



9-19-2022

Playing with Words: Amar's Nationalist Constitution

Robert J. Pushaw Jr.

Pepperdine Caruso School of Law, robert.pushaw@pepperdine.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr-online>



Part of the [Constitutional Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

Robert J. Pushaw, Jr., *Playing with Words: Amar's Nationalist Constitution*, 80 WASH. & LEE L. REV. ONLINE 55 (2022), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol80/iss2/1>

This Development is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Playing with Words: Amar's Nationalist Constitution

Robert J. Pushaw, Jr.*

Abstract

This essay provides a balanced critique of Akhil Amar's important book on early constitutional theory and practice. On the one hand, Amar's work has three unique virtues. First, unlike other constitutional historians, he does not examine a particular clause or a brief time period (such as 1787-1789), but rather analyzes the Constitution as a whole from 1760 to 1840. This holistic and longitudinal approach enables him to trace in detail the evolving constitutional views of America's leading Founders—John Adams, Alexander Hamilton, Thomas Jefferson, James Madison, John Marshall, and George Washington—and the personal relationships among those men that helped shape those views. Amar demonstrates that, contrary to popular belief, these dead white guys actually have much useful to say about modern constitutional law. Second, he contends that the Constitution has always been a living document—the subject of an ongoing conversation among all Americans. Third, among law professors, Amar has no peer as a wordsmith. He writes with singular power, precision, flair, and wit.

On the other hand, Professor Amar's extremely nationalistic vision of the Constitution leads him to excessively praise the similarly broad interpretations of federal power presented by Hamilton, adopted by Washington (whom Amar deems the true Father of the Constitution), and eloquently explicated by the

* James Wilson Endowed Professor, Pepperdine Caruso School of Law. J.D., Yale, 1988.

Marshall Court. Conversely, Amar tends to belittle the opposing constitutional approach of Madison and Jefferson as unprincipled political gamesmanship, instead of fully and fairly engaging with their arguments. Indeed, if Amar is correct that the Constitution developed as a dialogue in which ordinary people participated, then they must have endorsed the narrow construction of the Constitution proffered by Jefferson and Madison (and their successors Monroe and Jackson) because Americans elected these men as Presidents for four straight decades.

Whether one agree or disagrees with Amar, however, he is our most creative and prolific scholar of constitutional law and history. Therefore, any serious student of the Constitution must grapple with his analysis and conclusions.

Table of Contents

INTRODUCTION	56
I. SAY YOU WANT A REVOLUTION?	60
II. AMAR’S HOLISTIC AND NATIONALISTIC CONSTITUTION. 61	
A. <i>The Federal Government’s Constitutional Powers: Broad Yet Bounded</i>	62
B. <i>The ICC’s Original Market-Based Meaning</i>	63
C. <i>The Implications of Amar’s “Holistic” Constitution</i>	70
III. CONSOLIDATING THE CONSTITUTION, 1789–1840.....	71
A. <i>The National Bank</i>	73
B. <i>Jefferson to Jackson, 1801–1837</i>	76
CONCLUSION.....	79

INTRODUCTION

Commentators often dismiss America’s Founders as elitist, racist, sexist, white men who have little useful to say about constitutional law in our modern, diverse nation. Akhil Amar begs to differ. His latest book explains the vital contemporary significance of the Constitution’s text, as understood by those who wrote, ratified, and implemented it. He demonstrates that

practical experience and a clear-eyed view of human nature—not abstract theory—primarily forged our Constitution, yielding certain timeless principles.¹

To be sure, Professor Amar acknowledges the Constitution’s flaws, most obviously its pro-slavery tilt.² Nonetheless, he emphasizes that the Constitution has always engendered an ongoing conversation among all Americans—not merely government officials and intellectuals, but also ordinary folks.³ Thus, We the People have given its words fresh meaning in light of political, social, and economic developments, while always attempting to remain true to—indeed, to perfect—ideals of representative democracy, diffused government power, liberty, and equality.

Amar’s book is unique in several ways. Most importantly, whereas constitutional historians tend to focus on a specific clause or a short time period (typically 1787-1789), he examines the Constitution as a whole over an eight-decade stretch, starting in 1760.⁴ This holistic and kaleidoscopic treatment enables him to trace the evolving views of Founders such as John Adams (1735–1826), Thomas Jefferson (1743–1826), and James Madison (1751–1836).⁵ Amar argues that Adams and Jefferson were men of 1776, not 1789, who never fully grasped the Constitution’s novelty and nuances because they were in Europe during its drafting and ratification.⁶ While acknowledging Madison’s crucial role in both processes, Amar contends that Madison abandoned his correct nationalistic understanding of the Constitution when Jefferson returned in 1790 and persuaded his protégé to espouse limited federal authority and robust state reserved powers.⁷

1. AKHIL R. AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840* at 151–271 (2021).

2. *Id.* at 215–16, 462–64, 518–22, 597–98, 696.

3. *Id.* at x–xiii, 41–44, 155–59, 182, 191–93, 220–22, 226–27, 242–43, 328, 377–79, 690–91.

4. *Id.* at x–xii.

5. *Id.* at 694–96.

6. *Id.* at 185, 408–09, 455, 569–71, 662. Amar wickedly characterizes Adams as “a constitutional Rip Van Winkle who had slept through many of the most important events and conversations that a sound constitutionalist needed to understand.” *Id.* at 409.

7. *Id.* at xi, 350, 360–73, 405, 414–56, 525, 666–73, 692.

Professor Amar makes the controversial yet persuasive claim that George Washington, not Madison, was the Father of the Constitution.⁸ Washington got virtually everything he wanted at the Philadelphia Convention (especially a beefed-up federal government with a strong executive and greatly enhanced military power); his support for ratification carried more weight than any other argument; and as President he consistently advocated muscular federal authority.⁹ Amar commends President Washington for following the broad interpretations of the federal government's constitutional powers offered by Hamilton, the legal and financial genius who placed the fledgling federal government on solid footing.¹⁰

Professor Amar also insightfully humanizes the Founders. For example, he shows that the Revolutionary War resulted in part from English leaders' personal disrespect of men like Washington, Adams, Benjamin Franklin, and James Otis simply because they were American.¹¹ Similarly, Amar describes several deep personal connections—Washington's paternal bond with Hamilton; Jefferson's collaboration with Madison; Chief Justice John Marshall's mentorship of Joseph Story; and the animosity between the Hamiltonian Federalists and the Jeffersonians—that profoundly affected how the Constitution was interpreted and carried into effect.¹²

Amar's wide-angle lens is often cinematic, as he moves back and forth in time to make vital connections. For instance, the Articles of Confederation's weak central government frustrated Washington, Hamilton, and Marshall during the Revolutionary War. This experience led them to champion ratification of the Constitution and to interpret it through a nationalistic prism, as seen in the Washington Administration's decisions in the 1790s and in Chief Justice Marshall opinions from 1803 to 1835.¹³

8. *Id.* at 212–14.

