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AKHIL REED AMAR

An Open Letter to Professors Paulsen and Powell

Dear Mike and Jeff,

A book is an open invitation to a conversation between an author and his (or her) readers, and I am delighted that you both have accepted the invitation that I sought to extend in *America's Constitution: A Biography*. I recall many face-to-face conversations with each of you when we were all students together at the Yale Law School in the early 1980s. I learned a great deal from you at that time; I have continued to learn a great deal from you in print since then—indeed, you are both repeatedly cited with approval in my book; and I look forward to learning more from each of you in the days to come as the conversation that we have begun in this *Journal* ripens into what I hope will be additional, more informal, discussions among us.

Mike, I have only two quick things to say in response to your very warm review.

First, thank you. Thank you for your enthusiasm and encouragement, and most of all for your generosity of spirit. (Perhaps all that time you spent trying to set me straight in law school was not wasted after all.) Since you raise the question of whether your glowing review might be thought by some to be strongly colored by our long friendship, it may be worth noting (though it is immodest of me to do so) that several other leading reviews, written by eminent lawyers and historians whom I know much less well, have been similarly glowing—much closer to your bottom line than to Jeff's.¹

1. See, e.g., Scott Turow, *Everything Is Illuminated*, WASH. POST, Sept. 25, 2005, at BW03 (“[E]legantly written, thorough but concise, and consistently enlightening. . . . As one expects from the best history, *America's Constitution* illumines many contemporary debates. . . . I expect to be taking Amar's volume off my shelf for years to come as an indispensable reference whenever I want to know more about the actual words that underpin contemporary constitutional debates. . . . It is . . . an uncommonly engaging work of scholarship and deserves to be valued as such.”); Gordon S. Wood, *How Democratic Is the*

Second, stay tuned. You raise important questions about a couple of suggestive but underdeveloped paragraphs that I penned on the Ninth Amendment. I hope to revisit this issue in greater detail in what will be a sequel of sorts, tentatively entitled *America's Unwritten Constitution: Between the Lines and Beyond the Text*.² The challenge, as I see it, is to take seriously unenumerated aspects of our constitutional tradition and practice but to do so in a way that does not undermine the preeminent virtues of a written constitution. Perhaps this cannot be done. Perhaps I am questing for a square circle. But as John Ely famously reminded us all in *Democracy and Distrust*, at critical moments the document itself does seem to gesture beyond its own four corners; and I aim to take seriously the gestures of both the Ninth Amendment and the Privileges or Immunities Clause. I hope to do so in a way that leads directly away from *Dred Scott*—not toward it, as you fear. As you note, my book sharply criticizes Taney's disgraceful opinion on originalist grounds. In my view, Taney's outlandish and outrageous conclusion that federal free soil laws were generally unconstitutional could in no way have been justified by honest reference to my proposed benchmarks for unenumerated rights—namely, “the great mass of state constitutions,” “widely celebrated lived traditions,” and “broadly inclusive political reform movements.”³ The majority of state constitutions in 1857 were themselves free soil; the actual lived tradition in antebellum America was of various federal free soil laws stretching uninterruptedly back to the Northwest Ordinance passed by the very first Congress; and slavocrats in the Deep South could hardly be reckoned a broadly inclusive movement given the massive political exclusions in the South—of slaves, of free blacks, and of antislavery whites.

In my hoped-for sequel, I also aspire to think carefully about the role of judicial case law and *stare decisis*. I see a somewhat larger role for *stare decisis* than do you, but like you I believe that ultimately the doctrine should be

Constitution, N.Y. REV. BOOKS, Feb. 23, 2006, at 25, 25-27 (“[A]n extraordinarily full, rich, and fair-minded interpretation of the text of the Constitution that ought to be read by anyone interested in the document. . . . [A]s a reference book, it is superb. It is, so far as I know, the fullest and most reliable explanation of the written Constitution that we have. . . . [Amar’s] case for the fundamentally popular and democratic origins of the Constitution in the setting of its time gives his book a special distinction as a work of history.”).

2. I hint at the general contours and contents of this hoped-for sequel in the closing page of my postscript. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 477 (2005).
3. *Id.* at 329.

subordinate to the text, enactment history, and structure of the document itself, and its grand theme of popular sovereignty.⁴

Jeff, you raise more questions for me (and about me) and so I owe you more answers. I appreciate that space constraints limited your ability to flesh out all your reservations about my recent book (and about some of my earlier work), so I hope that the conversation between us begun in this *Journal* can continue outside it. Like you, I shall confine myself here to a few exemplary points rather than trying to cover everything that you say.

