CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Notre Dame Law School: NDLScholarship

Notre Dame Law School
NDLScholarship

Journal of Legislation Online Supplement

Journal of Legislation

Summer 7-23-2020

The Unfairness of the Misnamed “Fairness For All” Act

Ryan T. Anderson

Robert P. George

Follow this and additional works at: https://scholarship.law.nd.edu/jleg_blog

Part of the Legislation Commons

THE UNFAIRNESS OF THE MISNAMED "FAIRNESS FOR ALL" ACT

Ryan T. Anderson[1] *and Robert P. George*[2]

Intransigence is a vice, but there is no virtue in accepting bad compromises. The "Fairness for All" legislation is a bad compromise—and as a result, would be a misguided response to the Supreme Court's *Bostock* decision. To show this is not to question the good faith of the bill's advocates, with whom we have been in friendly dialogue for years.[3] It's merely to note that despite the undoubted goodwill of the bill's proponents (and despite its name), the bill is grievously unfair. Its protections for religious liberty are insufficient. And they come at the price of legally enshrining a misguided sexual and gender ideology—which would license officials to punish citizens who dissent from secular progressive orthodoxy.[4]

These costs are unsurprising: from the start, the compromise sought was misframed in two ways.

First, there was a woeful mismatch in ambitions: The "conservative" side failed even to seek protections for many crucial interests *apart* from religious liberty that are imperiled by the bill's antidiscrimination component. As Stewart and Schaerr stress, FFA is narrowly focused on "religious liberty and LGBTQ rights"[5] as the result of "negotiations between conservative religious groups and LGBTQ rights groups"[6] designed to protect "their core interests."[7] But religious freedom isn't the only interest here. What about women's and girls' privacy, safety, and equality, or the wellbeing of children with gender dysphoria? FFA's approach is narrow and selective. A sound approach would be inclusive and holistic, considering all of the interests and people who would be harmed by the proposed changes to civil rights law.

---

[1] Ryan T. Anderson is the William E. Simon Senior Research Fellow in American Principles and Public Policy at The Heritage Foundation and the St. John Paul II Teaching Fellow in Social Thought at the University of Dallas.

[2] Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University.

[3] We have also joined the academic discussions: Both of us participated in a 2017 conference on FFA at Yale Law School, and one of us contributed a chapter critiquing its approach to the book cited by Stewart and Schaerr. *See* Ryan T. Anderson, *Challenges to True Fairness for All: How SOGI Laws are Unlike Civil Liberties and Other Nondiscrimination Laws and How to Craft Better Policy and Get Nondiscrimination Laws Right*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 361 (William Eskridge, Jr. and Robin Fretwell Wilson eds., 2019), https://ssrn.com/abstract=3370373.

[4] Ryan T. Anderson, *Shields, Not Swords*, 35 NAT'L AFF. 74 (2018), https://ssrn.com/abstract=3141908.

[5] Chris Stewart & Gene Schaerr, *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, 46 J. LEGIS. 134, 138 (2020).

[6] *Id.*

[7] *Id.*

Second, while the compromise purports to allow both sides to "live and let live,"[8] it does not and *could* not do that, because only one side of the deal involves a form of legal freedom; the other side involves a form of legal coercion. By definition, antidiscrimination laws coerce some citizens on behalf of others—whereas religious liberty *limits* government to protect the personal freedom of all. Antidiscrimination policies—sometimes justifiably, to be sure—use legal force to make some people, in some domains, live by the majority's values; religious liberty protects everyone's interest in living by his or her own convictions. Pairing a coercive norm with a liberty exception is not live and let live. A true live-and-let-live approach would leave LGBTQ-identifying people free to live by their beliefs, but not "free" to use legal mechanisms to force others to act as if they shared those beliefs.

