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The Equal Rights Amendment After Bostock: A Means to Expand Constitutional Protections for Sexual Minorities

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THE EQUAL RIGHTS AMENDMENT AFTER *BOSTOCK*: A MEANS TO EXPAND CONSTITUTIONAL PROTECTIONS FOR SEXUAL MINORITIES

Courtney M. Hogan[*]

The Equal Rights Amendment (ERA) was presumed dead in the 1980s after a long battle for ratification failed, but it has recently returned to public discourse with the latest wave of feminist influence in the United States. The ERA declares that equal rights under the law cannot be denied on account of sex. In the 2020 U.S. Supreme Court decision, Bostock v. Clayton County*, the Court interpreted similar language from Title VII of the Civil Rights Act of 1964, which also prohibits sex discrimination. In that case, the Court interpreted the statutory prohibition on sex discrimination to include discrimination against sexual minorities for the first time. If the ERA is adopted in its present form, it should be interpreted in accordance with the Court's decision in* Bostock *to protect sexual minorities as well as women.*

While many scholars have answered constitutional questions regarding the ERA and articulated the ongoing need for its incorporation into the U.S. Constitution, none has had the opportunity to analyze its language in light of the landmark Bostock *opinion. This Note provides that evaluation, explaining why* Bostock *and other relevant jurisprudence support an all-encompassing interpretation of the ERA, should it be officially adopted.*

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I. INTRODUCTION

The Equal Rights Amendment (ERA) has a storied, century-long history in the United States. It is perhaps most well-known as the crowning jewel that the 1970s' women's rights movement was never able to obtain.[1] Although the ERA seemingly failed almost forty years ago, renewed feminist influence in the last half-decade has resurrected the ERA debate. Three state legislatures ratified the ERA between 2017 and 2020, possibly opening the door to enactment of the ERA in the U.S. Constitution.[2] Now, in light of the U.S. Supreme Court's landmark 2020 decision in *Bostock v. Clayton County*,[3] an expansion of the ERA's protections to include a proscription on anti-LGBTQ[4] discrimination seems likely should the ERA be enacted in its present form.

The ERA declares, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[5] This language closely resembles the text of Title VII of the Civil Rights Act of 1964 (Title VII),[6] the statute that the U.S. Supreme Court interpreted in *Bostock*.[7] Title VII states, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . sex . . . ."[8]

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[1] *See infra* Part III.

[2] *See infra* notes 52–62 and accompanying text.

[3] 140 S. Ct. 1731 (2020).

[4] This Note uses the terms "LGBTQ" and "sexual minorities" to refer to the community of gay, lesbian, bisexual, transgender, and queer individuals, as well as those who are intersex, asexual, or otherwise a sexual minority. Selection of this term in no way intends to limit the scope of this community, nor to disrespect those whose identity is not explicitly reflected. The acronym LGBTQ has a complex and ongoing story, and academic debate concerning the most accurate representation of this community continues. *See, e.g.*, Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. (forthcoming 2021) (manuscript at 2–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3570531# (citing various opinions regarding the proper acronym for this community). The Human Rights Campaign, the leading LGBTQ rights organization in the United States, formally uses LGBTQ. *See* Press Release, Human Rights Campaign, HRC Officially Adopts Use of "LGBTQ" to Reflect Diversity of Own Community (June 3, 2016), https://www.hrc.org/news/hrc-officially-adopts-use-of-lgbtq-to-reflect-diversity-of-own-community (explaining the organization's decision to use LGBTQ).

[5] H.R.J. Res. 208, 92d Cong., 86 Stat. 1523, 1523 (1972).

[6] 42 U.S.C. § 2000e-2(a) (2018).

[7] *See Bostock*, 140 S. Ct. at 1737 (finding Title VII prohibits employment discrimination against sexual minorities).

[8] 42 U.S.C. § 2000e-2(a)(1).

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Therefore, this Note argues that the parallels between the two provisions should lead the Court to read the ERA—should it be enacted—as prohibiting discrimination against both sexual minorities and women.

Part II of this Note provides background on the constitutional amendment process and Fourteenth Amendment jurisprudence to shed light on the ERA's complicated history and on how the ERA could expand on existing precedent concerning women's and sexual minorities' rights. Part III then traces the ERA from its original drafting in 1923 to its status today in 2021. Next, Part IV surveys Title VII precedents before turning to a detailed account of *Bostock v. Clayton County*. Part V then analyzes the Court's decision in *Bostock* and argues that its reasoning should apply when interpreting the ERA. After this argument, Part V also briefly notes some areas of the law in which the ERA stands to have significant impacts for both women, as it has always aimed to do, and for sexual minorities after *Bostock*. Finally, Part VI briefly concludes.

II. CONSTITUTIONAL BACKGROUND

A. THE CONSTITUTIONAL AMENDMENT PROCESS

Article V of the U.S. Constitution outlines the constitutional amendment process, a notoriously difficult task.[9] It reads, in relevant part, 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

[9] *See* Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RES. CTR. (Apr. 12, 2018), https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/ (surveying past failed congressional attempts at constitutional amendments).

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> in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.[10]

Stated plainly, Article V provides two routes for proposing amendments: either a two-thirds majority vote in both the House of Representatives and the Senate, or a constitutional convention called by two-thirds of the state legislatures, the latter of which has never been used.[11]

First, members of Congress introduce potential amendments as joint resolutions and must garner the requisite two-thirds vote in each chamber to formally propose a constitutional amendment.[12] With a successful vote, Congress proposes an amendment, and the Archivist of the United States then administers the ratification process.[13] Unlike federal legislation, constitutional amendments are not presented to the President for signature.[14] Instead, the Archivist submits the proposed amendment to the states for consideration with letters to the governors, who in turn submit the amendment to their state legislatures.[15] Each state legislature then votes on ratification of the proposed amendment.[16] When thirty-eight states ratify the proposed amendment, the Archivist certifies that the amendment is valid, and it becomes part of the U.S. Constitution.[17] Of an estimated 10,000 congressional attempts to propose amendments, only thirty-three were sent to the states, and only twenty-seven were ratified and adopted.[18] The ERA is one of the six proposed amendments that was never adopted.[19]

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[10] U.S. CONST. art. V.

[11] *See Constitutional Amendment Process*, FED. REG., https://www.archives.gov/federal-register/constitution (last updated Aug. 15, 2016) (detailing the official procedure for constitutional amendments).

[12] *Id.*

[13] *Id.*

[14] *Id.* For an argument that the President should have a role in the constitutional amendment process, see Sopan Joshi, Note, *The Presidential Role in the Constitutional Amendment Process*, 107 NW. U. L. REV. 963, 965 (2013).

[15] *Constitutional Amendment Process*, *supra* note 11.

[16] *Id.*

[17] *Id.*

[18] Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 9 (2000).

[19] *See infra* Part III.

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B. FOURTEENTH AMENDMENT JURISPRUDENCE

The Fourteenth Amendment contains two significant clauses with far-reaching effects on individual rights in the United States.[20] First, the Due Process Clause prohibits states from depriving "any person of life, liberty, or property, without due process of law."[21] Second, the Equal Protection Clause prohibits states from denying "any person within its jurisdiction the equal protection of the laws."[22] The U.S. Supreme Court has applied these Clauses to cases regarding women's and sexual minorities' rights, ensuring that the principles of equality articulated in the Fourteenth Amendment apply to these groups.

1. Women's Rights at the Court. In 1971, the U.S. Supreme Court applied the Fourteenth Amendment to a sex discrimination case for the first time in *Reed v. Reed*.[23] There, a unanimous Court struck down an Idaho law that explicitly made fathers the preferred administrators of their children's estates.[24] Chief Justice Warren Burger, writing for the Court, declared, "To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment,"[25] inextricably linking a prohibition on sex discrimination to the Fourteenth Amendment. Women's rights advocates then continued to progress towards their goal of gender equality in several cases throughout the 1970s and afterward, with each judgment relying on the Fourteenth Amendment to advance women's rights.[26]

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[20] *See* U.S. CONST. amend. XIV, § 1 (guaranteeing rights to due process and equal protection).

[21] *Id.*

[22] *Id.*

[23] 404 U.S. 71 (1971).

[24] *Id.* at 73.

[25] *Id.* at 76.

[26] *See* Craig v. Boren, 429 U.S. 190, 197–99, 210 (1976) (holding that an Oklahoma statute allowing young women to purchase low-alcohol beer but prohibiting their male counterparts from doing the same violated the Equal Protection Clause Fourteenth Amendment). *But see* Frontiero v. Richardson, 411 U.S. 677, 681–83, 691 (1973) (plurality opinion) (applying the Due Process Clause of the Fifth Amendment to a statute that discriminated against married female members of the U.S. armed forces).

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In 1996, Justice Ruth Bader Ginsburg authored the opinion for the Court in *United States v. Virginia*.[27] By a vote of 7–1, the Court determined that the Virginia Military Institute's male-only admissions policy violated the Fourteenth Amendment.[28] In this judgment, the Court applied intermediate scrutiny—articulated as an "exceedingly persuasive justification" standard—for sex-based classifications but declined to apply strict scrutiny, faithfully relying on precedent.[29]

Despite this high standard for evaluation of claims invoking the Equal Protection Clause, a subsequent decision demonstrated holes in the Court's gender equality jurisprudence. In *United States v. Morrison*, a female rape victim sought a civil remedy under the Violence Against Women Act (VAWA), and her male attackers argued that the statute was unconstitutional.[30] A bare five-member majority of the Court, in a decision written by Chief Justice William Rehnquist, held that Congress lacked the authority to pass VAWA under both the Commerce Clause and the Fourteenth Amendment.[31] This judgment is distinct from the *Reed* progeny of women's rights cases because it did not concern a statute that differentiated on the basis of sex.[32] Thus, the intermediate scrutiny standard described in *Virginia* did not apply; the Court instead analyzed the statute under the Commerce Clause and Section 5 of the Fourteenth Amendment.[33]

2. Sexual Minorities' Rights at the Court. The Fourteenth Amendment also provided the basis for several of the U.S. Supreme Court's twenty-first century LGBTQ rights decisions. In its 2003 judgment in *Lawrence v. Texas*, the Court struck down a Texas law criminalizing sodomy, ruling by a 6–3 margin that the law violated

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[27] 518 U.S. 515 (1996).

