# FAIRNESS FOR ALL IN A POST-*OBERGEFELL* WORLD: THE UTAH COMPROMISE MODEL

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*In November of 2004, Utah added thirty-four words to its Constitution affirming that the State's legal position on marriage would exclusively recognize the union of a man and a woman, and the legislature believed we had protected and bullet-proofed traditional marriage. Then, the Tenth Circuit held the state constitutional provision inconsistent with the Fourteenth Amendment to the U.S. Constitution. With bills protecting religious liberty moving through the state legislature concurrently with bills providing antidiscrimination protections in employment, housing, and public accommodations to the LGBT community, Utah was headed for a train wreck.*

*The Utah Compromise, as embodied in Senate Bills 296 and 297, solved this seemingly irreconcilable conflict. The Compromise married antidiscrimination provisions for LGBT communities with protections for religious liberty, and through the legislature's balancing of competing interests, crafted a solution that satisfies all stakeholders in a respectful and balanced measure. The lessons learned in the formation of the Utah Compromise are valuable going forward, and provide a template for other states looking to provide LGBT antidiscrimination protections while respecting religious liberty. This is the best way forward.*

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## I. INTRODUCTION

In November of 2004, Utah added thirty-four words to its Constitution affirming that the State's legal position on marriage would exclusively recognize the union of a man and a woman.[1] In the wake of the Massachusetts Supreme Court's decision granting marriage rights to same-sex couples and San Francisco Mayor Gavin Newson's decision to defy California state law and issue marriage licenses to gay couples, Utah was one of eleven states that passed similar ballot amendments that year.[2] I was serving in the Utah State House of Representatives at the time and was supportive and involved in the passage of the proposed ballot amendment. By constitutionally mandating that marriage in Utah would consist only of the legal union between a man and a woman and forbidding recognition of other types of domestic union, we believed we had protected and bullet-proofed traditional marriage.

## II. A TRAIN WRECK: THE COLLISION OF ANTI-DISCRIMINATION PROVISIONS AND RELIGIOUS-LIBERTY PROTECTIONS

Beginning in 2008, a small contingent of legislators, mostly Democrats, began pushing for legislation that would grant LGBT persons non-discrimination protections in housing and employment. For the next three years such a bill was generated and introduced in the House, but went nowhere. During that same period, however, non-discrimination ordinances were being advanced in several Utah municipalities. The first city to pass such an ordinance was Salt Lake City in 2010.[3] By the beginning of 2015, there were eleven cities and towns and three counties in Utah that had passed local rules governing non-discrimination for the LGBT community in employment and housing.[4] This patchwork of local rules across the state that provided protections for sexual orientation and gender identity not only created inconsistencies between jurisdictions, but offered little, if any, counterbalance for protecting individuals with traditional religious beliefs.

1. UTAH CONST. art. I, § 29, *held unconstitutional by* Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014). Section 29 reads: "[Marriage]: (1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

2. James Dao, *Same-Sex Marriage Issues Key to Some G.O.P. Races*, N.Y. TIMES (November 4, 2014), http://www.nytimes.com/2004/11/04/politics/campaign/04gay.html?_r=0 ("The [state constitutional] amendments, which define marriage as between only a man and a woman, passed overwhelmingly in all 11 states, clearly receiving support from Democrats and independents as well as Republicans.").

3. *See* Rosemary Winters, *Legislature may let SLC's Gay-rights Measures Stand*, SALT LAKE TRIB. (Jan. 11, 2010), http://archive.sltrib.com/story.php?ref=/news/ci_14154767 ("In November, Salt Lake City passed two ordinances -- the first of their kind in Utah -- that ban housing and employment discrimination based on sexual orientation and gender identity.").

4. *See* CITIES AND COUNTIES WITH NON-DISCRIMINATION ORDINANCES THAT INCLUDE GENDER IDENTITY, HUMAN RIGHTS CAMPAIGN (Jan. 13, 2016), http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender.

After the first of the local non-discrimination ordinances passed in 2010, lead sponsorship of the proposed statewide non-discrimination bill[5] was transferred to the Senate. In 2011, the bill was held by the Rules Committee; and in 2012, the Business and Labor Committee tabled the bill. In 2013, the bill acquired a new Republican sponsor. Under his sponsorship the bill was released out of the Rules Committee and was heard by a standing committee. The standing committee passed the bill and, as a result, it was sent to the Senate floor.[6] The bill, however, was never debated, and subsequently died.

Nine months after the session's adjournment, on December 20, 2013, Judge Shelby struck down Utah's constitutional definition of traditional marriage in *Kitchen v. Herbert*[7] thus mandating same-sex marriage recognition in Utah. Judge Shelby's decision, of course, gave no guidance as to the implementation of such a fundamental shift in policy, nor did it provide protections for those who, through their strongly held religious beliefs, felt that marriage could only exist between a man and a woman—the legislature had to step in and fill the gap.

