

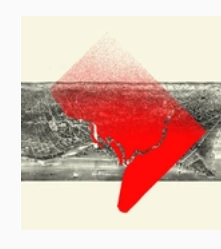
MORE FROM THE BATTLE FOR THE CONSTITUTION

Ban Him Forever

PAUL ROSENZWEIG



Don't Fall for the D.C. Retrocession 'Okey-Doke'

CHRIS MYERS ASCH
GEORGE DEREK MUSGROVE

The Chauvin Trial's Jury Wasn't Like Other Juries

SONALI CHAKRAVARTI



IDEAS

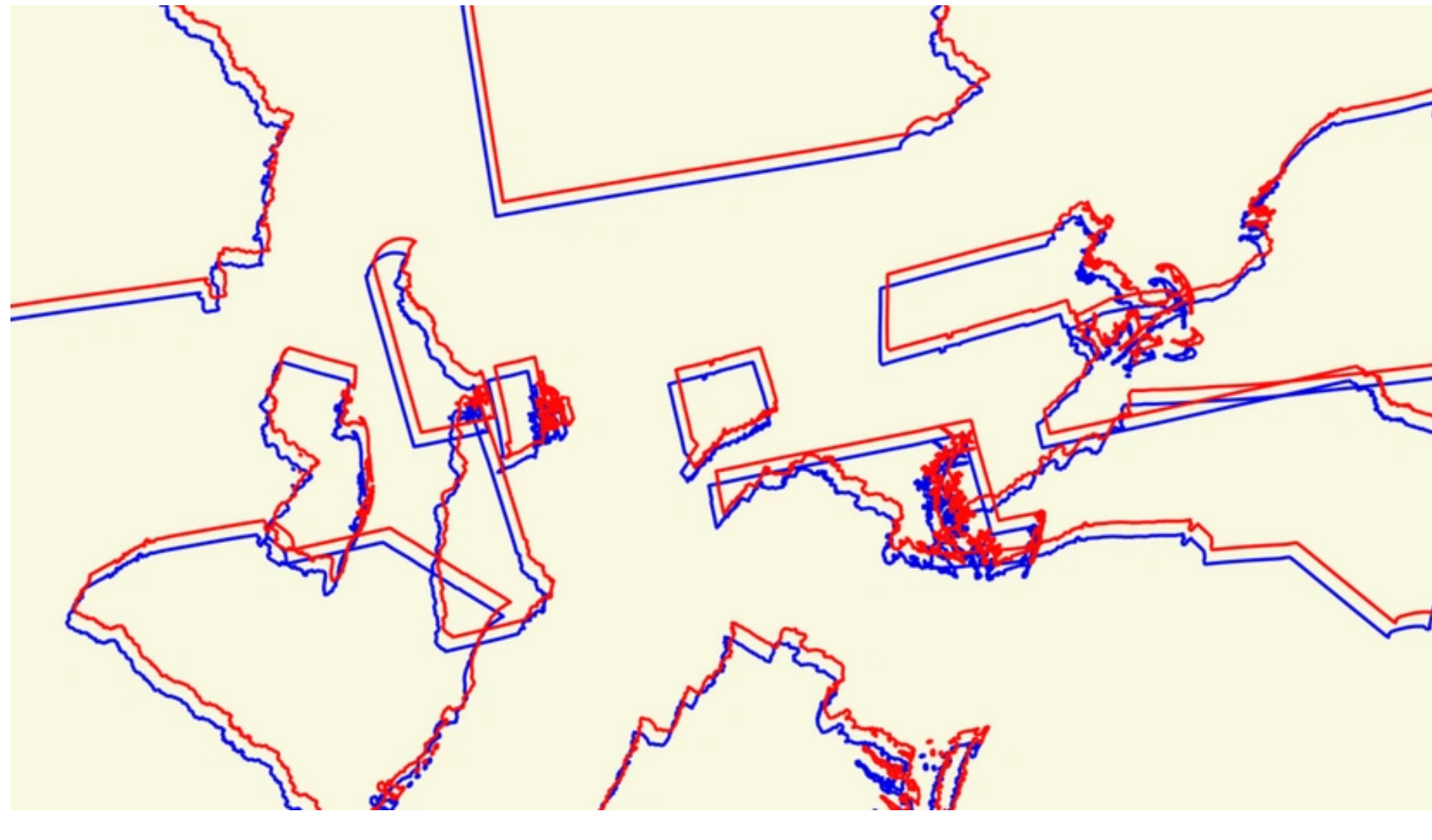
The Year That Changed Everything

Critiquing the Founders is in vogue these days, but what they did was extraordinary.

MAY 4, 2021

Akhil Reed Amar

Professor of law and political science at Yale University



THE ATLANTIC

In 1788, We the People of the United States ordained a Constitution to “secure the blessings of liberty to ourselves and our posterity.” It was the year that changed everything. Yet for the past century, posterity has profoundly misunderstood what happened then—who did what, why they did it, and how, and also what they failed to do that needed doing.

Much of the confusion began in 1913, when the American historian Charles Beard published his muckraking blockbuster, *An Economic Interpretation of the Constitution of the United States*, the 20th century’s most influential work of constitutional scholarship. Beard portrayed the Constitution’s leading drafters as moneymen lining their own pockets and those of their elite confreres. In Beard’s account, George Washington and company were Gilded Age robber barons avant la lettre, fat cats rigging the rules for themselves and other one-percenters.

Beard got lots wrong about the personal finances of various Federalists and Anti-Federalists, and it took decades of scholarship to set the record straight. By then, much of the cultural damage had been done. Many sophisticates came to see the Constitution’s democratic pretensions as a sham. In another best seller published two-thirds of a century after Beard’s, the popular historian [Howard Zinn repackaged neo-Beardian myths](#), disillusioning a new generation of Americans.

ADVERTISEMENT

