

## CHAPTER 23

### THE GOLDEN RULE

The gay population and many faith traditions have sharply contrasting moral visions. For that reason, zealous advocates in both communities understand religious liberty and marriage equality as a zero-sum exchange in a “culture war.” The Golden Rule (Matthew 7:12) offers a better approach to these interactions: “Do unto others as you would have them do unto you.”<sup>1</sup>

We spoke with dozens of faith leaders and visited churches all over America. On November 15, 2015, just months after *Obergefell*, one of us attended services at St. Paul’s Lutheran Church in St. Claire Shores, Michigan—the church where Ken and Wendy DeBoer were married and in which they raised their children, Ken Jr. and April. A member of the traditionalist Lutheran Church-Missouri Synod, St. Paul’s displays a framed statement of faith in its fellowship hall. Belief #11 is that “God creates each person as male or female,” and that to “reject one’s gender is to reject the Creator’s work.” Belief #12 is that marriage is an “institution of God, and is defined by uniting one man with one woman unto one flesh.” In 2015, the pastor and officers of St. Paul’s were all men. (Recently, the Missouri Synod gave local churches the option to include women as officers.) Ken DeBoer was the vice-president of the congregation. His former wife Wendy and his daughter April no longer worship at this church, in large part because of the clash between April’s lesbian marriage and Belief #12.<sup>2</sup>

We were warmly greeted by the president of the congregation. When we inquired about April DeBoer, he told us that the congregation was proud of her commitment to the children she and her partner were raising so wonderfully. He hoped that April would ask St. Paul’s to baptize her children within the church. We also met the Reverend David Rutter, his wife Susan, and their two teenage kids. Drawing from Matthew 25: 31-46, the pastor’s sermon that morning drew a sharp distinction between the “sheep” saved by Christ and the “goats” damned for eternity.

At the adult Sunday school class, we sat next to Dave, a former Catholic who married into the Lutheran Church. We talked about same-sex marriage, which he opposed

because the Bible taught him that marriage was all about procreation. If marriage were just about love and desire, there would be no reason not to allow relatives or threesomes to marry. But lesbian and gay couples do raise children, we suggested. He was okay with civil unions and spoke warmly about his gay brother-in-law, who absolutely, he believed, would make a great father someday. He said St. Paul's was concerned that its traditionalist stance would earn it the label of a hate group. We pooh-poohed the idea, but a few months later the U.S. Commission on Civil Rights issued a report called *Peaceful Coexistence* in which the Chair of the Commission worried that "religious liberty" and "religious freedom" are sometimes deployed as "code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance."<sup>3</sup>

At the end of Sunday school, we asked Reverend Rutter about April DeBoer's children, and he thoroughly endorsed the idea of baptizing them. When Ken DeBoer remarried within the church, he and his second wife met with the pastor. As we understand it, the new wife inquired: "From the church's point of view, how should I interact with my lesbian step-daughter?" Rutter responded: "Love her! She's family and a child of God." This theologically conservative congregation seemed fine with gay people and surprisingly acquiescent in civil marriage for lesbian and gay couples.

Our visit to St. Paul's helped us understand how "culture war" rhetoric mischaracterizes the dynamic marriage debate and the relationship between faith communities and gay families. An expanded freedom to marry has created more possibilities for conflict between equal treatment of ever more open LGBTQ+ persons and religious liberty for a diminishing number of persons and institutions. The Alliance Defending Freedom (ADF) and other organizations have seized upon conflicts between traditionalist wedding vendors and same-sex couples to publicize battles in a culture war they are hyping—but the wedding vendor cases ought not overshadow the common ground between LGBTQ+ equality and religious liberty. By the way, the focus on wedding vendors also obscures the more important interaction of anti-discrimination rules with employment and screening policies for institutions substantially controlled or managed by churches and organized religions—parochial schools and universities, religious nonprofits, and so forth.

We did not feel embattled at St. Paul's, and its congregants and pastor did not seem under siege. The main effect of marriage equality for that and most other traditionalist

churches has been to confront them with real LGBTQ+ families, including families linked with their own congregants, such as Ken DeBoer. These families have destabilized exclusionary practices and are softening doctrinal lines. The presence of gay families, especially marriages with children, tends to move the conversation away from icky sinful sexual practices toward family-based commitment, support for children, and love for your neighbor. When the gay families come from within the church (“pop-up” families), church leaders create internal tensions and hard feelings if they condemn and exclude. Once congregants come out of the closet as parents of gay children and grandparents of their kids, the conversation moves further away from centuries-old dogma toward pastoral concerns: How can we be helpful? The Golden Rule kicks in.<sup>4</sup>

For these internal reasons, there will continue to be variety and evolution in how faith communities respond to marriage equality and *Obergefell*. These responses will vary both among denominations and within them. In contrast to the Lutheran Church-Missouri Synod, the Evangelical Lutheran Church in America (ELCA) has adopted a policy of allowing local congregations to celebrate lesbian and gay marriages. Martin Luther himself was, conceptually, on both sides of the issue: he believed that marriage was between one man and one woman and that sodomy was sinful, but he rejected the Roman Catholic tradition of marriage as a sacrament focused primarily on procreation and also viewed it in terms of companionship, love, and mutual support, modern ideas reflected in *Obergefell*. Even within the Missouri Synod, attitudes have moved. The Pew Research Center found the Synod’s members split 44-47 percent against affirming attitudes toward homosexuality in 2007—but 56-37 percent the other way by 2014.<sup>5</sup>

There was anxiety within St. Paul’s that the new constitutional and social norms would limit their free exercise of religion. Would their church have to celebrate same-sex weddings? Nope, nor would it lose its tax-exempt status. Their church would not be required to hire a qualified gay man (or a woman of any sexual orientation) as its minister, or perhaps as its organist. What mainly concerned Reverend Rutter, however, was that his faith community would be shamed and shunned because it hewed to traditionalist marriage. These are realistic concerns.

One of the earliest religious thinkers to address the legal issues systematically was a remarkable member of the Quorum of the Twelve Apostles, part of the governing structure

of The Church of Jesus Christ of Latter-day Saints. In 1984, Elder Dallin Oaks wrote a statement of “Principles to Govern Possible Public Statement on Legislation Affecting Rights of Homosexuals.” He synthesized church doctrine and its deeply gendered understanding of marriage and family, and commented on these issues’ legal and practical dimensions. For example, he urged the Church not to single out “homosexual sodomy” for criminalization, but instead to focus its opposition on “homosexual marriage,” which was most deeply inconsistent with Latter-day theology. Although no state in 1984 included sexual orientation in its comprehensive anti-discrimination statute, Elder Oaks saw growing support for such laws. Rather than oppose such legislation “across the board,” he proposed that the Church support “well-reasoned exceptions” to protect faith concerns. Exactly 30 years later, the Church created an Ad Hoc Committee on Religious Liberty and decided to support a Utah law protecting LGBT persons against discrimination, along with securing generous religious accommodations. Embodying the lessons of the Golden Rule, this statute of principles has been the foundation of a “Fairness for All” movement seeking inter-group dialogue to reconcile equality for LGBT persons with religious liberty for conservative persons of faith.<sup>6</sup>

In May 2018, the Michigan Civil Rights Commission ruled that its comprehensive civil rights law would consider LGBT exclusions to be sex discriminations prohibited by employers, landlords, and public accommodations. Some religious Michiganders would be prepared to raise constitutional objections to some applications of a sexual orientation, gender identity anti-discrimination (SOGI) law: Can the law constitutionally require a baker, florist, or photographer to provide goods or services for a same-sex wedding, notwithstanding faith-based or expressive objections? Does such a law require the government to terminate subsidies for or contracts with faith-based adoption or foster care agencies that will not place with LGBT families? Would it require religious schools to hire lesbian janitors or gay teachers or transgender administrators?<sup>7</sup>

The most publicized cases are those where a state anti-discrimination commission requires a private person or small business to provide a wedding-related service that runs against her/his/its faith tradition. Overshadowed by these cases, the larger issue is whether the state should legally require religiously affiliated schools, charitable institutions, and other nonprofits to provide their services or make employment decisions on a non-discriminatory basis. Recall, from Chapters 13 and 16, that New York and other

states have largely refrained from pressing their SOGI laws so far. Other states, like Michigan, have narrower statutory allowances. What constitutional limits might there be?

We shall discuss the deep issues raised by these cases and the meta-principle that should help resolve them, namely, the Golden Rule's principle of reciprocity. Come up with a code of conduct for others that you would happily apply to yourself. To help figure that out, you need to discern the other person's point of view, and accompany her or him on the moral journey taken to get to that point of view. The Golden Rule, therefore, entails a process as well as a precept. That process and precept are transforming American religion and seek to transform the public law of both conservative red states like Utah as well as blue states like New York. As law professors, we implore lawyers and judges not to get in the way. This chapter lays out the case for legislatures, more than courts, to take the lead to resolve or ameliorate conflicts involving religion, sexuality, and gender.

### **Social Norms, Constitutional Equality, and Religion**

In 1975, when Clela Rorex issued marriage licenses to six lesbian and gay couples in Boulder, Colorado, all of them celebrated their marriages in religious ceremonies. Most American churches and synagogues at the time excluded lesbian and gay persons and families, but the Metropolitan Community Church (MCC), founded by Reverend Troy Perry in 1968, focused on the faith needs of gay people and specialized in gay marriages and unions. The Congregationalists (United Church of Christ), Unitarians, Quakers, and Reformed Jews were dialoguing with and embracing openly lesbian and gay persons and their families. Some pastors, such as Methodist Reverend Roger Lynn (who married Baker and McConnell), were willing on their own to officiate at lesbian and gay weddings. In the half century since 1968, there has been significant movement toward toleration and even acceptance among American religious denominations.

The most dramatic development has been increased understanding of sexual and gender variation as natural and not matters of "perverse choice," and with that understanding a rejection of discrimination against LGBTQ+ persons because of who they are. As early as the 1970s, Reform and Conservative Jews, Congregationalists, Unitarians, Episcopalians, Presbyterians, and Lutherans condemned anti-gay discrimination as a matter of religious principle. In the last generation, they have been joined by the Catholics, Methodists, Latter-day Saints, the Islamic Society of North America, and many Evangelical

churches and some denominations. These developments are consistent with the Golden Rule, a precept embraced by the Old and New Testaments, the Prophet Muhammed, and most other religious and ethical traditions.<sup>8</sup>

That so many faith traditions condemn discrimination because of a person's self-identification as lesbian or gay does not mean that they accept the moral legitimacy of consensual sodomy or same-sex marriage. For example, the four largest denominations in this country—the Catholic Church, the Southern Baptist Convention, the Church of Jesus Christ, and the United Methodist Church—remain committed, as a matter of religious doctrine, to the propositions that homosexual relations are sinful and same-sex marriage unacceptable. Likewise, Orthodox Christianity, Islam's Sunni as well as Shi'a sects, and Orthodox Judaism (major religions in the world) take the same positions as a matter of scriptural interpretation. On the other hand, most doctrinally conservative denominations are moving toward greater tolerance and pastoral concern for LGBTQ+ persons, especially those whose families are devoted worshippers.<sup>9</sup>

Among Jewish and mainstream Protestant traditions, however, the emerging norm is acceptance of LGBT congregants and clergy, *and* recognition of same-sex unions as marriages those denominations will celebrate and recognize. The debate within the Presbyterian Church USA is illustrative. In the twentieth century, the Church maintained that God made men and women as physical and gender complements, that the Bible defines conjugal marriage between one man and one woman, and that homosexual relations are morally wrong. Reverend Mark Achtemeier led the Presbyterians to issue, in 1997, a ban on gay persons' being ordained as ministers. Afterwards, he had a series of encounters with anguished seminarians who felt torn apart by the conflict between their natural feelings and their devotion to God's Word. These individuals were dedicated Christians, yet Achtemeier discovered that "the result of this faithfulness was a depth of despair and brokenness that was very different from anything the Bible would lead us to expect." These experiences led him to reexamine the Bible—and to change his mind. Achtemeier not only led the campaign within the Presbyterian Church to ordain openly gay ministers, but also supported the Church's 2015 rule change to allow ministers and congregations to celebrate same-sex marriages.<sup>10</sup>

Reverend Achtemeier's journey story offers insight into the process that pressed American religion toward inclusion. Religious doctrine and practice have influenced social attitudes and constitutional law—but the converse is also true: evolving social norms and constitutional rulings have influenced pastoral practices, vocabularies for addressing LGBT persons, and even religious doctrine. The pastor's conversations could not have happened without these changes, as the gay seminarians would have been afraid to open up to a straight moralist. His willingness to revisit the Bible was encouraged by his wife, Katherine Morton Achtemeier, and their children, who understood that many lesbian and gay persons were committed partners and excellent parents. That Achtemeier went public with his views was fueled by ever greater and friendlier interest in the subject than we had found in the 1990s, when we documented the support for marriage equality among religious leaders in the Washington D.C. area.<sup>11</sup>

Our overall thesis is that, just as religion played a large role in the social and legal marriage equality debate, so too social norms and constitutional principles are playing a large role in deliberations regarding doctrine and pastoral practice within the country's religious denominations. The dialectic relationship among religious doctrine, social norms, and constitutional law was originally suggested to us by the Presbyterian Church's history on issues of race (one of us is Presbyterian). Nineteenth-century Southern Presbyterians relied on Noah's curse against the family of his son Ham (Genesis 9:22-27), supposedly the father of the African race—a gloss southerners tendentiously read into Genesis—to justify slavery as having God's sanction. After slavery's end, Reverend Richard Palmer (the founder of the Southern Presbyterian Church) invoked the Bible to justify racial segregation and bans on interracial marriage. Motivated by the increasingly sharp conflict between apartheid and human rights, during the 20th century the Southern Presbyterians and other denominations revisited the Bible on these issues. By the 1960s, most Presbyterian and mainstream Protestant ministers supported civil rights. The Southern Baptists dragged their feet but ultimately got there as well.<sup>12</sup>

When social norms and constitutional status change, faith traditions come under pressure to evolve their doctrines and practices. Churches that disparage lesbian and gay couples risk social ostracism, as Justice Alito feared in *Windsor* and *Obergefell*. But most of the pressure to conform to social norms comes from within the faith community, not from the government or from private litigation. Nor do these internal as well as external

pressures mean that all faith traditions will follow; like niche markets, there will be space in the great American religious smorgasbord for denominations that hew to a traditionalist approach to issues of sexuality and gender. Table 3 suggests the current map of that smorgasbord in this country, and the ensuing discussion will focus on the three great conservative faith traditions.

