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**WOMEN’S AFTERNOON:  
What the Congressional Record Can—and  
Cannot—Tell us about the Meaning of “Sex”  
Under Title VII**

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EDITORS’ NOTE

This essay reviews the Congressional debate surrounding the addition of the term “sex” to Title VII of the Civil Rights Act of 1964. We included this essay because it serves as a reminder that the narratives we construct regarding legal and legislative history are often at risk of oversimplification. As the Justices of the Supreme Court deliberate and consider recent oral arguments regarding whether the term “sex” extends legal protections to persons on the basis of sexual orientation or gender identity, the Congressional Record from February 8, 1964 suggests one lesson: There are limits to relying on historical dialogues that exclude or mock marginalized voices. That is, if many of the proclaimed supporters of an amendment advancing women’s equality supported it solely to undermine the passage of civil rights legislation, how instructive can it be to speculate about what they intended by the term “sex”? While this essay does not answer this question, it suggests that the sincere supporters of the amendment—and even those opposed to it on the grounds it would impede passage of the legislation—were fundamentally concerned with advancing equality for any and all groups who faced discrimination.

## ESSAY

On October 8, 2019, the United States Supreme Court heard oral arguments in two employment discrimination cases.<sup>1</sup> The first oral argument consolidated two cases into *Bostock v. Clayton County Board Of Commissioners*, and queried whether Title VII of the 1964 Civil Rights Act's language "because of . . . sex" bars discrimination in employment on the basis of an individual's sexual orientation.<sup>2</sup> The second case, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, asked the Court to answer whether Title VII prohibits discrimination against transgender people because they are transgender, or because it is impermissible sex stereotyping.<sup>3</sup>

In considering these two related questions, the Court may look to the Civil Rights Act's legislative history in interpreting the phrase "because of . . . sex." As Justice Elena Kagan said during oral arguments in *Bostock*, "[f]or many years, the lodestar of this Court's statutory interpretation has been the text of a statute, not the legislative history, and certainly not the subsequent legislative history."<sup>4</sup> However, the practice of interpreting legislative history may not be

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1. Adam Liptak & Jeremy Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, THE NEW YORK TIMES, November 7, 2019, <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html>.

2. In *Bostock v. Clayton County Board Of Commissioners*, a panel of judges on the Eleventh Circuit affirmed the dismissal of Gerald Lynn Bostock's Title VII sex discrimination claim, writing that Title VII did not protect employees from being discriminated against on the basis of their sexual orientation. 723 Fed. App'x 964 (11th Cir. 2018); *Bostock v. Clayton Cty Bd. Of Comm'rs*, 894 F.3d 1335 (11th Cir. 2018) (denying a rehearing en banc). In the other consolidated case, *Zarda v. Altitude Express, Inc.*, the Second Circuit, sitting *en banc*, held that plaintiff Donald Zarda was entitled to bring his Title VII claim for employment discrimination based on sexual orientation. 883 F.3d 100 (2d Cir. 2018) (emphasis added). The Second Circuit observed that the language of Title VII, a broad, remedial statute, had evolved to encompass claims beyond race discrimination. Citing Justice Scalia's opinion for a unanimous 1998 decision, the Second Circuit observed it is "the Supreme Court's view that Title VII covers not just 'the principal evil[s] Congress was concerned with when it enacted' the statute in 1964, but also 'reasonably comparable evils' that meet the statutory requirements." *Id.* at 112 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

3. *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

4. Oral Argument *Bostock v. Clayton County*, (No. 17-1618), and *Altitude Express, Inc. v. Zarda*, (No. 17-1623) available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/17-1618\\_7k47.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf).

so far in the rearview mirror.<sup>5</sup> Furthermore, Justice Alito alluded to legislative history during oral arguments, claiming that critics of a decision interpreting “sex” more expansively will say that “whether Title VII should prohibit discrimination on the basis of sexual orientation is a big policy issue, and it is a different policy issue from the one that Congress thought it was addressing in 1964.”