There was significant tension on both sides of the issue. Many citizens expressed deep concern[8] and, further, most legislators felt extreme resentment toward the court's ruling and a desire to fix the mistake that, in their view, Judge Shelby had made. On the other hand, those supportive of the decision pushed hard to advance LGBT rights and incorporate non-discrimination protections for sexual orientation and gender identity statewide.[9]

The State immediately filed an appeal of the marriage decision to the U.S. Court of Appeals for the Tenth Circuit, and legislative leadership, in spite of great social pressure, subsequently held all legislation that would have addressed either religious liberties or non-discrimination throughout the 2014 session, citing the need to wait for the Tenth Circuit

5. S.B. 262, 60th Leg., Gen. Sess. (Utah 2013), *available at* http://le.utah.gov/~2013/bills/static/SB0262.html.

6. *Id.*

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

8. There were several demonstrations and protests throughout the session. One weekend, "blue notes" (blue sheets of paper used by constituents to send messages to legislators while they are on the floor) were taped—Martin Luther style—to the chamber doors of the Senate demanding that the bill be heard. Sit-ins were staged blocking committee-meeting entrances and the Governor's office. Several arrests were made as a result. Bob Henline, '*Operation Blue Note' underway at Utah State Capitol* Q SALT LAKE MAG., (Feb. 3, 2014), http://gaysaltlake.com/news/2014/02/03/operation-blue-note-underway-utah-state-capitol/#Q5GJOaUGHpKrD24m.99; Dennis Romboy and Lisa R. Roache, *Protesters arrested after blocking Senate committee room*, KSL, (Feb. 10, 2014), http://www.ksl.com/?nid=148&sid=28668522.

9. Eric Ethington, *Gay Rights Advocacy Group Launches New Push For Protections In Utah*, UTAH POL. CAPITOL (Jan. 30, 2013), http://utahpoliticalcapitol.com/2013/01/30/gay-rights-advocacy-group-launches-new-push-for-protections-in-utah/#.

to hand down a ruling and provide some much-needed clarity.[10] On June 25, 2014, the Tenth Circuit affirmed Judge Shelby's ruling.[11]

Many legislators were very frustrated by the loss. There was word in the upcoming session of the legislature that the LGBT anti-discrimination bill would be put to the floor, but most gave it little hope of passage. It was also well known that there would be several proposals for legislation aimed at protecting religious liberties. With both types of bills moving down the tracks, we were headed for a train wreck. In this tense environment, there was surprise when, on the second day of the session, The Church of Jesus Christ of Latter-day Saints ("LDS") held a press conference[12] and requested that the Utah Legislature find a way to combine protections for religious liberty and non-discrimination provisions in employment and housing in a manner that encouraged respect, compassion, tolerance, and fairness for all sides.[13] The announcement generated a tectonic shift in the dialogue.[14]

In prior years, the sponsors of the dueling bills were Senator Steve Urquhart and Senator Stuart Reid, who championed the non-discrimination legislation and the religious liberty protection bill, respectively. Senator Reid had finished his term at the end of 2014, and asked if I would advocate for religious liberty and become the bill's sponsor.

10. Lee Davidson, *Utah Legislators May Rewrite State Law on Gay Marriage*, SALT LAKE TRIB. (Oct. 6, 2014), http://www.sltrib.com/news/1676687-155/marriage-state-court-issues-gay-law.

11. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

12. Press Release, The Church of Jesus Christ of Latter-day Saints, Transcript of News Conference on Religious Freedom and Nondiscrimination (Jan. 27, 2015) *available at* http://www.mormonnewsroom.org/article/publicstatement-on-religious-freedom-and-nondiscrimination.

13. *Id.* Mormon Elder Jeffery Holland finished the press conference this way: "Let us conclude by emphasizing this point as an alternative to the rhetoric and intolerance that for too long has come to characterize national debate on this matter. We must 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. Every citizen's rights are best guarded when each person and group guards for others those rights they wish guarded for themselves. Today we have spelled out the Church's concerns about the erosion of religious liberties, while at the same time calling for fairness for all people." *Id.*

14. It should be clearly noted that their request for balanced legislation did not in any way shift Latter-Day Saint doctrinal beliefs or morality codes. In fact, it encompassed one of the Church's fundamental beliefs, which states, "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." ARTICLES OF FAITH, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS https://www.mormon.org/beliefs/articles-of-faith (last visited Mar. 6, 2016). The requested "fairness for all" legislation was to create an environment where *everyone*—whether involved in a religious organization or not—could safely act according to individual conscience dictates. The LDS Church has since reiterated that it does not sanction same-sex marriages. *See* Interview between Michael Otterson and Elder D. Todd Christofferson, Church Provides Context on Handbook Changes Affecting Same-Sex Marriages, (Nov. 6, 2015), *available at* http://www.mormonnewsroom.org/article/handbook-changes-same-sex-marriages-elder-christofferson.

