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Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom

By Ryan T. Anderson, Ph.D. (/about/staff/a/ryan-anderson)

All citizens should oppose unjust discrimination, but sexual orientation and gender identity (SOGI) laws are not the way to achieve that goal. SOGI laws are neither necessary nor cost-free. They threaten fundamental First Amendment rights. They create new, subjective protected classes that will expose citizens to unwarranted liability. Furthermore, SOGI laws would increase government interference in labor, housing, and commercial markets in ways that could harm the economy. Yet SOGI's damage is not only economic: It would further weaken the marriage culture and the freedom of citizens and their associations to affirm their religious or moral convictions, such as that marriage is the union of one man and one woman and that maleness and femaleness are not arbitrary constructs but objective ways of being human. SOGI laws would treat expressing these widely held beliefs in certain contexts as unlawful discrimination.

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America is dedicated to protecting the freedoms guaranteed under the First Amendment to the Constitution, while respecting citizens' equality before the law. None of these freedoms is absolute. Compelling governmental interests can at times trump fundamental civil liberties, but sexual orientation and gender identity (SOGI) laws do not pass this test. Rather, they trample First Amendment rights and unnecessarily impinge on citizens' right to run their local schools, charities, and

KEY POINTS

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businesses in ways consistent with their values. SOGI laws do not protect equality before the law; instead, they grant special privileges that are enforceable against private actors.

SOGI laws could also have serious unintended consequences. These laws tend to be vague and overly broad, lacking clear definitions of what discrimination on the basis of "sexual orientation" and "gender identity" mean and what conduct can and cannot be penalized. These laws would impose ruinous liability on innocent citizens for alleged "discrimination" based on subjective and unverifiable identities, not on objective traits. SOGI laws would further increase government interference in markets, potentially discouraging economic growth and job creation. With regard to "gender identity" and "transgender" teachers, students, and employees, SOGI laws could require education and employment policies concerning schoolhouse, locker room, and workplace conditions that undermine common sense.

SOGI laws threaten the freedom of citizens, individually and in associations, to affirm their religious or moral convictions—convictions such as that marriage is the union of one man and one woman or that maleness and femaleness are objective biological realities to be valued and affirmed, not rejected or altered. Under SOGI laws, acting on these beliefs in a commercial or educational context could be actionable discrimination. These are the laws that have been used to penalize bakers, florists, photographers, schools, and adoption agencies when they declined to act against their convictions concerning marriage and sexuality.[1] They do not adequately protect religious liberty or freedom of speech.

In short, SOGI laws seek to regulate decisions that are best handled by private actors without government interference. SOGI laws disregard the conscience and liberty of people of good will who happen not to share the government's opinions about issues of marriage and sexuality based on a reasonable worldview, moral code, or religious faith. Accordingly, these laws risk becoming sources of social tension rather than unity.

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ABOUT THE AUTHOR

Ryan T. Anderson, Ph.D.
(/about/staff/a/ryan-anders
*William E. Simon Senior Research Fel
Principles and Public Policy
DeVos Center for Religion and Civil Sc*

Of course, business owners should respect the intrinsic dignity of all of their employees and customers, but SOGI laws are bad public policy. Their threats to our freedoms unite civil libertarians concerned about free speech and religious liberty, free-market proponents concerned about freedom of contract and governmental overregulation, and social conservatives concerned about marriage and culture.

What SOGI Laws Do

Activist groups such as the Human Rights Campaign (HRC)—an influential, sophisticated, and lavishly funded LGBT[2]-activist organization—are pushing SOGI laws on unsuspecting citizens at the federal, state, and local levels. In 2015, HRC launched its Beyond Marriage Equality initiative.[3] The centerpiece of the initiative is the Equality Act, a piece of federal legislation.[4]

The Equality Act would add "sexual orientation" and "gender identity" to more or less every federal civil rights law that protects on the basis of race, expanding them beyond their current reach and explicitly reducing current religious liberty protections.[5]

The Equality Act goes well beyond the proposed Employment Non-Discrimination Act (ENDA), which would have added SOGI only to employment law. When it was first introduced in 1994, ENDA included only "sexual orientation," but "gender identity" was added to the bill in 2007. Each and every Congress has defeated ENDA since its introduction. Nevertheless its proponents have moved well beyond its original bounds of employment to now include "Public Accommodations, Education, Federal Financial Assistance, Employment, Housing, Credit, and Federal Jury Service."[6]

The Equality Act would significantly amend and expand the definition of "public accommodations" in the Civil Rights Act of 1964. Indeed, a fact sheet on the Equality Act produced by Senators Jeff Merkley (D–OR), Tammy Baldwin (D–WI), and Cory Booker (D–NJ) notes that the act "[e]xpands the types of public accommodations receiving federal protection to cover *nearly every entity that provides goods, services, or programs*."[7] Whereas the Civil Rights Act of 1964—which sought to combat institutionalized state-endorsed racism and integrate the South—defined public accommodations as entities such as hotels, restaurants, theaters, and gas stations, the Equality Act would define more or less *every* private business that is open to the public as a place of "public accommodation."

