

BACKGROUND

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How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom

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Abstract

*Current proposals to create new LGBT protections with varying types of religious exemptions will not result in what advocates claim is “Fairness for All.” Instead, they will penalize many Americans who believe that we are created male and female and that male and female are created for each other—convictions that the Supreme Court of the United States, in *Obergefell v. Hodges*, recognized are held “in good faith by reasonable and sincere people here and throughout the world.” There is a better way to think about the concerns animating these new policy proposals and the best solutions. It is one that does not exclude the idea of more tailored policies to address the mistreatment of people who identify as LGBT and at the same time would leave all Americans—not just the lucky few who are sufficiently well-connected to be exempted from “sexual orientation and gender identity” (SOGI) laws—free to act on their good-faith convictions.*

Openness to win-win policy solutions that address the needs and concerns on all sides of a policy debate are all to the good. This is just as true in current debates about the needs of people who identify as LGBT (lesbian, gay, bisexual, transgender) and concerns about infringements of religious liberty as it is in any other policy area. In the aftermath of the U.S. Supreme Court’s *Obergefell v. Hodges* decision,¹ all Americans—wherever they fall on the political spectrum and whether religious, secular, or agnostic—should join the effort to find ways to coexist peacefully.

But recent public policy proposals portrayed as win-win in this context are actually win-lose, and better policy solutions are possible. Current proposals to create new LGBT protections with vary-

KEY POINTS

- If it is determined that the legitimate needs faced by people who identify as LGBT are significant enough to warrant government attention, then proposed policy solutions must do three things.
- They must be nuanced and narrowly tailored to address the documented need; must employ accurately defined terms to avoid punishing good actions and interactions; and must respect the rights of conscience, religion, and speech.
- Sexual orientation and gender identity (SOGI) antidiscrimination laws are unjustified, but if other policies are adopted to address the mistreatment of people who identify as LGBT, they must leave people free to engage in legitimate actions based on the conviction that we are created male and female and that male and female are created for each other.
- This would leave all Americans—not just the lucky few who are sufficiently well-connected to be exempted from SOGI laws—free to act on those convictions.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3194>

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ing types of religious exemptions will not result in fairness for all. Instead, they will penalize many Americans who believe that we are created male and female and that male and female are created for each other—convictions that the Court recognized are held “in good faith by reasonable and sincere people here and throughout the world.”²

There is a better way to think about the concerns animating these new policy proposals and the best solutions. Although SOGI antidiscrimination laws are unjustified, that does not exclude the idea of more tailored policies that would address the mistreatment of people who identify as LGBT and at the same time would leave all Americans—not just the lucky few who are sufficiently well-connected to be exempted from “sexual orientation and gender identity” (SOGI) laws—free to act on their good-faith convictions.

“Fairness for All”: Fundamentally Misguided

The most prominent model for creating specific LGBT policies while showing concern for religious freedom is known as “Fairness for All,” a phrase used by proponents to describe a law first adopted in Utah and similar proposals in other states and potentially at the national level.³ This approach creates new protected classes in antidiscrimination law based on sexual orientation and gender identity and then grants limited exemptions and protections, mainly to religious organizations. Proponents argue that nothing short of elevating SOGI as protected classes in law is sufficient to address existing problems for people who identify as LGBT. Although several religious organizations have endorsed such proposals and are actively promoting them, other prominent religious voices oppose the idea.

Proponents of “Fairness for All” assume that adoption of SOGI laws in some form is both a good

thing and inevitable, and their arguments focus largely on how to mitigate the religious liberty harms of such laws. They do not argue the need for SOGI laws robustly, with facts and studies, and thus elide the question of whether that need requires SOGI laws to address it as opposed to some less drastic measure or measures.

Proponents of “Fairness for All” do not argue the need for sexual orientation and gender identity laws robustly, with facts and studies, and thus elide the question of whether that need requires SOGI laws to address it as opposed to some less drastic measure or measures.

Because new SOGI laws change the status quo and impose new penalties on people (in some cases, jail time), the burden is on their proponents to prove the need for such laws, the “fit” between the law and the harms to be addressed, and either the lack of infringement of a preexisting right or the sufficient justification for its infringement. The record indicates clearly that proponents have failed to carry their burden on all counts.

Unfairness for Many, Exemptions for a Few. The “Fairness for All” approach creates bad SOGI public policy⁴ and then tries to forestall some of its worst consequences through limited religious exemptions. Exemptions, however, do not convert an otherwise bad policy into a good one, and the result here is not fairness for all, but unfairness for many with exemptions for a fortunate few.⁵

1. See *Obergefell v. Hodges*, 576 U.S. ____ (2015), http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed February 6, 2017).

2. *Ibid.*

3. The “Utah Compromise” was a law enacted in Utah in the spring of 2015 that created sexual orientation and gender identity antidiscrimination policy in employment and housing while also creating certain religious liberty exemptions and protections. Indiana attempted but failed to pass similar legislation in January 2016. See Ryan T. Anderson and Robert P. George, “Liberty and SOGI Laws: An Impossible and Unsustainable ‘Compromise,’” *Witherspoon Institute Public Discourse*, January 11, 2016, <http://www.thepublicdiscourse.com/2016/01/16225/> (accessed February 6, 2017). Thus far, no “Fairness for All” legislation has been introduced at the federal level, but there is discussion among advocates about doing so.