But regardless of what factors the Justices consider, the legislative history and Congressional record on this point are clouded by insincerity and murky motives.<sup>6</sup> This is in part because Representative Howard Smith (D-VA), chairman of the powerful Rules Committee and staunch opponent of civil rights, may have proposed amending Title VII to include “sex” with the purpose of sabotaging the Civil Rights Act.<sup>7</sup> Prior to February 8, 1964, the proposed law had enumerated only race, color, religion and national origin as unlawful categories. By adding “sex,” he would delay the vote, thus spurring violent protests and white voter backlash.<sup>8</sup> Another related but distinct motive for the amendment may have been lobbying efforts targeted at Representative Smith by the National Women’s Party (NWP).<sup>9</sup> The NWP was a vestige of the women’s suffrage movement, whose practice of placing women’s rights ahead of racial equality persisted through the 1960s. Many of its small but influential membership also harbored racist beliefs that drove them to oppose civil rights efforts that they viewed as undermining the interests of white women.

Indeed, probing the legislative history of “sex” under Title VII has proved challenging to the Court before. As Justice William Rehnquist wrote in the Court’s landmark case addressing workplace sexual harassment, *Meritor Savings Bank v. Vinson*:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that “sex discrimination” was sufficiently

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5. Linda Greenhouse, *Justice Scalia’s Fading Legacy*, THE NEW YORK TIMES, March 15, 2018, <https://www.nytimes.com/2018/03/15/opinion/justice-antonin-scalia-legacy.html>; see also Richard Epstein, Symposium: Title VII did not and does not extend to sexual orientation or gender identity—in 1964 or today, SCOTUSblog (Sep. 6, 2019, 1:00 PM), <https://www.scotusblog.com/2019/09/symposium-title-vii-did-not-and-does-not-extend-to-sexual-orientation-or-gender-identity-in-1964-or-today>.

6. Louis Menand, *How Women Got In on the Civil Rights Act*, THE NEW YORKER, 2014, <https://www.newyorker.com/magazine/2014/07/21/sex-amendment>.

7. *Id.*

8. *Id.*

9. *Id.*

different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."<sup>10</sup>

This essay reviews the Congressional Record of Saturday, February 8, 1964 and focuses on the voices of the six Congresswomen—of the twelve elected women in the House of Representatives at that time, all of whom were white—who spoke up in response to the proposed amendment.<sup>11</sup> Over twenty Representatives discussed the topic of sex discrimination, some of them vying for laughs at the expense of serious debate. As Representative Edith Green (D-OR) observed, "I suppose that this may go down in history as 'women's afternoon,' but the women of the House, I feel sure, recognize that you men will be the ones who finally make the decision."<sup>12</sup>

In proposing the amendment adding "sex," Representative Smith explained that he was "very serious about this amendment," and continued, tongue firmly in cheek, to present background material "to show you how some of the ladies feel about discrimination against them."<sup>13</sup> He said he proposed to insert the word "sex" after the "religion" "to prevent discrimination against another minority group, the women." He then read aloud from a letter he had received describing how women were struggling to find husbands because of the gender imbalance in the United States, partly due to too many wars. As Representative Smith read the unnamed woman's plea on behalf of "poor unfortunate females" and "spinsters," many of his fellow elected officials laughed uproariously. He concluded by saying, "I read that letter just to illustrate that women have some real grievances and some real rights to be protected. I am serious about this thing."<sup>14</sup>

Representative Emanuel Celler (D-NY) was next to speak. As Chairman of the House Judiciary Committee, Celler helped draft the Civil Rights Act of 1964 and was committed to sending

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10. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–64 (1986) (internal citations omitted).

11. Representative Patsy Mink was the first woman of color to join Congress, and was elected later that year. The first African American Congresswoman, Representative Shirley Chisholm, would not be elected until 1968. <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/Changing-Guard/New-Patterns>.

