
ESSAY

AMENDING A RACIST CONSTITUTION

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Ours is a racist Constitution. Despite its soaring language, it was founded on slavery and a commitment to racial inequality. This vision is etched in the constitutional text, from the notorious Three-Fifths Clause to the equally repugnant Fugitive Slave Clause. And despite the Civil War and the Reconstruction Amendments, the Constitution retains these vestiges of slavery in its fabric. After 230 years, it is time to remove these troubling provisions from the Constitution. This Essay offers a radical departure from prior constitutional practice. Instead of appending yet another amendment that would simply require readers to ignore the offending language, this Essay proposes a constitutional amendment that excises these words from the text. While this amendment would not abridge, enlarge, or modify any substantive rights, it would generate a document that further distances the United States from its racist past and better reflects this present moment in the journey to form a more perfect Union.

INTRODUCTION	2
I. A RACIST CONSTITUTION.....	3
II. A PROPOSAL TO AMEND THE U.S. CONSTITUTION	8
III. CONSTITUTIONAL CHANGE AS ANTI-RACISM.....	12
CONCLUSION	16

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INTRODUCTION

Ours is a racist Constitution. Despite its soaring language, it was founded on slavery and a commitment to racial inequality.¹ This vision is etched in the constitutional text, from the notorious Three-Fifths Clause² to the equally repugnant Fugitive Slave Clause.³ And despite the Civil War and the Reconstruction Amendments, the Constitution retains these vestiges of slavery in its fabric. This is the document we reference as lawyers and celebrate as Americans.⁴ It is the document we share as inspiration with other countries.⁵ After 230 years, it is time to remove these troubling provisions from the Constitution.⁶

¹ See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (discussing how provisions in the Constitution supported slavery and protected slave owners); DONALD E. LIVELY, *THE CONSTITUTION AND RACE* (1992) (examining the influence of race in the Constitution's framing, ratification, and development); Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 31 (1992) ("Instead of citing the Bill of Rights' protections as a theoretical construct for individual Americans' liberties, we should bring the Bill of Rights to life as the basis of resolving the central dilemma in American history—racial inequality.").

² See U.S. CONST. art. I, § 2, cl. 3.

³ *Id.* art. IV, § 2, cl. 3.

⁴ See Irvin Molotsky, *Washington Talk: Q&A: Warren E. Burger; On Fixing Constitution and Spilling Gravy All Over the Preamble*, N.Y. TIMES, Apr. 16, 1987, at B8 (quoting Chief Justice Burger stating the Constitution was the "best thing of its kind that was ever put together"). *But see* Stuart Taylor, Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES, May 7, 1987, at A1 (quoting Justice Marshall's statement that the Constitution was "defective from the start").

⁵ See GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE* (2009) (recounting how the U.S. Constitution has influenced foreign countries for more than two hundred years); CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990) (addressing the influence of the U.S. Constitution around the world). *But see* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (demonstrating that the U.S. Constitution has fallen out of favor as a model for other countries, both structurally and in terms of rights-related provisions).

⁶ The Declaration of Independence shares the same racist origins. While Thomas Jefferson's initial draft denounced slavery, this section was eventually removed. See GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 66, 89 (2d ed. 2018). The final text does not explicitly address slavery. But even Justice Taney, who wrote the majority opinion in *Dred Scott v. Sanford*, pointed out the hypocrisy of the Declaration's affirmation of human equality:

But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the

This Essay offers a radical departure from prior constitutional practice.⁷ Instead of appending yet another amendment that would simply require readers to ignore the offending language, this Essay proposes a constitutional amendment that excises these words from the text. While this amendment would not abridge, enlarge, or modify any substantive or procedural rights, it would generate a document that further distances the United States from its racist past and better reflects its journey to form a more perfect Union.⁸

I. A RACIST CONSTITUTION

The U.S. Constitution reflects compromise.⁹ It represents a middle ground between the Federalists and Anti-Federalists. It offers concessions between large and small states. It conveys agreement between anti-slavery and pro-slavery factions. While compromise can be celebrated, it can also

sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

60 U.S. (19 How.) 393, 410 (1857). While the Declaration of Independence does not mention slavery, its text still reflects racist views by referencing “the merciless Indian Savages.” THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776). See also Jeffrey Ostler, *The Shameful Final Grievance of the Declaration of Independence*, THE ATLANTIC (Feb. 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/americas-twofold-original-sin/606163/> [https://perma.cc/8QJ7-QK5X] (discussing “the 27th grievance [of the Declaration of Independence] and its racist depiction of Native Americans”).