[28] *See id.* at 540–46 (concluding that the admissions policy constituted unlawful discrimination).

[29] *See id.* at 531–34 (explaining the Court's "heightened review standard" for sex discrimination cases).

[30] *See* United States v. Morrison, 529 U.S. 598, 602–05 (2000) (explaining the procedural history of the case).

[31] *Id.* at 627.

[32] *See id.* at 604 (describing the plaintiff's claim under Title IX and VAWA and explaining the defendants' argument that VAWA's "civil remedy is unconstitutional").

[33] *Id.* at 607.

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the Due Process Clause of the Fourteenth Amendment.[34] Justice Anthony Kennedy's opinion for the Court focused on the fact that the "petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[35] This opinion also recounted the historical evolution of, and increasing respect for, the LGBTQ community and emphasized fundamental dignity as a basis for its Fourteenth Amendment holding.[36]

In 2015, the Court, by a 5–4 margin in *Obergefell v. Hodges*, declared the right to marry to be "a fundamental right inherent in the liberty of the person," protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[37] The Court explained, again in an opinion by Justice Kennedy, that "couples of the same sex may not be deprived of that right and that liberty," guaranteeing the right to same-sex marriage nationwide.[38] Although Justice Kennedy relied on the Fourteenth Amendment, the standard of scrutiny for LGBTQ rights remains unclear.[39] Each of the four dissenting Justices (Roberts, Scalia, Thomas, and Alito) authored his own opinion, but they generally argued that the Court overreached by intervening in a political decision that should have been left to the public to decide through democratic processes of legislative reform.[40]

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[34] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[35] *Id.* at 564; *see also id.* at 575 (rejecting an Equal Protection Clause footing because "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants").

[36] *See id.* at 567–77 (examining the history of, as well as the social and legal trends surrounding, LGBTQ rights in the United States).

[37] Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

[38] *Id.*

[39] Justice Kennedy relies on broad notions of equality and justice in these cases without articulating a clear test for constitutional scrutiny. *See* Ruthann Robson, *Justice Ginsburg's* Obergefell v. Hodges, 84 UMKC L. REV. 837, 839 (2016) (criticizing Justice Kennedy's "lack of doctrinal rigor in his 'gay rights' cases").

[40] *See Obergefell*, 576 U.S. at 686–87 (Roberts, C.J., dissenting) (stating that "this Court is not a legislature" and criticizing the majority for "[s]tealing this issue from the people" who should have decided this question "through the democratic process"); *id.* at 715 (Scalia, J., dissenting) (arguing that the Fourteenth Amendment does not "remove [the same-sex marriage] issue from the political process"); *id.* at 722 (Thomas, J., dissenting) (criticizing the majority for using substantive due process "to enshrine their definition of marriage in the Federal Constitution and . . . put it beyond the reach of the normal democratic process"); *id.*

III. THE EQUAL RIGHTS AMENDMENT

For over a century after the U.S. Constitution took effect, women were generally excluded from the political sphere. In 1920, the Nineteenth Amendment upended this dynamic by granting women the right to vote: "The 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."[41] After gaining suffrage, the next logical step for many feminists was a constitutional amendment guaranteeing equal rights.[42]

In 1923, suffragist Alice Paul drafted what came to be known as the ERA: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[43] The ERA's early advocates had broad goals for the amendment, including to challenge social norms and double standards for men and women, to provide legal remedies for women, and to spotlight women's contributions to society.[44] The ERA was first introduced in Congress in 1923, and it was reintroduced during every session until 1972 when it finally garnered a two-thirds vote in both houses of Congress and was sent to the states for ratification with a seven-year time limit.[45]

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at 741 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.").

[41] U.S. CONST. amend. XIX.

[42] *See* JUDITH A. BAER, WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT 57 (3d ed. 2002) (stating that many women realized that the right to vote "was not enough" to ensure equal rights); Ruth Bader Ginsburg & M. Margaret McKeown, *Searching for Equality: The Nineteenth Amendment and Beyond*, 108 GEO. L.J. 5, 10 (2020) (statement of Justice Ruth Bader Ginsburg) ("The Nineteenth Amendment was the beginning, but strong feminists believed women should have equality in all fields of human endeavor, so we needed an Equal Rights Amendment.").

[43] H.R.J. Res. 208, 92d Cong., 86 Stat. 1523, 1523 (1972); *see also* BAER, *supra* note 42, at 57 (explaining the ERA's origins).

[44] *See* Patricia Thompson, Note, *The Equal Rights Amendment: The Merging of Jurisprudence and Social Acceptance*, 30 W. ST. U. L. REV. 205, 209–10 (2002–2003) ("[T]he ERA was designed to attack the lack of legal protection and available legal remedies for women[,] . . . to address social mores that attached a double standard of acceptable conduct for men and women[,] . . . [and] to address the devaluation of a woman's contribution to the family and the nation . . . .").

[45] *See* BAER, *supra* note 42, at 57–59 (recounting briefly the ERA's journey through the twentieth century).

The potential intersection of LGBTQ rights and women's rights through the term "sex" in the ERA appeared to be in the mind of some members of Congress and in the mind of the public writ large when the ERA was proposed.[46] During debate on the ERA, Senator Sam Ervin—an outspoken opponent of the amendment—proposed a change to the ERA's text, seeking to limit its effects with the following addition: "This article shall not apply to any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex."[47] Senator Birch Bayh—a strong supporter of the ERA—challenged Ervin's premise by arguing that because "homosexuality [is not] limited to men or to women," the laws about which Ervin was concerned would remain untouched after the ERA.[48]

Controversy surrounding LGBTQ rights continued in the fall of 1972, when the U.S. Supreme Court dismissed an appeal from the Minnesota Supreme Court in *Baker v. Nelson*.[49] The Minnesota Supreme Court rejected a constitutional challenge to a state statute when a county clerk refused to issue a marriage license to two adult men seeking to marry.[50] In 1973, an unsigned student law review note connected this case to the pending ERA, arguing that the claim in *Baker*—namely, that denial of marriage licenses to same-sex couples violates the U.S. Constitution—"would almost certainly be vindicated under the proposed Equal Rights Amendment."[51]

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[46] Harvard Professor Paul Freund's argument before Congress that "if the law had to be as undiscriminating toward gender as it was toward race, it would follow that laws outlawing marriage between two members of the same sex would be . . . illegal" was used by congresspersons and the anti-ERA movement. MARJORIE J. SPRUILL, DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS 101 (2017); *see also* 118 CONG. REC. 9314–72 (1972) (debating Senator Ervin's proposed amendment to qualify the ERA to ensure it would not make laws prohibiting homosexual acts unconstitutional).

[47] 118 CONG. REC. 9315 (1972).

[48] *Id.* at 9315–16, 9331.

[49] 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[50] *See* Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971) (denying a constitutional challenge based on the Ninth and Fourteenth Amendments concerning same-sex marriage because the state's definition of marriage was not "irrational or invidious discrimination").

[51] Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 574 (1973). The student note argued that "[a] statute . . . which permits a man to marry a woman, . . . but categorically denies him the right to marry another man clearly entails a classification along

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Despite a three-year extension of the initial seven-year time limit and a hotly contested battle nationwide, the ERA failed to meet the thirty-eight-state threshold for ratification by 1982.[52] Several decades later, however, the ERA has returned to public discourse alongside the recent surge of feminist activism headlined by the 2017 Women's March,[53] historic elections,[54] and the Time's Up and #MeToo movements,[55] among other events. In 2017, Nevada's state legislature ratified the ERA, and Illinois's did the same in 2018.[56] In January 2020, Virginia became the thirty-eighth state to ratify the ERA.[57]

Although the requisite thirty-eight states have now formally ratified the ERA, questions remain regarding the ERA's constitutional validity, including whether the expiration of

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sexual lines." *Id.* at 583. This tracks Justice Gorsuch's theory in the *Bostock* decision, as discussed in Section IV.B.*1*.

[52] The ERA initially had strong momentum, with fifteen states ratifying the amendment within one month of its passage through Congress, followed by an additional fifteen before the end of the year. BAER, *supra* note 42, at 59. By the expiration of the initial seven-year deadline, only thirty-five states had ratified it, and none ratified during the three-year extension. *Id.*

[53] *See* Dursun Peksen & Amanda Murdie, *The U.S. Was Ripe for a Women's Protest. And More are Likely*, WASH. POST: MONKEY CAGE (Jan. 28, 2017, 6:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/28/the-us-was-ripe-for-a-womens-protest-and-more-are-likely/ (explaining the factors that led to the Women's March in a series on the historic event).

[54] *See* Lisa Lerer & Sydney Ember, *Kamala Harris Makes History as First Woman and Woman of Color as Vice President*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/us/politics/kamala-harris.html (detailing the historic election of Kamala Harris as Vice President of the United States); Maya Salam, *A Record 117 Women Won Office, Reshaping America's Leadership*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/elections/women-elected-midterm-elections.html (breaking down women's success in the 2018 midterm elections).

[55] *See* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — And How They're Alike*, TIME (Mar. 8, 2018, 6:00 AM), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ (describing the two "groundbreaking anti-sexual assault and women's empowerment" movements in recognition of International Women's Day).

[56] *See* Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U. L. REV. 633, 640–42 (2019) (detailing the Nevada and Illinois ratifications and the significance of ratification to the state legislators).

[57] Bill Chappell, *Virginia Ratifies the Equal Rights Amendment, Decades After the Deadline*, NPR (Jan. 15, 2020, 3:36 PM), https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline.

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Congress's prescribed time limit and five states' rescissions of their ratifications have any bearing on the ERA's status.[58] After Virginia's ratification, the House of Representatives voted to remove the original ratification deadline, possibly eliminating one barrier to official adoption.[59] Another procedural challenge lies in official certification. Following instructions from the Department of Justice, the Archivist of the United States refused to certify and publish the ERA as the Twenty-Eighth Amendment after Virginia's ratification.[60] In response, the Attorneys General of Virginia, Illinois, and Nevada sued the Archivist, seeking a judicial determination that the recent ratifications should be formally recognized and that the ERA should be officially incorporated into the U.S. Constitution.[61] Whether the U.S. Supreme Court decides an appeal from this case or Congress takes further action on the ERA, progress towards enactment in the coming years appears likely with the increasing visibility of the ERA and women in the national political sphere.