9. *Id.* at 187–96, 212–14, 252–53, 270–71, 275–326, 353–60, 379–98, 686, 691.

10. *Id.* at 329–93, 692–93.

11. *Id.* at 32–33, 38, 115–16.

12. *Id.* at 322, 349–98, 405–96, 519–82, 694–96.

13. *Id.* at 117–18, 163, 186–89, 212–14, 229–31, 252–54, 275–398, 468, 483–496, 524–81.

Professor Amar's ideas are so thought-provoking that it is easy to overlook his engaging writing style. Every sentence is meticulously crafted, often with poetic touches and deft humor. I will often quote his wordplay, but here are a few illustrations. State constitutions "sprouted like so many daffodils in the springtime of the New World."¹⁴ Virginia slaveowners who knew the institution was wrong were like "lifelong smokers who wanted to quit."¹⁵ "Hamilton was not a backstabber. He was a front-stabber, open and honest in his confrontations."¹⁶

Alas, Amar's vast learning, peerless legal analytical skills, and facility with language sometimes lead him to simply denigrate alternative constitutional arguments. Most notably, his fervently nationalistic vision of the Constitution induces him to praise the similar views of Washington, Hamilton, and Marshall as plainly correct—and to condemn Jefferson and Madison's narrower interpretations of federal power as unprincipled political pandering.¹⁷ Yet Amar's very theme is that the Constitution evolved as a conversation in which ordinary Americans participated. Logically, they must have agreed with Jefferson when they elected him President a mere decade removed from the birth of our constitutional government—then reelected him and his disciples Madison and James Monroe. Amar's nationalism also explains his bald assertion that Congress's power "to regulate commerce . . . among the several States" licensed it to reach *all* interactions that had out-of-state impacts, whereas the linguistic and historical evidence clearly reveals that Congress could reach only interstate activities that were "commercial" (i.e., geared to the market).¹⁸

Of course, some mistakes are inevitable in an eight-hundred-page tome. Professor Amar's book is essential reading, not only for scholars but for anyone who wants to learn about constitutional law and history. Following his structure, I will

14. *Id.* at 153.

15. *Id.* at 293.

16. *Id.* at 655.

17. *Id.* at xi, 360, 366–70, 427–28, 561, 692.

18. See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 1–67 (1999) (summarizing this evidence).

divide this review into three Parts: Revolution, Constitution, and Consolidation.

I. SAY YOU WANT A REVOLUTION?

Amar deems James Otis the main planter of the seeds of independence, as Great Britain's increasingly heavy-handed laws led the colonists to unite in opposition.¹⁹ Otis was overwrought, but "in the middle of all the hay were a few sharp and steely needles."²⁰ He was the first to articulate the key constitutional ideas that gradually found wide acceptance: (1) Parliament could not enact a law contrary to England's unwritten Constitution; (2) specifically, there could be "no taxation without representation;" and, ultimately, (3) Parliament had no constitutional power to impose *any* laws on the American colonists, who accordingly had the Lockean right to revolt.²¹ Amar stresses that these radical ideas could be disseminated rapidly because, beginning in the 1760s, English and American writers began to converse primarily in letters, newspapers, pamphlets, and essays instead of learned books.²² Finally, he maintains that the success of the Continental Congresses of 1774–1775 and the Declaration of Independence depended on uniting Massachusetts—the revolutionary hub led by Adams—with Virginia (the oldest, largest, and wealthiest colony) and that Washington's appointment as Commander in Chief helped to cement the union.²³

Amar breathes new life into the standard history of the causes of the American Revolution, but does not break much new ground. By contrast, his analysis of the Constitution is highly original, which reflects his lifelong immersion in two different disciplines: American history and constitutional law.

19. See AMAR, *supra* note 1, at 3–95, 679.

20. *Id.* at 47.

21. *Id.* at 9–39.

22. *Id.* at 41–44, 682. Perhaps the best illustration of this more informal type of communication was Franklin's ubiquitous "Join or Die" snake cartoon. *Id.* at 98–103, 238–42, 680–82.

23. *Id.* at 104–36.

II. AMAR'S HOLISTIC AND NATIONALISTIC CONSTITUTION

In Amar's telling, the Philadelphia Convention delegates pragmatically cobbled together the best features of state constitutions and the Articles of Confederation—"first drafts," often hastily written during the beginning of the Revolution—while creatively addressing the weaknesses of these documents.²⁴ Democratic ideals demanded short constitutions written in plain language for ordinary people (not lawyers) that could be easily published in the popular press.²⁵ Federalist thinkers did make one major contribution to constitutional theory: relocating "sovereignty" from the government (particularly the legislature) to "the People" collectively, who could delegate their power as they pleased to their government servants.²⁶ This idea of popular sovereignty led certain states like Massachusetts, a few years after the initial 1776 rush of constitutions enacted by legislatures, to instead submit proposed constitutions to special "conventions" in which delegates elected by the People would debate the document and then vote on whether or not to approve it.²⁷

Professor Amar emphasizes that the United States Constitution was both drafted and ratified through such one-time, "conversational" conventions.²⁸ The Philadelphia Convention met in 1787 to revise the Articles of Confederation, which had certain virtues (e.g., recognizing "the United States of America," abolishing hereditary positions, and treating states equally), but fatal vices.²⁹ The Confederation featured an impotent central government that relied on states to pay taxes

24. *Id.* at 151–271, 685. As Amar vividly puts it: "The delegates were not trying to fashion the best imaginable Constitution in principle for some Utopia. They did not see themselves as so many Platos or Thomas Mores." *Id.* at 220. Moreover, the Constitution established the most democratic form of government and election system the world had ever seen, even though to our modern eyes its exclusion of groups like slaves and women looks undemocratic. *Id.* at 220–22, 225–27, 689–91.

25. *Id.* at 154–57, 684.

26. *Id.* at 93–95, 182, 191–93, 206–11, 244, 688.

27. *Id.* at 158–62, 242–43, 251.

28. *Id.* at 181–271. The deliberative process often led to delegates' "convention conversation conversion," in Amar's neat alliterative phrase. *Id.* at 251.

29. *Id.* at 162–68, 684.

voluntarily, address military emergencies, honor treaties, and enforce national laws, but that had no mechanisms—such as independent executive and judicial branches—to ensure compliance.³⁰ Amar makes the familiar point that the Framers sought to significantly strengthen the national government,³¹ but he downplays their decision to limit that government to its enumerated powers.

