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THE CONSTITUTION AMERICA COULD HAVE HAD

Richard Albert

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THE CONSTITUTION AMERICA COULD HAVE HAD

Richard Albert*

ABSTRACT

Over two centuries ago, Thomas Jefferson and James Madison suggested remedies for much of what ails America today. But their ideas were rejected, leaving the country saddled with what many believe has become an ancient, undemocratic, and broken constitution. Yet, for all its present faults, the Constitution would have been even worse had Abraham Lincoln gotten his way. What were Jefferson, Madison, and Lincoln fighting for? Why did they lose their battles? And what would America look like today had they won? In this Constitution Day lecture delivered at the University of Pittsburgh, I dig into America's past to excavate the Constitution the country could have had.

* Richard Albert, William Stamps Farish Professor in Law, Professor of Government, and Director of Constitutional Studies, The University of Texas at Austin. This text was delivered as the Constitution Day Lecture at the University of Pittsburgh School of Law on Friday, September 16, 2022. I am grateful to Dean Amy Wildermuth for inviting me to give this lecture, to Professor Deborah Brake for hosting me, and to Alec Bosnic and Caden Meier for the opportunity to publish these remarks in the *University of Pittsburgh Law Review*.

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INTRODUCTION—AN ARCHEOLOGICAL DIG

Over two centuries ago, Thomas Jefferson and James Madison suggested remedies for much of what ails America today. Jefferson had a solution to the problem of constitutional paralysis even before the Constitution became impossible to amend.¹ Madison, for his part, proposed an ingenious way for the country to reconcile with its racist and sexist beginnings.²

But their ideas were rejected, leaving the country saddled with what many believe has become an ancient, undemocratic, and broken Constitution.³ Yet, for all its present faults, the Constitution would have been far worse had Abraham Lincoln gotten his way. He wanted to entrench evil into the Constitution—and to make it an unamendable and permanent part of the text.⁴

What were these towering figures—Jefferson, Lincoln, and Madison—fighting for? Why did they lose their battles? And what would America look like today had they won? My remarks are entitled “The Constitution America Could Have Had” because the country came close to having a constitution that differs dramatically from the one that exists today. In this Constitution Day lecture delivered at the University of Pittsburgh, together we will dig into America’s past to excavate the Constitution the country could have had.

I. AMERICA’S FROZEN CONSTITUTION

The Constitution was enacted in 1789. It continues to govern the country today. That is a remarkable lifespan for a constitution. No other constitution in the world

¹ See, e.g., Jesse Wegman, Opinion, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now.*, N.Y. TIMES (Aug. 4, 2021), <http://www.nytimes.com/2021/08/04/opinion/amend-constitution.html> [https://perma.cc/9RLS-F2EU].

² Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON 212 (Robert A. Rutland et al. eds., 1977).

³ SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) *passim* (2006); Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), <http://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html> [https://perma.cc/JF83-EJXX]; Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 1, 2013), <http://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> [https://perma.cc/F67B-G63Q].

⁴ See Richard Albert, *America’s Amoral Constitution*, 70 AM. U. L. REV. 773, 812–16 (2022); Noah Feldman, Opinion, *This Is the Story of How Lincoln Broke the U.S. Constitution*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/opinion/constitution-slavery-lincoln.html> [https://perma.cc/5SYB-MKZR].

has survived as long.⁵ No other constitution is older.⁶ And no other constitution has been more influential in the history of the world.⁷

When the U.S. Constitution was written, it created a brand new technology for governance. It introduced an innovative architecture of the separation of powers, a unique method for presidential selection, a bold new vision for the role of courts, and so much more.⁸ The Constitution was ahead of its time. But today, the Constitution is well past its prime.

A. *Calls for Reform*

What was thought then to be revolutionary is today seen as outdated, archaic, and undemocratic.⁹ Most Americans believe there is at least one thing urgently in need of repair in the Constitution.¹⁰ Some want to change how the president is elected. They believe it is necessary to discard the Electoral College and transition to a national popular vote.¹¹ Others set their sights on the U.S. Senate. The Constitution guarantees each state two Senators, no matter how populous or deserted the state may be. So, whether you live among 40 million people in California or 600,000 people in Wyoming, you get the same representation in the Senate.

⁵ *Constitution of the United States*, U.S. SENATE, https://www.senate.gov/civics/constitution_item/constitution.htm [<https://perma.cc/XT2R-85MS>] (last visited Dec. 17, 2022) (noting in its introduction that “the United States Constitution is the world’s longest surviving written charter of government”).

⁶ While the Constitution of San Marino was written in 1600 and serves “some of the functions of a constitution[.]” it is not codified into law and thus, many do not consider it to be the oldest constitution still in place today. *San Marino*, LIBR. CONG., <https://www.loc.gov/item/guide-to-law-online/san-marino/> [<https://perma.cc/UY4M-GNLX>] (last visited Mar. 16, 2023); *San Marino: National Laws*, CHILD RTS. INT’L NETWORK, <https://archive.crin.org/en/library/publications/san-marino-national-laws.html> [<https://perma.cc/Y2CQ-FGCM>] (last visited Mar. 16, 2023).

