

# Religious Freedom, LGBT Rights, and the Prospects for Common Ground

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## Cultivating Common Ground

### *Lessons from Utah for Living with Our Differences*

Senator J. Stuart Adams

Across the United States, there is a palpable sense of uncertainty about whether tensions between gay rights and religious liberty will ever subside. After *Obergefell v. Hodges*,<sup>1</sup> a majority of the country finds itself with a new civil right handed down by court decision, with little to no statutory law to answer the predictable questions that have arisen. Must those who adhere to a traditional view of marriage facilitate marriages even when doing so violates their deeply held religious beliefs? Does the answer depend on whether the person or entity is a church, a private citizen, or a government employee? Can a church lose its tax exemption for declining to facilitate or celebrate a marriage it cannot recognize as a matter of its faith? Does it matter if the entity contracts with the government to provide services to children and families or if a person or business provides commercial goods for weddings, as in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>2</sup> a case presently decided by the US Supreme Court? These and other downstream concerns after *Obergefell* echo with an age-old question: When do the rights of one person stop and those of another begin?

Same-sex marriage decisions rippled across America even before *Obergefell*, with Utah at the leading edge.<sup>3</sup> Like a majority of states, Utah found itself grappling with a state same-sex marriage ban that had been struck and no playbook for how to proceed – not even a statewide nondiscrimination law.

The swirling uncertainty clouded matters not just for faith communities and individual believers, but for gay couples, too. Consider this: Who would preside over marriage for gay couples wanting to marry? At the time that same-sex marriage was recognized in Utah, Utah law imposed no duty for anyone to marry heterosexual

<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> No. 16–111, 2017 WL 4232758 (U.S. Aug. 31, 2017).

<sup>3</sup> *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).

couples, let alone gay couples.<sup>4</sup> Like Americans across the country who see marriage as a religious event,<sup>5</sup> many in Utah expressed concern about being asked to legally bring into existence a relationship that they could not assist with as a matter of faith. This should surprise no one since Utah is the second most religious state in America.<sup>6</sup> But Utah had no ready answers.

Even in parts of the country that had preexisting statewide laws banning sexual (SOGI) discrimination, as just under half the states did then and do today, those laws all predated same-sex marriage.<sup>7</sup> Laws written without same-sex marriage in mind cannot, by their very terms, assure traditional religious believers that they need not fear legal repercussions for speaking in favor of traditional marriage or for supporting those in traditional marriages through religious counseling and marriage retreats or in sundry other ways.

At times of great social change, people naturally look to legislators to forge common ground where others only see legal battlefields. When legislators do not act, courts are left to decide competing rights without the advantages of the legislative process, which affords opportunities such as hearings for multiple stakeholders to weigh in. Without the opportunity to forge common ground, communities that have a tremendous amount at stake pursue answers in court, which often results in winner-takes-all outcomes.

The easiest thing for the Utah State Legislature to have done would have been to provide assurance to the religious community only. But we charted a new path: We gave much-needed protections to *two* communities often pitted against one another – people of faith and the full LGBT community. This resulted in a stable law that has brought peace, security, and respect to all Utahns.

Plowing the field for common ground is hard work. It requires sensitivity to the diverse needs of a state's many citizens, respect for the state's body of preexisting law, and sometimes new thinking about how to maximize freedom for all our citizens, without offending equality, liberty, religious freedom, and other values we hold dear.

This chapter charts the evolution of Utah's marriage and nondiscrimination law from a constitutional amendment barring same-sex marriage to attempts to enact nondiscrimination protections to a two-bill package. That package protected the full LGBT community from discrimination in housing and hiring while cementing more protections around marriage than any other state in America.<sup>8</sup> As the majority

<sup>4</sup> See *infra*, note 86.

<sup>5</sup> Marriage Update, Rasmussen Reports (June 25, 2015), <https://perma.cc/U7L6-WL8B> (finding that 50% of Americans “consider marriage a religious institution”).

<sup>6</sup> Mark Kellner, *Utah Is Second Most-Religious State, Mississippi Ranks First and Vermont Last*, DESERET NEWS (Feb. 5, 2014), <https://perma.cc/3Y7J-J5R3>.

<sup>7</sup> See Wilson, Chapter 30.

<sup>8</sup> Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 265–68 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

whip in the Utah Senate, I carried the bill that answered many of the then-unanswered questions. This chapter offers lessons for the challenges facing the United States as it struggles with the scripts we have inherited for navigating religious freedom and LGBT rights – scripts that affirm the value of only one community. Utah wrote a new script about peaceful coexistence and living with our differences, even when they go to things as deep as attraction or the God we worship.

In a tolerant, inclusive, peaceful America, we can write new scripts that ensure that all of us can live according to those things most dear to us, without fear of repercussions.

### I UTAH'S EVOLVING SCRIPT ON MARRIAGE

The saga over same-sex marriage unfolded in Utah much as it did in most of the country. In 2015, Utah received same-sex marriage by judicial decision with no positive law surrounding it.

At the time, only twenty-one states and the District of Columbia banned discrimination based on sexual orientation or gender identity in housing, hiring, and public accommodations.<sup>9</sup> As explained later in this chapter, Utah's landmark legislation provided protections against discrimination for the full LGBT community in housing and hiring.<sup>10</sup> Some states had statutory protections around marriage because those states had enacted laws recognizing same-sex marriage.<sup>11</sup> Otherwise, the country was a blank slate.

The case law of some states subjects religious burdens to heightened scrutiny,<sup>12</sup> other states police infringements on religious belief or practice with state Religious Freedom Restoration Acts.<sup>13</sup> Some do both.<sup>14</sup>

<sup>9</sup> See Appendix, *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 541–43 (Robin Fretwell Wilson ed., 2018). The states banning discrimination based on sexual orientation or gender identity in housing, hiring, and public accommodations are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, as well as the District of Columbia. See Appendix, Chapter 35, at Col. 2.

<sup>10</sup> See *infra* Section IV.

<sup>11</sup> Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703 (2014).

<sup>12</sup> These states include Alaska, Arkansas, Hawaii, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington, and Wisconsin. See Appendix, Chapter 35, at Col. 1.

<sup>13</sup> These states include Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. See Appendix, Chapter 35, at Col. 1.

