WHY WORDS?

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What’s new in my new book, The Words That Made Us? What’s missing? What’s next? If my tale is anywhere close to correct, what tales told by other narrators must be rejected or revised?

At heart, the biggest news is that a book such as this now exists, as it did not before—a book that brings together between a single set of covers the main constitutional episodes of the fateful era in which America became America.

As I write the words of this postscript, in the late summer of 2020, I am frankly worried about the widespread constitutional illiteracy that surrounds me, illiteracy of young and old, left and right. A nation that does not understand its history is like a person who suffers amnesia. Without a strong memory of one’s own past, how can a person live a meaningful life? Without a deep understanding of our collective constitutional past, how can Americans live together? In 1860–1861, South Carolinians forgot what South Carolinians had in fact plainly agreed to in 1787–1788: an indissoluble union. And the war came.

This historical point can be recast as a legal one. Without a shared understanding of the basic rules of constitutional interpretation, how can Americans live free and thrive? Return once again to the secession question. The Constitution’s terse text and overarching structure really do prohibit unilateral secession. But to see this with crystal clarity, we need to read the document through a proper legal prism, with attention to both letter and spirit, noting how the text’s precise syntax and panoramic structure reinforce each other.

* Sterling Professor of Law and Political Science, Yale University. I am deeply grateful to the editors of the Michigan State Law Review for publishing a mini-symposium on my recent book, The Words That Made Us: America’s Constitutional Conversation, 1760-1840. I am also profoundly grateful to Tom Schmidt and Cat Tully for their close engagement with the book in this mini-symposium. In what follows, I offer some of my own thoughts about the book. These thoughts first appeared at the end of the book itself, in a Postscript that tried to summarize some of the book’s largest themes and provocations.
We Americans are a famously diverse and contentious lot. Today’s citizens bear myriad ethnic backgrounds and skin colors. We profess a multitude of faiths, and some profess agnosticism or atheism. We speak countless different languages. Our forebears came to this land at wildly different times and in profoundly different ways, some with bullwhips, some in chains. Some of us are male, others female, still others neither or both; some are gay, others straight, still others in between or beyond. We passionately embrace a wide range of ideologies and viewpoints.

But despite—or rather precisely because of—all these differences, there must be a common core. *E Pluribus Unum*. The United States Constitution and its history are what We (with a capital W) have in common, and if We don’t like the document as is, We can amend it, as indeed, previous generations of Americans have made amends and amendments. This terse text and the saga that underlies it are what make us Americans. Without broad agreement on the constitutional basics—not on every detail, but on the big picture, the basic narrative—we are lost. We are Babel. We are not a We. And if so, We may ultimately lose the Republic that Franklin hoped we could keep. Hence my title, *The Words That Made Us*, which can also be understood as *The Words That Made [the] US.*

Every four years, We must pick a president. *This is a constitutional decision*. We cannot make this decision well without an understanding of the presidency as an office structured by the Constitution, which both empowers and limits the person who holds this unique and uniquely dangerous post. The first thing that a president must do in office is swear an oath to “preserve, protect, and defend the Constitution of the United States.” For this system to work, an oath-taking president—and We Americans who pick that oath-taking president—must understand the basic outlines of our Constitution. What does it say and why does it say that? How has it been implemented over the years by prior presidents and other leading government actors? Which of our past presidents did this job well, and which did not? Why and how? These and related civics questions form the spine of this book. Thus, this is a book for my fellow citizens.

This is also a book for my fellow scholars. Too few law professors know history, and too few history professors know law. (Even historians familiar with the legal issues of their own main

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words of study often know little about the legal issues of earlier or later eras.) Every week this summer, as I sat in my family room, I saw scholars and pundits on cable TV saying silly things. On C-SPAN, distinguished Civil War historians airily opined that the Constitution of 1787–1788 was indeterminate on the secession question. Nonsense. On MSNBC, radical-chic intellectuals proclaimed, with barely suppressed smirks, that Americans revolted in 1776 mainly to protect slavery, which the British government was seeking to abolish. Ridiculous. On Fox News, pundits told viewers that the founders loathed “democracy” as a word and as a concept, and embraced only “republics,” which were always and everywhere sharply contradistinguished from “democracies.” Baloney.

Today’s Hillsdale graduates say that America’s founders never did anything wrong, and today’s Harvard graduates say that America’s founders never did anything right. (Okay, okay—that’s a gross oversimplification, but it felt good to get it off my chest.) We need facts and analysis, not reflexive right-wing boosterism or knee-jerk leftist hooting. Of course, the truth is not always and necessarily in the middle. On some issues, today’s conservatives are absolutely right on the law and the facts; on other issues, today’s liberals are 100 percent correct. But we can only decide which is which, and see when the truth is instead somewhere in the middle or something entirely different, once we know the key historical facts of America’s constitutional conversation and the basic legal rules for assessing those facts. Enter this book, which tries to offer readers the essential facts and figures, the notable quips and quotes, the relevant legal rules and principles, both substantively and methodologically—all in support of a coherent national narrative.

The claims made in this book may well elicit sharp responses and rejoinders from other scholars. I hope so! As I shall explain below, the preceding chapters tell a fresh story of America—a story that, in ways both large and small, breaks with reigning academic orthodoxies. If, as I believe, some of the greatest scholars of my youth—scholars for whom I have enormous respect, and who have inspired me to do what I do—have missed or misstated key points, then there is every reason to think that I too have erred in various ways that, alas, I cannot now see. Just as I seek to correct my predecessors, mentors, and role models, so I expect that scholars of the next generation will push back against some of what I say here.

