The Future of LGBTQ+ Equality After *Obergefell* and *Bostock*

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ABSTRACT

The Supreme Court's decisions in *Obergefell v. Hodges* and *Bostock v. Clayton County* are justly regarded as landmark decisions in American jurisprudence and, more importantly, significant milestones in the history of lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") Americans. However, these important decisions are not the end of the movement for LGBTQ+ equality, and many more obstacles remain for the LGBTQ+ community.

This article will begin with an overview of the legal history of sexual orientation and gender identity in the United States; the recognition of and enactment of constitutional and civil rights by courts and legislatures; and the discrimination performed by each. The next part is an overview of the future of sexual orientation and gender identity law, including the Equality Act and other legal issues.

The thesis of this article is to state the urgent need for passage of the Equality Act and the introduction and passage of other legal devices that will relieve the undue burdens still faced by ordinary LGBTQ+ Americans after the Supreme Court's decisions in *Obergefell v. Hodges* and *Bostock v. Clayton County*.

I. HISTORY OF SEXUALITY AND GENDER IDENTITY RIGHTS AND DISCRIMINATION

This section will provide a general overview of the history of discrimination based on sexual orientation and gender identity, as well as the progressive recognition of LGBTQ+ constitutional and civil rights. It highlights the unrelenting and harsh discrimination endured by

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the LGBTQ+ community prior to the progress that began at the end of the 20th Century. Part A will discuss the history of same-sex marriage law, Part B will discuss the history of sexual intimacy law, and Part C will discuss the history of gender identity law.

A. Same-sex Marriage

The recognition of same-sex marriage as a right was an extensive and prolonged campaign that took many decades to achieve and took many litigants as avatars for the marriage equality movement. The Supreme Court of New York in 1971 refused to annul a same-sex marriage, reasoning "that no marriage could legally have taken place between the plaintiff and the defendant."[1]

In *Baker v. Nelson*, the Supreme Court of Minnesota ruled that the drafters of the state statute regarding marriages did not intend for the statute to encompass same-sex marriages.[2] The Court in *Baker* further reasoned that the prohibition of same-sex marriages did not violate the Constitution and differentiated *Baker* from *Loving v. Virginia*, stating "not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[3]

The Superior Court of Pennsylvania reasoned that a same-sex couple that contracted a common law marriage could not divorce because same-sex couples were prohibited from contracting a common law marriage.[4]

The Supreme Court of Kansas ruled a transgender woman who had undergone gender affirmation surgery and obtained a new birth certificate listing her sex as female was still legally regarded as a male and declared her marriage to a cis male void.[5]

In 1996, President Bill Clinton in signed into law the Defense of Marriage Act ("DOMA") in response to the Supreme Court of Hawaii's decision in *Baehr v. Lewin*.[6] DOMA defined marriage for the purpose of federal law as "only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex

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[1] Anonymous v. Anonymous, 325 N.Y.S.2d 499, 501 (N.Y. Sup. Ct. 1971) (citing N.Y. DOM REL. LAW § 144 (McKinney 1962) (amended 1978)); *see also* Frances B. v. Mark B., 355 N.Y.S.2d 712, 716 (N.Y. Sup. Ct. 1974) ("In all cases, however, marriage has always been considered as the union of a man and a woman [. . .]").
[2] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).
[3] *Id.* at 187 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
[4] De Santo v. Barnsley, 476 A.2d 952, 956 (Pa. Super. Ct. 1984). Pennsylvania has since abolished recognition of common law marriages contracted starting in 2005, joining other states that have abolished or never recognized the doctrine. 23 PA. CONS. STAT. § 1103 (2004); *see also* Marvin v. Marvin, 18 Cal. 3d 660, 684 n.24 (Cal. 1976) ("We do not seek to resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895."); Fritsche v. Vermilion Parish Hosp. Service Dist. No. 2, 893 So. 2d 935, 937 (La. Ct. App. 2005) ("Louisiana does not recognize or permit the contracting of common-law marriages in this state [. . .]") (quoting Parish v. Minvielle, 217 So. 2d 684, 688 (La. Ct. App. 1969)).
[5] In re Estate of Gardiner, 42 P.3d 120, 136-37 (Kan. 2002).
[6] CARLOS A. BALL ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW 338 (6th ed. 2016); Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

who is a husband or wife."[7] DOMA also granted states the ability to not recognize a same-sex marriage contracted in another state.[8]

Due to the myriad aspects of life affected by federal recognition of marriage, the inability for same-sex couples to be married caused hardships and difficulties not faced by heterosexual married couples.[9] Marriage is not only a religious or civil contract between romantic partners, but it is also a government-recognized union that has significance in tax law,[10] property law,[11] and trusts and estates law.[12]

In the years prior to the Supreme Court's ruling in *Obergefell v. Hodges*, the right of same-sex couples to be married and have their marriage recognized by their local government varied across the United States.[13] Marriage had already been recognized as a fundamental right by the United States Supreme Court.[14] The last time the recognition of same-sex marriage across the United States was uniform prior to *Obergefell* was 2003, when the Supreme Judicial Court of Massachusetts reasoned that a ban on same-sex marriage violated the Massachusetts Constitution.[15] Prior to this decision, same-sex marriage was uniformly not conducted nor recognized across the United States. In the years following, the prohibitions against same-sex marriage in various states were lifted, either by judicial action or the legislative process.[16] The Supreme Court of California in *In re Marriage Cases* held that limiting marriage between opposite sex couples was unconstitutional.[17] This decision would be superseded by a referendum to amend the California Constitution to state, "Only marriage between a man and a woman is valid or recognized in California," which would later be ruled unconstitutional.[18]

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[7] 1 U.S.C. § 7 (1996).
[8] 28 U.S.C. § 1738C (1996).
[9] Obergefell v. Hodges, 576 U.S. 644, 669-70 (2015).
[10] 26 U.S.C. §§ 704(e), 2056, 6013 (2021).
[11] This applies particularly to states with a community property regime such as California and Louisiana. *See* CAL. CIV. CODE § 687 (Deering 2021); LA. CIV. CODE ANN. art. 2338 (2021).
[12] The surviving partner of a same-sex relationship that was unmarried due to a prohibition of same-sex marriages could be deprived of receiving the property of their deceased partner by the intestacy laws of the state. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 894 (2012).
[13] *Obergefell*, 567 U.S. at 663 ("After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.").
[14] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).
[15] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).
[16] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008) ("In accordance with these [Connecticut] state constitutional requirements, same sex couples cannot be denied the freedom to marry."); Garden State Equality v. Dow, 82 A.3d 336, 369 (N.J. Super. Ct. Law Div. 2013) ("Same-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey Constitution."), *aff'd*, 216 N.J. 314 (N.J. 2013); N.Y. DOM. REL. LAW § 10-a (McKinney 2011) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.").
[17] In re Marriage Cases, 43 Cal. 4th 757, 857 (Cal. 2008) ("[L]imiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.").
[18] CAL. CONST. art. I, § 7.5.