## **Continuum of Religious Acceptance for Lesbian and Gay Faithful (2020)**

<b>Denial/Exclusion</b>	<b>Tolerance/Pastoral</b>	<b>Acceptance/Marriage</b>
Benedict XVI Catholics	Francis I Catholics and Jesuits	New Ways Ministry
Russian/Greek Orthodox	Old Anglicans	Episcopalians
Old Southern Baptists Dr. Land and Dr. Mohler	New Southern Baptists Dr. Moore and Rev. Greear	Alliance of Baptists Cooperative Baptist Fellowship
Thomas Road Baptist Megachurch	North Point Megachurch	EastLake Megachurch
Assemblies of God	United Methodists	Metropolitan Community Churches
Evangelical Presbyterians	Presbyterian Church in America	Presbyterians (USA)
Jehovah’s Witnesses	Lutherans—Missouri Synod	Evangelical Lutherans
Conservative Pentecostals	National Ass’n of Evangelicals	Congregationalists (UCC)
Many Orthodox Jews	Conservative Jews	Reform Jews
Old Mormons	Modern Latter-day Saints	Affirmation (Latter-gay Saints)
Nation of Islam	Islamic Society N.A.	Muslims for Progressive Values
Shi’ite Muslims	Sunni Muslims	Unity Mosques
Lakewood Megachurch		Quakers
Westboro Baptists		Unitarian Universalists

### **Variation among Evangelical Protestants**

Table 3 reveals wide variation both among and within denominations and exposes the error made by scholars who treat “Evangelicals” as a homogenous anti-gay group. Because Evangelical Christianity tends to be institutionally decentralized and emphasizes the individual’s encounter with God’s Word and personal salvation, this broad cluster of



denominations—ranging from the huge Southern Baptist Convention (more than 16 million strong), to the more modest Assemblies of God and Jehovah’s Witnesses, to single-church or internet denominations—offers endless variety: from open loathing of gay people to love-the-sinner-hate-the-sin to open embrace and doctrinal rethinking.<sup>13</sup>

Some independent Evangelical churches preach anti-gay prejudice. The most famous is the Westboro Baptist Church, in Topeka, Kansas. Founded by the late Reverend Fred Phelps, Westboro Baptists believe that “God hates fags” and “God hates America” because it tolerates homosexuals. They are best known for protesting at military funerals. Even scarier is the Faithful Word Baptist Church in Tempe, Arizona. A lifelong Baptist with a remarkable memory for Bible verses, Reverend Steve Anderson zealously derides “horrible wicked” homosexuals, who “keep molesting and destroying people.” So, he urges, they should put a bullet in their heads; if they don’t take advantage of self-help, God will deal with them, per the death penalty directed by Leviticus 20:13. In a video available on YouTube, he can be seen joking to his congregation that “LGBT” stands for “Let God Burn Them.” And LGBTQ means “Let God Burn Them Quickly.” The video shows the congregation laughing.<sup>14</sup>

More representative of the Evangelical perspective is the Southern Baptist Convention (SBC), which since 1976 has regularly adopted resolutions condemning “the evils inherent in homosexuality.” In June 1996, the Convention passed its first “Resolution Against Homosexual Marriages,” condemning such relationships as “completely and thoroughly wicked” (Leviticus 20:13, Romans 1:26-28). Seven times since then, the Convention has adopted new resolutions condemning homosexual relationships, including domestic partnerships and civil unions. Other resolutions supported the Federal Marriage Amendment (2004, 2006) and DOMA (2011) and condemned *Obergefell* (2016).<sup>15</sup>

The intellectual leaders of the SBC’s opposition were Dr. Richard Land, the founding president of its Ethics & Religious Liberty Commission (ERLC), and Dr. Albert Mohler, the president of the Southern Baptist Theological Seminary. After being ensnared in race-baiting and plagiarism scandals, Land was replaced in 2013 as ERLC’s president by the mediagenic moderate conservative Dr. Russell Moore. In June 2012, the Convention’s marriage resolution avoided “wickedness” rhetoric and instead announced that “[a]ll people, regardless of race or sexual orientation, are created in the image of God and thus are due

respect and love (Genesis 1:26–27).” The resolution respectfully asserted that same-sex marriage went beyond Biblical and other traditions.<sup>16</sup>

The change in the SBC’s stance became apparent in a conference, “The Gospel, Homosexuality, and the Future of Marriage,” held in Nashville on October 27-29, 2014. More than 1300 ministers and theologians attended the event, which was packed with Evangelical all-stars: Moore and Mohler, Jim Daly and Glenn Stanton of Focus on the Family, Kristen Waggoner and other ADF counsel for Barronelle Stutzman (the florist who was penalized for declining to service a gay wedding in Washington state), and J.D. Greear, the charismatic pastor of the Summit Church in Raleigh-Durham, North Carolina. The conference offered neither anti-gay condemnations nor any doctrinal softening. LGBT persons were concentrated into a panel of Christians struggling with “same-sex attraction” but following God’s rules as to sexual conduct. The panel, hosted by Moore, accepted the premise was that sexual orientation is not a choice, a novel idea for most Baptists.<sup>17</sup>

Especially dramatic was Reverend Greear’s address that closed the conference, “Preaching Like Jesus to the LGBT Community.” The pastor announced that the Church owed that community an apology for not opposing anti-gay discrimination and abuse. He implored parents not to abandon their LGBT kids, Christians not to shun gay neighbors and relatives, and the Church to admit that its members are all sexual sinners—no different from gay people. Invoking Christ’s admonition that His followers not judge, lest they be judged for their own failings (Matthew 7:1), Greear urged a middle path between alienation of gay people from the Church and affirmation of homosexual relationships. Both, he said, are contrary to Scripture. The middle way would be pastoral concern and friendship: share the Good News with your gay friends, but let their hearts be guided by God and not by human shaming or discrimination. Focus on the Family’s cheerful president, Jim Daly, had delivered a similar message earlier in the conference.<sup>18</sup>

It remains to be seen how the SBC will respond to this call for friendship and pastoral concern. As a general matter, most Southern Baptists still consider “pastoral care” to include the practice of “pray-the-gay-away” conversion therapy, a set of controversial practices that have proven very harmful to minors involuntarily subjected to them. SBC President Ronnie Floyd, who once preached that homosexuality was a tool of Satan, announced “spiritual warfare” against the Supreme Court’s decision in *Obergefell*. On June

12, 2018, however, the Convention elected Reverend Greear as its president, over strong opposition from the old guard.<sup>19</sup>

The First Baptist Church of Decatur, Georgia, was kicked out of the Convention in 2009 for calling a woman, Reverend Julie Pennington-Russell, to be its senior pastor. During her tenure, this church has had as many as 40 LGBT members, some of them couples raising children. First Baptist Decatur is a member of the Cooperative Baptist Fellowship, an assembly of 1800 churches that allows a great deal of pastoral and doctrinal diversity on issues of sexuality and gender. Like the progressives who formed the Alliance of Baptists in 1987, the moderates who formed the Cooperative in 1990-91 were reacting to conservative domination of the SBC since 1979 and especially to Dr. Land's dogmatic activism.

Worshipping at the Decatur church is Dr. David Gushee of Mercer University, a leading Evangelical ethicist. He dropped a bombshell with his 2014 book *Changing Our Mind*, an account of how the marriage equality debate and encounters with gay Christians inspired him to revisit the Bible, which he found surprisingly open to committed lesbian and gay unions. His book provides a thoughtful examination of the “clobber verses” used to demonize gay people. Referring to Levitical condemnation of men lying with men, Dr. Gushee observes that there are 117 things identified as “abominations” in the Old Testament—including the charging of interest on loans, which Ezekiel 18:10-13 says is punishable by death. He challenges traditionalists to defend their principle of selection: Why emphasize one Levitical crime and ignore the rest? Christ's teachings sidestepped the Levitical commands for the most part. Do His life or teachings provide a principle for selection?<sup>20</sup>

Ezekiel condemned “adultery” as an abomination, and Jesus referred to adultery with disdain in Matthew 19:9, where He defined it to include a man who divorces his wife without cause and then remarries. When we visited St. Paul's Church in Michigan, we asked Reverend Rutter: Wasn't Ken DeBoer's second marriage, performed in their Church, inconsistent with Matthew 19:9? Reverend Rutter gave us a Mona Lisa smile and a lame answer, “well, that's a *very* good question.” Gushee's point is that reading the Bible should not be an exercise in looking over the crowd and picking out your friends; Evangelicals need a Christ- and Scripture-based principle for emphasizing one abomination over all the

others. Gushee finds that principle in Scripture's understanding of marriage as a "lifetime covenant." He agrees that the union of April DeBoer and Jayne Rowse epitomizes Christ's vision of selflessness, generosity, fidelity, devotion to vulnerable children, and charity.<sup>21</sup>

The Adam-and-Eve creation narrative is now the favored basis for the traditional Judeo-Christian view of marriage. Genesis 1-2 instructs that men and women carry out God's design when they marry and have children, but Gushee suggests that these chapters do not tell us how to treat a minority population that had no specification in Biblical times. Additionally, Genesis 3 tells us that the world described in Genesis 1-2 came crashing down with the Original Sin, the joint decision to eat the damned apple. Inspired by Dietrich Bonhoeffer's "Creation and Fall" lectures, Gushee maintains that, in a post-Genesis 1-2 world, everyone's sexuality is depraved, and no adult is a sexual innocent. "Our task, if we are Christians, is to attempt to order the sexuality we have in as responsible a manner as we can. We can't get back to Genesis 1-2, a primal sinless world."<sup>22</sup>

The biggest development in American religion in the last generation has been the explosion of mega-churches that combine crowd-pleasing Bible stories, entertaining services, and ethical leadership that avoids fire-and-brimstone. Because churches do not become "mega" without attracting scores of younger parishioners, these mega-churches avoid gay-bashing and are often gay-friendly. Noteworthy is Reverend Andy Stanley, pastor of the North Point Community Church outside of Atlanta. A boyishly handsome 60 years old, with well-trimmed sandy hair, a ready smile, and a Tom Sawyer aw-shucks demeanor, he is the son of Reverend Charles Stanley, for more than four decades the moralistic pastor of Atlanta's First Baptist Church, who proclaimed AIDS to be God's judgment on homosexuals. In 1995, Andy Stanley established his own church in an effort to appeal to the unchurched—what is called the "seeker" approach pioneered by the Willow Creek Community Church in Illinois. Though it celebrates only one-man, one-woman marriages, North Point generally welcomes lesbian and gay worshippers, and Stanley regularly confers with individual parishioners or groups. Other mega-churches and their pastors have been gay-affirming. EastLake Community Church, a mega-church in Bothell, Washington, for example, performs same-sex marriages.<sup>23</sup>

Pew Research reports that as many as two-fifths of Evangelicals now support marriage equality for LGBT persons, and young Evangelicals are particularly supportive.

The founder of the Reformation Project, 28 year-old Matthew Vines, sponsors conferences and training sessions for affirming Evangelicals. Openly gay musicians Trey Pearson and Vicky Beeching have amassed large followings by introducing gay-friendly lyrics to contemporary Christian music. Forty-one year-old Justin Lee founded the Gay Christian Network and helped persuade Alan Chambers, the former head of Exodus International, to stop asserting that homosexuality can easily be flipped and to apologize for the psychological harm that Exodus visited upon gay people and their families. In 2016, Texas Evangelical author and HGTV star Jen Hatmaker came out in favor of LGBT relationships as “holy.”<sup>24</sup>

In October 2018, the Executive Committee of the National Association of Evangelicals endorsed a fairness-for-all motion to support federal anti-discrimination legislation, combined with strong religious protections. In a sermon delivered on January 27, 2019, Reverend Greear opined that gay colleagues such as those he had welcomed into his home could enrich the Church and that homosexual intimacy was no greater sin than greed—comments that brought protests from conservative Baptists, including intemperate charges that the “depraved” SBC President was a “false prophet” for befriending “wicked, vile, disgusting reprobates.” Reverend Greear was channeling the Golden Rule, while his more thoughtful critics insisted that Christ’s directive did not permit sanctioning sinful behaviors.<sup>25</sup>

### **The Roman Catholic Church: Doctrinal Stability and Pastoral Evolution**

Traditional Catholic theology followed St. Thomas Aquinas’s focus on the procreative purpose of marriage, but in *Gaudium et spes* (1965) the Second Vatican Council valued marriage as a “community of love,” its unitive purpose. Recall, from Chapter 1, that the Catholic chaplain at the University of Minnesota told Jack Baker and Mike McConnell that Christ would approve their proposed marriage. In 1975, however, the Vatican’s Congregation for the Doctrine of the Faith closed the book on this possibility, in its Declaration *Persona humana*. The Declaration reaffirmed traditional doctrine that sexual intercourse responsive to God’s requirements and “those of human dignity” can only be legitimate in the context of “conjugal” marriage. Although individual homosexuals deserved the Church’s “pastoral care,” homosexual relations lacked the productive connection to human life that would give them value. “In Sacred Scripture [homosexual

acts] are condemned as a serious depravity and even presented as the sad consequence of rejecting God.” They are “intrinsically disordered and can in no case be approved of.”<sup>26</sup>

Father John McNeill, SJ, said in *The Church and the Homosexual* (1976) that homosexual relations were consistent with Scripture and Catholic tradition, liberally understood (as in *Gaudium et spes*). Arguing that the Declaration was 180 degrees backwards, McNeill’s book, which was approved by his Jesuit superiors, was a sensation. In 1977, Sister Jeannine Gramick and Father Robert Nugent established New Ways Ministry, a “gay-positive ministry of advocacy and justice for lesbian and gay Catholics and reconciliation within the larger Christian and civil communities.” Because even the Declaration recognized that some people were innately homosexual, Sister Jeannine and Father Robert reasoned that no moral blame could be attributed to them and that it was unjust to discriminate based upon their innate feature. From that premise, they argued that it was morally indefensible to deny these human beings the basic right to connect with one another and form families. “How can we have a *be* but *don’t do* theology,” Sister Jeannine asked. “How can you say, it’s okay to be a bird, but you can’t fly?” (For statements like these, the Vatican officially barred New Ways from speaking as representatives of the Church in 1999.)<sup>27</sup>

Imbued with what many called “the spirit of Vatican II,” some Catholic officials interpreted the Declaration as a doctrinal affirmation that left room for the view that homosexuals ought to be the beneficiaries of a more open-minded pastoral concern. Archbishops Jack Quinn of San Francisco, Raymond Hunthausen of Seattle, John Roach of Minneapolis, and others expanded the Church’s outreach to lesbian and gay persons and supported the principle that homosexuals should not be subject to discrimination because of their sexual orientation. In strong language, however, Cardinal Josef Ratzinger discouraged this kind of pastoral outreach in the Vatican’s *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (1986). *Pastoral Care* raised questions about how accepting the Church should be for Christians whose orientation was homosexual. “Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder.”<sup>28</sup>

Popes John Paul II and Benedict XVI (former Cardinal Ratzinger) appointed doctrinally conservative American bishops who mobilized church resources against “homosexual marriage” all over the United States. Those most relevant to the state debates examined earlier in this volume were Kenneth Angell in Vermont, Bernard Law in Massachusetts, Adam Maida in Michigan, Charles Chaput in Colorado and Pennsylvania, Salvatore Cordileone in California, Richard Malone in Maine, Peter Sartain in Washington, Timothy Dolan in New York, John Nienstedt in Minnesota, and William Lori in Maryland. The U.S. Conference of Catholic Bishops, dominated by these appointees, strongly supported the Federal Marriage Amendment, opposed efforts to repeal or invalidate DOMA, and filed a hard-hitting *amicus* brief in *Obergefell*.

