p. 222).

Born Equal deploys what Amar labels an "originalis[t]" approach to constitutional interpretation (p. 15). I say "labels" because Amar sketches this approach so broadly and applies it so readily that it is practically impossible to distinguish it from pluralist approaches to constitutional interpretation that take account of history but don't consider it dispositive.[56] Amar rarely cites originalist literature at all.[57] And he doesn't grapple with criticism that has been leveled against originalists who claim that their methodology has been part of our law since the Founding or who define originalism inclusively.[58]

So, when Amar claims that Mitchell's 1839 map provides evidence of a juridical fact about tribal lack of sovereignty (p. 222), what *is* he claiming? Does he mean that tribal sovereignty isn't consistent with the Constitution's original meaning? Amar says that when the United

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[55] *See* SCHULTEN, *supra* note 7, at 24.

[56] Appeals to history are not the exclusive province of originalism. *See, e.g.*, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 132 (criticizing the use of history by the liberal Warren Court, which is not often thought of as originalist); FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 136 (2013) (finding that the Warren Court cited *The Federalist* "more than any previous Court [in] American history"); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (identifying history as one of the accepted modalities of constitutional argument). For efforts to distinguish originalism from its competitors by emphasizing the weight that originalists give to history and the kind of history with which they are most concerned — namely, history bearing upon the communicative content of constitutional text or the content of original law — see, for example, Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1957 (2021); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 5 (2009); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 784 (2022); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813 (2019); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009).

[57] Amar's framework of the "letter," the original meaning of the text, and the "spirit," its original purpose (pp. 332, 337), was anticipated by other originalist scholars nearly a decade ago. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 5 (2018).

[58] *See, e.g.*, JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 19 (2024); ERIC J. SEGALL, ORIGINALISM AS FAITH 6–7 (2018); Richard Primus, Response, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 45 (2016) (responding to William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015)); Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2013 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011)); DAVID A. STRAUSS, THE LIVING CONSTITUTION 12–16 (2010)).

States treated with tribes, those treaties typically prohibited the tribes from treating with other "Westphalian" nations (p. 222). But if he thinks that this is decisive, that's a confession of failure to engage with originalist literature on the subject.[59]

There's compelling originalist evidence that the Constitution treats Native nations as sovereign entities and that their sovereignty persists in spite of asymmetric relationships with the United States.[60] Amar's "full Westphalian" (p. 222) distinction obscures the ways in which Native sovereignty was recognized by the Constitution, both in 1788 and in 1868, consistently with contemporaneous understandings of the law of the nations, which: (1) were incorporated into constitutional text; and (2) didn't demand absolute equality as a condition of sovereignty.[61]

Amar's neglect of federal Indian law is a species of a broader mapmaking problem. Part II will illuminate that problem by providing a counter-map of nineteenth-century constitutionalism. The counter-map covers some of the same places as does *Born Equal*, but it tells different, often conflicting, stories about the people and events that attract Amar's attention. It also identifies other places, events, and people of constitutional interest. The result is a fundamentally different geography of constitutional power that that is often more perilous, sometimes more promising, and always more polycentric than Amar's.

II. UNMAPPED TERRITORY

A. Philadelphia

Born Equal presents slavery as the original sin, singular, that lies at the root of all constitutional evil (p. 505). Amar doesn't engage with criticism of his prior treatment of Native nations.[62] Nor, in his description of the egalitarianism of the Declaration and his insistence upon continuity between the Declaration and the Constitution, does Amar mention the Declaration's reference to "merciless Indian savages" and consider its implications for the Constitution's treatment of Native nations and peoples.[63]

Here, federal Indian law scholar Gregory Ablavsky's work is an invaluable guide to how the Declaration's signees thought of Indigenous

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[59] *See, e.g.*, Evan D. Bernick, *Canon Against Conquest*, 2025 U. ILL. L. REV. ONLINE 1169, 1172; Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 556 (2022); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 335 (2018).

[60] *See* Bernick, *supra* note 59, at 1221; Davis, Biber & Kempf, *supra* note 59, at 586.

[61] *See* Bernick, *supra* note 59, at 1212–17, 1228–29.

[62] In particular, a detailed critique of his previous volume was published by a leading scholar of federal Indian law in one of the nation's top law reviews. *See generally* Ablavsky, *supra* note 31.

[63] THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776); *see, e.g.*, Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1013 (2014); KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS 63 (2022); Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 28 (2023).

peoples.[64] The Declaration licensed disregard of Indigenous rights by Anglo-American settlers.[65] After the Treaty of Paris put an end to the Revolutionary War, the congressional Committee on Indian Affairs recommended that the United States inform Native nations that all British territory east of the Mississippi River now belonged to the United States, by right of conquest.[66]

Congress's assertions of authority didn't go over well.[67] Settlers defied treaties and conducted brutal raids.[68] In 1786, a confederation of the Iroquois, Cherokees, and several Ohio Country tribes demanded that Congress only treat with them as a "united force."[69] Meanwhile, Georgia and North Carolina's aggression against southern tribes led Native nations to seek support from the Spanish and a resource-strapped federal government to scramble to conclude treaties to assuage Native complaints.[70]

The urgency of addressing Indian affairs was impressed upon the Framers by four deputies of the Cherokee, Chickasaw, and Choctaw Nations who visited Philadelphia on June 18, 1787.[71] The deputies met George Washington, other Convention members, congressional delegates, and Secretary of War Henry Knox.[72] They made plain their concerns with settler encroachment and dishonored treaties.[73]

And so it was that the Constitution of 1788 didn't speak of savages or rights of conquest. Native peoples continued to affirm the legitimacy of a pre-1788 "diplomatic constitution."[74] They also used every means available to hold the United States to its word, whether that word came in the form of treaties — under the Constitution, the supreme law of the land — or in the recognition of tribes as sovereign entities in the Indian Commerce Clause — the language of which likens them to foreign nations.[75]

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[64] *See* Ablavsky, *supra* note 63, at 1013–14.