The issues of rescission, time limits for ratification, and official publication by the Archivist raise questions about the constitutional amendment process itself, the bounds of congressional and state power in this area, and the Court's role in adjudicating these challenges.[62] This Note takes no position on the constitutionality of

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[58] The filing of a case in 2020 between three states and the Archivist of the United States clearly outlines the leading constitutional questions surrounding the ERA. *See* Complaint at 13–16, Virginia v. Ferriero, No. 1:20-cv-00242 (D.D.C. Jan. 30, 2020) (explaining why the ERA should be officially certified and enacted after Virginia's ratification).

[59] *See* Patricia Sullivan, *U.S. House Removes ERA Ratification Deadline, One Obstacle to Enactment*, WASH. POST (Feb. 13, 2020, 2:57 PM), https://www.washingtonpost.com/local/legal-issues/us-house-removes-era-ratification-deadline-one-obstacle-to-enactment/2020/02/13/e82aa802-4de5-11ea-b721-9f4cdc90bc1c_story.html (detailing early 2020 developments with the ERA).

[60] *See* Complaint at 1, Virginia v. Ferriero, No. 1:20-cv-00242 (D.D.C. Jan. 30, 2020) (bringing suit against the Archivist to compel official certification of the ERA).

[61] *Id.*

[62] Many scholars have commented on these constitutional questions for decades. *See, e.g.*, Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 920–30 (1979) (focusing on Congress's extension of the time limit and the Court's ability to adjudicate disputes in this area); Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 114–15 (1997) (arguing that, despite the expiration of the time limit, later ratifications of the ERA are appropriate).

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enacting the ERA as it stands, but rather seeks to explore what the ERA would mean were it enacted in its present form, specifically whether the U.S. Supreme Court should read the ERA in light of its interpretation of Title VII in *Bostock*.

IV. TITLE VII & *BOSTOCK*

Title VII prohibits employment discrimination on the basis of sex: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . sex . . . ."[63] The origin of this sex-based prohibition is debated.[64] Some claim Representative Howard W. Smith introduced an amendment adding "sex" to Title VII in an effort to defeat the entire statute because he staunchly opposed civil rights legislation.[65] Others claim that adding "sex" to the statute was a hard-earned victory by women who supported the ERA in Congress and believed Smith, an ERA sponsor, would garner southern votes if he introduced the change.[66] Regardless of Smith's purpose in introducing the new language, Title VII, with its "sex" provision, survived and became a pivotal piece of legislation for women's equality in the workforce.

A. EVOLUTION OF TITLE VII SEX DISCRIMINATION

In early decisions regarding Title VII sex discrimination claims, the U.S. Supreme Court ruled that a policy denying employment to women with young children—but not similarly situated men—violated the statute;[67] that forcing women to make larger pension contributions than men because women generally live longer

[63] 42 U.S.C. § 2000e-2(a)(1) (2018).

[64] *See* Ronald Turner, *Title VII and the Unenvisaged Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?*, 95 IND. L.J. 227, 230–32 (2020) (explaining the possible origins of the so-called Smith Amendment).

[65] *Id.* at 230–31.

[66] *Id.* at 231–32.

[67] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (holding that Title VII does not "permit[] one hiring policy for women and another for men—each having pre-school-age children").

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contradicted Title VII's policies;[68] and eventually, after Congress passed the Pregnancy Discrimination Act of 1978, that pregnancy discrimination constituted sex discrimination.[69] In 1986, more than two decades after Title VII was enacted, the Court recognized that male-to-female sexual harassment constitutes sex discrimination in *Meritor Savings Bank, FSB v. Vinson*, a unanimous decision authored by Justice William Rehnquist.[70] Twelve years later in *Oncale v. Sundowner Offshore Services, Inc.*, Justice Antonin Scalia, writing for a unanimous Court, determined that Title VII also prohibits same-sex sexual harassment because Title VII's language encompasses discrimination against both men and women, so long as it disadvantages one sex more than the other.[71]

The 1989 plurality opinion of *Price Waterhouse v. Hopkins* contains another significant Title VII expansion.[72] In that case, a woman was not promoted because she failed to comport with her superiors' understandings of womanly behavior.[73] In determining that this discrimination violated Title VII, the Court went beyond discrimination on the basis of biological sex to prohibit discrimination based on gender stereotyping as well.[74] As the Sixth Circuit later described when relying on this case, the *Price Waterhouse* plaintiff-respondent "was discriminated against not because she was a 'woman *per se*,' but because she was, in the employer's view, not 'womanly enough.'"[75]

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[68] *See* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 712–17 (1978) (invalidating the City's policy under Title VII).

[69] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682–83 (1983) (relying on prior Title VII precedent to incorporate pregnancy discrimination into Title VII's proscriptions).

[70] *See* 477 U.S. 57, 64 (1986) (deeming harassment of an inferior employee because of her sex to be sex discrimination for purposes of Title VII).

[71] *See* 523 U.S. 75, 78 (1998) (noting that Title VII "protects men as well as women").

[72] 490 U.S. 228 (1989) (plurality opinion).

[73] *See id.* at 235 (describing partners' objections to her promotion as being based on "sex stereotyping").

[74] *See id.* at 251 (stating that "Title VII lifts women out of [the] bind" of sex stereotyping and that "stereotyped remarks can certainly be *evidence* that gender played a part" in an employment decision); *see also* Turner, *supra* note 64, at 244 ("*Price Waterhouse* went beyond merely prohibiting discrimination on the basis of an individual's biological sex . . . .").

[75] Turner, *supra* note 64, at 244 (quoting EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 572 (6th Cir. 2018)).

More recently, in the 2007 judgment of *Ledbetter v. Goodyear Tire & Rubber Co.*,[76] a female employee was paid significantly less than her male colleagues, but a bare five-member majority of the Court determined that she filed suit after the statutory period for filing a Title VII claim expired.[77] Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, filed a dissenting opinion, putting forward a different interpretation of when to start the clock for sex discrimination claims.[78] Justice Ginsburg unequivocally called on Congress to amend Title VII to remedy this issue, stating "the ball is in Congress' court."[79] Congress responded with the Lilly Ledbetter Fair Pay Act, which codified that every paycheck with discriminatory compensation constitutes a separate Title VII violation, extending the statutory period beyond the *Ledbetter* majority's interpretation.[80]

Finally, an important note on Title VII expansion is that Congress attempted, but failed, on over ten occasions between 1975 and 2005 to add sexual orientation to the list of characteristics in Title VII.[81] Between 2007 and 2019, several bills were also introduced to add gender identity to Title VII.[82] None of these bills passed both Houses of Congress,[83] leaving only the discrimination "because of . . . sex" clause[84] to provide possible protections for LGBTQ employees, as the Court decided in *Bostock v. Clayton County*.[85]

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[76] 550 U.S. 618 (2007).

[77] *See id.* at 642–43 (holding that Title VII "as written" requires claims to be presented within the statutory period).

[78] *See id.* at 643–45 (Ginsburg, J., dissenting) (explaining why pay discrimination is "significantly different" from other discriminatory acts and requires a different interpretation).

[79] *Id.* at 661.

[80] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (amending Title VII to clarify the appropriate statutory period for filing a pay discrimination claim).

[81] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755 n.1 (2020) (Alito, J., dissenting) (listing the failed attempts to add sexual orientation to Title VII).

[82] *See id.* at 1755 n.2 (listing the failed attempts to add gender identity to Title VII).

[83] *Id.* at 1755.

[84] 42 U.S.C. § 2000e-2(a)(1) (2018).

[85] 140 S. Ct. at 1737.

B. *BOSTOCK V. CLAYTON COUNTY*

In 2020, the U.S. Supreme Court decided the landmark case of *Bostock v. Clayton County*, consolidated with *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*.[86] The facts of the three cases were relatively simple. After over a decade of employment, Clayton County, Georgia fired petitioner-plaintiff Gerald Bostock for "conduct 'unbecoming' a county employee" shortly after he joined a gay softball league.[87] Similarly, respondent-plaintiff Donald Zarda lost his job as a skydiving instructor in New York after mentioning for the first time at work that he was gay.[88] Finally, a Michigan funeral home fired respondent-plaintiff Aimee Stephens when she informed her boss that she would be presenting as a woman full-time, after she had worked with the company for about six years, during which she had presented as male.[89] Each employee sued under Title VII, "alleging unlawful discrimination on the basis of sex."[90]

Three U.S. Courts of Appeals disagreed on the application of Title VII to these claims, creating a circuit split.[91] In Bostock's case, the Eleventh Circuit dismissed the claim, holding that Title VII does not protect gay employees from discrimination under binding circuit precedent.[92] In Zarda's case, the Second Circuit sitting en banc overruled precedent and held that Title VII's prohibition on discrimination because of sex includes discrimination on the basis of sexual orientation.[93] In Stephens's case, the Sixth Circuit decided that Title VII forbids discrimination because of transgender and transitioning status, as well as discrimination for failure to conform to gender stereotypes.[94] The U.S. Supreme Court granted certiorari and consolidated the cases.[95]

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[86] *Id.* at 1731.

[87] *Id.* at 1737–38.

[88] *Id.* at 1738.

[89] *Id.*

[90] *Id.*

[91] *See id.* (describing the cases' procedural history).

[92] Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964–65 (11th Cir. 2018) (per curiam), *rev'd*, 140 S. Ct. 1731 (2020).

[93] Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018).

[94] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018).

[95] *See Bostock*, 140 S. Ct. at 1737–38 (discussing the three cases).

Justice Neil Gorsuch authored the opinion of the Court for a six-member majority,[96] which provoked a dissent by Justice Samuel Alito, joined by Justice Clarence Thomas,[97] as well as a separate, lone dissent by Justice Brett Kavanaugh.[98] Each of the three opinions reflected a different view of textualism,[99] a mode of legal interpretation defined by its focus on deriving the objective meaning of legal texts.[100] The opinion for the Court interpreted sex discrimination under Title VII to include discrimination against individuals "merely for being gay or transgender."[101] This arguably broad interpretation of "sex" expanded protections under Title VII to include sexual minorities, and it has already inspired several publications and at least one consequential lawsuit.[102]

1. The Opinion of the Court. The Court's holding is simple and logical: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex"; therefore, "[s]ex

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[96] *Id.* at 1737–54.

[97] *Id.* at 1754–1822 (Alito, J., dissenting).

[98] *Id.* at 1822–37 (Kavanaugh, J., dissenting).

