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The Civil Rights Act of 1964: Beyond Race to Employment Discrimination Based on Sex: The "Three Letter Word" That Has Continued to *Vex* Society and The United States Supreme Court

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Abstract
This article is a comprehensive review of the Civil Rights Act of 1964, more specifically, Title VII, which outlawed discrimination based upon, "race, color, creed, national origin, and sex." The article traces the legislative genesis of the Act, the function of the Equal Employment Opportunity Commission, and discusses some of the major cases decided by the United States Supreme Court and other federal courts that have defined both the reaches and limits of the legislation which initially focused on prohibiting discrimination based on "race." The article then focuses on discrimination based on "sex" and highlights the role the United States Supreme Court has played in fleshing out the parameters of employment discrimination from the 1960s through the historic decision reached by the Court in June of 2020 in *Bostock v. Clayton County, Georgia,* relating to sexual orientation, transgender status, and sex stereotyping.

Keywords: Discrimination Based on Sex, Civil Right Act of 1964, Filibuster, Cloture, Equal Employment Opportunity Commission

1. Introduction

In *Bostock v. Clayton County, Georgia* (2020), a historic case decided by the United States Supreme Court on Monday, June 15, 2020, the Supreme Court in a 6-3 decision ruled that Title VII of the Civil Rights Act of 1964 protects gay, lesbian, and transgender people from discrimination in employment "on the basis of sex," one of the protected categories under the Act (Sherman, 2020; Turner, 2020).

The United States Supreme Court had been asked to decide two discreet questions in *Bostock* and two companion cases, *Altitude Express Incorporated v. Zarda* and *Harris v. EEOC*:

> *"Does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of … sex," encompass discrimination based on an individual's sexual orientation?"*
>
> *"Does Title VII of the Civil Rights Act of 1964 prohibit discrimination against transgender employee based on (1) their status as transgender or (2) sex stereotyping?"*

Justice Neil Gorsuch, a Trump appointee to the Court, authored the majority opinion and answered these two questions in the affirmative. Justice Gorsuch wrote for the Court: "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."

2. The Origin of the Debate

The origin of the dispute which the Supreme Court at least partially resolved can be traced to a historic piece of legislation from the 1960's: The Civil Rights Act of 1964—most especially Title VII—because of its inclusion of the term "sex" in its enumerated categories.

Geiling (2014) noted that "Congress had considered, and failed to pass, a civil rights bill every year from 1945 to 1957. In 1957, Congress finally managed to pass a limited Civil Rights Act, which it added to in 1960, but these bills offered black Americans only modest gains."

The Civil Rights Act of 1964 was designed to outlaw the most severe forms of discrimination against African Americans, including all forms of segregation. In addition, the Act attacked the unequal application of voter registration requirements and all forms of racial segregation in schools, in the workplace, and by facilities that offered services to the general public.

Congress has enforced the various provisions of the Act (called Titles) under provisions of the United States Constitution, primarily Congress' power to regulate interstate commerce under Article One, the guarantee to all citizens of the equal protection of the law under the Fourteenth Amendment (Dunning, 1901), and the protection of voting rights for all citizens under the Fifteenth Amendment (Christopher, 1965).

The Civil Rights Act of 1964 was previewed by President John F. Kennedy during a radio and television speech broadcast to the American people on June 11, 1963, where the President demanded that Congress enact legislation which would guarantee all Americans the right to be served in public facilities (Aiken, Salmon, & Hanges, 2013).

In commenting about two black students who had recently enrolled in the University of Alabama, but who needed the presence of Alabama National Guardsmen in order to safely attend classes, President Kennedy said:

> "It ought to be possible…for every American to enjoy the privileges of being American without regard to his race or his color. In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated. …. Next week I shall ask the Congress of the United States to act" to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law."

[Registering two black students at the University of Alabama]

The bill which was introduced had its legislative origins in the Civil Rights Act of 1875. Finkleman (2018, p. 366) notes that "The Civil Rights Act of 1875 was a fairly straightforward public accommodations act, prohibiting discrimination in restaurants, inns, theaters, and on public transportation." The 1875 Act also sought to prevent being excluded from jury duty on the basis of race.

The 1875 law was enacted by the 43rd United States Congress and signed into law by President Ulysses S. Grant on March 1, 1875. However, in 1883, the United States Supreme Court ruled in the *Civil Rights Cases* (1883) that sections of the act were unconstitutional in an 8-1 decision. The Supreme Court held the Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by the state and local government (implicating "state action" or other actions undertaken "under color of law" (Brinster, 2020)), but it does *not* confer on the federal government the power to prohibit discrimination by private individuals and organizations. The Court also held that the Thirteenth Amendment was meant to eliminate "the badge of slavery," but not to prohibit racial discrimination in public accommodations (see McAward, 2012).

Justice John Marshall Harlan (the only Southerner on the Court) provided the lone dissent (see Liu, 2008). Harlan wrote: "These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person" (*Civil Rights Cases*, 1883, p. 41).

President Kennedy's vision for a new civil right bill included provisions to ban all forms of discrimination in public accommodations while enabling the United States Attorney General to join in lawsuits against state governments which operated or encouraged the formation of segregated schools. President Kennedy was convinced that that Supreme Court would change the views expressed in the *Civil Rights Cases* and uphold new civil rights legislation based on a more modern view of congressional authority under the Constitution.

On June 19, 1963, Congressman Emmanuel Celler, a New York Democrat and Chair of the House Judiciary Committee, introduced H.R. 7152—what would become the Civil Rights Act of 1964—in the House of Representatives.

2.1. The Legislative and Political Process

The history of the enactment of the Civil Rights Act of 1964 provides a unique view into the times and politics of the era. President Kennedy understood that he would be required to build a bipartisan coalition in the House and Senate in order to pass civil rights legislation, realizing that many members of his own party (most especially from the South) would not support the passage of a civil rights bill under any circumstances. President Kennedy sought allies in the Congress. One such ally was William McCulloch, a conservative Republican Congressman from Ohio, but who was an early supporter of the bill and a long-time supporter of civil rights. The August 1963 March on Washington proved to be a pivotal moment for the civil rights movement. The now iconic *"I Have a Dream"* speech of Dr. Martin Luther King, Jr. at the Lincoln Memorial seemed to galvanize public opinion in support of the legislation (Godwin, Houghton, Neck, & Mohan, 2011).