The Equality Act is not alone in this. In 2014, the Houston City Council passed a SOGI law, which was dubbed the Houston Equal Rights Ordinance (HERO). In November 2015, the citizens of Houston voted to reject HERO—for good reasons. The law stated: "*Place of public accommodation* means 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."[8] Every business in the city open to the public would have been subject to this law. Yet neither HERO nor SOGI laws in other jurisdictions clearly define what actions count as discrimination on the basis of sexual orientation or gender identity. SOGI laws vary from jurisdiction to jurisdiction, but common features are that they leave unclarified what actions could be considered discriminatory, and they use expansive definitions of public accommodations, with many also applying to education, employment, housing, and banking, among others.

SOGI laws do have clear implications for bathrooms, locker rooms, and other sex-specific facilities. The Equality Act is intended, according to its co-sponsors, to "[c]larify that where sex-segregated facilities exist, individuals must be admitted in accordance with their gender identity."[9] However, gender identity is an entirely subjective self-declaration. The Equality Act states: "The term 'gender identity' means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth."[10] The Houston law defined gender identity as "innate identification, appearance, expression, or behavior as either male or female, although the same may not correspond to the individual's body or gender assigned at birth."[11] No legal change of name or gender (and no surgery or hormone treatment) is required to identify as transgender—simply one's self-professed and chosen identity, appearance, mannerisms, and behavior.

What does this mean? In May 2015, the school board of Fairfax County, Virginia, voted to add "gender identity" to its list of protected classes against overwhelming opposition from parents at the school board meeting.[12] *The Washington Times* explains the likely effect of the policy: "The amended policy could allow male students who identify as female to use girls' bathrooms and locker rooms, among other changes."[13]

How do these laws come about? *The Washington Post* reported on one of the driving forces behind the decision: new policy created by federal agencies: "In April 2014, the U.S. Education Department's Office for Civil Rights released updated guidelines to the 1972 Title IX civil rights law highlighting that the nondiscrimination clause 'extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.'"[14] Because a federal agency unilaterally reinterpreted a 1972 law, local school boards were coming under fire. Indeed, the *Post* reports that "where schools are found to have failed to comply with Title IX, the Education Department may terminate federal funding. The Fairfax school system receives $42 million…[annually] from the federal government."[15]

Indeed, the federal pressure was not unique to Fairfax County. In November 2015, the Department of Education's Office for Civil Rights sent a letter to an Illinois high school district accusing the district of violating Title IX because of its policies regarding transgender students.[16] At issue is the school's decision to allow a male student that identifies and dresses as a girl to use bathrooms with private single-stalls, but not to allow him into the girls locker rooms unless he changes behind a curtain out of respect for the privacy concerns of the surrounding students.[17] The federal government attacked this compromise solution. As the *Chicago Tribune* reports, as a result of the federal government intervention, "The district has 30 days to reach an agreement with authorities or risk having their federal educational funding suspended or even terminated."[18] Because the district wants to protect the privacy of all students, it risks losing federal educational funding.

The problems with SOGI laws extend beyond privacy concerns. SOGI laws do not adequately protect religious freedom. Indeed, some explicitly provide *no* protections for religious liberty. For example, the Equality Act removed the meager religious liberty protections that had existed in ENDA. It now contains no protections for religious belief or conduct. Even worse, the Equality Act states that the federal Religious Freedom Restoration Act cannot be used to defend people who believe that marriage is the union of man and woman if they are incorrectly charged with "discrimination" under the Equality Act. The bill says that religious freedom needs to take a back seat to special SOGI protections.

Americans should respect the equal dignity of their neighbors, but SOGI laws do not protect true equality before the law. For example, when the city council of Fayetteville, Arkansas, adopted a SOGI ordinance, informed citizens raised concerns about its intended and unintended consequences, including the abridgement of religious liberty and disturbing policies governing transgender persons' access to restrooms. One organizer of the successful campaign to overrule the ordinance explained what was at stake:

> It was called the Civil Rights Ordinance, but it was misnamed. It was an ordinance that actually took away civil rights and freedom from people. It criminalized civil behavior. It didn't accomplish the stated purpose of the ordinance, and it was crafted by an outside group. It wasn't something Fayetteville residents put together.[19]

The reasons why SOGI laws are bad public policy are becoming clear.