[99] *See id.* at 1739–41 (majority opinion) (focusing on a literal interpretation of "sex"); *id.* at 1755 (Alito, J., dissenting) (arguing that because "sexual orientation" and "gender identity" are not listed in Title VII, they are not protected); *id.* at 1822 (Kavanaugh, J., dissenting) (claiming that this expansion of protections under Title VII is effectively an amendment to the statute, thus violating separation of powers).

[100] *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (explaining the distinction between textualism and what the author refers to as "intentionalism," which "tr[ies] to identify and enforce the 'subjective' intent of the enacting legislature"); *see also Bostock*, 140 S. Ct. at 1738 (majority opinion) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *id.* at 1755–56 (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school . . . . The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is . . . the theory that courts should 'update' old statutes so that they better reflect the current values of society.").

[101] *Bostock*, 140 S. Ct. at 1754 (majority opinion).

[102] *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 1–2, Walker v. Azar, No. 1:20-cv-02834 (E.D.N.Y. June 26, 2020) (arguing that the interpretation of "sex" in *Bostock* should also apply to the Affordable Care Act); Andrew Koppelman, Bostock*, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 1–3 (2020) (arguing that the *Bostock* majority's conclusion was the only logical interpretation and addressing counterarguments to the Court's opinion); Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 738–59 (2020) (supporting the *Bostock* majority's opinion as reflective of how sex "has been understood to be complex and capable of new social meanings").

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plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[103] Significantly, the Court interprets the statute's terms to be unambiguous, leaving no role for legislative intent in its analysis.[104] Furthermore, the Court argues that "sex" in Title VII is a broad term and has been widely misunderstood since Title VII's inception.[105] To defend this position, the Court acknowledges that its decision marked a large shift from prior interpretations and applications.[106] Nevertheless, the Court argued that Title VII was "written in starkly broad terms" and "has repeatedly produced unexpected applications."[107] Also crucial to the opinion's ultimate conclusion was its reliance upon the public understanding of sex in 1964, rather than on the ordinary public meaning of "sex" today.[108] "From the ordinary public meaning of the statute's language at the time of the law's adoption," the Court wrote, "a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex."[109] Furthermore, it stated, "As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[110]

This conclusion is perhaps best illustrated by the hypothetical Justice Gorsuch employed in the opinion for the Court:

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring

[103] *Bostock*, 140 S. Ct. at 1737.

[104] *See id.* at 1749 ("[N]o ambiguity exists about how Title VII's terms apply to the facts before us."); *id.* at 1749–50 (discussing the proper role of congressional intent and declaring that "legislative history can never defeat unambiguous statutory text").

[105] *See id.* at 1747 (explaining that Congress has enacted a "broad rule" without exceptions, requiring the Court to "apply the broad rule" as a simple rule of construction).

[106] *See id.* at 1753 ("[T]oday's holding . . . is an elephant[, but] . . . [t]his elephant has never hidden in a mousehole; it has been standing before us all along.").

[107] *Id.*

[108] *See id.* at 1738 (stating that the Court's duty is to "determine the ordinary public meaning of Title VII's command" at "the time of the statute's adoption"); *id.* at 1739 (using the employers' agreed upon definition of sex as "referring only to biological distinctions between male and female" as it did in 1964).

[109] *Id.* at 1741.

[110] *Id.* at 1747.

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> their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.[111]

The final statement of this hypothetical situation is the crux of this opinion's argument. Even when the employer's primary motivation is the employee's sexual orientation or gender identity, the employee's sex plays an inseparable role in the employer's decision.[112] Unlike the dissenters, the Court also argued that "equally" discriminating against gay or transgender men and women—by which it meant firing LGBTQ employees without regard to whether they are male or female—fails to cure this defect.[113] Instead, firing employees because of their sexual orientation or gender identity "doubles" the employer's liability under Title VII because the employer has now discriminated on at least two bases: gender identity or sexual orientation and sex.[114] Therefore, the majority of the Court interpreted Title VII to envelop protections for sexual minorities.

2. Justice Alito's Dissent. Justice Alito's dissent, joined by Justice Thomas, propounded an entirely different textualist understanding. Justice Alito stated his primary concern succinctly in his opening sentence: "There is only one word for what the Court has done today: legislation."[115] In his view, the majority's reasoning constituted an unthinkable instance of judicial overreach in violation of separation

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[111] *Id.* at 1742.

[112] *See id.* (explaining that even if the employer's goal is to discriminate on the basis of sexual orientation, the employer still "intentionally treat[s] an employee worse based in part on that individual's sex").

[113] *Compare id.* ("An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender."), *with id.* at 1764 (Alito, J., dissenting) (arguing that a firing policy that discriminates on the basis of sexual orientation or gender identity is not sex discrimination because it "appl[ies] equally to men and women").

[114] *Id.* at 1741 (majority opinion).

[115] *Id.* at 1754 (Alito, J., dissenting).

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of powers,[116] one that effectively amended Title VII "under the guise of statutory interpretation."[117]

Instead, Justice Alito argued that because sexual orientation and gender identity are not enumerated characteristics in the text of Title VII—which refers only to "sex"—the statute does not protect against discrimination based on sexual orientation or gender identity.[118] In contrast to the majority opinion, Justice Alito refused to accept that the word "sex" encompassed these characteristics; neither quality, he argued, was within Congress's vision when it enacted the statute in 1964.[119] He contended that the social context at the time of drafting should dictate statutory interpretation.[120] Applying this logic, he argued that "sex" is conceptually distinct from sexual orientation and gender identity, so it would be possible to discriminate against a sexual minority without violating Title VII.[121] Justice Alito also claimed that the Court was influenced by its own policy views and wrote that he feared the countless consequences this decision could have for sex discrimination jurisprudence.[122]

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[116] Justice Alito denounced Justice Gorsuch's view of textualism in his dissent. *See, e.g.*, *id.* at 1778 ("[T]he Court makes the jaw-dropping statement that its decision exemplifies 'judicial humility.' . . . If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold." (quoting *id.* at 1753 (majority opinion))).

[117] *Id.* at 1755.

[118] *See id.* at 1754–55 (explaining that Title VII lists "five specified grounds," none of which is "sexual orientation" or "gender identity"). Also significant to Justice Alito is that Congress had unsuccessfully attempted to amend Title VII multiple times to include protections for sexual minorities explicitly. *Id.* at 1755.

[119] *See id.* at 1756 ("[I]n 1964, it was as clear as clear could be that [sex discrimination] meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth."). Despite the extensive time Justice Alito devotes to explaining and citing dictionary definitions of "sex" from 1964, *id.* at 1784–91, Justice Gorsuch does not actually disagree with this conclusion. *See id.* at 1739 (majority opinion) (adopting the employers' definition of sex—i.e., a biological distinction between male and female—for the majority's analysis).

[120] *See id.* at 1769 (Alito, J., dissenting) (stating that the idea of sex discrimination encompassing sexual minorities in 1964 "would have clashed in spectacular fashion with the societal norms of the day").

[121] *See id.* at 1758 (declaring that the majority's argument "fails on its own terms" because sexual orientation and gender identity are not linked to one biological sex or another, so discrimination on these bases does not warrant Title VII liability).

[122] *See id.* at 1756 ("Many will applaud today's decision because they agree on policy grounds . . . . But the question in these cases is not whether discrimination . . . *should be*

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3. Justice Kavanaugh's Dissent. In his opinion, Justice Kavanaugh focused on both separation of powers[123] and certain "indicators of ordinary meaning"[124] to support his view that Title VII's prohibition against sex discrimination does not protect against discrimination on the basis of sexual orientation.[125] Like Justice Alito, Justice Kavanaugh described the Court's decision as amending Title VII and impermissibly encroaching on the legislative process, which recently failed to add sexual orientation to Title VII.[126] Echoing Justice Alito, he expressed fear that the Court's decision would be viewed as a "usurpation of the legislative process," awarding a "victory . . . by judicial dictate," and argued that a better outcome would have been to wait for a "democratic" solution.[127] His opinion reveals his judicial philosophy of restraint out of an asserted respect for both separation of powers and individual liberty.[128]

As for interpretation, again like Justice Alito, Justice Kavanaugh views sexual orientation and traditional sex discrimination as "two distinct harms caused by two distinct biases that have two different outcomes" and simply believes that the two cannot be interchangeable, nor intertwined.[129] Justice Kavanaugh accused the Court of using a "literalist approach" to distort Title VII in favor of its conclusion and contended that the majority's interpretation

outlawed."); *id.* at 1778 ("What the Court has done today . . . is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex.").

[123] *See id.* at 1823 (Kavanaugh, J., dissenting) ("Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written . . . . As written, Title VII does not prohibit employment discrimination because of sexual orientation.").

[124] *See id.* at 1828–33 (reviewing conversational use of the terms, congressional and executive interpretations and practices, states' applications, and precedent on sex discrimination).

[125] Notably, Justice Kavanaugh does not articulate any theory regarding gender identity. Instead, he simply states in a footnote that the analysis would proceed "in much the same way" as his analysis of sexual orientation. *Id.* at 1823 n.1.

[126] *See id.* at 1822–23 (emphasizing that the political branches have failed to amend Title VII, so it is not within the Court's purview to expand the law in this way).

[127] *Id.* at 1836–37.

[128] *See id.* at 1824 ("If judges could rewrite laws based on their own policy views . . . the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty.").

[129] *Id.* at 1828.

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threatened the important premise of "fair notice" to the public about what laws mean.[130] Furthermore, he focused on interpreting the statute's phrase as a whole, rather than delineating each individual term.[131] He also examined interpretations of Title VII from various bodies, especially the lower courts, and concluded that without any prior indication of an interpretation aligned with the majority's reasoning, the Court's conclusion had no foundation.[132] In short, according to Justice Kavanaugh, the historical application of Title VII precluded its contemporary expansion by the Court.[133]

V. ANALYSIS: APPLYING THE *BOSTOCK* JUDGMENT

A. *BOSTOCK* AS AN AUTHORITATIVE INTERPRETATION OF ANTI-SEX DISCRIMINATION LANGUAGE

The judgment in *Bostock* is fundamentally about the contemporary interpretation of legal texts that outlaw "sex" discrimination, and it should provide persuasive precedent to future courts interpreting similar texts. To reiterate, Title VII provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex . . . ."[134] The ERA declares, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[135] The connections between these short provisions support the proposition that a future Court should interpret the ERA in the same way as the *Bostock* majority interpreted Title VII.

