**LGBT Equality, Religious Liberty: Statutory Principles and the Golden Rule**

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In the twenty-first century, there has been a steady stream of clashes between federal, state, and local laws barring sexual orientation or gender identity (SOGI) discrimination and religious institutions treating lesbian, gay, bisexual, and transgender (LBGT) persons and families differently than their straight counterparts. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018),[[1]](#footnote-1) the Supreme Court on narrow grounds ruled in favor of a “pastry artist’s” freedom to decline to make a wedding cake for a gay wedding. In other cases, the New Mexico and Washington Supreme Courts had upheld liability under state antidiscrimination laws for a photographer and florist (respectively) who turned away gay wedding business for faith-based reasons. The U.S. Supreme Court denied review in both cases. Most recently, in *Fulton v. City of Philadelphia* (2021),[[2]](#footnote-2) the Court held that a state foster care program could not require Catholic Charities to play a role in placing children with married same-sex couples.

As these cases illustrate, three important developments have produced an increasing number of clashes between LGBT equality and religious liberty in the new millennium. The most obvious is the remarkable turnaround in the legal and social status of sexual and gender minorities in America. Until the Supreme Court’s decision in *Lawrence v. Texas* (2003), Virginia and other states made it a felony for gay people to have private consensual sexual relations. Overnight, LGBT persons were no longer presumptive criminals in the Commonwealth—and when marriage equality was imposed on the Commonwealth by federal judges in 2014, the former outlaws were suddenly in-laws. The Supreme Court in *Obergefell v. Hodges* (2015) nationalized the right of same-sex couples to marry. As more LGBT Americans have come out of the closet as a result of their legalized status, more laws protect them against job, housing, and public accommodation discrimination. In 2020, Virginia followed the lead of Maryland and the District of Columbia to expand its state antidiscrimination law to protect against discrimination because of sexual orientation or gender identity (SOGI). In *Bostock v. Clayton County, Georgia* (2020),[[3]](#footnote-3) the U.S. Supreme Court interpreted the federal job discrimination law to protect LGBT employees everywhere.

A less dramatic and more gradual development has been the expanded reach of antidiscrimination laws. When the Civil Rights Act of 1964 was adopted, Virginia’s two senators (Harry Byrd and Willis Robertson, the father of Reverend Pat Robertson) tried to block it by a filibuster, and West Virginia’s Senator Robert Byrd denounced the law as a violation of the religious liberty of southern Protestant employers and lunch counter owners who felt that God required racial segregation. Today, almost no one publicly objects to laws barring race, national origin, and sex discrimination in housing, employment, education, and public accommodations. Huge majorities of Americans believe that LGBT persons should enjoy the same protections—but few are aware of the more subtle expansion of public accommodation antidiscrimination laws.

Early laws, such as the 1964 Act, only applied to hotels, restaurants, and similar establishments that were analogous to common carriers, required by law to take all comers. Over time, public accommodation laws have expanded to include almost any establishment hosting social and recreational events and to cover a wide variety of “services,” including regular and online commercial sales, funerals, medical and dental services, and so forth. As amended in 2020-21, Virginia’s law defines public accommodation to include “all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations.”[[4]](#footnote-4) Thus, early antidiscrimination laws did not apply to photographers, pastry and flower shops, or wedding planners—indeed, Title II of the 1964 Act still does not—but the laws in Virginia and most other states apply to these enterprises and many more. Indeed, state courts applying their laws to a parade and to the Boy Scouts were rebuked by the Supreme Court on First Amendment grounds in 1995 and 2000, respectively.

At the same time LGBT persons and couples have changed from outlaws to in-laws and have come under the protection of ever-broader public accommodation laws, religion has been changing as well. The Big Three Denominations are now the Southern Baptist Convention, the Catholic Church, and the Church of Jesus Christ of Latter-day Saints. As a matter of core doctrine, each faith tradition maintains that one’s sex is forever fixed and binary (man, woman), that the only moral form of sexual relations is procreative intercourse within marriage, and that marriage can only be one man and one woman (Adam and Eve, not Adam and Steve). And all three traditions preach that devout Christians ought to carry their faith and perform its beliefs in their public and commercial lives as well as their private worship and family.

