



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

## Rethinking Discrimination

Does discrimination on the basis of sex include discrimination on the basis of sexual orientation or gender identity? For several years now, federal agencies and courts have been split on the issue. Last year, the Supreme Court agreed to hear three cases to settle the matter. And now the court has finally ruled: Discrimination on the basis of sex includes sexual orientation and gender identity.



There is much misunderstanding about discrimination — even among conservatives and libertarians. But first, to understand the court’s decision, we must go back to 1964.

### The Civil Rights Act

The Civil Rights Act of 1964 was signed into law by President Lyndon B. Johnson on July 2, 1964 (shown above). It claimed to be:

An act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States of America to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

The Civil Rights Act was divided into 11 titles. Relevant to the subject of discrimination are Titles II (Injunctive relief against discrimination in places of public accommodation) and VII (Equal employment opportunity).

Title II prohibits discrimination in public accommodations. According to section 201:

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and 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.

A “public accomodation” under the law could be an “inn, hotel, motel, or other establishment which provides lodging to transient guests” or “any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises,” including “any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.”

However, generally, “The provisions of this title shall not apply to a private club or other establishment not in fact open to the public.”

Title VII prohibits discrimination in employment. According to section 703:

(a) It shall be an unlawful employment practice for an employer —



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

(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 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) 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.

Title VII also established the Equal Employment Opportunity Commission (EEOC) to enforce anti-discrimination laws relating to employment.

The Civil Rights Act of 1964 has been supplemented over the years by various laws designed to prohibit even more forms of discrimination in employment. According to the EEOC, the Equal Pay Act of 1963 prohibits discrimination on the basis of sex in compensation for substantially similar work under similar conditions; the Age Discrimination in Employment Act of 1967 "protects applicants and employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment"; the Pregnancy Discrimination Act of 1978 made it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to these things; the Americans with Disabilities Act of 1990 protects "qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment"; and the Genetic Information Nondiscrimination Act of 2008 "protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment." These laws also "prohibit covered entities from retaliating against a person who files a charge of discrimination, participates in a discrimination proceeding, or otherwise opposes an unlawful employment practice."

## **Sexual Orientation and Gender Identity**

For years now Democrats have been trying to redefine the prohibition in the Civil Rights Act against discrimination on the basis of "sex" to include discrimination on the basis of "sexual orientation" or "gender identity." In 2013, the Employment Non-Discrimination Act, or ENDA (S.815), passed the Senate with the help of 10 Republicans. It was designed "to prohibit employment discrimination on the basis of sexual orientation or gender identity." The bill was never voted on in the House. In 2019, the Equality Act (H.R.5) passed the House with the help of eight Republicans. It is a bill "to prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes." It would amend the Civil Rights Act of 1964 "to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation" and expand the Civil Rights Act's categories of public accommodations. The Senate has sat on the bill for over a year.

The EEOC has itself, without any legislation passed by Congress and duly signed into law by the



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

president, expanded the definition of sex discrimination. As it states on its website, the EEOC is the federal agency “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.”

Also relevant here is the Civil Rights Act of 1968. Title VIII instituted the Fair Housing Act (FHA). It originally prohibited discriminatory acts regarding the sale, rental, and financing of housing based on race, color, religion, and national origin, but has been amended to include discrimination based on sex (1974) and disability or familial status (1988). Like the EEOC, the Office of Fair Housing and Equal Opportunity (FHEO) in the Department of Housing and Urban Development (HUD) has unofficially expanded the definition of sex to include sexual orientation and gender identity. “Persons who identify as LGBTQ who believe they have experienced housing discrimination may be able to pursue a claim” with the federal government under the Fair Housing Act or HUD’s Equal Access Rule. HUD is “committed to investigating violations of the Fair Housing Act against all individuals regardless of their sexual orientation or gender identity.” And the HUD rule “requires equal access to HUD programs without regard to a person’s actual or perceived sexual orientation, gender identity, or marital status.”

## The Supreme Court Cases

Government departments have unilaterally defined discrimination without the imprimatur of Congress, and so lawsuits have been lodged to clarify the issues.