The Court's opinion in *Bostock* explicitly referred to the ERA: "less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect

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[130] *Id.*

[131] *See id.* ("Statutory Interpretation 101 instructs courts . . . to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.").

[132] *See id.* at 1824 ("[T]he first 10 U.S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no.").

[133] *See id.* (claiming that the Court's decision means sexual orientation has been prohibited under Title VII "since 1964, unbeknownst to everyone").

[134] 42 U.S.C. § 2000e-2(a)(1) (2018).

[135] H.R.J. Res. 208, 92d Cong., 86 Stat. 1523, 1523 (1972).

homosexuals from discrimination."[136] This recognition, along with early Title VII complaints from LGBTQ employees, indicates that at least some members of the public in the 1960s and 1970s understood that sex discrimination could encompass discrimination against sexual minorities.[137] This reference also demonstrates the textual parallels that should persuade the Court to interpret the ERA in accordance with its *Bostock* decision.

As a preliminary matter, any difference in interpretation between the terms "because of" and "on account of" seems unlikely. Both the majority opinion and Justice Alito's dissent connect "because of" and "on account of."[138] The majority relied on a 2013 U.S. Supreme Court judgment: "as this Court has previously explained, 'the ordinary meaning of "because of" is . . . "on account of."'"[139] Similarly, Justice Alito considered discrimination "'because of,' 'on account of,' or 'on the basis of' sex" as having a single understanding.[140] Therefore, the Court is unlikely to distinguish the ERA from Title VII on these grounds. Instead, the use of the term "sex" in both provisions should unite the Court's interpretation of the ERA with that of Title VII as it was construed in *Bostock*.

Mirroring Justice Kennedy's LGBTQ rights opinions for the Court, one can argue that the ERA should have a broad reach, just as the Fourteenth Amendment does.[141] In following the Court's logic in those judgments, an evolved understanding of sex—one that encompasses different genders and recognizes that sex discrimination inherently discriminates on the basis of sexual orientation—would be sufficient to compel the conclusion that the

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[136] *Bostock*, 140 S. Ct. at 1751.

[137] *See id.* at 1750–51 (rejecting the employers' argument that "no one" would have expected the Court's *Bostock* decision at the time of drafting Title VII because, "[n]ot long after the law's passage, gay and transgender employees began filing Title VII complaints"); *see also supra* notes 46–51 and accompanying text.

[138] *See Bostock*, 140 S. Ct. at 1739 (interpreting "because of" to mean "on account of" (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013))); *id.* at 1769 (Alito, J., dissenting) (considering "because of" and "on account of" as having identical meanings).

[139] *Id.* at 1739 (majority opinion) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)).

[140] *Id.* at 1769 (Alito, J., dissenting).

[141] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 664 (2015) ("The generations that wrote and ratified . . . the Fourteenth Amendment . . . entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").

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ERA protects sexual minorities.[142] A future Court may be reluctant to adopt that reasoning without more concrete textual support, though. *Bostock* thus provides precedent for a potential litigator to use in persuading a skeptical Court that the ERA, if enacted in its present form, protects sexual minorities.

Further, the devotion of extended space in the majority's decision to theorizing about the literal meaning and scope of sex discrimination indicates that *Bostock* is not an anomalous interpretation limited to Title VII. Although the majority opinion relied on three Title VII cases,[143] it could have depended solely on the expansion of Title VII in prior cases to extend the prohibition on sex discrimination to discrimination against sexual minorities.[144] Nevertheless, the Court's opinion spent significant time evaluating the statutory text, presumably because most legal commentators and judges agree that text, when possible, is dispositive in interpretation.[145] Therefore, the *Bostock* Court laid the foundation for a textualist reading of the ERA that relies on the objective meaning of "sex," rather than on broad policy views.

A distinct issue that an originalist reader[146] would face when interpreting the ERA is determining which understanding of the

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[142] *See id.* ("When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

[143] *Bostock*, 140 S. Ct. at 1743–44 (first citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam); then citing City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); and then citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

[144] *See* John H. Shannon & Richard J. Hunter, Jr., *The Civil Rights Act of 1964: Beyond Race to Employment Discrimination Based on Sex: The "Three Letter Word" that Has Continued to* Vex *Society and the United States Supreme Court*, 3 J. SOC. & POL. SCI. 613, 627–28 (2020) (evaluating developments in Title VII sex discrimination case law); Turner, *supra* note 64, at 244 (explaining the expansion of Title VII in lower courts to encompass anti-LGBTQ discrimination claims).

[145] *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 792–93, 796 (2018) (stating that "[m]ost everyone—not just textualists anymore—agrees" that text and "ordinary communicative content" are the "starting point for interpretation"); *see also Bostock*, 140 S. Ct. at 1738 ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President.").

[146] "Originalism" is a term fraught with debate today, but this Note adopts the definition that "originalists" seek to apply terms' original public meaning—a purportedly objective definition from the time the text was written—in legal interpretation. *See, e.g.*, *Bostock*, 140 S. Ct. at 1738 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). For an exploration of the originalism

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language prevails. If the public's view at the time Congress enacted the statute supposedly controls in Title VII cases, should the 1972 definition of "sex" triumph? What about the 1982 understanding of "sex" at the expiration of Congress's deadline for ERA ratification after a decade of feminist influence? Or, even more complex, the post-2016 ratifications that brought the total number of ratifications across the thirty-eight-state threshold? Another, simpler answer would likely be the day the ERA officially becomes a part of the U.S. Constitution—a day yet to be seen. In that case, the interpreter must consider how *Bostock* has influenced the public perception of "sex" discrimination. Though the legacy of *Bostock* remains to be seen, the likely result seems to be a greater understanding that discrimination on account of sex encompasses discrimination on the bases of sexual orientation and gender identity.

For an analysis of the ERA backed by precedent, the Title VII judgment in *Price Waterhouse v. Hopkins* lends support to an interpreter who is concerned that the ERA and Title VII drafters understood "sex" as limited to biological distinctions.[147] In that case, the Court expanded its interpretation of Title VII beyond discrimination on the basis of biological sex to include a prohibition on discrimination based on gender stereotyping.[148] The *Price Waterhouse* decision thus weaves together any distinctions the modern understandings of sex and gender may create for purposes of interpreting the term "sex" in the ERA; this approach is further supported by the judgment in *Bostock*. Moreover, the reasoning in *Price Waterhouse* influenced the Sixth Circuit in its ruling on Aimee Stephens's case, which was upheld in *Bostock*.[149] To be precise, the Sixth Circuit determined that sex discrimination included discrimination against transgender individuals, based in part on

debate, see generally Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

[147] *See generally* 490 U.S. 228 (1989) (plurality opinion) (holding that failure to promote a woman because she failed to meet her superiors' understandings of womanly behavior was sex discrimination), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)), *as recognized in* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1017 (2020); *see also supra* notes 72–75 and accompanying text.

[148] *See supra* note 74.

[149] *See Bostock*, 140 S. Ct. at 1754 (affirming the Sixth Circuit's judgment).

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Price Waterhouse.[150] ERA proponents in both 1923, when the amendment was drafted, and the 1970s, when states were ratifying the ERA, sought to eradicate gender stereotyping.[151] This goal arguably places the protection of transgender and gender nonconforming people within the ERA drafters' intent.

Finally, there is also a strong case for expanding statutes and amendments beyond their originally understood meaning. For example, earlier courts did not interpret Title VII to prohibit sexual harassment, which is now a commonplace claim under the Act after judicial interpretations expanded its scope.[152] As public understanding and opinions change, new and unforeseen interpretations of law are commonplace.[153] The LGBTQ rights movement provides a case in point. As Professor William Eskridge explained, in some sectors of society in 1964, LGBTQ people "were, literally, considered psychopaths, criminals, and enemies of the people."[154] In the twenty-first century, this prejudiced view has dissipated, and contemporary U.S. Supreme Court precedent reflects society's growing acceptance of sexual minorities as equal persons.[155] Yet, as the Seventh Circuit Court of Appeals wrote in 2016: "a paradoxical legal landscape in which a person can be

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[150] *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571–72 (6th Cir. 2018) (stating that the circuit's precedent interpreting Title VII as prohibiting discrimination against transgender individuals was "[b]ased on *Price Waterhouse*").

[151] *See* SPRUILL, *supra* note 46, at 31 (explaining how a proposed amendment to the ERA, which would have excluded "protective legislation," failed because it was "antithetical to the amendment's central purpose—equal rights," a cause dependent on women being seen as equal in stature to men, rather than subordinate to them).

[152] *See* Turner, *supra* note 64, at 238–42 (discussing the evolution of sexual harassment claims in the courts and declaring that "Congress did not contemplate that the statute's sex discrimination prohibition banned workplace sexual harassment"); *see also supra* Section IV.A.

[153] *See* William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. (forthcoming 2021) (manuscript at 78), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674194 ("If a long-standing statute (or constitution) is applied over time to ever-evolving social facts, political and economic contexts, and even novel groups of people, the statute will evolve 'beyond' its original applications.").

[154] William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 336 (2017).

[155] *See supra* Section II.B.*2*.

married on Saturday and then fired on Monday for just that act"[156] persisted for the half-decade between the Court's 2015 decision in *Obergefell* and its 2020 decision in *Bostock*. After the decision in *Bostock*, a paradox remains in that members of the LGBTQ community have the right to marry and to be free from employment discrimination, yet they lack an explicit promise of equal rights in the U.S. Constitution—a contradiction that could be cured by the incorporation of the ERA and a broad interpretation of its prohibition on sex discrimination.

In sum, regardless of one's methodology for interpreting the ERA's text, an impartial jurist should come to the same conclusion: the ERA prohibits discrimination against sexual minorities.

B. EXPANDING PROTECTIONS: THE FOURTEENTH AND SECOND AMENDMENTS

Although some early ERA advocates may not have originally expected its text to protect sexual minorities—a point that presumably would frustrate Justices Alito, Thomas, and Kavanaugh[157]—strong textualist precedent and legal scholarship on linguistics in statutory and constitutional interpretation support application of the U.S. Constitution (and its amendments) beyond the drafters' intent and imagination. As Justice Gorsuch contended in his *Bostock* opinion, "the limits of the drafters' imagination supply no reason to ignore the law's demands."[158] Therefore, the ERA drafters' original intent should not limit the amendment's potential future applications. U.S. Supreme Court precedent interpreting the Fourteenth and Second Amendments demonstrates that it is appropriate to expand constitutional protections beyond the drafters' understanding. The following two

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[156] Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 714 (7th Cir. 2016), *rev'd en banc*, 853 F.3d 339, 341 (7th Cir. 2017) (holding "that discrimination on the basis of sexual orientation is a form of sex discrimination" under Title VII).