The Supreme Court in 2013 ruled in *United States v. Windsor* that Section 3 of DOMA was unconstitutional.[19] The case involved two women, Edith Windsor and Thea Spyer, who lived in New York City and were married in Ontario, Canada.[20] Spyer died two years later.[21] Windsor, as Spyer's surviving spouse, was unable to claim an estate tax exemption due to of DOMA, which defined marriage as a union between opposite-sex couples only for purposes of federal law.[22] The Supreme Court held that Section 3 of DOMA was unconstitutional under the Fifth Amendment's Due Process Clause, which "contains within it the prohibition against denying to any person the equal protection of the laws."[23]

On the second anniversary of the *Windsor* decision, the Supreme Court issued its ruling in *Obergefell*. The Court heard a consolidation of six cases from four different states.[24] The Court ruled that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry."[25] In responding to the argument that this decision circumvented the democratic process, the Court reasoned that when the denial of a fundamental right is at issue, courts should not allow the fundamental rights of particular groups to be trampled upon.[26]

Despite the Supreme Court's decision in *Obergefell*, which struck down same-sex marriage bans in states that identified marriage as solely being a union of a man and a woman, some states have maintained this definition in law, despite it being constitutionally unenforceable. Various conservative majority states took action to demonstrate their opposition to the *Obergefell* ruling. Louisiana has refused to repeal Article 86 of the Louisiana Civil Code, which defines marriage as "a legal relationship between a man and a woman that is created by civil contract."[27] Louisiana's dismissal of the *Obergefell* decision does not stop there. The Louisiana legislature has also maintained Article 89, which outright bans same-sex marriage.[28] It also provides a reference to the conflict of laws section of the Civil Code as the authority for same-sex marriages contracted outside Louisiana.[29] This section includes Article 3520, which provides that "[a] purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose [. . .]".[30] Mississippi went further when it passed House Bill 1523, known as the "Religious Liberty Accommodations Act."[31] The bill explicitly restricts

[19] United States v. Windsor, 570 U.S. 774, 775 (2013).
[20] *Id.* at 749.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 774 (citing Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Adarand Constructors v. Pena, 515 U.S. 200, 217-18 (1995)); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976).
[24] *Obergefell*, 576 U.S. at 653-54 ("These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman.").
[25] *Id.* at 675.
[26] *Id.* at 676-77.
[27] LA. CIV. CODE ANN. art. 86 (2021).
[28] *Id*. art. 89.
[29] *Id.*
[30] *Id.* art. 3520(B).
[31] H.R. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

the definition of marriage to opposite sex couples, recognizes the gender is determined at birth, and equally, and disturbingly, gives private and public entities a carte blanche license to discriminate against LGBTQ+ individuals with the excuse of "a sincerely held religious belief."[32]

Two years later, the Court in a *per curiam* decision, reaffirmed *Obergefell* in *Pavan v. Smith*.[33] The case was a challenge to an Arkansas statute that mandated birth certificates issued by the State of Arkansas bear the name of the mother and, if married to a man, her husband.[34] Two same-sex couples in Arkansas sued to have both parents of the child listed on the birth certificate.[35] The Supreme Court determined that not allowing both parents in a same-sex marriage to be listed as parents on the birth certificate was unconstitutional, and that it ran afoul of their ruling in *Obergefell* that, "a State may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'"[36]

The real strain on the respect of same-sex couples came the following year in the Supreme Court's decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, where the Court found that the Colorado Civil Rights Commission's "hostility" towards the religious views of a baker violated the First Amendment.[37] The case arose when a baker, Jack Phillips, did not want to make a custom wedding cake for a same-sex wedding, but that he could make and sell them deserts of a non-martial nature such as birthday cakes and cookies.[38] Phillips argues that his cakes are art and expressive speech, and that he should not be compelled to produce a wedding cake expressive of speech that is contrary to his religious views.[39] The Supreme Court found in favor of Phillips on the ground that commissioners in his case made disparaging remarks hostile to Phillips's religion.[40] The Court revoked the order that Phillips be compelled to make wedding cakes for same-sex weddings.[41] Interestingly enough, however, the Court later that month, in *Trump v. Hawaii*, made no such notion of disparaging comments towards religion as reason to invalidate an order.[42] The fact Phillips may have felt offended by the comments of the commissioners should not have resulted in the order being revoked, similar to how a passerby being offended by the appearance of the Bladensburg Peace Cross on public land should not be seen as an endorsement of religion and therefore unconstitutional under the Establishment Clause of the First Amendment.[43]

B. Sexual Intimacy

[32] *Id.*
[33] Pavan v. Smith, 137 S. Ct. 2075, 2076 (2017).
[34] *Id.* at 2077.
[35] *Id.*
[36] *Id.* at 2078 (quoting Obergefell v. Hodges, 576 U.S. 644, 647 (2015)).
[37] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).
[38] *Id.* at 1724.
[39] *Id.* at 1728.
[40] *Id.* at 1729.
[41] *Id.* at 1732.
[42] Trump v. Hawaii, 138 S. Ct. 2392, 2446-47 (2018) (Sotomayor, J., dissenting).
[43] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074, 2090 (2019).

During the reign of Nazi Germany, the Nazi Party instituted systemic oppression of gay men in Germany.[44] Gays in Nazi Germany during the Holocaust were identified by a pink triangle, similarly to how persecuted Jews were identified by a yellow Star of David.[45] During the AIDS crisis in the United States, beginning in the 1980s, the pink triangle was adopted as a symbol of the gay community, accompanied with the text "SILENCE = DEATH."[46]

Within the United States, there has been a long and dark history of violence against gays and lesbians. On the night of June 24, 1973, the lack of an empathetic response to an arsonist setting fire to a gay bar in the *Vieux Carré* (French Quarter) that resulted in the deaths of 32 people highlighted the homophobia rampant in Louisiana during the 1970s.[47] This was the deadliest attack on a gay bar until the horrific shooting at the Pulse gay bar in Orlando, Florida in 2016, where 49 patrons were murdered.[48]

Attacks on gay people and their right to exist by homophobic private individuals is not unique, as there have been state actors who have gone after gay people due to homophobic views with the backing of homophobic laws. In *Bowers v. Hardwick*, the respondent, a gay man, was arrested under a Georgia law prohibiting sodomy.[49] Hardwick claimed that the criminalization of sodomy meant that, as a gay man, he was unconstitutionally always in danger of being arrested.[50] The Court was unconvinced, determining that, since "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights" and that "when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws," there was no right to privacy to protect consenting adults from engaging in same-sex intimacy.[51] Justice John Paul Stevens dissented against the majority, arguing that "Georgia's prohibition on private, consensual sodomy has not been enforced for decades."[52] He argued that the Supreme Court had already previously recognized a Due Process Clause protection for married couples to engage in sexual intimacy outside of procreation in *Griswold v. Connecticut*, and that the Court extended that protection to unmarried persons in *Eisenstadt v. Baird*.[53]

The Supreme Court overturned *Bowers* in *Lawrence v. Texas*, adopting the reasoning of Justice Stevens's aforementioned dissent.[54] Writing for the majority, Justice Kennedy stated,

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[44] *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1781 (1996).
[45] *Id*. ("It was one of many symbols used in creating a taxonomy of 'contragenics': red patches for political prisoners, green triangles for criminals, black triangles for asocials, and yellow stars for Jews. The pink triangle thus implicitly links gay oppression to the oppression of other minorities - particularly Jews, who were the most numerous and prominent victims of the Holocaust.").
[46] *Id*. at 1787.
[47] Frank Perez, *After UpStairs Lounge Fire, Gay and Straight New Orleans Changed*, THE TIMES-PICAYUNE (June 22, 2013), http://www.nola.com/opinions/index.ssf/2013/06/after_upstairs_lounge_fire_gay.html.
[48] Crosby v. Twitter, Inc., 303 F. Supp. 3d 564, 567 (E.D. Mich. 2018).
[49] Bowers v. Hardwick, 478 U.S. 186, 187-88 (1986).
[50] *Id*.
[51] *Id.* at 191-93.
[52] *Id.* at 221 (Stevens, J., dissenting).
[53] *Id.* at 216 (Stevens, J., dissenting) (citing Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
[54] Lawrence v. Texas, 539 U.S. 558, 577-78 (2003).