The Church has also been clear, however, that individuals with same-gender attraction are to be treated courteously and respectfully. Several weeks after the signing of the bills, The LDS Church made a significant donation to a food bank dedicated to exclusively to helping homeless LGBT youth. 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." Jennifer Dobner, *Mormon Church Makes First-Time Donation to Utah Pride Center Youth Program*, SALT LAKE TRIB. (July 1, 2015), http://www.sltrib.com/home/2687980-155/mormon-church-makes-first-time-donation-to.

Utah has the shortest legislative session of any state in the country—a mere forty-five calendar days[15]—and during those seven weeks we meet only during the thirty-three regular working days. The request from The LDS Church came with thirty-one working days left in the session.

In keeping with the Church's request, we sought to produce legislation that would provide protection to all stakeholders. The concepts of fairness, equality, and respect are far easier to articulate in a conversation than to legally define. Our goal was to capture the meaning of these words in the code. With the LGBT, ACLU, NAACP, and HRC communities on one side and conservative religious communities, a majority of the legislators, and their constituents on the other, it appeared converting those concepts into a statute that could be agreed upon by everyone would be impossible. Indeed, most believed it simply could not happen—certainly not within the remaining thirty-one days of the legislative term.

Judicial rulings, particularly in heated social conflicts, create winners and losers as they declare one side's perspective victorious over another. By contrast, the legislative process has the ability to employ negotiation and compromise, thereby qualifying otherwise harsh absolutes and creating an environment where each side to a dispute shares in the gains and losses. The legislature knew there would be many challenges in combining anti-discrimination provisions and protections for religious liberty into a single piece of legislation. Bringing all the stakeholders to the table—and keeping them there—while we defined these complicated concepts in a workable compromise was a formidable challenge. The time limitation proved an advantage; though such a short time placed everyone under immense pressure, it also helped focus both sides on finding an acceptable balance.

A few weeks into the session, Professor Robin Fretwell Wilson was visiting Utah to speak at a conference. Professor Wilson co-edited *Same-Sex Marriage and Religious Liberties: Emerging Conflicts,*[16] and is well-versed in the nuances of accommodating religious liberties while providing sufficient protection to members of LGBT communities. She has been a trailblazer in advocating a balance between LGBT and religious rights.[17] Having read about Professor Wilson's visit in the newspaper, I asked my staff to contact her. She agreed to help with the initial bill drafting and then generously volunteered her time and expertise over the next few weeks in the arduous process of drafting, negotiating, re-

15. *See* Michelle L. Price, *Utah Legislature Enters Final Days of Session*, HERALD EXTRA (Mar. 11, 2013), http://www.heraldextra.com/news/local/govt-and-politics/legislature/utah-legislature-enters-final-days-of-session/article_731181ca-8a7f-11e2-a291-0019bb2963f4.html.

16. SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, & Robin Fretwell Wilson eds., 2008). Professor Laycock has likewise researched and written extensively on the free exercise clause and the history of religious liberties. *See, e.g.*, DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY (2010).

17. *See, e.g.*, 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 (2012).

drafting, and re-negotiating.[18] Our efforts would not have been successful without Professor Wilson's involvement. Professor Cliff Rosky, professor at the University of Utah's College of Law and an influential voice within Equality Utah, also played a crucial role,[19] and representatives of The LDS Church provided helpful perspectives and comments. Remarkably, with a mere ten days left in the session, it appeared that we had created a congenial foundation; and with one week left in the session, common ground was claimed.

## III. AVERTING THE TRAIN WRECK: THE UTAH COMPROMISE

Together with many other stakeholders (as well as our own legislative attorneys), we succeeded in drafting SB 296 and SB 297—and what has come to be naturally known as "The Utah Compromise" was created.

Senate Bill 296,[20] Employment and Housing Anti-discrimination Amendments, modified Utah's Anti-discrimination Act and the Utah Fair Housing Act by granting anti-discrimination protections to the LGBT community in housing and employment.[21] The inclusion of not only sexual orientation—but also gender identity—puts Utah on a short list with a minority of states who have granted these protections.[22] This was not an easy or insignificant accomplishment in the second reddest and arguably one of the most religious states in the nation.[23]

Including the transgender population in the scope of our proposed protections was a remarkably sensitive proposition, and therefore demanded a medically objective definition to provide as much clarity in its administration as possible. We agreed on the following definition for gender identity:

> 'Gender identity' has the meaning provided in the [American Psychiatric Association's] Diagnostic and Statistical Manual (DSM-5). A person's gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held,

18. Dennis Romboy, *Illinois Professor Could Help Utah Draft Religious Liberty, Nondiscrimination Bill*, DESERET NEWS (Feb 25, 2015), http://www.deseretnews.com/article/865622845/Illinois-professor-could-help-Utah-draft-religious-liberty-nondiscrimination-bill.html?pg=all.

