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# The principles of equality and non-discrimination, a comparative law perspective

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United States of America

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STUDY

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# THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION, A COMPARATIVE-LAW PERSPECTIVE

## United States of America

STUDY

March 2021

### **Abstract**

This study forms part of a larger comparative law project which seeks to study the way that the principles of equality and non-discrimination have developed and are demonstrated in a broad range of legal systems around the world.

The subject of this study is the principles of equality and non-discrimination in the United States federal legal system.

It provides a brief history of the evolution of the principles of equality and non-discrimination developed in United States federal law and major events that furthered the development of the principles. It provides a detailed review of relevant constitutional, statutory, and case law with respect to these principles. The current and likely future limits of the principles of equality and non-discrimination are discussed in the context of three examples: (1) affirmative action in higher education, (2) racial and partisan gerrymandering, and (3) discrimination on the basis of sexual orientation and gender identity in public accommodations.

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## Table of Contents

<b>List of abbreviations .....</b>	<b>VII</b>
<b>Executive summary .....</b>	<b>X</b>
<b>I. Introduction: historical evolution of the principles.....</b>	<b>1</b>
I.1. America under English rule .....	1
I.2. American Revolution and Declaration of Independence (1776).....	1
I.3. The adoption of the Constitution (1789).....	2
<b>II. Current legal framework.....</b>	<b>5</b>
II.1. Constitutional amendments.....	5
II.1.1. Bill of Rights (1791) .....	5
II.1.2. Civil War amendments .....	7
II.1.3. Constitutional amendments in the 1900s.....	10
II.2. Statutes .....	12
II.2.1. Reconstruction era statutes .....	12
II.2.2. Civil rights era statutes .....	16
II.2.3. Post-civil rights era statutes .....	32
<b>III. Relevant case law .....</b>	<b>50</b>
III.1. Equal Protection Clause: standards of review .....	50
III.2. Race and nationality.....	51
III.2.1. Race-specific laws .....	51
III.2.2. Race-neutral laws.....	52
III.2.3. Separate but equal.....	52
III.2.4. Interracial marriage.....	54
III.2.5. Affirmative action .....	55
III.3. Sex and gender.....	56
III.3.1. Arbitrary differentiation.....	56
III.3.2. Sexual harassment .....	56
III.4. Sexual orientation and gender identity.....	57
III.4.1. Protections on the basis of sexual orientation.....	57
III.4.2. Same-sex sexual practices .....	58
III.4.3. Defense of Marriage Act .....	58
III.4.4. Marriage equality.....	59
III.4.5. Employment discrimination .....	60
III.5. Right to vote .....	61
III.5.1. Intentional redistricting by race .....	61
III.5.2. Vote dilution .....	61
III.5.3. Predominant consideration of race .....	62
<b>IV. Current and likely future limits on the principles .....</b>	<b>64</b>
IV.1. Affirmative action in higher education .....	64
IV.2. Racial and partisan gerrymandering.....	67
IV.3. Sexual orientation and gender identity in public accommodations .....	70
<b>V. Conclusions .....</b>	<b>73</b>
<b>List of enacted legislation .....</b>	<b>75</b>
<b>List of cases .....</b>	<b>77</b>
<b>Bibliography .....</b>	<b>79</b>
<b>Consulted online resources.....</b>	<b>82</b>

## Table of Frames

<b>FRAME 1</b> .....	<b>2</b>
Declaration of Independence (1776), para. X.....	2
<b>FRAME 2</b> .....	<b>6</b>
Amendments I-X (The Bill of Rights).....	6
<b>FRAME 3</b> .....	<b>9</b>
Amendments XIII-XV (The Civil War Amendments).....	9
<b>FRAME 4</b> .....	<b>10</b>
Amendment XIX.....	10
<b>FRAME 5</b> .....	<b>11</b>
Amendment XXIV.....	11
<b>FRAME 6</b> .....	<b>11</b>
Amendment XXVI.....	11
<b>FRAME 7</b> .....	<b>13</b>
42 U.S.C. § 1981. Equal rights under the law. ....	13
<b>FRAME 8</b> .....	<b>13</b>
42 U.S.C. § 1982. Property rights of citizens.....	13
<b>FRAME 9</b> .....	<b>14</b>
42 U.S.C. § 1983. Civil action for deprivation of rights.....	14
<b>FRAME 10</b> .....	<b>14</b>
42 U.S.C. § 1985. Conspiracy to interfere with civil rights.....	14
<b>FRAME 11</b> .....	<b>15</b>
18 U.S.C. § 241. Conspiracy against rights.....	15
<b>FRAME 12</b> .....	<b>15</b>
18 U.S.C. § 242. Deprivation of rights under color of law.....	15
<b>FRAME 13</b> .....	<b>16</b>
29 U.S.C. § 206. Minimum wage.....	16
<b>FRAME 14</b> .....	<b>18</b>
52 U.S.C. § 10101. Voting rights. ....	18
<b>FRAME 15</b> .....	<b>19</b>
42 U.S.C. § 2000a. Prohibition against discrimination or segregation in places of public accommodation.....	19
<b>FRAME 16</b> .....	<b>21</b>
42 U.S.C. § 2000b. Civil actions by the Attorney General .....	21
42 U.S.C. § 2000c-6. Civil actions by the Attorney General.....	21
<b>FRAME 17</b> .....	<b>22</b>
42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin.....	22
<b>FRAME 18</b> .....	<b>23</b>
42 U.S.C. § 2000e-2. Unlawful employment practices .....	23
42 U.S.C. § 2000e-3. Other unlawful employment practices .....	24

<b>FRAME 19.....</b>	<b>25</b>
52 U.S.C. § 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation .....	25
<b>FRAME 20.....</b>	<b>26</b>
52 U.S.C. § 10303. Suspension of the use of tests or devices in determining eligibility to vote .....	26
52 U.S.C. § 10304. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates .....	27
<b>FRAME 21.....</b>	<b>28</b>
52 U.S.C. § 10501. Application of prohibition to other States; "test or device" defined .....	28
52 U.S.C. § 10508. Voting assistance for blind, disabled or illiterate persons.....	29
<b>FRAME 22.....</b>	<b>29</b>
29 U.S.C. § 623. Prohibition of age discrimination .....	29
<b>FRAME 23.....</b>	<b>31</b>
42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices .....	31
42 U.S.C. § 3605. Discrimination in residential real estate-related transactions .....	32
<b>FRAME 24.....</b>	<b>33</b>
20 U.S.C. § 1681. Sex.....	33
20 U.S.C. § 1684. Blindness or visual impairment; prohibition against discrimination ..	33
<b>FRAME 25.....</b>	<b>33</b>
29 U.S.C. § 793. Employment under Federal contracts .....	33
29 U.S.C. § 794. Nondiscrimination under Federal grants and programs .....	34
<b>FRAME 26.....</b>	<b>35</b>
15 U.S.C. § 1691. Scope of prohibition .....	35
<b>FRAME 27.....</b>	<b>37</b>
20 U.S.C. § 1703. Denial of equal educational opportunity prohibited .....	37
<b>FRAME 28.....</b>	<b>38</b>
42 U.S.C. § 6102. Prohibition of discrimination .....	38
<b>FRAME 29.....</b>	<b>38</b>
5 U.S.C. § 2302. Prohibited personnel practices.....	38
<b>FRAME 30.....</b>	<b>40</b>
8 U.S.C. § 1324b. Unfair immigration-related employment practices .....	40
<b>FRAME 31.....</b>	<b>42</b>
42 U.S.C. § 12112. Discrimination .....	42
<b>FRAME 32.....</b>	<b>42</b>
42 U.S.C. § 12132. Discrimination .....	42
<b>FRAME 33.....</b>	<b>43</b>
42 U.S.C. § 12182. Prohibition of discrimination by public accommodations .....	43
<b>FRAME 34.....</b>	<b>44</b>
38 U.S.C. § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited.....	44
<b>FRAME 35.....</b>	<b>45</b>
2 U.S.C. § 1302. Application of laws.....	45

<b>FRAME 36.....</b>	<b>46</b>
42 U.S.C. § 2000ff-1. Employer practices .....	46
42 U.S.C. § 2000ff-2. Employment agency practices .....	47
42 U.S.C. § 2000ff-3. Labor organization practices.....	47
42 U.S.C. § 2000ff-4. Training programs.....	47
<b>FRAME 37.....</b>	<b>48</b>
42 U.S.C. § 18116. Nondiscrimination.....	48
42 U.S.C. § 300gg-3. Prohibition of preexisting condition exclusions or other discrimination based on health status .....	49
<b>FRAME 38.....</b>	<b>53</b>
Brown v. Board of Education, 347 U.S. 483, 495 (1954) .....	53
<b>FRAME 39.....</b>	<b>60</b>
Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) .....	60



## List of abbreviations\*

<b>§</b>	section ( <i>“§§” is an abbreviation for “sections”</i> )
<b>1st Cir.</b>	United States Court of Appeals for the First Circuit
<b>11th</b>	eleventh
<b>2d</b>	second
<b>3d</b>	third
<b>ACA</b>	Patient Protection and Affordable Healthcare Act
<b>ADA</b>	Americans with Disabilities Act of 1990
<b>Am. Jur.</b>	American Jurisprudence
<b>amend.</b>	Amendment
<b>art.</b>	article
<b>B.</b>	Bar
<b>Cap.</b>	Capital
<b>ch.</b>	Chapter ( <i>an early designation for public laws published in United States Statutes at Large</i> )
<b>cl.</b>	clause
<b>Coll.</b>	College
<b>Comm’n</b>	Commission
<b>Cong. Rsch. Serv.</b>	Congressional Research Service
<b>Corp.</b>	Corporation
<b>Couns.</b>	Counsel
<b>D. Mass.</b>	United States District Court for the District of Massachusetts
<b>Dep’t</b>	Department
<b>Doc.</b>	Document
<b>DOMA</b>	Defense of Marriage Act
<b>e.g.</b>	<i>exempli gratia (in citations, used to indicate that the authority states the proposition; other authorities also state the proposition but citation to them is not useful or is repetitive)</i>

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\* Abbreviations are taken from *The Bluebook: A Uniform System of Citation* (21st ed. 2020). *The Bluebook* is an authoritative citation manual used in legal writing in the United States.

<b>ed.</b>	edition
<b>Educ.</b>	Education
<b>EEOC</b>	Equal Employment Opportunity Commission
<b>et seq.</b>	<i>et sequitur (used to indicate that the cited reference includes additional sections that follow the initial section cited)</i>
<b>ex rel.</b>	<i>ex relatione (in case names, used as an abbreviation for expressions like “on behalf of”)</i>
<b>Exec. Ord.</b>	Executive Order
<b>F.</b>	Forum
<b>F. Supp.</b>	Federal Supplement <i>(case law reporter that includes select opinions of the United States district courts)</i>
<b>FCC</b>	Federal Communications Commission
<b>Fin.</b>	Finance
<b>GINA</b>	Genetic Information Nondiscrimination Act of 2008
<b>Gov’t</b>	Government
<b>Harv.</b>	Harvard
<b>Hous. &amp; Urban Dev.</b>	Housing and Urban Development
<b>i.e.</b>	<i>id est (in text, used as an abbreviation for “in other words”)</i>
<b>id.</b>	<i>idem (in citations, used to refer to the immediately preceding authority cited)</i>
<b>Inc.</b>	Incorporated
<b>infra</b>	in a subsequent section or page <i>(used to indicate the material will be discussed on a subsequent page)</i>
<b>J.</b>	Journal
<b>L.</b>	Law
<b>L.Q.</b>	Law Quarterly
<b>L. Rev.</b>	Law Review
<b>Legis.</b>	Legislation
<b>LGBT</b>	lesbian, gay, bisexual, and transgender
<b>Ltd.</b>	Limited
<b>Mich.</b>	Michigan

<b>Nat'l</b>	National
<b>No.</b>	number
<b>Off.</b>	Office
<b>Okla.</b>	Oklahoma
<b>para.</b>	paragraph
<b>Pol'y</b>	Policy
<b>Pub.</b>	Public
<b>Pub. Papers</b>	Public Papers of the President
<b>rev.</b>	revised
<b>RFRA</b>	Religious Freedom Restoration Act of 1993
<b>S.</b>	Senate
<b>S. Ct.</b>	Supreme Court Reporter <i>(case law reporter that includes opinions of the United States Supreme Court)</i>
<b>Servs.</b>	Services
<b>slip op.</b>	slip opinion <i>(first version of a court's opinion, subject to correction and official pagination)</i>
<b>Stat.</b>	United States Statutes at Large <i>(official publication of statutes passed in the United States, in chronological order)</i>
<b>supra</b>	Above <i>(used to indicate that the material referenced was referenced in full in a prior footnote, but not in the immediately prior footnote)</i>
<b>Title IX</b>	Title IX of the Education Amendments of 1972
<b>U.</b>	University
<b>U.S.</b>	United States of America or United States Reporter <i>(in text, used as an adjective, as in, "U.S. history;" in citations, used to abbreviate "United States Reporter," the official case law reporter for opinions of the United States Supreme Court)</i>
<b>U.S. Const.</b>	United States Constitution
<b>U.S.C.</b>	United States Code <i>(official code containing the general and permanent laws of the United States)</i>
<b>v.</b>	Versus <i>(in case names, used to delineate opposing parties)</i>
<b>Wash.</b>	Washington

## Executive summary

The purpose of this study is to present and examine the principles of equality and non-discrimination in the federal legal system of the United States of America.<sup>1</sup>

While there is no universal standard for defining the principles of equality and non-discrimination, for the purposes of this study, the principle of equality is the principle that individuals under the same jurisdiction are equal in their rights, and the principle of non-discrimination is the principle that individuals should not be treated unfairly based on an immutable characteristic or core trait.

The principle of equality is woven into United States legal history, starting from the colonial period. The notion that all free men enjoyed certain fundamental rights and liberties was carried by the colonists from England to America, and it was a sense of inequality that drove the American colonists to eventually revolt against English rule. The United States of America was the first country founded on the principle that all men are created equal, although there were vast inequalities present in society at the time, including slavery and female subordination.

The original text of the Constitution contains vague concepts of equality but no clear pronouncements. The first ten amendments to the Constitution establish that certain individual rights, such as the right to free speech and the right to certain minimum standards in criminal proceedings, shall be protected from government abuse. The thirteenth, fourteenth, and fifteenth amendments, enacted after the Civil War, abolish slavery, prohibit states from depriving a person of due process or denying a person equal protection of the laws, and establish universal male suffrage.

The U.S. Congress, the federal legislative body, has enacted legislation designed to enforce, enhance, and expand upon the baseline right to equal protection of the laws established in the Constitution and to protect classes of individuals from discrimination. The principle of non-discrimination is primarily carried out in federal law through the Civil Rights Act of 1964 and similarly modeled federal statutes, which prohibit discrimination on the basis of specified characteristics and traits in many public and private sectors.

The U.S. Supreme Court, the highest court in the federal judicial branch, has issued opinions interpreting constitutional and statutory law pertaining to the principles of equality and non-discrimination. Most cases concerning equality and non-discrimination arise under the Equal Protection Clause of the Fourteenth Amendment. Through case law, the Supreme Court has established a standard of review for cases arising under the Equal Protection Clause according to which class of people is advantaged or disadvantaged by the law and whether the classification is subject to heightened scrutiny. The Court will highly scrutinize a state's race-based classification or classification affecting the right to vote; subject classifications of sex and gender to intermediate scrutiny; and defer to the state (lowest level of scrutiny) for classifications based on age.

Three examples are presented to highlight issues related to conflicts of laws; positive discrimination and reverse discrimination; exceptions justifying deviation from established law; and gray and fluctuating areas regarding the principles of equality and non-discrimination in federal law. The three examples are (1) affirmative action in higher education,

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<sup>1</sup> This study focuses on the principals of equality and non-discrimination the United States federal legal system. Individual states' laws are not discussed except to the extent that such laws were the subject of a U.S. Supreme Court decision.

(2) racial and partisan gerrymandering, and (3) discrimination on the basis of sexual orientation and gender identity in public accommodations.

The study demonstrates that the principles of equality and non-discrimination are protected and furthered by federal law in the United States. While there is certainly room for improvement and opportunities for the federal government to create law that provides more protections for these principles, there is a solid legal foundation from which to work towards achieving full equality for all U.S. citizens.



## I. Introduction: historical evolution of the principles

Section I of the study provides a broad overview of the evolution of the principles of equality and non-discrimination in the U.S. federal legal system and the major historical factors that influenced the evolution. Section I.1 discusses the principles of equality and non-discrimination in the American colonies under English rule; Section I.2, during the American revolutionary period; and Section I.3, in the United States Constitution. It is important to note that, unlike other countries, the United States has had only one constitution, which has been amended over time (*i.e.*, the original text of the Constitution is still in effect, as amended).

### I.1. America under English rule

The United States of America was formed after more than 150 years of colonization by the English and a revolutionary war. Prior to the American Revolution (1775 to 1783), people living in the thirteen American colonies were subjects of the English monarchy but were largely self-governed. Most colonies operated under a charter that provided for direct rule by the English monarchy, a governor appointed by the king, and a colonial legislature elected by property-holding males. While English control was not uniform across the colonies, colonial legislation remained subject to veto by the home government and the colonies had no direct role in setting taxes.

To the extent that a conception of equality existed among colonists, it was principally derived from their English heritage. While there was no English doctrine of universal equality in existence during this period, there was a general (and growing) belief that all free Englishmen enjoyed certain fundamental rights and liberties under the Magna Carta.<sup>2</sup> The charters and laws of the colonies reflected the Magna Carta's guarantees of basic individual rights and liberties.

During the period between the death of King George II and the Revolutionary War, the English government subjected residents of the American colonies to laws, policies, and taxes that had been largely overturned or abandoned as to residents of England. Americans understood that their rights—the rights of all natural and free Englishmen—were not being supported or upheld in a manner equal with their brethren living within the Kingdom.<sup>3</sup> It was this sense of inferiority under English law that led the American colonists to protest English rule. “The word *equality* itself made comparatively few explicit appearances in the language of American protest, but the emotions aroused by inequality were present everywhere.”<sup>4</sup>

### I.2. American Revolution and Declaration of Independence (1776)

The Continental Congress was a governmental organization formed by the American colonial governments in 1774 to coordinate resistance to English rule. On July 2, 1776, the Continental Congress voted to declare America's independence from England. Two days later, the Congress ratified the [Declaration of Independence](#), the purpose of which was to set forth the

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<sup>2</sup> POLE, J.: *The Pursuit of Equality in American History*, 2d ed. rev., Univ. of California Press, 1993, p. 12.

<sup>3</sup> *Id.* at 29–33.

<sup>4</sup> *Id.* at 33.

colonists' right to revolt against English rule. The principle of equality is set forth in the Declaration of Independence's most recognizable sentence in American culture today<sup>5</sup>:

## FRAME 1

**Declaration of Independence (1776), para. X**

*"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."*

Britain's North American colonies were the first European colonial subjects to achieve independence from the Old World and the United States of America was the first nation to base its "existence on an abstract moral principle... that all men are created equal[.]"<sup>6</sup> As espoused in the Declaration of Independence, America's commitment to equality was a "general commitment to the equal worth of individuals as individuals, as creatures with 'inalienable rights[.]'" regardless of heredity, status, or religion.<sup>7</sup> Yet, the Declaration of Independence was not an authoritative legal document; rather, it was a means to express a unified common sentiment in opposition to tyrannous English rule and advocate for independence. While the language on equality in the Declaration of Independence cast a wide net in favor of equality, there was little belief among white American men at the time—the men who drafted that statement—that the rights guaranteed to "all men" were available to non-white persons, women, or indigenous persons.

The Continental Congress and its successor, the Confederation Congress, existed from 1774 to 1789 during the Revolutionary War period.<sup>8</sup> The Articles of Confederation, adopted by the Continental Congress and operational from 1781 to 1789, created a limited federal government under which the Continental Congress governed the states (former colonies) after England's authority dissipated.<sup>9</sup> The Revolutionary War was declared officially over in 1784 when the Treaty of Paris became effective.<sup>10</sup>

### 1.3. The adoption of the Constitution (1789)

In peacetime, weaknesses in the governing structure of the Articles of Confederation became evident. In 1787, the states decided to send delegates to Philadelphia to convene in secret and discuss potential changes to the Articles of Confederation.<sup>11</sup> Instead, what emerged from the

<sup>5</sup> THE DECLARATION OF INDEPENDENCE para. X (U.S. 1776), <https://www.archives.gov/founding-docs/declaration-transcript>.

<sup>6</sup> POLE, *supra* note 2, at 1; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>7</sup> VROOM, C. A.: "Equal Protection versus the Principle of Equality: American and French Views on Equality in the Law," *Capital University Law Review*, n. 21, 1992, p. 202 (quoting VERBA, S. & ORREN, G.: *Equality in America: The View from the Top*, Harvard University Press, 1985, p. 27–28).