In other words, dear reader, the book that you have just read is nothing if not ambitious. I have aimed to offer you the most penetrating and wide-ranging book about America’s Constitution and

Allow me, then, to summarize my most notable points in each chapter, and in the process to connect these dots, bringing into sharper focus the new narrative that I offer.

The first thing to note about Chapter One—and about this book—is my start date, 1760. Not 1763—the opening year of just about every book on the American Revolution now in print. For all his craziness, old Adams was right, and old Hutchinson was even more right. It all started with imperial geopolitics, the death of the old king, and the fall of Montreal in 1760, even before the 1763 Treaty of Paris, the 1764 Sugar Act, and the 1765 Stamp Act. Ultimately, Americans revolted because they could. This was not a sufficient condition for revolution, but it was a necessary one. *After the fall of Montreal, colonists began to imagine life without the British shield, and it did not take long after Montreal’s fall for this imagination to reveal itself*. Even before the British started seriously misbehaving—indeed, even before the Treaty of Paris formally confirmed the new facts on the ground in Montreal—some Americans (at least in Boston, where it all began) were beginning to itch and agitate. True, the Brits were negligent and inattentive. They never even bothered to send timely proclamation instructions! But they were not tyrannical—not yet. On the law, Hutchinson was actually on solid ground, and the great Pitt backed him to the hilt, but that hardly mattered to young Otis or old Adams.

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No leading American scholar nowadays begins the story of the American Revolution quite this way, with detailed attention lavished upon the events in the Boston Court House in 1761. In fact, in recent decades almost no general textbook or trade book about the Revolution—almost no broad-gauged historian of the Revolution—has offered more than a fleeting mention of Paxton’s Case, perhaps because this lawsuit about writs of assistance teemed with legal technicalities, and perhaps also because old Adams muddied the waters. (The Supreme Court has routinely mentioned the case, but has bungled the technicalities, and never come close to seeing what the episode was really all about.) Despite all this (and with thanks to Billy Crystal, Meg Ryan, Rob Reiner, and the late Nora Ephron), I have chosen to begin my movie—Act I, scene 1—with the first time Harry Met Sally. The bad blood between Otis and Adams on the one side and Hutchinson on the other began in 1760–1761 and proved quite significant over the next fifteen years.

Chapter One also features important cameo appearances. Benjamin Franklin, George Washington, and William Pitt quickly stride across our stage, because in the backdrop of Paxton’s Case, there was a world at war. All three of these great men had played key roles in that world war before Otis ever opened his mouth.

Chapters Two and Three tell the story of 1763 to 1776—from the Treaty of Paris to the Declaration of Independence—in a broadly conventional way. These chapters owe an enormous debt (duly acknowledged in the endnotes, I hope) to three towering scholars, now deceased, whom I first met in my course books as a Yale College freshman: Edmund Morgan, Bernard Bailyn, and Pauline Maier. Morgan later became my teacher and senior colleague; Maier, my dear friend. I never met Bailyn in the flesh, alas.

Three-quarters of a century after his first writings in the field, Morgan’s work remains definitive: In the great imperial debate, the patriots had the more astute and farsighted arguments. George III


5. The most comprehensive treatment of the matter is M. H. SMITH, THE WRITS OF ASSISTANCE CASE (1978), a dense monograph filled with interesting details but not designed for a general audience. Some of the biggest points of all—young Otis’s large errors, old Adams’s huge misstatements, and the key background fact of the fall of Montreal (a fact later emphasized by both Hutchinson and Adams)—do not come across with clarity.
was a blockhead who surrounded himself with other blockheads. Americans’ top patriots were an impressive bunch, but few of America’s best (other than Hutchinson) became leading loyalists. Bailyn and his star student Gordon Wood also helped me see the light: The great imperial debate revolved tightly around the key legal concept of indivisible Parliamentary sovereignty. And Maier’s work is pitch-perfect: Colonists paid close attention to English libertarians and friends of America like Wilkes, Camden, Pitt, and Barré. Colonists also carefully distinguished riotous looting and rampaging from mob actions that were more controlled and socially acceptable—proportionate and poetically just, even if not law-abiding in the strictest sense. In 1776, Jefferson was not a creative genius, but a good scribe, distilling the common sense of Americans evident in countless precursors to the Declaration that dotted the land. Then Congress edited him good and hard.

My most original touches in Chapters Two and Three involve a pair of notable native Bostonians, Thomas Hutchinson and Benjamin Franklin, who were strikingly akin to each other prior to 1765 but chose divergent paths thereafter. History has treated these two titans utterly differently. Benjamin Franklin is nowadays a proverbial rock star. His first name has become a generic noun, as in the hip-hop song “It’s All About the Benjamins.” (In total dollars, more American currency in circulation bears his likeness than anyone else’s, and indeed Benjamins outrank all other denominations combined.) By contrast, Thomas Hutchinson is almost unknown, even among well-educated Americans passionate about history. How can this be? After all, Hutchinson was America’s most distinguished and discerning loyalist and was ubiquitous in the run-up to the American Revolution. To overlook him is to miss central aspects of the imperial crisis—the best voice on the other side.

True, Bernard Bailyn wrote a penetrating book on Hutchinson a half century ago, but Bailyn’s subtle style, intricate analysis, and myriad detours have made this academic classic, The Ordeal of Thomas Hutchinson, a challenge for general readers who do not already know the basic story and cast of characters. Bailyn did not quote—and only a few more recent works have quoted—Hutchinson’s affecting courtroom speech the morning after his home was destroyed. Surely this extraordinary, if uncomfortable, episode deserves a prominent place in the standard story of the American

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Revolution—as does the colony’s subsequent decision to indemnify Hutchinson (a point that I stress and that most other narratives omit). Chapter Two also highlights the specific ways in which Samuel Adams avoided anything like the Hutchinson mansion riot when patriots dumped some 340 tea chests into Boston Harbor eight years later. (Readers should recall that I write this postscript at a moment when Americans are once again trying to draw lines between abominable mass lootings and acceptable—many would say admirable—mass protests.)

