THE LESSER OF TWO EVILS: LOWERING THE CONSTITUTIONAL AMENDMENT BAR TO AVOID AN UNADAPTABLE CONSTITUTION, ENCOURAGED JUDICIAL ACTIVISM, AND DISRUPTED FEDERALISM

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ABSTRACT

The Constitution has not been amended for nearly three decades. During this time, the line in the sand between political parties has morphed into an impenetrable wall that neither side can or is willing to breach. This begs the question whether the constitutional amendment process in Article V is presently functional.

If Article V is no longer functional, then the constitutional amendment process itself needs to be amended. Drastic as this sounds, it is the lesser of two evils. The alternative—accepting that Article V is dead and the Constitution cannot be amended—will lead to a distorted world in which the Constitution cannot be altered, "constitutional amendments" are ratified through judicial activism, and the balance of federalism is disrupted by the elimination of a crucial check on federal power.

If Article V is still functional, however, it needs to prove it. The ultimate test case to determine whether Article V is functional or a dead letter is an amendment prohibiting the denial of equal protection of the laws based on sex. Although it may seem like there is no need for such an amendment because the Supreme Court has already recognized the Constitution generally prohibits sex discrimination, this protection is still vulnerable. So, attempting to ratify this amendment will serve two important purposes: first, if successful, it will solidify for women the right of equal protection of the laws and make sex classifications the subject of heightened scrutiny; and sec-

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ond, it will test Article V to evaluate whether the constitutional amendment process has become a dead letter, and if so, it should also prompt a consideration of the ensuing implications.

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INTRODUCTION

To say that our country is politically divided is an understatement. In recent years, the line in the sand between political parties has morphed into an impenetrable wall that neither side can or is willing to breach. This begs the question: Is the constitutional amendment process found in Article V presently functional?[1] Could two-thirds of Congress agree on something as significant as a proposed constitutional amendment? Could thirty-eight states do the same?

If Article V is no longer functional, then the constitutional amendment process itself must be amended. Drastic as this sounds, it is the lesser of two evils. The alternative—accepting that Article V is a dead letter and that the Constitution can no longer be amended—will inevitably lead to a distorted world in which the Constitution can never be altered, "constitutional amendments" are ratified through judicial activism, and the balance struck by federalism is disrupted by the elimination of a crucial check on federal power. If dead, Article V needs to be revived to avoid this result. This can only be done by amending the amendment process itself to slightly loosen the chains Article V has wrapped around the constitutional text. And although this proposal inherently faces the obstacle of overcoming the current amendment requirements, it is something the country should come together to consider. A virtue of the Constitution is not only its stability through time, but also its malleability when virtual consensus directs it to change.[2] This

1. U.S. CONST. art. V.

2. *Article V and the Amendment Process*, KHAN ACAD., https://www.khanacademy.org/humanities/us-government-and-civics/us-gov-foundations/us-

is something the Framers recognized in their construction of Article V,[3] and it is something we should strive to protect and maintain today.

If Article V is still functional, however, it needs to prove it. The ultimate test case to determine whether the Article V amendment process is still functional or a dead letter that needs to be revived is an amendment prohibiting the denial of equal protection of the laws based on sex; specifically, one that subjects sex classifications to the current scrutiny applied by the Supreme Court.[4] Amending the Constitution requires a near consensus both in Congress and among the states.[5] Equal protection of the laws among men and women is one of the few issues that may be able to obtain the general consensus necessary for a constitutional amendment. For this reason, it can be used to test the functionality of Article V.

Although it may seem like there is no need for such an amendment because the Supreme Court has already recognized that the Fifth and Fourteenth Amendments generally prohibit sex discrimination by government actors, and it applies the exact same level of scrutiny to sex classifications as this amendment proposes, [6] the protection against sex discrimination is still vulnerable. Precedent is not as sturdy as the Constitution. It can, and does, get overturned.[7] Moreover, if a

gov-ratification-of-the-us-constitution/a/article-v-and-the-amendment-process (last visited Jan. 28, 2020).

3. *See id.*

4. Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to discriminatory classifications based on sex to determine whether a classification violates the Fourteenth Amendment); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (explaining that sex classifications must have an "exceedingly persuasive justification" to pass constitutional muster).

5. U.S. CONST. art. V.

6. *See, e.g.*, *Clark*, 486 U.S. at 461 (applying a level of scrutiny higher than rational basis review); *Hogan*, 458 U.S. at 724 (same).

7. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019) (overruling the 32-year-old precedent of Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), by finding that a property owner whose property has been taken could file a Section 1983 claim without first seeking just compensation under state law); Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979));

majority of the Supreme Court ever holds the intentionalist viewpoint that any scrutiny applied to sex classifications above rational basis review has an illegitimate constitutional basis, genuine equal protection of the laws for women and men alike will be in jeopardy.[8] And even if this intentionalist viewpoint is neither adopted nor applied by the Supreme Court, there remains a concern over whether the Constitution actually prohibits the federal government from denying anyone, including women, equal protection of the laws via the Fifth Amendment.[9] While equal protection of the laws for women currently seems protected,[10] any one of these reasons taken alone demonstrates its true vulnerability.

Attempting to ratify an equal rights amendment will serve two important purposes: first, if successful, it will solidify for women the right of equal protection of the laws and make sex classifications the subject of heightened scrutiny; and second, it will test Article V to evaluate whether the constitutional amendment process has become a dead letter, and if so, it should also prompt a consideration of the ensuing implications.

Part I of this Article discusses the constitutional amendment process found in Article V of the Constitution, noting that a change to the Constitution requires a near consensus in both Congress and among the states. Part II then addresses the implications that follow if the Article V amendment process is dead. Part III proposes ways to revive Article V with possible

Roper v. Simmons, 543 U.S. 551, 575 (2005) (overruling Stanford v. Kentucky, 492 U.S. 361 (1989)); Crawford v. Washington, 541 U.S. 36, 62 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980)); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)); Katz v. United States, 389 U.S. 347, 353 (1967) (overruling Olmstead v. United States, 227 U.S. 438 (1928)); Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942)).

8. *See* Garrett Epps, *Why 'Because of Sex' Should Protect Gay People*, ATLANTIC (Sept. 26, 2019), https://www.theatlantic.com/ideas/archive/2019/09/title-vii-should-protect-gay-people/598825/.

9. *See infra* Part III.C.

10. *See Clark*, 486 U.S. at 461; *Hogan*, 458 U.S. at 724.

amendments that slightly lessen its requirements, but still call for more than single-party support. The revival of Article V in this way is the lesser of two evils—lowering the constitutional amendment bar to avoid an unadaptable Constitution, encouraged judicial activism, and disrupted federalism. Finally, Part IV submits that the test case to determine whether Article V is a dead letter or still functional should be an equal rights amendment preventing discrimination based on sex unless a sex classification can withstand the current scrutiny applied by the Supreme Court. Additionally, Part IV outlines why equal protection of the laws for women specifically is not as stable of a right as some may think, and thus why protection via a constitutional amendment is the most reliable method to ensure future protection.

I. AMENDING THE CONSTITUTION

The Framers of the Constitution intended to make the amendment process difficult.[11] In an apparent effort to learn from past mistakes, they strived to make the constitutional amendment process laborious and time-consuming—but not impossible.[12] The Articles of Confederation, in effect from 1781 until 1789, required the unanimous consent of all states to amend.[13] Although this procedure was only in place for a short time, and unanimous consent only required the consensus of thirteen states, it proved to be useless, as no proposed amendments ever gained the unanimous consent of the states

11. Eric Posner, *The U.S. Constitution is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html.

12. *Id.*

13. ARTICLES OF CONFEDERATION OF 1781, art. XIII ("Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

to be ratified as required by the Articles of Confederation.[14] So, with the benefit of hindsight, the Framers utilized a different amendment procedure for the Constitution—one that requires slightly less consensus, but is equally as onerous. Framer James Madison viewed this amendment procedure as striking a balance: it is designed to "guard[] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[15] As a result, the Constitution has only been amended twenty-seven times since its adoption in 1789, and not at all in about the last three decades.[16]

Article V of the Constitution outlines a specific two-step ratification procedure.

