

# CARNEGIE COUNCIL *for Ethics in International Affairs*

## The Constitution Today: Timeless Lessons for the Issues of Our Era

Public Affairs

**Akhil Reed Amar, Joanne J. Myers**

### Transcript

#### Introduction

**JOANNE MYERS:** Good afternoon, everyone. I'm Joanne Myers, and on behalf of the Carnegie Council I'd like to welcome our members, our guests, and C-SPAN Book TV to this Public Affairs program.

Our guest is the renowned Constitutional law scholar Akhil Reed Amar. Professor Amar's remarks will be based on his latest book, entitled *The Constitution Today: Timeless Lessons for the Issues of Our Era*.

In a fraught [election season](#), with so much at stake, you may wonder, "Why turn our attention to the [Constitution](#), to a document penned so long ago by those long gone?" The answer may surprise you, as it is simple and direct: While candidates do matter, the Constitution matters more. It is that one document which was created to watch over our government, limit its powers, and protect individual rights. All branches of the government—whether it is a president and his administration, the Congress, or the Supreme Court—are all under the rulings of the Constitution.

In *The Constitution Today*, Akhil brings the Constitution to us, and us to the Constitution. He does this by annotating and analyzing the real-life Constitutional contests of the last two decades, and by drawing our attention, for example, to the [impeachment of Bill Clinton](#), the [contested election of George W. Bush](#), and the fight over [Barack Obama's Affordable Care Act](#). Akhil teaches us how to do Constitutional law.

In the popular imagination, there are two ways of interpreting the Constitution: There is the conservative way, which views the document strictly in light of the words on the page and the original intent of the [Founding Fathers](#) at the time of the signing of the Constitution; and there is the liberal way, which sees the Constitution as a living text, with room to accommodate and change with the times. After today's talk, I posit there may be a third.

Please join me in giving a warm welcome to our guest today, Akhil Reed Amar.

#### Remarks

**AKHIL REED AMAR:** That was such a great introduction, Joanne. I'm not sure I should say anything more because I think she gave you already an extraordinary account of what it is that we're going to be talking about today, which is the [Constitution](#) and its ongoing relevance. At a certain point, actually earlier than you might expect, I am going to draw you into the conversation, because I'd

actually like us to have a democratic conversation about the issues that you want to talk about.

There's a reason you all came out tonight, and I'm not so vain as to think the reason is me. I think the reason is we are all part of a Constitutional tradition that is especially relevant at election times, particularly a presidential election, for reasons that I will tell you in just a minute or two, and maybe this [presidential election](#) more than just about any other election that I can remember since, believe it or not, [1864](#); and I'll tell you why this is such a significant electoral event and why, whether you know it or not, you all were drawn, I think, to this place to have a Constitutional conversation.

But before I tell you about 1864 and this moment, Joanne I think got us off on just the right foot by reminding us about the beginning of this project. So I want you to take your mind back to what the world looked like the year before the Constitution was proposed.

The Constitution was proposed in 1787. I consider that year, the year in which the Constitution was deliberated on by the American people, the hinge of human history, the year that changed everything. There is, in effect, if you are looking at things from a secular point of view, BC and AD—before the Constitution and after the document.

Just let's take our minds back to, let's say, 1786, the year before the Constitution was proposed. You look across the planet. Who governs themselves democratically, outside of the United States? The United States exists, you see—the [Articles of Confederation](#) are already up and running; the [War for Independence](#) has been won—but outside of America there is Britain and there is Switzerland, and that's about it.

Even Britain, although it has jury trials in which ordinary Britons can participate, and a so-called House of Commons—I say so-called because you need an estate worth £600 annual income just to occupy a seat in the so-called House of Commons. If you're a [Jane Austen](#) fan, that would be like [Darcy's Pemberley or Bingley's estate](#). They have a House of Commons, so called. But they have an unelected [monarch](#) who doesn't merely reign but rules. He decides issues of war and peace. He hires and fires prime ministers at will. He has real power, and no one elected him. And a real House of Lords that's hereditary, it has real power, it's a genuine upper house in a bicameral legislature. It's not like today's House of Lords, which is basically vestigial, and not so aristocratic—you can earn your way onto it. You can be Sir [Elton](#) or Sir [Paul](#) or Sir [Mick](#). That's not their House of Lords. But there is some self-government in Britain in 1786.

And in Switzerland, which by the way, at the time has no cities, it has no banks, [Mitt Romney](#) is not yet interested in it. There are more sheep and goats than human beings in Switzerland. They are largely self-governing because their neighbors leave them alone. You have to charge up a hill, and when you get to the top there's not much there.

That's it across the planet for self-government. And that's not just 1786—that's 1785 and 1685 and 1585 and all the '85s all the way back into the dawn of time—there's practically no self-government on the planet.

Yes, there are a few ancient Greek city states that make a go of democracy for a while. Five centuries before [Christ](#), you have Athens under the [Cleisthenic Constitution](#), [Periclean Athens](#). And you have pre-imperial Rome and Florence and tiny, little places, much smaller than modern-day New Haven, Connecticut, for example. These are people who make a go of democracy, but they all speak the same language; they worship the same god or gods; they're not warm-weather and cold-weather people getting together; there aren't multiple climate zones, or time zones for that matter; and they can't make democracy last for a long stretch of time. They can't surmount internal dissension. They

can't repel external attack. They all blink out, basically.

So here is the history of the world when the Constitution is proposed. It's the history of kings, emperors, tsars, sultans, Mughal lords, tribal chieftains—thugs all.

And then, "[We the People](#)" of the United States did in actual fact ordain and establish a Constitution up and down a continent—if [Joe Biden](#) were here, he would say "up and down a freakin' continent"—and the world would never be the same. That's the hinge of human history.

Today you look across the planet. Let's take India, where my parents are born. When they are born in undivided India, they have a British monarch who no one voted for telling them what to do, and a British Parliament who no one in India voted for telling them what to do, just like the American Revolutionaries confronted in the 1770s. Now it's a billion people across an entire subcontinent—multiple time zones, different climatic areas, multiple religions, multiple ethnicities, multiple languages, as much diversity as all of Europe, East and West—and they govern themselves now with a written [constitution](#) and free and fair elections, and multiple political parties that alternate in power, and a rule of law, and religious tolerance, and equality, and free speech, and judicial review. Where did they get those ideas from? They got them from the U.S. Constitutional project. [*Editor's note: For more on the Indian Constitution, check out Quinipiac professor [Sujata Gadkar-Wilcox's](#) recent Carnegie Council [podcast](#).*]

And not just India. Let's take Western Europe. France is a great republic now, a great democracy, almost as impressive as California. I say almost because actually they don't have as much religious toleration and equality in France, truth be told; they don't have as much linguistic diversity, and even ethnic diversity, as California, truth be told. You can guess where I grew up—California. But at the time of the Constitution, France is an absolutist monarchy.