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

20. S.B. 296, 61th Leg., Gen. Sess. (Utah 2015), *available at* http://le.utah.gov/~2015/bills/static/SB0296.html.

21. UTAH CODE ANN. § 34A-5-106 (2015).

22. At time of writing, Utah, eighteen other states, and the District of Columbia offer employment and housing protections covering sexual orientation and gender identity. *See Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Jan. 13, 2016), http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

23. *See, e.g.*, Philip Bump, *America's Reddest and Bluest Places*, WASH. POST, (Dec. 4, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/12/04/americas-reddest-and-bluest-places/.

> part of a person's core identity, and not being asserted for an improper purpose.[24]

The condition must continue and be treated for at least six months. By including the definition from the DSM-5, employers and landlords gained safeguards against fraudulent claims—while transgender renters and employees gained valuable protections against discrimination in employment and housing.

With key terms defined and the general nondiscrimination norm in place, we sought next to formulate the necessary rules and protections in the unique areas of employment and housing, using the principle of fairness for all as our guidepost. First, recognizing the exceptional character and function of faith communities in our society, the Compromise ensures that religious organizations, religious schools, and religiously-affiliated entities are free to order their employment affairs according to the dictates of their respective faith traditions.[25] SB 296 maintained and expanded Utah's existing employment exemption for religious entities.[26]

The Compromise also maintained the fifteen-employee threshold for discrimination claims under the law,[27] ensuring that Utah's numerous small family-run businesses retained the ability to manage their workplaces according to their values and needs without governmental interference. This structural protection allows Utah's vibrant family-run enterprises to incorporate their faith into the operation of their business, without fear of government reprisal.

SB 296 further protects employers by allowing them to control the environment and tenor of the workplace through the creation of reasonable dress and grooming standards[28] and reasonable policies that preserve "sex-specific facilities, including restrooms, shower facilities and dressing facilities." These standards must also ensure, however, that the gender-based needs of all employees are reasonably accommodated.[29]

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24. UTAH CODE ANN. § 34A-5-102(k) (2015). For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Gender dysphoria is manifested in a variety of ways, including strong desires to be treated another gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender. The DSM-5 diagnosis adds a post-transition specifier for people who are living full-time as the desired gender (with or without legal sanction of the gender change). This ensures treatment access for individuals who continue to undergo hormone therapy, related surgery, or psychotherapy or counseling to support their gender transition. *See* AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA FACT SHEET (2013), *available at* http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf.

25. Not only is this sound public policy, but some of these provisions may be required by the religion clauses of the First Amendment. U.S. CONST. amend. I; *see* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694 (2012).

26. UTAH CODE ANN. §§ 34A-5-102(i), 57-21-2(1), 57-21-3(b) (2015).

27. *Id.* § 34A-5-102(a)(i)(D).

28. *Id.* § 34A-5-109.

29. *Id.* § 34A-5-110.

Such accommodations could be implemented by means as simple and affordable as a lock on an individualized restroom door.

The Compromise reaffirms the First Amendment right of employers to express religious, social, or political messages by issuing a command to the judiciary that Utah's employment discrimination laws not be "interpreted to infringe upon the freedom of expressive association."[30] SB 296 also protects employees from discrimination based on their religious expression within the workplace, allowing them to express their "religious or moral beliefs and commitments in the workplace in a reasonable, nondisruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace,"[31] with the caveat that employees' expression cannot be "in direct conflict with the essential business-related interests of the employer."[32] In this way, the Compromise allows for both employer and employee expression, while recognizing that the business-oriented goals are paramount in such an environment.

Employees' personal expression was protected by providing that 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 *outside the workplace* regarding the person's religious, political, or personal convictions, including convictions about marriage, family or sexuality.[33]

So if an employee attends a pro-life rally or a gay-pride parade on the weekend, they cannot be fired or reprimanded at work on Monday morning for such actions.

Finally, because the bill was "the result of the Legislature's balancing of competing interests,"[34] protections for both sides were tied into a non-severability clause, stating that if any part of the bill were found to be invalid by a court, the remainder of the bill would be "rendered without effect and void."[35] Though this presents unique dangers, the addition of this clause (something unusual in Utah's state code) guaranteed the fairness for all element stakeholders desired.