> The two-step procedure was a deliberate compromise between two camps [at the Constitutional Convention] with opposing fears for the future: those who feared that the Congress would seek to increase its powers at the expense of the states and those who feared that the states would seek to truncate the powers of the fledgling federal government."[17]

These fears explain the bipartite nature and allocation of power of the amendment process. Deliberation and consideration, as well as nearly unanimous support, must be given to any change to the Constitution. Such an amendment proposal can emanate from (1) Congress, upon the approval of two-thirds of the Senate and House, or (2) the states, two-thirds of which can apply to Congress to call a convention for proposing con-

14. *See Articles of Confederation*, HISTORY, https://www.history.com/topics/early-us/articles-of-confederation (last updated Sept. 27, 2019).

15. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

16. *U.S. Constitution Amendments Timeline*, WORLD HISTORY PROJECT, https://worldhistoryproject.org/topics/us-constitution-amendments (last visited Jan. 30, 2020) (Amendment XXVII to the Constitution was adopted in 1992).

17. Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 4 (2000).

stitutional amendments.[18] Amendment proposals originating from either source are only adopted if ratified by (1) three-fourths of state legislatures, or (2) three-fourths of state conventions.[19] Congress has been the only source of amendment proposals in our nation's history, sending thirty-three proposals to the states for ratification, twenty-seven of which were ultimately adopted.[20]

One possible explanation for the decline in constitutional amendments in the last few decades[21] is the increase in partisanship in Congress and across the nation.[22] To send a constitutional amendment proposal to the states for ratification, two-thirds of both the Senate and House of Representatives must approve.[23] No party has had even close to two-thirds of the seats in both the Senate and the House in nearly half a century,[24] which may explain why the last time an amendment proposal escaped Congress was in 1978.[25] This begs the question: Is Article V a dead letter?

18. U.S. CONST. art. V.

19. *Id.*

20. Baker, *supra* note 17, at 9.

21. *U.S. Constitution Amendments Timeline*, *supra* note 16 (the most recent amendment to the Constitution was ratified in 1992).

22. *See* Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 9, 2013), https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution.

23. *See* Baker, *supra* note 17, at 9. Of course the states can apply to Congress to call a convention for proposing constitutional amendments, but this has never occurred.

24. *See Composition of Congress, by Political Party, 1855-2017*, INFOPLEASE, https://www.infoplease.com/history-and-government/us-government/composition-congress-political-party-1855-2017 (last updated Feb. 28, 2017). During the 89th session of Congress (1965-1967), Democrats controlled sixty-eight seats in the Senate (68%) and 295 seats in the House of Representatives (67%). In the 1970s, the Democrats came close to controlling two-thirds of the House, but only controlled 61% of the Senate (94th and 95th sessions of Congress). *Id.*

25. The District of Columbia Voting Rights Act, which would have given D.C. the same representation in Congress as the states, as well as repealed the Twenty-Third Amendment giving D.C. Electoral College votes, was approved by Congress and sent to the states in 1978. It was not ratified, however, by three-fourths of the states because it expired by the terms placed upon the proposal by Congress. *See* Ethan Trex, *6 Constitutional Amendments That Just Missed the Cut*, MENTAL FLOSS (Sept. 25, 2015), http://mentalfloss.com/article/24412/6-constitutional-amendments-just-missed-cut.

For the sake of the Constitution and the millions of people who depend upon it, the answer, hopefully, is no. However, if Article V is no longer functional, it raises many concerns that cannot be ignored. A dead Article V will force our nation to choose between either lowering the constitutional amendment bar to avoid a distorted world with an unadaptable Constitution, encouraged judicial activism, and disrupted federalism, or accepting that Article V is inoperable and that the aforementioned distorted world will become reality.

II. AND WHAT IF ARTICLE V IS DEAD, DEAD, DEAD?

Amending the Constitution should be difficult, but it should not be impossible. If amending is impossible, then Article V may as well be removed from the Constitution and we can live in a world ruled by judges. But that's not what the Framers intended; they purposefully lowered the amendment bar when moving from the Articles of Confederation to the Constitution with the intention of creating a more obtainable standard. The intent was to create a Constitution with the ability to change with the expanding landscape of our society, not one that is fixed in a time-capsule because its amendment standard is unattainable.

If the constitutional amendment process is dead, it can either be fixed or ignored. As often is the case, ignoring the problem will only make it worse. Consequently, fixing Article V with an amendment is the lesser of two evils.

A. *The Greater Evil: Ignoring the Problem*

Acceptance of a dead Article V necessarily requires the acceptance of other concerning consequences: (1) an unadaptable Constitution, (2) encouraged judicial activism, and (3) disrupted federalism.

1. *The first consequence: an unadaptable constitution*

Stability is a virtue of the Constitution, but so too is malleability, however slight it may be. If our country is now in a place where consensus on any issue can never be reached, this is cause for concern. Consider our nation's history, how the ability to amend the Constitution has been a crucial tool in shaping it.[26] Most notably, the Constitution has been amended to help the country pivot away from past injustices.[27] If the Constitution could not have been amended after the Civil War, then slavery would be permissible under the Constitution, and race could prevent certain citizens from voting.[28] In addition, if the Constitution could not have been amended in the early twentieth century, then women might still be yearning for the right to vote.[29]

Just because a right or practice is not protected or prohibited by the Constitution does not prevent legislatures from stepping in and enacting statutes to achieve the same end;[30] and that certainly may have happened as to slavery and voting rights had no constitutional amendments been ratified. Legislative enactments, however, are subject to the will of the majority, and therefore are constantly vulnerable to change, repeal, and expiration.[31] While a statute outlawing slavery or granting women the right to vote might have subjected the issues to a rollercoaster ride throughout history—enactment,

26. *See The Bill of Rights*, KHAN ACAD., https://www.khanacademy.org/humanities/us-history/road-to-revolution/creating-a-nation/a/the-bill-of-rights (last visited Jan. 30, 2020) (explaining the purpose behind the first ten amendments).

27. *See, e.g.*, U.S. CONST. amends. XIII (abolishing slavery), XIV (extending equal rights to states), XV (voters cannot be discriminated against based on color of skin), and XIX (voting extends to women).

28. U.S. CONST. amends. XIII (ending slavery), XV (voters cannot be discriminated against based on color of skin).

29. U.S. CONST. amend. XIX.

30. Civil Rights Act of 1964, 78 Stat. 241.

31. *See e.g.*, John J. Phelan IV, *The Assault Weapons Ban—Politics, The Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom"*, 77 ALB. L. Rev. 579, 591 (2014) (explaining how the Violent Crime Control and Law Enforcement Act of 1994 expired a decade after being passed in Congress).

amendment, repeal, reenactment, expiration, renewal—, instead, a constitutional amendment made these rights the supreme law of the land. As such, they became as close to permanent as they can be.

It is easy to see the injustices of the past, but it is hard to see them in the present. If the amendment tool has become useless, then there is no telling what consequences will follow, and what injustices will be left to the majority-will rollercoaster.