4. See, for example, Ryan T. Anderson, “Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom,” Heritage Foundation *Backgrounder* No. 3082, November 30, 2015, <http://www.heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom>, and Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington: Regnery Publishing, 2015).

5. Anderson and George, “Liberty and SOGI Laws.”

SOGI laws, including “Fairness for All,” threaten the civil rights of Americans who believe basic truths about the human condition articulated by ancient Greek and Roman philosophers, members of the Abrahamic faiths, and secular people who believe in freedom of inquiry. Orthodox Jews, Roman Catholics, Eastern Orthodox and Evangelical Christians, Latter-Day Saints, Muslims, and people of other faiths or none at all will be at risk. Where similar SOGI policies have been enacted, bakers, florists, photographers, adoption agencies, schools, and providers of services to the needy have been penalized or threatened not because they discriminated against someone because they identify as LGBT, but because they judged in conscience that they could not endorse certain morally relevant conduct.

Because of the *Obergefell* decision, which required the government to recognize same-sex relationships as marriages, the people who need legal protections are those who believe that male and female are objective biological categories and that marriage unites a man and a woman. Although *Obergefell* did not compel private citizens and their private associations to change their beliefs about marriage, in case after case, corporate and cultural pressures are mounting against those who seek to live and work consistent with their belief that marriage is the union of a man and a woman and sex is a biological reality.⁶ SOGI laws establish in law and culture the principle that acting on these beliefs is bigotry.

The Fundamental Difference Between Religious Freedom and Antidiscrimination Policies. Current “Fairness for All” proposals are fundamentally misguided because they fail to recognize the essential difference between antidiscrimination policies and religious freedom policies. Antidiscrimination laws are about government coercing people to live according to the majority’s values. Religious liberty laws are about removing government coercion and allowing people to live by their own beliefs. While there can be good justifications for certain antidiscrimination policies, there is not

a human right to them. Religious freedom, however, is a human right. “Fairness for All” mistakenly conflates these rather different concepts.

Current “Fairness for All” proposals are fundamentally misguided because they fail to recognize the essential difference between antidiscrimination policies and religious freedom policies.

When Mozilla Firefox forced CEO Brendan Eich to resign because he donated to California’s marriage initiative, many people thought the company was doing the wrong thing, but there were no widespread calls for the government to penalize the company for acting on its socially liberal convictions. And when A&E suspended Phil Robertson from *Duck Dynasty* and Cracker Barrel removed his products from its stores because he expressed support for Biblical views of sexuality, many Americans thought A&E and Cracker Barrel were in the wrong. Nevertheless, they were free to act on their socially liberal beliefs in running their businesses.

Similarly, even those who disagree with the beliefs of a baker, florist, photographer, adoption agency, or religious school that supports the historic understanding of marriage should agree that the government ought not to penalize them for running their organizations according to their moral and religious convictions. Yet this is exactly what SOGI laws do.

It is not “Fairness for All” when one side uses the law to coerce the other side, and all the other side gets is limited exemptions for freedom. Nor is it a “compromise”—or at least not a good one—when one side gets special new legal privileges applicable almost everywhere, and “in exchange” the other side gets limited exemptions (which are not guaranteed to last⁷) from this bad public policy. Compromise suggests that each side gets something that it wants,

6. For a litany of such incidents, see Anderson, *Truth Overruled*.

7. Once established, SOGI rules have come to swallow religious exceptions. After all, once the law has established a principle that sexual orientation and gender identity are akin to race, why should they not receive the same legal protections? Under such policy, what would prevent morally conservative people from being branded as bigots equivalent to racists (a charge many LGBT activists already make, but one that would be backed by law under SOGI policy)? For example, when Ireland first passed its SOGI law, it included exemptions for certain “religious, educational, or medical institutions.” In December 2015, the Parliament voted to repeal this section of the act. Likewise, Congress protected the religious freedom of religious schools in the District of Columbia with respect to sexual orientation, but in December 2014, the D.C. City Council rescinded those protections.

though less than everything, and that both sides stand roughly equal at the end of negotiations. In practice, “Fairness for All” means that one side advances and the other is punished.

Teaching that the Truth Is Discriminatory, Enforcing Government Sexual Orthodoxy. Beyond the particulars of current “Fairness for All” proposals, there are broader and deeper problems with the general model of adding sexual orientation and gender identity to existing antidiscrimination statutes. “Fairness for All,” like other SOGI laws, uses the government and the power of the law to send the message that traditional Judeo-Christian beliefs are not only false, but also discriminatory and rooted in animus.

SOGI policies attempt to impose by force of law a system of orthodoxy with respect to human sexuality: the belief that marriage is merely a union of consenting adults, regardless of biology, and that one can be male, female, none, or some combination—again, regardless of biology.⁸ SOGI laws impose this orthodoxy by punishing dissent and treating as irrational, bigoted, and unjust the beliefs that men and women are biologically rooted and made for each other in marriage.

Sexual Orientation and Gender Identity v. Race and Sex. Current SOGI laws, including “Fairness for All,” lack the nuance and specificity necessary for cases they seek to address. They take the existing paradigm of public policy responses to racism and sexism and assume that this paradigm is appropriate for the policy needs of people who identify as LGBT. This is misguided for both conceptual and practical reasons.