Notwithstanding the conservative clerical leadership, Catholic lay opinion between 2007 and 2017 moved from 40 percent supporting marriage equality to 67 percent. Attentive to Jesus’s example of befriending social outcasts, Pope Francis (elected in 2013) has introduced a new era in the Catholic Church’s stance toward gay people. He wrote his gay friend and former student Yayo Grassi, “in my pastoral work, there is no room for homophobia.” He is the first pope to use the term “gay,” as he has many times. “Who am I to judge?” he humbly confessed: We are all sinners, so why single out one set of sinners for denigration? How does that advance God’s plan? The dignity He has conferred upon each human life? The work of the Lord requires discernment into the souls of His children, as the shepherd accompanies them on their journeys. In 2018, his Vatican invited Fr. James Martin, SJ, to address the World Conference of Families on the topic of “Showing Respect and Welcome in Our Parishes for LGBT People and Their Families,” one of the first official uses of the term “LGBT” in any Vatican setting. Sister Jeannine told us that a gay couple in Rome were anguished because of admonitions from their parish priest. Should we split up, they asked Pope Francis? He called them late at night on his pope-phone, “No, find a new parish.”<sup>29</sup>

Pope Francis has asserted values of inclusion through his public pronouncements and through appointments of bishops dedicated to gay-welcoming pastoral themes. Among the most notable have been Cardinals Blase Cupich in Chicago and Joseph Tobin in Newark, as well as Archbishop Wilton Gregory in Washington, D.C. The Pope has also set a deliberative agenda aimed at advancing the Church’s understanding, starting with the Extraordinary Synod of the Bishops on Family and Marriage, held at the Vatican in

October 2014. Pope Francis opened this assembly of 170 clerics with a plea for the Church to include a broader rainbow of persons and families, and strong voices for the dignity of LGBTQ+ people came from Germany, England, and Australia. On the eve of the Synod, German Cardinal Walter Kasper urged church recognition for “homosexual unions,” too controversial a move for most bishops and anathema to those representing African, East European, and many Asian churches. Cardinal Lorenzo Baldisseri, Francis’s hand-picked Secretary of the Synod, supported efforts to “open doors and windows” of the Church to gay families. These efforts received strong support from European, Canadian, and Australian bishops, but very little from the American delegation, led by Archbishop Joseph Kurtz of Louisville, head of the U.S. Conference of Catholic Bishops.<sup>30</sup>

Orchestrated, some have said, by Baldisseri and his allies, the Synod’s midterm report proposed a sea change in pastoral thinking. “Homosexuals have gifts and qualities to offer to the Christian community: are we capable of welcoming these people, guaranteeing to them a fraternal space in our communities?” While reformers were not suggesting changes in the Church’s doctrine on conjugal marriage, they emphasized gay families in which “mutual aid to the point of sacrifice constitutes a precious support in the life of the partners. Furthermore, the Church pays special attention to the children who live with couples of the same sex, emphasizing that the needs and rights of the little ones must always be given priority.” Gone were characterizations of homosexuality as “depraved” or “disordered,” replaced by language about “gifts and qualities.” This language was not included in the final report, however, because it failed to secure approval by two-thirds of the participants. Strongest opposition came from Eastern European and African bishops. The Catholic Church is truly world-wide, and the growing Catholic population in Africa and Asia place limits on the Church’s ability to liberalize doctrine.<sup>31</sup>

The Pope called a second Synod on the Family for October 2015, and he made sure that it included more clerics sympathetic to the Kasper-Baldisseri philosophy. The 263 attending bishops included progressives such as Blase Cupich (added to the American delegation as a personal selection by Pope Francis), Mark Coleridge of Brisbane, and Heiner Koch of Berlin. Although the progressives were frustrated by their colleagues’ unwillingness to soften longstanding doctrine, they made some progress toward a pastoral embrace of sexual minorities. The Final Report avoided describing homosexuality as “disordered,” welcomed homosexual persons, denounced unjust discrimination against



them, expressed pastoral concern for families “experiencing” homosexual persons, and called for the Church to “accompany” such families—in the words of Father Martin, “[n]ot simply to repeat church teaching to them, or to scold them; but to get to know them, to be with them, to listen to them.” This is a deeply thoughtful expression of the Golden Rule: don’t just treat others as you would like to be treated, but internalize *their* point of view.<sup>32</sup>

Pope Francis was actively engaged in the Synods and inferred from their discussions how far he could go in his “small steps” approach toward a welcoming Church. On April 8, 2016, he issued *Amoris laetitia* (*The Joy of Love*), an “apostolic exhortation,” a document traditionally used to sum up a synod and to build on its deliberations to speak to the entire Church. Its main innovations concerned the Church’s relationship with divorced and remarried Catholics, and only a handful of paragraphs concerned gay Christians. “[E]very person, regardless of sexual orientation, ought to be respected in his or her dignity and treated with consideration, while ‘every sign of unjust discrimination’ is to be carefully avoided, particularly any form of aggression and violence.” But “as for proposals to place unions between homosexual persons on the same level as marriage, there are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.” *Amoris laetitia* rejected an absolute rule against all “irregular” relationships, however, as some of them bring a “stability” that ought to be respected. For such relationships, which implicitly included “same-sex unions,” the Pope counseled pastoral discretion and support.<sup>33</sup>

*Amoris laetitia* reaffirmed traditional Catholic precepts, recognized valuable lesbian and gay relationships that the Church was not prepared to consider marriages, and endorsed what we have been calling “equality practice” at the pastoral level. Parish priests and other counselors were urged to understand lesbian and gay unions in a broader context that might consider their mutual support and the needs of their children. The process has proceeded unevenly. Father Martin reports that a mother was overjoyed that her gay son was willing to give the Church another chance, and they attended Easter services together. After the priest “proclaimed the story of Christ’s Resurrection,” his homily focused on the “evils of homosexuality. The son stood up and walked out of the church. And the mother sat in the pew and cried.” Father Martin’s *Building a Bridge* (2017) laments this kind of dogmatism as undermining Christ’s mission and argues for greater outreach to and support for gay families, a stance that has brought him controversy, but also explicit endorsement

from a number of bishops, as well as Cardinals Cupich, Tobin, and Kevin Farrell, the current Prefect for the Dicastery for Laity, Family, and Life in the Vatican. Father Martin's bridge-building project probably has the implicit support of Pope Francis.<sup>34</sup>

Feeling the whiplash of the intramural debate were Greg Bourke and Michael DeLeon, plaintiffs in *Obergefell*. Legally married since 2004, they raised their children, Bella and Isaiah, in the Church of Our Lady of Lourdes in Louisville, Kentucky. After *Obergefell*, the *National Catholic Reporter* named Michael and Greg its "Persons of the Year," as an exemplary Catholic family. Subsequently, they applied for a joint burial plot in St. Michael Cemetery in Louisville, where Greg's parents and other family members are buried. After consulting with their pastor, they submitted this design for their joint headstone: their names at the top, separated by intertwined wedding rings, with a sketch of the Supreme Court underneath their names. Archbishop Kurtz vetoed this on the ground that the design was inconsistent with the Church's teaching about marriage. As Newt Gingrich (the husband of our Ambassador to the Holy See, Callista Gingrich) lectured us, the Catholic Church will continue to reach out to sexual and gender minorities in a pastoral manner, but do not expect doctrinal change or even softening from the Church's leadership in the foreseeable future.<sup>35</sup>

In that spirit, Archbishop Kurtz was looking for opportunities to reassert the Church's "understanding of marriage as the union of one man and one woman." In September 2015, he offered encouragement to Rowan County (Kentucky) Clerk Kim Davis, who went to jail rather than follow a court order directing her to issue marriage licenses to same-sex couples. The Archbishop praised her eagerness "to bear witness to the truth." When Pope Francis visited the United States that month, he met privately with Kim Davis. The Vatican stated that the Davis meeting was arranged under false pretenses, and the removal of Archbishop Carlo Vigano as papal nuncio to the United States was a sign of the Pope's displeasure. Indeed, immediately after the Davis meeting, the Vatican promoted a video of the Pope meeting with his gay friend Grassi and his partner. The pastoral message was implicit but unmistakable.

While Archbishop Kurtz has been frustrating to followers of Pope Francis's approach, what equality practice entails is ongoing Golden Rule conversations among gay Catholics, supportive priests and parishioners, and traditionalists like Kurtz.

Perfectionists on either side—gay Catholics who leave the Church and clerics who would exclude them—thwart the capacity of the Church to survive the troubled times that have followed decades of revelations about predatory priests long tolerated or protected by diocesan officials.<sup>36</sup>

## **The Church of Jesus Christ of Latter-day Saints**

Like the Catholic Church, the Church of Jesus Christ has a centralized structure: doctrine, procedure, and pastoral practices are all subject to directives from the main offices in Temple Square, Salt Lake City. The Council of the First Presidency and the Quorum of the Twelve Apostles, acting in concert, constitute the governing authority. Theologically, the Church is strictly traditionalist on sexuality and gender. The best statement of doctrine was generated during the Hawai'i marriage litigation, when the Church was, unsuccessfully, trying to intervene as a party formally defending one-man, one-woman marriage. In September 1995, President Gordon Hinckley, acting on behalf of the First Presidency and the Quorum, promulgated *The Family: A Proclamation to the World*. Its premise was that “[g]ender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose.” Thus, you are a son or daughter of God from the beginning of time; after you are born, you are supposed to live your mortal life in conformity to your pre-mortal gender role. God’s central commandment is “for His children to multiply and replenish the earth” through “the sacred powers of procreation employed only between man and woman, lawfully wedded as husband and wife.” The Church maintains that marriage on earth parallels the heavenly union between God the Father and God the Mother; the Mother in Heaven is a belief distinctive to this faith. The eternal plan entails a gendered division of labor within the family. “By divine design, fathers are to preside over their families in love and righteousness and are responsible to provide the necessities of life and protection for their families. Mothers are primarily responsible for the nurture of their children.”<sup>37</sup>

The Proclamation and its underlying cosmology generate connections among gender, sexuality, and marriage. If God has bestowed a sex and gender upon each of us, both transgender feelings and “same-gender attraction” are mistaken or perverse conditions that can be reversed back to one’s eternal, “natural” state. Hence some organs of the Church (such as BYU) sanctioned conversion therapy through the 1970s and probably beyond, and

many Latter-day Saints cannot accept that there is more than one sexual orientation or that gender identity might not match sex assigned at birth. For these reasons, the Church in the mid-1970s mobilized against the ERA and embraced Phyllis Schlafly's argument that a constitutional bar to sex discrimination would require states to recognize "homosexual marriages." Church money, organization, and volunteers were critical to the defeat of the ERA in several of the last key contests—Utah, Nevada, and Virginia—and were significant in Florida, North Carolina, and Missouri. The conceptual and organizational apparatus undergirding the anti-ERA campaigns is the same one the Salt Lake City leadership deployed to oppose same-sex marriage in Hawai'i in 1994-98, as well as California, Nebraska, and Nevada in 2000. Their campaign in support of California's Proposition 8 was their greatest triumph, but a surprisingly Pyrrhic victory.<sup>38</sup>

In the wake of Proposition 8, the Latter-day Saints found themselves the object of intense animosity from LGBT people and their allies. A harbinger of protests to come was "Home Invasion," an underground ad produced by the Courage Campaign at a cost of \$800 and filmed in the home of Rick Jacobs, who ran Courage. The ad depicted two white-shirted missionaries who invaded the house of a lesbian couple and tore up their marriage license. "That was too easy," one missionary smirked. "What should we ban next?" Yes-on-8 supporters called the Courage Campaign an appeal to prejudice against Latter-day Saints, but the ad foreshadowed an even harsher backlash.