Elevating "sexual orientation and gender identity" to a protected class in the Civil Rights Act isn't about "live and let live" *at all*. It's about legally enforcing new norms of sexuality nationwide, with limited "spaces" of freedom for some religious actors. FFA effectively helps brand alternatives to the favored ideology as bigotry while carving out a limited "right to discriminate" for some "bigots." This will do harm that Stewart and Schaerr fail to grapple with—harm to people's privacy, safety, equality, and physical and mental wellbeing, along with forms of liberty—not just for believers, but for all dissenters from progressive gender ideology.[9]

The Supreme Court's ruling in *Bostock* will undoubtedly impose *some*—though perhaps not all—of these harms on the nation. (We say perhaps not all because the Court's simplistic logic on "sex" discrimination does not directly add SOGI to all of our civil rights laws, and therefore many questions remain.[10]) Any effective response to the Court's ruling needs to focus not solely on religious liberty, but on the substantive harms that could come. This means we need legislation that clarifies what does, and what does not, constitute unlawful "discrimination" on these issues.

A Better Approach

Stewart and Schaerr observe that "[v]enerable religious beliefs regarding marriage, family, gender, and sexuality are routinely denounced as ignorance and even dangerous bigotry."[11] They rightly fear that these beliefs may be subject to the "[l]egal and social forces" that we use to "punish racist expressions and practices severely."[12] But they don't see that FFA would contribute to this disturbing trend.

---

[8] *Id.*

[9] Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J. OF L. AND PUB.POL'Y 1 (2018), https://ssrn.com/abstract=3113625.

[10] Ryan T. Anderson, *The Simplistic Logic of Justice Neil Gorsuch's Account of Sex Discrimination*, SCOTUSBLOG (June 16, 2020, 1:28PM), https://www.scotusblog.com/2020/06/symposium-the-simplistic-logic-of-justice-neil-gorsuchs-account-of-sex-discrimination/.

[11] Stewart & Schaerr, *supra* note 5 at 139.

[12] *Id.* at 147.

Under FFA, acting on what we and Stewart and Scherr hold to be *true* beliefs about sexuality would be legally viewed as "discrimination."

Stewart and Schaerr write that FFA "will certainly teach that unjust discrimination against LGBT persons is unlawful and wrong."[13] But the bill never *begins* to distinguish unjust discrimination from valid and honorable dissent from progressive ideology. FFA leaves its central term—"discrimination"—to the whims of government agencies and judges. And we've seen how officials interpret and apply these policies: men who identify as women must be allowed in women-only spaces, boys who identify as girls must be allowed to compete in the girls' athletic competitions, healthcare plans must pay for gender-transition procedures, doctors and hospitals must perform them, adoption agencies may not seek only married moms and dads to care for children in need, and wedding professionals must lend their talents to same-sex "weddings." No one can claim ignorance of these unjust applications. We need policy that challenges these changes, rather than "regularizes and refines" them, as Stewart and Schaerr admit FFA does.

It is particularly odd for Stewart and Schaerr to complain that conservatives "oppose any compromise with the LGBT community on the hope they can hold out forever"[14] when one of us, a senior research fellow at the country's largest conservative public policy institution, has proposed a better approach to these questions.[15] We don't oppose compromise, only bad compromises. Stewart and Schaerr charge conservatives with indulging a "dangerous fantasy," but it's a fantasy to think that making "sexual orientation" and "gender identity" protected classes will promote "live and let live," not coercion and harassment.

A better approach, especially in light of the Court's *Bostock* decision, would carefully consider the needs of LGBT-identifying people that require a policy response, and then target legislation at serving those needs. It would explicitly define what's unlawful and protect everyone's freedom to engage in legitimate actions based on the convictions that we are created male and female and that male and female are created for each other. It would protect parental rights, women's privacy and safety, medical professionals' conscience rights, and the free speech and religious liberty rights of wedding vendors and other professionals. This would leave all Americans free to act on their convictions.

We find it peculiar—indeed, disturbing—that Stewart and Schaerr claim that a "bill that protected every religious person or interest from any burden occasioned by LGBTQ rights would largely neuter the bar on SOGI discrimination."[16] This suggests that what religious objectors seek is the freedom to violate people's genuine rights, rather than the freedom to live by honorable beliefs. Truly fair legislation would not burden any honorable activity by religious actors—and *non*-religious actors. Fair legislation would prohibit unjust discrimination while not burdening good actions by clarifying what does and does not constitute unjust discrimination.