The story of the Hutchinson Letters Affair gets more attention in my narrative than in most standard accounts of the Revolution. The story casts light on the complex interpersonal relationships among several leading protagonists: Whately, Hutchinson, Franklin, and the Adams cousins. More abstractly, I see the Hutchinson Letters Affair as pivotal to my larger story, and not just because the episode seems so strikingly modern, featuring as it does leaked emails—er, letters—and proto-muckraking publishers. Hutchinson’s letters generated colonial outrage that drove the Boston Tea Party, which in turn precipitated the Coercive Acts and thus the Revolution. On the other side of the Atlantic, the purloined (?) letters led to the January 1774 Cockpit incident—Franklin’s Rubicon, when he ceased being the loyal British subject he had long been (rather like Hutchinson himself) and became forevermore a committed American Revolutionary.

As for Franklin more generally, I hope that readers now have even more reason to marvel at the man’s genius—not just as a world-class scientist and inventor, but as a great democratic communicator, the father of the modern political cartoon and the originator of the world’s first truly global proto-meme, *Join or Die*. I confess, I personally don’t much like snakes. In fact, they terrify me. But I find the story of Franklin’s inky serpent—its early appearances, its hibernations, its revivals at key moments, and its evolution—compelling. Yet few historians over the past century have told this ophidian story in any detail. In future work, I hope to show that cartoonists in the Civil War era revived Franklin’s reptile in revealing ways.

Franklin was a newspaperman extraordinaire, and Chapters Two and Three stress the strong links between American newspapers and the American Revolution. In the years after *Paxton’s Case*, newspapers were circulating faster and more widely, across both land and sea, than ever before, enabling colonists to begin to read and write and think continentally. Given this fact, Britain’s decision
to tax all sorts of colonial paper products, including newspapers, was especially obtuse. Arthur Schlesinger Sr. made this point nearly a century ago, but most recent historians have failed to reiterate and build on this theme. Deep in the endnotes of Chapter 2, interested readers will find exciting new data, based on a fresh analysis of the newspapers themselves, detailing how different print shops in different ways mocked the Stamp Act by refusing to print on stamped paper.

Chapter Four marks a fork in my narrative road, and a complicated fork at that. At least five divergent paths branched off from the Declaration of Independence, but I narrate only three stories. The military story, especially the story of Washington’s army, was of course critical to the American Revolution, but I do not recount this saga in any detail. Long Island, Kip’s Bay, Fort Washington, Fort Lee, Trenton, Princeton, Brandywine, Germantown, Saratoga, Valley Forge, Monmouth, Morristown, Camden, Cowpens, Guilford Courthouse, Yorktown—all of these episodes occur off-stage in my narrative, but my on-stage protagonists were powerfully affected by the carnage and hardship all around. The careful reader must thus keep the war and its implications constantly in mind. So, too, with a second critical off-stage story: the diplomatic drama in Paris, London, and Amsterdam starring (on the American side) Adams, Jay, and, most of all, Franklin.

The three narrative paths that I do tread in Chapter Four involve the West, the states, and the Confederation. On the West, I am broadly in agreement with the influential historian Alan Taylor: Although revolutionary unrest first began on the coast (a Massachusetts story), many colonists lusted for land in the backcountry (a Virginia story). British taxation without representation outraged colonials; so did a British proclamation that generally barred colonists from settling beyond the Appalachian crest. Americans seethed at the tyrannical 1774 Coercive Acts targeting Massachusetts; Americans also smoldered in response to that year’s Quebec Act, which snatched away from British Virginians western lands that they had won in the French and Indian War, but that the empire awarded instead to British Canadians.

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My version of the western story, however, is rather more Whiggish than Taylor’s. Chapter Four celebrates the strong anti-imperialist thrust of the Northwest Ordinance, which promised that western Americans could join the American constitutional project on an equal republican footing. I also highlight and praise the free-soil, rights-protecting, education-promoting, pro-republican, egalitarian, and tribe-sensitive aspects of the Ordinance. My most original thought is that the Ordinance was a powerful counterpart of and precedent for the US Constitution itself. In effect, the drafters of both the Ordinance and the Constitution sidestepped the Articles of Confederation, but each time, the states in the room acted unitedly, with a strong supermajority of states going beyond the Articles and simply doing what needed to be done in the summer of 1787. In New York, the Confederation Congress passed the Ordinance 8–0. In Philadelphia, the grand Convention drafted the Constitution, 11–0, in contemplation of ratification by 9 or more states.

As for the state constitutions that sprang to life in and shortly after 1776, there was little new work that I needed to do, given that this ground has been so well plowed by Gordon Wood in *The Creation of the American Republic* and Willi Paul Adams in *The First American Constitutions*. Is there anything original left to say? Perhaps this: Newspapers! I stress that Americans’ first constitutions emerged alongside their extraordinary and fast-rising newspaper culture. Revolution-style written constitutions were truly terse texts designed to appear in full in newspapers, and newspapers did in fact dramatically disseminate constitutions and constitutional ideas across the continent for easy replication.

My account of the many weaknesses of the Articles of Confederation is quite conventional. But here’s the odd twist: the most influential scholars over the past century have often conceded the utter unworkability of the Articles and then proceeded to ignore that elephant in the room in their accounts of the ensuing Constitution. My view, by contrast, is simple and straightforward: *The Constitution of 1787 was a direct, logical, and proportionate response to the basic failures of the Articles. Period.*

Indeed, that is one of my key claims in Chapter Five. In order to explain the emergence of the United States Constitution, we need not posit self-interested moneymen aiming to enrich themselves, à la Charles Beard. Nor was the Constitution a Madisonian project centrally addressed to solving the perceived internal governance flaws of individual state constitutions, as Gordon Wood has
cleverly—too cleverly—argued in a truly brilliant lifetime body of work.