SOGI Laws Create Unnecessary Problems

SOGI laws can have serious unintended consequences. They threaten small-business owners with liability for alleged "discrimination" based on subjective and unverifiable identities, not on objective traits. They expand state interference in labor markets, potentially discouraging economic growth and job creation. They endanger religious liberty and freedom of speech, and they mandate education and employment policies that undermine common sense in the schoolhouse and the workplace. In short, SOGI laws regulate commercial decisions that are best handled by private actors, and they regulate educational decisions best handled by parents and teachers, not bureaucrats.

Establishing special privileges based on gender identity is an especially bad idea. Prohibiting schools, businesses, and charities from making decisions about transgender students, faculty, and employees—particularly regarding those in positions of role models—could be confusing to children and detrimental to workplace morale.

First, while issues of sex and gender identity are psychologically, morally, and politically controversial, all should agree that children should be protected from having to sort through such questions before they reach an appropriate age as determined by their parents. SOGI laws would prevent schools, parents, and employers from protecting children from these adult debates about sex and gender identity by forcing employers, including schools, to yield to the desires of transgender employees in ways that put them in the spotlight.

Second, while some SOGI laws provide limited (and inadequate) exemptions for religious education, they provide no protection for students in public schools. These children would be prematurely exposed to questions about sex and gender if, for example, a male teacher returned to school identifying as a woman. Difficulties can also arise when a student identifies as transgender and seeks to use the restrooms and locker rooms that correspond to his or her new gender identity. These situations are best handled at the local level, by the parents and teachers closest to the children.

Finally, whatever the significance of gender identity, society cannot deny the relevance of biological sex in many contexts. For example, an employer or gym owner would be negligent to ignore the privacy or safety concerns of female employees or customers about having to share a bathroom or changing room with people who are biologically male, whether or not they "identify" as female. The same is true for students in bathrooms and locker rooms. The implications for the privacy and safety rights of adults and children are extremely serious, and state laws are already stirring up such concerns. Writing about the proposed federal Employment Non-Discrimination Act, Hans Bader, a scholar with the Competitive Enterprise Institute, warns:

ENDA also contains "transgender rights" provisions that ban discrimination based on "gender identity." Similar prohibitions in state laws created legal headaches for some businesses. One case pitted a transgender employee with male DNA who sued after being denied permission to use the ladies' restroom, a denial that resulted from complaints filed by female employees. The employer lost in the Minnesota Court of Appeals, but then prevailed in the Minnesota Supreme Court. Another case involved a male-looking person who sued and obtained a substantial settlement after being ejected from the ladies' room in response to complaints by a female customer who thought that a man had just invaded the ladies' room.[20]

SOGI laws have also mandated government discrimination against adoption agencies in Massachusetts, Illinois, and the District of Columbia. Catholic Charities of Boston was forced to end its foster care and adoption programs because it refused to abandon Catholic teaching and place children with same-sex couples. Similarly, the District of Columbia's sexual orientation policy compelled Catholic Charities in the District to shut down its foster care and adoption program in 2011 after 80 years of service. Likewise, because the Evangelical Child and Family Agency (EFCA) believes that children should have the care of a married mother and father, the state of Illinois under its sexual orientation policy refused to renew the EFCA's foster care contract, effectively forcing them to end their foster care program.[21]

Private businesses have also been the targets of government discrimination as a result of sexual orientation law. The Oregon Bureau of Labor and Industries fined a small family bakery $135,000 because the family members' Christian beliefs prohibited them from baking a wedding cake celebrating a same-sex marriage. Due to Washington state sexual orientation laws, 70-year-old Baronelle Stutzman, who owns Arlene's Flowers, still faces government seizure of her property because she politely refused to provide flowers for a same-sex wedding ceremony based on her religious beliefs. The owners of Elane Photography in New Mexico were ordered to pay more than $6,000 in fines because they declined to photograph a same-sex commitment ceremony, even though other photographers in the area were more than happy to photograph the ceremony.[22]

SOGI Laws Infringe on Freedoms of Contract, Speech, and Religion

A fundamental principle of American labor law is the doctrine of "at will" employment, which leaves employers free to dismiss employees at any time. In many other countries, a thicket of laws and regulations makes it extremely difficult to terminate a contract with an employee. Because businesses do not want to be stuck with unproductive or superfluous workers, they are less willing to take the risk of hiring new employees in jurisdictions with such laws.

Studies find that government restrictions on layoffs seriously restrict hiring and job creation. For example, in France, where the most severe government prohibitions on layoffs apply to businesses with 50 or more employees, one recent study found that more than twice as many French manufacturers have 49 employees as have 50 workers.[23] French businesses seem to curtail hiring to avoid being stuck with poor performers.

SOGI laws chip away at the at-will employment doctrine that has made the American labor market so much stronger than European labor markets. The subjective nature of sexual orientation and gender identity magnifies these problems by encouraging employees to threaten a lawsuit against their employer in response to adverse employment decisions.