12. 110 CONG. REC. 2577, 2581 (1964), available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1964-pt2/pdf/GPO-CRECB-1964-pt2-9-1.pdf>.

13. *Id.* at 2577.

14. *Id.*

the legislation to the Senate as originally drafted to avoid the risks associated with adding “sex” to the text. He thus rose “in opposition to the amendment,” knowing of Representative Smith’s intention to undermine the bill. Note the following exchange: Representative Celler focused his remarks on a letter from the U.S. Department of Labor’s Women’s Bureau, which observed that the President’s Commission on the Status of Women concluded that discrimination “based on sex . . . involves problems sufficiently different from discrimination based on other factors listed [in the legislation as originally drafted] to make separate treatment [of the issue] preferable.”<sup>15</sup> Representative Celler also jabbed at Representative Smith, stating, “I was a little surprised at your offering the amendment . . . Because I think the amendment seems illogical, ill-timed, ill-placed and improper. I was of that opinion, the amendment coming from the astute and very wise gentleman from Virginia.” Undeterred, Representative Smith replied, “Your surprise at my offering the amendment does not nearly approach my surprise, amazement, and sorrow at your opposition to it.”<sup>16</sup>

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15. *Id.*

16. *Id.* at 2578. The unusual nature of the debate regarding the incorporation of “sex” into the Civil Rights Act has even found its way to Broadway in Robert Schenkkan’s political drama *All the Way*, winner of the 2014 Tony Award for Best Play. The play depicts Lyndon Johnson’s first eleven months as President, and the intricate maneuvers leading to his signing of the legislation on July 2, 1964. In the hands of Schenkkan, it is the age of Representative Smith (often referred to as Judge Smith, since he had been a judge in Virginia) and Representative Celler that leads to a moment of humor when the topic is sex. Schenkkan draws from the actual banter in the *Congressional Record* and gives one of the female legislators, Representative Katharine St. George (R-NY), a salty comic line that elicits laughs from her audience on the stage. Here is Schenkkan’s dramatization of the sex amendment discussion:

Rep. Judge Smith: Very well. I would like to introduce a new amendment forbiddin’ discrimination based on *Sex*.

Rep. Emanuel Celler (*shouting*): Gender has nothing to do with discrimination! There are basic differences between Men and Women.

Rep. Judge Smith: Yes, I’m happily aware of the differences. I simply feel that while we’re doin’ “Good” here, that White, Christian Anglo-Saxon women not be the only group left unprotected.

Rep. Emanuel Celler: In my memory, Sex has never been an issue in the civil rights bill!

Rep. Katharine St. George: It is possible, given the age of the Chairman, that sex itself may be no more than a distant memory. (*Everyone laughs*) I, for one, support this amendment forbidding discrimination based on Gender and I encourage my colleagues to do so!

*All the Way* (Grove Press, 2014, p. 47), ROBERT SCHENKKAN, *ALL THE WAY*, act 1. That stage direction devised by a gifted playwright—“Everyone laughs”—and

The two elders of the House, with these courtly and performative remarks to each other, opened the floor for an unusual afternoon of rhetorical games.

Rising in support of the amendment, Representative Frances P. Bolton (R-OH) reminded her two senior colleagues that women were the majority of the population and had recently demonstrated their mettle with a strong showing at the ongoing Innsbruck Winter Olympics. She also observed, "Even your bones harden long before our bones do—we [women] live longer, we have more endurance."<sup>17</sup> She did request one modification to the amendment, perhaps to increase its likelihood of its passage: that it be offered as an amendment to Title X, the miscellaneous title of the act. Representative Smith replied that he did not like the idea of it going under "miscellaneous," and that "women are entitled to more dignity than that." Representative Bolton replied, wryly, "My colleague, may I suggest to you, that we are so used to being just 'miscellaneous.'"<sup>18</sup>