<sup>14</sup> These states include Arkansas, Indiana, Kansas, Mississippi, Pennsylvania, Tennessee, and Virginia. See Appendix, Chapter 35, at Col. 1.

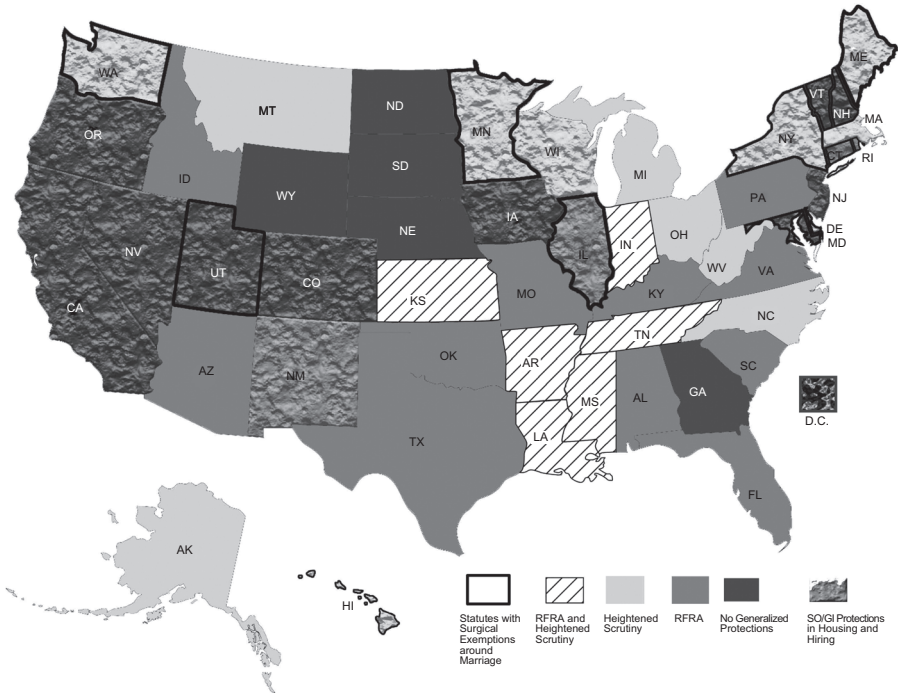


FIGURE 32.1 Patterns of religious liberty protections and SOGI nondiscrimination laws

Utah had neither a RFRA nor heightened scrutiny of religious burdens in its constitution and still does not.<sup>15</sup> In 2015, it did not protect the LGBT community from discrimination of any kind.

As Figure 32.1 details, six states today follow this pattern of not giving special protection to religion or the LGBT community.<sup>16</sup> But most speak to religious protections *or* LGBT rights. Some states give special protection to religious believers through constitutional guarantees *and* state RFRAs.<sup>17</sup> Some give heightened protection only in their state constitutions,<sup>18</sup> others only through a RFRA.<sup>19</sup> Eleven states and the District of Columbia give protections to the LGBT community but make no

<sup>15</sup> See THE CONTESTED PLACE, *supra* note 9, at 541–43.  
<sup>16</sup> These states are Georgia, Nebraska, North Dakota, South Dakota, West Virginia, and Wyoming. See Appendix, Chapter 35, at Cols. 1 & 2.  
<sup>17</sup> These states are Arkansas, Indiana, Kansas, Mississippi, Pennsylvania, Tennessee, and Virginia. See Appendix, Chapter 35, at Cols. 1 & 2.  
<sup>18</sup> These states are Alaska, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Montana, New York, North Carolina, Ohio, Washington, and Wisconsin. See Appendix, Chapter 35, at Col. 1.  
<sup>19</sup> These states are Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kentucky, Louisiana, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas. See Appendix, Chapter 35, at Col. 1.

general concessions for religious practice.<sup>20</sup> A number give special statutory protections for religious practice and protect LGBT persons from discrimination.<sup>21</sup> Roughly half of the states that banned discrimination against LGBT persons made specific rules for marriage.<sup>22</sup>

RFRA allows faith communities to do good work and protect religious minorities from government overreach – both important to Utahns. But we concluded quickly that a RFRA was not adequate to provide answers to what should happen around marriage, for three reasons. First, a RFRA had not been successfully invoked at that point against a nondiscrimination statute despite twenty-three years of history.<sup>23</sup> Unlike RFRA, legislative protections for specific religious practices around marriage give courts greater clarity about how the legislature intends for specific disputes to be resolved and are more likely to be enforced.<sup>24</sup>

Second, RFRA requires parties to litigate in order to get clarity about what is permitted and what is not. That litigation is taxing financially and emotionally. Worse, it is wholly unnecessary if it is within the power of the legislature to decide, *ex ante*, where one party's rights end and another's begins. As will be apparent later in this chapter, legislators have the ability to craft new solutions that avoid having to pick winners and losers – in other words, to cultivate ways to avoid having one person's interests come at the expense of another. But only legislatures have the institutional competence to write those new scripts. RFRA leaves courts largely to pick winners and losers under older, less nimble scripts.

Third, Utah faced this question shortly after Arizona's attempt to revise its existing RFRA sparked boycotts and damaged the state's image.<sup>25</sup> Religious stakeholders during the debate expressed a desire for RFRA "to stave off gay rights,"<sup>26</sup> something RFRA is largely incapable of doing.<sup>27</sup> But that misunderstanding tarnished RFRA. After Arizona, enacting RFRA has become politically costly, if not impossible.<sup>28</sup>

<sup>20</sup> These states are California, Colorado, Delaware, Iowa, Maryland, Nevada, New Hampshire, New Jersey, Oregon, Utah, Vermont, and the District of Columbia. See Appendix, Chapter 35, at Cols. 1 & 2.

<sup>21</sup> These states are Connecticut, Illinois, New Mexico, and Rhode Island. See Appendix, Chapter 35, at Cols. 2 & 5.

<sup>22</sup> See *supra* note 9 (listing Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia).

<sup>23</sup> See Laycock, Chapter 3, for evaluation of success of RFRA claims asserted against nondiscrimination statutes.

<sup>24</sup> See generally Wilson, *supra* note 11.

<sup>25</sup> Libby Hill, *Some Call It Religious Freedom, Others Call It Anti-Gay. Here's a Look at the Battle in Some States*, L.A. TIMES (Apr. 5, 2016), <https://perma.cc/74YZ-GNKX>.