Conceptually, sexual orientation and gender identity are unlike race and sex in important ways. This is one of the reasons why adding the concepts “sexual orientation” and “gender identity” to laws meant to protect on the basis of race and sex does not produce good legal outcomes. SOGIs, including “Fairness for All,” create legal privileges for new protected classes

based not on objective, verifiable traits, but on subjective identities. Furthermore, unlike race and sex, sexual orientation and gender identity are partly defined in terms of actions, and actions are subject to moral evaluation, while one’s status in terms of race and sex is not. As a result, existing and proposed SOGI laws, including “Fairness for All,” define “discrimination” with respect to sexual orientation and gender identity much too broadly, penalizing people for simply seeking not to facilitate, support, or participate in actions—such as same-sex weddings or sex “reassignment” surgeries—that they reasonably deem to be immoral.⁹

SOGI laws are not about the freedom of LGBT people to engage in certain actions, but about coercing and penalizing people who in good conscience cannot endorse those actions. SOGI laws do this by coercing and penalizing people who act on an understanding of human sexuality that is at odds with the prevailing viewpoint that the government seeks to enforce. It is one thing for the government to allow or even endorse conduct that is immoral to many religious faiths, but it is quite another thing for government to force others to condone and facilitate it in violation of their beliefs.

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There is also a practical difference between proposals for SOGI antidiscrimination policies and policies prohibiting discrimination on the basis of race or sex. The nature and extent of SOGI discrimination in the United States today are unlike racism and

8. For more on this, see Anderson, *Truth Overruled*.

9. People opposed to interracial marriage or racially integrated lunch counters could claim they were opposed to certain actions when blacks and whites did them together, but that stops the inquiry too soon. Why were they opposed? The reason they were against blacks and whites doing things together was an attitude of white supremacy that viewed and treated blacks as less intelligent, less skilled, and in some respects less human. They thus opposed blacks interacting with whites on an equal plane. One can and should hold that we are created male and female, with male and female created for each other, without holding any hostility toward people who identify as LGBT. For more on this, see the section on discrimination in this paper. See also John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017).

sexism when antidiscrimination laws were enacted (and unlike racism and sexism even today). When the Civil Rights Act of 1964 was enacted, blacks were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the tacit and often explicit backing of government.

Blacks were denied loans, kept out of decent homes, and denied job opportunities—except as servants, janitors, and manual laborers. These material harms both built on and fortified the social harms of a culture corrupted by views of white supremacy that treated blacks as less intelligent, less skilled, and in some respects less human. Making it harder for blacks and whites to mingle on equal terms was not just incidental: It was the whole point. Discrimination was so pervasive that the risks of lost economic opportunities or sullied reputation were acceptable to the many who engaged in it. Social and market forces, instead of punishing discrimination, rewarded it through the collusion of many whites (with a heavy assist from the state). Given the irrelevance of race to almost any transaction, and given the flagrant racial animus of the time, no claims of benign motives are plausible. Resort to the law was therefore necessary.¹⁰

But no such legal push is necessary today. There is no widespread heterosexual supremacy akin to white supremacy. There is no widespread treatment of people who identify as LGBT as second-class citizens akin to Jim Crow. There are no denials of the right to vote, no lynchings, no signs over water fountains saying “Gay” and “Straight.” This is not to deny that there has been historic bigotry against those who identify as LGBT or to argue that it has vanished. It exists and should be addressed appropriately. As with other forms of mistreatment, our communities must fight it. But the remaining instances simply cannot be compared to the systematic material and social harms wrought by racism in the 1960s and earlier.

Put another way, the legal response that was appropriate to remedy the legacy of slavery and Jim Crow is not appropriate for today’s challenges. Sim-

ply adding SOGI to far-reaching antidiscrimination laws and then tacking on some exemptions is not a prudent strategy. The policy response to the legitimate concerns of people who identify as LGBT must be nuanced and appropriately tailored. Antidiscrimination laws, however, are blunt instruments by design, and many go beyond intentional discrimination and ban actions that have “disparate impacts” on protected classes. Policymakers therefore need to rethink how to formulate and implement policy in this area.

LGBT Policy Needs

In responding to the legitimate needs of people who identify as LGBT while also respecting the religious freedom rights of all, policymakers must first assess the nature and extent of the problem and then determine whether governmental intervention is required and, if it is, what the appropriate remedy should be.

Consideration of the needs of people who identify as LGBT should look to both material and social needs. This is illustrated, for example, in the way that Jim Crow not only prevented blacks from accessing certain basic goods and services, but also treated blacks as second-class citizens. Once a legitimate need has been identified, policymakers must ask two questions:

- Is a governmental response appropriate? Are the needs of such a magnitude and extent as to warrant government attention?
- Is a government response required? Are social, economic, and cultural forces sufficient to address these needs on their own?