For starters, you raise questions about my general interpretive methodology. I have tried to explain and exemplify my preferred method elsewhere—most elaborately in a couple of articles that appeared in the *Harvard Law Review*.⁵ Readers of this *Journal* can also get a sense of my overall approach from the other pieces in this Colloquium. You are right to call me a constitutional textualist,⁶ but I also fancy myself a constitutional structuralist and a historian of original meaning. Generally, I seek to braid together arguments from text, (enactment) history, and structure into a satisfying account of the document itself as distinct from much later case law interpreting the document, sometimes quite loosely. You wonder whether my approach mixes apples and oranges. I can only say that (1) if I do, there are times when mixture is appropriate (consider for example the fruit salad); and (2) there are

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4. I briefly develop this way of thinking about stare decisis and “precedent’s proper place” in Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78-89 (2000).
 5. See AMAR, *supra* note 2, at 329; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).
 6. A brief aside on textualism. There is, as you note, an inherent danger that a textualist may overread the text. I try to minimize this danger—though doubtless I fail at times—by trying wherever possible to use enactment history and structure to confirm the seemingly best reading of the text, and to reconsider my initial textual leaning if confirmation is not forthcoming. For example, at one point you raise a question about my emphasis on the power of Congress under the Constitution to wield “legislative power” and to adopt “laws”—words pointedly absent from the Articles of Confederation. You ask whether there is an important difference between “laws” enacted by the post-1788 Congress and “ordinances” adopted by the old Confederation Congress. I think the answer is yes, and my book provides historical support for this answer. See AMAR, *supra* note 2, at 516 n.61 (citing Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress, 1781-1789*, 41 AM. J. LEGAL HIST. 411 (1997)). Given that you yourself seem to concede the correctness of my bottom line that the Constitution’s “Congress” was “a quite different institution” with far more effective coercive power than the Confederation “Congress,” the difference between us may at times be an aesthetic one: You would prefer that a particular textual point go unmentioned since you see it as wholly makeweight, whereas I prefer to highlight the text in combination with my other constitutional arguments that confirm my reading of the text.

many distinguished constitutional scholars and practitioners—liberals and conservatives, on the bench and off—who are roughly in the same methodological camp as am I (consider for example Hugo Black, John Hart Ely, Doug Laycock, and Steve Calabresi).⁷

You also pose pointed questions about whether I am a proper historian.⁸ You are right that ultimately I am concerned with legal meaning. But legal meaning may of course pivot on certain historical facts. For example, on the question of the legal permissibility of secession, I think it hugely relevant that leading Federalists in leading places during the ratification process explicitly said that the new system would be indivisible; that no prominent Federalist ever said otherwise (even though this made it much harder to convince states' rightists and fence-sitters to vote yes); and that in the New York ratifying

7. You seem to think that I cannot be reckoned a proper originalist because of my views on Congress's power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." I believe that whether or not you accept my interpretation of this clause, my argument is emphatically one based on text, Founding-era history, and structure. *Journal* readers can judge this issue for themselves, for most of my argument about this clause appears in my introduction to this Colloquium, with additional methodological elaboration on my part. You also point to my views about Article V. On this topic, the views expressed in the book are different from the views that I put forth in earlier articles. (Mike is right to see important shifts in my thinking here and elsewhere.) In any event, regardless of what you might think about the ultimate soundness of my Article V arguments, they, too, are based on text, Founding-era history, and structure. (For what it's worth, my earlier articles on this topic also featured much more than the views of James Wilson. Rather, the argument was based on a textual analysis of various parts of the original Constitution and the Bill of Rights, on the meaning of state constitutions, and on things said by many Founding figures other than Wilson about the Preamble, and about the First, Ninth, and Tenth Amendments.)

At the risk of kibitzing on your conversation with Jed, I would also note that in an important respect, I think you have misstated his argument as well. He does not claim that Court doctrine has always hewed to the core Application Understandings. Rather, he claims only that today's doctrine generally does so. I think he is right to limit his claim, though all this does raise real questions about the Court's fidelity to his approach over the actual course of American history—a topic that you as a historically minded commentator might have interestingly commented upon. For example, Supreme Court Justices gleefully enforced the Sedition Act of 1798 and again enforced laws criminalizing mere antigovernment speech in the 1910s in violation of core Founding-era understandings. If, as I have tried to show—and as Jed has nowhere denied—a core Application Understanding of the Fourteenth Amendment was that the Bill of Rights would in general (and expression rights would especially) be applied or incorporated against the states, then here too we confront decade after decade of Supreme Court nonenforcement of core rights. So too with much of the Fifteenth Amendment, alas.