<sup>26</sup> Juliet Eilperin, *After Veto in Arizona, Conservatives Vow to Fight for Religious Liberties*, WASH. POST (Feb. 27, 2014), <https://perma.cc/MX42-YMAD>.

<sup>27</sup> See *supra* note 26.

<sup>28</sup> See Emma Margolin, *Did Indiana and Arkansas Kill "Religious Freedom" for Everyone Else?*, MSNBC (Apr. 3, 2015), <https://perma.cc/FS63-CTSV>.

During the same session in which Utah enacted landmark legislation described later in this chapter, a RFRA-type bill was introduced but died in the Utah Senate.<sup>29</sup>

### *A Utah's Marriage Law and LGBT Ordinances before Same-Sex Marriage*

In November 2004, Utah passed a Constitutional amendment by an “overwhelming” margin recognizing marriage only between a man and a woman, one of eleven states that passed similar amendments that year<sup>30</sup> after Massachusetts first recognized same-sex marriage by court decision.<sup>31</sup> At the time, I stood with my colleagues in the House of Representatives, where I served, as we passed that amendment. I felt it went to the core of values I and other Utahns consider most dear: family, sexuality, and religious beliefs. We believed we had bulletproofed traditional marriage.

Not long after, in 2008, a small contingent of mostly Democrat legislators began introducing nondiscrimination legislation in the House to protect LGBT persons from discrimination in housing and hiring, with little traction.<sup>32</sup> During that same period, Utah municipalities began enacting nondiscrimination ordinances, led first by Salt Lake City in 2010.<sup>33</sup> By 2015, eleven cities and towns and three counties had passed LGBT employment and housing nondiscrimination protections.<sup>34</sup> However, none protected against discrimination based on gender identity. This patchwork of local rules created inconsistencies across Utah for employers operating in more than one jurisdiction. Because they were written before same-sex marriage in Utah, the ordinances could not have included specific protections around traditional marriage, even though the municipalities included categorical exemptions for religious employers.<sup>35</sup>

After Salt Lake City enacted its nondiscrimination ordinance in 2010, another nondiscrimination bill was introduced in the House.<sup>36</sup> It was followed in 2011 and 2012 by Senate bills that died without a hearing or were tabled.<sup>37</sup> In 2013, Senator Stephen Urquhart introduced SB 262, which was sent to the Senate floor but was never debated.<sup>38</sup>

<sup>29</sup> H.B. 322, Gen. Sess. (Utah 2015).

<sup>30</sup> UTAH CONST. art. I, § 29; James Dao, *Same-Sex Marriage Issues Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2014), <https://perma.cc/QC7E-76KP>.

<sup>31</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>32</sup> See S.B. 148, Gen. Sess. (Utah 2011); H.B. 305, Gen. Sess. (Utah 2010); H.B. 267, Gen. Sess. (Utah 2009).

<sup>33</sup> See Salt Lake City Ordinance No. 63 (2009), <https://perma.cc/gTMM-NNWE>.

<sup>34</sup> See Equality Utah, *Housing and Workplace Discrimination in Utah 15* (Jan. 2011), <https://perma.cc/DTK3-YVFF>; Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, <https://perma.cc/X57G-KTX8>.

<sup>35</sup> *Id.*

<sup>36</sup> H.B. 305, Gen. Sess. (Utah 2010).

<sup>37</sup> S.B. 148, Gen. Sess. (Utah 2011); S.B. 51, Gen. Sess. (Utah 2012).

<sup>38</sup> S.B. 262, Gen. Sess. (Utah 2013).



Then, on December 20, 2013, Judge Robert Shelby handed down *Kitchen*.<sup>39</sup> *Kitchen* gave no guidance about how to implement such a fundamental shift in state policy, nor did it provide protections for those who adhere to a traditional view of marriage or have strongly held religious beliefs.

There was significant tension on both sides. Some Utahns wanted to secede from the union.<sup>40</sup> Others felt that *Kitchen* was a harbinger of even more successes. In 2014, Senator Urquhart introduced SB 100.<sup>41</sup> Frustrated by the lack of progress, LGBT supporters taped “blue notes” to legislators to the Senate chamber doors, Martin Luther-style, demanding that SB 100 be heard in committee.<sup>42</sup> They blocked entrances to committee rooms and the governor’s office; thirteen people were arrested.<sup>43</sup>

The state immediately appealed *Kitchen* to the US Court of Appeals for the Tenth Circuit.<sup>44</sup> Judge Shelby declined to stay his decision, but the US Supreme Court ordered a stay.<sup>45</sup> As the substantive appeal percolated at the Tenth Circuit, our legislative leadership, despite great social pressure, held all relevant legislation; we needed clarity from the Tenth Circuit.

On June 25, 2014, the Tenth Circuit affirmed Judge Shelby’s ruling.<sup>46</sup> On November 4, 2014, the US Supreme Court denied *certiorari*.<sup>47</sup> The stay was lifted and couples began marrying.<sup>48</sup>

For communities that feel on the outside looking in, courts can be important agents of change, as *Kitchen* shows. Yet, the recognition of new civil rights by courts almost always creates as many new questions as are answered. However, legislatures are where all citizens can be heard, whether their interests are directly implicated or they simply care deeply about the state, its citizens, and their welfare. With a raft of unanswered questions, Utah’s Legislature had to step in and fill the gap.

<sup>39</sup> *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

<sup>40</sup> *How Utah’s Compromise Could Serve as a Model for Other States*, NPR (June 1, 2016), <https://perma.cc/358X-ML94>.

<sup>41</sup> S.B. 100, Gen. Sess. (Utah 2014).

<sup>42</sup> Bob Henline, “Operation Blue Note” Underway at Utah State Capitol, SALT LAKE MAG. (Feb. 3, 2014), <https://perma.cc/EV5L-G3R8>.

<sup>43</sup> Dennis Romboy & Lisa R. Roche, *Protesters Arrested After Blocking Senate Committee Room*, KSL (Feb. 10, 2014), <https://perma.cc/3EG2-XAPE>.

<sup>44</sup> Lee Davidson, *Utah Legislators May Rewrite State Law on Gay Marriage*, SALT LAKE TRIB. (Oct. 6, 2014), <https://perma.cc/2DSM-JXAL>.