[157] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting) (arguing that Justice Gorsuch's argument fails because "there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted"); *id.* at 1828–29 (Kavanaugh, J., dissenting) ("The women's rights movement was not (and is not) the gay rights movement . . . .").

[158] *Id.* at 1737 (majority opinion).

Sections show how the reasoning in these prior decisions could justify a broad reading of the ERA by a future Court.

1. The Fourteenth Amendment. Fourteenth Amendment jurisprudence provides a clear example of how the Court often looks beyond the drafters' intent in its analysis.[159] Although the text of the Equal Protection Clause is not self-limiting, the Fourteenth Amendment was passed just after the Civil War and was intended to provide equal treatment only to formerly enslaved men by prohibiting racial discrimination.[160] As it was over fifty years before women could join the political conversation with the Nineteenth Amendment[161] and a century before women's rights took hold in Fourteenth Amendment jurisprudence,[162] no additional protections for women were originally expected. To be sure, the Fourteenth Amendment marks the first use of gendered language in the constitutional amendments.[163] Further, the Court's decision in the *Slaughter-House Cases* indicates that the Equal Protection Clause was proposed with only formerly enslaved men in mind: "[W]e mean the . . . freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over *him*."[164] Despite this initial narrow understanding, the Fourteenth Amendment now supports the broad doctrines of substantive due process and equal protection, with a variety of decisions ensuring equal protection under the law for groups far beyond formerly enslaved men.[165]

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[159] *See supra* Section II.B.

[160] A committee draft of the Fourteenth Amendment proclaimed, "No discrimination shall be made by any state . . . because of race, color, or previous condition of servitude." Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1103 (2017) (quoting THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONG. (1865–1867), *reprinted in* BENJAMIN BURKS KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS 1865–1867, at 90 (1914)).

[161] *See* U.S. CONST. amend. XIX (granting women the right to vote).

[162] *See supra* Section II.B.*1*.

[163] *See* U.S. CONST. amend. XIV, § 2 (using the word "male" three times). The Nineteenth Amendment uses the word "sex," though with no further gender distinction, and the Twenty-Fifth Amendment uses the pronouns "he" and "his" to refer to the President. *Id.* amends. XIX, XXV.

[164] 83 U.S. 36, 71 (1873) (emphasis added).

[165] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564–66 (2003) (discussing cases in the Court's Fourteenth Amendment jurisprudence).

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For example, the Court based many of its gender equality judgments on the Equal Protection Clause, as explained earlier.[166] After *Reed v. Reed* linked women's rights to the Fourteenth Amendment, this core holding was regularly invoked when evaluating sex discrimination claims.[167] As Justice Ginsburg remarked in her opinion for the Court in *Virginia*, the premise of *Reed* and its progeny of gender equality cases is that sex-based "classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women" because to hold otherwise violates the Fourteenth Amendment's promise of equal protection.[168]

Furthermore, the Court relied on the Fourteenth Amendment in both *Lawrence v. Texas* and *Obergefell v. Hodges*, reading the Fourteenth Amendment as a guarantee of protection for sexual minorities.[169] In *Obergefell*, Justice Kennedy explicitly recognized the evolution of Fourteenth Amendment jurisprudence: "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[170] Justice Kennedy relied on both the Due Process and Equal Protection Clauses in his opinion for the Court, expounding that "the right to marry is a fundamental right . . . under the Due Process and Equal Protection Clauses of the Fourteenth Amendment" and that "couples of the same sex may not be deprived of that right and that liberty."[171] The LGBTQ community certainly was not an intended protected class when the Fourteenth Amendment was ratified, yet the Fourteenth Amendment now ensures some legal protections for sexual minorities after these cases.

Although these lines of Fourteenth Amendment precedent may have been unnecessary had the ERA been adopted beforehand, they reveal an opportunity for the Court to go beyond the ERA drafters' intent and to rely instead on the text's broader meaning in light of

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[166] *See supra* Section II.B.*1*.
[167] *See supra* notes 23–25 and accompanying text.
[168] United States v. Virginia, 518 U.S. 515, 534 (1996).
[169] *See supra* Section II.B.*2*.
[170] Obergefell v. Hodges, 576 U.S. 644, 673 (2015).
[171] *Id.* at 675.

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modern conceptions. Further, these cases do not eliminate the utility of the ERA in protecting women and sexual minorities today. As discussed below, there are still various areas in which the ERA would provide protections that Fourteenth Amendment precedent has not yet encompassed.

2. The Second Amendment. Justice Scalia's 2008 opinion for the Court in *District of Columbia v. Heller*[172] provides another example of constitutional interpretation that goes beyond the drafters' intent, this time with the Second Amendment. There, the Court purported that the Second Amendment's guarantee of "the right of the people to keep and bear Arms"[173] cannot apply only to the weapons that existed in the late eighteenth century.[174] To underline this point, Justice Scalia pointed to evolving interpretations of two other constitutional provisions: "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search," he wrote, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[175] Under this logic, "sex" in the ERA's text need not be limited to the biological differences between man and woman.[176]

This reasoning demands a brief consideration of the linguistic concepts of "sense" and "reference" in legal interpretation. Both "arms" and "sex" are commonplace nouns that, like most words, have different meanings in different contexts. Put simply, a word's "sense" is a broad understanding of the term, encompassing various meanings.[177] In that way, "arms" applies to everything from a knife to an atomic bomb. Its reference, however, depends on surrounding context because the reference denotes only the specific thing being

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[172] 554 U.S. 570 (2008).

[173] U.S. CONST. amend. II.

[174] *See Heller*, 554 U.S. at 582 (finding that the interpretation of arms is not limited to the Founders' understanding).

[175] *Id.* (citations omitted).

[176] *Cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1756 (2020) (Alito, J., dissenting) (arguing that sex only includes anatomical and genetic characteristics at birth).

[177] *See* Lee & Mouritsen, *supra* note 145, at 819–20 (describing a continuum of understanding based on a word's sense); *see also* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 563–65 (2006) (distinguishing "sense" from "reference" in constitutional interpretation).

named; thus, reference is constrained to the author's understanding and intent.[178] For example, no one would argue that the 1950s "arms race" concerned a stockpile of swords and sabers—nor human limbs for that matter—because its reference is limited to nuclear weapons. In Title VII, the reference of "sex" likely only included the biological distinction between men and women; however, its sense is much broader, as *Bostock* established.

To draw on Justice Scalia's reasoning in *Heller*, "[w]e do not interpret constitutional rights" according to their limited reference alone.[179] Instead, the sense of "sex," as used in the ERA, is broad enough to encompass sexual orientation and gender identity. Feminists using the word "sex" in the 1970s were challenging perceived gender norms,[180] and ERA supporter and feminist leader Gloria Steinem propounded an inclusive approach to feminism, advocating for lesbians in her women's rights activism.[181] In that way, neither the sense nor the reference of "sex" was limited to biological distinctions in the years that states were ratifying the ERA. Further, leading feminists of that time, including then-Professor Ruth Bader Ginsburg, understood that the ERA could have far-reaching consequences beyond their considerations, as one can imagine the Founders anticipated for the U.S. Constitution.[182] As Ginsburg asserted in a 1979 law review article, "No one can predict with complete assurance how the ERA will be applied in every instance in which it may be relevant, just as no one can predict every application of the [F]irst [A]mendment."[183] In line with the wide-ranging goals of the ERA advocates, the sense of "sex" in the

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[178] *See* Green, *supra* note 177, at 565 (comparing sense to connotation and reference to denotation).

[179] *Heller*, 554 U.S. at 582.

[180] *See, e.g.*, Ginsburg, *supra* note 62, at 934 (describing "[a]rbitrary gender lines" the ERA was meant to erase).

[181] *See* SPRUILL, *supra* note 46, at 22 ("Steinem believed feminists must stand together regardless of [sexuality] and that lesbians within the movement deserved support.").

[182] *See* Ginsburg, *supra* note 62, at 934–36 (describing possible applications of the ERA); *see also* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 26 (2000) ("The Founders knew that in drafting any law—whether a Constitution or a statute—one could not hope to anticipate every case to which it would be applied.").

[183] Ginsburg, *supra* note 62, at 934.

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ERA places gender, sexual orientation, and gender identity within the proposed amendment's purview.

Notably, the Court's reasoning in *Bostock* likely would arrive at the same result for the ERA, regardless of whether one relies on the alleged reference or sense of sex from the 1960s and 1970s. Even accepting a solely biological definition of "sex," sex discrimination naturally envelops sexual orientation and gender identity discrimination because it still implies a distinction based on this narrow view of sex.[184] Thus, if one applies *Bostock*'s authoritative interpretation of sex, this linguistic inquiry is mooted by an all-embracing reading of the ERA, finding that "sex" provides protections for both women and sexual minorities.

C. THE ERA'S UTILITY TODAY: PROTECTING BOTH WOMEN AND SEXUAL MINORITIES

This Section aims to touch on some areas of law that would be affected by the ERA, should it be enacted and interpreted in accordance with *Bostock*. This short list encompasses only a few potential shifts, but there are many areas in which the ERA could be impactful today.[185]

1. Elevation of Constitutional Scrutiny. First, the enshrinement of gender equality in the U.S. Constitution would be a win-win for both feminists and textualists on the Court who oppose the use of policy to drive judgments.[186] Any fears that Fourteenth Amendment jurisprudence is not durable enough to survive a skeptical Court were likely confirmed by Justice Scalia in a 2011 interview when he explained his position: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it

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[184] *See supra* notes 103–114 and accompanying text.

[185] For a compelling case on improvements to be made in American law through the ERA, see, for example, JESSICA NEUWIRTH, EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW (2015).

