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# A Push for An Egalitarian Constitution

by Richelle Joy German\*

## I. Introduction

This note explores avenues of constitutional change to achieve actual and effective protection of the rights of Black, Indigenous, People of Color, and other marginalized folks, who have historically been left out by the written words of the United States Constitution and its interpretations. This note is by no means a comprehensive study; it only intends to spark a real discussion of why it is important to have a dialogue about re-writing the Constitution.

Firstly, this note will explore the limitations of Article V as an avenue for change. Article V outlines the steps to amend the Constitution.<sup>1</sup> This note will briefly discuss the few successful amendments to pass through Article V, while also examining the Equal Rights Amendment (hereinafter “ERA”) as an example of an unsuccessful attempt to amend the Constitution via Article V.

Secondly, this note will compare Article V against the constitutional amendment processes of other countries to demonstrate how Article V often acts as a nearly impossible barrier to achieving actual change.

Thirdly, this note will compare and contrast the equality provisions in the Canadian Charter of Rights and Freedoms and the South African Constitution to the U.S. Constitution as specific examples of how other countries have successfully changed their constitutions in an attempt to enshrine the protection of marginalized communities.

Lastly, the article will explore the waning influence of the U.S. Constitution in the international world and considers the notion of re-writing it.

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

## II. The United States Constitution

The Founding Fathers wrote the U.S. Constitution to protect the freedom of the minority from the tyranny of the majority.<sup>2</sup> This was a response to the oppressive British monarchy that the Founding Fathers escaped from. The Constitution formed the nationhood of the United States, and its main purpose was to create “a government that will meet the needs of its people.”<sup>3</sup> It created a limited government by design and institutionalized separation of powers, federalism, and individual liberties. The founding document opens with:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>4</sup>

The aspirational words of the preamble to the U.S. Constitution are deceiving. The preamble declares that the Constitution was enacted by “the People of the United States” who are meant to be its stewards and ultimately responsible for its continued existence.<sup>5</sup> In reality, it was written by a select group of land-owning white men.<sup>6</sup> The preamble continues to deceive the American people when it claims the Constitution protects the people’s interests when in actuality it has failed to protect groups of people who are not land-owning white men.

Throughout American history, the expansion and increase of individual liberties have been attributed to the U.S. Constitution.<sup>7</sup> Professor Erwin Chemerinsky suggests that because of the U.S. Constitution, and the Supreme Court Justices sworn to uphold it, the United States

has gone from slavery to mandated segregation to prohibiting race discrimination to affirmative action. It has progressed from women being literally chattel, property of their husbands, to their having the right to vote, to having gender equality protected by

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2. ERWIN CHERMERINSKY, CONSERVATIVE ASSAULT ON THE CONSTITUTION 267 (2010).

3. *Id.*

4. U.S. CONST. pmb1.

5. *Id.*

6. Adila Hassim, *Affirmative Action Policies in the United States and South Africa: A Comparative Study*, 2000 ST. LOUIS-WARS AW TRANS’L 119, 134 (2000).

7. *Id.* at 272.

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statute and by the Constitution . . . gays and lesbians have gone from being criminals when they engage in sex to having a constitutional right to private consensual activities to being able to marry ...<sup>8</sup>

Most Americans are proud to cite constitutional amendments such as the Reconstruction Amendments,<sup>9</sup> the Nineteenth Amendment,<sup>10</sup> and opinions such as *Brown v. Board of Education*,<sup>11</sup> *Roe v. Wade*,<sup>12</sup> *Lawrence v. Texas*,<sup>13</sup> and more recently in 2015, *Obergefell v. Hodges*<sup>14</sup> as proof that the U.S. Constitution does in fact protect the rights of marginalized peoples. But these are too small of victories and have less to do with the U.S. Constitution itself but more to do with marginalized groups organizing together and fighting and, at times, dying for their rights to finally be recognized. It should not be forgotten that the same court that decided these celebrated cases is also responsible for heinous decisions that cut against protecting the civil rights and liberties of marginalized folks such as in *Dred Scott v. Sandford*,<sup>15</sup> *Korematsu v. United States*,<sup>16</sup> *University of California v.*

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8. CHEMERINSKY, *supra* note 2, at 272.

9. U.S. CONST. amend. XIII–XV. The Reconstruction Amendments are the Thirteenth Amendment which ended slavery, the Fourteenth Amendment which contains the Due Process Clause and Equal Protection Clause, and the Fifteenth Amendment which prohibits the government from denying a citizen the right to vote based on that citizen’s race. *Id.*

10. U.S. CONST. amend. XIX. The Nineteenth Amendment guarantees women the right to vote. *Id.*

11. 347 U.S. 483 (1954). In *Brown*, the Supreme Court rejected the “separate but equal” doctrine and held that school segregation is a violation of the Equal Protection Clause of the Fourteenth Amendment, and, therefore, unconstitutional. *Id.*

12. 410 U.S. 113 (1973). In *Roe*, the Supreme Court held that the choice to have an abortion before viability was within the scope of the personal liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. *Id.*

13. 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court held that individuals have the right to engage in private same gender intimacies without interference by the government under the Due Process Clause of the Fourteenth Amendment because it falls under the realm of personal liberty which the government may not enter. *Id.*

14. 135 S. Ct. 2584 (2015). In *Obergefell*, the Supreme Court held that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. *Id.*

15. 60 U.S. 393 (1857). In *Dred Scott*, the Court held that Black people were not citizens, regardless of whether they were enslaved or free, and, therefore, the rights and privileges that the Constitution confers upon citizens did not apply to them. *Id.*

