Common Ground Lawmaking: Lessons for Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise

Robin Fretwell Wilson

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ROBIN FRETWELL WILSON

Only recently have lawmakers tried in earnest to combine protections for both the faith and LGBT communities, rejecting the zero-sum framing that sees one community as pitted against the other. In 2015, Utah, to the surprise of many, enacted a statewide law protecting the full LGBT community from discrimination in housing and hiring—giving LGBT persons more protections from discrimination than New York had expressly extended at that time. Popularly known as the “Utah Compromise,” Utah’s landmark legislation did so by following the signposts for a new American pluralism that Justice Anthony Kennedy later sketched in Masterpiece Cakeshop: that no one is disparaged for who they are, and that society protects all persons to the greatest extent possible consistent with our other commitments as a society.

By comparing the Utah Compromise with Masterpiece Cakeshop, this Article illuminates foundational principles of common ground lawmaking in the area of religious liberty and LGBT nondiscrimination. Section I reviews Justice Kennedy’s vision for a new American pluralism—one that honors the dignity of LGBT persons as well as persons of faith. Section I also describes guardrails around this pluralism that Justice Kennedy sees as essential. Section II contrasts Justice Kennedy’s vision for peaceful coexistence between the LGBT and faith communities with the distressing state of affairs in America today, where in no state does the law governing public accommodations consciously leave room for all citizens. Section III then turns to the pair of laws Utah enacted three years ahead of Masterpiece Cakeshop, which affected the kind of thick pluralism envisioned by Justice Kennedy—one that respects all interests by accommodating different communities’ needs. The Utah Compromise offers a blueprint for other states to affirm the dignity of all citizens, rather than elevating one set of interests over others.

Sections IV and V describe approaches that lawmakers who believe in the thick pluralism described by Justice Kennedy should consider as they craft laws that move
from a grammar of rights to a new, more helpful grammar of mutual respect. Section VI walks provision by provision through the elements of the Utah Compromise, describing how specific provisions operate to affirm the needs of the LGBT community and religious communities simultaneously. Section VI also takes up and answers common refrains: that the Utah Compromise should have tackled more—reaching the thorny question animating Masterpiece Cakeshop of how to share the public square—that it should have given greater protections to the faith community, and that the laws were possible only because of the strong presence of the Church of Jesus Christ of Latter-day Saints in Utah. Before concluding, Section VII briefly describes deep differences that remain even after forging common ground.
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Common Ground Lawmaking: Lessons for Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise

ROBIN FRETWELL WILSON *

INTRODUCTION

After five years of litigation across four venues culminating in the United States Supreme Court, the place of LGBT persons and persons of faith in the public square is no clearer than it was in 2012 when Jack Phillips declined to make a cake for Charlie Craig and David Mullins’s marriage celebration.¹ Although Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission is touted as a victory for religious business owners in America,² Phillips cannot resume making wedding cakes without legal risk should he again refuse to serve gay couples.³ Rather than a victory, Masterpiece Cakeshop is only the latest strafe in what seems like an unending culture war.⁴

¹ See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1724 (2018) (holding that the Colorado Civil Rights Commission violated the Free Exercise Clause when it ruled in favor of a same-sex couple suing a cake decorator for refusing to provide his services to the couple for their wedding ceremony).
² See Marissa Mayer, What People Are Saying About Jack Phillips’ Win at the Supreme Court, ALLIANCE DEFENDING FREEDOM (June 8, 2018), http://adflegal.org/detailspages/blog-details/allianceedge/2018/06/08/what-people-are-saying-about-jack-phillips-win-at-the-supreme-court (arguing that Phillips “finally got the justice he deserved” and that the Supreme Court’s decision was “a big win for religious freedom”).
At the center of *Masterpiece Cakeshop* and cases like it is a question that concerns all of us: how to live authentically in the public square without betraying one’s core beliefs and without impinging on the ability of others to do the same. This question is as important to LGBT people as it is to people of faith.

In the wake of the United States Supreme Court’s decision extending marriage to same-sex couples, states have been ground zero for working out whether and how Americans—who so often seem at odds over matters of faith and sexuality—can peacefully coexist. State legislatures have hotly debated protections sought by both the LGBT community and religious communities, including laws protecting against discrimination based on sexual orientation and gender identity (SOGI), and laws protecting against needless burdens on religious beliefs and practices known as Religious Freedom Restoration Acts (RFRAs). Many Americans support both aims.

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5 See infra Part I (discussing cases similar to *Masterpiece Cakeshop*).

6 LGBT persons and people of faith are not two discrete communities; many persons self-identify with both. See, e.g., Chai Feldblum, *What I Really Believe About Religious Liberty and LGBT Rights*, MEDM (Aug. 1, 2018), https://medium.com/@chaidfeldblum/what-i-really-believe-about-religious-liberty-and-lgbt-rights-2ce64ade95a2 (explaining that, as a lesbian EEOC Commissioner raised in a religious home, the author believes both LGBT rights and “respect for religion” are equally important).

7 See Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived” of the fundamental right to marry).

8 See Kelsey Dallas, *How 140 Bills Across the Country are Redefining Religious Freedom*, DESERET NEWS (June 12, 2018, 10:14 PM), https://www.deseretnews.com/article/900020906/interactive-heres-how-139-bills-across-the-country-are-redefining-religious-freedom.html (discussing pending, preenacted, and dead bills across the country impacting religious freedom). But see Alan Blinder, *Wary, Weary or Both, Southern Lawmakers Tone Down Culture Wars*, N.Y. TIMES (Jan. 22, 2018), https://www.nytimes.com/2018/01/22/us/transgender-bathroom-bill-religious-freedom.html (“[T]he social issues that have provoked bitter fights in recent years across the conservative South—including restroom access for transgender people and so-called religious freedom measures—are gaining little legislative momentum in statehouses this year.”).

But laws preventing discrimination have stalled in some quarters on the idea that gains for the LGBT community come at the expense of the faith community. Likewise, new state RFRAs are no longer tenable. They are seen as ways to undo hard-wrought gains by minorities, in part because supporters in some states urged their enactment to “stave off a rapid shift in favor of gay rights.”

Only recently have lawmakers tried in earnest to combine protections for both communities, rejecting the zero-sum framing that sees one community as pitted against the other. In 2015, Utah, to the surprise of many, enacted a statewide law protecting the full LGBT community from discrimination in housing and hiring, giving LGBT persons more protections than New York had expressly extended at that time. Popularly known as the “Utah Compromise,” the Utah law did so by following the signposts for a new American pluralism that Justice Anthony Kennedy later sketched in Masterpiece Cakeshop: that no one is disparaged for who they are and that society protects persons to the greatest extent possible consistent with our other commitments as a society.

By comparing the Utah Compromise with Masterpiece Cakeshop, this Article illuminates foundational principles of common ground lawmaking in the area of religious liberty and LGBT nondiscrimination. Section I reviews Justice Kennedy’s vision for a new American pluralism—one that honors the dignity of LGBT persons as well as persons of faith. Section I also

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10 Influential religious leaders and conservatives have opposed SOGI laws, contending that these laws are a “serious threat . . . to fundamental freedoms guaranteed to every person.” Preserve Freedom, Reject Coercion, BREAK POINT, http://breakpoint.org/freedom (last visited Oct. 3, 2018). As Part II shows, SOGI laws before the Utah Compromise contained scant devices for melding the interests of the LGBT and faith communities. Infra Part II.


12 Jonathan Miller, Utah (!) Leads on LGBT Rights, CQ ST. REP., May 9, 2016, at 31 (discussing the irony that the “solid red state” implemented “an extraordinary compromise . . . that granted anti-discrimination protection for homosexuals and transgender individuals while at the same time providing accommodations for religious institutions”).

13 For instance, New York law does not expressly cover transgender individuals. See the Sexual Orientation Non-Discrimination Act (“SONDA”), N.Y. ST. OFF. ATT’Y GEN., https://www.ag.ny.gov/civil-rights/sonda-brochure (last visited Oct. 3, 2018) (“SONDA protects everyone in the State from discrimination on the basis of sexual orientation. Therefore, SONDA applies when a transgender person is discriminated against based upon his or her actual or perceived sexual orientation.”).

describes guardrails around this pluralism that Justice Kennedy sees as essential. Section II contrasts Justice Kennedy’s vision for peaceful coexistence between the LGBT and faith communities with the distressing state of affairs in America today, in which in no state does the law governing public accommodations consciously leave room for all citizens. Section III then turns to the pair of laws Utah enacted three years ahead of Masterpiece Cakeshop, which affected the kind of thick pluralism envisioned by Justice Kennedy—one that respects all interests by accommodating different communities’ needs. The Utah Compromise offers a blueprint for other states to affirm the dignity of all citizens, rather than elevating one set of interests over others.

Sections IV and V describe approaches that lawmakers who believe in Justice Kennedy’s vision of pluralism should consider as they craft laws that move from a grammar of rights to a new, more helpful grammar of mutual respect. Section VI walks provision by provision through the elements of the Utah Compromise, describing how specific provisions operate to affirm the needs of the LGBT community and religious communities simultaneously. Section VI also takes up and answers common refrains: that the Utah Compromise should have tackled more—reaching the thorny question animating Masterpiece Cakeshop of how to share the public square—that it should have given greater protections to the faith community, and that the laws were possible only because of the strong influence of The Church of Jesus Christ of Latter-day Saints, commonly known as the Mormon Church. Section VII concludes.

I. JUSTICE KENNEDY’S VISION OF PLURALISM IN MASTERPIECE CAKESHOP

The clash of rights around same-sex marriage has bubbled up in states like Colorado that have enacted laws protecting LGBT persons from discrimination in public spaces—including restaurants, bars, hotels, and entertainment venues. In all, twenty-one states and the District of Columbia have passed such laws. States differ not only in whether they bar SOGI discrimination but also in the breadth of their nondiscrimination laws. In some states, nondiscrimination laws cover virtually every business open to the public, including bakeries like Masterpiece Cakeshop. Laws in other states banning discrimination on the basis of race, national origin, and other

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15 See Miller, supra note 12 (describing Utah as a conservative state); How Utah’s Compromise Could Serve as a Model for Other States, NPR (June 1, 2016, 5:07 AM), https://www.npr.org/2016/06/01/480247305/how-the-utah-compromise-could-serve-as-a-model-law-for-other-states (exploring the LDS Church’s support of legislation passed in Utah).

16 See infra Figure 1 (depicting the overlap in states with “Heightened scrutiny for religious claims,” “SOGI Public Accommodations Protections,” and “Specific Protections Around Marriage”).

17 Id. (showing states where LGBT persons are protected from exclusion by businesses open to the general public).
protected characteristics hew to the narrow scope of “public accommodations” under federal law, which does not reach retail establishments like Masterpiece Cakeshop.\(^{18}\) Crucially, across two-thirds of the landmass of America,\(^ {19}\) no law protects LGBT persons from being told to “get out” of a business that serves the public.\(^ {20}\)

In both instances, the public square is effectively awarded to one community or the other. In some parts of America, a baker can be effectively forced to stop making wedding cakes a photographer coerced into stopping the photographing of weddings.\(^ {21}\) In far more states, gay couples can be told

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\(^{18}\) See Robin Fretwell Wilson, Bathrooms and Bakers: How Sharing the Public Square is the Key to a Truce in the Culture Wars, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 402, 415 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., forthcoming 2019) (citing as archetypal examples of the former California’s Unruh Civil Rights Act and of the latter Ohio’s public accommodations law). Title II of the Civil Rights Act of 1964 regulates inns and transient lodging, places that sell food for consumption on site, gas stations, entertainment venues, and establishments containing these kinds of places for patrons. 42 U.S.C. § 2000a(b) (2012).

\(^{19}\) William N. Eskridge, Jr. & Robin Fretwell Wilson, Anthony Kennedy Opens New Chapter in American Pluralism, REAL CLEAR RELIGION (July 18, 2018), https://www.realclearreligion.org/articles/2018/07/18/anthony_kennedy_opens_new_chapter_in_americanpluralism.html (stating that “[f]or LGBT persons,” civil rights protections are “tragically absent across two-thirds of the land mass in America today”).

\(^{20}\) How one feels about whether LGBT persons should be legally protected from discrimination may reflect views of whether discrimination occurs or occurs on any large scale. For a review of such arguments and evidence that discrimination does occur, especially against transgender persons, see Robin Fretwell Wilson, The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns, 20 LEWIS & CLARK L. REV. 1373, 1388–1405 (2017).

\(^{21}\) See, e.g., Elane Photography, LLC v. Willock, 309 P.3d 53, 63 (N.M. 2013) (holding that a photography company that allegedly refused to photograph a customer because of her sexual orientation discriminated against her on the basis of sexual orientation in violation of NMHRA); State v. Arlene’s Flowers, Inc., 389 P.3d 543, 568 (Wash. 2017), vacated, 138 S. Ct. 2671 (2018), re affirmed on remand, No. 91615-2 (Wash. 2019), ( “[T]he conduct for which Stutzman was cited and fined in this case—refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding—constitutes sexual orientation discrimination under the WLAD.”). Attorneys for Arlene’s Flowers have petitioned the U.S. Supreme Court for cert. Alex Swoyer, Christian Florist Appeals to Supreme Court Over Same-Sex Wedding Case, WASH. TIMES (June 6, 2019), https://www.washingtontimes.com/news/2019/jun/6/christian-florist-appealing-supreme-court-over-sam/. In another case, Aaron and Melissa Klein, co-owners of Oregon bakery “Sweetcakes by Melissa,” denied their bakery services to same-sex couple Rachel Cryer and Laurel Bowman for their 2013 nuptials. The bakery was forced to close its doors and relocate their operation from their home. Klein, Case Nos. 44-14 & 45-14, at 42 (Or. Bureau Labor & Indus. 2015), https://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf. In yet another case, Mennonite art gallery owners, in Grimes, Iowa, refused to rent the venue to a same-sex couple for their same-sex ceremony. The gallery owners settled a lawsuit against them but chose to close the galley, ultimately selling it to a local church group. Verified Petition ¶ 1–2, 9–10, 26, Odgaard v. Iowa Civil Rights Comm’n (Iowa Dist. Ct. Oct. 7, 2013); see also Kevin Hardy, After Gay Marriage Controversy, Görtz Haus Now a Church, DES MOINES REG. (Oct. 27, 2015), http://www.desmoinesregister.com/story/money/business/2015/10/27/gortz-haus-church-grimes-harvest-bible-church/74682272/ (“Shuttered Gortz Haus, whose owners attracted controversy by refusing to host same-sex wedding ceremonies because of their personal religious objection has been repurposed and will reopen its doors as a church Sunday morning.”). Similarly, the Wildflower Inn in
they are not welcome in a hardware store.\textsuperscript{22}

For states like Colorado that moved early on to protect LGBT persons from discrimination, the outcome for religious business owners like Phillips was not baked in. That is, laws like Colorado’s were enacted before same-sex marriage was a possibility in the state—and in some instances, before same-sex marriage was a possibility anywhere in the world, as Section II documents.\textsuperscript{23} Patently, lawmakers could not have drafted laws with collisions around same-sex marriage in mind, and it is these older laws that civil rights commissions and courts are applying when resolving the newer clash of interests.

Despite hopes by both sides for a ringing endorsement of their interests, the majority in \textit{Masterpiece Cakeshop} declared neither side the victor in the struggle over the public square.\textsuperscript{24} As discussed \textit{infra}, the Court resolved only Phillips’s specific claims. More importantly, the opinion moved from our familiar grammar of rights to a grammar of respect.

\textit{Masterpiece Cakeshop} arose in 2012 after Jack Phillips, a Colorado baker, declined to create a wedding cake for Charlie Craig and David Mullins.\textsuperscript{25} Because same-sex marriage was not yet legal in Colorado, Craig and Mullins had planned to marry out of state, after which they would celebrate in Colorado with family and friends.\textsuperscript{26} Phillips cited his religious belief that marriage is between one man and one woman as the reason he was unable to make the couple’s cake.\textsuperscript{27} He offered to sell any other premade goods to the couple, saying, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex

\begin{verbatim}


\textsuperscript{22} See, e.g., \textit{Tennessee Hardware Store Puts Up ‘No Gays Allowed’ Sign}, USA TODAY (July 1, 2015, 7:30 AM), https://www.usatoday.com/story/news/nationnow/2015/07/01/tennessee-hardware-store-no-gays-allowed-sign/29552615/ (updated June 8, 2018, 10:54 AM) (“An East Tennessee hardware store owner decided to express his beliefs following the Supreme Court’s ruling allowing same-sex marriage by putting up a sign that reads, ‘No Gays Allowed.’”).

\textsuperscript{23} See discussion \textit{infra} Section II and Figure 2 (setting forth the chronology of LGBT anti-discrimination statutes and same-sex marriage legalization).

\textsuperscript{24} See Eskridge & Wilson, supra note 19 (“[F]or nearly a year, LGBT and religious freedom advocates held their breath, hoping for a dramatic victory. Both have been underwhelmed [by the \textit{Masterpiece Cakeshop} decision].”).


\textsuperscript{26} Id.

\textsuperscript{27} See id. (noting Phillips’s “religious opposition to same-sex marriage” as it is “something that directly goes against the teachings of the Bible” (internal citation omitted)).

\end{verbatim}
weddings.” In Justice Clarence Thomas’s concurring opinion, Justice Thomas noted that Phillips saw this refusal to bake a cake for Craig and Mullins as no different than when he regularly declined other requests, for example, to make Halloween cakes and cakes with alcohol.

The couple reported Phillips’s refusal to the Colorado Civil Rights Division which, after an investigation, determined that there was probable cause that Phillips had violated Colorado’s public accommodations law—which bars sexual orientation discrimination by businesses open to the public—and referred the matter to the Colorado Civil Rights Commission (“Commission”). A state administrative law judge (ALJ) determined that Phillips’s conduct constituted prohibited discrimination and ruled in favor of Craig and Mullins on Phillips’s constitutional claims. The Commission affirmed the ALJ’s decision and ordered Phillips to change his business practices, to file “quarterly compliance reports” for two years, and for Masterpiece Cakeshop employees to undergo “comprehensive staff training.”

Phillips appealed. He argued to the U.S. Supreme Court that Colorado’s punishment infringed his First Amendment free speech rights by forcing him to send a message—support for same-sex marriage—with which he did not agree. Phillips also argued that the law denied him the free exercise of religion. The Court’s opinion rested on neither argument. Instead, the decision hinged on the fairness and neutrality of the procedure under which Phillips was punished for declining to make the cake.

Writing for the majority, Justice Kennedy latched onto statements made by one commissioner of the Colorado Civil Rights Commission that went unrebuted by other commissioners. In Justice Kennedy’s estimation, the...
commissioner’s statement labeled Phillips’s religious views as “despicable,” “merely rhetorical,” and no different than justifying the Holocaust or slavery.\footnote{Id. at 1729.} Compounding matters, he Commission had also treated similar cases differently—that is, bakers who declined to make cakes condemning same-sex marriage were found not to have religiously discriminated.\footnote{Id. at 1731.} Together, these facts meant that the “neutral and respectful consideration to which Phillips was entitled was compromised.”\footnote{Id. at 1724, 1732.} Colorado violated its constitutional duty to craft and administer laws without “hostility to a religion or religious viewpoint.” Thus, the Court vacated the judgments against Phillips and erased the penalties Colorado had imposed on him.\footnote{Id.}


throughout history, whether it be slavery, whether it be the holocaust, . . . we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can . . . use their religion to hurt others.”\textsuperscript{43}).

37 Id.
38 Id. at 1730.
39 Id. at 1729.
40 Id. at 1731.
41 Id. at 1724, 1732.
42 Id. at 1730.
43 Id. at 1732.
44 Id. at 1730.
45 Id. at 1732.
46 Id. at 1732.
make a birthday cake with a pink center and blue exterior signifying the process of transitioning from male-to-female, which the requestor wanted because she “had come out as transgender on [her] birthday.”

Although not a ringing endorsement of Phillips’s discretion to serve whomever he pleased, neither was Masterpiece Cakeshop a narrow decision of little significance. It “reaffirmed” the importance of SOGI nondiscrimination laws, even though many had feared it would dilute them.

Instead, Masterpiece Cakeshop’s signal contribution was its call for a new pluralism that “leaves space for everyone.” This new pluralism should assure that “religious beliefs can[] legitimately be carried into the public sphere or commercial domain” “without subjecting gay persons to indignities when they seek goods and services in an open market.” Laws should be crafted “with tolerance, without undue disrespect to sincere religious beliefs,” while not treating LGBT persons as “social outcasts or as inferior in dignity and worth.” Presumably, this thick pluralism should be the hallmark not only of newer SOGI laws enacted going forward but of older SOGI laws as well.

Justice Kennedy elaborates on necessary guardrails in such legislation. Government, he writes, “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” At the same time, exceptions to public accommodations laws cannot be so

Kathleen Foody, Colorado’s Masterpiece Cakeshop Ends Battle Over Transgender Woman’s Cake with State, HUFF POST (March 6, 2019), https://www.huffpost.com/entry/colorado-baker-end-legal-spat-over-transgender-woman-s-cake_n_5c7fdad0e4b066f26ba46b02.