The lighthearted sparring turned serious when Representative Martha Griffiths (D-MI), rose in strong support of the amendment, observing, "Mr. Chairman, I presume that if there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it."<sup>19</sup> Weaving together legal hypotheticals, anecdotes, and historical references, Representative Griffiths addressed various arguments against the sex amendment, repeatedly requesting and receiving additional time to speak.<sup>20</sup> Notably, Griffiths had been a member of the N.W.P.<sup>21</sup> Thus, while making a compelling case for women's equality, she also leaned heavily on N.W.P.'s racially charged and problematic talking points. These included framing the advancement of racial equity as undermining gender equity by claiming that white women would be "last at the hiring gate" and the only group "with no rights at all" if the Civil Rights Act passed without the amendment.<sup>22</sup> Of course, this ignores the fact that Black women may face discrimination on the basis of both race *and* sex, and at the intersection of the two.<sup>23</sup>

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its brief relief of tension is telling. Schenkkan crisply captures the flippant tone of much of the "sex" debate. In the broader and somber context of the play, which depicts the seeds of Lyndon Johnson's complex political demise, this moment stands out and then slips by.

17. 110 CONG. REC. at 2578.

18. *Id.*

19. *Id.*

20. *Id.* at 2578–2580.

21. Menand, *supra* note 6.

22. 110 CONG. REC. at 2578–79.

23. Crenshaw, Kimberle (1989) "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine,

Similarly, with regard to voting rights, she pointed out, “Mr. Chairman, your great-grandfathers were willing as prisoners of their own prejudice to permit ex-slaves to vote, but not their own white wives.”<sup>24</sup> In response to concerns about potentially undermining protective legislation safeguarding the health of women, she observed, “Most of the so-called protective legislation has really been to protect men’s rights in better paying jobs.”<sup>25</sup> Finally, in recounting the passage of the Nineteenth Amendment giving women the right to vote, she argued that women’s rights were not advanced by women or white people alone: “White men voted for that right; but white people alone did not secure that right. Colored men voted for that right, and colored women were among the suffragettes. Sojourner Truth, a Detroit woman, was the greatest of all of these.”<sup>26</sup> She concludes, “[A] vote against the amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.”<sup>27</sup>

The third woman to speak that day was Representative Katharine St. George (R-NY).<sup>28</sup> Representative St. George spoke up in favor of the amendment, and focused her remarks on responding directly to a main argument against the amendment: that the amendment was unnecessary because of robust, existing state laws.<sup>29</sup> She countered, “There are still many States where women cannot serve on juries. There are still many States where women do not have equal educational opportunities. In most States, and, in fact, I figure it would be safe to say, in all States—women do not get equal pay for equal work. That is a very well known fact.”<sup>30</sup> She also criticized the protective legislation that “prevents women from going into the higher salary brackets” by limiting the late-night hours they can work at restaurants and cabarets.<sup>31</sup> She then remarks, sarcastically, that people supporting such laws “have taken beautiful care

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Feminist Theory and Antiracist Politics,” University of Chicago Legal Forum: Vol. 1989: Iss. 1, Article 8. Available at: <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

24. 110 CONG. REC. at 2580.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Representative St. George is also the politician playwright Robert Schenkkan depicted in *All the Way* as the feisty female presence in his humorous condensed version of this debate. ROBERT SCHENKKAN, *ALL THE WAY*.

29. 110 CONG. REC. at 2580.