In 2013, a funeral director in Michigan informed his employer that he was transitioning into a woman and would soon start to dress in female business attire at work consistent with “her” gender identity as a woman. Shortly thereafter, he was fired by the funeral home. He then filed a complaint with the EEOC, which then brought a lawsuit against the funeral home. A federal district court granted summary judgment to the funeral home, but in 2018, the U.S. Court of Appeals for the Sixth Circuit reversed the lower court decision. The man, who lived the rest of his life as a woman, died just a month before the Supreme Court decision in question.

In 2013, an employee of Clayton County, Georgia, joined a “gay” softball league and promoted his participation in it, for which was criticized in the workplace. Soon afterward, he was investigated for mispending funds and fired. He filed a complaint with the EEOC, and then, in 2016, a lawsuit against his former employer. A federal district court dismissed the lawsuit. He appealed, but in 2018, the U.S. Court of Appeals for the Eleventh Circuit affirmed the lower-court decision.

In 2010, a homosexual man who worked as a sky-diving instructor was accused of inappropriately touching a female client during a tandem skydive after informing her about his sexual orientation. In response to the accusation, he was fired. He then filed a complaint with the EEOC, which issued a non-binding memo in 2015 stating that sexual orientation was covered by Title VII of the Civil Rights Act. However, before this, the man filed a lawsuit against his former employer, but died in a sky-diving accident in 2014. His family continued the case, but were ruled against by a federal district court. In 2017, the U.S. Court of Appeals for the Second Circuit affirmed the lower court decision, but then in 2018, meeting *en banc*, it reversed the prior ruling and held for the plaintiff.

In *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, the issue was whether Title VII of the Civil Rights Act prohibits discrimination against transgender people based on



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

(1) their status as transgender or (2) sex stereotyping. In *Bostock v. Clayton County, Georgia*, the issue was whether “discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination ‘because of ... sex’ within the meaning of Title VII of the Civil Rights Act of 1964.” In *Altitude Express Inc. v. Zarda*, the issue was whether “discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination ‘because of ... sex’ within the meaning of Title VII of the Civil Rights Act of 1964.” The latter two cases were consolidated, and oral arguments before the court in all of the cases were heard on October 8, 2019.

On June 15 of this year, the Supreme Court issued an opinion that covered all three cases. It concluded:

In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

Or, in other words: discrimination on the basis of sex includes sexual orientation and gender identity. “Conservative” justices Neil Gorsuch and John Roberts joined with Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan in the 6-3 decision. Gorsuch wrote the majority opinion. Justice Samuel Alito filed a dissenting opinion in which he was joined by Justice Clarence Thomas. Justice Brett Kavanaugh also filed a dissenting opinion.

The dissenting opinion by Alito and Thomas sums up in one word what the court did: “legislation.” What Congress was unable to do (pass legislation to define discrimination based on sex as including discrimination based on sexual orientation or gender identity), the court has now done. The court’s decision will be analyzed and evaluated for weeks and months to come. However, the question of the constitutionality and legitimacy of anti-discrimination laws themselves will never be raised, although but this is the real issue.

## The Meaning of Discrimination

Discrimination in and of itself is neither a dirty word nor an evil deed. We used to laud a man for having discriminating taste. Discrimination involves choosing between options. Any time we choose one thing instead of another, we are discriminating against the thing not chosen. Consciously or unconsciously, everyone discriminates every day. When someone buys a Ford, he is discriminating against a Chevy. When someone shops at Walmart, he is discriminating against Target. When someone orders steak, he is discriminating against chicken. When someone drinks a Coke, he is discriminating against Pepsi. When a man puts on a black suit, he is discriminating against blue suits. When a family vacations in Florida, they are discriminating against California.