And not just France, which we see is a great republic today, but all of Western Europe pretty much. We could talk about Italy. We could talk about Germany. We could talk about Eastern Europe, because [a wall fell](#)—and I want to give credit to both Republican presidents like [Ronald Reagan](#) and Democratic presidents like [Jack Kennedy](#), who said that [he was a Berliner](#), very famously. But that wall fell, and now we have democracy across much of Eastern Europe struggling to firmly entrench itself in Hungary, in Poland, in the Czech Republic, in Ukraine, and elsewhere. Japan has a democracy today.

That democracy, my friends, my claim is, was made in the United States of America and by the United States of America and by the U.S. Constitution, which is not just a text but a deed, a doing, an act, a constituting, an ordainment, an establishment; and that act took place in 1787, the hinge of human history, when we put the thing to a vote—We the People did something.

And even the ancient democracies had never put their constitutions to a vote. One person, typically the lawgiver, maybe claiming a pipeline to god, in effect hands the law down from on high—[Solon the Lawgiver](#), [Lycurgus](#).

The [British Constitution](#) is never reduced to a single text. It's a series of institutions, practices, evolving customs; but it's never reduced to a single text that Parliament has authorized, much less that the entire British people actually can read and vote on, up or down.

Do you know why this thing is short? Not so judges can make stuff up. It's so the ordinary people can read it. Then, and now, you can read the thing from start to finish, it takes you an hour, and you can decide whether you are for it or against it—if you're a farmer in New Hampshire, or an artist in New

York for that matter, or anywhere else, up and down the continent. It's pretty extraordinary. And we can still read it, you see. That's why it's short, so that you can read it. And you have to make ongoing Constitutional decisions, and they're called elections—I'm going to come to that in just a moment.

But, you see, even the ancient democracies had never put constitutions to a vote. They didn't have democratic constitution-making procedures.

In 1776, the [Declaration of Independence](#) was not put to a vote. The [New York Constitution](#) of the following year was not put to a vote. None of the state constitutions in 1776 was put to a vote. Articles of Confederation, the preexisting regime, was not put to any sort of popular vote.

Now, [Massachusetts](#) does adopt its constitution by popular vote, and so does [New Hampshire](#). What the U.S. Constitution does is it takes those local state experiments—this is a Brandeisian idea; [Brandeis](#), of course, hasn't been born, but this idea of state experimentation—and it is going to take that idea and bring it to scale.

Now a whole continent will put a written constitution to a vote on the model of Massachusetts and New Hampshire. But that had never been seen before in the world, before Massachusetts and New Hampshire, and now we're doing it up and down a continent—and not just voting, but speaking. You can be for the thing and you can be against the thing, and no one votes you off the island if you're against it. The Greeks would call that ostracism, to vote someone off the Peloponnesus. And people who oppose the Constitution—see, if you oppose the Declaration of Independence, you're never heard from again in America basically. This is war, and you're either with us or against us. In 1776, if you're not basically on our side, you have two choices—(1) leave; (2) shut up.

But that's not the Constitution of 1787–1788. People who oppose the Constitution become presidents of the United States ([James Monroe](#)), vice presidents of the United States ([George Clinton](#), [Elbridge Gerry](#)), justices on the Supreme Court ([Samuel Chase](#)). The people who oppose the Constitution say, "Dudes, you forgot the rights," and they're the ones, the anti-Federalists, who, in effect, give us the Bill of Rights that bubbles up, bottom up, from this ratification process.

What phrase appears in more amendments than any other? The phrase "the people." The [First Amendment](#) has a right of the people to petition and assemble; the [Second](#), the right of the people to keep and bear arms; and the [Fourth Amendment](#) has the right of the people to be free from unreasonable searches and seizures; and this phrase appears in the [Ninth](#) and the [Tenth Amendments](#). Why? Because it's coming from this Preamble, "We the People" process, this bottom-up process.

When you actually ask people how they and their posterity should be governed, they say, "Well, now that you mention it, we actually do have a few ideas. [George Washington](#), you're pretty good, and [Ben Franklin](#), you're pretty good, but you are just an elite group in a small room—and, stooge, you forgot the rights."

The Constitution is crowdsourced, it's Wikipedia *avant la lettre*, because if you believe in democracy, you believe actually that there is a common wisdom, a wisdom of crowds, that may be greater as a collectivity than any one individual, even if the individual is a genius like Ben Franklin. That's the project that Joanne rightly invoked, that we continue because, you see, it was deeply flawed in all sorts of ways. "We the People—What do you mean, Professor? What about women? What about slavery?"

So it begins this democratic modern Constitutional project, the project that changes the entire world,

in 1787–1788. It's like the [Big Bang](#).

But it continues, it radiates. Amendments make amends. They add the Bill of Rights. A later generation will [abolish slavery](#) and promise [birthright citizenship](#) for everyone in America—and there are presidential candidates who don't understand that birthright citizenship idea for everyone in America—and we promise equal voting rights for blacks.

And we're not done, because we [enfranchise half the population](#) a half-century later with women's suffrage. If you don't think women's suffrage matters, I've got three words for you, "President [Mitt Romney](#)," because he [won](#) among the men, and without women's suffrage you'd have a different person who's president of the United States. Mitt Romney won among the men; he lost among the women. That's a Nineteenth Amendment story in fact, whether you realize it or not, and it's the continuation of this "We the People" idea that began in 1787.

It keeps going in our lifetime. We got rid of [poll tax disfranchisement](#) and other things. And we're not done yet. But we can't really know how to carry forward that project unless we actually understand it. That brings me to this book, *The Constitution Today*.

But I told you I'd say just a little bit about 1864, and let me do that, and then in the next five minutes we're going to start our conversation together.