A. The Federal Government's Constitutional Powers: Broad Yet Bounded

The Constitution established three independent branches and granted the national government the traditional “great powers” over war, foreign affairs, commerce, and revenue.³² First, the new Congress retained all of the Confederation’s powers (e.g., maintaining post offices and regulating coinage), but received needed powers to (1) raise money by taxing private individuals and entities; (2) create, regulate, and fund the military; (3) regulate foreign, interstate, and Indian commerce; (4) organize the executive and judicial departments, with the Senate authorized to confirm or reject the President’s appointees and to ratify treaties; and (5) govern the territories.³³ Second, Article II established an independent executive department headed by a single President with exclusive power to execute the law and to command the armed forces, as well as substantial leadership of foreign affairs.³⁴ Third, Article III vested “judicial power” in courts staffed by life-tenured federal judges with jurisdiction over “all Cases” and “Controversies” that had national or international implications.³⁵

30. *Id.* at 169–78. Furthermore, the Articles did not authorize (1) the Confederation government to control Western lands (although it eventually asserted such power in the Northwest Ordinance), or (2) any amendments without unanimous consent, which proved impossible to obtain despite America’s increasingly dire political and economic situation in the 1780s. *Id.* at 169, 174–78.

31. *Id.* at 151–271.

32. See Nelson & Pushaw, *supra* note 18, at 17, 25–56 (describing the constitutional scheme).

33. AMAR, *supra* note 1, at 182–89.

34. *Id.* at 183–84, 190.

35. *Id.* at 184, 190–91.

Not content with this huge increase in federal power, Professor Amar believes that the Framers should have granted even more: “[T]he new Congress would also need sweeping legislative power to regulate all matters that genuinely spilled across state lines.”³⁶ Yet the Constitution itself nowhere mentions such omnicompetence. This void forces Amar to repeat a claim he initially made in 2005: that the word “commerce,” as used in the Interstate Commerce Clause (“ICC”), meant all “intercourse”—including social and political interactions—that had impacts across state borders.³⁷

B. The ICC’s Original Market-Based Meaning

This assertion lacks a credible linguistic or historical basis. In a lengthy 1999 article, Grant Nelson and I analyzed over a thousand primary sources that illuminated (1) the British conception of “commerce” in both ordinary and legal usage before 1787; (2) the understanding of that term in America in the eighteenth century; (3) the Commerce Clause’s drafting and ratification history in the context of the Constitution’s overall structure and purposes; and (4) the Clause’s early implementation by Congress and the Court.³⁸ That evidence revealed that “commerce” meant the voluntary sale of goods or services and all accompanying activities oriented toward the market.³⁹ Thus, Congress could regulate as “commerce” not merely trade in goods—its core meaning⁴⁰—but also making products for sale (e.g., through manufacturing or agriculture); rendering compensated services such as transportation, banking, insurance, labor, and public accommodations; and business documents.⁴¹

36. *Id.* at 189.

37. *See id.* at 189, 736 n.3; AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 107-108 n.* and accompanying text, 542 (Basic Books 2005).

38. *See* Nelson & Pushaw, *supra* note 18, at 9–67.

39. *See id.* at 9, 107–10.

40. *See* Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 696, 700, 705-06, 711 (2002) (recognizing this primary definition of “commerce”).

41. *See* Nelson & Pushaw, *supra* note 18, at 9–12, 14–25, 36–42, 45–46, 50–63, 107–13, 119–27, 136–52, 158–63.

Nelson and I argued that Congress could reach all such “commerce”—even matters that could not have been foreseen in 1787.⁴² Hence, most federal statutes fall within the Nelson/Pushaw definition of “commerce.” Nonetheless, the Clause has clear limits. For instance, “commerce” includes goods and services provided for the market, but not for individual or household consumption.⁴³

Finally, if Congress has regulated “commerce,” that activity must be “among the several States” (that is, have a non-trivial impact in more than one state).⁴⁴ As America’s economy has become ever more integrated, almost all “commerce” will have such an interstate effect.⁴⁵

The foregoing interpretation of the ICC complements the Constitution’s structure. The Framers declined to make Congress a Parliament that could pass any laws it thought would be in the general interest, but instead confined Congress to specified powers and left all others to either the states (to preserve their autonomy over matters of public health, safety, welfare, and morality) or “the People” (to promote individual liberty).⁴⁶ In particular, the Clause reflected the Federalist idea that national uniformity was desirable in interstate commerce, but not in purely social, cultural, and moral areas (such as

42. See *id.* at 8–10, 69 n. 300, 108, 124–25. Thus, the *legal* meaning of “commerce”—market-based goods and services—remains constant, but can be applied to changing *factual* circumstances. For example, Congress can guarantee a free market through antitrust and antidiscrimination laws and can regulate the impacts of commercial production, such as pollution. *Id.* at 79–93, 107–73.

43. The modern Court has disregarded this restriction in allowing Congress to regulate the personal or home growth and use of commodities like wheat and marijuana. See Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress’s Powers*, 2012 ILL. L. REV. 1703, 1710, 1735, 1737–42. Another limit is that “commerce” must be voluntary, so Congress cannot force people to buy products or services, as it attempted to do in the Affordable Care Act. See *id.* at 1707–08, 1743–53. A final illustration: Congress cannot address crimes, except for the few that are “commercial,” such as interstate drug or prostitution operations. See *id.* at 1740.

44. Nelson & Pushaw, *supra* note 18, at 10–11, 42–49, 110–12.

45. *Id.* at 11, 49, 110.

46. *Id.* at 25–30, 43–46.

personal relationships, private associations, and religion) and political and legal subjects like family law and most crimes.⁴⁷

Professor Amar breezily dismissed all of the foregoing evidence in his 2005 “biography” of the Constitution.⁴⁸ His skeletal argument, later fleshed out by Jack Balkin, was that “commerce” meant “intercourse” (“interactions,” in modern parlance)—not only economic but also *social* (such as friendships, meetings, conversations, correspondence, religious worship, and networks of transportation and communication) and *political* (for example, dealing with foreign nations and people).⁴⁹ Accordingly, Congress has always been able to regulate any interactions that extend beyond a state’s borders in either their operations (e.g., transportation and communication and their networks) or effects (activities in one state that generate collective action problems or spillovers, such as pollution).⁵⁰

Amar did not mention that Nelson and I had considered this “interaction” definition and rejected it as contrary to the overwhelming weight of evidence.⁵¹ That conclusion did not change after I examined all of Amar’s supporting sources and others provided by Balkin. In a detailed response, I stressed that they did not grapple with my massive documentation of the primary market-based meaning of “commerce” *as used in the ICC*, but rather cobbled together random sources (such as European philosophers)—often published long before 1787—mentioning “commerce” in its nonstandard sense of personal or social “intercourse.”⁵² Most pertinently, they did not cite *anyone*

47. *Id.* at 11–12, 113–19.

