

WOMXN AT WORK

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Exploring Intersections of Sex, Gender, Work, & Law

FROM TITLE VII TO #METOO

Prior to the passing of the Civil Rights Act of 1964, employers were within their rights to terminate or refuse opportunities of employment on the basis of sex, race, nation of origin, color, and religion. As it stands, Title VII of the Civil Rights Act of 1964 prohibits employers from actions such as these (U.S. Equal Employment Opportunity Commission, n.d.a). Title VII also prohibits sexual harassment in the workplace, which is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment" (U.S. Equal Employment Opportunity Commission, n.d.b). It is important to note, however, that formal legal equality does not always translate to *material* equality (see Page 7).

Despite clear legislation being in place and despite remedies available to employees for punitive damages may be awarded for up to \$300,000 (Back and Freeman., 2018, p. 44), discrimination in the workplace persists. For instance, the Equal Employment Opportunity Commission reports that it received 13,055 claims of sex-based discrimination and sexual harassment within the fiscal year of 2018 (n.d.c). As employees continue to be mistreated by employers, supervisors, and co-workers, social movements such as #MeToo have gained momentum (Marysville University, 2019). In this issue, we will explore what rights womxn have and what work remains unfinished in the fight for equality in the workplace.

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PREGNANCY DISCRIMINATION

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Pregnancy discrimination in the workplace continues to limit women's opportunities and economic advancement.

-Nora Ellman & Jocelyn Frye

While the original language of Title VII provided protections to employees based on their membership of a protect class, the verbiage was more ambiguous for pregnant employees. In the years following the passage of the Civil Rights Act of 1964, two notable cases made their way through the courts: *Geduldig v. Aiello* and *General Electric v. Gilbert*. The arguments made by the lawyers serving on these cases poked holes in the legislation, brought the debate of Fourteenth Amendment equal protections to the forefront, and presented the sitting Supreme Court Justices with the burden of interpreting the new and unclear framework of the law. In the end, with these cases, the Supreme Court set the precedent that the denial of disability insurance and disability benefits for pregnant workers did not violate Title VII, thus shielding employers from further litigation (JURIST, 2014).

In response to the aforementioned legal battles, the United States "passed the Pregnancy Discrimination Act as an amendment to the sex discrimination section of the Civil Rights Act of 1964" (JURIST, 2014). This amendment to Title VII extends the definition of sex-based discrimination to include "pregnancy,

childbirth, or related medical conditions" and prohibits disparate treatment of employees for "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 (U.S Equal Employment Opportunity Commission, n.d.d). In short, the Pregnancy Discrimination Act of 1978 requires that employers offer benefits and accommodations to employees equal to that of other employees within the organization. Despite this federal legislation and relatively recently adopted state-level efforts to prohibit "pregnancy discrimination in the workplace[, such discrimination] continues to limit women's opportunities and economic advancement. It is pervasive in both its overt forms—firing pregnant employees and denying accommodations and leave time—as well as in its subtler forms, such as not considering pregnant women for promotions and raises" (Ellman and Frye, 2018). This evidences the disconnect that exists between legislative reform and meaningful social reform.

Therefore, in order for substantial change to take place, cultural shifts and employer participation will be necessary.



SEXUAL HARASSMENT

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[L]aw shapes how we live [and] it also shapes how we talk and how we think. At the most basic level, law creates conceptual categories and determines their contents and boundaries.

-Kitty Calavita

WHAT'S IN A NAME?

Prior to 1975, the phenomenon of 'sexual harassment' did not have a name. It was not until "journalist-turned activist Lin Farley" coined the phrase that it made its way into the public discourse. Consequently, many victims embraced the new found empowerment that came with their ability to better articulate their untenable experiences in the workplace (Blakemore, 2018). It is no coincidence that this led to a seismic cultural shift in the years following Farley's bold innovation. An explanation can be found in legal scholar Kitty Calavita's argument of the social significance and "cognitive power of legal language": "[L]aw shapes how we live [and] it also shapes how we talk and how we think. At the most basic level, law creates conceptual categories and determines their contents and boundaries" (Calavita, 2010, pp.42-43). Therefore, by integrating vocabulary into our legal system that outlines

which behaviors constitute sexual harassment, not only are victims offered validation that what they have endured is unethical in the eyes of the law, but they also have recourse available to them that would be otherwise impossible. To illustrate the modern impact, the U.S. Equal Employment Opportunity Commission reports that in 2018, it "recovered nearly \$70 million for the victims of sexual harassment through litigation and administrative enforcement" (n.d.e). Although, the paradox here is that this also evidences the pervasive nature of sexual harassment and that, though sexual harassment has become relatively more stigmatized since second wave feminists refused to tolerate it any longer, it continues to plague workers. Therefore, while social change through legal language has proven to be possible, it is also slow-moving and requires enduring attention from enforcers of the law.