[65] *See* Blackhawk, *supra* note 63, at 28.

[66] Ablavsky, *supra* note 63, at 1014–15.

[67] *See id.* at 1024.

[68] *Id.*

[69] *Id.* at 1026 (quoting Speech of the United Indian Nations to Congress (Dec. 18, 1786), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789: REVOLUTION AND CONFEDERATION 356, 358 (Alden T. Vaughan gen. ed., Colin G. Calloway ed. 1994)).

[70] *See id.* at 1027–29.

[71] *See* Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707, 1718–19 (2021).

[72] *Id.* at 1708.

[73] *See id.* at 1731–34.

[74] Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 254 (2023).

[75] *See* Bernick, *supra* note 59, at 1213–14; *see also* Jeremy Rabkin, *Commerce with the Indian Tribes: Original Meanings, Current Implications*, 56 IND. L. REV. 279, 281–82 (2023) (pointing out that citizens of Native nations were also beyond the reach of taxation, "stand[ing] outside the whole scheme," *id.* at 282, as members of "independent or at least semi-independent entities," *id.* at 281).

It must be said, however, that the Constitution wasn't designed to represent Native interests, and competing federal factions strove to implement their understanding of optimal Indian policy.[76] Those who chose anti-Indigenous violence had a fearsome new "fiscal-military state" on their side.[77] Federal Indian law scholar Maggie Blackhawk (Fond du Lac Band of Lake Superior Ojibwe) reminds us that the United States continues to hold hundreds of sovereign nations under colonial domination.[78] This, too, is sin. And it's sin that certain of Amar's antislavery heroes recognized in opposing Indian Removal and the invasion of Mexico (pp. 127–28).

B. Texas and California

In 2005's *America's Constitution: A Biography*, Amar rejected President Lincoln's claim that the Constitution was calculated to put slavery on the course of its ultimate extinction.[79] Slavery in *America's Constitution* is a constitutional theme, recapitulated in self-similar fractals across provisions that lend support to enslavement across the Constitution's interlocking parts.[80] But in *Born Equal*, Amar distances himself from abolitionists who labeled the Constitution proslavery (p. 64). And he suggests that the antebellum Constitution well into the 1830s ought to have satisfied everyone but "impatient . . . abolitionist[s]" and enslavers, as the Constitution was by then facilitating slavery's retreat (p. 211).

The latter suggestion is dubious. Matthew Karp has shown that well into the 1850s "[s]lavery . . . was not in retreat; in fact, it was advancing all across the Atlantic world."[81] Brazil, the largest country by population in South America, was the Western Hemisphere's second-largest slaveholding society, second only to the United States.[82] The Spanish colony of Cuba also remained a slaveholding society.[83] American enslavers could look abroad for "international vindication of their own slave system" even as they faced abolitionist resistance at home.[84]

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[76] *See* Ablavsky, *supra* note 63, at 1006–07.

[77] *Id.* at 1050. *See generally* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 73–146 (2003) (describing the development of the American fiscal-military state and its use against Native nations).

[78] *See* Blackhawk, *supra* note 63, at 2.

[79] AMERICA'S CONSTITUTION, *supra* note 10, at 20 (claiming that "nothing in the original Constitution aimed to eliminate slavery, even in the long run").

[80] *Id.* at 20 (describing how "many of the Constitution's clauses specially accommodated or actually strengthened slavery"); *id.* at 352 (contending that "the Constitution's basic structure tilted the long-run game against the forces of freedom").

[81] MATTHEW KARP, THIS VAST SOUTHERN EMPIRE: SLAVEHOLDERS AT THE HELM OF AMERICAN FOREIGN POLICY 157 (2016).

[82] *See id.* at 70.

[83] *See id.* at 81.

[84] *Id.* at 159.

Further, the invasion of Mexico, which Amar attributes entirely to proslavery priorities, was about more than slavery. It was about seizing millions of square miles of land from what Virginia Senator Robert M.T. Hunter referred to as "the occupation of the savage."[85] The connection between settler colonialism and the expansion of slavery was central to how the antislavery movement came to understand and oppose the war.

In Amar's presentation, John Quincy Adams differed only in degree from Andrew Jackson. Quoting an 1814 diary entry in which Adams expressed his disgust at "condemn[ing] vast regions of territory to perpetual barrenness and solitude [so] that a few hundred savages might find wild beasts to hunt upon it," Amar claims that Adams "accepted the basic premises of dispossession, and [was] not ashamed to articulate th[o]se premises" (p. 575).[86] But the moral and legal travesty of Removal shaped Adams's opposition to the invasion of Mexico.[87] Amar focuses attention on "one fraught day in 1836" where Adams predicted that Great Britain wouldn't "stand by and witness a war for the re-establishment of slavery [in Mexico] where it had been for years abolished" (p. 128).[88] Adams made those statements during the Second Seminole War, which he attributed to Georgia's "trampling upon the faith of our national treaties with the Indian tribes, and . . . subjecting them to [its] State laws"[89] in defiance of the Supreme Court's decision in *Worcester v. Georgia*[90] and the federal government's failure to intervene on behalf of the Cherokee.[91]

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[85] *See id.* at 114 (quoting Brian Delay, *Independent Indians and the U.S.-Mexican War*, 112 AM. HIST. REV. 35, 63 (2007)); AMY S. GREENBERG, A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 U.S. INVASION OF MEXICO xviii (2012).