On November 7, 2008, about a thousand protesters marched around the Los Angeles Temple and plastered its fences with signs demanding that the Church stop persecuting gay people. Similar protests occurred elsewhere in California and in Salt Lake City, the latter drawing more than 2000 people. In the ten days after the election, at least seven Mormon houses of worship in Utah and ten in California were vandalized. A peaceful candlelight vigil by 600 parents of LGBTQ+ persons at the Salt Lake City Temple on November 8 was a more effective sign of the anguish church opposition had engendered. "I don't think anyone thought through the consequences," recalled a top church official. "They really didn't anticipate the backlash, and they were not prepared for it. It hurt us, and it really hurt us with the young people."<sup>39</sup>

Much of the criticism came from within the Church. During the Yes-on-8 campaign, Barbara Young, Carole Lynn Pearson, and other Mormon women reported dozens of

disturbing episodes where stake (congregation) leaders pressured or bullied reluctant faithful to give money to Proposition 8. Barbara and her husband, football quarterback Steve Young, became active in Affirmation, a support group for “Latter-gay Saints.” Large numbers of gay and lesbian youth came out to their parents, many of whom were anguished by the perceived pressure to choose between their religion and their children. Wendy Montgomery voted for Proposition 8 and did not understand why “the gays” were so upset: “Marriage is for us. Marriage is for straight people,” she thought. Later, when her son came out as gay, Wendy felt “shame and regret over that, and the pain that I caused my son,” who interpreted her Yes-on-8 yard sign as a signal she didn’t love him. “Some of the most atrocious things I have ever heard about gay people,” she recalled, “were in that time period. I sat there silently.” Through social media, she knows of 300 to 400 Latter-day Saints who left the Church over this issue.<sup>40</sup>

The Church leadership was listening. Although senior Apostle Boyd Packer emphasized traditional attitudes, Apostles Dallin Oaks, Dieter Uchtdorf, Todd Christofferson (whose brother Tom is openly gay), and Jeff Holland led the Church of Jesus Christ toward a more moderate stance. Concerned that post-2008 public opinion was judging them harshly, they pondered the standing offer from the gay rights organization Equality Utah to meet with church representatives. Public affairs officers Bill Evans and Michael Purdy were eager to have such a meeting, but the Church does not act without consensus within the First Presidency and the Quorum.<sup>41</sup>

A kiss accelerated that process. On July 9, 2009, Matthew Aune kissed his boyfriend Derek Jones right across from the gleaming Mormon Temple, on a part of Main Street that had been deeded to the Church. According to Aune and Jones, private security guards yelled at them, body-slammed them to the ground, handcuffed them, and called the police, who charged the young men with criminal trespass. The Church vigorously denied that the men had been assaulted and claimed that their conduct, on church property, was lewd and drunken. Former Council Member Deeda Seed (who had opposed the sale of that part of Main Street to the Church) organized a crowd of 60-100 straight and gay people to stage a “Kiss-In” in front of the Temple the next Sunday. Kiss-Ins ridiculing the Church continued all summer in cities all over America. *The Colbert Report* ran a five-minute “Nailed ‘Em” clip featuring Matt and Derek as a comically unthreatening couple and an allegedly genuine video of four big security officers berating the couple and then pushing

them to the ground. The *Report* gave equal time to a cute law professor who explained that he and his Church were *not* “Stick it to the Gays.” Instead, those rascals were criminal *trespassers* for behaving lewdly on the private block of Main Street. The *Report* filmed a bunch of romantic straight couples caressing and wildly making out in front of the Temple in broad daylight, and expressed surprise that the public lewdness did not call forth the gendarmes! Colbert’s hip audience found all this mighty amusing.<sup>42</sup>

The kiss controversy was the public relations disaster that broke the inertia. Deeda Seed urged the Church to establish a dialogue with Equality Utah, and Bill Evans of Public Affairs said yes. At a private home, Brandie Balken, Jim Dabakis, Stephanie Pappas, Valerie Larabee, and Jon Jepson met with Evans and Michael Purdy. After someone suggested that each person say something about her- or himself, the participants chatted away for two-and-a-half hours, discovering that they had much in common. Other meetings followed, but trailed off later in the summer.<sup>43</sup>

Discussions reopened after Dabakis paid a visit to the Human Rights Campaign in Washington, D.C. HRC was considering a number of themes for its next round of public education and fundraising. The front-runner was “Slam the Door.” Riffing on the classic Latter-day Saint missionary visit, like the one in “Home Invasion,” the campaign planned to urge families to slam the door on these young missionaries because the religion they represented was dedicated to taking away rights from gay people. Dabakis tipped off the Public Affairs Office: Shouldn’t the Church try to avoid this? Evans reported this to the leadership, which gave an okay for a deal. Dabakis asked HRC to back off the campaign, which it did, and Evans asked the Church to respond with a good faith gesture, which it did.<sup>44</sup>

In November 2009, Michael Otterson of the Church’s Public Affairs Office testified in favor of a sexual orientation anti-discrimination bill before the Salt Lake City Council. This was the first time the Church had *endorsed* a gay rights measure, and it signaled to the Utah Legislature that it should not use its authority to nullify the ordinance. Cued by apparent church approval, at least 11 other Utah municipalities copied the Salt Lake City law. In the ensuing years, as the Church deliberated on what, if anything, to do next, its leaders decided to take a vacation from marriage initiatives. Church insiders tell us that Princeton Professor Robby George made an emphatic personal pitch to some of the Apostles

not to abandon the marriage issue, which would be in play during the 2012 election. As always, George was articulate, insistent, and polite—but the leadership was unmoved.<sup>45</sup>

In 2012, the Church launched an official website, [www.mormonandgay.lds.org](http://www.mormonandgay.lds.org). That the site used the term “gay” rather than “same-gender affection” was significant. More important, however, the Church stepped away from its previous dogma that homosexuality was a perverse choice, and not a fact of life for most gay persons. Dozens of videos of church members and leaders populate the website today, including one featuring Dallin Oaks, a Counselor in the First Presidency. A doctrinal traditionalist, he urged that the primary response of parents with gay children should be to reaffirm parental love and support. Like some Evangelicals and progressive Catholics, President Oaks has advocated doctrinal stability but pastoral outreach and flexibility.<sup>46</sup>

Although the Church had earlier supported a statewide anti-discrimination law (discussed below), four months after *Obergefell*, Salt Lake City made a change in the Handbook of Instructions that is supposed to guide stake and mission presidents in their pastoral responsibilities. Even though there was not complete consensus, the leadership, approved the addition of “homosexual relations (especially sexual cohabitation)” to the list of apostasies calling for a disciplinary council; other items on the list were murder, rape, serious assault, adultery, and fornication. The implication was that legally married same-sex couples were subject to expulsion from the Church. Moreover, the Handbook was amended to instruct presidents that they could not offer baptism in the Church for “a child of a parent who has lived or is living in a same-gender relationship,” unless the president were satisfied that the child is a legal adult *and* “[t]he child accepts and is committed to live the teachings and doctrine of the Church, and specifically disavows the practice of same-gender cohabitation and marriage.”<sup>47</sup>

Church leaders told us that the model for the change was its stance on polygamy: having multiple wives is an apostasy, and the Church will not baptize children raised in polygamous relationships without a disavowal of plural marriage. Moreover, the First Presidency routinely waived the baptism requirement for any stake or mission president who requested one. From the outset, however, many devout families and some church leaders were anguished and embarrassed by the changes. Some would have followed the Church’s advice to single parents instead: they are not apostates, nor do their children

have to disavow their parents: “Regardless of their family situation, all Church members are entitled to receive all the blessings of the gospel of Jesus Christ.” The Handbook allows unwed mothers to join the Church’s Relief Society and to participate in religious activities.<sup>48</sup>

The Church of Jesus Christ is rethinking its stance toward lesbian and gay married couples. Reportedly, 40 percent of Latter-day Saints supported gay marriage in 2017, up from 27 percent in 2014. Support was 52 percent for respondents aged 18-29. Latter-day Saints report that attitudes of stake presidents vary widely; in urban and university communities, presidents and stake members tend to be welcoming and supportive of lesbian and gay couples and their children. Almost no one expects the official doctrine to change anytime soon, but the Church has altered doctrine in the past, as in 1978, when President Spencer Kimball and his colleagues enjoyed a Revelation from the Lord to abandon their longstanding rule barring persons of African descent from full church membership. Kimball’s son says that one reason for the doctrinal shift was that the “American conscience was awakened to the centuries of injustice toward blacks; the balance had tipped socially against racism and toward egalitarianism.” To be sure, the Church’s race-based understanding of marriage was not as central to Latter-day Saints’ doctrine and cosmology as its gender-based understanding of marriage. But that doctrine does not foreclose a tolerant interpretation of the Proclamation to include the same Golden Rule support for lesbian and gay families that it shows for single-parent families and divorced families. In April 2019, as our book was going to press, the First Presidency and the Quorum of the Twelve reversed the 2015 changes to the Handbook: no longer is same-sex marriage an “apostasy,” and children raised by such parents can be baptized within the Church. Notice the parallel to the stance taken by St. Paul’s Church in Saint-Claire Shores, Michigan.<sup>49</sup>

### **Constitutional Dialogue Involving Faith, Gender, and Sexuality**

Many religious traditionalists fear that marriage equality will create social pressure for their faith communities to provide equal treatment to devout gay persons and their families. They are likely correct, but the main pressure will be internal: colleagues who plead for a welcoming attitude because they have decent gay friends, relatives, or co-workers; parents whose children come out as gay or transgender; and scholars and



theologians who question traditional doctrine from within the premises of the faith community. Religion is changing from the inside more than from the outside.

Nonetheless, we have heard concerns from St. Paul's and other churches that they will lose their tax exemptions and will be hit with anti-discrimination lawsuits—maybe even hate crime prosecutions. They fear that religious schools might have to hire lesbian and gay employees and pay spousal benefits to support relationships their faith tradition considers sinful; that religious institutions might have to withdraw from activities funded or licensed by the government; and that religious entrepreneurs could be forced to participate in gay weddings that violate their consciences. In our view, the most serious effects have involved Catholic adoption/foster care services in Massachusetts, Washington D.C., New York, Pennsylvania, and Michigan because of governmental pressure to place children with married lesbian and gay couples. Where religiously affiliated institutions are performing traditional governmental functions or in partnership with the government, they should expect to treat LGBTQ+ persons and families the same as everyone else. On the other hand, private religiously affiliated schools and other institutions have stronger moral objections to having their employment (including benefits) policies second-guessed by state anti-discrimination commissions.<sup>50</sup>

Nevertheless, we caution against exaggerating the scope of these conflicts: most gay people do not want to force their marriages onto unwilling churches and wedding-service providers, and most conservative Christians, Muslims, and Jews do not begrudge the happiness of their LGBT neighbors and co-workers. Indeed, traditionalist faith communities should be more worried about alienating young people—the future of any denomination—than about avoiding social pressure to be nice to gay people. And LGBTQ+ groups ought to be more worried about charges that they are bullying or shunning persons of faith, precisely the kind of social pressure that kept gay people in painful closets during the last century.

In any event, the Constitution affords persons and institutions of faith substantial protection. The Due Process, Equal Protection, and Religion Clauses require government neutrality (and non-discrimination) with regard to religious minorities. The neutrality principle underwrites both *Obergefell* and the Supreme Court's decision in *Masterpiece*

*Cakeshop v. Colorado Civil Rights Commission* (2018), which overturned an administrative penalty against a baker who invoked religious conscience reasons not to serve a gay wedding. Because the justices found that the Colorado Civil Rights Commission's deliberations treated religion-based reasons as illegitimate compared with secular reasons, the Court ruled that the penalty violated the neutrality required by the Religion Clauses. Justice Kennedy's opinion for the Court ducked the broader issue, whether the First Amendment's Free Speech or Free Exercise Clause protected the baker's "expressive conduct."<sup>51</sup>

The Court was wise to duck these issues, which require a great deal more public deliberation. On personal matters that are "bred in the marrow" the way religion, gender, and sexuality are for most people, the government should give its citizens liberty to create a personal structure in which they can flourish, and should not tell them what to do, what to believe, whom to associate with, whom to marry, or (consistent with child welfare) how to raise their children. The companion principle, however, is civic collegiality. In the public sphere, it is fair for the government to demand that we be tolerant and cooperative. The widely accepted anti-discrimination norm establishes a legal duty to treat one another with respect in the workplace, in public accommodations, and in government and sometimes private services. The controversial cases are the quasi-public, quasi-private sphere cases like commercial vendors serving private weddings or religious institutions reserving leadership positions for persons of their faith. Inspired by the Golden Rule, we shall suggest some neutral principles to accommodate religious freedom and equal treatment.