---

[13] *Id*. at 196.
[14] *Id*. at 139.
[15] Anderson, *supra* note 3.
[16] Stewart & Schaerr, *supra* note 5 at 157.

Consider a parallel. When Congress passed Title IX's ban on sex-based discrimination in education, the implementing regulations clarified that sex-specific housing, bathrooms, and locker rooms are not unlawful discrimination. This was not a carve-out for religious entities; *all* institutions could have sex-specific facilities, because doing so is not invidiously discriminatory at all. Likewise with abortion: in *Bray v. Alexandria Women's Health Clinic*, the Supreme Court resolutely rejected the idea that pro-lifers commit invidious discrimination against women: "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women."[17]

Thus, local, state, and federal laws were enacted to protect pro-lifers' rights: The Church and Weldon Amendments have protected pro-life medical personnel refusing to perform or assist with abortions, and the Hyde Amendment and Mexico City policy have prevented taxpayer funding of abortion. Antidiscrimination law was not used to brand pro-life citizens as bigots subject only to exemptions for certain religious institutions.

Here, too, in the wake of *Bostock* any truly fair legislation would make explicit that it's lawful to act on the convictions that we are created male and female, and that male and female are created for each other—for example, by supporting marriage as the conjugal union of husband and wife. Likewise, a fair bill would expressly provide that no institution has to let males compete against females in sports or use women-only locker-rooms and shelters. It would explicitly say that no physician has to engage in so-called "gender-affirming" care, and that no child can be denied assistance with accepting and identifying with his or her body. These measures would protect genuine human interests, not merely specialized religious interests.

FFA is the opposite of clear on these points. Over and over, the protections for "LGBTQ rights" are bold and explicit, and those for "religious liberty" are convoluted and implicit. Thus, it takes Stewart and Schaerr over 5,000 words to explain how FFA would protect adoption agencies that believe children deserve both a mom and a dad. And on wedding vendors, Stewart and Schaerr actually say that FFA's "drafters . . . had a choice whether to ignore the issue, expressly address it, or use structural mechanisms to address it without calling it out," and "chose the latter."[18]

The obfuscation guarantees extensive litigation—and the results are anyone's guess, especially with a Court as unreliable as the *Bostock* court. That is legislative malpractice. And it ensures that the teaching function of FFA is not what they hope. It will not promote public support for religious liberty. It will effectively teach that religious people "discriminate"—the kind of thing practiced and supported by bigots—but that some rule of statutory construction gives them a limited license to do so. This is reinforced by Stewart and Schaerr's own discussion of the adoption

[17] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993).
[18] Stewart & Schaerr, *supra* note 5 at 171.

issue: "The general rule is that any entity receiving federal financial assistance for performing adoption and foster care services must avoid discriminating against a prospective parent or child on the basis of … sexual orientation, and gender identity."[19] But they propose to set up an indirect funding mechanism to do an end-run around that "general rule," whereby an "agency that receives federal funding in this way is not bound by the same nondiscrimination rules as an agency that receives federal funding directly."[20] So "discrimination" is unacceptable when funded directly, but acceptable when funded indirectly?

Likewise, Stewart and Schaerr write: "To be sure, after FFA, federal law *would* teach that secular commercial spheres should be fair and open to everyone regardless of … SOGI,"[21] implying that religious spheres get to be domains of unfairness. They repeatedly write as if choices based on sound convictions about human sexuality amount to "discrimination," to be permitted in a few specifically religious contexts anyway. As they put it, FFA provides "protections and allowances for religious spaces and voices."[22] How generous. This almost ensures the further ghettoization of orthodox religious believers and the further marginalization of the truth about human sexuality. In the public sphere, progressive sexual ideology reigns supreme; in specifically religious private institutional spheres, dissenters from that ideology can find limited respite. This is "fairness for all"?