[86] The author quotes John Quincy Adams, Diary of John Quincy Adams (Sep. 1, 1814), *reprinted in John Quincy Adams Digital Diary*, PRIMARY SOURCE COOP., https://www.primarysourcecoop.org/publications/jqa/document/jqadiaries-v29-1814-09-p141--entry1 [https://perma.cc/5ZPB-63QX].

[87] *See* 12 REG. DEB. 4041 (1836).

[88] The author quotes John Quincy Adams, The Joint Resolution for Distributing Rations to the Distressed Fugitives From Indian Hostilities in the States of Alabama and Georgia, Speech Before the House of Representatives (May 25, 1836), *in* NAT'L INTELLIGENCER OFF., at 6.

[89] 12 REG. DEB. 4048 (1836).

[90] 31 U.S. (6 Pet.) 515 (1832).

[91] *See* Linda K. Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 281 (1975) ("Although in 1819 he had supported Jackson's foray into Florida, Adams interpreted Jackson's Indian policies as the reversal of his own and criticized them strenuously. He was sharply critical of Cherokee Removal and even more hostile to the Florida War.").

Natalie Joy,[92] Gerard Magliocca,[93] and Susan Zaeske[94] have documented how, as Joy puts it, "Indians were central to the radical antislavery movement in the period between Jackson's election and the Civil War."[95] Opposition to Removal "helped to shape abolitionist arguments against colonization and to develop the Slave Power argument that emerged in the late 1830s."[96] Those arguments were shaped by Native, White, and Black advocates, and women played a leading role — including Harriet Beecher Stowe.[97]

On Amar's account, abolitionists were generally ineffectual. Here, too, there are more stories to tell.

C. Boston

Abolitionists are mostly minor antagonists in Amar's narrative. They're wrong on the merits of their constitutional interpretations; they're wrong to think that abolition can be achieved without constitutional veneration (pp. 302–03). It might be unreasonable to expect Amar to render a global judgment on the vices and virtues of abolitionist political activity, given the scope of his ambitions. But that is what he does, so his selective and dismissive depiction of that activity invites criticism.

Take Amar's negative description of abolitionist resistance to the reenslavement of Anthony Burns (pp. 302–03). Daniel Farbman places Anthony Burns's trial within a context of resistance lawyering, which saw abolitionists of all stripes and orientations toward the Constitution litigating with remarkable success for the freedom of alleged fugitives.[98] Taking the full measure of that success requires looking beyond how judges ruled. Commissioner Edward Loring, who sent Burns back to Virginia in chains, was removed from the state probate court and even the law faculty at Harvard after an enthusiastic campaign led by

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[92] *See generally* Natalie Joy, *The Indian's Cause: Abolitionists and Native American Rights*, 8 J. CIV. WAR ERA 215 (2018) (discussing the role of abolitionist support for Native Americans in the antebellum period).

[93] *See generally* Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008) (examining the relationship between Native tribal interests and the Citizenship Clause of the Fourteenth Amendment); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003) (describing the impact of Native Removal on the drafters, and the text, of the Fourteenth Amendment).

[94] *See generally* SUSAN ZAESKE, SIGNATURES OF CITIZENSHIP: PETITIONING, ANTISLAVERY, & WOMEN'S POLITICAL IDENTITY (2003) (describing the popular opposition campaign led by abolitionist women against Native Removal policies).

[95] Joy, *supra* note 92, at 216.

[96] *Id.*

[97] *See* ZAESKE, *supra* note 94, at 27.

[98] *See* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1929–31 (2019).

antislavery lawyers.[99] And Burns was the last fugitive removed from Boston.[100]

Amar also fails to acknowledge abolitionist resistance that was successful in liberating alleged fugitives. Consider the story of Shadrach Minkins, who escaped to Boston from Norfolk, Virginia, only for his former enslaver, John DeBree, to dispatch slave-catcher John Caphart after him.[101] After Caphart presented Commissioner George Curtis with a certificate, Curtis issued a warrant for Minkins's arrest.[102]

None of this activity escaped abolitionist notice.[103] Caphart had already been spotted and placed under constant surveillance by the Boston Vigilance Committee.[104] When Minkins made his first appearance before Commissioner Curtis, a large crowd that included many Black women was in attendance, and five leading abolitionist lawyers were ready to represent Minkins.[105]

Minkins's lawyers were able to further delay Minkins's hearing by requesting that DeBree's documentation be read aloud beforehand.[106] When Curtis granted the request, he found that there was no place to hold Minkins during the three days prior to his hearing, as there was no federal jail in Boston and both "[t]he city . . . and the state of Massachusetts refused to allow the federal government to use their jails."[107] An antislavery mob eventually broke into the courthouse and shepherded Minkins through the streets to freedom.[108]

Shadrach's flight continued to pay antislavery dividends. Robert Morris, one of Minkins's lawyers, "the second Black lawyer admitted to practice in Massachusetts,"[109] was prosecuted for conspiring to rescue Shadrach.[110] Abolitionist defense lawyer Richard Dana, who would later represent Anthony Burns,[111] used the cross-examination of John Caphart to put the FSA and slavery on trial.[112] The result inspired Harriet Beecher Stowe, and equipped her to respond to critics of *Uncle*

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99 *See* STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 222, 222–25 (2010).

