

Equality: Y'all Means All

- ★ American faith communities have undertaken a long, at times painful, debate regarding the full inclusion of LGBTQ persons that spans six decades. Just like demographic change precedes political change, theological reflection in faith communities has preceded the changes of the official position of religious denominations.
- ★ In 2021, polling by the Public Religion Research Institute showed that majorities of every major religious group support nondiscrimination protections for LGBTQ persons. Majorities of almost every major religious group support same-sex marriage, with the exception of White evangelical Protestants, Mormons, and Jehovah's Witnesses.
- ★ All of the denominational members of Texas Impact agree that civil government should provide equal protection in our laws, even if they still debate the specifics of their internal policies such as ordination.

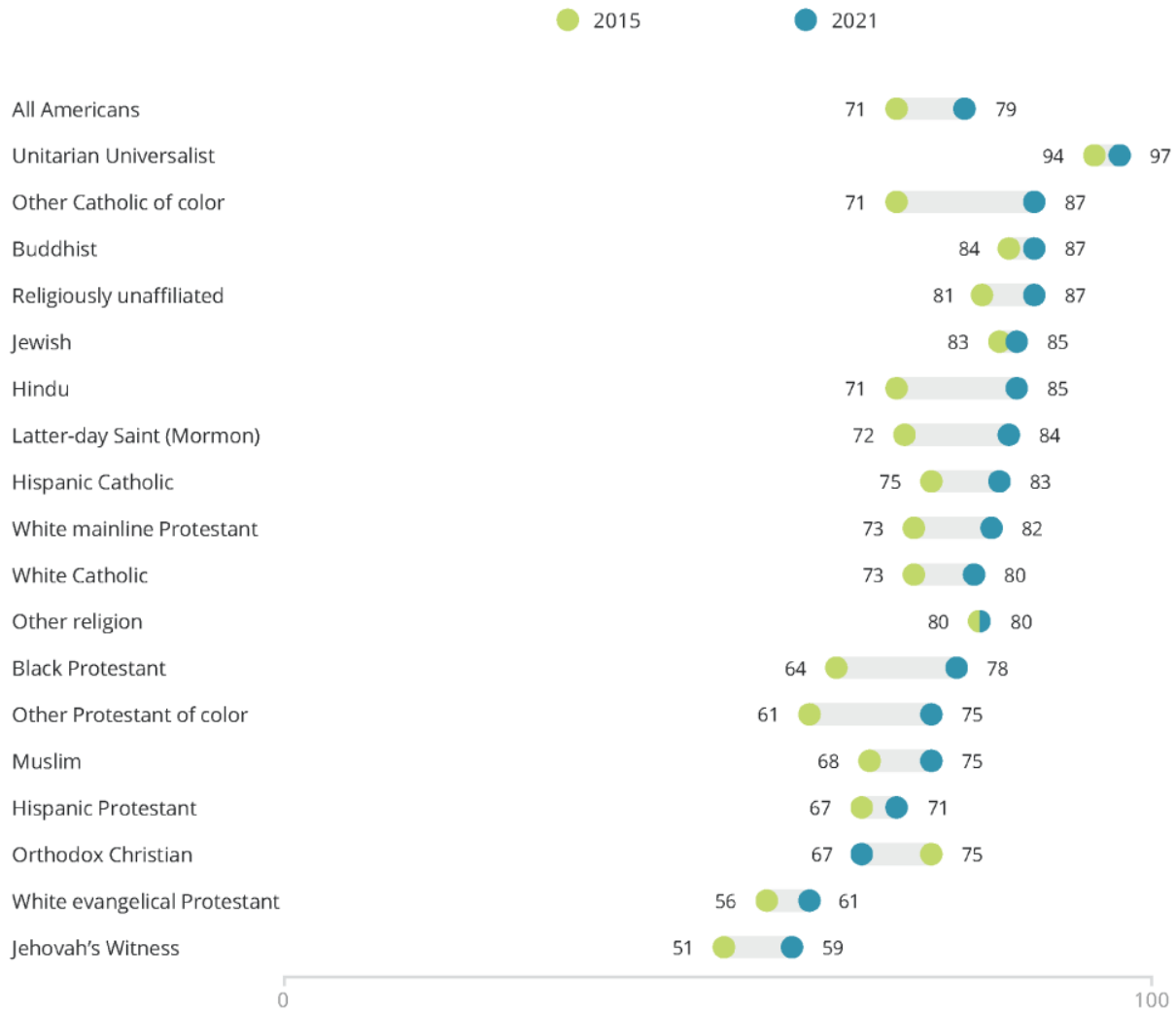
Discrimination is the failure to treat an individual or group the same as another. Acts of bias or prejudice can occur in any setting against anyone. These acts can be subtle or overt.

Laws cannot change hearts, but they can regulate conduct. The United States has laws to diminish prejudicial conduct. Those laws are the product of generations of struggle to live into our nation's founding ideal that all humans are created equal.