And it’s not just *things* we discriminate against; we discriminate against people as well. When a man asks for a particular barber when he goes to get a haircut, he is discriminating against all of the other barbers in the barbershop. When a woman asks for a particular manicurist when she goes to get her nails done, she is discriminating against all of the other manicurists in the nail salon. When a student selects a course taught by a particular teacher, he is discriminating against all of the other teachers who teach the course. When we pick our friends, we discriminate against the people we reject. The biggest decision that most people make in life is also the biggest case of discrimination. When a man



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

asks a woman to marry him he is discriminating against every other woman in the world. When a woman accepts a man's marriage proposal, she is discriminating against every other man in the world. We can't go through the day without discriminating.

Churches discriminate all the time — and even advocates of discrimination laws in general are usually willing to make an exception for them. Churches practice discrimination in employment and membership based on religion, sex, marital status, and sexual orientation. A church of a particular denomination is free to limit offers of employment and membership to people of that particular denomination and discriminate against all others; a church that considers homosexuality to be a sin is free to hire and accept as members only heterosexuals and discriminate against homosexuals; a church that believes in having only men in leadership positions is free to hire only men and discriminate against women; and a church that believes in having an unmarried priesthood is free to employ as priests only those who are unmarried and discriminate against those who are married.

Regardless of anyone's religious views — or absence of religious views — this is what we expect when it comes to any religious organization. We expect a Jewish community center to be staffed by Jews, we expect a Catholic mass to be said by an unmarried male priest; we expect the minister of a theologically conservative church to be a heterosexual; we expect a Baptist church to have a pastor who is a Baptist; and we expect a Christian school to have Christian teachers.

Even when it doesn't concern religion, some degree of discrimination by employers in hiring is accepted and expected. People with physical disabilities are discriminated against by owners of coal mines. People without engineering experience are discriminated against by owners of engineering firms. People without driver's licenses are discriminated against by owners of taxi companies. People without typing skills are discriminated against by executives looking for secretaries. People without college degrees are discriminated against by companies that require a college degree.

Discrimination is not hatred. When someone chooses a Ford over a Chevy, this doesn't mean that he hates Chevys, wants all Chevys to break down, and desires to see all Chevy dealerships go out of business. When a family vacations in Florida, this doesn't mean that they hope California has an earthquake or wildfires that will keep tourists away. When someone prefers a particular barber, manicurist, teacher, friend, or spouse over other barbers, manicurists, teachers, friends, or potential spouses, this doesn't mean that he wishes ill will to any of them.

Discrimination is not even racism — a term that is never defined or explained, but merely employed by liberals, progressives, and social-justice warriors to smear and neutralize conservative and libertarian opponents of various government programs and social movements. To say that discrimination is racism and that proponents of the freedom to discriminate long for the return of the Jim Crow era is a gross misrepresentation. Jim Crow laws, which banned white businessmen from serving black customers, are just as wrong as anti-discrimination laws. These government-mandated and government-enforced laws denied the fundamental right of whites to freely associate with and engage in commerce with blacks as they saw fit. They were the antithesis of the voluntary association found in a free society. The real problem with past segregation and discrimination is that they were de jure, not de facto; mandatory, not voluntary; public, not private.

Discrimination is not aggression, force, coercion, threat, or violence. Discrimination is therefore a crime in search of a victim. Every real crime needs a tangible victim with measurable damages. Thus,



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

discrimination *should never be* a crime. To ban discrimination is to ban freedom of thought and freedom of association. In a free society, everyone has the natural right to think whatever he wants to think about any individual or group and to choose to associate or not associate, in both personal or business relationships, with any individual or group on the basis of those thoughts. His thoughts may be erroneous, illogical, irrational, unreasonable, or nonsensical; his opinions may be based on stereotypes, conjectures, prejudice, bigotry, or racism — but in a free society everyone is entitled to his own thoughts and opinions. The law should be concerned with conduct and actions, not thoughts and opinions. Thoughts and opinions, like motives and desires, are the realm of morality and religion. Although acts of discrimination may be arbitrary, capricious, subjective, unfair, or unjustified, this doesn't change the fact that no one has the right to any particular job, club membership, residence, product, or service.