100 *See* Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1818 (1996).

101 Farbman, *supra* note 98, at 1906.

102 *Id.*

103 *Id.* at 1907.

104 *Id.*

105 *Id.*

106 *Id.* at 1908.

107 *Id.*

108 *Id.*

109 Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 HOFSTRA L. REV. 1, 2 (2022).

110 *Id.* at 1–2.

111 *See* Finkelman, *supra* note 100, at 1812, 1814.

112 *See* Bernick, *supra* note 109, at 2.

Tom's Cabin by pointing to a real-life comparator for fictional slave-trader Mr. Haley.[113]

D. Harper's Ferry

Amar's discomfort with prewar antislavery violence is obvious throughout *Born Equal*. He denigrates those who either engaged in or supported the "chaos" that resulted from abolitionist efforts to liberate Burns (p. 303) and distances his heroes, Douglass and Lincoln, from "[John] Brown's violent conspiracy" (p. 367). This discomfort leads to the erasure of a well-attested component of the antislavery movement.

Recall Amar's brief description of the killing of a federal marshal — James Batchelder — during the Anthony Burns affair (p. 303). The shooter was probably Lewis Hayden,[114] a prominent Black abolitionist.[115] Together with Thomas Wentworth Higginson, a militant White abolitionist minister, Hayden organized a small group of Bostonians to plot Burns's release.[116] Hayden shot Batchelder in order to protect Higginson.[117]

Kellie Carter Jackson's discussion of the response to Hayden's actions reveals the extent of abolitionist support for antislavery violence. Four years earlier, Frederick Douglass had declared that if "anyone who attacked an enslaved person 'be shot down, his punishment is just.'"[118] Now, William Watkins, the Black coeditor of *Frederick Douglass' Paper*, proclaimed that whoever shot Batchelder was no more a murderer than was George Washington.[119] Broader public outrage was more focused on the initial seizure of a free black man in Boston than the marshal's death.[120]

Amar mentions Joanne Freeman's indispensable deep dive into congressional conflict during the antebellum period (p. 318).[121] Freeman counts "more than seventy violent incidents between congressmen in the House and Senate chambers or on nearby streets and dueling grounds" from 1830 to 1860.[122] The most infamous incident of congressional violence was South Carolina Senator Preston Brooks's caning of

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113 *Id.* at 1–2.

114 *See* KELLIE CARTER JACKSON, FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE 72 (2019).

115 *See id.* at 67.

116 *Id.* at 71–72.

117 *Id.* at 72 (quoting Letter from William F. Channing to Thomas Wentworth Higginson (Feb. 6, 1898), *in* Thomas Wentworth Higginson Papers, 1856–1911 (on file with the Harvard University Archives)).

118 *Id.* at 69 (quoting Leslie F. Goldstein, *Violence as an Instrument for Social Change: The Views of Frederick Douglass, 1819–1895*, 41 J. NEGRO HIST. 61, 69 (1976)).

119 *Id.* at 73.

120 *Id.*

121 The author cites JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR (2018).

122 *Id.* at 5 (emphasis omitted).

Massachusetts Senator Charles Sumner.[123] Brooks's violence was especially provocative, not only because he nearly killed Sumner but because he had attacked an unarmed man who was seated and unable to rise from his desk.[124]

Republicans didn't take Brooks's cowardly attack lying down. Their constituents made clear that they expected them to literally fight for constitutional rights.[125] Massachusetts Republican Chauncey Knapp's constituents gave him "a revolver inscribed with the words 'Free Speech'" before a trip to Washington.[126]

True, even Republicans who came to the Congress armed with pistols and bowie knives[127] disapproved of John Brown's raid on the federal arsenal at Harper's Ferry.[128] Brown became an antislavery hero less because of his violent actions than because of what they anticipated — an abolitionist war.

The popularity of the song "John Brown's Body" among Union soldiers was a testament not merely to Brown's rehabilitation but to his canonization.[129] In 1857, Illinois Senate candidate Lincoln insisted that "not bloody bullets, but peaceful ballots only, are necessary" to achieve abolition.[130] In 1861, President Lincoln, still hoping to avoid war, was reported as saying that "[e]mancipation would be equivalent to a John Brown raid, on a gigantic scale."[131] In 1863, Abe the Emancipator commanded thousands of troops — including former slaves — who marched to kill defenders of slavery and liberate enslaved people. And Frederick Douglass recruited Black troops for President Lincoln's army by promising that "[e]very honest soldier who marches into Virginia goes there to carry out the object that led JOHN BROWN to Harper's Ferry."[132]

Although Amar singles W.E.B. Du Bois's scholarship out for praise, (p. 573), he doesn't mention how his work was shaped by the memory of John Brown. Du Bois chose Harper's Ferry as the place to hold the

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123 *See id.* at 217–18.

124 *See* Manisha Sinha, *The Caning of Charles Sumner: Slavery, Race, and Ideology in the Age of the Civil War*, 23 J. EARLY REPUBLIC 223, 223, 252 (2003).

125 *See* FREEMAN, *supra* note 121, at 223, 234.

126 *Id.* at 234.

127 *Id.* at 256–59.

128 *See* DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST: THE MAN WHO KILLED SLAVERY, SPARKED THE CIVIL WAR, AND SEEDED CIVIL RIGHTS 359–60 (2005).

129 *See id.* at 465–66.

130 *Id.* at 442 (emphases omitted) (quoting then-candidate Abraham Lincoln).

131 *Id.* at 471 (quoting President Abraham Lincoln).

