GENDER IS FAKE: THE ONGOING NEED FOR AN EQUAL RIGHTS AMENDMENT

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In 1979, the United States Senate passed the Equal Rights Amendment (ERA) and sent it to the states for ratification with a seven-year deadline.[1] Decades later, on January 27th 2020, Virginia became the 38th and final state needed to ratify the Constitutional amendment, but perhaps over 40 years too late.[2] Now, in 2022, proponents of the amendment contend that, per the language of the ERA, it is due to take effect.[3] Consequently, litigation concerning the law's legitimacy is expected to ramp up.[4]

This article will argue that the need for the ERA is more pressing now than ever given modern conceptions of gender as a social construct. The article will begin with a brief history of gender discrimination cases in the context of the Equal Protection Clause, then discuss queer theories around the meaning of gender, and finally, provide recommendations moving forward.

I. Background: Categories as the Foundation of Equal Protection Law

Historically, as there is no such explicit language in the Constitution, legal protections barring gender discrimination have derived from the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause reads in part: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."[5] Today, this provision is largely interpreted through the lens of varying levels of scrutiny based on the category of people a given piece of legislation targets.

The tiered scrutiny approach that forms the basis of Equal Protection jurisprudence originated from a footnote to the Court's 1938 opinion in *United States v. Carolene Products*. In *Carolene Products*, Justice Stone wrote that the presumption of constitutionality should be set aside when legislation is directed at "discrete and insular minorities" that are victims of prejudice.[6] This footnote set the groundwork for higher standards of review, namely, strict scrutiny and intermediate scrutiny.

It was not until 1971 in *Reed v. Reed* that the Supreme Court first ruled that the Equal Protection Clause could be used to prohibit differential treatment on the

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[1] Chris Marr, *Equal Rights Amendment Litigation Likely to Ramp Up in New Year*, BLOOMBERG L. (Dec. 28, 2021), https://news.bloomberglaw.com/daily-labor-report/equal-rights-amendment-litigation-likely-to-ramp-up-in-new-year.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] U.S. Const. amend. XIV, § 1.

[6] United States v. Carolene Products Co., 304 U.S. 144 (1938).

basis of sex.[7] Then in the landmark decision of *Craig v. Boren*, decided in 1976, the Court applied the standard of intermediate scrutiny to gender categories for the first time.[8] In this case, the Court struck down an Oklahoma law that allowed eighteen-year-old year girls to purchase beer, but required boys to be twenty-one.[9] Later in *Mississippi University for Women v. Hogan*, Justice O'Connor, writing for the majority, overturned a state law allowing only women to enroll at the state nursing college.[10] The opinion established the definition for intermediate scrutiny in gender discrimination cases, stating that when a state adopts a sex-based classification, the state has a burden of showing an "exceedingly persuasive justification for the classification."[11]

Subsequently, litigants have moved to expand suspect class analysis and heightened scrutiny to the gay and trans communities. In *Romer v. Evans*, the Court initially declined to recognize sexual orientation as a suspect class.[12] But later in *Obergefell v. Hodges*, the Court relied on the Equal Protection and Due Process clauses to hold that same sex couples are entitled to the same state benefits that opposite-sex couples enjoy.[13] Here, Justice Kennedy's analysis seemed to consider the queer community as a class of people subject to equal protection.[14]

Most recently, in the 2017 case, *Evancho v. Pine-Richland School District*, the District Court of the Western District of Pennsylvania struck down a local school district's restroom policy that required students to use the restroom that matched the sex they were assigned at birth.[15] In overturning the law, the district court held that trans people constituted a suspect class because:

> "The record before the court reflects that transgender people as a class have historically been subject to discrimination or differentiation; that they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; that as a class they exhibit immutable or

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[7] 404 U.S. 71 (1971).
[8] 429 U.S. 190 (1976).
[9] *Id.*
[10] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). In later cases, however, the Court has not employed O'Connor's "exceedingly persuasive" language, instead opting for a more watered down version of intermediate scrutiny. *See* Nguyen v. INS, 553 U.S. 53 (2001)
[11] *Id.*
[12] Romer v. Evans, 517 U.S. 620 (1996).
[13] Obergefell v. Hodges, 576 U.S. 644, 672-75 (2015).
[14] *Id*. at 675 ("It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: Same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them").
[15] Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017).

distinguishing characteristics that define them as a discrete group; and that as a class, they are a minority with little political power."[16]

This case is notable because it considers trans individuals as members of a suspect class of their own, as opposed to conceptualizing trans discrimination as within the gender discrimination umbrella. The apparent critique to this choice is that traditional sex discrimination claims have a robust set of precedent, making them easy and practical to apply. But outside the practical implications, creating new suspect classes affirms a categorical and fixed conception of gender identities. This class-based approach understands trans identities as a distinct category, rather than as a form of subverting gender norms and stereotypes. Instead, the *Evancho* court could have reached this same decision with a traditional sex discrimination framework simply by using a more expansive definition of sex that accounts for gender nonconformities and a variety of gender expressions and identities.

II. Evolving Conceptions of Gender

Since the Supreme Court's 1971 decision in *Reed*, societal conceptions of gender have dramatically evolved. The framework used in *Reed* and its progeny do not reflect our current understandings of gender. Legal doctrines built on the framework of gender as a fixed and immutable characteristic are doomed to be inadequate in modern times.