Senate Bill 297,[36] Protections For Religious Expression And Beliefs About Marriage, Family Or Sexuality, gives protections and remedies for individuals, religious officials, religious organizations, and government officers and employees concerning the free exercise of religion and religious or deeply held beliefs about marriage, family, and sexuality. The bill amended Utah law to require that county clerks in all twenty-nine

30. *Id.* § 34A-5-111.
31. *Id.* § 34A-5-112.
32. *Id.*
33. *Id.* (emphasis added).
34. *Id.* § 34A-5-102.7.
35. *Id.*; § 57-21-2.7.
36. S.B. 296, 61th Leg., Gen. Sess. (Utah 2015), *available at* http://le.utah.gov/~2015/bills/static/SB0297.html.

counties in Utah ensure solemnization services are available to every couple that makes a request and has the legal right to marry.[37] Previously, county clerks had the authority to solemnize marriages but no legal duty to do so[38]—SB 297 created a legal duty to provide solemnization services. However, if the clerk is not a "willing" celebrant, for whatever reason, including religious beliefs, scheduling issues, or otherwise, the bill grants county clerks the ability to recuse themselves prior to anyone entering the office and designate someone else who is willing to perform the marriage. If a clerk should choose not to perform marriages, there could be no retaliation from their office or any other branch of government for exercising that choice—and no one need know that any county employee had any objection to marrying anyone.[39]

The Compromise restricts any form of government from requiring a religious official to perform any marriage that is contrary to the official's beliefs.[40] This provision is of course uncontroversial. The Compromise takes this uncontroversial proposition one step further; it also prohibits government retaliation or the denial of a religious official's authority to marry based on the official's refusal to solemnize any marriage that is contrary to the religious official's beliefs.[41] Not only is the government barred from forcing religious officials to perform marriages against their religion, but the government likewise cannot deny a refusing official the ability to perform other marriages based on the tenets of their faith.

The Compromise codifies the tax-exempt status of religious organizations and individuals with extra protections vis-à-vis their beliefs on marriage and sexuality.[42] In addition, religious organizations were given discretion and control over their facilities and grounds for activities asso-

37. UTAH CODE ANN. 17-20-4 (1) & (2).

38. *See* Dennis Romboy, *County Clerks in Utah Poring over New Law on Access to Marriage Ceremonies*, DESERET NEWS (Apr. 15, 2015), http://www.deseretnews.com/article/865626791/County-clerks-in-Utah-poring-over-new-law-on-access-to-marriage-ceremonies.html?pg=all.

39. UTAH CODE ANN. 63G-20-102 (1) A clerk in the county in which I reside has opted not to perform marriages. As a result, when a couple comes to the office and requests a marriage license they are given a list of those in the county that have agreed to marry everyone. The clerk has indicated to me most couples are relieved to have the list and contact information. Everyone is treated identically. Contrast this experience with reactions in other states to the mandate. In Tennessee, every clerk in one office resigned rather than perform marriages contrary to their belief. Tyler Whetstone, *Decatur County Clerk, Employees Resign over Same-Sex Ruling*, JACKSON SUN, (July 1, 2015), http://www.jacksonsun.com/story/news/politics/2015/07/01/decatur-county-clerk-employees-resign-over-same-sex-ruling/29579785/. A clerk in Arkansas resigned overnight after 24 years of service. *Arkansas County Clerk to Resign over Same-Sex Marriage*, CBS NEWS (June 29, 2015), http://www.cbsnews.com/news/arkansas-county-clerk-to-resign-over-same-sex-marriage/. In Texas, a clerk who was given the mandate to perform a marriage which she did not believe in also made the extreme choice to leave her job. *County Clerk in East Texas Resigns over Gay Marriage Ruling*, WASH. TIMES, (July 10, 2015), http://www.washingtontimes.com/news/2015/jul/10/county-clerk-in-east-texas-resigns-over-gay-marria/. At time of writing, instances where individuals are being forced to give up lifetime careers or violate deeply-held religious convictions are still commonplace. Utah's legislative solution allowed it to avoid such tragedies.

40. UTAH CODE ANN. 63G-20-201(1) (2015).

41. *Id.* § 63G-20-201(2).

42. *Id.* § 63G-20-102(1)(b)(i). Forbidden government retaliation actions include: "impos[ition of] a formal penalty on, fines, disciplines, discriminat[ion] against, deni[al of] the rights of den[ial of] benefits to, or deni[al of] tax-exempt status of a person." *Id.* § 63G-20-102(1)(b)(i).

ciated with any marriage that is contrary to the religious organization's beliefs.[43] SB 297 further protects religious organizations in their ability to promote marriage in a way that is consistent with their beliefs through religious programs, counseling, courses, or retreats without fear of government retaliation.[44]

Finally, SB 297 bars government and accrediting, certifying, or licensing bodies from denying or revoking licenses or otherwise penalizing or disadvantaging a person who hold a professional or business license based on his or her beliefs or expression in nonprofessional settings regarding marriage, family, or sexuality.[45] This provision recognizes disagreement on these topics will not disappear overnight. In our democratic society, deliberation free of government interference is of the utmost importance; therefore people must remain free to believe and speak on those topics as they will, without fear of government retaliation or censure, including by professional or licensing authorities.