In the last half century, each of these denominations has become more involved with the larger society and government than they were before 1964. This has been through religiously affiliated elementary and secondary schools, colleges, and universities (Liberty University and private academies down the road in Lynchburg are famous examples); aggressive involvement in political campaigns such as the defeat of the ERA (the Latter-day Saints were key players in Virginia’s ERA rejection) and the adoption of state constitutional amendments barring recognition of same-sex marriages, civil unions, or domestic partnerships (Virginia adopted several such bars); and election of cultural conservatives to the presidency and other public offices (Reverend Jerry Falwell played a big national role starting in 1980). Longstanding religious institutions such as Catholic Charities and the Salvation Army have partnered with governments and have even become agents in government-funded and sponsored programs such as the foster care program in *Fulton*.

When you combine the new visibility of sexual and gender minorities, the expansion of antidiscrimination laws, and changes in our country’s religious sociology, it is remarkable that there are not more clashes between LGBT equality and religious liberty. In my view, the rhetoric on both sides of the so-called “culture war” dramatically overstates the incidence and stakes of these conflicts. One reason for the modest number of clashes is that many LGBT persons do not want to disturb the religious freedom of institutions and devout persons. Another reason is that most Catholics, Latter-day Saints, and Evangelicals do not want to discriminate against LGBT persons. Both groups believe in the Golden Rule—which brings me to a third reason: LGBT and religiously devout Americans overlap a lot. Their fates are intertwined at the congregational level, and those linked fates are influencing the leadership structures in both religion and civil rights.

Nonetheless, equality-liberty clashes occur regularly, and they are important to people and institutions on both sides of the debate. In my view, litigators, judges, and law professors have raised the normative stakes of the debate without offering neutral solutions. On one side, judges sponsored by the Federalist Society, politicians like former Vice President Mike Pence, and litigators in the Alliance Defending Freedom insist that the First Amendment allows religious persons, institutions, and businesses free passes to discriminate against LGBT persons across the board. On the other side, judges sponsored by the American Constitution Society, politicians like Governor Gavin Newsom, and litigators for the ACLU insist that conscience allowances will destroy antidiscrimination law. Law professors tend to line up according to their political preferences—Mike McConnell and other conservatives supporting broad religious liberty, Doug NeJaime and other liberals supporting no exceptions to antidiscrimination laws—but without strong legal reasons that might persuade a neutral judge. Doug Laycock of this University and Robin Wilson of the University of Illinois are exceptional in their efforts to seek principled resolution to the genuinely intractable clashes between incommensurable goods (equality and liberty).

The point of this Lecture is to explore an underexamined source of principled resolution—statutes and their administration. I shall start with a few early examples but will feature a recent one.

An early equality-liberty clash arose out of San Francisco’s referenda in 1989 and 1990 to veto or approve a domestic partnership ordinance. Catholics and Evangelicals defeated the proposal in 1989, but a gay rights coalition led by the mayor prevailed in 1990. In 1996, the Board of Supervisors adopted an ordinance requiring institutions doing business or partnering with the city to provide health insurance and other benefits to same-sex domestic partners of their employees. Among the institutions contracting with the city were the Salvation Army and Catholic Charities. The latter stood to lose municipal support for several valuable programs, especially an AIDS-hospice that was about to open. This was a classic equality-liberty conflict. The Archbishop of San Francisco maintained that extending marital benefits to lesbian and gay employees would morally sanction relationships its faith doctrine considered immoral. What the Church considered a matter of conscience and religious liberty, gay rights leaders considered discriminatory and homophobic. Most of us can agree that the conflict was especially tragic, because it threatened to create intergroup bitter feelings and to undermine the good work performed by Catholic Charities for people with AIDS and other needy persons in the city.

This conflict never got to court, however, because it was resolved through discussions between city administrators and church officials, with sign-offs from Mayor Willie Brown and Archbishop William Levada. The city took the position that it wanted to support lesbian and gay families—but it did not want to humiliate the Church or sink its needed AIDS hospice. The Church took the position that it did not want to endorse same-sex unions—but it did not want to harm its lesbian and gay employees and, indeed, did want them to have decent health care. Once the representatives of the clashing interests sat down with one another, in a spirit of trying to work this out, the solution was simple. San Francisco agreed that compliance with its ordinance could be established by a new church policy allowing all its employees to designate a legally domiciled member of their household to be the joint beneficiary of their employer-provided health insurance. Purists on either side had reason to complain, but I consider this a model approach –and a principled one – for working through liberty-equality clashes.

