A Poor Guide for Trump's High Court Choices

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To the chagrin of the vast majority of professors of constitutional law, President-elect Donald Trump has promised to appoint judges to the Supreme Court and throughout the federal judiciary who believe that the Constitution's original meaning provides authoritative guidance in resolving cases and controversies.

Trump said that his kind of judges would uphold the Second Amendment right of individuals to own firearms, and would overturn *Roe v. Wade*. That, he emphasized on CBS's "60 Minutes," would return the question of abortion to the states—which, given public opinion data, would likely leave abortion legal in most of the country.

Hillary Clinton hoped as president to pursue a markedly different course. In the third presidential debate, she had little to say about the Constitution. But she did signal agreement with President Obama that "empathy" is the leading judicial virtue, stating her plan to "appoint Supreme Court justices who understand the way the world really works, who have real-life experience."

Like Obama, Clinton assumes that the exercise of empathy from the bench yields progressive results. Her justices, she declared, would reverse *Citizens United* so that the government could lawfully regulate independent political spending by for-profit corporations, while also protecting voting rights, abortion, and same-sex marriage. To the delight of the vast majority of the nation's law professors, Clinton indicated that she believes in a "living" Constitution—one that evolves to accommodate progressive policy preferences.

Non-experts who are capable of stepping back from the partisan crossfire may wonder whether the divide over how to interpret the Constitution is quite as clear cut as politicians and law professors depict it. Can't one respect the Constitution while applying its principles based on an accurate grasp of history and contemporary circumstances?

If only we had authoritative voices that could rise above the fray; situate the Supreme Court within the complex governing structure created by the Constitution; elaborate principles of constitutional interpretation that distinguish the practice of judging from lawmaking and executive action; and keep abreast of society, politics, and the operation of law in the everyday world in order to address constitutional questions impartially.

Akhil Reed Amar aspires to provide such a voice. A professor of law and political science at Yale, Amar is among the outstanding scholars of the Constitution of his generation. He is the co-author of a leading constitutional law casebook and has written several important volumes for the public on the American constitutional tradition.

Amar is also a preeminent constitutional journalist. "The Constitution Today: Timeless Lessons for the Issues of Our Era" gathers his op-eds, columns, and essays spanning more than two decades and supplements them with engaging chapter introductions that provide political and personal context and elaborate a longer view. While drawing on a vast knowledge of constitutional text, structure, history, and precedent, he writes about the Constitution's "specific rules and general themes" in a manner that keeps them "accessible to the people—not just to a professional caste of lawyers, judges, and scholars, but to ordinary citizens."

Professor Amar is a proud man of the left and he is also proud of his "professional mission," which he describes as evaluating the Supreme Court from a "relatively disinterested" point of view so that he can serve as "the Court's true friend—neither a sycophant nor a scold but a genuine *amicus."* He touts his own prescience, incisiveness, and influence with an ingenuous enthusiasm. Certainly, Amar has much to tout: few constitutional law scholars can write as effectively on deadline about the legally complex and politically charged issues that come before the court, and few journalists writing about the Constitution can match his command of law and history. Yet his blind spots show just how deeply entrenched progressive assumptions are in the contemporary legal academy.

Amar boasts that he sometimes comes down on the conservative side of the question. It's true. He argues persuasively that the court correctly decided in *Citizens United* that independent spending on political messages by private corporations is a form of speech protected by the First Amendment. And well before the Supreme Court's landmark 2008 decision *District of Columbia v. Heller,* Amar argued that the Constitution protected an individual's right to own a gun.

Sometimes he adopts positions that are neither obviously of the left nor of the right. Invoking the Constitution's two prohibitions on "titles of nobility," he criticizes "the political dynasties rising up in our midst" (though his fawning comparison of Hillary Clinton to Alexander Hamilton suggests that his gratitude to Donald Trump for breaking the Clinton dynasty may be limited). To promote democratic accountability, he advocates ending the filibuster and abolishing the Electoral College (but it is polemical excess to contend that the Founders' principal justification for the indirect and state-based institution for electing presidents was to protect slavery). And he favors broadcasting Supreme Court oral arguments to demystify the justices and foster informed public debate.

Mostly, though, Amar reaches legal conclusions that comport with the progressive political preferences he espouses. In itself, that's not objectionable. His vindication of *National Federation of Independent Business v. Sebelius*—the 2012 challenge to the Affordable Care Act in which Chief Justice John Roberts stunned many conservatives by upholding Obamacare's individual mandate as a legitimate exercise of Congress's power to tax—is a tour de force. With impressive attention to the original meaning of Congress's Article I powers to regulate commerce and to tax, to the separation of powers, to Supreme Court precedent, and to the immense and integral role of health care in interstate commerce today, Amar constructs a formidable argument that addresses originalists on their own terms.

On other polarizing high-profile disputes, however, Amar exhibits the one-sidedness that typifies his journalistic homes such as Slate, The New Republic, and The New York Times—as well as Yale Law School, where he has taught for nearly 30 years. He writes in defense of affirmative action without examining the abundant evidence of the costs it inflicts on its intended beneficiaries and of its failure to provide the true diversity in education that is its constitutional justification. He makes a serious case for the constitutionality of same-sex marriage but fails to consider the sound federalism arguments for leaving the question to the states.

And he excoriates the five more-conservative justices for what he refers to as "the notorious *Bush v. Gore* ruling in 2000," which he condemns as a thoroughly political decision that "delivered the presidency on a silver platter to the Republican candidate." Amar does not mention that of the seven Florida Supreme Court justices who heard the case—all appointed by Democratic governors—three found constitutional infirmities with the Florida recounts (though he does opaquely and grudgingly acknowledge that two of the four more-liberal Supreme Court justices also concluded that the Florida recount was constitutionally flawed).

Only an intellectual environment that has become a progressive echo chamber could allow so high-minded and well-informed a scholar and journalist as Amar to overlook matters so pertinent to interpreting the Constitution today.

The legal academy's incorrigible left-wing reflexes encourage the court to promote social justice as elite law professors see it rather than decide cases in accordance with constitutional text, structure, history, and precedent. If President-elect Trump keeps his promise to appoint judges who place law before politics and put the Constitution first, he will rightly direct the federal judiciary to its proper constitutional role.

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