30. *Id.*

31. *Id.*



of the women,” yet have never expressed concern or worry about women cleaning offices at two or three in the morning.<sup>32</sup>

She continued, chastising Representative Cellar for his comment that the amendment was “illogical”: “What is illogical about it? All you are doing is simply correcting something that goes back, frankly to the Dark Ages. Because what you are doing is to go back to the days of the revolution when women were chattels. Of course, women were not mentioned in the Constitution. They belonged, first of all, to their fathers; then to their husbands or to their nearest male relative. They had no command over their own property. They were not supposed to be equal in any way, and certainly they were never expected to be or believed to be equal intellectually. Well, I will admit from what I have seen very frequently here, I think the majority sex in the House of Representatives may not consider us mentally quite equal, but I think on the whole considering what a small minority we are here that we have not done altogether too badly.”<sup>33</sup> Appealing to a potentially humorous trope, she said, “[Women] do not want special privileges. We do not need special privilege. We outlast you [men]—we outlive you—we nag you to death. So why should we want special privileges? I believe we can hold our own [and] are entitled to this little crumb of equality. The addition of that little, terrifying word “s-e-x” will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right.”<sup>34</sup>

Representative Edith Green (D-OR), the next woman to speak, was well aware of the insidious motivations behind the amendment.<sup>35</sup> Thus, while an outspoken advocate for women's equality (she had even authored an earlier equal pay bill), she opposed the amendment and first highlighted the hypocrisy of many of the amendment's supporters.<sup>36</sup> Addressing Representative Smith, she said, “I wish to say first to the gentleman who offered this amendment and to others who by their applause I am sure are giving strong support to it that I, for one, welcome the conversion, because I remember when we were working on the equal pay bill, that, if I correctly understand the mood of the House, those gentlemen of the House who are most strong in their support of women's rights this afternoon, probably gave us the most opposition when we considered the bill which would grant equal pay for equal work just a very few months ago. I say I welcome the conversion and

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32. *Id.* at 2581.

33. *Id.*

34. *Id.*

35. Menand, *supra* note 6.

36. 110 CONG. REC. at 2581.

hope it is of long duration.”<sup>37</sup> She continued, voicing concern for the haphazard introduction of the sex amendment and stating, “I do not believe this is the time or place for this amendment.”<sup>38</sup>

After emphasizing the uniquely severe and pervasive nature of race discrimination, Representative Green said, “[L]et us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes [sic] of our country.”<sup>39</sup> She also noted she was not in “complete agreement with everything said by [her] women colleagues,” and that while she had been discriminated against, she believed Black women had “suffered 10 times that amount of discrimination” and faced “a double discrimination.”<sup>40</sup> She was therefore willing to wait a few years to end “the discrimination against me, and my women friends” if they could finally end race discrimination.<sup>41</sup> Representative Green concluded by reading a from a letter from the American Association of University Women which expressed concern that the amendment could weaken or impede passage of the entire act.<sup>42</sup>

The fifth elected woman to speak that day was Representative Catherine May (R-WA) who rose in favor of the amendment and noted, “You have heard eloquent, articulate, logical and consistent arguments in support of this amendment from my distinguished fellow female colleagues from both sides of the aisle.” While also an advocate for women’s equality closely aligned with Representative Green on most issues, she stated, “[M]ay I point out to [Representative Green] that I just cannot assume, as she has, that the addition of this important amendment, no matter who offers it, will jeopardize this bill.” As if anticipating arguments regarding potentially insidious motivations behind the sex amendment, she remarked, “I would say that I do not think we can ever really assume what is in the mind of any one of the 435 Members of the House when he offers an amendment . . . I would not assume that responsibility.”<sup>43</sup> Citing a letter from the NWP expressing “alarm over the complete absence in this bill of any reference to civil rights for women,” she urged support for the amendment.<sup>44</sup>

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 2581–2.

41. *Id.* at 2582.