THE EQUAL PAY ACT

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'[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.

*-As cited by
Derrick Bell*

EQUAL PAY FOR EQUAL WORK?

Forty-three years after women were granted the right to vote by the ratification of the Nineteenth Amendment (Alice Paul Institute, 2018), President John F. Kennedy signed the Equal Pay Act (EPA) into law (Pearsall, 2013).

"The EPA... prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions," although, the Act does not protect all workers and includes exemptions, such as "any employee employed on a casual basis in domestic service employment ..." (U.S. Equal Employment Opportunity Commission, n.d.f). Therefore, the EPA is not without its weaknesses, as it does not protect all women in all jobs from being denied equal pay for equal work. This is especially true given that care work is devalued and viewed as women's work by most (Spade and Valentine, 2011, p. 352). What is more, "by focusing solely on pay equity, this legislation did not address

gender segregation or gender discrimination in the workplace. Thus, it was illegal to discriminate by paying a woman less than a man who held the same job, but gender segregation of the workforce and differential pay across comparable jobs was legal." And while the Title VII of the Civil Rights Act of 1964 does include language to prohibit such discrimination, enforcement remains problematic (as cited by Spade and Valentine, 2011, p. 350). This evidences that legislation is just one action of a series of collective actions, such as political and social support, necessary to ensure meaningful change for womxn in the workplace." "[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism" (as cited by Bell, 1976, p. 514). The very fact that a substantial gap in wages among gender and race (Spade and Valentine, 2011, p. 346) signifies that, while U.S. Congress and President John F. Kennedy may have very well might have been well-intentioned in making EPA federal law, it was far insufficient for ensuring that pay equity is a reality for American workers.



THE EQUAL RIGHTS AMENDMENT

UNFINISHED BUSINESS

On January 4th, 1776, the Declaration of Independence was formalized and went on to become a foundational document of the United States. While it does guarantee equal protections for some, it does not guarantee equal protections for all Americans:

"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" (The U.S. National Archives and Records Administration, 2019) [emphasis added].

The failure to include women in the language was either: a) a mishap for which the long-lasting ramifications were not anticipated, or b) an intentional omission as a result of women not being seen as worthy of equal rights and opportunities. In any case, its consequences continue to impact modern womxn, particularly in the workplace, as they are not entitled to the same unalienable rights as their male counterparts.

The late Supreme Court Justice Scalia expressed his interpretation of American womxn's constitutional rights with a jolting on-the-record-remark: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't" (as cited by ERA Coalition, n.d.). As a representative of the highest American court, Scalia underscored the urgency that clear legislative protections for all sexes and genders be enacted.

In this vein, Alice Paul, an infamous women's rights activist, drafted the Equal Rights Amendment (ERA) "in 1923, and Congress passed the ERA in 1972[. B]y 1982 only 35 states had ratified, three shy of the necessary 38. But in 2017 Nevada ratified the ERA; the first state in 40 years to do so; Illinois ratified in 2018" ERA Coalition, 2019). Interestingly though, with only one more ratification necessary, and after twenty years of having a Republican state congressional majority, Virginia voters collectively opted for a Democratic majority during the 2019 elections. The state's new leaders are openly in support of the ERA. Thus, its passage is a realistic possibility in the very near future (Smeal, 2019).

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The movement [for equal rights] is a sort of mosaic. Each of us puts in one little stone, and then you get a great mosaic at the end.

*-Alice Paul
As cited by the Alice Paul
Institute, 2018*



AIMEE STEPHENS TAKES HER CASE TO SCOTUS

In 2012, Aimee Stephens, informed her employer, R.G. & G.R. Funeral Homes, that she identifies as female and will fully take on that identity, including at work. Shortly thereafter, her employer terminated her, despite her twenty years of experience in the funeral service industry (ACLU, 2019). Now, along with the support of the EEOC, Stephens' case rests in the hands of the Supreme Court of the United States (SCOTUS) (R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, n.d.).