"*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[55] He reasoned that the Due Process Clause of the Fourteenth Amendment protects the right of privacy for gay people to have sexual intimacy, free of government intrusion, and that the State of Texas "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[56] As a result of *Lawrence*, the Texas statute and remaining laws in other states criminalizing sodomy across the United States were struck down as unconstitutional.[57]

C. Gender Identity

Historically and contemporarily, the laws of the United States and the constituent states have not been kind to transgender people. Gender dysphoria, originally called "gender identity disorder", was considered by courts to be a "serious mental disorder."[58]

In the summer of 2020, the Supreme Court announced their decision in the case of *Bostock v. Clayton County*, which extended the protections of Title VII of the Civil Rights Act of 1964 to transgender and non-binary employees.[59] Prior to this decision, the rights of transgender individuals to be protected from discrimination in the workplace varied by state. States such as New Jersey and Vermont had already amended their employment discrimination statutes to protect transgender employees in 2006 and 2007, respectively.[60] Some municipalities, such as the city of New Orleans, had ordinances protecting gender identity as a category from employment discrimination.[61]

Before the *Bostock* decision, courts grappled with the issues presented by discriminated transgender employees.[62]

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[55] *Id.* at 578.
[56] *Id.*
[57] Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 145-46 (2014). The government's intrusion into individual sexual intimacy rights did not end with *Lawrence*. The year following the *Lawrence* decision, the 11th Circuit upheld an Alabama statute prohibiting the sale of sex toys that are "designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004) (quoting ALA. CODE § 13A-12-200.2 (2003)). The 11th Circuit later attempted to rationalize their ruling by claiming that "while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue in this case forbids *public*, *commercial* activity." Williams v. Morgan, 478 F.3d 1316, 1322 (11th Cir. 2007).
[58] O'Donnabhain v. Comm'r, 134 T.C. 34, 70-73 (T.C. 2010) (ruled that hormone therapy and gender confirmation surgeries were not cosmetic procedures, but held that breast augmentation was a cosmetic procedure); *see also* Julie Furr Youngman and Courtney D. Hauck, *Medical Necessity: A Higher Hurdle for Marginalized Taxpayers?*, 51 LOY. L.A. L. REV. 1, 37-38 (2018).
[59] Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020); 42 U.S.C. § 2000e-2 (2021).
[60] N.J. STAT. ANN. § 10:5-12 (2021); VT. STAT. ANN. 21 § 495 (2021).
[61] *See* NEW ORLEANS, LA., CODE OF ORDINANCES ch. 86, art. IV, § 22 (2021).
[62] Some courts, such as the U.S. District Court for the Northern District of California in *Gottschalk v. City & County of San Francisco*, even seemed to avoid the use of "trans nomenclature" when confronted with employment discrimination issues pertaining to gender identity. Kris Franklin and Sarah E. Chinn, *Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases*, 32 BERKELEY J. GENDER L. & JUST. 1, 23-24 (2017) (discussing Gottschalk v. City & County of San Francisco, 964 F. Supp. 2d 1147 (N.D. Cal. 2013)).

The Seventh Circuit held that a trans woman pilot was not discriminated by her employer as a woman, but as a transsexual, and that Title VII did not apply in this case.[63] The plaintiff had served as a United States Army pilot for four years "with a record of combat missions in Vietnam for which [she] received the Air Medal with eight clusters."[64] She subsequently became a pilot for Eastern Airlines, serving in a variety of capacities as a pilot and logged an excess of 8,000 flight hours.[65] On paper, it would appear that she was extremely experienced and qualified for her job as a pilot.[66] After being diagnosed as a transsexual and undergoing hormone and surgical procedures, she received an amended birth certificate from the State of Illinois and Federal Aviation Administration certification identifying her as female.[67] Once she returned to her job as a pilot of Eastern Airlines, her employment was terminated because she identified as, and had medical procedures to appear as, a woman.[68] The Court was unconvinced by the district judge's conclusion that "sex is not a cut-and-dried matter of chromosomes", and that Title VII must be interpreted to protect transsexuals.[69] The Court stated that Congress only intended for the "traditional concept of sex" to be protected.[70] The Court further determined that since Eastern Airlines did not regard plaintiff as a female, that it did not discriminate against her as a female when they terminated her employment.[71]

Transgender Americans were banned from military service until 2016.[72] Although transgender servicemembers attempted to have courts strike down the ban on transgender service in the military, the ban was upheld.[73] Gay servicepeople were similarly prohibited from openly serving following the enactment of the "don't ask, don't tell" policy under President Clinton in 1993.[74] The prohibition on gay servicepeople ended with the passage of the Don't Ask, Don't Tell Repeal Act of 2010.[75] Then-Secretary of Defense Ash Carter announced in the summer of 2016 that the ban on transgender people from serving in the military would be lifted.[76] On his decision, Carter stated, "We're talking about talented Americans who are serving with distinction or who want the opportunity to serve. We can't allow barriers unrelated to a person's qualifications prevent us from recruiting and retaining those who can best accomplish the mission."[77] The victory for transgender servicepeople would be short-lived, as Donald Trump, in

[63] Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).
[64] *Id.* at 1082.
[65] *See id.* at 1082-83.
[66] *See id.*
[67] *Id.* at 1083.
[68] *See id.*
[69] *Id.* at 1084 (quoting Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983)).
[70] *Id.* at 1085.
[71] *Id.* at 1087.
[72] Victoria Manuel, *Trump's Transgender Military Ban: Policy, Law, and Litigation*, 29 TUL. J.L. & SEXUALITY 75, 79 (2020).
[73] BALL, *supra* note 6 at 477 (citing Leyland v. Orr, 828 F.2d 584, 586 (9th Cir. 1987); DeGroat v. Townsend, 495 F. Supp. 2d 845, 850 (S.D. Ohio 2007); Doe v. Alexander, 510 F. Supp. 900, 904 (D. Minn. 1981)).
[74] 10 U.S.C. § 654 (1993) (repealed 2010).
[75] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).
[76] Press Release, U.S. Dep't of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/.
[77] *Id.*

his first year in office as President and only a year after the lifting of the transgender military ban, reimplanted the ban via an announcement on Twitter.[78]

> "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you."[79]

Trump then issued two presidential memorandums, first in 2017 and an updated version in 2018, to implement his transphobic ban.[80] Legal challenges to the Trump transgender military ban soon began,[81] with the Trump administration appealing directly to the Supreme Court.[82] The Supreme Court permitted the ban to go into effect on January 22, 2019, staying the preliminary injunctions.[83] The Trump administration never lifted the ban. Trump was later defeated by Joe Biden in the 2020 U.S. presidential election.[84] During his first week in the White House, President Biden revoked the Trump ban on transgender military service from 2018.[85] The Biden administration order stated that, "it shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination."[86]