42. *Id.*

43. *Id.*

44. *Id.*

The final woman to speak was Representative Edna Kelly (D-NY), who rose in favor of the amendment but nevertheless “compliment[ed]” Representative Green, presumably because Kelly was sympathetic to the reason for Green’s opposition.<sup>45</sup> But for Representative Kelly, the issue was simple: “If this section VII, equal employment opportunity section cannot be perfected to include women, then, it has no place in the bill. Why restore civil rights to all and fail to give equal opportunity to all. My support and sponsorship of this amendment and of this bill is an endeavor to have all persons, men and women, possess the same rights and same opportunities. In this amendment we seek equal opportunity in employment for women. No more—no less.”<sup>46</sup>

Following Representative Kelly’s remarks, more Congressmen rose in support of the amendment, but most offered seemingly sarcastic or insincere endorsements. For example, Representative J. Russell Tuten (D-GA), struck by the “brilliant performance” of his female colleagues, said he would “accept [his] place, ladies, as a second-class citizen” and “member of a minority group,” since, as Representative Bolton had noted,<sup>47</sup> women outnumbered men in the United States.<sup>48</sup> He continued, “I have been vigorously opposed to this bill—not as a racist—but in the interest of the rights of all of the citizens of this country. Since I am a man, which places me in the minority and makes me a second-class citizen—and the fact that I am white and from the South—I look forward to claiming my rights under the terms of this legislation.” More Congressmen focused on the need to ensure white women were not at a disadvantage relative to non-white persons.<sup>49</sup>

Representative Green made one final attempt to highlight the hypocrisy and insincerity of the recent women’s equality converts, remarking that she was “touched by the strong support of this legislation by some of my colleagues”<sup>50</sup> because previously these very gentlemen “were the strongest in their opposition to a

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45. *Id.* at 2582–3.

46. *Id.* at 2583.

47. *Id.* at 2578.

48. *Id.* at 2583.

49. Representative George W. Andrews (Democrat, Alabama) said, “[t]he white woman will be at a great disadvantage in the business world unless this amendment is adopted.” Representative Mendel Rivers (Democrat, South Carolina) said, “[i]t is incredible to me that the authors of this monstrosity—whomever they are—would deprive the white woman of mostly Anglo-Saxon or Christian heritage equal opportunity before the employer. I know this Congress will not be a party to such an evil.” *Id.*

50. *Id.* at 2584.

very simple bill to provide equal pay for equal work for women.”<sup>51</sup> But her argument fell flat, even with an attempted assist from civil rights advocate Representative James Roosevelt II, eldest son of President Franklin Roosevelt. Despite the lengthy, substantive participation of many elected women that afternoon, a man supporting the amendment, Representative Ezekiel Gathings (D-AR), had the final word before a vote was called.<sup>52</sup>

Toward the end of the debate, prominent advocates for civil rights including Representative James Roosevelt (D-CA) reiterated Representative Celler’s opening argument. When the votes were counted, the amendment adding “sex” as a protected class passed, with the tellers reporting 168 votes to 133 votes.<sup>53</sup> And, no doubt much to the surprise of Representatives Celler and Green, so did the Civil Rights Act of 1964. As legal advocate Gillian Thomas observed in her account of the lawsuits following the passage of Title VII, “the law best known as a monumental achievement for African Americans’ civil rights was a milestone in the struggle for sex equality too. Title VII started a revolution for women.”<sup>54</sup> This legacy includes increased representation by women, including the 105 women who are currently serving in the House of Representatives in the 116<sup>th</sup> Congress.<sup>55</sup>

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51. *Id.*

52. *Id.* Representative Gathings argued, “[t]here can be no plausible reason that a white woman should be deprived of an equal opportunity to get a job simply because of her sex and a colored woman obtain that position because of her preferential rights as contained in this bill. Title VII seeks to make it an unlawful employment practice for an employer to fail or refuse to hire or to discharge or otherwise discriminate against any individual because of race, color, religion or national origin. The language covers all employees, or would-be employees, except white women.” *Id.*

53. *Id.*

54. Gillian Thomas, *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work*, 3 (St. Martin's Press 1st ed. 2016).

55. Women Serving in the 116th Congress 2019–21, available at <https://cawp.rutgers.edu/list-women-currently-serving-congress>.