⁷ This Essay builds upon recent calls to action. See, e.g., Marty Piatt, *Commentary: The Racial Reckoning in the U.S. Should Include Fixing the Constitution*, SAN DIEGO UNION-TRIB. (Sept. 28, 2020, 4:49 PM), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-09-28/united-states-constitution-slavery> [https://perma.cc/T7QD-L5MQ] (describing the Constitution as “the last ‘monumental bastion’ of our nation’s Confederacy”); Richard Albert, *Time to Update the Language of the Constitution*, THE HILL (June 30, 2020, 12:00 PM), <https://thehill.com/opinion/white-house/505071-time-to-update-the-language-of-the-constitution> [https://perma.cc/D8TQ-2Q2R] (“The United States Constitution[s] . . . gendered and racist words stand in the way of true reconciliation in this divided country and have no place in any modern society.”); Stephon Johnson, *Rally Calls for “Three-Fifths” Language To Be Removed From Constitution*, N.Y. AMSTERDAM NEWS (Apr. 28, 2016, 12:32 PM), <http://amsterdamnews.com/news/2016/apr/28/rally-calls-three-fifths-language-be-removed-const> [https://perma.cc/847E-SZYT] (discussing New York City Council Member Andy King’s efforts to remove the Three-Fifths Clause from the Constitution).

⁸ Cf. U.S. CONST. pmb1. (“We the People of the United States, in Order to form a more perfect Union . . .”).

⁹ See generally JAMES OAKES, *THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION* (2021) (describing the many compromises surrounding slavery); DAVID BRIAN ROBERTSON, *THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION’S FRAMERS WERE REALLY THINKING* (2013) (describing numerous compromises that occurred during the Constitutional Convention).

“mean[] to accept less than some ideal.”¹⁰ In the Constitution, that ideal was the principle of racial equality and human dignity.

While the Constitution never uses the words “slave” or “slavery,” the shadows of these malignant words inhabit its text.¹¹ Four constitutional provisions reflect a legal architecture that treats Black people as property. Two of these provisions are substantive, and two are procedural.

Article I, Section 2, Clause 3 is the notorious Three-Fifths Clause.¹² This provision is used to determine the number of congressional representatives apportioned to a state as well as its corresponding tax obligations. Free persons, including those bound to service for a term of years, were included in the calculation of state populations. In contrast, slaves would be calculated as three-fifths of a person.¹³ Native Americans who were not taxed would not be included in these calculations. While the Three-Fifths Clause did not directly affect the rights of slaves, it served as clear evidence of their inequality. The Clause also had a profound impact on the power structure in Congress by providing slave states disproportionate political influence in the House for decades.¹⁴ Because of this, the slave states were even less inclined to end slavery.

Article IV, Section 2, Clause 3 represents the Fugitive Slave Clause.¹⁵ It provides that any person who escapes from servitude and flees to another

¹⁰ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086 (1984).

¹¹ DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* 44 (Ward M. McAfee ed., 2001).

¹² U.S. CONST. art. I, § 2, cl. 3. See generally Jan Ellen Lewis, *What Happened to the Three-Fifths Clause: The Relationship Between Women and Slaves in Constitutional Thought, 1787–1866*, 37 J. EARLY REPUBLIC 1 (2017) (discussing the lack of explicit acknowledgement of women and slavery in the Constitution); Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution*, 28 WM. & MARY Q. 563 (1971) (analyzing various arguments by historians regarding the Three-Fifths Clause and offering a new interpretation).

¹³ While this Essay uses the word “slave,” it acknowledges the complexity of the word and the validity of other terms, such as “enslaved person.” See Katy Waldman, *Slave or Enslaved Person? It’s Not Just an Academic Debate for Historians of American Slavery.*, SLATE (May 19, 2015, 6:00 AM), <https://slate.com/human-interest/2015/05/historians-debate-whether-to-use-the-term-slave-or-enslaved-person.html> [<https://perma.cc/XRM4-WQPJ>]; Eric Zorn, Column, *Language Matters: The Shift From “Slave” to “Enslaved Person” May Be Difficult, But It’s Important*, CHI. TRIB. (Sept. 6, 2019, 4:17 PM), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-slave-enslaved-language-people-first-debate-zorn-20190906-audkntayrarfjimpz6uk7hvy-story.html> [<https://perma.cc/8HPR-VN6U>].