48. *See* AMAR, *supra* note 37, at 107–08 n.* and accompanying text, 542 nn.18–19.

49. *See id.*; *see also* Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 5–6, 15–29 (2010).

50. *See* AMAR, *supra* note 37, at 107–08 n.* and accompanying text; Balkin, *supra* note 49, at 5–6, 17–18, 22–24, 28–44, 49–51.

51. *See* Nelson & Pushaw, *supra* note 18, at 19, 41.

52. *See* Pushaw, *supra* note 43, at 1705–20. Amar and Balkin have also ignored that the word “commerce” always carried its market-oriented meaning when preceded by the phrases “to regulate” or “regulations of,” most notably in the many seventeenth- and eighteenth-century Acts of Parliament “to regulate commerce” that the Framers and Ratifiers used as their model. *See* Pushaw, *supra* note 43, at 1711, 1715–19 (citing Nelson & Pushaw, *supra* note 18, at 14–19).

who drafted, ratified, or implemented the ICC who expressed this understanding, whereas the market-based meaning was widely noted.⁵³ Furthermore, the idea that the ICC authorized Congress to reach *all* interactions contradicts the Framers' decision to withhold such general lawmaking authority and instead enumerate Congress's powers.⁵⁴ The most obvious defect in the Amar theory is that it would allow Congress to regulate all personal, social, and religious interactions that transcended state borders—federal government intrusion that would have been unthinkable in 1787.⁵⁵

Amar's focus on the Constitution's language⁵⁶ sits uneasily with his notion that the Framers gambled that Americans would understand "commerce" in its unusual sense of "intercourse," instead of explicitly inserting that word to clarify that they intended this arcane meaning.⁵⁷ Then as now, standard rules of interpretation require reading the phrase "to regulate commerce" as conveying its ordinary meaning: making rules to govern market-directed activities.

Professor Amar's new book does not cite, much less address, my responsive article. Instead, in a one-page footnote, he reiterates a dubious claim he made in 2005.⁵⁸ In both books, Amar begins by observing that (1) Article I authorized Congress to regulate "commerce" not only "among the several States," but also with "Indian Tribes" and "Foreign Nations;" and (2) "commerce" presumably had the same meaning in all three categories. Based on the premise that the Indian Commerce

53. See *id.* at 1714–20, 1730 (citing Nelson & Pushaw, *supra* note 18, at 15–16, 21–42, 45–46, 101).

54. See *id.* at 1717–26, 1730. Amar and Balkin rely on a tentative resolution introduced on the first day of the Philadelphia Convention that would have given Congress comprehensive authority over interstate affairs, rather than the Framers' later and final decision to reject that resolution and instead enumerate—and thereby limit—Congress's powers. See *id.* at 1721–26.

55. See *id.* at 1706, 1712–14.

56. Amar seeks to answer one central question: "What did these words mean and how should they be read and made real?" See AMAR, *supra* note 1, at xiii. Starting in 1789, the key issue was "what America's written Constitution did in fact say" about specific topics. See *id.* at 327.

57. See Pushaw, *supra* note 43, at 1716, 1720, 1730.

58. For the argument in this paragraph, see AMAR, *supra* note 1, at 189, 736 n.3, and AMAR, *supra* note 37, at 107–08 n.* and accompanying text & 542 nn.18–19. It is elaborated upon in Balkin, *supra* note 49, at 6, 13–17, 23–29.

Clause is the sole source of federal power over Native Americans, Amar asserts that the First Congress invoked this Clause to regulate all social and political “intercourse” with Indian Tribes, not just market-oriented transactions. Therefore, by analogy Congress must also have been able to regulate as “commerce” all interactions that occurred “among the states.”

Although Professor Amar is correct that “commerce” carried the identical meaning in all three parts of the Commerce Clause, that meaning is market-based activity. Amar erroneously assumes that the Indian Commerce Clause was intended as the exclusive font of federal authority over Indians.⁵⁹ Rather, that Clause authorized Congress to regulate market “commerce” with Indian Tribes, whereas other constitutional provisions—particularly those addressing military and foreign affairs—and structural principles (most importantly, that only the United States could deal with other sovereigns, including Indian nations) combined to confer broad federal control over noncommercial matters.⁶⁰

Amar ultimately rests his thesis on the early “Acts to Regulate Trade and Intercourse with the Indian Tribes.”⁶¹ He infers that such legislation could only have been passed under Congress’s power “to regulate commerce . . . with Indian Tribes,” and that therefore “commerce” must include both “Trade” (the sale of goods) and “Intercourse” (noneconomic

59. See Pushaw, *supra* note 43, at 1727, 1729–34.

60. See *id.* at 1717, 1725–34, 1726–30 (citing Nelson & Pushaw, *supra* note 18, at 21–37, 49–50). The Constitution’s creation of a genuine nation to replace a confederation of independent states necessarily conferred on the new federal government exclusive authority to address other sovereigns in areas like war, treaties, and other foreign affairs. Treaties with any sovereign could address all issues of mutual concern, so a Tribe might consent to allow United States officials into its territory to enforce federal treaties and statutes. *Id.* The many constitutional powers concerning Indian Tribes could be deployed in a coordinated way as to commercial matters. For example, the early federal government made commercial treaties with Indian Tribes, which Congress could then implement by enacting laws necessary and proper to effectuate those treaties. Congress also had direct power to regulate commerce with Indian Tribes—including protecting such commercial regulations from tortious or criminal interference. See Pushaw, *supra* note 43, at 1727, 1729–30; Nelson & Pushaw, *supra* note 18, at 49–50, 66, 148–49.

