

Memorandum

From: ERA Project, Columbia Law School

Date: July 26, 2022

RE: Equal Rights Amendment and LGBTQ Rights, including Marriage Equality

Below, we provide an analysis of the potential for the Equal Rights Amendment (ERA) to strengthen protections for LGBTQ rights, including marriage equality. Currently pending before the U.S. Senate is a resolution that would lift any congressionally imposed deadline for final ratification of the ERA. Lifting that deadline would remove the last legal impediment to adding the ERA to the Constitution, which would then constitutionalize, and thus secure, rights currently enjoyed by LGBTQ people that are vulnerable to reversal by the Supreme Court in a future case.

The ERA, if finally ratified as the 28th amendment, would add specific sex equality protections to U.S. Constitution, “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” A majority of the current Supreme Court has adopted an interpretive methodology that places particular importance on specific textual sources for rights in the Constitution. The words “sex” and “sex equality” do not appear in the text of the current Constitution. Amending the Constitution to include specific sex equality protections would both clarify and strengthen existing constitutional prohibitions against sex discrimination, but would also include protections against sexual orientation and gender identity discrimination. The Supreme Court found in *Bostock v. Clayton County* (2020) that federal law prohibiting sex discrimination in employment necessarily includes sexual orientation and gender identity discrimination. 140 S. Ct. 1731 (2020). Thus, the ERA should be read to prohibit sexual orientation and gender identity discrimination.

The constitutional ground under which LGBTQ rights have rested has recently been drawn into question by the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*. 597 U. S. ____ (2022). In *Dobbs*, the Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey* by holding that the U.S. Constitution generally—and the substantive due process and equal protection doctrines specifically—provides no constitutional anchor for a right to abortion. To the extent that the Supreme Court has recognized constitutional protections for LGBTQ communities, they too rested on the Court’s reading of substantive due process. The weakening, if not elimination, of abortion rights under the Constitution thus has the potential to undermine previous Supreme Court decisions finding that states may not criminalize same-sex sexual conduct (*Lawrence v. Texas*, 539 U.S. 558 (2003)), and that states may not deny the right

to marry same-sex couples (*Obergefell v. Hodges*, 135 S. Ct. 1039 (2015)). Justice Clarence Thomas, in his concurrence in the *Dobbs* case, explicitly urged the Court to revisit these cases, specifically: “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous’”. *Dobbs*, 597 U. S. ____ (2022) (Thomas, J., concurring) (slip op., at 3).

The ERA and Marriage Equality Rights – Constitutionalizing *Obergefell v. Hodges*

One of the alarms that was set off by the *Dobbs* decision related to the vulnerability of marriage equality rights, secured by the Supreme Court in *Obergefell v. Hodges* in 2015. Thirty-five states retain laws on their books limiting marriage to a man and a woman, and these laws would spring back into validity immediately upon the Court’s reversal of *Obergefell*.

On July 19th, 2022, the House passed the *Respect for Marriage Act*, a measure that would repeal the *Defense of Marriage Act (DOMA)*, 28 U.S.C. Sec. 1738C, and prohibit any state from not fully recognizing, on the basis of the sex, race, ethnicity, or national origin of the married individuals, any marriage legally entered into in another state, and requires the federal government to recognize any marriage legally entered into in any state. H.R.8404, 117th Congress (2021-2022). (The Supreme Court found *DOMA* unconstitutional in 2013 in *U.S. v. Windsor*, but Congress never repealed it. 133 S. Ct. 786 (2012).) The *Respect for Marriage Act*, while repealing *DOMA*, falls short of “codifying *Obergefell*” insofar as it does not prohibit states from denying marriage rights to same-sex couples, as does the Supreme Court’s *Obergefell* decision.¹

Final ratification of the ERA would mean that the Constitution would explicitly prohibit states from discriminating on the basis of sex, sexual orientation, or gender identity in granting marriage licenses, thus creating a new explicit constitutional equality right that would anchor the right recognized in *Obergefell*, and immunize marriage equality rights from reversal by the Supreme Court.

¹ While the *Respect for Marriage Act* would not fully codify *Obergefell*, it is important to note that the bill reaches and prohibits state action beyond the scope of *Obergefell*. The bill bars states from refusing to recognize valid marriages from other states on the basis of the sex, race, ethnicity, or national origin of the married individuals, and as such would ban states from prohibiting interracial marriages (as did the Supreme Court in *Loving v. Virginia*) and would ban national origin discrimination in the issuing of marriage licenses. From the mid-19th century until the Court’s decision in *Loving*, many states prohibited white people from marrying people of another race, including specific bans on marrying people who were Black, Chinese, Japanese, Filipino, Native Hawaiian, Native American or South Asian. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, 20, 78–93, 194–200, 235–40 (2009); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. Davis L. Rev. 795, 797–98 (2000); Rose Cuizon Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. Law Rev. 1361 (2011).

The ERA and the Criminalization of Sexual Conduct – Constitutionalizing *Lawrence v. Texas*

Similarly, the ERA, as the 28th amendment, would prohibit states from criminalizing sexual activity between persons of the same-sex when it does not criminalize similar sexual behavior between people of different sexes. This was the position taken by Justice Sandra Day O’Connor in her concurrence in *Lawrence v. Texas*: “The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction ... A law branding one class of persons as criminal based solely on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.” 539 U.S. 558, 581, 585 (2003) (O’Connor, J., concurring).

Over a dozen states still have laws on their books criminalizing “sodomy”. These laws are not enforceable so long as *Lawrence* is good law. But state officials in some states have recently indicated that they would return to enforcing those laws should the Court overrule *Lawrence*.²

The ERA would explicitly build into the Constitution Justice O’Connor’s approach to laws criminalizing sexual activity, which, like the law in Texas, only criminalize same-sex sexual activity. Thus, the ERA would put a constitutional firewall between the right secured in *Lawrence* and a Supreme Court majority that sought to reverse that decision, building on *Dobbs*.

Conclusion

Passage of S.J. Res. 1, the resolution lifting any deadline for ratification of the Equal Rights Amendment, and thus finalizing the ratification of the ERA, would add explicit sex equality protections to the U.S. Constitution as the 28th amendment. This amendment would have broad reach in prohibiting sex discrimination, including sexual orientation and gender identity discrimination. The legal significance of the 28th amendment would include, among many other things, a new constitutional grounding for the Supreme Court’s LGBTQ equality cases, and would insulate the rights secured in cases such as *Lawrence v. Texas*, *U.S. v. Windsor*, and *Obergefell v. Hodges* from being overruled by the Supreme Court.

² Wells Dunbar, *Ken Paxton Says State Could Prosecute Sodomy Laws Should Supreme Court, Texas Law Allow It*, Texas Standard, July 1, 2022, <https://www.texasstandard.org/stories/ken-paxton-says-state-could-prosecute-sodomy-laws-should-supreme-court-texas-law-allow-it/>.