In 2020, the Supreme Court issued its ruling in *Bostock v. Clayton County*, holding that an employer discriminating against an employee due to their status as a gay or transgender person is prohibited "discrimination on the basis of sex" under Title VII of the Civil Rights Act

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[78] Manuel, *supra* note 72 at 82.
[79] Karnoski v. Trump, 926 F.3d 1180, 1188 (9th Cir. 2019).
[80] Military Service by Transgender Individuals Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security, 82 Fed. Reg. 41,319 (Aug. 30, 2017); Military Service by Transgender Individuals Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security, 83 Fed. Reg. 13,367 (Mar. 28, 2018).
[81] Manuel, *supra* note 72 at 84.
[82] Petition for a Writ of Certiorari Before Judgment at 27, Trump v. Karnoski, 139 S. Ct. 946 (2018) (No. 18-676), 2018 WL 6169245. Solicitor General Noel Francisco sought to have three cases consolidated and heard by the Supreme Court. *Id.*; *see* Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17 Civ. 1597), *vacated sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019); Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019); Stockman v. Trump, 331 F. Supp. 3d 990, 993 (C.D. Cal. 2018), *vacated and remanded*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).
[83] Orders in Pending Cases, 586 U.S. 1 (Jan. 22, 2019), https://www.supremecourt.gov/orders/courtorders/012219zor_8759.pdf.
[84] Alexander Burns, Jonathan Martin & Katie Glueck, *How Joe Biden Won the Presidency*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/us/politics/joe-biden-president.html.
[85] Enabling All Qualified Americans To Serve Their Country in Uniform, Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 25, 2021).
[86] *Id*. ("It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service.").

of 1964.[87] Justice Neil Gorsuch, writing for the majority, reasoned that although this may not have been the intention of the drafters of the legislation, "[s]ometimes small gestures can have unexpected consequences."[88] The finding that sexual orientation and gender identity discrimination is sex discrimination was interpreted on the finding that the individual's sex was the "but-for cause" in an employer's discriminatory action.[89] A male employee in a relationship with another male would not be discriminated against by a homophobic employer if the employee were female.[90] Similarly, a trans woman employee would not be discriminated against by a transphobic employer if the employee were biologically female.[91] Justice Gorsuch's opinion did not address discrimination in "sex-segregated bathrooms, locker rooms, and dress codes," leaving that question open for a future decision on whether such situations are also included under Title VII's sex discrimination prohibitions.[92] In a lengthy dissent, Justice Samuel Alito charged that the Court's majority in *Bostock* was a not a textualist interpretation, but merely judicial activism.[93] This was not surprising, given that Justice Alito has made this assertion before.[94]

II. THE FUTURE OF SEXUALITY, GENDER IDENTITY, AND THE LAW

This section will discuss the future of the interactions between sexuality and gender identity with the law. Part A will discuss the Equality Act of 2021, Part B will discuss trans women and sports, Part C will discuss an amendment to the United States Constitution for sexuality and gender identity equality, and Part D will discuss changes to the law for the purpose of name changes and birth certificate requirements.

A. The Equality Act

The United States presidential election in November 2020 was a victory for the Democratic Party,[95] whose nominees, former vice president and now President Joe Biden, who as Vice President had preempted President Barack Obama in his support for same-sex marriage

[87] Bostock v. Clayton County, 140 S. Ct. 1731, 1737-38 (2020); *see also* Victoria D. Manuel, *Bostock v. Clayton County: The Supreme Court's Textualist Recognition of LGBTQ+ Employment Rights*, 30 TUL. J.L. & SEXUALITY 203, 206 (2021).
[88] *Bostock*, 140 S. Ct. at 1737, 1752.
[89] *Id.* at 1742.
[90] *Id.* at 1741 ("If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.").
[91] *Id.* ("[A]n employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.").
[92] *Id.* at 1753.
[93] *Id.* at 1755-56 (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. Its sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society.").
[94] *Obergefell*, 576 U.S. at 742 (Alito, J., dissenting).
[95] Burns, Martin & Glueck, *supra* note 84.

in 2012,[96] and then-senator and now Vice President Kamala Harris, who advocated for discrimination protections as Attorney General of California, are allies of the LGBTQ+ community.[97] Democrats also retained their majority in the United States House of Representatives and gained control of the United States Senate.[98]

Representative David Cicilline of Rhode Island introduced the Equality Act in the U.S. House of Representatives in February 2021.[99] The purpose of the proposed legislation is to "to expand as well as clarify, confirm and create greater consistency in the protections and remedies against discrimination on the basis of all covered characteristics and to provide guidance and notice to individuals, organizations, corporations, and agencies regarding their obligations under the law."[100] The legislation acknowledges that gay and transgender individuals have constantly suffered from pervasive discrimination due to their sexual orientation and gender identity in housing, employment, and public accommodations in violation of the Fourteenth Amendment.[101] The legislation also sets forth that this bill is a proper exercise of Congressional power under the Fourteenth Amendment.[102]

Adopting the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County*, the Equality Act would add a parenthetical, "(including sexual orientation and gender identity)," after the term "sex" as a protected category.[103] The Equality Act would amend various sections of the Civil Rights Act of 1964 to prohibit discrimination of a gay or transgender individual in public accommodations, public facilities, public education, federal funding, and employment.[104] The United States Attorney General would be empowered to intervene in cases on behalf of the United States "[w]henever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution."[105]

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[96] Steven Levingston, *Speaking from the heart: When Biden went off script on same-sex marriage*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/nation/2021/01/11/gay-marriage-joe-biden/.
[97] Press Release, Off. of the Att'y Gen. of Cal., Attorney General Kamala D. Harris Urges Federal Courts to Protect Transgender Individuals From Discrimination (July 28, 2016), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-urges-federal-courts-protect-transgender.
[98] Rachael Bade, Juliet Eilperin, Steven Mufson & Amber Phillips, *House Democrats appear poised to keep the House but fall drastically behind expectations*, WASH. POST (Nov. 4, 2021), https://www.washingtonpost.com/politics/house-races/2020/11/02/9823d974-1d64-11eb-b532-05c751cd5dc2_story.html; Alana Wise, *Jon Ossoff Wins Georgia Runoff, Handing Democrats Senate Control*, NPR (Jan. 6, 2021), https://www.npr.org/2021/01/06/952417689/democrat-jon-ossoff-claims-victory-over-david-perdue-in-georgia-runoff.
[99] *See* Equality Act of 2021, H.R. 5, 117th Cong. § 1 (2021). This section will be a discussion of the 2021 version of the Equality Act introduced in the 117th Congress and not the previous unenacted incarnations.
[100] *Id.* § 2(b).
[101] *Id.* § 2(a)(10); *see* U.S. CONST. amend. XIV, § 1, cl. 2-3 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
[102] Equality Act of 2021, H.R. 5, 117th Cong.§ 2(a)(9) (2021); *see* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").
[103] *See, e.g., id.* § 3(a)(1).
[104] *Id.* §§ 3-7.
[105] *Id.* § 8; 42 U.S.C. § 2000h-2 (1964).