61. AMAR, *supra* note 1, at 736 n.3.

interactions like crimes on Indian lands).⁶² Textually, however, if Congress understood that “commerce” meant “intercourse” of all kinds, it presumably would have said “An Act to Regulate Commerce with the Indian Tribes.” Yet Congress used two words: “Trade” (which certainly referenced the Commerce Clause) and “Intercourse” (which pointed to other constitutional provisions and principles). The historical record confirms this dichotomy. Federal officials understood that the Indian Commerce Clause empowered Congress to regulate “commerce” (market activities such as “trade” in goods like liquor) with Indian Tribes, whereas different constitutional clauses and principles governed other “intercourse” with Indians.⁶³

In his new book, Amar adds only one primary source to support his idea:

[As] Chief Justice Marshall recognized in his most important pronouncement on Indian law: “The *whole intercourse* between the United States and this Indian nation is, by our constitution and laws, vested in the government of the United States” (emphasis added). *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Ten times in *Worcester*, Marshall spoke of Congress’s power to “*regulate . . . intercourse*” (emphasis added)—whether or not narrowly economic—with Indians. These repeated references obviously glossed the Article I clause giving Congress the power to “*regulate Commerce*” (emphasis added) with Indians.⁶⁴

That selective citation ignores that the Court in *Worcester* did not “gloss” the Indian Commerce Clause alone, but rather

62. See *id.* “Congress plainly read Indian ‘commerce’ as synonymous with Indian ‘affairs’ and Indian ‘trade and intercourse’ more generally.” *Id.*

63. See Pushaw, *supra* note 43, at 1729–32 (citing statutes). Professor Ablavsky confirmed my conclusions in rejecting Amar’s assumption that the Indian Commerce Clause was the lone source of federal power over Native Americans, rather than merely one of many constitutional provisions and principles that bestowed broad federal authority in this area. See Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014–21, 1024, 1028, 1033, 1036–45, 1050–53, 1066–67, 1085–88 (2015). He also echoed my point that none of the Constitution’s drafters, ratifiers, or early implementers suggested that the *Indian* Commerce Clause could illuminate the meaning of the *Interstate* Commerce Clause, or vice versa. See *id.* at 1024–28. Amar does not cite Ablavsky’s definitive work.

64. See AMAR, *supra* note 1, at 736 n.3 (emphasis added).

characterized that provision as one part of a detailed constitutional tapestry that ensured exclusive federal control in this area:⁶⁵

[The] [C]onstitution . . . confers on [C]ongress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians.⁶⁶

This passage makes plain that federal authority “for the regulation of our intercourse with the Indians” did *not* depend only on the Indian Commerce Clause (mentioned last), but rather on an array of constitutional provisions and structural postulates. Accordingly, when the Court in other parts of its opinion mentioned the United States’ power to regulate “intercourse” with Indians, it was cross-referencing this constellation of constitutional powers.⁶⁷

Amar also fails to mention that in the seminal Commerce Clause case, *Gibbons v. Ogden*,⁶⁸ the Marshall Court declared that the word “commerce” had “been universally admitted to comprehend every species of *commercial* intercourse.”⁶⁹ Such “*commercial* intercourse . . . in all its branches”⁷⁰ included the sale of goods, paid navigation, and all similar market-oriented

65. The Court enforced as supreme law federal treaties recognizing the Cherokee Tribe as a sovereign nation able to govern activities within its agreed-upon territorial boundaries, but under the United States’ exclusive power and protection. *Id.* at 536–63. Chief Justice Marshall confirmed that Congress’s plenary authority to regulate “intercourse” with Indians derived from the Constitution writ large, which made the federal government the sole political entity authorized to do so and contained several provisions manifesting that power. *Id.* at 559.

66. *Id.* at 559–61 (emphasis added).

67. See, e.g., *id.* at 561 (“The intercourse between the United States and this [Cherokee] nation is, by our [C]onstitution and laws, vested in the government of the United States.”); *id.* at 557 (describing the federal treaties and statutes governing “all intercourse” with the Cherokee Tribe); *id.* at 540 (chastising Georgia for interfering with Congress’s constitutional power “to regulate and control the intercourse” with the Cherokees). Moreover, the Court noted that several treaties had distinguished “trade” (i.e., commerce in its core sense) from “affairs.” See *id.* at 553–56.

68. 22 U.S. (9 Wheat.) 1 (1824).

69. *Id.* at 193 (emphasis added).

70. *Id.* at 189–90 (emphasis added).

activities.⁷¹ The Court nowhere suggested that Congress could reach “*noncommercial* intercourse” involving social and political relationships. Finally, Chief Justice Marshall emphasized that his definition of “commerce” also applied to the “Indian Tribes” part of the Commerce Clause.⁷² Thus, *Gibbons* contradicts the Amar “interaction” theory, both generally and in the specific context of the Indian Commerce Clause.⁷³

In short, Amar erroneously believes that (1) the Indian Commerce Clause was the lone source of federal power in this area, and (2) early federal government actions concerning *Indians* establish the original meaning of “commerce” in the *interstate* context. The direct evidence—the Convention and Ratification records, Acts of Congress, and cases interpreting the ICC—discloses the predominant market-based conception of “commerce.” Putting aside the Commerce Clause, however, I agree with most of Amar’s analysis of the Constitution’s drafting and ratification.⁷⁴

C. *The Implications of Amar’s “Holistic” Constitution*

Amar’s key insight is that the Philadelphia delegates’ decision to keep their proceedings secret during the Convention meant that the Constitution was presented as a whole to Americans.⁷⁵ Consequently, he rejects historians’ typical chronological narrative of the Convention, which places undue weight on Madison’s daily notes and on the evolution of particular provisions—and concomitantly gives short shrift to

71. *Id.* at 188, 190–94, 215–18.

72. *Id.* at 189, 193, 196–97.

73. Amar lauds the Marshall Court for faithfully interpreting the Constitution by asking the following questions: “What words did the document in fact use and not use? Why had the document used certain words and rejected other words?” See AMAR, *supra* note 1, at 529. As to the Commerce Clause, the answer was that the Constitution used the word “commerce”—not “intercourse”—because the Framers sought to confine Congress to regulating market activities, not all interactions.

74. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 412–35 (1996) (describing how “We the People” delegated significantly more power to their representatives in three independent and coordinate branches of the federal government).

75. AMAR, *supra* note 1, at 219–23, 242, 685.

overall structural features.⁷⁶ A related point is that each state convention had to vote on the entire Constitution and could not condition a “yes” vote on adoption of amendments, although they could be proposed.⁷⁷ Because the Constitution required ratification “*in toto* and forever,” after ratification no state could unilaterally secede.⁷⁸ Indeed, secession would be incompatible with the decisive “geostrategic” argument for adopting the Constitution: A united continental land mass separated from Europe by an ocean would be the surest deterrent against military aggression.⁷⁹

Professor Amar’s focus on the entire Constitution, rather than its individual clauses, helpfully corrects scholars’ infatuation with Madison—both his Convention diary and his essays in *The Federalist* on factions and separation of powers—and their concomitant neglect of a brute fact: Americans ratified the Constitution as a single document because it ensured national security. Moreover, Amar makes a convincing structural argument that states could not secede.