⁷ See, e.g., Jesse Katz, *Global Influence of the U.S. Constitution*, NAT’L ARCHIVES: PIECES OF HIST. (Sept. 17, 2021), <https://prologue.blogs.archives.gov/2021/09/17/global-influence-of-the-u-s-constitution> [<https://perma.cc/V8U8-Y289>] (“[A] major legacy of the Constitution was its global impact on legal thinking and adaptation in emerging nations.”).

⁸ U.S. CONST. arts. I–III; *id.* art. II, § 1; *id.* art. III, §§ 1, 2.

⁹ See sources cited *supra* note 3.

¹⁰ See Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. TIMES (Aug. 10, 2022), <http://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html> [<https://perma.cc/9CBB-2LMG>].

¹¹ Rebecca Salzer & Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Aug. 5, 2022), <http://www.pewresearch.org/fact-tank/2022/08/05/majority-of-americans-continue-to-favor-moving-away-from-electoral-college> [<https://perma.cc/F825-YNUA>].

Reformers want to rebalance state representation in the Senate according to population.¹²

Still others believe the constitution does not protect the *right* rights. They have called for the Constitution to guarantee social and economic rights, in addition to the civil rights currently codified in the Constitution.¹³ Civil rights impose restrictions on what government can do. Government cannot deny religious freedom, for example, or the freedom of the press, or the freedom of assembly.¹⁴ Nor can the government subject you to unreasonable searches and seizures, for instance.¹⁵ In contrast, social and economic rights impose duties and obligations on government to help improve lives. The right to a job, the right to shelter, the right to food, the right to a clean environment—these are modern rights that newer constitutions commonly protect.¹⁶ None of these appear in the U.S. Constitution, though we do find them in some state constitutions around the country.¹⁷

It is no surprise that many Americans today believe the Constitution does not serve the country as well as it could. No constitution is perfect. Each and every constitution in the world could perform better, no matter how well it delivers on the goods it promises. The authors of a given constitution could have the very best intentions for creating a well-functioning democracy, but the simple reality is that no one really knows how any constitution will work until it is enacted and begins to operate. It takes time and experience to reveal flaws and errors that might need correction.

¹² See Eric Black, Opinion, *U.S. Senate Representation Is Deeply Undemocratic—and Cannot Be Changed*, MINN. POST (Feb. 19, 2021), <http://www.minnpost.com/eric-black-ink/2021/02/u-s-senate-representation-is-deeply-undemocratic-and-cannot-be-changed> [https://perma.cc/NCX8-87AM]; Eric W. Orts, *The Path to Give California 12 Senators, and Vermont Just One*, THE ATLANTIC (Jan. 2, 2019), <http://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172> [https://perma.cc/4ZUK-V6JM].

¹³ See Michel Rosenfeld, *The Role of Justice in the Constitution: The Case for Social and Economic Rights in Comparative Perspective*, 42 CARDOZO L. REV. 763, 810–11 (2021).

¹⁴ U.S. CONST. amend. I.

¹⁵ *Id.* amend. IV.

¹⁶ See David Bilchitz, *Towards a Defensible Relationship Between the Content of Socio-Economic Rights and the Separation of Powers: Conflation or Separation?*, in THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 57, 57 (David Bilchitz & David Landau eds., 2018).

¹⁷ See EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 19 (2013).

That's why virtually every single constitution in the world makes it possible to fix its problems as they arise. Almost all constitutions codify procedures that authorize constitutional amendment.¹⁸ The U.S. Constitution has its own amendment procedure.¹⁹ But amending the U.S. Constitution is much easier said than done because it requires two-thirds approval in both houses of Congress, along with the approval of three-quarters of the states.²⁰ Cobbling together that level of supermajority agreement is difficult, even in the best of times. Amending the Constitution is quite likely impossible today at a time when the country is perhaps at its most divided since the Civil War era.²¹

Scholars agree that the U.S. Constitution is one of the world's most difficult to amend.²² Since the ratification of the Constitution over two centuries ago, there have been more than 11,000 congressional proposals to amend it, but only twenty-seven have been ratified.²³

The odds are extraordinarily long for any amendment proposal to succeed. The odds are higher that you will win a prize in the Powerball lottery, or that you will be called to "Come on Down!" on the Price is Right, or that you will earn a perfect score on the SAT.²⁴ It is an understatement to say that it is very difficult to amend the U.S. Constitution.

¹⁸ See Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB. CHOICE 37, 37 (2003).

¹⁹ U.S. CONST. art. V.

²⁰ *Id.* There is another way to amend the Constitution, but it has never been attempted: it is to convene a Constitutional Convention and to propose amendments in that forum, with ratification still requiring three-quarters approval of the states. *See id.*

²¹ See Simon Jackman, *America More Divided than at any Time Since Civil War*, U.S. STUD. CTR. (Mar. 15, 2022), <http://www.usc.edu.au/analysis/america-more-divided-than-at-any-time-since-civil-war> [https://perma.cc/X969-G8QQ].

²² See, e.g., LEVINSON, *supra* note 3, at 21; DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 170 (2006); Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005 (2022); Dieter Grimm, *Types of Constitutions*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 98, 111 (Michel Rosenfeld & András Sajó eds., 2012).

²³ *Measures Proposed to Amend the Constitution*, U.S. SENATE, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm> [https://perma.cc/78WA-7LPY] (last visited May 30, 2023).