8. Interestingly enough, this is not a question that has typically arisen when various distinguished card-carrying historians—such as Jack Rakove, Gordon Wood, Pauline Maier, David B. Davis, Les Benedict, and Eric Foner have evaluated my work.

convention, the secession issue arose in a highly visible way and was resolved by a clear set of anti-secession-right votes at a time when all eyes on the continent had good reason to be glued to New York and when the Federalists understood that their stubbornness on this point might cause them to lose the ultimate ratification vote in this key convention. None of these facts made it into your critique of my account; but I think these facts from history do very much bear on the public meaning of the Constitution at the time of its enactment. I further explain how this public meaning was codified in various provisions of the Constitution's text—the “more perfect union” language of the Preamble, the uncompromising words of the Article III Treason Clause and the Article VI Supremacy Clause, and the evident contrast between the enactment rules of Article VII and the amendment rules of Article V—and by basic features of the Constitution's geostrategic national security structure.

If you think my legal bottom line is wrong, perhaps it might have been better for you to have set forth the entirety of my constitutional arguments—based on text, structure, and enactment history—and then presented your own legal counterarguments, so that the reader could judge for herself. You instead invoke the views of two earlier Jeffersons—Thomas Jefferson and Jefferson Davis. (What is it with you Jefferson guys, anyway?) To me, what Thomas Jefferson may have thought in the 1790s and 1800s is not particularly helpful in understanding the public meaning of a document publicly debated and enacted in 1787-1788, when Jefferson was an ocean away from the main event. Jefferson Davis (who was not even alive in 1788) likewise was in no real sense a “witness” to the relevant public conversation, and the textual, historical, and structural arguments that he made on behalf of secession simply failed to mention much of the relevant history that I have tried to bring to the surface, and in my view failed to rebut the strong arguments against him based on constitutional text and structure. Judged by legal ground rules of text, (enactment) history, and structure, Lincoln's bottom line was in my view right—not because he was a witness to the Founding but rather because his bottom line best squared with what the Founders said and did.

To the extent that you might disagree with Lincoln's bottom line on this issue, I would say, with all due respect, so much the worse for you. The question here is not some abstract hypothetical or merely some “fun” (your word) parlor game allowing “a twenty-first-century scholar [to] ask nineteenth-century questions and chastise nineteenth-century statesmen.”⁹ The legality or illegality of secession was probably the most serious constitutional question ever to arise in America. As a result of Lincoln's and

9. H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 *YALE L.J.* 2067, 2071 (2006).

Davis's different answers to this question, hundreds of thousands died, and ultimately our Constitution was reborn in the ashes. If Jefferson Davis was legally right, then it would seem that Abraham Lincoln was a lawless butcher—well intentioned, perhaps, but hardly a constitutional hero. Or if, as you at times seem to imply, neither side was clearly correct on the secession question, that legal conclusion, too, would I think badly tarnish Lincoln as both a lawyer and a President, charged as he was with preserving, protecting, and defending the Constitution.

Finally, a few words about the Preamble, constitutional geostrategy, and the Supremacy Clause. You quote Randolph pooh-poohing the significance of the Preamble, but do not note that I invoke perhaps the three most significant opinions of the Marshall Court—*Marbury*,¹⁰ *McCulloch*,¹¹ and *Martin v. Hunter's Lessee*¹²—each of which does turn to the Preamble at key moments. (As a rule, I'll take John Marshall and Joseph Story over Edmund Randolph any day.) The Preamble also of course looms large in the text itself—and was central to the ratification debates. You say that I make the “implicit but unmistakable” (and self-aggrandizing) claim that my book is “novel[]” in arguing that geographic-geostrategic and national security considerations drove the Founding.¹³ I make no such claim, and in fact I say just the opposite: Many important scholars have discussed these issues before me. The idea that the Founding was primarily about national security and geostrategy was, in fact, probably the dominant view of most scholarship prior to Beard, and I cite several leading post-Beardians who have seen the light, including Frederick Marks III, David F. Epstein, and Peter Onuf.¹⁴ Indeed, in my Postscript, I say that “I am especially indebted to Frederick Marks III, for his brilliant work establishing the primacy of national-security and foreign-policy concerns in the making of the Constitution.”¹⁵ To repeat: I do not say that my view about the

10. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

11. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402-05 (1819).