Gender Identity

FFA also engages in legislative malpractice in its handling of "gender identity," imposing serious liability without defining the offense. What exactly would be banned as "discrimination" based on "gender identity"? Can the bill's drafters and sponsors tell us what that will mean long term? Can they tell us what it would legally ban or mandate *today*? Advocates insist that gender identity is fluid and exists along a spectrum, with varieties currently including "gender-hybrid" and "gender ambidextrous." What activities based on these statuses would get protection? It is irresponsible to rewrite our civil rights laws to make "gender identity" a protected class when we cannot even define what gender identity is, or what gender identities there are. Notably, the *Bostock* decision did not use the language of "gender identity" but of "transgender status."[23] FFA goes well *beyond* even the errors of *Bostock*.

Stewart and Schaerr caricature these concerns: "Sometimes critics allege that protecting gender identity means forced accommodation of people who will switch their gender identity regularly, even daily, in an effort to abuse the protections for nefarious ends. The image they conjure is of teenage boys announcing one day that

[19] *Id*. at 187.
[20] *Id*. at 186.
[21] *Id*. at 198.
[22] *Id*.
[23] Ryan T. Anderson, *The Supreme Court's Mistaken and Misguided Sex Discrimination Ruling*, PUB. DISCOURSE (June 16, 2020), https://www.thepublicdiscourse.com/2020/06/65024/.

they are 'girls' so they can gawk in the girls' locker room, returning to their male status when the hijinks are done."[24] They cite no examples of such critics. They should know better. When Schaerr was legal counsel defending North Carolina's HB2—the so-called "bathroom bill"—he submitted expert testimony from an FBI sex-crimes specialist on how "gender identity"-based access would increase risks to safety and privacy. Why he now joins in mischaracterizing these concerns is puzzling. And it does nothing to clarify what legal duties would be owed under FFA to people who are "gender fluid," "genderflux," "genderqueer," "trigender," "polygender," "non-binary," etc. Even *Bostock* didn't go this far.

Stewart and Schaerr note that many jurisdictions already entitle people to "use the bathroom or locker room of their gender identity"[25] and allow gender-dysphoric males to compete in female sports. But this is just what many people want to stop, or to prevent from starting in their communities. FFA would mandate such practices nationwide, in all public and nearly all private institutions.[26]

FFA also does not adequately address concerns about medical care. The FFA text allows doctors to provide a service or treatment "on the same medical terms or criteria applicable to individuals needing that service [or] treatment . . . , without regard to protected class status."[27] But this completely sidesteps the debate about care for persons with gender dysphoria. That debate is precisely about what counts as proper "medical terms or criteria" or discrimination. Stewart and Schaerr distinguish[28] "purely cosmetic breast augmentations or reductions" from "augmentation or reconstruction" for "therapeutic" reasons, but this begs the question of whether gender transition *is* cosmetic, or is rather therapeutic, as leading pro-"transition" advocates insist.

Activists now draw a parallel between "transition" procedures and life-saving medical care. Even for children. One physician explained to CNN: "If your child had asthma and was turning blue, you wouldn't deny them their albuterol inhaler or say 'let's wait.' If this were cancer or diabetes, we wouldn't be having this conversation, but people get funny when it comes to medical care when gender is involved, and that's harmful."[29] Gender ideology advocates argue that far from being cosmetic, "transition"-related care is life-saving. So if you provide life-saving breast reductions to cancer patients but not those with gender dysphoria, activists say you "discriminate" based on "gender identity." FFA strengthens their hand.

---

[24] Stewart & Schaerr, *supra* note 5 at 160.

[25] *Id*. at 202.

[26] Stewart and Schaerr explain why: "FFA exempts religious schools from this mandate to the extent sex-separated sports are important to a schools' religious mission. While this may be a cultural issue, it is not a religious liberty threat." Yes, but the decision to ignore "cultural issues" is a design flaw of FFA, its failure to take a holistic approach to serving the good of all—the *common good*—and not just that of churches and religious institutions. *Id*. at 204.