As Chairman of the drafting committee in the House of Representatives, Congressman Celler assured that the bill would receive a favorable hearing in the Judiciary Committee. There was one unexpected complication or rather "twist." More liberal Democratic and Republican members (including a West Virginia Congressman, Arch Moore, whose daughter serves today as a member of the United States Senate) saw this as an unique opportunity to affect real change and crafted a bill which included calling for a fair employment section that would ban discrimination by *private employers*, as well as a section that expanded the power of the Attorney General to intervene in Southern civil rights cases. "Fearing that the bill would become impossible to pass (Senators Mansfield, the Democratic Majority Leader, and Senator Everett Dirksen, the Republican leader, did not favor provisions relating to public accommodations) Kennedy himself had to intervene, creating a compromise that kept the fair employment section but limited the power of the Justice Department" (Geiling, 2014).

The bill passed out of the House Judiciary Committee to the House Rules Committee on November 20, 1963. The Rules Committee was chaired by an avowed segregationist, Congressman Howard W. Smith of Virginia (Dierenfield, 1981). On November 22, 1963, however, President Kennedy was assassinated in Dallas, Texas, and the future of the Civil Rights Act seemed to be in doubt.

President Lyndon Johnson decided to take up the mantle of the assassinated President on the issue of civil rights. President Johnson addressed a joint session of Congress on November 27, 1963, five days after President Kennedy's death, and stated in somber terms: "We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter, and to write it in the books of law."

Not completely unexpectedly, President Johnson became personally involved in the legislative process. (He had served as Senate Majority Leader from 1955 through January of 1961 when he was sworn in as Vice President.) Under normal Senate procedures, the bill would have been referred to the Senate Judiciary Committee, chaired by United States Senator James O. Eastland of Mississippi. Eastland was an unabashed segregationist and was firmly opposed to the bill (Zwiers, 2015). Senator Eastland was quoted as saying:

> "The people of the South are expected to remain docile while their civilization and culture are destroyed, while their segregation statutes are repealed by Federal action, and while the white race is destroyed under the false guise of another civil-rights bill. We are expected to remain docile while the pure blood of the South is mongrelized by the barter of our heritage by northern politicians in order to secure political favors from Red mongrels in the slums of the cities of the East and West" (Quote Park.com, 2020).

However, Senator Mansfield took a "novel approach" to prevent the bill from being assigned to Judiciary Committee and assured that the bill would immediately be sent to the Senate floor for debate. McWhite (2017, p. 946) noted: "As chair, Eastland managed to obstruct most floor votes designed to end segregation and safeguard voting rights for all citizens. Eventually, Senate leadership took the rare action of sidestepping the traditional committee process to gain passage of the Civil Rights Acts of 1957, 1960, and 1964 as well as the Voting Rights Act of 1965."

The Senate Historical Office (2019) has provided the following background:

> "To pass a civil rights bill in 1964, the Senate proponents of that bill developed a three-part strategy. First, Majority Leader Mike Mansfield maneuvered the bill away from the Judiciary Committee and made it the Senate's pending business. Second, a bipartisan legislative team of senators and staff, led by Majority Whip Hubert Humphrey and Minority Whip Thomas Kuchel, developed a plan to defeat a well-organized filibuster. Finally, they enlisted the aid of Minority Leader Everett Dirksen. Only Dirksen could provide the Republican votes needed to invoke cloture and bring about passage of the bill. 'The bill can't pass unless you get Ev Dirksen,' President Lyndon Johnson told Hubert Humphrey. 'You get in there to see Dirksen. You drink with Dirksen! You talk with Dirksen. You listen to Dirksen.'"

When the bill came before the full Senate for debate on March 30, 1964, the "Southern Bloc" of 18 southern Democratic Senators and one Republican Senator (Bourke Hickenlooper of Iowa) led by Senator Richard Russell of Georgia (a long-time mentor and protégé of President Johnson) launched a filibuster in order to prevent its passage (Perry & Powe, 2004, p. 661). Reflecting the deep societal divisions of the day, Russell stated: "We will resist to the bitter end any measure or any movement which would have a tendency to bring about social equality and intermingling and amalgamation if the races in our states."

Strong opposition to the bill also came from Senator Strom Thurmond (he would later officially join the Republican Party in 1964) who said: "This so-called Civil Rights Proposals, which the President has sent to Capitol Hill for enactment into law, are unconstitutional, unnecessary, unwise and extend beyond the realm of reason. This is the worst civil-rights package ever presented to the Congress and is reminiscent of the Reconstruction and actions of the radical Republicans" (quoted in Federer, 2019).

After 54 days of filibuster, Senators Humphrey, Mansfield, Dirksen, and Kuchel introduced a substitute bill that they hoped would attract enough Republican votes in addition to keeping the core "liberal" pro-civil rights Democrats behind the legislation in order to end the filibuster.

On the morning of June 10, 1964, Senator Robert Byrd (D-W.Va.) completed remarks that he had begun 14 hours and 13 minutes earlier opposing the legislation (Price, 2019). Until then, the measure had been before the Senate for 60 working days, including six Saturdays. With six wavering senators providing a four-vote victory margin on ending the filibuster (at that time, a cloture motion ending debate required 67 affirmative votes), the final tally stood at 71 to 29, ending debate on the measure. The future Republican nominee against President Johnson in 1964, Senator Barry Goldwater of Arizona, voted against ending the debate, and later against the bill itself, stating that the bill is a "threat to the very essence of our basic system." [This vote may have assured his selection as the Republican nominee against President Johnson in 1964, but may have doomed his chances against the President in the fall elections.]