### ***The Religion Clauses, Church Autonomy, and Freedom of Association***

At oral argument in *Obergefell*, Justice Scalia asked Mary Bonauto whether constitutional marriage rights for gay and lesbian couples would impose a duty upon traditionalist faiths to celebrate their marriages. Bonauto answered that the Religion Clauses would protect those faith traditions. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), a unanimous Supreme Court held that the Religion Clauses bar the federal government from applying anti-discrimination laws to church personnel decisions regarding ministers and similar faith officials. The Chief Justice's opinion relied on the First Amendment principle that the state cannot regulate any

“internal church decision that affects the faith and mission of the church itself.” Justice Alito’s concurring opinion emphasized the need to protect “certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.” In *Obergefell*, Justice Kennedy observed: “The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”<sup>52</sup>

The *Obergefell* oral argument raised a more worrisome issue. Churches are exempt from federal income tax, because they are “charitable institutions.” The tax code defines “charitable institution” to include those “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” Justice Alito asked Solicitor General Donald Verrilli whether marriage equality would affect the tax status of churches that refused to perform same-sex marriages. Verrilli had no answer; the issue had never come up in his preparation for the argument.<sup>53</sup>

Behind the Alito-Verrilli exchange was *Bob Jones University v. United States* (1983). In 1971, the IRS decided that a private school whose admissions policy discriminated because of race was not “charitable” within the Code’s exemption. By the time its case reached the Supreme Court, Bob Jones admitted students of color but still prohibited interracial dating or marriages, based upon its reading of Scripture. All nine justices saw this policy as discriminating because of race, and all nine rejected the university’s constitutional claim. Would *Bob Jones* be extended to deny tax-exempt status to churches refusing to celebrate same-sex marriages? In *Obergefell*, the Chief Justice warned that it might. We think he is wrong about that.<sup>54</sup>

*Bob Jones* held that the national policy against race discrimination is so powerful that it overwhelmed the public policy encouraging private charity, religion, and education. No court has expanded *Bob Jones* to penalize private educational institutions that discriminate on any ground other than race, nor has any court ever applied *Bob Jones* to churches for any reason (even race-based discrimination). Within a month of *Obergefell*, the IRS announced that it “does not view *Obergefell* as having changed the law applicable to section 501(c)(3) determinations or examinations.”<sup>55</sup>

If the IRS were to apply the *Bob Jones* exception more broadly, churches are the last place it would start. Sex discrimination is a quasi-suspect constitutional classification, yet the IRS has consistently applied section 501(c)(3) to churches that openly discriminate on the basis of sex, such as denominations that will not ordain women as priests or ministers. Additionally, the tax code requires the IRS to give churches special treatment. Most charitable organizations must apply to the IRS for tax-exempt status—but churches are entitled to their tax exemption automatically, by virtue of being churches. Churches even enjoy special procedural protections that discourage IRS audits. “Even in the area of racial discrimination, where it has the strongest explicit mandate and has, in fact, revoked exemptions, [the IRS] has not revoked the exemption of a single discriminatory church.”<sup>56</sup>

Finally, the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from taking any action that “substantially burden[s] a person’s exercise of religion,” unless the government proves that the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” Although the Supreme Court has struck down the application of RFRA to state discrimination (as beyond Congress’s authority to enforce the Fourteenth Amendment), it has treated RFRA as binding on the federal government. Even if, as we think, *Bob Jones* could be decided the same way under RFRA, existing Supreme Court precedent suggests that the public policy against sexual orientation discrimination may not rise to the same compelling level. *Boy Scouts of America v. Dale* (2000) held that a state policy against sexual orientation discrimination was not sufficiently compelling to justify a milder infringement on the Boy Scouts’ First Amendment right of expressive association. A broad reading of *Obergefell* could call that feature of *Dale* into question. Because many clashes between gay rights and religious liberty will involve employment with or services from normative institutions like the Boy Scouts or associations or nonprofits controlled by religious denominations or societies, *Dale* will be relevant in future cases.<sup>57</sup>

Under the statute, the IRS will not and should not penalize churches, synagogues, mosques, and other religious institutions that authorize only conjugal marriages. If it did so, there might be constitutional concerns under *Hosanna-Tabor*, for the Court ruled that a statute of general application could not constitutionally be applied to a church’s decision about officials and practices central to worship and faith. Does the *Hosanna-Tabor* reasoning also assure churches that the state cannot constitutionally take away a tax

benefit? Current constitutional doctrine says not. In *Employment Division v. Smith* (1990), the Court upheld the application of laws of general application, like anti-discrimination laws, in ways that might substantially burden religious freedom, unless such application were inspired by anti-religious animus (as in *Masterpiece*). Admittedly, *Hosanna-Tabor* narrowed *Smith*'s rule that laws of general application do not raise religion clause concerns absent a showing of animus. Might the Roberts Court overrule *Smith* altogether? Most scholars would argue against such a course, because RFRA and other statutes have built upon and responded to *Smith* and because the statutory protections for religious liberty are more robust in any event.<sup>58</sup>

*Masterpiece Cakeshop* suggests another angle. Jack Phillips believed that he would be committing a sin by “participating” in a gay marriage ceremony. The state agency threw the book at him—but showed leniency in other cases. A Christian ally, William Jack, had asked three other bakeshops for wedding cakes in the shape of a Bible, with two grooms accompanied by a big red “X” and text opining that homosexuality is a “detestable sin.” When all three bakeshops refused to do those decorations, the Commission provided no remedy, because the refusal was based on the offensive message, not the customer’s religion or sexual orientation. Raising constitutional red flags, however, two commissioners in Phillips’s case suggested that religious beliefs cannot legitimately be carried into the commercial domain, disparaged Phillips’ faith, and compared his invocation of his religious beliefs to defenses of slavery. A 7-2 Supreme Court majority ruled that this lack of neutrality violated the Religion Clauses. Dissenting, Justices Ginsburg and Sotomayor objected that the Commission properly distinguished the Jack cases, which were denials of service because of message and not because of a protected trait. Later the same month, the Supreme Court dismissed Religion Clause objections to President Trump’s immigration travel ban, which he had repeatedly defended as anti-Muslim. As Justices Sotomayor and Ginsburg’s dissent observed in the travel-ban case, the Court was not treating the different religious liberty claims in a neutral manner.<sup>59</sup>

### ***Services to the Public and Freedom of Speech***

In *Masterpiece*, Phillips also claimed that Colorado violated the Free Speech Clause, because the directive requiring him to make cakes for gay weddings was an example of government-compelled speech, subject to strict scrutiny. In *Hurley v. Irish-American Gay*,

*Lesbian and Bisexual Group of Boston* (1995), for example, a unanimous Court invalidated the application of a state anti-discrimination law to require that Boston's St. Patrick's Day Parade include an LGBT marching group. The Court treated the parade as classic expressive conduct, and Phillips's ADF lawyers claimed that as a "cake artist," he was engaging in similarly expressive activity. Solicitor General Noel Francisco (formerly an ADF-affiliated lawyer) offered a narrower ground: there is a First Amendment violation when the government compels a person *both* to "create" speech he doesn't believe *and* to "participate" in an "expressive event." A concurring opinion by Justice Thomas (joined by Justice Gorsuch) agreed with ADF.<sup>60</sup>

The ADF/Thomas argument stretches First Amendment doctrine and threatens to eviscerate anti-discrimination laws. In *Masterpiece*, all nine justices recognized that religious and philosophical "objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Nor can wedding vendors "who object to gay marriages for moral and religious reasons put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'" An early example of this liberty-equality clash was *Newman v. Piggie Park Enterprises* (1966). Anne Newman, a woman of color, sued Piggie Park, for refusing to serve her, in violation of the public accommodations title of the Civil Rights Act of 1964. Piggie Park's owner, Maurice Bessinger, claimed that applying the statute would violate his First Amendment rights, because he believed that racial mixing was contrary to Scripture. Bessinger saw his refusal to desegregate as protected expression, but the Supreme Court viewed it as conduct that the government can regulate.<sup>61</sup>

*Bob Jones* had the same conceptual structure as *Piggie Park*: the university's defense invoked the expressive/religious features of its refusal to admit; the government focused on the action based upon a race-based classification. Many public accommodation cases can be understood in precisely this way—including *Masterpiece* and *Hurley*. So why did *Piggie Park* and *Bob Jones* come out differently from *Hurley*? It may be that judges in the earlier cases found the elimination of race discrimination a more compelling interest than judges found elimination of sexual orientation discrimination in the later cases (the *Dale* point), but such reasoning would be at odds with the text of the Equal Protection

Clause, with *Romer's* and *Obergefell's* reasoning that gay people are entitled to at least many of the same civil rights as racial minorities, and with the analysis in *Masterpiece Cakeshop*. Writing for seven justices and referencing *Piggie Park*, Kennedy's opinion for the Court rejected the claim made by ADF and the Conference of Catholic Bishops that sexual orientation and race are on separate constitutional tracks. Following the longstanding national consensus, Kennedy applied a Golden Rule of Equal Protection: whatever exemption judges create for religious defendants in anti-gay discrimination cases will presumptively be applicable in race and sex discrimination cases.<sup>62</sup>

A more authoritative doctrinal distinction between *Piggie Park* and *Hurley* is provided by the Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)* (2006). A unanimous Court rejected law school objections to a statute cutting off government funding for their universities unless they hosted military recruiters who excluded LGBT applicants from consideration. The law schools (1) refused to provide host services, (2) because hosting a recruiter having a particular institutional identity because it excluded gay people (3) would convey an offensive message (that anti-gay employment discrimination is okay). The *FAIR* Court rejected the First Amendment claim because "the compelled speech to which the law schools point is plainly incidental to the [statute's] regulation of conduct." As an example of a conduct regulation with a permitted ancillary restriction of expression, the Court cited laws barring "employers from discriminating in hiring on the basis of race." *Hurley* was also distinguishable because "the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR* characterized *Hurley* as direct regulation of a core form of political expression protected by the First Amendment. Under *Hurley*, a state public accommodations law cannot tell parade organizers what marchers and banners to include—but under *FAIR* it can tell a business that sells banners and flags that it must sell to all comers, gay or straight. Under *FAIR*, however, it is not clear whether the state can require a vendor to make customized banners that say things inconsistent with her core beliefs.<sup>63</sup>

Unless *Piggie Park*, *Bob Jones*, and *FAIR* must be rewritten or overruled, the ADF/Thomas free speech argument does not work in *Masterpiece*. The Court may be willing to sacrifice doctrinal coherence to reassure religious traditionalists that the state will not bully them in repeated exercises of political correctness. Given our analysis in this

chapter, we think that these disputes will go the way of the dispute in *Piggie Park*: after social norms shift toward equality, most people will go along with the new requirements. Another lesson of *Masterpiece* is that anti-discrimination laws protect religious minorities against discrimination, and so reciprocity ought to be considered. Under the ADF's broad understanding of protected expression, traditionalist Christians, Jews, and Muslims could face discrimination from service providers whose faith tradition insists upon the equal dignity of LGBTQ+ persons. In our view, anti-discrimination laws ought to vigorously protect religious minorities, just as they ought to protect sexual and gender minorities.

Indeed, a useful First Amendment heuristic suggested by *Masterpiece* is the Golden Rule: impose upon others only those restrictions you would gladly accept for yourself. Consider this thought experiment. Can a religious customer go to a progressive baker and ask her to do a cake for a male-female wedding that has icing spelling out "Thank God We're Straight," and then complain of religion-based discrimination when the baker refuses? We think the baker enjoys First Amendment protection from application of the anti-discrimination law to require affirmative expression of an idea antithetical to one's core beliefs. Conversely, if a gay couple asks a traditionalist baker to do a cake for a same-sex wedding with icing spelling out "Gay is Good," the baker has the same First Amendment justification for refusing to serve. But neither the progressive baker nor the religious baker ought to be able to refuse to sell a wedding cake simply because of the identity of the spouses or because of what they plan to do with the cake. In *Masterpiece*, Phillips said he would have been happy to sell the couple a generic wedding cake. In a subsequent controversy, however, he was unwilling to make a cake with a pink inside and blue outside, once he learned that it celebrated a gender transition. Although the state agency ultimately declined to prosecute, Phillips' claim is inconsistent with *FAIR*. The law schools claimed an expressive interest in denying interview rooms to a gay-excluding federal employer, but Chief Justice Roberts held, for a unanimous Court, that the law schools were over-reading the meaning of such access.

Robin Wilson would separate the service from the provider. LGBTQ+ customers might have a statutory right to service for their weddings—but traditionalist providers ought to be able to subcontract the service to another provider that they remain responsible for. In the spirit of the Golden Rule, this remedy has the virtue of asking each side to



accommodate the needs of the other: the indignity of being denied service is ameliorated by the behind-the-scenes arrangement, and the complicity with an unholy event is ameliorated by allowing another enterprise to have the business. We worry that the Wilson proposal would often be cumbersome to implement, but some jurisdiction should try it and see how it works. *Masterpiece* suggests a different procedural amelioration, consistent with this chapter's analysis of denominational deliberations. An agency enforcing an anti-discrimination law against a service provider who seriously claims an expressive interest (whether religious or not) has an implicit constitutional obligation to work with the complainant and the provider to devise a remedy that accommodates both (perhaps Wilson's farming-out idea) and *not* to impose ruinous financial or business penalties on the enterprise unless it engages in bad faith behavior. From a gay-friendly point of view, what value is served by imposing financial martyrdom on small businesspeople?<sup>64</sup>

First Amendment scholars have a variety of other ideas about where the line should be drawn. Douglas Laycock would exempt any small business providing any same-sex marriage or wedding services to which the owner has a faith-based objection, so long as another provider can be found without substantial hardship. He would provide a Speech Clause defense for Jack Phillips as well as Barronelle Stutzman, the florist who was sanctioned in *Arlene's Flowers and Gifts* (2017), and Elane Huguenin, the wedding photographer sanctioned in *Elane Photography* (2013). Kent Greenawalt, reflecting a different balance, would exempt only those businesses where the religious owner is directly involved with the wedding ceremony—the photographer and caterer, but not the baker and the florist. Michael McConnell would exempt any commercial provider who has a sincere religious objection to performing a particular service. Douglas NeJaime and Reva Siegel would not exempt any religious provider if it would significantly harm a third party in a dignitary or financial manner.<sup>65</sup>

The foregoing suggestions are grounded in theories of fairness rather than in accepted sources of law. We have sought to provide a rule based on nothing more than the precedents already decided by the Supreme Court—but we cheerfully admit that a rule grounded in past decisions might not be the best rule moving forward. The best approach may not even be a bright-line rule. Consider the theory recently proffered by Lance Wickman, the General Counsel of the Church of Jesus Christ. He organized various First

Amendment religious freedoms and free speech rights into concentric circles, in which claims to constitutional protection weaken as one goes outward. The strongest protection should be reserved for core religious activities: personal and family worship, internal church affairs and doctrine, the free exercise of religion in public spaces, and nonprofit status. *Hosanna-Tabor* protects religious activities within this inner circle. Wickman's second circle would include decisions about non-ministerial personnel, the operation of religious schools, and the activities of religious charities, which can be regulated so long as they do not unduly burden the religious mission. The outer circle would encompass "commercial settings," where "our expectations of unfettered religious freedom must be tempered." Secular businesses are properly limited by longstanding civil rights laws and regulations. This circle includes religious dress and observances, which Wickman believes should be reasonably accommodated, but "a county clerk may need to perform marriages contrary to her religious beliefs if no one else can easily take her place."<sup>66</sup>

Wickman's approach combines (1) bright-line rules for the inner circle with (2) standards balancing freedom and community needs in the middle circle, and (3) regulatory allowances in the outer circle. It calibrates the freedom to exclude with the expectation of privacy that accompanies traditional religious practice. The more an institution or individual participates in the market or in public or governmental activities, the smaller is the freedom to exclude. This is a promising approach—but one better calibrated by legislatures than by judges, for legislators can engage in an open give-and-take with the relevant stakeholders. Deciding where to draw the line between *Hurley* and *FAIR* is a matter of policy where judges have fewer comparative advantages and lack accountability to the democratic process.