In my view, this administrative solution – reconciling clashing rights or principles through a dialectic that seeks to recognize the most important thing each side needs – is not beyond the capacity of judges. Another early equality-liberty clash came in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.[[5]](#footnote-5) Gay student groups at Georgetown University petitioned to be recognized as official student organizations, which would entitle them to office space, funds from the student government, and other tangible services. Georgetown is a Catholic university whose main officers in the 1980s were Jesuit priests; they denied the petition, because they felt that recognition would connote acceptance of an association espousing moral views about sexuality that were inconsistent with Catholic theology. The student groups viewed the decision as a denial of equal treatment in violation of the District’s Human Rights Act, which barred sexual orientation discrimination in a school’s or university’s provision of “facilities and services” to its students.[[6]](#footnote-6) The students sued the University for violating the statute. Georgetown responded that application of the statute to its faith-based policy would violate both the Free Speech and Free Exercise Clauses of the First Amendment.

Judge Julia Cooper Mack delivered a Solomonic judgment for the District of Columbia Court of Appeals. Closely adhering to the statutory text while at the same time attentive to the norms most important to each party, she ruled that Georgetown did not have to formally “recognize” these student groups, for recognition deeply implicated the school’s religious affiliation and mission, both protected by the First Amendment. But the University was required to provide equal treatment, namely, facilities and services to the gay groups. Her judgment was respectfully criticized by two conservative judges as insufficiently attentive to the First Amendment and by two liberal judges as insufficiently attentive to the antidiscrimination norm. Interestingly, these four judicial critics were all white, while the three judges who joined Judge Mack’s judgment were Black.

Shortly afterwards, I joined the Law Center’s faculty, after being denied tenure at the University of Virginia’s School of Law. As the law school’s (and perhaps the university’s) first openly gay faculty member, I was swiftly adopted as the sponsor of the new Bisexual, Lesbian, and Gay Association (“Bi-LAGA”), which helped create a deeply welcoming space for sexual minorities. I also enjoyed a warm relationship with the University’s Jesuit faculty and administrators, who not only vetoed their attorneys’ pursuit of a Supreme Court appeal but also honored and even celebrated their settlement with the students after Congress amended the Human Rights Act to create a broader faith-based allowance for educational institutions.

My final example is purely statutory. Utah is a very conservative state, politically as well as theologically. The Church of Jesus Christ of Latter-day Saints, the overwhelmingly dominant faith tradition, understands sex as binary and unchanging for all eternity and acceptable sexuality as procreative intercourse within a marriage. Given its moral commitments, the Church had played a pervasive and critical role in the 2008 triumph of California’s Proposition 8, which amended the state constitution to limit marriage to one man, one woman and hence override the state supreme court’s earlier marriage equality ruling. This lavish investment of resources in a measure taking away minority rights and some of the arguments denigrating lesbian and gay families provoked a strong backlash outside the Church and significant anguish inside the Church. In 2009, officials within the Church accepted an invitation to sit down with leaders of Equality Utah, the organization supporting equal rights for sexual and gender minorities.[[7]](#footnote-7) The initial conversation started with everyone in the room telling their own journey stories: where they came from, what were their moral commitments, and what were their life plans. The participants found more common ground than they expected. In late 2009, the Church officially endorsed a proposal before the Salt Lake City Council to add sexual orientation and gender identity protections, as well as religious allowances, to its jobs and housing antidiscrimination ordinance.[[8]](#footnote-8) The Council immediately passed the measure. A few Latter-day Saints in the Utah Legislature wanted a state law along the same lines, but the idea languished – or percolated – for five years.

In 2013-14, federal judges invalidated Utah’s exclusion of same-sex couples from civil marriage, and the U.S. Supreme Court denied the state’s petition for review on October 6, 2014.[[9]](#footnote-9) Governor Gary Herbert directed county clerks to issue marriage licenses to same-sex couples forthwith, and thousands of lesbian, gay, and other minority couples took advantage of this new opportunity to validate their families. The Church of Jesus Christ not only supported the Governor’s adherence to the rule of law, but also made its own move in support of equal rights for sexual and gender minorities.