<sup>8</sup> *E.g.*, *Records of the Continental and Confederation Congresses and the Constitutional Convention*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/research/guide-fed-records/groups/360.html#360.2> (last reviewed August 15, 2016).

<sup>9</sup> *E.g.*, *Continental and Confederation Congresses*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Continental-Congress/Continental-Confederation-Congresses/> (last visited February 18, 2021).

<sup>10</sup> *E.g.*, *The Confederation Congress's Ratification of the "Treaty of Paris"*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/HistoricalHighlight/Detail/36454> (last visited February 18, 2021).

<sup>11</sup> *E.g.*, *A More Perfect Union: The Creation of the U.S. Constitution*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN.,



Philadelphia Convention was a new governing instrument, the United States Constitution, proposing the structure of government still in place today. Ratification by at least nine states was required for the Constitution to be adopted. In 1789, after ratification by eleven states, the [U.S. Constitution](#) became the governing instrument of the federal government of the United States of America.<sup>12</sup>

The Constitution governs the way the federal government is structured and how it operates. It establishes three branches of government—legislative, executive, and judicial—and delineates their powers. Legislative power is vested in the Congress; executive power is vested in the President; and judicial power is vested in the U.S. Supreme Court and lower federal courts.<sup>13</sup> A system of checks and balances exists to prevent any one branch from dominating. The Constitution also establishes the relationship of the states to the federal government; establishes the Constitution as the supreme law of the land; and sets forth the processes for its ratification and amendment.<sup>14</sup>

The original text of the U.S. Constitution as ratified in 1789 does not contain explicit language on equality similar to that in the Declaration of Independence. “[I]n creating a republican form of government, the Constitution [does implicitly promote] a certain degree of political equality.”<sup>15</sup> The original text also precludes the granting of titles of nobility by the federal government;<sup>16</sup> guarantees to every state a republican form of government;<sup>17</sup> and sets forth that the citizens of one state shall be entitled to the privileges and immunities of citizens in the several states.<sup>18</sup>

It is important to note that while there is no specific reference to race in the original text of the Constitution, the language in the Constitution reflected a society that accepted the institution of race-based chattel slavery and that did not recognize slaves as having rights equal to citizens. Apportionment of members of the House of Representatives and direct taxes were based on a count of “*the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.*”<sup>19</sup> The euphemistic phrase “all other Persons” referred to slaves.<sup>20</sup> Additionally, persons in “Service or Labour” in one state who escaped to another would not be considered to have been

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<https://www.archives.gov/founding-docs/more-perfect-union> (last revised December 16, 2019).

<sup>12</sup> E.g., *On This Day: March 4, 1789*, UNITED STATES SENATE, [https://www.senate.gov/artandhistory/history/anecdote/days/009week\\_0304.htm](https://www.senate.gov/artandhistory/history/anecdote/days/009week_0304.htm) (last visited February 18, 2021).

<sup>13</sup> U.S. CONST. arts. I–III, <https://constitution.congress.gov/constitution/>.

<sup>14</sup> U.S. CONST. arts. IV–VII.

<sup>15</sup> ESLE, M.: “Equality in American Law,” *St. Louis-Warsaw Transatlantic Law Journal*, n. 1998, 1998, p. 105. See also POLE, *supra* note 2, at 47 (“The principle of the equality of political individuals, which translates into that of one man, one vote...was implicit in the Constitution...rather than being expressly declared by it.”).

<sup>16</sup> U.S. CONST. art. I, § 9.

<sup>17</sup> U.S. CONST. art. IV, § 4.

<sup>18</sup> U.S. CONST. art. IV, § 2; Cong. Rsch. Serv., *Privileges and Immunity Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIV-S2-C1-1-2/ALDE\\_00001167/](https://constitution.congress.gov/browse/essay/artIV-S2-C1-1-2/ALDE_00001167/) (last visited February 18, 2021).

<sup>19</sup> U.S. CONST. art. I, § 2.

<sup>20</sup> *Historical Note on Formation of the Constitution*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/appx-2/ALDE\\_00000002/](https://constitution.congress.gov/browse/essay/appx-2/ALDE_00000002/) (discussing the “great compromise” on proportional representation “that in the upper house each State should have an equal vote, that in the lower branch each State should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves.”).

discharged from such service or labor, but would be *“delivered up on Claim of the Party to whom such Service or Labor may be due.”*<sup>21</sup> In other words, the Constitution required escaped slaves to be returned to their masters. The Constitution also specified that Congress could not legislate to prohibit the migration or importation of slaves prior to the year 1808.<sup>22</sup>

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<sup>21</sup> U.S. CONST. art. 4, § 3, cl. 2.

<sup>22</sup> U.S. CONST. art. I, § 9, cl. 1.

## II. Current legal framework

Section II of the study covers the principles of equality and non-discrimination in constitutional amendments and federal statutes. Section II.1 discusses the first ten amendments to the Constitution (the Bill of Rights), the thirteenth through fifteenth amendments (the Civil War amendments), and amendments from the past century. Section II.2 discusses major federal civil rights legislation as it exists in statutory law today, referencing the U.S. Code.<sup>23</sup> Legislation will be presented in the order in which the original laws were enacted, which aids in following the evolution of civil rights law in the United States over time.

### II.1. Constitutional amendments

#### II.1.1. Bill of Rights (1791)

The original text of the Constitution did not address the rights of the individual—it set forth what the government could do but did not set forth what it could not do. Delegates to the Philadelphia Convention proposed the addition of a bill of rights but the proposal was rejected.<sup>24</sup> During the Constitution’s ratification period, the states collectively proposed 124 amendments to the Constitution related to enumerated individual rights.<sup>25</sup> After the Constitution went into effect, the first Congress addressed the proposed amendments, twelve of which were eventually approved and submitted to the states for ratification.<sup>26</sup> Ten of the twelve amendments were ratified by three-fourths of the states and went into effect on December 15, 1791; these amendments are known as the Bill of Rights.<sup>27</sup>

The [Bill of Rights](#) was created to protect the inalienable rights of individuals referenced in the Declaration of Independence from abuses of power of the federal government.<sup>28</sup> These rights include:

- First Amendment: freedom of religion, speech, press, petition, and assembly;<sup>29</sup>
- Second Amendment: the right to keep and bear arms;<sup>30</sup>
- Fourth Amendment: the right to be free from unreasonable government searches and seizures;<sup>31</sup>
- Fifth Amendment: the right to be free from deprivation of life, liberty, or property without due process of law;<sup>32</sup> and

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<sup>23</sup> The U.S. Code contains the general and permanent laws of the United States organized by subject. *E.g., About the United States Code and this Website*, OFF. OF THE LAW REVISION COUNS., [https://uscode.house.gov/about\\_code.xhtml](https://uscode.house.gov/about_code.xhtml) (last visited February 18, 2021).

<sup>24</sup> *E.g., Bill of Rights (First Through Tenth Amendments) Annotated*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/intro-4/ALDE\\_00000681/](https://constitution.congress.gov/browse/essay/intro-4/ALDE_00000681/).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *E.g., The Bill of Rights: A Transcription*, U.S. NAT’L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/founding-docs/bill-of-rights-transcript> (last reviewed October 28, 2020).

<sup>28</sup> *E.g., POLE, supra* note 2, at 65.

<sup>29</sup> U.S. CONST. amend. I.

<sup>30</sup> U.S. CONST. amend. II.

<sup>31</sup> U.S. CONST. amend. IV.

<sup>32</sup> U.S. CONST. amend. V.

- Fifth, Sixth, and Seventh Amendments: the right to certain minimum standards in criminal prosecutions and punishments.<sup>33</sup>

In providing protection to individuals against possible governmental abuses of power, the first ten amendments represent a constitutional articulation of the principle of equality that individuals—American citizens—are equal in their rights before the law.<sup>34</sup>

FRAME 2

**Amendments I-X (The Bill of Rights)**

***Amendment I***

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

***Amendment II***

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.*

***Amendment III***

*No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*

***Amendment IV***

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

***Amendment V***

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

***Amendment VI***

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

***Amendment VII***

*In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

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<sup>33</sup> U.S. CONST. amends. V, VI, and VIII.

<sup>34</sup> E.g., POLE, *supra* note 2, at 65.

***Amendment VIII***

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

***Amendment IX***

*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

***Amendment X***

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

### **II.1.2. Civil War amendments**

During the colonial period and the early days of the nation, Americans of African descent essentially had no equality in politics, law, or opportunity. Slavery was a prevalent form of labor, particularly in the southern states, and slaves were considered a form of property.<sup>35</sup> Free Americans of African descent were not treated much better than slaves; they generally had no right to vote, were in most cases restricted from attending school, and had far fewer training and professional opportunities, resulting in their perpetual existence “on the margins of white civilization.”<sup>36</sup> Laws targeted at free Americans of African descent systematically denied them the inalienable rights to which white Americans had deemed themselves entitled.<sup>37</sup>

By the 1850s, the United States was divided on the issue of whether the institution of slavery should be ended. Citizens of northern states generally wanted to limit the spread of slavery or abolish it entirely, while citizens of southern states generally wanted to maintain or expand the institution.<sup>38</sup> In 1861, after the election of Abraham Lincoln to the presidency, eleven southern states seceded from the United States and formed a confederacy of states in which the institution of slavery would be protected; a South Carolina militia attacked a federal fort in the state, initiating the civil war.<sup>39</sup> The northern states believed that the secession was unconstitutional and were willing to use military force to preserve the Union.<sup>40</sup> The north and south waged a bloody and costly civil war from 1861 to 1865. On January 1, 1863, President Lincoln issued the [Emancipation Proclamation](#), which proclaimed slaves free in the states engaged in rebellion against the Union.<sup>41</sup> By the spring of 1865, the northern military forces had prevailed, the south had surrendered, and the eleven states that had seceded were restored to the United States.<sup>42</sup>

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<sup>35</sup> E.g., FINKELMAN, P.: “Slavery in the United States: Persons or Property?,” p. 105-34, [https://scholarship.law.duke.edu/faculty\\_scholarship/2709/](https://scholarship.law.duke.edu/faculty_scholarship/2709/), in ALLAIN, J.: *The Legal Understanding of Slavery: From the Historical to the Contemporary*, Oxford University Press, 2012, 396 pp.

<sup>36</sup> E.g., POLE, *supra* note 2, at 175.

<sup>37</sup> *Id.*

<sup>38</sup> E.g., MCPHERSON, J.: “Out of War, a New Nation,” *Prologue Magazine*, Spring 2010, <https://www.archives.gov/publications/prologue/2010/spring/newnation.html> (last reviewed December 15, 2017).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Proclamation No. 17, 12 Stat. 1268 (January 1, 1863), <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html>.

<sup>42</sup> E.g., PLANTE, T.: “The Last Surrenders of the Civil War,” *Prologue Magazine*, Spring 2015, <https://www.archives.gov/publications/prologue/2015/spring/cw-surrenders.html> (last reviewed November

In the post-Civil War period, referred to as Reconstruction, three constitutional amendments were enacted to address the inequalities resultant from the long institution of slavery. By the end of the Civil War, it became clear that a constitutional amendment was required in order to formally and fully abolish slavery in the United States, as neither Congress nor the President was believed to have the full power to do so.<sup>43</sup> In December 1865, the [Thirteenth Amendment](#) became effective. The amendment declares that neither slavery nor involuntary servitude shall exist in the United States except as a punishment for a person duly convicted of a crime, and that Congress shall have the power to enforce the amendment by appropriate legislation.<sup>44</sup>

The [Fourteenth Amendment](#), effective in 1868, is the longest and most complex amendment to the U.S. Constitution. It confers citizenship on all persons born or naturalized in the United States;<sup>45</sup> prohibits states from making or enforcing laws that abridge the privileges or immunities of citizens; prohibits states from depriving any person of life, liberty, or property without due process (the “Due Process Clause”); and prohibits states from denying any person within its jurisdiction the equal protection of the laws (the “Equal Protection Clause”).<sup>46</sup> The amendment also provides that if a state denies the right to vote to any law-abiding citizens (at that time, males age 21 and over), that state’s representation in Congress shall be proportionately reduced.<sup>47</sup> Similar to the Thirteenth Amendment, the Fourteenth Amendment provided that Congress has the power to enforce the amendment by appropriate legislation.<sup>48</sup>

The [Fifteenth Amendment](#) was an attempt to rectify the weak suffrage provision in the Fourteenth Amendment.<sup>49</sup> Effective in 1870, the Fifteenth Amendment declares that the right of citizens of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude, and that Congress has the power to enforce the amendment by appropriate legislation.<sup>50</sup>

The Civil War amendments were the “new constitution” born of the “Second American Revolution.”<sup>51</sup> They were intended to completely change the American political system.<sup>52</sup> Yet, for many years afterwards, the Thirteenth, Fourteenth, and Fifteenth Amendments were interpreted by courts so narrowly that the intentions were never fully realized. Supreme Court

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30, 2016).

<sup>43</sup> *Thirteenth Amendment: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt13-1/ALDE\\_00000991/](https://constitution.congress.gov/browse/essay/amdt13-1/ALDE_00000991/).

<sup>44</sup> U.S. CONST. amend. XIII.

<sup>45</sup> Congress drafted the Fourteenth Amendment to apply to “[a]ll persons born or naturalized in the United States” in order to invalidate the Supreme Court holding from the “*Dred Scott*” case, *Scott v. Sandford*, 60 U.S. 393 (1857), that the status of U.S. citizenship was unavailable to freed slaves with African heritage. See *Citizenship Clause: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-1-1-1/ALDE\\_00000811/](https://constitution.congress.gov/browse/essay/amdt14-S1-1-1-1/ALDE_00000811/).

<sup>46</sup> U.S. CONST. amend. XIV, § 1.

<sup>47</sup> U.S. CONST. amend. XIV, § 2.

<sup>48</sup> U.S. CONST. amend. XIV, § 5.

<sup>49</sup> See *Fifteenth Amendment: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt15-1/ALDE\\_00000634/](https://constitution.congress.gov/browse/essay/amdt15-1/ALDE_00000634/); POLE, *supra* note 2, at 207.

<sup>50</sup> U.S. CONST. amend. XV.

<sup>51</sup> FRANK, J. & MUNRO, R.: “The Original Understanding of Equal Protection of the Laws,” *Washington University Law Quarterly*, n. 1972, 1972, p. 472, [https://openscholarship.wustl.edu/law\\_lawreview/vol1972/iss3/4/](https://openscholarship.wustl.edu/law_lawreview/vol1972/iss3/4/).

<sup>52</sup> *Id.*

decisions interpreting the Civil War amendments—particularly the guarantee of equal protection of the laws—are discussed in greater detail in Section III of the study on case law.

FRAME 3

**Amendments XIII-XV (The Civil War Amendments)**

***Amendment XIII***

*Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

*Section 2. Congress shall have power to enforce this article by appropriate legislation.*

***Amendment XIV***

*Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

*Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,\* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*

*Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.*

*Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.*

*Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

*\*Changed by section 1 of the 26th amendment.*

***Amendment XV***

*Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude--*

*Section 2. The Congress shall have the power to enforce this article by appropriate legislation.*

## II.1.3. Constitutional amendments in the 1900s

### II.1.3.1 Women's suffrage

The principle that women are equal in their rights to men was absent from the Constitution for most of the United States' early history. When the Civil War amendments were adopted, most Americans believed it was unnecessary to grant women the right to vote because women were imagined to be represented in the state through male heads of household and because granting women the right to vote could negatively affect the institution of marriage.<sup>53</sup> Women had a place in family and domestic affairs, but rarely a place in the political or occupational world.<sup>54</sup> They enjoyed some rights of citizenship, including access to the courts, standing to sue, and a reasonable expectation of due process.<sup>55</sup>

In the early 1900s, the women's suffrage movement began to concentrate on the adoption of a constitutional amendment rather than state-level reform.<sup>56</sup> Women's roles were changing, and their increased participation in the national efforts in World War I demonstrated their worth beyond family and domestic affairs.<sup>57</sup> In 1920, the [Nineteenth Amendment](#) became effective, introducing women into the "one person, one vote" principal of equality that is a defining attribute of the original text of the Constitution. The Nineteenth Amendment declares that the right of citizens of U.S. citizens to vote shall not be denied or abridged on account of sex.

#### FRAME 4

##### Amendment XIX

*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.*

*Congress shall have power to enforce this article by appropriate legislation.*

### II.1.3.2 Poll tax prohibited

Poll taxes—fees paid in order to be able to vote—were implemented as voting qualifications in eleven states in the southern United States following the Reconstruction era.<sup>58</sup> The poll tax was a tactic largely used to disenfranchise free Americans of African descent, but also affected poor and uneducated white southerners as well.<sup>59</sup> In the late 1930s, Congress began working towards the elimination of the poll tax as a qualification for voting in federal elections.<sup>60</sup> A constitutional amendment was deemed necessary because the poll tax had had previously

<sup>53</sup> SIEGEL, R.: "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review*, n. 115, 2002, p. 951, [https://digitalcommons.law.yale.edu/fss\\_papers/1106/](https://digitalcommons.law.yale.edu/fss_papers/1106/).

<sup>54</sup> See generally POLE, *supra* note 2, at 379; SIEGEL, *supra* note 53, at 951.

<sup>55</sup> POLE, *supra* note 2, at 388.

<sup>56</sup> POLE, *supra* note 2, at 392; *Nineteenth Amendment: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt19-1/ALDE\\_00001003/](https://constitution.congress.gov/browse/essay/amdt19-1/ALDE_00001003/).

<sup>57</sup> POLE, *supra* note 2, at 392; SIEGEL, *supra* note 53, at 1007.

<sup>58</sup> *Twenty-Fourth Amendment: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt24-1/ALDE\\_00001011/](https://constitution.congress.gov/browse/essay/amdt24-1/ALDE_00001011/).

<sup>59</sup> POLE, *supra* note 2, at 250.

<sup>60</sup> *Twenty-Fourth Amendment: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt24-1/ALDE\\_00001011/](https://constitution.congress.gov/browse/essay/amdt24-1/ALDE_00001011/).



survived constitutional challenges in court.<sup>61</sup> The [Twenty-Fourth Amendment](#), adopted in 1964, states that the right of citizens of the United States to vote in any federal primary or other election shall not be denied or abridged by the United States or any state by reason of failure to pay a poll tax or other tax, and further that Congress shall have the power to enforce the amendment by appropriate legislation.<sup>62</sup>

FRAME 5

**Amendment XXIV**

*Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.*

*Section 2. The Congress shall have power to enforce this article by appropriate legislation.*

**II.1.3.3 Voting age**

Prior to 1970, the voting age in most states was age 21, even though 18-year-olds were legally able to marry, work, and pay taxes; additionally, all men aged 18 to 26 were eligible to be drafted into military service. The United States was in the fifth year of the Vietnam War when, in 1970, Congress passed legislation to lower the age qualification in all federal, state, and local elections to age 18.<sup>63</sup> However, the Supreme Court quickly voided the application of the federal law to state and local elections.<sup>64</sup> To avoid the possibility that states might have to maintain two voting rolls—one for federal elections and the other for state and local elections—the states indicated that they were receptive to a constitutional amendment establishing a universal minimum age qualification for voting at age 18. The [Twenty-Sixth Amendment](#), adopted in 1971, set forth that the right to vote of U.S. citizens age eighteen or older shall not be denied or abridged by the United States or any state on account of age, and further that Congress shall have the power to enforce the amendment by appropriate legislation.<sup>65</sup>

FRAME 6

**Amendment XXVI**

*Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.*

*Section 2. The Congress shall have power to enforce this article by appropriate legislation.*

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<sup>61</sup> *Id.*

<sup>62</sup> U.S. CONST. amend. XXIV.

<sup>63</sup> *Twenty-Sixth Amendment: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt26-1/ALDE\\_00001015/](https://constitution.congress.gov/browse/essay/amdt26-1/ALDE_00001015/) (citing 79 Stat. 437, <https://www.govinfo.gov/content/pkg/STATUTE-79/pdf/STATUTE-79-Pg437.pdf#page=1>, as extended and amended by the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, <https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg314-2.pdf#page=1>).

<sup>64</sup> *Id.* (citing *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

<sup>65</sup> U.S. CONST. amend. XXVI.