### **Fairness-for-All Statutes**

Legislatures are much better forum than over courts for working out clashes between a SOGI law and conscience claims, because they bring all the stakeholders together and because they have more policy tools to ameliorate conflict. Thus, anti-discrimination laws often deflect conflict through carve-outs of small businesses or landlords with only a handful of apartments entirely from the statutory mandates, through special defenses tied to the purposes of the enterprise, and through allowances for specified

institutions to engage in classifications that might otherwise be considered discriminatory. For example, New York's 2011 marriage equality law reaffirmed the autonomy of churches and synagogues, and also exempted religiously affiliated institutions (like parochial schools) and benevolent associations (like Knights of Columbus) from public accommodations regulation, allowing them to limit their facilities and halls to marriage celebrations their faith tradition accepts. For another example, the 1993 RFRA was a consensus statute barring the state from imposing substantial burdens on a person's free exercise unless needed to accomplish a compelling state interest. In *Burwell v. Hobby Lobby Stores, Inc.* (2014), the Supreme Court significantly expanded RFRA to protect religious expression for closely held commercial enterprises opposing governmental equality mandates. Alarmed at the Court's hostile move, LGBTQ+ groups retracted their willingness to provide additional religious allowances in their proposed Employment Non-Discrimination Act (ENDA). State supreme courts interpreting junior-RFRAs have been reluctant to follow the Supreme Court, and when legislatures have tried to codify *Hobby Lobby*, they have been rebuked in all but the reddest of states.<sup>67</sup>

For the last two decades, the most powerful lobbyist in Arizona has been Cathi Herrod, the Executive Director of the Center for Arizona Policy (CAP). In 2014, responding to concerns that new municipal anti-discrimination ordinances might apply to wedding vendors, CAP and ADF proposed an Act Relating to the Free Exercise of Religion. S.B. 1062 would have expanded free exercise protections to include companies as well as persons and would have protected this expanded class against private discrimination lawsuits as well as government actions. The Arizona Chamber of Commerce had concerns about the bill, because any whiff of homophobia would scare away the high-tech companies the state was trying to attract.<sup>68</sup>

Backed by the Arizona Conference of Catholic Bishops and the Republican leadership, S.B. 1062 passed on party-line votes in the Arizona Senate (17-13) on February 19 and the House (33-27) the next day. The day after House passage, however, thousands of queer folk angrily protested on the green lawn in front of the Capitol. National LGBTQ+ groups and the media lampooned S.B. 1062, and businesses like Apple and Google publicly deplored it. There was talk of yanking the 2015 Super Bowl from Arizona. The Chamber of Commerce staff in charge of tourism and technology warned that the law's repercussions

would be immediate, severe, and long-lasting, as it would revive business fears generated by earlier anti-immigrant measures sought by the governor and adopted by the legislature. Backed up by moderate GOP senators who regretted their votes, Chamber of Commerce President Glenn Hammer met with Governor Brewer, who listened attentively as he warned that S.B. 1062 would significantly set back to Arizona economy. Most Arizonans saw it as a provocative anti-gay discrimination measure.

A staunch conservative, Governor Brewer vetoed S.B. 1062 on February 26, 2014. The rout was so complete that legislators refused to consider a more moderate religious freedom bill that session. Arkansas and Indiana went through similarly painful experiences in 2015. Arkansas Governor Asa Hutchinson vetoed a broad religious freedom bill on March 31, and the legislature responded with a more moderate bill resembling a traditional junior-RFRA. Indiana Governor Mike Pence signed a broad junior-RFRA on March 27, 2015, but faced such a tremendous business backlash that he and the legislature moderated the law in April.<sup>69</sup>

While these states were swamped in public relations nightmares, Utah and the Church of Jesus Christ were approaching the issue more productively. In 2014, the Church created an Ad Hoc Committee on Religious Liberty, which sought common ground between equality for LGBT persons and liberty for religious persons and organizations. After October 6, 2014, when the Supreme Court denied its petition for review, Utah was required by court order to distribute marriage licenses to same-sex couples—a development that motivated the First Presidency and the Quorum to support a law barring state sexual orientation and gender identity (“SOGI”) discrimination while also affirming important religious liberty protections. The leadership acted after years of discussions between its public affairs officers and Equality Utah.<sup>70</sup>

On January 22, 2015, Senate Majority Whip Stuart Adams got a phone call from the Public Affairs Committee: the Church wanted him to pass a SOGI law, to be paired with a statute assuring marriage licenses for gay couples, but with conscience allowances for county clerks. A small businessman representing Ogden, Adams had no experience with civil rights legislation but did not hesitate to take it up. On January 27, 2015, Elders Dallin Oaks, Jeffrey Holland, and Todd Christofferson and Ms. Neill Marriott (a leader in the women’s group) held a press conference at the state capitol to announce the Church’s

support for SOGI legislation. Legislators saw this as a game-changer—a reality missed by the national press accounts, which emphasized Oaks’s lament about attacks on religious freedom.<sup>71</sup>

In the three months remaining in the legislative session, Senator Adams, the Church, and Equality Utah would have to draft the bill from scratch, figure out what religious accommodations to include and how to phrase them, consult the Chamber of Commerce and social conservative organizations like the Eagle Forum, and persuade the nation’s reddest state legislature to pass a law protecting sexual and gender minorities who seemed to violate every sentence of the 1995 Proclamation on the Family that hung in most of their houses. The process was a legislative opera. Until the end, no one knew whether it would be a tragedy or a comedy.

Act One involved a basic question: How should SOGI anti-discrimination protections be added to the Utah Code? Reflecting their conviction that sexual orientation and gender identity were completely different classifications from race or sex, the Republican leadership and the Church concluded that there should be a special law just for gays. Cliff Rosky, counsel to Equality Utah, insisted that discrimination based on sexual orientation or gender identity was as harmful and irrational as other forms. In late February, Equality Utah was prepared to walk away from negotiations if the legislators did not agree to integrate SOGI protections into the existing anti-discrimination law, which had generous religious exemptions. Bill Evans and Mike Purdy helped persuade the Church’s leadership that an integrated law made sense, and Robin Wilson showed Senator Adams how most other states had followed the integrated approach. Act One closed on February 26, when Alexander Dushku (counsel for the Church) came back with a draft bill that integrated the new protections into existing law. Dueling divas, singing in entirely different registers, could still harmonize.<sup>72</sup>

Act Two, full of dramatic conflict, involved working out the exact coverage of the bill. The Church, the GOP leadership, and Wilson all wanted relatively broad exemptions for religious institutions, religiously affiliated institutions, expressive institutions like the Boy Scouts, and religious persons. To their left, Equality Utah, the ACLU, and the handful of Democrats in the legislature wanted only to add SOGI to the existing anti-discrimination law. To their right, Representative LaVar Christensen, the sponsor of Utah’s 2004

constitutional DOMA, opposed a SOGI law and instead favored a Religious Freedom Restoration Act of the sort Arizona was considering. There were a lot of anguished conversations about covering the Boy Scouts and BYU, and about defining gender identity and employers' discretion over their bathrooms.

On Sunday March 1, a meeting of the main negotiators worked out substantial agreement on the religious allowances and the gender identity provisions. Section 1 of the bill would exempt from the definition of "employer" not only religious organizations, associations, and societies, but also their affiliates, leaders, and educational institutions (left undefined). In a last-minute concession to seal the deal, the Church agreed to limit the expressive association exemption to just the Boy Scouts, and Equality Utah agreed to exempt them. Section 5 allowed religious schools to make employment decisions based on religion. Sections 7 and 8 gave employers latitude on dress codes and bathrooms if they provided reasonable accommodations based on gender identity (defined by reference to medical standards). Section 14 gave nonprofit and educational institutions wide latitude in making distinctions with regard to housing, which meant that BYU could keep its sex-segregated dorms and continue to offer married-student residences only to different-sex couples. The Boy Scouts and BYU exemptions were hard pills for Equality Utah to swallow. In a series of conference calls to gay rights leaders around the country, Cliff Rosky suggested that these exemptions were needed for the legislation to pass, and the national leaders reluctantly went along.<sup>73</sup>

In an important innovation, section 10 assured employees they could express their "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." GOP legislators recalled the plight of Eric Moustos, a Salt Lake City police officer who was discharged because he criticized his bosses for bullying officers to work overtime for the 2014 Gay Pride Parade. Because section 10 protected LGBTQ+ as well as traditionalist straight employees, Equality Utah was okay with it.<sup>74</sup>

Act Two concluded with the big reveal of S.B. 296, and the chief actors joined hands at the front of the stage. The Senate approved S.B. 296 on March 6 by a vote of 23-5-1. Although the cast was exhausted and ready for the opera to end, there would be an

explosive Act Three. While the various stakeholders were working out their disagreements regarding S.B. 296, Dushku and Wilson were drafting S.B. 297 for Senator Adams. The point of this bill was to give religious allowances that states like Connecticut and New York had given and to ensure that same-sex couples could get marriage licenses while allowing individual clerks to opt out of the process for conscience reasons. House Republicans, however, were worried that there were not enough votes to pass S.B. 296. And the chair of the relevant committee, LeVar Christensen, was unfriendly to say the least. In a side plot worthy of Mozart, Brad Dee and Stuart Adams asked Christensen to be the House sponsor of S.B. 297, in return for his tacit acquiescence in S.B. 296. Wilson and Adams finalized S.B. 297. Their bill contained several faith-based exemptions, including a bar to government penalties against religious individuals or organizations who invoked “religious or other deeply held beliefs...regarding marriage, family, or sexuality” as a defense to a claim under the SOGI law. Also added were protections for religious counseling.<sup>75</sup>

Equality Utah and Rosky did not get the text of S.B. 297 until the evening of March 5. They went ballistic nine seconds later. They interpreted the new exemptions as creating a religious belief defense to S.B. 296 claims and as possibly opening the door to reparative therapy, which they considered a combination of voodoo medicine and waterboarding. Dushku and Wilson insisted that this was not their intent and that Equality Utah was over-reading the new provisions. Without quite comprehending why S.B. 297 was so inflammatory, church leaders still wanted a deal, so Adams and Wilson reworked and tightened the anti-penalty and other offending provisions. Behind the scenes, the Church was the *deus ex machina* that magically made everything come together, with no more last-minute hitches. Casting aside all doubts, the House voted 65-11 for S.B. 296 on March 11. With a chorus of hundreds singing hosanna, Governor Herbert signed it into law in a huge public ceremony in the capitol the next day.<sup>76</sup>

Utah’s Anti-Discrimination and Religious Freedom Amendments Act of 2015 might be a template for future legislation. Its approach of adding specific exemptions, after legislative deliberation, strikes us as a productive strategy for protecting religious freedom. The Church and its allies have created a movement dubbed “Fairness for All.” The plan is to persuade other red states to follow Utah’s example of bringing stakeholders together—leading religious denominations, the business community, and LGBTQ+ organizations and

civil rights groups—to work out statutory schemes, state-by-state, that ensure equal treatment for sexual and gender minorities while also entrenching protections for religious minorities. In 2019, a proposed Fairness for All Act was introduced in Congress. Like the Utah statute, this proposed legislation would add SOGI to existing anti-discrimination laws, together with allowances for churches, religious associations, and religiously affiliated or controlled nonprofits and educational institutions to operate according to the dictates of their faith traditions.<sup>77</sup>

Consistent with Fairness for All, we believe the 2015 Utah law is a statute of principles and not just a set of political compromises:

- *Non-Discrimination.* LGBT citizens need assurance that the state disapproves of discrimination because of sexual orientation and gender identity in employment, housing, and public accommodations. As the Supreme Court said in *Romer* and repeated in *Masterpiece*, a baseline of non-discrimination is taken for granted by most Americans today—and that group should include sexual and gender minorities as well as racial minorities.
- *Religious Free Exercise.* Free exercise of religion should extend beyond churches, stakes, synagogues, and mosques to include religiously-affiliated or -controlled institutions, such as seminaries, charity associations, madrassas, and schools. One reason we support leeway for BYU in the 2015 Utah law is that BYU is effectively a seminary for the Latter-day Saints, who have no formal clergy.
- *Freedom of Speech and Association.* Utah’s exclusion of the Boy Scouts from the employment protections can be justified by the freedom expressive associations ought to have to pick their own officials. Without state compulsion, the Boy Scouts have responded to internal pressure to integrate sexual and gender minorities.