The historical implications of invoking cloture on the bill cannot be overstated (Senate Historical Office, 2019). The Senate had never in its history been able to muster enough votes to cut off a filibuster on a civil rights bill. In

fact, only once in the 37 years since 1927 had it agreed to invoke cloture on any measure. Finally, on June 19, after 83 days of debate and parliamentary maneuvering, the United States Senate voted 73-27 to pass the Dirksen-Mansfield substitute bill. The final "Yes" votes included 46 Democrats and 27 Republicans — the "No" votes were 6 Republicans and 21 Democrats. The Senate compromise bill was quickly passed by the House **290–130 after it was passed through a House-Senate Conference Committee, and was** signed into law by President Johnson on July 2, 1964 — a year and 22 days after President Kennedy's historic speech calling for a new civil rights bill.

U. S. President Lyndon B. Johnson signs the Civil Rights Act of 1964. Behind him is Dr. Martin Luther King, Jr., July 2nd, 1964

Perhaps the most dramatic moment during the cloture vote came when Senator Clair Engle of California was wheeled into the chamber. Senator Engle, suffering from terminal brain cancer, was unable to speak. When his name was called, he pointed to his left eye, signifying his affirmative vote. Senator Engle died seven weeks later (Son, 2015).
[See Appendix I: Key Players in the Passage of the Civil Rights Act of 1964]

3. Major Provisions of the Civil Rights Act of 1964

The Act is divided into several sections or "Titles" which were designed to address specific problems which President Kennedy had identified in American society that prevented many Americans, but most especially certain impacted groups, from fully participating in the promises of equal protection under the United States Constitution. However, in its most important provisions, the bill was designed to eradicate discrimination against African-American citizens.

Title I of the Civil Rights Act of 1964 barred unequal application of voter registration requirements. Although this provision required that all voting rules, provisions, and procedures be uniform regardless of race, it did not eliminate the administration of so-called *good character and literacy tests*, which was the predominant method used to exclude African American voters—most especially in the South. This was later seen as a major flaw of the legislation.

3.1. A Brief Detour: The Voting Rights Act of 1965: Progeny of the Civil Rights Act of 1964

In response to *Lassiter v. Northhampton Board of Elections* (1959), in which the U.S. Supreme Court held that literacy tests were not necessarily violations of Equal Protection Clause of the Fourteenth Amendment nor of the Fifteenth Amendment (see Christopher, 1965), Congress enacted the Voting Rights Act of 1965, which was specifically designed to remove the poll tax and unfair literacy tests and provided for federal oversight of voter registration in states where less than 50 percent of the non-white population had not registered to vote.

Literacy tests were considered as the most egregious forms of discrimination. From the 1890s to the 1960s, many state governments initiated “poll taxes” (see Highton, 2004) and administered literacy tests to prospective voters purportedly to test their fitness to vote as part of their voter registration process. However, white voters were generally exempted from paying a poll tax or the administration of a literacy test if they could meet alternate requirements that in practice excluded the vast majority of African Americans from voting, such as a “grandfather clause” which allowed any person who had been granted the right to vote before 1867 to continue voting without the requirement to take a literacy test, proof of ownership of property, or a finding of "good moral character.”

Since most African Americans had been enslaved prior to the 1860s and did not have the right to vote, grandfather clauses prevented them from voting even after they had won their freedom from slavery (see *Grimm v. U.S.*, 1915).

Quigley (2017, p. 60) provides an example of these discriminatory practices from the State of Louisiana:

> “In 1960, the legislature tried to change the qualifications for new voter registration by authorizing a constitutional amendment election to require every new voter to have good character, pass a literacy test, and understand the qualifications to be eligible to vote. This law absolutely exempted from its requirements those already registered to vote, but defined the other qualifications in the following way:
> (A) Good Character "One who has committed any of the following acts shall not be considered of good character:" (i) "given birth to an illegitimate child ... or proven to be ... father of an illegitimate child," (ii) "lived with another in a "common law' marriage", (iii) convicted of a felony without full pardon, or (iv) convicted to 90-180 days in jail for misdemeanor, "other than traffic and/or game law violations." (B) Literacy eligible voter must also "be able to read and write ... and shall demonstrate his ability to do so when he applies ... by reading and the writing ... of any portion of the preamble to the Constitution of the United States" EXCEPT that the "inability of any person to read or write for any reason, who is registered to vote as of November 8, 1960, shall not be grounds for removal of such person from the registration rolls." (C) Understanding eligible voter must finally "be able to understand and give a reasonable interpretation of any section of either [the U.S. or state] Constitution when read to him by the registrar, and he must be well disposed to the good order and happiness of the State of Louisiana ... shall demonstrate ... [this disposition] by executing an affidavit affirming that he will faithfully and fully abide by all of the laws of the State of Louisiana.”
> Ramirez and Williams (2019, p. 120) commented:
> “The impact of the 1965 Act was immediate and dramatic. By 1968, more than one million new Black voters were registered, a figure that included more than 50 percent of the Black voting-age population in every southern state. The most dramatic immediate change occurred in Alabama, where the percentage of Black Americans registered to vote rose from 11 percent in 1956 to 51.2 percent in 1966.
>
> Over the longer term, the Act delivered impressive (though not perfect) results as the number of registered Black voters continued to climb and the historic gaps between Black and White registration rates narrowed. In addition, there was significant growth in the number of Black elected officials. Most notably, by the time the Supreme Court heard *Shelby County v. Holder (2013)*, "African-American voter turnout ha[d] come to exceed White voter turnout in five of

> the six States originally covered by Section 5, with a gap in the sixth State of less than one half of one percent."

3.2. Beyond Voting Rights: Other Provisions of the Civil Rights Act of 1964

Title II of the Civil Rights Act of 1964 prohibited discrimination or segregation in motels, hotels, theatres, restaurants and other public accommodations (public gathering places, educational institutions, parks, lodging facilities) which were engaged in interstate commerce based on race, ethnicity, or gender. A public accommodation was defined as any establishment that leases, rents, or sells goods and provides services to the general public.

Title III of the Civil Rights Act of 1964 prohibited state and municipal governments from barring access to public facilities based on an individual's religion, gender, race, or ethnicity.

Title IV of the Civil Rights Act of 1964 encouraged the desegregation of public schools and enabled the United States Attorney General to initiate suits to enforce the Act.