Hans Bader points out, "Since American business seldom discriminates based on sexual orientation, the potential benefits of ENDA are limited, at best. But ENDA would impose real and substantial costs on business, and it could trigger conflicts with free speech and religious freedom."[24]

The threats to speech and religion are serious. Bader notes that the Supreme Court found that Title VII of the Civil Rights Act of 1964 "require[s] employers to prohibit employee speech or conduct that creates a 'hostile or offensive work environment' for women, blacks, or religious minorities."[25] Employers may be liable for damages and attorney's fees if they are negligent in failing to notice, stop, or discipline employees whose speech or conduct creates such an environment.

SOGI laws create new problems with respect to hostile work environment claims because they extend these restrictions to "actual and perceived sexual orientation or gender identity." In practice, this means employers who express disapproving religious or political views of same-sex marriage or tolerate employees who do could incur enormous legal liabilities. Such potential liability could cause employers to self-censor their speech and develop policies to prevent employees from expressing views such as support for marriage as a union of one man and one woman.

Bader, who supports same-sex marriage, warns of the potential violations of liberty that ENDA threatens for those who hold other views:

> If ENDA were enacted, such liability would also cover "sexual orientation"–based hostile work environments…. Thus, to avoid liability, an employer might have to silence employees with political opinions that are perceived as anti-gay, and prevent such employees from expressing political views such as opposition to gay marriage or gays in the military that could contribute to a "hostile work environment."… While I have supported gay marriage and the inclusion of gays in the military, I do not think employers should be sued because their employees express contrary views…. [S]ome courts have interpreted "disparate treatment" to include speech or conduct by the complainant's co-workers that affects the complainant's work environment, even when the speech is not aimed at the complainant, and is not motivated by the complainant's sex or minority status.…

> The possibility that ENDA will be used to silence speech about gay issues is very real. Indeed, some supporters of ENDA openly hope to use it to squelch viewpoints that offend them.[26]

In states with SOGI laws employers have already started censoring their employees.[27] Regina Redford and Robin Christy, two employees of the City of Oakland, California, responded to the formation of an association of gay and lesbian employees by forming the Good News Employee Association, which they promoted with flyers that read, "Good News Employee Association is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family values." These flyers contained no reference to homosexuality, but their supervisors ordered the flyers removed, announced in an e-mail that they contained "statements of a homophobic nature and were determined to promote sexual orientation-based harassment," and warned that anyone posting such materials could face "discipline up to and including termination."[28]

State SOGI laws have also chilled employer speech. Seattle's Human Rights Commission brought charges against Bryan Griggs for playing Christian radio stations (on which he advertised) in his place of work and posting a letter from his congresswoman expressing reservations about gays in the military, when a self-identified gay employee complained of a hostile work environment. Griggs had to spend thousands of dollars on legal fees before the plaintiff dropped the charges, saying he had made his point.[29] State SOGI laws have also been used to violate the religious freedom of wedding professionals and religious charities, as noted above.

SOGI laws imperil economic freedom, privacy, child welfare, and religious liberty, creating more problems than they aim to resolve. They are a solution in search of a problem. Instead of government regulation and coercion, we should embrace the best of the American tradition: liberty under law.

A Presumption of Freedom

The foundational principle of American life is liberty under law. In general, consenting adults are free to enter or refuse to enter relationships of every sort—personal, civic, commercial, romantic—without government interference. Freedom of association and contract are presumed. If the government decides to interfere, it must explain why. It has the burden of proof.

The U.S. Constitution has traditionally protected such fundamental civil liberties as freedom of religion, speech, association, and contract as well as the right to own property. The recognition of these civil liberties leaves everyone equal before the law.

These rights of association and contract mean that businesses, charities, and civic associations should be generally free to operate by their own values. They should be free to choose their employees and their customers, the products and services that they produce or sell, the terms of employment, and the standards of conduct for members. They should be free to advance their own values and to live them out as they see fit. In the United States, after all, it is perfectly legal for an employer to fire an employee for all kinds of reasons—reasons someone else may find compelling, trivial, or deplorable. Of course, some people and groups can and do exercise their freedoms in ways that others may disapprove. But in this country we tolerate such differences for the sake of the benefits of liberty—creativity, innovation, reform, economic vitality, and the like.

Disagreement with someone's actions is not enough to justify the government coercing him into conformity with prevailing opinion. Free association and exchange are usually sufficient to sort these things out without the costs of government interference. Any business in the United States that posted a "no gays allowed" sign would soon find the power of public opinion expressed in the marketplace intolerably costly, without any need for the government to weigh in.