Professor Wilson lays down this challenge. In three-fifths of America, there are no statewide sexual orientation or gender identity protections in public accommodations laws. Hence, LGBT people can be told “we don’t serve people like you.” In two-fifths of the country, there are no statutory conscience protections, so people of faith can be told “get over your faith or get out of business.” “Across all of America,” she says, “the public square



belongs only to one side. Unless America finds new ways to share the public square, it will remain a checkerboard of injustice to someone.”<sup>78</sup>

As of 2020, Congress has not acted on the proposed Fairness for All Act, nor has any red state replicated Utah’s statute. To do so, leaders and staff of conservative religious and gay rights groups need to sit down together and create common ground, based upon a Golden Rule process where each group appreciates the core needs of the others. Gay rights leaders need to understand that conscience claimants are not just ADF puppets seeking to revoke *Obergefell*. They are speaking from their hearts and expressing their faith as animating all of their dealings in the world. Religious leaders need to understand that LGBTQ+ people are not just engaged in political correctness; many of them are still not at home in an America that persecuted them until very recently. Both sets of leaders need to understand the limits of a substantially subjective understanding of rights. For the same reason the ADF’s John Bursch objects to constitutional liberty based upon subjective views about dignity and the “mystery of life,” so GLAD’s Mary Bonauto objects to constitutional expression based upon subjective views about complicity with the “homosexual agenda.” In other words, both groups of Americans need to understand that an expansive, subjective understanding of “harm” is neither constitutionally acceptable nor socially productive in our pluralist polity.<sup>79</sup>

Even with mutual understanding, each group must be strongly motivated to *want* a fairness-for-all statute. The religious groups’ motivation might be that their future depends on the interest and allegiance of young people—who are turned off by even mildly anti-gay stances and who want a faith that stands for something positive. Evangelicals and Catholics need to do more than just say nice things about LGBTQ+ people: they need to work with sexual and gender minorities before the ship sails without them. Gay rights leaders need to remember that most Americans live in states without public accommodations laws applicable to sexual and gender minorities. If they want such laws and if they want to entrench marriage equality against an increasingly conservative Supreme Court, they need to meet red state religions halfway. ADF has recruited hundreds of bakers, florists, wedding planners, photographers, and marriage counselors who have brought or want to bring lawsuits—and *Masterpiece* is just the first of a string of victories ADF may win, notwithstanding existing First Amendment doctrine. Moreover, First Amendment doctrine (namely, the Boy Scouts Case) protects Americans’ freedom of

association in normative groups. Following *Hobby Lobby*, the next wave of religious freedom cases will be those brought by or for religiously affiliated institutions. If the Supreme Court perceives that the states are working out religious conscience accommodations on their own, the conservative majority will be more reluctant to announce sweeping new doctrines.<sup>80</sup>

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A theme that pervades this chapter is a contrast between unyielding doctrine—whether it be dogmatic understandings of marriage or dogmatic insistence upon equal treatment—and on-the-ground governance of a church or a society whose members have seemingly inconsistent normative commitments. Following the lead of SBC President J.D. Greear, Catholic Pope Francis, and Latter-day Saints’ President Dallin Oaks, we suggest the value of Golden Rule deliberations, where people of good will try to understand the lives and commitments of those with whom they disagree. Deep deliberation requires a commitment to reciprocity, takes time and patience, and considers novel accommodations and principles. Although we think deliberation works best in administrative or legislative settings, it can also work in judicial settings if judges use evidentiary hearings, trial testimony, and oral arguments to listen empathically to perspectives not their own and to seek common ground rather than lobby for their personally preferred policy. Whether your model is the Golden Rule, the original meaning of the Equal Protection Clause, or the soaring rhetoric of *Romer* and *Masterpiece*, the goal ought to be building bridges rather than blowing them up.

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<sup>1</sup> James Davison Hunter, *Culture Wars: The Struggle to Control the Family, Art, Education, Law, and Politics in America* (1992); Robert Cochran Jr. & Michael Helfand, *The Competing Claims of Law and Religion: Who Should Influence Whom?*, 39 *Pepperdine L. Rev.* 1051, 1056 (2011).

<sup>2</sup> Statement of Faith, St. Paul’s Lutheran Church (2017) (quotations in text); Comm’n on Theology and Church Relations of the Lutheran Church—Missouri Synod, Report, *Human Sexuality: A Theological Perspective* (Sept. 1981) (traditionalist understanding of sexual morality, grounded in conjugal marriage).

<sup>3</sup> U.S. Comm’n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles With Civil Liberties* 29 (2016) (quoting the separate statement of Chairman Martin Castro).

<sup>4</sup> See Netta Barak-Corren, *The War Within* (draft 2018) (rejecting the culture wars view and analyzing the response of religious leaders to liberty-equality conflicts in schools).

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<sup>5</sup> Evangelical Lutheran Church of America, *Human Sexuality: Gift and Trust* (Nov. 2009); Letter from Elizabeth Eaton, Presiding Bishop, Evangelical Lutheran Church, June 30, 2015; Pew Research Center, *Views About Homosexuality Among Members of the Lutheran Church-Missouri Synod*, available at <http://www.pewforum.org/religious-landscape-study/religious-denomination/lutheran-church-missouri-synod/views-about-homosexuality/> (viewed Sept. 1, 2018). See Martin Luther, *Selections from Writings*, volume 2, pp. 326, 331 (John Dillenberger editor 1961); Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 *Yale J.L. & Feminism* 29 (2014).

<sup>6</sup> Elder Dallin Oaks, “Principles to Govern Possible Public Statement on Legislation Affecting Rights of Homosexuals” (Aug. 7, 1984), Prince Archives; William Eskridge Jr. & Robin Fretwell Wilson, *Religious Freedom, LGBT Rights, and the Prospects of Common Ground* 441-59 (2019).

<sup>7</sup> Elliott-Larsen Civil Rights Act, 1976 Mich. Pub. Acts No. 453.

<sup>8</sup> Endorsing the non-discrimination norm for sexual and gender minorities are United Church of Christ (Congregationalists), Council on Social Action Resolution on Homosexuality (1969); Unitarian Universalist, General Assembly Resolution on Homosexuality (1970); Central Conference of American Rabbis, Convention Resolution on Homosexuality (1977) (Reform Judaism); Presbyterian Church USA, General Assembly, *The Church and Homosexuality* (1978); Episcopal Church, General Convention, *Human Sexuality* (1980); U.S. Conference of Catholic Bishops, *Discriminations Against Homosexuals* (1992); Committee on Jewish Laws and Standards, *On Homosexuality* (1992) (Conservative Judaism); United Methodist Church, Resolution, *Opposition to Homophobia and Heterosexism* (2008); Islamic Society of North America, Statement Endorsing ENDA (2013). Encouraging discrimination are Southern Baptist Convention, Resolution on Homosexuality (1977, updated periodically); Russian Orthodox Church, *Basis of the Social Concept* (2016).

<sup>9</sup> For hate-the-sin-love-the-sinner expressions, see Congregation for the Doctrine of the Faith, Vatican, *Pastoral Care of Homosexual Persons* (1986), read liberally in Pope Francis, *Amoris Laetitia* (2016); Rabbinical Council of America, *Declaration on Torah Approach to Homosexuality* (2011); United Methodist Church, *Book of Discipline (Social Principles)* (2012); Assemblies of God, General Presbytery, *Official Statement on Homosexuality, Marriage, and Sexual Identity* (2014); First Presidency, Church of Jesus Christ, *General Handbook* (as of 2019); National Baptist Conv., *Baptist Denominations & Doctrines Frequently Asked Questions* (as of 2019). See also Southern Baptist Convention, Resolution on Same-Sex Marriage and Civil Rights Rhetoric (2012) (milder disapproval than in previous years); Russian Orthodox Church, *Basis of the Social Concept* (2016) (similar).

<sup>10</sup> Mark Achtemeier, *The Bible’s Yes to Same-Sex Marriage: An Evangelical’s Change of Heart* 1-5 (2014); Presbyterian Church USA, 221st General Assembly, Resolution to Change the Rule Book to Allow Same-Sex Marriages (June 14, 2014) (taking effect in March 2015 after ratification by a majority of presbyteries).

<sup>11</sup> Letter from Katherine Morton Achtemeier to William Eskridge, March 7, 2016; William Eskridge Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (1996) (appendix collecting a few dozen letters from religious leaders supporting marriage equality).

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<sup>12</sup> Stephen Haynes, *Noah's Curse: The Biblical Justification of American Slavery* (2002); William Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (2011).

<sup>13</sup> Frances Fitzgerald, *The Evangelicals: The Struggle to Shape America* 2-3 (2017) (what faith traditions are “Evangelical”); William Martin, *With God on Their Side: The Rise of the Religious Right in America* (1996).

<sup>14</sup> “Pastor Steven Anderson’s Genocide of Homosexuals,” video clips available at <https://www.youtube.com/watch?v=gVseLfwfCMA> (viewed Sept. 3, 2018).

<sup>15</sup> SBC, Kansas City, Resolution on Homosexuality (June 14-16, 1977) (first quotation in text); SBC, New Orleans, Resolution Against Homosexual Marriages (June 1996) (subsequent quotations). SBC resolutions against gay marriage, domestic partnerships, and civil unions can be accessed on the Convention’s website, <http://www.sbc.net/resolutions/about/gay%20marriage> (visited Sept. 5, 2018); see Oran Smith, *The Rise of Baptist Republicanism* (1997).

<sup>16</sup> SBC, Resolution on “Same-Sex Marriage” (2012) (quotations in text); Sarah Posner, *Amazing Disgrace: How Did Donald Trump Hijack the Religious Right?*, New Republic, March 20, 2017 (Land’s ouster because of racially divisive jibes and plagiarism).

<sup>17</sup> Our discussion of the 2014 Conference is based upon video tapes available on YouTube.

<sup>18</sup> Rev. J.D. Greear, “Preaching Like Jesus to the LGBT Community,” ERLC Homosexuality and Marriage Conference, Oct. 30, 2014; Jim Daly, Focus on the Family, “Reconcilable Differences: Building Bridges with Those Who Disagree About Marriage,” *ibid.*, Oct. 30, 2014; see Glenn Stanton, Focus on the Family, “Loving My (LGBT) Neighbor,” *ibid.*, Oct. 28, 2014.

<sup>19</sup> Reverend Ronnie Floyd, *The Gay Agenda: It's Dividing the Family, the Church, and a Nation* (2004); Reverend Frank Page, SBC President, *Southern Baptists and Homosexuality*, SBC Life: Journal of the Southern Baptist Convention, Dec. 2014; SBC, *Position Statement on Sexuality* (as of 2019); Focus on the Family, *Counseling for Sexual Identity Concerns* (2018).

<sup>20</sup> David Gushee, *Changing Our Mind* 64-72 (rev. ed. 2015) (analysis of Levitical abominations); William Eskridge Telephone Interview with David Gushee, Sept. 10, 2018.

<sup>21</sup> Gushee, *Changing Our Mind*, pp. 103-04 (quotation in text).

<sup>22</sup> *Ibid.*, pp. 91-98; *ibid.*, p. 98 (quotation in text); Dietrich Bonhoeffer, “Creation and Fall: A Theological Exposition of Genesis 1-3” (Lectures, Univ. Berlin, 1932-33).

<sup>23</sup> Willow Creek Community Church, Elder Statements, “Marriage, Singleness, and Sexual Practice” (updated as of Jan. 2016); Andy Stanley, *Deep and Wide: Creating Churches Unchurched People Love to Attend* (2012); John Blake, *Two Preaching Giants and the “Betrayal” That Tore Them Apart*, CNN, Nov. 19, 2012 (quotation in text).

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<sup>24</sup> Elizabeth Dias, *Inside the Evangelical Fight Over Gay Marriage*, Time, Jan. 15, 2015; Madeleine Buckley, *Notable Christians Who've Had a Change of Heart on LGBT Issues*, Religion News Serv., July 12, 2017.

<sup>25</sup> National Association of Evangelicals, Exec. Comm., "Fairness for All Motion" (approved Oct. 2, 2018); Reverend J.D. Greear, "How the Fall Affects Us All" (Jan. 27, 2019), with response by Reverend Jonathan Shelley, Stedfast Baptist Church, Fort Worth TX, March 2019 (quotation in text), excerpts from both available at <https://www.youtube.com/watch?v=KDwaH7dZrho> (viewed April 18, 2019).

<sup>26</sup> Pope Paul VI, *Pastoral Constitution of the Church in the Modern World*, Gaudium et spes (Dec. 7, 1965); Congregation for the Doctrine of the Faith, Declaration *Persona humana* ch. XI (Dec. 29, 1975) (first quotation in text); *ibid.*, ch. VIII (remaining quotations, citing New Testament verses); see Vincent Genovesi, *In Pursuit of Love* 187-91 (1996). The Congregation later opined: such persons "must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided." *Catechism of the Catholic Church*, Nos. 2358 & 2396 (1994).

<sup>27</sup> Father John McNeill, SJ, *The Church and the Homosexual* (1976); McNeill, "Address to First National Dignity Conference," National Catholic Reporter, Oct. 5, 1973; Barbara Rick, Director, "In Good Conscience: Sister Jeannine Gramick's Journey of Faith" (Out of the Blue Films, 2009).

<sup>28</sup> Father Charles Curran, *Transition and Tradition in Moral Theology* (1979); Thomas Thurston in *Homosexuality and Roman Catholic Ethics* (1995); *Catechism of the Catholic Church*, No. 2358 & 2396 (1994). But see Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* ¶ 3 (Oct. 1, 1986) (quotation in text); Congregation for the Doctrine of the Faith, *Considerations regarding proposals to give legal recognitions to unions between homosexual persons* (June 3, 2003).

<sup>29</sup> Robert Shine, "There Is No Place for Homophobia," *Pope Told Gay Former Student*, New Ways Ministry, Nov. 1, 2016 (quoting Pope Francis's letter to gay friend); William Eskridge Telephone Interview with Father James Martin, SJ, April 20, 2019; William Eskridge Interview with Sister Jeannine Gramick, New Haven CT, Jan. 2017.

<sup>30</sup> For an insider's informal account of the Extraordinary Synod, see the postings for October 2014 in Rocco Palmo's blog, *Whispers in the Loggia*, available at <http://whispersintheloggia.blogspot.com/2014/10/> (viewed April 21, 2019).

<sup>31</sup> Jonathan Capehart, *Synod Draft Furthers "Welcoming" Tone for Gay People from Pope Francis*, Wash. Post, Oct. 14, 2014 (quotations in text, from ¶¶ 50, 52 of the draft report).

<sup>32</sup> Synod of the Bishops, *The Final Report of the Synod of the Bishops to the Holy Father* (Oct. 24, 2015) (initial quotations in text); James Martin, SJ, *Five Important Things the Synod on the Family Accomplished*, America, Jesuit Review, Oct. 25, 2015 (last quotation).

<sup>33</sup> Post-Synodal Apostolic Exhortation *Amoris laetitia* by the Holy Father Francis to Bishops, Priests and Deacons, Consecrated Persons, Christian Married Couples, and All the Lay Faithful ¶¶ 11-19 (March 19, 2016) (Genesis assumption of conjugal marriage); *ibid.*, ¶¶ 52, 301-302, 308

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(pastoral discretion for “irregular” unions that are not marriages); *ibid.*, ¶¶ 250-251 (no gay marriage but affirming pastoral support for gay people).

<sup>34</sup> Fr. James Martin, *How Parishes Can Welcome L.G.B.T. Catholics*, America, The Jesuit Review, Aug. 23, 2018 (quotation in text); Martin, *Building a Bridge: How the Catholic Church and the LGBT Community Can Enter into a Relationship of Respect, Compassion, and Sensitivity* (2017, revised edition 2018).