12. 14 U.S. (1 Wheat) 304, 324-25 (1816).

13. Powell, *supra* note 9, at 2075.

14. See AMAR, *supra* note 2, at 523 n.95; see also *id.* at 561 n.30, which cites, among other works, your own excellent book on presidential powers, *The President's Authority over Foreign Affairs: An Essay in Constitutional Interpretation*, and Dean Koh's fine book, *The National Security Constitution*.

15. See AMAR, *supra* note 2, at 47. In passing you note that I do not cite a 2002 book and a 2003 article. Despite over 100 pages of endnotes, I of course could not cite everything, and I chose to highlight the works that most influenced my thinking and that appeared in print before my own published work on this topic, which first appeared in 1987-1991. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469-78 (1989); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425,

primacy of these concerns is novel. Rather, I claim that most scholars have not yet seen the light, as they are in the grip of various towering twentieth-century scholars—Beard, Merrill Jensen, and even to some extent my hero Gordon Wood—who have downplayed these issues in their accounts.

What I do claim is novel is my specific argument: (1) that the Preamble’s phrase about “form[ing] a more perfect Union” strongly resembled, and was perhaps consciously borrowed from, the British indivisible Union of Scotland and England of 1707; (2) that the Preamble phrase blended language from the official 1707 enactment, which spoke of “rendring the union of the two kingdoms more intire and compleat,”¹⁶ with language from Queen Anne’s July 1, 1706 letter to the Scotch Parliament, which spoke of an “entire and perfect Union”;¹⁷ (3) that the conceptual linkage between the Preamble’s more perfect union and the earlier 1707 union was publicly explained to ratifying Americans; and (4) that this high visibility 1707 model—this paradigm case, to use Jed’s jargon—of an indivisible island-nation drove the basic Federalist argument in 1787-1788 for an indivisible America that would rely on her oceans to secure her liberty, *à la* Britain. You say that there is no evidence that anyone at the Founding understood how the Preamble reflected and codified this vision. Here is a snippet of evidence—taken from *The Federalist* No. 5—that I would say does make the link between the Preamble’s language and the 1707 Act:

Queen Anne, in her letter of the 1st July, 1706, to the Scotch Parliament, makes some observations on the importance of the *Union* then forming between England and Scotland, which merit our attention. . . . “An entire and perfect union will be the solid foundation of lasting peace:”

. . . .

The history of Great Britain . . . gives us many useful lessons. . . . Although it seems obvious to common sense that the people of such an island should be but one nation, yet we find that they were for ages

1462-63 n.162 (1987); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 485-97 (1991). In retrospect, I do wish that I had mentioned my towering friend Philip Bobbitt, from whom I have learned so much in print and in person. See Akhil Reed Amar, *In Praise of Bobbitt*, 72 TEX. L. REV. 1703 (1994). Though Bobbitt’s 2002 book came to hand too late to influence the particulars of my analysis in *America’s Constitution*, I suspect that some of my appreciation of the centrality of national security issues has come from casual conversations with Phillip.

16. See AMAR, *supra* note 2, at 36.

17. *Id.*

divided into three, and that those three were almost constantly embroiled in quarrels and wars with one another. Notwithstanding their true interest with respect to the continental nations was really the same, yet by the arts and policy and practices of those nations, their mutual jealousies were perpetually kept inflamed, and for a long series of years they were far more inconvenient and troublesome than they were useful and assisting to each other.

Should the people of America divide themselves into three or four nations, would not the same thing happen? Would not similar jealousies arise, and be in like manner cherished? Instead of their being “joined in affection and free from all apprehension of different interests,” envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits. Hence, like most other *bordering* nations, they would always be either involved in disputes and war, or live in the constant apprehension of them.¹⁸

I believe that readers will find lots more evidence in the opening chapter of *America’s Constitution*.¹⁹

Finally, we come to the words in the Supremacy Clause that speak of “the land”—words that you insist have no conceivable legal bearing on the territorial-geographic nature of the American Constitution. You assert that “[n]o competent lawyer”²⁰ would point to these words in, say, explaining why a state could not unilaterally take its land with it and leave the Union. I consider Lincoln a pretty darn competent lawyer, and though I admit that he did not highlight these two words in precisely the way that I have highlighted them, he did in his First Special Message to Congress on July 4, 1861 say that “even Texas gave up [her sovereign] character on coming into the Union; by