47 Scardina, Charge No. CP2018011310 at 2 (alteration in original).


51 Wilson & Bean, supra note 3.


53 Id. at 1732.

54 Id.

55 Id. at 1727.

56 Id. at 1731.
unbounded and utilized so often that they result “in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”\textsuperscript{57} Otherwise they are no different than “put[ting] up signs saying ‘no goods or services will be sold if they will be used for gay marriages,’ something that would impose a serious stigma on gay persons.”\textsuperscript{58}

In this peaceful pluralism, no one should be disparaged for who they are or what they believe. One set of interests should not be subordinated to another. Excluding gay persons from businesses just because they are gay is as wrong as excluding Phillips from a livelihood (or significant portion of a livelihood—making wedding cakes) just because he holds a traditional belief in marriage that precludes him from facilitating same-sex marriages.

At present, however, refusals like Phillips’s are being decided under laws written without marriage in mind. The result: these laws treat a refusal to facilitate a marriage as if Phillips had excluded all LGBT persons from his store entirely. As the next Section explains, a red-blue fault line runs across America, in which every state elevates one set of interests over the other—the baker over couples or couples over the baker—instead of trying to accommodate both, as Justice Kennedy envisioned.

II. THE PROBLEM AT HAND: DECIDING COMPETING CLAIMS UNDER OLD LAWS

As Figure 1 shows, twenty states and the District of Columbia protect LGBT persons from exclusion by businesses open to the public—sorely needed laws that accord respect to LGBT persons and protect against the indignities to LGBT persons described by Justice Kennedy.\textsuperscript{59}

\textsuperscript{57} \textit{Id.} at 1727.
\textsuperscript{58} \textit{Id.} at 1729.
Figure 1

However, these laws contain no devices for giving citizens like Phillips a way to comply with the law while abiding by their faith. Indeed, the laws could not have included such devices because they were written before same-sex marriage came on the scene, as Figure 2 shows with respect to states where high-profile clashes have unfolded.
In Phillips’s case, for instance, Colorado enacted the underlying law prohibiting discrimination in public accommodations in 2008, at a time when little media was given to same-sex wedding services, then largely a hypothetical possibility. Colorado did not authorize same-sex marriage within the state for another six years. Phillips’s refusal occurred two years before the Supreme Court’s 2015 decision in Obergefell v. Hodges. 62

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60 The dollar figures represent the fine assessed against the defendants. “SSM Dates” refers to the date this state began issuing marriage licenses to same-sex couples.


62 The earliest high-profile case pitting the rights of wedding vendors against the rights of same-sex couples also preceded marriage equality. See Elane Photography, LLC v. Willock, 309 P.3d 53, 59–60 (N.M. 2013). There, a New Mexico wedding photographer declined to take pictures for a same-sex commitment ceremony in 2006. Id. at 59. The SOGI law under which the photography business was fined was enacted in 2004—before any U.S. jurisdiction had conducted same-sex marriages and almost a decade before marriage equality became a reality in New Mexico in 2013. 2004 N.M. Laws 1162, 1164, 1170 (enacted on March 10, 2004, effective July 1, 2004); Goodridge v. Dep’t Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (legalizing same-sex marriage in Massachusetts); Order and Judgment, Goodridge v. Dep’t Pub. Health, 2004 WL 5064000 (Mass. Super. Ct. May 17, 2004) (trial court order upon remand; first same-sex marriages in Massachusetts on this date); Griego v. Oliver, 316 P.3d 865, 872 (N.M. 2013) ("[T]he State of New Mexico is constitutionally required to allow same-gender couples to marry.").
before Colorado allowed same-sex marriages to be entered into within the state’s boundaries.\textsuperscript{63} a fact that Justice Kennedy makes much of:

Phillips’[s] dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. At the time of the events in question, this Court had not issued its decisions either in \textit{United States v. Windsor}, or \textit{Obergefell}. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.\textsuperscript{64}

In much of the popular discussion of \textit{Masterpiece Cakeshop} during the litigation, Phillips’s refusal to make the couple’s cake received the kind of condemnation levelled at the Tennessee hardware store owner who excluded gay couples from his store.\textsuperscript{65} In the latter instance, there is no religious content to the transaction or product being sought from the hardware store owner—thus, it is hard to imagine that a refusal by the hardware store owner to serve an LGBT person can reflect anything other than animus toward that person. The objection cannot be parsed from an objection to the customer him or herself. But objections grounded in the nature of marriage are

\begin{quote}


\textsuperscript{65} Compare Zack Ford, \textit{The Anti-LGBTQ Baker Is Actually Trying to Convince the Supreme Court that Homosexuality Isn’t Real}, THINKPROGRESS (Dec. 4, 2017, 2:59 PM), https://thinkprogress.org/masterpiece-cakeshop-homosexuality-ff8088cc1e3c/ (“The undisputed facts of the case are that he wouldn’t sell the same wedding cakes to a same-sex couple that he would sell to different-sex couples—regardless of the design, which the couple never even had the chance to discuss with him before he refused them service. It’s the couple—not their message—that ADF and Phillips are rejecting.”), with Ewan Palmer, ‘\textit{No Gays Allowed’ Sign Returns to Tennessee Store Following Masterpiece Cakeshop Supreme Court Ruling}, NEWSWEEK (June 8, 2018, 9:43 AM), https://www.newsweek.com/no-gays-allowed-sign-returns-tennessee-store-following-masterpiece-cakeshop-966352.
different—they may be parsed from objections to the couple themselves. An objection focused on marriage has less to do with the specific couple than it does with the person’s faith tradition. Indeed, attorneys and advocates for the wedding vendors routinely emphasize their willingness to otherwise serve or employ LGBT persons.66

However, the laws under which these clashes are decided are not so nuanced; they leave no room for persons of faith to act consistent with their faith while treating gay couples with dignity. They leave no room for persons of faith to be true to who they are, without fear of reprisal.67

Just as tragic, across most of America, it is perfectly legal to exclude LGBT persons wholesale from hardware stores, bakeries, bars, restaurants, and other establishments open to the public, as Figure 1 shows. These laws leave no room for LGBT persons to be authentic and true to who they are without fear of exclusion or humiliation.68 And that is the trouble.

America’s red-blue fault line traces not only whether LGBT persons are able to participate in the public sphere as others do, it also traces protections for religious belief and practice. These protections may take the form of generalized religious freedom laws patterned on the federal RFRA, which twenty-one states have enacted, or the form of heightened scrutiny of religious burdens in state constitutions.69 But they also take the form of bargained-for protections for religious practices around marriage in states that voluntarily embraced same-sex marriage, as eleven states and the District of Columbia did before Obergefell v. Hodges resolved the question.70

67 See infra Part IV (discussing the fear felt by religious people that their views will be marginalized or treated as bigotry).
70 Twelve jurisdictions enacted same-sex marriage by legislation or popular ballot: Delaware, the
Although mired in the culture war today, RFRAs operate to police needless burdens on religious belief or practice by governments. In some states, RFRAs supplement state constitutional protections for religious free exercise; in others, RFRAs adds protections not available under the state constitutions. The classic burden that RFRAs police would be laws like those in Kentucky that led authorities to jail nine Amish men for operating horse-drawn buggies at night. Kentucky law required an orange triangle on the back of the buggy, a color too flashy for the Amish’s conservative faith. Facing a similar situation in Wisconsin, Amish drivers had proffered other safety measures, like white reflective tape or lanterns that government


73 RFRAs supplement heightened scrutiny of religious burdens under state constitutions in a number of states: Arkansas, Indiana, Kansas, Louisiana, Mississippi, and Tennessee. Wilson, supra note 59, at 501, 507-09, 512, 518. RFRAs provide protection unavailable under state constitutions in Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kentucky, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Virginia. *Id.* at 500, 502, 505-06, 508, 512, 515, 517-20. States without a RFRA but with similar state constitutional protection are Alaska, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Montana, New York, North Carolina, Ohio, Washington, West Virginia, and Wisconsin. *Id.* at 500, 505, 509-12, 515-17, 521-22. Figure 1 codes both state RFRAs and similar state constitutional protections as “Heightened Scrutiny for Religious Claims.”


75 *Id.*
officials would not accept. Under RFRA’s analysis, the orange-only rule would trigger RFRA as a substantial burden on religious exercise, making it incumbent upon the government to show a compelling reason—here, safety—for not exempting the Amish from the rule, as well as no less restrictive means. If lanterns and other devices serve the need for safety as well as an orange triangle, RFRA would require Kentucky authorities to bend, not the Amish.

Unlike this straight-forward application, RFRA has been successfully asserted only once as to a nondiscrimination law across twenty-five years of experience with federal and state RFRAs; that assertion occurred in a Michigan case that was later overturned on appeal and is now awaiting decision by the U.S. Supreme Court. There, a funeral home operator contended RFRA entitled him to an exemption from the ban on sex discrimination under the federal employment nondiscrimination law—specifically, Title VII of the Civil Rights Act of 1964 (“Title VII”)—which courts and the Equal Employment Opportunity Commission (“EEOC”) interpret to also ban discrimination on the basis of gender identity. The dispute centered on whether the funeral home operator must allow a transgender employee to dress consistent with her gender identity—the owner contended that because he operated the funeral home according to his faith, which compelled him to serve grieving people, RFRA would absolve him of the duty. The United States Court of Appeals for the Sixth Circuit disagreed. The case has now been heard in the Supreme Court, which

76 Miller, 549 N.W.2d at 237.
77 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018), cert granted, No. 18-107 (U.S. Apr. 22, 2019) (“Petition GRANTED limited to the following question: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).”).
78 See id. (“[T]he Funeral Home argued that . . . Title VII should not be enforced against the Funeral Home because . . . [it] would constitute an unjustified substantial burden upon [the owner’s] sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act (‘RFRA’).”).
80 See Robin Fretwell Wilson, Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports, 34 J.L. & INEQUALITY 385, 405 (2016) (discussing the gender discrimination jurisprudence on which the EEOC relied, including Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), in which the Supreme Court observed that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”). It remains to be seen whether the Supreme Court agrees with the EEOC’s characterization of cases like Price Waterhouse as allowing Title VII claims for transgender discrimination. See Melissa Hart, Skepticism and Expertise: The Supreme Court and the EEOC, 74 FORDHAM L. REV. 1937, 1944–45 (2006) (describing the Supreme Court’s recent reluctance to defer to the EEOC’s interpretation of certain laws and administrative rules).
81 Harris Funeral Homes, 884 F.3d at 585.
82 See id. at 586, 592, 594 (finding no substantial burden on religious practice while also finding a compelling interest in nondiscrimination and no less restrictive means to accomplish the nondiscrimination aim). In contrast, the Court of Appeals of Kentucky has held that a Louisville, Kentucky T-shirt printer, who refused to print shirts with rainbow-colored circles and the words “Lexington Pride Festival 2012” did not violate a public accommodations law. In that case, the court
granted the petition for certiorari and is expected to issue a decision in October 2019.83

Three state RFRA’s, by their terms, cabin application only to laws other than civil rights protections.84 In the remaining states, RFRA would be available in litigation like Phillips’s suits but unlikely to overcome a duty not to discriminate. This is so because avoiding discrimination will likely be seen as a compelling interest for not extending an accommodation. Absent the kind of creative approaches that Utah developed to meld LGBT rights with religious liberty detailed below,85 there often exists no obviously less restrictive method to achieve the nondiscrimination law’s goal other than barring treatment based on illicit characteristics.86 Still, some voices in religious communities have agitated for RFRA’s precisely to stall “gay rights,”87 wrongly ascribing to RFRA the ability to push aside the legal mandates under such laws.

Unlike RFRA, lawmakers enacting same-sex marriage laws specifically addressed how opening access to marriage to same-sex couples could mesh with traditional views of marriage—views held today by a slim majority of Americans.88 In these states, the adoption of same-sex marriage went hand-

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83 See infra Part III.

84 Indeed, in arguably the most divisive RFRA case since RFRA’s enactment, the outcome is best explained by the creative accommodation the Obama Administration created for religious non-profit organizations that objected to providing the full array of required contraceptive coverage. The Court found that the concession, which was extended to objecting religious nonprofits, represented one less restrictive means for achieving the government’s aims under the regulations as to closely held corporations like Hobby Lobby. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2782 (2014). See Robin Fretwell Wilson, Demystifying Hobby Lobby, in THE INTERNATIONAL SURVEY OF FAMILY LAW 364–65 (Bill Atkin ed., 2015) (“The religious liberty ‘fix’ that the Obama Administration extended to religious nonprofit corporations proved to be fatal to the government’s argument.”).

85 Eilperin, supra note 11.

86 See Wilson, supra note 18, at 402–03 (discussing the population that support religious exemptions for LGBT wedding cases).
in-hand with increased protection for religious belief and practice around marriage.\footnote{See Jason R. Moyer, Should an Amish Baker Sell a Cake for a Same-Sex Wedding? A Letter on Toleration of LGBT Rights from Anabaptists to Evangelicals, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 200, 204 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds.) (2019) (stating that the “religious protection tradition” is continued through new litigation centered on gay rights).}

These laws addressed many pressing needs of both communities: for the LGBT community, the need to be recognized as full members of society and receive the same benefits others find in marriage; for the religious community, the need to be able to continue to adhere to and transmit practices around marriage driven by their faith, including the ability to believe same-sex marriage is wrong and step away from facilitating marriages they see as impossible or wrong—without violating the preexisting SOGI nondiscrimination laws in those states. For example, in Delaware, when the legislature enacted a law recognizing same-sex marriage, it made sure not only that religious ministers would not have to solemnize marriages with which they disagreed, but also that magistrates employed by the state received an absolute exemption from a duty to solemnize marriages, too.\footnote{DELAWARE CODE ANN. tit. 13, §§ 101(e), 106(e) (West 2013); Governor Signs Marriage Equality Bill Into Law, DELAWARE.GOV (May 7, 2013), https://news.delaware.gov/2013/05/07/governor-signs-marriage-equality-bill-into-law/. For criticism of absolute protections for objections to same-sex marriage for government employees who can erect a roadblock to marriage, see infra Part V(B) (discussing local clerks); see also Robin Fretwell Wilson, The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State, 53 B.C. L. REV. 1417, 1480 (2012) (“[N]o state official may ever act as a chokepoint on the path to marriage.”).}

Other states spoke to a common concern: that no church or house of worship should be compelled or at risk of punishment for declining to host a marriage celebration on the church’s property when the church could not sanctify the marriage in its sanctuary.\footnote{See 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, 788 (2014) (documenting a core of protections by states that voluntarily enacted same-sex marriage preserving the tax exemption of religious organizations that decline to facilitate or celebrate same-sex marriages in their respective legislation).} This balancing of needs was crucial to the passage of same-sex marriage in these states.\footnote{See Robin Fretwell Wilson & Anthony Michael Kreis, Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process, 15 GEO. J. GENDER & L. 485, 495–96, 540–41 (2014) (collecting vote counts and giving context for the role played by religious accommodations in reaching the threshold needed for passage).}

Because no court decision assured either community of such protections at that juncture—access to marriage or step-offs from a duty to facilitate such marriages—both communities had incentives to give protections to the other in order to secure their own protections.

This thick pluralism also found a place at the ballot box. In Maine, voters
enacted marriage equality by a popular referendum. That measure took the needs of both communities to heart by permitting clergy and religious groups to follow their religious beliefs when deciding to host, or not to host, any marriage. Thus, years before Justice Kennedy articulated the need for a new chapter in American pluralism, voters and lawmakers across America did the hard work of writing laws around marriage that both opened access and calmed culture war tensions. Ironically, the states that acted proactively—like Maine and Delaware—have more protections today around marriage than far more religiously and politically conservative states like Alabama, Arkansas, and Oklahoma.

For states like Utah that did not legislatively recognize same-sex marriage, some believed the window for cooperation and creative legislative solutions around marriage had slammed shut with the recognition by the courts of same-sex marriage—obviously, rights secured through court decision need not be bargained for through legislation. But as the next Section chronicles, the genius of the Utah Compromise was a merging of the needs of both communities for respect in the law, respect for who they are, and respect for the ability to live with authenticity in public and in private.

Utah built on this architecture around access to marriage to enact thicker protections for the faith and LGBT communities. Utah lawmakers not only calibrated protections around marriage, they gave protections to the LGBT community in employment and housing that few would have imagined possible from what was then one of the most politically conservative states in America. The next Sections review this new script for peaceful coexistence—its genesis, structure, and devices for mutual respect.

III. UTAH’S HISTORIC PIVOT

To understand Utah’s historic breakthrough, it is essential to understand that Utah’s history around religious freedom and same-sex marriage tracked the rest of the nation. Like most states, Utah’s constitution has never been interpreted to impose heightened scrutiny of state actions burdening the free

93 See Susan M. Cover, Mainer’s Vote to Legalize Same-Sex Marriage, PORTLAND PRESS HERALD (Nov. 6, 2012), https://www.pressherald.com/2012/11/06/same-sex-marriage-question-challenges-voters-from-the-heart/ (discussing Maine’s effort to approve same-sex marriage by popular referendum, bypassing the legislature and courts).
95 See generally Wilson, supra note 70, at 1210, 1258–61 (discussing demographic factors that may have influenced marriage protections in enacting jurisdictions and noting the lack of a state constitutional ban on same-sex marriage in Maine and Delaware).
exercise of religion. Any religious impacts of same-sex marriage would be evaluated under the more easily satisfied rational basis review established by Employment Division v. Smith for general rules of neutral applicability. Thus, despite Utah’s status as one of the most religious states in the nation, any need by religious communities or persons for special accommodation of religious practices around marriage would have to come through a RFRA or specific legislative protections in a positive law.

After the U.S. Supreme Court invalidated the federal RFRA’s application to the states, lawmakers introduced state RFRA’s with varying success until 2014. In 2014, Arizona’s governor vetoed an amendment to Arizona’s RFRA that had precipitated threats to boycott the state and move the Super Bowl. At that juncture, commentators had just begun to tag RFRA’s as a license to discriminate, a label that would stick; after Indiana’s pitched battle over its RFRA and the law’s subsequent carve back a year later, state RFRA’s proved controversial and costly to enact.

Utah lawmakers introduced something similar to a state RFRA during the 2015 session. However, with the drubbing Arizona took over its RFRA fresh in the minds of Utah lawmakers, it gained little traction. Further, as support for the Utah Compromise grew, there was little appetite for RFRA’s generalized protection for religious practice, which some feared would detract from the good will propelling the Utah Compromise.

Moreover, Utah lawmakers were acutely aware that courts are reticent when applying RFRA to find no compelling governmental interest, or to find a less-restrictive means to achieve that interest, lest they “be confronted with an endless chain of exemption demands from religious deviants of every stripe” and create binding judicial precedent. By contrast, judges are much

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97 See Wilson, supra note 59, at 519 (showing that Utah does not have RFRA or heightened scrutiny).
98 See Emp’t Div. v. Smith, 494 U.S. 872, 878–89 (1990) (holding that strict scrutiny is inapplicable to generally applicable laws “prohibiting conduct that the State is free to regulate”).
99 Compare Wilson, supra note 70, at 1259–61 (showing Utah as the second most religious state in America), with Michael Lipka & Benjamin Wormald, How Religious Is Your State?, PEW RES. CTR. (Feb. 29, 2016), http://www.pewresearch.org/fact-tank/2016/02/29/how-religious-is-your-state/?state=utah (ranking Utah as the eleventh most religious state in the nation).
100 See City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (holding that Congress exceeded its power by extending the RFRA to the states).
102 See supra note 71 (providing examples of sources suggesting RFRA’s are a “license to discriminate”).
more likely to enforce surgically drawn, concrete accommodations, because doing so accords with a clear legislative intent.\textsuperscript{105} For some Utah lawmakers, the calculus came down to who should be the ones to strike the balance between competing interests: the judiciary or the legislature.\textsuperscript{106}

It mattered that judges lack the capacity of legislatures to take testimony, vet conceptual approaches and concerns through hearings, and broker consensus between stakeholders.\textsuperscript{107} Without such capacities, courts are seen by some as appearing to create accommodations out of whole cloth\textsuperscript{108} without taking into account all stakeholders’ interests, which may make courts reticent to fashion accommodations.