Title V empowered the United States Commission on Civil Rights Civil, which had been established in 1957, to further investigate and act on allegations of discrimination (Lhamon, 2018).

Title VI of the Civil Rights Act of 1964 outlawed discrimination on the basis of race, creed, and national origin in programs or activities receiving federal financial assistance or funding.

Title VII banned discrimination by employers on the basis of race, religion, color, sex or national origin in the employment sphere. It also added protections for individuals "associated with other races," such as individuals involved in an interracial marriage. Employers were prohibited from discriminating in any phase of employment including hiring, recruiting, pay, termination, and promotions. However, the Act provided for certain limited "Bona fide occupational qualifications" or exceptions to the Act (Thompson, 2006; Hunter, Shannon, & Amoroso, 2019).

As noted by the Equal Employment Opportunity Commission (1982):

> "In §703(e)(1), Title VII provides an exception to its prohibition of discrimination based on *sex, religion, or national origin.* That exception, called the bona fide occupational qualification (BFOQ), recognizes that in some extremely rare instances a person's sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer's business or enterprise. The protected class of race is not included in the statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job."

Title VIII created a record of voter registration and data for use by the Commission on Civil Rights.

Title IX provided for the removal of civil rights trials with all white juries or segregationist judges to federal courts in order to secure a "fair trial" (see Wasserman, 1994; Dittman, 1985).

Title X established *Community Relations Services* (CRS) to investigate allegations of discrimination in community disputes in order to help resolve and prevent racial and ethnic conflict and violence. The mission of CRS is to "provide violence prevention and conflict resolution services for community conflicts and tensions arising from differences of race, color, or national origin."

The mandate of the CRS was expanded in 2009 under the *Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act* (2009) (Boram, 2016) to include working with communities to prevent and respond to alleged hate crimes based on actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability. According to the United States Department of Justice (2020), "With its unique mission, CRS

is the only federal agency dedicated to assisting state and local governments, private and public organizations, law enforcement agencies, tribal communities, and community groups to resolve conflicts based on these aspects of identity."

Title XI established harsher penalties for violating the Civil Rights Act.

4. Important Supreme Court Cases Interpreting the Civil Rights Act of 1964

The Supreme Court has been called up on many occasions to interpret the constitutionality and reaches of some of the more important elements of the Act. The following is a summary of some of the important decisions of the United States Supreme Court relating to the Civil Rights Act of 1964 (Justia, 2020). In addition, a 7th Circuit case is discussed because of its importance regarding the awarding of attorney's fees in discrimination cases.

- **Heart of Atlanta Motel Inc. v. United States (1964)**

> "Appellant, the owner of a large motel in Atlanta, Georgia, which restricts its clientele to white persons, three-fourths of whom are transient interstate travelers, sued for declaratory relief and to enjoin enforcement of the Civil Rights Act of 1964, contending that the prohibition of racial discrimination in places of public accommodation affecting commerce exceeded Congress' powers under the Commerce Clause and violated other parts of the Constitution. A three-judge District Court upheld the constitutionality of Title II, §§ 201(a), (b)(1) and (c)(1), the provisions attacked, and, on appellees' counterclaim, permanently enjoined appellant from refusing to accommodate Negro guests for racial reasons."
> *Held:*
> "1. Title II of the Civil Rights Act of 1964 is a valid exercise of Congress' power under the Commerce Clause as applied to a place of public accommodation serving interstate travelers.
> (a) The interstate movement of persons is "commerce" which concerns more than one State.
> (b) The protection of interstate commerce is within the regulatory power of Congress under the Commerce Clause whether or not the transportation of persons between States is "commercial."
> (c) Congress' action in removing the disruptive effect which it found racial discrimination has on interstate travel is not invalidated because Congress was also legislating against what it considered to be moral wrongs.
> (d) Congress had power to enact appropriate legislation with regard to a place of public accommodation such as appellant's motel even if it is assumed to be of a purely "local" character, as Congress' power over interstate commerce extends to the regulation of local incidents thereof which might have a substantial and harmful effect upon that commerce. (2) The prohibition in Title II of racial discrimination in public accommodations affecting commerce does not violate the Fifth Amendment."

The Supreme Court cited the relevant portions of Section 201 of the Civil Rights Act of 1964 that dealt with public accommodations:

> "Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; '(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment" (Justia, 2020).

- **Katzenbach v. McClung (1964)**

"Appellees, whose restaurant in Birmingham, Alabama, caters to local white customers with take-out service for Negroes, serving food a substantial portion of which has moved in interstate commerce, sued to enjoin appellants from enforcing against their restaurant and others Title II of the Civil Rights Act of 1964, which they claimed was unconstitutional. A three-judge District Court granted an injunction, holding that there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and Congress' conclusion that discrimination in the restaurant would affect commerce so as to warrant regulation of local activities to protect interstate commerce."
Held:
"1. Since interference with governmental action has occurred and the constitutionality of Title II is before the Court in a companion case, the Court reaches the merits of this case by considering the complaint as an application for declaratory judgment, instead of denying relief for want of equity jurisdiction as it would ordinarily do on the ground that appellees should have waited to pursue the statutory procedures for adjudication of their rights.
2. Congress acted within its power to protect and foster commerce in extending coverage of Title II to restaurants serving food a substantial portion of which has moved in interstate commerce, since it had ample basis to conclude that racial discrimination by such restaurants burdened interstate trade" (Justia, 2020).

- **Griggs v. Duke Power Co. (1974)**

"Negro employees at respondent's generating plant brought this action, pursuant to Title VII of the Civil Rights Act of 1964, challenging respondent's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. These requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs. While § 703(a) of the Act makes it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin, § 703(h) authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate. The District Court found that respondent's former policy of racial discrimination had ended, and that Title VII, being prospective only, did not reach the prior inequities. The Court of Appeals reversed in part, rejecting the holding that residual discrimination arising from prior practices was insulated from remedial action, but agreed with the lower court that there was no showing of discriminatory purpose in the adoption of the diploma and test requirements. It held that, absent such discriminatory purpose, use of the requirements was permitted, and rejected the claim that, because a disproportionate number of Negroes was rendered ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job-related.
Held:

"1. The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent.
2. The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance" (Justia, 2020).