²⁴ See Sarah Long, *17 Random Statistics That Will Actually Surprise You*, SHEKNOWS (May 3, 2018, 4:14 PM), <http://www.sheknows.com/living/articles/1023453/what-are-the-odds-21-statistics-that-will-surprise-you> [https://perma.cc/J2HL-4DN5]; Lee Roth, *Falling to Your Death, Dating a Millionaire Are Better Odds than Bills Making Playoffs*, WGRZ (Sept. 20, 2018, 5:51 PM), <http://www.wgrz.com/article/sports/nfl/bills/falling-to-your-death-dating-a-millionaire-are-better-odds-than-bills-making->

If you like the Constitution as it is today, then it might not matter to you that it is virtually unamendable. But if you do not like the Constitution in its present form, you might well feel stuck in a straitjacket and powerless to do anything about it. If this describes you, you are not alone. Americans across the entire spectrum of political thought report wanting to change *something* about the Constitution. What would you change about the Constitution?

Not too long ago, the National Constitution Center brought together three groups of scholars to create their ideal versions of the U.S. Constitution.²⁵ Each group represented a different political orientation—one self-identified as Libertarian, another as Progressive, and the third as Conservative.²⁶ Each group proposed dozens of changes to the Constitution.²⁷ The Libertarian group would clamp down on the Commerce Clause, introduce stronger protections against eminent domain, and impose a balanced-budget requirement.²⁸ The Progressive group would codify a general right to vote, replace life tenure for judges with a single eighteen-year term, and put into the Constitution explicit protections for equality on grounds of gender identity and sexual orientation.²⁹ The Conservative group, for its part, would reduce the size of the Senate, limit the president to a single six-year term, and make it easier to amend the Constitution.³⁰ These are just a few items on each group's wish list. The crucial point is that all three groups—covering the entire political spectrum—would like to change something in the Constitution.

playoffs/71-596653275 [https://perma.cc/3HBE-M9AX]; Isabel Sepulveda, *Odds of 50 Random Events Happening to You*, STACKER (May 2, 2021), <http://stacker.com/stories/2343/odds-50-random-events-happening-you> [https://perma.cc/FS2A-88NE].

²⁵ Nat'l Const. Ctr., *Constitution Drafting Project*, <https://constitutioncenter.org/news-debate/special-projects/constitution-drafting-project> [https://perma.cc/U4MQ-LJKU] (last visited Nov. 5, 2022).

²⁶ *Id.*

²⁷ ILYA SHAPIRO ET AL., THE PROPOSED AMENDMENTS, NAT'L CONST. CTR. 3–13, https://constitutioncenter.org/media/files/The_Proposed_Amendments_v1.pdf [https://perma.cc/EX2X-C782] (last visited Mar. 12, 2023).

²⁸ ILYA SHAPIRO ET AL., THE LIBERTARIAN CONSTITUTION 2, 10, https://constitutioncenter.org/media/files/The_Libertarian_Constitution_1.pdf [https://perma.cc/T3PQ-78BC] (last visited Dec. 17, 2022).

²⁹ CAROLINE FREDRICKSON ET AL., THE PROGRESSIVE CONSTITUTION 3, 5–6, https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf [https://perma.cc/6G63-CYK3] (last visited Dec. 17, 2022).

³⁰ ROBERT P. GEORGE ET AL., THE CONSERVATIVE CONSTITUTION 4, 6, https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf [https://perma.cc/9CBT-R5AU] (last visited Dec. 17, 2022).

But all three groups—and everyone in the United States—have to resign themselves to the reality that the Constitution is frozen. It is today unchangeable. It is today unamendable.

B. Jefferson's Solution

There was a solution to America's problem of constitutional paralysis long before the Constitution became unamendable. The solution was proposed by Thomas Jefferson. I'll tell you about the solution in a moment, but first let me tell you about what prompted Jefferson to propose it.

Jefferson was concerned about two problems. He worried that the Constitution would become permanent because Americans would grow to love it too much.³¹ He worried that Americans would come to see the text as a holy, hallowed, and sacrosanct symbol of American nationhood, so much so that they would never want to change the Constitution—even if it was in urgent need of reform. Here is Jefferson making this point, two centuries ago: “Some men look at Constitutions with sanctimonious reverence, [and] deem them, like the ark of the covenant, too sacred to be touched. . . . [T]hey ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.”³²

Jefferson captures perfectly how many Americans perceive the Constitution today. Jefferson feared that the Constitution would become unamendable. He worried that you would feel like you have to keep the Constitution you inherited from the founders.

There was also a practical reason why Jefferson wanted to avoid the problem of a sacred constitution: for him, it made little sense to use an old technology to address modern challenges. A constitution, he believed, must be adapted to the needs and values of the present generation. Here, again, is Jefferson:

[L]aws and institutions must go hand in hand with the progress of the human mind. . . . [A]s new discoveries are made, new truths disclosed, and manners and

³¹ Letter from Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval) (July 12, 1816), in 10 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES, MAY 1816 TO 18 JANUARY 1817, 222–28 (J. Jefferson Looney ed., 2013), <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> [<https://perma.cc/EBW4-GC6A>] (“[L]et us [not follow European monarchical] examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. [L]et us, as our sister-states have done, avail ourselves of our reason and experience to correct the crude essays of our first and unexperienced, altho’ wise, virtuous, & well meaning councils.”).