To drive home my key point, Chapter Five narrates the drafting of the Constitution in a distinctive manner. There are now in print dozens of books that take the reader deep into the bowels of the Philadelphia delegates’ deliberations, week by week, debate by debate. This standard approach is an obvious way to tell the tale, given the chronological structure of Madison’s notes and of the official Convention journal. But neither Madison’s notebook nor the official journal was contemporaneously available to the Americans who were asked to say yes or no in 1787–1788. True, the secrecy ban lapsed at Convention’s end—a key point that I am at pains to prove (with extensive endnote details and documentation), because so many today wrongly think otherwise. But almost no one in 1787–1788 sought or got a week-by-week, vote-by-vote, issue-by-issue, blow-by-blow account, à la modern Philadelphia stories in the tradition of Andrew McLaughlin, Catherine Drinker Bowen, Clinton Rossiter, Jack Rakove, Richard Beeman, and Michael Klarman (to name only the most notable authors—there are, to repeat, countless others in this genre). Rather, Americans in late 1787 began—just as I begin—by confronting the Constitution’s text as a whole. They began—as I begin—by trying to understand the final Philadelphia plan (and not some intermediate set of rejected drafts) as a comprehensible and comprehensive solution to the problems that expressly triggered the Convention. Those problems involved the failures of the continental government—not, as Wood and his neo-Madisonian followers would have it, the internal republican failures of individual states.

The standard chronological-narrative approach to the grand Convention has serious drawbacks. First, in showcasing individual delegates and their speeches, this approach tends to miss America in the room. Delegates came to Philadelphia bearing constitutional ideas from all across the land, especially ideas embodied in their respective home state constitutions. Delegates also understood that

newspaper publication and popular debate would begin immediately after the Convention adjourned; America’s likely reactions in the ratification process to come thus hovered over the Philadelphia conclave from start to finish. Second, the standard approach typically slight the basic structural features that powerfully shaped the Convention’s big state–small state showdown: the recapitulation phenomenon, with the Convention itself voting state by state, rather than proportionately; the infinite-regress, no-census, and slave-apportionment issues that doomed any other internal voting rule at Philadelphia; and the counterbalancing fact that big states enjoyed an enhanced threat-advantage once immediate ratification unanimity was abandoned. Put differently, the standard accounts typically feature too much colorful storytelling and too little hardheaded rational-choice analysis. Third, the standard approach gives far too much weight to Madison’s notes, often treating them as if they were objective and complete verbatim transcripts. Far from it—and even scholars who in principle understand this methodological problem end up, in practice, for reasons of research ease and narrative convenience, over-relying on Madison’s undeniably selective, perhaps self-serving, and sometimes non-contemporaneous paraphrases. Fourth, and related, the standard approach pays far too little attention to the man who almost never spoke, because he did not need to speak, but who was far more important than any who did speak.

George Washington presided, literally and figuratively. He got what he wanted—a strikingly strong presidency (by American revolutionary standards) and a robust central government able to cure the union’s problems (though not the internal problems of individual states). At Convention’s end, he spoke officially for his colleagues in an accompanying letter that virtually every American read alongside the Constitution itself—a letter stressing the Constitution’s solution to the Confederation’s flaws, not those of individual states. Thereafter, he was unanimously elected president, twice. The Constitution of 1787 was emphatically Washington’s Constitution, not Madison’s.

In insisting on this absolutely crucial point, I stand on the shoulders of the great historian Edward Larson and stand squarely opposed to a cadre of influential Madison boosters. This distinguished group is led by the incomparable Gordon Wood, who is by acclamation America’s greatest living scholar of the founding era. The neo-Madisonian cadre also includes the estimable Jack
Rakove and his fellow Madison biographers Lynne Cheney and Noah Feldman.

Wood, Rakove, Cheney, Feldman, and many other modern scholars—even Bailyn—have also stumbled in their accounts of the ratification process by paying far too much attention to Madison’s *Federalist* No. 10. This lavish emphasis would be perfectly acceptable if their project were pure intellectual history and/or political theory. Madison’s provocative opening contribution to *The Federalist* bubbles over with interesting and subtle ideas worthy of careful exposition and analysis. But for anyone purporting to explicate America’s Constitution as understood by actual Americans when enacted in 1787–1788, it simply will not do to dwell on No. 10.

As I stress in Chapter Six, *almost no one paid any attention to Federalist No. 10 in the ratification process*—or for the next century, for that matter. The eagle-eyed historian Douglass Adair first flagged this issue in the early 1950s. The more recent and massive twenty-nine-volume *Documentary History of the Ratification of the Constitution* corroborates Adair, as does the careful empirical work of the political scientist William Riker. Indeed, after painstaking investigation of the matter, law professor Larry Kramer has reported that Madison’s distinctive ideas in No. 10 were “virtually absent from the contest to secure the Constitution’s adoption.”

The key to ratification was a *Federalist* No. 8 argument, a Washingtonian-Hamiltonian argument, an England-Scotland-Act-of-Union argument, a “Join or Die” argument. This argument addressed the basic failures of the Confederacy to achieve the central purpose of common defense and had almost nothing to say about Madison’s aim of reforming state governments to effect a kinder, gentler, worthier, and more elitist republicanism state by state.