## II.2. Statutes

A number of federal statutes have been enacted to enforce the rights guaranteed by the U.S. Constitution and protect classes of individuals from discrimination. The United States largely categorizes this body of law as “civil rights” law.<sup>66</sup> The evolution of federal civil rights law largely tracks “big events” in U.S. history. The two major historical events in the United States resulting in landmark legislation were (1) the post-Civil War Reconstruction era; and (2) the civil rights movement of the 1950s and 1960s, sometimes referred to as the “Second Reconstruction.”<sup>67</sup>

### II.2.1. Reconstruction era statutes

During the post-Civil War Reconstruction era, Congress enacted a series of statutes intended to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.<sup>68</sup> The federal laws passed during this era provided remedies to individuals deprived of their civil rights and were written in broad language that has been “interpreted broadly to protect individuals from a wide range of discriminatory conduct.”<sup>69</sup> They were intended, in part, to diminish the effectiveness of “black codes”—state-level legislation enacted immediately after the end of the Civil War intended to control free Americans of African descent and limit their access to property ownership, courts, employment, and personal liberty.<sup>70</sup> The federal statutes enacted between 1870 and 1871 are referred to as the Enforcement Acts and were intended to suppress growing white supremacist violence and terrorism against African Americans; the second and third Enforcement Acts are also referred to as the Ku Klux Klan Acts, named for the activities of the white supremacist group established after the end of the Civil War that the statute was trying to suppress.

The last major piece of Reconstruction legislation passed was the [Civil Rights Act of 1875](#).<sup>71</sup> It affirmed the right of all persons to equal enjoyment of transportation facilities, inns, theaters, and places of public amusement. In 1883, six years after Reconstruction ended, the U.S. Supreme Court invalidated the Civil Rights Act of 1875, holding that laws addressing acts of discrimination by private parties were not subject to Congress’s authority under the Thirteenth or Fourteenth Amendments.<sup>72</sup>

Federal civil rights laws enacted during the Reconstruction era and still in effect today are largely codified in Title 42 and Title 18 of the U.S. Code. Provisions under Title 42 provide for

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<sup>66</sup> See generally FEDER, J., CONG. RSCH. SERV.: *RL33386, Federal Civil Rights Statutes: A Primer*, 2012, PROQUEST CONGRESSIONAL CRS-2012-AML-0280 (summarizing major federal civil rights legislation in the United States).

<sup>67</sup> See *The Civil Rights Movement and the Second Reconstruction, 1945-1968*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> (last visited February 18, 2021); *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS: EXHIBITIONS, <https://www.loc.gov/exhibits/civil-rights-act/> (last visited February 18, 2021).

<sup>68</sup> FEDER, *supra* note 66, at 8.

<sup>69</sup> *Id.*

<sup>70</sup> COLEMAN, K., CONG. RSCH. SERV.: *R43626, The Voting Rights Act of 1965: Background and Overview*, 2015, p. 3 <https://crsreports.congress.gov/product/pdf/R/R43626/15>.

<sup>71</sup> Act of March 1, 1875, ch. 114, 18 Stat. 335, <https://www.loc.gov/law/help/statutes-at-large/43rd-congress/session-2/c43s2ch114.pdf>.

<sup>72</sup> The Civil Rights Cases, 109 U.S. 3 (1883), <https://www.loc.gov/item/usrep109003/>.

civil remedies, while provisions under Title 18 provide for criminal charges and are enforced by the U.S. Department of Justice ("DOJ").

42 U.S.C. § 1981 derives from the [Enforcement Act of 1870](#).<sup>73</sup> As interpreted today, section 1981 prohibits racial discrimination in public and private contractual relationships, including employment contracts.<sup>74</sup>

FRAME 7

**42 U.S.C. § 1981. Equal rights under the law.**

*(a) Statement of equal rights*

*All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.*

*(b) "Make and enforce contracts" defined*

*For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*

*(c) Protection against impairment*

*The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.*

42 U.S.C. § 1982 derives from the [Civil Rights Act of 1866](#).<sup>75</sup> As interpreted today, section 1982 prohibits racial discrimination in public and private transactions involving real or personal property.<sup>76</sup>

FRAME 8

**42 U.S.C. § 1982. Property rights of citizens.**

*All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.*

42 U.S.C. § 1983 derives from the [Enforcement Act of April 1871](#).<sup>77</sup> Section 1983 is typically used today to enforce constitutional rights deprived under color of state law (that is, under actual or purported government authority) where relief under state law is inadequate, and it is not limited to racial discrimination.<sup>78</sup>

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<sup>73</sup> Act of May 31, 1870, ch. 114, § 16, 16 Stat. 14, <https://www.loc.gov/law/help/statutes-at-large/41st-congress/session-2/c41s2ch114.pdf>.

<sup>74</sup> FEDER, *supra* note 66, at 8.

<sup>75</sup> Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, <https://www.loc.gov/law/help/statutes-at-large/39th-congress/session-1/c39s1ch31.pdf>.

<sup>76</sup> FEDER, *supra* note 66, at 8.

<sup>77</sup> Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, <https://www.loc.gov/law/help/statutes-at-large/42nd-congress/session-1/c42s1ch22.pdf>.

<sup>78</sup> FEDER, *supra* note 66 at 8–9.

## FRAME 9

**42 U.S.C. § 1983. Civil action for deprivation of rights.**

*Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.*

42 U.S.C. § 1985 relates to conspiracy to interfere with civil rights. Subsection 1985(2) pertains to conspiracy to obstruct justice with the purpose of denying a citizen equal protection of the law. Subsection 1985(3) pertains to conspiracy to deprive a person or class of persons equal protection of the law, the right to vote in a federal election, or the right to participate in the political process. Section 1985 is derived from the Enforcement Act of April 1871.<sup>79</sup> "Although Section 1985 may apply to private acts of discrimination, it is not clear whether it covers discrimination based on factors other than race."<sup>80</sup>

## FRAME 10

**42 U.S.C. § 1985. Conspiracy to interfere with civil rights.**

...

*(2) Obstructing justice; intimidating party, witness, or juror*

*If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;*

*(3) Depriving persons of rights or privileges*

*If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to*

<sup>79</sup> Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.

<sup>80</sup> FEDER, *supra* note 66, at 9.

*be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.*

18 U.S.C. § 241 makes it a federal crime to conspire to interfere in the exercise or enjoyment of a person's constitutional or statutory rights. Section 241 originates from the Enforcement Act of April 1871.<sup>81</sup> Those convicted of violating section 241 can be fined or imprisoned up to ten years, or up to life in prison or death if certain aggravating factors are present.<sup>82</sup>

FRAME 11

**18 U.S.C. § 241. Conspiracy against rights.**

*If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or*

*If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured-*

*They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.*

18 U.S.C. § 242 makes it a federal crime to deprive persons of constitutional or statutory rights under color of law on account of the person's alienage, color, or race. Section 242 originates from the Civil Rights Act of 1866.<sup>83</sup> Those convicted of violating section 242 can be fined or imprisoned up to ten years, or up to life in prison or death if certain aggravating factors are present.<sup>84</sup>

FRAME 12

**18 U.S.C. § 242. Deprivation of rights under color of law.**

*Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.*

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<sup>81</sup> Act of April 20, 1871, ch. 22, §§ 1–2, 17 Stat. 13

<sup>82</sup> *Id.*

<sup>83</sup> Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27.

<sup>84</sup> *Id.*

## II.2.2. Civil rights era statutes

### II.2.2.1 Equal Pay Act of 1963

Pervasive disparities in pay between men and women were first addressed by Congress in 1963.<sup>85</sup> Acting under its broad constitutional authority to regulate interstate commerce,<sup>86</sup> Congress determined that wage differentials based on sex depress wages and living standards; prevent maximum utilization of available labor resources; cause labor disputes; burden commerce and the free flow of goods; and constitute unfair competition.<sup>87</sup> The [Equal Pay Act of 1963](#),<sup>88</sup> codified as amended at 29 U.S.C. § 206(d), makes it illegal for an employer to discriminate between employees on the basis of sex by paying lower wages to employees of one sex for the same work performed under similar working conditions by employees of the opposite sex.<sup>89</sup> It further prohibits labor unions from causing an employer to discriminate against an employee in violation of the Equal Pay Act.<sup>90</sup> An employer attempting to remedy a violation of the Equal Pay Act is not permitted to reduce the wage rate of any employee.<sup>91</sup> Under the Equal Pay Act, a prevailing plaintiff is eligible for back pay (the difference between what the employee was paid and what the employee should have been paid) for wages unlawfully withheld as a result of pay inequality. If a willful violation is shown, the plaintiff additionally may be awarded liquidated damages equal to the amount of back pay.<sup>92</sup>

#### FRAME 13

#### 29 U.S.C. § 206. Minimum wage.

...

##### *(d) Prohibition of sex discrimination*

*(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.*

<sup>85</sup> See generally COLLINS, B. & FEDER, J., CONG. RSCH. SERV.: *RL31867, Pay Equity Legislation*, 2012, ProQuest Congressional CRS-2012-DSP-0087 (discussing the issue of gender wage disparity and related federal legislation).

<sup>86</sup> U.S. CONST. Art. 1, § 8, cl. 3.

<sup>87</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a), 77 Stat. 56.

<sup>88</sup> Pub. L. No. 88-38, 77 Stat. 56, <https://www.govinfo.gov/content/pkg/STATUTE-77/pdf/STATUTE-77-Pg56.pdf> (current version at 29 U.S.C. § 206(d)).

<sup>89</sup> 29 U.S.C. § 206(d)(1).

<sup>90</sup> 29 U.S.C. § 206(d)(2).

<sup>91</sup> 29 U.S.C. § 206(d)(1).

<sup>92</sup> 29 U.S.C. § 216(b).

*(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.*

*(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.*

*(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.*

...

### **II.2.2.2 Civil Rights Act of 1964**

The [Civil Rights Act of 1964](#) is the most prominent and sweeping piece of federal civil rights legislation pertaining to issues of equality and non-discrimination in modern U.S. history.<sup>93</sup> For decades before it was enacted, Americans of African descent and allies engaged in an organized legal and social justice movement to end racial discrimination and assert equal rights for African Americans under the law, referred to as the civil rights movement.<sup>94</sup> In 1954, due to persistent efforts of the civil rights movement, the U.S. Supreme Court invalidated the practice of segregated public education in a landmark decision, [Brown v. Board of Education](#),<sup>95</sup> discussed in greater detail in Section III.2.3 of this study. That decision caused a years-long surge of white supremacist violence against African Americans. African Americans engaged in public, nonviolent civil disobedience to protest racial segregation and related racist laws, policies, and practices. Hundreds of demonstrations occurred across the nation. Media coverage showed the nation the violent means used by white supremacists to suppress peaceful protestors.<sup>96</sup> Bombings and riots in Birmingham, Alabama, in May 1963 caused President John F. Kennedy to deploy federal troops to Birmingham.<sup>97</sup> In the midst of this crisis, in June 1963, President Kennedy urged Congress to pass civil rights legislation that would address race-based voter suppression, unequal access to public accommodations, school segregation, and discrimination in federally funded programs.<sup>98</sup> After President Kennedy was assassinated in November 1963, President Lyndon Johnson prioritized passage of President Kennedy's proposed civil rights legislation.<sup>99</sup> Protracted negotiations in Congress eventually culminated in the Civil Rights Act of 1964, signed into law on July 2, 1964.

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<sup>93</sup> Pub. L. No. 88-352, 78 Stat. 241, <https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf>.

<sup>94</sup> A timeline of legal events related to the Civil Rights Act and the civil rights movement is available on the Library of Congress Exhibitions website, *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS: EXHIBITIONS, <https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html> (last visited February 18, 2021).

<sup>95</sup> 347 U.S. 483 (1954), <https://www.loc.gov/item/usrep347483>.

<sup>96</sup> E.g., *The Civil Rights Act of 1964: A Long Struggle for Freedom: Civil Rights Era (1950-1963)*, LIBRARY OF CONGRESS: EXHIBITIONS, <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-era.html> (last visited February 18, 2021).

<sup>97</sup> *Id.*

<sup>98</sup> E.g., DOWNING, P., CONG. RSCH. SERV.: 65-GGR 100-2, *The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments; Text*, 1965, ProQuest Congressional CRS-1965-GGX-0001.

<sup>99</sup> E.g., *The Civil Rights Act of 1964: A Long Struggle for Freedom: The Civil Rights Act of 1964*, LIBRARY OF CONGRESS: EXHIBITIONS, <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html> (last visited February 18,

Title I of the Civil Rights Act of 1964, codified as amended at 52 U.S.C. § 10101, pertains to non-discrimination in the exercise of the right to vote. It prohibits the unequal application of state voter registration requirements for federal elections and provides for a presumption of literacy for anyone who has not been adjudicated incompetent and who has achieved a sixth-grade education. Prerequisites for voting, such as literacy tests, were a longstanding tactic used by state and local governments to disenfranchise large numbers of otherwise eligible African American voters by requiring them to meet standards that were not applied or enforced evenly across races.<sup>100</sup>

## FRAME 14

**52 U.S.C. § 10101. Voting rights.**

*(a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions*

*(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.*

*(2) No person acting under color of law shall-*

*(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;*

*(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or*

*(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 [52 U.S.C. 20701 et seq.]: Provided, however, That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.*

*(3) For purposes of this subsection-*

*(A) the term "vote" shall have the same meaning as in subsection (e) of this section;*

*(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.*

*(b) Intimidation, threats, or coercion*

2021).

<sup>100</sup> Literacy tests would be effectively banned nationwide the following year by the Voting Rights Act, *See infra* Section II.2.2.3.



*No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.*

*(c) Preventive relief; injunction; rebuttable literacy presumption; liability of United States for costs; State as party defendant*

*Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.*

...

Title II of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000a to 2000a-6, pertains to non-discrimination in places of public accommodation. Pursuant to Congress's broad authority to regulate interstate commerce,<sup>101</sup> section 2000a prohibits discrimination or segregation on the basis of race, color, religion, or national origin in places of public accommodation, such as inns, restaurants, theaters, and stadiums. Persons aggrieved by discriminatory acts with respect to public accommodations are entitled to bring a civil action for injunctive relief against the perpetrator.<sup>102</sup> In cases where the Attorney General has reasonable cause to believe that a person or group is engaged in a pattern of violation of the right to equal enjoyment of a public accommodation, he or she may also institute a civil action against the perpetrator for preventive relief.<sup>103</sup>

#### FRAME 15

##### **42 U.S.C. § 2000a. Prohibition against discrimination or segregation in places of public accommodation.**

###### *(a) Equal access*

*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.*

<sup>101</sup> U.S. CONST. Art. 1, § 8, cl. 3.

<sup>102</sup> 42 U.S.C. § 2000a-3.

<sup>103</sup> 42 U.S.C. § 2000a-5.

*(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments*

*Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter 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.*

*(c) Operations affecting commerce; criteria; "commerce" defined*

*The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers of a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.*

*(d) Support by State action*

*Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.*

*(e) Private establishments*

*The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).*

Titles III and IV of the Civil Rights Act of 1964 pertain to desegregation. Title III, codified at 42 U.S.C. §§ 2000b to 2000b-3, pertains to desegregation of public facilities owned or operated by state or local governments. Section 2000b authorizes the Attorney General to receive complaints of segregation of public facilities and to bring civil actions to further the orderly

progress of desegregation of public facilities (other than public educational facilities). Title IV, codified at 42 U.S.C. §§ 2000c to 2000c-9, pertains to desegregation of public education. Sections 2000c-2 to 2000c-5 authorize the U.S. Secretary of Education to facilitate the desegregation of public schools through technical assistance, training, and funding. Section 2000c-6 authorizes the Attorney General to receive complaints of segregation of public education and to bring civil actions to further the orderly achievement of desegregation in public education.

FRAME 16

**42 U.S.C. § 2000b. Civil actions by the Attorney General**

*(a) Complaint; certification; institution of civil action; relief requested; jurisdiction; impleading additional parties as defendants*

*Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 2000c of this title, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.*

...

**42 U.S.C. § 2000c-6. Civil actions by the Attorney General**

*(a) Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants*

*Whenever the Attorney General receives a complaint in writing—*

*(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or*

*(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,*

*and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise*

*enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.*

...

Title VI of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. §§ 2000d to 2000d-7, pertains to non-discrimination in federally funded programs. Section 2000d sets forth that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The federal agency administering the program is authorized to effectuate the provisions of section 2000d,<sup>104</sup> but the Attorney General, through the DOJ, oversees and coordinates federal Title VI activities.<sup>105</sup>

If a recipient of federal assistance is found to have discriminated and voluntary compliance cannot be achieved, the federal agency providing the assistance should either initiate fund termination proceedings or refer the matter to the [DOJ] for appropriate legal action. Aggrieved individuals may file administrative complaints with the federal agency that provides funds to a recipient, or the individuals may file suit for appropriate relief in federal court. Title VI itself prohibits intentional discrimination. However, most funding agencies have regulations implementing Title VI that prohibit recipient practices that have the effect of discrimination on the basis of race, color, or national origin.<sup>106</sup>

#### FRAME 17

##### **42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin**

*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*

Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. §§ 2000e to 2000e-17, pertains to non-discrimination in employment.<sup>107</sup> Section 2000e-2 makes it unlawful for an employer,<sup>108</sup> employment agency, or labor organization to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” because of an individual’s race, color, religion, sex,<sup>109</sup> or national origin; section 2000e-3 makes it unlawful for an

<sup>104</sup> 42 U.S.C. § 2000d-1.

<sup>105</sup> Exec. Order No. 12,250, 3 C.F.R. 298 (1980), *reprinted in* 42 U.S.C. § 2000d-1 note (Exec. Ord. No. 12250. Leadership and Coordination of Implementation and Enforcement of Nondiscrimination Laws).

<sup>106</sup> *Title VI of the Civil Rights Act of 1964: Title VI Overview*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/fcs/TitleVI> (last visited February 18, 2021).

<sup>107</sup> Many small businesses are not required to comply with federal employment discrimination laws. *Do the Federal Employment Discrimination Laws Enforced by EEOC Apply to My Business?*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/small-business/1-do-federal-employment-discrimination-laws-enforced-eeoc-apply-my> (last visited February 18, 2021).

<sup>108</sup> In general, Title VII is not applicable to religious employers. 42 U.S.C. § 2000e-1(a).

<sup>109</sup> In 1978, Congress amended Title VII to expand the definition of the terms “because of sex” and “on the basis of sex” to include “on the basis of pregnancy, childbirth, or related medical conditions,” and to state that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work.” Pregnancy

employer, employment agency, or labor organization to discriminate against someone for opposing unlawful discrimination under the statute. Title VII also establishes the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with overseeing claims of violations of Title VII and preventing unlawful employment practices,<sup>110</sup> and authorizes the Attorney General to bring civil actions against employers engaged in a pattern of resistance to the rights secured in Title VII.<sup>111</sup> Section 2000e-16, added in 1972, extends the right to be free from employment discrimination based on race, color, religion, sex, or national origin to most employees of the federal government.<sup>112</sup>

FRAME 18

**42 U.S.C. § 2000e-2. Unlawful employment practices**

*(a) Employer practices*

*It shall be an unlawful employment practice for an employer—*

*(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or*

*(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.*

*(b) Employment agency practices*

*It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.*

*(c) Labor organization practices*

*It shall be an unlawful employment practice for a labor organization—*

*(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;*

*(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or*

*(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.*

*(d) Training programs*

*It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or*

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Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (current version at 42 U.S.C. § 2000e(k)).

<sup>110</sup> 42 U.S.C. §§ 2000e-4 to 2000e-5.

<sup>111</sup> 42 U.S.C. § 2000e-6.

<sup>112</sup> Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111.

*national origin in admission to, or employment in, any program established to provide apprenticeship or other training.*

...

#### **42 U.S.C. § 2000e-3. Other unlawful employment practices**

*(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings*

*It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*

*(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception*

*It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.*

#### **II.2.2.3 Voting Rights Act of 1965**

By 1965, it was evident to President Johnson and Congress that federal efforts to eliminate state discriminatory election practices, even as strengthened by Title I of the Civil Rights Act of 1964, were insufficient to overcome intransigent resistance by state and local officials to enforcement of the Fifteenth Amendment.<sup>113</sup> Violence against voting-rights activists and other acts of terrorism related to resisting African American enfranchisement had gained national attention. On March 7, 1965, state troopers in Selma, Alabama, carried out an unprovoked and bloody attack on peaceful protesters marching for voting and civil rights; this incident persuaded President Johnson to propose that Congress enact a strong voting rights law.<sup>114</sup> The resulting legislation, the [Voting Rights Act of 1965](#), was enacted on August 6, 1965.<sup>115</sup> The original law was scheduled to expire five years after it was enacted, but the Voting Rights Act has been extended and amended five times, most recently in 2006 for 25 years.<sup>116</sup>

The Voting Rights Act of 1965 is primarily codified as amended at 52 U.S.C. §§ 10301 to 10314 and 10501 to 10508. Section 10301 prohibits states and local governments from using voting

<sup>113</sup> *The Voting Rights Act of 1965*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/history-federal-voting-rights-laws> (last updated July 28, 2017).

<sup>114</sup> *Id.*

<sup>115</sup> Pub. L. No. 89-110, 79 Stat. 437, <https://www.govinfo.gov/content/pkg/STATUTE-79/pdf/STATUTE-79-Pg437.pdf>. See generally COLEMAN, *supra* note 70 (provides a detailed history and background of the Voting Rights Act and subsequent amendments and issues).