132 *Fred. Douglass on the Proclamation; He Pronounces It a Mighty Event for the Colored Race, the Nation and the World*, N.Y. TIMES, Feb. 7, 1863, at 8. *Compare id.* ("Good old JOHN BROWN . . . was a madman two years ago, now the whole nation is as mad as he."), *with* FREDERICK DOUGLASS ON SLAVERY AND THE CIVIL WAR: SELECTIONS FROM HIS WRITINGS 19 (Phillip S. Foner ed., 2003) (describing not only Douglass's refusal to join Brown's raid because it "was doomed to fail," but also how Douglass "always paid great tribute to John Brown's courage and devotion to freedom").

Second Niagara Movement's organizational meeting in 1906.[133] "[H]ere on the scene of John Brown's martyrdom," said Du Bois at the meeting, "we reconsecrate ourselves, our honor, [and] our property to the final emancipation of the race which John Brown died to make free."[134] The Second Niagara Movement would become the NAACP, and the NAACP's constitutional litigation was indispensable to meaningful enforcement of the Reconstruction Amendments.[135]

E. The Freedom Fort

Amar also omits one of the most compelling stories of American constitutionalism that Du Bois ever told. Few of Du Bois's ideas have been as generative as his conception of emancipation as a general strike of enslaved laborers.[136] On Du Bois's account, even before President Lincoln issued the Emancipation Proclamation, emancipation was an "accomplished fact" for hundreds of thousands, many of whom had already freed themselves.[137] Amar emphasizes the catalytic force of the Proclamation's promise, attributing to it "much of the credit for the Union Army's ultimate successes in 1863–1864" (p. 463). Up until this point in Amar's wartime narrative, we have heard nothing of enslaved people. Then, we are told, "a huge mass of humanity leapt off the Confederate pan of the balance scale and leapt onto the Union pan" (p. 463). One episode should suffice to illustrate what Amar's Lincoln-centered narrative leaves out.

In 1861, President Lincoln sought to broaden his constituency for the war effort by encouraging Southerners in their belief that they could, if they abandoned the Confederacy, return to the Union with their slaves.[138] Congress enacted the Crittenden Resolution, which declared that the "established institutions" of seceding states weren't military targets.[139] Some Union army commanders closed their camps to fugitives and in some cases returned them to slavery.[140]

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133 REYNOLDS, *supra* note 128, at 494.

134 RIDGELY TORRENCE, THE STORY OF JOHN HOPE 151 (1948) (quoting W.E.B. Du Bois); *see also* W.E. Burghardt Du Bois, *John Brown*, *in* AMERICAN CRISIS BIOGRAPHIES 338 (Ellis Paxson Oberholtzer et al. eds., 1909) (declaring that "[t]o-day at last we know: John Brown was right").

135 *See* REYNOLDS, *supra* note 128, at 494–95; Angela Jones, *The Niagara Movement, 1905–1910: A Revisionist Approach to the Social History of the Civil Rights Movement*, 23 J. HIST. SOCIO. 453, 460 (2010).

136 *See* James Oakes, *"The General Strike": W.E.B. Du Bois's Interpretation of Slave Resistance During the American Civil War*, *in* AGRARIAN REFORM AND RESISTANCE IN AN AGE OF GLOBALISATION 33, 33 (Joe Regan & Cathal Smith eds., 2019); *cf.* Eric Foner, *Black Reconstruction: An Introduction*, 112 S. ATL. Q. 401, 417 (2013) (suggesting that Du Bois's "notion of a 'general strike'" is one of "many . . . insights [that] are now taken for granted").

137 W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 87 (Free Press 1998) (1935).

138 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at 5–6 (Henry Steele Commager & Richard B. Harris eds., updated ed. 2014).

139 *Id.* at 3–6.

140 GREGORY P. DOWNS, DECLARATIONS OF DEPENDENCE: THE LONG RECONSTRUCTION OF POPULAR POLITICS IN THE SOUTH, 1861–1908, at 49 (2011).

It was General Benjamin Butler, commander of the Union forces at Fortress Monroe, who, upon meeting three enslaved people walking into his camp, first employed fugitive slaves as laborers.[141] Word of the "freedom fort" travelled quickly, thanks to what abolitionist Edward L. Pierce described as "the mysterious spiritual telegraph which runs through the slave population."[142] By August of 1861, Congress had passed a Confiscation Act that allowed the seizure of insurrectionist property, including enslaved laborers.[143]

The Proclamation did produce signs and wonders. It put radical abolitionists in the vanguard of an emancipatory army. Begin with Harriet Tubman, whom Amar mentions only in a postscript to explain that because she was "not highly literate" she didn't "rank among the era's most notable constitutional conversationalists" (p. 615). Tubman joined forces with Army colonel James Montgomery to launch a slave-raiding expedition on the Combahee River.[144] At one point Montgomery made camp in South Carolina alongside T.W. Higginson[145] — the same militant minister whose life Lewis Hayden had saved in Boston[146] and who had helped plan Harper's Ferry.[147] Higginson, now a colonel, had been summoned from Massachusetts to serve as the first official commander of Black troops.[148]

All of this unfolded with what now appears to be inexorable logic. But it culminated in something truly new under the sun: universal military emancipation. James Oakes, upon whom Amar relies for his account of military emancipation, describes that American innovation as "nothing short of revolutionary."[149] And that revolution wasn't driven solely by President Abraham Lincoln.