Fence-sitting ratifiers everywhere said yes for common-defense, collective-action reasons. For example, Edmund Randolph, Virginia’s flip-floppy governor—a pivotal man in a pivotal state—changed his mind for common-defense, collective-action, English-Scottish-Act-of-Union, *Federalist* No. 8 reasons and said so openly and repeatedly. The argument of *Federalist* No. 10 did not become more compelling as the months passed, but the Washingtonian and Hamiltonian *Federalist* No. 8 argument did become stronger—a classic bandwagon, gaining velocity over time—as more states said

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yes. Once most states were in, their bordering states had to join—or die. (Franklin in 1754 was truly farsighted, as were those who revived his snake in 1765 and 1774.) Momentum became self-fulfilling; new states had to say yes because other states had already done so, as newspaper publisher Benjamin Russell brilliantly understood and underscored with his deceptively simple pillar cartoons.

*This common-defense, collective-action, Federalist No. 8 argument was utterly inconsistent with a state’s alleged right to unilaterally secede post-ratification.* At every turn in Chapter Six, I am at pains to stress this point—a point, astonishingly, either ignored altogether or barely mentioned in passing by most standard founding narratives. (Founding historians’ widespread inattention to the secession issue is astonishing because this issue was central to the Constitution of 1787–1788 and turned out to be, well, rather important later in American constitutional history.) I cap off my anti-secession argument with compelling newspaper evidence from venues far and wide, even Charleston, South Carolina—evidence that has never before been presented in any previous work of constitutional scholarship, including my own. (I have been writing about secession for more than thirty years, ever since my first article as a law professor in 1987.) As Washington stressed in his accompanying official letter, the nation’s *existence* required an indissoluble *consolidation* of states and the transcendence of individual state *sovereignty*. Washington later reiterated this point in his 1797 Farewell Address. Alas, scholars have often ignored this essential part of the address in their rush to analyze more peripheral aspects of this parting pronouncement.

Standing alone, Madison’s *Federalist* No. 10 was rather agnostic on the crucial question of secession. If the chief reason for a state to join was that the central government would stabilize it from above for its own *internal* benefit, well and good; but if that state later decided it did not really want or need that stabilization, thank you, why shouldn’t it be allowed to leave? To repeat: *Federalist* No. 10 is not the key to understanding what the Constitution was all about, or what ratification was all about, in the fateful year when America became *indivisibly* America.

Indeed, if Madison’s essay was convincing, why didn’t the subsequent Bill of Rights limit state governments? After all, on Madison’s view, each state government posed a greater threat to liberty than did the federal government. In late 1789, Madison in fact desperately wanted a “No state shall” amendment, but he lost on this
issue in the first Congress because his *Federalist* No 10-ish arguments did not persuade his contemporaries. The Bill of Rights that emerged was Washington’s Bill of Rights even more than Madison’s—and one of its main purposes was to woo North Carolina and Rhode Island back into the fold for Federalist No. 8 reasons.

Readers seeking more details on the central topic of Chapter Six—the state-by-state ratification process in the fateful year when Americans said “yes, We do”—should consult Pauline Maier’s splendid 2010 book, *Ratification*. Yet for all its virtues, her marvelously detailed book sometimes misses the larger pattern that unfolded.

Because Chapter Six is so much shorter than Maier’s book, it perforce emphasizes the big picture. Ultimately, the ratification decision did not turn on this detail or that one. The key question was simply this: union or no union? And if no union, what was the Anti-Federalists’ workable alternative? *They had none.* The debate was thus best framed by the opening Federalist essays of Hamilton and Jay. The two biggest and best critiques of the Constitution deplored its unduly small House and its omission of a Bill of Rights. On both issues, Federalists sensibly pivoted during and immediately after the ratification, thanks to the crowd-sourcing that ratification conventions facilitated.

More generally, Maier is too kind to neo-Beardian critics of the Constitution. She was an exceedingly gracious and gentle person. I am more blunt and sharp-elbowed—a product of law-school culture, perhaps—and here is my bottom line: *Almost everything that Charles Beard and his modern-day debunking followers have said about the Constitution’s launch is either dead wrong or more wrong than right.* The Constitution’s ratification was remarkably democratic, legal, and legitimate—a truly stunning achievement for its time and place.

Concretely: Beard argued that the document was basically undemocratic. But unlike the Declaration of Independence, the Articles of Confederation, and every early (that is, pre-1778) revolutionary state constitution, the Constitution was put to a vote. And what a vote it was! Ordinary property qualifications were lowered or eliminated in most states, and nowhere raised. (Beard evidently knew these key facts but withheld them from his readers. The truth on all this did not generally come to light until 2005, in the opening pages and endnotes of my book, *America’s Constitution: A Biography.*) Beardians have argued that the Constitution was illegal,
breaking as it did with the unanimity requirement of the Articles of Confederation. Wrong again. Then sovereign states had a legal right to secede from a widely breached and failing treaty, especially when mass secession and reunion might secure their very existence and vindicate the core common-defense purposes of the initial treaty. Neo-Beardians also fault the Philadelphia delegates for breaching their state-issued instructions. But delegates led by George Washington went beyond the letter of their instructions to fulfill the spirit of their instructions—please fix the union’s problems!—and nothing in their plan was binding. Rather, it was a mere proposal for their legal masters, the American people, to consider and then say yea or nay. Without a syllable of criticism, the Confederation Congress promptly and unanimously forwarded the Philadelphia plan to states for proper consideration under the special ratification process envisioned by the grand Convention.\footnote{See Libr. of Cong., Journals of the Continental Congress 1774–1789: Volume XXXIII. 1787, at 549 (1936).} Neo-Beardians routinely fault Philadelphia delegates for their secrecy. But this secrecy facilitated thoughtful early deliberation and then lapsed—a point neo-Beardians either do not know or do not tell their readers. Neo-Beardians try to make hay of the few and paltry episodes of mild political violence that occasionally flared up in the year of ratification. But the big news was precisely the opposite: virtually no one died or was maimed. (Relatedly, neo-Beardians confuse political hardball for legal impropriety, as when they fail to recognize that early Pennsylvania Federalists were entirely within their rights to forcibly compel the attendance of Anti-Federalists who attempted to break a legislative quorum.) Neo-Beardians bellyache that the ratification game was rigged. On the contrary, the press was free; pamphlets and essays of every sort proliferated; political discourse was robust, uninhibited, and wide open. Anti-Federalists in Massachusetts and elsewhere spoke their piece in convention, in full view and with their words often reprinted, even by Federalist publishers. Many thoughtful men in fact changed their minds, and many Anti-Federalists graciously acquiesced precisely because they thought the process was fair. Neo-Beardians present the basic contest as rich against poor. Actually, various prominent rich men opposed the Constitution (for example, George Mason, Elbridge Gerry, and notable Virginia Lees). By contrast, working folk in cities generally favored the Constitution, as did veterans high and low, who, along with countless others, combined to stage massive and dazzling pro-
Constitution parades in Philadelphia and New York City that bespoke the terse text’s genuine popularity. We should also note that convention apportionment rules in Massachusetts, and perhaps elsewhere, gave rural Anti-Federalists more than their fair share of seats. If the system was rigged, why did voters overwhelmingly reward Federalists in the first set of federal elections? (Of course, direct House elections took place that year thanks to the Constitution itself, which mandated popular involvement in selecting the members of Congress—in dramatic contrast to the Articles of Confederation, which failed to do anything of the sort.)