¹⁴ Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1031 (1993).

¹⁵ U.S. CONST. art. IV, § 2, cl. 3. See generally H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133 (2012) (addressing the Fugitive Slave Clause and changing interpretations of the term “fugitive”).

state may not gain their freedom. Instead, that person must be returned to the custody of their owner.¹⁶ This clause was used on countless occasions to perpetuate slavery. Individuals who had escaped from bondage by crossing state lines were subject to capture and returned to slavery.¹⁷ Those who aided such efforts were subject to civil or even criminal liability.¹⁸ While there was some resistance to its application, this pernicious clause made anti-slavery states and the federal government complicit in slavery.¹⁹ This complicity even extended to the Supreme Court.²⁰

Article I, Section 9, Clause 1 limited the ability of Congress to adopt legislation prohibiting the migration or importation of slaves until 1808.²¹ Congress drafted around this restriction in 1803, when it adopted An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited.²² This statute was adopted at the request of the slave states, which were concerned with the rise of free people of color in the United States and viewed the successful slave rebellion in Haiti with trepidation.²³ Four years later, Congress took a more significant step with

¹⁶ U.S. CONST. art. IV, § 2, cl. 3.

¹⁷ See, e.g., *Wright v. Deacon*, 5 Serg. & Rawle 62, 64 (Pa. 1819) (ordering that an escaped slave be returned to Maryland).

¹⁸ See, e.g., *Giltner v. Gorham*, 10 F. Cas. 424, 432 (C.C.D. Mich. 1848) (No. 5,453) (“Under this provision this action has been brought; and if the jury shall believe that the defendants, or any part of them, aided and assisted in the rescue, as before stated, the jury will find the whole of the defendants, or a part of them guilty, as the facts may authorize.”). See generally STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* 1 (2010) (discussing how cases implicating the Fugitive Slave Clause “contributed greatly to the growing discord between the free and slave states”).

¹⁹ See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 172-74 (2013) (describing the federal government’s role in enforcing the Fugitive Slave Clause); Allen Johnson, *The Constitutionality of Fugitive Slave Acts*, 31 YALE L.J. 161 (1921) (same).

²⁰ See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625-26 (1842) (holding that a Pennsylvania state law preventing the return of a slave to another state was a violation of the Fugitive Slave Clause). See generally H. ROBERT BAKER, *PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION* (2012) (discussing the historical context, outcome, and effect of *Prigg*); Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1995) (describing *Prigg* as a pro-slavery decision).

²¹ U.S. CONST. art. I, § 9, cl. 1. However, Congress was authorized to impose a tax or duty on the importation of slaves, but this could not exceed ten dollars per person. *Id.*

²² An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited, ch. 10, 2 Stat. 205 (1803).

²³ DAVID SCOTT FITZGERALD & DAVID COOK-MARTÍN, *CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS* 89 (2014).

the Act to Prohibit the Importation of Slaves Into Any Port or Place Within the Jurisdiction of the United States.²⁴ While the statute was drafted to end the slave trade in the United States, the practice of slavery remained legal.²⁵

Finally, Article V addresses the process for constitutional amendments.²⁶ These amendments can be proposed for state ratification by a two-thirds vote in both Houses.²⁷ Alternatively, amendments can be proposed through a constitutional convention called by a two-thirds vote of the states.²⁸ Either process then requires approval by three-fourths of the states. Reflecting one of the central compromises to the Constitution, Article V prohibited any amendment to Article I, Section 9, Clause 1 until 1808.²⁹ Working in tandem, these provisions ensured that the slave trade would remain legal in the United States for at least twenty years.

Following the Civil War, the Reconstruction Amendments were adopted. The Thirteenth Amendment was adopted to affirm the military victory at war's end by abolishing slavery and involuntary servitude in the United States.³⁰ It also ended the relevance of the Fugitive Slave Clause. The Fourteenth and Fifteenth Amendments ended the significance of the Three-

²⁴ An Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, ch. 22, 2 Stat. 426 (1807).

²⁵ See JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS* 32 (2012) (discussing the 1807 statute and its effects on the slave trade in the United States).

²⁶ U.S. CONST. art. V. Some scholars suggest constitutional change would still be possible even in the absence of the amendment mechanism. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001) (“[T]hrough most of our history, the amendment process has not been an important means of constitutional change. The Constitution, in practice, changes in many ways—but not because a supermajority makes a discrete, self-conscious decision to amend its text.”).