The personal finances of the Founders aside, the biggest fact undermining Beard and his disciples has lain in plain sight all along: The Constitution was put to a vote. This is the obvious meaning of the subject, object, and verbs of the document’s dramatic opening sentence: “We the People of the United States ... do ordain and establish this Constitution.” And what a vote it was. The breadth and depth of inclusion were stunning—unprecedented and, in hindsight, transformative.

[*George Thomas: ‘America is a republic, not a democracy’ is a dangerous—and wrong—argument*]

Before 1788, only a few democracies had existed in world history. Across most of the planet most of the time, most humans were ruled by princes and priests. None of the democratic or quasi-democratic regimes that had preexisted the American Revolution—various ancient Greek Republics, pre-imperial Rome, the post-feudal British and Swiss nations—had ever promulgated written constitutions that had been put to any sort of special popular vote. In 1776, America’s Declaration of Independence did not undergo a special vote, nor did any of the Revolutionary state constitutions born that year. In 1781, a continental legal blueprint, the Articles of Confederation, likewise launched without a special popular vote.

By contrast, in 1788, ordinary folk across the continent weighed in on the proposed Constitution with both voices and votes. In eight of the 13 states, the usual property qualifications were lowered or eliminated; nowhere were they raised. In New York, all free, adult male citizens could vote—no race tests, religious tests, literacy tests, or property qualifications. These were not the ordinary rules for ordinary New York elections, but all of America understood the need for a special democratic mandate for the bold plan proposed by Washington and company. Never before had so many people played so direct a role in deciding their collective fate.

Beard and his disciples downplayed the astonishing extent of popular deliberation and newspaper discourse that accompanied the vote. Although the Constitution’s draftsmen initially met behind closed doors, secrecy lapsed when the proposed Constitution was unveiled in September 1787. Immediately, the delegates chattered like magpies about what had transpired in the conclave, and why.