F. Louisiana

Amar is aware that the Thirteenth, Fourteenth, and Fifteenth Amendments were sabotaged by racial terrorism. It's still shocking that he spends about as many pages tracing the connections between President John Quincy Adams's death and a painting of British Prime Minister William Pitt's stroke on the floor of Parliament (pp. 109–11) as he does on the killing of Reconstruction (pp. 555–57). And his abbreviated analysis fails to persuade. Amar claims that the saboteurs of the

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141 *Id.* at 48.

142 *Id.* (quoting Edward L. Pierce, *The Contrabands at Fortress Monroe*, ATL. MONTHLY, Nov. 1861, at 626, 628).

143 *See* EDNA GREENE MEDFORD, LINCOLN AND EMANCIPATION 44 (2015).

144 *See* LEEANNA KEITH, WHEN IT WAS GRAND: THE RADICAL REPUBLICAN HISTORY OF THE CIVIL WAR 179 (2024).

145 *Id.* at 178.

146 *See* JACKSON, *supra* note 114, at 72.

147 KEITH, *supra* note 144, at 102.

148 *See* DOUGLAS R. EGERTON, A MAN ON FIRE: THE WORLDS OF THOMAS WENTWORTH HIGGINSON 1–6 (2025).

149 OAKES, *supra* note 35, at 159.

Reconstruction Amendments never accepted the constitutional vision behind them, and they either ignored or "contorted" the constitutional text (p. 556). This framing screens out contestation within the Republican ranks, as well as institutional and ideological impediments to making Reconstruction stick.

Amar, like most constitutional scholars to have considered the question,[150] harshly criticizes the Supreme Court's 1873 decision in the *Slaughter-House Cases*[151] (p. 558). By a 5–4 vote, the Supreme Court "disembowel[ed] Section One of the Fourteenth Amendment," failing to give effect to what John Bingham "had plainly and repeatedly said it meant — that states and localities must honor the Bill of Rights" (p. 558). Amar believes the Court to have reached the correct outcome in upholding the constitutionality of the Slaughtering Act of 1869 against an antimonopoly challenge (p. 558). Still, he says that it did so by "essentially read[ing] the [Privileges or Immunities Clause] to mean nothing at all" (p. 558).

How was it that Justice Miller, the Lincoln appointee who authored the majority opinion, missed the mark so badly? I've argued that the explanation is relatively straightforward: Republican Presidents didn't select Justices with an eye to Reconstruction.[152] President Lincoln was murdered before Reconstruction commenced; President Grant was only fitfully attentive to it; and Radical Republicans like Representatives Jacob Howard, Charles Sumner, and Thaddeus Stevens only briefly had control over it.[153]

Amar also observes that "[a]fter 1870, most of the ex-rebels were back in the Union in good standing" (p. 556). That's what Representative Thaddeus Stevens sought to prevent through a sweeping exclusion for insurrectionists.[154] Now in office, ex-rebels could scuttle other

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150 *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 41–258 (2021); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 104–20 (2020); McDonald v. City of Chicago, 561 U.S. 742, 852 (2010) (Thomas, J., concurring in part and concurring in the judgment); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 21 (2015); Morton J. Horwitz, *The Supreme Court, 1992 Term — Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 84 (1993); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 175 (1990). *But see* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 706 (2000); Bryan H. Wildenthal, Perspective, *How I Learned to Stop Worrying and Love the* Slaughter-House Cases*: An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241, 245 (2001) (defending the Court's decision on the ground that it didn't foreclose protection of rights enumerated in the first eight amendments).

151 83 U.S. (16 Wall.) 36 (1873).

152 *See* Evan D. Bernick, *Slaughtering Abolition Democracy*, 76 RUTGERS U. L. REV. 965, 987–88 (2024).

153 *See id.* at 969, 972–73.

154 *See* CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (statement of Rep. Stevens) (worrying that the ratified version of section 3 would "endanger[] the Government of the country, both State and national; and may give the next Congress and President to the reconstructed rebels").

measures that Representative Stevens and like-minded Republicans favored. Any Republican power worthy of association with Abe the Emancipator became precarious in the former Confederacy.

The Crescent City Live-Stock Landing and Slaughter-House Company was chartered in 1869,[155] shortly after the ratification of a radical state constitution and the election of a biracial legislature.[156] It was an ingenious response to pressing public health problems that the City of New Orleans had for decades failed to address, thanks to a formidable power bloc of butchers who not only inflated prices and drove off competitors but also clogged gutters and polluted the Mississippi River with rotting, festering filth.[157] But the company's structure revealed its political precarity. Louisiana legislatures granted exclusive charters to private corporations because many White Louisianans wouldn't pay for Reconstruction governance.[158]

One day before the Supreme Court narrowly upheld the Crescent City slaughterhouse, a White mob murdered scores of Black Republicans some miles away.[159] The Colfax Massacre was committed by supporters of Democratic gubernatorial candidate John McEnery, in response to Radical Republican victories, including that of William Pitt Kellogg over McEnery.[160]

Kellogg and McEnery both claimed victory and commissioned a judge and a sheriff to serve in Grant Parish.[161] McEnery's supporters installed Alphonse Cazabat as judge and former Confederate Captain Christopher Columbus Nash as sheriff; they occupied the Colfax courthouse part time.[162] Former Union Captain William Ward, a radical Black Republican who had just been sent to the state legislature, summoned members of his militia unit to take possession of the courthouse in the name of Judge R.C. Register and Sheriff Daniel Shaw.[163] Finding the courthouse unoccupied, they entered and asserted control.[164]

The gruesome details of the battle for the Colfax courthouse on April 13, 1873, and the subsequent murder of Black prisoners have been recounted elsewhere.[165] The nine men whom the United States eventually

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155 The Slaughter-House Cases, 83 U.S. (16 Wall.) at 59.