18. THE FEDERALIST NO. 5, at 18-19 (John Jay) (Clinton Rossiter ed., 1961).

19. You mention that the Articles of Confederation also contained important language about “common defence” and note that I too point this out. You somehow think language from the Articles thus undercuts my constitutional argument. How so? I think the central purpose of the Articles was to secure common defense, and that it was failing its basic mission—hence the need for a new Constitution that would accomplish the most basic aims of 1776. This was indeed the basic Federalist argument—that the new Constitution would in fact vindicate the national security purpose of the old Articles. See THE FEDERALIST NOS. 40-41, 45 (James Madison). But all this stands in tension with the Beardian and neo-Beardian view that still prevails in many modern circles and that focuses more attention on class issues, the Contracts Clause, and matters of internal governance.

20. Powell, *supra* note 9, at 2078.

which act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land”;²¹ and then in his Second Annual Message (on December 1, 1862) Lincoln proceeded to elaborate at great length the significance of territorial-land-based considerations that argued strongly against secession. I quote extensively from this Message in my book, and I shall not repeat the passage here.²² (It’s also worth mentioning here that in his Inaugural Address, Lincoln argued against secession by quoting and highlighting the Preamble phrase about “form[ing] a more perfect Union.”²³)

Now, I think it will be quite clear to any fair-minded reader of my book that my specific reference to the words “the land” in Article VI is only one of a long string of pieces of legal evidence that I invoke for my views about the basic indivisibility of the Constitution and for the significance of geography and geostrategy in its creation. But you seem to think that this is the thirteenth chime of the clock that calls into question all that went before. OK, I’ll take the bait and take you on here. However, every reader of this *Journal* should be aware that I am spending vastly more space elaborating a small point than I actually spent making it my book. And I am doing so only because you think this is somehow proof of my fondness for arguments that no competent lawyer would make.²⁴

First, the “land” language of this clause was added at Philadelphia at precisely the same instant that various changes to the Preamble were made that textually highlighted the geostrategic link to Britain’s perfect union—and by

21. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 434 (Roy P. Basler ed., 1953).

22. See AMAR, *supra* note 2, at 52. Here is some additional language from this speech linking land and law:

A nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability. “One generation passeth away, and another generation cometh, but the earth abideth forever.” It is of the first importance to duly consider, and estimate, this ever-enduring part. That portion of the earth’s surface which is owned and inhabited by the people of the United States, is well adapted to be the home of one national family; and it is not well adapted for two, or more.

Id.

23. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 21, at 262, 265.

24. Really, Jeff, surely you can’t mean this. One quick data point: my own work has been cited with approval by the Supreme Court about twenty times in the last twenty years—by Justices from every wing and on a broad range of topics. This is not how one would expect the Court to treat some legal incompetent who does not understand the basics of constitutional argumentation.

precisely the same Committee of Style (led by Gouverneur Morris).²⁵ You say that the “land” language was simply lifted from Magna Charta, but it is widely understood that in America “the law of the land” can mean something different than in England. For example, here, “the law of the land” Clause establishes judicially enforceable limits on the power of Congress whereas English law does not envision judicial review of acts of Parliament. In part, this is because of other differences in language between England’s “law of the land” documents and America’s Article VI. But it is also well established that even the identical words can sometimes sensibly mean different things when used in a different context. (For example, Americans thought that various words of Magna Charta meant jury trials, when in fact this was probably not so originally. Much of the language of the Bill of Rights meant something rather different to the Fourteenth Amendment framers who reglossed it than it did to their Founding forbearers. Various words from the Establishment Clause changed meaning dramatically when copied verbatim by state constitutions.) Moreover, even in England, there were and are strong territorial elements worthy of our attention. In a feudal system in which military obligations traveled through land, a person born of foreign parents on English soil owed permanent obligations to the English crown; and England had strict territorial ideas about the use of the militia outside English soil and about the presence of slavery on English soil.

In short, I mentioned the words “the land” not because these words must be read in the way I suggest, but because they may permissibly be so read if such a reading makes good structural sense and coheres with the broad enactment history and the overarching purposes of the Constitution itself—which I think it does (and here I build on arguments that President Lincoln made long ago). Whether or not you agree with my argument, I believe that you should admit that it is strictly legal, and even (dare I say it?) competent.

I am loath to close on this note of sharp disagreement. So let me instead issue another invitation: Let’s keep the conversation going. Mike, Jeff, next time you are in New Haven, the pizza is on me.

Sincerely,
Akhil

25. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 565, 572, 590, 603 (Max Farrand ed., rev. ed. 1937).