[27] Stewart & Schaerr, *supra* note 5 at 169 n.113.

[28] *Id*. at 170.

[29] Jen Christensen, *Parents want custody to stop transgender teen having hormone treatment*, CNN (Feb. 13, 2018), https://edition.cnn.com/2018/02/13/health/transgender-teen-medical-custody-fight/index.html.

Indeed one aspect of FFA accepts wholesale the transgender activists' perspective on proper care. FFA states that an "entity unlawfully discriminates against a child by" treating a child "inconsistently with the child's gender identity" or by providing "any practice or treatment that seeks to change the child's … gender identity."[30] So children must be affirmed in their gender confusion, and adults may not attempt to help them—all in the name of … fairness? That is outrageous. The bill limits these provisions to foster children and others in the state's custody. But if this is what "fairness" requires for *those* children, why not for all? This logic will play itself out, with parents depicted as oppressors and abusers for refusing to go along with the claim that their gender confused little girl is actually a little boy who needs puberty blockers, cross sex hormones, and eventually amputations.[31] This, too, goes well beyond *Bostock*—and serves as another reminder that FFA would enshrine SOGI laws deeper and further into our legal system than the Court has already.

False analogy to Religious liberty/nondiscrimination

Stewart and Schaerr defend FFA's structure and pedagogical impact with a flawed analogy to religious liberty and to religious antidiscrimination laws (they are not always clear on the distinction). On religious liberty, they write: "When for example an organization of Southern Baptists or other evangelical Christians supports the right of Jews and Seventh-day Adventists to worship on Saturday, no one seriously thinks they are somehow weakening their own theological commitment to Sunday worship."[32] That is correct. The Southern Baptists are acting for the sake of religious liberty, a real human right. But nothing similar is true in the SOGI context: there is no "sexual self-definition" or "erotic freedom" human right.

And here again, Stewart and Schaerr miss the point we opened with, about the difference between guarding all people from governmental coercion, and allowing people to enlist the government in coercing others.[33] Religious liberty laws say that Orthodox Jews have the right to be authentically Jewish, Latter-day Saints to be LDS, Muslims to be Muslim, etc. But SOGI laws require *other people* to perform actions that endorse, support, and facilitate sexual practices and self-identities they do not believe in. These laws aren't about allowing "people to act in ways that others disagree with,"[34] as Stewart and Schaerr write; instead they force those who disagree into complying with the beliefs of others. Just ask Jack Phillips. Or Baronelle Stutzman. Or Catholic adoption agencies.

---

[30] H.R. 5331, 116th Cong., § 3 (3)(b)(2)(E) (2019).

[31] See Ryan T. Anderson and Robert P. George, *Physical Interventions on the Bodies of Children to 'Affirm' their 'Gender Identity' Violate Sound Medical Ethics and Should be Prohibited*, PUB. DISCOURSE (Dec. 8, 2019), https://www.thepublicdiscourse.com/2019/12/58839/.

[32] Stewart & Schaerr, *supra* note 5 at 148.

[33] *See* Anderson, *supra* note 4.

[34] Stewart & Schaerr, *supra* note 5 at 140.

Stewart and Schaerr's analogy to religious antidiscrimination laws fails for the same reason. They write that a law forbidding employers to exclude Catholics "does not mean that the law, much less people of other faiths or no faith at all, endorse Catholicism. It means we have decided that religion shouldn't be held against someone in those areas. The same is true of SOGI."[35] If only.

They are right that bans on religious discrimination aren't used to force religious groups to violate their religious beliefs, or secular organizations to violate their own convictions. For example, while Planned Parenthood cannot refuse to hire a pro-choice Jew because he wears a yarmulke, it can refuse to hire a pro-life Jew, *even when his pro-life convictions flow from his understanding of Jewish faith and his Jewish identity*. This leaves Planned Parenthood free to make reasonable distinctions based on its convictions and mission, even when its resulting policies have a disparate impact on people who have a certain religious identity or engage in certain sorts of religiously motivated conduct.