The Fair Housing Act, passed in 1968,[106] would be amended to include a prohibition on discriminating against tenants on the based on sexual orientation and gender identity.[107] The Equal Credit Opportunity Act, passed in 1968 as well,[108] would be amended to include a prohibition of sexual orientation and gender identity discrimination by creditors.[109] The Equality Act would prohibit discrimination "from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade [. . .],"[110] based on sexual orientation and gender identity by amending Chapter 121 of Title 28 of the United States Code.[111]

The modern Equality Act had previously been proposed by Representative Cicilline three times before the Equality Act of 2021 was introduced and the decision in *Bostock v. Clayton County* was issued.[112] The first two versions died in committee during the time the Republican Party controlled the House of Representatives. Once the Democratic Party won control during the 2018 midterm election,[113] the Equality Act of 2019 passed with a vote of 236-173.[114] However, it died in committee once it reached the Republican-controlled Senate.[115]

The passage of the Equality Act of 2021 is paramount because it would not only codify the Supreme Court's interpretation in *Bostock* of Title VII, but also provide additional protection for LGBTQ+ individuals in the areas of public accommodations, public facilities, public education, and federal funding.[116] While the rule of *stare decisis* appears to have preserved the decisions in *Lawrence* and *Obergefell,*[117] to the point where it would seem unfathomable that either they or *Bostock* could be overturned, this does not diminish the imperative need to codify LGBTQ+ employment protections into law. Furthermore, the Equality Act of 2021 should be expanded to include codifying protections for transgender servicemembers in the United States Armed Forces. While the Biden Administration has repealed the previous administration's ban on transgender individuals serving openly in the military,[118] and has even indicated that the Department of Veterans Affairs under Secretary Denis McDonough will begin offering gender affirmation surgery to veterans,[119] such executive branch policies could be unilaterally revoked and a new transgender service ban could be implemented by a future transphobic

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[106] 42 U.S.C. § 3602 (1988).
[107] Equality Act of 2021, H.R. 5, 117th Cong. § 10(a)(1) (2021).
[108] 15 U.S.C. § 1691(a)(1) (1991).
[109] Equality Act of 2021, H.R. 5, 117th Cong. § 11(a) (2021) (citing 15 U.S.C. § 1691(a)(1)).
[110] 28 U.S.C. § 1862 (1980).
[111] Equality Act of 2021, H.R. 5, 117th Cong. § 12(a) (2021).
[112] *See* Equality Act of 2015, H.R. 3185, 114th Cong. (2015); Equality Act of 2017, H.R. 2282, 115th Cong. (2017); Equality Act of 2019, H.R. 5, 116th Cong. (2019).
[113] Alexander Burns, *A Week After the Election, Democratic Gains Grow Stronger*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/us/politics/midterm-results-democratic-gains.html.
[114] Catie Edmondson, *House Equality Act Extends Civil Rights Protections to Gay and Transgender People*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/us/politics/equality-act.html.
[115] Equality Act, S. 788, 116th Cong. (2019).
[116] Equality Act of 2021, H.R. 5, 117th Cong. §§ 3-6 (2021).
[117] Justices Samuel Alito and Clarence Thomas however have continued to express their opposition to the ruling in *Obergefell v. Hodges*. Davis v. Ermold, 141 S. Ct. 3, 3-4 (2020) (Thomas, J., concurring).
[118] Enabling All Qualified Americans To Serve Their Country in Uniform, Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 25, 2021).
[119] Annie Karni, *V.A. Plans to Offer Gender Confirmation Surgeries for Transgender Veterans*, N.Y. TIMES (June20, 2021), https://www.nytimes.com/2021/06/20/us/politics/veterans-transgender-surgery.html.

administration.[120] Codifying transgender military service protections into law would not make a future repeal of those protections invincible, but it would, however, make them far unlikely to be removed again in the future, such as the Don't Ask, Don't Tell Repeal Act of 2010 for lesbian, gay, and bisexual servicemembers.[121]

The Equality Act provides federal solutions to many various forms of harsh discrimination faced by LGBTQ+ individuals. For transgender individuals, the Equality Act provides protections for equal bathroom, locker room, and dressing room access.[122] For too long, the ability of a trans person to have equal access to these facilities depended entirely on which municipality or state they were located in. This scenario became reality in North Carolina, when the city of Charlotte passed an amendment to prohibit discrimination to places of public accommodation on the basis of sexual orientation and gender identity.[123] The State of North Carolina soon responded with House Bill 2, which preempted any municipality from enacting protections for transgender individuals to have equal bathroom access.[124] The bill mandated discriminatory access to the bathrooms based on the sex listed on an individual's birth certificate,[125] even though almost no individual carries their birth certificate on their person in daily life. The result of this bill was a severe backlash against North Carolina by corporate America.[126]Assistant Attorney General Vanita Gupta brought suit against North Carolina, alleging that the bathroom law was a violated Title VII and Title IX "on the basis of sex" and the Violence Against Women Act "on the basis of sex and gender identity [. . .]"[127] North Carolina repealed the law the following year.[128] The Equality Act would prevent such incidents from happening again with federal preemption, and also ensure protections that the *Bostock* Court was unwilling to discuss.[129]

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[120] *See* U.S. CONST. art. II, § 2; Military Service by Transgender Individuals Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security, 82 Fed. Reg. 41,319 (Aug. 30, 2017); Military Service by Transgender Individuals Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security, 83 Fed. Reg. 13,367 (Mar. 23, 2018).

[121] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

[122] Equality Act of 2021, H.R. 5, 117th Cong. § 1101(b)(2) (2021).

[123] CHARLOTTE, N.C., CODE § 12-59 (2016) (repealed 2021).

[124] 2016 N.C. Sess. Laws 3 (commonly referred to as "House Bill 2").

[125] N.C. GEN. STAT. § 115C-521.2 (2017), *repealed by* 2017 N.C. Sess. Laws 4.

[126] CARLOS A. BALL, THE QUEERING OF CORPORATE AMERICA 161-62 (2019).

[127] Complaint at 12-13, United States v. North Carolina, 192 F. Supp. 3d 620 (2016) (No. 1:16-cv-425), 2016 WL 2730796; Press Release, U.S. Dep't of Just., Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), https://www.justice.gov/opa/pr/justice-department-files-complaint-against-state-north-carolina-stop-discrimination-against (Assistant Attorney General Vanita Gupta: "Transgender men are men – they live, work and study as men. Transgender women are women – they live, work and study as women. America protects the rights of all people to be who they are, to express their true selves and to live with dignity.").

[128] 2017 N.C. Sess. Laws 4.

[129] Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020) ("Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind."). The Fourth Circuit Court of Appeals subsequently ruled that transgender individuals are a quasi-suspect class and after applying heightened scrutiny, found that denial of equal access to bathrooms for transgender individuals was a violation of Equal Protection Clause, as well as a violation of Title IX. Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 613-16, 618-19 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

The amendments to the Fair Housing Act and Equal Credit Opportunity Act are also of vital importance,[130] though these are scarcely discussed in detail as employment and public facilities and accommodations. Much like employment, equal access to housing and credit are as essential for the LGBTQ+ community as it is for the cisgender and heterosexual population of the United States. Homelessness in the LGBTQ+ community is high due to various factors, such as family disownment, discrimination, and lack of financial resources.[131] Additionally, denial to access of credit prevents members of the LGBTQ+ community from acquiring necessities such as financing a vehicle or a home to provide for their families and themselves. Denial of access to housing and credit dooms people in the LGBTQ+ community to harsh and undue conditions simply because of who they are. Access to housing and credit should be a human right,[132] a truth that has been exacerbated during the COVID-19 pandemic,[133] and the inclusion of protections for the LGBTQ+ community in the Equality Act is a much-needed step towards recognizing that right.