16. 323 U.S. 214 (1944). In *Korematsu*, the Court upheld the internment of Americans of Japanese descent and Japanese migrants during World War II without proof that they posed a threat to national security. *Id.*

*Bakke*,<sup>17</sup> *Citizens United v. Federal Election Commission*,<sup>18</sup> and most recently, *Trump v. Hawaii*.<sup>19</sup> Minorities<sup>20</sup> historically have not been protected by the Constitution and have always had to fight for their civil rights and liberties.<sup>21</sup>

The U.S. government is described as “a constitutional democracy, not a pure democracy.”<sup>22</sup> The U.S. Constitution itself is anti-majoritarian by design, and historically only truly protected the specific interests of white, land-owning men.<sup>23</sup> The Founding Fathers are revered in this country as the “protectors” of freedom, but it is not difficult to see the document they created has many shortcomings.<sup>24</sup> White men have monopolized the interpretation and enforcement of the Constitution since the founding of the United States.<sup>25</sup> In *The Cult of the Constitution*, Professor Franks purports that “... the creation, interpretation and application of constitutional rights have all primarily served the interests of the Americans who most closely resemble the original [F]ounding [F]athers.”<sup>26</sup> It is past due for the Constitution to hold true to its promise of protecting the civil rights and liberties for all of the People of the United States. This note is an attempt to explore the best way to achieve this.

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17. 438 U.S. 265 (1978). *Bakke* shaped the ongoing debate around affirmative action. See also Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, THE ATLANTIC, (Oct. 13, 2018), <https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/>. Justice Powell essentially shifted the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the detriment of race-conscious college admission strategies. *Id.*

18. 558 U.S. 310 (2010). The effect of the Court’s decision in *Citizens United* has allowed for unlimited election spending by corporations and labor unions and has given rise to Super PACs. *Id.*

19. 585 U.S. 2392 (2018). *Trump v. Hawaii* upheld the validity of the travel ban as within the President’s powers despite the President’s clear discriminatory intent to ban Muslims his administration deems as undesirable immigrants. *Id.*

20. I use the term minorities to refer to communities that have historically or continue to be left out of the political process despite the fact that some of these groups, for example people of color, are technically the global majority.

21. It is important to note that there is a difference in approach to constitutional rights between civil rights—emphasizes group rights and the need to ensure their equal protection by the government—and civil liberties—emphasizes individual rights and the need to protect them from the interference of the government. MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 12 (2019).

22. CHEMERINSKY, *supra* note 2, at 267.

23. See FRANKS, *supra* note 21, at 6 (2019).

24. See *id.* at 8.

25. *Id.* at 10.

26. FRANKS, *supra* note 21, at 10.

The operative U.S. Constitution is fundamentally different from the document as it was first written.<sup>27</sup> Bruce Ackerman, in an interview at the National Constitution Center about his book, *Revolutionary Constitutions*, explained how most successful constitutions last around fifty to seventy-five years before they need to be changed.<sup>28</sup> According to him, the American Constitution has gone through three distinct eras and is on the brink of its fourth iteration.<sup>29</sup> The current era is ending, but it started with the Civil Rights movement.<sup>30</sup> If constitutions inevitably change every fifty to seventy-five years, why should that evolution not be explicitly recognized, institutionalized, and reflected in the U.S. Constitution?

Despite the fundamental changes in the existence of protected rights via current operative interpretations, the text of the Constitution has remained largely unchanged and, therefore, remains a barrier in adequately responding to the current political and social times.<sup>31</sup> In *The Conservative Assault on the Constitution*, Chemerinsky argued there is a conservative assault on the U.S. Constitution which started in 1968 after the liberal Warren Court.<sup>32</sup> He calls for an alternative vision for the U.S. Constitution to counter this assault.<sup>33</sup> It is important to articulate this alternative vision, but Chemerinsky's proposal to merely affect judicial interpretation does not go far enough.<sup>34</sup> Judicial interpretations of the Constitution are the product of individual justices, who are appointed by and align with one of the two major American political parties. As a result, they are not insulated from the political process and do not put forth a consistent effort to protect the rights of marginalized people.

### III. Article V Amendments

The Framers indirectly acknowledged the possibility of imperfection by writing into the U.S. Constitution procedures to amend it.<sup>35</sup> The founders made constitutional amendments possible because they did not want

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27. ROGER C. HARTLEY, HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE 4 (2017).

28. Bruce Ackerman, *Revolutionary Constitutions*, <https://www.youtube.com/watch?v=M8tlqVmrXmw> (last visited Dec. 27, 2019).

29. *Id.*

30. *Id.*; HARTLEY, *supra* note 27, at 4.

31. HARTLEY, *supra* note 27, at 4.

32. CHEMERINSKY, *supra* note 2, at 272.

33. *Id.*

34. *See* CHEMERINSKY, *supra* note 2, at 272.

35. SANFORD LEVINSON, RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENTS 5 (1995).

revolutions to be the only route for constitutional change.<sup>36</sup> The text of Article V is as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>37</sup>

It is incredibly difficult to amend the U.S. Constitution through Article V, as its procedures are extraordinarily undemocratic.<sup>38</sup> Many scholars deem Article V a pre-twentieth century relic, a hoax, something that masquerades as an engine of change, or a comatose Article.<sup>39</sup> Article V empowers a relatively small minority of the population to block constitutional change desired by a substantial majority.<sup>40</sup> A prime example of which is the ERA. Since the ERA's passing in Congress in 1973, its nationwide approval never dropped below fifty-seven percent.<sup>41</sup> The ERA continues to be a subject of hearings in the House and the Senate almost every Congress since its proposal.<sup>42</sup> But its advocates have struggled to get the amendment ratified by the required three-fourths of the states in time.<sup>43</sup>

36. MARY FRANCES BERRY, *WHY THE ERA FAILED* 4 (1988).

37. U.S. CONST. art. V.

38. HARTLEY, *supra* note 27, at 5.

39. *Id.*

40. *Id.*

41. THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, *THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES* (2018).

