

RESPONSE

AMERICA’S CONSTITUTIONAL CONTRADICTIONS

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INTRODUCTION

Professor Richard Albert’s article, *America’s Amoral Constitution* describes the paradox of the U.S. Constitution as a document whose value neutrality is both the font of democratic legitimacy and a threat to the preconditions of liberal democracy.¹ He suggests that the absence of constraints on the amending power of the people renders a constitution amoral even if the democracy itself meets liberal preconditions.² Professor Albert’s definition of constitutional morality seems to require a localized version of Cass Sunstein’s “internal

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1. Richard Albert, *America’s Amoral Constitution*, 70 AM. U. L. REV. 773, 777–78 (2021).

2. *See id.* at 778.

morality” of democracy.³ There must be some defining features of the local democracy without which it would no longer be cognizable as the local democracy; only then is the morality of a constitution implicated. For Professor Albert, “moral” constitutions are those that protect the internal morality of their democracies through “unamendability” provisions.⁴ Moral constitutions thus contain within them substantive limitations, not only on the individual laws a legislature can pass, but also on ways the people can revise their existing democratic government. Professor Albert’s description of America’s constitution as amoral rests on its lack of unamendability provisions protecting the core tenets of our democracy.

I do not take issue with this framing, but where Professor Albert sees a deliberate choice to have an amoral Constitution across all of U.S. history, I see an amorality that is the result of efforts to navigate the contradictions of American history. The Americans who wrote and ratified the Constitution privileged democratic legitimacy while simultaneously founding an apartheid state that violated the preconditions of liberal democracy.⁵ In doing so, the Founders created an America that was neither fish nor fowl, with high republican ideals co-existing with the everyday reality of the most inhuman oppression. Thus, I view the current amorality of the Constitution as a mid-point in the complex constitutional history that began with the immorality of slavery and that may yet end with an unamendable commitment to racial equality. In this Response, I suggest that America’s amoral Constitution is not a free-standing original choice but rather is the product of the nation’s inability to resolve its substantive and procedural self-contradictions: the contradiction between the moral values of the Declaration of Independence (“the Declaration”) and the immorality of slavery, the contradiction between de facto white

3. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 7 (2001) (“This internal morality requires constitutional protection of . . . the right of free expression, the right to vote, the right to political equality, and even the right to private property . . .”).

4. See Albert, *supra* note 1, at 777, 790–91 (contrasting the “amoral” Constitution with the constitutions of nations like Germany and Brazil that include unamendability provisions to express their constitutional values).

5. See Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES: THE 1619 PROJECT (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

supremacy and de jure racial equality, and the contradiction of constitution creation by amendment.

I. INTERNAL MORALITY OF REPUBLICANISM AND SLAVERY

Though the idea that democracy has an internal morality only gained widespread currency after World War II and the universalization of rights,⁶ the Declaration was an early instantiation of a similar concept. In announcing their independence, the founding generation articulated a value-laden definition of republicanism that relied on pre-political fundamental values.⁷ The invocations of male political equality,⁸ consensual representation,⁹ and respect for fundamental rights as the preconditions of legitimate government suggests that the founding era republican government, like modern democracy, entailed certain moral and ideological preconditions. One central assertion of the Declaration was that governments that abridge the right to political equality and the right to representation should be overthrown. Given that amendment rules tend to channel revolutionary tendencies into non-violent political change,¹⁰ translating the Declaration's revolutionary language into today's language of amendment would make the right to political equality and the right to vote unamendable. This did not happen. As history advanced from the Declaration to the modern Constitution, the nation's democratic legitimacy paradigm shifted from the "internal morality of republicanism" to constitutional amorality.¹¹ The

6. Franciska Coleman, *Protection to Empowerment*, 101 B.U. L. REV. 101, 113 (2021); see also David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WM. & MARY BILL RTS. J. 1183, 1245–46, 1258, 1260 (2019) (“[T]here was an obvious tension between the moral framework of the [Universal Declaration of Human Rights (UDHR)] and the dominant political morality that prevailed in the United States from the end of Reconstruction until World War II.”).

7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

8. *Id.* (asserting that “all *men* are created equal” (emphasis added)).

9. See *id.* (“That to secure these rights, Governments are instituted . . . deriving their just powers from the consent of the governed . . .”).

10. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 129 (1st ed. 2017).

