Gender Identity and Sexual Orientation

Legal and Regulatory Perspectives

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The Legal Foundation: The Civil Rights Act of 1964

- Makes it illegal to to discriminate (in various contexts to be discussed below) on the basis of race, color, religion, ***sex***, or national origin.
- Signed into law by President Lyndon Johnson on July 2, 1964.
- Its broad purposes were to prohibit (1) unequal application of voter registration requirements, and(2) discrimination against African Americans and ***women*** in schools, employment, and public accommodations.

The Legal Foundation: The Civil Rights Act of 1964

Consists of eleven titles, usually identified as Title I, Title II, &c., through Title XI.

For our purposes the two most important provisions are Title VII (related to employment) and Title IX (related to education).

- Title VII was amended by the Equal Employment Opportunity Act of 1972, which gave the Equal Employment Opportunity Commission ("EEOC") authority to initiate its own enforcement litigation. Prior to this, EEOC could only refer cases to the Justice Department. EEOC is now the primary enforcement agency of Title VII, rather than the Justice Department.
- And Title IX was amended by the Education Amendments of 1972, empowering the Dept. of Education to issue regulations applying the statute.
- This is an important development, because federal courts defer to the interpretation of regulatory agencies' interpretation and application of its own rules ("Auer" deference) and, in some cases, enabling legislation ("Chevron" deference).
- And agencies are ***inherently political***, staffed by the incumbent President.

The Civil Rights Act of 1964
Title VII

Definitions: Almost any new legislation or regulation starts with definitions of terms used in the law or regulation if those terms or phrases are different from ordinary usage.

Title VII of the Civil Rights Act ***does not*** define "sex."

It does define the phrases "because of sex" and "on the basis of sex":

- "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and ***women*** affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. 2000e(k)
- Nothing in the legislative history or statute can remotely be construed as sex meaning anything other than biological gender; and more specifically, ***female*** biological gender.
- Unfortunately, some federal courts don't feel constrained by that. More on that below.

Civil Rights Act of 1964
Title VII

The statement of the law:

"It shall be an unlawful employment practice for an employer . . . 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." 42 U.S. Code s. 2000e-2(a)

- Five protected classes, of which sex is our concern today.

Civil Rights Act of 1964
Title VII

- Title VII Contains Specific Religious Exemptions

- "This subchapter shall not apply to an employer with respect . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. §2000e-1(a)
- "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion [or] sex . . . where religion [or] sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such [institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such [institution] is directed toward the propagation of a particular religion." 42 U.S.C. §2000e-2(e)

Civil Rights Act of 1964
Title VII

Federal Courts have taken these and similar exemptions in other anti-discrimination laws, and fashioned a "***ministerial exception***" to such laws.

Solidified by the United States Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012), in a unanimous decision.

Hosanna-Tabor is not a Title VII case, but it applies perfectly to Title VII, especially in light of the exemptions cited above.

Civil Rights Act of 1964
Title VII
Hosanna-Tabor

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Holdings from unanimous opinion by Chief Justice John Roberts:

"Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."

"The Establishment Clause [of the First Amendment] prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

This establishes a "ministerial exception" to anti-discrimination laws that otherwise might apply.

"Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."

Civil Rights Act of 1964
Title VII
Hosanna-Tabor

The test of what constitutes a “minister” is case-by-case, and heavily fact-specific.

Relevant considerations:

- The employee’s formal title (minister, pastor, priest, deacon, religion teacher, &c.);
- The “substance” reflected in that title;
- The employee’s “use of that title”;
- The “important religious functions that she performs.”

Civil Rights Act of 1964
Title VII
Hosanna-Tabor

Employment Contracts and employee manuals should use specific language for any employee who could even marginally be considered a "minister." Make the ministerial function as broad as reasonably possible.

The employee should be encouraged to use that title in correspondence and other contexts.

Religious functions may include:

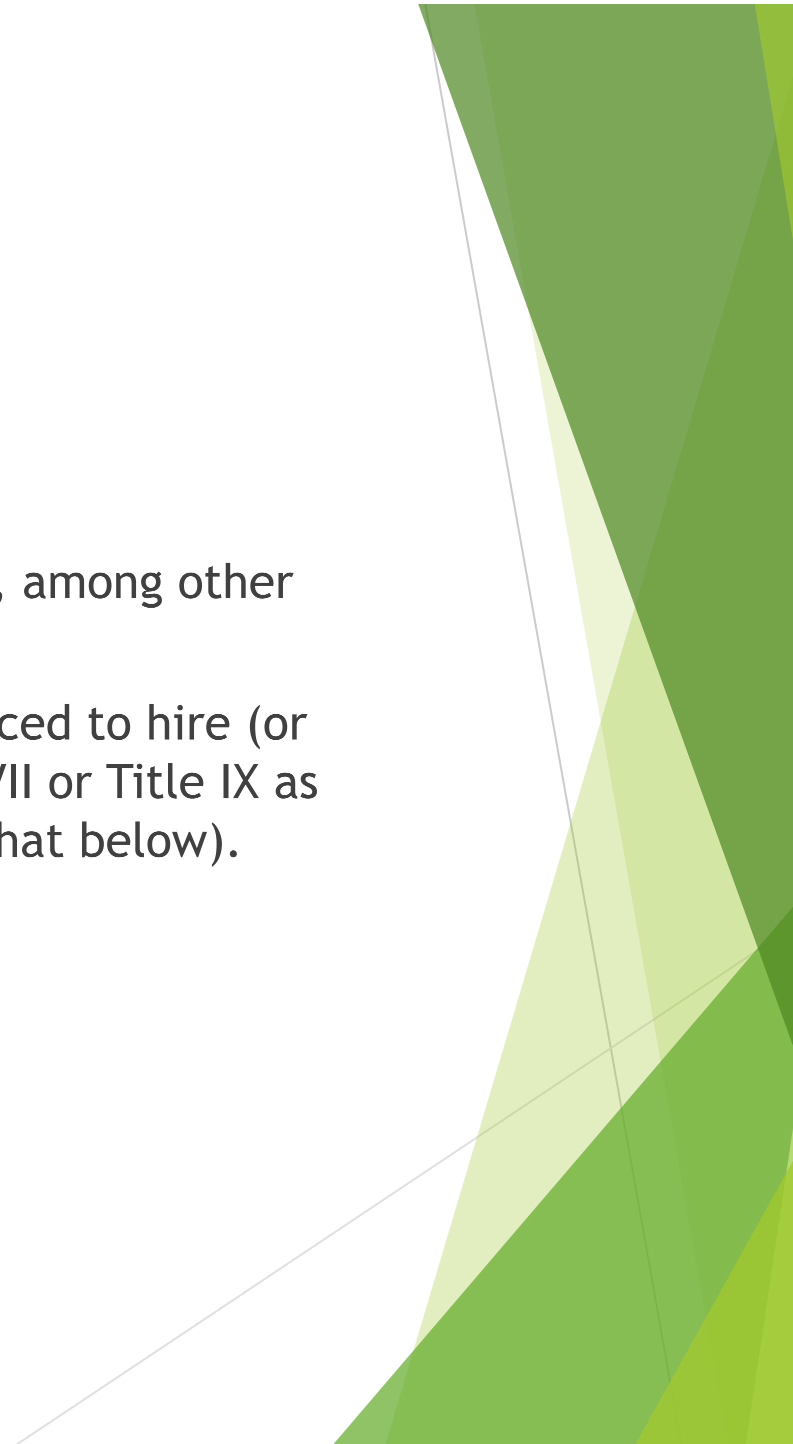
- Leading daily or periodic prayer;
- Participation in development of religious curriculum;
- Religious instruction;
- Religious counseling or direction;
- Any other indication of spiritual leadership or guidance.
- See Fratello v. Archdiocese of New York, 863 F.3d 190 (2d Cir. 2017).

Civil Rights Act of 1964
Title VII

The ministerial exception is not a license to discriminate.

Rather, it is an application of the First Amendment by which, among other statutes, Title VII and Title IX are to be applied.

It protects Churches and religious institutions from being forced to hire (or retain) employs who might otherwise be protected by Title VII or Title IX as the definition of “sex” is expanded by the Courts (more on that below).



Civil Rights Act of 1964
Title VII
Significant Cases

Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017).

- Plaintiff alleged that she was fired on account of her sexual orientation, and sued under Title VII.
- Argued that "on the basis of sex" includes sexual orientation. Dismissed by District Court; affirmed by Seventh Circuit panel; ***Reversed*** by 7th Circuit en banc.
- Dissent argued that (1) "sex" did not mean "sexual orientation" in 1964 (or now for that matter); and (2) Congress has passed legislation related to "sexual orientation," indicating that it considers sexual orientation to be different from "sex."
- Ivy Tech did not appeal.

Civil Rights Act of 1964
Title VII
Significant Cases

Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017).

- On similar facts came to the opposite conclusion, affirming dismissal of Plaintiff's case.
- Plaintiff's certiorari petition was denied.

U.S. Supreme Court—Accepted three seminal Title VII cases for review for October 2019 Ter

- Bostock v. Clayton (case dismissed) and Altitude v. Zarda (case upheld) deal with sexual orientation. These will resolve the Hively/Evans split.
- Harris Funeral Homes Inc. v. EEOC deals with gender identity. Sixth Circuit held that "sex" in Title VII includes gender identity. Funeral Home appealed.

Civil Rights Act of 1964
Title IX

20 U.S.C. sec. 1681(a): "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*** . . . ."

- An institution does not have to be a public college or university to fall under the statute;
- Any ***private*** institution that receives federal grants, or ***whose students receive federal financial aid*** are also subject.
- Of course, it's normally not an issue is "sex" means, well, "sex." But if it means "sexual orientation" or "gender identity," problems arise.