In short, any law that would establish special privileges based on a given trait has a high bar to clear. For one thing, it should be hard to imagine any *legitimate* decisions based on the trait. Otherwise, the cost of the law—sacrificing legitimate liberty—outweighs its benefit. Furthermore, the purported injustice targeted by the law must be resistant to market forces to justify *government* intervention, with all of its unintended costs. Some people now claim that laws that create special privileges based on SOGI clear this high bar. They are mistaken.

Freedom and Competition Work Better

Market competition can provide more nuanced solutions for particular situations that are superior to a coercive, one-size-fits-all government policy on sexual orientation and gender identity. Individual schools should be free to develop individualized policies to address the needs of their students, parents, and teachers. The same is true for businesses. Having various employers who hold a wide variety of religious beliefs or moral commitments makes it more likely that employees

can find a good fit while limiting the chance of discrimination. After all, employers compete with each other for the best employees. They have incentives to consider only those factors that truly matter for their mission. And businesses compete with each other for customers, so they have every reason to accept business unless it really does conflict with their deepest commitments.

Those who base their business decisions on moral and religious views may well pay a price in the market, perhaps losing customers and qualified employees and perhaps gaining others. If the losses consistently outweigh the gains, they may be forced out of the business altogether. But this natural process of equilibration only weakens the case for costly government intervention. Bader reports that the liberal Center for American Progress admitted that market forces are already at work in this area: "Businesses that discriminate based on a host of job-irrelevant characteristics, including sexual orientation…put themselves at a competitive disadvantage compared to businesses that evaluate individuals based solely on their qualifications and capacity to contribute."[30] Decisions as to what is "job-relevant" should generally be left to employers and the market.

Many companies have voluntarily adopted their own SOGI policies. The Human Rights Campaign reports that 89 percent of Fortune 500 companies already do not consider sexual orientation in employment decisions.[31] Moreover, "[m]edian LGBT household income is $61,500 vs. $50,000 for the average American household," according to Prudential.[32] It is hard to justify a federal law that would interfere in employment decisions to create special privileges based on sexual orientation and gender identity when the market is already sorting these things out.[33]

The Analogy to Race

Advocates of SOGI laws, however, say that they are just like racial antidiscrimination laws. Indeed, the refrain from SOGI advocates for the past decade has been that laws designating marriage as the union of male and female are no more defensible than bans on interracial marriage. Some argue further that laws protecting the freedom of conscience with respect to sexual morality are indistinguishable from the laws that enforced race-based segregation. These arguments are wrong on several counts.

Even after the Supreme Court's judicial redefinition of marriage effectively deemed the sexes interchangeable, government has no compelling interest in forcing every citizen to affirm same-sex relationships as marriages in violation of their religious or moral convictions. Even people who personally support same-sex marriage and gender transitions can see that the government is not justified in coercing people who do not. After all, it is reasonable for citizens to believe that humans

are created male and female and that marriage is the union of man and woman. When citizens lead their lives and run their businesses in accord with these beliefs, they deny no one equality before the law. They deserve protection against government coercion.

Sexual Orientation and Gender Identity Are Conceptually Different from Race. Sexual orientation and gender identity are radically different from race and thus should not be elevated to a protected class in the way that race is. First, race manifests itself readily, whereas sexual orientation and gender identity are ambiguous, subjective, and variable traits. Second, sexual orientation and gender identity are linked to actions, which are a proper subject matter for moral evaluation. Race is not.

Martin Luther King Jr. dreamed that his children would be judged not by the color of their skin, but by the content of their character. A person's character is expressed in his voluntary actions, and it is reasonable to make judgments about those actions. Race implies nothing about one's actions. But in practice, sexual orientation and gender identity terms are frequently used in reference to a person's actions. "Gay" comes to mean not simply a man who experiences same-sex attraction, but one who voluntarily engages in sexual conduct with other men. "Lesbian" similarly comes to mean a woman who engages in sexual conduct with other women. Meanwhile, "transgender" is used not simply to describe someone who experiences distress at his biological sex, but a biological male who voluntarily presents himself to the world as a female or a biological female who voluntarily presents herself as a male. This differs categorically from people in the civil rights era who from the moment they were born were excluded by law and practice from massive areas of public life simply because of the color of their skin.

Professor John Finnis of the University of Oxford explains why most modern legal systems are right to resist adding sexual orientation (much less gender identity) to antidiscrimination provisions:

> [T]he standard modern position deliberately rejects proposals to include in such lists the item "sexual orientation." For the phrase "sexual orientation" is radically equivocal. Particularly as used by promoters of "gay rights," it ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one towards homosexual activity; (II) the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct.