Not everyone in the ratification process supported the proposal, but skeptics said their piece and newspapers covered almost every word. Americans conversed but did not combat. No one died from political violence in an entire year of intense debate, and apart from a few fisticuffs here and there, no one was even seriously injured. Critics were not bullied or ostracized. Rather, several eventually became presidents, vice presidents, and Supreme Court justices. The best criticisms of the Philadelphia draft were quickly incorporated into a set of amendments—the Bill of Rights—that championed the very rights of speech, press, petition, and assembly so prominently on display in 1788.

If the Constitution was not all about enriching the Federalist few, then what *was* its driving impulse? Simple: The document aimed to create a “more perfect union”—that is, an indivisible union on the model of that of Scotland and England in 1707—in order to provide for “the common defense,” which would in turn secure “the blessings of liberty.”

As I explain in my new book, *The Words That Made Us*, the Constitution was a direct and sensible reaction to two things: the war for independence and the Articles of Confederation. Washington and his supporters understood that Americans had just barely won the war and risked losing everything if England (or France) ever tried to reconquer. But the Articles of Confederation were a flop; states didn’t pay their dues, and there was no money to repay veterans and other creditors for the previous war, much less finance the next war or crisis just over the horizon. Solving these problems would require a whole slew of changes. Several of these changes themselves created other mini-problems, which then entailed still more changes.

Drafting the Constitution was thus like solving a giant sudoku puzzle. Start with the war-finance imperative, which meant that Congress needed to tax citizens individually rather than relying on state dues. But if individuals were to be taxed, they needed to be authentically represented in a new House of Representatives. (No taxation without representation, after all.) So the old unicameral Congress under the confederation had to transmogrify into a real bicameral legislature, just like a typical state legislature. In turn, this stronger legislature would need to be counterbalanced by a stronger executive and a stronger judiciary, as in the best state governments. The big losers in this schema would be small-minded state legislators, who would wield less clout in the new regime. So Washington and company needed to bypass state governments by securing a mandate directly from the American people, via a series of sweeping special elections.

This then required that the draftsmen lace their proposal with democratic sweeteners—a regular census to limit malapportionment; lawmaker salaries so that men without fortunes could serve in government; repudiation of property qualifications for House members, senators, and presidents; and so on.

[*From the October 2020 issue: The flawed genius of the Constitution*]

Beard and his disciples missed all of this, and in the process mangled the key events and ideas of the late 1780s. If, as Beard and Zinn claimed, the Constitution was essentially antidemocratic, why did ordinary Americans vote for it? Why did they unanimously elect and reelect its avatar, George Washington, and put into power so many leading Federalists in the first set of elections under the new document?

Alas, even as the Constitution enacted and envisioned democracy on an epic scale, the document had an Achilles’ heel that went largely unmentioned by Beard. To provide for the common defense, the new Constitution needed to keep the North and the South united and indeed needed to strengthen the union by making the nation legally indivisible—immune from state secession, post-ratification. Liberty and union were truly inseparable, for if the South ever tried to opt out, European powers could use southern territory for military invasions of the North. If so, America would no longer be a kind of island nation akin to post-1707 Britain. A large army would need to defend the new nation’s southern flank. But large armies would imperil liberty.

To woo the Deep South into a new legally indivisible union, the Constitution had to accommodate slavery, and it did so most disastrously via the three-fifths clause giving southern states extra seats in the House of Representatives and the Electoral College. This wasn’t the central purpose of the new Constitution, but the document certainly did serve to bolster an incipient slavocracy—and ultimately imperiled the very blessings of liberty the document aimed to secure.

Thus, a Constitution designed by and for George Washington ultimately led to the age of Andrew Jackson. Whereas Washington became, over time, an embarrassed slaveholder who, at his life’s end, freed the enslaved people he owned, Jackson was a proud slaveholder who bought and sold humans with abandon.

Both General Washington and General Jackson were American war heroes, defenders of national security and national indivisibility, who knew how to beat the British—an absolute imperative to secure the blessings of liberty. But British armies were not the only threat to American liberty. American slavery was a deeper and indeed existential threat to the entire constitutional project. It was a threat that the Constitution’s architects, for all their insights and achievements, tragically underestimated.