If a government response is judged necessary, it must be tailored to address the documented need at the appropriate level of government (federal, state, or local) while doing everything possible to avoid burdening such rights as the freedoms of contract, conscience, religion, and speech.¹¹

The Needs. Before any law can be justified and crafted, there must be a documented need for it. Advocates of SOGI laws must therefore provide evidence proving the need for a coercive governmental

10. Portions of this paragraph are adapted from Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*.

11. See *ibid.*

response—a requirement they have failed to meet. This is not to say conclusively that such a need does not exist or that we live in a country that is free from discrimination against people who identify as LGBT. It *is* to say, however, that evidence of discrimination comparable to the evidence used to justify passage of our civil rights laws on race and sex has not been demonstrated. Absent such demonstration, civil rights laws used to combat racism and sexism are not the proper models to use in addressing discrimination against those who identify themselves as LGBT.

Before any law can be justified and crafted, there must be a documented need for it. Advocates of SOGI laws must therefore provide evidence proving the need for a coercive governmental response—a requirement they have failed to meet.

As to broader trends, there is no evidence that people who identify as LGBT have been turned away by a single hotel chain, a single major restaurant, or a single major employer.¹² In fact:

- The Human Rights Campaign (HRC)—the nation’s premier LGBT advocacy group—reports that 89 percent of *Fortune* 500 companies have policies against considering sexual orientation in employment decisions.¹³
- According to Prudential, “median LGBT household income is \$61,500 vs. \$50,000 for the average American household.”¹⁴

- An August 2016 report from the U.S. Treasury—based on tax returns, not surveys—shows opposite-sex couples earning on average \$113,115, compared to \$123,995 for lesbian couples and \$175,590 for gay male couples. For couples with children, the gap is even more dramatic: \$104,475 for opposite-sex couples but \$130,865 for lesbian couples and \$274,855 for gay couples.¹⁵

When it comes to the denial of services to LGBT people, Professor Andrew Koppelman, an LGBT advocate, acknowledges that:

Hardly any of these cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people.¹⁶

Those three sentences shatter the strongest case for SOGI laws. Amid several years of fierce debate and intense media attention, all but one of the cases have involved vendors opposed to serving same-sex weddings and professionals and nonprofits convinced that children ought to have a mother and father, that marriage unites husband and wife, or that sex is for marriage. The cases do not involve people or organizations treating people who identify as LGBT differently just because they identify as LGBT. The fact is that the strongest grounds for enacting policy to ensure that people who identify as LGBT have access to basic services are rare to vanishing.

Furthermore, the few cases that have garnered media attention—cases involving bakers, a flo-

12. The U.S. Equal Employment Opportunity Commission suggests that it secured a total of \$4.4 million in awards for complainants of LGBT discrimination last year, but these figures appear to be overstated, because “[m]onetary benefits include amounts which have been recovered exclusively or partially on non-LGBT claims included in the charge.” U.S. Equal Employment Opportunity Commission, “LGBT-Based Sex Discrimination Charges FY 2013–FY 2016,” https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm (accessed February 7, 2017).

13. Human Rights Campaign, “LGBTQ Equality at the Fortune 500,” <http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500> (accessed February 7, 2017).

14. Prudential, “The LGBT Financial Experience 2016–2017,” <http://www.prudential.com/lgbt> (accessed February 7, 2017).

15. Robin Fisher, Geof Gee, and Adam Looney, “Joint Filing by Same-Sex Couples After Windsor: Characteristics of Married Tax Filers in 2013 and 2014,” U.S. Department of the Treasury, Office of Tax Analysis, *Working Paper* No. 108, August 2016, <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-108.pdf> (accessed February 6, 2017).

16. Andrew Koppelman, “A Zombie in the Supreme Court: The *Elane Photography* Cert Denial,” *Alabama Civil Rights & Civil Liberties Law Review*, Vol. 7 (2015), pp. 77–95, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455848 (accessed February 7, 2017).

rist, and a photographer—hardly diminish a single person or couple’s range of opportunities for room, board, or entertainment. If businesses started to refuse service specifically to gays and lesbians, it is hard to imagine a sector of commerce or a region of the U.S. where media coverage would not provide a remedy swift and decisive enough to restore access in days.

Think, for example, of the pizzeria in small-town Indiana that, after the local news reported that its owners would not cater a hypothetical gay wedding, became the target of protests, boycotts, and death threats that forced it to shut down for several months.¹⁷ Had this been an actual case, not a mere hypothetical, and had it involved a blanket “No Gays Allowed” policy, not simply a conviction about marriage, the resultant media coverage and social pressure would likely have been even more intense. This example and others like it highlight a related point: The LGBT community’s political influence is profound and still growing.

In reality, there is neither a national nor even a local problem of bakers vilifying people who identify as gay. They have no problems crafting birthday cakes for customers regardless of sexual orientation, but some bakers cannot in good conscience use their talents to help celebrate a same-sex wedding by designing a cake topped by two grooms or two brides. Similarly, religious schools have no problem employing teachers with same-sex attractions who support their religious mission and teachings, but some religious schools have had to dismiss teachers who fail to model or who outright oppose those teachings. These decisions do not count as mistreatment based on sexual orientation, and preventing them should not be counted as a legitimate need.

Cultural Forces and Government Responses. As for the mistreatment that remains, it is being driven ever more to the margins by media, markets, and culture. Where we can leave these more efficient forces to do the job, we should do so. Market forces are already curbing wrongful discrimination based on factors that are irrelevant to employment ability or performance without the costs and inevitable side effects of heavy-handed legal coercion. Market competition can provide nuanced solutions that are far

superior to coercive, costly, one-size-fits-all government policy.

