

A Better Way than the Equality Act



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By Stanley Carlson-Thies

The Equality Act was introduced into the House of Representatives on March 13, 2019, with the designation [H.R. 5](#), a very low bill number to signify its urgency to Speaker Nancy Pelosi and the House's Democratic majority. The Equality Act ([S. 788](#) in the Senate) would add to federal civil rights laws new prohibitions of discrimination on the bases of sexual orientation, gender identity, and sex, creating national uniformity where today there is a patchwork of protections for LGBT people. Supporters of the Equality Act claim that it protects religious freedom, but in fact it would severely constrain many faith-based organizations and persons of faith who simply desire to live by their convictions about human sexuality and marriage without harming others. Rather, Congress should adopt legislation that would simultaneously protect both LGBT people and people and organizations with different convictions.

In the House, in which 218 votes is a majority, all 237 Democrats and three Republicans have co-sponsored the Equality Act. In the Senate, all but one Democrat, plus the two Independents and one Republican, have signed on, bringing the count to two votes below a majority. The bill is currently going through a series of committee hearings, and the House may vote on it as early as May 14th. It is sure to pass. However, Senate Majority Leader Mitch McConnell is not expected to schedule the bill for a Senate vote. Accordingly, some regard support for the bill in this Congress to be just a messaging exercise. But what is the message?

The aim of the Equality Act is to prohibit discrimination based on sexual orientation and gender identity (SOGI) across a broad range of activities—housing, public schools, government-funded services, public accommodations, jury service, consumer credit, employment. Some twenty states—but not the rest—already ban such discrimination; some large cities in the other states do the same. Yet in those places without SOGI nondiscrimination requirements, a

woman can legally marry her same-sex partner over the weekend and be fired from her job on Monday for doing so, without any ramifications for the employer. Similarly, in many places it is legal for a transgender individual to be refused medical services that anyone else would receive.

Enforcing basic civil rights for everyone should not be controversial. Government has a responsibility to ensure protection from unjust treatment to all, including LGBT persons. Everyone should be equal before the law, notwithstanding the varied faiths and normative systems present in our society. But the Equality Act goes far beyond that laudable goal. It would outlaw as discriminatory views and actions that should be protected by law. Critics say that the Equality Act elevates LGBT rights without protecting religious freedom. That's an abstract way to put it. It is more straightforward to say that the Equality Act would legally enforce the newly dominant view of human sexuality and marriage, while criminalizing actions that flow from what used to be the consensus view, even though the latter view is perfectly legal.

Disfavored, But Legal

Recall Justice Anthony Kennedy's statement in the U.S. Supreme Court's decision legalizing same-sex marriage across the country in the case [Obergefell v. Hodges](#) in 2015. Same-sex couples, Kennedy said, must have access in every state to the legal status of marriage, and yet, he emphasized, "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Religious groups and faith-based entities are not only allowed to advocate a different view of marriage: "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to *teach* the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to *continue the family structure* they have long revered" (emphases added).

However, under the Equality Act that was introduced in March, religious organizations and persons who hold that respectable and constitutionally protected dissenting view of marriage will be compelled, in many circumstances, to act according to an understanding of marriage (and gender identity and human sexuality in general) that they reject.

Religious Freedom?

The Human Rights Campaign (HRC), the primary organization pushing the Equality Act, has specifically addressed the bill's effect on religious freedom, according to "The Equality Act and Religion" published by HRC on Jan. 19, 2019. Religious protections are legitimate but cannot be limitless, HRC says. They must not be "misused" to enable religious people and religious organizations to override nondiscrimination requirements. Protections provided in the Equality Act, HRC argues, are adequate and appropriate, because (since the Equality Act amends existing civil rights laws) it "retains the exact same religious exemptions that already exist [in the case of] every other protected characteristic."

Yet the Equality Act explicitly undermines the main federal law that protects religious freedom, the [Religious Freedom Restoration Act](#) of 1993 (RFRA). Following the U.S. Supreme Court's decision in [Employment Division v. Smith](#), which weakened the constitutional

protection of religious freedom, RFRA was adopted nearly unanimously by Congress and signed into law with lavish praise by President Bill Clinton. RFRA, which applies to federal laws and actions, protects religious people and organizations from laws that would substantially burden their religious exercise, unless the government has a compelling interest to impose that burden and has no less restrictive way to achieve its aim.

In other words, RFRA is a balancing test. It gives no automatic victory to religious claims, but simply allows a religious organization charged with violating, say, a sexual orientation nondiscrimination requirement, perhaps in a hiring decision, to fairly defend itself. In court, a judge would assess whether the nondiscrimination claim should override or instead give way to, the religious practice of the organization. The Equality Act, by contrast, would prohibit appeals to RFRA when a religious person or organization is charged with violating a nondiscrimination rule. Yet cases such as these, which weigh LGBT rights against religious freedom, are exactly about whether some religiously grounded action is a protected act of religious exercise or a wrongful act of invidious discrimination. By preventing the application of RFRA, the Equality Act would make the LGBT claim always win, by definition.