Further, Utah lawmakers understood that RFRA only allows parties to bring claims or assert defenses; it does not give them assurances as to the outcome. Instead, impacted persons have to litigate, which can be taxing, expensive, and uncertain—the process itself may subject one or one’s company to negative publicity and the attendant economic losses.\textsuperscript{109}

Utah’s early experimentation with SOGI nondiscrimination bills also paralleled the experience across much of America, in which state lawmakers gravitated to SOGI nondiscrimination laws shorn of robust protections for religious practice.\textsuperscript{110} In 2009, a small group of Utah’s Democratic legislators began to introduce bills to protect Utah’s LGBT community from discrimination.\textsuperscript{111} These proposals naturally followed and borrowed elements from the municipal ordinances that had sprung up in communities across Utah. Indeed, although often overlooked, by 2015, forty-two percent

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\textsuperscript{105} See Wilson, supra note 91, at 720–22 (noting that legislation clearly evincing the legislature’s intent as to how a dispute should be resolved is “more likely to be enforced” by the courts).
\textsuperscript{106} Adams, supra note 104, at 445.
\textsuperscript{107} See Wilson, supra note 91, at 720–22 (discussing the differences that judges and members of the legislature face when deciding to enforce or enact specific rules).
\textsuperscript{109} Adams, supra note 104, at 445 (explaining that RFRA was unhelpful as a solution to Utah’s religious freedom concerns because: (1) RFRAs are unsuccessful at striking balance with nondiscrimination laws; (2) RFRAs require costly litigation that picks winners and losers; and (3) RFRAs had been rendered politically toxic after Arizona’s attempt to amend its state RFRA).
\textsuperscript{110} See supra Section II & Figure 1 (discussing and illustrating SOGI nondiscrimination laws in other states).
\textsuperscript{111} See S.B. 148, 2011 Leg., Gen. Sess. (Utah 2011) (proposing to amend the Utah Antidiscrimination Act and Utah Fair Housing Act to include protection from discrimination on the basis of sexual orientation or gender identity); H.B. 305, 2010 Leg., Gen. Sess. (Utah 2010) (intending to prohibit discrimination and housing and employment on the basis of sexual orientation or gender identity); H.B. 267, 2009 Leg., Gen. Sess. (Utah 2009) (intending to prohibit discrimination in housing and employment on the basis of sexual orientation or gender identity).
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of Utahns lived under a municipal SOGI, as Figure 3 shows.  

Utah’s local SOGI ordinances reached back as far as 1980, but most had been adopted in the seven years preceding the Utah Compromise. In 1980, Garland City enacted an ordinance barring discrimination in the sale or leasing of housing on, among other prohibited bases, sexual orientation. It contained no religious accommodations. It remained the lone LGBT nondiscrimination protection in the state until 2007. Between 2007 and 2015, eleven municipal ordinances were enacted across Utah banning discrimination in housing and hiring on the basis of sexual orientation and sometimes gender identity—none reached public accommodations. These municipalities include some of Utah’s largest population centers (Salt Lake County and City, West Valley City, and Ogden); college towns like Logan, home to Utah State University; and tourist destinations like Alta, the ski resort. All in all, municipal SOGI ordinances edged close to covering half of Utah’s population before the 2015 legislative session.


See infra Appendix (citing Garland City Code § 5-5-4 (1980)).

See infra Appendix (listing Holladay City (2014); Springdale City (2012); Alta City (2011); Midvale City (2011); Salt Lake County (2010); Summit County (2010); Taylorsville City (2010); Moab City (2010); Logan City (2010); West Valley City (2010); Salt Lake City (2009); Ogden City (2007)). Two other municipal nondiscrimination ordinances banning discrimination on the basis of sexual orientation and gender identity have since been enacted. See id. (listing Park City (2017) and Murray City (2016) ordinances; Murray City’s SOGI ordinance provides no exemptions).

See sources cited supra note 112.
This crop of municipal nondiscrimination ordinances provided modest accommodations for religious, nonprofit, and charitable organizations, including associated educational institutions. These carve-outs bear a striking resemblance to one another, having been largely patterned after Salt Lake City’s 2009 ordinance. Many of Utah’s municipal SOGI ordinances expressly permitted preferences in housing for persons of the same faith, as well as for religious groups that operate housing when “in the furtherance of a religious organization’s sincerely held religious beliefs.” Nearly all extended these protections to individuals when acting “in conjunction with” a religious group. Three of the municipalities—two tourist destinations and Utah’s most populous county—protected expressive associations from hiring nondiscrimination duties. As Utah State Senator J. Stuart Adams has observed, “[t]his patchwork of local rules created inconsistencies”

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116 See infra Appendix (listing municipal ordinances and noting religious organization accommodations in the hiring ordinances of Salt Lake County, Salt Lake City, West Valley City, Ogden, Logan, Summit County, Midvale, Park City, Moab, Holladay, Taylorsville, Springdale, and Alta).

117 See infra Appendix (discussing religious exemptions of municipal SOGI housing ordinances patterned after Salt Lake City’s ordinance, including Salt Lake County, West Valley City, Ogden, Logan, Summit County, Midvale, Moab, Holladay, Taylorsville, and Springdale).

118 See infra Appendix (discussing religious exemptions of municipal SOGI housing ordinances patterned after Salt Lake City Code § 10.05.060 (2009), including Holladay, Logan, Midvale, Moab, Ogden, Salt Lake County, Springdale, Summit County, Taylorsville, and West Valley City). Park City’s protection, passed later, also extends to individuals acting “in conjunction with” a religious group. See infra Appendix (documenting the relevant Park City ordinances).

119 See infra Appendix (reviewing the ordinances of Alta, Moab, and Salt Lake County and noting the significant burden that protection would have on an association’s rights of expressive association). Park City’s protection, passed later, also exempts expressive associations. Id.
across Utah for employers operating in more than one jurisdiction.\footnote{J. Stuart Adams, Taking Colliding Trains Off a Collision Path: Lessons from the Utah Compromise for Civil Society, in THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 539, 545–46 (Robin Fretwell Wilson ed., 2018).}

In addition to pressure from below, there was pressure from above. Utah is home to some of the premier companies to work for, on the Fortune 100 best businesses\footnote{Fortune 100 Best, FORTUNE, http://fortune.com/best-companies/list/filtered?sortBy=pct-minority-employees&hq-state=Utah (last visited Oct. 23, 2018).} and four businesses in the Fortune 1000,\footnote{Fortune 500, FORTUNE, http://fortune.com/fortune500/list/filtered?statename=Utah (last visited Oct. 23, 2018).} and it is a vibrant corridor for technology and start-ups.\footnote{See Anna Hensel, How Utah’s Startups Are Attracting Tech Talent From Other States, VENTUREBEAT (Mar. 30, 2018, 8:30 AM), https://venturebeat.com/2018/03/30/how-utahs-startups-are-attracting-tech-talent-from-other-states/ (explaining the “density and critical mass” of Utah’s tech companies and quoting one tech executive’s hiring needs: “If we hired every engineer every year that all of the universities in the state put out . . . that still wouldn’t be enough. And we’re just one company.”); Ellen Rosen, As ‘Unicorns’ Emerge, Utah Makes a Case for Tech Entrepreneurs, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/business/smallbusiness/tech-start-ups-utah.html (“[Utah] has a thriving technology hub in the roughly 80-mile swath from Provo to Ogden, with Salt Lake City in between. The region has given rise to at least five companies valued at more than $1 billion. The concentration of these so-called unicorns is surpassed only by California, New York and Massachusetts.”).} Even during the Great Recession, Utah boasted positive economic growth.\footnote{See Lee Davidson, Utah Again Leads the Nation in Job Growth, SALT LAKE TRIB. (July 20, 2018), https://www.sltrib.com/news/politics/2018/07/20/utah-again-leads-nation/ (reporting that “Utah led the nation in job growth by percentage” since June 2017); Ruth Mantell & Joe Fleming, State Economic Growth Uneven Since Recession Began, PEW CHARITABLE TRUSTS (May 2, 2018), http://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/02/state-economic-growth-uneven-since-recession-began (“[Utah] has experienced growth since the recession’s onset that matched or beat the historical U.S. pace.”); New Rankings Position Utah’s Economy Among Top in Nation, UTAH GOVERNOR’S OFFICE OF ECON. DEV. (Apr. 22, 2015), https://business.utah.gov/news/new-rankings-utahs-economy-among-top-in-nation/ (ranking Utah first in the nation in both private sector and total job growth).}

If there is one lesson of the last decade, it is this: culture war battles are bad for business. To appreciate the economic implications, one need not look farther than the RFRA-driven boycotts of Indiana in 2015 and Georgia in 2016, or the economic battering North Carolina experienced before partially repealing its “bathroom-of-one’s-birth law.”\footnote{See, e.g., ‘Bathroom Bill’ to Cost North Carolina $3.76 Billion, CNBC (Mar. 27, 2017), https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html (“[T]he law limiting LGBT protections will cost [North Carolina] . . . $3.76 billion in lost business over a dozen years.”); Joel Ebert, Cost of a Tenn. Transgender-Bathroom Bill Could be $1.5B, TENNESSEAN (Apr. 12, 2016), https://www.tennessean.com/story/news/politics/2016/04/12/tennessee-bathroom-bill/82938128/ (estimating a potential loss of $300 million in tax revenue and $1.2 billion in federal Title IX money if a Tennessee bill were passed without protections); Brandi Grissom, Transgender Bathroom Bill Could Cost Texas $3 Billion a Year, Study Says, DALL. NEWS (Apr. 2017), https://www.dallasnews.com/news/texas-legislature/2017/04/17/transgender-bathroom-bill-could-cost-texas-billions (discussing the effects of discriminatory bathroom regulations making Texas “less attractive to event planners and potential visitors”); Aaron Gould Sheinin, Studies Show Billions at Risk}
appreciated than boycott risk is the fact that SOGI protections themselves are good for business. Companies that states want to attract—from eBay to Apple to Amazon—see SOGI nondiscrimination protections as essential to attracting and maintaining the best talent. How LGBT-friendly a state climate matters to decisions to locate in a state, as the fierce competition to host Amazon’s second headquarters illustrates.

During the period that Utah’s municipal SOGI ordinances took hold, 2007 to 2014, Democrats introduced similar nondiscrimination measures in the Utah Legislature, with modest protections for religious actors patterned on those in Salt Lake City’s ordinance. All but one of these measures


128 S.B. 262, 2013 Leg., Gen. Sess. (Utah 2013) (providing in the housing context that the chapter “does not apply to a temporary or permanent residence facility, approved, operated, or owned by a nonprofit organization, a charitable organization, or a person in conjunction with a religious organization, association, society, or its affiliates, including a residence facility approved, operated, or owned by a public or private educational institution, if the discrimination is by sex, sexual orientation, gender identity, or familial status: (a) for reasons of personal modesty or privacy; or (b) in the furtherance of a religious institution’s free exercise of religious rights under the First Amendment of the Constitution of the United States or the Utah Constitution.” (emphasis and strikeouts omitted)). In the employment context, the bill added affiliate protection. S.B. 51, 2012 Leg., Gen. Sess. (Utah 2012) (“This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit [or] organization, a charitable organization, or a person in conjunction with a religious organization, including a dormitory operated by a public or private educational institution, if the discrimination is by sex, sexual orientation, gender identity, or familial status: (a) for reasons of personal modesty or privacy; or (b) in the furtherance of a religious institution’s free exercise of religious rights under the First Amendment of the United States Constitution.” (emphasis and strikeouts omitted)); S.B. 148, 2011 Leg., Gen. Sess. (Utah 2011) (no added exemption); H.B. 305, 2010 Leg., Gen. Sess. (Utah 2010) (removing specific religious exemption in employment context).
failed to clear the relevant committee for full consideration by either chamber; the other, in 2013, was approved by committee but not voted on in the Senate. To the political climate in Utah was simply not favorable to granting nondiscrimination protections to the LGBT community, especially when public support for same-sex marriage in Utah, not yet recognized, hovered below fifty percent.

Although not then viable, the prospect that a statewide measure could be enacted in coming years, together with the religious freedom tensions that same-sex marriage would be an occasion for, provided a rich medium for stakeholders in the LGBT and faith communities to open a dialogue. Several years of private dialogue and conversations preceded the 2015 legislative gauntlet, an opportunity for frank exchange about what mattered to each community.

Utah’s political climate around same-sex marriage and gay rights reached a fever pitch on December 20, 2013, when Judge Robert Shelby issued *Kitchen v. Herbert*, granting Utah couples the right to marry regardless of whether they were of the opposite sex or same sex. Even though not raised by the state in its arguments, the court spoke to religious freedom impacts.

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130 See Dennis Romboy, Poll: Majority of Utahns Against Same-Sex Marriage and Say States Have the Right to Decide, DESERET NEWS (Jan. 18, 2014, 10:00 PM), https://www.deseretnews.com/article/865594458/Poll-Majority-of-Utahns-against-same-sex-marriage-and-say-states-have-the-right-to-decide.html (reporting 57% of Utahns opposed same-sex marriage, 36% support it, and 6% are undecided); Brooke Adams, Poll: Utahns Evenly Split on Same-Sex Marriage, SALT LAKE TRIB. (Jan. 15, 2014, 9:44 AM), http://archive.sltrib.com/article.php?id=57391605&itype=CMSID (reporting 48% of Utahns opposed same-sex marriage while 48% supported it).

131 See, e.g., Panel Discussion, Gays, Mormons, and the Constitution: Are There Win-Win Answers for LGBT Rights and Religious Conscience?, BROOKINGS INST. (Mar. 16, 2015), https://www.brookings.edu/wp-content/uploads/2015/03/20150316_lgbt_utah_transcript.pdf (summarizing a dialogue between the faith and LGBT community beginning when Utah adopted a constitutional amendment limiting marriage to one man and one woman, eleven years before the Utah Compromise); id. at 13 (“It wasn’t just coincidence that two months ago, the LGBT community and the church came together and had a dialogue.”); Adams, supra note 104, at 446 (describing efforts before 2015 to enact LGBT protections in Utah).

132 See Jessica Miller et al., 10th Circuit Court Upholds Same-Sex Marriage, SALT LAKE TRIB. (June 25, 2014, 11:00 PM), http://archive.sltrib.com/article.php?id=58007681&itype=CMSID (describing the back-and-forth reaction to the District Court decision in *Kitchen* and the seventeen-day window before the U.S. Supreme Court issued a stay window during which more than 1,000 same sex couples married).


134 Id. at 1214.
For instance, the court noted that its decision did not mandate any change for religious institutions, which could continue to express their own moral viewpoints and define their own traditions about marriage. If anything, the recognition of same-sex marriage expands religious freedom because some churches present in Utah desire to perform same-sex wedding ceremonies but are currently unable to do so. “[b]y recognizing the right to marry a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices.”

The decision was immediately appealed to the United States Court of Appeals for the Tenth Circuit. While the appeal percolated, pressure grew on the Utah Legislature to do something.

Utah legislators decided to wait for the Tenth Circuit to provide guidance. The LGBT community’s frustration with the lack of legislative progress led LGBT advocates to post “blue notes” to the Utah Senate chamber doors, Martin Luther-style, and block access to a committee hearing; thirteen persons were arrested.

On June 25, 2014, the Tenth Circuit affirmed Judge Shelby’s decision. Like Judge Shelby, the Tenth Circuit panel stressed that its decision left untouched the religious freedom of persons opposed to same-sex marriage:

[R]eligious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit. We respect the views advanced by members of various religious communities and their discussions of the theological history of marriage. And we continue to recognize the right of the various religions to define marriage according to their moral, historical, and ethical precepts. Our opinion does not intrude into that domain or the exercise of religious principles in this arena. The right of an officiant to perform or decline to

135 Id.
136 See Brief for Bishops of The Episcopal Church et al. as Amici Curiae Supporting Respondent at 8–15, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (arguing that the inherent dignity of lesbian and gay individuals informs the theology of numerous religious beliefs, including the Unitarian Universalist Church and the United Church of Christ).
137 Kitchen, 961 F. Supp. 2d at 1214.
138 Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).
139 Adams, supra note 104, at 447.
141 Kitchen, 755 F.3d at 1193–94.
perform a religious ceremony is unaffected by today’s ruling.142

The State again appealed.143 On October 6, 2014, the United States Supreme Court denied certiorari144 and gay couples began marrying in Utah.145

Same-sex marriage was a win for LGBT advocates in a state that was not ready for it. As noted above, Utah had no device for fashioning judicial accommodations—no state RFRA, no heightened scrutiny under its constitution for religious burdens, and no surgical accommodations for marriage-related practices like those in place in states that had legislated the recognition of same-sex marriage.146 At first blush, the district court and Tenth Circuit decisions in *Kitchen* seemed to be the final word on the thorny issue of religious freedom’s intersection with same-sex marriage—questions that extend well beyond which ceremonies religious institutions would choose to oversee, as Section V shows.147

Utah found itself at the vanguard of uncertainty and angst that would sweep the country as marriage equality decisions became authoritative in the months before *Obergefell*. Some Utahns reacted strongly to same-sex marriage’s legalization in Utah, asking to secede from the nation.148 Nationally, positions hardened too. After *Obergefell*, pockets of conservatives dug their heels in—challenging whether federal court decisions, including the Supreme Court’s, had to be respected by the states.149 Many progressives met this resistance ferociously, dismissing out-

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142 Id. at 1227.
147 See infra Section V.
148 Adams, supra note 120, at 546; NPR, supra note 15.
149 In Alabama, for instance, officials refused to issue marriage licenses only to same-sex couples. Robin Fretwell Wilson, “*Getting the Government Out of Marriage*” Post *Obergefell*: The Ill-Considered Consequences of Transforming the State’s Relationship to Marriage, 2016 U. ILL. L. REV. 1445, 1454
of-hand religious accommodations that had been palatable only years before when marriage equality laws had been enacted by the states.\textsuperscript{150}

Utah side-stepped unyielding deadlock. It gave protections to both communities in the same set of laws—not either/or, but both/and. The insight that melding interests should be the path forward came not from Republican sponsors of RFRA, nor from Democratic sponsors of earlier SOGI bills, but from an unexpected player: The Church of Jesus Christ of Latter-day Saints (“LDS Church”).\textsuperscript{151} On January 27, 2015, after the Supreme Court denied certiorari in Kitchen v. Herbert, the LDS Church called a special news conference to address “the increasing tensions and polarization between advocates of religious freedom on the one hand, and advocates of gay rights on the other.”\textsuperscript{152}

The news conference featured top Church leaders: Elder D. Todd Christofferson, Sister Neill Marriott, Elder Dallin H. Oaks, and Elder Jeffrey R. Holland.\textsuperscript{153} They urged legislators to “seek for solutions that will be fair to everyone,” with “wisdom and judgment, compassion and fairness.”\textsuperscript{154} They called for legislators to “strengthen laws related to LGBT issues in the interest of ensuring fair access to housing and employment,” and “public accommodation in hotels, restaurants and transportation,” while at the same time protecting “faith communities and individuals against discrimination and retaliation for claiming the core rights of free expression and religious
practice.” In the past the LDS Church had announced broad principles that lawmakers might consider when writing legislation. But in this instance, Church leaders made a specific call to legislators to balance 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.” They called for a new legislative model: “[F]airness for all.” The Church hoped that the news conference would show “an alternative to the rhetoric and intolerance that for too long has come to characterize national debate on this matter” and would point communities to “find ways to show respect for others whose beliefs, values and behaviors differ from ours while never being forced to deny or abandon our own beliefs, values and behaviors in the process.”

Utah’s legislators, many of whom are members of the LDS Church, answered the LDS Church’s call during what is one of the shortest lawmaking sessions in America. Senate Majority Whip J. Stuart Adams, Senator Stephen H. Urquhart, Senator Jim Dabakis, Representative Brad L. Dee, Representative LaVar Christensen, and others began consulting stakeholders to negotiate a measure that would capture the principle of “fairness for all.” Among those, of course, were religious freedom advocates; representatives of religious communities, including the LDS Church; corporate interests; seasoned political activists on social issues spanning the gamut from LGBT advocates—such as Equality Utah—to social conservatives like Eagle Forum; and everyone in between. Still others like myself and Professor Cliff Rosky of the University of Utah’s S.J. Quinney College of Law—then the Chairman of Equality Utah, who had participated in discussions between stakeholders from the discussions’

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155 Id.  
156 Adams, supra note 104, at 448; Transcript of News Conference, supra note 152; Goodstein, supra note 151.  
157 Transcript of News Conference, supra note 152.  
158 Id.  
159 Id.; see also, e.g., Articles of Faith, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (1842), https://www.mormon.org/beliefs/articles-of-faith (expressing the LDS Church’s belief “[i]n worshipping God according to our own dictates and allowing others to do likewise” and “[i]n sustaining the laws and leaders of the land”); The Family: A Proclamation to the World, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Sept. 23, 1995), https://www.lds.org/topics/family-proclamation?lang=eng&old=true (expressing the LDS Church’s belief that marriage remains a union between a man and a woman).  
161 See Adams, supra note 104, at 446, 448 (explaining the “fairness for all” approach and mentioning other legislators involved in the effort).  
inception—picked up where the unfinished negotiations left off and assisted lawmakers to shape and refine areas of agreement into the bills as enacted.

The Utah Legislature forged new devices for harmonizing the interests at issue on the scaffolding of values prized in Utah’s tight-knit legislature: cooperation and trust. The bills’ principal sponsors enjoyed long relationships with one another. For instance, Senator Adams had served with Senator Dabakis in the same chamber for four years. Although beginning from different places—one sought principally to protect the LGBT community, the other the faith community—the lawmakers’ long history together assisted them to locate areas of consensus that allowed each to also maintain his core beliefs, as the next Section explains.

IV. LOCATING CONSENSUS AT THE INTERSECTION OF LGBT RIGHTS AND RELIGIOUS FREEDOM

Utah forged common ground by taking seriously the shattering consequences to both communities of denying something so central to one’s being as one’s faith or one’s sexuality. The end product rests on four pillars that provide the foundation for peaceful coexistence: respecting all people for who they are; allaying the very real fears expressed by both communities; giving clarity to parties around the immediate challenges; and honoring the non-negotiables of each community.