<sup>116</sup> COLEMAN, *supra* note 70, at 13.

practices or procedures that result in the denial or abridgement of the right to vote on account of race or color. Sections 10302 and 10305 provide the Attorney General and the federal courts with the power to certify political subdivisions (counties) for the assignment of federal observers, assigned to monitor polling places to ensure compliance with the Voting Rights Act. Section 10303(e) prohibits political subdivisions from applying literacy requirements for citizens who have completed a sixth-grade education in American schools, including schools in Puerto Rico, a U.S. territory with a Spanish-speaking population. Section 10303(f), added in 1975,<sup>117</sup> prohibits voting qualifications based solely on an individual's membership in a language minority and prohibits English-only voting materials in census-determined jurisdictions where 5 percent or more of citizens of voting age are members of a single language minority. Section 10306 declares that the constitutional right of citizens to vote can sometimes be denied or abridged by the imposition of a poll tax as a precondition to voting, and as such, the Attorney General is authorized to institute actions for relief against enforcement of poll taxes. Section 10307(b) prohibits any person, acting under color of law or otherwise, from using intimidation, threats, or coercion to prevent any person from voting.

FRAME 19

**52 U.S.C. § 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

*(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).*

*(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*

Sections 10303 and 10304 authorize increased federal oversight for certain "covered" jurisdictions before they can establish new voting laws to ensure that the laws would not have the effect of denying or abridging the right to vote on account of race or color, also known as "preclearance." A formula, set forth in section 10303(b), based on voter registration data from 1964, is used to determine which jurisdictions are considered "covered" jurisdictions. However, in a 2013 decision in *Shelby County v. Holder*, the Supreme Court found unconstitutional the coverage formula in 52 U.S.C. § 10303(b).<sup>118</sup> "The effect of the Shelby County decision is that the jurisdictions identified by the coverage formula... no longer need to seek preclearance for new voting changes, unless they are covered by a separate court order[.]"<sup>119</sup>

<sup>117</sup> Pub. L. No. 94-73, § 203, 89 Stat. 401-02.

<sup>118</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013), <https://www.supremecourt.gov/opinions/boundvolumes/570bv.pdf#page=559>. See also *Hearing on History and Enforcement of the Voting Rights Act of 1965 Before the H. Comm. on the Judiciary*, 116th Cong. 68 (2019) (statement of L. Paige Whitaker, Legislative Attorney, American Law Division, Congressional Research Service), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg39677/pdf/CHRG-116hhrg39677.pdf#page=72>.

<sup>119</sup> *Statutes Enforced by the Voting Section*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/statutes-enforced->

## FRAME 20

**52 U.S.C. § 10303. Suspension of the use of tests or devices in determining eligibility to vote**

*(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court*

*(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action-*

*(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);*

*(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;*

*(C) no Federal examiners or observers under chapters 103 to 107 of this title have been assigned to such State or political subdivision;*

*(D) such State or political subdivision and all governmental units within its territory have complied with section 10304 of this title, including compliance with the requirement that no change covered by section 10304 of this title has been enforced without preclearance under section 10304 of this title, and have repealed all changes covered by section 10304 of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;*

*(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 10304 of*



*this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 10304 of this title, and no such submissions or declaratory judgment actions are pending; and*

*(F) such State or political subdivision and all governmental units within its territory-*

*(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;*

*(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under chapters 103 to 107 of this title; and*

*(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.*

...

*(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register\**

*The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.*

*A determination or certification of the Attorney General or of the Director of the Census under this section or under section 10305 or 10309 of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.*

*\*Section 10303(b) declared unconstitutional by the Supreme Court's decision in Shelby County v. Holder.*

...

**52 U.S.C. § 10304. Alteration of voting qualifications; procedure and appeal;  
purpose or effect of diminishing the ability of citizens to elect their preferred candidates**

*(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in*

force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Section 10501, added to the Voting Rights Act in 1970, prohibits the use of any literacy, educational achievement, subject knowledge, moral character, or proof of qualifications prerequisites to deny the right to vote in federal, state, or local elections. Section 10508, added in 1982,<sup>120</sup> permits any voter who requires assistance to vote because of blindness, disability, or inability to read to be given assistance by a person of their choice.

#### FRAME 21

##### **52 U.S.C. § 10501. Application of prohibition to other States; "test or device" defined**

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any

<sup>120</sup> Act to Amend the Voting Rights Act of 1965, Pub. L. No. 97-205, § 5, 96 Stat. 134–35.

*particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.*

**52 U.S.C. § 10508. Voting assistance for blind, disabled or illiterate persons**

*Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.*

**II.2.2.4 Age Discrimination in Employment Act of 1967**

Shortly after the passage of the Civil Rights Act of 1964, Congress directed the Secretary of Labor to submit a report on age discrimination.<sup>121</sup> The resulting report demonstrated that many older Americans, as early as age 40, were disproportionately excluded from or driven out of the workforce.<sup>122</sup> State-level statutes, to the extent they existed, were determined to be ineffective at addressing age discrimination in employment.<sup>123</sup> Finding, ultimately, that arbitrary age discrimination in employment burdens interstate commerce, Congress enacted the [Age Discrimination in Employment Act of 1967](#),<sup>124</sup> presently codified as amended at 29 U.S.C. §§ 621 to 634.

29 U.S.C. § 623 makes it generally unlawful for an employer, employment agency, or labor organization to carry out employment practices or decisions that are discriminatory based solely on age, or to discriminate against someone for opposing unlawful age discrimination under the statute. Under section 626, the EEOC (established in the Civil Rights Act of 1964) is the federal agency responsible for overseeing claims of violations of the Age Discrimination in Employment Act; persons aggrieved by a violation of the statute may either commence a proceeding before the EEOC or bring a civil action. Section 631 states that the Age Discrimination in Employment Act applies only to individuals 40 years of age and older. Section 631, added in 1974,<sup>125</sup> extends the protections against age discrimination to most employees in federal government.

FRAME 22

**29 U.S.C. § 623. Prohibition of age discrimination**

*(a) Employer practices*

*It shall be unlawful for an employer—*

*(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;*

*(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or*

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<sup>121</sup> GLENN, J. & LITTLE, K.: "A Study of the Age Discrimination in Employment Act of 1967," *GPSolo*, n. 31, 2014, p. 42.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 42–43.

<sup>124</sup> Pub. L. No. 90-202, 81 Stat. 602, <https://www.govinfo.gov/content/pkg/STATUTE-81/pdf/STATUTE-81-Pg602.pdf>.

<sup>125</sup> Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 74, <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg55.pdf#page=20>.

*(3) to reduce the wage rate of any employee in order to comply with this chapter.*

*(b) Employment agency practices*

*It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.*

*(c) Labor organization practices*

*It shall be unlawful for a labor organization—*

*(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;*

*(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;*

*(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.*

*(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation*

*It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.*

...

### **II.2.2.5 Fair Housing Act of 1968**

Racial discrimination, segregation, and disparity in housing have long been an issue in the United States. After the Civil War, many African Americans were barred from owning or occupying housing in majority-white neighborhoods through local zoning ordinances and neighborhood covenants. In the 1960s, African American and Hispanic American soldiers returning from the Vietnam War were often precluded from purchasing or renting homes in certain neighborhoods because of their race, color, or national origin. These inequities came into the spotlight during the civil rights movement. After the passage of the Civil Rights Act of 1964, Congress considered fair housing bills but was not able to enact fair housing legislation until after the assassination of civil rights leader Dr. Martin Luther King in April 1968; within days of Dr. King's death, at President Johnson's urging, Congress enacted the [Fair Housing Act](#), Title VIII of the Civil Rights Act of 1968.<sup>126</sup>

The Fair Housing Act is primarily codified as amended at 42 U.S.C. §§ 3601 to 3619.<sup>127</sup> The purpose of the statute is to provide for fair housing in the United States within constitutional limitations.<sup>128</sup> The Fair Housing Act applies to many types of public and private housing and

<sup>126</sup> *History of Fair Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history) (last visited February 18, 2021); Pub. L. No. 90-284, §§ 801–819, 82 Stat. 81 (1968), <https://www.govinfo.gov/content/pkg/STATUTE-82/pdf/STATUTE-82-Pg73.pdf#page=9>.

<sup>127</sup> See generally CARPENTER, D., CONG. RSCH. SERV.: 95-710, *The Fair Housing Act (FHA): A Legal Overview*, 2016, <https://crsreports.congress.gov/product/pdf/RL/95-710/23>.

<sup>128</sup> 42 U.S.C. § 3601.

includes the secondary mortgage market.<sup>129</sup> The statute makes it unlawful to discriminate on the basis of race, color, religion, national origin, sex, physical or mental handicap, or family status in the sale of, rental of, financing of, or provision of brokerage services related to housing. The statute also makes it unlawful to coerce, intimidate, threaten, or interfere with individuals exercising their rights under the Fair Housing Act.<sup>130</sup>

FRAME 23

**42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices**

*As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—*

*(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.*

*(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.*

*(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.*

*(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.*

*(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.*

*(f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—*

*(A) that buyer or renter,*

*(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or*

*(C) any person associated with that buyer or renter.*

*(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—*

*(A) that person; or*

*(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or*

*(C) any person associated with that person.*

...

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<sup>129</sup> CARPENTER, *supra* note 127, at 1–2.

<sup>130</sup> 42 U.S.C. § 3617.

#### 42 U.S.C. § 3605. Discrimination in residential real estate-related transactions

##### (a) In general

*It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.*

...

The Fair Housing Act is administered by the Department of Housing and Urban Development ("HUD"), which is authorized to enforce its provisions.<sup>131</sup> Sections 3610 and 3616 set forth that persons aggrieved by violations of the Fair Housing Act can file an administrative proceeding with HUD or commence a civil action in federal court. Additionally, the Attorney General is authorized to commence a civil action where there is reasonable cause to believe that a person or group of persons is engaged in a pattern of resisting the full enjoyment of the rights secured by the Fair Housing Act.<sup>132</sup>

### II.2.3. Post-civil rights era statutes

#### II.2.3.1 Title IX of the Education Amendments of 1972

The Civil Rights Act of 1964 did not address sex discrimination in education. Women in the United States were historically excluded from educational opportunities or limited in accessing the educational opportunities afforded to men.<sup>133</sup> They faced discrimination because of their sex both as students and in employment in the field of education.

In 1972, Congress passed [Title IX of the Education Amendments of 1972](#) ("Title IX"),<sup>134</sup> primarily codified as amended at 20 U.S.C. §§ 1681 to 1688. Title IX prohibits discrimination on the basis of sex in educational institutions and programs receiving federal funding. It applies to public and private schools from pre-school through graduate school.<sup>135</sup> Title IX also prohibits denial of admission to education programs and activities on the basis of blindness or visual impairment.<sup>136</sup> Title IX compliance is overseen primarily by the U.S. Department of Education Office for Civil Rights.<sup>137</sup> DOJ also has a role in enforcing Title IX through its ability to file suit against persons or groups believed to be engaged in a pattern of resisting the full enjoyment of the rights secured by Title IX.<sup>138</sup> Although Title IX does not specifically address sexual harassment, the courts and the Department of Education have "determined that a school's

<sup>131</sup> 42 U.S.C. § 3608.

<sup>132</sup> 42 U.S.C. § 3614.

<sup>133</sup> U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

<sup>134</sup> Pub. L. No. 92-318, §§ 901–907, 86 Stat. 373, <https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg235.pdf#page=139>.

<sup>135</sup> 20 U.S.C. § 1681(c).

<sup>136</sup> 20 U.S.C. § 1684.

<sup>137</sup> *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., OFF. FOR CIVIL RIGHTS, [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last modified January 10, 2020).

<sup>138</sup> U.S. DEP'T OF JUSTICE, *supra* note 133, at 5.

response to sexual harassment allegations... must conform to Title IX's bar on sex discrimination."<sup>139</sup>

FRAME 24

**20 U.S.C. § 1681. Sex**

*(a) Prohibition against discrimination; exceptions*

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: (exceptions omitted)*

...

**20 U.S.C. § 1684. Blindness or visual impairment; prohibition against discrimination**

*No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.*

**II.2.3.2 Rehabilitation Act of 1973**

The [Vocational Rehabilitation Act](#)<sup>140</sup> was originally enacted in 1920 to provide vocational assistance to injured workers returning to jobs. It was eventually fully replaced by the [Rehabilitation Act of 1973](#),<sup>141</sup> a landmark piece of legislation addressed to improving services and expanding employment opportunities to individuals with a variety of physical and mental disabilities. The Rehabilitation Act of 1973 also included the first federal civil rights law generally addressing the rights of people with disabilities. In pertinent part, the act, codified as amended at 29 U.S.C. §§ 791 to 794g, prohibits discrimination on the basis of an individual's disability in federally funded programs and activities.<sup>142</sup> It also requires affirmative action for hiring, placing, and promoting individuals with disabilities in employment in federal executive branch agencies and with federal contractors.<sup>143</sup> DOJ, the EEOC, and the Department of Labor are the federal agencies with responsibilities for enforcing the non-discrimination provisions with respect to federally funded programs or activities, federal employers, and federal contractors, respectively.<sup>144</sup>

FRAME 25

**29 U.S.C. § 793. Employment under Federal contracts**

*(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified individuals with disabilities; regulations*

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<sup>139</sup> COLE, J., CONG. RSCH. SERV.: *LSB10479, New Title IX Sexual Harassment Regulations Overhaul Responsibilities for Schools*, 2020, p. 1, <https://crsreports.congress.gov/product/pdf/LSB/LSB10479>.

<sup>140</sup> Act of June 2, 1920, ch. 219, 41 Stat. 735, <https://www.loc.gov/law/help/statutes-at-large/66th-congress/session-2/c66s2ch219.pdf>.

<sup>141</sup> Pub. L. No. 93-112, 87 Stat. 355, <https://www.govinfo.gov/content/pkg/STATUTE-87/pdf/STATUTE-87-Pg355.pdf>.

<sup>142</sup> 29 U.S.C. §§ 793–794.

<sup>143</sup> 29 U.S.C. §§ 791 & 793.

<sup>144</sup> FEDER, *supra* note 66, at 4.

*Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. The provisions of this section shall apply to any subcontract in excess of \$10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.*

...

#### **29 U.S.C. § 794. Nondiscrimination under Federal grants and programs**

##### *(a) Promulgation of rules and regulations*

*No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*

...

### **II.2.3.3 Equal Credit Opportunity Act**

The issue of discrimination based on sex in the consumer credit market received national attention in 1972 with the publication of a report concluding there were “widespread instances of unwarranted discrimination in the granting of credit to women.”<sup>145</sup> Women were routinely denied credit, held to different income standards than men, and treated differently based on whether they were married, single, or of childbearing age.<sup>146</sup> Accordingly, Congress passed the [Equal Credit Opportunity Act](#) to address sex and marital status discrimination in the credit industry.<sup>147</sup> Two years later, an amendment extended the right to be free from discrimination by the consumer credit industry to additional classes of individuals.<sup>148</sup>

The Equal Credit Opportunity Act, codified as amended at 15 U.S.C. §§ 1691 to 1691f, makes it unlawful for any creditor to discriminate against an applicant for credit on the basis of race, color, religion, national origin, sex or marital status, age, income derived from public assistance, or a history of the applicant exercising consumer credit protection rights in good faith.<sup>149</sup> When making an adverse decision to a credit applicant, the creditor must disclose in

<sup>145</sup> BURNS, J.: “An Empirical Analysis of the Equal Credit Opportunity Act,” *University of Michigan Journal of Law Reform*, n. 13, 1979, p. 103, <https://repository.law.umich.edu/mjlr/vol13/iss1/6>, (quoting NAT’L COMM’N ON CONSUMER FIN., *Report 160* (1972)).

<sup>146</sup> See *id.* at 103 fn. 13 (citing NAT’L COMM’N ON CONSUMER FIN., *Report 160* (1972)).

<sup>147</sup> Pub. L. No. 93-495, §§ 501–503, 88 Stat. 1521 (1974), <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg1500.pdf#page=22>.

<sup>148</sup> Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251, <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg251.pdf> (current version at U.S.C. §§ 1691 to 1691f).

<sup>149</sup> 15 U.S.C. § 1691(a).



writing the reasons for the action and furnish copies to the applicant.<sup>150</sup> Several federal agencies share responsibility for overseeing and enforcing the Equal Credit Opportunity Act.<sup>151</sup> Creditors who violate the rights afforded by the Equal Credit Opportunity Act may be liable to the aggrieved applicant for damages, equitable or declaratory relief, and costs.<sup>152</sup> Additionally, the Attorney General is authorized to commence a civil action if he or she has reasonable cause to believe that one or more creditors is engaged in a pattern of violating the Equal Credit Opportunity Act.<sup>153</sup>

FRAME 26

**15 U.S.C. § 1691. Scope of prohibition**

*(a) Activities constituting discrimination*

*It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—*

*(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);*

*(2) because all or part of the applicant's income derives from any public assistance program; or*

*(3) because the applicant has in good faith exercised any right under this chapter.*

...

*(d) Reason for adverse action; procedure applicable; "adverse action" defined*

*(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.*

*(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—*

*(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or*

*(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.*

*(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.*

*(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.*

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<sup>150</sup> 15 U.S.C. § 1691(d) & (e).

<sup>151</sup> See *The Equal Credit Opportunity Act*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/equal-credit-opportunity-act-3> (last updated July 22, 2020).

<sup>152</sup> 15 U.S.C. § 1691e(a)–(d).

<sup>153</sup> 15 U.S.C. § 1691e(g)–(h).

*(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.*

*(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.*

...

#### **II.2.3.4 Equal Educational Opportunities Act of 1974**

As a follow up to the school desegregation laws enacted in the 1960s, in 1972, President Richard Nixon proposed the enactment of a law requiring state and local governments to grant equal educational opportunities to persons regardless of race, color, or national origin.<sup>154</sup> President Nixon desired to shift lawmaking on the issue of desegregation from the courts to Congress.<sup>155</sup> Two years later, Congress, declaring it to be the policy of the United States that all children enrolled in public school are entitled to equal educational opportunity without regard to race, color, sex, or national origin,<sup>156</sup> enacted the [Equal Educational Opportunities Act of 1974](#),<sup>157</sup> presently codified as amended at 20 U.S.C. §§ 1701 to 1720.

Section 1703 makes it unlawful for a state to deny equal education opportunity to an individual on account of race, color, sex, or national origin by deliberately segregating students on the basis of these classifications; failing to take steps to eliminate segregated schools; assigning or transferring students to a school other than the school in his or her neighborhood on the basis of these classifications, if the assignment results in a greater degree of segregation among schools in the same system; discriminating on the basis of these classifications in the employment of faculty or staff; or failing to take appropriate action to overcome language barriers that impede equal participation by students in instructional programs. However, a "balanced" school system based on race, color, sex, or national origin is not required by the statute,<sup>158</sup> nor is assignment of students to schools based on their neighborhood a denial of equal educational opportunity as long as it is not done for the purpose of segregating students on the basis of race, color, sex, or national origin.<sup>159</sup> Either individuals aggrieved by violations of the Equal Educational Opportunities Act, or the Attorney General on behalf of aggrieved individuals, may institute civil actions for relief against the offending parties.<sup>160</sup>

<sup>154</sup> NIXON R.: "Special Message to the Congress on Equal Educational Opportunities and School Busing," *Public Papers of the Presidents of the United States: Richard M. Nixon (1972)*, n. 1972, 1974, p. 429, <https://www.govinfo.gov/app/details/PPP-1972-book1>.

<sup>155</sup> *Id.* at 442–43.

<sup>156</sup> 20 U.S.C. § 1701.

<sup>157</sup> Pub. L. No. 93-380, §§ 201–259, 88 Stat. 514, <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg484.pdf#page=31>.

<sup>158</sup> 20 U.S.C. § 1704.

<sup>159</sup> 20 U.S.C. § 1705.

<sup>160</sup> 20 U.S.C. §§ 1706, 1709–1710.

FRAME 27

**20 U.S.C. § 1703. Denial of equal educational opportunity prohibited**

*No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—*

*(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;*

*(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;*

*(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;*

*(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;*

*(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or*

*(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.*

**II.2.3.5 Age Discrimination Act of 1975**

Continuing protection of the right to be free from discrimination on the basis of age, Congress enacted the [Age Discrimination Act of 1975](#),<sup>161</sup> as part of the larger [Older Americans Amendments of 1975](#). The act, codified as amended at 42 U.S.C. §§ 6101 to 6107, generally prohibits discrimination on the basis of age in programs or activities receiving federal funding.<sup>162</sup> The language of the act is largely modeled on prior, similar anti-discrimination language in Title VI of the Civil Rights Act of 1964,<sup>163</sup> Title IX of the Education Amendments of 1972,<sup>164</sup> and the Rehabilitation Act of 1973.<sup>165</sup> Individuals aggrieved by violations of the Age Discrimination Act provisions may bring an administrative proceeding against the offending party at the federal agency that manages the funding of the program or activity or institute a civil action for relief.<sup>166</sup> The Department of Health and Human Services oversees federal activities carried out pursuant to the Age Discrimination Act.<sup>167</sup>

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<sup>161</sup> Pub. L. No. 94-135, §§ 301–308, 89 Stat. 728, <https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg713.pdf#page=16>.