- **Washington v. Davis (1976)**

"Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance, and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for summary judgment.
The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment, in view of the facts that 44% of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance), and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted.
The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs v. Duke Power Co.*(1974), which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests that operate to exclude members of minority groups unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance."
Held:
"1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases.
(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose.
(b) The Constitution does not prevent the Government from seeking, through Test 21, modestly to upgrade the communicative abilities of its employees, rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and, on the facts before it, the District Court properly held that any inference of discrimination was unwarranted.
(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where, as in this case, special racial impact, but no discriminatory purpose, is claimed. Any extension of that statutory standard should await legislative prescription.
2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion that Test 21 was directly related to the requirements of the police training program, and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate.
The court further ruled that: "Racial discrimination by the state must contain two elements: a racially disproportionate impact and discriminatory motivation on the part of the state actor"" (Justia, 2020).

- **Chrapliwy v. Uniroyal (1982) (7Th Circuit Court of Appeals)**

"The plaintiffs in this case are female workers who were employed by the defendant. In 1972, they filed a class action under Title VII of the Civil Rights Act of 1964, alleging that the defendant had engaged in the practices of segregated hiring and seniority rosters.
In 1979, the parties reached a settlement favorable to the plaintiffs, amounting to $9,318,000 in cash and pension benefits, in addition to reinstatement of 296 terminated class members to active employment with full seniority. The defendant also agreed to pay attorneys' fees to the plaintiffs, in an amount to be established by the district court.
Accordingly, the plaintiffs applied to the district court for an allowance of attorneys' fees pursuant to Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), with an initial amount of $1,510,768 for the number of hours worked times the hourly rates for the plaintiffs' eleven attorneys. The plaintiffs also sought additional allowances for the risks of litigation and quality of representation.
The district court allowed a fee of $833,679, which included an initial amount of $583,679 for hours times hourly rates, $50,000 for the risks of litigation, and $200,000 for the quality of representation.
The plaintiffs have appealed this fee award, claiming that the district court erred in lowering the hourly rates and number of hours worked. The plaintiffs further claim that the district court abused its discretion in awarding only $250,000 for risk and quality. The defendant has filed a cross-appeal, challenging only the additional $250,000 awarded for risk and quality as too generous.
Thus, the issues raised by this appeal concerning the district court's award of attorneys' fees to the prevailing plaintiffs, pursuant to Section 706(k), 42 U.S.C. § 2000e-5(k), are as follows:
1. Did the district court err in concluding that as a matter of law it was required to refuse to award attorneys' fees to the prevailing plaintiffs for time spent persuading the federal government to debar the defendant from its federal contracts on account of discrimination in employment, although these efforts by the plaintiffs led to the settlement of the Title VII action?

2. Did the district court err in concluding that as a matter of law it was required to lower the hourly rates customarily charged by the plaintiffs' attorneys to rates within the range of hourly rates customarily charged by attorneys in the locality where the district court sits?3. Did the district court abuse its discretion in awarding to the plaintiffs additional fees of $50,000 for the risks of litigation and $200,000 for the quality of representation?

Held:
"The Court of Appeals found that the district court erred in concluding that as a matter of law it was required to refuse to award attorneys' fees for the time spent by the plaintiffs persuading the federal government to debar the defendant from its federal contracts. The Court of Appeals also found that the district court erred in concluding that as a matter of law it was required to lower the hourly rates

customarily charged by the plaintiffs' attorneys to rates customarily charged by attorneys in South Bend, Indiana, where the district court sits.

The Court of Appeals found that the district court did not abuse its discretion in awarding $50,000 for risks and $200,000 for the quality of representation. However, in light of the Court's conclusion as to the initial amount determined by the district court, it will be necessary that on remand the district court also reconsider the award of $200,000 for quality of the services rendered."

- **Wards Cove Packing Co. v. Atonio (1989)**

"Jobs at petitioners' Alaskan salmon canneries are of two general types: unskilled "cannery jobs" on the cannery lines, which are filled predominantly by nonwhites; and "noncannery jobs," most of which are classified as skilled positions and filled predominantly with white workers, and virtually all of which pay more than cannery positions. Respondents, a class of nonwhite cannery workers at petitioners' facilities, filed suit in the District Court under Title VII of the Civil Rights Act of 1964, alleging, *inter alia,* that various of petitioners' hiring/promotion practices were responsible for the workforce's racial stratification and had denied them employment as noncannery workers on the basis of race. The District Court rejected respondents' claims, finding, among other things, that nonwhite workers were overrepresented in cannery jobs because many of those jobs were filled under a hiring hall agreement with a predominantly nonwhite union. The Court of Appeals ultimately reversed in pertinent part, holding, *inter alia,* that respondents had made out a *prima facie* case of disparate impact in hiring for both skilled and unskilled noncannery jobs, relying solely on respondents' statistics showing a high percentage of nonwhite workers in cannery jobs and a low percentage of such workers in noncannery positions. The court also concluded that, once a plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practice's business necessity.

Held:

"1. The Court of Appeals erred in ruling that a comparison of the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a *prima facie* disparate impact case. Rather, the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market. *Hazelwood School Dist. v. United States (1977).* With respect to the skilled noncannery jobs at issue, the cannery workforce in no way reflected the pool of job applicants or the *qualified* labor force population. Petitioners' selection methods or employment practices cannot be said to have had a disparate impact on nonwhites if the absence of minorities holding such skilled jobs reflects a dearth of qualified nonwhite applicants for reasons that are not petitioners' fault. With respect to the unskilled noncannery jobs, as long as there are no barriers or practices deterring qualified nonwhites from applying, the employer's selection mechanism probably does not have a disparate impact on minorities if the percentage of selected nonwhite applicants is not significantly less than the percentage of qualified nonwhite applicants. Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to a *prima facie* statistical disparate impact case. Moreover, isolating the cannery workers as the potential labor force for unskilled noncannery jobs is both too broad -- because the majority of cannery workers did not seek noncannery jobs -- and too narrow -- because there are many qualified persons in the relevant labor market who are not cannery workers.