Here's one of the reasons I believe that you all came today. It's not just that you face a presidential election and that's interesting. It's not just that one of the two candidates this time around is very unusual. We haven't really seen anyone with just the profile of no government experience whatsoever, including military experience. That's true of [Trump](#), and it hasn't ever been true of any elected president. The only nominee who ever came close in all of American history was [Wendell Willkie](#), who hadn't done public service before. That's just a sort of political science way of saying this is an interesting election. You have a candidate who is very distinctive in that way.

But it's not just that. It's that all four of the major branches of federal power are up for grabs. We're on a knife's edge. The House, the Senate, the judiciary, the presidency—are all up for grabs. Come January, you could have President Donald Trump; and, if he wins, because there's very little ticket-splitting, I think he carries the Senate; and if he carries the Senate, he also carries the Supreme Court, which is now poised between four Republican appointees and four Democrat appointees—but if he wins the presidency and the Senate, he fills that vacancy created by Justice [Scalia](#)'s demise, and therefore he wins the judiciary; and actually, it's almost impossible, from a political science perspective, to imagine that he wins the presidency and the Senate and doesn't carry the House of Representatives with him. That's one possible world.

Another possible world is that [Hillary Clinton](#) becomes president. She is not certain to carry the Senate, but likely to, for similar reasons. She therefore gets the Supreme Court. I'm not sure she carries the House of Representatives; she'd have to win by five or six points nationally probably for that to happen, and we could talk about why that's so if you're interested.

But it's possible for all four to be Democrat-controlled come January, or Republican-controlled—they're all up for grabs. That doesn't usually happen. Indeed, as I cast my mind back, I basically think you have to go back to [Abraham Lincoln](#) in 1864, when all four of the branches—House, Senate, judiciary, and the presidency—were up for grabs, in play in that way. I'll just say maybe one or two sentences about why that's so, and then we're going to play a game together.

Basically, our current two-party system goes back to 1860. In [1860](#), even if Lincoln wins, he's never

going to control the Supreme Court because it is dominated by previous Democrat presidential appointees. But by 1864 the Court is in play, the House is in play, the Senate is in play. It matters whether you vote for Lincoln or for [McClellan](#), who runs against him. McClellan is a narcissist businessman type; he's from New Jersey, although he doesn't own any casinos. That election matters because everything is in play.

But after Lincoln wins—and on my way over, by the way, I walked over, and I passed that amazing equestrian statue to [William Tecumseh Sherman](#)—he wins because [Atlanta falls](#). But when he wins, his party keeps winning—[Ulysses S. Grant](#), [Rutherford B. Hayes](#), and so on—and eventually the Republicans dominate the Court.

The rare Democrats who win in the ensuing era have no chance of actually dominating the Court—[Grover Cleveland](#), who doesn't even win consecutive terms; [Woodrow Wilson](#). No Democrat wins a majority after Lincoln until [FDR](#) (Franklin Delano Roosevelt)—and this had been the dominant political party before Lincoln. That's how large Lincoln looms in our story.

So, nothing. The Supreme Court now is in play. It's not in play for FDR in [1932](#). It's dominated by Republicans. He's not going to be able to turn it. But he keeps winning, and eventually it's in play. But by that time, his party overwhelmingly controls the Congress, so that's really not in play, and it really doesn't come back in play until the [Gingrich revolution](#) of 1994.

So here I am. This is a particularly interesting election because everything is up for grabs. It's on a knife edge. We the People of the United States are once again called upon for our input, just as we were in 1787–1788.

In my view we can't discharge that duty. You don't just have a right to vote in my view; you have a responsibility to vote. You don't just have freedom of speech; you have a responsibility to listen, and even to listen to folks on the other side. This Constitution dies unless actually every generation reintroduces itself to the thing. Enter this book. There's a reason I tried to write this book, *The Constitution Today*, for this season, because I want you all to share my passion for the Constitution.

The way I'm hoping to do that is through a series of essays that I have written over the last 20 years, each quite short, an op-ed basically, for *The Washington Post* or *The Wall Street Journal*, or *The Atlantic*, or *Time* magazine, or *The New York Times*, or the *Los Angeles Times*, or Slate. These short op-eds are about what I saw, as they were developing over the last two decades, as the most interesting Constitutional questions around—Constitutional questions about all three of the branches of government, about rights and about structure. I thought, "Let me put these together and package them for my fellow citizens and try to give you, my fellow citizens, a sense of what it is to actually do Constitutional law, to engage Constitutional issues."

You lived through these cases and controversies just as I did. You remember some of these. I can show you how to think Constitutionally about some of these issues.

So here's the game we're going to play. I'd like you to come up to the microphone and ask me a question about some important issue that has arisen basically in the last two decades. Now, if I'm lucky, I'll bat .500 or so. Half of the things that you're going to ask me about I'm going to say, "Well, actually there's some stuff in this book about that," of the half that you are going to ask me about.

This is an experiment. C-SPAN is recording it. It could be a big flop. So keep watching, C-SPAN audience. Let's see if it's a flop.

But I'm hoping that on half of them I'll have something to say and I can say, "If you want more, it's in the book." For the half that I don't engage, if I'm lucky, I might say, "Well, it's not in this book, but here are some other things that you might want to read on that topic that are relevant."

You're here because you want to participate in the next chapter of this extraordinary Constitutional story.

## Questions

**QUESTION:** Thank you. James Starkman.

Just before you field the questions, could you just describe the Constitutional ratification process in a little more detail? Was this a popular vote? Was it a ratification by the [Constitutional Convention](#)?

**AKHIL REED AMAR:** Great. Here, I have a different view.

There's a new [book](#) out by a great Harvard scholar. His name is [Mike Klarman](#). He presents the ratification process as not that democratic. He's in the tradition that travels through [Charles Beard](#), [Howard Zinn](#), [Woody Holton](#). These are people who have said, "Oh, the Constitution was basically a kind of fast one, a coup pulled off by the rich and powerful at the expense of the unwashed masses." I think that's all hooey, and I give evidence for that in a book that I wrote in 2005, called [America's Constitution: A Biography](#), first chapter, but I return to that theme very powerfully in this new book.

In every state, a specially elected convention was summoned into existence to decide whether to vote for or against the Constitution. It wasn't a California-style referendum, because that hadn't been invented yet. The Swiss hadn't even done it. And, even if it had been invented, how are you going to deliberate on something as a society when you don't have the Internet or anything like that, or Twitter? So a smaller group of folks are going to be specially elected to basically deliberate about the thing.