On or about January 22, 2015, Senate Majority Whip Stuart Adams got a phone call from the Church’s 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 appropriate conscience allowances. A small businessman and devout Latter-day Saint, Adams had no experience with LGBT rights but did not hesitate to take up this charge. On January 27, 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.[[10]](#footnote-10)

In the three months remaining in the legislative session, Senator Adams and his advisers, the Church’s lawyers, and Equality Utah drafted such a bill, figured out what religious accommodations to include and how to phrase them, consulted the Chamber of Commerce and other organizations, and persuaded the nation’s reddest state legislature to pass a law protecting sexual and gender minorities who seemed to violate every sentence of the Church’s influential Proclamation on the Family (1995).

For starters, the drafters faced this 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 LGBT law. Cliff Rosky, counsel to Equality Utah, insisted that discrimination based on sexual orientation or gender identity was as harmful and irrational as other forms. Church officials Bill Evans and Mike Purdy helped persuade the leadership that an integrated law made sense, and Robin Wilson showed Senator Adams how most other states had followed the integrated approach. On February 26, Alexander Dushku (outside counsel for the Church) came back with a draft bill that integrated the new protections into existing law.[[11]](#footnote-11)

The harder task 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 antidiscrimination law. To their right, Representative LaVar Christensen, the sponsor of Utah’s 2004 constitutional amendment excluding lesbian and gay couples from civil marriage, opposed a SOGI law and instead favored a Religious Freedom Restoration Act of the sort that 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 expanded Utah’s job discrimination law to bar SOGI-based discriminations and exempted from the definition of “employer” not only religious organizations, associations, and societies, but also their affiliates, leaders, and educational institutions (left undefined).[[12]](#footnote-12) In last-minute concessions 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).[[13]](#footnote-13) 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. [[14]](#footnote-14) 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, Rosky suggested that these exemptions were needed for the legislation to pass, and the national leaders reluctantly went along.

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.”[[15]](#footnote-15) 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 supported it.

The Utah Senate approved S.B. 296 on March 6 by a vote of 23-5-1—just as the coalition was on the verge of collapse. The day before, Equality Utah was surprised by the broad language of Senator Adams’ companion bill, S.B. 297. 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. The 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.[[16]](#footnote-16)

Equality Utah 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. The drafters of S.B. 297 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, the Church suggested that the drafters rework and tighten 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. The House voted 65-11 for S.B. 296 on March 11. Governor Herbert signed it into law in a huge public ceremony in the capitol the next day.[[17]](#footnote-17)

An astounded media dubbed Utah’s Anti-Discrimination and Religious Freedom Amendments Act of 2015 the “Utah Compromise,” which has been picked up by both progressives and traditionalists as a reason to dismiss the measure as a one-off deal that could not and should be replicated elsewhere. In public remarks at BYU and private conversations with Senator Adams and President Oaks, I have asked its supporters – with uneven success – to refer to the remarkable law as Utah’s “Statute of Principles.” I very much like the idea espoused by the Church that the Statute of Principles is a model for national and state laws promising “Fairness for All.”[[18]](#footnote-18)

What might those principles be? I think there are three great principles, each with important corollaries, at the heart of the 2015 law:

**1. *Nondiscrimination: Neutral Rules*.** Sections 1 and 5 of Utah’s revised antidiscrimination law protect workers against workplace discrimination, harassment, or other ill-treatment because of their race, sex, religion, gender, and sexuality. The nondiscrimination norm at the heart of that law is and ought to be central to our polity. The government should set an example by prohibiting discrimination based on traits that are unrelated to a person’s worthiness – race, ethnicity, sex, religion, disability, and now sexual orientation and gender identity. In a society where merit is rewarded and arbitrary decisions disapproved, these are criteria that should be considered irrelevant to a person’s ability to contribute. But the nondiscrimination principle also underwrites a healthy social and political pluralism. No productive classes of citizens – racial and ethnic minorities, women, religious minorities, people with disabilities, and now LGBT persons – should be subject to systematic exclusion from jobs, housing, education, and public accommodations.