2. *The second consequence: encouraged judicial activism*

Another concerning consequence of a dead Article V is one that has gradually percolated into the jurisprudence of the Supreme Court. When the Constitution cannot be amended by the Article V process, the people have learned to next turn to the Supreme Court for their constitutional amendment needs.[32] For example, amendment proposals prohibiting same-sex couples from marrying were submitted to Congress as early as 2002.[33] At the same time, same-sex marriage advocates historically backed the Equal Rights Amendment ("ERA") movement and all such amendment proposals submitted to Congress, as there was hope that an equal rights amendment would encompass the right to not only equal protection of the laws for women, but also same-sex marriage.[34] None of these amendment proposals (other than the unsuccessful 1972 ERA proposal),[35] however, passed the first phase of the amendment

32. *See, e.g.*, Obergefell v. Hodges, 547 U.S. 1118 (2015) (legalizing same-sex marriage through the Supreme Court).

33. The first such amendment, House Joint Resolution 93, proposed in 2002 by Mississippi congressman Ronald Clifford Shows, stated: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." H.R.J. Res. 93, 107th Cong. (2002).

34. *See* Lisa M. Farabee, *Marriage, Equal Protection, and New Judicial Federalism: A View From the States*, 14 YALE L. & POL'Y REV. 237, 267 n. 159 (1996).

35. *See infra* notes 75–76.

process.[36] Refusing to admit defeat, same-sex marriage advocates used another tactic to achieve their goal: the Supreme Court of the United States. Prior to 2015, the Supreme Court did not recognize a constitutional right to marry for same-sex couples, even though it had countless opportunities to do so.[37] This changed with *Obergefell v. Hodges*, an opinion in which the Supreme Court held that same-sex couples are guaranteed the fundamental right to marry by the Due Process Clause (via substantive due process) and the Equal Protection Clause of the Fourteenth Amendment.[38]

Critics of the *Obergefell* decision do not necessarily believe that same-sex couples should be denied the right to marry.[39] Instead, they believe the majority opinion engaged in judicial activism by finding a "right" in the Constitution that does not exist under the veil of "substantive due process."[40] This is not to say that such a right could never exist; it could, but only if recognized by legislatures[41] or added to the Constitution through the Article V amendment process. It may have taken longer through the constitutional amendment process for same-sex couples to enjoy the right to marry, but once

36. *See The Constitution: Failed Amendments*, LEXISNEXIS, https://www.lexisnexis.com/constitution/amendments_failed.asp (last visited Mar. 26, 2020).

37. *See, e.g.*, Bogan v. Baskin, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014) (challenge to state's same-sex marriage ban); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied,* 574 U.S. 875 (2014) (same).

38. *Obergefell*, 135 S. Ct. at 2605–06.

39. *See id.* at 2612 (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

40. *See, e.g., id.* at 2618–19 (Roberts, C.J., dissenting) ("[The majority's] aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to [its prior] unprincipled approach.").

41. *See* Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, DISSENT (Summer 2009), https://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law (describing how some states passed same-sex marriage laws through legislation).

achieved, that right, like all amendments, would be virtually untouchable.

To enact such an amendment, a consensus of support needs to exist. But since the Supreme Court stepped in before a consensus of support could build, deciding the issue and removing it from majority politics, the nation was forced into acceptance of the right before most of it was ready.[42] Amendment by judicial activism is not how the Constitution is designed to operate, and it leads to even more division in our nation.[43]

If these critical views of *Obergefell* are accurate, then the decision is an example of judicial activism at its worst. Moreover, unfortunately for same-sex marriage advocates, this "right," just like the prohibition of sex discrimination found in Supreme Court cases,[44] will always be vulnerable to the changing views of the Court's majority.

If the Constitution cannot be amended via Article V, then the justices of the Supreme Court will continue to be pressured by citizens to engage in even more activism. Judicial activism is never justified, but if the only part of the Constitution enabling change is broken, then this will likely become the next defense of activist decisions.

3. *The third consequence: disrupted federalism*

Finally, if Article V is a dead letter and the problem is ignored, then the ability of states to protect infringements upon

42. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) ("Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that [is] much more difficult to accept.").

43. *See generally*, Ian Lovett, *Rift Within Methodist Church Grows in Wake of Vote on Gay Marriage*, WALL ST. J. (Mar. 3, 2019, 5:36 PM), https://www.wsj.com/articles/rift-within-methodist-church-grows-in-wake-of-vote-on-gay-marriage-11551652579 (highlighting disagreement among Methodist church members about whether to strengthen the church's ban on LGBTQ clergy); *Thousands March in US for LGBT Rights Under Trump*, BBC: NEWS (June 11, 2017), https://www.bbc.com/news/world-us-canada-40241661.

44. *See infra* Part III.C. for a discussion of the vulnerability of the prohibition of sex discrimination in Supreme Court cases.

state power by the federal government will be severely depleted. Per the terms of Article V, a constitutional amendment can be added to the Constitution *without any involvement of the federal government*.[45] Instead, two-thirds of *state* legislatures can apply for a convention to propose amendments, and then three-fourths of *states* can ratify any amendment proposals from that convention, and *voila*—the Constitution is amended without any input from the federal government.[46] In Federalist No. 85, Alexander Hamilton clearly views this amendment method as a way to curb federal power while simultaneously increasing state power, over any resistance or objection of the federal government:

> But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. It is this; that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air.[47]

Accordingly, Article V empowers states to amend the Constitution without any input from or interference by Congress.

45. U.S. CONST. art. V.

46. *Id.*

47. THE FEDERALIST NO. 85, at 525–26 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

States benefit from this mechanism because it prevents usurpation of power by the federal government. Although two-thirds of state legislatures have not yet come together successfully to apply for a constitutional convention,[48] it is still important that this under-utilized method is functional. It deters the federal government from improperly attempting to expand its power and also acts as a tool that can be used to curb federal power that infringes on state power if necessary.

If Article V is dead so that the Constitution is no longer amendable, then our Constitution cannot adapt to change, and it will inevitably lead to a distorted world in which "constitutional amendments" are ratified through judicial activism, and the balance struck by federalism is disrupted by the elimination of a crucial check on federal power.

B. *The Lesser Evil: Fixing the Problem*

The constitutional amendment process was intended to be difficult, only granting the coveted protection to the most important rights agreed upon by a near consensus of citizens. Lowering the constitutional amendment bar, therefore, should not be taken lightly, and should not be done too severely. But this course is the lesser of two evils and should therefore be pursued. Accordingly, to fix a dead Article V, its requirements should be slightly lessened, but still call for more than single party support in order to avoid an unadaptable constitution, encouraged judicial activism, and disrupted federalism.

1. *Amend the amendment process*

To amend Article V requires the amendment process found within it to be followed, and consensus to do so must therefore

48. *See* Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1, 58 (2016).

be built.[49] Although it may seem so, this is not a futile goal. The Framers recognized the necessity for a functioning constitutional amendment process. The amendment process in the Articles of Confederation requiring unanimous consent did not work. At least a few proposed amendments would have likely gained the unanimous consent of the states eventually, but this task was nearly impossible. The Framers accordingly crafted a slightly lesser burden that a proposed amendment needs to overcome to achieve ratification and included it in the Constitution.

Just like the Articles of Confederation amendment process, the Article V amendment process may theoretically produce a few more amendments over the next centuries, but due to the political polarization of our country, this task has become nearly impossible.[50] The Framers recalibrated their amendment mechanism in a similar situation; if necessary, we should consider doing the same.

a. Recalibration: proposed amendments to Article V

A balance must be struck in the constitutional amendment process. On the one hand, amending the Constitution cannot be too easy, or else the Constitution will not be anything special—it will not rise above mere statutes, the viability of which depend completely on the present will of the majority. On the other hand, amending the Constitution cannot be too difficult, or else it will fail to reflect the changing values of society and become effectively useless, just like the amendment tool in the Articles of Confederation.