A. Being Respected for Who One Is in Public and Private

As others have pointed out, the religious and LGBT communities share common desires and needs.163 Both groups wish to be respected for an aspect of their existence they regard as essential to their flourishing.164 For the LGBT community, that means recognizing that sexual orientation and

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163 Chai Feldblum, the EEOC’s only openly gay commissioner, argued while a law professor that the “identity liberty” same-sex couples have in marriage and the “belief liberty” objectors have in their religion both constitute core values and deserve protection, but these values directly conflict when civil rights laws elevate one value to the exclusion of the other. See Chai R. Feldblum, Moral Conflict and Conflicting Liberties, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 125 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) (“Acknowledging [the burden’s impact] does not necessarily mean that [civil rights] laws will be invalidated or that exemptions . . . will always be granted to individuals holding such beliefs.”); Thomas C. Berg, What Same-Sex-Marriage and Religious-Liberty Claims Have in Common, 5 NW. J.L. & SOC. POL’Y 206, 219–20, 230–32 (2010) (drawing several parallels between religious and LGBT communities) [hereinafter Berg, Same-Sex-Marriage and Religious-Liberty Claims]; Thomas C. Berg, Freedom to Serve: Religious Organizational Freedom, LGBT Rights, and the Common Good, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 307, 307–08 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) (discussing contributions to the common good from both religious and LGBT communities).

164 See Berg, Same-Sex-Marriage and Religious-Liberty Claims, supra note 163, at 207 (“[B]oth same-sex couples and religious believers claim that their conduct stems from commitments central to their identity . . . .”).
gender identity are formative to one’s identity, and that being treated differently for these reasons is wrong and demeaning.\textsuperscript{165} For religious communities, it means a recognition that faith shapes one’s experience of the world and permeates choices in every domain, private and public.\textsuperscript{166}

Identity means little to anyone if confined to one’s home or even to the sanctuary of one’s church. Living an authentic life means being able to be true to one’s deepest commitments in all places—at home, at school, at church, at work, in the marketplace, in public parks—in all journeys in life. The Utah Legislature struggled with how to give groups with world views that are worlds apart—and in some respects fundamentally opposed to one another—the elbow room to live with integrity while permitting others to do the same.

Never far from the surface for many members of the Legislature was the conscious realization that Latter-day Saints have been oppressed and derided by others for practicing their faith.\textsuperscript{167} This history made the body especially sensitized to the need to stand against bigotry and oppression to erase bias and discrimination—not against just persons of faith, but all persons.

B. Living Without Fear of Legal Repercussion

In a liberal democracy, individuals should be able to move through life uninhibited—without being barred, for irrelevant characteristics, from working, securing housing, or frequenting places open to the public. After\textit{ Kitchen}, just as after\textit{ Obergefell}, many citizens who may have taken such things for granted found themselves grappling with fear too: the fear of suddenly finding themselves and their once-prevailing views marginalized or, worse, treated as a form of bigotry.\textsuperscript{168} Chief Justice John Roberts crystallized this concern in his dissent in\textit{ Obergefell}: “It is one thing for the majority to conclude that the Constitution protects a right to same-sex

\textsuperscript{165} See Pizer,\textit{ supra} note 68, at 386–87, 390–91 (”[E]veryone must be treated equally in public life notwithstanding particular sects’ religious objections to who others are and to how they live.”).


\textsuperscript{167} In 1838, Governor Boggs of Missouri instructed a general that “[t]he Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace.” William G. Hartley, \textit{Missouri’s 1838 Extermination Order and the Mormons’ Forced Removal to Illinois}, 2 MORMON HISTORICAL STUDIES 5, 5 (2001); Richard E. Bennett, \textit{He Is Our Friend: Thomas L. Kane and the Mormons in Exodus, 1846–1850}, 48 BYU Q. 37, 37–38 (2009).

marriage; it is something else to portray everyone who does not share the majority’s “better informed understanding” as bigoted.”

Justice Samuel Alito in dissent charged the Obergefell majority with “facilitat[ing] the marginalization of the many Americans who have traditional ideas” “[b]y imposing its own views on the entire country.”

Whether granting access to marriage would hurt anyone else had been a subject of intense debate during legislative battles for marriage equality. Justice Kennedy assured Americans in Obergefell that granting marriage rights to same-sex couples would leave undisturbed the rights of others: “reasonable and sincere” religious people will be able to “teach the principles that are so fulfilling and so central to their lives and faiths” and honor their “deep aspirations to continue the family structure they have long revered.” In Kitchen, the Tenth Circuit panel addressed the fear by those holding traditional views of marriage that they might be marginalized:

[A]ppellants express concern that a ruling in plaintiffs’ favor will unnecessarily brand those who oppose same-sex marriage as intolerant. We in no way endorse such a view and actively discourage any such reading of today's opinion. . . . [F]or many individuals, religious precepts concerning intimate choices constitute “profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives” . . . . Our conclusion that plaintiffs possess a fundamental right to marry and to have their marriages recognized in no way impugns the integrity or the good-faith beliefs of those who supported [Utah’s same-sex marriage ban].

These assurances fell flat for many Utahns. High profile ousters of religious traditionalists dominated the news both nationally and in Utah during this time. Three months before the Tenth Circuit’s decision in Kitchen was handed down, Brendan Eich, co-founder of Mozilla, resigned as Mozilla’s CEO eleven days after being named, in the wake of negative

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170 Id. at 2643 (Alito, J., dissenting).
171 Compare, e.g., Mark Regnerus, Yes, Marriage Will Change—and Here’s How, WITHERSPOON INST. (June 7, 2013), http://www.thepublicdiscourse.com/2013/06/10325/?utm_source=RTA+Regnerus+Marriage+Will+Change&utm_campaign=winstorg&utm_medium=email (discussing how same-sex marriage may change the traditional monogamous marriage), with Adam & Steve, Getting Used to Gay Unions, ECONOMIST (Nov. 23, 2017), https://www.economist.com/special-report/2017/11/23/getting-used-to-gay-unions (stating that there is no evidence to show that same-sex marriage will “spoil straight people’s appetite for the traditional kind” of marriage).
172 Obergefell, 135 S. Ct. at 2594, 2607.
173 Kitchen v. Herbert, 755 F.3d. 1193, 1229 (10th Cir. 2014).
publicity over a donation of $1,000 to Proposition 8 six years earlier. Commentators downplayed the harm, stressing how “completely reasonable [it is] for people to be upset about California Prop 8 and to be upset at anyone who supported it, including Brendan Eich.” Others, including LGBT advocates, criticized Eich’s ousting, saying it violated norms of fair play. Of course, the fear of repercussions for private conduct is something many LGBT persons instantly recognize. LGBT people have been fired for attending gay rights parades on their own time, far from the workplace.

And in Salt Lake City, motorcycle police officer Eric Moutsos’s clash with Salt Lake City authorities over a request that he perform motorcycle maneuvers at the front of the Utah Pride Parade was still playing out. Moutsos, who testified in favor of S.B. 296, had declined to do motorcycle maneuvers, saying, “(Some might say) just because you may disagree with somebody means that you hate them. And that’s just not true. Because I love people. I’ll take a bullet for you. I’ll protect you. But I will not advocate certain things in people’s lives.” Moutsos stated he would gladly do security for the parade and wanted to swap assignments with another officer: “I felt that by being an actual participant in the parade, I would be perceived to be supporting certain messages that were contrary to who I am . . . . I will protect their parade. But I just don't want to be in the parade.” He claimed that when the City learned of his reasons for the proposed swap, they put him on leave. He contended publicly that the City had discriminated
against him based on his religious beliefs; the City, he said, could have easily accommodated his request. Ultimately, Moutsos never filed suit. But his case stoked public concern at precisely the moment the Utah Legislature grappled with the competing interests of persons of faith and LGBT persons—far outside the sanctuary of churches.

In the end, the devastating outcomes for both communities of suppressing something as core to themselves as their sexuality or their faith served as the substrate for common protections.

As noted below, the Utah Compromise protected employees from such losses for lawful, non-harassing speech outside the workplace, as well as at work in some instances. The Utah Compromise also preserved the ability of organizations with a unique identity to structure their affairs around that identity and populate their ranks with like-minded individuals.

C. Give Parties Needed Certainty to Immediate Challenges

Much of the skepticism of SOGI nondiscrimination law proceeds from fear of the unknown: What does extending rights to others mean for me? The Utah Compromise defused such skepticism by providing specific answers to concerns by each community over what a new script for peaceful coexistence would mean for them. “This is allowed, this is not” gives important clarity and by itself can allay fears. Indeed, security and peace of mind are crucial to a détente in the culture war.

Providing such clarity guided the kind of accommodations for faith that would be utilized: specific, surgical protections in the law rather than multifactorial tests like those in RFRA and even Title VII. Title VII places a duty on covered employers to accommodate religious beliefs or practices when they can be “reasonably” accommodated, up to an “undue hardship.” The Supreme Court has interpreted undue hardship to require no more than a “de minimis” impact on the employer’s operations or other coworkers. Faith leaders and others have called on Congress to abrogate the holding in TWA v. Hardison and more strongly protect workers’ religious

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183 See id. (indicating that Moutsos noted that trades were a part of the department’s policy and that other officers had already traded out that same day, but that he was the only one who provided an explanation). For a discussion of duties placed upon employers, including government employers, to reasonably accommodate an employee’s religious practices up to an undue hardship on the employer or co-workers under Title VII, see Robin Fretwell Wilson, Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws, 5 NW. J.L. & SOC. POL’Y 318, 323, 347–58 (2010).

184 See infra note 228 and accompanying text.

185 See infra note 230 and accompanying text.


187 Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). Despite the dialing down of Title VII’s protections in TWA v. Hardison, Title VII can provide an important protection by pushing the norm of accommodation into workplace practices.
beliefs and practices, as Congress intended. But even as written, Title VII requires courts to decide layers of questions before they can resolve any specific dispute: What accommodation is being requested? Is it reasonable? Would giving that accommodation be a hardship for the employers or the accommodated employee’s co-workers? Would any hardship be undue?

The Utah Legislature sought to give clear answers on how foreseeable clashes around marriage, faith, and sexuality should be resolved. That led to a strong preference for clear lines drawn in specific statutory protections, which would allow persons engaging in protected conduct to, if sued, point to those protections early in litigation, permitting resolution at the earliest stages of litigation, rather than after a trial on the merits.

D. Respecting Stakeholders’ Non-Negotiables

A number of non-negotiables held by the LGBT community marked the outer boundaries of any viable accord around LGBT rights and religious freedom. These acted as guardrails, cabining the zone of possible lawmaking to approaches that would meet the core commitments held by the relevant communities.

Of central importance to the LGBT community was the tenet that any new nondiscrimination law must protect the full LGBT community. In other words, the “T” must stay in. Further, any new compact must also protect LGBT persons in equal measure to other protected classes, like race, gender, national origin, etc. Doing otherwise would be seen as a signal that LGBT persons do not merit the protections given to racial and other minorities.

Of course, nondiscrimination laws do not hew to these principles today. Not all protected classes have been protected alike, as Jonathan Rauch has pointed out. Most notably, differently abled persons are protected not just by “thou shall not discriminate” strictures, but by affirmative duties to, for

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189 Lisa Mottet & Justin Tanis, Opening the Door to the Inclusion of Transgender People, NAT’L GAY & LESBIAN TASK FORCE POL’Y INST./NAT’L CTR FOR TRANSGENDER EQUALITY 60 (2008) (“Ensure that all proactive bills/policies you support include sexual orientation and gender identity or expression. If policies or laws exist that only include sexual orientation, work to get gender identity/expression protections added.”).

190 Michael Kent Curtis, A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context, in THE RULE OF LAW AND THE RULE OF GOD 83, 95 (Simon O. Ilesanmi et al. eds., Palgrave Macmillan 2014) (“So, as a matter of public policy, legislation protecting people against discrimination based on sexual orientation—for example, in housing, employment, and public accommodations—generally should be treated as race and gender discrimination are treated.”).

instance, make tangible changes to facilities so that work and living spaces are meaningfully available. Still, if feasible, lawmakers should move all the protected classes together. Thus, if in the employment context racial discrimination is prohibited for companies with more than fifteen employees, then SOGI nondiscrimination protections should kick in at the same size threshold.

A second principle follows on the first: pre-existing protections of other minorities should not be rolled back just to make SOGI protections more palatable. Thus, when a racial discrimination ban applies to companies with more than fifteen employees, that threshold should not change when adding “sexual orientation” and “gender identity” to the prohibited grounds for hiring and firing persons.

Perhaps more than any other signal that LGBT persons were being protected in like measure and respected equally was precisely where the new SOGI protections would be added to Utah’s existing law. Writing a separate chapter to contain new protections may have been tempting to some. However, Utah lawmakers elected a cleaner structure: adding “four words and a comma” to the Utah Antidiscrimination Act and the Utah Fair Housing Act, together with new protections for faith communities to meet their needs.

People of faith and faith communities also come to the table with non-negotiable principles. One non-negotiable is that religious freedom does not just entail protections for the collective—groups like churches and their affiliated non-profit auxiliaries—but also protections for individual beliefs and practices. Individual persons require autonomy and security to hold
their religious beliefs just as groups require the autonomy to pursue their unique religious missions. A second non-negotiable required that protection for religious belief must extend to all faiths, not just a single favored sect. Third, those protections must extend to public life so that religious practice would not be confined inside the walls of a mosque, temple, or church.

A fourth principle echoed Chief Justice Roberts in his *Obergefell* dissent: the state must not declare one viewpoint on marriage a winner but must leave to each person’s conscience the prerogative to believe what he or she believes and to speak accordingly (in a lawful manner). In other words, traditional views of marriage would have to be respected in the resulting law as strongly as the view that marriage should be open to same-gender couples.

Finally, any protection for the LGBT community should not be so broadly constructed that the protections have the inadvertent consequence of washing out the religious character of religious communities, that is, of infringing on their autonomy to determine the tenets and practices of their faith. As explained below, Utah’s pre-existing nondiscrimination law never reached churches and religious actors, which have always operated outside Utah’s legal regulation of discrimination. That separate-sphere approach ensured religious groups the kind of autonomy animating *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.* There, the U.S. Supreme Court held that a ministerial exception, grounded in the First Amendment’s Religion Clauses, applied to a “called teacher” who worked in a church-affiliated school, barring recovery against the school under the Americans


199 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (observing that no one “who does not share the majority’s ‘better informed understanding’ [should be painted] as bigoted”).

Importantly, churches have the autonomy to determine—according to their religious tenets—who may transmit their messages, who may lead their workshops, and who is qualified to be a minister. That respect for religious autonomy would permeate the Utah Compromise’s treatment of religious actors and persons.

Some of the autonomy granted in the Utah Compromise followed from Utah’s preexisting municipal SOGI ordinances—rolling back protections that religious stakeholders received under local law were rolled back would mean many religious actors would fare worse under a statewide measure, making that a non-starter. Here, the decision by so many municipalities to exempt expressive associations—like the Boy Scouts—would drive the decision by state lawmakers to exempt the Boy Scouts by name.

Often lost in the public’s consideration of SOGI laws are the implications for business. The proper policy is difficult because it implicates not just sexual minorities and faith communities, but employers and landlords as well. Utah is a strong right to work state. It prides itself on a climate friendly to business interests and development. Moreover, any nondiscrimination law imposes costs on companies, whether because illicit discrimination occurs within the company or because of compliance costs. Ryan Anderson has argued that “SOGI laws chip away at the at-will employment doctrine that has made the American labor market” strong. He contends that “[b]ecause businesses do not want to be stuck with unproductive or superfluous workers, they are less willing to take the risk of hiring new employees in jurisdictions with such laws” because “[t]he subjective nature of sexual orientation and gender identity . . . encourage[es] employees to threaten a lawsuit against their employer in response to adverse employment decisions.”

But the “patchwork” of municipal SOGI ordinances across Utah offered a pro-business rationale for a statewide measure: to resolve the

\[201\] Id. at 204.

\[202\] Id.

\[203\] Id. at 190–94.

\[204\] See supra note 119 and accompanying text (discussing extension of privileges to expressive associations).


\[206\] Andrew Dash Gillman, Utah Economic Development Clusters Around a Governor’s Vision, 15 Industry Today (2012) (“Utah, and its forward-thinking governor, wants to make the state a fertile environment where businesses can thrive and increase the population’s standard of living.”).


\[209\] Id.
inconsistencies for employers across Utah’s municipalities.\textsuperscript{210} Many successful businesses, some of which began as chains in Utah, operate across the state, including Bruges Waffles & Frites (locations in Salt Lake and Provo),\textsuperscript{211} Big 5 Sporting Goods (locations in Salt Lake, Davis, and Utah counties),\textsuperscript{212} and Petersen Medical (stores in Logan and Utah County).\textsuperscript{213} To address the concern that gay or transgender persons would bring frivolous employment discrimination claims, the Utah Legislature took care with definitions. For example, “gender identity” is defined according to the Diagnostic and Statistical Manual (DSM-5)\textsuperscript{214} and can be demonstrated by a doctor’s note or consistent and uniform assertion of the gender identity, among other modes of proof.\textsuperscript{215} For the transgender worker, the definition gives much needed clarity: once gender identity is shown, transgender workers are protected and cannot legally be treated differently just because they are transgender.

Countervailing privacy interests of other workers—and any expense that those interests would entail—received serious study and airing. Lawmakers were acutely aware that imposing steep costs by mandating the construction or remodeling of bathroom facilities (much like a duty to provide access to disabled persons under the Americans with Disabilities Act)\textsuperscript{216} could stall Utah’s humming economy.

Utah lawmakers authorized businesses to “designate sex-specific facilities” but required employers to “afford reasonable accommodations based on gender identity to all employees” if they “designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities”.\textsuperscript{217} Both chambers recognized that many Utahns may have never interacted with

\begin{footnotes}
\item[210] Adams, supra note 104 (“This patchwork of local rules created inconsistencies across Utah for employers operating in more than one jurisdiction.”).
\item[212] See \emph{Find a Store}, Big 5 Sporting Goods, https://www.big5sportinggoods.com/store/integration/find_a_store.jsp (last visited Sept. 28, 2018) (listing locations in American Fork City, Orem City and Spanish Fork City in Utah County, as well as Centerville, Clinton, and Layton in Davis County).
\item[214] See infra text accompanying note 278 (“‘[G]ender identity’ has the meaning provided in the Diagnostic and Statistical Manual (DSM-5) . . . .”).
\item[215] See infra text accompanying note 279 (“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.”).
\item[217] \textsc{Utah Code Ann.} § 34A-5-110 (West 2018).
\end{footnotes}
a trans person, given their tiny fraction of the population, which may be a source of unease initially. Concerns about privacy, they concluded, could be solved with nothing more than a $100 lock on a bathroom door. In multiuse bathrooms, patrons concerned about sharing space with a trans person can simply lock the stall—and men who might have used a urinal can use a stall instead. Throughout the Utah Code, businesses are instructed to act reasonably and are insulated from liability when they do so. Asking employers to use “reasonable rules and policies” to manage competing interests here was no different.

To recap, any law would have to meet the following criteria:

- Protect the full LGBT Community;
- treat protected classes equally to the greatest extent possible;
- not roll back preexisting protections for anyone;
- protect faith communities in all their forms, even associated non-profits;
- protect collectives and individual believers individually;
- protect all faiths together;
- not disparage faith-informed views of marriage;
- impose as few new obligations on economic actors as possible; and
- preserve the religious character of religious organizations.

To borrow a phrase from the Jesuit theologian John Courtney Murray, one can think of respecting these principles as “articles of peace.”

V. OPERATIONALIZING COMMON GROUND PRINCIPLES

Implementing these principles is far harder than making the case for their worth. The Utah Legislature operationalized these principles by deploying several devices for common ground lawmaking. Like the pillars of peaceful coexistence, these devices are useful for any state seeking to strike an accord, whatever its unique composition and history.