42. *Id.*

43. On January 15, 2020, Virginia became the 38th state to ratify the ERA. Bill Chappell, *Virginia Ratifies The Equal Rights Amendment, Decades After The Deadline*, NPR, (Jan. 15, 2020 3:36PM), <https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline>. Currently, there is a legal battle over whether this ratification is legally viable because it came after the amendment's ratification deadline. *Id.* Trump's Department of Justice issued an opinion declaring that the ERA is dead. *See* *Ratifications of the Equal Rights Amendment*, 44 Op. O.L.C. 1 (2020). In a recent ruling by Judge Casper, she determined that women—individually or in advocacy groups—do not have standing to sue the

There are four ways to amend the U.S. Constitution through Article V:

(1) Congress proposes, by two-thirds supermajority, a constitutional change, and the change becomes valid when it is ratified by three-quarters of the states in *legislative votes*; (2) Congress proposes a change by two-thirds supermajority, and the change becomes valid when it is ratified by three-quarters of the states in *conventions*; (3) two-thirds of the states petition Congress to call a constitutional convention to propose a constitutional change, and the change becomes valid when it is ratified by three-quarters of the states in *legislative votes*; and (4) two-thirds of the states petition Congress to call a constitutional convention to propose a constitutional change, and the change becomes valid when it is ratified by three-quarters of the states in *conventions*.<sup>44</sup>

There have been around 12,000 amendment proposals introduced in Congress, and several hundred petitions have been filed by States requesting a constitutional convention.<sup>45</sup> Yet, in the 225 years since the ratification of the U.S. Constitution, only twenty-seven amendments have been ratified and incorporated into the Constitution.<sup>46</sup> The odds of a constitutional amendment actually being ratified are one in a thousand and the odds of proposals gaining Congressional approval for state ratification are only one in 500.<sup>47</sup> According to Hartley, “Article V’s formidable procedural barriers largely explain the overwhelmingly low probability of success of efforts to add new constitutional text.”<sup>48</sup>

#### A. Equal Rights Amendment

The ERA is emblematic of the great difficulty in passing a constitutional amendment through Article V despite national support for the amendment. It is an example of an unsuccessful attempt by a marginalized group to change the substance of the U.S. Constitution to ensure that the

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government to declare the amendment ratified. *Equal Means Equal v. Ferriero*, 2020 U.S. Dist. LEXIS 140027, at \*1 (D. Mass 2020); Bob Egelko, *Equal Rights Amendment Battle Highlights Obstacles to Challenging Federal Decisions in Court*, S.F. CHRONICLE (updated Oct. 23, 2020, 7:02 PM), <https://www.sfchronicle.com/politics/article/Equal-Rights-Amendment-battle-highlights-15671497.php>.

44. Richard Albert, *Constitutional Amendments and Dismemberments*, 43 YALE J. INT’L L. 1, 16 (2018) (emphasis added).

45. HARTLEY, *supra* note 27, at 2.

46. *Id.* at 3.

47. *Id.* at 2.

48. *Id.*

protection of women's rights is codified. The Framers did not believe women possessed the same legal rights as men; therefore, their rights were not written into the Constitution.<sup>49</sup> The ERA proposes to add the text, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on accounts of sex."<sup>50</sup> Proponents of the ERA are fighting for the expansion of rights guaranteed by the Constitution to apply to both genders.<sup>51</sup> They hope to codify equal protection from discrimination regardless of sex, according to clear federal judicial standards for deciding sex discrimination cases, and to provide a strong legal defense against a rollback of women's rights.<sup>52</sup> The ERA is both a symbolic and practical effort.<sup>53</sup> Adding the ERA to the U.S. Constitution would send a strong message to the American people: They can positively influence individual behavior and social practices.<sup>54</sup>

It is more difficult to achieve ratification when the amendment proposes a major substantive change to the U.S. Constitution, as opposed to amendments which propose only structural changes.<sup>55</sup> The ERA was first introduced almost a century ago in 1923, but was not ratified by any state until 1972.<sup>56</sup> Despite having popular national support for the amendment, because of the antimajoritarian procedures of Article V, it still has not been

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49. FRANKS, *supra* note 21, at 28.

50. EQUAL RIGHTS AMENDMENT, <https://www.equalrightsamendment.org/> (last visited on Dec. 27, 2019).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*; though it can be argued that the ERA is not enough of a victory for all women or that its practical impact will still leave out important demographics of women because the ERA movement is largely supported and centered around college-educated, elite women. See Joan C. Williams, *The Misguided Push for an Equal Rights Amendment*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/opinion/sunday/equal-rights-amendment.html>.

Professor Williams critiques the effort of pushing for the ERA as "just one expression of elites' obsession with using politics to enact their virtue." *Id.* Also, the ERA could potentially become another barrier to actually creating laws that attempt to remedy past sex and gender discrimination similar to the ways in which the Fourteenth Amendment has become a barrier to effective affirmative action.

55. BERRY, *supra* note 36, at 1; see U.S. CONST. amend. XI–XV and compare the Eleventh Amendment and the Twelfth Amendment to the Reconstruction Amendments.