³² *Id.*

opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. we might as well require a man to wear still the coat which fitted him when a boy, as civilised society to remain ever under the regimen of their barbarous ancestors.³³

That was Jefferson diagnosing the problem. For Jefferson, the cause of constitutional sacrality is constitution worship, and the consequence is constitutional paralysis. So, what can be done to ward it off? This brings us now to Jefferson's brilliant solution, which he offered for the Constitution of Virginia.

Jefferson proposed that the Constitution should require each and every generation to choose for itself whether or not to reform the Constitution.³⁴ Each generation would be forced to make a choice at the ballot box: do you want to keep your constitution as it is, or do you want to revise it in some way? Jefferson believed that forcing people to make this choice roughly every twenty years was a way to prevent them from passively accepting the old constitution as their own. Listen to Jefferson as he presents and defends his proposal:

[L]et us provide in our constitution for it's revision at stated periods. . . . [E]ach generation is as independant of the one preceding, as that was of all which had gone before. it has then, like them, a right to chuse for itself the form of government it believes most promotive of it's own happiness: consequently to accomodate to the circumstances in which it finds itself that recieved from it's predecessors; and it is for the peace and good of mankind that a solemn opportunity of doing this every 19 or 20 years should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation[.]³⁵

Of course, in the end, the U.S. Constitution was not designed in the way Jefferson suggested. But many state constitutions have adopted Jefferson's proposal.³⁶ They require that the people, in each and every generation, must decide affirmatively whether to revise their constitution or to keep it as it is.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Jennie Drage Bowser, *Constitutions: Amend with Care*, STATE LEGISLATURES MAG., Sept. 1, 2019, at 14, 16.

For instance, the Constitution of Connecticut requires that voters be asked in a referendum, every twenty years, to answer the following question: “Shall there be a Constitutional Convention to amend or revise the Constitution of the State?”³⁷ If a majority of voters say “yes,” the Connecticut General Assembly must convene a Constitutional Convention to reform the constitution.³⁸

Imagine if voters across the United States were asked every twenty years whether and how they wish to amend their Constitution—and imagine further that Congress would have no choice but to act if the people answered “yes.” Would presidents continue to be selected by the Electoral College? Would the right to abortion now be expressly protected in the text of the Constitution? Would there be a Balanced-Budget Amendment?

Jefferson’s proposal is therefore to pre-program the Constitution to force the people to answer periodically the question whether and how they want to change their Constitution—rather than waiting for Congress to make the first move.

The genius in the Jeffersonian solution is that it breaks through the stalemate in Congress that presently prevents serious deliberation and action on constitutional reform. The Jeffersonian solution generates a concrete expression of popular views, leaving Congress with effectively no choice but to heed the people’s call for constitutional change—but only if the people call for it.

The Jeffersonian solution to constitutional paralysis has achieved its purpose in the states. Their constitutions are not seen as untouchable. They are not seen as sacred. They are amended much more regularly than the U.S. Constitution.³⁹ That may well be why state constitutions more clearly and correctly communicate the present needs, hopes, and preferences of the people they govern.⁴⁰

Now that you know about Jefferson’s solution—and that you know many states in the Union have adopted it for their own constitutions—let me invite you to think about a question, my first of three questions for you today: if you could wave a magic wand, would you insert this Jeffersonian rule of periodic constitutional revision into the U.S. Constitution?

³⁷ CONN. CONST. art. XIII, § 2.

³⁸ *Id.*

³⁹ Bowser, *supra* note 36.

⁴⁰ See Clint Bolick, *State Constitutions: Freedom’s Frontier*, 2016–2017 CATO SUP. CT. REV. 15, 16–17 (2017).

II. AMERICA'S UNERASABLE CONSTITUTION

The rule of periodic constitutional revision is yet more proof that states are sometimes the site of solutions to national problems. That's one of the benefits of America's federalist system—states offer an avenue to test-drive policies and programs that might later be adopted at the national level. This is what U.S. Supreme Court Justice Louis Brandeis meant when he described states as laboratories for experimentation: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴¹

A. *The Path Not Chosen*

Would you believe that the Constitution of Alabama is today doing more than the U.S. Constitution to reflect the promise of a society rooted in justice, fairness, and equality? I'll admit that I found it hard to believe. After all, the Constitution of Alabama has long been rooted in racism, hate, and exclusion. It was written in 1901 and its text is just as you would expect from a state that did its utmost to stop progress toward true equality in America.

A few examples from Alabama's 1901 Constitution will suffice to drive home the point. It banned interracial marriage.⁴² It required schools to be segregated along racial lines, mandating that “[s]eparate schools shall be provided for white and colored children.”⁴³ It imposed a poll tax as a way to prevent African-Americans from voting.⁴⁴ And it created an exception for involuntary servitude—an exception that was exploited to put African-Americans into forced labor until the 1920s.⁴⁵ All of these racist rules were inserted into the 1901 Constitution and each of them, in some way, remains in the text of the Alabama Constitution today. But not for much longer. Those texts will soon be erased.⁴⁶

⁴¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴² ALA. CONST. art. IV, § 102, *repealed by* ALA. CONST. amend. 667. *Id.* art. XIV, § 256, *amended by* ALA. CONST. amend. 111.