49. Two-thirds of Congress or two-thirds of the states at a convention must approve an amendment proposal to this effect, then three-fourths of the states must approve that proposal. *See* U.S. CONST. art. V.

50. *See* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1701 (2015).

As it is now, amending the Constitution may be too difficult. Thus, amendment proposals to the amendment process should be considered.

i. *Amendment proposal: decrease stage one percentages*

Article V currently requires a two-thirds supermajority of both chambers of Congress to approve an amendment proposal before it is sent to the states for ratification.[51] One way to lower the Article V bar to maintain the functionality of the amendment process is to change the supermajority requirement from two-thirds, or about sixty-seven percent, to sixty percent. This number may seem a bit arbitrary—it is, and really any specific percentage will be. This number does, however, have some key characteristics that make it a contender to maintain the balance between difficulty and ease of amendment the Framers aimed to strike in Article V.

First, based on the historical political party makeup of Congress, it will still require support from both sides of the aisle. No party has had sixty percent or more of the seats in either chamber since 1993.[52] And no party has had sixty percent or more of the seats in both chambers at the same time since 1979.[53] Thus, to garner sixty percent of congressional support of a proposed amendment will require some sort of agreement between members of different political parties, and therefore some sort of consensus as envisioned by the Framers.

Second, it will decrease the number of approval votes needed in the Senate by six and in the House of Representatives by twenty-nine.[54] Again, while achieving the sixty-percent ap-

51. U.S. CONST. art. V.

52. In the 102nd Congress (1991-1993), Democrats had 61% of the House. *Composition of Congress*, *supra* note 24.

53. In the 95th Congress (1977-1979), Democrats had 61% of the Senate and 67% of the House. *Id.*

54. Lowering the threshold from 2/3 to 60% would decrease the number of votes needed in the Senate from 67 to 60 based on 100 sitting senators and from 290 to 261 in the House of Representatives based on 435 sitting representatives. U.S. CONST. art. V; *The Permanent Appor-*

proval number will still be a difficult feat, this alteration will make it easier, but not too easy. It also will have no effect on the second stage of the proposed amendment approval process, requiring ratification by three-fourths of states.[55] Recall, just because a proposed constitutional amendment emerges from Congress does not automatically mean it will make it into the Constitution; six proposed constitutional amendments have failed.[56] This lowering of the bar at the first stage, then, will allow more constitutional amendment proposals to make it to the second stage of the amendment ratification process where an even larger supermajority of seventy-five percent of states must come together to approve a proposed amendment.[57] Ideally, this will cultivate more widespread discussion about the merits of proposed amendments on a national scale and keep the Constitution and its virtues at the forefront of the minds of all Americans as they are challenged to consider if the Constitution is sufficient as is or needs a new amendment.

ii. *Amendment proposal: alter stage two to a district popular vote*

Another change that will lower the Article V amendment bar, and at the same time ensure that some consensus must be reached to amend the Constitution, is to administer stage two of the Article V amendment process via a district popular-vote within states. This method is somewhat like the electoral college in a presidential election: each state has a set number of votes based on population, and districts within each state vote

tionment Act of 1929, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES (June 11, 1929), https://history.house.gov/Historical-Highlights/1901-1950/The-Permanent-Apportionment-Act-of-1929/; U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm (last visited Apr. 6, 2020).

56. *See* U.S. CONST. art. V.

56. Baker, *supra* note 17, at 9.

57. *Article V and the Amendment Process*, *supra* note 2.

to award one of the state's votes in favor of or against a proposed amendment.[58]

As is, stage two of the Article V amendment process is problematic when one considers the potential number of citizens who could be ignored. A proposed amendment sent to the states currently must be ratified by thirty-eight states to become part of the Constitution.[59] Each state gets one vote in this process, but each state does not have an identical number of citizens. In fact, the difference in populations between the smallest state and the largest state is almost forty million people.[60] This means that a proposed constitutional amendment could be ratified with the support of less than half of the population, depending on which states make up the thirty-eight ratifiers.[61] This cannot be the consensus that the Framers had in mind for the amendment process.[62]

The stage two district popular-vote method decreases the risk that a proposed amendment becomes part of the Constitution with the approval of less than half of the population. In addition, discarding the 38-state requirement for this district popular-vote method will slightly lower the Article V bar, but at the same time maintain the requirement for consensus among multiple political parties.

58. This method requires each state to award its ratification votes more akin to the way Maine and Nebraska award their Electoral College votes. Whereas Maine and Nebraska award two votes to the popular vote winner, and one vote to the winner of each congressional district, similarly, the method proposed here allocates votes solely based on the winner of each district. All other states award Electoral College votes based on a winner-take-all popular vote method. *See Splitting Maine And Nebraska's Votes*, NPR (Nov. 3, 2008), https://www.npr.org/templates/story/story.php?storyId=96551302.

59. U.S. CONST. art. V.

60. *The 50 US States Ranked by Population*, WORLD ATLAS, https://www.worldatlas.com/articles/us-states-by-population.html (last visited Jan. 29, 2020) (California is the most populous state with almost forty million residents, while Wyoming is the least populous state with under 600,000 residents).

61. Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 258–59 (1996).

62. *See* Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 165 (1997).

III. HOW DO WE KNOW IF ARTICLE V NEEDS TO BE REVIVED?

Before resorting to choosing between the two evils presented by a dead Article V, it must first be determined whether Article V is in fact dead. To do this, Article V needs to be tested with a proposed amendment that theoretically should withstand its current requirements, meaning one upon which a virtual consensus of society can agree. Funneling such a proposed amendment through Article V will determine if it still works. If it does, then society can simultaneously exhale. If it does not, then it confirms that this important constitutional tool needs to be fixed. Because amendments to the Constitution require a near consensus in both Congress and among the states, partisan deadlock seems to sweep the legs out from under any amendment proposal that is minutely political.[63] An issue that enjoys consensus among citizens and is not likely to be politicized is thus the only viable option to act as a constitutional amendment test case.[64] An amendment prohibiting the denial of equal protection of the laws based on sex—specifically one that subjects sex classifications to the current scrutiny applied by the Supreme Court of the United States—fits this bill and can be used to determine the functionality of Article V, especially once the vulnerability of this "established" constitutional right is exposed.

A. *Why Equal Protection for Women is Not Set in Stone*

Equal protection of the laws for women is not set in stone; actually, it is set in something more akin to soap. It appears solid and sturdy, but it can nevertheless be altered by external forces and is therefore vulnerable. The fact that equal protection for women is at all vulnerable should be motivation

63. U.S. CONST. amend. V.

64. Baker, *supra* note 17, at 5 ("Thirty-four Senators, 146 Representatives, or any combination of 13 state legislative chambers are enough opposition to keep an amendment from becoming part of the Constitution. There must be a national consensus to amend the Constitution, and the consensus must be as broad as it is deep.").

enough to solidify the right through a much more enduring method—a constitutional amendment.

1. *The historical development of women's rights*

a. The abolitionist movement

Women were among the most vocal and persistent members of the abolitionist movement in the years preceding the Civil War.[65] Indeed, prominent leaders included Elizabeth Cady Stanton and Lucretia Mott, who were both instrumental in drafting a Declaration of Sentiments that was presented at the Seneca Falls Convention of 1848 and launched the first women's rights and suffrage movements in the United States.[66] By fighting for equality of rights for slaves, women hoped that they too would gain equality.[67] But after the Thirteenth Amendment abolished slavery following the Civil War, women did not share in the newfound equality of African American men.[68] Although the Fourteenth Amendment guarantees "equal protection of the laws" to "any person,"[69] it was only intended to provide equality of rights to former male slaves, which was made clear by the country's continued denial of the right to vote to all women.[70]

65. *See* Cynthia Noland Dunbar, *True Feminism: Identifying the Real Threats to Women*, 20 WM. & MARY J. WOMEN & L. 25, 27 (2013).