For LGBTQ persons, discrimination can arise in a multitude of settings. Common examples include schools, healthcare, employment, government benefits, family law, housing, and public accommodation. Only recently have laws in the United States begun to cover discrimination against individuals based on sexual orientation or gender identity; LGBTQ persons have little or no protection from discrimination in most cases.



Support for Nondiscrimination Protections for LGBTQ People, by Religious Affiliation, 2015-2021



Source: PRRI American Values Atlas 2015, 2021.

Percent who favor laws that would protect gay, lesbian, bisexual, and transgender people against discrimination in jobs, public accommodations, and housing.

From Americans' Support For Key LGBTQ Rights Continues To Tick Upward: Findings from the 2021 American Values Atlas by the Public Religion Research Institute

The U.S. Constitutional Framework

The Due Process and Equal Protection Clauses are critical to protecting all persons from discrimination. These two clauses have been expanded to include LGBTQ people in the following ways: Private, consensual sexual activity is protected under an implied right to privacy in the Due Process Clause. The landmark U.S. Supreme Court case that established this precedent is *Lawrence v. Texas*. The Equal Protection Clause prohibits overt discrimination by the government against persons based on sexual orientation where the only basis for the discrimination is the morality of the majority. The landmark U.S. Supreme Court case that established this precedent is *Romer v. Evans*. Marriage equality is protected under both the Due Process and Free Exercise Clauses. The landmark U.S. Supreme Court case establishing this precedent is *Obergefell v. Hodges*.

Which clause protects which right is increasingly important after the recent U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*. While seemingly unrelated, a woman's right to bodily autonomy used to exist under the implied right to privacy in the Due Process Clause. The majority's reasoning in *Dobbs* was that no such right exists in the Constitution. By logical extension, if an implied right to privacy does not exist, and therefore a woman's right to bodily

autonomy does not exist, then neither does an implied right to privacy in private, consensual sexual activity. The rationale also extends to the implied right to privacy in marriage equality. Fortunately, the right to marriage equality also exists in the Equal Protection Clause.

The U.S. Statutory Framework

Legislative bodies can and should strengthen the rights bestowed by courts. The legislative branches of states and the federal government are not limited to codifying the legal reasoning of a court; they can pass legislation that is even more protective of rights. One such example is the Civil Rights Act of 1964. Before the Civil Rights Act, the U.S. Supreme Court held that a person alleging discrimination on the basis of race not only had to prove a discriminatory effect of a law, but but also had to prove that the government acted with discriminatory intent. Proving the intent of a body of lawmakers became increasingly difficult as legislators learned courts were looking at their words. Additionally, the U.S. Supreme Court held that the Constitution did not apply to private actors, such as segregated transportation or restaurants, but only state actors. The Civil Rights Act instructed courts to look at discriminatory effects alone for certain claims affecting employment, housing, or public accommodations, and made the act apply to private actors.



No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

– U.S. Constitution, XIV Amendment, Section 1

The majority of protections in the Civil Rights Act only apply to race, color, religion, or national origin. However, the employment protections in Title VII additionally apply on the basis of “sex.” In 2020, the U.S. Supreme Court ruled that the plain text of the statute’s language included sexual orientation and gender identity since discrimination against such persons was because of biological sex — either being attracted to a person of the same sex or identifying as a particular sex. Many argue that similar rationales apply to Title IX of the Education Amendments of 1972. In December 2022, Congress passed the Respect for Marriage Act, which protects same-sex marriages if the U.S. Supreme Court were to overturn Obergefell. Congress should also extend protections against discrimination in housing, education, and public accommodation.

U.S. Executive Action

Executive action means any action taken by the executive branch that makes policy. American Government 101 teaches that the legislative branch makes the laws, the judicial branch interprets the law, and the executive branch enforces the law. While this is accurate, the executive branch also has formal and informal powers to make policy. For instance, executive agencies make rules—which carry the force of law—when the legislative branch has delegated an agency that authority. Presidents also have the power of executive orders, proclamations, and administrative orders that manage the operations of the federal bureaucracy.

These actions can allow or prohibit discrimination. The policy’s durability lasts only as long as that President is in office. For instance, whether a state contractor can discriminate against LGBTQ parents or LGBTQ



foster children has gone back and forth for more than five years. States receive federal dollars for child welfare services under the Social Security Act. The Obama Administration enacted federal rules that prohibited federal tax dollars from being used by contractors to discriminate on the basis of gender identity and sexual orientation. However, several faith-based state contractors want to be able to refuse to work with LGBTQ persons as well as persons of other faiths while acting as contractors of the state, and they are pressuring their state governments to allow them to do so. In 2018, South Carolina pushed for a federal waiver for its faith-based contractor and received it from the Trump Administration. The Trump Administration then changed the federal rule. The Biden Administration has since reinstated the Obama-era rule. This is but one example of a myriad of executive actions that have ping ponged back and forth over the last several years.

Texas Law

In 2001, Texas passed the *James Byrd Jr. Hate Crimes Act*, which enhances penalties for crimes motivated by bias. The legislation includes crimes motivated on the basis of “sex” and “sexual preference,” but has not been updated to explicitly include “gender identity.”