⁴³ *Id.* art. XIV, § 256, *amended by* ALA. CONST. amend. 111.

⁴⁴ *Id.* art. VIII, § 194, *repealed by* ALA. CONST. amend. 579.

⁴⁵ *Id.* § 32; see Mike Cason, *Alabama Constitution of 2022 Removes Repealed Laws, Racist Language*, ADVANCE LOC. (July 31, 2022), <https://www.al.com/news/2022/07/alabama-constitution-of-2022-removes-repealed-laws-racist-language.html> [<https://perma.cc/JJA5-MB6R>].

⁴⁶ Cason, *supra* note 45.

At this very moment, the Constitution of Alabama is being rewritten to remove its racist, hateful, and exclusionary language.⁴⁷ These textual changes will be truly historic when they are completed. They will make the Alabama Constitution more welcoming, more affirming, and more inclusive. Together, they will make the Constitution a text that all Alabamans can be proud of.

The U.S. Constitution raises a sharp contrast. Its text reveals just as many examples, if not more, of racist, hateful, and exclusionary rules that are visible still today for all to see.⁴⁸ But unlike the extraordinary reforms that will transform the text of the Alabama Constitution, there is no plausible likelihood that any of these racist rules in the U.S. Constitution will ever be erased. The reason why brings us back to the Philadelphia Convention of 1787. That is when James Madison, a delegate to the Convention, saw one of his most important proposals rejected decisively and emphatically.⁴⁹

What was his proposal, and what prompted it? We'll get to Madison in a moment. But first, let's take a short detour.

About a decade ago, the powerful Tea Party Movement swept through the country, with huge victories in the 2010 midterm congressional elections in the United States.⁵⁰ When the new Congress began its work in 2011, the Tea Party caucus called for a return to the country's roots.⁵¹ And what better way to do this than to recite aloud the text of the original Constitution in the House of Representatives?⁵² But something happened on floor of the House as the Tea Party members began to read the text of the Constitution: they conspicuously omitted the

⁴⁷ *Id.*

⁴⁸ See *infra* notes 53–56 and accompanying text.

⁴⁹ See Edward Hartnett, A “Uniform and Entire” Constitution; or, What if Madison Had Won?, 15 CONST. COMMENT. 251, 251–52 (1998).

⁵⁰ See Paul Harris & Ewen MacAskill, *US Midterm Election Results Herald New Political Era as Republicans Take House*, THE GUARDIAN (Nov. 3, 2010), <http://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party> [<https://perma.cc/7NMU-48B6>].

⁵¹ See *Congressional Tea Party Caucus Debut Message: We Are Not Racist*, PBS NEWS HOUR (July 21, 2010, 2:32 PM), <https://www.pbs.org/newshour/politics/congressional-tea-party-caucus-debut-message-we-are-not-racist> [<https://perma.cc/MEP9-85VR>] (indicating that the Tea Party felt it was “distancing itself” from racist rhetoric used by some members of the movement).

⁵² See Philip Rucker & David A. Fahrenthold, *After Wrangling, Constitution Is Read on House Floor, Minus Passages on Slavery*, WASH. POST (Feb. 25, 2011), http://www.washingtonpost.com/national-politics/after-wrangling-constitution-is-read-on-house-floor-minus-passages-on-slavery/2011/01/06/ABLmphD_story.html [<https://perma.cc/8DWE-JDX4>].

many words in the Constitution that authorize and perpetuate slavery—words that today remain written, though not in force.⁵³

The vestiges of slavery and its painful reminders of the past still appear in the Constitution. The Three-Fifths Clause counts an enslaved person as three-fifths of a whole person for purposes of taxation and congressional representation.⁵⁴ That is still written in the Constitution. The Capitation Tax Clause requires taxation to be based on the census,⁵⁵ which in turn is parasitic on the Three-Fifths Clause. That is still in the Constitution. The Fugitive Slave Clause requires enslaved persons who have fled to their freedom to be hunted and returned to their captors⁵⁶—still written in the Constitution. The Importation and Migration Clause prohibits Congress from ending the international slave trade.⁵⁷ Also still in the text of the Constitution. Along with the Electoral College and the Senate, these were the core pillars of the Constitution’s infrastructure of slavery. And each of these slavocratic rules still appears in the text of the U.S. Constitution in the year 2022.

Of course, we know well that the Thirteenth, Fourteenth, and Fifteenth Amendments brought a legal end to slavery.⁵⁸ We know that together these constitutional reforms ushered in a new era of legal equality for all Americans regardless of their race.

But the rule of equality under law is overwhelmed by the rule of apartheid in the constitutional text. Rules of law are no match for the rules imprinted on the hearts and minds of people. Rules of law just do not have the same salience in society. Legalistic appeals to the details of jurisprudence just do not resonate as much as the power of emotive appeals to words and narrative. The Thirteenth, Fourteenth, and Fifteenth Amendments may well prevail in law over the racist, hateful, and exclusionary language of the Constitution. But the social truth prevails in society. These indelible stains of injustice remain written in America’s higher law for all to see.

⁵³ *Id.*

⁵⁴ U.S. CONST. art I, § 2, cl. 3.

⁵⁵ *Id.* art. I, § 9, cl. 4; *id.* art. V.