On October 8th, 2019, oral arguments were heard by the Court. The attorneys representing Stephens have argued that her termination was a violation of Title VII, though Title VII does not explicitly outline gender identity as a protected class, it *does* outline sex as a protected class (U.S. Equal Employment Opportunity Commission, n.d.a). On behalf of Stephens, her attorney, David Cole, made the following argument during the proceedings: "[T]he objection to someone for being transgender is the ultimate sex stereotype. It is saying, I

“ *[T]he objection to someone for being transgender is the ultimate sex stereotype. It is saying, I object to you because you fail to conform to this stereotype.”*

-David Cole

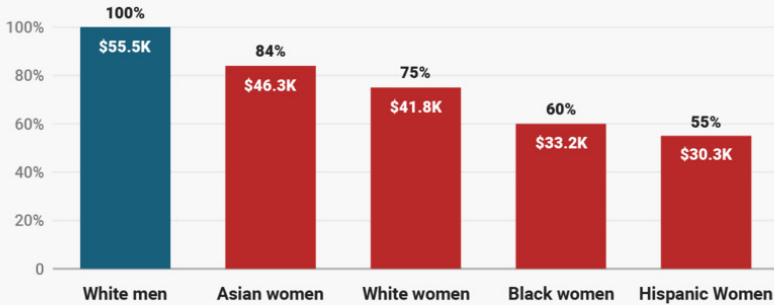
object to you because you fail to conform to this stereotype: The stereotype that if you are assigned a male sex at birth, you must live and identify for your entire life as a man. That is a true generalization for most of us, but it is not true for 1.5 million transgender Americans. And so to say we're going to fire you because you fail to -- to accord to a generalization about how people who are assigned a particular sex based on visible anatomy at birth have to live their lives for the rest of their lives is sex discrimination. It's also sex discrimination because she was clearly treated differently because of her sex assigned at birth" (R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, 2019, pp. 1, 19-20). What impact Cole's plea had on the Court remains to be seen.,

as the case is still pending (R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, n.d.) No matter the outcome, the Court's ruling will set a precedent for how employers may treat employees who, in their view, do not conform to sex stereotypes. Thus, either employees' rights will be expanded, and the decision will serve as a watershed moment, or their rights will be rolled back. As is the case with the ERA, Title VII's language remains unfinished business. When the day finally comes that codifying equal rights for all is done, like pregnancy discrimination, equal pay, and sexual harassment, the battle for enforcement will continue to be a long, hard battle that will require enormous dedication and persistence on the part of activists.

WOMXN AT WORK



WOMEN'S ANNUAL EARNINGS COMPARED TO WHITE MEN'S



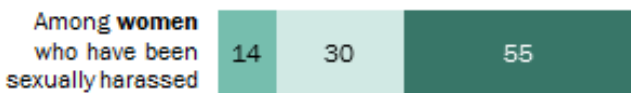
SOURCE: JEC.senate.gov; U.S Census Bureau

BUSINESS INSIDER

More than half of women who have been sexually harassed say it has happened both in and outside of work

% of those who say they have ever received unwanted sexual advances or verbal or physical harassment of a sexual nature saying this happened ...

- In a professional or work setting
- Outside of a professional or work setting
- Both



Note: Share of respondents who didn't offer an answer not shown. Source: Survey of U.S. adults conducted Feb. 26-March 11, 2018. "Sexual Harassment at Work in the Era of #MeToo"

PEW RESEARCH CENTER

Roughly four-in-ten working women say they've experienced gender discrimination at work

% of employed adults saying they have experienced each of these things at work because of their gender



Source: Survey conducted July 11-Aug. 10, 2017.

PEW RESEARCH CENTER

Perceptions of Discrimination

% saying this ... because of their sexual orientation or gender identity



Notes: Based on all LGBT (N=1,197). "Net" was computed prior to rounding.

PEW RESEARCH CENTER

LGBT/82a-f



- State law explicitly prohibits discrimination based on sexual orientation and gender identity (20 states + D.C.)
- State explicitly interprets existing prohibition on sex discrimination to include sexual orientation and/or gender identity (3 states)
- State law explicitly prohibits discrimination based on sexual orientation only (2 states)
- No explicit prohibitions for discrimination based on sexual orientation or gender identity in state law (26 states)
- State has law preventing passage or enforcement of local nondiscrimination laws (3 states)

Alice Paul Institute. (2018, October 19). *Equal Rights Amendment: Unfinished Business for the Constitution (trailer)* [Video file]. Retrieved from <https://www.youtube.com/watch?v=SAIU5Mae2ag&feature=youtu.be>

This video clip informs viewers about women's fight for equal rights. This will be used to establish historical context relevant to the passing of the Equal Pay Act.

American Civil Liberties Union. (2019, September 10). *R.G. & G.R. Harris Funeral Homes v EEOC & Aimee Stephens*. Retrieved November 15, 2019, from <https://www.aclu.org/cases/rg-gr-harris-funeral-homes-v-eeoc-aimee-stephens>

This article offers a summary of the pending Supreme Court case, "R.G. & G.R. Harris Funeral Homes v. EEOC," that will establish whether employers have the right to terminate employees on the basis of gender identity. This will be used to show the history of the case and to examine employees' rights as they stand in the present moment.