66. *See id*. at 27–29.

67. *See* Lucinda M. Finley, *Putting 'Protection' Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists 'Understandings of Equality'*, 13 TEMP. POL. & C.R. L. REV. 429, 432 (2004).

68. *See* Alexander Tsesis, Symposium, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications: Panel II: Reconstruction Revisited: Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1653 (2012) ("The failure of the [F]ramers of the Thirteenth Amendment to include women in the protections of equal citizenship did not invalidate feminists' conviction that as citizens they deserved equal civil treatment.").

69. U.S. CONST. amend. XIV, § 1.

70. *See* Alexandra Murray, *Marriage—The Peculiar Institution: An Exploration of Marriage and the Women's Rights Movement in the 19th Century*, 16 UCLA WOMEN'S L.J. 137, 144 (2007).

b. The right to vote

For the next fifty years following the passage of the Civil War Amendments,[71] women's rights activists focused their attention on gaining the right to vote for women.[72] They tried many different strategies and were finally successful with the passage of the Nineteenth Amendment in 1920, which ensures that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."[73]

c. The equal rights amendment

After the successful passage of the Nineteenth Amendment, women turned their attention to securing equal protection of the laws through the Equal Rights Amendment ("ERA").[74] The first version of the ERA was introduced to Congress in 1923[75] reading: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[76] Facing opposition and wavering support, this version of the ERA did not gain traction. In 1943, a new version of the ERA was introduced in Congress, stating: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[77] This version cleared the

71. The Civil War Amendments include the Thirteenth Amendment (abolishing slavery), Fourteenth Amendment (providing, among other things, due process of law and the equal protection of the laws to any person), and Fifteenth Amendment (prohibiting the denial of the right to vote based on race, color, or previous servitude). *See* Baker, *supra* note 17, at 11; U.S. CONST. amends. XIII, XIV, XV.

72. *See* Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2175 (1993).

73. U.S. CONST. amend. XIX.

74. ALICE PAUL INST., *History of the Equal Rights Amendment*, ERA, https://www.equalrightsamendment.org/the-equal-rights-amendment (last visited Mar. 29, 2020).

75. S.J. Res. 21, 68th Cong. (1923); H.R.J. Res. 75, 68th Cong. (1923); ALICE PAUL INST., *supra* note 74.

76. ALICE PAUL INST., *supra* note 74.

77. S.J. Res. 25, 78th Cong. (1943); *see also* ALICE PAUL INST., *supra* note 74.

House and Senate vote in 1972, and the ERA was sent to the states for ratification.[78] Congress placed a seven year deadline for the required thirty-eight state ratification.[79] As the deadline approached, it became clear that the ERA was not going to obtain the minimum number of state ratifications.[80] Feeling the pressure from supporters of the ERA to extend the ratification deadline, Congress set a new ratification deadline of June 30, 1982.[81] But this was still not enough time, and the amendment proposal expired before it was ratified, coming up only three states short.[82] The ERA has been reintroduced in Congress every year since 1982, but has yet to gain enough approval from Congress to clear stage one of Article V.[83]

B. *Equal Rights from the Supreme Court*

Amid efforts to ratify the new versions of the ERA, the Supreme Court of the United States stepped in to set precedents protective of sex equality, arguably stifling state ERA ratification efforts due to an apparent lack of necessity.

78. 86 Stat. 1523 (adopting H.R.J. Res. 208, 92d Cong. (1971)); 118 CONG. REC. 9,598 (1972) (showing approval in the Senate by a vote of 84 to 8); 117 CONG. REC. 35,815 (1971) (showing approval in the House by a vote of 354 to 24); CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 14 (last updated Dec. 23, 2019); ALICE PAUL INST., *supra* note 74.

79. 86 Stat. 1523 ("[T]he following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress[.]"); ALICE PAUL INST., *supra* note 74.

80. ALICE PAUL INST., *supra* note 74.

81. 92 Stat. 3799 (adopting H.R.J. Res. 638, 95th Cong. (1977)); *see also* ALICE PAUL INST., *supra* note 74.

82. ALICE PAUL INST., *supra* note 74. Although the ERA originally sent to the states for ratification in 1972 recently reached thirty-eight states to ratify the proposed amendment, it is unclear whether this ratification is constitutionally valid. *See infra* note 156.

83. *Id.*

1. Frontiero v. Richardson

Sex was first treated as a suspect class in *Frontiero v. Richardson*.[84] In *Frontiero*, a female Air Force officer challenged the differential treatment of men and women when it came to increased benefits for their dependents.[85] The relevant statute provided that "a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support," but "[a] service*woman*, on the other hand, may not claim her husband as a 'dependent' . . . unless he is in fact dependent upon her for over one-half of his support."[86] The Supreme Court struck down this statute as an unconstitutional violation of the Fifth Amendment's Due Process Clause, but because this was a plurality opinion,[87] it left unsettled the level of scrutiny to be applied to sex-based classifications.[88] At the time, the Court only used two levels of scrutiny: strict and rational basis.[89] Although it held no precedential authority, the plurality's reasoning for finding the statute unconstitutional was novel: it applied strict scrutiny—the

84. 411 U.S. 677 (1973); UNITED STATES COMMISSION ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE 3–4 (1977).

85. *Id*. at 678–79.

86. *Id.* at 678 (emphasis added).

87. "A plurality opinion occurs when there is no majority opinion signed onto by five or more Justices." Linas E. Ledebur, *Plurality Rule: Concurring Opinions and A Divided Supreme Court*, 113 PENN ST. L. REV. 899, 904 (2009); *see* Panetti v. Quarterman, 551 U.S. 930, 949 (2007) ("When there is no majority opinion, the narrower holding controls."); Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." (internal quotation marks omitted)).

88. Since the Fourteenth Amendment's Equal Protection Clause only applies to the states, the Fifth Amendment's Due Process Clause, which the Court has explained has an equal protection component, applies to classifications by the federal government. *Frontiero*, 411 U.S. at 680 n. 5.

89. *A Double Standard for Benefits*—Frontiero v. Richardson, *The Supreme Court Historical Society*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/lc_a_double_standard.html (last visited Apr. 7, 2020).

highest level of scrutiny that can be applied to a class—to this sex-based classification.[90]

2. Craig v. Boren

In a strategic effort to gain recognition of the equal protection of the laws for women under the Fourteenth Amendment, *Craig v. Boren* involved a challenge to an Oklahoma law that discriminated against men.[91] Under the law, the sale of certain beer was prohibited to males under age twenty-one and females under age eighteen.[92] The Supreme Court struck it down, finding that the law denied males age eighteen to twenty years old equal protection of the laws as required by the Fourteenth Amendment.[93] The Court employed a new level of scrutiny, intermediate scrutiny, to reach its conclusion, requiring a state's sex-based distinctions to be substantially related to an important government interest to be constitutional.[94]

3. Feeney *&* Hogan

With the groundwork laid by *Frontiero* and *Craig*, heightened scrutiny for sex discrimination found its place in Supreme Court jurisprudence. A few years later, this scrutiny was raised even higher in *Personnel Administrator of Massachusetts v. Feeney*[95] and *Mississippi University for Women v. Hogan*.[96]

In *Feeney*, a female nonveteran employee of the Commonwealth of Massachusetts challenged a veterans' preference

90. *Frontiero*, 411 U.S. at 688 ("[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.") "Administrative convenience," the only justification for the differential treatment offered by the government, could not propel the statutes past the "strict judicial scrutiny" barrier. *Id.* at 690–91.