Civil Rights Act of 1964
Title IX

Title IX does expressly provide an exemption for religious institutions:

- "[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. 1681(a)(3).
- But the exemption is not automatic, or at the judgment of the institution. The institution must apply to DOE. See DOE guidelines: https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html
- Because of uncertainty about the meaning of "sex," institutions have sought exemptions in relation to admissions, accommodations, housing, and other issues related to LGBTQ.
- As of 2015, 56 schools had received exemptions: 33 related to gender identity; 23 related to sexual orientation.

Civil Rights Act of 1964
Title IX

Significant Cases and Directives

Obama “Dear Colleague Letter”—May 13, 2016

- DOE and DOJ joint letter directed schools that received federal funds to permit students to use restrooms and participate in gender-specific programs according to their gender identity.
- Declared that “sex” in Title IX means, among other things “gender identity.”
- Schools were not permitted to question the sincerity or integrity of a person’s gender identity.
- Applied to teams, clubs, locker rooms, and restrooms.

Civil Rights Act of 1964
Title IX

G.G. v. Gloucester County School Board (Virginia)

- Attempted to comply by allowing a girl who identified as a male, Gavin Grimm, to use a single-use faculty restroom, rather than the boys restroom.
- G.G. sued (or, rather, the ACLU sued on her behalf), claiming that this created a stigma, and therefore violated Title IX.
- The District Court dismissed the claim, but the 4th Circuit reversed. The Board appealed to the U.S. Supreme Court, which accepted the case for review in the October 2016 Term.

Civil Rights Act of 1964
Title IX

- Elections matter.
- But after the 2016 election, the Trump DOE and DOJ rescinded the Dear Colleague letter, and the Supreme Court remanded the case back to the 4th Circuit.
- Grimm withdrew her complaint after she graduated in2017, and filed an amended complaint for nominal damages. A hearing on cross motions for summary judgment is set for July 23, 2019.
- But it's only one of literally dozens pending across the country. To date no other similar case has been accepted for review by SCOTUS.
- But it's only a matter of the right case going up at the right time.

Civil Rights Act of 1964
SOGI Legislation

While the litigation track proceeds on many fronts, concurrent legislative efforts are underway, essentially to settle the issue not by fiddling with the definitions of "sex," but rather by amending the Civil Rights act, adding sexual orientation and gender identity as protected classes.

They are usually referred to as "SOGI" laws.

Most importantly, the U.S. House of Representatives passed the so-called "Equality Act" on May 17, 2019.

Three major areas of concern:

- Care of gender dysphoric children
- Religious liberty
- Female privacy and athletics

Civil Rights Act of 1964
SOGI Legislation
Gender Dysphoric Children

The Equality Act and similar legislation in statues and municipalities would make it illegal to treat children for gender dysphoria.

Actions could be brought on behalf of children to force so-called “gender affirmation” treatment and surgery in young children.

To oppose such measures is equivalent to racism and any other form of invidious discrimination under the Civil Rights Act.

SOGI laws are not designed to prevent *discrimination*, but rather ***disagreement*** with LGBTQ ideology.

Civil Rights Act of 1964
SOGI Legislation
Religious Liberty

Masterpiece Cakeshop (Colorado), Arlene's Flowers (Washington State), and similar businesses

- Public accommodations may not exercise religious objection to same sex marriage or gender transition

Lyceum v. City of South Euclid

- City Ordinance makes it illegal to discriminate on the basis of sexual orientation, and makes not exception for religious objection

St. Vincent Catholic Charities v. Michigan Dept. of Health and Human Services

- State ban on state contracts with foster and adoption agencies that refuse to place children with same sex couples

Civil Rights Act of 1964
SOGI Legislation
Female Athletics and Women's Privacy

Radical feminists and conservative Catholic and Evangelical women have untied in opposition to this aspect of SOGI laws.

Of most immediate concern is that it would be illegal for public schools, or any school receiving federal funds, from preventing boys and men to use girls' and women's restrooms, locker rooms, and other facilities.

As written, most of them, including the federal Equality Act, would eviscerate women's athletics by mandating that male athletes be permitted to compete against women.

Connecticut State High School

Franklin Pierce University—Cece Telfer

- Competed as a man for three years, with back-of-the pack track results
- Decided he identified as a woman, and is winning national D II championships and falsifying women's collegiate records

Martina Navratilova has become an unlikely ally of Christians and an outcast from (some sectors of) the LGBTQ community.

Civil Rights Act of 1964
SOGI Legislation
Further Reading

The Equality Act will Harm Religious Freedom, Thomas F. Farr, Real Clear Religion.

The Equality Act is a Time Bomb, Madeleine Kearns, National Review

How the Supreme Court Will Rule in Title VII SOGI Cases, Ed Whelan, National Review

Mass. Bans Therapists from Efforts to Change Minors' Orientation or Gender Identity, Christine Rousselle, National Catholic Register

The Eclipse of Sex by the Rise of Gender, Abigail Favale, Church Life Journal

"Equality Act" Would Turn Back the Clock for Women, Kristin Waggoner

Feminists, Conservatives Join Forces to Oppose 'Equality Act,' Natasha Chart & Penny Nance, Real Clear Politics

The Rules on Trans Athletes Reward Cheats and Punish the Innocent, Martina Navratilova, The Sunday Times