Market forces are already curbing wrongful discrimination based on factors that are irrelevant to employment ability or performance without the costs and inevitable side effects of heavy-handed legal coercion. Market competition can provide nuanced solutions that are far superior to coercive, costly, one-size-fits-all government policy.

When corporate giants like the NBA, the NCAA, the NFL, Apple, Salesforce, Delta, and the Coca-Cola Company threaten to boycott a state over laws that merely give conscientious objectors their day in court, it is hard to see the case for legally coercing such dissenters to achieve progressives’ social goals. SOGI laws, including “Fairness for All,” are legal hammers purportedly justified by extensive, entrenched, and unjust discrimination. SOGIs, including “Fairness for All,” are solutions in search of a problem.

Nevertheless, supposing that the evidence showed a need both large enough and entrenched enough to justify a policy response, how should such a policy be structured? Specifically, how can policymakers be precise in tailoring such a law to meet the underlying need while not prohibiting legitimate actions and interactions and not burdening the rights of conscience, religion, or speech?

Scope of Coverage: The Case of “Public Accommodations”

Any policy response to a legitimate need must be appropriately tailored. If a policy is justified by a housing or employment need, the scope of who counts as an employer or what counts as relevant housing must be defined accurately so that it can address the problem without unnecessarily burdening others. One problem with current SOGI laws,

17. Madeline Buckley, “Threat[] Tied to RFRA Prompt Indiana Pizzeria to Close Its Doors,” *IndyStar*, updated April 3, 2015, <http://www.indystar.com/story/news/2015/04/02/threats-tied-rfra-prompt-indiana-pizzeria-close-doors/70847230/> (accessed February 7, 2017).

however, is that they apply to too many sectors of life and employ unreasonably expansive definitions. The scope of coverage—areas where the law applies, penalizes, and coerces—is far too broad.

For example, the Equality Act,¹⁸ the centerpiece of the Human Rights Campaign’s Beyond Marriage Equality Initiative,¹⁹ would add “sexual orientation” and “gender identity” to virtually all federal civil rights laws covering race—“Public Accommodations, Education, Federal Financial Assistance, Employment, Housing, Credit, and Federal Jury Service”²⁰—and expand them beyond their current reach. Moreover, it is explicitly designed to shrink existing religious liberty protections.²¹ It also would stretch the scope of “public accommodations” quite far. The Civil Rights Act of 1964—the purpose of which was to integrate half of the continental United States after centuries of race-based slavery and Jim Crow—covered entities like hotels, restaurants, theaters, and gas stations. The Equality Act would cover almost every business serving the public.

Another proposal, a 2014 SOGI law passed by the Houston City Council—but later repealed by a supermajority of the city’s voters—would have covered “every business with a physical location in the city, whether wholesale or retail, which is open to the general public and offers for compensation any product, service, or facility.”²² No inch of the public square would have been spared its costs to conscience, pluralism, and speech.

By contrast, at common law, the term “public accommodations” is used to refer to public utilities, common carriers, and other natural monopolies that have a general duty to serve the public.²³ Likewise,

the federal Civil Rights Act of 1964 does not apply to bakeries. Yet racial discrimination is not rampant at Dunkin’ Donuts, not least because all incentives are aligned against it. Because “sex” is not a protected class for federal antidiscrimination law for public accommodations, federal law allows restaurants of any size to refuse to admit women. It also allows theaters and stadiums to turn away Democrats just for being Democrats and Republicans just for being Republicans. Yet culture and commerce prevent these and other forms of discrimination without any help from the law.

Thus, the first step to finding an appropriate policy solution is to consider the scope of coverage. A policy response must be tailored to the need that justifies it in the first place. This entails defining key terms such as “public accommodations” appropriately.²⁴

Definition of Key Terms: “Discrimination”

The second step is to define “discrimination” accurately. The biggest problem with current SOGI laws, including “Fairness for All,” is that they do not appropriately define what counts as discriminatory. To illustrate this, consider several different cases of putative “discrimination.” The law must be nuanced enough to capture the important differences in these cases.

Invidious and Rightly Unlawful Discrimination. Racially segregated water fountains were one form of discrimination that took race into consideration—in a context where it was completely irrelevant—and then treated blacks as second-class citizens precisely because they were black. The entire point was to classify on the basis of race in order to

18. Equality Act, S. 1858, 114th Cong., 1st sess., <https://www.congress.gov/114/bills/s1858/BILLS-114s1858is.pdf> (accessed February 7, 2017). The House version of the bill is H.R. 3185.

19. Human Rights Campaign, *Beyond Marriage Equality: A Blueprint for Federal Non-discrimination Protections*, 2014, <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/HRC-BeyondMarriageEquality-42015.pdf> (accessed February 7, 2017).

20. Senator Jeff Merkley, Senator Tammy Baldwin, and Senator Cory Booker, “The Equality Act,” 2015, p. 1, https://www.merkley.senate.gov/imo/media/doc/EqualityAct_OnePager.pdf (accessed February 7, 2017).

21. Equality Act, S. 1858, Sec. 9.

22. City of Houston, Texas, Ordinance No. 2014-530, May 28, 2014, Exhibit A, pp. 2-3, <http://www.scribd.com/doc/228533432/Equal-Rights-Ordinance> (accessed February 7, 2017).