Furthermore, despite the assurances of HRC, religious freedom is not adequately protected simply by maintaining the existing religious protections in the civil rights laws. Sexual orientation and gender identity are distinct new protective categories that deal directly with teachings and practices central to many different religions and their institutions: sexual intimacy, the identity of males and females, the nature of marriage. It is much more likely that existing protections would prove inadequate than that they would be sufficient.

Here are six areas in which the Equality Act would be harmful to many religious organizations—houses of worship, charities, schools, and hospitals, and others.

Vastly expanding public accommodations. Public accommodations provisions in civil rights laws are meant to ensure that everyone has access to basic goods and services. The Equality Act proposes to dramatically expand the definition of public accommodations in federal law to include not only just about every kind of facility and service provider, but even many individual professionals. Even services and entities without a physical location are included in the new definition. Very little is left out. Under the Equality Act, will churches, synagogues, and mosques be declared to be public accommodations and thus be subject to strict SOGI nondiscrimination requirements in everything they do, including if they ever invite into worship non-members as well as members, if they ever rent out their facilities, or if they occasionally host public events such as voting on election day? It is not difficult to clearly protect these holy spaces so that they can remain faithful to the requirements of their respective religious traditions, but the Equality Act has no such language.

Employment by religious organizations. Title VII, the fundamental federal employment law, includes an exemption that protects the ability of religious schools, charities, and houses of worship to consider religion when hiring and firing. Moreover, according to the courts, this legitimate religious decision-making can include assessing whether a job applicant not only professes, but lives, according to a religion. The Equality Act does not touch this religious exemption. But if the bill becomes law, will the courts, for example, consider it a legitimate exercise of religious discretion when a Catholic school

declines to hire a teacher who professes to be Catholic but is in a same-sex marriage? Or will it instead consider the school's decision to be an illegal act of SOGI discrimination? The need for clarification on dilemmas like this is routinely acknowledged in employment law and religious freedom circles, but the Equality Act offers no assurances at all to religious employers about this vital matter.

Hospitals and medical practices. The Equality Act proposes to treat any “establishment that provides health care” to be a public accommodation and thus subject to its SOGI nondiscrimination requirements. It offers no protection for religious hospitals or medical facilities staffed by doctors and nurses who for reasons of religion or conscience are unable to perform sex-change operations or gender identity transition treatments. Health care professionals, including religious providers, should be willing to provide regular care for transgender persons, from heart surgeries to treatment for the flu. But it is unethical to make them violate their most deeply held beliefs.

Adoption and foster care. Much of the funding that supports foster care and adoption services comes from the federal government and would be subject to the Equality Act's prohibition on SOGI discrimination in federally funded services. This part of civil rights law (Title VI, dealing with government funding) has never included religion as a protected class and it correspondingly has no religious exemption. Thus, under the Equality Act, all private organizations that accept federal funding to support the services they offer—faith-based organizations along with secular nonprofits—will be subject to a new nondiscrimination requirement that will apply not only to the services funded with federal dollars but also to every other service they offer, even when these other services are privately funded. When a faith-based adoption or foster care provider, exercising its professional judgment about the best environment for children needing new homes, declines to place a child with a same-sex couple or LGBT person, it may well lose vital government funding or even the ability to operate at all. Yet there are many agencies ready to serve LGBT persons, and shuttering those with different convictions does not expand the number of families ready to foster or adopt.

Religious schools and colleges. These are key institutions for transmitting religious beliefs to the next generation, places where religious perspectives are put into action in analysis and in dialog with other perspectives, and locales where a religion's convictions are embodied in community life. Yet the Equality Act makes no effort to ensure that such institutions—places where staff, faculty and students all enter voluntarily—will remain free to be faithful to their respective religious convictions about sexuality and marriage.

FEMA, historic preservation and security grants. As noted, the Equality Act adds a SOGI nondiscrimination requirement to federal funding, with no accommodations for religious institutions that hold dissenting views. It is thus likely that, to avoid having to compromise their convictions, many parochial schools will have to cease participating in the [National School Lunch Program](#), to the detriment of poor children whose families selected these schools. Synagogues, parochial schools and other morally and theologically conservative religious institutions may be deemed ineligible to continue participating in the [Nonprofit Security Grant Program](#), a federal program to help organizations protect themselves against possible terrorist attacks. Additionally, many houses of worship and other religious institutions may be unable to win FEMA disaster assistance aid or federal historic preservation grants.