<sup>162</sup> 42 U.S.C. §§ 6101–6102.

<sup>163</sup> See *supra* Section II.2.2.2.

<sup>164</sup> See *supra* Section II.2.3.1.

<sup>165</sup> See *supra* Section II.2.3.2.

<sup>166</sup> 42 U.S.C. § 6014.

<sup>167</sup> 42 U.S.C. §§ 6103, 6104, and 6106a.

## FRAME 28

**42 U.S.C. § 6102. Prohibition of discrimination**

*Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.*

**II.2.3.6 Civil Service Reform Act of 1978**

In the 1970s, a negative perception of federal executive branch employees led to a call for greater accountability and transparency in federal employment.<sup>168</sup> Congress enacted a large civil service reform law titled the [Civil Service Reform Act of 1978](#).<sup>169</sup> The law made changes to human resources and management systems in federal civil service and provided greater protections for employees' rights in line with anti-discrimination statutes in place for employees in the private sector. Congress declared that it is the policy of the United States to have a federal workforce reflective of the nation's diversity and to implement federal personnel management free from prohibited personnel practices such as discrimination.<sup>170</sup> Any employee who has authority to make personnel decisions shall not discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, disability, marital status, or political affiliation.<sup>171</sup> Additionally, any employee who has authority to make personnel decisions shall not discriminate for or against an employee or applicant on the basis of "conduct which does not adversely affect the performance of the employee or applicant or the performance of others[.]"<sup>172</sup> this clause "has long been recognized as barring discrimination based on sexual orientation and gender identity."<sup>173</sup> The Civil Service Reform Act is enforced concurrently by the Merit Systems Protection Board and the U.S. Office of Special Counsel.<sup>174</sup>

## FRAME 29

**5 U.S.C. § 2302. Prohibited personnel practices**

...

*(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-*

*(1) discriminate for or against any employee or applicant for employment-*

*(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);*

<sup>168</sup> E.g., SCHROTH, P.: "Corruption and Accountability of the Civil Service in the United States," *American Journal of Comparative Law*, n. 54, 2006, p. 563–64.

<sup>169</sup> Pub. L. No. 95-454, 92 Stat. 1111, <https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg1111.pdf>.

<sup>170</sup> 5 U.S.C. § 1101 note (Civil Service Reform Act of 1978 Findings and Statement of Purpose).

<sup>171</sup> 5 U.S.C. § 2302(a)–(b).

<sup>172</sup> 5 U.S.C. § 2302(b)(10).

<sup>173</sup> *Resources for LGBT-Related Prohibited Personnel Practices*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/PPP-LGBT.aspx> (last visited February 18, 2021).

<sup>174</sup> SHIMABUKURO, J. & STAMAN, J., CONG. RSCH. SERV.: *R45630, Merit Systems Protection Board (MSPB): A Legal Overview*, 2019, p. 1, <https://crsreports.congress.gov/product/pdf/R/R45630>.

*(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);*

*(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));*

*(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or*

*(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;*

...

*(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;*

...

### **II.2.3.7 Immigration Reform & Control Act of 1986**

"During the 1970s and 1980s, Congress became increasingly concerned about the escalating rate of illegal immigration" in the United States.<sup>175</sup> Accordingly, in 1986 Congress passed immigration reform measures requiring U.S. employers to verify the employment eligibility (i.e., citizenship or work-eligibility status) for all new employees; employers who violate the hiring requirements can face sanctions.<sup>176</sup> Concerned that the threat of sanctions could cause employers to be reluctant to hire "foreign appearing" yet otherwise work-eligible individuals,<sup>177</sup> Congress added a provision that generally prohibits employers from discriminating against any individual (other than work-ineligible individuals) with respect to employment because of the person's national origin or citizenship status.<sup>178</sup> Intimidation or retaliation against an individual who has asserted his or her rights under the anti-discrimination provisions is also prohibited. The "[unfair immigration-related employment practices](#)" law, codified as amended at 8 U.S.C. § 1324b, also establishes the Special Counsel for Immigration-Related Unfair Employment Practices within DOJ, responsible for investigating complaints and securing compliance related to section 1324b.<sup>179</sup> Aggrieved individuals or immigration officials who become aware of a violation of section 1324b can file charges of the violation with the Special Counsel, or the office of the Special Counsel can initiate an investigation on its own initiative and file charges before a judge.<sup>180</sup>

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<sup>175</sup> GOV'T ACCOUNTABILITY OFF.: *Immigration Reform: Employer Sanctions and the Question of Discrimination*, 1990, p. 2, <https://www.gao.gov/assets/150/148824.pdf>.

<sup>176</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, <https://perma.cc/3Q37-BMDK>.

<sup>177</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 175, at 2.

<sup>178</sup> 8 U.S.C. § 1324b(a).

<sup>179</sup> 8 U.S.C. § 1324b(c).

<sup>180</sup> 8 U.S.C. § 1324b(c)-(d). See also *Overview of the Immigrant and Employee Rights Section*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/overview-immigrant-and-employee-rights-section> (last updated July 28, 2017).

## FRAME 30

**8 U.S.C. § 1324b. Unfair immigration-related employment practices***(a) Prohibition of discrimination based on national origin or citizenship status**(1) General rule*

*It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-*

*(A) because of such individual's national origin, or*

*(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.*

*(2) Exceptions*

*Paragraph (1) shall not apply to-*

*(A) a person or other entity that employs three or fewer employees,*

*(B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-2], or*

*(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.*

*(3) "Protected individual" defined*

*As used in paragraph (1), the term "protected individual" means an individual who-*

*(A) is a citizen or national of the United States, or*

*(B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986, and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.*

*(4) Additional exception providing right to prefer equally qualified citizens*

*Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.*

*(5) Prohibition of intimidation or retaliation*

*It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or*

*retaliated against shall be considered, for purposes of subsections (d) and (g), to have been discriminated against.*

*(6) Treatment of certain documentary practices as employment practices*

*A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).*

...

### ***II.2.3.8 Americans with Disabilities Act of 1990***

Through the 1970s and 1980s, advocacy by and on behalf of Americans with disabilities greatly increased. There was a growing call to reject traditional “charitable” attitudes towards persons with disabilities and advocate instead for their full integration into every area of society.<sup>181</sup> In 1986, the National Council on Disability recommended that discrimination against people with disabilities should be addressed by non-discrimination legislation similar to that enacted to address discrimination on the basis of sex, race, or religion.<sup>182</sup> As Vice President, George H.W. Bush committed to supporting non-discrimination legislation with respect to Americans with disabilities; two years after Bush was elected to the presidency, he signed the [Americans with Disabilities Act of 1990](#) (“ADA”).<sup>183</sup> It is hailed as a landmark piece of legislation addressing the civil rights of disabled Americans.

The ADA, largely codified as amended at 42 U.S.C. §§ 12101 to 12213, sets forth that its purpose is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and to “invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”<sup>184</sup> The statute broadly prohibits discrimination against or exclusion of individuals with disabilities in regard to employment (Title I);<sup>185</sup> services, programs, or activities of a public entity, including public transportation (Title II);<sup>186</sup> and places of public accommodation operated by private entities (Title III).<sup>187</sup> Retaliation and coercion against individuals who assert their rights under the ADA are also prohibited.<sup>188</sup>

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<sup>181</sup> In 1975, Congress enacted a major piece of legislation regarding the education rights of children with disabilities, the Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773, guaranteeing the right of disabled children to a free, appropriate public education. The law, renamed the Individuals with Disabilities Education Act, is currently codified at 20 U.S.C. §§ 1400–1482. *See also About IDEA*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/idea/about-idea/> (last visited February 18, 2021).

<sup>182</sup> NAT’L COUNCIL ON DISABILITY: *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities - With Legislative Recommendations*, 1986, <https://ncd.gov/publications/1986/February1986>.

<sup>183</sup> Pub. L. No. 101-336, 104 Stat. 327, <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg327.pdf>.

<sup>184</sup> 42 U.S.C. § 12101(b).

<sup>185</sup> 42 U.S.C. § 12112(a).

<sup>186</sup> 42 U.S.C. § 12132.

<sup>187</sup> 42 U.S.C. § 12182.

<sup>188</sup> 42 U.S.C. § 12203.

The employment discrimination provisions of the ADA, Title I, apply to “qualified individuals” defined in the statute as individuals “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>189</sup> Prohibited discriminatory practices include “limiting, segregating, or classifying” individuals on the basis of a disability in such a way that their employment opportunities are negatively impacted; using employment standards that have the effect of discriminating on the basis of disability or perpetuating discrimination; discriminating against individuals with relationships to a disabled individual; and failing to provide reasonable accommodations.<sup>190</sup> Title I is enforced by the EEOC and the Attorney General in the same manner as Title VII of the Civil Rights Act of 1964.<sup>191</sup>

## FRAME 31

**42 U.S.C. § 12112. Discrimination***(a) General rule*

*No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*

...

Title II of the ADA, pertaining to public services, applies to “qualified individual[s] with a disability[.]” defined in the statute as individuals with disabilities “who, with or without reasonable modifications... [meet] the essential requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>192</sup> No “qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>193</sup> The enforcement procedures and remedies set forth in the Rehabilitation Act of 1973 at 29 U.S.C. § 794a apply to Title II of the ADA,<sup>194</sup> and include the right to seek damages and injunctive relief.

## FRAME 32

**42 U.S.C. § 12132. Discrimination**

*Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.*

Title III of the ADA, pertaining to public accommodations and services operated by private entities, provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or

<sup>189</sup> 42 U.S.C. § 12111(8).

<sup>190</sup> 42 U.S.C. § 12112(b).

<sup>191</sup> 42 U.S.C. § 12117.

<sup>192</sup> 42 U.S.C. § 12131(2).

<sup>193</sup> 42 U.S.C. § 12132.

<sup>194</sup> 42 U.S.C. § 12133.



leases to), or operates a place of public accommodation.”<sup>195</sup> Many businesses open to the public, including hotels, restaurants, and theaters, are considered places of public accommodation under the statute.<sup>196</sup> Public accommodations must generally not exclude individuals, segregate individuals, or provide unequal treatment to individuals on the basis of a disability.<sup>197</sup> Additionally, newly constructed or altered places of public accommodation must comply with ADA construction standards.<sup>198</sup> The enforcement procedures and remedies set forth in Title II of the Civil Rights Act at 42 U.S.C. § 2000a-3 apply to Title III of the ADA,<sup>199</sup> and include the right to seek injunctive relief.

FRAME 33

**42 U.S.C. § 12182. Prohibition of discrimination by public accommodations**

*(a) General rule*

*No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.*

...

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<sup>195</sup> 42 U.S.C. § 12182.

<sup>196</sup> 42 U.S.C. § 12181.

<sup>197</sup> 42 U.S.C. § 12182.

<sup>198</sup> 42 U.S.C. § 12183.

<sup>199</sup> 42 U.S.C. § 12188.

### 11.2.3.9 Uniformed Services Employment & Reemployment Rights Act of 1994

In order to encourage noncareer service in the uniformed services (generally, the military), minimize disruption to the civilian careers of people serving in the uniformed services, and prohibit discrimination against people for serving in the uniformed services,<sup>200</sup> Congress enacted the [Uniformed Services Employment and Reemployment Rights Act of 1994](#).<sup>201</sup> The anti-discrimination provisions, codified as amended at 38 U.S.C. § 4311, generally prohibit an employer from discriminating against a past, present, or future member of the uniformed services on the basis of that membership or against someone who has asserted his or her rights under section 4311.<sup>202</sup> The U.S. Department of Labor is the federal agency charged with enforcing and investigating violations of section 4311.<sup>203</sup>

#### FRAME 34

##### **38 U.S.C. § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited**

*(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.*

*(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.*

*(c) An employer shall be considered to have engaged in actions prohibited-*

*(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or*

*(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.*

*(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.*

<sup>200</sup> 38 U.S.C. § 4301.

<sup>201</sup> Pub. L. No. 103-353, 108 Stat. 3149, <https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg3149.pdf>.

<sup>202</sup> See *Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/servicemembers/uniformed-services-employment-and-reemployment-rights-act-1994-userra> (last updated July 31, 2019).

<sup>203</sup> 38 U.S.C. § 4321.

### ***II.2.3.10 Congressional Accountability Act of 1995***

Prior to 1995, the United States Congress and the legislative branch agencies were exempt from federal laws protecting employees in the private sector and the executive branch agencies.<sup>204</sup> Following public allegations of harassment and wage discrimination from staff of the legislative branch,<sup>205</sup> Congress passed the [Congressional Accountability Act of 1995](#).<sup>206</sup> Title I of the Congressional Accountability Act, codified at 2 U.S.C. §§ 1301 to 1302, extends the employment non-discrimination provisions of several federal statutes to employees of Congress and the legislative branch.<sup>207</sup> The Office of Congressional Workplace Rights administers claims brought under the Congressional Accountability Act.<sup>208</sup>

#### FRAME 35

#### **2 U.S.C. § 1302. Application of laws**

##### *(a) Laws made applicable*

*The following laws shall apply, as prescribed by this chapter, to the legislative branch of the Federal Government:*

- (1) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).*
- (2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).*
- (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).*
- (4) The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.).*
- (5) The Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.).*
- (6) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).*
- (7) Chapter 71 (relating to Federal service labor-management relations) of title 5.*
- (8) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).*
- (9) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.).*
- (10) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).*
- (11) Chapter 43 (relating to veterans' employment and reemployment) of title 38.*
- (12) Section 9202 of title 5.*

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<sup>204</sup> See BACK, C., CONG. RSCH. SERV.: *LSB10067, Addressing Sexual Harassment by Modifying the Congressional Accountability Act of 1995: A Look at Key Provisions in H.R. 4924*, 2018, p. 2, <https://crsreports.congress.gov/product/pdf/download/LSB/LSB10067/LSB10067.pdf>.

<sup>205</sup> E.g., GRASSLEY, G. & SCHMIDT, J.: "Policy Essay: Practicing What We Preach: A Legislative History of Congressional Accountability," *Harvard Journal on Legislation*, n. 35, 1998, p. 35; HOPKE, C.: "Is Congress Holding Itself to Account? Addressing Congress's Sexual Harassment Problem and the Congressional Accountability Act of 1995 Reform Act," *Notre Dame Law Review*, n. 94, 2019, p. 2161.

<sup>206</sup> Pub. L. No. 104-1, 109 Stat. 4, <https://www.govinfo.gov/content/pkg/STATUTE-109/pdf/STATUTE-109-Pg3.pdf>.

<sup>207</sup> 2 U.S.C. § 1301(3).

<sup>208</sup> 2 U.S.C. § 1301(b). See generally *About the OCWR*, OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS, <https://www.ocwr.gov/about-ocwr> (last visited February 18, 2021).

### II.2.3.11 Genetic Information Nondiscrimination Act of 2008

After scientists mapped the human genome in 2003, opening “major new opportunities for medical progress,”<sup>209</sup> public fear about the potential for human genetic information to be misused by third parties, such as health insurers and employees, began growing.<sup>210</sup> Accordingly, in 2008, Congress enacted the [Genetic Information Nondiscrimination Act of 2008](#) (“GINA”),<sup>211</sup> which prohibits discrimination on the basis of genetic information by health insurers and employers.

#### Title I of GINA

prohibits health insurers from engaging in three practices: (1) using genetic information about an individual to adjust a group plan’s premiums, or, in the case of individual plans, to deny coverage, adjust premiums, or impose a preexisting condition exclusion; (2) requiring or requesting genetic testing; and (3) requesting, requiring, or purchasing genetic information for underwriting purposes.<sup>212</sup>

GINA provides for penalties should a health insurer fail to comply with the non-discrimination requirements.<sup>213</sup>

Title II of GINA, codified at 42 U.S.C. §§ 2000ff to 2000ff-11, generally prohibits an employer from carrying out employment practices or decisions because of genetic information with respect to the employee,<sup>214</sup> and prohibits an employer from requesting, requiring, or purchasing genetic information from an employee.<sup>215</sup> Title II of GINA is generally enforced by the EEOC and the Attorney General in the same manner as Title VII of the Civil Rights Act of 1964.<sup>216</sup>

#### FRAME 36

#### **42 U.S.C. § 2000ff-1. Employer practices**

##### *(a) Discrimination based on genetic information*

*It shall be an unlawful employment practice for an employer—*

*(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or*

*(2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.*

<sup>209</sup> 42 U.S.C. § 2000ff note (Findings).

<sup>210</sup> SARATA, A., CONG. RSCH. SERV.: *RL 34584, The Genetic Information Nondiscrimination Act of 2008 (GINA)*, 2015, p. 3–4 (2015), <https://crsreports.congress.gov/product/pdf/RL/RL34584>.

<sup>211</sup> Pub. L. No. 110-233, 122 Stat. 881, <https://www.govinfo.gov/content/pkg/STATUTE-122/pdf/STATUTE-122-Pg881.pdf>.

<sup>212</sup> SARATA, *supra* note 210, at 10. Pub. L. No. 110-233, §§ 101–106, 122 Stat. 883 (codified as amended in scattered sections of 26, 29, & 42 U.S.C.).

<sup>213</sup> SARATA, *supra* note 210, at 12.

<sup>214</sup> 42 U.S.C. § 2000ff-1(a); 42 U.S.C. § 2000ff-4.

<sup>215</sup> 42 U.S.C. § 2000ff-1(b).

<sup>216</sup> 42 U.S.C. § 2000ff-6; SARATA, *supra* note 210, at 17–18.

...

#### **42 U.S.C. § 2000ff-2. Employment agency practices**

*(a) Discrimination based on genetic information*

*It shall be an unlawful employment practice for an employment agency—*

- (1) to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of genetic information with respect to the individual;*
- (2) to limit, segregate, or classify individuals or fail or refuse to refer for employment any individual in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the status of the individual as an employee, because of genetic information with respect to the individual; or*
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this chapter.*

...

#### **42 U.S.C. § 2000ff-3. Labor organization practices**

*(a) Discrimination based on genetic information*

*It shall be an unlawful employment practice for a labor organization—*

- (1) to exclude or to expel from the membership of the organization, or otherwise to discriminate against, any member because of genetic information with respect to the member;*
- (2) to limit, segregate, or classify the members of the organization, or fail or refuse to refer for employment any member, in any way that would deprive or tend to deprive any member of employment opportunities, or otherwise adversely affect the status of the member as an employee, because of genetic information with respect to the member; or*
- (3) to cause or attempt to cause an employer to discriminate against a member in violation of this chapter.*

...

#### **42 U.S.C. § 2000ff-4. Training programs**

*(a) Discrimination based on genetic information*

*It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs—*

- (1) to discriminate against any individual because of genetic information with respect to the individual in admission to, or employment in, any program established to provide apprenticeship or other training or retraining;*
- (2) to limit, segregate, or classify the applicants for or participants in such apprenticeship or other training or retraining, or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the status of the individual as an employee, because of genetic information with respect to the individual; or*
- (3) to cause or attempt to cause an employer to discriminate against an applicant for or a participant in such apprenticeship or other training or retraining in violation of this chapter.*

...

### II.2.3.12 Patient Protection and Affordable Healthcare Act

In 2010, Congress enacted a landmark healthcare statute, the [Patient Protection and Affordable Care Act](#) ("ACA").<sup>217</sup> The ACA contains two major provisions pertaining to non-discrimination. There is a [general non-discrimination provision](#), codified at 42 U.S.C. § 18116, providing that,

an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance.... The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.<sup>218</sup>

Additionally, as part of the general reforms to the health insurance market, codified at 42 U.S.C. § 300gg to gg-9, the ACA prohibits a health insurer or group health plan from discriminating against an individual's health status in that it [bars an insurer from imposing any preexisting condition exclusion](#) with respect to a health insurance plan or coverage.<sup>219</sup>

#### FRAME 37

#### 42 U.S.C. § 18116. Nondiscrimination

##### (a) In general

*Except as otherwise provided for in this title<sup>1</sup> (or an amendment made by this title)<sup>1</sup> an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title<sup>1</sup> (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.*

##### (b) Continued application of laws

*Nothing in this title<sup>1</sup> (or an amendment made by this title)<sup>1</sup> shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of title 29, or the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).*

##### (c) Regulations

<sup>217</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010), <https://www.govinfo.gov/content/pkg/STATUTE-124/pdf/STATUTE-124-Pg119.pdf>.

<sup>218</sup> 42 U.S.C. § 18116; see also Section 1557 of the Patient Protection and Affordable Care Act, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last reviewed June 12, 2020).