The Equality Act, in its current state, will not prevent any instance of discrimination faced daily by the LGBTQ+ community, but it can provide statutory protections to cure some instances of discrimination, strengthen current civil rights law, and codify the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County*.[134] If the Equality Act is not passed by Congress while the Democratic Party controls both houses and signed into law by the Biden-Harris Administration, the chances of enacting similar legislation could be another generation away.

B. Trans Women and Sports

In the waning days of the 116th Congress and her tenure as an elected official, Representative Tulsi Gabbard of Hawaii decided to end her career in Congress by introducing the "Protect Women's Sports Act of 2020."[135] Gabbard, a failed presidential hopeful for the Democratic nomination during the 2020 presidential primaries, had been criticized for her previous homophobic and transphobic statements and claimed to apologize for them.[136] However, as a favored Democrat among right-wing Republicans, it seems that Gabbard attempted to gain last minute points with the transphobic masses by introducing this legislation. The bill, if passed, would have amended Title IX of the Education Amendments of 1972.[137] by adding the following subsection: "It shall be a violation of subsection (a) for a recipient of Federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose biological sex at birth is male to participate in an athletic program or activity that

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[130] Equality Act of 2021, H.R. 5, 117th Cong. §§ 10(a)(1), 11(a) (2021).
[131] *See* Chris Cameron, HUD Rule Would Dismantle Protections for Homeless Transgender People, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/us/politics/hud-transgender.html.
[132] Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 437 (2015).
[133] *See* Claire Corea, *Tenants' Right: The Law on Paper Versus The Law in Practice*, 47 RUTGERS L. REC. 226, 254 (2020).
[134] Equality Act of 2021, H.R. 5, 117th Cong. § 1 (2021).
[135] Protect Women's Sports Act of 2020, H.R. 8932, 116th Cong. § 1 (2020).
[136] Lisa Lerer & Maggie Astor, *Tulsi Gabbard Drops Out of Presidential Race*, N.Y. TIMES (Mar. 19, 2020), https://www.nytimes.com/2020/03/19/us/politics/tulsi-gabbard-drops-out.html; Liam Stack, *Tulsi Gabbard, Democratic Presidential Candidate, Apologizes for Anti-Gay Past*, N.Y. TIMES (Jan. 19, 2019), https://www.nytimes.com/2019/01/17/us/politics/tulsi-gabbard-gay-lgbtq.html.
[137] 20 U.S.C. § 1681 (2020).

is designated for women or girls."[138] The bill, introduced on December 10, 2020, failed once the 116th Congress ended and Gabbard's term expired.[139]

Gabbard's vision of government-sanctioned transphobia in sports would survive her tenure in Congress when Representative Greg Steube of Florida introduced the "Protection of Women and Girls in Sports Act of 2021" on January 21, 2021,[140] the day after the inauguration of President Joe Biden. The bill would amend Title IX with language similar to Gabbard's bill, where "a person whose sex is male to participate in an athletic program or activity that is designated for women or girls."[141] However, this bill differs from Gabbard's bill with the additional amendment language for Title IX to include, "For purposes of this subsection, sex shall be recognized based solely on a person's reproductive biology and genetics at birth."[142] Similarly to Gabbard's bill, this bill only focuses on prohibiting trans women from participation in women's sports and is silent on the status of trans men in men's sports.[143]

While this bill is likely doomed to fail in the Democrat-controlled House of Representatives, it is likely that this proposed legislation is merely a right-wing stunt to promote state-level, transphobic legislation directed at barring trans women from participation in women's sports. Many states across the nation have had similar bills introduced in their state legislatures.[144] While some governors have signed transgender athlete bans into law, Governor John Bel Edwards of Louisiana vetoed a transgender athlete ban passed by the Louisiana State Legislature, stating that such a ban is "in search of a problem that simply does not exist in Louisiana."[145] The author of the bill, President pro tempore of the Louisiana State Senate Beth Mizell, had previously authored a similar bill in the previous term that failed.[146]

The solution to state legislation banning trans women from women's sports should be new legislation proposed by Congress amending Title IX to protect transgender athletes from discrimination. Like everyone else, trans women deserve to live with dignity and have access to the opportunities afforded to all individuals, such as participation in sports. Unlike the difficulty, mentioned in the previous section, with passing legislation designed to encourage states to amend their birth certificate and name change laws, Title IX is already federal law that can be

[138] H.R. 8932, 116th Cong. § 2 (2020). Subsection (a) of Title IX of the Education Amendments of 1972 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [. . .]". 20 U.S.C. § 1681(a) (2021).
[139] *See id*.
[140] Protection of Women and Girls in Sports Act of 2021, H.R. 426, 117th Cong. § 1 (2021).
[141] *See id*. § 2.
[142] *Id*.
[143] *Id*.
[144] Kevin Blackistone, *Lawmakers targeting trans youth demonize kids to pander to fearful voters*, WASH. POST (Apr. 18, 2021), https://www.washingtonpost.com/sports/2021/04/18/trans-youth-sports-bills-lawmakers/; Gillian R. Brassil, *N.C.A.A. Responds, Tentatively, to Transgender Athlete Bans*, N.Y. TIMES (Apr. 12, 2021), https://www.nytimes.com/2021/04/12/sports/ncaabasketball/ncaa-transgender-athletes.html.
[145] Fairness in Women's Sports Act, S. 156, 2021 Leg., Reg. Sess. (La. 2021); Press Release, Off. of the Governor of La., Gov. Edwards Vetoes Senate Bill 156 from the 2021 Regular Session (June 22, 2021), https://gov.louisiana.gov/index.cfm/newsroom/detail/3230.
[146] Save Women's Sports Act, S. 172, 2020 Leg., Reg. Sess. (La. 2020).

amended.[147] However, the ability to pass such an amendment will require Democratic control of both houses of Congress (to include either repealing or overcoming the filibuster in the Senate),[148] and control of the White House.

In response to these state-level bills, the U.S. Department of Education, under Secretary Miguel Cardona, issued a notice of interpretation that transgender athletes are protected under Title IX.[149] This interpretation follows the Supreme Court in *Bostock*'s interpretation of Title VII, stating "courts rely on interpretations of Title VII to inform interpretations of Title IX."[150] This follows a similar interpretation in a memorandum by Assistant Attorney General Pamela S. Karlan at the Civil Rights Division of the U.S. Department of Justice.[151] While such interpretations by the federal government of Title IX ought to bring relief to transgender advocates for equality in athletics, equality would be better ensured by amending the statutory text of Title IX to reflect the inclusion of gender identity in discrimination on "the basis of sex."[152] Amending Title IX to explicitly state that discrimination on the basis of sex is extended to protect individuals on the basis of gender identity will not prevent some state and local governments from acting in violation of this principle; much like the aftermath of same-sex marriage, some states will maintain anti-transgender athlete statutes in their codified laws, though such statutes would be federally preempted.[153] However, this will provide potential transgender athlete plaintiffs with a statutory cause of action to seek remedies from potential discrimination.[154]

C. Constitutional Amendment for Sexuality and Gender Identity Equality

The Equal Rights Amendment, proposed a century ago, has never been enacted.[155] Advocates of the Equal Rights Amendment have argued for it on the premise of gender equality between men and women.[156] This country, failing to enact the Equal Rights Amendment, must instead focus its efforts on a new amendment. The first section of the proposed Equal Rights Amendment states: "Equality of rights under the law shall not be denied or abridged by the

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[147] 20 U.S.C. § 1681 (2021).
[148] *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 182, 246-47 (1997).
[149] Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) ("Consistent with the Supreme Court's ruling and analysis in Bostock, the Department interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity.").
[150] *Id.*
[151] Memorandum from Principal Deputy Attorney General Pamela S. Karlan, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.
[152] *See id.*
[153] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("It is basic to this constitutional command that all conflicting state provisions be without effect.").
[154] *See* Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009); FED. R. CIV. P. 8(a).
[155] Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 383 (2017).
[156] *Id.*

United States or by any State on account of sex."[157] The meaning of the word "sex" in this proposal must be inclusive of sexual orientation and gender identity. While the Supreme Court recognized discrimination against individuals based on their sexual orientation and gender identity as sex discrimination in *Bostock*, that was a case regarding Title VII of the Civil Rights Act of 1964 and was not a constitutional case.[158] However it is worded or phrased, such an inclusion would lead to more just decisions by courts in legal actions involving discrimination against gay and transgender individuals.