In that special election, that "We do" election, the ordinary property qualifications that applied to ordinary elections were waived or abolished in eight of the 13 states. Nowhere were they raised.

So here are the rules in New York, since we're in New York: All adult free male citizens get to vote for the special ratifying convention that's going to meet in Poughkeepsie. No race tests. No religious tests. No property qualifications. No literacy test. And those are not the ordinary rules in New York. That's a special jubilee year-like idea, that for this one special election in which we're doing to decide the basic ground rules by which we and our posterity will be governed we're going to have a specially broad electorate.

And not just that. As I said, extraordinary free speech baked into the Constitutional cake—robust, uninhibited, wide open. No one is censored basically in that year. No one dies politically in that year. Think about that. Think about how extraordinary that is even by modern standards.

So I think those first words of the Constitution are not just a metaphor, they're not being used sarcastically. This "We the People of the United States do . . . ordain and establish this Constitution" were really couched out in a substantial way. It was as broad a participation as was imaginable at that time. The "at that time" is important, because women didn't vote. But they had never voted anywhere in human history before—not in Athens, not in pre-imperial Rome, not in England, not in the colonies. A few women actually did vote in New Jersey, and that was phased out shortly after the Constitution.

But women not voting isn't quite news. It's old—just like that old *Saturday Night Live* joke about how [Franco](#) is still dead—so it's not a great leap forward. But the women actually aren't demanding a right to vote. They will eventually, and actually there's stuff in here on that story, beginning with [Seneca Falls](#) and carrying through a conversation about voting rights in the Fourteenth Amendment, then eventually culminating in the Nineteenth Amendment that's going to be absolutely revolutionary. It's going to change, for example, the nature of the First Lady, and I tell that story.

**QUESTIONER:** Was it a cumulative vote across the 13 states?

**AKHIL REED AMAR:** Each state decided for itself whether to join the Constitution. No state was bound unless it affirmatively agreed. Nine states were required to ratify. Eleven initially agreed. When George Washington is [elected](#) president there are 11 states in the Union. North Carolina and Rhode Island have not said yes yet, but then they later join.

But just on the women's suffrage thing—I'm obsessed by women's suffrage because I think it's utterly transformative—[Abigail Adams](#), you may recall, very famously says to [John Adams](#), "Remember the ladies." She's not asking at the time—it's a private letter between two people who are actually really smart and respect each other and love each other, and John Adams takes his wife very seriously, and she's an impressive political operative. She is not asking for a right to vote for women. She's actually asking for rules that will prevent husbands from beating their wives legally. That's actually what she's asking for when she says, "remember the ladies."

So women's suffrage wasn't even in play. But when it eventually happens—just let's think about [Abigail Adams](#) for just a second. You know what? Women didn't suddenly become smart in 1920. They always were. But [Abigail Adams](#) has to hide her political intelligence in some ways because it's not going to help John politically. And [Dolley Madison](#) is a political operative, and so was [Mary Todd Lincoln](#), and they have to hide it.

Women's suffrage comes along, and now [Eleanor Roosevelt](#) does not have to hide it, and she can actually appeal to a different group of voters. He can appeal to the moderates; she can appeal to the crusaders—two for the price of one. When you have the Nineteenth Amendment, that is going to give you Franklin and [Eleanor](#), Bill and Hillary, Barack and [Michelle](#). It transforms, for example, the whole role of the First Lady. So now presidents have two running mates who can succeed them—not just their vice presidents, but their spouses. There is no way [Martha Washington](#) is ever going to be president of the United States, or [Abigail Adams](#) or [Dolley Madison](#). But yes, it's actually possible that Hillary Clinton can be president of the United States, or Michelle Obama for that matter—that was not unthinkable—and that's all a Nineteenth Amendment story.

It begins by letting more people vote than ever before at the founding, but then later chapters of this story carry it forward in time. You need to know not just the story of how it began, but what has happened between then and now, so you can figure out how to write the next chapter. That how to write the next chapter is called an election.

**JOANNE MYERS:** Just following up on that, let me ask you a question. You just opened the door. But what do you think about dynasties then? You talk about Hillary and Bill.

**AKHIL REED AMAR:** She has read the book maybe a little bit. But chapter one is actually called "The Presidency: A Return to Dynasty?" I talk about all sorts of dynasties.

You see, Donald Trump is dynastic in that he [inherits](#) vast wealth. But let's just think in the modern era.

Well, let me take a step back—and this is a story I actually tell in chapter one. Why does the president have to be 35 years old? Here's the answer: Who could have the name recognition to get elected president at the age of, say, 33? The answer is a famous son of a famous father. Who is the prime minister of England when they write that 35-year-old rule? [William Pitt the Younger](#), who is 21 when he is a member of Parliament and 24 when he is prime minister. He might be good, he might be bad; but he is getting the prime ministership because he has the same first and last name as his daddy, [William Pitt the Elder](#), who was prime minister.

And George Washington is elected president in part because he has no children of his own. He says that. He says, "You can trust me because I've got no children of my own, no sons to succeed me." [Thomas Jefferson](#) has no sons—at least legitimate ones that we know about—that bear his name. [James Madison](#) has no sons. James Monroe has no sons. Now, John Adams has a [son](#), and his name is Q—as in W—and he becomes president of the United States.

The framers were acutely aware of dynasty. Part of the reason they were so freaked out about [Alexander Hamilton](#), he was the person who was most feared—why was Hamilton feared? Because he is, in effect, Washington's adopted son. Washington has taken him under his wing—[Robin](#) to Washington's [Batman](#), or something like that.

And there's even a conspiracy theory that circulates. It's an amazing one: "Have you heard the rumor? Alexander Hamilton is actually the illegitimate son of George Washington." The conspiracy theory is that.

The people say, "That's preposterous. Washington was never in Nevis."

"Actually, no, Washington was in the West Indies."

"Yeah, but he was in the West Indies three years before Hamilton was born."

"Yeah, but there's no birth certificate. Have you seen the birth certificate? I haven't seen the birth certificate." [Laughter]

"Hamilton is illegitimate. He has no father. He's the bastard brat of a Scot peddler. Why is Washington befriending this fellow? And maybe he's two years older than he is because he's freakishly smart, but maybe actually when he came to the United States he was 17 and not 15."

I'm not making any of that up. It's all in the book.