Back, C. J., & Freeman, W. C. (2018, April 9). *Sexual harassment and Title VII: Selected legal issues*. Retrieved from <https://fas.org/sgp/crs/misc/R45155.pdf>

This Congressional Report offers credible insight into what constitutes sexual harassment in the workplace, what damages employers may be liable for in the event of a successful claim made by an employee, and how some cases have unfolded within the legal system. This source will serve as evidence for argumentative claims related to workplace sexual harassment.

Bell, D. (1976). Serving two masters: Integration ideals and client interests in school desegregation litigation. *Yale Law Journal*, 85, 470-516. Retrieved from https://www-jstor-org.offcampus.lib.washington.edu/stable/795339?sid=primo&origin=cr_ossref&seq=1#metadata_info_tab_contents

Bell's article will be useful for applying legal theory to arguments related to the effectiveness of the EPA.

Bingham, C., & Gansler, L. L. (2002). Chapter four: No name for it. In *Class Action: The Landmark Case that Changed Sexual Harassment* (pp. 60-77). New York, NY: Anchor Books.

This book drills into one of the first precedent cases in which an employee claimed in court that she had been sexually harassed. The historical context provided within chapter four will be used to evidence the significance of language and its relationship to the law and employees' rights.

Calavita, K. (2010). Law in the everyday, everywhere. In *Invitation to law and society: An introduction to the study of real law* (2nd ed., pp. 37-58). Chicago, IL: University of Chicago Press.

This chapter explores the relationships that exists between law and society. This will be used to evidence the important role legal language has played in the civil rights modern women have to work in an environment free from sexual harassment.

Ellman, N., & Frye, J. (2018, November 2). Efforts to combat pregnancy discrimination: Confronting racial, ethnic, and economic bias. Retrieved November 10, 2019, from <https://www.americanprogress.org/issues/women/news/2018/11/02/460353/efforts-combat-pregnancy-discrimination/>

This article offers insight into more recent legislation that protects pregnant workers and addresses the ways in which these workers continue to face discrimination. Thus, this source will be used to evidence claims related to a continued need for social change.

ERA Coalition. (2019). ERA Coalition – Equal Rights Amendment Coalition. Retrieved November 11, 2019, from <http://www.eracoalition.org/>

This site offers a clear and concise summary regarding the history of the Equal Rights Amendment. I will use this information to provide historical context of the Amendment to readers.

ERA Coalition. (n.d.). Why we need an Equal Rights Amendment. Retrieved November 11, 2019, from <http://www.eracoalition.org/wp-content/uploads/2019/09/Why-We-Need-the-ERA.pdf>

This informational document contains a quote from the late Supreme Court Justice Scalia, which will be used to emphasize the significance of legal language in relation to women's rights.

JURIST Legal News & Research Services. (2014, December 20). History of the Pregnancy Discrimination Act. Retrieved November 9, 2019, from <http://jurist.org/archives/feature/background-for-pda/>

JURIST offers legal research and news to readers. This article provides useful historical, legal, and political context for the Pregnancy Discrimination Act. This will serve as evidence in claims related to the legal protections pregnant workers have.

"R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission." Oyez. Accessed November 15, 2019. <https://www.oyez.org/cases/2019/18-107>.

This source will be used to evidence the current status of the Supreme Court case pertaining to Aimee Stephens.

"R.G. & G.R. Harris Funeral Homes Inc, v. Equal Employment Opportunity Commission." (2019, October 8). Heritage Reporting Corporation. Retrieved November 15, 2019, from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf

This is a transcript of oral arguments that took place on behalf of Aimee Stephens in the Supreme Court. Some of the powerful dialogue will be used to illustrate the legal strategy for establishing that discrimination on the basis of gender identity is, in essence, discrimination on the basis of sex.

Pearsall, B. (2013, March 18). 50 years after the Equal Pay Act, parity eludes us. Retrieved November 10, 2019, from <https://www.aauw.org/article/50-years-after-the-equal-pay-act-parity-eludes-us/>

This article discusses the history of the Equal Protection Act. It will be used to provide background about workers' rights to receive equal pay for equal work.

Smeal, E. (2019, November 6). The fight to ratify the ERA is in the homestretch. Retrieved November 11, 2019, from <https://msmagazine.com/2019/11/06/the-fight-to-ratify-the-era-is-in-the-homestretch/>

This article provides an update regarding the ratification of the Equal Rights Amendment (ERA) and will be used to inform readers as to the potential future of the ERA.