Although often illuminating, Amar’s emphasis on the holistic Constitution sometimes leads him to distort its individual clauses. To return to my main example, even though the Constitution’s overall structure might suggest that Congress should be able to govern all interactions among the states, Article I expressly limits Congress to regulating only “commercial” (i.e., market) interactions. Structural arguments cannot trump the plain meaning of the Constitution’s specific provisions.⁸⁰

III. CONSOLIDATING THE CONSTITUTION, 1789–1840

I agree with Professor Amar that Washington did more than anyone to successfully launch the constitutional ship of state. The Framers understood that many of them would likely

76. *Id.* at 221–22, 685–87.

77. *Id.* at 245–51, 269–61, 685.

78. *Id.* at 259–64, 688.

79. *Id.* at 186–89, 229, 239, 263–64, 687–89.

80. For instance, it would be absurd to contend that the Constitution’s overarching democratic structure requires the Senate to be apportioned based on population when the Constitution expressly provides that each state must have two Senators.

hold offices under the Constitution and that Washington certainly would be President.⁸¹ He dwarfed all others in stature as the indispensable American Republican patriot, as reflected in his unanimous election and reelection.⁸² Among his many accomplishments, he redeemed critical promises made during the ratification debates to meet two valid objections. First, Washington successfully urged Congress to draft a Bill of Rights.⁸³ Second, he led the way in increasing the size of the House of Representatives.⁸⁴

Of utmost importance, Washington viscerally understood that the United States faced a constant existential threat from England, France, and Spain, each of which had colonial territories in the West and South and often allied with Indian Tribes to fight Americans.⁸⁵ Washington had access to remarkable talent in his Vice President (Adams) and Cabinet (especially Hamilton at Treasury and Jefferson at State), and he selected outstanding judges.⁸⁶ However, conflicts emerged that pitted Adams and especially Hamilton against Jefferson and Madison.⁸⁷ Amar praises Washington for siding with Hamilton in recognition of the Treasury Secretary's superior—indeed, singular—expertise as a constitutional interpreter and a master of financial and tax matters.⁸⁸

81. See AMAR, *supra* note 1, at 222, 269–71.

82. See *id.* at 193, 275–326, 353–98, 691–92. Unlike any other leader, Washington had commanded the Continental Army and had spent significant time in the South, North, and West as a soldier, surveyor, and landowner. *Id.* at 296–98. He embodied integrity and self-control, and he had by far the best understanding of military and foreign affairs. *Id.* at 283–85. Finally, Washington had an unparalleled network of correspondents and newspaper contacts. *Id.* at 298–303.

83. *Id.* at 308–21, 689. The Bill of Rights also helped persuade the two holdout states, North Carolina and Rhode Island, to ratify the Constitution. *Id.* at 313–14.

84. *Id.* at 222–23, 321–22, 689.

85. *Id.* at 187–88, 379–80. Accordingly, Washington concentrated on subduing Indians by force or treaty, which in turn led to peace treaties with England and Spain. *Id.* at 380–87, 395–98.

86. *Id.* at 322.

87. *Id.* at 322, 349–98, 412–56, 692.

88. *Id.* at 329–93, 692–93.

A. The National Bank

Most notably, Washington accepted Hamilton’s argument that Congress could establish the Bank of the United States as a reasonable means of effectuating the objectives of various Article I powers—borrowing money, regulating commerce, and levying taxes to pay for national debts, defense, and the general welfare.⁸⁹ The Marshall Court in 1819 eloquently restated Hamilton’s points in *McCulloch v. Maryland*.⁹⁰

I share Professor Amar’s opinion that Hamilton’s constitutional analysis was well reasoned.⁹¹ However, Amar goes too far in dismissing the competing interpretation of Madison, Jefferson, and Randolph as “nonsensical,”⁹² “poppycock,”⁹³ and “constitutional gibberish” motivated solely by partisan politics.⁹⁴ Rather, the three Virginians plausibly contended that (1) the Constitution confined the federal government to its enumerated powers, which did not include chartering a bank corporation; (2) such authority should not loosely be implied from any other Article I provision; and (3) the Necessary and Proper Clause allowed only laws that were essential—not merely convenient—to the exercise of enumerated powers.⁹⁵ The federal government’s modern explosion illustrates that it was prescient, not frivolous, to fear that construing Article I as implicitly allowing Congress to establish a corporation simply by labeling it as a “means” to achieve other listed “ends” would encourage similar verbal

89. *Id.* at 330, 365–63. *See also* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 15 – 35, 96 – 99, 102 – 03, 105 – 12 (M. St. Clair & D.A. Hall eds., 1832) [hereinafter BANK HISTORY].

90. 17 U.S. (4 Wheat.) 316 (1819), *discussed in* AMAR, *supra* note 1, at 460 – 61, 532 – 38, 561.

91. Most persuasive to me was Hamilton’s contention that the Bank bore a “natural relation to the regulation of trade between the States” because it created “a convenient medium of exchange between them” by “furnish[ing] facilities” to circulate money, “the very hinge on which commerce turns.” *See* BANK HISTORY, *supra* note 89, at 108; *see also supra* notes 38–45 and accompanying text (showing that “regulations of commerce” in Anglo-American law included banking).

92. AMAR, *supra* note 1, at ix.

93. *Id.* at 561.

94. *Id.* at 360, 366 – 70, 427 – 28, 692.

95. *See* BANK HISTORY, *supra* note 89, at 39 – 45, 82 – 84 (Madison); *id.* at 86 – 91 (Randolph); *id.* at 91 – 94 (Jefferson).

ingenuity in the future—and thereby destroy the fundamental tenet of limited federal powers.⁹⁶ Moreover, Amar too casually dismisses the Virginians' views as disingenuous. For example, Madison could surely believe that the power to charter a Bank corporation was so important that it would have been granted explicitly had that been the Framers' intent. After all, at the Convention he twice brought up that the Constitution lacked a provision authorizing Congress to establish corporations and proposed adding such a clause, which the delegates rejected.⁹⁷ Similarly, Randolph's opinion on the Bank bill was perfectly consistent with his statements and actions at the Convention.⁹⁸ Furthermore, even if Amar is right that Jefferson did not correctly understand the Constitution because he had not participated in its drafting and ratification, that has no bearing on the sincerity of Jefferson's narrow construction of Congress's powers.⁹⁹ Finally, even if the Virginians' constitutional position

96. See Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How can the Federal Government Have Limited Unlimited Powers?*, 65 FLA. L. REV. 1993, 2000–53 (2013) (describing how the modern Court has allowed Congress to exercise virtually unbridled authority).

97. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321, 615–16 (Max Farrand ed., 1966).