<sup>45</sup> Brooke Adams & Lindsay Whitehurst, *Supreme Court Halts Utah Gay Marriages Pending Appeal*, SALT LAKE TRIB. (Jan. 7, 2014), <http://archive.sltrib.com/story.php?ref=/sltrib/news/57357406-78/court-utah-state-stay.html.csp>.

<sup>46</sup> *Kitchen*, 755 F.3d 1193.

<sup>47</sup> 135 S. Ct. 265 (2014).

<sup>48</sup> Dennis Romboy, *Same-Sex Marriage Now Legal in Utah*, DESERET NEWS (Oct. 6, 2014), <https://perma.cc/8NFF-V4SS>.

Many legislators were frustrated by *Kitchen*. Most gave a rumored LGBT non-discrimination bill little hope of passage. Several proposals for religious liberty legislation were expected, too, including the RFRA mentioned earlier. With both types of bills moving down the tracks, the rights of Utahns were on a collision course.

### B *An Unprecedented Request for an Alternative to Intolerance*

Then, something unprecedented happened. On the second of our forty-five day session,<sup>49</sup> The Church of Jesus Christ of Latter-day Saints, sometimes called The LDS Church or Mormon Church (the Church), held a press conference.<sup>50</sup> The Church requested the Utah Legislature find a way to combine protections for religious liberty and for LGBT persons from discrimination in employment and housing.<sup>51</sup>

Elder Jeffrey R. Holland, a member of the Church's governing Quorum of the Twelve Apostles, finished the press conference with a call for "an alternative to the rhetoric and intolerance that for too long has come to characterize national debate."<sup>52</sup>

The Church urged the legislature to follow one overarching principle: "fairness for all" – that is, an "approach that balances religious freedom protections with reasonable safeguards for LGBT people – specifically in areas of housing, employment and public transportation, which are not available in many parts of the country."<sup>53</sup> This desire to protect both communities has its genesis in one of the Church's fundamental beliefs: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may."<sup>54</sup> To say the Church's announcement generated a tectonic shift in the dialogue would be an understatement.

The legislature put this principle into law, creating a space for everyone to act according to individual conscience – whether a member of the LGBT community, a person of faith, or both. Bringing all the stakeholders to the table – and keeping them there – was a formidable challenge, especially when advocates for different communities sometimes prioritized different needs.

Judicial rulings, particularly around heated social conflicts, create winners and losers – one side's perspective emerges victorious. The legislative process has the

<sup>49</sup> See Michelle L. Price, *Utah Legislature Enters Final Days of Session*, DAILY HERALD (Mar. 11, 2013), <https://perma.cc/39J7-DMXN>.

<sup>50</sup> The Church of Jesus Christ of Latter-day Saints, *Transcript of News Conference on Religious Freedom and Nondiscrimination* (Jan. 27, 2015), <https://perma.cc/EPR3-B6L6>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (statement of Elder Dallin H. Oaks).

<sup>54</sup> The Church of Jesus Christ of Latter-day Saints, *Articles of Faith* (1842), <https://perma.cc/95XY-RVLW>.

advantage of negotiation and compromise; it tempers absolutes while allowing both sides to share in the gains and losses.

Our session's time limitation proved advantageous. It placed everyone under immense pressure, focusing stakeholders on finding an acceptable balance. A few weeks into the session, the coeditor of this volume, Professor Robin Fretwell Wilson, visited Utah to speak at a conference. Given her expertise,<sup>55</sup> I asked Professor Wilson to help with drafting the bill. She volunteered her time and expertise until the legislative session ended. Without her involvement, that of Professor Cliff Rosky of the University of Utah's College of Law, an influential voice within Equality Utah,<sup>56</sup> representatives of The Church of Jesus Christ of Latter-day Saints and other faith traditions, and our own legislative counsel, our efforts would not have been successful. Remarkably, with days left in the session, we had cultivated common ground.

## II CONTOURS OF COMMON GROUND

Together, SB 296 and 297 were dubbed by the press as the Utah Compromise. In drafting the two bills, we were guided by a number of principles.

### *A Involve Everyone and Listen Earnestly*

We did what legislators should do: get stakeholders across the spectrum to find constructive solutions. We sat down with members of Utah's LGBT community, social conservatives, and business leaders. Many were familiar to us as seasoned advocates at the statehouse, others we had never met, especially from the LGBT community. We listened to stories they shared of feeling like outcasts and second-class citizens. Putting a human face to legislative needs changed the tenor of the discussion. Similarly, those who expressed concerns for religious liberty, as I did, felt listened to and respected, as well. That process was not only best done legislatively, it could only be done legislatively.

### *B Meet Each Side's Core Needs*

The Utah Compromise gives the LGBT community more protections than it had in New York at the time.<sup>57</sup> SB 296, the Employment and Housing Antidiscrimination Amendments, modified Utah's Antidiscrimination Act and the Utah Fair

<sup>55</sup> SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello & Robin Fretwell Wilson eds., 2008).

<sup>56</sup> See e.g., Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).

<sup>57</sup> See Office of N.Y. State Office of the Attorney Gen. Eric T. Schneiderman, *The Sexual Orientation Non-Discrimination Act (SONDA)*, <https://perma.cc/5QG2-5H37>.

Housing Act to protect the full LGBT community from discrimination.<sup>58</sup> The inclusion of not only sexual orientation, but also gender identity, as illicit grounds for hiring or housing decisions puts Utah on a short list of states with these protections.<sup>59</sup> Incidentally, the law did not reach public accommodations because no municipal law had reached so far, and we did not have the benefit of the thinking of our municipal counterparts on questions such as those raised by *Masterpiece*.

Protection of the transgender population was not easy in a deeply conservative and religious state.<sup>60</sup> But inclusion of the full LGBT community was a must-have for Equality Utah and others. And it proved positive, resolving issues much of the country still struggles with.<sup>61</sup>

As noted next, SB 296 also maintained Utah's existing carve-out of religious entities in employment, but expanded it to include religious primary and secondary schools, as well as the Boy Scouts.<sup>62</sup> SB 296 carried forward and extended somewhat similar carve-outs in the housing context, too.<sup>63</sup>

We were cognizant of the need not to roll back at-will employment or hobble employers unduly. Under SB 296, employers have a duty to meet the gender-based needs of all employees. Employers control the workplace environment through reasonable dress and grooming standards and reasonable policies that preserve "sex-specific facilities," like restrooms.<sup>64</sup> This permits them to respect the privacy of transgendered employees and their coworkers by means as simple as locked stalls or an individual restroom.