91. 429 U.S. 190 (1976).

92. *Id.* at 191–92.

93. *Id.* at 210.

94. *Id.* at 197.

95. 442 U.S. 256 (1979).

96. 458 U.S. 718 (1982).

statute that required certain veterans to be considered for appointment to civil service jobs ahead of nonveterans.[97] The female nonveteran argued that the statute "inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws."[98] Although the Court did not agree with her that the statute violated the Equal Protection Clause,[99] it did explain that to be upheld, state laws containing sex-based distinctions must have an "exceedingly persuasive justification."[100]

In *Hogan*, a male was denied admission to the nursing program at the Mississippi University for Women, a state-sponsored school, solely based on his sex.[101] He sued, alleging that such single-sex admissions policies violated the Equal Protection Clause of the Fourteenth Amendment.[102] Reckoning back to its decision in *Feeney*, the Court explained that to uphold a statute with sex-based distinctions, a state must provide an "exceedingly persuasive justification" for the distinction and meet the requirements of intermediate scrutiny.[103] Writing for the majority, Justice O'Connor explained that the state did not meet its burden and the policy violated the Equal Protection Clause of the Fourteenth Amendment.[104]

By requiring an "exceedingly persuasive justification" for a sex-based discriminatory statute or policy to withstand constitutional scrutiny under the Fourteenth Amendment, the Court seemed to move intermediate scrutiny for sex classifications closer to strict scrutiny[105] and away from rational basis re-

97. 442 U.S. at 259.

98. *Id*.

99. *See id*. at 281.

100. *Id*. at 273.

101. 458 U.S. at 720–21.

102. *Id*. at 721.

103. *Id*. at 724.

104. *Id*. at 733.

105. "Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." John-

view.[106] This move arguably secured for women more equal protection of the laws, as it is difficult for a state's law or policy that discriminates against women based on sex to withstand this heightened scrutiny afforded to sex classifications.

4. United States v. Virginia

More recently, the heightened scrutiny applied to sex-based classifications was reinforced in *United States v. Virginia.*[107] At the center of this controversy was a long-standing practice of the Virginia Military Institute, a public military college.[108] Inversely similar to the all-female nursing school in *Hogan*, no women were allowed to attend VMI.[109]

A female high school student wanted to attend VMI, but knew that rejection was imminent due to her sex.[110] She complained of this injustice to the United States Attorney General, who sued the Commonwealth of Virginia and VMI "alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment."[111]

The Supreme Court agreed.[112] It found that Virginia failed to meet its burden to provide an "exceedingly persuasive justification" for its differential treatment of men and women at VMI.[113] In addition, VMI's all-male admission policy did not pass intermediate scrutiny—Virginia did not demonstrate that the policy "serve[d] 'important governmental objectives and

son v. California, 543 U.S. 499, 505 (2005) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (internal quotation marks omitted)).

106. Under rational basis review, the challenger has the burden to prove that there is not "a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

107. 518 U.S. 515 (1996).

108. *Id.* at 520.

109. *See id.* at 521 n. 2.

110. *Id.* at 523.

111. *Id.*

112. *Id.* at 519.

113. *Id.* at 534.

that the discriminatory means employed' [were] 'substantially related to the achievement of those objectives.'"[114] After this case and to this day, VMI is open to both men and women.[115]

C. *Equal Protection for Women is Vulnerable*

With each of these Supreme Court precedents weaving heightened scrutiny for sex classifications into the fabric of both the Constitution and the Court's jurisprudence, women's right to equal protection of the laws under the Fifth and Fourteenth Amendments seemed to be strengthening. At the same time, the quest for the ERA did not appear as dire of a mission, as the Supreme Court provided women some protection in its decisions.[116] While efforts to amend the Constitution with the ERA continue, the trend since these decisions has generally been less public demand for such a change, especially since many Americans think the protection is already constitutionally established.[117]

What most may not realize, however, is that equal protection of the laws for women provided by Supreme Court precedent, both generally and as to the level of scrutiny applied to sex classifications, is vulnerable.[118] It's not set in stone. External forces have the ability to erode the right as we know it today.[119]

114. *Id.* at 533 (quoting *Hogan*, 458 U.S. at 724).

115. *Admissions and Aid: Apply*, VA. MILITARY INST., https://www.vmi.edu/admissions-and-aid/apply (last visited Feb. 1, 2020).

116. *See, e.g.*, *Virginia*, 518 U.S. at 534 (explaining that the state could not provide sufficient reason for excluding women from attending Virginia Military Institute).

117. *See, e.g.*, ERA Coalition, *Americans—by 94%—Overwhelmingly Support the Equal Rights Amendment (ERA)*, PR NEWSWIRE (June 17, 2016), https://www.prnewswire.com/news-releases/breaking-americansby-94—-overwhelmingly-support-the-equal-rights-amendment-era-300286472.html (In a poll of both men and women, "80% . . . mistakenly believe that men and women are already guaranteed equal rights in the U.S. Constitution.").

118. *See* Amanda Terkel, *Scalia: Women Don't Have Constitutional Protection Against Discrimination*, HUFFPOST (Jan. 3, 2011), https://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitutional_n_803813.html.

119. *See id.*

1. *Supreme Court precedent is vulnerable*

The decades of Supreme Court precedent providing equal protection of the laws for women and men alike under the Fifth and Fourteenth Amendments, as well as the heightened scrutiny applied to sex classifications, are significant accomplishments of women's rights advocates. Following the ratification of the Nineteenth Amendment in 1920, women's rights advocates shifted their focus to equal protection of the laws for women.[120] This has been their fight for the past century.[121] The pedestal that the Supreme Court has placed equal protection of the laws for women upon in its precedent is one avenue by which women have obtained some equal protection of the laws,[122] and it is a huge step toward accomplishing complete equal protection of the laws for women.

But the pedestal equal protection rests upon is on shaky ground. When justices on the Court change, so too does the Court's ideological makeup. Accordingly, what the Court pronounces as law today may be overturned when the next Court vacancy is filled. Take the recent example of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[123] Prior to *Janus*, the *Abood v. Detroit Board of Education*[124] Court explained that public sector non-union members could be required to pay union fees for apolitical activities.[125] This was the law for over four decades. The entire makeup of the Court changed during this time, and with a conservative majority, *Abood* was overruled in 2018.[126] *Janus* holds that *Abood*

120. Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 403 (2015).

121. Deana Rohlinger, *In 2019, Women's Rights Are Still Not Explicitly Recognized in US Constitution*, CONVERSATION (Dec. 13, 2018, 6:45 AM), http://theconversation.com/in-2019-womens-rights-are-still-not-explicitly-recognized-in-us-constitution-108150.

122. *See supra* Section III.B.

123. 138 S. Ct. 2448 (2018).

124. 431 U.S. 209 (1977).

125. *Id.* at 236.

126. *Janus*, 138 S. Ct. at 2460.

was "wrongly decided," and forcing non-union members to pay union fees in the public sector violates the First Amendment.[127] The text of the First Amendment did not change from *Abood* to *Janus*—the Court did. There is no shortage of similar examples of overturned precedent.[128]

Take another recent example of *South Dakota v. Wayfair, Inc.*[129] Prior to this ruling, the Supreme Court held in *Quill Corp. v. North Dakota ex rel. Heitkamp*[130] and *National Bellas Hess Inc. v. Department of Revenue of State of Illinois*[131] that due to the dormant commerce clause, states could not collect sales tax from sales to state residents by out-of-state sellers without a physical presence in the taxing state.[132] Justice Clarence Thomas concurred in the *Quill* holding.[133] The physical presence requirement was the law of the land for twenty-six years. Then eight of the nine justices changed and the Court's interpretation of the dormant commerce clause changed.[134] Even more surprising, however, is that Justice Thomas, the one justice on

127. *Id.* at 2486.