Such an amendment would essentially prohibit any reversal of *Obergefell* and *Bostock*. Members of the LGBTQ+ community will no longer feel the status of their constitutional and civil rights are at stake when there is a change in the composition of the Supreme Court. It would provide a continuity of recognition of constitutional and civil rights. Although the LGBTQ+ community in the United States is only a subsection of the greater population, it does not mean they are entitled only to secondary protection.[159]

However, the main problem facing this new amendment, is the same as the original Equal Rights Amendment. The chances of this amendment becoming part of the Constitution are very small and remote. While the Constitution provides a mechanism for amendments,[160] history has shown it is very difficult to amend the Constitution, as the last amendment ratified was the 27th Amendment in 1992.[161] While the strength of a congressional amendment would be preferred, the more likely solution will be statutory protections enacted by Congress such as the Equality Act of 2021.[162]

D. Changes to Legal Name Change and Birth Certificate Requirements

While the issue of birth certificates and procedures are a matter of state law, the federal government needs to intervene to mandate uniformity across the country. The requirement of transgender people having to publish their name change in newspapers by court orders is unduly invasive and could have major negative ramifications for the person seeking a name change, such as being consequently outed and facing prejudice from transphobes.[163] The costs of such name changes through the courts should also be reduced or outright eliminated as it burdens transgender people in a way that most cisgender people will never experience. While some states such as New Jersey have removed the publication requirement,[164] the cost of a name change in the state is still $250.[165] The determination of whether $250 is a nominal fee or a substantial amount of money is subjective and, for many, it is the latter. A transgender individual having their preferred name recognized, both by society and as their legal name, is a matter of dignity, not vanity.

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[157] Frontiero v. Richardson, 411 U.S. 677, 687 (1973).
[158] Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).
[159] Manuel, *supra* note 72 at 90 ("The Constitution does not provide quotas or minimum numbers needed for a group to have its rights protected and enforced.").
[160] U.S. CONST. art. V.
[161] U.S. CONST. amend. XXVII.
[162] Equality Act of 2021, H.R. 5, 117th Cong. § 1 (2021).
[163] *See, e.g.*, Matter of E.P.L., 891 N.Y.S.2d 619, 620-21 (N.Y. Sup. Ct. 2009).
[164] N.J. CT. R. 4:72-4 (2021).
[165] N.J. STAT. § 22A:2-6 (2021); N.J. CT. R. 1:43 (2021).

More difficult and stressful than court fees and publication requirements for transgender name changes is the process of changing the marker on a birth certificate.[166] While states such as New Jersey and California require only an affidavit,[167] other states unduly require much more. For example, Louisiana requires a transgender resident to have "sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual."[168] Georgia goes even further by not only requiring a surgical procedure, but also requiring a name change before the gender marker on a Georgia birth certificate will be changed.[169]

This gross disparity in gender marker laws across this country cannot be sustained, like the disparity in same-sex marriage recognition prior to the *Obergefell* decision. While some states have embraced their transgender residents and have enacted laws that drive towards obtaining equality with their cisgender counterparts, other states have made it more unduly burdensome with the requirement of surgical procedures. This implies that every transgender individual in those states needs surgery to become the gender they identify with. This is untrue because gender identity is a separate construct from biological sex,[170] and there are many transgender individuals who face difficulty with access to surgeries.[171] The objective of many states is to simply make the process as burdensome as possible by establishing a hurdle that requires procedures that are expensive and unobtainable for some. For example, consider a couple that are expecting a child. This couple then travels from New York to California. During the drive across the country, the partner carrying the child gives birth to the child in Texas before proceeding on to California. That child will be issued a Texas birth certificate, which is governed by the laws of Texas and will require a Texas court to amend. The child's only connection to the state is that they were born there, but for the rest of their life, the laws and people of Texas, a state they do not reside in, will govern their ability to amend their birth certificate.[172]

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[166] *See, e.g.*, Somers v. Superior Court, 172 Cal. App. 4th 1407, 1410-11 (Cal. Ct. App. 2009). A California-born trans woman living in Kansas applied to have her California birth certificate amended to list her sex as female, but her application was denied by the Superior Court of San Francisco City and County because she was a resident of Kansas and not California. *Id*. On appeal, the California Court of Appeal reversed the Superior Court's decision, stating "the requirement that a petitioner [must] file the petition in the county of his or her residence unconstitutionally denies California-born transgender individuals residing outside California the same rights that California-born transgender individuals residing in California have under [the statute]." *Id*. at 1416 (citing CAL. HEALTH & SAFETY CODE § 103425 (1995) (repealed 2019)).

[167] N.J. STAT. ANN. § 26:8-40.12 (2021); CAL. HEALTH & SAFETY CODE § 103426 (Deering 2021) (effective January 1, 2022). The City of New York also permits such an affidavit and allows for an X marker, to "[signify] a sex designation that is not exclusively female nor exclusively male." N.Y.C., N.Y., 24 RULES § 207.05 (2021).

[168] LA. REV. STAT. ANN. § 40:62(A) (2021). The statute further states that "The court shall require such proof as it deems necessary to be convinced that the petitioner was properly diagnosed as a transsexual or pseudo-hermaphrodite, that sex reassignment or corrective surgery has been properly performed upon the petitioner, and that as a result of such surgery and subsequent medical treatment the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner." *Id*. § 40:62(C) (2021).

[169] GA. CODE ANN. § 31-10-23(e) (2021).

[170] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995).

[171] *See, e.g.*, Davidson v. Aetna Life & Casualty Ins. Co., 420 N.Y.S.2d 450, 452-53 (N.Y. Sup. Ct. 1979).

[172] TEX. HEALTH & SAFETY CODE ANN. § 192.003, 192.011 (2021).