Under the Court of Appeals' method of comparison, any employer having a racially imbalanced segment of its workforce could be hauled into court and made to undertake the expensive and time-consuming task of defending the business necessity of its selection methods. For many employers, the only practicable option would be the adoption of racial quotas, which has been rejected by this Court and by Congress in drafting Title VII. The Court of Appeals' theory is also flawed because, if minorities are overrepresented in cannery jobs by virtue of petitioners' having contracted with a predominantly nonwhite union to fill those positions, as the District Court found, petitioners could eliminate respondents' *prima facie* case simply by ceasing to use the union, *without making any change whatsoever* in their hiring practices for the noncannery positions at issue.

2. On remand for a determination whether the record will support a *prima facie* disparate impact case on some basis other than the racial disparity between cannery and noncannery workers, a mere showing that

nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth herein will not alone suffice. Rather, the courts below must also require, as part of respondents' *prima facie* case, a demonstration that the statistical disparity complained of is the result of one or more of the employment practices respondents are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.
This specific causation requirement is not unduly burdensome, since liberal discovery rules give plaintiffs broad access to employers' records, and since employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures must maintain records disclosing the impact of tests and selection procedures on employment opportunities of persons by identifiable race, sex, or ethnic group.
3. If, on remand, respondents establish a *prima facie* disparate impact case with respect to any of petitioners' practices, the burden of producing evidence of a legitimate business justification for those practices will shift to petitioners, but the burden of persuasion will remain with respondents at all times. This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts and with the rule in disparate treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment practice was based solely on a legitimate, neutral consideration. *See Texas Dept. of Community Affairs v. Burdine (1981)*. To the extent that some of this Court's decisions speak of an employer's "burden of proof" with respect to the business justification defense, they should be understood to mean an employer's burden of production, not persuasion.
Even if respondents cannot persuade the trier of fact on the business necessity question, they may still prevail by coming forward with alternatives that reduce the disparate impact of petitioners' current practices, provided such alternatives are equally effective in achieving petitioners' legitimate employment goals in light of the alternatives' costs and other burdens" (Justia, 2020).

5. The Critical Role of the EEOC

The **Equal Employment Opportunity Commission (EEOC) is a** government agency established on July 2, 1965, under Title VII of the Civil Rights Act of 1964 to "ensure equality of opportunity by vigorously enforcing federal legislation prohibiting discrimination in employment"—particularly discrimination on the basis of religion, race, sex, color, national origin, age, or disability. The EEOC is headquartered in Washington, D.C. and has 53 field offices throughout the United States. Title VII applies to employers with 15 or more employees, as well as colleges and universities (both public and private), employment agencies, and labor organizations.

The following is a brief summary of the legislation which falls under the enforcement powers of the EEOC:

- **The Equal Pay Act of 1963 (EPA)** protects men and women who perform "substantially equal work" in the same establishment from sex-based wage discrimination.

  According to Saba (2019, p. 778)

  "Courts utilize a burden-shifting analysis to determine whether the Equal Pay Act has been violated. First, the plaintiff must make a prima facie showing of discrimination by establishing that the employer paid different wages to employees of opposite sexes for equal work. Next, the burden shifts to the employer justify the disparity with one of four affirmative defenses set forth in the Equal Pay Act: (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of product; or (iv) a differential based on "any other factor other than sex." Finally, if the employer proves one of the affirmative defenses, the burden of persuasion shifts back to the plaintiff to prove that the reason for the pay disparity was a pretext."

- **The Lilly Ledbetter Fair Pay Act of 2009**, which codified into law the EEOC's position that each inequitable paycheck is a separate incident of wage discrimination. The Act extended the statute of limitations for filing lawsuits in cases of pay discrimination based on sex, race, national origin, age, religion, and disability. The law directly addressed *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), a decision of the United States Supreme Court in which the Court held that the statute of limitations for

presenting an equal-pay lawsuit begins on the date that the employer makes the *initial* discriminatory wage decision, not at the date of the most recent paycheck.

Coluccio (2010, p. 238) stated:

"The signing of the Lilly Ledbetter Fair Pay Act embodies a climactic moment in an ongoing struggle between Congress and the courts to define the meanings of the civil rights statutes in a variety of contexts. Despite the fact that the core issue of the *Ledbetter* case turned on a statute of limitations technicality, the case, nonetheless, captured the nation's attention. Lilly Ledbetter's compelling personal story garnered an outcry of support and effectuated federal legislation."

- **The Age Discrimination in Employment Act of 1967 (ADEA)** protects individuals who are 40 years of age or older from employment discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment. The ADEA applies to organizations with 20 or more workers, including governmental entities, labor organizations, and employment agencies. (see Ventrell-Monsees, 2019).

- **Title I and Title V of the Americans with Disabilities Act of 1990 (ADA)** prohibit employment discrimination against qualified individuals with disabilities employed in the private sector, and in state and local governments. Title I covers employers with 15 or more employees from discriminating against people with disabilities in job application procedures, hiring, firing, compensation, job training, and other conditions of employment. Title I also applies to labor organizations and employment agencies. Morin (1990, p. 213) noted that "Title I of ADA also makes people with disabilities less dependent on government assistance and gives them the opportunity to become integrated and productive members of society."

- **Sections 501 and 505 of the Rehabilitation Act of 1973** prohibit discrimination against qualified individuals with disabilities who work in the federal government, as well as laying out specifications about legal remedies and attorneys' fees (see Herbst, 1978).

- **The Civil Rights Act of 1991**provides monetary damages in cases of intentional employment discrimination. The Act also amends several EEOC statutes, allowing, for example, jury trials and potential damages in Title VII and ADA lawsuits involving intentional discrimination.

Fiss (2018, p. 1953) noted that:
"'The Congress finds that … the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* (1989) … has weakened the scope and effectiveness of Federal civil rights protections … .' Congress, in particular, made clear that it was objecting to the way Wards Cove altered the burden of proof governing disparate impact claims. While *Wards Cove* held that the employer bore the burden of producing evidence that the test is job related, the Court in that case allocated the burden of persuasion to the plaintiff. The 1991 Act signaled its objection to this feature of the decision by placing the burden of persuasion on the employer."