128. *See, e.g.*, *Knick*, 139 S. Ct. 2179 (overruling the 32-year-old precedent of *Williamson Cty.*, 473 U.S. 172, by finding that a property owner whose property has been taken could file a Section 1983 claim without first seeking just compensation under state law); *Hyatt*, 139 S. Ct. 1485 (overruling *Hall*, 440 U.S. 410); *Roper*, 543 U.S. 575 (overruling *Stanford*, 492 U.S. 361); *Crawford*, 541 U.S. 36 (overruling *Roberts*, 448 U.S. 56); *Lawrence*, 539 U.S. 558 (overruling *Bowers*, 478 U.S. 186); *Katz*, 389 U.S. 347 (overruling *Olmstead*, 227 U.S. 438); *Gideon*, 372 U.S. 335 (overruling *Betts*, 316 U.S. 455).

129. 138 S. Ct. 2080 (2018).

130. 504 U.S. 298 (1992).

131. 386 U.S. 753 (1967).

132. *See Quill Corp*, 504 U.S. at 315–18.

133. *Id.* at 319.

134. *See Wayfair*, 138 S. Ct. at 2094–95 ("In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced. . . . Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*."). Another set of justices had the opportunity to overturn *Bellas Hess* in *Quill* a quarter century after *Bellas Hess* was decided, against the exact same Dormant Commerce Clause backdrop, however, the justices did not do so even though many technological advancements were made during this time period.

the Court for both *Quill* and *Wayfair*, concurred in both antithetical results, essentially overruling himself.[135]

All precedents, no matter how established, old, and universally accepted are subject to the interpretive methods and views of the current nine Supreme Court justices. There is no rule that the Constitution must be interpreted in a specific way. There is likewise no rule that Supreme Court justices can never change their minds. As a result, equal protection of the laws for women and the level of scrutiny afforded to sex classifications only established via Supreme Court precedent are, and always will be, vulnerable.

2. *The intentionalist argument: sex classifications get the lowest level of scrutiny under the Fourteenth Amendment*

The current state of Supreme Court precedent is protective (to an extent) of sex-based equality per the Equal Protection Clauses of the Fifth and Fourteenth Amendments. This logic, however, is not free from criticism, specifically from those with an intentionalist, or original intent, viewpoint of constitutional interpretation.

Intentionalists interpret the Constitution based on what its drafters meant.[136] Prominent originalists[137] Robert Bork and Justice Antonin Scalia have expressed intentionalist views that the Fourteenth Amendment does not prohibit sex-based discrimination because at the time of its ratification in 1868, both

135. *Wayfair*, 138 S. Ct. at 2100 (Thomas, J., concurring) ("Today, I am slightly further removed from *Quill* than Justice White was from *Bellas Hess* [an opinion in which Justice White also changed his mind]. And like Justice White, a quarter century of experience has convinced me that *Bellas Hess* and *Quill* can no longer be rationally justified." (quoting *Quill*, 504 U.S. at 333 (White, J., concurring in part & dissenting in part) (internal quotation marks omitted))).

136. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1212 (1987).

137. Originalists generally interpret the Constitution based on a reasonable person's understanding of the text at the time it was adopted. *See* Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition"*, 39 TEX. TECH L. REV. 261, 268 (2007).

the drafters and citizens alike would not have viewed it as prohibiting discrimination on the basis of sex.[138]

According to Bork, the Equal Protection Clause of the Fourteenth Amendment does not prohibit sex discrimination:

> I feel justified [in this view] by the fact ever since [the Supreme Court held that the Fourteenth Amendment applies to discrimination based on sex], the Equal Protection Clause kept expanding in ways that cannot be justified historically, grammatically, or any other way. Women are a majority of the population now—a majority in university classrooms and a majority in all kinds of contexts. It seems to me silly to say, "Gee, they're discriminated against and we need to do something about it." They aren't discriminated against anymore.[139]

Justice Scalia explained in an interview:

> Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things

138. *See* David Lat, *Borking Up a Storm: Romney's High-Profile Legal Adviser Speaks His Mind*, ABOVE THE LAW (Oct. 20, 2011, 4:17 PM), https://abovethelaw.com/2011/10/borking-up-a-storm-romneys-high-profile-legal-adviser-speaks-his-mind/; Amanda Terkel, *Scalia: Women Don't Have Constitutional Protection Against Discrimination*, HUFFPOST (Jan. 3, 2011, 4:58 PM) https://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html. Both Bork and Scalia would undoubtedly concede that women are included in the Fourteenth Amendment's "any person" language, but based on their views, they would likely contend that sex classifications need only be subjected to rational basis review: the burden is on a law's challenger to prove that a sex classification is not rationally related to a legitimate government interest (scrutiny that a law virtually always withstands). This is the extent of the equal protection of the laws that Bork and Scalia believe women constitutionally enjoy as a class.

139. Lat, *supra* note 139.

> called legislatures, and they enact things called laws.[140]

If such a view, whether meritorious or not, is ever adopted by a majority of the Supreme Court, its precedent surrounding sex-based classifications will be at risk of being overturned. And without such precedent, women will be left with the right to vote and only rational basis review to protect them from a government actor's sex discrimination; women will have no other recourse in the judiciary branch to address sex discrimination by the government.

3. *The reverse incorporation problem: the Equal Protection Clause may not apply to the Federal Government*

Even if the Supreme Court never adopts this intentionalist viewpoint, there remains a concern whether the Fourteenth Amendment prohibits the denial of equal protection of the laws by all government actors, namely the federal government. The Fourteenth Amendment explicitly addresses *state* government action, but says nothing about federal government action.[141] Even so, the Supreme Court has held that the Due Process Clause of the Fifth Amendment, which applies to the federal government, has an equal protection component.[142] Specifically, the Court explains that "[t]he 'equal protection of

140. Terkel, *supra* note 142. After some backlash, Scalia later walked this position back in front of Congress by expressing that he was only referring to private discrimination. *See* Amy Matsui, *Justice Scalia Before Senate Judiciary Committee: Maybe the Constitution Protects Against Sex Discrimination After All*, NAT'L WOMEN'S LAW CTR. (Oct. 12, 2011) https://nwlc.org/blog/justice-scalia-senate-judiciary-committee-maybe-constitution-protects-against-sex-discrimination-after-all/ ("Yeah, of course [women] are included [under the Equal Protection Clause], said Scalia. 'The Fourteenth Amendment, Senator, does not apply to private discrimination. . . . I was speaking of Title VII and laws that prohibit private discrimination. The Fourteenth Amendment says nothing about private discrimination, only discrimination by government." (alteration in original) (quoting *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 20 (2011) (internal quotation marks omitted))).

141. U.S. CONST. amend. XIV.

142. Bolling v. Sharpe, 347 U.S. 497 (1954), *supplemented sub nom.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955).

the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases."[143]

This leaves women susceptible to a denial of equal protection of the laws by the federal government for a few reasons. First, a plain reading of the Fifth Amendment's Due Process Clause says absolutely nothing about equal protection of the laws.[144] It would be easier to accept the Supreme Court's edict that the Due Process Clause has an equal protection component if the Court discussed this notion prior to the ratification of the Fourteenth Amendment. The concept of "equal protection of the laws," however, conveniently emerged solely from the ratification process of the Fourteenth Amendment.[145]

Beyond that, by its language, the Fourteenth Amendment only applies to the states—but there was nothing to prevent its drafters from writing it to apply to both federal and state governments. Congress approved and the states ratified an amendment prohibiting *only states* from denying to any person equal protection of the laws. As a result, the Court's expansion of equal protection to the federal government only after ratification of the Fourteenth Amendment may be viewed as an example of the Court disregarding the Article V amendment process and instead rewriting the Fifth Amendment to coincide with what the Court thinks the Fourteenth Amendment should say. Although this precedent has held for more than six decades, this illegitimacy argument still lingers, leaving women susceptible to a denial of equal protection of the laws by the federal government altogether if opinions on the issue, or the justices of the Supreme Court, change.