56. Maggie Astor, *The Equal Rights Amendment May Pass Now. It's Only Been 96 Years*, N.Y. TIMES, (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/politics/virginia-ratify-equal-rights-amendment.html>. The ERA gained 35 state ratifications by its 1982 deadline. Nevada ratified it in 2017 as the 36th state, followed by Illinois in 2018 as the 37th state. *Id.* Virginia became the 38th state to ratify the ERA. See Chappell, *supra* note 42. While the ERA now has the required number of ratifications, there is concern that it will not be added to the U.S. Constitution. First, because it has been passed the deadline for ratification and second, because legislators in five states (Idaho, Kentucky, Nevada, South Dakota, and Tennessee) have since voted to rescind their state's ratification.

incorporated into the U.S. Constitution. However, amendments that propose fixes to problems in the structure of the Constitution are relatively easy to pass. For instance, adding the electoral college.<sup>57</sup> In comparison, an amendment to the Constitution proposing the end of slavery, lingered and festered for about fifty years before the Thirteenth Amendment was finally ratified.<sup>58</sup> Article V poses as an “iron cage,” indestructible bars that create a near impossibility of effecting significant change through the constitutional amendment mechanism.<sup>59</sup>

Some scholars attribute the ERA’s failure to certain inadequacies on the part of proponents of the ERA.<sup>60</sup> According to Mary Frances Berry in *Why the ERA Failed*, the failure of the ERA is partly because its proponents were unprepared to defend the amendment from women who believed the proposed changes would lead to their becoming more vulnerable and exposed.<sup>61</sup> Berry implies that because of the proponents’ inability to adequately address the counter-movement, the ERA was unable to achieve the stringent consensus needed to pass a constitutional amendment.<sup>62</sup> The fierce opposition to the ERA mostly came from religious, older, somewhat educated middle-class women.<sup>63</sup> Phyllis Schlafly is one of the most popular anti-ERA leaders.<sup>64</sup> She is quoted as saying, “ERA was the men’s liberation amendment.”<sup>65</sup> Berry argues that proponents of the ERA failed to seriously address the anti-ERA fears about transforming the traditional roles men and women play.<sup>66</sup> Almost a century since the first proposal of the ERA, support for the ERA endures. Nationwide support for the ERA has never dropped below fifty-seven percent.<sup>67</sup> But despite the changed social climate, that is arguably more accepting of non-traditional gender roles, the ERA has not been added to the Constitution.<sup>68</sup>

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57. BERRY, *supra* note 36, at 10.

58. *Id.*; see U.S. CONST. amend. XIII. The text of the Thirteenth Amendment is as follows, “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. Congress shall have power to enforce this article by appropriate legislation.” *Id.*

59. HARTLEY, *supra* note 27, at 5.

60. See BERRY, *supra* note 36, at 1.

61. See *id.* at 84–85.

62. *Id.* at 83.

63. *Id.* at 84.

64. *Id.* at 83.

65. *Id.*

66. *Id.*

67. Neale, *supra* note 41.

68. Astor, *supra* note 56. Some supporters hope that because the ratification deadline of the ERA is written in the preamble that either Congress will remove the deadline, or the Supreme Court will rule favorably for the passage of ERA. Legal experts disagree on whether Congress has the authority to remove ratification deadlines. Article V of the U.S. Constitution does not say anything about when ratification must happen.

Other scholars claim that despite advocates' failure to pass the ERA, the amendment represents certain victories for women's rights.<sup>69</sup> Hartley argues that even if most amendments are not ratified through Article V procedures, the amendment procedures and the process of seeking ratification allows for political advantages that are important for social change.<sup>70</sup> In fighting for the ERA, proponents of the Amendment were able to build a social movement.<sup>71</sup> Often litigation, as a tool to claim legal rights, can initiate and nurture political mobilization.<sup>72</sup> This allows for mobilizing supporters, recruiting new members, promoting group cohesion, providing media coverage, mobilizing financial support, and creating a political legacy.<sup>73</sup> The Article V process is akin to litigating a legal right.<sup>74</sup> Hartley claims the ERA was still successful because, through proposing the Amendment to Congress and pushing for ratification by states in the past, it was able to mobilize supporters and recruit many members that formed national coalitions, it is widely known, and it achieved political legacy in the form of statutes.<sup>75</sup> The ERA also achieved change through judicial interpretation of the Fourteenth Amendment's Equal Protection Clause, in that there is now heightened scrutiny for sex and gender classifications. Because of the enduring fight for the ERA, President Kennedy created a presidential commission on the status of women, which allowed for continued research that resulted in data confirming rampant sex discrimination.<sup>76</sup>

According to Hartley, it is a mistake to evaluate Article V entirely by the number and quality of amendments it has added to the Constitution because the changes proposed by constitutional amendments have mostly occurred off-text.<sup>77</sup> Hartley declares Article V an effective tool to secure diverse forms of political leverage, while constitutional amendments are crafted for political advantage.<sup>78</sup>

Constitutional amendments are often used as a top-down influence on state politics.<sup>79</sup> Additionally, constitutional conventions are used as a threat

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69. See HARTLEY, *supra* note 27.

70. *Id.* at 5.

71. *Id.*

72. *Id.* at 10.

73. *Id.* at 14.

74. See *id.*

75. See *id.*

76. *Id.* at 16–17. President Kennedy started the commission on the status of women to attempt to “blunt support” from the ERA, but it backfired because the commission actually helped the arguments for the passage of the ERA.

77. *Id.* at 162.