6. Civil Rights, Sex and Gender

In recent years, in addition to adjudicating cases relating to "race," the EEOC and the United States Supreme Court have seen an increase in cases relating to gay, lesbian, and transgendered individuals in which both the EEOC and the Supreme Court would be called upon to interpret the reaches of Title VII relating to discrimination based on sex. From the outset, the inclusion of the term "sex" has proved to be a vexing area of dispute in both context and meaning.

The prohibition on sex discrimination found in Title VII was added by Rep. Howard Smith, who chaired the House Rules Committee, and who strongly opposed the legislation. Smith's amendment to add the word "sex" to the bill

was passed by vote of 168 to 133. However, several historians and others have debated Congressman Smith's real motivation (Osterman, 2009). The *Congressional Record* records that Smith was greeted by laughter when he introduced the one-word amendment (Freeman, 1990).

Was the inclusion of the term "sex" a strategic attempt to defeat the bill by Congressman Smith, or was it a genuine attempt to support women's rights by broadening the bill to include the prohibition against discrimination based on sex? Some historians have speculated that Smith was trying to embarrass Northern Democrats who echoed the position of organized labor and some women's groups who had opposed the inclusion of women in the bill because they feared that a new law would take away "protections for pregnant women and women in poverty" already in place (Napikoski, 2020). Others argued that Smith was sincere in his efforts. Napikoski (2020) offers the following commentary on Congressman Smith's intentions:

> "For twenty years Smith had sponsored the Equal Rights Amendment, however, with no linkage to racial issues, in the House. He for decades had been close to the National Woman's Party and its leader Alice Paul, who was also the leader in winning the right to vote for women in 1920, the author of the first Equal Rights Amendment, and a chief supporter of equal rights proposals since then. She and other feminists had worked with Smith since 1945 trying to find a way to include sex as a protected civil rights category."

The inclusion of the term "sex" in the bill under these confusing circumstances led to the comments of Justice William Rehnquist who explained in *Meritor Savings Bank v. Vinson* (1986), "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives... the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" This comment would be quite prophetic!

6.1. Cases Relating to Sex and Gender

Precisely because of unanswered question generated by the Act itself, the Supreme Court has been called upon to decide cases relating to the Act—more specifically to Title VII. These cases may be summarized as follows (Find Law, 2017):

- "*Cleveland Bd. of Ed. v. LaFleur* (1974): The Court found that Ohio public schools' mandatory maternity leave rules for pregnant teachers violate constitutional guarantees of due process.
- *Meritor Savings Bank v. Vinson* (1986): The Court found that a claim of "hostile environment" sexual harassment is a form of sex discrimination that may be brought under Title VII of the Civil Rights Act of 1964.
- *Johnson v. Transportation Agency* (1987): The Court decided that a county transportation agency appropriately took into account an employee's sex as one factor in determining whether she should be promoted.
- *Franklin v. Gwinnett County Public Schools* (1992): The Court ruled that students who had been subjected to sexual harassment in public schools may sue for monetary damages.
- *Oncale v. Sundowner Offshore Serv., Inc*. (1998): The Court held that sex discrimination consisting of same-sex sexual harassment can form the basis for a valid claim under Title VII of the Civil Rights Act of 1964.
- *Burlington Industries, Inc. v. Ellerth* (1998): The Court held that an employee who refuses unwelcome and threatening sexual advances of a supervisor (but suffers no real job consequences) may recover against the employer without showing the employer is at fault for the supervisor's actions.
- *Faragher v. City of Boca Raton* (1998): The Court decided that an employer may be liable for sexual harassment caused by a supervisor, but liability depends on the reasonableness of the employer's conduct, as well as the reasonableness of the plaintiff victim's conduct.

7. The Context of The Supreme Court's June 2020 Decision: The Underlying Cases

The cases which the Court decided in June of 2020 involved two gay men and a transgender woman who sued for employment discrimination after they lost their jobs.

The facts of the individual cases may be summarized as follows (Justia, 2020):

- *Bostock v. Clayton County, Georgia*

  "Gerald Bostock, a gay man, began working for Clayton County, Georgia, as a child welfare services coordinator in 2003. During his ten-year career with Clayton County, Bostock received positive performance evaluations and numerous accolades. In 2013, Bostock began participating in a gay recreational softball league. Shortly thereafter, Bostock received criticism for his participation in the league and for his sexual orientation and identity generally. During a meeting in which Bostock's supervisor was present, at least one individual openly made disparaging remarks about Bostock's sexual orientation and his participation in the gay softball league. Around the same time, Clayton County informed Bostock that it would be conducting an internal audit of the program funds he managed. Shortly afterwards, Clayton County terminated Bostock allegedly for "conduct unbecoming of its employees."
  Within months of his termination, Bostock filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Three years later, in 2016, he filed a pro se lawsuit against the county alleging discrimination based on sexual orientation, in violation of Title VII of the Civil Rights Act of 1964. The district court dismissed his lawsuit for failure to state a claim, finding that Bostock's claim relied on an interpretation of Title VII as prohibiting discrimination on the basis of sexual orientation, contrary to a 1979 decision holding otherwise, the continued which was recently affirmed in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). Bostock appealed, and the US Court of Appeals for the Eleventh Circuit affirmed the lower court. In addition to noting procedural deficiencies in Bostock's appeal, the Eleventh Circuit panel pointed out that it cannot overrule a prior panel's holding in the absence of an intervening Supreme Court or Eleventh Circuit en banc decision" (Justia, 2020).