11. Melissa De Witte, *When Thomas Jefferson Penned “All Men Are Created Equal,” He Did Not Mean Individual Equality, Says Stanford Scholar*, STAN. NEWS (July 1, 2020), <https://news.stanford.edu/2020/07/01/meaning-declaration-independence-changed-time> [<https://perma.cc/Q2ZH-EW9X>] (“The Declaration . . . gives us self-evident truths The original Constitution, by contrast, involved a set of political

Declaration, with its commitment to male political equality and universal rights,¹² gave way to a Constitution in which even the guarantee of a republican form of government could be amended.¹³

One way of understanding this “anything goes” amorality is as the inevitable result of the founding era’s conjunction of the democratically immoral politics of slavery with the internal morality of republicanism articulated in the Declaration. The centrality of slavery in the Southern states meant that the preservation of slavery was a precondition to constituting the nation.¹⁴ At the same time, however, the Declaration’s insistence that all men are created equal¹⁵ was incompatible with the entrenchment of the right of white men to buy, sell, and own Black men as articles of ordinary commerce.¹⁶ Similarly, the Declaration’s pronouncement that the rights to “[l]ife, [l]iberty, and the pursuit of [h]appiness” were “inalienable”¹⁷ could not be reconciled with the entrenchment of the “peculiar institution”¹⁸ that robbed Black men of all three. Explicitly codifying the permanent preservation of slavery into an unamendability provision would have

commitments that recognized the legal status of slavery . . . [and was] implicated in establishing ‘a slaveholders’ republic’ . . .”).

12. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

13. Albert, *supra* note 1, at 777–78, 790–91 (“Meanwhile, in the United States, the *only* rules made unamendable protected the slave trade.” (emphasis added)).

14. See, e.g., *Debates in the Federal Convention*, in WENDELL PHILLIPS & JAMES MADISON, THE CONSTITUTION: A PRO-SLAVERY COMPACT. SELECTIONS FROM THE MADISON PAPERS, & C., 22, 30, 32 (1844) (“The security the South States want is, that their negroes may not be taken from them, which some of the gentlemen within or without doors have a very good mind to do General Pinckney reminded the Convention, that if the Committee should fail to insert some security to the Southern States against an emancipation of slaves . . . he should be bound by his duty to his State to vote against their report.”) (discussing the various opinions of delegates on how to incorporate slavery into the republic).

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

16. See also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–05 (1857) (Black people “were at [the founding] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

17. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

18. Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 57 HOW. L.J. 1, 5 (2013); Daina Ramey Berry, “*Broad is de Road dat Leads ter Death*”: *Human Capital and Enslaved Mortality*, in SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 147 (Sven Beckert & Seth Rockman eds., 2016).

been tantamount to a formal rejection of the Declaration; thus, the Founders faced a conundrum. America's republican philosophy argued against slavery while its economy relied upon it.¹⁹ The compromise between moral ideals and immoral economics was a pro-slavery Constitution that chose *constructive*, rather than *codified*, unamendability for the institution of slavery.²⁰ For example, under the formula of Article V in 1789, the consent of nine states was needed to make slavery unconstitutional in the United States.²¹ As there were eight slave states and only five free states at that time, a constitutional amendment outlawing slavery would have required the agreement of at least half of the slave states. Given the centrality of slavery to Southern economies,²² this was not much different in effect than the constructive unamendability of equal Senate representation.²³ Professor Albert treats such constructive unamendability as a matter of procedure having little to do with the substantive morality with which he is concerned, noting that, "[t]he Equal Senate Suffrage Clause is therefore a procedural limitation on *how* the Constitution may be amended; it does not constrain *what* may be amended."²⁴ I believe that is too narrow a reading in light of the historical practice of the United States. The contradictions baked into U.S. democracy are such that procedure in this country is often substantive.²⁵ The doctrine of substantive due process is a case in point, while the debates over second

19. See Berry, *supra* note 18, at 1, 25, 196. ("During the eighty years between the American Revolution and the Civil War, slavery was indispensable to the economic development of the United States.").

20. See Albert, *supra* note 1, at 786–87, 792. "Codified amendability" expressly prohibits amendment on certain clauses, such as the Migration and Importation Clauses that allowed the slave trade. *Id.* at 786–87. "Constructive amendability" occurs "when reformers cannot practically meet the requirements [of the Constitution] to amend it." *Id.* at 792.

21. U.S. CONST. art. V.

22. Berry, *supra* note 18, at 36, 120.

23. See, e.g., U.S. CONST. art. V ("[N]o State, without its [c]onsent, shall be deprived of its equal [s]uffrage in the Senate.").