### C *Leave in Place Existing Law as Much as Possible*

Creating a whole new set of rights and obligations *only as to* sexual orientation and gender identity might have created unintended consequences. We feared we would inadvertently fail to replicate something from existing law in a new, separate chapter. And having a single, all-inclusive nondiscrimination law proved important to the LGBT community, too.<sup>65</sup>

We began with the existing scaffolding of Utah's law, which protected Utahns from discrimination in housing and hiring of the basis of race, sex, color, national

<sup>58</sup> S.B. 296, Gen. Sess. (Utah 2015); UTAH CODE § 34A-5-106 (2015).

<sup>59</sup> See *supra* Section I.

<sup>60</sup> See Philip Bump, *America's Reddest and Bluest Places*, WASH. POST (Dec. 4, 2014), <https://perma.cc/LS9H-XDZ4>.

<sup>61</sup> See Minter, Chapter 4; Pizer, Chapter 29.

<sup>62</sup> UTAH CODE §§ 34A-5-102(i), 57-21-2(1), 57-21-3(b) (2015).

<sup>63</sup> § 57-21-3 (4)(a)(i) (2015).

<sup>64</sup> § 34A-5-109.

<sup>65</sup> Zack Ford, *Utah Bill Would Ban LGBT Discrimination, With Some Big Exceptions*, THINK PROGRESS (Mar. 6, 2015), <https://perma.cc/RB7G-BVA2>.

origin, religion, age, and disability and categorically set aside religious organizations.<sup>66</sup> In practice, this meant that churches were not regulated as employers, nor were their wholly owned subsidiaries.

SB 296 also maintained the fifteen-employee threshold for discrimination claims,<sup>67</sup> ensuring that Utah's small family-run businesses could nimbly manage their workplaces according to their values without government interference. Some fault Utah for not increasing the number of employees a business could have and remain outside the nondiscrimination structure.<sup>68</sup> Raising the limit in preexisting Utah law, however, would have meant either rolling back existing nondiscrimination protections for people of color and other protected classes or creating a two-tier structure in which LGBT discrimination receives less protection. Both results offended principles of just and fair treatment, in our view. And both were unnecessary given the capaciousness of Utah's existing treatment for employers, one of the most generous in the nation.

Preexisting protections for religious liberty were not disturbed either. SB 296 and 297 instructed courts not to interpret provisions "to infringe upon the freedom of expressive association or the free exercise of religion" protected by the United States and Utah constitutions.<sup>69</sup>

#### D Give Clarity About the Duties Owed

Definitions do a lot of the important work in statutes. One tricky definition was "gender identity," where we believed a medically objective definition would provide the needed clarity for employers and employees about when duties and protections were triggered. Borrowing the documentation requirement from Connecticut and other states with a longer history of protecting transgender individuals,<sup>70</sup> we agreed on the following definition:

"Gender identity" has the meaning provided in the [American Psychiatric Association's] Diagnostic and Statistical Manual (DSM-5). A person's gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose.<sup>71</sup>

<sup>66</sup> UTAH CODE §§ 34A-5-102(1)(i)(ii)(A)-(C), 34A-5-104 (2015).

<sup>67</sup> § 34A-5-102(a)(i)(D).

<sup>68</sup> Andrew T. Walker & Russell Moore, *Is Utah's LGBT-Religious Liberty Bill Good Policy?*, ETHICS & RELIGIOUS LIBERTY COMM'N OF THE S. BAPTIST CONVENTION (Mar. 6, 2015), <https://penma.cc/38BR-CQRC> (describing the fifteen-employee limit as an "arbitrary threshold").

<sup>69</sup> UTAH CODE §§ 34A-5-111, 63G-20-103(1) (2016).

<sup>70</sup> CONN. GEN. STAT. § 46a-51 (2016). See also DEL. CODE tit. 19, § 710 (2014).

<sup>71</sup> § 34A-5-102(k). See Am. Psychiatric Ass'n, *Gender Dysphoria Fact Sheet* (2013), [https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-5-Gender-Dysphoria.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf).

The condition must continue and be treated for at least six months. By requiring documentation, employers and landlords received an important safeguard against fraudulent claims. Transgender renters and employees gained valuable protections against discrimination in employment and housing.

Some might dismiss the definition as an unwarranted burden, having to provide a doctor's note. We sought consciously to benefit from the experience of legislators across the country to allow a variety of evidence; we also understood that many in the transgender community receive care or treatment, making evidence of this kind readily available.

### E. *Preserve the Autonomy of Faith Communities*

Before the Utah Compromise, Utah's nondiscrimination statute never reached certain religious organizations – this structural feature is less an exemption than a set-aside, separating society into secular and sectarian spheres. SB 296 and 297 carried forward that separate-spheres model.<sup>72</sup> We also retained discretion in hiring when an employer needs workers with specific characteristics, called *bona fide* occupational qualifications.<sup>73</sup>

Utah's previous protections omitted Utah's freestanding religious schools. Numbering in the dozens, these schools include those in Catholic, Baptist, and evangelical traditions.<sup>74</sup> Such religious schools receive insulation even if not owned or directed by a specific church.

As a lay church, religious figures in The Church of Jesus Christ of Latter-day Saints as well as members of other religious traditions often are business people who also hold religious office, that dual identity opens the possibility for punishment by secular authorities for disfavored positions through, for example, loss of one's professional license. We protected speech in a nonreligious setting and forestalled such results.<sup>75</sup>

The division of secular and sectarian occurred in housing, too. As Professor Wilson observed at the time: "SB296 accomplishes a balancing act between non-discrimination protections and religious liberties by placing faith groups outside the bounds of state dictates. Thus, existing law simply exempts religious sole corporations, like the LDS Church, giving them much-needed autonomy [and also] leaves aside wholly-owned corporations, the classic example of which is Brigham Young University."<sup>76</sup>

<sup>72</sup> UTAH CODE § 34A-5-102(i)(ii).

<sup>73</sup> § 34A-5-106(3)(a)(i).