- *Altitude Express v. Zarda*

  "Donald Zarda worked in 2010 as a sky-diving instructor at Altitude Express. Part of his job was to participate in tandem skydives with clients, in which he was necessarily strapped in close proximity to the client. A gay man, Zarda sometimes told female clients about his sexual orientation to address any concern they might have about being strapped to a man for a tandem skydive. On one occasion after Zarda informed a female client about his sexual orientation and performed the tandem jump with her, the client alleged that Zarda had inappropriately touched her and disclosed his sexual orientation to excuse his behavior. In response to this complaint, Zarda's boss fired him. Zarda denied touching the client inappropriately and claimed that he was fired solely because of his reference to his sexual orientation.
  Zarda filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) claiming that he was fired because of his sexual orientation and also because of he did not conform to male gender stereotypes. He brought a claim in federal court alleging, among other things, that Altitude Express violated Title VII of the Civil Rights Act of 1964 by terminating him because of his sexual orientation. The district court ruled for Altitude Express, finding that Title VII does not protect against discrimination based on sexual orientation. After the district court's ruling, the EEOC issued an opinion in a separate case (persuasive but not binding on federal district courts) that Title VII's "on the basis of sex" language necessarily includes discrimination "on the basis of sexual orientation." In light of this decision, Zarda moved for the district court to reinstate his Title VII claim, but the district court denied the motion, citing binding Second Circuit precedent, *Simonton v. Runyon*, 2000), and *Dawson v. Bumble & Bumble*, 2005).
  Zarda appealed to the US Court of Appeals for the Second Circuit, which ruled for Altitude Express as well. The panel declined Zarda's request that it reconsider its interpretation of Title VII and overturn *Simonton* and *Dawson*, as only the court sitting en banc can do that. The Second Circuit then agreed to rehear the case en banc and expressly overruled *Simonton* and *Dawson*,

finding, consistent with the EEOC's position, that Title VII's prohibition on discrimination because of sex necessarily includes discrimination because of sexual orientation" (Justia, 2020).

- *Harris v. Equal Employment Opportunity Commission*

"Aimee Stephens worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc., which is a closely held for-profit corporation that operates several funeral homes in Michigan. For most of her employment at the Funeral Home, Stephens lived and presented as a man. Shortly after she informed the Funeral Home's owner and operator that she intended to transition from male to female, she was terminated.
Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she had been terminated based on unlawful sex discrimination. After conducting an investigation, the EEOC brought a lawsuit against the Funeral Home charging that it had violated Title VII of the Civil Rights Act of 1964 by terminating Stephen's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes.
The district court granted summary judgment to the Funeral Home, and a panel of the US Court of Appeals for the Sixth Circuit reversed, holding that the Funeral Home's termination of Stephens based on her transgender status constituted sex discrimination in violation of Title VII" (Justia, 2020).

7.1. The Majority Opinion

Shackford (2020) cites some of the more important points emphasized by Justice Gorsuch in his majority opinion:

"An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the 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."

Later, Justice Gorsuch explained how this also applies to the treatment of transgender employees:

"Or take an 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. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

Shackford (2020) notes that Justice Gorsuch's order concludes with a pure expression of textualism: "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

7.2. Dissents by Justices Alito and Kavanaugh

Justices Samuel Alito, Brett Kavanaugh, and Clarence Thomas dissented. "The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous," Alito wrote in the dissent. "Even as

understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"

Justice Kavanaugh wrote in a separate dissent that the court was rewriting the law to include gender identity and sexual orientation, a job that belongs to Congress.

> "Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of " an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court."

Still, Justice Kavanaugh acknowledged that the decision represents an "important victory achieved today by gay and lesbian Americans." Justice Kavanaugh wrote:

> "Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit — battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result" (Clark, 2020).

8. Why the Issue Will Simply Not "Go Away"

Echoing many of the points raised in the dissenting opinion of Justice Alito, Justice Gorsuch himself noted that the Supreme Court would no doubt be called upon in the not-too-distant future to express its views and establish precedents under which a host of other questions would be litigated. For example:

… Lawsuits are currently pending over transgender athletes' participation in school sporting events (Bezuvis, 2011; Hunter & Brown, 2015; Genel, 2017) and cases have been brought concerning sex-segregated bathrooms and locker rooms (More, 2008; Sanders & Stryker, 2016; Pogofsky, 2018; Portuondo, 2018), a subject that the several of the justices (most especially Justice Alito) had raised during oral arguments in October.

… Employers who have religious objections to employing LGBT people also might be able to raise those claims in a different case. As Denley (2020, p. 209) notes:

> "A possible solution to the question of whether religion or equality should be given more weight is to balance the "substantial burden" on the petitioner's religious freedom rights versus the burden on the third party. Once a petitioner has made a religious freedom claim and shown that the law has imposed a substantial burden on their religious expression, the court would then look to see how the third party is burdened by the religious freedom claim. Examining the burden on third parties is not a new idea as the Court has articulated in prior religious freedom claims that the accommodation should not impinge on the rights of others"

However, "But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today," Justice Gorsuch wrote.

Just as in the 1970s and 1980s, the Supreme Court was beset—some might say inundated—with cases related to the civil rights of citizens who were discriminated against on the basis of race, creed, color, and national origin, the future holds out the prospect that cases relating to the rights of the LGBT community will dominate the courts—and public discourse—as these individuals press for a recognition of their rights in American society.

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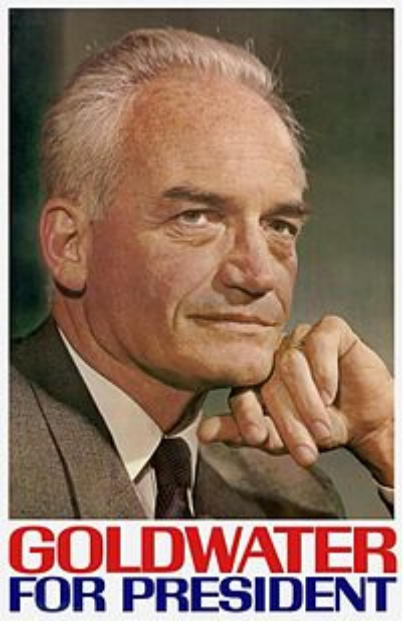
APPENDIX I: KEY PLAYERS IN PASSING THE CIVIL RIGHTS ACT OF 1964: PROPONENTS SENATORS HUMPHREY, MANSFIELD, KUCHEL, DIRKSEN, AND ENGLE; AND OPPONENTS REP. SMITH, SENATORS EASTLAND, BYRD, GOLDWATER, THURMOND, AND RUSSELL e


GOLDWATER
FOR PRESIDENT