156 DU BOIS, *supra* note 137, at 468–70.

157 *See* RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES*: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 38, 40 (2003).

158 MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 194 (2003).

159 *See* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 135 (2008).

160 *Id.* at 80–81.

161 *Id.* at 82, 86–87.

162 *Id.* at 87.

163 *Id.*

164 *Id.*

165 *See generally id.* (documenting the Colfax Massacre); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 97–109 (2008) (same).

charged in connection with the massacre weren't major players and Nash, the lead defendant, disappeared on horseback into the Red River before he could be prosecuted.[166] But these prosecutions did provide the Supreme Court with another opportunity to do justice to the meaning of the Fourteenth Amendment.

Once again, the Court failed. The Court reiterated the *Slaughter-House Cases'* limited conception of the privileges or immunities of citizenship,[167] dismissed the indictment,[168] and stressed that only the most narrowly defined forms of racial discrimination could be targeted by Congress.[169] The stage was set for a constitutional counterrevolution. A nation on the verge of being redeemed from the original sin of slavery by Reconstruction would now be "redeemed" from Reconstruction.[170]

The Constitution played a role in Reconstruction's disemboweling (p. 558). As much as Du Bois admired radicals like Representatives Sumner and Stevens, he found that they had less power than they ought to have possessed because of the Constitution.[171] What he denounced as "fetich-worship of the Constitution" inspired misgivings about overwhelming federal power, confusion over the precise legal status of the former Confederate states, and undue attachment to a capitalist economic order that the Constitution presupposed and perpetuated.[172] Cynthia Nicoletti's work on the failed prosecution of Confederate President Jefferson Davis reveals how deeply Republicans cared about the Constitution and about maintaining its continuity after Appomattox.[173] One can appreciate Republican concerns about the rule of law while acknowledging their costs — among them, the fact that the President of the Confederate States of America was released from prison to a hero's reception because Republicans were divided on the legality of secession.[174]

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166 KEITH, *supra* note 159, at 131–32.

167 United States v. Cruikshank, 92 U.S. 542, 549 (1876).

168 *Id.* at 559.

169 *Id.* at 555.

170 *See* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 188 (new ed. 2007) (describing how military arms of the Democratic Party waged a "victorious guerilla war" that ultimately thwarted Republican efforts "to remake southern society").

171 *See* DU BOIS, *supra* note 137, at 336 (contending that the North had "formed a new United States on a basis broader than the old Constitution and different from its original conception" and that it was "idiotic" to look to the old Constitution for guidance).

172 *See id.* at 328, 336, 340.

173 *See* CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 5 (2017) (contending that "the U.S. government sought to mitigate the war's disruption of the regular legal process by selecting a test case that would provide a final determination of secession's constitutionality and the war's legitimacy").

174 *See id.* at 300.

G. The Niobrara River

Aziz Rana has done a great deal to dispel the myth that the Constitution has been revered since its ratification.[175] Still, constitutional veneration is with us now — in part because of President Lincoln.[176] In Amar's narrative, those who don't participate in the "cult" of the Constitution consistently lose (p. 278). His discussion of Native peoples in the late nineteenth century seems intended to illustrate this theme. It is an unwelcome and unfortunate intervention.

Recall that Amar situates President Adams alongside President Jackson without mentioning President Adams's fervent opposition to President Jackson's Removal of the Cherokee in the 1830s (p. 575). Amar does this in the service of apologizing for President Lincoln, whose anti-Tribal sentiments and actions he attributes to a "ghastly 1786 encounter" in which President Lincoln's paternal grandfather, also named Abraham, was shot and killed; his participation in the Black Hawk War of 1832; and his views about the superior productivity of farming (pp. 576–77).[177]

Amar then says that "Abe's allies . . . included as equal citizens only American-born Indians who lived outside tribal enclaves" (p. 578). If Amar is implying that the exclusion of the children of Tribal citizens from birthright citizenship stemmed from anti-Tribal refusal to "wrap[]" the "protective arms" of the United States around Indians (p. 578), this is contrary to a wealth of secondary literature placing that exclusion in the context of abolitionist and then Republican constitutionalism.[178] The Reconstruction Republicans who spoke most directly and authoritatively to the question of birthright citizenship for Indian children framed the exclusion as a recognition of Tribal sovereignty.[179]

One would also think from Amar's presentation that few Native people other than Ponca Chief Standing Bear even tried to interact nonviolently with the United States. We are told of Tribes who either joined the Confederacy "or us[ed] the rebellion to stab America in the back"

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[175] *See generally* AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM (2024) (discussing the varying levels of importance that the Constitution played in supporting political cohesion throughout American history and contending that attachment to the Constitution has put genuine democracy out of reach).

[176] *See id.* at 58.

[177] For more detailed accounts of President Lincoln and Native peoples that discuss his ordering and commutation of the largest mass execution in U.S. history during the Dakota War of 1862, see MICHAEL S. GREEN, LINCOLN AND NATIVE AMERICANS 70 (2021), and NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 293–94 (2023).

[178] *See* Bernick, *supra* note 59, at 1172; Gregory Ablavsky & Bethany Berger, *"Subject to the Jurisdiction Thereof": The Indian Law Context*, 100 N.Y.U. L. REV. ONLINE 201, 213, 223 (2025); Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331, 347–48 (2010); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 442–44 (2020); Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 558, 560 (2000).

[179] *See* sources cited *supra* note 178.