98. As Virginia's Governor, Randolph introduced the main plan of the Constitution at the Convention and strenuously requested a provision requiring a two-thirds majority for commercial laws, fearing that otherwise the Northern states would dominate the agrarian South. See 2 *id.* at 143, 452–53. Ultimately, he declined to sign the Constitution because it gave Congress too much power. See 3 *id.* at 127. Although Randolph later voted for ratification, he strictly construed Congress's Article I powers throughout his career. *Id.* at 253. For instance, as a Representative in 1816, Randolph decried the Second Bank bill as “unconstitutional” and “dangerous.” BANK HISTORY, *supra* note 89, at 707–08. Likewise, in 1824 he denied Congress's power to build and maintain internal improvements such as roads and canals. See 41 ANNALS OF THE CONGRESS OF THE UNITED STATES 1297–1311 (Joseph Gales ed., 1834).

99. Amar is correct that Jefferson (1) lacked the same intimate understanding of the Constitution as those who helped draft and ratify it, and (2) influenced Madison to construe the federal government's constitutional powers in a restricted way. See Nelson & Pushaw, *supra* note 18, at 54. I also recognize that politics and ideology have always affected constitutional interpretation. Rather, my point is that Madison's evolving views and Jefferson's consistent position need not be ascribed to bad faith, hypocrisy, or political pandering. As for Madison, thoughtful interpreters can change their minds upon further reflection, and in doing so often genuinely do not think that nonlegal factors are shaping their opinions. See *id.*

was influenced in part by their political views (at least subconsciously), that same charge can be leveled against Hamilton—and indeed is a hardy perennial of constitutional debate.¹⁰⁰ Likewise unconvincing is Professor Amar’s suggestion that Jefferson and Madison were dissembling in 1790 because they accepted the constitutionality of the Bank when they each became President.¹⁰¹ In short, Professor Amar’s ardent nationalism again leads him astray in concluding that Hamilton was obviously correct, and Madison plainly wrong, as to the constitutionality of the Bank and other issues,¹⁰² such as the taxing power.¹⁰³ The same problem affects the impartiality of his assessment of Washington’s successors.

100. To support his conclusion that the Virginians’ constitutional interpretation transparently masked their partisan politics, Amar notes that all the Representatives who voted “no” on the National Bank bill came from Southern States: They wanted the nation’s capital to be moved to the Potomac, but were afraid it would remain in Philadelphia if the Bank in that city were approved. *See* AMAR, *supra* note 1, at 366–67. Indeed, this specific fear reflected a larger suspicion that Northern merchants, manufacturers, and financiers would favor laws that disadvantaged the agrarian South. *See* Nelson & Pushaw, *supra* note 18, at 31–32. However, this North-South political conflict cuts both ways, as it undoubtedly influenced Hamilton’s broad interpretation of the Constitution, which disproportionately benefitted East Coast business interests.

101. *See* AMAR, *supra* note 1, at xi, 367, 405, 459–60, 561–62. For instance, Amar repeatedly stresses that Madison in 1816 signed the bill to renew the Bank. *Id.* at xi, 367, 460, 561–62, 692. In doing so, however, Madison did not recant his earlier interpretation, but rather declared that practice had settled the constitutional question (as Amar recognizes). *See id.* at 561–62. This decision might well reflect mature statesmanship, not hypocrisy or political expediency.

102. A critical early constitutional issue concerned Hamilton’s plan for federal assumption of state war debts, funded by customs duties and excise taxes, to secure the federal government’s credit worthiness. *Id.* at 329, 360–64. Virginians led by Madison dropped their constitutional objections when Hamilton agreed to relocate the capitol to Washington, D.C. *Id.* at 364.

103. Amar praises Hamilton for persuading the Supreme Court that Congress had sweeping power under Article I to impose taxes—specifically, that a luxury tax on the possession of carriages was a “duty” that was imposed uniformly (as required by the Constitution), not a “direct” tax that had to be apportioned among the states based on population. *Id.* at 329, 340–49, 374 (citing *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796)). Although Hamilton’s interpretation was sound, Madison’s opposing view was not beyond the pale. *Id.* at 350, 374. The word “duty” is vague (*see Hylton*, 3 U.S. (3 Dall.) at 176 (Paterson, J.)) and most commonly denotes a tax on foreign imported goods, whereas the federal tax applied to mere possession of carriages domestically. Moreover, a century later, the Court held that taxes on personal

B. Jefferson to Jackson, 1801–1837

Professor Amar correctly concludes that President Adams (1797–1801) properly continued most of Washington’s policies but lacked his wisdom.¹⁰⁴ Adams’s most notorious constitutional mistake was supporting the Alien and Sedition Acts to punish his political enemies, prompting Jefferson and Madison to courageously defend freedom of expression and ultimately obtain repeal of these statutes.¹⁰⁵

Amar then turns to the Presidencies of Jefferson (1801–1809), Madison (1809–1817), Monroe (1817–1825), John Quincy Adams (1825–1829), and Andrew Jackson (1829–1837). Jefferson ushered in a constitutional philosophy emphasizing populism, a minimalist federal government, and state autonomy.¹⁰⁶ Amar’s main contention is that this constitutional vision was largely rhetorical, as these Presidents quietly acquiesced to the Federalist constitutional foundation laid by the Presidents and Congresses during America’s first dozen years.¹⁰⁷ Indeed, in 1803 Jefferson outdid his predecessors in asserting extraordinarily broad executive discretion to make the Louisiana Purchase (thereby doubling America’s size) without prior congressional authorization or funding.¹⁰⁸ Jefferson also enforced the National Bank law, which Madison and his

property were “direct” taxes. *See generally* Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895). Again, my point is not that Hamilton was wrong, but rather that contrary interpretations were reasonable.

104. *See* AMAR, *supra* note 1, at 406–13, 434–35.

105. *Id.* at 405–06, 415–27, 438–59. Unfortunately, in championing the First Amendment against the Federalist Congress, President, and judiciary, Jefferson and Madison argued that each state had the right to resist unconstitutional laws based on the notion that the Constitution was a compact among independent states, which ignored its foundation in popular sovereignty. *Id.* at 450–56.

106. *See* JOHN LARSON, INTERNAL IMPROVEMENTS 39–45 (2001); JOSEPH ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 210–20, 228, 235–36 (1998).

107. *See* AMAR, *supra* note 1, at 405, 414–64, 459–60, 504–18, 526, 693–96. Amar hyperbolically declares that they were fortunate to inherit this stable system because “Jefferson and Madison did not understand armies, navies, shipping, manufacturing, investment, banks, trade, taxation, money, and much more.” *Id.* at 405.