<sup>219</sup> 42 U.S.C. § 300gg-3.

*The Secretary may promulgate regulations to implement this section.*

**42 U.S.C. § 300gg-3. Prohibition of preexisting condition exclusions  
or other discrimination based on health status**

*(a) In general*

*A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.*

...

### III. Relevant case law

This section presents a selection of major U.S. Supreme Court cases addressing and espousing the principles of equality and non-discrimination. As many of the cases discussed reference established standards for evaluating classifications arising under claims of discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment (“Equal Protection Clause”), Section III.1 will briefly summarize these standards to provide the reader with a working familiarity. After an explanation of the standards for evaluating classifications, subsequent parts of the section will discuss major case law decisions under three broad categories of classifications—race and nationality, sex and gender, and sexual orientation and gender identity—and a fourth category, the fundamental right to vote.

#### III.1. Equal Protection Clause: standards of review

While the Constitution contains several provisions addressed to equal treatment in a variety of circumstances, most constitutional cases concerning equality and non-discrimination arise under the Equal Protection Clause, establishing that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>220</sup> In a typical case arising under the Equal Protection Clause that reaches the Supreme Court, the Court will evaluate a state government’s law to determine whether it contains a classification that violates the rights of individuals to equal treatment under law. However, laws often involve classifications, and not all classifications violate the Fourteenth Amendment.<sup>221</sup> Accordingly, the Supreme Court, through case law, has developed general standards within which it will usually examine certain types of government classifications, asking two questions: (1) which class of people (if any) is advantaged or disadvantaged by the law, and (2) is that classification subject to heightened scrutiny?<sup>222</sup> The standards provide for a level of consistency in Equal Protection Clause jurisprudence, although the Supreme Court deviates from the framework or decides cases without relying on established standards from time to time.

The most restrained level of judicial review, affording the state government the most amount of deference, is usually referred to as “rational basis” review.<sup>223</sup> Under rational basis review, a government classification that does not target a suspect class or fundamental right is presumed valid under the Fourteenth Amendment as long as it rationally furthers the government’s legitimate objective.<sup>224</sup> The government’s classification will withstand rational basis review unless the classification is utterly irrelevant to the government’s objective.<sup>225</sup> Rational basis review is the default standard of review applicable to most classifications.

<sup>220</sup> U.S. CONST. amend. XIV, § 1. See SEIDMAN, L.: *Constitutional Law: Equal Protection of the Laws*, Foundation Press, 2003, p. 19.

<sup>221</sup> For example, a state may set the minimum age at which a person may obtain a license to operate a vehicle, a classification on the basis of age, without running afoul of the Equal Protection Clause. See *Race-Based Classifications: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-2/ALDE\\_00000817/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-2/ALDE_00000817/); 16B AM. JUR. 2D *Constitutional Law* § 848 (2020).

<sup>222</sup> See SEIDMAN, *supra* note 220, at 37.

<sup>223</sup> E.g., *Race-Based Classifications: Historical Background*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-2/ALDE\\_00000817/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-2/ALDE_00000817/); 16B AM. JUR. 2D, *supra* note 221, §§ 847, 850.

<sup>224</sup> 16B AM. JUR. 2D, *supra* note 221, § 850.

<sup>225</sup> 16B AM. JUR. 2D, *supra* note 221, § 850.



The most active level of judicial review, affording the government the least amount of deference, is usually referred to as "strict scrutiny." Under strict scrutiny, a government's use of a suspect classification is presumed unconstitutional under the Fourteenth Amendment. "Suspect" classifications include those based on race, and sometimes include those based on national origin, alienage, religion, and wealth.<sup>226</sup> A government's suspect classification will fail strict scrutiny if the government cannot demonstrate that the classification is narrowly tailored to achieve a compelling government interest, with no less restrictive means available for achieving the result.<sup>227</sup> Strict scrutiny also applies when certain fundamental liberties and interests are involved regardless of whether the classification is suspect.<sup>228</sup> The rights to vote, to travel, to be free of wealth distinctions in the criminal process, and to bear children are some of the rights deemed fundamental and to which strict scrutiny has been applied.<sup>229</sup>

There is a level of scrutiny between rational basis and strict scrutiny, often referred to as "intermediate" scrutiny. Under intermediate scrutiny, a government's use of a quasi-suspect classification must serve an important, permissible government objective and must be substantially related to serving that end.<sup>230</sup> "Quasi-suspect" classifications include those based on sex, gender, and illegitimacy.<sup>231</sup> A government's quasi-suspect classification will fail intermediate scrutiny if the government cannot demonstrate that the classification is substantially related to and genuinely advances an important government interest.<sup>232</sup>

## III.2. Race and nationality

### III.2.1. Race-specific laws

In *Strauder v. West Virginia*,<sup>233</sup> decided in 1880, the Supreme Court reviewed a race-specific state statute permitting only white men to serve on a jury. In this early test of the parameters of the Fourteenth Amendment, the Court's affirmed that the Fourteenth Amendment was

designed to assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship

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<sup>226</sup> *Facially Neutral Laws Implicating a Racial Minority*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-3-1-4/ALDE\\_00000825/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-3-1-4/ALDE_00000825/); 16B AM. JUR. 2D, *supra* note 221, § 858. Whether a classification is deemed "suspect" is based on

(1) the history of invidious discrimination against the class burdened by the legislation, (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society, (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control, and (4) the political power of the subject class. *Id.* § 849.

<sup>227</sup> *E.g.*, SEIDMAN, *supra* note 220, at 37; 16B AM. JUR. 2D, *supra* note 221, § 854.

<sup>228</sup> *Equal Protection: Overview*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-4-3-1/ALDE\\_00000839/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-3-1/ALDE_00000839/).

<sup>229</sup> *Id.*

<sup>230</sup> *Non-Race Based Classifications: Overview*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-4-2-1/ALDE\\_00000828/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-2-1/ALDE_00000828/); *Gender Classifications: General Approach*, CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14-S1-4-2-3-1-2-1/ALDE\\_00000832/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-2-3-1-2-1/ALDE_00000832/).

<sup>231</sup> 16B AM. JUR. 2D, *supra* note 221, § 853.

<sup>232</sup> *Id.*

<sup>233</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880), <https://www.loc.gov/item/usrep100303/>.

to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.<sup>234</sup>

The Court found that the state statute discriminated against African American men due only to their color; that the right to a trial by jury is a right afforded to all men, regardless of color; and that the statute diminished that right with respect to African American men in comparison to white men.<sup>235</sup> It further found the Fourteenth Amendment provides “an immunity from inequality of legal protection” and that any state law that denies this immunity on the basis of color violates the Constitution.<sup>236</sup> In so finding, the Court reversed the conviction of an African American man who had been convicted at a trial at which only white persons were legally permitted to serve on the jury.

### III.2.2. Race-neutral laws

In *Yick Wo v. Hopkins*,<sup>237</sup> decided in 1886, the Supreme Court reviewed a municipal law that was not facially class-specific but that was being administered disproportionately against a class. A city ordinance required laundries in a wooden building to obtain a permit before operating, and the permitting officials had discretion over who would be issued a permit. Persons of Asian descent (Chinese nationals) operated the vast majority of the laundries, but none had been granted a permit, while virtually all requests by non-Chinese persons were granted. The Court found that the ordinance divided laundry operators into two arbitrary classes of those permitted and those not permitted to operate their business;<sup>238</sup> that the ordinance, while facially fair, was being administered in a way that penalized one class, comprised largely of Chinese nationals, and benefited another class, comprised entirely of persons who were not Chinese nationals; and that there was no justification presented, leading to the conclusion that the unequal treatment was due only to hostility towards the Chinese race and nationality.<sup>239</sup> The Court thus held that the discrimination resulting from the administration of the ordinance amounted to a violation of equal protection of the laws.<sup>240</sup> In so holding, the Court reversed the convictions of two Chinese nationals who had been found guilty of operating a laundry without a permit.<sup>241</sup> The *Yick Wo* decision was the first time the Supreme Court ruled that a facially neutral law, administered in discriminatory manner, violates the Equal Protection Clause.

### III.2.3. Separate but equal

In the notorious case of *Plessy v. Ferguson*, decided in 1896, the Supreme Court upheld a state law requiring “separate but equal” facilities on railroad transportation for white and African

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<sup>234</sup> *Id.* at 306–07.

<sup>235</sup> *Id.* at 308–09.

<sup>236</sup> *Id.* at 310.

<sup>237</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), <https://www.loc.gov/item/usrep118356/>.

<sup>238</sup> *Id.* at 368.

<sup>239</sup> *Id.* at 374.

<sup>240</sup> *Id.*

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Id.* at 373–74.

<sup>241</sup> *Id.* at 374.

American passengers.<sup>242</sup> Scores of subsequent judicial opinions relied on the validity of the doctrine of “separate but equal” when reviewing challenges to the Equal Protection Clause, including with respect to segregation in education.<sup>243</sup> However, starting in the 1930s, the Supreme Court began to move away from its prior reliance on the validity of “separate but equal” with respect to equality in education.<sup>244</sup>

In 1954, by its decision in *Brown v. Board of Education*,<sup>245</sup> the Supreme Court “formally abandoned” the doctrine of “separate but equal.”<sup>246</sup> *Brown* involved challenges to segregated schools in four states in which the lower courts found that the provision of equalized but segregated schools did not violate the Equal Protection Clause under the doctrine of “separate but equal.”<sup>247</sup> The Supreme Court, however, found that the segregation of children in public schools by race, even if the facilities and other factors are equal, deprives the minority group of equal educational opportunities, implies inferiority, and has a detrimental effect on African American children.<sup>248</sup> In language limited to the “field of public education,” the Supreme Court concluded that “the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>249</sup> Therefore, students subjected to racially segregated schools are deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>250</sup> The Supreme Court remanded the cases aggregated in *Brown* to the lower courts to carry out its mandate to desegregate the schools.

FRAME 38

**Brown v. Board of Education, 347 U.S. 483, 495 (1954)**

*“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”*

Although the Supreme Court’s decision in *Brown* was narrowly written to apply only to public education, it is regarded as the tipping point in the eradication of the doctrine of “separate but equal” across all sectors.<sup>251</sup> Within ten years of *Brown*, the Supreme Court would write that “it is no longer open to question that a State may not constitutionally require segregation of

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<sup>242</sup> Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896), <https://www.loc.gov/item/usrep163537/>.

<sup>243</sup> See *Brown v. Board of Education* (1954), CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14\\_S1\\_4\\_1\\_3\\_1\\_2\\_1\\_1/](https://constitution.congress.gov/browse/essay/amdt14_S1_4_1_3_1_2_1_1/).

<sup>244</sup> See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that denial of an African American student’s admission to the state’s only law school, which was “whites only,” was a violation of the Equal Protection Clause and therefore unlawful discrimination); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that establishment of a separate, inferior law school for African American students was not substantially equal to that available to white students and therefore was a violation of the Equal Protection Clause).

<sup>245</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954), <https://www.loc.gov/item/usrep347483/>.

<sup>246</sup> *Brown v. Board of Education* (1954), CONSTITUTION ANNOTATED, *supra* note 18, [https://constitution.congress.gov/browse/essay/amdt14\\_S1\\_4\\_1\\_3\\_1\\_2\\_1\\_1/](https://constitution.congress.gov/browse/essay/amdt14_S1_4_1_3_1_2_1_1/).

<sup>247</sup> *Brown*, 347 U.S. at 488.

<sup>248</sup> *Id.* at 494. “To separate [African American students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.*

<sup>249</sup> *Id.* at 495.

<sup>250</sup> *Id.*

<sup>251</sup> See, e.g., POLE, *supra* note 2, at 329–30; ARAIZA, W.: *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law*, New York University Press, 2015, p. 54–55.

public facilities.”<sup>252</sup> That is not to say that desegregation went smoothly; indeed, the process of desegregation and its effects resulted in years of widespread, fierce, and violent opposition by white supremacists and segregationists. School segregation was particularly entrenched.<sup>253</sup>

### III.2.4. Interracial marriage

Over the history of the United States, many states enacted anti-miscegenation laws that prohibited intermarriage between members of different races; as of 1951, twenty-nine states’ laws prohibited intermarriage between African American and white persons and many of those states’ laws prohibited certain other interracial marriages as well.<sup>254</sup> Breaking these laws could result in criminal punishment.

In 1967, by its decision in *Loving v. Virginia*,<sup>255</sup> the Supreme Court declared that anti-miscegenation statutes are unconstitutional for violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The case was brought by a married couple—an African American woman and white man—who had been convicted and sentenced under Virginia’s anti-miscegenation law prohibiting a white person from marrying anyone other than a white person.<sup>256</sup> The Court found the state’s anti-miscegenation laws were undoubtedly based solely on race, with “patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibit[ed] only interracial marriages involving white persons demonstrate[d] that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”<sup>257</sup> Thus, there could be no doubt that the law violated the Equal Protection Clause as an improper restriction on the rights of citizens on account of race.<sup>258</sup> The Court further asserted that marriage is a basic human civil right and that freedom to marry is a vital personal right, the denial of which on the basis of a racial classification violates the Fourteenth Amendment’s guarantee of due process of law.<sup>259</sup>

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<sup>252</sup> Johnson v. Virginia, 373 U.S. 61, 62 (1963) (holding that a state’s required racial segregation in courtrooms violated the equal protection of law), <https://www.loc.gov/item/usrep373061>.

<sup>253</sup> In 1968, the Supreme Court addressed pervasive segregation in public schools in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). The county school district used a desegregation plan called “freedom of choice” whereby white and African American families “freely chose” which school their children would attend, resulting in a pattern of separate white and African American schools. *Id.* at 435. The Court rejected the school board’s desegregation plan because it did not effectuate a unitary, nonracial system and it burdened families with the responsibility for dismantling the dual system for which the school board was responsible. *Id.* at 441–42. In 1971, the Supreme Court firmly restated that “state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause.” *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22 (1971). In *Swann*, the Court ruled that desegregation plans were to be judged by their effectiveness; that schools with mostly or all African American students required close scrutiny by courts; that certain remedial steps like busing are permissible; and that federal courts were authorized to oversee and remediate state-enforced segregation. *Id.* at 25–31.

<sup>254</sup> BROWNING, J.: “Anti-Miscegenation Laws in the United States,” *Duke Bar Journal*, n. 1, 1951, p. 31, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1544&context=dlj>.

<sup>255</sup> *Loving v. Virginia*, 388 U.S. 1 (1967), <https://www.loc.gov/item/usrep388001>.

<sup>256</sup> *Id.* at 3–6.

<sup>257</sup> *Id.* at 11.

<sup>258</sup> *Id.* at 11–12.

<sup>259</sup> *Id.* at 12.

Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the

### III.2.5. Affirmative action

The concept of “affirmative action” (positive discrimination) with respect to equality of opportunity began to receive attention in the early 1960s.<sup>260</sup> As the civil rights movement unfolded, and the realities of entrenched and systemic racism became more obvious to all Americans, employers, universities, and other institutions began look for ways to increase opportunities for members of minority groups that had been disadvantaged by a history of racist law and policy in the United States.

In 1978, by its decision in *Regents of University of California v. Bakke*,<sup>261</sup> the court determined that the government’s imposition of a rigid racial quota system is unconstitutional, but that the use of race as a criteria in university admissions decisions does not necessarily violate the Fourteenth Amendment. The case was brought by a white male applicant to a state medical school who was denied admission. The medical school had adopted a special admissions program to increase the representation of “disadvantaged” students in the program; a certain number of spots per year (a quota) were reserved for disadvantaged applicants, and the special admissions committee only considered students of certain racial minorities as “disadvantaged.” The Court concluded that the school’s special admissions program was clearly a classification based on race and ethnicity and so denied certain individuals their right to equal protection of the law.<sup>262</sup> The school’s special admissions program was found unconstitutional because the school failed to demonstrate that the race- and ethnicity-based classification was “necessary to promote a substantial state interest” as required for such a classification to be deemed valid under the Fourteenth Amendment.<sup>263</sup> However, the Court recognized that the state does have “a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin[,]” and thus preserved the constitutionality of affirmative action programs in general.<sup>264</sup>

The Supreme Court’s standard for reviewing the constitutionality of affirmative action programs appeared unsettled in decisions post-*Bakke*.<sup>265</sup> In 1995, the Court set forth a consistent approach to reviewing the constitutionality of affirmative action programs in its decision in *Adarand Constructors, Inc. v. Peña*, stating that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”<sup>266</sup> Post-*Adarand*, any government-sponsored racial classification, even for a

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Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State. *Id.*

<sup>260</sup> ANDERSON, T.: *The Pursuit of Fairness: A History of Affirmative Action*, Oxford University Press, 2004, p. 60.

<sup>261</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), <https://www.loc.gov/item/usrep438265>.

<sup>262</sup> *Id.* at 289–91.

<sup>263</sup> *Id.* at 299.

<sup>264</sup> *Id.* at 320.

<sup>265</sup> See *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (holding that a city regulation setting aside thirty percent of public contract awards to minority enterprises, a rigid racial quota, was subject to strict judicial scrutiny, and that the affirmative action plan was unconstitutional); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (holding that federal affirmative plans were subject to intermediate-level scrutiny and that the federal affirmative action plan in question was constitutional).

<sup>266</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995), <https://www.loc.gov/item/usrep515200>.

“benign” purpose or intended to favor rather than harm a class (such as affirmative action),<sup>267</sup> must be able to withstand strict scrutiny to be constitutional under the Equal Protection Clause.<sup>268</sup>

### III.3. Sex and gender

#### III.3.1. Arbitrary differentiation

The 1971 case of *Reed v. Reed*<sup>269</sup> involved a state statute mandating a preference for men over women in serving as the administrator of an estate, a clear class distinction.<sup>269</sup> The state claimed that its objective was to eliminate an area of controversy and reduce the workload of the probate courts.<sup>270</sup> The Court applied a version of rational basis review and held that the class distinction on the basis of sex did not advance the state’s objective in anything other than an arbitrary fashion.<sup>271</sup> In so finding, the Court held the statute to be invalid under the Equal Protection Clause.

*Reed* is the first Supreme Court decision holding that the Equal Protection Clause prohibited different treatment on the basis of sex. Five years later, in *Craig v. Boren*,<sup>272</sup> the court held invalid a state statute that prohibited the sale of low-alcohol beer to males under the age of 21 and females under the age of 18. In *Craig*, the Court articulated for the first time an intermediate level of scrutiny between rational basis review and strict scrutiny: “[t]o withstand constitutional challenge... classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.”<sup>273</sup>

#### III.3.2. Sexual harassment

In *Meritor Savings Bank v. Vinson*,<sup>274</sup> decided in 1986, the Supreme Court addressed whether the creation of a hostile work environment due to unwelcome sexual advances violates Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of sex. The case involved a woman who alleged that she had been subjected to egregious sexual harassment over an extended period of time at her workplace by a male supervisor. Based on the broad language of Title VII and subsequent EEOC interpretations of the statute including sexual harassment as a form of sex discrimination prohibited by Title VII, the Court held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”<sup>275</sup>

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<sup>267</sup> *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 307–08 (2013), <https://www.supremecourt.gov/opinions/boundvolumes/570bv.pdf#page=327>.

<sup>268</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Johnson v. California*, 543 U.S. 499 (2005); *Fisher*, 570 U.S. at 307–08. See also BACK, C., CONG. RSCH. SERV.: R45481, “Affirmative Action” and Equal Protection in Higher Education, 2019, p. 24–26, <https://crsreports.congress.gov/product/pdf/R/R45481>.

<sup>269</sup> *Reed v. Reed*, 404 U.S. 71 (1971), <https://www.loc.gov/item/usrep404071>.

<sup>270</sup> *Id.* at 76.

<sup>271</sup> *Id.*

<sup>272</sup> *Craig v. Boren* 429 U.S. 190 (1976), <https://www.loc.gov/item/usrep429190>.

<sup>273</sup> *Id.* at 197.

<sup>274</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), <https://www.loc.gov/item/usrep477057>.

<sup>275</sup> *Id.* at 66.



*Meritor Savings Bank* was the first Supreme Court decision establishing sexual harassment as an illegal form of discrimination under Title VII of the Civil Rights Act. In subsequent decisions, the Court expanded on the holding in *Meritor Savings Bank*. In *Harris v. Forklift Systems, Inc.*,<sup>276</sup> decided in 1993, the Court held that proving psychological harm is not a requirement for demonstrating that sexual harassment amounted to illegal discrimination under Title VII. Citing *Meritor Savings Bank*, the Court stated: “[c]ertainly Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive... there is no need for it also to be psychologically injurious.”<sup>277</sup> In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>278</sup> decided in 1998, the Court held that Title VII protected employees from same-sex (i.e., male-to-male or female-to-female) sexual harassment amounting to illegal discrimination on the basis of sex.