This norm is as old as the Declaration of Independence and represents the best aspirations of our republic. As one of the parents of the Fourteenth Amendment put it before the Civil War, constitutional equality means that every citizen “is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties, according to higher capacities, but it welcomes all to its equal, hospitable board.”[[19]](#footnote-19) Notice the relationship of this equal care metaphor and the Golden Rule found in Mathew 7:12 as well as other Scriptural traditions (such as Quran 41: 34-35).

The nondiscrimination principle is not confined to the Equal Protection Clause that is its most explicit codification. The Supreme Court has interpreted the Due Process Clause of the Fifth Amendment and the Free Exercise Clause of the First Amendment to implement this norm for federal laws and to require nondiscriminatory treatment of religious persons and institutions, respectively. Reiterating the importance of equal treatment for gay people, *Masterpiece* applied the principle to persons of faith. By denigrating Jack Phillips’s religious reason for not baking a wedding cake for a gay wedding, while respecting progressive reasons other bakers gave for refusing to bake a wedding cake with traditionalist Bible verses, the Colorado’s Civil Rights Commission violated the government’s duty to be a neutral arbiter.

A corollary of the nondiscrimination principle, reflected in *Masterpiece*, is that different-treatment allowances – whether for religious or other reasons – should presumptively apply to all protected traits. In the Georgetown Case, Judge Theodore Newman wrote a concurring opinion, joined by a majority of the Court, rejecting the proposition that protected traits should be arrayed in a hierarchy. Sexual orientation discrimination, he maintained, ought to be no less illegal than race or sex discrimination. This is a presumption that can be relaxed, based on context. Given their heritage in apartheid, race-segregated bathrooms are clearly unacceptable even though sex-segregated bathrooms are not. If bathrooms are sex-segregated, the Utah statute gives employers discretion so long as gender minorities are reasonably accommodated.

**2. *Freedom to Be Me: Against an Apartheid of the Closet*.** Sections 1 and 5 of Utah’s revised antidiscrimination law protect what workers consider an important freedom: the freedom not to be harassed or penalized at their workplaces because of their race, sex, religion, gender, and sexuality. This freedom-to-be-myself principle is a foundational liberty in our workplace society. Other provisions of the Utah law were more direct instantiations of this freedom principle: section 10 says that employers cannot restrict workers’ expression of their moral and religious beliefs except through a business-justified rule applicable to everyone; section 7 suggests considerable latitude for employees’ dress and attire, again subject to neutral, applicable-to-everyone professional guardrails.

Another way to express this freedom-to-be-me principle is that it pushes back against employer or peer pressure for nonconforming persons to hide their identities. A home should have closets, but your home should not be a closet. I was a closeted gay professor at this University, which was suffocating and still did not insulate me from gay-bashing. Several Utah legislators told me that their enthusiasm for the Statute of Principles owed much to the empathy they felt for transgender and gay youth brutalized when they came out of the closet to their families and classmates. Conversely, when I was researching my and Chris Riano’s history of marriage equality, many persons of faith asked that I mask their identities because they feared professional ridicule or penalty for their role in faith-protecting administrative or legislative acts. The pain of the closet can be as keen for religious minorities as it has been for sexual and gender minorities.

A corollary – or more accurately a limitation or guardrail – of the personal freedom principle is that people do not have a presumptive freedom to act on their identity-based commitments in ways that hijack the commitments of other persons or institutions or bully them into phony conformity. A wedding photographer usually participates in the marriage ceremony and crafts photos and albums that interpret the occasion, the happy couple, and their witnesses. Under this corollary, the homophobic photographer acts wrongfully if they take gay wedding pictures that depict participants in what appear to be unflattering or compromising positions. Conversely, LGBT persons enjoy the personal freedom to marry those persons whom they deeply love, but their freedom does not entitle them to enlist a wedding photographer who does not, for religious identity reasons, want to participate in a gay wedding. Indeed, forced participation of a reluctant wedding photographer would likely result a less-than-satisfactory memorialization of the happy event.