Most damning of all to the neo-Beardian school is that the great mass of Americans at the time (unlike many scholars today) understood that the Constitution was designed by and for George Washington. If the system was truly bad, unfair, illegitimate, illegal, rigged—blah, blah, blah—why did Americans unanimously elect George Washington, twice, and in the process, in effect, re-ratify and re-re-ratify the Constitution that was his two-dimensional counterpart?

Which brings us to Part III of this book, beginning with Chapter Seven—”Washington.” The chapters in Part III seek to combine biographical narrative with constitutional analysis in distinctive ways. For example, if the Constitution truly was designed by and for Washington, surely Washington’s views about the Constitution in general and particularly about his own constitutional article—Article II—deserve special attention, even special weight, I would argue. (Chief Justice John Marshall thought so, too.) In the Decision of 1789, Madison and Hamilton were acting as Washington’s lieutenants, much as they had acted as his aides, in the main, both at Philadelphia and in the ratification process. On most issues that arose in the Washington administration, I’m a Hamilton man, because Hamilton, on most issues, was a Washington man, and Washington, in turn, on most issues, was the Constitution’s man. To repeat, the document was in large part designed by and for George Washington and was ratified with Washington constantly in the minds of Americans, especially those who voted yes. Then, everyone agreed that he was the man to make the Constitution real, effective, operational, three-dimensional. These key historical facts, in my view, have legal significance.

When Madison and Jefferson opposed Hamilton, they also opposed Washington, who generally sided with Hamilton, and whom Hamilton served loyally. This is one factor that should weigh against Madison’s and Jefferson’s constitutional claims circa 1791–1797. Several other factors also weigh against Madison’s and Jefferson’s views in this time period. The duo themselves in later years quietly slinked away from some of their most outlandish claims; judges of all stripes, sometimes including men they themselves placed on the Court, repeatedly rejected many of their views; and later generations of judges have generally followed suit. Most decisive of all, what Madison and Jefferson said between 1791 and 1797 was often inconsistent with what the Constitution itself said, when rightly read and judged against the backdrop of the great ratification debate of 1787–1788.

In researching and writing my opening chapters, I paid painstaking attention to America’s best historians. In Part III, I frankly felt less diffident, because in the time period covered in these chapters there was now—at last!—a written and ratified Constitution I could expound. This a written constitution (flanked of course by unwritten legal rules and principles) is something that I have thought about and written about and lectured about and testified about for more than three decades. It is a legal document that invites proper use of the legal tools of analysis that I wear on my daily tool belt as a law professor.

Many of the topics that I highlight in Part III have rarely received careful attention from generalist historians. Examples include *Chisholm v. Georgia* (on state sovereign immunity), *Hayburn’s Case* (on the proper role of judges), the justices’ 1793 letter to President Washington (on judicial advisory opinions), *Hylton v. United States* (on taxes—the biggest issue to reach the Court in the 1790s), the Presidential Succession Act (lurking in the backdrop of the Jefferson-Burr-Marshall election crisis), *Marbury v. Madison* (on the technical question of Supreme Court original jurisdiction above and beyond the broader question of judicial review), *Stuart v. Laird* (on judicial independence and the validity of the 1802 Repeal Act—an enormous issue at the time), *United States v. Hudson & Goodwin* (on the absence of a federal common law of crimes), *Martin v. Hunter’s Lessee* (on the Supreme Court’s appellate jurisdiction), and *Barron v. Baltimore* (on the scope of the
Bill of Rights). Other passages in Part III address legal topics that have often found their way into general textbooks and trade books by mainstream historians. Examples include the Alien and Sedition Acts, the Virginia and Kentucky Resolutions, the Louisiana Purchase, *Marbury v. Madison* (on the topic of judicial review itself), *McCulloch v. Maryland*, the Missouri Compromise, *Worcester v. Georgia*, the Nullification Crisis, and the Jackson-era controversies over presidential removal power and abolitionist mail.14

On both sets of issues—those usually ignored by historians and those routinely discussed by historians—I have generally followed my own lights as a constitutional law scholar. Many of my passages summarize positions that I have explicated elsewhere in law journals aimed at judges, lawyers, and other legal specialists. On many of the biggest issues in Part III, I side with the Hamiltonian nationalists. Prominent examples include *Hylton*, the Louisiana Purchase, *Martin, McCulloch*, the Missouri Compromise, *Worcester*, and the Nullification Crisis.15 On other important topics, I ally with Madison, Jefferson, and/or states’ rightists. Prominent examples include *Chisholm*, the Sedition Act, *Hudson and Godwin*, and *Barron v. Baltimore*.16 In all this, I have not aimed merely to split the difference between the broad camps that emerged in the 1790s, and that endured thereafter in various incarnations. Rather, I have tried to get each issue right on its own legal merits, using proper methods of constitutional analysis. In every case, I have tried to tell the reader not just which side was right but why. In the process, I have tried to explain and exemplify the proper way to do constitutional interpretation, and thus the proper way to discover the meaning of America.