24. Albert, *supra* note 1, at 793–95. ("The Equal Suffrage Clause does no more and no less than simply to require a State's approval to change the size of its Senate delegation relative to that of other States. This is a procedural amendment condition that . . . falls outside the family of substantive codified amendment prohibitions . . .").

25. Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 71 (2010) ("Procedure is substance. A slight exaggeration, perhaps, but few would dispute that rules of practice and procedure can, and often do, have predictable and systemic substantive effects.").

generation voting restrictions,²⁶ documentary disenfranchisement,²⁷ and partisan gerrymandering²⁸ are only the most recent instantiations of a longstanding American tradition of using a “how” to limit or protect a “what.” Thus, if the most important function of codified unamendability is “to express constitutional values,”²⁹ a key function of constructive unamendability is to preserve those fundamental values it is impolitic to express. Such efforts towards preservation should not be considered amoral (rather than immoral) simply because they are indirect.

In the case of the United States, history supports the fact that the constructive unamendability of slavery in Article V was not merely a matter of procedure. As the admission of free states from the territories threatened the constructive unamendability of slavery, the Southern states seceded.³⁰ It is instructive that the response to this secession was the Corwin Amendment,³¹ which would have codified the unamendability of slavery in face of the expected loss of slavery’s constructive unamendability.³² The Corwin Amendment stated that:

“No amendment shall be made to the Constitution which will authorize or give to Congress the 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.”³³

26. See, e.g., *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 216–18, 223, 226, 238 (4th Cir. 2016) (finding the state legislature engaged in racial discrimination when it amended its voting procedures to eliminate voting methods that were disproportionately used by Black citizens).

27. See, e.g., Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 394 (2011) (describing the use of onerous documentation requirements to transform formally temporary bans on felon voting into permanent disenfranchisement.).

28. See, e.g., Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options*, 46 HARV. J. ON LEGIS. 243, 244 (2009) (discussing the use of the procedure of redistricting to abridge voting rights).

29. Albert, *supra* note 1, at 790.

30. See CONG. GLOBE, 36th Cong., 2d Sess. App. 230 (1861) (“The greatest evil under which the slave states now labor seems to be the unequal growth and prosperity of the free and slave states [and] to check this evil of the overgrowth of the free states, the slave States are to secede from the Union.”).

31. H.R.J. Res. 80, 36th Cong. (1861).

32. *Id.*

33. *Id.* (proposing to amend the Constitution of the United States with the Corwin Amendment).

The Constitution also provided a temporary codified unamendability for the slave trade³⁴ and obligated Northern states to protect slavery in the Southern states by means of the Fugitive Slave Clause.³⁵ Given the codified and constructive unamendability of its pro-slavery provisions,³⁶ the 1789 Constitution was not value-neutral on the key issue of the time—the institution of slavery.³⁷ If it became value-neutral over time, however, that was, in part, because the nation's peculiar ambivalence towards racial equality prevented it from making the Constitution's anti-slavery and racial equality provisions unamendable.

II. A CASTELESS RACIAL HIERARCHY

The Civil War and Reconstruction-era amendments repudiated the pro-slavery values in the original Constitution, but they did not begin as an effort towards repudiation. As mentioned above, secession was originally met with an offer of codified unamendability for slavery, but with a geographic limitation.³⁸ It was partially the South's rejection of this geographic limitation that defeated the unamendability provision.³⁹ Later, the use of slave labor by the Confederate Army, the

34. See U.S. CONST. art. V (“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 . . .”); see also PHILLIPS & MADISON, *supra* note 14, at 5 (“[A] pledge not to abolish that traffic till after twenty years, without obliging Congress to do so even then). *But cf.* George Livermore, *August Meeting. An Historical Research Respecting the Opinions of the Founders of the Republic of Negroes as Slaves, as Citizens, and as Soldiers*, 6 MASS. HIST. SOC'Y 82, 150 (1862–63) (“On the other side, gentlemen said, that the step taken in this article towards the abolition of slavery was one of the beauties of the Constitution . . . [T]his Constitution provides that Congress may, after twenty years, totally annihilate the slave-trade.”).

35. See U.S. CONST. art. IV, § 2, cl. 3; see also PHILLIPS & MADISON, *supra* note 14, at 31–32 (“General Pinckney was not satisfied with [Article 14]. He seemed to wish some provision should be included in favor of property in slaves . . . Mr. Butler and Mr. Pickney moved to require ‘fugitive slaves and servants to be delivered up like criminals.’”).