A Biased Approach

Rep. David Cicilline (D-RI), the main House sponsor of the Equality Act, [has said](#) that religious communities have no reason to fear the bill. Echoing HRC's assurances and arguments, he says that "[t]he [existing] Civil Rights Act does some very careful balancing between two important values, freedom of religion and freedom from discrimination, and we think it strikes the right balance and the Equality Act will continue that."

Indeed, in the existing civil rights acts, there exists a careful balance. Federal civil rights laws [do not treat all protected classes alike](#) but instead include varying limits, thresholds, and exemptions. These civil rights laws, albeit imperfectly, both define where and when some act of differential treatment is wrong and illegal and where and when such acts are acceptable and legal. Civil rights laws declare what is wrongful discrimination and also what are legitimate and protected acts by religious organizations and persons who have different standards than the general public.

Yet such careful work is just what the Equality Act does not do as it adds new protected classes. The Equality Act simply labels as illegal discrimination any differential treatment related to SOGI. It posits that all necessary religious protections are already present in the civil rights laws. Then it strips away the religious freedom protections that Congress has said should apply to all federal laws and actions. By dramatically narrowing the scope of application of RFRA, which is the premier federal statutory protection for religious freedom, the Equality Act seeks to declare that, by definition, religious exercise claims can never outweigh claims of SOGI discrimination.

Fairness for All: A Better Way

There is a better way, a way that respects both LGBT rights and religious exercise rights. It is a way that acknowledges that many Americans have adopted a progressive ethic about marriage, sexuality, and gender while many other Americans hold the historic convictions about these deep and basic matters. In its [Masterpiece Cakeshop](#) decision of 2018, the U.S. Supreme Court said that governments must ensure fair treatment for LGBT persons while also respecting religious exercise. Changes to federal civil rights laws to ensure that LGBT people can enjoy the same basic rights as other Americans must be carefully designed so as simultaneously to protect the legitimate rights of people and organizations that hold to a traditional sexual morality. Not all differential treatment is wrongful discrimination. For example how a workplace should accommodate a pregnant woman differs from how the expectant father should be treated. Rights are not always mutually exclusive. Our nation's commitment to individual freedom and to a diverse civil society—one full of distinctive private organizations—makes possible both-and solutions rather than the legal imposition of uniformity.

The Fairness for All approach is inspired by the [joining together](#) of LGBT activists and the Church of Jesus Christ of Latter-day Saints (Mormon) leaders in Utah in 2015 to craft protections simultaneously for LGBT people and for religious freedom. It is also inspired by current civil rights laws. As noted above, these laws—imperfectly, to be sure—do not simply make illegal all differential treatment, but rather both prohibit and permit differences, depending on what the protected characteristic is, what the arena of action is (housing, employment, etc.), and what the reason for the different treatment is.

A draft of a federal Fairness for All legislation, the fruit of three years of intensive discussions and negotiations between religious freedom advocates and LGBT rights advocates, will soon be introduced into Congress. It seeks to establish in law, across the major categories of civil rights law, the needed, careful, clarifying line between what should be regarded as wrongful discrimination and what should be accepted as permissible alternate patterns of action. Not every conflict can be anticipated and forestalled or mitigated by statute, to be sure, but the long and detailed discussions have revealed that many positive solutions are possible—arrangements that enable adherents of the contrasting sexual ethics to live side by side, dealing with their differences through persuasion rather than through courts and coercion.

Consider the following five possible win-win arrangements.

FEMA, historic preservation and security grants. These are grants to enable diverse people and institutions to maintain their varied activities despite the threat of terrorism, the devastation of a natural disaster, and the like. This is not funding for government-mandated services. With these infrastructure grants, the government should not pick and choose, based on ideology or sexual ethics, which institutions should get help. The government's legitimate interest is only which institution needs recovery help, funding to increase its security measures or assistance to maintain its structure because the public has deemed it to have historical significance. FEMA used to deny disaster relief to houses of worship, but this unfair treatment was recognized for what it was, and access to assistance [was expanded to all religious organizations](#) in January of 2018. When SOGI nondiscrimination is added to federal funding rules, precedent should be respected, and infrastructure-focused grants should be exempt.

Religious schools and colleges. No one is required to attend religious educational institutions instead of their secular counterparts; at the same time, religious communities have always had a special interest in forming educational institutions. In the U.S., students and families can select from a wide array of distinctive schools and colleges, choosing the particular one that best embodies their respective convictions. This is often only possible because the government helps to defray the costs. Federal law allows its educational support dollars to follow the students to their chosen institution. A Fairness for All approach would continue this evenhandedness. Religious schools whose convictions about sexuality, marriage, and gender differ from the progressive view would be able to maintain their admissions criteria, curriculum, campus community rules, employment standards, and residence rules, with no threat of loss of accreditation, student access to scholarship help, faculty eligibility for federal research grants, or nonprofit tax exemption.