## IV. THE FAILURE OF THE JUDICIAL SOLUTION

There are two sides to every decision made by a court—the winning side and the losing side. Such was the paradigm created by the Supreme Court's decision in *Obergefell v. Hodges*[46] (and the decision in *Kitchen v. Herbert*[47] in Utah's individual case prior to the Compromise). As a result of Obergefell, discussions about the legal definition of marriage have been rendered academic—the Supreme Court has spoken and, for the foreseeable future at least, its ruling will stand. Justice Scalia, in a typically fiery dissent, saw the verdict as nothing less than a strategized and swiftly-executed attempt by the Court to subvert democratic process.[48] The late Justice Scalia dissented in *Obergefell*, because, in his view, the

43. *Id.* § 63G-20-301. For example, if a church owned a park or a summer camp, they could respectfully and safely decline the option to host and perform a marriage which did not conform with their practiced beliefs about marriage, family, or sexuality.

44. *Id.* § 63G-20-201(4).

45. *Id.* § 63G-20-203 ("[A] state or local government, a state or local government official, or another accrediting, certifying, or licensing body may not: deny, revoke, or suspend a licensee's professional or business license based on that licensee's beliefs or the licensee's lawful expression of those beliefs in a nonprofessional setting, including the licensees' religious beliefs regarding marriage, family, or sexuality; or penalize, discipline, censure, disadvantage, discriminate against, or retaliate against a licensee who holds a professional or business license based on that licensee's beliefs or lawful expressions of those beliefs in a nonprofessional setting, including the licensee's religious beliefs regarding marriage, family or sexuality."). Once again, protecting an individual's professional life regardless of which rally they show up at over the weekend or what they preach at Bible club on Thursday night.

46. 135 S. Ct. 2584 (2015).

47. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

48. Justice Scalia termed it "judicial [p]utsch." *Obergefell,* 135 S. Ct. 2584, 2629 (Scalia, J., dissenting). A "putsch," for those of us not quite as sesquipedalian as Justice Scalia, is a plotted revolt or attempt to overthrow a government, especially one that depends upon suddenness and speed. NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). Justice Scalia's opinion contains little concern for the civil consequences of conferring marriage rights to same-sex couples. He acknowledges that there will both positive and negative social effects. Far greater was his concern that "[t]oday's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." *Obergefell*, 135 S. Ct. 2584, 2626 (Scalia, J., dissenting).

Court halted the critical debate on same-sex marriage, a debate where, prior to intervention by the Court, "[i]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. [Where] Americans [had] considered the arguments and put the question to a vote."[49] Due to the Court's needless intervention into the debate, Americans have lost the fundamental assurance of democracy, that "an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work."[50]

In his dissent, Chief Justice Roberts pragmatically observed that forcing the recognition of this very new right of same-sex marriage in such a radical and abrupt way will have a profound effect on the American people, and in particular, the nature of the national discourse around same-sex marriage: "Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide."[51] The Chief Justice's statement was prophetic. Within weeks, polls showed that a bare majority actually approved of the decision made by the five Justices and an even higher number were concerned that the mandate would come at the expense of those wishing to exercise their religious liberties—something the respondents viewed (in some groups as high as eighty-two percent) as untenable.[52] Further, in a separate poll conducted less than three weeks after *Obergefell*, fifty-six percent believed protection for religious liberties should "take precedence" over protections for gay rights.[53] The *Obergefell* majority, however, gave little direction as to how protections for religious minded people to exercise their rights would or could be provided.[54] So, State legislatures must step in and fill in the gap left by the operation of a coordinate branch of the government.

It is impossible to achieve fairness for all when a complex social issue is 'resolved' by judicial decree. No matter the actual constitutional decision in *Obergefell*, the debate around same-sex marriage, and homosexual protections more broadly, will (and does) continue to rage on. This is so in part because courts simply cannot take into account the needs and desires of all stakeholders—a prime advantage of the legislative process.

States have been stripped of the ability to decide how they will legally define marriage with regard to the same-sex marriage question. By

49. *Obergefell*, 135 S. Ct. 2584, 2626 (Scalia, J., dissenting).

50. *Id.* at 2627.

51. *Id.* at 2625 (Roberts, C.J., dissenting).

52. Mark Movseian, *Same-Sex Marriage and Our New Religious Politics*, FIRST THINGS (July 23, 2015), http://www.firstthings.com/blogs/firstthoughts/2015/07/same-sex-marriage-and-our-new-religious-politics.

53. David Crary and Emily Swanson, *AP Poll: Sharp Divisions After High Court Backs Gay Marriage*, YAHOO! NEWS, (July 18, 2015), http://news.yahoo.com/ap-poll-sharp-divisions-high-court-backs-gay-120451180.html.