> Indeed, laws or proposed laws outlawing "discrimination based on sexual orientation" are always interpreted by "gay rights" movements as going far beyond discrimination based merely on (i) A's belief that B is sexually attracted to persons of the same sex. Such movements interpret the phrase as extending full legal protection to (ii) public activities intended specifically to promote, procure, and facilitate homosexual conduct.[34]

Rather than merely protecting against unjust discrimination based on involuntary attractions or desires, SOGI policies forbid citizens from considering public actions. But responding to what other people do is a reasonable basis for human action, something that government should not prohibit. Professor Finnis concludes:

> So, while the standard position accepts that discrimination on the basis of type I dispositions is unjust, it judges that there are compelling reasons both to deny that such injustice would be appropriately remedied by laws against "discrimination based on sexual orientation," and to hold that such a "remedy" would work significant discrimination and injustice against (and would indeed damage) families, associations, and institutions which have organized themselves to live out and transmit ideals of family life that include a high conception of the worth of truly conjugal sexual intercourse.[35]

Finnis's argument highlights one of SOGI policies' most concerning implications: The laws would further weaken the marriage culture and the ability of citizens and their associations to affirm that marriage is the union of a man and a woman and that sexual relations are reserved for marriage so understood. SOGI laws treat these convictions as if they were bigotry.

SOGI laws impugn judgments common to the Abrahamic faith traditions and to great thinkers from Plato to Kant. By the light of religion, reason, and experience, many people of good will believe that our bodies are an essential part of who we are and that maleness and femaleness are not arbitrary constructs but objective ways of being human. A person's sex is to be valued and affirmed, not rejected or altered. Our sexual embodiment as male and female goes to the heart of what marriage is: a union of sexually complementary spouses from which the next generation naturally springs. Sexual orientation and gender identity refers not only to thoughts and inclinations, but also to behavior, and it is reasonable for citizens to make distinctions based on actions. However, SOGI laws would prohibit reasonable decisions made in response to behaviors that are fraught with moral weight.

SOGI laws impinge on the ability of people to make reasoned and reasonable moral judgments concerning human sexuality in part because the definitions of sexual orientation and gender identity are ambiguous. They make it unlawful for citizens to engage in what the government deems to be "discrimination" based on an "individual's actual or perceived sexual orientation or gender identity." "Sexual orientation" is typically defined as "homosexuality, heterosexuality, or bisexuality," but the laws leave those terms undefined and offer no principle that limits "orientation" to those three. The definition of "gender identity" is usually just as elastic: "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[36]

Two eminent authorities—Paul McHugh, MD, the university distinguished service professor of psychiatry at the Johns Hopkins University School of Medicine, and Gerard V. Bradley, a professor of law at the University of Notre Dame—explain why antidiscrimination laws based on these categories are problematic as a matter of science and the law:

> [S]ocial science research continues to show that sexual orientation, unlike race, color, and ethnicity, is neither a clearly defined concept nor an immutable characteristic of human beings. Basing federal employment law on a vaguely defined concept such as sexual orientation, especially when our courts have a wise precedent of limiting suspect classes to groups that have a clearly-defined shared characteristic, would undoubtedly cause problems for many well-meaning employers.[37]

McHugh and Bradley caution against elevating sexual orientation and gender identity to the status of protected characteristics because of the lack of clear definition:

> "Sexual orientation" should not be recognized as a newly protected characteristic of individuals under federal law. And neither should "gender identity" or any cognate concept. In contrast with other characteristics, it is neither discrete nor immutable. There is no scientific consensus on how to define sexual orientation, and the various definitions proposed by experts produce substantially different groups of people.[38]

Continuing, they summarize the relevant scholarly scientific research on sexual orientation and gender identity:

> Nor is there any convincing evidence that sexual orientation is biologically determined; rather, research tends to show that for some persons and perhaps for a great many, "sexual orientation" is plastic and fluid; that is, it changes over time. What we do know with certainty about sexual orientation is that it is affective and behavioral—a matter of desire and/or behavior. And "gender identity" is even more fluid and erratic, so much so that in limited cases an individual could claim to "identify" with a different gender on successive days at work. Employers should not be obliged by dint of civil and possibly criminal penalties to adjust their workplaces to suit felt needs such as these.[39]

Because sexual orientation and gender identity are ambiguous, subjective concepts that may change over time, a law invoking them to define a protected class would be especially ripe for abuse.

It is not clear, moreover, what would prevent the category of "sexual orientation" from expanding to cover a host of inclinations and behaviors. McHugh and Bradley explain this policy problem in the context of the proposed ENDA:

> Despite the effort of ENDA's legislative drafters to confine "sexual orientation" to homosexuality, heterosexuality, and bisexuality, the logic of self-defined "orientation" is not so easily cabined…. Even polyamory, "a preference for having multiple romantic relationships simultaneously," has been defended as "a type of sexual orientation for purposes of anti-discrimination law" in a 2011 law review article.[40]

No principle limits what will be classified as a sexual orientation or gender identity in the future. For example, Wesleyan College extended the LGBT acronym to recognize LGBTTQQFAGPBDSM students.[41] Will SOGI laws be used to protect all of these numerous orientations and identities including those clearly defined by their actions, such as sadism and masochism? If not, why not?

