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THE EQUALITY ACT'S UNEXPECTED IMPACTS:
Single-Sex Colleges, Fraternities & Sororities, and Religious Schools

Arguments against the Equality Act have focused on its adverse impacts on privacy, safety, women's sports, religious liberty, and parental rights. But those problems are just the beginning. The Equality Act will inflict additional, somewhat unexpected harms:

A. The Equality Act will cut off federal tuition assistance to students at single-sex educational institutions like Wellesley and Smith Colleges.

B. The Equality Act might be interpreted to cut off federal tuition assistance to students at institutions of higher education that allow single-sex social fraternities and sororities to exist.

C. The Equality Act might be interpreted to make single-sex educational institutions illegal, even if they do not accept federal financial assistance.

D. The Equality Act might be interpreted to forbid religious educational institutions from admitting only students who share the school's beliefs.

A. The Equality Act will cut off federal tuition assistance to students at single-sex educational institutions.

Two federal laws forbid discrimination by institutions of higher education whose students receive federal student aid: (1) Title VI of the Civil Rights Act of 1964; and (2) Title IX of the Education Amendments of 1972.

Title VI forbids discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. 42 U.S.C. § 2000d. It does not forbid discrimination on the basis of sex.

Title IX forbids discrimination on the basis of sex in education programs or activities that receive federal financial assistance. 20 U.S.C. § 1681(a).

Given Title IX's ban on sex discrimination by schools receiving federal money, one might ask why single-sex colleges and universities are allowed to deny admission to one sex or the other and continue receiving federal money. The answer is this: both Title IX and its implementing regulations allow for single-sex institutions under specified circumstances. *See* 20 U.S.C. § 1681(a)(2), (4); 34 C.F.R. § 106.34(c).

Under current law, then, single-sex educational institutions are permitted to receive federal financial assistance because (1) Title VI does not forbid discrimination on the basis of sex; (2) Title IX has exemptions.

The Equality Act would dramatically alter the status quo by adding "sex" (conventionally understood) to Title VI. *See* H.R. 5, § 6. The Equality Act's amendment to Title VI does *not* contain the sort of exemptions that, in the Title IX context, have permitted single-sex institutions to receive federal financial assistance despite their "discriminatory" practices.

The continued existence of Title IX (and its exemptions) does not ameliorate the problem the Equality Act's amendment of Title VI would create. The fact that a single-sex school is not violating Title IX does not change the fact that it would violate Title VI if the Equality Act passes. Title IX has exemptions; Title VI will not. And one cannot simply "transport" or read Title IX's exemptions into Title VI.

Accordingly, if the Equality Act passes, students at single-sex educational institutions will be denied federal financial aid. The list of single-sex institutions whose students would lose aid includes Smith, Morehouse, Wellesley, Wabash, Barnard, Bryn Mawr, Hampden-Sydney, Mount Holyoke, and Scripps. One can expect these institutions to abandon their current admissions policies if the Equality Act passes. Whether the drafters or supporters of the Equality Act desire or intend this outcome is irrelevant.

Assuming one does not wish to defund students at single-sex institutions or to force single-sex schools to become co-educational, he or she should oppose the Equality Act.

B. The Equality Act might be interpreted to cut off federal tuition assistance to students at institutions of higher education that allow single-sex social fraternities and sororities to exist.

As discussed above, Title IX of the 1972 Education Amendments forbids discrimination on the basis of sex in education programs or activities that receive Federal financial assistance. 20 U.S.C. § 1681(a).

Under the Civil Rights Restoration Act of 1987 (which Congress adopted in response to the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984)), an educational institution that receives federal financial assistance may not discriminate on the basis of sex in *any* aspect of campus life—not just the particular program or activity receiving federal money.

The drafters of Title IX recognized that federally funded educational institutions would violate the statute's ban on sex discrimination if they supported, recognized, or tolerated single-sex social fraternities and sororities. Because they did not desire that outcome, they deemed it necessary to add an explicit exemption for single-sex social fraternities and sororities. That exemption states as follows:

> this section [i.e., the ban on sex discrimination] shall not apply to membership practices of a social fraternity or social sorority which is exempt from taxation

> under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education.