So much for the constitutional aspects of Part III. What about the biographical aspects? Readers will surely have noticed that each chapter in Part III bears the name of one or more leading statesman

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in the Constitution’s first half century. A few themes are worth highlighting.

First, I try to attend to key relationships among my protagonists. Washington and Hamilton teamed up. So did Jefferson and Madison. Marshall and Story also made a great duo. Adams, by contrast, was a political loner, but at least he had Abigail. Adams hated Hamilton, unfairly, much as Adams had earlier hated Hutchinson, unfairly. There was bad blood between Jefferson and Hamilton. Madison started out as Hamilton’s friend and Washington’s acolyte and later betrayed them both, partly to save his own political skin back in Virginia, partly because he was a policy lightweight on certain big issues (including banks, trade, and national defense), and partly because he was smitten by Jefferson. Jefferson and Marshall were always rivals. Andrew Jackson came to loathe Henry Clay and John C. Calhoun. Adams had a quirky frenemy relationship with Jefferson, who thought about Adams late in life much less than Adams thought about him.

It might seem that all these observations are merely gossip, but if researching and writing Chapter One has taught me anything, it is that personal dynamics, like the strong antipathy that Otis and Adams came to have for Hutchinson, can often have enormous political repercussions. Old Hutchinson characteristically understated the matter when he looked back on the events of 1760–1761: “From so small a spark” as the Otis family resentment, he wrote, “a great fire [the Revolution] seems to have been kindled.” Sometimes the personal is indeed the political.

Nothing is more personal than fatherhood and spousal fidelity, which brings me to a second point. While mine is in general an account of the public lives of public figures, I have at the margins alluded to certain arguably private matters. Thus, I discuss in passing Franklin’s estrangement from his loyalist son William, Washington’s childlessness, Hamilton’s philandering, Adams’s special bond with Abigail and his high hopes for their son John Quincy, Jefferson’s secret relationship with Sally Hemings and their children, Story’s tight bonds with his wife and son, Jackson and his wife’s informal adoption of an orphan Native American, and Madison’s deathbed need to provide financially for Dolley. All these matters became

17. Thomas Hutchinson, The History of the Province of Massachusetts Bay, from 1749 to 1774, Comprising a Detailed Narrative of the Origin and Early Stages of the American Revolution 88 (John Hutchinson, ed. 1828).
topics of public, political conversation in the lifetimes of these public figures, and thus seemed fair game for a book such as this.

A third, related point: I have tried where possible to analyze even personal and private matters using standard empirical techniques. Perhaps the best example is the detailed addendum to Chapter Six. In that compendium, I trace the bloodlines of early prominent American politicians in order to measure the strength of dynastic forces, state by state, in an idealistic republic that proudly renounced titles of nobility, but where in fact blood still mattered, often immensely.

Fourth, I am particularly interested in how my main protagonists’ memories sometimes failed and did so self-servingly. Old Adams routinely misstated matters and in the process inflated his own role and deflated others’ contributions. Old Jefferson claimed, misleadingly, that he was the author of the Declaration as opposed to being merely the chief composer of a rough draft that underwent substantial and salutary editing. Old Madison initially forgot some of the worst things about Jefferson’s proto-secessionist rantings in the late 1790s and later tried to wish everything away. Leading scholars—most notably, Mary Sarah Bilder—have raised serious questions about the accuracy and integrity of old Madison’s Philadelphia Convention notes.18

18. See Mary Sarah Bilder, Madison’s Hand: Revising the Constitutional Convention 1–16 (2015). For an example of old Madison’s elaborate efforts to rewrite history and cover his tracks—unsuccessfully, thanks to the outstanding detective work of modern scholars, see Letter from James Madison to Thomas Jefferson (Oct. 17, 1784). The original letter contained an unkind remark about Lafayette that old Madison later took great pains to hide by forging Jefferson’s handwriting and doctoring the cipher. For details, interested readers should consult the editorial notes to this letter in both the Jefferson Papers project and the Madison Papers project. See To Thomas Jefferson from James Madison, 17 October 1784, Nat’l Archives Founders Online, https://founders.archives.gov/?q=2020Author%3A%22Madison%2C%20James%22%20Recipient%3A%22Jefferson%2C%20Thomas%22&s=1111311111&r=92 [https://perma.cc/Z64D-7S9X] (last visited Apr. 11, 2022); From James Madison to Thomas Jefferson, 17 October 1784, Nat’l Archives Founders Online, https://founders.archives.gov/?q=Project%3A%22Madison%20Papers%22%20Author%3A%22Madison%2C%20James%22%20Recipient%3A%22Jefferson%2C%20Thomas%22&s=1111311111&r=46 [https://perma.cc/8C2E-7RB9] (last visited Apr. 11, 2022). If old Madison was so calculatingly and intricately dishonest in this small item, what other larger frauds and fudges that have thus far escaped detection might he have attempted elsewhere while massaging his papers over the years? Future historians should be on notice: Perhaps because of the pervasiveness of slavery in their lives, both Madison and Jefferson were accomplished liars when they needed to be and even when they did not. The potential link between personal slave-holding
Finally, I aim to pay particular attention to the main arc of my protagonists’ lives. Indeed, I have openly criticized various leading biographers who have failed in their obligation to trace these arcs, be they soaring, sagging, or sideways. This theme is particularly pronounced in my final chapter, “Adieus.” As they aged and approached the end, Franklin and Washington got better on the slavery question. Jefferson and Madison got worse. They started out as youthful anti-slavery idealists but ended up creating an emphatically pro-slavery party that would in time become the party of Andrew Jackson. Neither in life nor in death did Jefferson or Madison ever liberate any substantial number of slaves, many of whom eventually stood on auction blocks, ripped apart from their loved ones to pay for their masters’ sins and selfishness.