<sup>35</sup> Editorial: *Our Persons of the Year for 2015*, Nat’l Catholic Rptr., Dec. 28, 2015; Amanda Terkel, *Catholic Cemetery Rejects Supreme Court Plaintiffs’ Headstone Design Celebrating Marriage Equality*, HuffPost, May 17, 2016; William Eskridge Conversation with Newt and Callista Gingrich, Basilica of the National Shrine of the Immaculate Conception, Washington DC, April 26, 2019.

<sup>36</sup> Martha Elson, *Clergy Weighs Kim Davis’s Legal, Moral Rights*, Cincinnati Enquirer, Sept. 13, 2015.

<sup>37</sup> The First Presidency and Council of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World* ¶ 2 (Sept. 23, 1995) (all the quotations in text). On the centrality of gender in the Mormon cosmology, see Church of Jesus Christ, *Mother in Heaven* (2015); Terryl Givens, *Wrestling the Angel: The Foundations of Mormon Thought: Cosmos, God, Humanity* 106-12, 274-79 (2014); David Paulsen & Martin Pulido, “A Mother There”: A Survey of Historical Teachings about Mother in Heaven, 50 BYU Studies 70-97 (2011).

<sup>38</sup> President Spencer Kimball et al., *The Church and the Proposed Equal Rights Amendment: A Moral Issue*, Ensign 11 (1980). On opposition to the ERA, see William Eskridge Jr., *Latter-Day Constitutionalism: Sexuality, Gender, and Mormons*, 2016 U. Ill. L. Rev. 1227, 1234-38; D. Michael Quinn, *The LDS Church’s Campaign Against the Equal Rights Amendment*, 20 J. Mormon Hist. 85–155 (1994); Neil Young, “The ERA Is a Moral Issue”: *The Mormon Church, LDS Women, and the Defeat of the Equal Rights Amendment*, 59 Am. Q. 623 (2007).

<sup>39</sup> Jessica Garrison & Joanna Lin, *Prop 8 Protesters Target Mormon Temple in Westwood*, L.A. Times, Nov. 7, 2008; Gregory Prince, *Gay Rights and the Mormon Church: Intended Acts, Unintended Consequences* 161 (2019) (quotation in text).

<sup>40</sup> Prince, *Gay Rights and the Mormon Church*, pp. 164-67 (quotations in text; detailed insider account of the anti-Prop 8 backlash within the Church).

<sup>41</sup> Stephanie Mencimer, *Mormon Church Abandons Its Crusade Against Gay Marriage*, Mother Jones, April 12, 2013. Our discussion in this and following paragraphs is based upon Prince, *Gay Rights and the Mormon Church*, pp. 175-218, and off-the-record conversations in Salt Lake City

<sup>42</sup> Maria LaGanga, *An Embrace That Swayed the Mormon Church on Gay Rights*, L.A. Times, Jan. 31, 2015; Scott Taylor, *LDS Church Defends Actions in Plaza “Kissing” Incident*, Deseret News, July 19, 2009 (Church’s side of the story); Colbert Report, *Nailed Em—Mormon Church Trespassing* (Nov. 3, 2009), available at <http://www.cc.com/video-clips/olb2ep/the-colbert-report-nailed-em---mormon-church-trespassing> (visited Sept. 9, 2018).

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- <sup>43</sup> Maria LaGanga, *An Embrace That Swayed the Mormon Church on Gay Rights*, L.A. Times, Jan. 31, 2015.
- <sup>44</sup> Prince, *Gay Rights and the Mormon Church*, pp. 184-86.
- <sup>45</sup> William Eskridge Telephone Interview with Clifford Rosky, Legal Counsel, Equality Utah, Oct. 1, 2015; Off-the-record conversations.
- <sup>46</sup> Peggy Fletcher Stack, *New Mormon Church Website Has Softer Tone on Gays*, Salt Lake Tribune, Dec. 6, 2012. The Dallin Oaks video can be viewed at <https://mormonandgay.lds.org/videos?id=7254846371177561723&lang=eng> (visited Sept. 10, 2018).
- <sup>47</sup> Jennifer Dobner, *New Mormon Policy Makes Apostates of Married Couples, Bars Children From Rites*, Salt Lake City Trib., Nov. 5, 2015.
- <sup>48</sup> Church of Jesus Christ of Latter-day Saints, *Single-Parent Families* (2006); LDS Family Services, *Adoption and the Unwed Mother*, Ensign (Feb. 2002); Jane Edwards, *Has the LDS Church Changed Its Policies on Adoption?*, First Mother Forum (Sept. 29, 2013).
- <sup>49</sup> Brady McCombs, *Mormon Support for Gay Marriage Gradually Grows*, Assoc. Press, May 4, 2018; Edward Kimball, *Spencer W. Kimball and the Revelation on Priesthood*, 47 *BYU Studies*, Issue 2, pp. 43-44 (quotation in text); Elizabeth Dias, *Mormon Church to Allow Children of LGBT Parents to Be Baptized*, NYT, April 4, 2019; cf. Lester Bush Jr., *Mormonism's Negro Doctrine: A Historical Overview*, 8 *Dialogue* 54 (Spring 1973).
- <sup>50</sup> *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. April 22, 2019) (upholding termination of municipal contracts with Catholic foster-care service); U.S. Conference of Catholic Bishops, "Discrimination Against Catholic Adoption Services" (2018); Kayla Mullen, *Same-Sex Couples to Receive Benefits*, [Notre Dame] Observer, Oct. 16, 2014 (controversy at Notre Dame over its extension of spousal benefits to same-sex married couples).
- <sup>51</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1712 (2018); Senator J. Stuart Adams, *Cultivating Common Ground: Lessons from Utah for Living with Our Differences*, in Eskridge & Wilson, *Prospects of Common Ground*, pp. 441-59.
- <sup>52</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *ibid.*, p. 199 (Alito, J., concurring) (first quotation in text, with emphasis added); *Obergefell*, 135 S.Ct., p. 2607 (second quotation).
- <sup>53</sup> I.R.C. § 501(c)(3), 26 U.S.C. § 501(c)(3); see I.R.C. § 170(c), 26 U.S.C. § 170(c) (similar definition for taxpayer deductions for charitable contributions); Interview by William Eskridge of former Solicitor General Donald Verrilli, Washington D.C., July 2018.
- <sup>54</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), upholding Revenue Ruling 71-447, 1971-2 Cum. Bull. 230 (quotations in text); *Obergefell*, 135 S.Ct., p. 2626 (Roberts' dissent).

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<sup>55</sup> Mark Lehman & David Dorn, *Obtaining Tax Exempt Status for Religious Institutions*, 7 Colum. J. Tax Law 7-8 (2016) (IRS statement responding to *Obergefell*); Nicholas Mirkay, *Globalism, Public Policy, and Tax-Exempt Status: Are U.S. Charities Adrift at Sea?*, 91 N.C.L. Rev. 851, 871 (2013) (IRS will deny tax exempt status for charitable institutions that engage in “racial discrimination, civil disobedience, or certain illegal activity”); Marcus Owens, Bob Jones, *Obergefell, and the IRS*, AHLA Connections, March 2016 (quoting former IRS official).

<sup>56</sup> Samuel Brunson & David Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell*, 92 Ind. L.J. 1175, 1203-04 (2017) (quotation in text).

<sup>57</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Anti-Discrimination Law in Masterpiece Cakeshop*, 131 Yale L.J. Forum 201, 205-10 (Sept. 14, 2018).

<sup>58</sup> *Employment Division v. Smith*, 494 U.S. 872, 883-86 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens’s concurring opinion, opposing a constitutional rule that would require government to prefer a religious point of view); *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985) (similar).

<sup>59</sup> *Masterpiece*, 138 S.Ct., pp. 1727-29 (facts of the case, including the parallel complaints); *ibid.*, pp. 1728-31 (Court’s holding); Brief for Petitioners, *ibid.* (No. 16-111, filed Aug. 31, 2017), 2017 WL 3913762. Compare *ibid.*, pp. 1748-52 (Ginsburg’s dissent), and pp. 1733-34 (Kagan’s concurring opinion, but agreeing with most of Ginsburg’s analysis), with *ibid.*, pp. 1734-40 (Gorsuch’s response to Ginsburg). And compare *Trump v. Hawaii*, 138 S.Ct. (2018) (upholding the anti-Muslim travel ban), with *ibid.*, pp. (Sotomayor’s dissent, demonstrating anti-Muslim justifications for travel ban).

<sup>60</sup> Brief for Petitioners, pp. 16-38, *Masterpiece*; Brief for the United States as *Amicus Curiae*, *ibid.*, 2017 WL 4004530; *Masterpiece*, 138 S.Ct., pp. 1740-45 (Thomas’s concurring opinion, joined by Gorsuch); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 567 (1995).

<sup>61</sup> *Masterpiece*, 138 S.Ct., pp. 1727-29 (quotations from Court’s opinion, approved in Ginsburg’s dissent, *ibid.*, p. 1748); *Newman v. Piggie Park Ents.*, 256 F. Supp. 941 (D.S.C. 1966), *aff’d*, 390 U.S. 406 (1968). On the religious view that Scripture forbids “mixing” of the races, see Eskridge, *Noah’s Curse*, pp. 672-77.

<sup>62</sup> NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, pp. 201-05; Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U.L. Rev. 929, 946-47 (2015). *Hurley* was a harder case than its 9-0 disposition indicates, because counsel conceded that the parade excluded the openly gay marching unit because of *both* their sexual orientation *and* their expression. Oral Argument, p. 49, *Hurley* (April 25, 1995), 1995 WL 301703.

<sup>63</sup> *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); see *Hurley*, 515 U.S., pp. 568, 572-73; *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

<sup>64</sup> Robin Fretwell Wilson, *Bathrooms and Bakers: How Sharing the Public Square Is the Key to a Truce in the Culture Wars*, in Eskridge & Wilson, *Prospects for Common Ground*, pp. 402-20.



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<sup>65</sup> Douglas Laycock, *Liberty and Justice for All*, in Eskridge & Wilson, *Prospects for Common Ground*, pp. 24-37; Kent Greenawalt, *Mutual Tolerance and Sensible Exemptions*, in *ibid.*, pp. 102-10; Michael McConnell, *Dressmakers, Bakers, and the Equality of Rights*, in *ibid.*, pp. 378-84; Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015). See *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), vacated and remanded, 138 S.Ct. 2671 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S.Ct. 1787 (2014).

<sup>66</sup> Lance Wickman, *Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All*, available at <https://www.mormonnewsroom.org/article/promoting-religious-freedom-secular-age-fundamental-principles-practical-priorities-fairness-for-all> (visited Dec. 14, 2018).

<sup>67</sup> Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach Us About Specific Exemptions*, 48 U.C. Davis L. Rev. 703 (2104); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

<sup>68</sup> Our account of S.B. 1062 is based upon coverage in the *Arizona News Service* and interviews with some of the participants, including former General Counsel of the Arizona Chamber of Commerce Kory Langhofer, New Haven CT, March 8, 2018; Chief of Staff of the Chamber Brittany Kaufman, Phoenix AZ, May 3, 2018; former Mayor Scott Smith (Mesa AZ), May 3, 2018 (telephone interview); former Executive Director of the Arizona Republican Party Chad Heywood, May 1, 2018 (telephone interview); and a few off-the-record conversations.

<sup>69</sup> Bob Moser, *Why the Religious Right Is Terrified of Pete Buttigieg*, New Republic, April 10, 2019.

<sup>70</sup> *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1193-94 (D. Utah, Dec. 20, 2013), affirmed, 755 F.3d 1193 (10th Cir., June 25, 2014), cert. denied, 135 S. Ct. (Oct. 6, 2014); Prince, *Gay Rights and the Mormon Church*, pp. 219-30.

<sup>71</sup> Prince, *Gay Rights and the Mormon Church*, pp. 230-35; William Eskridge Interviews with Utah Senator Stuart Adams, Champaign IL, Sept. 10-11, 2015; Peggy Fletcher Stack, *In Major Move, Mormon Apostles Call for Statewide LGBT Protections*, Salt Lake Tribune, Jan. 27, 2015.

<sup>72</sup> William Eskridge Telephone Interview with Professor Robin Wilson, Sept. 18, 2015.

<sup>73</sup> S.B. 296, § 1, codified at Utah Code § 34A-5-102(1)(h)(ii) (restrictive definition of “employer,” including an exemption for the Boy Scouts); *ibid.*, § 5, codified at Utah Code § 34A-5-106(3)(a)(ii) (limited exemption for religious schools); *ibid.*, §§ 7-8, codified at Utah Code §§ 34A-5-109-110 (dress code and bathroom provisions); *ibid.*, § 14, codified at Utah Code § 57-21-3(2), (7) (limited exemptions in housing law for nonprofits and educational institutions, including BYU).

<sup>74</sup> *Ibid.* § 10(1), codified at Utah Code § 34A-5-112(1) (quotation in text).

<sup>75</sup> The original draft of S.B. 297, with the religious exemptions, can be accessed at <https://le.utah.gov/~2015/bills/static/sb0297.html> (visited Sept. 11, 2018).

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<sup>76</sup> Jennifer Dobner & Robert Gerhke, *GBT Leaders Concerned about Adams' Religious-Protection Bill*, Salt Lake Tribune, March 6, 2015.

<sup>77</sup> William Eskridge Jr. & Robin Fretwell Wilson, *Introduction*, to Eskridge & Wilson, *Prospects for Common Ground*.

<sup>78</sup> Wilson, *Bathrooms and Bakers*, p. 405 (quotation in text).

<sup>79</sup> See Jonathan Rauch, *Nondiscrimination for All*, Nat'l Affairs, Summer 2017.

<sup>80</sup> Compare Kate Shellnutt, *Fairness for All: Evangelicals Explore Truce on LGTB and Religious Rights*, Christianity Today, Dec. 8, 2016, with Yonat Shimron, *A Push for LGBTQ Protections May Tear Evangelicals Apart*, ANS: Religious News Service, Dec. 20, 2018.