<sup>74</sup> Robin Fretwell Wilson, *SB296 Comes in the American Tradition of Live and Let Live*, SALT LAKE TRIB. (Mar. 9, 2017), <https://perma.cc/2NLC-HFVH>; UTAH CODE § 34A-5-106(3)(a)(ii).

<sup>75</sup> 2015 Utah S.B. 297, Gen. Sess. (Utah 2015), <https://perma.cc/6Y84-7NNT>.

<sup>76</sup> Wilson, *supra* note 74.

### F Recognize the Dual Nature of Marriage as Civil and Religious

SB 297, Protections For Religious Expression And Beliefs About Marriage, Family Or Sexuality, protects specific practices related to marriage, borrowing from the states that voluntarily enacted same-sex marriage by statute or initiative.<sup>77</sup> Like those states, we protected the decision not to solemnize, host, or facilitate a marriage on religious grounds, gave step-offs for the clergy, allowed religious counselors to decide whom they would counsel, and protected those covered from lawsuits and government coercion.<sup>78</sup> We assured religious groups that government could not strip their ability to perform recognized marriages if a group or official declined to perform same-sex marriages.<sup>79</sup>

We gave absolutely essential assurance to religious groups that avail themselves of protections that their tax-exempt status would not be disturbed.<sup>80</sup> While Professor William N. Eskridge, Jr. in this volume urges that tax exemption would not be at risk even in the absence of specific protections, statutes have a calming and norming effect. Explicit protections both signal to disappointed parties that moving against a religious entity's tax exemption will serve no purpose and avoids the chilling effect that might follow silence in the law on such a central question.

We avoided the unseemliness of clerks turning away gay couples, too.<sup>81</sup> SB 297 creates, for the first time in Utah, a legal duty for someone to provide solemnization services for every couple with the legal right to marry.<sup>82</sup> But we provided a mechanism that avoids needless clashes over conscience. The innovation: the county clerk's office can designate any willing celebrant, whether a worker in the office or someone in the community authorized and willing to perform marriages for all who ask. Offices might select someone in the community for a variety of reasons, including scheduling and a staff working at capacity. Should no one be willing, the county clerk is required to perform marriages.

<sup>77</sup> S.B. 297, Gen. Sess. (Utah 2015); *supra* note 9 [Marriage statutes like HB 438 (Md. 2012)].

<sup>78</sup> S.B. 297, Gen. Sess. (Utah 2015).

<sup>79</sup> § 63G-20-201(2).

<sup>80</sup> UTAH CODE § 63G-20-102(1)(b)(i) (2016). Government retaliation includes "impos[ition of] a formal penalty on, fines, disciplines, discriminat[ion] against, deni[al of] the rights of den[ial of] benefits to, or deni[al of] tax-exempt status of a person." *Id.* § 63G-20-102(1)(b)(i).

<sup>81</sup> Rowan County, Kentucky clerk Kim Davis refused to issue any marriage licenses after the legalization of same-sex marriage and blocked others from doing so, too. The ACLU sued in federal court, which ruled all couples must be provided licenses. Davis refused, was held in contempt of court, jailed, and then released under order to not interfere with others issuing marriage licenses. Davis appealed, but dismissed her appeal after Kentucky enacted a law removing the names and signatures of county clerks from marriage licenses. *Miller v. Davis*, ACLU (Sept. 19, 2016), <https://perma.cc/UVPS-7GLM>. Kentucky has since paid \$225,000 in fees in that litigation. John Cheves, *State of Kentucky Must Pay Nearly \$225,000 in Legal Fees for Kim Davis Case*, LEXINGTON HERALD LEADER (July 21, 2017), <https://perma.cc/BW3A-AG5G>.

<sup>82</sup> UTAH CODE §17-20-4 (1)-(2).

Whatever method used, every clerk's office must provide immediate service to all couples.<sup>83</sup> There can be no retaliation from the government if an employee other than the elected clerk chooses not to solemnize a marriage – and no one need know of that choice, avoiding the humiliation experienced by gay couples elsewhere.<sup>84</sup> This means government workers are not forced to violate their consciences *and* LGBT people are treated like everyone else, receiving seamless access to marriage – a win-win. This common sense solution – removing religious persons from choke points on the path to constitutional rights – has saved Utah and its citizens from destructive litigation.

Consider the North Carolina magistrate who asked not to perform marriages before North Carolina enacted a law allowing magistrates to recuse themselves;<sup>85</sup> she was given no recourse other than quitting or being fired, despite protections for religious exercise under the federal employment nondiscrimination law, Title VII of the Civil Rights Act of 1964.<sup>86</sup> Title VII permits reasonable accommodation for a religious belief or practice where it does not cause an undue burden on the employer or coworkers. Receiving no accommodation, the magistrate left her job and went for years without wages or benefits amounting to \$210,000.00.<sup>87</sup> To recoup, she had to file a complaint with the federal authorities, attend hearings and arguments, wait on the decision, navigate a settlement, and face the harsh light of national media. Like Kentucky in Kim Davis's case, North Carolina paid \$325,000 to settle the case. It was a loss for everyone involved. Far better to avoid these considerable human costs by taking citizens out of positions of conflict, avoiding the need to pick winners and losers.

### G Give Everyone as Much Liberty as Possible Without Infringing Other Values

A hallmark of the Utah Compromise was its emphasis on individual liberties. At a time of great fear about the place of traditional values in our culture, we were especially concerned to permit Utahns space to speak about their religious and moral commitments. To honor the principle of fairness for all, protections for speech needed to extend to all, whether the speaker held a traditional view or not.

SB 296 protects employees from discrimination based on their nondisruptive expression within the workplace about marriage, family, and sexuality where

<sup>83</sup> *Id.*

<sup>84</sup> § 63G-20-102 (1).

<sup>85</sup> S.B. 2, Gen. Assem. (N.C. 2015).

<sup>86</sup> *Myrick v. Warren*, 16-EEOC-0001 (2017), <https://perma.cc/TX67-JCHB> (holding that under Title VII, 42 U.S.C. §§ 2000e to 2000e-17, the North Carolina Administrative Office of Courts discriminated against the former magistrate by failing to accommodate her religious belief against participating in same-sex marriages).