**3. *Expressive Associations: Churches, Religious Institutions, and Normative Associations*.** The principle of expressive association posits that people ought to be free to associate together to enjoy and develop shared interests and ideas and to institutionalize and express those shared norms. Gay Pride events, political organizations, and (decades ago) gay bars have served as normative training grounds for personal bonding and community-building. Likewise, churches, charities, and other religious institutions have served as normative training grounds for personal bonding, spiritual development, and community-building. Even if the Free Exercise Clause did not ensure freedom for churches, the expressive association principle recognized under the First Amendment would do so.

As President Oaks suggested in last year’s Smith Lecture, religious institutions are worthy of respect and insulation from government pressure because they help the faithful reach a deeper sense of spiritual fulfillment and moral aspiration, provide social and emotional support in times of need, and can be institutional buffers between people and the government. Although many of my colleagues – probably most of them at Yale – would object to the exemption of BYU from the employment provisions of the 2015 Utah law, from the beginning I have supported it as a matter of principle. A corollary of the Supreme Court’s unanimous decision in *Hosanna Tabor* is that antidiscrimination laws ought not apply to a church’s clerics – ministers, priests, rabbis, mullahs, lamas – or seminary students. How might this apply to the Latter-day Saints, who do not have a professional clergy? Consider this: the Brigham Young Universities in Utah, Idaho, and Hawaii are considered educational institutions that prepare young persons for service as lay leaders as well as members of the Church of Jesus Christ. Utah’s flagship BYU is not a seminary per se, but its similarity to classic seminaries and its role in their faith tradition justify an allowance, as a matter of the expressive association principle.

Recall that the Boy Scouts were also exempted from the job discrimination protections of the 2015 Utah statute. Although its local chapters are usually sponsored by churches, the Boy Scouts are not a religious organization—but the Supreme Court in *Boy Scouts Association v. Dale* (2000) held that the First Amendment’s freedom of association allows them to exclude gay people from the (unpaid) position as scoutmasters. For reasons articulated by Justice Stevens, I am unimpressed with the Court’s poorly reasoned decision in that case, but I respect the general principle. Indeed, after both the Supreme Court decision and the Utah law, the Boy Scouts, left to their own internal deliberations and under the leadership of former Secretary of Defense Robert Gates, have opened their association to gay scouts and scoutmasters.

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Utah’s Anti-Discrimination and Religious Freedom Amendments Act of 2015 only addressed discrimination in the workplace and in housing. The Church and the Utah Legislature were not willing to tackle public accommodations issues in 2015, and they have not gotten any easier since then. But the principles emerging from the 2015 law provide some guidance for addressing the thornier issues presented by today’ expansive public accommodations laws. Consider some applications of the norms I have found in the Utah Statute of Principles:

**1. *Spaces of core religious institutions are not public accommodations.*** Broadly written antidiscrimination laws, like Virginia’s, should decidedly not be interpreted to apply to church sanctuaries and fellowship halls, religiously affiliated soup kitchens, or homeless shelters, even if the public is invited into those spaces. Although some of these spaces might fall within the literal coverage of public accommodations laws like Virginia’s – which includes “all places \* \* \* offering or holding out to the general public goods, services, privileges, facilities,” and so forth – as a matter of constitutional principle they must not be construed to be public accommodations churches must open to all comers if they choose. If a church-sponsored AIDS hospice only accepts persons who are members of the sponsor’s faith community, that is a decision that ought to be allowed under an antidiscrimination law. Unfortunately, from my perspective, that also means that such a hospice can also limit its services to AIDS patients who did not contract the disease from sexual contact.

This corollary ought not protect commercial enterprises that happen to be owned and operated by a religious organization or person. Thus, a Salvation Army thrift store must open its services and sell its goods to all comers in states with broad public accommodations laws – but it need not accept donations that its religious volunteers consider inappropriate. Although the Supreme Court has held that for-profit close corporations like Hobby Lobby have federal statutory free exercise rights to exclude contraceptives from their health plans, the personal freedom principle ought not insulate such commercial enterprises from state antidiscrimination laws.

**2. *Religious institutions that serve as state agencies ought to be subject to neutral regulations.***That a religious institution receives government benefits, such as tax exemptions, or even subsidies that are neutrally awarded, such as grants to support the installation of solar panels, does not affect the analysis above. Likewise, a religious institution performing a function sometimes performed by the government – like matching kids and adults for foster care and/or adoption – is not thereby brought within the ambit of state regulation. But in *Fulton,* Catholic Charities was participating in a state program: the government had taken responsibility for foster care and had entered into contracts with religious organizations to help with screening. Once the institution is a state actor, the analysis ought to change.