Lack of a limiting principle led McHugh and Bradley to conclude that SOGI laws would "lead to insurmountable enforcement difficulties, arbitrary and even whimsical results in many cases, and…would have an unjustified chilling effect upon all too many employers' decisions."[42] Whatever difficulties exist in enforcing laws banning discrimination because of race, they pale in comparison to the conceptual line-drawing problems associated with SOGI laws.

Laws Protecting Against Racism Were Necessary and Justified, Unlike SOGI Laws. Government should never penalize 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 that people should accept instead of resist. Such views are inherently reasonable, even as people continue to disagree about them. Some people, however, want the government to penalize actions based on these reasonable beliefs, claiming that it is akin to racism. They are wrong. Here is why.

While protections against racial discrimination have been necessary and justified, antidiscrimination laws based on sexual orientation and gender identity are neither.

To see how racial discrimination was always alien to our liberties, rightly understood, we can look to history. "The most robust of all property rights," writes the law professor Adam MacLeod, "is the right to exclude, which enables an owner to choose which friends, collaborators, and potential collaborators to include in the use of land and other resources."[43] In common law, these protections extend even to the commercial domain: "If a property owner opens his or her domain to the public as a bakery, for example, the owner does not thereby relinquish her right to exclude. Rather, the common law requires the landowner to have a reason for excluding."[44]

But there are no such reasons for excluding on the basis of race, MacLeod argues:

> To combat widespread racial discrimination, Congress and state legislatures promulgated rules in the latter half of the twentieth century that prohibit discrimination in public accommodations and large-scale residential leasing on the basis of race….

> In essence, these laws established a bright-line rule. Exclusion on the basis of race is always unreasonable, and therefore unlawful. These laws pick out motivations for exclusion that are never valid reasons. This wasn't really a change in the law—it was never reasonable to discriminate on the basis of race—but rather a conclusive statement of what the law requires.[45]

Before the Civil War, a dehumanizing regime of race-based chattel slavery existed in many states. After abolition, Jim Crow laws enforced race-based segregation. Those wicked laws enforced the separation of persons of different races, preventing them from associating or contracting with one another. Even after the Supreme Court struck down Jim Crow laws, integration did not come easily or willingly in many instances. Public policy therefore sought to eliminate racial discrimination, even when committed by private actors on private property.

Racial segregation was rampant, entrenched, and backed by state-endorsed violence when Congress intervened to stop it. Today, however, market forces are sufficient to ensure that people identifying as gay or lesbian receive the wedding-related services they seek. In every publicized

case of a business owner declining to facilitate a same-sex ceremony, the service sought by the couple was readily available from other businesses. In other words, a pluralistic civil society is policing itself; no law is needed here.

Furthermore, experience shows that the right of religious liberty has been invoked largely with respect to marriage, not with respect to sexual orientation in general. Citizens have resisted being coerced into celebrating or providing services to same-sex weddings and treating same-sex relationships as marriages in violation of their beliefs. Devout Christian bakers, for example, will serve gays and lesbians like any other person, but might not render their baking services for a celebration of a same-sex wedding.

MacLeod explains how the right to exclude on a reasonable basis applies in these situations:

> Why is it unreasonable for a photographer to serve all people, including those who self-identify as homosexual, but to refuse to endorse by her conduct the claim that a same-sex commitment ceremony is, in fact, a wedding? If a jury or other competent fact-finder determines that the photographer has a sincere moral or religious conviction that marriage is the union of a man and a woman (and therefore does not include a same-sex couple, a polyamorous group, a polygamous family, and so on), then the photographer has a reason not to use her property (in this case, her camera and her business) to endorse what she believes to be a lie.[46]

Running a business, school, or charity in accordance with the view that marriage is a union of husband and wife is reasonable. The same is true for a business, school, or charity that implements bathroom or locker room policies based on the biological differences of the sexes. Even if one disagrees with these beliefs and policies, they are reasonable and should remain lawful, unlike racist views which are unreasonable and rightly unlawful.

Bans on Interracial Marriage Were Based on Racism and Had Nothing to Do with Marriage. People who consider opposition to SOGI laws as analogous to racism often make their argument by comparing current opponents of same-sex marriage to people who once opposed interracial marriage. This argument also fails as a historical and conceptual matter, but few people know the relevant history. The assumption that marriage is the union of male and female was nearly universal among human societies until the year 2000. Same-sex marriage is the work of revisionism in historical reasoning about marriage. By contrast, racial segregation laws, including bans on interracial marriage, were aspects of an insidious ideology that arose in the modern

period in connection with race-based slavery and denied the fundamental equality and dignity of all human beings. The race of the spouses has nothing to do with the nature of marriage, and it is therefore unreasonable to make it a condition of marriage.[47]

Interracial marriage bans are the exception in world history. They have existed *only* in societies with a race-based caste system, in connection with race-based slavery. On the other hand, the understanding of marriage as the union of male and female has been the norm throughout human history, shared by the great thinkers and religions of both East and West and by cultures with a wide variety of viewpoints about homosexuality.