Spade, J. Z., & Valentine, C. G. (2011). Gender at Work. In *The Kaleidoscope of Gender: Prisms, Patterns, and Possibilities* (3rd ed., pp. 345-406). Thousand Oaks, CA: Pine Forge Press.

This chapter of the text will be useful for connecting some course themes with the Visual Project assignment.

U.S. Equal Employment Opportunity Commission. (n.d.a). Title VII of the Civil Rights Act of 1964. Retrieved November 9, 2019, from <https://www.eeoc.gov/laws/statutes/titlevii.cfm>

This excerpt outlines the history of Title VII of the 1964 Civil Rights Act and what legally constitutes discrimination. This will be useful for contextualizing the history of federal legislation in relation to workplace discrimination and harassment.

—— (n.d.b). Facts about sexual harassment. Retrieved November 9, 2019, from <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>

This excerpt from the EEOC's official website describes what constitutes workplace sexual harassment. This source offers a formal legal definition of sexual harassment that will be useful for creating a foundational context for readers.

—— (n.d.c). Sexual Harassment Charges (EEOC Only). Retrieved November 9, 2019, from https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm

This excerpt provides useful data related to sex-based discrimination and sexual harassment in the workplace. This data will serve as evidence that despite formal legal legislation to prevent discrimination and harassment, both persist.

—— (n.d.d). The Pregnancy Discrimination Act. Retrieved November 9, 2019, from <https://www.eeoc.gov/laws/statutes/pregnancy.cfm>

This summary of the Pregnancy Discrimination Act will be used to evidence the legislative language for what rights pregnant workers have in the workplace.

- (n.d.e). EEOC Releases Preliminary FY 2018 Sexual Harassment Data. Retrieved November 10, 2019, from <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>

This excerpt provides relevant data related to damages recovered by the EEOC for those filing claims of sexual harassment against their employers. This will be used to substantiate the recourse victims have available to them resulting from federal regulations prohibiting harassment.

- (n.d.f). The Equal Pay Act of 1963 (EPA). Retrieved November 11, 2019, from <https://www.eeoc.gov/laws/statutes/epa.cfm>

This excerpt from the EEOC provides the legal language of the EPA, which will be used to illustrate the rights women have to receive equal pay for equal work.

- The U.S. National Archives and Records Administration. (2019, July 26). Declaration of Independence: A transcription. Retrieved from <https://www.archives.gov/founding-docs/Declaration-transcript>

This transcription of the Declaration of Independence serves as primary evidence of the document's language, which will be used as evidence that women's rights were not protected by the Founding Fathers.

- AAUW. (1963). *JFK Signs EPA* [Photograph]. Retrieved from <https://www.aauw.org/article/50-years-after-the-equal-pay-act-parity-eludes-us/>
- ACLU. (2019). *Aimee Stephens SCOTUS* [Photograph]. Retrieved from <https://www.aclu.org/cases/rg-gr-harris-funeral-homes-v-eeoc-aimee-stephens>
- CNN. (n.d.). *ERA activists* [Photograph Screen-grab]. Retrieved from <https://www.cnn.com/2015/04/02/us/new-womens-equal-rights-movement/index.html>
- Getty Images. (2018). *Sexual harassment concept, businessman making sexual threatening by touching and hugging women in office* [Photograph]. Retrieved from <https://www.canva.com/media/MAC4RiXMmeM>
- MaxRiesgo. (n.d.). *Pregnant woman working in construction factory* [Photograph]. Retrieved from <https://www.canva.com/media/MADaA1-FuQg>
- Morillo, C. (n.d.). *Three Women in Front of Desk* [Photograph]. Retrieved from <https://www.canva.com/media/MADGv-5Xb20>
- Movement Advancement Project & The National LGBTQ Workers Center. (2018, September 13). *States that protect LBGTQ in the workplace* [Data Map]. Retrieved from <https://victoryinstitute.org/issue-at-a-glance-lgbtq-employment-discrimination/>
- Pew Research Center. (2013, January 13). *Perceptions of discrimination* [Bar Graph]. Retrieved from <https://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>
- Pew Research Center. (2017, December 13). *Gender discrimination at work* [Graph]. Retrieved from https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/ft_17-12-13_genderdiscrimination_women/
- Pew Research Center. (2018, March 30). *Sexual harassment at work* [Bar Graph]. Retrieved from https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/sdt_04-04-18_harassment-00-06/
- Skye Gould, & Business Insider. (2017, February 13). *Women's annual earnings compared to white men's* [Bar Graph]. Retrieved from <https://www.weforum.org/agenda/2017/04/the-us-gender-gap-in-5-charts>