<sup>87</sup> Settlement Agreement and Release, BECKET (Jan. 23, 2018), <https://perma.cc/N9HR-PYCz>.



employers permit such speech by anyone and it is not “in direct conflict with the essential business-related interests of the employer.”<sup>88</sup> This protection extends outside the workplace, too. Employers may not take action against an otherwise qualified person for lawful expression outside the workplace regarding the person’s religious, political, or personal convictions, including convictions about marriage, family, or sexuality.<sup>89</sup> So, whether an employee attends a pro-life rally or a gay-pride parade on the weekend, they cannot be reprimanded for that at work.

Disagreement on these matters will not disappear overnight, if ever. In our democratic society, people must remain free to believe and speak on those topics, whatever view they hold, without fear of government retaliation or censure.

### *H End Divisiveness with an Enduring Compact*

SB 296 reflected “the Legislature’s balancing of competing interests.”<sup>90</sup> We preempted local law that was inconsistent to give employers uniformity across the state.<sup>91</sup> We tied the fate of protections for both sides to one another through a non-severability clause. Thus, if any part of the bill is invalidated by a court, the remainder will be “rendered without effect and void.”<sup>92</sup>

This measure keeps both sides honest – no one is incentivized to undo concessions through litigation. Though unusual, adding a non-severability provision assured stakeholders that the arrived-at bargain would not be revisited, permitting everyone to move forward.

### III UTAH’S UNPLOWED GROUND

True, we did not provide answers for every question sparked by *Kitchen*, as this volume illustrates.<sup>93</sup> The Utah Compromise did not extend to public accommodations, to the chagrin of some.<sup>94</sup> We lacked the benefit of local laws to guide our decision-making. The Utah Legislature is inherently cautious about regulating to questions that have not been tested on a smaller field.

Still, we are proud to have enacted protections that outstrip those in many “blue” states. Indeed, nondiscrimination norms established in the Utah

<sup>88</sup> UTAH CODE § 34A-5-112.

<sup>89</sup> *Id.*

<sup>90</sup> UTAH CODE § 34A-5-102.7.

<sup>91</sup> § 57-21-2.5.

<sup>92</sup> § 57-21-2.7.

<sup>93</sup> For a discussion of special concerns raised by public accommodations, see e.g., Laycock, Chapter 3; Krotoszynski, Chapter 7; Melling, Chapter 19; Eskridge, Chapter 22; Hollman, Chapter 23; McConnell, Chapter 28; and Pizer, Chapter 29.

<sup>94</sup> UTAH CODE § 13-7-1 et seq; Nelson Tebbe, et al., *Utah “Compromise” to Protect LGBT Citizens from Discrimination Is No Model for the Nation*, SLATE (Mar. 18, 2015), <https://perma.cc/E9SX-H5WV>.

Compromise shape Utah's culture to be a more inclusive, tolerant one – even in public places.

Other unplowed ground: how to ensure faith-guided child welfare agencies can make placements of children that are consistent with their faith tenets – a pressing concern in states where religious adoption agencies are shouldering much of the load. As the CEO of the National Council for Adoption has observed, “the whole [adoption] system would collapse on itself” if religious adoption agencies closed.<sup>95</sup> Many close when faced with violating their faith tenets.<sup>96</sup>

In Utah, LDS Family Services long placed between 300 and 600 children annually.<sup>97</sup> But this “titan in the domestic adoption field” closed its adoption placement services in Utah before the Utah Compromise.<sup>98</sup> Faith-guided adoption agencies are “especially effective in placing special needs children who usually are hard to place.”<sup>99</sup> The protection that SB 297 might have afforded for such agencies to reopen ultimately proved too much to achieve consensus on.<sup>100</sup>

As Figure 32.2 shows, the United States is a mix of laws working in different directions on the question of whether adoption agencies can serve only those families that are consonant with their faith. Ten states explicitly say social services agencies can follow their faith in placement.<sup>101</sup>

Some provide specific exemptions for adoption agencies to make the same kinds of placements after same-sex marriage that the agencies made before.<sup>102</sup> Newer stand-alone laws allow agencies to decline to provide services, while making

<sup>95</sup> STEPHEN V. MONSMA & STANLEY W. CARLSON-THIES, *FREE TO SERVE: PROTECTING THE RELIGIOUS FREEDOM OF FAITH-BASED ORGANIZATIONS* (2015) (quoting Nicholas D. Kristof, *Learning from the Sins of Sodom*, N.Y. TIMES (Feb. 28, 2010).

<sup>96</sup> See Berg, Chapter 24, for examples; Laurie Goodstein, *Illinois Bishops Drop Program Over Bias Rule*, N.Y. TIMES (Dec. 29, 2011); Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOS. GLOBE (Mar. 11, 2006).

<sup>97</sup> See Ryan Morgenegg, *LDS Family Services No Longer Operating as Adoption Agency*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://perma.cc/HZ9T-JTFJ>.

<sup>98</sup> Kathryn Joyce, *Why Is the Mormon Church Getting Out of the Adoption Business?*, DAILY BEAST, <https://perma.cc/V9JB-HFLF>.

LDS Family Services provides counseling about adoption, but stopped making placements in 2014. *Licensing Search*, UTAH DEP'T OF HUMAN SERVS., OFFICE OF LICENSING, <https://perma.cc/UW74-5GTV>.

<sup>99</sup> MONSMA & THIES, *supra* note 95 at 31, 39 (quoting ISSUES OF FAITH, JUSTICE, AND FORGIVENESS: WORKING WITH FAITH-BASED ORGANIZATIONS TO FOSTER DIVERSITY OF MISSION 2 (Sept. 2008)).

<sup>100</sup> Utah Code § 63G-20-201(1) (leaving discretion “for ecclesiastical purposes only”).

<sup>101</sup> These states are Alabama, Connecticut, Maryland, Michigan, Minnesota, North Dakota, South Dakota, Rhode Island, Texas, and Virginia. See Appendix, Chapter 35, at Col. 6.

<sup>102</sup> These states are Connecticut, Maryland, Minnesota, and Rhode Island. See Appendix, Chapter 35, at Col. 6.