20 U.S.C. § 1681(a)(6)(A).

As discussed above, Section 6 of the Equality Act adds "sex" to Title VI of the 1964 Civil Rights Act. Congress has already established--given how it crafted Title IX of the 1972 Education Amendments--that federally funded colleges and universities subject to a ban on sex discrimination cannot have single-sex social fraternities and sororities UNLESS there is an explicit exemption specifically protected protecting that practice.

The Equality Act's addition of "sex" to Title VI of the 1964 Civil Rights Act has no such exemption. Therefore, federally funded colleges and universities will violate Title VI (as amended by the Equality Act) if they support, recognize, or tolerate single-sex social fraternities and sororities.

It is highly unlikely that colleges and universities will forfeit federal funding (including student aid) to ensure the continued existence of single-sex social fraternities and sororities. Schools will instead simple force Greek-letter organizations to become co-ed or disband. The Equality Act will likely mean the end of single-sex social fraternities and sororities in the United States. Again, whether the drafters or supporters of the Equality Act desire or intend this outcome is irrelevant.

Unless one favors the elimination of single-sex social fraternities and sororities, he or she should oppose the Equality Act.

C. <u>The Equality Act might be interpreted to make single-sex educational institutions illegal, even if they do not accept federal financial assistance</u>.

The Equality Act also amends Title II of the Civil Rights Act of 1964, which forbids discrimination on the basis of race, color, religion, or national origin in places of public accommodation. 42 U.S.C. § 2000a. It does so in two ways:

1. it adds "sex (including sexual orientation and gender identity)" to the list of protected characteristics; and
2. it dramatically expands the definition of "place of public accommodation" and thus the coverage of the law.

See H.R. 5, § 3. The expanded definition includes "any establishment that provides a good, service, or program." *Id.* § 3(a)(2)(C). Given the breadth of that language, there is a substantial possibility that educational institutions—which, after all, are establishments that offer educational "services" and "programs"—might be subject to Title II if the Equality Act passes.

[In fairness, it is also possible that courts will *not* conclude that private educational institutions are "places of public accommodation." An establishment is a place of public accommodation

only if it "serves the public." 42 U.S.C. § 2000a(b). It is not a place of public accommodation if it is "not in fact open to the public." 42 U.S.C. § 2000a(e).]

In any event, it is fair to say that there is a serious possibility that an adjudicator would conclude that at least some if not all private educational institutions are "places of public accommodation" under the Equality Act's expanded definition of that term.

Because the Equality Act would add "sex" (conventionally understood) to Title II, the law would forbid single-sex private educational institutions in such a circumstance.

There are enormous numbers of well-respected single-sex private educational institutions throughout the country. The Equality Act poses an unacceptable risk to their freedom to continue in their present form. Assuming one has no desire to eliminate single-sex educational institutions, he or she should vote oppose the Equality Act.

D. <u>The Equality Act might be interpreted to forbid religious educational institutions from admitting only students or families who share the school's beliefs</u>.

As noted above, Title II of the Civil Rights Act of 1964 forbids discrimination on the basis of race, color, *religion*, or national origin in places of public accommodation. 42 U.S.C. § 2000a (emphasis added).

As also noted above, the Equality Act's expanded definition of "place of public accommodation" might bring private educational institutions within the scope of Title II's coverage.

Were a court to reach that conclusion, the current practices of countless faith-based educational institutions would become illegal, as Title II bans discrimination on the basis of religion. Many institutions of higher education, including Biola University and Wheaton College, draw their student bodies from among applicants who share the schools' religious commitments. Many religious elementary and secondary schools form their communities from families who share common beliefs, typically requiring one or both parents to profess agreement with those beliefs.

This is a common and mostly uncontroversial practice legally permitted in every state. The Equality Act would jeopardize the freedom of faith-based schools to maintain their religious character through their admissions policies and practices.

Assuming one has no desire to risk outlawing such practices, he or she should oppose the Equality Act.