78. See HARTLEY, *supra* note 27, at 158.

79. *Id.* at 160.

to prod Congress into action.<sup>80</sup> The fight for the ERA stimulated significant alteration in the legal status of women.<sup>81</sup> In 1963, the Fair Labor Standards Act was amended to include equal pay for men and women.<sup>82</sup> Between 1972 and 1982, the Supreme Court gradually broadened protection for women under the Fourteenth Amendment's Equal Protection Clause.<sup>83</sup> Title VII of the Civil Rights Act included a provision outlawing sex discrimination by employers.<sup>84</sup> The ERA influenced constitutional meaning because of the nationwide democratic deliberation that took place as a result of the backlash to the ERA.<sup>85</sup> It is worth noting that the ERA was ultimately added to many state constitutions.<sup>86</sup> But Hartley concedes that Article V may be a "road to nowhere" when assessed as a means for modifying government structure and constitutional norms by adding new text to the Constitution,<sup>87</sup> even though the Article V process of constitutional amendment may lend itself as a somewhat effective political tool.

#### B. Constitutional Amendments in Other Countries

It is well recognized by scholars that the U.S. Constitution possesses one of the most burdensome constitutional amendment processes.<sup>88</sup> One of the ways the U.S. Constitution stands out is by the extraordinarily difficult process to formally amend it, in contrast to most other less-rigid democratic constitutions.<sup>89</sup> The U.S. Constitution is unique among master-text<sup>90</sup> democratic constitutions of the world.<sup>91</sup> It was "at the vanguard of the world's constitutions for being written, supreme, entrenched against ordinary legislative amendment[s] or repeal[s]."<sup>92</sup>

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80. See HARTLEY, *supra* note 27, at 160.

81. BERRY, *supra* note 36, at 86.

82. *Id.*

83. *Id.*

84. HARTLEY, *supra* note 27, at 18. There were different factions of the proponents of the ERA, some of which were racist. The New Women's Party partnered with the southern segregationists to introduce an amendment to the Civil Rights bills to protect "white womanhood." This also backfired.

85. *Id.* at 158.

86. *Id.* at 160.

87. *Id.* at 162.

88. James Julius Baber, *An Analysis of Different Constitutional Amendment Models*, SETTON HALL U. L. SCHOOL STUDENT SCHOLARSHIP 435 (May 1, 2014), [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1435&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1435&context=student_scholarship).

89. *Id.* at 3.

90. Constitutions written in aggregate form. See Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN UNIV. L.J. 387, 387 n.1 (2015).

91. Richard Albert, *American Exceptionalism in Constitutional Amendments*, 69 ARK. L. REV. 217, 218 (2016).

92. *Id.* at 232.

The U.S. Constitution is only amendable in theory. Article V tells us there are no current barriers to formal amendments except for procedural ones.<sup>93</sup> Article V authorizes political actors to formally amend the Constitution, but this process ultimately becomes inoperable as a result of a divided political climate. Such a climate prevents achieving the consensus required to amend the Constitution. The reason why the U.S. Constitution is so hard to amend is that it makes institutional consolidation exceedingly difficult to achieve.<sup>94</sup>

Generally, there are two types of processes for constitutional amendments around the globe. One process requires a referendum, while the other requires a supermajority of political actors. Article V of the U.S. Constitution employs the second version. An example of the first process is Denmark. Denmark's constitution requires forty percent of the electorate, not just forty percent of votes, for an amendment to pass.<sup>95</sup> Despite this seemingly onerous procedure the U.S. Constitution is still ranked at the top of the scale of amendment difficulty in a study by Arend Lijphart. Donald S. Lutz also ranks the U.S. Constitution at the top of all other democratic constitutions for amendment difficulty.<sup>96</sup> According to Astrid Lorenz's study, the U.S. Constitution is one of the four most rigid constitutions ever, along with Belgium, Bolivia, and the Netherlands.<sup>97</sup> The least rigid constitutions to amend are those of the U.K. and New Zealand. This might be attributed to the fact that these countries do not have master-text constitutions like the United States.<sup>98</sup>

Other democratic constitutions are more frequently amended than the U.S. Constitution.<sup>99</sup> The annual revision rate across other countries is 0.35, while the U.S.' is only 0.07.<sup>100</sup> An example of a constitution that was designed to be amendable, and is amenable in practice, is the German Basic Law. It has been amended a dozen times.<sup>101</sup> In contrast, the Constitution of Canada is virtually unamenable except for low stakes matters of provinces, parliamentary, or regional interests.<sup>102</sup>

Even though it is practically impossible to amend the U.S. Constitution, state constitutions are amendable. Traditions of U.S. state constitutions

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93. Albert, *supra* note 91.

94. *Id.* at 250.

95. Baber, *supra* note 88, at 16.

96. Albert, *supra* note 91, at 223. Donald S. Lutz wrote *Principles of Constitutional Design*, one of the most influential studies of constitutional amendment difficulty.

97. *Id.* at 222.

98. *Id.*

99. *Id.* at 226.

100. *Id.* at 229.

101. *Id.* at 221.