Adoption and foster care. It is asking a lot of a family or person to persuade them to adopt or foster a child. But with [over 100,000](#) children across the country waiting to be adopted, we need as many families to make these hard choices as possible. The more the family trusts and feels comfortable with the agency making the appeal and arrangements, the more likely much-needed decisions to adopt and foster will be made. HRC understands this and has been offering for many years [specialized training and resources](#) to help agencies become welcoming to LGBT people and couples. Seeing pictures of a family like your own, having agency representatives come to the places where you and your friends gather, hearing language that reflects your values and sensibilities—accommodations like these can encourage someone to start on the hard path to foster care or adoption. Values compatibility is important for LGBT people, as HRC

recognizes—and it is also important for conservative Jews, Christians, Muslims, and others who do not share HRC’s values. Thus, for the sake of children desperately needing new homes, adoption and foster care policy should not drive out of operations private agencies with conservative moral standards. An adoption and foster care system that is fair for all will not bar conservative faith-based agencies from a license to operate, but will instead encourage the development of a wide variety of distinctive private agencies. Federal funds will go to whichever agencies families and individuals choose to work with; state regulations will ensure that no one eligible to become an adoptive or foster parent is excluded from the opportunity to do so.

Funeral homes and cemeteries. There is no reason at all for military cemeteries to exclude gay veterans, Hindu soldiers, or atheist former sailors. And there is no reason at all for private funeral homes and cemeteries to be declared public accommodations and be forbidden to be selective in who and how they serve. Many Jewish funeral parlors only serve members of the Jewish faith. We do not all agree on the meaning of death nor on who the Maker is whom we will be facing upon leaving this life. Fairness for All requires letting a diverse public be served by distinctive private institutions.

Employment. Federal civil rights employment law has always banned baseless religious job discrimination, while at the same time protecting a religious organization’s ability to select staff on the basis of religion. Religion is more than a set of opinions; for most believers, it extends to living according to the expectations of that set of beliefs. When SOGI nondiscrimination is added to federal employment law, the existing religious exemption should be broadened; any religious employer that consistently uses religious criteria for deciding who to add to the work community should not be subject to second-guessing by government or applicants about whether the “real” reason was baseless bias against gays.

The Law is a Teacher

Gay people, straight people, evangelicals, Episcopalians, Catholics, Sikhs, “nones”—we all would prefer that the laws would embody our respective values, beliefs, and ethical systems. After all, we are each sure that our particular set of convictions and our own ethical system is right and true, not just for us, but for everyone. But we Americans now deeply disagree on ethics and morality, even as we live together in one single nation. Neither the laws—nor science, social media, TV shows, Scripture—have succeeded in persuading us to agree on a single set of values.

In these circumstances, what is it that the law nonetheless can teach us? Mutual respect and a robust freedom to live by conviction, despite differences—the principle of religious freedom has taught us the possibility, practicality, and worthiness of this kind of “modus vivendi” or pluralism. In extending respect and freedom to each other across our differences in worldview, we do not proclaim that all beliefs are equally true (or equally false)—only that we acknowledge each other as worthy fellow humans whose Maker has given the freedom to seek truth and to embrace error, and that we refuse to concede to government the right and power to dictate what we must all affirm when we are so convinced of different things.

Differences over marriage, human sexuality, and gender identity are not the same as differences over religious doctrines and rituals, but there are **important similarities**. Here, too, there are deep differences that have to do not only with ideas, but also with practices and with

the identity or persona we reveal to others. Is the law able to draw boundaries and to foster common ground efforts so that we are able to live together despite these deep differences? That is what the detailed provisions of Fairness for All legislation aim to offer us.

The goal of Fairness for All is to enable us to live with each other as good neighbors, across our differences. Good neighbors treat each other with respect and give each other room to maintain distinct ways of life. And good neighbors, caring for each other, are glad to testify to what they each, respectively, have come to acknowledge as the Truth. The legal framework of Fairness for All does not require dropping one's religious and moral commitments, but rather provides guidelines and guardrails to enable us to live together well despite, and with, our varied worldviews and beliefs.

Everyone free to live consistently with his or her own convictions about what matters: that is what the Fairness for All law will make possible. It is not what the Equality Act, as it has been introduced, even attempts to achieve.

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Tags: [civil rights](#), [equality](#), [Equality Act](#), [Fairness for All](#), [First Amendment](#), [human rights](#), [human sexuality](#), [LGBT](#), [LGBTQ](#), [marriage](#), [religion](#), [same-sex marriage](#)