In 2003, Texas amended its statutes

to prohibit same-sex marriage, and added the prohibition to the state constitution in 2005. While *Obergefell* struck down these laws as well as similar provisions in more than 30 other states, these “zombie laws” are still on the books.

After *Obergefell*, Texas reacted by passing “Pastor Protection” legislation. Largely symbolic, the legislation reaffirmed existing Texas constitutional law that no member of the clergy may be forced to perform any marriage. In 2019, Texas passed largely symbolic legislation with the so-called “Save Chick-Fil-A” bill. That legislation reaffirmed existing constitutional law related to the freedom of association, which prohibits government from discriminating on the basis of a person or entity’s associations.

More recently, Texas Legislature has passed increasingly substantive legislation. In 2017, Texas passed HB 3859, which allows faith-based state contractors performing child welfare services to discriminate based on sexual orientation and gender identity while implementing a government benefit program. In 2021, the Texas Legislature passed legislation requiring school children to play on the sports team that corresponds to the sex the child was designated at birth. Though early versions of the bill a provision for children who are born intersex, the final version makes no mention or provision for this group.



Texas Executive Action

In December 2016, the Texas Health and Human Service Commission rewrote its rules implementing the so-called “Foster Children’s Bill of Rights.” Despite being called a “bill of rights,” state statute prohibits children from enforcing these “rights” in court. Nevertheless, the “rights” are expressions of policy that the Department of Family and Protective Services (DFPS), which falls under Texas’s Health and Human Services Commission (HHSC), is supposed to follow. The original rules stated that children had a choice regarding religious upbringing and were not to be discriminated against based on sexual orientation. The new rules removed those verbal commitments, and instead protected the rights of faith-based state contractors to impose their religion on children.

In 2021, DFPS removed resources for LGBTQ youth from its website, including a suicide hotline. The

Governor sent a letter to DFPS requesting the agency opine on whether the provision of gender affirming care constitutes “child abuse” under the existing statute. The Attorney General issued an opinion redefining “child abuse” to include gender affirming care. After the opinion was issued, the Governor’s Office sent a letter to DFPS instructing the agency to begin investigating parents of children receiving such medical care under the direction of their doctors.

Texas Judicial Action

With few exceptions, the Texas judiciary has responded to the *Obergefell* decision by updating processes and documents to implement marriage equality. A handful of judges have taken actions in protest of the decision. After *Obergefell*, state judges could choose to marry no one or everyone, but were not allowed to discriminate by marrying only opposite sex couples. The State Commission reasoned that such discrimination casts doubt on a judge’s capacity to act impartially

Religious freedom is not a license for discrimination against any of God’s people, and cannot justify the denial of secular employment or benefits, healthcare, public or commercial services or goods, or parental rights to persons based on race, ethnicity, sex, gender, sexual orientation, gender identity, religion or gender expression.

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toward persons appearing before the court. Subsequent to that reprimand, a lawsuit has been filed against the State Commission on Judicial Conduct alleging a Free Exercise right for state judges to discriminate in their official capacity as a judge. The lawsuit also asks the courts to revisit the U.S. Supreme Court’s decision in *Obergefell*.

As the elected branches have become more hostile toward LGBTQ persons, the judiciary has increasingly found litigants challenging those actions in their courts. For example, after DFPS initiated child abuse investigations and threatened to remove children receiving gender-affirming care under the advice of medical professionals, the state judiciary was asked to weigh in on the legality of the investigations. That case is named *Doe v. Abbott*, and litigation is ongoing at the trial court level. Currently, a restraining order has been granted which temporarily restrains the state from investigating the family of Doe.

Local Government Actions

If Congress and a state refuse to prevent discrimination, and states have not prohibited them from doing so, then local governments

may offer additional protections such as in housing, education, or public accommodations. Texas has not “preempted”—or legally prohibited—local political subdivisions from enacting local ordinances prohibiting discrimination. Currently, Arlington, Austin, Dallas, Denton, Ft. Worth, Plano, and San Antonio prohibit discrimination on the basis of sexual orientation and gender identity in housing and public accommodation. El Paso protects against discrimination in public accommodations, but not housing. Galveston, Port Isabel, and Sour Lake protect against discrimination in housing, but not public accommodations.

Often referred to as “a patchwork quilt,” discovering the layers of protection at a local level can take significant research into the policies and ordinances of the county, city, independent school district, or university, or even into the case law in the jurisdiction of a particular appellate court. Nevertheless, the importance of local policy should not be understated.



THE WAY FORWARD FOR TEXAS

- ★ Keep politics out of public school curriculum development
- ★ Require enhanced monitoring and prosecution of hate crimes and domestic terrorism
- ★ Affirm privacy, bodily autonomy, and family autonomy of all Texans, including trans people seeking gender-affirming care; and LGBTQ+ people
- ★ Reject civil or criminal penalties for providing non-medical assistance to people seeking health care, including gender-affirming care

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