23. Separately, under common law, individuals who open their private property to the public to conduct business, though they have no general duty to serve, may exclude members of the public from the premises only for a valid reason. At common law, race is never a valid reason for exclusion, but many other reasons can be valid, depending on the circumstances of the case. Such reasons would include the inability to perform actions that violate the conviction that marriage is the union of a man and woman. See Adam J. MacLeod, “Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace,” *Michigan State Law Review*, Vol. 2016, Issue 3 (2016), pp. 643-711, <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1169&context=lr> (accessed February 7, 2017).

24. The same is true for defining housing or employers that are covered should the need be in housing or employment.

treat blacks as socially inferior. As a result, such actions were rightly described as invidious race-based discrimination, and—given the entrenched, widespread, state-facilitated nature of the problem—they were rightly made unlawful.

The biggest problem with current SOGI laws, including “Fairness for All,” is that they do not appropriately define what counts as discriminatory.

Likewise, throughout much of American history, girls and women were not afforded educational opportunities equal to those available to boys and men. This form of discrimination took sex into consideration and then treated girls and women poorly precisely because of their sex, barring them from education in certain subjects or at certain levels despite being otherwise qualified. As with invidious racial discrimination, such treatment took a feature (in this case, sex) into consideration precisely to treat women as less than men. The law rightly deemed such actions invidious sex-based discrimination, and—again, given the entrenched, widespread, and state-facilitated nature of the problem—Title IX of the Education Amendments was enacted to ensure that girls and women received equal educational opportunities.

Appropriate and Rightly Lawful Distinctions That Are Not Classified as Discrimination. When Title IX was enacted in 1972 and its implementing regulations were promulgated in 1975, the law made clear that sex-specific housing, bathrooms, and locker rooms were not unlawful discrimination. Such policies take sex into consideration, but they do not treat women as inferior to men or men as inferior to women. They treat both sexes equally *because* they take sex into consideration (they “discriminate”—in the nonpejorative sense of “distinguish”—on the basis of sex) precisely in a way that matters: by appreciating the bodily sexual difference of men and women in things such as housing, bathroom, and locker room policy.

Would we really be treating men and women equally in anything but an artificial way if we forced

men and women, boys and girls, to undress in front of each other? Justice Ruth Bader Ginsburg, in her majority opinion for the Supreme Court forcing the Virginia Military Institute to become co-ed, wrote that it “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”²⁵ Yet we certainly would be treating people unequally if access to intimate facilities were based on factors wholly unrelated to privacy, such as race.

As a result, policymakers did not consider sex-specific intimate facilities as discriminatory in the first place, and laws explicitly reflected that commonsense understanding while rightly declaring racially segregated facilities to be unlawful. The lesson here is that not all distinctions in fact should be deemed unlawful discrimination.

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Not Discriminatory at All. If sex-specific intimate facilities are an example of lawful, legitimate policies that take sex into consideration, pro-life medical practices are examples of policies that are legitimate and lawful because they do not take sex into consideration at all. That only women can get pregnant has no bearing whatsoever on the judgment of the conscientious doctor or nurse who refuses to kill the unborn. The insistence of LGBT activists that men actually can become pregnant highlights the point: Pro-life medical personnel refuse to do abortions on pregnant women *and* “pregnant men” (i.e. women who identify as men).

Thus, we can identify three different types of cases:

- Cases of invidious discrimination, in which an irrelevant factor is taken into consideration in order to treat people poorly based on that factor, as with racially segregated water fountains;
- Cases of distinctions without unlawful discrimination, in which a factor is taken into consideration precisely because it is relevant to the under-

25. *United States v. Virginia*, 518 U.S. 151, 550 n.19 (1996), <https://supreme.justia.com/cases/federal/us/518/515/case.html> (accessed February 6, 2017).

lying policy and people are not treated poorly, as with sex-specific intimate facilities; and

- Cases with neither distinctions nor discrimination, in which a particular factor simply does not enter into consideration, as with pro-life doctors.

Any proposed policy intended to address the documented needs of people who identify as LGBT must take these categories into account without conflation.²⁶

SOGI Discrimination: Real and Imagined.

Consider a florist who refused to serve all customers who identify as LGBT simply because they identified as LGBT. That would be a case of invidious discrimination because the mere knowledge that they identify as LGBT should have no impact whatsoever on the act of the florist selling flowers, because there is no rational connection between the two.