⁵⁶ *Id.* art. IV, § 2, cl. 3.

⁵⁷ *Id.* art. I, § 9, cl. 1; *id.* art. V.

⁵⁸ *Id.* amends. XIII, XIV, XV.

What is more, the text of the U.S. Constitution is not only racist, but sexist, too. When Article I and Article II refer to the President of the United States or to eligibility for election to the House of Representatives and the Senate, the Constitution refers only to “he,” not “she,” suggesting that only a man is eligible.⁵⁹ “He shall hold his Office during the Term of four Years[;]”⁶⁰ “before he enter on the Execution of his Office, he shall take [an] Oath or Affirmation[;]”⁶¹ “no person shall be a Senator who shall not . . . be an inhabitant of that state for which he shall be chosen[;]”⁶² and “no person shall be a Representative who shall not . . . be an inhabitant of that state in which he shall be chosen.”⁶³

To be sure, this did not stop Hillary Clinton from winning the Democratic nomination and running for president in 2016.⁶⁴ And no question of law today turns on the outdated reality that the Constitution codifies the masculine pronoun alone with reference to public office. For a long time now, women have been elected, and no reasonable person would point to the Constitution’s obsolete language as a barrier to electing a woman to any office today. But the question did arise in 1916 when Jeannette Rankin became the first woman elected to the House of Representatives.⁶⁵ At the time, the *New York Times* published a letter arguing that Rankin could not lawfully take her seat in Congress because the Constitution’s usage of masculine pronouns disqualified her.⁶⁶

B. *Madison’s Proposal*

Words and symbols matter. Madison knew that well. That is why he opposed the suggestion made in the First Congress to codify constitutional amendments as an

⁵⁹ *Id.* art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 1; *id.* art. II, § 1, cl. 8.

⁶⁰ *Id.* art. II, § 1, cl. 1.

⁶¹ *Id.* art. II, § 1, cl. 8.

⁶² *Id.* art. I, § 3, cl. 3.

⁶³ *Id.* art. I, § 2, cl. 2.

⁶⁴ Stephen Collinson, *Hillary Clinton Clinches Democratic Presidential Nomination*, CNN POL. (June 7, 2016), <http://www.cnn.com/2016/06/06/politics/hillary-clinton-nomination-2016> [<https://perma.cc/6QV5-MXSR>].

⁶⁵ See Rankin, Jeannette, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/20147> [<https://perma.cc/452T-JN JL>] (last visited Nov. 8, 2022).

⁶⁶ See NORMA SMITH, JEANNETTE RANKIN: AMERICA’S CONSCIENCE 103 (2002).

addendum to the Constitution.⁶⁷ Madison lost that battle; ever since the First Amendment to the U.S. Constitution, all amendments are placed at the end of the text of the Constitution. And anything that comes before—either in the original Constitution or in any subsequent amendment—does not change. Instead, it stays in the Constitution—even if it is repealed, replaced, or revised by a later constitutional change.

Madison’s defeat is why racist and sexist language still appears in the Constitution today. The upshot of the choice in the First Congress to append amendments sequentially at the back of the Constitution means that once something is put into the Constitution, it cannot ever be removed.

Madison had hoped that things would go differently. He argued that amendments should be integrated into the original text of the Constitution. Madison believed that inserting amendments directly into the Constitution would produce clarity—more clarity than a constitution whose amendments were simply appended serially to the end of the original text.⁶⁸ There was another advantage to Madison’s proposal: it brought “a neatness and propriety in incorporating the amendments into the [C]onstitution itself.”⁶⁹

The U.S. Constitution did not follow this Madisonian path. But other constitutions around the world have taken Madison’s advice on incorporating rather than appending amendments. Norway, for example. In 1814, the original Norwegian Constitution banned Jews from the country and repudiated religious beliefs contrary to the established Evangelical-Lutheran faith.⁷⁰ The constitution did not disguise its intentions. The text proclaimed outright that “Jesuits and Monastic orders shall not be tolerated” and that “Jews are furthermore excluded from the Kingdom.”⁷¹ But today, that same Norwegian Constitution reveals no hint of the hateful language that once appeared in its text. We find instead assurances that “all inhabitants of the realm shall have the right to free exercise of their religion” and that “all religious and philosophical communities were to be supported on an equal footing.”⁷² This textual transformation of the Norwegian Constitution was possible precisely because amending the Norwegian Constitution is not done in the American way of appending

⁶⁷ See Mehrdad Payandah, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 *BYU J. PUB. L.* 87, 88–89 (2011).

⁶⁸ *Id.*

⁶⁹ 1 *ANNALS CONG.* 735 (1789).

⁷⁰ Kongeriket Norges Grunnlov [constitution] May 17, 1814, art. 2 (Nor.) (*repealed in part* 1851, 1956).

⁷¹ *Id.*

⁷² *Id.* art. 16.

amendments to the end of the Constitution. Amending the Norwegian Constitution instead follows the Madisonian model of integrating amendments directly into the existing text of the Constitution—and rewriting old text where new text supersedes it.

It is possible today to imagine what the U.S. Constitution would look like as an integrated text, just like the one suggested by Madison. The First, Third, and Fourth Amendments would be inserted into Article I alongside other rules restricting the powers of Congress. The Fourteenth Amendment would be spread out across different parts of the Constitution. The Seventeenth Amendment would be codified among the Constitution’s rules on Senate elections.