Likewise, many religions, quite reasonably, teach that human beings are created male and female and that male and female are created for each other in marriage. Nothing even remotely similar is true of race.

Far from having been devised as a pretext for excluding same-sex relationships—as some now charge—marriage as the union of husband and wife arose in many places over several centuries entirely independent of and well before any debates about same-sex relationships. Indeed, it arose in cultures that had no concept of sexual orientation and in some that fully accepted homoeroticism and even took it for granted.[48]

Searching the writings of Plato and Aristotle, Augustine and Aquinas, Maimonides and al-Farabi, Luther and Calvin, Locke and Kant, and Gandhi and Martin Luther King Jr., one finds that the sexual union of male and female goes to the heart of their reflections on marriage, but considerations of race with respect to marriage are simply absent.[49] Only late in human history do we see political communities prohibiting interracial marriage. Such bans had nothing to do with the nature of marriage and everything to do with denying racial equality.

The prohibitions of interracial marriage in colonial America were unprecedented, writes the historian Nancy Cott of Harvard:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class…. But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.[50]

Laws banning interracial marriage were virtually unique to America, explains the legal scholar David Upham: "As one jurist explained in 1883…'[m]arriage is a natural right into which the question of color does not enter except as an individual preference expressed by the parties to the marriage. It is so recognized by the laws of all nations except our own.'"[51] The English common law, which Americans inherited, imposed no barriers to interracial marriage.[52] Antimiscegenation statutes, which first appeared in Maryland in 1661, were the result of African slavery.[53] Slaves, Cott notes, "could *not* marry legally; their unions received no protection from state authorities. Any master could override a slave's marital commitment."[54] They were not citizens or even persons in the eyes of the law. "The denial of legal marriage to slaves quintessentially expressed their lack of civil rights," writes Cott. "To marry meant to consent, and slaves could not exercise the fundamental capacity to consent."[55]

Francis Beckwith summarizes the history of antimiscegenation laws:

> The overwhelming consensus among scholars is that the reason for these laws was to enforce racial purity, an idea that begins its cultural ascendancy with the commencement of race-based slavery of Africans in early 17th-century America and eventually receives the imprimatur of "science" when the eugenics movement comes of age in the late 19th and early 20th centuries.[56]

He concludes:

> Anti-miscegenation laws, therefore, were attempts to eradicate the legal status of real marriages by injecting a condition—sameness of race—that had no precedent in common law. For in the common law, a necessary condition for a legitimate marriage was male-female complementarity, a condition on which race has no bearing.[57]

In other words, antimiscegenation laws were but one aspect of a legal system designed to hold a race of people in a condition of economic and political inferiority and servitude. They had nothing to do with the nature of marriage. At their heart was a denial of human dignity.

Race has nothing to do with marriage, but marriage has everything to do with uniting the two halves of humanity—men and women—as husbands and wives and as mothers and fathers committed to any children they bring into the world. So while marriage must be color-blind, it cannot be blind to sex. The melanin content of a person's skin has nothing to do with his capacity to unite with another in the bond of marriage as a comprehensive union naturally ordered to

procreation. However, the sexual difference between a man and a woman is at the heart of marriage. Men and women, whatever their race, can unite in marriage. Children, whatever their race, deserve a mom and a dad—their own mom and dad wherever possible.

Conclusion

The problem with SOGI policies is not merely that they are unnecessary, that they produce unintended but profoundly damaging consequences, or that they are based on a false analogy between same-sex marriage and interracial marriage. The main problem is even deeper: Sexual orientation and gender identity are radically different from race and should not be elevated to a protected class in the way that race is. There are no good historical or philosophical reasons for the law to treat sexual orientation and gender identity as it treats race—and doing so has serious costs.

SOGI laws are a solution in search of a problem. They pose serious problems for free markets and contracts, free speech and religious liberty, and the health of our culture and of pluralism. The main justification used to defend SOGI laws—that distinction made because of sexual orientation or gender identity is equal to invidious discrimination by race or color—fails conceptually, historically, and practically.

In this context, free markets and free contracts can and do provide the best solutions, while also respecting Americans' freedom of association, freedom of religion, and freedom of speech.

—Ryan T. Anderson, PhD, *is William E. Simon Senior Research Fellow in American Principles and Public Policy in the Richard and Helen DeVos Center, of the Institute for Family, Community, and Opportunity, at The Heritage Foundation.*

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