Thus, the participation of religious institutions in a government program does not justify that program’s discrimination against same-sex married couples, as the Court seemed to hold in *Fulton*. In my view, the Court missed a valuable opportunity. At oral argument, Justice Kavanaugh asked counsel for Philadelphia whether there was a solution to the case that respected both LGBT equality and the faith principles of Catholic Charities. Counsel had nothing to say in response to the most important question he faced – but he might have been able to answer the question if he had been familiar with Utah’s S.B. 297, the companion law for the 2015 SOGI measure. S.B. 297 guaranteed same-sex couples access to every county clerk’s office for the same handling of marriage licenses that everyone else enjoyed – but provided a behind-the-scenes process by which clerks who for religious reasons objected to such marriages could tag team with clerks having no objections. As it has done in previous controversies, the Court could have reversed and remanded *Fulton* to the lower courts, with instructions to give Philadelphia and Catholic Charities a chance to work out a similar plan for foster care screening.

**3. *Private accommodations and service providers must serve all comers but should not be required to provide customized services when contrary to their faith.*** Commercial bakeries, flower shops, thrift stores, and dress shops are included as regulated public accommodations in newer statutes like Virginia’s. In the Colorado bakery case and the Washington florist case, the religious baker and florist said they were willing to sell anything in their shops to LGBT and other customers but were not willing to sell customized cakes and floral arrangements for gay weddings. In my view, the U.S. Supreme Court was right to reverse Colorado’s aggressive remedy and inconsistent jurisprudence applied to bakeries. The Court was also probably wise not to have taken review in the florist’s case, but I think the state courts should have handled the issue more sensitively.

In *State v. Arlene’s Flowers* (2019),[[20]](#footnote-20) the Washington Supreme Court upheld the application of the state public accommodations law to require the florist to sell a gay couple floral arrangements that they could use for their wedding. The court upheld a broad injunction, damages against the florist as well as her company, and attorney’s fees. In my view, the state supreme court should have been more sensitive to the liberty as well as equality values in the case. I doubt that the trial court should have assessed damages against the florist personally as well as against her company, should have levied expensive counsel fees, or should have affirmed a broad injunction. Instead, the court should have remanded the case to the trial court to reconsider the damages and fees issues and to engage in further factfinding. The parties agreed that when the gay customer asked the florist to provide flowers for his large wedding, the florist terminated the conversation. Like the U.S. Supreme Court in *Masterpiece*, the state supreme court should have laid out a more nuanced understanding of the requirements of both equality and liberty: the public accommodations law does require florist to sell gay wedding couples a standard array of flowers, but not to customize the order any further, to deliver the flowers to the wedding, or to participate in the wedding in any way. The district court should have given the florist an opportunity to apologize for her abrupt end to the conversation and accept a duty to supply a standard floral arrangement – but without a duty to tailor the arrangement for a gay wedding or to help set of or participate in that ceremony.

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Notice that my analysis above has been inspired by the process reflected in the Utah Statute of Principles as much as the substance of those principles. Recall that progress was only possible when the primary stakeholders – Equality Utah, the Church of Jesus Christ, and the Republican Party – were motivated to work together in a spirit of openness. GOP legislators, church officials, and LGBT rights advocates were separately motivated to make this law a priority and were collectively willing to listen to one another and try to seek common ground.

The Fairness 4 All bill introduced by Latter-day Saint representatives in Congress was assailed on all sides: none of the stakeholders was willing to sign on to a respectful process. Adoption of such legislation in Congress is unlikely because of the bitter partisan polarization, the optimism that LGBT rights advocates have that the Court and the President will expand rights protections through dynamic textual interpretations of civil rights laws (but not Title II, the public accommodations provision), and the optimism that religious freedom advocates have that the Court will read RFRA and the First Amendment aggressively to carve out sweeping conscience allowances. My advice to the Court is to follow an approach of mutual accommodation rather than win-lose and to nudge lower courts, religious defendants, and LGBT rights litigators to work out principled accommodations or compromises.