Had Madison won the day on this question of constitutional form, the present Constitution would be completely different in its appearance—and it would have a substantially different public salience in relation to historically marginalized groups like African-Americans and women. The constitutional rules protecting and advancing slavery would have been deleted after the enactment of the Thirteenth Amendment. And the rules governing eligibility for elected office could have been edited—from “he” to “he/she”—after the enactment of the Nineteenth Amendment.

But the Constitution of Alabama has taken this Madisonian advice.⁷³ And this has made Alabama far and away a national leader on textual inclusivity, while the U.S. Constitution lags far behind.

We’ve now arrived at my second question for you—this time on codifying constitutional amendments in America’s constitutional text: had you been a member of the First Congress, would you have voted for Madison’s proposal to integrate amendments into the text of the Constitution or would you have preferred the appendative model the Congress ultimately chose?

III. AMERICA’S SLAVOCRATIC CONSTITUTION

We have so far confronted two missed opportunities. First, to take Jefferson’s advice to make the U.S. Constitution more responsive to the present needs and values of the people. Second, to take Madison’s advice to rid the Constitution of its obsolete and hateful language by integrating amendments into the Constitution’s original text.

Both Jefferson and Madison lost their battles. And because they lost, the Constitution is harder to amend and is replete with archaic and insensitive words that

⁷³ See *supra* notes 42–48 and accompanying text.

hold the country back from reconciling with its past. America is left, as a result, with what many believe is a text tragically ill-suited to its people and to the modern day.⁷⁴ Yet, as bad as some believe the Constitution is today, the Constitution would have been even worse had Abraham Lincoln gotten his way.

A. *The Unamendable Amendment*

While he was running for President, Lincoln initiated a pivotal battle about the future of the Constitution. Lincoln desperately wanted to win that battle. But fortunately for the country and for the world, Lincoln lost. What was that battle?

Come back with me to the year 1861, just before the Civil War erupted in the United States. The question on everyone's mind at the time was how to keep the peace—and how to keep the South in the Union. Thomas Corwin chaired a congressional committee tasked with searching for ways to defuse the risk of civil war.⁷⁵ Corwin came up with a solution that he thought would work. His solution was designed to placate the South, to moderate secessionist anger, and to avoid the bloodshed of war. His solution was a constitutional amendment—an amendment he hoped would calm the mounting fears of war rising across the Union:

No amendment shall be made to the Constitution which will authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.⁷⁶

It is hard to tell from its words, but this amendment was all about slavery. Known as the Corwin Amendment, the text of the constitutional reform was drafted shrewdly to hide its purpose in plain sight.⁷⁷ This is not unlike much of the rest of the Constitution, which embeds slavery deep within its architecture but dares not speak its name.

⁷⁴ See, e.g., sources cited *supra* note 3.

⁷⁵ See Ralph R. Martig, *Amending the Constitution—Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1276 n.106 (1937).

⁷⁶ H.R. Res. 80, 36th Cong., 12 Stat. 251 (1861).

⁷⁷ Robert Langley, *The Corwin Amendment, Enslavement, and Abraham Lincoln*, THOUGHTCO. (Oct. 6, 2021), <https://www.thoughtco.com/corwin-amendment-slavery-and-lincoln-4160928> [<https://perma.cc/NSE2-XHYW>].

The Corwin Amendment contained three mutually reinforcing rules. First, it legally authorized slavery across the country. It conferred on each of the states the power to regulate the “persons held to labor” within their internal borders.⁷⁸ That phrase was code for slavery. Giving each state the power to regulate its “domestic institutions” in relation to “persons held to labor” was an enticing carrot for the slave states.⁷⁹ The states would promise to remain in the Union in exchange for the right to keep their profitable practice of slavery. Second, the amendment guaranteed states the right to slavery by denying Congress the power to “abolish” slavery or to “interfere” with it.⁸⁰ That part of the amendment compelled Congress to keep its hands off what would become an area of exclusive state power. Third, the amendment would be an unamendable, unalterable, and permanent part of American federalism as long as the Constitution survived.⁸¹ Not only did the Corwin Amendment deny Congress the power to abolish slavery or to interfere with it, but the text of the amendment itself also shielded the Corwin Amendment from future alterations—even if using Article V, “no amendment shall be made to the Constitution” in the future to repeal the Corwin Amendment.⁸²

This is the constitutional amendment Representative Corwin suggested on behalf of his congressional committee as a response to the threat of civil war in America.

Abraham Lincoln supported this diabolical amendment to the U.S. Constitution.

B. Lincoln’s Blessing

When the idea for the Corwin Amendment was first proposed, Lincoln had just been elected president but had not yet entered office. In his inaugural address as President, Lincoln endorsed the Corwin Amendment.⁸³ And he defended the right of states to adopt it. This was an extraordinary moment: here was Lincoln, the newly installed president, supporting the right of states to adopt a constitutional amendment

⁷⁸ H.R. Res. 80, 36th Cong., 12 Stat. 251 (1861).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*; President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861); *see also supra* note 77.

that had been designed specifically to prohibit Congress from interfering with any state that enslaved any of its residents.