²⁷ U.S. CONST. art. V.

²⁸ *Id.*

²⁹ Article V also prohibited any amendment to Article I, Section 9, Clause 4 until 1808. This section provides that “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. 1, § 9, cl. 4; see also *id.* art. V (“[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . .”). The adoption of the Sixteenth Amendment superseded this provision. U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . .”).

³⁰ See U.S. CONST. amend. XIII; see also ALEXANDER TSEKIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004) (discussing the effects of the Thirteenth Amendment and its relevance today); cf. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1460 (2012) (“One of the ironies of the U.S. Constitution is that although it was clearly designed to accommodate the interests of slaveholding states, the word ‘slavery’ first appears in the Constitution in the Thirteenth Amendment, which claims to abolish slavery forever.”).

Fifths Clause.³¹ However, the Reconstruction Amendments did not remove either clause from the constitutional text. Accordingly, these provisions remain part of the Constitution even though they have been drained of their legal meaning.

While slavery and segregation have ended, the Black community continues to struggle against oppression as it confronts structural racism.³² Other people of color share a similar fate. The regime of structural racism—where public and private norms, rules, and institutions reinforce and perpetuate racial inequality—survived the civil rights battles of the 1960s and has continued into this century.³³ Unlike its predecessors, which lived openly in law, structural racism is pernicious because it hides in plain sight, even within the pillars of the legal system.³⁴ It does not require animus. Yet, it still bestows privilege to whiteness and burden to color. Structural racism traces its origins to a racist Constitution.³⁵

³¹ U.S. CONST. amends. XIV, XV; *see* *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (finding the Fourteenth Amendment had abrogated the Three-Fifths Clause). *See generally* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019) (noting how the Reconstruction Amendments were meant to provide African Americans with equal citizenship).

³² *See, e.g.*, Zinzi D. Bailey, Justin M. Feldman & Mary T. Bassett, *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequalities*, 384 *NEW ENG. J. MED.* 768 (2021), <https://www.nejm.org/doi/pdf/10.1056/NEJMms2025396> [<https://perma.cc/FD5U-UG9A>] (focusing on residential racial segregation, mass incarceration, police violence, and unequal medical care in discussing the impact of structural racism on health outcomes); ANGELA HANKS, DANYELLE SOLOMON & CHRISTIAN E. WELLER, *CTR. FOR AM. PROGRESS, SYSTEMATIC INEQUALITY: HOW AMERICA’S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP* (2018), https://cdn.americanprogress.org/content/uploads/2018/02/20131806/RacialWealthGap-report.pdf?_ga=2.246671878.322356677.1630456553-1958758403.1630456553 [<https://perma.cc/Z4TE-Z9WT>] (discussing the history and persistence of the racial wealth gap).

³³ *See generally* Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 *B.U. L. REV.* 1069 (2020) (discussing racial disparities in fatal police shootings); Dayna Bowen Matthew, *On Charlottesville*, 105 *VA. L. REV.* 269 (2019) (reviewing the impact of legally constructed residential segregation).

³⁴ *See* Victoria J. Haneman, *Contemplating Homeownership Tax Subsidies and Structural Racism*, 54 *WAKE FOREST L. REV.* 363 (2019) (critiquing structural racism in the tax code); Palma Joy Strand, *The Invisible Hands of Structural Racism in Housing: Our Hands, Our Responsibility*, 96 *U. DET. MERCY L. REV.* 155 (2019) (addressing structural racism in housing).

³⁵ *See generally* IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 116 (2016) (discussing the “racist ideas in the nation’s founding document”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012) (discussing how the original Constitution’s structure and content preserved a racial caste system).

II. A PROPOSAL TO AMEND THE U.S. CONSTITUTION

Constitutional change has been a topic of deep reflection by scholars, but only one method has been used in the United States.³⁶ Since the adoption of the Bill of Rights, amendments have been added sequentially to the Constitution. The appendative model has been used twenty-seven times.³⁷ These amendments have created new rights, clarified existing text, and even negated some provisions of the Constitution.³⁸ But these amendments have not changed the actual wording of the Constitution. The integrative model provides a different method of constitutional change.³⁹ Instead of simply appending a new amendment sequentially to the existing list, these amendments would also make substantive changes to the wording of the Constitution. This would achieve what James Madison described as a “uniform and entire” Constitution.⁴⁰

The Constitution does not require the use of the appendative model. Pursuant to Article V, an approved amendment “shall be valid to all Intents and Purposes, as Part of this Constitution”⁴¹ During debate surrounding the ratification of the Bill of Rights, delegates discussed whether to follow the appendative model or integrative model.⁴² Advocates of the integrative model argued the Constitution should function as a cohesive document and

³⁶ See generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) (discussing the various methods by which constitutional change occurs); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993) (exploring the intellectual and philosophical foundations of the Constitution). See also JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2015 (4th ed. 2015) (describing all the proposed constitutional amendments); RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? (1993) (chronicling efforts to amend the Constitution).