Now, dynasty today. Americans have forgotten. You know the rule but you don't know the reason behind the rule. You think 35—but why did they have that; what were they worried about?

It's not just that in 2000 we had someone who is the son of a [president](#) running and winning, George W. Bush. He's also the grandson of a [senator](#) and the brother of a [big state governor](#) who himself [runs](#) for president. And who's on the other side? [Al Gore](#), whose father, [Al Gore, Sr.](#), actually was a leading political statesman.

And we could talk about the [Kennedys](#)—I don't want to be partisan here—and not just Jack and [Robert](#), a senator from this state, and [Ted](#). But we could talk about the [current governor](#) of this state, not just whose [father](#) was governor, who also [spoke](#) at the [Democratic National Convention](#) way back when; his [first wife](#) was Robert Kennedy's daughter, Jack Kennedy's niece, Ted Kennedy's niece.

If we would pick another coast, we could talk about [Arnold Schwarzenegger](#), who isn't just a movie star in his own right, but was married to [Maria Shriver](#), whose dad ran for the vice presidency and whose uncle was president and whose other uncle ran for president, whose other uncle ran for president—and we could keep going.

We could talk about the governor of California, my friend [Jerry Brown](#)—Yale Law School Class of '64, and his daddy was governor—same name, [Edmund G. Brown](#), although less name confusion because his father was Pat and he goes by Jerry.

Now, there are dynasties and there are dynasties and there are dynasties.

Bill and Hillary, is that the same kind of dynasty, because it's within a generation? Hillary Clinton is not related by birth or blood to Bill. They find each other. Now, if [Chelsea](#) would have run, that would be dynastic.

And indeed, the entire Trump campaign seems to me quite dynastic, because the main surrogates all have the last name Trump, whether it's [Donald Jr.](#) or [Eric](#) or [Ivanka](#). And he inherits vast wealth. Is vast wealth the same as political power?

But I analogize in chapter one Hillary Clinton—I say she's actually common-born; she and Bill find each other; he's common-born too. It's not actually that different than the political partnership that Thomas Jefferson and James Madison formed together, sort of a Batman/Robin alliance; George Washington with Alexander Hamilton.

Now, you have to add to that sex, which complicates everything, all this. But this chapter one invites you to think seriously about many different—is dynasty different if it involves gender? Look around the world. Dynasty has actually enabled women to achieve political power that they otherwise wouldn't have achieved, whether that's Queen [Elizabeth](#) or [Indira Gandhi](#) or prime ministers in Indonesia and the Philippines, and [Benazir Bhutto](#) in Pakistan.

But now we're starting to think about, in my view, some interesting things about the nature of political power in America and how the framers wanted you to focus on dynasty and we're not sufficiently.

**QUESTION:** Hi. My name is Abraham Miha. I am a studying economist at City College. I'm part of the Colin Powell program.

My question for you is if you could clarify a little bit more about the Thirteenth Amendment. From my standpoint, it isn't really actually absolutely about slavery; it just redistributes it to the present population.

**AKHIL REED AMAR:** You're the second person in the last week who has asked me about the fact that the Thirteenth Amendment in effect has an exception. The Thirteenth Amendment prohibits slavery, but there's an exception for people who are duly convicted. You're the second person to ask me about that.

I actually don't have anything in this book about that. But I've thought about it a lot, and I have some stuff in other work.

Here's one question: Where did this exception come from? Where did the Thirteenth Amendment come from? The Thirteenth Amendment abolishes slavery. It comes from the [Northwest Ordinance of 1787](#); it's word-for-word-for-word the Northwest Ordinance of 1787.

Again, the idea was there's no slavery, except as a punishment for a crime of which one has been duly convicted. Now, should we have chain gangs today? That's a real question.

Here is a related one that I do talk about. We have a prison population and they don't get to vote but they are counted actually for certain representation purposes in these districts. Basically, in effect, the prison guards, who often reflect a rather different demographic—to be very blunt, in places like Texas, you have a lot of black folk in prison, a prison industrial complex, and they don't get to vote, but their bodies are counted in these rural Texas counties, even though they might come from urban areas—this is an issue in New York State also—to boost the representation of these rural counties that basically are overwhelmingly white and vote very differently from how the prison population or their families might vote. Some folks have said this is like the new [three-fifth law](#), in which blacks were counted, they padded the political power of the slave masters who were voting, but the slaves themselves didn't vote.

I do have some stuff on the three-fifths clause, but not so much, frankly, on whether we should have chain gangs at all. It's an excellent question. Thank you.

**QUESTION:** Peter Russell's my name.

More on voting rights. We're 50 years after the [Voting Rights Act](#). There are many reports that voters are being constricted in their getting access to vote. As a layman, if I read the Fourteenth Amendment, I see that it says that the allocation of representation, representatives, members of Congress, to a state can be reduced if voting rights are denied. Is there any applicability to our time?

**AKHIL REED AMAR:** You are absolutely astute in noticing that the words "the right to vote" don't appear in the original Constitution—and why not? In part because of the issues of race and slavery—but do for the first time appear in the Fourteenth Amendment—but not the part of the Fourteenth Amendment that most people have heard about, Section 1 of the Fourteenth Amendment. They appear in Section 2 of the Fourteenth Amendment, and then that phrase is going to be repeated four more times in the Constitution: in the [Fifteenth Amendment](#), which says no race-based discrimination in voting; in the Nineteenth Amendment, the one that also obsesses me, the women's suffrage amendment; and the Twenty-Fourth and the [Twenty-Sixth Amendments](#), which are about no poll tax discrimination in voting and young adults get to vote—if you're old enough to fight and die in Vietnam, you're old enough to vote.

Now, first of all, there's a pattern here. We should read the Constitution as a whole and understand what's going on.

Here's one thing that's going on. There's an interesting connection between war and democracy. Why do unpropertied people get to vote in the Constitution? Ben Franklin says they should get to vote because they fought in the American Revolution.

Why do black men get the right to vote after the [Civil War](#) when educated white women—people who went to Smith, Radcliffe, Wellesley—didn't? Because [Denzel Washington](#) is there with [Matthew Broderick](#) in the [Massachusetts 54th, fighting and bleeding](#), and people like him are giving their lives and limbs.

And if you're old enough and if you fight, you get to vote. That's one of the reasons why women's suffrage wasn't really in the air at the founding.