Jefferson’s and Madison’s disappointing life vectors are particularly notable on the specific topic that would ultimately precipitate Civil War in America: slavery in America’s virgin West. As young dreamers and reformers, Thomas Jefferson and James Madison, respectively, drafted (in 1784) and enacted into federal law (in 1789) a clause of the Northwest Ordinance banning slavery in western land. As old men, this very same slaveholding duo opposed the Missouri Compromise provision banning slavery in additional western land. Both sagging statesmen eventually and self-servingly managed to convince themselves that spreading the virus of slavery would somehow help cure the disease of slavery. Madison even wrote that the 1819 slavery ban was unconstitutional, a truly preposterous assertion, albeit one that the Supreme Court would later endorse, to its everlasting shame, in the 1857 _Dred Scott_ decision.¹⁹ The ablest constitutional lawyer of the _Dred Scott_ era, a rising politician named Lincoln, would famously denounce that ruling an “astonisher” in legal history. Lincoln was right to be incredulous.

Alas, many of Jefferson’s and Madison’s most distinguished biographers—including Dumas Malone, Jack Rakove, Lynne Cheney, and Noah Feldman—have either minimized or ignored their deceptiveness will be explored in more detail in my future work. Cf. _From George Washington to Tobias Lear, 12 April 1791_, NĀ’T’L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-08-02-0062 [https://perma.cc/EX4L-GU8J] (last visited Apr. 11, 2022) (rotating slaves out of free-soil states in a way that would “deceive both them and the Public”).

protagonists’ troubling downward trajectory on slavery, with little or no analysis of the Virginians’ regression on western free soil. Future biographers need to do better on this score.

And where, the reader may fairly ask at this point, should I myself have done better in this book? I wish I knew for sure. Despite my best efforts, there are doubtless many flaws in the preceding pages. Future scholars will, I hope, expose and correct them, much as I in this postscript have bluntly exposed and corrected what I believe to be the flaws of earlier scholarly works.

My biggest present regret is also my greatest source of excitement. My story, at least for now, has ended too soon—before America’s most notable crusading women and most influential African Americans have had a proper chance to stride onto center stage. Frederick Douglass, Elizabeth Cady Stanton, Sojourner Truth, Harriet Beecher Stowe, Lucy Stone, Susan B. Anthony, Hiram Revels, Alice Stone Blackwell, Ida B. Wells, W. E. B. Dubois, Carrie Chapman Catt, Alice Paul—none of these individuals appear, except em in passing, in the preceding pages. Prior to 1840, White men overwhelmingly dominated America’s constitutional conversation. White men were the ones whose voices and votes most counted, whose political preferences invariably prevailed.

But all that would soon change. This is a story I can’t wait to tell in my next book, *The Words That Made Us Equal: America’s Constitutional Conversation, 1840-1920*. This sequel will begin with the world’s first anti-slavery conference, a conference attended by both Blacks and Whites, women and men—though the women’s attendance was not without complexity and controversy. The story will travel through the Reconstruction Amendments, which promised freedom and equal civil rights for all—Black and white, male and female—and equal political rights (voting, jury service, officeholding, and the like) for men of all races. By the end of this sequel, the election of 1920, America’s women will have won the right to vote equally with men at all levels of government. So, dear reader, if you want to learn more about the era in which nonwhites and women transformed America’s constitutional conversation and won astonishing constitutional victories, I hope to have something ready for your consideration in the years to come.

Chapter One of the current volume began with the story of the *Racehorse*, a transatlantic ship that in 1760 brought important tidings to the New World, the biggest news since word of the fall of Montreal. Chapter One of the next volume will begin with an 1840 transatlantic ship that went in the other direction, a ship bearing an
improbably coincidental name, the *Montreal*. Aboard that ship, Elizabeth Cady Stanton, a twenty-four-year-old bride on her honeymoon, began conversing seriously about abolition and related topics with two of America’s leading activists, all three on their way to the world’s first anti-slavery convention in London. Upon arrival in the grand imperial city, Stanton, a New Yorker, met Philadelphia’s anti-slavery crusader Lucretia Mott, then in her mid-forties. As the convention opened on June 12, a majority of the world’s most utopian, philanthropic, liberal, and racially egalitarian men voted to exclude women from formal participation. That evening, Stanton and Mott strolled through London “arm in arm” and “resolved to hold a convention as soon as we returned home, and form a society to advocate the rights of women.”

Or at least that is how Stanton remembered it much later. (Mott had a different recollection. Perhaps old Stanton’s story was not entirely accurate. Shades of John Adams!) The opening scene of *The Words That Made Us Equal* is not yet cast in concrete. So, if anyone out there has suggestions, I’m all ears. But however this sequel begins, a more demographically diverse cast of characters will be stepping onto center stage. As will Lincoln. I hope you will come to love him as much as I do.

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