36. See, e.g., U.S. CONST. art. I, § 9, cl. 1, *superseded by* 2 Stat. 426 (1807) (Slave Trade Clause); *id.* art. IV, § 2, cl. 3 (Property Clause); *id.* art. I, § 2, cl. 3 (repealed 1868) (Enumeration Clause).

37. See Michael J. Klarman, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION*, 257 (2016) (noting James Madison's argument to the delegates at the Constitutional Convention that the “great division of interests in the United States . . . resulted . . . principally from the effects of their [the states'] having or not having slaves”).

38. See H.R.J. Res. 80, 36th Cong. (1861).

39. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (1st ed. 2019); see also James Oliver

flood of enslaved persons escaping the Confederacy, and the growing manpower shortage in the Union army all served to give abolition and Black citizenship a more prominent place in the justifications for the war, in tandem with preserving the Union.⁴⁰ Black soldiers eventually made up approximately ten percent of the Union Army,⁴¹ and their military service anchored calls for Black citizenship.⁴² Unlike the German constitution,⁴³ however, the repudiation of the (pro-slavery) values of the previous regime did not result in a converse unamendability provision in the American Constitution expressing the nation's commitment to racial equality and equal citizenship for Black people. Instead, as the delegates to the National Equal Rights Convention noted, “[w]e have been . . . insolently informed that this a white man’s country, though it required the strong arms of over 200,000 [B]lack men to save it.”⁴⁴

The Constitution’s march from unamendably pro-slavery to unamendably pro-racial equality stalled in the middle at outcome neutrality. This is attributable in part to the Reconstruction era’s ethos, which opposed the expansion of slavery without a similar commitment to substantive racial equality. Justice Harlan’s *Plessy v. Ferguson*⁴⁵ dissent, viewed as ahead of its time in matters of racial equality, captures the paradoxical nature of the era’s “progressive” vision of America’s commitment to racial equality: “The white race deems itself to be the dominant race in this country. And so it is So, I doubt not, it will continue to be for all time But . . . [t]here is no caste here.”⁴⁶ In a

Horton, *Confronting Slavery and Revealing the “Lost Cause,”* NAT’L PARK SERV., <https://www.nps.gov/articles/confronting-slavery-and-revealing-the-lost-cause.htm> [<https://perma.cc/GH5W-Z4QY>].

40. See, e.g., Fabrikant, *supra* note 18, at 9; Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348–49 (2003).

41. Fabrikant, *supra* note 18, at 9.

42. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 81–82, 87–88 (2000) (quoting General Sherman’s observation that, “when the fight is over, the hands that drop the musket cannot be denied the ballot”).

43. See GRUNDGESETZ [GG] [CONSTITUTION] May 8, 1949, arts. 1, 79 (3) (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg [<https://perma.cc/PDG5-NS22>].

44. PROCEEDINGS OF THE FIRST ANNUAL MEETING, 1 NAT’L EQUAL RTS. LEAGUE 39 (1865), <https://omeka.coloredconventions.org/files/original/fb65c14986b873da22b7b6e00640ab8a.pdf> [<https://perma.cc/UC5S-K8T6>].

45. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

46. *Id.* at 559 (Harlan, J., dissenting).

single unbroken thought, Harlan extols the Constitution as one that “neither knows nor tolerates classes among its citizens,” while simultaneously asserting that it will, for all time, tolerate the superiority of the white race “in prestige, in achievements, in education, in wealth and in *power*.”⁴⁷ This framing embraces the continuation of de facto white supremacy alongside de jure racial equality, a conjunction that reflects the deeply contested nature of racial equality in the United States. For example, the Congress that promised Black Americans equal protection also promised white Americans that Black children would remain relegated to segregated schools,⁴⁸ making racial equality something that was both desired and rejected.

As a result of this ambivalence, in the revolutionary moments following the Civil War, when one might have expected the nation to use unamendability provisions to signal its commitment to racial equality and political participation, there was silence. There is no unamendability for the Thirteenth Amendment’s elimination of the practice of slavery; instead, slavery is expressly preserved as a form of punishment.⁴⁹ There is also no unamendability codicil appended to the Fourteenth Amendment’s guarantee of equal protection of the laws. Instead, in the first century after its passage, equal protection was specifically limited to those practices that were the least disruptive of

47. *Id.* (Harlan, J., dissenting) (emphasis added).

48. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 965 & n.69, 977, 980 (1995) (“The single piece of evidence most often cited in support of the proposition that the framers of the Fourteenth Amendment did not deem school segregation unconstitutional is the fact that the schools of the District of Columbia, under the direct constitutional authority of Congress, remained segregated by law during the entire period of proposal, ratification, and enforcement of the Amendment (and indeed remained segregated until after *Brown*).”). *But cf. id.* at 980 (“At no time after the Fourteenth Amendment did Congress vote in favor of segregated schools in the District (although Congress appropriated money for the segregated schools that already existed). The sin was one of omission.”); Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 494 (2014) (“Thus, the law which required segregated schools had already been passed in 1864, and it was therefore on the books at the time the District of Columbia laws in general were codified. A simple recodification of all D.C. laws in 1873 should not be read to suggest that Congress still approved of and endorsed all those laws.”).

49. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

the existing racial hierarchy.⁵⁰ This was done by distinguishing between protected civil equality and unprotected social equality.⁵¹ In the final Reconstruction amendment, the Fifteenth Amendment, there is no guarantee of the right to vote at all,⁵² much less an unamendable provision securing the right to vote. The lack of unamendability provisions in the revolutionary moment, on the heels of the proffer of unamendability for slavery, suggests that the nation's commitment to slavery was much stronger than its commitment to racial equality.

In his Article, Professor Albert notes that “[c]odified unamendability opens a window into the soul of a constitution [and] reveals the polity's deepest and most fundamental commitments.”⁵³ By this reasoning, the amorality of the U.S. Constitution post-Reconstruction reveals not only the “fiercely democratic foundations”⁵⁴ of American constitutionalism but also its deep ambivalence towards substantive racial equality. The amorality that Professor Albert sees as a “font of the [Constitution's] popular legitimacy”⁵⁵ also indexes the lack of a firm moral commitment to the equal citizenship of African-Americans. As a result, the amorality of the Constitution is not only the product of founding era commitments to popular sovereignty,⁵⁶ but also the product of the lack of commitment to racial equality in the Reconstruction era. The Constitution has certainly come a long way from the days when Black non-citizenship was an unamendable feature, but the day when racial equality is one of

50. See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTION LAW* 115–17 (2004) (discussing Supreme Court cases where the Equal Protection Clause of the Fourteenth Amendment was interpreted to allow certain forms of racial discrimination).

51. See, e.g., *Plessy*, 163 U.S. at 551–52 (treating racial segregation as an issue of social equality and noting that while civil and political equality are guaranteed by the Fourteenth Amendment, social equality cannot be legally mandated).

52. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam) (expressly making the right to vote turn on the actions of the state legislature and noting that “the right to vote *as the legislature has prescribed* is fundamental” (emphasis added)); *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1875) (“The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.”).

53. Albert, *supra* note 1, at 791.

54. *Id.* at 778.

55. *Id.*

56. *Id.* at 783–84.

the nations “deepest and most fundamental” and unamendable commitments has yet to appear.⁵⁷

III. CONSTITUTION CREATION BY AMENDMENT

One additional source of constitutional amorality is an “amendment” formula that conflates the power to create anew and the power to amend. The power to create, also called the “primary constituent power,” is a pre-political power used by the people to constitute their sovereign nation.⁵⁸ As this power exists prior to the nation, it cannot be limited by the nation’s laws and organs. The power to amend, also called the “secondary constituent power,” is the power to revise what has been previously created.⁵⁹ It is not a pre-political power but a delegated power that is exercised within the constraints imposed by the laws and organs of the nation. As such, the secondary constituent power is both limited and limitable. This makes internal moral limits on the secondary power, instantiated in codified unamendability, both justifiable and defensible. In contrast, the idea of internal moral limits on the primary constituent power is incoherent, as the very activation of the primary constituent power resets the nation to a type of *tabula rasa*. As a result, I understand Professor Albert’s claim of amorality to be directed towards the lack of limits on the secondary constituent power.

The paradox of Article V, however, is that it is simultaneously an amendment procedure for revising the existing Constitution and the procedure for calling out the primary constituent power and resetting the nation. For example, the first part of Article V allows two-thirds of both houses of Congress to propose amendments and send them to the states for ratification.⁶⁰ In this method, the substance of the amendments is generated by an existing organ of the nation, the U.S. Congress, operating with existing laws. The act of proposing amendments using this method is thus an exercise of secondary constituent powers. Professor Albert takes the view that the second part of the clause is also an exercise of the secondary constituent power, for it relies on Congress to call a convention of the states and to oversee the ratification process.⁶¹ According to Professor Albert, Congress has

57. *Id.* at 791.

58. ROZNAI, *supra* note 10, at 105–06.

59. *Id.* at 113.