In ancient Greece, you have to be 21 to vote. Why 21? Because 21 is the age at which a [hoplite](#) can

wear his armor. There's the connection you see between defense and voting.

Women eventually are going to get the right to vote with the Nineteenth Amendment in [World War I](#), as a war measure in part, because Woodrow Wilson is saying they're actually supporting the war measure on the home front—[Rosie the Riveter](#), *avant la lettre* in effect.

In our lifetime, 18-year-olds get the right to vote because if you're old enough to fight and maybe die in Vietnam, you're old enough to vote on whether we should be in that war in the first place.

So the founders didn't have a right to vote in their Constitution. You heard me wax eloquent about how extraordinary that project was for its time. But that's only the beginning, you see, and now we have five different clauses that affirm a right to vote, reinforced by iconic civil rights and voting rights laws that people bled for, died for, [John Lewis](#) got his [head cracked open](#) for.

And yes, I'm deeply disappointed that the Supreme Court gutted a huge part of the iconic Voting Rights Act of 1965 in a case called [Shelby County](#), which is discussed here and other places.

The founders didn't have a right to vote. But we do in our Constitution in five places, and we have to read them together and holistically, and also alongside iconic pieces of legislation, like the Voting Rights Act. And yes, that is under assault today in various places. It's unfortunate, because ordinary voters don't believe generally in suppression. But some incumbent politicians do because high turnout sometimes tends to favor one party and disfavor the other party, and the party that's disfavored tries to suppress it. I think you know which party I'm talking about.

They didn't used to do that. The Voting Rights Act of 1965 was passed. Yes, [Lyndon Johnson](#) as a Democrat pushed it through, but a lot of the Democrats voted against it, and a lot of great Republicans voted for it because they understood they were the party of Lincoln. What party put those words in the Constitution the first time? That would be the Republican Party in Section 2 of the Fourteenth Amendment and then again in the Fifteenth Amendment and then again and again. I keep waiting for that party to remember its best sell. And yes, voting rights are under attack.

If someone asks me about the Electoral College, which I haven't gotten asked yet, I can connect it still further. But I hope I've been somewhat responsive.

**QUESTION:** Hi. Good evening. My name is Christopher Lewis, majoring in pre-law. I am bringing this topic a little bit closer to recent events.

As I said, I major in pre-law. Not too long ago, I was taught that the Fourth Amendment gives every citizen in this country certain rights against unreasonable search and seizure.

**AKHIL REED AMAR:** Yes.

**QUESTIONER:** If unreasonable search and seizure occur, then there are exclusionary rules that kick out any evidence that was obtained.

However, in June of this year, the Supreme Court ruled in the case [Utah v. Strieff](#). It says that illegal evidence obtained can still be used against someone who was unreasonably searched.

**AKHIL REED AMAR:** Perfect question. Thank you.

The Fourth Amendment, which provides for rights against unreasonable searches and seizures, says, "The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated," and then it has some other language about warrants and probable cause.

I told you all this is an experiment. So there's really not very much on chain gangs, oh but there's a lot of voting rights and there's a ton in the new book on the Fourth Amendment, maybe more than on any other topic. Some of what I say the liberals are going to like and some of what I say the conservatives are going to like.

According to the Constitution, as I explain in great detail in some of these essays, there is not a right to a warrant, or even probable cause, or even individual suspicion, every time you are intruded upon.

Think about metal detectors at airports. There's no warrant, there's no probable cause, there's no individual suspicion. Why are those okay? You put your finger on it. The Constitution actually doesn't say that. It says, "the right of the people to be secure against *unreasonable* searches and seizures."

Now, we have to figure out what makes a search or seizure unreasonable, and we have to think about the Constitutional values behind the Fourth Amendment, just like we have to think about why we have a rule about 35 years old or what's behind these multiple provisions on the right to vote. Privacy is one of the values. They single out homes above all other buildings because homes are a private space. They protect people's persons, their bodies, because that's a particularly intimate space.

But if it was only about privacy, we should have as few searches as possible in airports. We don't. We search everyone. And I love it. You know why? Because they're not just searching people who have dark skin, people who look faintly Arabic. Misery loves company. There's an equality value also. If everyone is searched or seized, that's a little different. And if they are too aggressive in general, then politically powerful people will start to complain because they are being intruded upon.

Now, why are metal detectors in airports different than [stop-and-frisks](#), for example? Well, for one, everyone goes through it. It's not as intrusive a patdown, typically. It's pretty justified because people really did hijack planes and fly them into buildings. The same people who are being intruded upon—that is, every passenger—is also a beneficiary because the planes are safer. We're on both sides of that transaction.

Whereas for stop-and-frisks, some people in the community who look a certain way are more intruded upon for the benefit maybe of other people who don't get stopped and frisked at the same rate but who are maybe benefited by a robust police.

So now we're beginning to talk in interesting ways about what makes a search or seizure unreasonable. If it's unequal, if it's discriminatory, if it's more intrusive than necessary, if it's overly gendered—when you go to the TSA (Transportation Security Administration), men never pat down women, interestingly. So gender norms fit in. You see, I'm quite interested in this.

If it's legislatively authorized. If the same people who are being intruded upon are also being benefited, that might make it more reasonable.

I have several essays, actually, about how to think about the Fourth Amendment. Now, here's a very controversial thing that I say: The exclusionary rule, so-called, the rule that says if the cops violate the Fourth Amendment we have to toss out the evidence, is completely and totally made up. It's not in the Constitution. No framer believed it was in the Constitution. No court in America for the first 100 years ever excluded evidence. And it's actually a bad idea. It frees the guilty. It doesn't actually

properly protect the innocent in all sorts of ways. Them's fightin' words to lots of folks. But I defend that proposition.

One of the blurbers, my very dear friend [Alan Dershowitz](#) says the following: "No one's going to agree with all of the ideas in this book. I couldn't disagree more with Professor Amar's opposition to exclusionary rules. But he makes you think . . ." blah, blah, blah.

If you want a book that's just going to reaffirm all your liberal prejudices, this probably isn't for you. I have other conservative things that I haven't been asked about—I don't want to pollute the jury pool because there are a couple more questions still—but I say actually we need robust protections for innocent people.

Right now, for example, suppose the cops know you're innocent but they just want to hassle you because of your race or your politics. Well, if the exclusionary rule is the only game in town, it's open season on you because they can do whatever they want. They can brutalize you. They're not going to find any evidence.