54. The majority opinion did indicate support for religious liberty protections, at least for belief and expression. *See Obergefell*, 135 S. Ct. at 2603.

implementing legislation similar to what Utah crafted, states can, however, still set the boundary lines for discussion between those advocating for religious protections and those lobbying for LGBT protections. All nine Justices conceded that such conversations would take place.[55] Courts do not have the level of competence or ability to control such nuanced discussions, however, and so it is up to the states to provide safe guidance for the inevitable debates.

## V. THE BEST WAY FORWARD

Discussion is the cornerstone of democracy. In order for "We the People" to truly govern, we must debate and decide the important issues of the day. We must not allow government, political factions, or social pressure to suppress meaningful dialogue about issues of fundamental social importance or our democratic form of government will cease. In our Constitutional Republic incompatible voices cannot be vilified, punished, or subjected to retribution. Discussion is a two-way street. While it is sometimes as difficult to delineate and concretely define the terms of a tolerant discussion as it is to define the terms fairness, equality and respect, the principle of full, tolerant discussion must nevertheless remain viable if we hope to preserve our democracy.

"Fairness for all"—the goal of Utah's Compromise—creates a legal space for deliberations to safely continue in both public and private conversations as society sifts through the deeply held beliefs on both sides of this and other issues. Respectful persuasion and diplomatic negotiations were the processes used to create the Utah Compromise and in turn, the Compromise created parameters for the safe, respectful discussions in and out of the workplace.[56] In the end, none of the stakeholders got eve-

55. *See, e.g.*, *id.* at 2643 (Alito, J., dissenting).

56. In addition to the question of clerks and magistrates maintaining their jobs despite the fact that performing same-sex marriages is contrary to their core beliefs, there is evidence of intolerance toward religious speech in the workplace and public arena as well. For example, a Newport Beach City Councilman faced a possible formal reprimand for an email criticizing same-sex marriage. Hanna Fry, *No Censure for Newport Beach Councilman over Anti-Gay Marriage Remarks*, L.A. TIMES (August 15, 2015), http://www.latimes.com/local/lanow/la-me-ln-no-censure-for-councilman-over-anti-gay-marriage-remarks-20150812-story.html. A Ford Motor Company engineer was fired via voicemail for disagreeing with the company's support of GLOBE, a separate organization that promotes LGBT inclusivity in the workplace. Even though it was acknowledged that the comment was an expression of his religious convictions he was told that it was "discrimination in and of itself and that's not something that we can protect." Kate Abbey-Lambertz, *Ford Worker Fired for Anti-Gay Comment Sues For Religious Discrimination*, HUFFINGTON POST (July 14, 2015), http://www.huffingtonpost.com/entry/thomas-banks-ford-lawsuit_55a42530e4b0a47ac15d2669. Craig James, a former running back for the New England Patriots, was an ESPN pundit who quit in 2012 to run as a candidate for a U.S. Senate seat in Texas. After an unsuccessful bid, he was later hired by Fox Sports Southwest only to be fired days later for comments he had made regarding his opposition to same-sex marriage while on the campaign trail. *Sportscaster Sues Fox Sports, Saying He Was Fired for Religious Views Against Gay Marriage*, RELIGION NEWS SERVICE (August 4, 2015), http://www.religionnews.com/2015/08/04/sportscaster-sues-fox-sports-saying-he-was-fired-for-religious-views-against-gay-marriage/. Kelvin Cochran had worked as a firefighter for thirty-four years and was Atlanta's Fire Chief when he was ordered to take sensitivity classes and fired a few weeks later—all because he wrote and distributed to his colleagues a book on the Biblical meaning of sexuality, holding that homosexuality was a sin. Carolyn

rything they wanted from the final version of the Utah Compromise, but everyone gained specific and very significant statutory protections a court could not have delivered to both sides. The results garnered at the end of Utah's legislative session were starkly different from those of Indiana, Arkansas, or Louisiana.[57]

In a post-*Obergefell* world, can a balanced and fairness-for-all approach create allowances and protections for everyone to exercise their beliefs? The answer unequivocally is yes, as Utah demonstrates. On a smaller scale, Utah's position was ubiquitous throughout the nation. The definition of marriage the Courts gave us was not one that was decided upon by the voice of the People; rather, it was one mandated by the Court. *Obergefell* gave no specific protections to those wishing to safely exercise their religious beliefs. Yet through the legislative process, in a post-same-sex marriage victory environment, the Utah Legislature was able to negotiate a balanced and palatable solution. The stakeholders at the table all had something big to win and everyone had a bit to concede, but the results speak for themselves.[58]

There are several courses states may take to balance anti-discrimination and religious liberty provisions. One is to do nothing, which may by default allow the issue to be decided by the judiciary. Another is to pass or strengthen a RFRA[59] or similar statute in tandem with LGBT rights' legislation, but recent attempts have not been successful.[60]

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Monynihan, *Atlanta's Sacked Fire Chief: 'I Want My Job Back*,' CONJUGALITY (July, 7 2015), http://www.mercatornet.com/conjugality/view/atlantas-sacked-fire-chief-i-want-my-job-back/16465.