Beginning in the 1990s, third wave feminists ignited the discourse about gender and sex as socially constructed phenomena.[17] Renowned philosopher Judith Butler contended that gender is entirely performative and does not stem from any stable identity.[18] Butler argued that gender must be understood, not as an inherent part of one's core self, but "as the mundane way in which bodily gestures, movements, and styles of various kinds constitute of an abiding gendered self."[19] Taking it another step further, even sex categories are social constructs. For example, the binary system used as the basis of most legal documents does not account for intersex people who experts estimate comprise up to 1.7% of the world's population.[20]

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[16] *Id.* at 288.
[17] *See* Kroløkke, Charlotte & Anne Scott Sørenson*, Three Waves of Feminism: From Suffragettes to Grrls, Contemporary Gender Communication Theories & Analyses: From Silence to Performance,* SAGE PUBL'N (2005*),* at 18, https://webpages.scu.edu/ftp/cmurphy/courses/sctr165/resources/krolokke-and-sorenson_three-waves-of-feminism.pdf.
[18] JUDITH BUTLER, GENDER TROUBLE: FEMINISM & THE SUBVERSION OF IDENTITY (Routledge 1990).
[19] *Id.*
[20] Intersex People, U.N. HUM. RTS. OFF. OF THE HIGH COMM'N (2019), https://www.ohchr.org/EN/Issues/LGBTI/Pages/IntersexPeople.aspx.

Consequently, the sex organs a person is born with are not indicative of any reliable or inherent truths about that individual.[21] However, one's body does determine whether one is socialized as a boy or as a girl, and whether a person is raised within the context of masculine or feminine gender roles.[22] There are certain ways men and women are each expected to look, to dress, to act, to date, and to interact with the world at large. These series of performances define their gender. The confines of these roles have loosened over time – women now comprise nearly half of the American workforce and men have assumed more childcare responsibilities;[23] women wear pants and men wear makeup.[24] But the traditionally rigid categories remain the basis of the legal system.

Applying Butler's logic, understanding gender as a construct also serves to dismantle the traditional notion of sexual orientations as identities that can be categorized. If gender identities do not exist as preexisting truths, then neither do sexuality labels as we understand them. Feminist theorist Eve Kosofsky Sedgwick, considered one of the founders of queer studies, famously wrote that the standard homo-hetero binary does not accurately capture human sexuality.[25] Rather, queerness refers to the "open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or can't be made) to signify monolithically."[26] Sexuality is fluid and exists on a spectrum; it is not a series of fixed categories that can coherently translate into suspect classes that garner legal protection.[27] Instead, discrimination based on the fictional concept of gender categories must be outlawed altogether.

III. Moving Forward: *Bostock* as an Example

Bostock v. Clayton County demonstrates how explicit legal protections against sex discrimination effectively protect vulnerable populations without relying on regressive understandings of gender. In *Bostock*, the Supreme Court held that Title VII protects gay and transgender individuals from workplace discrimination.[28] Title VII prohibits workplace discrimination against a job applicant or employee "because of such individual's sex."[29]

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[21] *See* Butler, *supra* note 18, at 8.
[22] *Id.*
[23] *See* U.S. Bureau of Labor Statistics, Women in the Labor Force: A Databook (April 2021), https://www.bls.gov/opub/reports/womens-databook/2020/home.htm.
[24] *See* Lidia Jean Kott, *For These Millennials, Gender Norms Have Gone Out of Style*, NPR (Nov. 30, 2014), ttps://www.npr.org/2014/11/30/363345372/for-these-millennials-gender-norms-have-gone-out-of-style.
[25] EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (University of California Press 1993).
[26] EVE KOSOFSKY SEDGWICK, TENDENCIES (Duke University Press 1990).
[27] *See id.*
[28] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
[29] 42 U.S.C.§ 2000e-2(a).

Writing for the majority, Justice Neil Gorsuch takes a textualist approach in reasoning that "sex," as used in Title VII, must encapsulate trans and gay identities.[30] The Court stated that two examples illustrate how gender causes workplace discrimination against homosexual or transgender employees. First, where an employer with a gay male and a straight female employee fires the gay male solely because of his sexual preferences, he is making a gender-based decision.[31] This is because the employer condones sexual attraction to men in female employees, but not male employees.[32] Second, an employer who fires a person identified at birth as male who now identifies as female, while retaining an employee who always identified as female, is again discriminating based on gender because the only difference between the two employees is the gender assigned at birth.[33] In sum, firing an employee for being gay or trans violates Title VII.[34]

Importantly, this analysis focuses on the individual as opposed to gay or trans people as a class. Because Title VII explicitly bars discrimination on the basis of sex, the legal analysis does not need to rely on categorizations or suspect classes. Instead, barring statutory exceptions, the courts can strike down any law that treats employees differently based on the sex they were assigned at birth. If the Equal Rights Amendment were passed, these same protections could be applied outside of the employment context, without needing to face the uphill battle that intermediate scrutiny and suspect-class analysis provides. Employing Gorsuch's textualist reading, statutes discriminating on the basis of sex – whether that be traditional sex discrimination, sex stereotyping, or discrimination against queer or trans identities – would thus be presumed unconstitutional.

The late Justice Scalia wrote, "[c]ertainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."[35] The passage of the Equal Rights Amendment would undeniably refute that.[36] Courts would be obligated to apply strict scrutiny to all sex-based classifications, ensuring that such measures could only stand if they were the least restrictive means of achieving a compelling state interest.[37] Given contemporary understandings of gender as a construct, this high standard is the most appropriate analysis to prevent the injustices perpetuated by archaic gender distinctions in the law.

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[30] Bostock, 140 S. Ct. at 1739.
[31] Bostock, 140 S. Ct. at 1741.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS NEWS (Jan. 4, 2011), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/
[36] Linda Coberly, *What is the Equal Rights Amendment?*, WINSTON & STRAWN LLP, https://www.winston.com/en/legal-glossary/equal-rights-amendment.html.
[37] *Id.*