By contrast, SOGI laws *are* used to impose adherence to an orthodoxy—e.g., to force Catholic schools to employ people who undermine Catholic principles of sexual morality, or Evangelical bakers to celebrate messages about marriage contrary to their faith, or Catholic Charities to violate its faith-based commitment to finding a mom and a dad for every child in need.

So it is sheer, groundless assertion to claim, as Stewart and Schaerr do, that FFA "does not, contrary to conservative critics, teach that a single SOGI ideology governs all of American life."[36] By making SOGI a protected class, FFA would constitute a national endorsement of a certain viewpoint about sexuality and empower officials to punish those acting on dissenting views.

Moving the Discussion the Forward

None of the criticisms of FFA we've put forth in this essay is new. So it is baffling why Stewart and Schaerr's lengthy article fails to quote a single actual critic of FFA, relying instead on caricatures and strawmen—and imputations of bad faith. They say that "[r]ight-wing advocacy groups" opposed to FFA "are deeply invested—ideologically and institutionally—in this conflict" and "may embrace and even relish such fights."[37] We do not. Nor do we know anyone working on these issues who does. Stewart and Schaerr give no examples. To impugn FFA's opponents as venal or conflict-loving is wrong, just as it would be wrong for FFA's critics to brand religious groups or individuals who support FFA as "sell-outs" or "cowards" who desire to curry favor with secular progressive elites.

Stewart and Schaerr also claim that "important center-right voices in the religious freedom community have endorsed" FFA, but they never say if any "important" voices have criticized it. They do say that "some conservative religious groups have harshly denounced"[38] FFA. This gives the impression that Catholic and

---

[35] *Id*. at 197.
[36] *Id*. at 198.
[37] *Id*. at 143.
[38] *Id*. at 196.

Southern Baptist leaders, among other opponents, far from raising legitimate concerns, have offered only "harsh denunciations." That is not true. Or fair.

Indeed, Stewart and Schaerr close with some truly unfortunate rhetoric about critics of FFA:

> The best response to conservative critics is a reality check. . . . [W]hat is *their* plan for preserving religious liberty from the threat of laws like the Equality Act? Deny the threat, hoping for legislative gridlock forever despite tectonic shifts in public opinion? Hope the public grows tired of LGBT rights and the whole issue just goes away? More one-sided religious freedom bills or bathroom bills, so more states can be firebombed in the media and boycotted by corporate America as anti-LGBTQ? Sweeping exemptions for everyone who might be inclined to discriminate, so the SOGI nondiscrimination rule applies only to those who never would in the first place? Trust the Supreme Court to hand out exemptions to anyone who wants one?[39]

Religious and policy organizations opposing FFA have not done so out of ignorance, a failure to grapple with reality, or a perverse attraction to conflict. They have opposed it—as we have—because they judge it misguided.

Religious communities are concerned with transcendent matters, but most also seek to promote the temporal common good. Doing so in a culture so often hostile to authentic flourishing is not easy. We would never accuse supporters of FFA of seeking to save face or win liberal media accolades. They are doing what they believe to be in the public interest. But so are groups who find FFA's selective focus and structural flaws unacceptable.

Only the truth can promote authentic flourishing and peace. Faith and reconciliation detached from the truth are counterfeits. While we work to find a way of addressing legal and cultural conflicts that is fair for all, we must not allow the truth to be treated in law as the law treats bigotry, or to surrender vital principles of public policy that are central to the common good.

In the aftermath of the Court's *Bostock* decision, we need to define explicitly what sort of conduct counts as unlawful, while also protecting everyone's freedom to engage in legitimate actions based on the convictions that we are created male and female and that male and female are created for each other. Religious liberty is an important human right, but we must also protect parental rights, women's privacy and safety, and medical professionals' conscience rights. We must refuse to impose a misguided gender ideology on the nation. This holistic and inclusive approach would achieve true fairness for all.

[39] *Id*. at 206.