[186] *See* Magliocca, *supra* note 56, at 662 ("Some originalists might . . . find ratification of the ERA useful because it would reduce the Court's reliance on common law methods of constitutional interpretation. If heightened scrutiny for sex distinctions . . . rested on text that was more specific than the Equal Protection Clause, then those doctrines could be examples of rather than exceptions to originalism.").

prohibits it. It doesn't."[187] More recently, these concerns resurfaced for many with Justice Thomas's dissent from a 2020 denial of a petition for a writ of certiorari in a case that could have overturned *Obergefell*.[188] Thus, the ERA would not only support the feminist goals it has always aimed to serve but also provide textual support for the Court to interpret and apply, rather than relying on common law,[189] in both women's and LGBTQ rights cases.

Ratification of the ERA would also make sex a suspect classification subject to strict scrutiny. In 1973, the U.S. Supreme Court fell one vote short of establishing strict scrutiny as the standard for evaluating claims of sex-based discrimination in *Frontiero v. Richardson*.[190] *Frontiero* concerned a law that treated male and female servicepeople differently, based on the assumption that husbands are "generally the 'breadwinner'" while wives are "dependent" on their husbands.[191] In his opinion for the plurality, Justice William Brennan explained the historic discrimination against women in the United States and the justifications for strict scrutiny; he then declared, "[C]lassifications based upon sex . . . are inherently suspect and must therefore be subjected to close judicial scrutiny."[192] Justice Lewis Powell originally agreed to join Justice Brennan's first draft (which did not hold sex to be a suspect classification) but declined to join his final draft, stating that he felt "the Court should take no great stride while the Equal Rights Amendment (ERA) was before the states for ratification."[193] This

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[187] *Justice Scalia's Legally Speaking Interview from September 2011*, CAL. LAW. (Feb. 2016), http://legacy.callawyer.com/2016/02/antonin-scalia-2/.

[188] *See* Davis v. Ermold, 141 S. Ct. 3 (2020) (Thomas, J., dissenting from the denial of certiorari) (arguing that *Obergefell* should be reconsidered); Mark Joseph Stern, *Two Supreme Court Justices Just Put Marriage Equality on the Chopping Block*, SLATE (Oct. 5, 2020, 3:47 PM), https://slate.com/news-and-politics/2020/10/supreme-court-ready-to-overturn-obergefell.html (arguing that "marriage equality is in imminent peril at the Supreme Court" as shown by Justice Thomas's and Justice Alito's dissent in *Davis*).

[189] *See* Magliocca, *supra* note 56, at 662 (explaining that the ERA "would reduce the Court's reliance on common law methods of constitutional interpretation").

[190] 411 U.S. 677 (1973) (plurality opinion).

[191] *Id.* at 681.

[192] *Id.* at 682.

[193] Ruth Bader Ginsburg & Wendy Webster Williams, *Court Architect of Gender Equality: Setting a Firm Foundation for the Equal Stature of Men and Women*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 185, 188 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

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abstention—coupled with Justice Powell's reasoning that adopting the ERA would "resolve the substance of this precise question" of the appropriate level of scrutiny[194]—demonstrates an earlier understanding that ratification of the ERA would make women a suspect class.

Because *Frontiero* is a non-binding plurality opinion, intermediate scrutiny remains the standard of review for sex discrimination cases.[195] As ERA proponent Jessica Neuwirth explained in her 2015 book describing the contemporary need for the ERA, the U.S. Supreme Court ironically enforces equal protection "in a discriminatory manner, holding those who would discriminate on the basis of sex accountable to a lower standard than those who would discriminate on the basis of race or religion."[196] Even the Court's 1996 opinion in *United States v. Virginia*—seemingly the highest standard in a binding opinion on sex discrimination and the Fourteenth Amendment—does not apply strict scrutiny.[197] Further, Justice Kennedy's opinions for the Court in LGBTQ rights cases articulate an even less clear standard than the gender equality cases,[198] requiring future ERA jurisprudence to clarify the constitutional inquiry for LGBTQ discrimination.

By enacting the ERA with the clear intent of prohibiting sex discrimination, it would be difficult for the Court to justify that the elevation of this prohibition to constitutional status does not warrant an increase in the standard of scrutiny. Many scholars have also looked to states' equal rights amendments for guidance on how a federal ERA may impact judicial scrutiny.[199] They found that the

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[194] *Frontiero*, 411 U.S. at 692 (Powell, J., concurring in the judgment).

[195] *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (articulating the "exceedingly persuasive justification" standard of intermediate scrutiny); *id.* at 533 ("The heightened review standard our precedent establishes does not make sex a proscribed classification.").

[196] NEUWIRTH, *supra* note 185, at 9. *But cf.* Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J.L. & GENDER 569, 570 (2014) ("[E]ven if sex was granted strict scrutiny—long the Holy Grail of constitutional sex equality litigation—this approach is not, has not been, and will not be enough to provide what women need." (footnote omitted)).

[197] *See supra* note 195.

[198] *See supra* note 39.

[199] *See, e.g.*, Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 429–46 (2008) (applying evidence from state equal rights amendments to her proposed interpretation of the federal ERA); Dawn C. Nunziato, Note, *Gender Equality:*

addition of equal rights amendments to state constitutions has generally led state courts to subject sex discrimination claims to strict scrutiny, on par with racial discrimination claims.[200] Based on this evidence, Professor Martha F. Davis argued that the explicit reference to equality of the sexes in the U.S. Constitution "would result in strict scrutiny for governmental policies that discriminate based on sex."[201] Additionally, in recent debates surrounding ratification, state legislators in Nevada and Illinois argued that the ERA would lead to strict scrutiny,[202] signaling a widespread understanding that the ERA would establish sex as a suspect classification.

Whether the Court applies this outcome because enactment of the ERA would reflect a shift in public morals and prioritization of gender equality or because the ERA would provide textual support in the U.S. Constitution for such a shift, strict scrutiny for claims of discrimination against women and sexual minorities would be one important function of the ERA.[203]

2. Women's Rights. As to what the ERA would provide for women specifically, there are many areas for improvement, but this Section briefly comments on the following three areas: stricter penalization of violence against women, an immutable guarantee of equal pay, and improved access to reproductive justice.[204]

First, in *United States v. Morrison*, the Court struck down VAWA because of a lack of explicit congressional authority to pass the Act.[205] Both legislators and scholars, including Professor Catherine A. MacKinnon, have argued that the ERA would provide a

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States as Laboratories, 80 VA. L. REV. 945, 945–46 (1994) (describing changes in state law after integration of state equal rights amendments into state constitutions).

[200] *See* Davis, *supra* note 199, at 434 ("Most states have adopted the strict scrutiny approach.").

[201] *Id.* at 422.

[202] Magliocca, *supra* note 56, at 659.

[203] *See* Davis, *supra* note 199, at 422 ("By adding a specific reference to sex equality to the Constitution, the [ERA] would result in strict scrutiny . . . .").

[204] Examining each of these fields in-depth would require three distinct Notes, but a brief allusion to each is warranted here. For further reading, see generally NEUWIRTH, *supra* note 185.

[205] *See* 529 U.S. 598, 617 (2000) (holding that Congress cannot "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *id.* at 627 (holding that the Fourteenth Amendment likewise does not support Congress's power to pass VAWA).

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constitutional foothold for VAWA by giving Congress authority to pass legislation targeted at remedies for gender-based violence.[206] An enumerated prohibition on sex discrimination would give Congress the textual authority to pass an enhanced Violence Against Women Act without reliance on the Commerce Clause or the Fourteenth Amendment, both of which the Court deemed insufficient in *Morrison*.[207]

Second, economic inequality is an area in which the ERA could provide for significant improvements.[208] The gender pay gap persists, as exemplified by the highly publicized case of the U.S. Women's National Team of world champion soccer players fighting their employer, U.S. Soccer, in federal court to be paid on the same scale as their male counterparts.[209] Furthermore, women across the country encounter this problem every day outside of the spotlight.[210] By some estimates, a college-educated woman in the United States can expect to earn $1.2 million less than her male classmate over the course of her life, and the problem only grows for women of color and women with lower levels of education.[211] The ERA could help

[206] *See, e.g.*, MacKinnon, *supra* note 196, at 576–79 (explaining ongoing problems with violence against women that the ERA would improve); NEUWIRTH, *supra* note 185, at 51–69 (detailing the significance of the ERA in efforts to provide sufficient legal remedies to victims of violence against women); *see also* Magliocca, *supra* note 56, at 659 ("[T]he ERA would 'give Congress a constitutional basis to enact legislation that targets gender violence and enhances the protections for victims' and thereby overrule *United States v. Morrison*." (footnote omitted) (quoting H.R. Transcription Debate, 100th Gen. Assemb., Reg. Sess., at 342–44 (Ill. May 30, 2018) (statement of Rep. Stratton))).

[207] *See supra* notes 30–33, 205 and accompanying text.

[208] *See* MacKinnon, *supra* note 196, at 573–76 (detailing the modern problems with economic inequality that "were not central to the legal debate" in the 1970s); *see also* NEUWIRTH, *supra* note 185, at 15–32 (explaining persisting pay inequity and how the ERA could help eliminate that disparity).

[209] *See* Plaintiffs' Collective Action Complaint for Violations of the Equal Pay Act and Class Action Complaint for Violations of Title VII of the Civil Rights Act of 1964 at 3, Morgan v. U.S. Soccer Fed'n, Inc., No. 2:19-cv-01717 (C.D. Cal. Mar. 8, 2019) (suing to be paid on the same structure as the men's national team); Andrew Das, *U.S. Women's Soccer Team Sues U.S. Soccer for Gender Discrimination*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/sports/womens-soccer-team-lawsuit-gender-discrimination.html (outlining the facts giving rise to the case and the initial claims).

[210] *See* NEUWIRTH, *supra* note 185, at 15–31 (detailing pay inequity litigation in the United States).

[211] *Id.* at 17; *see also* Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RES. CTR. (July 1, 2016), https://www.pewresearch.org/fact-

eliminate this disparity by supplementing Title VII and the Lilly Ledbetter Fair Pay Act[212] to make pay discrimination a constitutional violation.[213]

Third, persistent pregnancy discrimination and access to reproductive healthcare services could be positively impacted by the ERA. Cases regarding pregnancy had a complicated history at the U.S. Supreme Court before the all-male bench of the 1970s.[214] Reproductive healthcare remains contentious, with statutes limiting abortion access regularly reaching the U.S. Supreme Court almost fifty years after *Roe v. Wade*.[215] Additionally, contraceptive access is often challenged at the Court on various grounds.[216] Future ERA doctrine could eliminate these inconsistencies and end this debate by including pregnancy discrimination and reproductive healthcare within its jurisprudence.