³⁷ RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 230 (2019).

³⁸ See, e.g., U.S. CONST. amend. XVIII (establishing prohibition of alcohol); *id.* amend. XIX (prohibiting the denial of voting rights on the basis of sex); *id.* amend. XXI (repealing the Eighteenth Amendment).

³⁹ ALBERT, *supra* note 37, at 230, 236–38.

⁴⁰ CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 118 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (statement of Rep. James Madison during Aug. 13, 1789 debate).

⁴¹ U.S. CONST. art. V.

⁴² Edward Hartnett, “A Uniform and Entire” Constitution: Or, What If Madison Had Won?, 15 CONST. COMMENT. 251, 252–58 (1998); see also Kenneth R. Bowling, “A Tub to the Whale”: The Founding Fathers and Adoption of the Federal Bill of Rights, 8 J. EARLY REPUBLIC 223, 228–29, 238–242 (discussing the debate over various ways of amending the Constitution).

not appear “like a careless written letter.”⁴³ Critics asserted such an approach would cause the Constitution to appear as a patchwork quilt, “resembling Joseph’s coat of many colors.”⁴⁴ While the delegates ultimately decided to follow the appendative model, this was a political compromise and not a legal decision.⁴⁵ Article V indicates that a properly ratified amendment is assimilated into the Constitution and becomes part of that document.⁴⁶ This can also be accomplished through the integrative model.⁴⁷

A proposed Twenty-Ninth Amendment would remove the vestiges of slavery from the Constitution.⁴⁸ Substantively, it would remove the Three-Fifths Clause and the Fugitive Slave Clause from the constitutional text. Procedurally, it would follow the process for constitutional amendment contained in Article V. It would begin in Congress, with a two-thirds vote in both Houses proposing the amendment.⁴⁹ Alternatively, Article V indicates that two-thirds of the states can propose a constitutional convention for

⁴³ 1 ANNALS OF CONG. 710 (1789) (Joseph Gales ed., 1834) (statement of Rep. John Vining).

⁴⁴ *Id.* at 714 (statement of Rep. James Jackson).

⁴⁵ See Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 BYU J. PUB. L. 87, 90 (2010) (“[T]he decision in favor of Sherman’s approach of adding the amendments constitutes a concession by Madison, . . . for the sake of achieving a consensus with regard to the substance of the amendments.”); Thomas E. Baker, *Towards a More Perfect Union: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 10 (2000) (noting that since the adoption of the Bill of Rights in 1791, all “amendments have been added at the end of the document”); Price Marshall, *A Careless Written Letter—Situating Amendments to the Federal Constitution*, 51 ARK. L. REV. 95, 110 (1998) (“Madison compromised on form to secure the substance of the larger project of amendments.”).

⁴⁶ U.S. CONST. art. V.

⁴⁷ Hartnett, *supra* note 42, at 284-99 (depicting how the integrative model would be used to address constitutional amendments).

⁴⁸ Because the Equal Rights Amendment (“ERA”) may still be adopted as the Twenty-Eighth Amendment, this Essay titles its proposal as the Twenty-Ninth Amendment in solidarity. The ERA was proposed by Congress to ensure gender equality attained constitutional status. *See generally* Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419 (2008) (chronicling the history of the ERA); Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (arguing for the necessity of the ERA in ensuring equal legal status for women). The ERA has received the approval of thirty-eight states. However, its status remains unresolved because the time for ratification has long expired. Legislative proposals call on Congress to remove the original ratification deadline, thereby allowing the ERA to enter into force. *See* Sheryl Gay Stolberg, *House Votes to Extend Deadline to Ratify Equal Rights Amendment*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/equal-rights-amendment.html> [<https://perma.cc/Z7A2-JGS5>] (“House Democrats on Thursday moved to enshrine the decades-old Equal Rights Amendment into the Constitution . . .”).

⁴⁹ U.S. CONST. art. V.

considering amendments.⁵⁰ Either approach would then require approval by three-fourths of the states.