A. Use Protections with Universal Application—Protect All People Alike

One obvious solution is to meet as many of these principles as is possible with “parity” or two-way-street protections. The assurances to each

219 See Adams, supra note 216, at 1657–58.
220 See, e.g., id. (explaining that employers are allowed to adopt “reasonable rules and policies” that afford for sex-specific bathrooms, as long as those rules and policies provide reasonable accommodations with respect to “gender identity to all employees”).
221 Id.
222 John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition 48 (1960).
community that it could speak about marriage, faith, and sexuality—that their views would not need to be confined to their homes, clubs, or churches—followed this pattern. Utah provided that lawful, non-harassing speech about an employee’s religious, moral, or political beliefs, whether expressed inside or outside the workplace, cannot be the basis for taking action against an employee.223 Borrowing a page from the archetypal conscience clause, the Church Amendment,224 the Legislature protected any (lawful) expression of opinion on marriage, faith, or sexuality.225

The key to protecting both religious dissenters from same-sex marriage and advocates for same-sex marriage was to protect them in like measure, in the same provision. These novel workplace speech protections—patterned on laws elsewhere protecting employee speech226—covered speech inside the workplace if employers allowed any speech about marriage, faith, or sexuality, and the speech did not undermine the employer’s business purposes. Employers could rule all such topics out of bounds; but if they allowed some speech on the topics, they would have to allow all legal, non-harassing speech.227

Speech protections encompassed activities outside the workplace as well. Businesses in Utah cannot now fire employees for legal speech outside the workplace, ensuring that no one can do a “Brendan Eich” in Utah.228 Neither can an employer fire employees for attending a gay rights parade.229 The structure of Utah’s law ensured institutional autonomy along with

223 UTAH CODE ANN. § 34A-5-112 (West 2018).
224 See 42 U.S.C. § 300a-7(e)(1) (2012) (protecting individual physicians from losing staff privileges or suffering other discrimination for doing abortions or refusing to do them if they have a moral or religious belief about abortion).
225 UTAH CODE ANN. § 34A-5-112 (West 2018).
226 See Eugene Volokh, Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation, 16 TEX. REV. L. & POL. 295, 304 (2012) (detailing employee speech protections, such as those that cover both on-the-job and off-the-job speech—many of which were originally implemented to protect employees from retaliation based on how they voted—and federal labor laws which preempt their application to union employees whose political opinions conflict with the union).
227 See UTAH CODE ANN. § 34A-5-112(1) (West 2018) (“An employee may express the employee’s religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer.”).
228 Id. § 34A-5-112(2) (“An employer may not discharge, demote, terminate, or refuse to hire any person, or retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, for lawful expression or expressive activity outside of the workplace regarding the person’s religious, political, or personal convictions, including convictions about marriage, family, or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer.”). Of course, Eich would be protected only if he had an employment relationship.
229 See supra note 178 (describing a lawsuit where the plaintiff “claim[ed] that he was fired from the company’s . . . franchise location because he is gay” after plaintiff went to a gay rights parade).
Because religious organizations are not covered employers, they retain the discretion to employ only those who sing from the same sheet of music. 230

Both provisions acknowledge that employers’ interests can be disrupted by unfettered speech protections—both are cabined by the essential business purposes of the employer. 231 This common-sense limitation reflects the fact that an employee’s speech can hurt a business’s brand and therefore its operation, especially when the business pursues a greater societal aim like expanding access to reproductive services, advancing environmental justice, or protecting conservative notions of the family. 232 Thus, employees of Planned Parenthood can be expected to align with the organization’s views on abortion.

Utah’s speech provisions are essential for minority voices to be heard. Who precisely is in the minority may change from location to location, with some views more mainstream in Salt Lake City than in a southern Utah city, like Monroe, and vice versa. But as Chief Justice Roberts intimated in his dissent in Obergefell, respectful dialogue with one another involves mutual understanding and authentic acceptance. 233

The speech protections anticipated flare-ups soon to come. Weeks after S.B. 296’s signing, controversy erupted at Utah Valley University, a public institution, after its president signed an amicus brief in Obergefell v. Hodges. 234 S.B. 296—which became effective on May 12, 2015, just days

231 UTAH CODE ANN. § 34A-5-112 (West 2018).
232 See Statement of Robin Fretwell Wilson at 44:20, Senate Business and Labor Standing Committee (Mar. 5, 2015), http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18751&meta_id= (“Sometimes, an employee’s speech can hurt the business . . . . If, for example, I worked at Planned Parenthood, it would be totally appropriate for them to say, ‘You can’t wear one of those little buttons [that have the words] right to life with the fetus on it.’ ”).
233 See Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (“Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause.”).
234 Annie Knox, Professors Say UVU President’s Signature Against Gay Marriage Harms Utah School’s Mission, SALT LAKE TRIB. (May 5, 2015), archive.sltrib.com/article.php?id=2474696&itype=CMSID; Andy Thomason, Utah Valley State President Draws Fire for Arguing Gay Marriage Causes Abortions, CHRON. HIGHER EDUC. (May 4, 2015), https://www.chronicle.com/blogs/ticker/utah-valley-state-president-draws-fire-for-arguing-gay-marriage-causes-abortions/98321 (“Mr. Holland’s office released a statement[:] . . . ‘As the brief clearly indicates, Matthew Holland’s title was used for identification purposes only,’ the statement reads. ‘He was signing as an individual and not in any capacity on behalf of Utah Valley University.’ ”); Brief of 100 Scholars of Marriage as Amici Curiae Supporting Respondents, Obergefell v. Hodges, 135 S. Ct. 2584, (2015) (Nos. 14-556, 14-562, 14-571, 14-574), https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-
after criticism was voiced against the university president—helped resolve matters quickly and respectfully.235

B. Sometimes, Old Structures Must Be Reimagined

Many culture war collisions occur because of scarcity—as a result of old patterns for how something has always been done, which may have made sense in the past. Because of this, we often believe we are forced to pick one winner.

The classic instance in which policymakers and the public perceived a stark choice after same-sex marriage was the taxpayer-paid employee who declined to solemnize, or facilitate, a same-sex marriage for religious reasons. Some have quietly asked to step aside,236 others have become the cause célèbre of groups that opposed same-sex marriage.


In October 2014 the North Carolina Administrative Office of the Courts issued a guidance memorandum telling its judges and magistrates that it would not defend them if they refused to issue same-sex marriages. Myrick v. Warren, No. 16-EEOC-0001, 5 (Mar. 8, 2017), https://s3.amazonaws.com/becketnewsite/Myrick-v.-Warren-et-al.-16-EEOC-0001.pdf. On Myrick’s first day back on duty after the announcement, she met with her supervisor and informed her “that due to her religious beliefs she could not be a participant in same-sex marriages,” and provided a letter of resignation. Id. at 5–6. Myrick met again with her supervisor a few days later, but her supervisor said that the guidance memorandum allowed for no religious accommodation and accepted Myrick’s resignation.

Myrick ultimately filed a complaint for religious discrimination against the North Carolina courts with the EEOC. Myrick was ultimately found to have been wrongfully discharged and entitled to back pay and benefits in the amount of $325,000. During the litigation, she went years without wages or benefits (forgoing around $210,000), had to attend various hearings and arguments associated with the case, wait on the EEOC’s decision, and navigate through a settlement agreement in the face of an appeal. Settlement Agreement and Release, BECKET (Jan. 23, 2018), https://s3.amazonaws.com/becketnewsite/Signed-settlement-agreement-JW-and-GB.pdf. Even now she faces the harsh light of national media.

As the case was pending, the “North Carolina Legislature passed into law Senate Bill 2 which provides an opportunity for magistrates in North Carolina the right to recuse themselves from performing
Most infamously, county clerk Kim Davis, an elected Kentucky official, shut down marriage to everyone in a part of Kentucky for ten weeks after *Obergefell*. She claimed that issuing licenses to same-sex couples affixed with her name “would conflict[] with God’s definition of marriage” and “would violate [her] conscience.” She refused to issue licenses to heterosexual couples, too, and barred anyone else in her office from doing so until Judge David Bunning tossed her in jail and broke the impasse.

To be clear, Davis is as unsympathetic as a religious objector can possibly be. In the name of religious freedom, she claimed the ability to deny others their rights. She used the chokepoint position that her office occupied as an occasion to humiliate couples she refused to serve.

Other objectors have been far more sympathetic. In Indiana, Harrison County Clerk Linda Summers was fired after asking not to process marriages based on a sincerely held religious belief.” *Myrick*, No. 16-EEOC-0001 at 19. The bill had no direct impact on the case, other than as “an example in support of [the magistrate’s] argument that an accommodation could have been granted.” *Id.* at 20.


238 See John Mura & Richard Pérez-Peña, *Marriage Licenses Issued in Kentucky County, but Debates Continue*, N.Y. TIMES (Sept. 4, 2015), http://www.nytimes.com/2015/09/05/us/kim-davis-same-sex-marriage.html (“Kentucky law says that a marriage license must contain ‘an authorization statement of the county clerk issuing the license,’ which same-sex marriage advocates note is standard language, preprinted on the form. State law does not require a clerk’s signature on the license; to be valid, it must have ‘the signature of the county clerk or deputy clerk issuing the license.’”).


241 Some religious figures fault Davis’s approach. Peter Wehner, a Christian commentator who served in the last three Republican presidential administrations, stated “I think she’s wrong on the merits, wrong theologically and her stance is harmful to Christians both in the religious liberty debate and in trying to present Christianity to the watching world.” Travis Loller, *Many Religious Conservatives around S2Split on How to Feel About Kim Davis*, TALKING POINTS MEMO (Sept. 13, 2015, 5:40 PM), http://talkingpointsmemo.com/news/kim-davis-religious-liberty-groups.

242 A male couple was ignored for days as they waited to be served. Bil Browning, *Watch: Cops Respond to Kentucky Gay Couple Requesting Marriage License*, ADVOCATE (July 8, 2015, 11:42 AM), https://www.advocate.com/politics/marriage-equality/2015/07/08/watch-cops-respond-kentucky-gay-couple-requesting-marriage-lic. Kentucky officials were ultimately ordered to pay $222,695 in attorneys’ fees and $2,008 in costs as a result of Ms. Davis’s actions. Associated Press et al., *Judge: Kentucky Will Pay $224,000 in Fees in Kim Davis Case*, WKMS (July 21, 2017), https://www.wkms.org/post/judge-kentucky-will-pay-224000-fees-kim-davis-case#stream/0.
“marriage paperwork for same-sex couples” when others were willing to do so.243 Summers sued,244 arguing that she did not have to “hang [her] religious beliefs at the door of the office.”245 Some refusals have extended to all marriages,246 others only to same-sex marriages.247 Persons authorized


246 See Emily E. Smith, Second Oregon Judge Ends Wedding Services After Gay Marriage Allowed, OREGONIAN: OREGONLIVE (Sept. 9, 2015, 5:38 PM), http://www.oregonlive.com/hillsboro/index.ssf/2015/09/second_oregon_judge_ends_wedding_services_after_gay_marriage_allowed.html (discussing how judges in Oregon have refused to perform weddings, with one calling it “a personal choice based on my faith”).

Three judges and one mayor in Ohio refused to marry anyone, with two specifically citing their opposition to same-sex marriage. Alan Johnson, Gay or Not, Civil Weddings Not Offered in Guernsey County, COLUMBUS DISPATCH (July 13, 2015, 12:01 AM), http://www.dispatch.com/content/stories/local/2015/07/13/guernsey-county-marriages.html (“People who want to have a civil-marriage ceremony in Guernsey County—same sex, opposite sex, doesn’t matter—are out of luck. None of the three judges in the county is willing to perform any marriage. The same goes for Cambridge Mayor Thomas D. Orr.”). The Ohio Board of Professional Conduct also issued an advisory opinion that judges “may not refuse to perform same-sex marriages while [performing] opposite-sex marriages” and cannot “decline to perform all marriages in order to avoid marrying same-sex couples.” See Sanaa Orra, Judges Must Perform Same-Sex Marriages According to Advisory Board, 13ABC (Aug. 10, 2015, 10:17 PM), http://www.13abc.com/home/headlines/judges-must-perform-same-sex-marriages-according-to-advisory-board-321339561.html (“A judge who performs civil marriages may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages, based upon his or her personal, moral, and religious beliefs, acts contrary to the judicial oath of office and [rules of judicial conduct].”).

under state law to marry others, but who can imagine themselves declining service to same-sex couples, have been cast as unethical even if no one has been refused. In Wyoming, a judge who had expressed her intent to not perform same-sex marriages on religious grounds was publicly condemned, investigated by an ethics commission, and made part of litigation that challenged the ethics commission’s findings. Although the appeal resulted in an accommodation for the judge (she may choose to perform all weddings or none at all), it came only after the judge was disparaged in the media and forced through a gauntlet of litigation. The ethics commission also expended resources, and members of the LGBT community appearing

probate judges had to issue licenses. Id. Alabama revised its licensure law in anticipation of the Supreme Court’s decision in Loving v. Virginia, 388 U.S. 1 (1967), striking down anti-miscegenation laws. Id.

The Louisiana Supreme Court Committee on Judicial Ethics, which makes disciplinary recommendations to the Louisiana Supreme Court, issued an advisory opinion that judges and magistrates must marry all couples. See The Judiciary Commission of Louisiana—Powers, L.A. SUP. CT., http://www.lasc.org/la_judicial_entities/judiciary_commission.asp (last visited Oct. 6, 2018) (stating that the Judiciary Commission can recommend to the Louisiana Supreme Court that it “censure, suspend with or without salary, remove from office, or involuntarily retire a judge for willful misconduct relating to his official duty, willful and persistent failure to perform his duty, persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and conduct while in office which would constitute a felony, or conviction of a felony”). “Even though solemnization is ‘not a mandatory judicial function,’ any judge who ‘once performed marriages and now chooses not to’ is subject to recusal for ‘animus.’” Wilson, supra note 149, at 1455–56. Such “animus” may raise the specter of due process concerns. See Susannah W. Pollvogt, Unconstitutional Animus, 81 FORDHAM L. REV. 887, 888 (2012) (providing an overview of the legal concept of “animus”). It is unclear whether the choice to not solemnize any marriages would also subject one to discipline. See Pizer, supra note 68, at 392–93 (discussing the Mississippi law that permitted individuals and organizations to refuse services due to religious beliefs without penalty). The Committee’s advice conflicted with Governor Bobby Jindal’s executive order purporting to “prevent the state from discriminating against persons or entities with deeply held religious beliefs”—setting up a struggle between two arms of the Louisiana government over who decides what judges must do. Emily Lane, Bobby Jindal Plans to Issue an Executive Order Enforcing Intent of Religious Freedom Bill, NOLA.COM: TIMES-PICAYUNE (May 19, 2015), http://www.nola.com/politics/index.ssf/2015/05/bobby_jindal_executive_order_r.html; see Jonah Hicap, Louisiana Governor Draws IBM’s Ire for Issuing Religious Freedom Order, CHRISTIAN TODAY (June 23, 2015), http://www.christiantoday.com/article/louisiana.governor.draws.ibms.ire.for.issuing.religious.freedom.order/56854.htm (discussing IBM’s opposition to Louisiana’s executive order).

The Oregon Commission on Judicial Fitness and Disability found that Marion County Circuit Court Judge Vance Day discriminated by “instructing his staff to screen marriage applicants for same-sex couples and for refusing to perform the marriages,” instead “referring them to other judges.” Shelby Sebens, Oregon Judge Who Refused to Perform Gay Marriages Should Lose Job—Panel, REUTERS (Jan. 26, 2016, 3:58 PM), http://in.reuters.com/article/oregon-court-idINKCN0V42MJ (noting that Judge Day faced the possibility of losing his job).

Neely v. Wyo. Comm’n on Judicial Conduct & Ethics (Inquiry Concerning Neely), 390 P.3d 728, 732 (Wyo. 2017) (ordering the judge to perform all marriages or none at all, and holding that a judge’s expression of her intent not to participate in a same-sex marriage, if asked, violated rules requiring promotion of public confidence in integrity and impartiality of the judiciary), cert. denied, 138 S. Ct. 639 (2018) (mem.).
before Judge Neely may have feared whether they would receive a fair shake in her courtroom. The case was a loss for all involved. 251

Have no doubt, these denials are hurtful. When judges in Alabama stopped issuing marriage licenses altogether in the days after Obergefell, it crushed the expectations of same-sex couples who grew up in the area and simply wanted to be married in “[their] home county.” 252

As a threshold matter, no one may marry without state permission. 253

The state’s monopoly power over marriage means that one person’s refusal to solemnize a relationship or to issue the needed license can frustrate the ability to marry. Refusal by government officials to solemnize marriages may also force couples to seek religious officials to do so—not because the couple is observant, but because they desire to have the protections afforded by marriage.

Because the Supreme Court has ruled on same-sex marriage, no one may erect a “chokepoint on the path” to that right. 254 But that bare fact does not dictate how the state dispatches the duty to make marriage available to all qualified couples. Nothing requires that only taxpayer-paid officials be available to solemnize marriages.

To avoid chokepoints—which often result in win-lose outcomes in which either the clerk wins and the couple loses, or the couple wins and the clerk is fired—Utah created a new structure that avoids finitude. The Utah Legislature, for the first time, guaranteed the right to marriage solemnization by the state for all couples who seek the service, including same-sex couples. 255 Each county clerk’s office must designate a willing celebrant, 256

251 Because the state has monopoly power over marriage—that is, no one may marry statutorily without state permission—it is hardly surprising that clashes over same-sex marriage erupted first with registrars, magistrates, and judges.

252 Rose Hackman, Meet the Alabama Judges Who Refuse to Issue Marriage Licenses—Gay or Straight, GUARDIAN (July 12, 2015, 7:00 AM), https://www.theguardian.com/us-news/2015/jul/12/alabama-judges-gay-marriage-licenses; see also Reeves, supra note 247 (discussing the decisions of judges who oppose same-sex marriage to quit issuing marriage licenses).


254 Wilson, supra note 149, at 1480.

255 UTAH CODE ANN. § 17-20-4 (West 2018) (“A county clerk shall: (1) establish policies to issue all marriage licenses and keep a register of marriages as provided by law; (2) establish policies to ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued.”).

256 Id. § 17-20-4(2); see Statement at 7:25, Protections for Religious Expression and Beliefs About Marriage, Family, or Sexuality: Hearing on 2d Sub. S.B. 297 Before the H. Judiciary Standing Comm., 61st Leg., Gen Sess. (Utah 2015) (statement of Robin Fretwell Wilson, Professor of Law, U. Ill.), http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18895&meta_id=552079 (noting who counts as an “authorized celebrant” and how the provision operates practically to provide marriage on the same grounds to all people).
who in Utah may be a judge, religious authority, or other elected official.\textsuperscript{257} This function could be served by any willing clerk in the office, or this function could be outsourced to persons in the community willing to serve all couples on exactly the same basis.\textsuperscript{258} This expanded choice of options to fulfill a new duty placed on government to solemnize marriages meant that individual employees of the clerk’s office could “step off” without harm to the public.\textsuperscript{259} Same-sex couples and heterosexual couples both receive seamless access to marriage; no one is treated differently.\textsuperscript{260} Litigating is wasteful when decisions about where one person’s rights end and the other person’s begins can be worked out \textit{ex ante}. Moreover, no good can come of allowing government-paid workers to stand loudly on their rights or to make decisions in the moment about whether to provide a service, without having first made some provision for the public to be served respectfully.\textsuperscript{261} With fresh thinking and re-imagination of old statutory schemes, the Utah Legislature found a win-win.

C. \textit{Respect the Separate Spheres of the State and Religion}

Both the state and religion often do best when they govern in their own spheres. The Utah Compromise held to this concept by carrying forward the structure of Utah’s underlying nondiscrimination law, which had never regulated religious entities.\textsuperscript{262} The separate-sphere structure not only provides elbow room in society for persons who see the world differently; it also provides “categorical” exemptions as a result of scope provisions that make clear the Legislature’s intent not to reach a particular group or action. In practice, this means covered entitles or persons can, if sued, extricate themselves at the earliest stages of litigation, saving angst, money, and reputational harm.

\textsuperscript{257} UTAH CODE ANN. § 30-1-6 (West 2018).

\textsuperscript{258} Id. § 30-1-6(1).

\textsuperscript{259} See Dennis Romboy, \textit{New Law Helps Utah Avoid Marriage License Conflict Playing Out in Kentucky}, DESERET NEWS (Sept. 3, 2015, 5:30 PM), https://www.deseretnews.com/article/865636031/New-law-helps-Utah-avoid-marriage-license-conflict-playing-out-in-Kentucky.html (“The clerk’s office would allow people to step off as long as there was someone to issue the license.”).

\textsuperscript{260} More specifically, same-sex couples should never stand in another line or receive the service in a different manner than heterosexual couples. Offices may elect to outsource the function for workload reasons as well. The mechanism chosen to guarantee seamless access must be established \textit{ex ante} so that no one is surprised by or confronted with an objecting employee.

\textsuperscript{261} North Carolina’s measure allows recusal but does not make it invisible to the public, inviting ugly exchanges and precipitating dignitary harms to the couples who seek services. See Alan Blinder, \textit{North Carolina Governor Vows to Veto a Bill Seen as Targeting Gay Marriage}, N.Y. TIMES (May 28, 2015), https://www.nytimes.com/2015/05/29/us/north-carolina-governor-vows-to-veto-a-bill-seen-as-targeting-gay-marriage.html (noting the proposal allows officials “to recuse from performing lawful marriages” based on their sincerely held religious beliefs).

\textsuperscript{262} Goodstein, \textit{supra} note 151.
VI. The Resulting Text of the Utah Compromise: S.B. 296 & S.B. 297

In order to protect the needs of both communities, the Utah Legislature passed two bills: S.B. 296 and S.B. 297. Together, they address the most pressing needs of both communities with a “both-and” approach—rather than an “either-or” approach, much as Justice Kennedy’s later call to the nation in Masterpiece Cakeshop envisioned.

A. S.B. 296

With the passage of the Utah Compromise, LGBT individuals gained significant protection against discrimination—an improvement over scattered municipal protections. This itself is a singular accomplishment—indeed, Utah remains the last state in America to protect the full LGBT community from discrimination in a state-wide law.

As a result of robust accommodations, these protections for LGBT persons did not erase the religious character of faith communities. Noncommercial housing units owned by churches and other religious organizations can give preferences to those of their own faith, and small landlords with four or fewer units may choose their tenants based on personal preferences. Churches, subsidiaries, affiliates, religious schools, and the Boy Scouts of America may make hiring decisions based on religious values—as can small businesses with fewer than fifteen employees, many of which are family owned and run. But outside these narrow areas, LGBT people cannot be penalized just for being who they are.