102. Albert, *supra* note 91, at 221.

follow the larger democratic constitutions of other countries.<sup>103</sup> State constitutions that were born before, or shortly after, the U.S. Constitution have higher amendment rates than the U.S. Constitution.<sup>104</sup> State constitutions are more likely to pursue constitutional change through formal mechanisms of constitutional change, as opposed to change through litigation.<sup>105</sup> The reason why state constitutions are relatively more amendable compared to the U.S. Constitution might be due to the fact that state constitutions are more detailed because state constitutions deal with day-to-day governmental functions.<sup>106</sup> States retain all of the residual powers not delegated to the national government.<sup>107</sup>

Some argue constitutions should not be easily changed to secure the stability of government.<sup>108</sup> The argument is that the difficulty of the process defends the core of the document against being rewritten to fit the political expediency of the moment.<sup>109</sup> The Framers wanted to ensure that the will of the people would not be infringed.<sup>110</sup> However, the U.S. constitutional amendment process has done exactly that: infringe upon the will of the people, as it has continued to do with the ERA. Article V amendments are effectively irrelevant. U.S. Constitutional change today occurs “off the books.”<sup>111</sup>

#### **IV. Equality in the U.S. Constitution Versus Equality in Canada’s Charter of Rights and Freedoms and South Africa’s Constitution**

This section explores how newer constitutions, such as those of Canada and South Africa, guarantee equality between genders. The Canadian Charter of Rights and Freedoms is more expansive than the U.S. Constitution and less absolute. Constitutional scholars reckon the Canadian Constitution is now more influential than the American Constitution.<sup>112</sup> The South African Constitution has also been on the rise as one of the more influential

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103. Albert, *supra* note 91, at 221.

104. *Id.* at 228.

105. Albert, *supra* note 91, at 228.

106. *Id.*

107. *Id.*; *see also* U.S. CONST. amend. X.

108. Baber, *supra* note 88, at 2.

109. Baber, *supra* note 88, at 6.

110. *Id.*

111. Albert, *supra* note 91, at 224.

112. *Id.* at 224–25.

constitutions,<sup>113</sup> along with the European Convention on Human Rights, India's, and New Zealand's constitutions.<sup>114</sup>

The Fifth and Fourteenth Amendments of the U.S. Constitution collectively guarantee the people of the United States equal protection under the law.<sup>115</sup> The Equal Protection Clause<sup>116</sup> of the Fourteenth Amendment guarantees equal treatment under the law by state governments. The Fifth Amendment Due Process Clause<sup>117</sup> is interpreted to extend equal protection guarantees to the federal government.<sup>118</sup> In effect, these equality provisions have given way for a highly formalistic definition of equality rights.<sup>119</sup>

In Canada, equality rights are guaranteed by sections 15(1) and 15(2) of the Canadian Charter of Rights and Freedoms.<sup>120</sup> Section 15(1) reads as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>121</sup>

Section 15(a) reads as follows:

Subsection (1) does not preclude any law, program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are

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113. See Albert, *supra* note 91, at 224–25.

114. *Id.*

115. See U.S. CONST. amend. V, XIV.

116. U.S. CONST. amend. XIV, § 1. (The relevant portion of the Fourteenth Amendment reads as follows: “No State shall . . . deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

117. U.S. CONST. amend. V. (The relevant portion of the Fifth Amendment reads as follows: “No person shall be deprived of life, liberty, or property, without due process of law . . .”).

118. See *Bolling v. Sharp*, 347 U.S. 497, 499 (1954) (Chief Justice Warren wrote the opinion of the court. His opinion opined that the concepts of equal protection and due process, both stem from the American ideal of fairness, and are not mutually exclusive. Though the concepts are not always interchangeable, Chief Justice Warren wrote, “this Court has recognized . . . discrimination may be so unjustifiable as to be violative of due process.”).

119. See Roozbeh B. Baker, *Balancing Competing Priorities: Affirmative Action in the United States and Canada*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 527, 528 (2009).

120. Canadian Charter of Rights and Freedoms, § 15, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

121. *Id.*

disadvantaged because of race, national or ethnic origin, religion, sex, age or mental or physical disability.<sup>122</sup>

These provisions apply to both the federal and provincial levels of government.<sup>123</sup> In South Africa, the new constitution recognizes equality as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>124</sup>

The effort of these countries to codify progressive and comprehensive interpretations of equality in their constitutions can serve as a blueprint for America's effort in re-thinking its equality provisions.<sup>125</sup>

#### A. Equality in the Canadian Charter of Rights and Freedoms

Canada and America's approach to equality are radically opposed.<sup>126</sup> In the United States, equal protection is the idea that the U.S. government must not discriminate against its citizens by treating some individuals differently from others.<sup>127</sup> Equality in America centers around the proper judicial standard of review required to give effect to equality rights.<sup>128</sup> While in Canada, equality rights start with the idea of ameliorating past

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122. Canadian Charter of Rights and Freedoms, § 15, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

121. Canadian Charter of Rights and Freedoms, § 15, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

122. S. AFR. CON., 1996, ch. 2, 9.

123. I am not advocating for a direct importation of either Canada's or South Africa's equality provisions, but I am advocating the use of these provisions as a guide.

124. *See* Baker, *supra* note 119, at 528.

125. *Id.* at 529.

126. *Id.* at 530. (There are three tiers of review: Strict Scrutiny, Intermediate Scrutiny, and Rational Basis Review. Intermediate Scrutiny is commonly applied to discrimination based on gender or sex.).

discrimination.<sup>129</sup> The Canadian approach redefines the meaning of discrimination as excluding a group for the sole purpose of exclusion—in other words, a violation of “human dignity.”<sup>130</sup> Unequal treatment at the hands of the law alone does not constitute discrimination.<sup>131</sup>

Section 15(1) of the Canadian Charter of Rights and Freedoms is motivated by protecting the Canadian people against the violation of essential human dignities.<sup>132</sup> Equality rights are about the possession of self-respect and self-worth.<sup>133</sup> Section 15(2) is a clarification of Section 15(1) rather than an exception.<sup>134</sup> It is to ensure that it is clear that the purpose of Section 15(1) is to promote equality in a substantive way and not merely a formal sense.<sup>135</sup> In comparison to the American approach where equal treatment is not a natural extension of equality rights, but rather an outdated, formalistic characterization.<sup>136</sup> Often times, equality in America means equal treatment under the law and no distinctions ought to be allowed with only narrow exceptions.<sup>137</sup>