Twenty-Ninth Amendment

Proposing an amendment to the Constitution of the United States that removes the vestiges of slavery.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

That the following revisions shall be made to the Constitution of the United States, which shall be valid when ratified by the legislatures of three-fourths of the several States:

Section 1.

The following revisions are made to Article I, Section 2, Clause 3 of the Constitution of the United States.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding ~~to~~ the whole Number of ~~free~~ Persons, ~~including those bound to Service for a Term of Years, and~~ excluding Indians not taxed, ~~three fifths of all other Persons~~. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse [sic] three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

⁵⁰ *Id.*

Section 2.

Article I, Section 9, Clause 1 of the Constitution of the United States is hereby deleted.

The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Section 3.

Article IV, Section 2, Clause 3 of the Constitution of the United States is hereby deleted.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 4.

The following revisions are made to Article V of the Constitution of the United States.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided ~~that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its~~ Consent, shall be deprived of its equal Suffrage in the Senate.

Section 5.

This amendment shall not abridge, enlarge, or modify any rights, benefits, or obligations, substantive or procedural. It shall not affect the interpretation of any other constitutional provision or amendment.

* * *

These changes to the Constitution would require no further conforming edits. There are no relevant cross-references. There is no added text. The Constitution's overall structure would remain unchanged.⁵¹ Moreover, these amendments would not affect existing law. Rather, they would directly address the legacy of slavery that remains in the Constitution.⁵² Accordingly, the adoption of the Twenty-Ninth Amendment would not raise the concerns that might exist if more substantive changes were proposed.⁵³

III. CONSTITUTIONAL CHANGE AS ANTI-RACISM

The Constitution was drafted so that the words “slave” and “slavery” never appeared in its text. As James Madison argued during the constitutional convention, it would be “wrong to admit in the Constitution the idea that there could be property in men.”⁵⁴ The Twenty-Ninth Amendment would remove the original traces of this idea from the Constitution.

⁵¹ Cf. Tobin Harshaw, *The Constitution, Sort Of*, N.Y. TIMES: OPINIONATOR (Jan. 7, 2011, 8:37 PM), <https://opinionator.blogs.nytimes.com/2011/01/07/the-constitution-sort-of> [<https://perma.cc/B6U8-C3KP>] (collecting statements that describe several constitutional provisions as inoperative). *But see* Peter Beck, *The Parts We Skip: A Taxonomy of Constitutional Irrelevancy*, 34 CONST. COMMENT. 223 (2019) (arguing the value in keeping the original constitutional text).

⁵² The provision in Article I, Section 2, Clause 3 regarding the apportionment of direct taxes could also be eliminated. While this provision does not implicate the racial justice considerations that motivate the Twenty-Ninth Amendment, it was also made functionally irrelevant by the Fourteenth Amendment. Hartnett, *supra* note 42, at 274.

⁵³ Cf. Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1753 (2005) (addressing the difficulties of adopting constitutional amendments); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (proposing various alternative methods for amending the Constitution). *See generally* Jesse Wegman, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/opinion/amend-constitution.html> [<https://perma.cc/W7BZ-6QJQ>] (discussing the difficulty of amending the Constitution).

⁵⁴ James Madison, *Power of Congress to Prohibit the Slave Trade*, (Aug. 25, 1787), in 10 THE PAPERS OF JAMES MADISON 157, 157 (Robert A. Rutland, Charles F. Hobson, William M.E. Rachal & Frederika J. Teute eds., 1977).

In addition, this proposal would remove any possibility that these provisions could be used in the future. Constitutional law is ultimately about constitutional interpretation.⁵⁵ While the Three-Fifths Clause and the Fugitive Slave Clause are universally condemned today, the future is uncertain. By remaining in the constitutional text, future courts are given the opportunity to reinterpret and resuscitate them.⁵⁶ The Twenty-Ninth Amendment would end this potential threat.

As revealed by the 2020 racial justice movement, silence is complicity in racism.⁵⁷ The Reconstruction Amendments were essential to ending the institution of slavery, but they did not remove the remaining “badges and incidents” of slavery from the Constitution.⁵⁸ To stay silent and maintain the constitutional status quo is to perpetuate the legacy of racism. Until the Constitution is excised of the Three-Fifths Clause and the Fugitive Slave Clause, it will remain a racist document. The adoption of the Twenty-Ninth Amendment would thus serve as an anti-racist act and perhaps signal the start of the next Reconstruction.⁵⁹

In recent years, the call for slavery reparations has been growing.⁶⁰ While financial compensation is most commonly discussed as a modern response to

⁵⁵ See David A. Strauss, Foreword, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015) (describing how constitutional text and interpretation are often inconsistent).