3. Sexual Minorities' Rights. Interpreting the ERA in line with *Bostock* would also provide significant protections for the LGBTQ community. While many protections that the ERA would guarantee for sexual minorities have not yet been guaranteed through

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tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/ (explaining contemporary wage gaps by gender and race).

[212] *See supra* note 80 and accompanying text.

[213] *See* NEUWIRTH, *supra* note 185, at 32 ("[The ERA] could make a meaningful difference in the power of the law to bring real equality between women and men to the workplace.").

[214] *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1554 (1991) (explaining how the Court "struggled with the question" of how to treat pregnancy cases in the 1970s); *see also The Ginsburg Tapes: Pregnancy Discrimination Cases of the 1970s* (Sept. 20, 2020) (downloaded using Apple Podcasts) (following various pregnancy discrimination cases argued in U.S. the Supreme Court during the 1970s).

[215] 410 U.S. 113 (1973); *e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2113 (2020) (finding a Louisiana statute limiting abortion access to be unconstitutional).

[216] In 2020, the Court decided both *Little Sisters of the Poor* and *June Medical* on these issues. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372–73 (2020) (finding that exemptions to the Affordable Care Act's contraceptive mandate for religious and conscientious objectors were proper); *June Med.*, 140 S. Ct. at 2112–13 (striking down a Louisiana law that created an unconstitutional burden on women seeking abortions). For a breakdown of each case, see Adam Liptak, *Supreme Court Strikes Down Louisiana Abortion Law, With Roberts the Deciding Vote*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/us/supreme-court-abortion-louisiana.html; Adam Liptak, *Supreme Court Upholds Trump Administration Regulation Letting Employers Opt Out of Birth Control Coverage*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/supreme-court-birth-control-obamacare.html.

statute,[217] nor through case law,[218] this Section briefly considers violence against members of the LGBTQ community, healthcare, and athletics.

The ERA could provide Congress with authority to pass a law targeted at providing additional legal remedies for victims of violence and hate crimes against the LGBTQ community. According to the 2019 FBI hate crime analysis, almost one in five hate crimes in the United States was motivated by the victim's sexual orientation, with an additional 227 crimes motivated by anti-transgender or anti-gender-non-conforming bias.[219] Transgender women of color face disproportionate rates of violence within this community, resulting from animus and compounding factors, such as disproportionate rates of homelessness, poverty, and unemployment, all of which increase their risk of victimization.[220] Yet, only twenty-three states enumerate sexual orientation and gender identity in their hate crime laws; thirteen states do not include either.[221] At the federal level, the Matthew Shepard and

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[217] In February 2021, the House of Representatives passed the Equality Act, which would both codify the *Bostock* decision and prohibit discrimination on the basis of sexual orientation and gender identity more broadly, including in housing, federally funded programs, and public accommodations. Danielle Kurtzleben, *House Passes the Equality Act: Here's What It Would Do*, NPR (Feb. 24, 2021, 5:00 AM), https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do.

[218] Justice Alito's dissent highlights various areas of persistent discrimination that could be eliminated by the *Bostock* majority's interpretation of ERA, and possibly, as he suggests, by *Bostock* itself. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778–83 (2020) (Alito, J., dissenting) (listing various potential areas of impact for the *Bostock* decision, including healthcare, women's sports, housing, and more). President Biden supported the application of *Bostock*'s reasoning to other statutes like Title IX with an Executive Order on his first day in office. *See* Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021) ("Under *Bostock*'s reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation . . . .").

[219] *2019 Hate Crime Statistics*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/hate-crime/2019/topic-pages/victims (last visited Apr. 4, 2021); *see also* Colleen Curry, *9 Battles the LGBTQ Community in the US is Still Fighting*, GLOB. CITIZEN (June 20, 2017), https://www.globalcitizen.org/en/content/9-battles-the-lgbt-community-in-the-us-is-still-fi/ (cataloguing ongoing forms of discrimination the LGBTQ community faces).

[220] *Violence Against the Transgender Community in 2019*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019 (last visited Apr. 4, 2021).

[221] *Hate Crime Laws*, MOVEMENT ADVANCE PROJECT, https://www.lgbtmap.org/equality-maps/hate_crime_laws (last visited Apr. 4, 2021).

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James Byrd, Jr., Hate Crimes Prevention Act of 2009 criminalizes hate crimes targeting an individual's sexual orientation or gender identity.[222] This statute is limited, however, in that the government must prove the crime affected interstate commerce because congressional authority for the Act rests on the Commerce Clause.[223] The *Bostock* interpretation of the ERA would allow federal statutes to provide legal remedies for victims of anti-LGBTQ-motivated violence without the caveat of a connection to interstate commerce.[224]

Healthcare discrimination is also a serious problem that plagues the LGBTQ community, especially transgender people. In a 2020 national report by the Human Rights Campaign, 70% of transgender or gender non-conforming people and 56% of lesbian, gay, or bisexual people reported experiencing discrimination in healthcare.[225] Immediately after the *Bostock* decision was announced, the Human Rights Campaign filed suit on behalf of two transgender women of color, arguing that the interpretation of sex in *Bostock* ought to apply to similar terms in the Affordable Care Act as well.[226] The *Bostock* interpretation of the ERA would prohibit both federal and state statutes and regulations from sidestepping a prohibition on LGBTQ discrimination by only prohibiting discrimination on the basis of "sex."[227]

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[222] Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249(a)(2) (2018).

[223] *See The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, DEP'T JUST., https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0 (last visited Apr. 13, 2021) (describing the Act and its enforcement).

[224] The *Morrison* decision that gutted VAWA likewise limits the Shepard-Byrd Act by "requir[ing] the violent conduct in question to trigger substantial interstate commerce concerns or effects." Kelly Jo Popkin, Note, *FACEing Hate: Using Hate Crime Legislation to Deter Anti-Abortion Violence and Extremism*, 31 WIS. J.L. GENDER & SOC'Y 103, 115 (2016). This requirement significantly narrows federal hate crime legislation "because a single hate crime action is not likely to trigger interstate commerce concerns." *Id.*

[225] HUMAN RIGHTS CAMPAIGN, HEALTHCARE EQUALITY INDEX 2020, at 7 (2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/HEI-2020-FinalReport.pdf?mtime=20200830220806&focal=none.

[226] *See* Complaint for Declaratory and Injunctive Relief at 1–2, Walker v. Azar, No. 1:20-cv-02834 (E.D.N.Y. June 26, 2020) (advocating for an extension of the *Bostock* interpretation of "sex" to the Affordable Care Act).

[227] For example, if enacted, the ERA may provide a valid basis to challenge Arkansas's recent bill prohibiting doctors from providing transgender youth with gender-affirming

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Finally, intersex and transgender people's participation in athletics, particularly transgender women on women's teams, has become a recent topic of debate and subject of litigation.[228] For example, in April 2020, the American Civil Liberties Union filed suit to challenge an Idaho law barring transgender and intersex women and girls from participation on all-female sports teams.[229] As of April 2021, about twenty-five state legislatures have introduced legislation seeking to limit or ban transgender athletes' participation on sports teams consistent with their gender identity.[230] The *Bostock* interpretation of the ERA would ensure that under Title IX, among other rules concerning state-sponsored athletics, intersex and transgender people could participate consistent with their gender identity by prohibiting this form of discrimination on the basis of sex.[231]

In short, there is still much work to be done in the efforts for equal rights of sexual minorities and women, but the ERA would be a catalyst for positive change in guaranteeing equal treatment under the law.

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treatment. *See* Devan Cole, *Arkansas Becomes First State to Outlaw Gender-Affirming Treatment for Trans Youth*, CNN (Apr. 6, 2021, 6:56 PM), https://www.cnn.com/2021/04/06/politics/arkansas-transgender-health-care-veto-override/index.html (explaining the Arkansas bill and controversy surrounding the law).

[228] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1779–80 (2020) (Alito, J., dissenting) (fearing that outstanding cases concerning transgender persons participation in single-sex sports would now succeed in ending this discrimination under *Bostock*'s reasoning).

[229] *See* Complaint for Declaratory and Injunctive Relief at 2–3, Hecox v. Little, No. 1:20-cv-00184 (D. Idaho Apr. 15, 2020) (challenging the discriminatory Idaho law on behalf of a Boise State student-athlete).

[230] *See* Canela López, *Every Anti-Trans Bill US Lawmakers Introduced This Year, From Banning Medication to Jail Time for Doctors*, INSIDER (Apr. 7, 2021, 11:55 AM), https://www.insider.com/over-half-of-us-states-tried-passing-anti-trans-bills-2021-3 (cataloguing anti-transgender legislation introduced in 2021).

[231] Notably, President Biden also instructed executive agencies to apply this reasoning to Title IX in a January 2021 Executive Order. *See* Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021) ("[L]aws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972 . . . prohibit discrimination on the basis of gender identity . . . .").

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VI. CONCLUSION

Almost forty years after the ERA was presumed dead, ERA advocates today have the opportunity to seize the momentum of the latest wave of feminist influence in the United States—combined with a concerted effort of women and sexual minorities working together—to apply enough political pressure to officially incorporate the ERA into the U.S. Constitution. Following the U.S. Supreme Court's reasoning in *Bostock*, the ERA's text would prohibit discrimination motivated by bias both regarding sexual orientation or gender identity and traditional notions of sex and gender, just as the Court determined is true of Title VII. With the enactment of the ERA and the *Bostock* interpretation of "sex," major shifts in law and policy would become possible through new constitutional protections.

As then-Professor Ruth Bader Ginsburg remarked in a 1978 article advocating for ERA ratification and adoption, the ERA is "a signal that so far as laws and officialdom are concerned, males and females, our daughters and our sons, should be free to grow, develop, choose, and aspire in accordance with their individual talents and capacities."[232] Today, the ERA would stand for this principle for *all* children, regardless of their sexual orientation or gender identity. Despite tremendous progress on the path towards equality for women and sexual minorities, a guarantee of equal rights remains absent from the U.S. Constitution. Still, the efforts of so many trailblazers who fought for the ERA may soon be realized by official incorporation of the Equal Rights Amendment into the Constitution of the United States.

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[232] Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 475 (1978).