60. U.S. CONST. art. V.

61. Albert, *supra* note 1, at 780.

the power to refuse to call a convention if it rejects the validity of the petitions made by the states, or to refuse to submit amendments proposed by the states for ratification.⁶² As this gives an existing organ of the nation the final say over the amending process, this approach as well seems to be an exercise of delegated, and thus limitable, authority.

However, I think there is another way of understanding the latter portion of this clause that gives greater weight to U.S. history and context. For example, the role assigned to Congress in the latter portion of the clause is the exact role played by the Confederation Congress in the process of ratifying the new United States Constitution. The Confederation Congress, created under the Articles of Confederation, formalized the call for the Philadelphia Convention and then later submitted the new Constitution to the states.⁶³ Rather than functioning as the ultimate arbiter of the product of the Convention, however, the Confederation Congress's role was to facilitate a non-violent re-emergence of the constituent power.⁶⁴ That is the same role assigned to the current Congress under Article V. For, even though the Convention procedure is included within the Constitution's amendment provisions, the State Convention method has only ever been used to create a new Constitution.⁶⁵ Indeed, a large part of the fear of calling a new State Convention for the purposes of amendment is recognition of the fact that there is no way to limit the mandate of a State Convention to the act of amendment rather than recreating.⁶⁶ This apparent limitlessness lies in the fact that what is

62. *Id.*

63. *Annapolis Convention Resolution, 1786*, TEACHING AM. HIST., <https://teachingamericanhistory.org/library/document/annapolis-convention-resolution> [<https://perma.cc/W9XJ-C9DF>].

64. See A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501, 507-08 (2003).

65. See Editorial, *We're Surprisingly Close to Our First Constitutional Convention Since 1787. Bad Idea.*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/opinions/were-surprisingly-close-to-a-new-constitutional-convention-bad-idea/2017/04/06/f6d5b76a-197d-11e7-855e-4824bbb5d748_story.html.

66. *Id.*; see, e.g., Robert Greenstein, *A Constitutional Convention Could Be the Single Most Dangerous Way to 'Fix' American Government*, WASH. POST (Oct. 21, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government>; Editorial, *A Constitutional Convention Is a Bad Idea*, TIMES W. VIRGINIAN (Jan. 22, 2020), https://www.timeswv.com/opinion/a-constitutional-convention-is-a-bad-idea/article_cf86b8da-3cca-11ea-98fb-a75ae25a1a5f.html [<https://perma.cc/3S4T-QKGY>]; Steven F. Hayward, *An Article V Constitutional Convention: A Bad Idea Whose Time Has Come?*, FORBES (Aug. 7, 2014, 6:24 PM), <https://www.forbes.com/sites/steven>

called into existence with the State Conventions is the primary constituent power. As a result, the second part of this clause seems best understood, not as an alternative amendment procedure but rather as a procedure for the non-violent reconvening of the primary constituent power. In effect, Article V is simultaneously an amendment procedure and a procedure for calling out the primary constituent power. The textual conflation of the two has produced an amendment power that is coextensive with the primary constituent power, and this is a key factor in the clause's textual amorality. For, while moral limits on the secondary constituent power can be seen as necessary for legitimacy, moral limits on the primary constituent power are incompatible with sovereignty.

CONCLUSION

The amorality of the Constitution is only partially the product of deliberate constitutional design and higher order commitments to popular sovereignty. The other part of the amorality flows from the choice of constructive rather than codified unamendability for slavery, the unspoken ambivalence towards racial equality, and the original conflation of primary and secondary constituent powers. I do not believe that amorality is the final end of the Constitution, however. As the nation becomes more diverse and the judiciary more inclusive, constructive, or even codified, unamendability of the right to equal protection seems quite possible.

hayward/2014/08/07/an-article-v-constitutional-convention-a-bad-idea-whose-time-has-come/?sh=331f062f1baa [https://perma.cc/7DFH-VEYN]; David A. Super, Opinion, *A 'Convention of States' Is the Last Thing America Needs Right Now*, HILL (Mar. 27, 2018, 1:00 PM), https://thehill.com/opinion/campaign/380467-a-convention-of-states-is-the-last-thing-america-needs-right-now [https://perma.cc/QJ77-57QK]; *America Might See a New Constitutional Convention in a Few Years*, ECONOMIST: BRIEFING (Sept. 30, 2017), https://www.economist.com/briefing/2017/09/30/america-might-see-a-new-constitutional-convention-in-a-few-years [https://perma.cc/NB6P-4MK6].