108. *Id.* at 415, 504–17. Amar correctly notes that Jefferson made a mistake that eventually proved fatal by failing to ban slavery in the Louisiana Territory. *Id.* at 518–21.

congressional allies later allowed to expire, until the War of 1812 exposed the folly of doing so and prompted its renewal.¹⁰⁹ Finally, Amar describes how Andrew Jackson vigorously exercised executive power and protected the Constitution as an indissoluble union against the nullification efforts led by Calhoun.¹¹⁰

Professor Amar's narrative suggests that Jefferson and his successors parroted states-rights platitudes, but actually capitulated to the Federalist Presidents' wise nationalist policies. Admittedly, Jefferson pragmatically accepted certain established practices and seized the golden opportunity to make the Louisiana Purchase despite his constitutional misgivings, and the War of 1812 and westward expansion also forced the Jeffersonians to compromise their small-government ideology.¹¹¹

Nonetheless, Amar virtually ignores other areas in which they faithfully implemented this constitutional vision. For instance, the Federalists' aggressive taxing, spending, and borrowing ended when Treasury Secretary Albert Gallatin, who served throughout Jefferson's Presidency and during Madison's first term, imposed fiscal discipline by reducing the national debt and lowering internal taxes.¹¹² Similarly, Jefferson, Madison, and Monroe rejected the conclusion that federal legislation on coastal infrastructure (such as lighthouses and piers) dating back to 1790 logically supported Congress's constitutional authority to build and maintain "internal improvements" such as roads, canals, and bridges.¹¹³

Most significantly, in 1817 Madison vetoed a major internal improvements bill because (1) the power to regulate interstate commerce could not be stretched to include such projects, and

109. *Id.* at 460 – 61, 533.

110. *Id.* at 593, 598 – 603, 606 – 11.

111. See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801 – 1829*, 116 YALE L.J. 1636, 1640 – 47, 1734 – 40 (2007).

112. See ELLIS, *supra* note 106, at 223, 230 – 34, 252, 271; LARSON, *supra* note 106, at 53, 57; Mashaw, *supra* note 111, at 1640 – 41.

113. See Mashaw, *supra* note 111, at 1641 – 42; Adam S. Grace, *From the Lighthouses: How the First Federal Improvements Projects Created Precedent that Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 123 – 38 (2004).

(2) the General Welfare Clause authorized spending only in furtherance of other Article I enumerated powers, not anything Congress might deem to be in the national interest.¹¹⁴ Likewise, Monroe in his initial Annual Message to Congress announced his adoption of Madison's position that the Constitution did not authorize comprehensive internal improvements,¹¹⁵ and he always vetoed such bills.¹¹⁶ Finally, Jackson vetoed a new national bank bill and cast doubt on *McCulloch*.¹¹⁷

In sum, Professor Amar's constitutional nationalism induces him to highlight the actions of Jefferson, Madison, Monroe, and Jackson that continued Federalist policies, while paying scant attention to their decisions that were consistent with their philosophy of limited federal government. Furthermore, Adams's failed presidency, and America's abrupt and long-lasting shift to the Jeffersonians, indicate that Washington's popularity and success resulted from his peerless reputation and leadership abilities, not his policies that reflected a broad interpretation of the Constitution. Indeed, Washington likely would have been unanimously reelected even if he had adopted Jefferson's constitutional approach.

Nonetheless, Professor Amar is correct that Chief Justice Marshall, the last great Founder, provided an impregnable Federalist redoubt in the Supreme Court.¹¹⁸ Marshall's tenure (1801–1835) coincided almost exactly with the Jefferson-to-Jackson Presidencies.¹¹⁹ Remarkably, Marshall persuaded his colleagues—appointed by his political enemies Jefferson, Madison, and Monroe—to adopt the Hamiltonian vision of the Constitution by generously interpreting federal power in all three branches.¹²⁰

114. See 30 ANNALS OF THE CONGRESS OF THE UNITED STATES 1060–61 (Joseph Gales ed., 1834). Madison's veto message echoed the arguments he had made in 1790 against the Bank. See *supra* notes 95–103 and accompanying text.

115. See 31 ANNALS OF THE CONGRESS OF THE UNITED STATES 17–18 (Joseph Gales ed., 1834).

116. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 267–82 (2001).

117. He ultimately rested his veto on policy grounds. See AMAR, *supra* note 1, at 609.

118. *Id.* at 465–66, 525–82.

119. *Id.*

120. *Id.* at 460–61, 483–500, 524–42.

In particular, Marshall and his protégé Joseph Story crafted foundational opinions explaining what the Constitution's skeletal text said and meant in light of its structure and purpose.¹²¹ I agree with Amar that, despite the fame of *Marbury v. Madison*,¹²² *McCulloch* is actually the Marshall Court's most important opinion, as it reaffirmed Hamilton's position that Congress had broad implied powers to enact laws that would be conducive to the exercise of express powers.¹²³

However, I would reiterate two points. First, I do not think that arguments against the constitutionality of the Bank were intellectually indefensible.¹²⁴ Second, Amar conspicuously omits mention of *Gibbons*, the landmark Commerce Clause case, likely because the Marshall Court gave no credence to his "interaction" theory.¹²⁵

Overall, Professor Amar is on solid ground in contending that the Federalists' nationalist reading of the Constitution often survived their demise, in large part because certain federal laws and executive practices had become so entrenched by the time the Jeffersonians took control. Moreover, the Marshall Court carried the Washington/Hamilton agenda well into the nineteenth century. In many other areas, however, Presidents from Jefferson to Jackson faithfully implemented their constitutional commitment to narrowing federal power and preserving the states' jurisdiction.

CONCLUSION

This review has highlighted the one weak spot in Professor Amar's book: His nationalistic reading of the Constitution, while usually perfectly reasonable, does not always fully and fairly

121. *Id.* at 529–82.

122. 5 U.S. (1 Cranch) 137 (1803). Amar correctly argues that the Court in *Marbury v. Madison* (1) recognized rather than invented the courts' power to disregard unconstitutional laws; (2) articulated a modest account of judicial review that acknowledged the right and duty of Congressmen and the President to interpret the Constitution in performing their duties; and (3) reflected Marshall's personal and political hostility towards Jefferson. See AMAR, *supra* note 1, at 483–96.

123. *Id.* at 532–38.

124. See *supra* notes 95–103 and accompanying text.

125. See *supra* notes 68–73 and accompanying text.

engage the opposing Jefferson/Madison view—which, after all, won the American people’s unbroken support from 1800 to 1840. Nevertheless, Amar’s book is a dazzling, encyclopedic treatment of early American constitutional law and history.