1. Utah Antidiscrimination Act

Most of the changes to statutory law in S.B. 296 are focused on the Utah Antidiscrimination Act (UAA), the body of law in Utah that ensures discrimination does not hamper the ability of Utahns to secure housing and employment. S.B. 296 kept intact the statutory framework of the UAA while adding two new prohibited grounds for making decisions. If the UAA were a building, there would have been few structural changes, only the

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265 See Robin Fretwell Wilson, Bakers and Bathrooms: How Sharing the Public Square is the Key to a Truce in the Culture Wars, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 402, Fig. 30.2 (William N. Eskridge, Jr. & Robin Fretwell Wilson, eds.) (2018). Other states have added protections against gender identity discrimination to preexisting laws banning discrimination based on sexual orientation. See Graphic 1, FAIRNESS FOR ALL INITIATIVE, https://www.fairnessforallinitiative.com/why-find-common-ground.
268 UTAH CODE ANN. §§ 34A–5101 to 5112 (West 2018).
welcoming of a few more occupants.

i. Sexual Orientation and Gender Identity Added as Prohibited Grounds, with Definitions

The most fundamental change to the UAA was the addition of two new prohibited grounds for decisions: sexual orientation and gender identity. Adding SOGI to the UAA ensured that LGBT persons cannot lawfully be the target of discriminatory employment practices, such as “refus[al] to hire, promote, discharge, demote, or terminate a person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment.” It also prohibits employment agencies, on the same bases, from refusing to list or refer an otherwise qualified individual for a job or to cooperate with discriminatory requests from employers. Similar protections apply to labor organizations, apprenticeships and on-the-job training programs, and employment advertisements, and it is illegal for anyone to try to aid, incite, compel, or coerce noncompliance or obstruct or prevent compliance with the UAA. Thus, where an employee’s sexual orientation and gender identity are irrelevant to the job, the UAA outlaws discrimination on those bases.

Where sexual orientation or gender identity are in fact relevant to employment, S.B. 296 preserves the ability to make distinctions on those bases under the UAA. This would occur, for instance, where a given characteristic is a “bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise.” Similarly, the UAA preserves the right of a religious educational institution to make employment decisions according to an employee’s religion.

The Utah legislature’s overriding concern was to protect transgender persons from illicit discrimination while providing employers both security against frivolous or transient claims and certainty about what duties an employer would have. The care taken with gender identity illustrates that clarity can serve both the employer and employee. In the pair of laws, “gender identity” has the meaning provided in the Diagnostic and Statistical Manual (“DSM-5”), which provides detailed criteria for a medical diagnosis

269 Id. § 34A-5-106(1)(a)(i).
270 Id.
271 Id. § 34A-5-106(1)(b).
272 Id. § 34A-5-106(1)(c)(i).
273 Id. § 34A-5-106(1)(f)(i).
274 Id. § 34A-5-106(1)(f)(i)(D).
275 Id. § 34A-5-106(1)(e).
277 Id. § 34A-5-106(3)(a)(ii).
known as gender dysphoria. A person’s gender identity can be shown by providing evidence of gender dysphoria 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. By anchoring to the DSM-5, Utah’s law does not stand on the shifting sands of a scientific organization’s evolving treatment of a medical diagnosis. This alone builds in a fixedness.


280 As described by Steve Bressert:

In order for someone to be diagnosed with gender dysphoria today, they must exhibit a strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex). In children, the disturbance is manifested by six (or more) of the following for at least a 6-month duration: repeatedly-stated desire to be, or insistence that he or she is, the other sex; in boys, preference for cross-dressing or simulating female attire; in girls, insistence on wearing only stereotypical masculine clothing; strong and persistent preferences for cross-sex roles in make-believe play or persistent fantasies of being the other sex; a strong rejection of typical toys/games typically played by one’s sex; intense desire to participate in the stereotypical games and pastimes of the other sex; strong preference for playmates of the other sex; a strong dislike of one’s sexual anatomy; a strong desire for the primary (e.g., penis, vagina) or secondary (e.g., menstruation) sex characteristics of the other gender.[.]

In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex.

Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.

In children, the disturbance is manifested by any of the following: in boys, assertion that his penis or testes are disgusting or will disappear or assertion that it would be better not to have a penis, or aversion toward rough-and-tumble play and rejection of male stereotypical toys, games, and activities; in girls, rejection of urinating in a sitting position, assertion that she has or will grow a penis, or assertion that she does not want to grow breasts or menstruate, or marked aversion toward normative feminine clothing.

In adolescents and adults, the disturbance is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex.

The disturbance is not concurrent with a physical intersex condition.
One cannot understate the significance of Utah’s decision to add gender identity to the protected grounds. Utah is the last state in America to protect the full LGBT community in a statewide nondiscrimination law. No other measure has succeeded statewide since opponents tagged SOGI nondiscrimination laws as “bathroom bill[s]” in 2007.\(^\text{281}\)

Since then, a SOGI ordinance has been repealed in Houston.\(^\text{282}\) North Carolina’s bathroom-of-one’s-birth law precipitated boycotts until it was mostly repealed.\(^\text{283}\)

Concerns about persons asserting to be trans for illicit reasons have scant factual or empirical basis.\(^\text{284}\) But the definition of gender identity itself wards against assertion for wrongful reasons: gender identity may not be asserted for an improper purpose. Further, employers may require medical documentation. This certainty protects employees, too. Once an employee has made the needed showing, duties attach for the employer to accommodate that employee, as the next Section shows.

ii. Other Employment Protections

For some employers, dress and grooming standards are important aspects of business. Thus, the UAA now provides that employers may adopt “reasonable dress and grooming standards” that “afford reasonable accommodations based on gender identity to all employees.”\(^\text{285}\) Further, as noted earlier, employers may adopt “reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities,” provided they afford “reasonable accommodations based on gender identity to all employees.”\(^\text{286}\) Additionally, to make sure that all viewpoints concerning marriage, faith, and sexuality are permitted equally in the workplace, S.B. 296 permits expressions about “religious or

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The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.


\(^{281}\) Wilson, *supra* note 20, at 1374–75.


\(^{284}\) Wilson, *supra* note 20, at 1400–01.

\(^{285}\) UTAH CODE ANN. § 34A-5-109 (West 2018).

\(^{286}\) *Id.* § 34A–5–110.
moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression” allowed by the employer, unless the expression is “in direct conflict with the essential business-related interests of the employer.” 287 S.B. 296 also takes an extra step of protecting lawful expression on these subjects made outside the workplace by prohibiting employers from taking negative employment actions against employees with views with which they disagree. 288

iii. Defining “Employer” Subject to the UAA

Utah is often dismissed as a theocracy. 289 Religious stakeholders certainly permeate the state, which in 2017 was the third most religious in the nation, measured by the number of respondents who self-identify as “very religious.” 290 This degree of religiosity, together with the many religiously guided businesses that operate in Utah, led Utah lawmakers to revisit precisely where the wall separating church and state in Utah presently falls.

Some adjustment would be needed ultimately to get to “yes” by the faith community. “Employer” before S.B. 296 did not reach a religious organization or association, a religious corporation sole, or any corporation or association constituting a wholly owned subsidiary or agency of any religious organization. 291 After the UAA, the definition of employer was narrowed to also leave aside “a religious society[,] . . . or a religious leader, when that individual is acting in the capacity of a religious leader,” as well as “any corporation or association constituting an affiliate” of covered entities. 292

As noted earlier, S.B. 296 also categorically sets aside the Boy Scouts of America and its councils, chapters, and subsidiaries from the definition of “employer” under the UAA. 293 Not only are the Boy Scouts inextricably linked with the LDS Church in Utah, 294 but municipal SOGI ordinances in

287 Id. § 34A–5–112(1).
288 Id. § 34A–5–112(2).
289 Donald W. Meyers, Mormons make Utah nation’s 2nd most religious state, SALT LAKE TRIB. (Mar. 30, 2012), http://archive.sltrib.com/article.php?id=53811534&itype=cmsid (“‘We have a de facto theocracy,’ said Lane, board president of the Humanists of Utah, ‘because most of the Legislature is LDS.’”).
291 S.B. 296, 2015 Sess. (Utah 2015), at § 1 (“‘Employer’ does not include: (A) a religious organization, a religious corporation sole, a religious association . . . (B) any corporation or association constituting an affiliate, a wholly owned subsidiary, or an agency of any religious organization . . . .”).
292 Id.
293 UTAH CODE ANN. § 34A-5-102(1)(ii)(C) (West 2018).
294 In fact, the LDS Church infuses the single largest base of young men into the Boy Scouts, sponsoring thirty-seven percent of all Boy Scout troops. See Peggy Stack & Lee Davidson, If Mormons
large population centers across Utah already set these employers to the side.\textsuperscript{295}

Within Utah, the Boy Scouts and the LDS Church are especially intertwined, like two strands of DNA,\textsuperscript{296} as evidenced by how the LDS Church organizes its Scout troops. Boy Scout leaders functioning within the LDS Church are “called” by their local ecclesiastical leaders, who believe they have been prompted to extend the “calling” to the Boy Scout leader by God.\textsuperscript{297} Not only does the Scout leader provide assistance with the Scouting program, but that same leader often provides spiritual guidance by teaching Sunday school lessons and the like.\textsuperscript{298} In Utah, for many the Boy Scouts are as much a religious association as they are an expressive one. It quickly became non-negotiable for many in the faith community to preserve the group’s autonomy to hire persons who shared their core beliefs.

Further, not rolling back existing protections for either community augured in favor of an accommodation at the state level. As noted earlier, several of Utah’s underlying municipal laws left aside “expressive associations,” of which the Boy Scouts would be one.\textsuperscript{299} More fundamentally, extending to the Boy Scouts the treatment given to churches

\textit{Leave Scouting, BSA Will Feel It-In Its Wallet, SALT LAKE TRIB.} (Aug. 17, 2015, 5:47 PM), http://archive.sltrib.com/article.php?id=2778130&it=CMSID (“The LDS Church is far and away the nation’s largest Scouting sponsor, serving 437,160 boys in 37,933 troops. In 2013, more than a third (37 percent) of troops were LDS sponsored, accounting for 18 percent of the BSA’s 2.4 million total membership . . . .”); see also Jana Riess, Mormons Scale Back Involvement with Boy Scouts. What’s Behind It?, RELIGION NEWS SERV. (May 11, 2017), https://www.religionnews.com/2017/05/11/mormons-scale-back-involvement-with-boy-scouts-whats-behind-it/ (explaining the LDS Church’s decision to discontinue its partnership with the BSA for boys ages fourteen to eighteen).

\textsuperscript{295}See SALT LAKE CITY, UTAH, CODE § 10.04.060 (2018) (exempting “religious organization[s]” and “an expressive association whose employment of a person protected by this chapter would significantly burden the association’s rights of expressive association under Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) . . . .”); see also Tad Walch, Mormons Scale Back Involvement with Boy Scouts. What’s Behind It?, RELIGION NEWS SERV. (May 9, 2018, 8:38 PM), https://www.deseretnews.com/article/900018204/breaking-up-is-hard-to-do-lds-boy-scouts-partnership-wont-be-easy-to-disenchant.html (“Over 105 years, the LDS Church intertwined itself with the Boy Scouts of America in ways so inextricable that the two seemed to share strands of DNA.”).

\textsuperscript{296}See Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (“[T]he Boy Scouts is an expressive association . . . .”).
and other groups would not undercut the employment opportunities opened by S.B. 296 since the organization employed less than one hundred employees in the state—a veritable drop in the bucket.\(^{300}\)

That said, insulating the Boy Scouts proved thorny. Some in the LGBT community rankled at a categorical set aside for “youth organizations.”\(^{301}\) Framing an accommodation for any group in such terms, some influential leaders feared, would negatively reinforce “historical[] conflat[ions of] homosexuality with sexual perversity,” which had “fueled widespread, irrational fears that homosexuals had a propensity to molest children and to actively recruit juveniles to become gay.”\(^{302}\)

During discussion of the bill in hearings, women senators in particular asked sponsors why the accommodation covered the Boy Scouts only and not other organizations devoted to building character of girls, most prominently the Girl Scouts.\(^{303}\) Within weeks, the Girl Scouts opened a troop at the gay pride center in Salt Lake City, suggesting that the organization was uninterested in a carve-out even if proffered.\(^{304}\)

Ultimately, S.B. 296 protected the Boy Scouts specifically and the “freedom of expressive association” generally but not other “expressive associations,” as other bills had done.\(^{305}\)

Finally, although the LDS Church is the predominant religious group in Utah,\(^{306}\) S.B. 296 copied from federal law an accommodation for free-standing elementary and secondary religious educational institutions.\(^{307}\)
Between 55 and 110 operate in Utah, representing the Protestant, Catholic, and other faith traditions.

iv. Freedom of Expressive Association and Free Exercise of Religion

In an effort to ensure that religious freedom was broadly protected amid the multiple changes to the UAA, S.B. 296 directed that changes “may not be interpreted to infringe upon the freedom of expressive association or the free exercise of religion protected by the First Amendment of the United States Constitution and Article I, Sections 1, 4, and 15 of the Utah Constitution.” The statements are generally superfluous since they are co-extensive with constitutional guarantees. Combined with meatier protections for religious freedom, these statements point to the significance of the package of protections for religious freedom.

2. Utah Fair Housing Act

Following the same principles used with the UAA, S.B. 296 modified the Utah Fair Housing Act (UFHA) to extend protections to the LGBT community, with carve-outs and accommodations to preserve religious freedom.

i. SO & GI Added as Prohibited Grounds, with Definitions

S.B. 296 added sexual orientation and gender identity to the list prohibited grounds on which to engage in certain housing practices, such as refusing to sell or rent, refusing to negotiate, denying or making unavailable a dwelling, refusing to provide facilities or services in connection with a dwelling, or falsely representing that a dwelling is not available. Prohibited practices also extend to discriminatory advertisements, and encouragements for others to buy up dwellings so that protected persons or persons who merely associate with protected persons cannot enter a neighborhood. S.B. 296 added the same definition of gender identity to

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308 UTAH CODE ANN. § 34A-5-111 (West 2018).
311 Id. § 57-21-5(2).
312 Id. § 57-21-5(3).
313 Id. § 57-21-5(5).
the UFHA as used in the UAA.\textsuperscript{314}

ii. Small Landlord and Religious Accommodations

While the discriminatory practices prohibited by the UFHA are easily enumerated with the four new words, who the UFHA applies to is more detailed and nuanced. S.B. 296 carried forward the UFHA’s historical structure of leaving aside certain religious entities. For example, the UFHA does not apply to small landlords—owners of fewer than four single-family dwellings who may be motivated by personal modesty, privacy, or religious reasons to restrict the lease or sale of those dwellings to certain individuals.\textsuperscript{315} The UFHA also does not apply to nonprofits, charitable organizations, or religious organizations (including religious associations, religious educational institutions, religious societies, and those under contract with any of those entities) which own a dwelling, temporary residence facility, or permanent residence facility if they are motivated by personal modesty, privacy, or religious reasons to restrict leasing or sales to certain individuals.\textsuperscript{316}

For religious groups that do not restrict their membership by race, color, sex, or national origin, the UFHA allows religious entities to restrict its primarily non-commercial housing to members of the same religion, or to preference those of the same religion.\textsuperscript{317} For primarily commercial housing owned by religious entities, and those under contract with a religious entity, the UFHA allows restrictions and preference-giving along the lines of religion, sex, sexual orientation, and gender identity.\textsuperscript{318}

S.B. 296 also took care to ensure that religious educational institutions remained to the side of the UFHA’s reach.\textsuperscript{319} This provision protected Brigham Young University’s sex-segregated housing structure on and off-campus, grounded in the Latter-day Saint belief about the impropriety of sexual relations before marriage. Indeed, off-campus providers of student housing contractually agree to uphold residential living standards which impose curfews; bar opposite-sex guests from bedrooms, private hallways, and bathrooms; and maintain BYU’s honor code requirements concerning chastity and pornography, the consumption of alcohol, tobacco, tea, and

\textsuperscript{314} Compare \textit{id.} § 57-21-2(16), with \textit{id.} § 34A-5-102(1)(o) (using the same definition of gender).
\textsuperscript{315} \textit{id.} § 57-21-3(1). These small owners must also not sell more than two of their units every two years and use a real estate broker or salesperson to conduct their sales. \textit{id.}
\textsuperscript{316} \textit{id.} § 57-21-3(2).
\textsuperscript{317} \textit{id.} § 57-21-3(4)(a)(i).
\textsuperscript{318} \textit{id.} § 57-21-3(4)(b).
\textsuperscript{319} See \textit{id.} §§ 34A-5-102.5, 57-21-2.5 (The Utah Legislature took special care to state that neither sexual orientation nor gender identity were viewed as “protected classes” for purposes other than employment and housing, as specified in S.B. 296.).
Single students may only attend BYU by certifying they live in housing contractually obligated to enforce these rules. Because these landlords form an integral part of BYU’s religious ethos, they receive similar insulation. Landlords who do not enforce BYU’s religious code do not receive the protection afforded to religious actors. Any religious school could similarly contract with housing providers and make such a requirement a condition of the contract.

3. Non-severability Clause

S.B. 296 added valuable protections for both the LGBT community and the religious community. However, some of the conservative stakeholders sympathetic to the religious community’s concerns were wary to enter into a final deal. Fearing the worst, they were concerned that without a non-severability clause, LGBT advocates who were not content with the rights they secured in the Utah Compromise would try to undo many of the religious freedom protections through litigation. This fear was symptomatic of the deep distrust between the two communities that pre-dated the Utah Compromise. To make Utah Compromise work in the long term required a device that would prevent both sides from unwinding the arrived-at bargain though litigation, S.B. 296 included a non-severability clause. Thus, if any portion of S.B. 296 was “held invalid in a final judgment by a court of last resort, the remainder of the enactments and amendments” of S.B. 296 would be “rendered without effect and void.”

S.B. 296’s non-severability clause allowed both communities to walk away from the Utah Compromise with confidence, in the deal struck, a predicate for peaceful coexistence.

4. S.B. 297

But S.B. 296 did not answer all of the questions that arose when same-sex marriage came to Utah. For that, S.B. 297 provided additional security around religious practices connected to marriage and family.

i. Solemnization of Marriage

With the nation and state nearly evenly split on support for or opposition to same-sex marriage, Utah was faced with a tough question: How to guarantee access to marriage for all couples in a state that had never imposed a duty on state officials to solemnize marriages, without effecting widespread firing or dismissal of employees newly tasked with that duty.

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The Utah Legislature crafted an innovative approach that gave seamless access to all couples on exactly the same basis without creating the artificial scarcity that forces many states to prize access over conscience or conscience over access. First, as groundwork, S.B. 297 created a statutory duty for a county clerk’s office to solemnize legal civil marriages—such a duty had not existed in Utah law before.\footnote{Id. § 17-20-4 (1)–(2).} Second, S.B. 297 provided the county clerk’s office with multiple ways to dispatch this new duty of the office: the office could designate a willing clerk within the office to solemnize marriages on exactly the same basis for every couple that requested it, or the office could designate someone from a long list of other individuals in the community authorized to marry couples—including ecclesiastical leaders, spiritual advisors, the governor, mayors, judges, other county clerks or their designees, the president of the Senate, and the speaker of the House of Representatives.\footnote{Id. § 30-1-6(1).} They, too, would have to marry couples on exactly the same basis. The effect of expanding options is that those working in the clerk’s office who object to participating in marriages, for any reason, are able to step away and let another willing person solemnize marriages. Such an employee need never articulate their motivation for stepping off to a superior, and the couple presenting at the office would never know that anyone stepped aside. In this way, S.B. 297 avoided the nasty scenes that have unfolded at county clerk offices, where public officials have very publicly humiliated and blocked others from their rights in the name of conscience.\footnote{E.g. Mura & Pérez-Peña, supra note 238; Katie Rogers, Outside Courthouse, Kim Davis Is Seen as a Villain and a Hero, N.Y. TIMES (Sept. 3, 2015), https://www.nytimes.com/2015/09/04/us/outside-courthouse-kim-davis-is-seen-as-a-villain-and-a-hero.html.}

Utah lawmakers consciously sought to avoid friction around marriage in other ways, too. For many, marriage remains a religious sacrament. To respect this viewpoint and the religious practices that flow from it, S.B. 297 forbade government from requiring a religious official or organization to solemnize a marriage (or recognize one for ecclesiastical purposes) contrary to the official’s or organization’s religious belief.\footnote{Utah Code Ann. § 63G-20-201(1) (West 2018).} S.B. 297 also forbade government from denying religious individuals or organizations the ability to solemnize marriages if they decline to perform same-sex marriages or “provide goods, accommodations, advantages, privileges, services, facilities, or grounds for activities connected” to same-sex marriages.\footnote{Id. §§ 63G-20-201(2)–(3), 63G-20-301. Sections 63G-20-204 and 63G-20-302 provide a civil cause of action and remedies to religious officials and religious organizations in connection with these protections. Id. §§ 63G-20-204, 63G-20-302.} S.B. 297 prohibited the government from forcing a religious official or organization to promote same-sex marriage through its “programs,
counseling, courses, or retreats.\textsuperscript{327}

The legislation also exempted the Joseph Smith Memorial Building,\textsuperscript{328} a venue open to the public with restaurants,\textsuperscript{329} even though the Utah Compromise did not reach public accommodations. Moreover, under the definition of a public accommodation in other states, such a building would likely have been included.\textsuperscript{330} This building—a beautiful downtown venue that had previously operated as the Hotel Utah—is an ideal wedding or reception venue. But the building is owned by and houses offices of the LDS Church,\textsuperscript{331} whose doctrine does not allow for its facilities to be used for same-sex weddings.\textsuperscript{332} By pre-empting municipal ordinances,\textsuperscript{333} the bill took off the table an obvious issue that would arise under any municipal SOGI that may be passed in the future by Salt Lake City. In this regard, bracketing one potentially divisive question allows municipal authorities the flexibility to experiment with public accommodations SOGI laws without having to decide application to property that is synonymous with the LDS Church.

