

# Amar for Justice

Why Yale law professor Akhil Amar belongs on the Supreme Court.

BY TIMOTHY J. DOWLING

The new legislative landscape is already influencing judicial nominations. President George W. Bush has decided not to resubmit the names of several controversial nominees who failed to win confirmation in the 109th Congress. Senate Judiciary Committee member Charles Schumer (D-N.Y.) has flatly proclaimed that “there will be no more right-wing judges, period.”

For the Supreme Court in particular, the short list of candidates desired by the White House but confirmable by the Senate might now be a blank sheet of paper.

There is one potential Supreme Court nominee, however, who would be fully consistent with Bush’s professed jurisprudential values and yet compatible with current political realities.

If Bush wants to appoint a principled originalist who would avoid the rancor of previous confirmation battles, he should nominate Yale law professor Akhil Reed Amar, a rare political liberal who views the Constitution’s original meaning as a serious constraint on judicial discretion.

I hope Amar doesn’t mind my presumptuousness. I’ve never met him, and he had no prior knowledge of this proposal. But his approach to constitutional interpretation is worthy of attention even if the White House ignores my eminently sensible suggestion.

Little time need be spent examining Amar’s extraordinary paper credentials. A child of immigrants, Amar joined the Yale Law School faculty in 1985, and his scholarship is broad, deep, and highly respected. He is co-editor of a leading constitutional law casebook and author of several other celebrated books and countless articles. The American Bar Association could be counted on to give him its highest rating.

More significantly, Amar’s scholarship demonstrates two points that should ensure broad bipartisan support.

## A DOCUMENTARIAN

First, Amar’s record should convince Senate Republicans that he is genuinely committed to reading the Constitution as originally understood and he believes this original meaning should play a primary role in constitutional interpretation.

Amar calls himself a “documentarian” first and a doctrinalist second, declining to follow case law unthinkingly at the expense of the constitutional text. He embraces the more nuanced form of originalism that seeks the original public understanding of the document, rather than the subjective intent of any particular Framers.

“What counts as text,” he writes, “is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent.”

Some self-proclaimed originalists might be suspected of making textual arguments merely because they increasingly view originalism as the only game in town. Amar’s originalism, however, is not a newfound convenience but a long-standing philosophy anchored in immense respect for the supreme law of his home. Although aware of the tragic flaws in the founding society, he movingly describes how the Constitution derives its authority and authenticity from its “extraordinarily extended and inclusive ratification process,” which allowed citizens, for the first time in history, to vote on the law that would govern themselves and their posterity.

Indeed, Amar’s commitment to text, structure, and history is based in large measure on the grand scheme of popular sovereignty as reflected in the ratified text, and on the epic historical events that gave rise to its provisions. Nowhere is this idea of popular sovereignty more evident than in Amar’s extended

treatment of the Constitution's preamble as an interpretive guide, much as the Marshall Court used the preamble to support its most important rulings. And his full-throated reading of the Reconstruction amendments shows them to be a "redemptive" response to the deplorable defects in the original, unamended Constitution.

Other committed originalists give Amar's work rave reviews. University of Minnesota law professor Michael Paulsen, a former head of the Yale Federalist Society, gushed over Amar's latest treatise, *America's Constitution: A Biography*, describing it as "the best book about the Constitution in two hundred years," finishing a "close second" to *The Federalist*. For Federalist Society co-founder Steven Calabresi, Amar's book on the Bill of Rights "shows by example how the very best work in constitutional law can be done." And the national Federalist Society more than a decade ago gave Amar its Paul M. Bator Award for distinguished scholarship.

Amar's originalism encompasses a view of presidential authority the executive branch should find appealing. His textual explication of Article II leans toward a robust executive power, one properly checked by the other branches to be sure, but flexible and muscular enough to "keep the ship of state afloat." Under his view, the president is vested not only with enumerated powers but also with a general executive authority to respond to the emergencies and vicissitudes of our national life.

#### POLITICAL NEUTRALITY

The second salient point to be gleaned from Amar's scholarship, one that should provide comfort to Senate Democrats, is that he pursues originalism in an honest and noble fashion, without regard to a political agenda. Much of the corrosive debate over Bush's nominees comes from a suspicion that some of them, while professing a commitment to neutral principles, actually would be judicial activists and advance conservative political ends at the expense of the rule of law. Democrats on the newly constituted Judiciary Committee should embrace Amar because he practices originalism in a manner untethered to any rightist political platform. Indeed, he proclaims himself to be a registered Democrat who voted for Al Gore.

His explication of the interstate commerce clause provides a case in point. Some libertarians employ a one-sided historical analysis to argue that this congressional power is limited to trade regulation and nothing more, thereby relegating many of our federal civil-rights laws, environmental protections, and other vital safeguards to the constitutional dustbin. Amar, on the other hand, persuasively argues for a broader reading of "commerce," based on text, structure, and history, that promotes the Framers' goal of establishing a central regime capable of addressing all affairs, both economic and noneconomic, that a single state cannot competently manage.

Just as Amar has been praised by the right, his scholarship has

received effusive kudos from the left. Harvard law professor Laurence Tribe hails *America's Constitution* by saying, "What David McCullough is to John Adams, what Walter Isaacson is to Benjamin Franklin, Akhil Amar is to the Constitution." Supreme Court justices of all stripes have cited Amar's writings roughly 20 times.

#### JUDICIAL TEMPERAMENT

Chief Justice John Roberts Jr. has committed himself to unanimity and collegiality, and Amar would fit right in.

When Amar disagrees, he remains generous, eschewing the all-too-common temptation to demonize those who use different interpretive methods. He invites readers to enter not an argument but an "interpretive journey." He responds to his critics not with acrimony but with invitations to continue the conversation.

Throughout the interpretive journey, he emphasizes the principles and history that unite us, a common ground that he seems to view as infinitely more important than any interpretive disagreements. And he is capable of seeing both sides of an issue. On abortion, for instance, Amar is sensitive to how the law has used women's biology to curtail their liberty, while simultaneously recognizing that the Supreme Court has brushed over other values in the Constitution's text and structure that should inform the analysis.

An optimist at heart, Amar sees America not as slouching toward Gomorrah, but instead as a nation with a "grand arc of constitutional history" that shows "how democracy has swept forward across the centuries."

#### LAW, NOT POLITICS

The president and his advisers say they want judges who will leave their political views on the courthouse steps and decide cases based on the law. In light of these assertions, it should not matter one whit that Amar has expressed disagreement with some administration positions as a matter of policy. Amar's scholarship leaves no doubt that as a judge, he would set aside his political beliefs, adhere to the Constitution, and interpret (rather than make) the law without regard to any political agenda.

Conservative legal thinkers have long criticized result-oriented judges who bring a liberal agenda to the bench. If White House advisers want to show that their originalism is not similarly infected with a conservative agenda, and if they want a nominee who is both a genuine originalist and confirmable in today's Senate, Amar is an obvious choice.

If no Supreme Court vacancy arises during the balance of Bush's term, the next president also would do well to study Amar's work with care. Whether in this term or not, this originalist would make a fine justice.

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