We need remedies for innocent people, and I talk about what those might be—damage actions, class actions, other things. We need community-based policing involving community review boards to make sure the cops—not just who's being searched or seized, but who's doing the searching and seizing, and do they look like the community or do they look like an alien occupying army? Civilian supremacy is a deep principle in the Constitution, and it applies to a paramilitarized police force today.

So the Fourth Amendment is a very great amendment. It uses those words "the people, the right of the people" that came from the Preamble, and there's lots of good stuff about it.

**QUESTION:** Sondra Stein.

My question is about the whole concept of original intent. It always seemed to me like it was a canard, because the society we had when the Constitution was first formed is so different. We didn't have the power of TV in a political campaign, or the Gore decision, we didn't have anything like that in the Constitution.

Since our society is so different, I think this original intent is just used. But it would be impossible, word for word, to have a society like the original Constitution.

**AKHIL REED AMAR:** I'm more a defender of original intent than is perhaps conventional. You might associate original intent with conservatives, like Antonin Scalia or [Clarence Thomas](#) or [Ed Meese](#) or [Robert Bork](#)—Robert Bork was my teacher; there's actually a remembrance essay about him.

The greatest originalist textualist in modern Supreme Court history, in my view the greatest justice of the 20th century, was a liberal who always carried a copy of the Constitution with him wherever he went. I've got several right here now, and I could pull some out of my back pocket too. So I usually have—you know, "Here's one, here's two, here's three." [Laughter] There are more where they came from.

This fellow, a justice on the Supreme Court, always, always carried a copy of the Constitution with him. A crusading liberal, FDR's first appointee to the Court. His name was [Hugo Lafayette Black](#).

Here's what the world looked like. I told you what it looked like in 1786. Here's what it looked like the

year before he came on the Court—and it was a bad world, because we weren't taking seriously stuff that really is in here.

- In 1936 there's no judicial protection for the right to vote. Today there is—not robust enough, but there is a lot.
- The Bill of Rights has never been applied against the states basically as a general proposition, only against the federal government.
- Criminal defendants have precious few Constitutional rights. Indigent defendants, for example, don't get appointed counsel.
- There is organized sectarian prayer in the public schools.
- Free expression has never won.
- [Jim Crow](#) prevails across much of America.

Hugo Black comes on. He says, "Now wait a minute. It says 'equal,' and apartheid isn't equal; and it says 'the freedom of speech,' and the freedom of speech should mean the freedom of speech; and it says the right to vote' again and again and again, and by god we should enforce that because people died for it; and it says actually 'no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States,' and what are those? Speech, press, petition, assembly; the Bill of Rights should apply against state governments; and it really does say you have a right of counsel, and that applies to poor people too, and poor people might be innocent but they can't prevail unless actually they have a lawyer. This document says you have more rights than are listed—that's what the Ninth Amendment says, that's what the Fourteenth Amendment says—but never fewer. So I want us to know what the original intent behind certain provisions is. Even if it doesn't bind us, we would be foolish not to know why they put it in here because we might be repeating mistakes that they actually bled to fix."

Since I mentioned my friend Alan Dershowitz before, he writes a [book](#) that says "rights come from wrongs; mistakes are made and then the corrections are inscribed in a document."

Even if it doesn't bind you today, I would not want you to be unaware of why they put stuff here. In my view, if they put a right in the Constitution, we enforce that right. We might enforce more than that right, because they say there are unenumerated rights, but we should never enforce less.

**QUESTION:** Ellen Berenson.

The most important thing I've gotten out of this is I'm going to go read my little copy of the Constitution that I have at home, because that's really what we should be doing.

**AKHIL REED AMAR:** Good. Progress

**QUESTIONER:** Two things come to mind. One is that—and maybe this isn't a question about the Constitution, but I'll ask it anyway—President [Obama](#) and the use of executive order. I know that's not in the Constitution, but it's an issue.

The second, if you don't want to answer that—issues that have come up in the last two decades, let's say—what about the attempted [impeachment](#) of Clinton, and I think [Johnson](#), wasn't it?

**AKHIL REED AMAR:** Perfect. I'm not going to talk a lot about executive orders because I would need to go into lots of detail. But there are 10 chapters in the book. One is about dynasty; one is about criminal procedure, from [O. J.](#) to DNA, with lots of Fourth Amendment stuff; but one's all about the Clinton impeachment.

My bottom line about the Clinton impeachment is that it was a partisan impeachment and that's a problem. Maybe he should have been impeached and removed—I don't actually weigh in on that particularly. What I do say is the Constitution requires two-thirds of the Senate in order to convict. Ours is a two-party world. In order to get two-thirds, people of both parties have to agree. If you are going to undo a national election, you should only undo it if the people who supported that president or their political leaders basically want the person out.

Nixon, actually, on that standard was justifiably **forced out** because Republicans decided that what he did was wrong. **Barry Goldwater** had turned against him; **Howard Baker**; **Lowell Weicker**. So it was not a partisan witch hunt. Republicans and Democrats agreed that Nixon's **misdeeds** really did rise to the level of high crimes and misdemeanors.

Democrats never agreed, whether rightly or wrongly, that Clinton's misdeeds rose to that standard. What I said is it's basically a misuse of Constitution power if you are doing certain things when actually you are never getting the other party onboard, because you need a buy-in of both parties to undo a national election. That's the fundamental—one takeaway point among many in that chapter.

There's lots on the Clinton impeachment if you're interested.

**QUESTION:** We have been at **war** since 2003. Thousands of American soldiers have died since 2003. The Constitution provides that Congress shall declare wars. But Congress has never declared war since 2003. What do you think about that?

**AKHIL REED AMAR:** I discuss it in other books, not so much in this one.

I do want to tell you one thing about that. In all of American history, we've had really only a handful of declared wars. They are the **War of 1812**, the **Mexican-American War**, the **Spanish-American War**, **World War I**, **World War II**. I think that's it. Many wars have been legislatively authorized but not by things that are called formal declarations of war, beginning with the **Quasi-War** against France under John Adams.

A president needs to have Congressional support. Only Congress can create an army. Only Congress can fund an army. But the way in which the president needs Congress's support, given 200-plus years of American history, need not take the form of a formal declaration of war, just because that's not how we've done it in America for a very long time, really in effect going all the way back to John Adams, for example, and what was called the Quasi-War against France.