⁵⁶ See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018) (explaining that laws found unconstitutional remain in the statutory code until a legislature repeals them); Gabriel J. Chin, Roger Hartley, Kevin Bates, Rona Nichols, Ira Shiflett & Salmon Shomade, *Still on the Books: Jim Crow and Segregation Laws Fifty Years After Brown v. Board of Education*, 2006 MICH. ST. L. REV. 457 (reviewing how segregationist laws remain in the codes of many Southern states).

⁵⁷ See IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 18 (2019) (“There is no such thing as a nonracist or race-neutral policy.”).

⁵⁸ See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (referring to the “badges and incidents” of slavery). See generally Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012) (discussing how the second section of the Thirteenth Amendment addresses the vestiges of slavery).

⁵⁹ The rise of the civil rights era in the 1950s is often referred to as the birth of the Second Reconstruction. See, e.g., RICHARD JOHNSON, THE END OF THE SECOND RECONSTRUCTION: OBAMA, TRUMP, AND THE CRISIS OF CIVIL RIGHTS 74-103 (2020); Kevin K. Gaines, *The End of the Second Reconstruction*, 1 MOD. AM. HIST. 113 (2018); George S. Burson, Jr., *The Second Reconstruction: A Historiographical Essay on Recent Works*, 59 J. NEGRO HIST. 322 (1974).

⁶⁰ See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/6FZP-JYNE>] (“Until we reckon with our compounding moral debts, America will never be whole.”).

slavery, reparations can encompass other acts.⁶¹ These can include apologies, memorials, educational programs, and days of remembrance.⁶² Indeed, non-monetary reparations can be particularly valuable when the passage of time makes it more difficult to assign modern responsibility for past harms.⁶³ Symbolic reparations are also valuable when the number of victims make financial calculations overwhelming, and the depth of suffering make any compensation meaningless.⁶⁴ The Twenty-Ninth Amendment can thus serve as a healing and restorative act.⁶⁵

There are other revisions worth making to the Constitution.⁶⁶ For example, the Thirteenth Amendment allows for involuntary servitude if imposed as a form of criminal punishment.⁶⁷ This provision should be stricken. The Constitution reflects other forms of inequality such as its use

⁶¹ See A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1255 n.2 (2020) (“Reparations include . . . apologies, commissions, legislation, and cash payments to groups or individuals.”).

⁶² See REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 5 (Michael T. Martin & Marilyn Yaquinto eds., 2007) (delineating three categories of reparations, “which, broadly defined, are ‘capital transfer,’ ‘skill transfer,’ and ‘power sharing’”). See generally ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004) (chronicling the various forms of the Black redress movement).

⁶³ See Thomas Craemer, *Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies*, 96 SOC. SCI. Q. 639, 640 (2015) (“With regard to reparations, the uncertainty associated with the passage of time is viewed as a major obstacle.”); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 727-732 (2003) (considering alternative reparations models to cash payments, such as affirmative action and apologies).

⁶⁴ See, e.g., Anja Hense, *Limitation of Economic Damages as a “Humanitarian Gesture”*: The German Foundation “Remembrance, Responsibility and the Future”, 46 J. CONTEMP. HIST. 407, 421 (2011) (stating that victims seeking German reparations after World War Two “remained largely unfulfilled”); Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1166, 1185 (2004) (discussing the challenges faced by those attempting to seek reparations through litigation).

⁶⁵ See generally VIRGINIE LADISCH & ANNA MYRIAM ROCCATELLO, INT’L CTR. TRANSITIONAL JUST., THE COLOR OF JUSTICE: TRANSITIONAL JUSTICE AND THE LEGACY OF SLAVERY AND RACISM IN THE UNITED STATES (2021), https://www.ictj.org/sites/default/files/ICTJ_Briefing_TJ_US_Race.pdf [<https://perma.cc/64UL-2FGS>] (arguing that transitional justice principles should be applied in response to slavery and racism in the United States).

⁶⁶ See, e.g., Symposium, *The Democracy Constitution: Responses*, DEMOCRACY, Summer 2021, <https://democracyjournal.org/magazine/61/the-democracy-constitution> [<https://perma.cc/GL5F-43K4>] (describing several proposed constitutional amendments); *It’s Been 50 Years Since America’s Last Real Update to Its Constitution*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html> [<https://perma.cc/7K5X-NV8B>] (collecting proposed constitutional revisions from scholars and experts).