Now consider Baronelle Stutzman, the 71-year-old grandmother who served one particular gay customer for nearly a decade but declined to do the wedding flowers for his same-sex wedding ceremony. The customer's sexual orientation did not play any role in Stutzman's decision. Her belief that marriage is a union of sexually complementary spouses does not spring from any convictions about people who identify as LGBT. When she says she can do wedding flowers only for true weddings, she makes no distinctions based on sexual orientation at all.²⁷

This is seen most clearly in the case of Catholic Charities adoption agencies. They decline to place the children entrusted to their care with same-sex couples not because of their sexual orientation, but because of the conviction that children deserve both a mother and a father. That belief—that men and women are not interchangeable, mothers and fathers are not replaceable, the two best dads in the world cannot make up for a missing mom, and the two best moms in the world cannot make up for a

missing dad—has absolutely nothing to do with sexual orientation. Catholic Charities does not say that people who identify as LGBT cannot love or care for children; it does not take sexual orientation into consideration *at all*. Its preference for placing children with mothers and fathers is not an instance of discrimination based on sexual orientation—and the law should not say otherwise.²⁸

Purported gender identity discrimination presents similar problems. *The Washington Post* recently reported on a woman who was suing a Catholic hospital for declining to perform a sex reassignment procedure on her that entailed removing her healthy uterus. In that report, the *Post* captures the conflation of real and imaginary discrimination:

“What the rule says is if you provide a particular service to anybody, you can't refuse to provide it to anyone,” said Sarah Warbelow, the legal director for the Human Rights Campaign. That means a transgender person who shows up at an emergency room with something as basic as a twisted ankle cannot be denied care, as sometimes happens, Warbelow said. That also means if a doctor provides breast reconstruction surgery or hormone therapy, those services cannot be denied to transgender patients seeking them for gender dysphoria, she said.²⁹

The two examples given, however, differ in significant ways. A hospital that refuses to treat the twisted ankles of people who identify as transgender simply because they identify as transgender would be engaging in invidious discrimination, but a hospital that declines to remove the perfectly healthy uterus of a woman who identifies as a man is not engaging in “gender identity” discrimination. The gender identity of the patient plays no role in the decision-making process: Just as pro-life physicians do not kill unborn babies, regardless of the sex or gender iden-

26. There is a fourth category of “discrimination”: nonmalicious oversight or neglect. Consider the type of discrimination the Americans with Disabilities Act is meant to combat. Before enactment of the ADA, many movie theaters, for example, did not have wheelchair ramps. This was the result of an oversight with respect to the needs of people with disabilities, not because of any hostility toward them. Because such oversights were so widespread and contributed to the exclusion of people with disabilities from full participation in society, Congress acted.

27. See discussion in Anderson, *Truth Overruled*.

28. *Ibid.*

29. Sandhya Somashekhar, “Catholic Groups Sue Over Obama Administration Transgender Requirement,” *The Washington Post*, December 29, 2016, https://www.washingtonpost.com/news/acts-of-faith/wp/2016/12/29/catholic-groups-sue-over-obama-administration-transgender-requirement/?utm_term=.85ff03f50d40 (accessed February 6, 2017).

tity of the pregnant person, doctors do not remove healthy uteruses from *any* patients, regardless of how they identify themselves.

As for the Human Rights Campaign spokesperson's claim that emergency rooms "sometimes" refuse to treat the twisted ankles of transgender patients, there is no evidence—including on the HRC's website—that it or anything similar in fact happens. Furthermore, insofar as this "sometimes happens," it seems reasonable to think that the media would focus so much attention on it that the hospital would reverse course within hours. It therefore seems highly unlikely that this alleged problem merits a governmental response.

In any event, if analysis of the scope and extent of a need and of the cultural and social forces at play indicates that people who identify as LGBT have a legitimate need that justifies governmental action, then the government's response must be limited to the proper scope and must accurately define what counts as "discrimination."

Need for Policy Shapes the Nature of Policy Response, Definitions, and Protections

The preceding sections provide a framework for thinking through how to (1) identify the needs of people who identify as LGBT that government must address, (2) tailor the scope of any policy remedy appropriately, and (3) carefully distinguish which circumstances count as discrimination and which do not. If all of those steps are accomplished, another consideration comes to the fore: Any legal remedy must not penalize valid forms of action and interaction or burden the rights of conscience, religion, and speech.

Because there was such widespread, entrenched systemic and institutional racism throughout American society in the 1960s, for example, and because social and market forces were not sufficient to remedy the problem, it was appropriate for government to respond. That response was properly tailored to meet this need. It defined discrimination to include racially segregated accommodations, places of employment, and housing providers while providing thin religious liberty protections. Because the justification for antidiscrimination laws based on race was so strong and the need was so great, the law was appropriately broad with limited exemptions.

By contrast, consider laws that address discrimination based on sex. Because the nature of sex and the history of sexism did not represent an exact parallel to racism, the law did not treat them in entirely the same ways. To this day, for example, sex is not a protected class for federal antidiscrimination law as applied to public accommodations. Discrimination was legally defined so as not to include sex-specific intimate facilities, and much broader—and in some cases total—religious liberty exemptions were included. In other words, because the justification for laws against sex-based discrimination was weaker than the justification for laws against race-based discrimination, the legal response was more modest: It covered less terrain, defined discrimination more narrowly, and provided greater protection for religious liberty.

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Any proposed policies intended to meet the needs of people who identify as LGBT would need to be crafted in a similar manner. Without greater evidence of the justification for specific policy responses—greater documentation of what the needs truly are—it is hard to be specific. In general, however, the need clearly seems weaker than the need for policies designed to deal with discrimination on the basis of race and sex. A policy response would therefore need to cover less ground, target discrimination more narrowly, and avoid undermining the rights of conscience, religion, and speech.

Policy Responses Matter Because of the Messages They Send

Getting public policy right matters both because the law is binding and because the law is a teacher. A law that burdens and penalizes nondiscriminatory actions and violates the rights of conscience, religion, and speech is purely and simply unjust, and an

unjust law that supposedly applies to all Americans while exempting a select few from its provisions hardly represents “Fairness for All.”