The Tenth Amendment states that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[173] This would seem to indicate that the states have the power to pass legislation on name change and birth certificate procedures as they see fit, without uniformity.[174] However, the federal government is not totally powerless to encourage the implementation of such uniformity. The Supreme Court's 1987 decision in *South Dakota v. Dole* provides the basis of precedent to allow the federal government to pressure states to change their laws regarding name and gender marker changes for transgender individuals.[175] Congress passed a law in 1984 geared to promote states to raise their drinking ages to 21 years old, which permitted the federal government to withhold a percentage of interstate highway funds from states with legal drinking ages lower than 21 years old.[176] The Court found this to be a lawful use of Congress's spending power.[177] The majority further reasoned that there are "some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'"[178] however, coercion will not be found if the consequence of a state not taking action to the preference of the federal government only results in a "small percentage" of funds being withheld.[179] The federal government's appropriate use of this mechanism would require the funds to be related to some purpose tied to the encouraged state action.[180]

Similar to how Congress lacks the power to outright set the drinking limit for every state, they cannot mandate the same requirements for birth certificates and name changes, as they are issues of state law. However, Congress may encourage the states to change their laws by passing legislation to withhold federal funds from projects that the states draw federal funds for. To withstand a judicial challenge, however, these federal funds must be related to some use with an appropriate nexus to name and gender marker changes.[181] While this is not the most ideal solution to this issue, it is, unfortunately, the most practical, and as seen in many instances, money encourages action.[182] However, this approach will likely never occur.

The case of birth certificates and gender markers remains a state issue as birth certificates are issued by the states.[183] The move to a federal birth certificate program would remove the ability of states to enact unjust laws,[184] like some have done by potentially providing a uniform

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[173] U.S. CONST. amend. X.
[174] *See id.*
[175] South Dakota v. Dole, 483 U.S. 203 (1987).
[176] *Id*. at 205.
[177] *See id*. at 211-12; U.S. CONST. art. 1, § 8, cl. 1.
[178] *Dole*, 483 U.S.at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
[179] *Id.*
[180] *See id.* at 207-08 (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
[181] *See id*. at 211-12.
[182] BALL, *supra* note 126 at 161-62.
[183] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 102100 (Deering 2021) (effective January 1, 2022); LA. REV. STAT. ANN. §§ 40:34.1-34.9 (2021); N.J. STAT. ANN. § 26:8-28 (2021).
[184] *See, e.g.*, MICH. COMP. LAWS § 333.2831(c) (2021) ("A request that a new certificate be established to show a sex designation other than that designated at birth. The request shall be accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed."). Missouri further requires an individual also legally change their name in addition to a surgical procedure to amend the gender marker on their birth certificate. MO. REV. STAT. § 193.215-9 (2021) ("Upon receipt of a certified copy of an order of a court of competent jurisdiction

federal law for changing the gender marker on the birth certificate without the requirement of a surgical procedure.[185] The requirement of a trans individual to undergo a surgical procedure to amend the gender marker on their birth certificate to align with their gender identity is tantamount to compulsory sterilization, echoing the sentiment of *Buck v. Bell*,[186] where the Supreme Court stated "[i]t is better for all the world, if [. . .] society can prevent those who are manifestly unfit from continuing their kind."[187] A federal birth certificate does align with the ideals of the Citizenship Clause of the Fourteenth Amendment, establishing American citizenship for all born on American soil.[188] However, the prospects of such an idea coming to fruition seem as unlikely as a federal law reducing federal funds towards discriminatory states.

III. CONCLUSION

LGBTQ+ Americans have had a long and dark history of discrimination and prejudice levied against them. From the denial of the right to marry, denial of the right to intimacy with their loved ones, and even the denial of the ability to earn a living while being open and true to themselves; this country has come a long way in recognizing the rights that members of the LGBTQ+ community have always been entitled to but were denied because of both implicit and explicit homophobic and transphobic biases.

The Equality Act will go a long way by codifying the holding in *Bostock* and expanding it to the areas of public accommodations, public facilities, education, and more. It has been over half a decade since the Court's ruling in *Obergefell*, and, unfortunately, the LGBTQ+ community still find themselves on uneven footing from cisgender and heterosexual Americans. The Supreme Court, which brought together an unlikely but great majority in *Bostock* delivered a unanimous decision in *Fulton v. City of Philadelphia*, where the Court reasoned that Philadelphia violated the Free Exercise Clause of the First Amendment by refusing to contract with Catholic Social Services over the latter's refusal to "to certify same-sex couples as foster parents."[189] The Equality Act does not go far enough, however, and Congress must recognize this.

Donald Trump may be out of the White House and Antonin Scalia may not be sitting on the Supreme Court anymore, but more like them will follow and, in the case of Scalia, have already followed.[190] Their ideas, their policies, and their interpretations of the law are not lost. They will be carried on by likeminded people, some of whom will find themselves elected to Congress or nominated to serve as a judge in a state or federal court. Those ideas will not leave.

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indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended.").

[185] The model uniform law for amending and issuance of a new birth certificate with the correct gender marker would ideally be based on the progressive state laws enacted in New Jersey and California that require only an affidavit and not proof of surgery. N.J. STAT. ANN. § 26:8-40.12 (2021); CAL. HEALTH & SAFETY CODE § 103426 (Deering 2021) (effective January 1, 2022).

[186] *See* Jon Ostrowsky, *Birth Certificate Gender Corrections: The Recurring Animus of Compulsory Sterilization Targeting Transgender Individuals*, 27 UCLA WOMEN'S L.J. 273, 275-76 (2020).

[187] Buck v. Bell, 274 U.S. 200, 207 (1927).

[188] U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[189] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

[190] *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1943 (2017) ("Nothing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly.").

There are still many uncertainties in judicial adjudication of issues involving LGBTQ+ rights, as court majorities become harder to predict following the *Masterpiece Cakeshop*, *Bostock*, and *Fulton* decisions.[191] There are individuals and organizations who continue to relentlessly challenge statutes and policies that recognize LGBTQ+ rights and equality.[192] There is also the matter of the level of scrutiny that the Supreme Court will apply in the future when analyzing the constitutionality of laws discriminating against the transgender community. Will the Court apply rational basis review like in *Romer*,[193] or decline to expressly state which level of review was applied as it did in *Obergefell*?[194] The Court in *Bostock v. Clayton County* interpreted sex discrimination under Title VII to include discrimination on the basis of gender identity and sexual orientation.[195] Will the Court also interpret discrimination on the basis of gender identity and sexual orientation as sex discrimination in a constitutional under the Fourteenth Amendment and apply intermediate scrutiny?[196] Will the Court recognize members of the LGBTQ+ community as "discrete and insular minorities" and more strictly scrutinize laws and actions enacted against?[197] These questions present much uncertainty for the LGBTQ+ community. Congress must act while those who advocate for LGBTQ+ equality are still in power and in a position to implement change. The future is always in question, and Trump may not be the last occupant of the White House to unilaterally upend decades of civil rights activism.

[191] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018); Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

[192] These individuals and organizations suffer no real legal infringement from the recognition of LGBTQ+ equality, but instead pursue these legal actions as "taxpayers" solely for the purpose of targeting members of the LGBTQ+ community. *See, e.g.*, Pidgeon v. Turner, 538 S.W.3d 73, 78, 85 (Tex. 2017); Taking Offense v. State of California, 66 Cal. App. 5th 696, 702-03 (Cal. Ct. App. 2021), *cert granted*, 2021 WL 5238560 (Cal. 2021).

[193] Romer v. Evans, 517 U.S. 620, 632 (1996).

[194] *See* Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 21 (2016).

[195] *Bostock*, 140 S. Ct. at 1737 ("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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

[196] *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982). The Southern District of New York has applied intermediate scrutiny where transgender individuals were discriminated against on the basis of their gender identity, reasoning that they are a quasi-suspect class. Adkins v. City of New York, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2013); *see also* Manuel, *supra* note 72 at 89.

[197] United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) ("Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [. . .] or national, [. . .] or racial minorities, [. . .] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 148 (1980).