No state has yet followed the Utah approach – and the more realistic challenge is to focus on a state whose business community opposes SOGI discrimination, whose LGBT leaders are hungry to work with both society and law to bring greater respect for their community, and where a religious coalition can support a moderate measure. Robin West has worked with groups in Idaho and Ohio. Maybe Protestant North Carolina, just south of here, could be a possibility.

For example, I found reservoirs of support in Arizona, a state in considerable political flux. The Arizona Chamber of Commerce led the campaign for Governor Brewer to veto a *Hobby Lobby* style Junior-RFRA in that state. Its leaders realize that a SOGI law would help attract high tech and other important businesses to the state. A coalition of moderate Catholics, Latter-day Saints, and mainstream Protestants might support SOGI legislation with appropriate religious freedoms. Ironically, I found the LGBT rights groups least willing to come to the table in that state several years ago – but I strongly hope that they are more willing today or in the near future. A process whereby faith communities, business executives, and conservative legislators encounter and listen to their journey stories is one that does more to advance equality of treatment than adoption of dry statutory language.

Consider data my colleague Robin Wilson has emphasized. 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.”[[21]](#footnote-21) Amen.

1. 141 S. Ct. (2021). [↑](#footnote-ref-1)
2. 138 S. Ct. 1712 (2018). [↑](#footnote-ref-2)
3. 140 S. Ct. 1731 (2020). [↑](#footnote-ref-3)
4. Va. Code § 2.2-3904(A) (as amended in 2020 and 2021). [↑](#footnote-ref-4)
5. 536 A.2d 1 (D.C. en banc 1987). [↑](#footnote-ref-5)
6. D.C. Code § 1–2520 (1987). [↑](#footnote-ref-6)
7. Greg Prince, *Gay Rights and the Mormon Church* 219-30 (2019). [↑](#footnote-ref-7)
8. Statement of Michael Otterson, representing the Church of Jesus Christ of the Latter-day Saints, Salt Lake City Council (Nov. 8, 2009). [↑](#footnote-ref-8)
9. *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). [↑](#footnote-ref-9)
10. 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. [↑](#footnote-ref-10)
11. William Eskridge Telephone Interview with Professor Robin Wilson, Sept. 18, 2015. [↑](#footnote-ref-11)
12. 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). [↑](#footnote-ref-12)
13. S.B. 296, §§ 7-8, codified at Utah Code §§ 34A-5-109-110 (dress code and bathroom provisions). [↑](#footnote-ref-13)
14. S.B. 296, § 14, codified at Utah Code § 57-21-3(2), (7) (limited exemptions in housing law for nonprofits and educational institutions, including BYU). [↑](#footnote-ref-14)
15. S.B. 296,§ 10(1), codified at Utah Code § 34A-5-112(1) (quotation in text). [↑](#footnote-ref-15)
16. 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). [↑](#footnote-ref-16)
17. Jennifer Dobner & Robert Gerhke, *GBT Leaders Concerned about Adams' Religious-Protection Bill*, Salt Lake Tribune, March 6, 2015. [↑](#footnote-ref-17)
18. William Eskridge Jr. & Robin Fretwell Wilson, *Introduction,* to Eskridge & Wilson, *Prospects for Common Ground*. [↑](#footnote-ref-18)
19. Charles Sumner, *Equality before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts.* Argument of Charles Sumner, Esq., Before the Supreme Court of Massachusetts In The Case of *Sarah C. Roberts v. City of Boston* 7 (Washington: F. & J. Rives & Geo. A. Bailey, 1870). For similar aspirations by other supporters of the Fourteenth Amendment, see Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard): *ibid.,* pp. 2961 (Sen. Poland), 2459 (Speaker Stevens); 2 Joseph Story, *Commentaries on the Constitution of the United States* 676-77 (Thomas Cooley ed., 4th ed. 1873). See William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 67, 73, 79 (1988); Steven Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 35-42 (2011); William Eskridge Jr., *Original Meaning and Marriage Equality*, 52 Hous. L. Rev. 1067 (2015). [↑](#footnote-ref-19)
20. 441 P. 3d 1203 (Wash. 2019), cert. denied, (2020). [↑](#footnote-ref-20)
21. Wilson, *Bathrooms and Bakers,* p. 405 (quotation in text). [↑](#footnote-ref-21)