It's a great question. I have some stuff on "the War on Terror" in general, but not so much on—what I do say is, if you're going to do all sorts of surveillance, Congress has to be involved. So my big idea is yes, Congress needs to authorize all sorts of things. The executive branch shouldn't come up with all sorts of things that threaten civil liberty unilaterally. There's lots on that in the new book, especially about surveillance.

But I don't really weigh in about whether Congress has to do something that's formally called a declaration of war, as opposed to, for example, the authorization of the use of military force, which was a statute that was in fact passed by Congress.

**QUESTION:** Thank you, Professor. My name is Emmanuel Bropleh, Jr. I'm a Skadden Arps scholar at the City College of New York.

I'm really moved by your enthusiasm for this living document, and I am glad to be here in person to

see all of that.

But here is my question: You mentioned rights and responsibility in your opening statement. It is one of the political rights of We the People. It becomes problematic when, say, for example, Congress doesn't fulfill the responsibility of getting the nominee of the Supreme Court to be confirmed.

What can We the People do, or must do, to move the hands of our own people who might be stalling the progress of our democracy, or wherein there is a great lag, if there is no election? What can We the People do about that?

**AKHIL REED AMAR:** Perfect question on which to end.

The Scalia vacancy, the [Garland nomination](#)—there are actually two essays on [Merrick Garland's](#) nomination.

Here's my view. A lot of times, in the views that I put forth in the book my Constitutional analysis is different than my personal political view.

I like Merrick Garland. I think he's a great man. I'd love to see him confirmed.

Now, I do not, however, believe that the Senate has a duty that they are breaching in some very super-strong sense by not holding a hearing. The Constitution doesn't mention hearings. They don't have to hold a committee vote because the Constitution doesn't mention that. They don't have to hold a floor vote—and by the way, even if they did, they could vote no, which I wouldn't want, because I want Merrick Garland confirmed.

When the Constitution actually imposes a certain kind of duty, it often says so. It says, "When the House and the Senate have passed a bill, the president has to act within 10 days, Sundays excepted; and if he doesn't that bill becomes a law." They could have said, "Whenever the president sends up a nominee, the Senate has a certain number of days; and if they don't act, the person gets on the Court." The Constitution in fact doesn't say that.

Now, I want Garland confirmed. I think that actually it's very unfortunate that he hasn't been, but not because, strictly speaking, my Republican friends in the Senate are violating the Constitution. Now, let me make the best case for them and then what should we do.

Here's the best case for what the Republicans are doing. They say, "Yes, Barack Obama [won in 2012](#), but we Republicans [won in 2014](#), we took back the Senate, and our constituents sent us to basically thwart his plans, especially anything that he might try to do to project his vision to the future. Half of us were elected on basically a one-word platform, 'No.' The other half of us Republicans were elected on a two-word platform, 'Hell no.' That's actually what our constituents sent us to do, and that's what we're doing—no and hell no."

I'm trying to actually really understand what they're saying: "He won 2012, we won 2014. It's a standoff. Let's let the people decide. We're going to have a tiebreaking election. If we Republicans win, then we're going to put someone else in that vacancy. If the Democrats win, then they'll have a fresh mandate." That's not, it seems to me, a preposterous view, that presidential elections are not bugs but features, that direct senatorial elections are not bugs but features. I said earlier, in effect, that all the branches of government are on the ballot. Our Constitution is designed so that presidents and senators pick judges, and the people get to pick presidents and senators, so this election is our chance to weigh in on that.

I don't think that presidents should pick justices. The justices never pick presidents. That's why *Bush v. Gore* is a disgrace, and I have some essays on the disgrace that is *Bush v. Gore*.

I'm coming to a close now. The basic thought here is We the People actually are going to, in effect, have a referendum on that open Court seat. If you want Garland, you have to vote for Hillary Clinton and Democratic senators. If you don't want Garland, you have to vote for Donald Trump and Republican senators.

I had one suggestion that I put forth that has not been adopted. I said: Listen, if this election is a referendum on the Court, why not have the hearings now, let Garland make his case? Let his supporters make his case; let his detractors explain why they actually don't think he should be on the Court. Let's use this as an opportunity, because we do have an election, to educate the American citizenry about the Court and its future. If we do that, and if Hillary Clinton wins, we can confirm him in mid-November and now the Supreme Court won't limp along for another term short-staffed. That was the solution I put forward. It was not accepted.

But here's what I'll say just in conclusion: My Constitutional views are different than my personal views. I'd love to see him confirmed immediately. But I can't stand up and tell you that the Constitution requires a hearing and a vote and a yes vote.

Let me say one final thing. This issue did come up not so long ago. An ideological president in his last year facing a Senate dominated by the other party, Ronald Reagan in 1987—he's as conservative a Republican as Obama is a liberal Democrat—faced a Senate of the opposition party and we got *Anthony Kennedy*, who the Republicans could agree on and the Democrats, and who was the one person most on the Supreme Court who sometimes votes with Republicans and sometimes with Democrats, because almost no one else ever crosses the aisle. I think the Republicans have been well served by Anthony Kennedy.

My own view is that Garland is like that. The Republicans would like him. He'd be their favorite Democrat, a kind of *Joe Lieberman*-like person, because he's not a *Bernie Sanders* socialist. He's a person of great distinction and moderation. I wish the Republican Senate had done for him what a Democrat Senate led by then-Senator *Joe Biden* and others did for Anthony Kennedy. They didn't. I wish they had.

Ours is a more polarized time. I actually talk a lot about political polarization in the book.

But what can you do? You can vote.

**JOANNE MYERS:** We the People thank you. Thank you so much.

### Audio

BC--before the Constitution--the history of the world was the history of kings, emperors, and tsars. AD--after the document--the world would never be the same again, says Constitutional law scholar Akhil Reed Amar. And the Constitution is particularly important in a fraught presidential election like this one.

### Video Clips

BC--before the Constitution--the history of the world was the history of kings, emperors, and tsars. AD--after the document--the world would never be the same again, says Constitutional law scholar Akhil Reed Amar. And the Constitution is particularly important in a fraught presidential election like this one.

**Read More:** [Democracy](#), [Education](#), [Cultural Rights](#), [International Law](#), [North America](#), [United Kingdom](#), [United States](#)

Copyright © 2016 Carnegie Council for Ethics in International Affairs