(p. 577). Of the Tribal citizens who fought for the Union[180] or the United States's betrayal of its constitutionally mandated treaty obligations,[181] we hear nothing.

Standing Bear's story has been recounted by federal Indian law scholars.[182] Adam Crepelle explains that Standing Bear litigated only because his demands that federal officials "g[et] off [his] land" were ignored, a quarter of his tribe was killed during Removal, and he was arrested after defying federal law by burying his son in ancestral Ponca lands, near the Niobrara River.[183] Bethany Berger emphasizes that the outcome of the litigation was more equivocal than Amar admits.[184]

Amar tells readers that "Standing Bear used his freedom as an equal citizen to travel and lecture across the eastern states" (p. 581). Indeed, Standing Bear was able to make a compelling case for the reform of federal Indian policy.[185] But when reform came, it came as deliberate cultural destruction — and some of Standing Bear's supporters facilitated it.

Two such supporters were Susette and Francis La Flesche, whom Amar calls "gifted mixed-race translators" (p. 581).[186] They were much more. Together with ethnologist Alice Fletcher, the La Flesches secured the allotment of Omaha land in 1884 and U.S. citizenship for members of the Omaha Tribe in 1887.[187] The results were disastrous, and by the end of 1887, 158 Omahas had petitioned Congress, pleading for their citizenship to be revoked.[188]

Ultimately, Amar provides little reason to think that if Native peoples had "carefully articulated for American citizens a vision of what the maturing nation's Constitution actually meant and/or what it should mean in a more just and more equal future," things might have gone better for them in the late nineteenth century (p. 554). Standing Bear

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180 For a corrective, see generally CLINT CROWE, CAUGHT IN THE MAELSTROM: THE INDIAN NATIONS IN THE CIVIL WAR, 1861–1865 (2019).

181 *See, e.g.*, PEKKA HÄMÄLÄINEN, LAKOTA AMERICA 342–80 (2019) (describing U.S. violations of the 1868 Treaty of Fort Laramie, including the seizure of the Black Hills (where gold had just been discovered), the ensuing Lakota victory at Little Bighorn, and the United States's retaliatory massacre at Wounded Knee Creek).

182 *See, e.g.*, Adam Crepelle, *Making Red Lives Matter: Public Choice Theory and Indian Country Crime*, 27 LEWIS & CLARK L. REV. 769, 774–76 (2023); Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1211 (2016).

183 Crepelle, *supra* note 182, at 775.

184 *See* Berger, *supra* note 182, at 1213.

185 *See* Crepelle, *supra* note 182, at 775; Berger, *supra* note 182, at 1214.

186 Amar's use of "race" to distinguish between Native and non-Native peoples would have benefited from conversation with federal Indian law scholars who have studied this complex area. *See, e.g.*, Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593 (2009); Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 297–98 (2015); Gregory Ablavsky, "*With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1028 (2018).

187 Berger, *supra* note 182, at 1208.

188 *Id.*

didn't engage in the sort of conversation that Amar considers the price of admission to American constitutionalism, and there's no reason to think that it would have been helpful for him to attempt to do so. There's an ongoing conversation about the need to reckon with the Constitution's role in American colonialism.[189] Alas, Amar doesn't join it.

CONCLUSION

In a candid postscript, Amar says that his target audience includes judges whom he intends to "set . . . straight" concerning the Constitution's original meaning (p. 611). A footnote in which Amar lists many citations of his work by Supreme Court Justices across the political spectrum is a reminder that Amar was once an *enfant terrible*, the subject of harsh criticism by his colleagues for his text and history–based challenges to doctrine developed by the liberal Warren Court (p. 612 n.1).[190] Amar evidently believes that what is now conventional wisdom — thanks in part to his efforts — is under attack. The *New York Times*'s *1619 Project* grounded national identity in slavery; Amar is determined to ground it in the Declaration's promise of equality, as expounded by the Great Emancipator (p. 4).[191]

The Constitution of the United States has been made into an instrument of both dominating and liberatory power. The stories we tell about the Constitution's history and the memories that those stories preserve can affect what kind of power we get out of it.[192] Not only peoples but what Robert Cover once called "normative universe[s]" can be destroyed by means of constitutional visions that marginalize and exclude competitors.[193]

Cover may have overemphasized judges' power to destroy normative universes.[194] But that doesn't justify Amar in asking them to exercise

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189 *See* Blackhawk, *supra* note 63, at 12–13; Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 316 (2020); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 562–63 (2021); Christian R. Burset, *The Founders' Common-Law Empire*, 35 YALE J.L. & HUMANS. 419, 435 (2024).

190 He was especially lambasted for his criticism of criminal procedure doctrines like the exclusionary and *Miranda* rules. *See, e.g.*, Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 822, 841, 846 (1994); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2635 (1996); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 2, 4 (1994).

191 The author claims that President Lincoln "invoked 1776 to reject '1619'" (p. 239).

192 *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024) (explaining how judicial narratives shape collective memories of the past and inform the values that claim constitutional significance in the modern world).

193 *See* Robert M. Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV 4, 4 (1983); Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, The Deed, and the Role*, 20 GA. L. REV. 815, 816 (1985).

194 *See* Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785, 1795–96 (1990); Sarah Krakoff, *Law, Violence, and the Neurotic Structure of American Indian Law*, 49 WAKE FOREST L. REV. 743, 752 (2014).

it. *Born Equal* slights the democratic work of multitudes of people who have shaped our constitutional order without sharing Amar's constitutional vision. And it obscures inequalities that will persist as long as the constitutional cult to which Amar demands fealty.

Alas.