The difference between the Canadian and American approaches is due to external constitutional mechanics of the American system, which views equal protection under the law as an absolute right and freedom; as opposed to the Canadian system, which views the amelioration of past discrimination of minority groups as a compelling enough goal to allow for the potential limitation of other rights and freedoms.<sup>138</sup>

## B. Equality in the South African Constitution

The new South African Constitution strives to achieve both political and socio-economic equality.<sup>139</sup> The founding provisions in the first section of the South African Constitution declares that South Africa was founded on “. . . human dignity, achievement of equality, and the advancement of the human rights and freedoms.”<sup>140</sup> In the epilogue, it says that South Africa embraces a “future founded on the recognition of human rights, democracy

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127. Baker, *supra* note 119, at 530.

128. *See id.*

129. *Id.*

130. *Id.*

131. *See Lovelace v. Ontario*, [2000] 1 S.C.R. 950 (Can.) (Canadian Supreme Court Justice Lacobucci’s opinion in the case.).

132. Baker, *supra* note 119, at 537.

133. *Id.*

134. *Id.* at 540.

135. *See id.*

136. *Id.* at 543.

137. Hassim, *supra* note 6.

138. S. AFR. CON., 1996, ch. 1 § 1.

and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief, or sex.”<sup>141</sup>

The Constitution recognizes the core of equality is the notion of dignity.<sup>142</sup> Built into the South African Constitution is the intent to remain conscious of the country’s history of conflict and prejudice instead of avoiding or ignoring the history of apartheid.<sup>143</sup> In Section 9(2), the word “unfairly” appears to have been included by the drafters to allow for the interpretation that discrimination is “unfair” when it occurs against members of a disadvantaged group and would perpetuate inequalities and disadvantages. This is because discrimination against members of a privileged or empowered class may not necessarily be “unfair.”<sup>144</sup> The South African Constitution recognizes that human beings are inherently equal in dignity.<sup>145</sup> Unfair discrimination means treating persons differently in a way which impairs their fundamental dignity as human beings.

A key constitutional difference between United States and South Africa is how the latter explicitly allows for affirmative action measures as written in Section 9(2).<sup>146</sup> Whereas in America, the Supreme Court has struck down countless attempts for remedial measures as unconstitutional for violating the Fourteenth Amendment because the proposed measures impermissibly discriminate.<sup>147</sup> The Supreme Court focuses too much on the level of judicial review and misses the point of affirmative action.<sup>148</sup> Some powerful Supreme Court justices in America, “ignore the distinction between ‘treatment as an equal’ and ‘equal treatment,’” while the Constitutional Court in South Africa recognizes this crucial distinction.<sup>149</sup> The framers of the South African Constitution see affirmative action not as a derogation from the right to equality, but part and parcel to the right of equality because the purpose of affirmative action furthers the goals of equality.<sup>150</sup>

Another difference between the treatment of equality in South Africa and America is the constitutional analysis that the respective Courts employ.<sup>151</sup> The South African Constitution establishes a Constitutional

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139. S. AFR. CON., 1996, ch. 1 § 1.

140. Hassim, *supra* note 6, at 126.

141. *See id.* at 127.

142. *Id.* at 149.

143. *Id.* at 150.

144. *See id.* at 152–53.

145. *See id.* (Race classifications in legislations are specifically difficult to uphold because of the application of strict scrutiny. As a result, many affirmative action programs have been struck down by the Supreme Court. Programs survive when they focus on diversity instead of correcting past discrimination because diversity is seen as a “compelling government interest.”).

146. *Id.* at 159.

147. Hassim, *supra* note 6, at 159.

148. *Id.* at 153.

149. *See id.* at 139.

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Court with the role of a) promoting the values that underlie an open and democratic society based on human dignity, equality, and freedom; b) prescribing the consideration of international law; and c) allowing the Constitutional Court to consider foreign law in its decisions.<sup>152</sup> In America, the Supreme Court's approach is formalistic. It looks at the legislative classification at issue then determines what level of scrutiny applies.<sup>153</sup> In South Africa, the Constitutional Court treats the forms of classification the same and once finding discrimination, examines questions of justifiability and reasonability.<sup>154</sup> The Constitutional Court has "...stressed in all the equality cases that no exegesis of the concept of equality can occur without an appreciation of South Africa's peculiar context."<sup>155</sup>

### C. What America Can Learn from Canada and South Africa

The differences between the American approach to equality and those of South Africa and Canada lie in the U.S. Constitution and its jurisprudence's reluctance to recognize that dignity forms the essence of the right to equality.<sup>156</sup> The United States pales in comparison in how it treats equality. Both Canada's Charter of Rights and Freedoms and the South African Constitution, in their principles and in their words, (1) recognize that dignity is essential to equality; (2) enumerate sex, and in the case of the South African Constitution also gender, as a protected class; (3) allow for affirmative action measures to ameliorate past discrimination to effectively promote equality. These countries' constitutions prevent the formalistic interpretation of equality employed in the United States. This allows for a more substantive protection of equal rights. The Supreme Court of Canada and the Constitutional Court of South Africa do not need to work on developing a constitutional theory to support it. Instead, the Courts only need to determine whether the structure of a program goes beyond what is permitted by the equality provision.

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150. Hassim, *supra* note 6, at 126.

151. *Id.* at 127.

152. *Id.*

153. *Id.* at 152.