Second, the Due Process Clause found in the Fifth Amendment only prohibits the deprivation by the federal government

143. *Bolling*, 347 U.S. at 497.

144. U.S. CONST. amend. V.

145. The Editors of Encyclopedia Britannica, *Equal Protection*, Britannica (June 18, 2004), https://www.britannica.com/topic/equal-protection.

"of life, liberty, or property, without due process of law."[146] Some critics assert that this clause is purely procedural, only ensuring that none of the aforementioned deprivations can constitutionally occur unless minimum procedural safeguards are followed.[147] Since *Dred Scott v. Sandford*,[148] however, the Supreme Court has taken the view that the Due Process Clause has a substantive element that not only ensures minimum procedures but also protects certain substantive rights.[149] If a majority of the Supreme Court decides to wholly discard substantive due process, then it will have a hard time justifying an equal protection component in the Fifth Amendment's purely procedural Due Process Clause. This leaves women susceptible to a denial of equal protection of the laws by the federal government.

D. *How Equal Protection for Women Can Be Set in Stone*

Equal protection of the laws for women can be set in stone by ratifying an amendment that states:

> Equal protection of the laws shall not be denied or abridged by a federal or state government actor on the basis of sex, unless the government actor can prove the sex classification is substantially related to an important governmental interest

146. U.S. CONST. amend. V.

147. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation."); United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (joined by Thomas, J.) (referring to "substantive due process" as an "oxymoron," not a constitutional right).

148. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

149. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993); *see also Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) ("The Court first applied substantive due process to strike down a statute in *Dred Scott*. There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders." (internal citations omitted)).

> and provide an exceedingly persuasive justification for the sex classification.

Attempting to amend the Constitution in this way can serve a dual purpose: first, if successful, it will set in stone equal protection of the law for women and ensure that heightened scrutiny is afforded to sex classifications. Second, it will test the functionality of the constitutional amendment process.

An amendment to the Constitution has not been added in nearly three decades. In that time, partisanship has exponentially increased, prompting the question if enough members of Congress and states could ever come together in agreement to amend the Constitution again. For any proposed amendment to have a chance of success, it must accordingly relate to an issue that all sides agree upon. An amendment providing that equal protection of the laws shall not be denied or abridged on the basis of sex, while also subjecting sex classifications to the current Supreme Court standard of intermediate scrutiny and requiring an exceedingly persuasive justification for the classification, fits this criterion. A common misconception among citizens is that women and men must be treated equally under the law.[150] This is not accurate,[151] and if this reality is exposed, enough support may build to propel an equal rights amendment through the Article V process.

It is true, some opposition to an equal rights amendment exists; the multiple attempts to ratify the ERA faced opposition from different fronts. The opposition was, and still may be, concerned about the effects an equal rights amendment may have on traditional sex roles, including leading to women in combat, unisex bathrooms, and same-sex marriage,[152] as well

150. *See, e.g.*, Tabby Biddle, *Wait, Women Don't Have Equal Rights in the United States?*, HUFFPOST (Nov. 4, 2014), https://www.huffingtonpost.com/tabby-biddle/wait-women-dont-have-equa_b_6098120.html; ERA Coalition, *supra* note 118.

151. *See supra* Section III.C.

152. This issue was resolved in *Obergefell*. *See Obergefell*, 547 U.S. 1118 (legalizing same-sex marriage).

as possibly eliminating any restrictions on abortion.[153] But if citizens were actually aware of the vulnerability of equal protection for women, it is difficult to believe that support for an equal rights amendment would not build. Moreover, if the language of an equal rights amendment simply enshrines in the Constitution the standards that Supreme Court precedent already applies, nothing should change. Instead, vulnerable Supreme Court precedent will become set in stone until another constitutional amendment says otherwise. So the concerns of opponents that have yet to come to fruition—women in the draft, unisex bathrooms, and unrestricted abortion—will not be aggravated by such an amendment.

This is how an equal rights amendment can gain the consensus necessary to overcome Article V's requirements and become the ideal constitutional amendment test case. Nothing should change, and any future discrimination based on sex will be subject to intermediate scrutiny and require an exceedingly persuasive justification to pass constitutional muster. If successfully added to the Constitution, women will enjoy enduring equal protection of the laws. To enshrine equal protection of the laws for women and heightened scrutiny in the Constitution itself, therefore, will make the right virtually impenetrable and protect it from any future erosion.[154]

153. ALICE PAUL INST., *supra* note 74.

154. There was a recent push for three-fourths of states to ratify the ERA that was sent to the states back in the 1970s. Thirty-eight states finally ratified the amendment, but constitutional challenges to its legitimacy are unsurprisingly in progress. First, there's an expiration problem. The proposal was sent to the states with a deadline for ratification. This was not met, the deadline was extended, and that new deadline again was not met. While some believe this caused the proposed amendment to expire, so current efforts to recognize the "ratified" ERA are futile, others argue that amendment proposals cannot expire, as there is no time limit in the text of Article V. The expiration of the proposed amendment is one point of constitutional challenge to the ERA. Second, there's a ratification withdrawal problem. A few states counted towards the ERA ratification total have since attempted to withdraw their ratifications. As a result, whether a state can withdraw a ratification, and whether the ERA in fact can count those states towards its ratification total, are more points of constitutional challenge to the ERA. Due to each of these potential problems with the current ERA efforts, it is clear that starting the process again will ensure that the amendment is legitimized if successful. Prominent women's rights advocate and current Supreme Court Justice Ruth Bader Ginsburg also

Equally important, testing the functionality of the constitutional amendment process with this proposed equal rights amendment will signal Article V's status—dead or alive—and, if the former, force the country to deal with the ensuing implications by choosing between the two evils of ignoring the problem (and accepting the resultant distorted world) or fixing it.

CONCLUSION

Article V has been on life support for years, and the only way to see if it is still breathing is to push for a constitutional amendment that theoretically should be successful as an apolitical issue. An equal rights amendment utilizing the current level of scrutiny found in Supreme Court precedent for sex classifications has this potential, and an amendment to this effect should be pursued to prohibit sex discrimination by government actors in the most enduring and close-to-permanent method our Constitution provides. An equal rights amendment is the ideal test case to take on the Article V process, and it needs to be tested quickly to prevent citizens from turning to the Supreme Court—a wholly inappropriate avenue—for their constitutional amendment needs. But if this cannot be achieved, and the amendment process is truly a dead letter, then Article V itself must be amended. The ability to amend the Constitution is a crucial function of the sacred document, allowing it to adapt to changing times when a consensus builds as to new important issues and place those issues beyond majority politics; as such, the Constitution's viability and legitimacy in the future may depend upon the amendment function. Even more crucial, however, is to ensure that a dead

holds this view. *See* Russell Burmen, Ruth Bader Ginsburg Versus the Equal Rights Amendment, ATLANTIC (Feb. 15, 2020) https://www.theatlantic.com/politics/archive/2020/02/ruth-bader-ginsburg-equal-rights-amendment/606556/ (reporting that Justice Ginsburg stated in an interview that she'd like to see the ERA start over because it has too much controversy surrounding it).

Article V does not encourage judicial activism or disrupt the balance of federalism. Thus, amending the amendment process to extend the life of Article V is the lesser of two evils.