Lincoln was of course not the only lawmaker to support this evil amendment. There were the congresspersons who voted for it, as well as Lincoln's predecessor in the presidency, James Buchanan. Buchanan signed the congressional proposal approving the amendment even though the Constitution gives the President no legal role in constitutional amendments.⁸⁴

Lincoln was therefore far from alone in supporting this slavery-protecting amendment. But Lincoln did something quite extraordinary to support this amendment. Within twelve days of his installation as President, Lincoln sent a copy of the Corwin Amendment to each of the governors in the country, including governors from states that had already seceded from the Union.⁸⁵ He included a personal letter in which he noted that President Buchanan had approved the amendment.⁸⁶ This was an unusual campaign for a President to run—to get so deeply involved in the ratification of a constitutional amendment when the Constitution does not even contemplate a role for the President in the amending process.⁸⁷

But Lincoln believed profoundly in the need for the Corwin Amendment. For Lincoln, the twin ends of keeping the Union together and keeping the Constitution supreme justified the means: better to suffer evil in the nation than to lose the Republic.

Shortly after Lincoln sent his letter to each of the governors, states began to ratify the Corwin Amendment, just as Lincoln had hoped. It looked like the Corwin Amendment was on its way to becoming an official part of the U.S. Constitution. But before the amendment could be ratified by the three-quarters of the states needed to make the amendment official, the onset of the Civil War interrupted the steady march to ratification.

We know how the Civil War ended. Its outcome changed the course of a nation. And it also changed Lincoln's tactics. With the war underway, Lincoln stopped

⁸⁴ See Sopan Joshi, *The Presidential Role in the Constitutional Amendment Process*, 107 NW. U. L. REV. 963, 964, 971 (2013).

⁸⁵ See Daniel Patrick Sheehan, *An "Amazing Find["] in Allentown** Letter Written by President Lincoln Seeks Governor's Support on Legalizing Slavery*, MORNING CALL (July 19, 2006, 12:00 AM), <https://www.mcall.com/news/mc-xpm-2006-07-19-3689343-story.html> [<https://perma.cc/NT8Z-SNCY>].

⁸⁶ *Id.*

⁸⁷ See U.S. CONST. art. V.

urging the country to approve the Corwin Amendment. He soon thereafter issued the Emancipation Proclamation. And he then fought for an amendment to abolish slavery.

Had the Corwin Amendment been ratified, it would have become the Thirteenth Amendment to the United States Constitution. But in one of the great redemptive twists in the history of America, the actual Thirteenth Amendment that now appears in the text of the Constitution does the opposite of what the Corwin Amendment intended to do: it abolishes slavery.⁸⁸

That is just how close the country came to having a constitution that makes slavery permanent. It was never fated that the right side would win the war. But the country and the world can be thankful for all who fought for good over evil. The point is that today we think of Lincoln as the great defender of all peoples. However, the truth, as I've shown here today, is more complicated than that.

Lincoln was a pragmatist, not an idealist. His pragmatism is praised for saving the Union. But that same pragmatism brought the country only one step away from becoming a slavocracy, forever and for all times. That is the alternative constitution America could have had. I imagine we all are relieved that Lincoln did not get his way with the unamendable Corwin Amendment.

My third and final question draws from Lincoln's vision of unamendability for the Constitution: do you think anything in the U.S. Constitution should be unamendable? If yes, why, and what would it be?

CONCLUSION—THE RIGHT CONSTITUTION FOR THE TIMES?

Jefferson, Lincoln, and Madison. All had in mind a constitution for America. Each was a constitution America could well have had. But none is the constitution America has today.

Here is the crucial question each of you should ask yourselves: is the Constitution you have now the constitution you want for yourselves?

An earlier generation of Americans confronted this question. They wanted to reform their constitution, but they could not do it because it was too difficult to amend—tougher even than amending the U.S. Constitution of today. That constitution was the Articles of Confederation—America's first constitution. The

⁸⁸ Martig, *supra* note 75.

Articles were amendable only with the unanimous consent of each of the thirteen states.⁸⁹

Almost as soon as the Articles came into force, there were efforts to amend it. But every single amendment proposal failed. The unanimity requirement for amendment just proved too onerous, too difficult.⁹⁰ That generation ultimately decided to discard their constitution and to write a new one.

Do you think it's time to replace the U.S. Constitution with a new one?

Is it right that the Constitution still today speaks in racist and gendered language, in hateful and exclusionary terms? Are you satisfied with the current form of government? Are you happy with the divisive political culture that is generated by the Constitution's rigid architecture? Are you in favor of states having the power to diminish rights and to subordinate classes of people?

These are questions worth asking on Constitution Day, and Constitution Day itself is worth marking. Not out of blind veneration for the text nor for those who wrote it, but rather in appreciation of the efforts of later generations of Americans who have taken ownership of their Constitution to expand rights and liberties for formerly excluded groups of persons.

No constitution ages like fine wine. On the contrary, the older a constitution gets, the less it deserves deference, fidelity, and a presumption of faith in its capacity to deliver the goods it promises. An old constitution should always invite circumspection about whether it is right for the present generation, right for the moment—and above all else, right for you and your loved ones.

⁸⁹ ARTICLES OF CONFEDERATION of 1781, art. XIII.

⁹⁰ See RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 95 (2019).