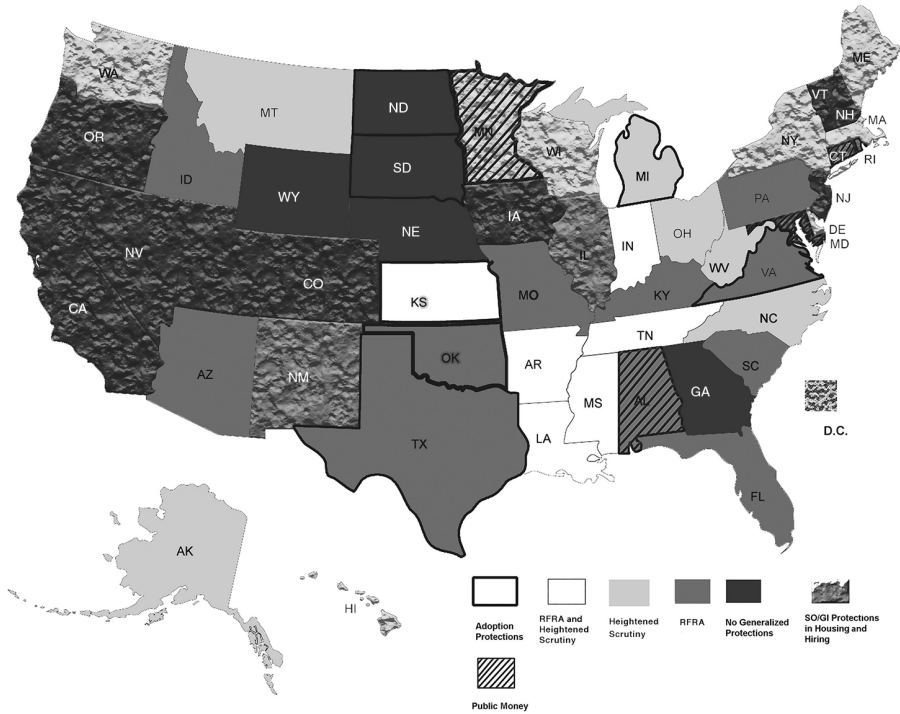


FIGURE 32.2 Religious exemptions in adoption context

referrals.<sup>103</sup> But no one should doubt the pain and humiliation of being turned away when seeking to give children a permanent loving home.

As Professor B. Jessie Hill explains elsewhere, when taxpayer money becomes involved, matters get especially thorny. That shoe has quietly fallen. In the closing hours of the Obama administration, a regulation was finalized, effective January 11, 2017, that all recipients of federal grants cannot “discriminate” against “beneficiaries” or participants on the “basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity.”<sup>104</sup>

In South Carolina, a religious foster-care agency, one of the state’s largest agencies, is currently at risk of forced closure by the state’s Department of Social Service, which interpreted this regulation as barring that agency from recruiting only families that practice the agency’s religion – *e.g.*, Christians.<sup>105</sup> South Carolina’s governor has asked the federal government for a waiver.

<sup>103</sup> These states are Alabama, Michigan, North Dakota, South Dakota, Texas, and Virginia. See Appendix, Chapter 35, at Col. 7.

<sup>104</sup> Health and Human Services Grants Regulation, 81 FR 89393–01; 45 C.F.R. § 75.300.

<sup>105</sup> Tim Smith, *Sumter Group Home Director Responds to Governor Siding with Faith-Based Foster Care Approach*, SUMTER ITEM (Feb. 23, 2018), <https://perma.cc/Z4KK-XHAQ>.

Declaring either side the winner sends a bad message: “close up shop” is as bad as allowing prospective adoptive families to be told “we don’t serve you here.” What is most important is the needs of the children. They need homes.

One solution may be taking government money out of adoption agencies’ hands and placing it in potential parents’ pockets. In that way, all potential parents will be served equally, and all would have the resources to make this profound commitment to children.<sup>106</sup> This would allow all adoption agencies to continue their vital work while preserving respect for all families.

#### IV A TRANSFORMATION IN VIEW

As humans, our natural impulse is to assume that one person’s rights come at another’s expense. We can be selfish; we sometimes reflexively desire to restrict the ability for anyone to disagree with us. When I voted with colleagues to limit marriage to one man and one woman, I thought I was protecting my ability to practice my faith. With *Goodridge* just handed down, challenging our views of marriage as a heterosexual institution, I thought it was best to restrict other people’s actions in order to protect my own beliefs.

During SB 296 and 297’s legislative process, a light went on. I thought to myself, “I am a Christian and I believe in the New Testament, in loving your neighbor, and in trying to be compassionate and tolerant.” I realized that by looking out for those who may not agree with me, I was living my religion. These good, Christian principles are ones that we ought to not just talk about, we ought to actually live them. Utah’s landmark law does just that.

As I have become more compassionate and tolerant, I am getting respect back from others. Far better, I have learned, is to do the hard work Utah did: to ask how we can secure rights for everyone.

This transformation in views can be hard to make. The label *Utah Compromise* does not help. Like most Utahns, I have deep-seated religious beliefs. And like many of my colleagues in the Utah Legislature, I am a very conservative legislator. Some in my state rankle at the term “Utah Compromise” which the media attached to the law. Like them, my religious principles are not in any way, shape, or form compromisable. But nothing in this landmark legislation forces anyone to change doctrine or beliefs. Quite the contrary, we protected religious organizations and people of faith in the ability to maintain their doctrines and beliefs.

<sup>106</sup> Kelsey Dallas, *How Children Get Caught in the Clash Over LGBT and Religious Rights*, DESERET NEWS (Mar. 1, 2018), <https://perma.cc/DZF2-NW6T>.

## V CONCLUSION

If there is one lesson from Utah's experience around marriage and LGBT rights, it is this: find a statutory solution before judicial rulings are made. In a pluralistic society with differing views about the great questions facing us, there is a better way than litigation. Legislating, rather than litigating, gives us the ability to find common ground.

When *Kitchen* and *Obergefell* declared marriage to be a fundamental right for same-sex couples, they left unresolved important questions about discrimination and the scope of civil rights laws. They left unresolved core questions about religion's role in civil society. Striving for fairness for all offered Utah a way to protect the LGBT community while cementing protections for the religious community.

In the end, none of the stakeholders got everything they wanted, but everyone gained specific and very significant statutory protections that a court could not deliver, and all without the rancor experienced elsewhere. The result is a less costly, more enforceable, and *more decent* legal regime in which all can coexist, true to who we are while respecting others for who they are – a true win-win.