\section*{ii. Professional Licenses}

At the news conference urging Utah lawmakers to consider “solutions that will be fair to everyone,” the implications for professionals holding licenses or certifications that permit them to practice received specific attention.\textsuperscript{334} Elder Jeffrey Holland, a member of the Quorum of Twelve Apostles of the LDS Church, noted that the LDS Church hoped for a

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\item[327] Id. § 63G-20-201(4).
\item[328] See id. § 63G-20-301 (explaining that a religious official or organization cannot be compelled to provide “goods, accommodations, services, facilities, or grounds” in connection with same-sex marriages (emphasis added)). The Joseph Smith Memorial Building is a historical facility of the LDS Church of Jesus Christ of Latter-day Saints. Joseph Smith Memorial Building, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.lds.org/locations/temple-square-joseph-smith-memorial-building?lang=eng&_r=1 (last visited Oct. 28, 2018).
\item[329] See Joseph Smith Memorial Building, supra note 328 (identifying three restaurants located in the Joseph Smith Memorial Building—the Roof Restaurant, the Garden Restaurant and Nauvoo Cafe).
\item[330] See, e.g., ALASKA STAT. § 18.80.300(16) (2018) (“[A] place that caters or offers its services, goods, or facilities to the general public [including] a . . . restaurant . . . “); COLO. REV. STAT. § 24-34-601(1) (2018) (“[A]ny place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public . . . “); KY. REV. STAT. ANN. § 344.130 (West 2018) (“[A]ny place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public . . . “).
\item[331] Joseph Smith Memorial Building, supra note 328.
\item[332] Same-Sex Marriage, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.lds.org/topics/same-sex-marriage?lang=eng (last visited Oct. 28, 2018) (“Consistent with our fundamental beliefs, . . . the Church does not permit its meetinghouses or other properties to be used for ceremonies, receptions, or other activities associated with same-sex marriages.”).
\item[333] See UTAH CODE ANN. § 63G-20-301 (West 2018) (“Notwithstanding any other provision of law, an individual may not require a religious official . . . or religious organization to provide . . . accommodations . . . for activities connected with [same-sex marriage].” (emphasis added)).
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blueprint that extended beyond the “rights of faith communities to preach their beliefs from the pulpit, teach them in church classrooms and freely select their own leaders and ministers.”335 Religious freedom, Elder Holland indicated, “should also extend to [Latter-day Saint] physicians who refuse to perform abortions or artificial insemination for a lesbian couple, or a Catholic pharmacist who declines to carry the ‘morning after’ pill.”336

Denying accreditation, licensure, or certification to a person who dissents from the prevailing norms in society has been a powerful weapon in forcing conformity with societal norms—in essence, putting dissenters to the choice of conforming or closing. In 1996, for instance, Congress enacted the Coats/Snowe Amendment,337 which insulated medical schools from repercussions by the federal government and private accreditation organizations if the school chose not to teach their students how to perform abortions. The Coats/Snowe Amendment augmented the original abortion conscience protection enacted by Congress in 1973 on the heels of Roe v. Wade, the “Church Amendment.”338 The Church Amendment specified that no one may be compelled because of the receipt of certain federal financial assistance to perform or assist with an abortion if doing so violated their religious or moral beliefs.339 One might have thought the Church Amendment would cement the norm that no one in America need perform an abortion when their deepest commitments demand otherwise; accreditation, however, served as a creative end-run around the Church Amendment for placing pressure on objectors. Rather than back-walking its earlier judgment, Congress doubled-down with additional conscience protection.

Recognizing that effective conscience protections must preclude such end-runs, Utah lawmakers expressly spoke to licensure and accreditation. S.B. 297 prohibited licensing bodies from taking negative action against professional or business licenses “based on that licensee’s beliefs or the licensee’s lawful expressions of those beliefs in a nonprofessional setting, including the licensee’s religious beliefs regarding marriage, family, or sexuality.”340 Thus, S.B. 297 protected those who believe marriage is between a man and a woman, between a man and a man, or between a woman and a woman from sanction by licensing bodies, protecting real estate agents, healthcare professionals, financial professionals, or—anyone else in need of a license or accreditation in order to legally conduct business—for beliefs they expressed in a nonprofessional setting (it did not extend to acts taken in a professional capacity).

335 Id.
336 Id.
339 Id.
This provision reflects a second judgment of the legislature as well: room to have respectful opinions about marriage, family and sexuality is needed for more than just those persons in the employ of county clerk’s offices. Other professionals need security, as well.

B. Arguments Against the Utah Compromise

Considered together, S.B. 296 and S.B. 297 provide a host of well-defined, statutory protections for both the LGBT community and religious communities in Utah. Even so, the Utah Compromise has not escaped criticism. However, as shown below, this criticism comes from individuals and organizations that remain invested in the false, zero-sum, all-or-nothing framework that has stalled progress on LGBT and religious freedom measures. As Justice Kennedy would later do in Masterpiece Cakeshop, the Utah Legislature refused to name one side a winner in the culture wars, emphasizing instead mutual respect.

First, the Utah Compromise has been criticized by some hard-liner LGBT advocates as not having done enough for the LGBT community.341 According to this criticism, the Utah Compromise should have extended to every conceivable domain rather than securing protections in only some of them. This view stresses that the Utah Compromise does not contain protections for the LGBT community in public accommodations,342 the very topic at issue in Masterpiece Cakeshop.

This criticism misses the core message of the Utah Compromise: one risks getting nothing by holding out for absolutes—only through cooperation is one able to move forward. This is especially true in a state like Utah, where legislators prefer to benefit from the thinking and experimentation of local lawmakers. With no local guidance or experience as to models and trade-offs, the Utah Legislature followed the Burkean path of not tackling a question until ripe in order to avoid well-meaning but potentially destructive change.

Instead, LGBT advocates focused their bargaining on immediate needs

341 See Zack Ford, The ‘Utah Compromise’ Is a Dangerous LGBT Trojan Horse, THINKPROGRESS (Jan. 29, 2016, 1:00 PM), https://thinkprogress.org/the-utah-compromise-is-a-dangerous-lgbt-trojan-horse-db790ad3b69e/ (arguing that failure to include public accommodations under the law provides less protection to LGBT groups than other vulnerable groups, including religious persons); Nelson Tebbe et al., Utah “Compromise” to Protect LGBT Citizens From Discrimination Is No Model for the Nation, SLATE: OUTWARD (Mar. 18, 2015, 3:18 PM), http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html (lamenting religious group exemptions that allow continued discrimination against LGBT groups in ways impermissible under many state and federal laws); Editorial, Why LGBT Rights Must Include Public Accommodation, IND. STAR (Nov. 13, 2015, 8:01 AM), https://www.indystar.com/story/opinion/2015/11/12/editorial-lgbt-rights-must-include-public-accommodation/75674220/ (lamenting Utah’s failure to include public accommodations).

342 Editorial, supra note 341.
and left the desire for public accommodations protections for a future date. In the needs column, LGBT individuals were being denied jobs for which they were perfectly capable, others faced difficulty in finding simple housing, and outside Utah, couples were derided and refused licenses or solemnization when all they wanted was to form a lasting union. Not making the perfect the enemy of the good resulted in protections in each of these situations.

That the Utah Compromise did not extend to public accommodations protections should not be surprising. Across numerous states, public accommodations laws have formed the basis for contentious litigation around wedding services. As the Supreme Court’s decision in Masterpiece Cakeshop shows, even the nation’s highest court is reticent to address, head on, how to reconcile duties not to make distinctions when serving the public with the sincere religious beliefs of market actors in the marketplace.

Utah forbade discrimination by market actors in two spheres—housing and hiring. Adding a third sphere would have multiplied the number of points of needed agreement for the laws, threatening the success of the housing and hiring protections. That these additional points of agreement tee up questions that are especially divisive and have been used to drive wedges, as shown in the media coverage of Masterpiece Cakeshop, would only have exacerbated Utah legislators’ task of crafting an inclusive law premised on mutual respect.

On the other side, hard-line advocates from socially conservative, religious communities have criticized the Utah Compromise for doing too much for the LGBT community. These advocates hold fast to the idea that every inch ceded to the LGBT community is an inch lost by the religious community. They fear the creation of an LGBT orthodoxy, which, they

343 See, e.g., Crosby Burns & Jeff Krehely, Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment, CTR. FOR AM. PROGRESS (June 2, 2011, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/ (reporting that eight to seventeen percent “of gay and transgender workers report[ed] being passed over for a job or fired because of their sexual orientation or gender identity”).

344 See, e.g., Emily Badger, Look How Many States Still Allow Housing Discrimination Against Gays, CITYLAB (Apr. 12, 2013), https://www.citylab.com/equity/2013/04/states-where-its-still-legal-discriminate-against-gays-single-women-and-poor-housing/5273/ (providing maps that show that in twenty-nine states a person may be denied housing because they are gay and that in thirty-four states a person may be denied housing because of their gender identity).

345 See, e.g., Robert Barnes, Supreme Court to Take Case on Baker Who Refused to Sell Wedding Cake to Gay Couple, WASH. POST (June 26, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-take-case-on-baker-who-refused-to-sell-wedding-cake-to-gay-couple/2017/06/26/0c2f8606-0cde-11e7-9d5a-a83e627dc120_story.html?noredirect=on&utm_term=.8c8ad9c17b63 (providing background information on the Masterpiece Cakeshop case).

believe, threatens their religious orthodoxy. For example, days after the landmark legislation Russell Moore, the president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, decried the Utah Compromise as being “not the right strategy,” labelling it “well intentioned [sic] but naïve.” These critics fear the Utah Compromise was a compromise of religious values themselves—a betrayal of Christian doctrine. To some, Utah legislators would have best served their strong conservative and religious constituencies by enacting a state religious freedom restoration act to moderate or keep LGBT rights at bay—despite the fact that generalized religious freedom protections have not operated in this way, as Section II shows.

Separately, critics maintain that the Utah Compromise’s religious freedom protections will not hold, predicting they will be eroded over time—either through litigation or through subsequent legislation. This concern overlooks the very devices used by Utah lawmakers to prevent such an outcome. Moreover, every law is subject to later revision, as Indiana’s amendment of its state RFRA illustrates. The primary defense against later undoing by legislation is to reach a fundamentally balanced law in the first analysis—it is precisely that balance that ensures that the deal reached will stick over the long run.

At a more basic level, claims that the Utah Compromise should have tilted more to one side or another miss the central insight of the laws. Utah legislators patently had the political power to enact one-sided measures. But such purity models, premised on naked power rather than mutual respect precipitate protracted bitter legal battles to undo the one-sided measures, and mobilize LGBT persons and their allies to boycott states, just as Arizona experienced in the months before Utah’s landmark laws.

347 Goodstein, supra note 151.
351 In 2018, Republicans had control of both houses in the Utah Legislature, with twenty-three members in the Senate and sixty-one members in the House of Representatives. Utah Democrats held five and thirteen seats, respectively. 2018 State & Legislative Partisan Composition, NAT’L CONF. OF STATE LEGISLATURES 1 (Jan. 10, 2018), https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_011018_26973.pdf.
C. Problems Left Unsolved by the Utah Compromise That Can Be Resolved Through Common Ground Lawmaking

The Utah Compromise did not answer every question that arose after same-sex marriage came to Utah. It left untouched Utah’s public accommodations law. Yet one should expect that nondiscrimination norms flowing from S.B. 296 and S.B. 297 will have a broad regulatory effect upon Utah’s culture. In other words, although S.B. 296 does not reach public accommodations, the culture it creates helps to ensure that LGBT Utahns are treated with respect in public. Individuals and businesses, aware of S.B. 296’s protections, may assume they apply everywhere. And as norms shift in employment and housing, outliers will be increasingly reticent to be seen as excluding or humiliating LGBT persons.

Another question left for another day by the Utah Compromise was how to ensure that religious adoption agencies receiving government funding neither turn away gay couples wanting nothing more than to take a child into their home nor are they shut down for wanting to make placements of children consistent with their religious tenets. S.B. 297’s prohibition against requiring a religious organization to recognize a marriage that is contrary to the organization’s religious beliefs extends only to ecclesiastical purposes, meaning that Utah Legislature did not thread this needle. But how to ensure mutual respect in this context is an important question to consider; gay couples have disproportionately stepped up to adopt and foster children in need of families, while religious adoption agencies account for a

352 UTAH CODE ANN. §§ 13-7-1–13-7-4 (West 2018). For a proposal of how to ensure the LGBT community is protected in public accommodations without running religious wedding vendors out of business, see Wilson, supra note 18, at 402.

353 To date, no Utah municipality has extended protection in a public accommodations ordinance to sexual orientation or gender identity. If S.B. 296 and S.B. 297 fail to regulate Utah’s business culture, it is likely that Utah’s municipalities will enact SOGI public accommodations ordinances, just as was done in the areas of employment and housing nondiscrimination before Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

354 UTAH CODE ANN. § 63G-20-201(1) (West 2018).
substantial number of adoptions nationwide and are “especially effective in placing special needs children who usually are hard to place.”

Those calling for the closure of religious adoption agencies contend that the agencies violate nondiscrimination principles and the Establishment Clause by accepting government money but not using it to serve all people.

Meanwhile, religious adoption agencies profess that they cannot, consistent with their faith, place a child in a same-sex household, but they are successful at placing children in homes consistent with their faith. Declaring either side the winner sends a harmful message; either “close up shop” or “we don’t serve you here.” Adoptive and foster parents feel the

355 The CEO of the National Council for Adoption has stated, “the whole [adoption] system would collapse on itself” if religious adoption agencies closed. STEPHEN V. MONSMA & STANLEY W. CARLSON-THEIS, FREE TO SERVE: PROTECTING THE RELIGIOUS FREEDOM OF FAITH-BASED ORGANIZATIONS 31 (2015) (quoting Chuck Johnson, CEO of the National Council for Adoption). In Utah, the LDS Church has at least fifteen different adoption counseling centers for its members. Private Agencies, ADOPTION EXCH., https://www.adoptex.org/learn-about-us/locations/utah/ (last visited Oct. 28, 2018). Previously, the LDS Church also provided adoption services, but modified its services to encompass only counseling in 2014. See Kathryn Joyce, Why Is the Mormon Church Getting Out of the Adoption Business?, DAILY BEAST (June 23, 2014, 5:45 AM), https://www.thedailybeast.com/why-is-the-mormon-church-getting-out-of-the-adoption-business (noting that LDS Family Services “has been a titan in the domestic adoption field,” providing adoptions to couples for as little as $4,000); Ryan Morgenegg, LDS Family Services No Longer Operating as Adoption Agency, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (July 1, 2014), https://www.lds.org/church/news/lds-family-services-no-longer-operating-as-adoption-agency?lang=en (reviewing LDS Family Services’ history of placing between 300 and 600 children annually since 1970). On the question of gay couples, 24% of gay couples in Oklahoma, for example, are raising adopted kids, compared to 4% of heterosexual couples, according to the Williams Institute at the UCLA School of Law. Lambda Legal, Letter to Governor Mary Fallin, LAMBDA LEGAL (May 4, 2018), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lambda_legal_letter_to_governor_fallin_on_sb_1140.pdf.


practical effects of this debate. In Utah, and in many other states, prospective same-sex parents feel like second-class citizens.\textsuperscript{359} Meanwhile, religious birthmothers may be loath to place their child for adoption without knowing whether the child will be placed with a family with the same religious beliefs or values.\textsuperscript{360} Of course, more important than the desires of the adults are the needs of the children—they need homes.

It is possible to put children’s needs first and solve the sticky funding situation. For example, giving resources to the families to select the agency that best serves their needs—rather than awarding contracts to a handful of agencies and forcing all families through them-- is a solution that serves all potential parents equally. Potential parents, regardless of their religious or sexual identity, would direct themselves to the foster care agency that will best serve their needs. This approach relies on good information about the niches that each agency operates in, information that the state should supply to prospective foster and adoptive families. Revamping the antiquated funding system that has artificially created scarcity will allow all foster care and adoption agencies to continue the vital work of placing children in homes while ensuring that prospective families are treated with the dignity they deserve.

VI. DEEP DIFFERENCES REMAIN BETWEEN COMMUNITIES

The Utah Compromise was lauded as refreshingly progressive, both within the U.S. and abroad.\textsuperscript{361} Many saw—in its spirit of inclusiveness and

\textsuperscript{359} See, e.g., Jay Bookman, Opinion, Georgia Should Not Protect Anti-Gay Bigotry, ATLANTA J.-CONST. (Mar. 6, 2018, 12:08 PM), https://www.myajc.com/news/opinion/opinion-georgia-should-not-protect-anti-gay-bigotry/4d3decEiEZaGrI69IsRKK/ (“All over the country, the notion that gay, lesbian and transgender Americans are second-class citizens who can be legally discriminated against is giving way to a recognition that liberty and freedom cannot be denied on the basis of sexual identity.”); Ryan Thoreson, Anti-LGBT Bills in US States Could Derail Adoptions, HUM. RTS. WATCH (Apr. 30, 2018, 5:07 PM), https://www.hrw.org/news/2018/04/30/anti-lgbt-bills-us-states-could-derail-adoptions (observing that allowing agencies to deny adoptions to otherwise qualified people on the basis that they are LGBT “sends a clear message that LGBT people are second-class citizens”); Ashley Woods, Michigan Sued For Treating Gay Couples Like ‘Second-Class Citizens,’ HUFFINGTON POST (Apr. 14, 2014, 5:15 PM), https://www.huffingtonpost.com/2014/04/14/michigan-gay-marriage_n_5148314.html (“[T]he state is obligated to extend the protections that flow from marriage to all those who celebrated their weddings last month . . . . Doing anything less treats legally married gay and lesbian couples like second-class citizens . . . .” (internal quotations omitted)).

\textsuperscript{360} See Emilie Kao, The Left’s Assault on Adoption, NAT’L REV. (Mar. 13, 2018, 6:30 AM), https://www.nationalreview.com/2018/03/faith-based-adoption-agencies-under-assault-from-left/ (“[S]ome women facing an unplanned pregnancy want their child to be raised by a married man and woman. A birth mother should have the freedom to work with an agency that honors her preferences and shares her values.”).

\textsuperscript{361} See, e.g., Associated Press, Historic Bill Protecting LGBT and Religious Rights Succeeds Through Utah Senate, DAILY NEWS (Mar. 7, 2015, 5:38 PM), http://www.nydailynews.com/news/politics/utah-senate-passes-bill-protecting-gay-religious-rights-article-1.2141318#/ (noting that one Utah state senator called the LGBT issue addressed in the bill by the Republican-controlled Utah Senate “the civil rights issue of our time”); Robert Gehrke & Lee Davidson,
respect—the portends of doctrinal shifts within LDS Church doctrine itself.\textsuperscript{362} The Utah Compromise sensitized Utahns to the needs of LGBT persons, especially LGBT youth. As one example, Senator Todd Weiler brought a young man, who had lost his job due to his sexual orientation, onto the floor of the Utah Senate and expressed hope that the young man would be accepted in the Senator’s district.\textsuperscript{363}

An outpouring of compassion led to concrete gestures of support. Several weeks after the signing of the bills, the LDS Church made a significant donation to a food bank exclusively dedicated to helping homeless LGBT youth.\textsuperscript{364} As Senator Jim Dabakis, Utah’s only openly gay legislator said, “[a]lthough the LDS Church and the LGBTQ community do not agree on everything, this is yet another link in a continuing relationship of respect and civility.”\textsuperscript{365}

But there has been disappointment, too, as the LDS Church reaffirmed one of the core tenets of the faith—that marriage is between one man and one woman.\textsuperscript{366} In a related move, the LDS Church initially restricted baptism of children to those children living in a home with different gender parents, before backtracking and allowing the children of same-sex couples to be

\textit{Obama Touts Solar Initiative, Thanks Mormon Leaders for LGBT Law}, \textit{SALT LAKE TRIB.} (Apr. 3, 2015, 10:08 PM), http://archive.sltrib.com/article.php?id=2362542&itype=CMSID (“The Church of Jesus Christ of Latter-day Saints said the president also ‘expressed his appreciation for the church’s leadership role in seeking a balance between religious freedom and nondiscrimination’ . . . .”); Miller, \textit{supra} note 12 (noting that while Utah is “a solid red state, . . . its anti-discrimination law is seen as a model”); NPR, \textit{supra} note 15 (noting that after a federal judge overturned a Utah constitutional amendment banning same-sex marriage, some people in Utah wanted to secede from the United States, but “[i]nstead, Utah lawmakers passed legislation that was backed by the Mormon church and by pro-gay rights organizations”).