57. David Blankenhorn points to the fact in a recent *Time Magazine* article: "Recall what happened recently in a number of states: In states including Arizona, Indiana, and Kansas, religious liberty bills paying complete attention to the rights of religious dissenters and zero attention to the rights of gays and lesbians achieved almost nothing and made no one happy. But Utah was different. Encouraged by the LDS Church, long an opponent of gay marriage but now in mutually respectful dialogue with gay and lesbian leaders, the Utah legislature passed legislation earlier this year that combined reasonable exemptions to protect religious freedom with new statewide legal protections for gays and lesbians." David Blankenhorn, *A Way Forward for LGBT and Religious Liberty Rights*, TIME (Aug. 10, 2015), http://time.com/3989228/gay-marriage-lgbt-religious-liberty-rights/.

58. As I have previously pointed out, there are many who recognize the simple elegance of the solution, from political leaders like Jeb Bush and President Obama, to thought-leaders from The Church of Jesus Christ of Latter-day Saints, Brookings Institute, The Wall Street Journal, Washington Post, Time Magazine, the New York Times, and The First Amendment Center. Perhaps most importantly, leaders in the state of Arizona, who tried but failed last year to accomplish the balance achieved in Utah. *See* Editorial, *Religious Freedom' Is Guaranteed by the Constitution. There's No Reason to Sacrifice the Liberties of Others*, AZ CENTRAL, (March 31, 2015), http://www.azcentral.com/story/opinion/editorial/2015/03/31/indiana-take-lesson-tolerance-utah/70748856/. Utah has found an innovative, resourceful solution that is being lauded as a model for legislatures across the country. *See* Tad Walch, *LDS Position on Gay, Religious Rights May Influence State Legislatures Around the U.S.*, DESERET NEWS (Jan. 31, 2015), http://www.deseretnews.com/article/865620878/LDS-position-on-gay-religious-rights-may-influence-state-legislatures-around-the-US.html?pg=all; J. Stuart Adams, *The Utah Compromise*, LIBRARY OF LAW AND LIBERTY (April 14, 2015), http://www.libertylawsite.org/2015/04/14/the-utah-compromise/.

59. Currently, twenty-one of the states and the Federal Government have some form of Religious Freedom Restoration Act. *See, e.g.*, 42 U.S.C. § 2000bb-1 (2012) (Federal Religious Freedom Restoration Act); *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

60. *See* Editorial, *supra* note 58.

A final—and the best—option is to negotiate a balanced approach, providing both anti-discrimination protections and specific statutory religious liberties protections. The flaws in the other approaches are legion: judicial decisions lack compromise, fail to take into account all stakeholders, and lack political accountability. RFRAs have triggered severe political and economic backlash[61] and, in reality, are difficult to apply[62] and likely do not provide an ideal statutory landscape for religious protections.

Legislating both anti-discrimination protections and specific statutory religious liberties protections not only adequately balances the interests of both sides but also provides clearly delineated provisions, giving the courts greater clarity when disputes arise. This results in a less costly and more enforceable legal regime where everyone gets protections enough to coexist and express their own personal values and beliefs without discrimination—a true win-win.

Perhaps a comment by The Church of Jesus Christ of Latter-day Saints gives the best perspective. In a brief statement issued at a press conference near the end of the legislative session, the Church said

> The principle that we have urged legislators to address is that of fairness for everyone. In a society which has starkly diverse views on what rights should be protected, the most sensible way to move forward is for all parties to recognize the legitimate concerns of others. After a considerable amount of hard work, we believe that the Utah legislature has wisely struck that balance. LGBT people cannot be fired or denied housing just for being gay. At the same time, religious conscience and the right to protect deeply held religious beliefs is protected by robust legislation. While none of the parties achieved all they wanted, we do at least now have an opportunity to lessen the divisiveness in our communities without compromising on key principles.[63]

The Utah Compromise is model legislation providing the balance and fairness that will be critical for the continued survival of our democratic process and its dialog.

This is the best way forward.

61. *See, e.g.*, Robert King, *RFRA: Boycotts, Bans and A Growing Backlash*, INDY STAR (Apr. 2, 2015), http://www.indystar.com/story/news/politics/2015/04/01/rfra-boycotts-bans-growing-backlash/70810178/.

62. *See, e.g.*, Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 886–87 (1990) (describing how the "compelling government interest" test is difficult to apply).

63. Press Release, The Church of Jesus Christ of Latter-day Saints, Utah Lawmakers Introduce Bill Balancing Religious Freedom and Nondiscrimination Protections (Mar. 4, 2015), *available at* http://www.mormonnewsroom.org/article/publicstatement-on-religious-freedom-and-nondiscrimination.