⁶⁷ See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 980-83 (2019).

of gendered pronouns.⁶⁸ These should be revised. Perhaps this proposal will serve to inspire changes to other racist elements in federal law. It is remarkable that several civil rights statutes continue to use “white citizens” as the standard for assessing equality.⁶⁹ Section 1981 of Title 42, which addresses equal rights under the law, provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*⁷⁰

Section 1982, which addresses property rights, contains similar language that refers to the rights “enjoyed by *white citizens*.”⁷¹ Because these statutes were adopted as part of the Civil Rights Act of 1866, it is not surprising that whiteness would be the standard for assessing equal treatment.⁷² Yet today, this language is unnecessary. It also serves as a stark reminder of both white privilege and the burden of color. These statutes could be amended by simply striking the phrase “as is enjoyed by white citizens.”⁷³

⁶⁸ See, e.g., Darrell A.H. Miller, *Constitutional Pronouns*, 27 DUKE J. GENDER L. & POL’Y 227 (2020) (criticizing the Constitution’s use of gendered pronouns).

⁶⁹ In *Comcast Corp. v. National Ass’n of African American-Owned Media*, the Supreme Court cited these statutes and their treatment of “white citizens” as the benchmark for equality. 140 S. Ct. 1009, 1015 (2020). This reflects how structural racism functions within the highest levels of the legal system without any pause or reflection.

⁷⁰ 42 U.S.C. § 1981(a) (emphasis added).

⁷¹ 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by *white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”) (emphasis added).

⁷² See generally THE GREATEST AND THE GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY (Christian G. Samito ed., 2018) (discussing the language of the Civil Rights Act of 1866 and its implications); GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 4 (2012) (arguing that the Civil Rights Act of 1866 established “the rights of whites” as “the natural measure of equality for everyone”).

⁷³ 42 U.S.C. § 1982. Other changes should also be made to federal law. See, e.g., U.W. Clemon, Joshua Karsh & Cyrus Mehri, *The Nation’s First Civil-Rights Law Needs to Be Fixed*, THE ATLANTIC (Aug. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/nations-first-civil-rights-law-needs-be-fixed/614926/> [<https://perma.cc/EL97-QLBU>] (discussing the need to reform Section 1981).

CONCLUSION

Since 1789, there has been a moral reckoning on the horizon of history. Each step in America's journey to racial equality and human dignity reflects this moral reckoning. And yet, the horizon of history still beckons. Unlike the removal of Confederate monuments and symbols, the Twenty-Ninth Amendment does not represent *damnatio memoriae*—it is not a condemnation of memory.⁷⁴ The original language of the Constitution will always exist in our history.⁷⁵ The Twenty-Ninth Amendment represents *nova creatio ex memoria*—the creation of new memory.⁷⁶

It is often said that slavery is America's original sin.⁷⁷ But if America was born in original sin, its current citizens need not suffer from the crimes of their founding fathers. The Twenty-Ninth Amendment—which would remove the racial ink stains written into the constitutional text—offers a deeply meaningful and symbolic step toward modernity.

⁷⁴ See Alex Zhang, Essay, *Damnatio Memoriae and Black Lives Matter*, 73 STAN. L. REV. ONLINE 77, 78 (2020) (“[D]amnatio memoriae . . . [was a] Roman legal practice [which] involved the erasure of public figures . . . from all public memory by negating their presence in monuments, statues, and records.”).

⁷⁵ Some legal scholars argue the appendative model offers a more accurate description of history than the integrative model. See, e.g., ALBERT, *supra* note 37, at 244 (arguing that the appendative model makes the Constitution “a public record of a country’s many mistakes”); Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 686 (2002) (describing how appendative amendments reflect a Constitution that remains a work in progress).

⁷⁶ See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 673, 675 (Adrienne Koch & William Peden eds. 1944) (“[I]t is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the Constitution; so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.”).

⁷⁷ See generally JIM WALLIS, AMERICA’S ORIGINAL SIN: RACISM, WHITE PRIVILEGE, AND THE BRIDGE TO A NEW AMERICA (2016) (describing slavery and racism as America’s original sin); George H. Taylor, *Racism as “The Nation’s Crucial Sin”: Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269 (2004) (addressing the theological debates surrounding racism).