154. *Id.* at 160.

## V. Declining Influence of the U.S. Constitution Among Other Nations

The U.S. Constitution is the oldest written constitution still in force anywhere in the world, but its influence is waning.<sup>157</sup> America's unique constitution has attracted many admirers. It was used as a model for other countries' constitutions. The 1935 Constitution of the Philippines is the closest one to replicate it fully. In the 1960s and the 1970s, constitutional similarity to the United States was at its highest.<sup>158</sup> In 1987, about 160 written charters out of 170 democratic countries were modeled directly or indirectly on the U.S. version.<sup>159</sup> Today, the U.S. Constitution has fewer admirers and fewer imitators. On average, constitutions of the world's democracies are less similar to the U.S. Constitution now than they were at the end of World War II.<sup>160</sup> Justice Ruth Bader Ginsburg caused a controversy when she said, "I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012."<sup>161</sup> Even Bruce Ackerman, an American constitutional law scholar, advised against adopting the U.S. Constitution.<sup>162</sup>

The decline of influence might have to do with the fact that the U.S. Constitution is terse, old, and guarantees few rights.<sup>163</sup> The U.S. Constitution is rooted in proceduralist values.<sup>164</sup> American democracy is oriented towards the process, not content.<sup>165</sup> It reflects the ultimate procedural value with outcome neutrality.<sup>166</sup> It also reflects the general decline of American power and prestige.<sup>167</sup> New African nations do not find it as useful due to the fact that current members of the U.S. Supreme Court are committed to interpreting the Constitution to its original meaning.<sup>168</sup> The U.S. Supreme Court, as an institution, is now less influential than it was before.<sup>169</sup> Foreign judges today are less likely to cite U.S. Supreme Court decisions partly because of its parochialism.<sup>170</sup>

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155. Adam Liptak, "We the People" Loses Appeal with People Around the World, N.Y. TIMES (Feb. 6, 2012), <https://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>.

156. Liptak, *supra* note 155.

157. *Id.*

158. *Id.*

159. Albert, *supra* note 91, at 248.

160. *Id.*

161. Liptak, *supra* note 155.

162. Albert, *supra* note 91, at 249.

163. *Id.*

164. *Id.*

165. Liptak, *supra* note 155.

166. *Id.*

167. *Id.*

168. *Id.*

## VI. Conclusion

The core of equality is dignity and respect for the equal worth of all human beings.<sup>171</sup> The U.S. Constitution makes no reference to equality nor does it contemplate dignity.<sup>172</sup> The Declaration of Independence states that, “all men are created equal.”<sup>173</sup> In this statement lies one of the main flaws of the principles of the U.S. Constitution. The Founding Fathers failed to contemplate women or anyone else who do not look like them as equals under the law. Equality does not begin to be a concept until the Fourteenth Amendment, but the Equal Protection Clause fails to recognize the dignity in all Americans and has not allowed for the correction of past wrongs because of its formalistic application. In order for equality to be truly achieved, there has to be awareness of context.<sup>174</sup> The U.S. Constitution and its jurisprudence has to be cognizant of America’s political, historical, social, and traditional underpinnings.

The U.S. Constitution is out of step with the rest of the world by failing to protect more rights.<sup>175</sup> Newer constitutions now protect equal rights for women, entitlement to food, education, and healthcare. There are several newer, “sexier,” and more powerful constitutions in the constitutional marketplace.<sup>176</sup>

Other nations routinely trade in their constitutions every 19 years.<sup>177</sup> In a 1789 letter to James Madison, Thomas Jefferson wrote, “Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right—it may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only.”<sup>178</sup> The often uncited part of the Declaration of Independence states, “[t]hat whenever any Form of Government becomes destructive of [Life, Liberty and the pursuit of Happiness], it is the Right of the People to alter or to *abolish* it.”<sup>179</sup>

South Africa’s new constitution is a notable political achievement because it allowed South Africa to emerge from apartheid and steer itself through the transition from parliamentary sovereignty to constitutional

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169. Hassim, *supra* note 6, at 160.

170. *Id.* at 129.

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

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

173. Liptak, *supra* note 155.

174. *Id.*

175. *Id.*

176. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789).

177. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

supremacy without bloodshed.<sup>180</sup> Constitution-making in South Africa was inclusive,<sup>181</sup> in comparison to the constitution-making process in America, where some commentators assert that only 160,000 Americans of around four million took part in the process.<sup>182</sup> South Africa's constitution-making was forward looking. It encapsulated a vision of human rights in the 21st century and its Bill of Rights is easily accessible to any person on the street.<sup>183</sup>

The centuries and decades after the drafting on the U.S. Constitution were fraught with injustice, disadvantage, and marginalization—politically, economically, and educationally—of people of color. Our Constitution has yet to truly grapple with this reality. The existence and the extent of fundamental rights is amorphous under this Constitution. The incorporation approach to the Bill of Rights created fertile ground for uncertainty and judicial subjectivity.<sup>184</sup> To achieve real equality under the Constitution, all Americans must accept and appreciate the oppression many Americans have faced and continue to face. The correction of this imbalance will set America on the road to attaining justice, equality, and democracy.

The greatest challenge of a society is making equality more than a seemingly unattainable pot at the end of a rainbow.<sup>185</sup> We must learn from the Canadian Charter of Rights and Freedoms and the Constitution of the Republic of South Africa. It is time to revisit the U.S. Constitution.

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178. Hassim, *supra* note 6, at 122.

179. *Id.* at 123.

180. *Id.* at 129.

181. Hassim, *supra* note 6, at 134.

182. *Id.*

183. *Id.*

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