Refusing to sell a product, provide a service, or rent an apartment has everything to do with property rights and freedom of association. Since no potential customer has a claim on the property of any business owner, he should have no legal recourse if the owner of the property refuses to do business with him. Public accommodations are still private businesses. Just because they serve the public by offering to sell them goods or services doesn't mean that they should be regarded as public libraries, public parks, and public buildings that have to accept all members of the public. There is a big difference between the government's protecting "constitutional rights in public facilities" such as libraries and courthouses and the government's providing "injunctive relief against discrimination in public accommodations" such as restaurants and gas stations. The former is a legitimate purpose of government; the latter is an illegitimate purpose. One protects rights; the other violates rights. The first ensures that the government grants the public equal access and equal opportunity to what is public; the second dictates how a private business should operate. The former is a legitimate purpose of government; the latter is an illegitimate purpose. One protects rights; the other violates rights. The first ensures that the government grants the public equal access and equal opportunity to what is public; the second dictates how a private business should operate.

If a property owner cannot restrict whom he employs, whom he engages in commerce with, whom he rents or sells to, whom he admits, and whom he associates with, then he has no property rights. Why is it that customers can legally discriminate against businesses by favoring one over another but businesses cannot legally discriminate against customers? Why is it that consumers can discriminate against merchants for whatever reason they want — no matter how irrational, illogical, or unreasonable — and on any basis they want — no matter how racist, sexist, or homophobic — but not the other way around? In a free society, the practice of discrimination must be an option for both buyers and sellers, property owners and patrons.

Keep in mind, too, that in a free market consumers can make or break a business by where they spend their dollars. This is as it should be. The liberal premise that (say) a business that will only serve white customers can thrive in America today is ludicrous. Those who think that racial desegregation can occur only through government mandates should consider how baseball was *voluntarily* desegregated through the on-field exploits of Jackie Robinson — without any court orders or laws.

## **Ill-favored Groups**

The hypocrisy of the Left on discrimination is appalling. When then-White House press secretary Sarah



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

---

Huckabee Sanders went out for dinner with her family at a restaurant in Virginia, she was asked to leave in the middle of dinner by the owner of the restaurant. Leftists generally cheered the actions of the restaurant's owner — even though they involved discrimination and refusal of service based on political beliefs. But if someone was refused service at a restaurant, gas station, or department store, and asked to leave because of the color of his skin, his religion, or his sexual orientation, then leftists would be calling for federal intervention, lawsuits, fines, boycotts, and protests.

In a free society, the right to discriminate is essential and absolute. A free society must include the freedom to discriminate against any individual or group for any reason and on any basis. A free society may or may not be free of discrimination, but a free society is certainly free of discrimination laws. By their very nature, the rights of private property, freedom of assembly, freedom of association, free enterprise, and freedom of contract include the right to discriminate.

The cases of *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, *Bostock v. Clayton County, Georgia*, and *Altitude Express Inc. v. Zarda* should never have gone to the Supreme Court, any lower federal court, or even any state court. Since discrimination is not aggression, force, coercion, threat, or violence, the government should never prohibit it, seek to prevent it, or punish anyone for doing it.

*Image: O.J.Rapp/Wikimedia Commons*

*This article originally appeared in the August 10, 2020 print edition of The New American.*



Written by [Laurence M. Vance](#) on August 10, 2020

Published in the August 10, 2020 issue of [the New American](#) magazine. Vol. 36, No. 15

## Subscribe to the New American

Get exclusive digital access to the most informative, non-partisan truthful news source for patriotic Americans!

Discover a refreshing blend of time-honored values, principles and insightful perspectives within the pages of "The New American" magazine. Delve into a world where tradition is the foundation, and exploration knows no bounds.

From politics and finance to foreign affairs, environment, culture, and technology, we bring you an unparalleled array of topics that matter most.



[Subscribe](#)

### What's Included?

- 24 Issues Per Year
- Optional Print Edition
- Digital Edition Access
- Exclusive Subscriber Content
- Audio provided for all articles
- Unlimited access to past issues
- Coming Soon! Ad FREE
- 60-Day money back guarantee!
- Cancel anytime.