### III.4. Sexual orientation and gender identity

#### III.4.1. Protections on the basis of sexual orientation

The case of *Romer v. Evans*, decided in 1996, involved a state constitutional amendment prohibiting any state or local government action designed to protect homosexual persons;<sup>279</sup> the law was immediately challenged as discriminatory on the basis of sexual orientation.<sup>280</sup> The state argued that its law only put homosexual persons in the same position as all other persons and so was not discriminatory. The Supreme Court found, in fact, that the law put homosexual persons in a solitary class, withdrawing from them, but no others, legal protection from injuries caused by discrimination.<sup>281</sup> Worse, the Court speculated, it could be inferred from the broad language of the amendment that it deprived homosexual persons “even of the protection of general laws and policies that prohibit arbitrary discrimination[.]”<sup>282</sup> Analyzing the law under the rational basis test, the Court found that the state law failed even this deferential standard. “[The law] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”<sup>283</sup> The Court found that the breadth of the harm inflicted by the law so outweighed any claimed legitimate purpose that it failed rational basis review.<sup>284</sup> Accordingly, the Court held that the law was unconstitutional under the Equal Protection Clause.

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<sup>276</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), <https://www.loc.gov/item/usrep510017>.

<sup>277</sup> *Id.* at 22.

<sup>278</sup> *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), <https://www.loc.gov/item/usrep523075>.

<sup>279</sup> *Romer v. Evans*, 517 U.S. 620, 624 (1996), <https://www.loc.gov/item/usrep517620>.

<sup>280</sup> *Id.* at 625.

<sup>281</sup> *Id.* at 627.

<sup>282</sup> *Id.* at 630.

<sup>283</sup> *Id.* at 633.

<sup>284</sup> *Id.* at 635.

### III.4.2. Same-sex sexual practices

The case of [\*Lawrence v. Texas\*](#), decided in 2003, involved two men convicted of violating a state statute making it a crime for two persons of the same sex to engage in sodomy.<sup>285</sup> The Supreme Court reviewed the statute under the Due Process Clause of the Fourteenth Amendment,<sup>286</sup> stating:

[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.<sup>287</sup>

The Court found that there was nothing in the conduct proscribed by the state that was otherwise criminalized.<sup>288</sup> Rather, the case involved two mutually consenting adults “engaged in sexual practices common to the homosexual lifestyle” and entitled to respect for their private lives without the state “demean[ing] their existence or control[ing] their destiny by making their private sexual conduct a crime.”<sup>289</sup> In so finding, the Court reversed the convictions on the ground that the underlying state law violated the Due Process Clause’s right to liberty.<sup>290</sup>

### III.4.3. Defense of Marriage Act

In 1996, Congress enacted the [\*Defense of Marriage Act\*](#) (“DOMA”),<sup>291</sup> defining the words “marriage” and “spouse” as applicable only to legally-married opposite-sex couples and declaring that no state shall be required to give effect to any relationship between persons of the same sex that is treated as a marriage under another state’s laws.<sup>292</sup> While individual states were not precluded from recognizing same-sex marriage within their state,<sup>293</sup> same-sex couples who were married in a state where same-sex marriage was legal were not entitled to have their marriage recognized outside that state or by the federal government.

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<sup>285</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), <https://www.loc.gov/item/usrep539558>.

<sup>286</sup> The Court initially set forth that it granted review to consider whether the convictions violated either the Equal Protection Clause or the Due Process Clause. *Id.* at 564. Ultimately, the Court declined to declare the statute invalid under the Equal Protection Clause out of concern that that outcome may cause some to question whether a similar statute criminalizing sodomy for both same-sex and different-sex partners would be valid. *Id.* at 574–75.

<sup>287</sup> *Id.* at 575.

<sup>288</sup> *Id.* at 578.

<sup>289</sup> *Id.*

<sup>290</sup> In *Lawrence, id.*, the Court expressly overruled its prior controlling decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there was no constitutional right for homosexual persons to engage in sodomy).

<sup>291</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996), <https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg2419.pdf>.

<sup>292</sup> Pub. L. No. 104-199, §§ 2–3, 110 Stat. 2419.

<sup>293</sup> *United States v. Windsor*, 570 U.S. 744 (2013), <https://www.supremecourt.gov/opinions/boundvolumes/570bv.pdf#page=774>.



DOMA was challenged by a woman who was denied a federal tax exemption available to surviving spouses after the death of a spouse; the woman and the decedent had been in a same-sex marriage legally recognized by their state of residence, New York.<sup>294</sup> In its 2013 decision in *United States v. Windsor*, the Supreme Court found that the institution of marriage was traditionally governed and defined by states, not the federal government, and that DOMA disrupted the federal balance.<sup>295</sup> Whereas a state had decided to confer on a class of persons recognition and protection, DOMA sought to injure the same class.<sup>296</sup> The Court found that that the “principle purpose and the necessary effect” of DOMA was to “demean those persons who are in a lawful same-sex marriage.” The court held that DOMA was unconstitutional as a deprivation of individual liberty protected by the Fifth Amendment:

The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.<sup>297</sup>

#### III.4.4. Marriage equality

After the Supreme Court’s decision invalidating DOMA, it was not long before a case on whether individual states were permitted to define marriage as a union between one man and one woman made its way before the Court.<sup>298</sup> In *Obergefell v. Hodges*, decided in 2015, the Court considered whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex or to recognize a same-sex marriage legally licensed in another state. The case was brought by homosexual persons who had been denied the right to marry or who had been denied recognition of their marriage as legal. Under due process analysis, the Court confirmed that the right to marry is a fundamental right protected by the Constitution.<sup>299</sup> Denying same-sex couples the right to “seek in marriage the same legal treatment as opposite-sex couples... disparage[s] their choices and diminishes their personhood[.]”<sup>300</sup> Additionally, under equal protection analysis, the Court found that state laws barring recognition of marriages between same-sex persons “burden the liberty of same-sex couples... [and] abridge central precepts of equality.”<sup>301</sup> The Court declared that “same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.”<sup>302</sup> The Court’s decision in *Obergefell* requires all states to permit and recognize marriage between two same-sex persons.<sup>303</sup>

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<sup>294</sup> *Id.* at 753.

<sup>295</sup> *Id.* at 768–69.

<sup>296</sup> *Id.* at 779.

<sup>297</sup> *Id.* at 774 (internal citations omitted).

<sup>298</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)).

<sup>299</sup> *Id.* at 2598.

<sup>300</sup> *Id.* at 2602.

<sup>301</sup> *Id.* at 2604.

<sup>302</sup> *Id.* at 2605.

<sup>303</sup> *Id.* at 2607–08.

## FRAME 39

**Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015)**

*"The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."*

**III.4.5. Employment discrimination**

In its 2020 decision in *Bostock v. Clayton County*,<sup>304</sup> the Supreme Court considered whether an employer who discriminates against an employee because of sexual orientation or gender identity is, in fact, discriminating against them because of "sex" as prohibited in Title VII of the Civil Rights Act of 1964. The cases consolidated under *Bostock* had similar facts: "An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."<sup>305</sup> The Court examined the ordinary public meaning of Title VII's command that it is unlawful for an employer to make employment decisions or discriminate against an individual with respect to employment because of an individual's sex.<sup>306</sup> Based on the Court's analysis, it set forth a rule:

[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."<sup>307</sup>

The Court further reasoned that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."<sup>308</sup> "[H]omosexuality and transgender status are inextricably bound up with sex... because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."<sup>309</sup> Accordingly, the Court held that when an employer discriminates against an employee for being homosexual or transgender, that employer is discriminating against individual men and women in part because of sex, which is prohibited by Title VII.<sup>310</sup>

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<sup>304</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf)).

<sup>305</sup> *Id.* at 1737.

<sup>306</sup> *Id.* at 1738–39.

<sup>307</sup> *Id.* at 1741 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), <https://www.loc.gov/item/usrep490228>).

<sup>308</sup> *Id.* at 1741.

<sup>309</sup> *Id.* at 1742.

<sup>310</sup> *Id.* at 1743.

### III.5. Right to vote

#### III.5.1. Intentional redistricting by race

Defining the boundaries of a voting district is typically a power accorded to state and municipal governments. The case of *Gomillion v. Lightfoot* involved a challenge to a state's redistricting plan. In 1957, the Alabama state legislature had redrawn the electoral district boundaries of the City of Tuskegee, altering the shape from a square to an "uncouth twenty-eight-sided figure[.]"<sup>311</sup> The consequence of the redistricting was that nearly all African American voters were removed from the district while not a single white voter was removed.

The issue before the Supreme Court in *Gomillion*, decided in 1960, was whether the courts are empowered to review political subdivisions fixed by the state legislature. African American voters claimed that Alabama's redistricting act deprived them of their right to vote in violation of the Fourteenth and Fifteenth Amendments. The state argued that its power over political subdivisions was unrestricted and not subject to review under the Fourteenth or Fifteenth Amendment. The Court found that legislative control over municipalities is within the limitations imposed by the Constitution.<sup>312</sup> "When a legislature... singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.... [T]hese considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation."<sup>313</sup> Accordingly, the Court held that the courts were empowered to review political subdivisions fixed by the state legislature for constitutional violations.

#### III.5.2. Vote dilution

In 1964, the Supreme Court addressed claims of denial of equal protection in conjunction with the fundamental right to vote in two important decisions: *Wesberry v. Sanders* and *Reynolds v. Sims*.<sup>314</sup> In *Wesberry*, the state-determined federal legislative electoral districts were extraordinarily unbalanced in terms of population, resulting in a single district with a huge population and nine districts with significantly smaller populations; the one district's congressman represented two to three times as many people as congressmen from the other districts. The Court found that the state's federal district apportionment grossly discriminated against the voters in the hugely populated district, devaluing their votes while

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<sup>311</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960), <https://www.loc.gov/item/usrep364339>. The practice of redistricting to the benefit of one political party is typically referred to as "gerrymandering," defined as [t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength. When Massachusetts Governor Elbridge Gerry ran for reelection in 1812, members of his political party... altered the state's voting districts to benefit the party. One newly created district resembled a salamander, inspiring a critic to coin the word *gerrymander* by combining the governor's name, *Gerry*, with the ending of *salamander*. *Gerrymandering*, BLACK'S LAW DICTIONARY (11th ed. 2019) (italics in original).

<sup>312</sup> *Gomillion*, 364 U.S. at 344–45.

<sup>313</sup> *Id.* at 346–47.

<sup>314</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964), <https://www.loc.gov/item/usrep376001>; *Reynolds v. Sims*, 377 U.S. 533 (1964), <https://www.loc.gov/item/usrep377533>.

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized. *Reynolds*, 377 U.S. at 561–62.

expanding others' votes.<sup>315</sup> The Court set forth that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives."<sup>316</sup>

In *Reynolds*, the state legislative electoral districts were extraordinarily unbalanced in terms of population, resulting in hugely populated districts apportioned to the same number of representatives in the state legislature as sparsely populated districts. The Court found that the state's districting scheme diluted and undervalued the votes of certain persons while favoring others,<sup>317</sup> constituting an impairment of voting rights and a discriminatory classification prohibited by the Equal Protection Clause.<sup>318</sup> The Court held the Equal Protection Clause requires state legislative districts to be apportioned roughly equally by population.<sup>319</sup>

### III.5.3. Predominant consideration of race

In *Shaw v. Reno*,<sup>320</sup> decided in 1993, the Supreme Court addressed the right to vote in the context of race-conscious state legislation designed to benefit members of a historically disadvantaged racial minority group. The North Carolina legislature enacted an electoral redistricting plan that incorporated "dramatically irregular shape[s]" and that resulted in two majority African American congressional districts.<sup>321</sup> The issue reviewed by the Supreme Court was whether North Carolina had created an "unconstitutional *racial* gerrymander."<sup>322</sup> The Court presented a long history in the United States of the use of racial gerrymanders to disenfranchise and discriminate against people on account of their race or color,<sup>323</sup> noting that it was "unsettling how closely the North Carolina plan resemble[d] the most egregious racial gerrymanders of the past."<sup>324</sup> The Court also commented on how difficult it is to determine

from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race. A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.<sup>325</sup>

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<sup>315</sup> *Wesberry*, 376 U.S. at 7.

<sup>316</sup> *Id.* at 18.

<sup>317</sup> *Reynolds*, 377 U.S. at 563.

<sup>318</sup> *Id.* at 566.

<sup>319</sup> *Id.* at 568. "*Reynolds* and its progeny are sometimes criticized for paying obsessive attention to very small population differences." SEIDMAN, *supra* note 220, at 266 (2003). However, the decision has largely been a "success story... [and] today it is relatively uncontroversial... [that] districts are no longer of the wildly divergent population sizes that were common a half century ago." *Id.* at 267.

<sup>320</sup> *Shaw v. Reno*, 509 U.S. 630 (1993), <https://www.loc.gov/item/usrep509630>.

<sup>321</sup> *Id.* at 633.

<sup>322</sup> *Id.* at 636 (italics in original).

<sup>323</sup> *Id.* at 639–41.

<sup>324</sup> *Id.* at 641.

<sup>325</sup> *Id.* at 646.

Nevertheless, the Court determined that a reapportionment statute, “though race neutral on its face, [that] rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race,”<sup>326</sup> may violate the Equal Protection Clause if the state cannot show sufficient justification for the separation. *Shaw* was remanded for further consideration as to whether the reapportionment was “narrowly tailored to further a compelling governmental interest.”<sup>327</sup> Since *Shaw*, the Supreme Court has clarified that in reviewing claims of racial gerrymandering, the “ultimate constitutional question is whether ‘race for its own sake’ was ‘the legislature’s dominant and controlling rationale in drawing its district lines.’”<sup>328</sup>

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<sup>326</sup> *Id.* at 649.

<sup>327</sup> *Id.*

<sup>328</sup> HAYES, B., CONG. RSCH. SERV.: *LSB10273, Racial Gerrymandering: Past Cases and the Supreme Court’s Upcoming Decision in Bethune-Hill II*, 2019, p. 2 (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995), <https://www.loc.gov/item/usrep515900>).

## IV. Current and likely future limits on the principles

This section presents three areas of recent concern to illustrate the current and likely future limits on the concepts of equality and non-discrimination in the United States: (1) affirmative action in higher education, (2) racial and partisan gerrymandering, and (3) discrimination on the basis of sexual orientation and gender identity in public accommodations. These three examples highlight issues related to conflicts of laws; positive discrimination and reverse discrimination; exceptions justifying deviation from established law; and grey and fluctuating areas regarding the principles of equality and non-discrimination in federal law.

### IV.1. Affirmative action in higher education

Positive discrimination in the United States takes the form of affirmative action policies. Affirmative action “means active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination.”<sup>329</sup> Affirmative action considers race, sex, or national origin in the present with the goal of eliminating considerations of race, sex, or national origin in the long run.<sup>330</sup> It “recognizes that because of the duration, intensity, scope, and intransigence of the discrimination women and minority groups experience, affirmative action plans are needed to assure equal opportunity.”<sup>331</sup> Affirmative action policies or plans specify which groups are protected classes covered by the plan or policy.

Despite widespread use,<sup>332</sup> affirmative action has always been an area of controversy in the United States. “Some view it as a policy of inclusion and representation or as a remedy for discrimination; others see it as simply discrimination (or ‘reverse discrimination’).”<sup>333</sup> The concept of affirmative action—taking steps to “equalize” a class that has been historically marginalized—conflicts to some extent with the Equal Protection Clause, which prohibits classifications that violate the rights of individuals to equal treatment under law. Most accept that affirmative action is a temporary remedy that should end once the goal of eliminating the effects of racism and sexism is achieved.

Affirmative action in higher education is often undertaken with the goal of increasing diversity in the student body. Guidance issued by the U.S. Department of Education’s Office for Civil Rights makes it clear that, under current law,

colleges and universities can pursue a racially diverse student body through their admissions, recruitment, outreach, mentoring, support, and financial aid programs, among others. If an educational institution considers an individual student’s race in providing access to its programs or activities, however, it must be narrowly tailored to achieve a compelling interest, consistent with criteria set by the U.S. Supreme Court[.]<sup>334</sup>

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<sup>329</sup> U.S. COMM’N ON CIVIL RIGHTS: *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, 1981, p. 3.

<sup>330</sup> *Id.* at 4.

<sup>331</sup> *Id.*

<sup>332</sup> OPPENHEIMER, D., ET AL.: *Comparative Equality and Anti-Discrimination Law*, 3d ed., Edward Elgar Publishing Ltd., 2020, p. 242.

<sup>333</sup> *Id.*

<sup>334</sup> *Supporting Racial Diversity*, U.S. DEP’T OF EDUC., OFF. FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/roi-issue07.html> (last modified January 16, 2020).

Since its 1978 decision in *Regents of University of California v. Bakke*,<sup>335</sup> the Supreme Court has repeatedly affirmed that the use of race as a criterion in university admissions decisions does not necessarily violate the Fourteenth Amendment. However, language in more recent opinions indicates that the Supreme Court may be approaching a point where it will conclude that race-based affirmative action policies are no longer able to withstand strict scrutiny.

In *Grutter v. Bollinger*,<sup>336</sup> decided in 2003, the Supreme Court examined a state law school's use of race in admissions decisions undertaken in furtherance of achieving diversity that enriches education and strengthens the class as a whole.<sup>337</sup> The petitioner, a white student, was rejected from the law school; she claimed that the law school's decision to use race as a factor in admissions discriminated against her on the basis of race in violation of the Fourteenth Amendment. On the facts presented, the Court found that the law school's admission plan withstood strict scrutiny.<sup>338</sup> However, the Court further asserted that as the Fourteenth Amendment was intended to eliminate government-sponsored discrimination based on race,

race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.

...

The requirement that all race-conscious admissions programs have a termination point "assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."

... It has been 25 years since... [the Court's decision in *Bakke*] first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>339</sup>

In *Fisher v. University of Texas at Austin ("Fisher II")*,<sup>340</sup> decided in 2016, the Supreme Court examined a state university's race-conscious admissions plan undertaken in furtherance of providing the educational benefits of diversity. The petitioner, a white student, was rejected from the university; she claimed that the university's race-conscious admissions policies disadvantaged her in violation of the Equal Protection Clause. On the facts presented, the Court upheld as constitutional the university's policy under strict scrutiny. However, the Court made it clear that the university must continuously review the constitutionality and efficacy of

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<sup>335</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>336</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003), <https://www.loc.gov/item/usrep539306>.

<sup>337</sup> *Id.* at 315.

<sup>338</sup> *Id.* at 343.

<sup>339</sup> *Id.* at 341–43 (internal citations omitted) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)).

<sup>340</sup> *Fisher v. Univ. of Tex. at Austin ("Fisher II")*, 136 S. Ct. 2198 (2016) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/15pdf/14-981\\_4g15.pdf](https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf)).



its race-conscious admissions plan in light of the data it has gathered and the experience it has accumulated since the adoption of the admissions plan.<sup>341</sup> “The Court’s affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.”<sup>342</sup>

The language in *Grutter* and *Fisher II* indicates that affirmative action plans that would withstand scrutiny today may not be able to do so in the future, considering the passage of time and changes in circumstances—i.e., “even narrowly tailored plans should not last forever.”<sup>343</sup> A recent case filed against Harvard University, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,<sup>344</sup> appears “tailored to go to the Supreme Court” to test this premise.<sup>345</sup> The plaintiff alleges that Harvard’s admissions policy discriminates against Asian American applicants. After a trial, the District Court determined that Harvard’s race-conscious admissions plan in furtherance of diversity in its student body withstood strict scrutiny analysis;<sup>346</sup> that Asian Americans are not unduly burdened by Harvard’s admissions policy;<sup>347</sup> and that Harvard’s policies do not amount to racial balancing or improper quotas.<sup>348</sup> In November 2020, the [District Court’s opinion was affirmed by a 2-judge panel on the First Circuit Court of Appeals](#), holding that “Harvard’s limited use of race in its admissions process in order to achieve diversity... is consistent with the requirements of Supreme Court precedent.”<sup>349</sup>

Notably, some of the Supreme Court Justices who upheld some forms of affirmative action, including Justice Anthony Kennedy, who wrote the majority opinion in *Fisher II*, are no longer on the Court. Moreover, the executive branch’s position on affirmative action in higher education policies can be affected by the administration (*i.e.*, the political party that controls the executive branch due to the presidency). For example, during President Trump’s administration, the United States filed an [amicus curiae brief](#) in *Students for Fair Admissions*, arguing that Harvard’s admissions practices are discriminatory.<sup>350</sup> However, it is anticipated that under President Biden’s administration, the United States will take the opposite position

<sup>341</sup> *Id.* at 2210.

<sup>342</sup> *Id.* at 2215.

<sup>343</sup> UROFSKY, M.: *The Affirmative Action Puzzle: A Living History from Reconstruction to Today*, Pantheon Books, 2020, p. XIV.