“Fairness for All” advocates who believe the truth about marriage, human nature, and human embodiment should consider how the law would teach future generations that this truth is a lie and that a lie is the truth. Any good that an exemption from the law preserves for religious communities will pale in comparison to the damage that the law does in its pedagogical function.

Some LGBT activists express concerns about the message that religious exemptions send. They claim that such laws teach that people have a “license to discriminate.” But their criticism proves the point made earlier: SOGI laws will teach that legitimate conduct and judgments discriminate, are morally wrong, and should therefore not be given a “license.” Much better, then, not to have the law define such actions as discrimination in the first place.

In the aftermath of the judicially imposed legal redefinition of marriage, the law should not be used to punish and hound those who continue to believe that marriage unites husband and wife. The law should respect their full and equal status as citizens. If *Obergefell* was about respecting the freedom of people who identify as LGBT to live as they wish, as LGBT activists claim, then that same freedom should be respected for Americans who believe in the conjugal understanding of marriage as the union of husband and wife. The law should not force these Americans into the closet.

Lessons from *Roe v. Wade* Applied to *Obergefell v. Hodges*

After the Supreme Court’s decision in *Roe v. Wade*, Americans responded by protecting the rights of pro-life citizens—religious and nonreligious, for-profit and nonprofit—to lead their lives in accordance with their beliefs. Americans did not pass “Fairness for All” legislation that would have made it unlawful sex discrimination to decline to perform an abortion with some limited exceptions. After *Roe*, Americans did not give even greater legal privileges to the forces promoting abortion; they instead sought to enshrine

stand-alone conscience protections in law and over time succeeded.

Americans enacted legislation at the local, state, and federal levels to protect the rights of pro-life Americans not to be punished by government for living out their beliefs. The Church and Weldon Amendments have protected the conscience rights of pro-life medical personnel to refuse to perform or assist with abortions, and the Hyde Amendment and Mexico City policy prevent the use of taxpayer money to support abortion.

The same needs to happen in the aftermath of *Obergefell* for Americans who believe that male and female are objective biological categories and that marriage unites a man and a woman. Public policy must ensure that government never penalizes people for expressing or acting on their view that marriage is the union of husband and wife, that sexual relations are properly reserved for such a union, or that maleness and femaleness are objective biological realities. An example of good policy along these lines is the First Amendment Defense Act.³⁰

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Some argue that *Obergefell* was only a first step and that Congress and state legislatures should get ahead of the coercive laws they fear will come by enacting their own coercive law with some exceptions under the mantle of pragmatism. This is more akin to “burning the village in order to save it” because such a proposal in reality favors one side of a cultural debate—the culturally and politically powerful LGBT lobby—at the expense of citizens of goodwill who believe reasonably that we are creat-

30. H.R. 2802, 114th Cong., 1st Sess., <https://www.congress.gov/bill/114th-congress/house-bill/2802> (accessed February 8, 2017). See also Ryan T. Anderson, “First Amendment Defense Act Protects Freedom and Pluralism After Marriage Redefinition,” Heritage Foundation *Issue Brief* No. 4490, November 25, 2015, <http://www.heritage.org/research/reports/2015/11/first-amendment-defense-act-protects-freedom-and-pluralism-after-marriage-redefinition>.

ed male and female and that marriage unites a man and a woman but who lack the influence and power of the LGBT lobby (and cannot therefore bring the power of Google, Microsoft, the NBA, the NCAA, Starbucks, and similar organizations to bear in helping them to defend their rights or achieve their political goals).

Some proponents of “Fairness for All” go beyond pragmatic arguments and claim that it would be unjust not to adopt SOGI laws, but that those laws must have religious exemptions. These proponents, however, spend relatively little time arguing for the rules under which they propose others should live compared to the large amount of time they spend on the benefits of exceptions to those rules. Suffice it to say that it is unusual for proponents of any laws to focus on what the laws do *not* do as opposed to what they actually *do* and why we need such actions in the first place. As noted previously, SOGI proponents, including those of the “Fairness for All” variety, have failed to demonstrate the requisite need to enact SOGI laws.

While such proposals may have some superficially appealing aspects, they would only increase cultural tensions, further empower an already powerful special-interest lobby, and impose unjustly on Americans of many different faiths and all walks of life. Big Business and Big Law are using Big Government to impose their cultural values on small businesses and ordinary Americans. Corporate elites are using their privilege and positions of power to have government coerce people whose convictions on matters of profound moral import differ from theirs.

Conclusion

If it is determined that the legitimate needs faced by people who identify as LGBT are significant enough to warrant government attention, then proposed policy solutions must do three things:

- They must be nuanced and narrowly tailored to address the documented need;
- They must employ accurately defined terms to avoid punishing good actions and interactions; and
- They must respect the rights of conscience, religion, and speech.

SOGI antidiscrimination laws are unjustified, but if other policies are adopted to address the mistreatment of people who identify as LGBT, they must leave people free to engage in legitimate actions based on the conviction that we are created male and female and that male and female are created for each other. This would leave all Americans—not just the lucky few who are sufficiently well-connected to be exempted from SOGI laws—free to act on those convictions.

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