\textsuperscript{362} See Goodstein, \textit{supra} note 151 (calling the bill’s passage “an extraordinary moment for the Church of Jesus Christ of Latter-day Saints” and quoting a Utah state senator who said that the bill was “about changing the culture in Utah” to promote “respect, civility and understanding”).


\textsuperscript{364} Ben Lockhart, \textit{LDS Church Donates to Utah Pride Center’s Efforts to Feed Homeless Youths}, \textit{DESERET NEWS}, (July 1, 2015, 7:45 PM), https://www.deseretnews.com/article/865631810/LDS-Church-donates-to-Utah-Pride-Centers-efforts-to-feed-homeless-youths.html.

\textsuperscript{365} Jennifer Dobner, \textit{Mormon Church Makes First-Time Donation to Utah Pride Center Youth Program}, \textit{SALT LAKE TRIB.} (July 1, 2015, 7:44 PM), http://archive.sltrib.com/article.php?id=2687980&itype=CMSID.

baptized. In scathing reactions to the initial policy, some charged hypocrisy: limiting religious ceremonies in this way revealed disrespect for LGBT families. Yet, officials understood the decision as showing respect—without such a restriction, LDS Church leaders believed they would be instructing children that their parents are living immorally. The Church explained its reversal as meeting changing circumstances.

**CONCLUSION**

Former EEOC Commissioner Chai Feldblum, who is openly gay, reminded us after Obergefell that “a ‘winner-takes-all’ mentality that refuses to accept the complexity of Justice Kennedy’s words in Masterpiece Cakeshop and insists instead on an outcome in which one side must always win and the other must always lose . . . will not serve us well as a nation.”

In the months and years preceding the Utah Compromise, LGBT persons and persons of faith shared an ontological challenge: both feared for how they would fare in society for something no one should have to fear, being themselves. Both feared legal risks. And although each had something they needed from the other—or from lawmakers—both also had security to offer to the other. In this crucible of risk and gain, protections for both emerged. The Utah Compromise marked “a major step forward” because neither LGBT supporters nor religious freedom advocates “allowed the best to become the enemy of the good.”

Achieving the ends of the Utah Compromise would have been near impossible through judicial channels. The nuanced step-asides, balanced

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368 See Laurie Goodstein, New Policy on Gay Couples and Their Children Roils Mormon Church, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/us/mormons-set-to-quit-church-over-policy-on-gay-couples-and-their-children.html (quoting an LDS member who planned to resign from the church as saying, “Any church that wants to claim itself as a Christian organization that uses Jesus Christ the savior to somehow exclude any group of people is not anything that I want to be a part of . . . .” (internal quotations omitted)).

369 Church Provides Context on Handbook Changes Affecting Same-Sex Marriages, supra note 367 (“We don’t want the child to have to deal with issues that might arise where the parents feel one way and the expectations of the Church are very different. And so . . . when a child reaches majority, he or she feels like that’s what they want and they can make an informed and conscious decision about that.”).

370 Wamsley, supra note 367 (quoting President Henry Eyring as saying that “we need the Lord’s direction to meet the changing circumstances, and He has guided changes in practice and policy through the history of the Church”).

371 Feldblum, supra note 163.

protections, and careful definitions are simply too numerous and detailed for a court to pronounce. As Utah Senator Adams has said,

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.\(^\text{373}\)

In reaching an accord around LGBT rights and religious liberty, Utah Legislators crafted the sort of pluralistic solution that Justice Kennedy called for—resolving questions “with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities.”\(^\text{374}\)

The Utah Compromise can serve as a template for the country, and any state interested in bridging divides.\(^\text{375}\) Of course, its details cannot be copied over wholesale to another body of law since, like any law, it is tailored and shaped to the needs of Utah’s citizens and Utah’s preexisting body of law. But understanding the inflection points in the shaping and content of Utah’s common ground lawmaking can be instructive for lawmakers and others frustrated by the singular interests that have informed laws in the past and exacerbated the culture war.

Utah’s success in melding LGBT protections with those for persons of faith serves as a beacon, it is striking evidence that cooperation and fair play can guide laws even as to the most divisive and seemingly intractable of questions. It is proof of principle that Americans do not have to simply accede to the forces stoking conflict. Through dialogue and good will, we can resolve conflicts and stand not just with people like ourselves, but with our neighbors, affirming the dignity of each of us.

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\(^{373}\) Adams, supra note 104, at 442.


\(^{375}\) See Mark Saal, One Year Later, Utah LGBT Anti-discrimination Law Continues to Resonate, STANDARD-EXAMINER (June 17, 2016), https://www.standard.net/news/one-year-later-utah-lgbt-anti-discrimination-law-continues-to/article_a69b281-1757-52e7-97ba-a20c387fca07.html (calling the passage of the Utah bill “a landmark moment” and “the first time a pro-LGBT bill passed through a Republican legislature in the entire country”); Michelle L. Price, 22 Complaints Filed Under Utah’s New Mormon-backed LGBT Anti-discrimination Law, SALT LAKE TRIB. (June 3, 2016, 9:35 PM), http://archive.sltrib.com/article.php?id=3902752&itype=CMSID (noting that the twenty-two complaints filed under the law in the year after the “landmark measure” took effect were “far fewer than the annual number of race or religious-based discrimination complaints lodged in the state”).
## Appendix

### Utah Municipal Nondiscrimination Ordinances

<table>
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<tr>
<th>Municipality</th>
<th>SOGI Ordinances</th>
<th>Religious Accommodations</th>
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</table>

**Employment**

“An employer may not refuse to hire or promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

**Alta, Utah, Town Code § 1-13-7 (2011).**

**Housing**

“Discriminatory Housing Practices: It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of
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<tr>
<th>Location</th>
<th>Ordinance Type</th>
<th>Ordinance Description</th>
<th>Related Source</th>
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<tbody>
<tr>
<td>Holladay County</td>
<td>Employment &amp; Housing</td>
<td>“An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified primarily because of a person’s sexual orientation or gender identity.”</td>
<td>Holladay, Utah, City Code § 18.02.010 (2014).</td>
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<td>Garland City</td>
<td>Limited Housing</td>
<td>“It shall be an unlawful real estate practice and a violation of this chapter for any real estate broker, salesperson, agent, owner or other person to represent to any person that any real property is not available for inspection, purchase, sale, lease or occupancy when in fact it is so available, or otherwise to hold real property from any person because of race, color, religion, sex, age, marital status, physical limitations, source of income, family responsibilities, educational association, sexual orientation or national origin.”</td>
<td>Garland City, Utah, City Code § 5-5-4 (1980).</td>
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<tr>
<td>Grand County</td>
<td>Employment &amp; Housing</td>
<td>Multiple sources identify Grand County as having a municipal ordinance barring discrimination in housing and employment—as Moab, its largest city, does—but the text of the ordinance is not available.</td>
<td>The text of the ordinance is not available.</td>
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<tr>
<td>Holladay County</td>
<td>Employment</td>
<td>“A. This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization, a charitable organization, or a person in conjunction with a religious organization, association, or society, including any dormitory operated by a public or private educational institution, if the...</td>
<td>Holladay, Utah, Town Code § 1-14-7 (2011).</td>
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<tr>
<td>Housing</td>
<td><strong>Discriminatory Housing Practices:</strong> It is a discriminatory housing practice to do any of the following: 1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity; 2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity; 3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available; 4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination; 5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity; 6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”</td>
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<td><strong>Employment</strong></td>
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<td><strong>HOLLADAY, UTAH, CITY CODE § 18.03.010 (2014).</strong></td>
<td><strong>LOGAN, UTAH, CITY CODE § 2.62.070 (2010).</strong></td>
<td><strong>“This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization; a charitable organization; a person in conjunction with a religious organization, association, or society, including any dormitory operated by a public or private educational institution; or a person who rents to individuals of the same religion or sex.”</strong></td>
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Discrimination is based on sexual orientation or gender identity for reasons of personal modesty or privacy or in the furtherance of a religious organization’s sincerely held religious beliefs. B. This chapter does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from limiting the sale, rental, or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons."
### Housing

“Discriminatory Practices: It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person's sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person's sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person's association with another person.”

LOGAN, UTAH, CITY CODE § 2.64.070 (2010).

### Midvale (2011)

#### Employment

“An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

MIDVALE, UTAH, MUNICIPAL CODE § 26.08.010 (2011).

“

A. This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization, a charitable organization, or a person in conjunction with a religious organization, association, or society, including any dormitory operated by a public or private educational institution, if the discrimination is based on sexual
**Housing**

“It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”


**Moab (2010) Employment**

“An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

**Moab, Utah, Municipal Code § 9.40.070 (2010).**

“**This chapter does not apply to:**
A. A religious organization;
B. An expressive association whose employment of a person protected by this chapter would significantly burden the association’s rights of expressive association under Boy Scouts of America v. Dale, 530 U.S. 640 (2000); the United States government, any of its departments or agencies, or any corporation...”
Housing

“It is a discriminatory housing practice to do any of the following: 1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity; 2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity; 3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available; 4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination; 5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity; 6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”

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<th>Ogden (2011)</th>
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<td>“This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization; a charitable organization; or a person in conjunction with a religious organization, association, or society, including any dormitory operated by a public or private educational institution, or the rental by any person of shared living space within a single unit of a dwelling under separate contracts to two (2) or more individuals, if any of the above discrimination is based on sexual orientation or gender identity for reasons of tenants’ personal modesty or privacy or in the furtherance of a religious organization's sincerely held religious beliefs. This chapter does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from limiting the sale, rental, or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons.”</td>
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| Housing |
| “Discriminatory Practices: It is a discriminatory housing practice for a real estate broker, salesperson, or owner of a dwelling, or their agents or employees, to do any of the following: 1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person's sexual orientation or gender identity; 2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person's sexual orientation or gender identity; 3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available; 4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination; 5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity; 6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person's association with another person; 7. Retaliate against a person for availing themselves of the | OGDEN CITY, UTAH, CITY CODE § 12-19-7 (2011). |

protections of this chapter.”
OGDEN CITY, UTAH, CITY CODE § 12-20-7 (2011).

Salt Lake City (2009)

Employment

“An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

SALT LAKE CITY, UTAH, CITY CODE § 10.04.070 (2009).

Housing

“Discriminatory Housing Practices: It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person's sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”

“This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization; a charitable organization; or a person in conjunction with a religious organization, association, or society, including any dormitory operated by a public or private educational institution, if the discrimination is based on sexual orientation or gender identity for reasons of personal modesty or privacy or in the furtherance of a religious organization’s sincerely held religious beliefs.

This chapter does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from limiting the sale, rental, or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons.”

SALT LAKE CITY, UTAH, CITY CODE § 10.05.060 (2009).
<table>
<thead>
<tr>
<th>Salt Lake County (2010)</th>
<th>Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>“A. Employers. An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.</td>
<td></td>
</tr>
<tr>
<td>B. Employment agencies. An employment agency may not refuse to list and properly classify for employment, or refuse to refer a person for employment, in a known available job for which the person is otherwise qualified because of a person’s sexual orientation or gender identity.</td>
<td></td>
</tr>
<tr>
<td>C. Labor organizations. A labor organization may not exclude any person otherwise qualified from full membership rights in the labor organization, expel a person from membership in the labor organization, or otherwise discriminate against or harass any of the labor organization’s members in full employment of work opportunity, or representation, because of a person’s sexual orientation or gender identity.</td>
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</tr>
<tr>
<td>D. Training programs. An employer, labor organization, joint apprenticeship committee, or vocational school providing, coordinating, or controlling apprenticeship programs, or providing, coordinating, or controlling on-the-job training programs, instruction, training, or retraining programs may not deny to, or withhold from any qualified person the right to be admitted to or participate in any apprenticeship training program, on-the-job training program or other occupational instruction, training or retraining program because of a person’s sexual orientation or gender identity.</td>
<td></td>
</tr>
<tr>
<td>E. Notices and advertisements. Unless based upon a bona fide occupational qualification, or required by and given to an agency of government for security reasons, an employer, employment agency or labor organization may not print, circulate or cause to be printed or circulated any statement, advertisement, or publication, use any form of application for employment or membership, or make any inquiry in connection with prospective employment or membership that expresses, either directly or indirectly any limitation, specification or discrimination because of a person’s sexual orientation or gender identity.</td>
<td></td>
</tr>
<tr>
<td>“This chapter does not apply to: A. A religious organization; B. An expressive association whose employment of a person protected by this chapter would significantly burden the association’s rights of expressive association under Boy Scouts of America v. Dale, 530 U.S. 640 (2000)[.].”</td>
<td></td>
</tr>
</tbody>
</table>

Salt Lake City, Utah, City Code § 10.05.070 (2009).
It is unlawful for a joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to print or publish, or cause to be printed or published, any notice or advertisement relating to admission to, or employment in, any program established to provide apprenticeship or other training by the joint labor-management committee that indicates any preference, limitation, specification, or discrimination based on sexual orientation or gender identity.

Nothing in this chapter prohibits a notice or advertisement from indicating a preference, limitation, specification, or discrimination based on sexual orientation or gender identity when sexual orientation or gender identity is a bona fide occupational qualification for employment.

F. No preferential treatment. Nothing in this chapter shall be interpreted to require any employer, employment agency, labor organization, vocational school, joint labor-management committee or apprenticeship program subject to this chapter to grant preferential treatment to any person because of the person's sexual orientation or gender identity on account of any imbalance that may exist with respect to the total number or percentage of persons of any sexual orientation or gender identity employed by any employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by a labor organization, or admitted to or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of that sexual orientation or gender identity available in the available workforce existing throughout the county.”

SALT LAKE COUNTY, UTAH, CODE OF ORDINANCES § 10.13.070 (2010).

Housing

“A. It is a discriminatory housing practice to do any of the following:

1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;

2. Discriminate against any person in the terms, conditions or privileges of the sale or rental of any dwelling or in providing
facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. Make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. Induce or attempt to induce, for profit, any person to buy, sell or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person's association with another person.

B. It is a discriminatory housing practice for a real estate broker or salesperson to do any of the following because of a person's sexual orientation or gender identity:
1. Discriminate against any person in making available a residential real estate transaction, or in the terms or conditions of the transaction, in the county, because of a person’s sexual orientation or gender identity;
2. Deny any person access to, or membership or participation in, any multiple-listing service, real estate brokers’ organization, or other service, organization, or facility relating to the business of selling or renting dwellings in the county or to discriminate against any person in the terms or conditions of access, membership, or participation in the organization, service, or facility in the county because of a person’s sexual orientation or gender identity; or
3. Engage in any discriminatory housing practices in the county because of sexual orientation or gender identity based upon a person’s association with another person.”


Springdale
Employment

“This chapter does not apply to a
“An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

SPRINGDALE, UTAH, TOWN CODE § 1-11-7 (2012).

Housing

“Discriminatory Housing Practices: It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that a dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. Make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination; or
5. Induce or attempt to induce, for profit, any person to buy, sell or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity.”

SPRINGDALE, UTAH, TOWN CODE § 1-12-7 (2012).

Summit County (2010) Employment

“An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, temporary or permanent residence facility operated by a nonprofit organization; a charitable organization; or a person in conjunction with a religious organization, association, or society, including any dormitory operated by a public or private educational institution, if the discrimination is based on sexual orientation or gender identity for reasons of personal modesty or privacy or in the furtherance of a religious organization's sincerely held religious beliefs. This chapter does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from limiting the sale, rental, or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons.”

SPRINGDALE, UTAH, TOWN CODE § 1-12-6 (2012).
and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

SUMMIT COUNTY, UTAH, COUNTRY CODE § 1-15B-7 (2010).

Housing

“Discriminatory Housing Practices Generally: It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. Make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. Induce or attempt to induce, for profit, any person to buy, sell or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”

SUMMIT COUNTY, UTAH, COUNTRY CODE § 1-15A-7 (2010).

Taylorsville (2010) “An employer may not refuse to hire, promote, discharge, demote, or terminate any person, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified because of a person’s sexual orientation or gender identity.”

“A. This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization; a charitable organization; or a person in conjunction with a religious organization, association or society, including any dormitory operated by a public or private educational institution, if the discrimination is based on sexual orientation or gender identity for reasons of personal modesty or privacy or in the furtherance of a religious organization’s sincerely held religious beliefs.
B. This article does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization from limiting the sale, rental or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons.”

SUMMIT COUNTY, UTAH, COUNTRY CODE § 1-15A-6 (2010).
TAYLORSVILLE, UTAH, CODE OF ORDINANCES § 19.02.010 (2010).

Housing

“Discriminatory Housing Practices: It is a discriminatory housing practice to do any of the following:
1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;
2. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;
3. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;
5. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;
6. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”

TAYLORSVILLE, UTAH, CODE OF ORDINANCES § 19.03.010 (2010).

West Valley City (2010)

Employment

“(1) This chapter does not apply to a temporary or permanent residence facility operated by a nonprofit organization; a charitable organization; or a person in conjunction with a religious organization, association, or

organization, association, or society, including any dormitory operated by a public or private educational institution, if the discrimination is based on sexual orientation or gender identity for reasons of personal modesty or privacy or in the furtherance of a religious organization’s sincerely held religious beliefs.

B. This chapter does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from limiting the sale, rental, or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons.”

TAYLORSVILLE, UTAH, CODE OF ORDINANCES § 19.03.020 (2010).
identity.”


**Housing**

“It is a discriminatory housing practice to do any of the following:

a. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any person because of the person’s sexual orientation or gender identity;

b. Discriminate against any person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s sexual orientation or gender identity;

c. Represent to any person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;

d. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on sexual orientation or gender identity, or expresses any intent to make any such preference, limitation, or discrimination;

e. To induce or attempt to induce, for profit, any person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular sexual orientation or gender identity;

f. Engage in any discriminatory housing practices because of sexual orientation or gender identity based upon a person’s association with another person.”

WEST VALLEY CITY, UTAH, MUNICIPAL CODE § 26-3-101 (2010).

**Municipal SOGI Ordinances Enacted After the Utah Compromise**

<table>
<thead>
<tr>
<th>Park City</th>
<th>Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2017)</td>
<td>“An Employer may not refuse to hire, promote, discharge, demote, or terminate any persons, and may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any Person Otherwise Qualified because of a person’s Sexual Orientation or Gender Identity.”</td>
</tr>
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</table>

“This Chapter does not apply to:

A. A Religious Organization;

B. An expressive association whose employment of a Person protected by this Chapter would significantly burden the association's rights of expressive association under Boy Scouts of America v. Dale, 530

Society, including any dormitory operated by a public or private educational institution, if the discrimination is based on sexual orientation or gender identity for reasons of personal modesty or privacy or in the furtherance of a religious organization’s sincerely held religious beliefs.

(2) This chapter does not prohibit or restrict a religious organization or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from limiting the sale, rental, or occupancy of dwellings it owns or operates for primarily noncommercial purposes to persons of the same religion, or from giving preference to such persons.”

WEST VALLEY CITY, UTAH, MUNICIPAL CODE § 26-3-102 (2010).
### Housing

“It is discriminatory housing practice to do any of the following:

1. Refuse to sell or rent after the making of a bona fide offer, refuse to negotiate for the sale or rental, or otherwise deny or make unavailable any dwelling from any Person because of the person’s Sexual Orientation or Gender Identity;
2. Discriminate against any Person in the terms, conditions, or privileges of the sale or rental of any dwelling or in providing facilities or services in connection with the dwelling because of the person’s Sexual Orientation or Gender Identity;
3. Represent to any Person that any dwelling is not available for inspection, sale, or rental when in fact the dwelling is available;
4. To make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or Discrimination based on Sexual Orientation or Gender Identity, or expresses any intent to make any such preference, limitation, or Discrimination;
5. To induce or attempt to induce, for profit, any Person to buy, sell, or rent any dwelling by making representations about the entry or prospective entry into the neighborhood of persons of a particular Sexual Orientation or Gender Identity;
6. Engage in any discriminatory housing practices because of Sexual Orientation or Gender Identity based upon a person’s association with another Person;”

### Limited Hiring

“The following principles and policies are established:

A. In matters of compensation or in terms, privileges, or conditions of City employment, the City shall not demote, discharge, terminate, harass, refuse to promote or hire, or retaliate or

### Limited Hiring

“The following principles and policies are established:

A. In matters of compensation or in terms, privileges, or conditions of City employment, the City shall not demote, discharge, terminate, harass, refuse to promote or hire, or retaliate or
discriminate against any person otherwise qualified, because of a person's race; color; gender; pregnancy, childbirth or pregnancy related conditions; religion; national origin; age (if 40 years of age or older); disability; sexual orientation or gender identity, unless based upon a bona fide occupational qualification.”

MURRAY CITY, UTAH, CITY CODE § 2.62.010 (2013).