<sup>344</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176, slip op. at 1 (D. Mass. Sep. 30, 2019), <https://www.govinfo.gov/content/pkg/USCOURTS-mad-14-cv-14176/pdf/USCOURTS-mad-14-cv-14176-4.pdf>. “Harvard College is a component of Harvard University which receives federal funds [and] is therefore subject to the same standards that the Equal Protection Clause imposes on state actors for the purposes of a Title VI claim.” *Id.* at 103.

<sup>345</sup> OPPENHEIMER, *supra* note 332, at 275 note 2.

<sup>346</sup> *Students for Fair Admissions*, No. 1:14-cv-14176 at 112.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 116.

<sup>349</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 19-2005, slip op. at 103–04 (1st Cir. Nov. 12, 2020), <https://www.govinfo.gov/content/pkg/USCOURTS-ca1-19-02005/pdf/USCOURTS-ca1-19-02005-0.pdf>.

<sup>350</sup> Brief for United States as Amicus Curiae Supporting Appellant and Urging Reversal, *Students for Fair Admissions*, No. 19-2005, <https://www.justice.gov/crt/case-document/students-fair-admissions-v-harvard-brief-amicus>.



should the Supreme Court agree to hear the case on appeal.<sup>351</sup> Additionally, in October 2020, the DOJ under President Trump sued Yale University for race and national origin discrimination, alleging that Yale discriminates against Asian American and white applicants in its admissions policy.<sup>352</sup> However, after the change in administration, the DOJ under President Biden voluntarily dismissed the action.<sup>353</sup>

## IV.2. Racial and partisan gerrymandering

This study earlier discussed the Voting Rights Act and the Supreme Court's 2013 invalidation of a key provision of that law that held states with a history of discriminatory voting conditions to account for proposed changes to voting laws, including proposed electoral redistricting plans.<sup>354</sup> Additionally, from the discussion of the decision in *Shaw v. Reno*,<sup>355</sup> one can see how the Supreme Court has struggled to establish a distinction between constitutionally impermissible racial gerrymandering and permissible political or partisan redistricting decisions.<sup>356</sup> When race is the predominant factor in a legislature's drawing of voting district boundaries, the redistricting will be found unconstitutional unless it can withstand strict scrutiny, i.e., the legislature must demonstrate that it has a compelling interest justifying the use of race and that the use of race was narrowly tailored to serve that interest.<sup>357</sup> In many cases, an assertion by the state of its need to comply with the Voting Rights Act has been sufficient to demonstrate a compelling interest.<sup>358</sup>

Proving that race is the predominant factor is not easy:

That task is made all the more difficult where there is a significant correlation between race and political affiliation—i.e., where a large portion of a racial group aligns with the same political party. Where that is so, proving that race was the government's dominant motivator will be an uphill battle because the government can always identify legitimate political reasons for drawing the

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<sup>351</sup> As of March 10, 2021, the Supreme Court has not yet decided whether it will take up the appeal.

<sup>352</sup> Complaint, United States v. Yale Univ., No. 3:20-cv-01534 (D. Conn. Oct. 8, 2020), ECF No. 1, <https://www.justice.gov/opa/press-release/file/1326181/download>.

<sup>353</sup> Notice of Voluntary Dismissal of USA, United States v. Yale, No. 3:20-cv-01534, ECF No. 50. After the DOJ dismissed its action against Yale, Students for Fair Admissions filed suit against Yale in the District Court of Connecticut, alleging that Yale's undergraduate admissions policy intentionally discriminates against Asian-American applicants on the basis of race or ethnicity. Complaint, Students for Fair Admissions v. Yale Univ., No. 3:21-cv-00241 (D. Conn. February 25, 2021), ECF No. 1.

<sup>354</sup> See *supra* Section II.2.3.3.

<sup>355</sup> See *supra* Section III.5.3.

<sup>356</sup> Before 1962, the Supreme Court generally determined that all challenges to redistricting plans were non-justiciable political questions that the Court would not decide. In 1962 the Court held that certain constitutional challenges to redistricting plans were judiciable, *Baker v. Carr*, 369 U.S. 186, <https://www.loc.gov/item/usrep369186>. "Since then, while invalidating redistricting maps on equal protection grounds for other reasons—based on inequality of population among districts or one-person, one-vote and as *racial* gerrymanders—the Court has not nullified a [redistricting] map because of *partisan* gerrymandering." WHITAKER, L., CONG. RSCH. SERV.: *LSB10324, Partisan Gerrymandering Claims Not Subject to Federal Court Review: Considerations Going Forward*, 2019, p. 1, <https://crsreports.congress.gov/product/pdf/LSB/LSB10324> (italics in original).

<sup>357</sup> HAYES, *supra* note 328, at 2.

<sup>358</sup> *Id.* See also *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/16pdf/15-1262\\_db8e.pdf](https://www.supremecourt.gov/opinions/16pdf/15-1262_db8e.pdf)).

district's boundaries as it did. Addressing this conundrum, the Court has explained that when there exists a significant correlation between race and political affiliation in a given district, a plaintiff must prove "that the legislature could have achieved its legitimate political objectives in alternative ways" that are "comparably consistent with traditional districting principles," and would "have brought about significantly greater racial balance."<sup>359</sup>

The ability to demonstrate that a redistricting decision was race-based as opposed to neutral or even partisan in nature can have a significant effect on claims that a redistricting decision violates the Equal Protection Clause. In the case of *Bethune-Hill v. Virginia State Board of Elections*,<sup>360</sup> Virginia redrew its legislative districts, using both traditionally neutral principles and race-conscious principles ensuring compliance with the Voting Rights Act requirement that there be no "retrogression" in minorities' ability to elect candidates of their choice.<sup>361</sup> The redistricting was challenged as a violation of the Equal Protection Clause because race was the predominant factor; the state argued that race was not a predominant factor because it was one of many factors. Although the Supreme Court did not decide the ultimate issue of the constitutionality of the districting plan, instead remanding the case to the lower court, it confirmed that "[r]ace may [still] predominate even when a reapportionment plan respects traditional principles... if '[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'"<sup>362</sup> On remand, the District Court found that race was a predominant factor in the redistricting plan and that the redistricting plan could not withstand strict scrutiny; thus, the redistricting plan was determined to have violated the Equal Protection Clause.<sup>363</sup> While the District Court's decision was the subject of an appeal to the Supreme Court, the appeal was dismissed on procedural grounds without the Court reaching the merits of the case.<sup>364</sup>

In subsequent decisions, the Court has continued to grapple with the contention that despite looking a lot alike in evidence and outcomes, racial gerrymandering is prohibited under the Equal Protection Clause, while partisan gerrymandering is not necessarily prohibited.<sup>365</sup> In 2019, the court asserted definitively for the first time that cases challenging redistricting as unconstitutional partisan gerrymanders are not justiciable (able to be reviewed by courts). In

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<sup>359</sup> HAYES, *supra* note 328, at 2.

<sup>360</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/16pdf/15-680\\_c07d.pdf](https://www.supremecourt.gov/opinions/16pdf/15-680_c07d.pdf)).

<sup>361</sup> 52 U.S.C. § 10304(b). After the redistricting was completed, the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), removed this compliance requirement.

<sup>362</sup> *Bethune-Hill*, 137 S. Ct. at 798 (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996), <https://www.loc.gov/item/usrep517899>).

<sup>363</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (2018).

<sup>364</sup> *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/18pdf/18-281\\_6j37.pdf](https://www.supremecourt.gov/opinions/18pdf/18-281_6j37.pdf)).

<sup>365</sup> *E.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/16pdf/15-1262\\_db8e.pdf](https://www.supremecourt.gov/opinions/16pdf/15-1262_db8e.pdf)). In *Cooper*, the Court acknowledged that both political and racial reasons can produce the same type of evidence that would normally be a bellwether for racial gerrymandering, but ultimately upheld the lower court's finding of racial predominance for both districts under principles of judicial review. *Id.* at 1474.

*Rucho v. Common Cause*,<sup>366</sup> the court examined two cases in which the plaintiffs challenged state congressional districting as unconstitutional partisan gerrymanders that violated the Equal Protection Clause. The Court found that in contrast to “one person, one vote” claims and claims of racial gerrymandering, which do implicate the Equal Protection Clause, claims of partisan gerrymandering do not give rise to Equal Protection concerns because that clause does not require proportional representation.<sup>367</sup> Rather, claims of partisan gerrymandering are political questions, review of which the federal courts are not authorized or equipped to provide.<sup>368</sup> “Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.”<sup>369</sup> Accordingly, the Court determined that the remedy for the problem of partisan gerrymandering is best left to other branches of government.<sup>370</sup>

It is yet unclear how the decision in *Rucho* will affect claims of racial gerrymandering or claims of a mix of racial and partisan gerrymandering going forward, particularly in light of the Supreme Court’s numerous contentions that these issues are complexly intertwined. Leaving racial gerrymandering aside, the *Rucho* decision indicated that Congress and state legislatures have authority to address excessive partisan gerrymandering through legislation. Several proposals for addressing the problem of partisan gerrymandering have been introduced in recent Congresses:

- Requiring state congressional redistricting to be conducted in accordance with a plan developed by independent state commissions or, if those commissions fail to enact a plan, by federal judges.<sup>371</sup>
- Prohibiting states from carrying out congressional redistricting more than once every ten years, tied to the decennial census.<sup>372</sup>
- Requiring state congressional redistricting to be conducted with the opportunity for public participation in the process.<sup>373</sup>
- Amending the Voting Rights Act and revising criteria for determining which states and political subdivisions must obtain federal approval before they can change voting practices.<sup>374</sup>

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<sup>366</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/18pdf/18-422\\_9ol1.pdf](https://www.supremecourt.gov/opinions/18pdf/18-422_9ol1.pdf)).

<sup>367</sup> *Id.* at 2499.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 2502.

<sup>370</sup> *Id.* at 2507–08.

<sup>371</sup> *E.g.*, For the People Act of 2021, H.R. 1, 117th Cong., Title II, §§ 2401–2435 (as passed by the House of Representatives on March 3, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1>.

<sup>372</sup> *E.g.*, Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2021, H.R. 134, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/134>.

<sup>373</sup> *E.g.*, Redistricting Transparency Act of 2021, H.R. 81, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/81>.

<sup>374</sup> *E.g.*, Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (as passed by the House, December 6, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/4>. It is anticipated that this bill will be introduced again in the 117th Congress.

### IV.3. Sexual orientation and gender identity in public accommodations

Public accommodations are private entities or enterprises that have been deemed to affect interstate commerce, such that Congress has authority to regulate them under its broad constitutional power to regulate interstate commerce.<sup>375</sup> Places of public accommodation include lodgings, restaurants, and entertainment and cultural venues.<sup>376</sup> The Equal Protection Clause generally prohibits discrimination by state actors but does not apply to private entities or enterprises. Federal non-discrimination statutory law in the area of public accommodations prohibits discrimination only on the basis of race, color, religion, national origin,<sup>377</sup> and disability;<sup>378</sup> it does not at present prohibit discrimination on the basis of sexual orientation or gender identity.

Some states have enacted laws prohibiting discrimination in public accommodations against LGBT persons.<sup>379</sup> The Supreme Court recently examined the application of one such law in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>380</sup> The state of Colorado had enacted a law prohibiting discrimination on the basis of sex and sexual orientation in places of public accommodations.<sup>381</sup> A Colorado bakery's owner refused to create a cake for a wedding between two same-sex individuals on the basis of his religious opposition to same-sex marriage. The Colorado Civil Rights Commission, the state agency charged with enforcing Colorado's anti-discrimination law, determined that the bakery's actions violated the state's anti-discrimination statute. The Supreme Court stated that the case presented "difficult questions as to the proper reconciliation of... two principles[:]" the state's authority to protect the rights of a class of persons, and individuals' rights to fundamental First Amendment freedoms of speech and exercise of religion.<sup>382</sup> The Court found that the state had a clear right to enact a law to "protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."<sup>383</sup> However, in enforcing the law, the state must treat individuals in a neutral and respectful manner without hostility toward sincere religious belief.<sup>384</sup> Based on the record presented, the Court found that the state's treatment of the case

<sup>375</sup> U.S. CONST. Art. 1, § 8, cl. 3.

<sup>376</sup> 42 U.S.C. §§ 2000a(b) and 12181(7).

<sup>377</sup> 42 U.S.C. § 2000a-a-6.

<sup>378</sup> 42 U.S.C. § 12182.

<sup>379</sup> *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> (last updated April 8, 2019). "LGBT" stands for lesbian, gay, bisexual, and transgender.

<sup>380</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018) (Supreme Court Reporter available on Westlaw database; slip opinion without pagination available at [https://www.supremecourt.gov/opinions/17pdf/16-111\\_new2\\_22p3.pdf](https://www.supremecourt.gov/opinions/17pdf/16-111_new2_22p3.pdf)).

<sup>381</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

<sup>382</sup> *Id.* at 1723. "The First Amendment's Free Exercise Clause, which is applicable to the states through the Fourteenth Amendment's Due Process Clause, 'protects religious observers from unequal treatment' by the government." BRANNON, V., CONG. RSCH. SERV.: *LSB10146, Masterpiece Cakeshop: Proving Government Hostility to Religion*, 2018, p. 1, <https://crsreports.congress.gov/product/pdf/LSB/LSB10146>.

<sup>383</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

<sup>384</sup> *Id.* at 1729. "In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge." *Id.* at 1374 (citing 494 U.S. 872, 878–79 (1990)).

against the bakery and its owner violated its duty under the First Amendment “not to base laws or regulations on hostility to a religion or religious viewpoint[.]” Accordingly, the Court reversed the state’s determination that the bakery and its owner had violated the state’s anti-discrimination law.<sup>385</sup> The Court concluded:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.<sup>386</sup>

In *Masterpiece Cakeshop*, the Supreme Court did not squarely reconcile the two principles at issue: the state’s authority to protect the rights of a class of persons and the individual’s right to free exercise of religion. While there is a general trend in the United States towards expanding protections from discrimination on the basis of sexual identity and gender identity,<sup>387</sup> fundamental rights to freedom of religion and religious expression will inevitably clash with those protections,<sup>388</sup> particularly in the area of public accommodations where the government proposes to regulate the behavior of private entities and enterprises.

Freedom of religion and freedom from discrimination are core principles under U.S. law, and neither lawmakers nor judges can trample upon these basic freedoms. The tension between these freedoms, however, lies at the crux of the political and cultural divide in the United States over LGBT rights, and the courts are now being asked to decide which of these basic freedoms should prevail when the two are in conflict.<sup>389</sup>

Congress has recently considered legislation, the [Equality Act](#), which would expand the federal protections in Title II of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000a to 2000a-6, to prohibit discrimination on the basis of sex, gender identity, and sexual orientation.<sup>390</sup> The *Equality Act* incorporates language anticipating the conflict between rights of LGBT persons to be free from discrimination in public accommodations and the rights of individuals to the free exercise of their religion. A federal statute, the [Religious Freedom Restoration Act of 1993](#) (“RFRA”),<sup>391</sup> “establishes rights beyond those protections afforded by the Constitution’s free exercise clause by creating a heightened standard of review for government actions that substantially burden a person’s exercise of religion.”<sup>392</sup> However, the

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<sup>385</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

<sup>386</sup> *Id.* at 1732.

<sup>387</sup> See *supra* Section III.4.

<sup>388</sup> See generally, MOVESIAN, M.: “Masterpiece Cakeshop and the Future of Religious Freedom,” *Harvard Journal of Law and Public Policy*, n. 42, 2019, p. 711 <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2019/06/Movesian-Final.pdf>; NEJAIME, D. & SIEGEL, R.: “Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop,” *Yale Law Journal Forum*, n. 128, 2018-19, p. 201, <https://www.yalelawjournal.org/forum/religious-exemptions-and-antidiscrimination-law-in-masterpiece-cakeshop>; ALEXANDER, K.: “The Masterpiece Cakeshop Decision and the Clash Between Nondiscrimination and Religious Freedom,” *Oklahoma Law Review*, n. 71, 2019, p. 1069, <https://digitalcommons.law.ou.edu/olr/vol71/iss4/4>.

<sup>389</sup> ALEXANDER, *supra* note 388, at 1106.

<sup>390</sup> Equality Act, H.R. 5, 117th Cong. (as passed by the House of Representatives on February 25, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/5>.

<sup>391</sup> Pub. L. No. 103-144, 107 Stat. 1488, <https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg1488.pdf#page=1>.

<sup>392</sup> NOVAK, W., CONG. RSCH. SERV.: *IF11490, The Religious Freedom Restoration Act: A Primer*, 2020, p. 1,

*Equality Act* would provide that RFRA would not apply as a defense in response to the enforcement of the rights provided in the *Equality Act*.<sup>393</sup>

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<https://crsreports.congress.gov/product/pdf/IF/IF11490>.

<sup>393</sup> Equality Act, H.R. 5, 117th Cong. § 9 (as introduced on February 18, 2021). See also H.R. REP. NO. 116-56, at 9 (2019), <https://www.congress.gov/116/crpt/hrpt56/CRPT-116hrpt56.pdf>.

## V. Conclusions

The United States has a robust body of law—constitutional, statutory, and case law—addressing the principles of equality and non-discrimination. The principle of equality has been recognized in U.S. law since its inception. The principle of non-discrimination is a more modern concept than the principle of equality, but it too has been established in U.S. law since the end of the Civil War.

The principle of equality, that individuals under the same jurisdiction are equal in their rights, is primarily carried out in federal law through the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which establishes that no state shall deny an individual equal protection of the laws. However, the Equal Protection Clause has never provided a straightforward path to the achievement of full equality for all citizens. It applies only to state actions and even in cases where it applies, the right to equal protection must always be balanced with other legitimate rights, goals, and interests. It can be used to protect the rights of members of disadvantaged or vulnerable populations, as in *Brown v. Board of Education*,<sup>394</sup> and at the same time it can be used to blunt the positive effects of race-conscious policies, as could potentially come to pass in cases like *Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College*.<sup>395</sup> In case law, where the Equal Protection Clause truly lives and breathes, it is possible to see the United States' progress towards a more equal and just society and at the same time see deep resistance to that progress:

Equality and inequality have always coexisted in America. Cycles of heightened commitment to equality have often been followed by periods of retrenchment. However, during any given period egalitarian and inegalitarian beliefs operate simultaneously, sometimes in the bosom of the same person. Such is the complexity of equality in the United States.<sup>396</sup>

The principle of non-discrimination, that individuals should not be treated unfairly based on an immutable characteristic or core trait, is primarily carried out in federal law through the Civil Rights Act of 1964 and similarly modeled federal statutes, which prohibit discrimination on the basis of specified characteristics and traits in many public and private sectors. Again, just like the Equal Protection Clause, federal anti-discrimination statutes are not a complete panacea for discrimination. The anti-discrimination statutes are limited by both classification and sector and there are still gaps in the protections. It is hard not to notice, however, in cases like *Bostock v. Clayton County*,<sup>397</sup> that anti-discrimination statutes may have not yet reached their full potential.

Between the Constitution and federal statutes, there is a solid legal foundation that protects the principles of equality and non-discrimination in the United States, but that foundation does not cure every ill. The Supreme Court has also been very influential in interpreting the outer boundaries of these laws, but only a handful of extraordinary cases ever receive Supreme Court attention. Congress has an opportunity to enact new laws to strengthen and protect the principles of equality and non-discrimination; however, it usually only does so after the citizenry demonstrates widespread support for such measures. While U.S. law can, and does, further the principles of equality and non-discrimination, personal beliefs, prejudices, and

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<sup>394</sup> See *supra* Section III.2.3.

<sup>395</sup> See *supra* Section IV.1.

<sup>396</sup> ESLE, *supra* note 15, at 106.

<sup>397</sup> See *supra* Section III.4.5.

biases are well beyond the reach of government. The study's review of relevant constitutional, statutory, and case law demonstrates the history of the United States' efforts to fulfill a bold declaration made nearly 250 years ago that everyone is created equal and endowed with the rights to life, liberty, and the pursuit of happiness.



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5 U.S.C. § 2302.

8 U.S.C. § 1324b.  
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18 U.S.C. § 241.  
18 U.S.C. § 242.  
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20 U.S.C. §§ 1701 to 1720.  
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29 U.S.C. §§ 621 to 634.  
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42 U.S.C. § 1981.  
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This study forms part of a larger comparative law project which seeks to study the way that the principles of equality and non-discrimination have developed and are demonstrated in a broad range of legal systems around the world.

The subject of this study is the principles of equality and non-discrimination in the United States federal legal system.

It provides a brief history of the evolution of the principles of equality and non-discrimination developed in United States federal law and major events that furthered the development of the principles. It provides a detailed review of relevant constitutional, statutory, and case law with respect to these principles. The current and likely future limits of the principles of equality and non-discrimination are discussed in the context of three examples: (1) affirmative action in higher education, (2) racial and partisan gerrymandering, and (3) discrimination on the basis of sexual orientation and gender identity in public accommodations.

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