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Still Not Equal: A Report from the Red States

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Still Not Equal: A Report from the Red States

Clifford Rosky

When I moved from San Francisco to Salt Lake City to begin teaching law, I knew that I was moving to one of the country's most conservative states—indeed, to the headquarters of the Church of Jesus Christ of Latter-day Saints, an organization widely known for promoting conservative values. I did not realize, however, that I was moving to the next battleground in the struggle for LGBT rights.

But a few weeks after I arrived, the LDS Church transformed the geography and the trajectory of the LGBT movement. On June 29, 2008, the church announced that it was joining the campaign to pass Proposition 8, a ballot initiative to prohibit same-sex marriage in California. In a letter read aloud to Mormons during Sunday services in California, the church called upon followers to “do all you can to support the proposed constitutional amendment by donating of your means and time” and explained that “Local Church leaders will provide information about how you may become involved in this important cause.”¹ By helping to repeal one of the LGBT movement's crowning achievements, the church invited attention and scrutiny from LGBT advocates across the United States.

Proposition 8 is history now, and the church stayed out of ballot initiatives in Maine, Maryland, and Minnesota in 2012.² But since the church's announcement, Utah has remained at the vanguard of the country's debates about LGBT rights. In December 2013, a federal court in Salt Lake City ruled that Utah's ban against same-sex marriage was unconstitutional—making it the first state law to fall in the wake of *United States v. Windsor*.³ In the next seventeen days, more than twelve hundred same-sex couples were married in Utah, before the Supreme Court issued a temporary stay pending appeal.⁴ In 2014, the Tenth Circuit upheld the lower court's ruling,⁵ along with the validity of the twelve hundred marriages already performed.⁶ In 2015, the Supreme Court vindicated the reasoning of the Tenth Circuit, granting same-sex couples the freedom to marry in all fifty states.⁷

As a result, LGBT activists and scholars across the country are asking “what's next” for the LGBT movement—what issues LGBT organizations should pursue now that marriage equality has been secured. Increasingly, the LGBT movement's leaders have begun to rally behind the banner of “lived equality.”⁸ While *legal* equality is defined as the equal protection of LGBT people in policies and laws, *lived* equality is measured by reference to “equality of outcomes and community wellbeing”⁹—the “lived experiences” of LGBT people.¹⁰ Drawing on “the history of civil rights struggles in the United States,” one scholar warns that “formal legal equality does not provide more resources, greater political power or better lives.”¹¹

Although the LGBT movement's interest in lived equality is greater than ever, the idea itself is not new. Twenty years ago, Urvashi Vaid described the options now confronted by LGBT activists in terms that are still apt:

We can choose in this moment to follow the path our predecessors paved—of pursuing incremental legal and legislative reform, increasing gay and lesbian visibility, pressing for fair treatment in all aspects of life. . . . But we do have the choice of reaching beyond the civil rights framework of mainstream integration, and beyond the partial equality that it delivers, to imagine and create a different movement whose goal is genuine social change.¹²

Needless to say, the contents of concepts like “lived equality” and “genuine social change” depend heavily on the particular organizations or individuals who invoke them and the particular purposes and contexts in which they are invoked. In general, however, the LGBT movement's new calls to pursue lived equality include many of the most familiar items on the progressive agenda—

namely, immigration, homelessness, education, criminal justice, and health care reforms.¹³ Rather than focusing on the LGBT movement's traditional goals—most obviously, the passage of antidiscrimination laws—lived equality focuses on the intersection of LGBT identity with race, class, ethnicity, and age.¹⁴ As a result, lived equality would require LGBT organizations to prioritize broader issues and form coalitions with a wider range of other groups—not only the NAACP, La Raza, and the National Organization for Women, but also the AFL-CIO, Sierra Club, and Occupy Wall Street.¹⁵

Before I raise any strategic questions about the wisdom of this shift, I want to be very clear about where I stand on the political values that underlie it: I wholeheartedly agree with this vision of what the LGBT movement should be fighting for. By definition, the pursuit of lived equality is vital work; the movement should not press forward without it. As the phrase suggests, equality is not worth nearly as much when it is not lived in everyday life—when it exists only in law, or only on paper. The freedom to marry is a valuable right, but it doesn't mean nearly as much when you're unemployed, homeless, uninsured, or imprisoned. Unless LGBT organizations support progressive causes, LGBT people will continue to suffer from pervasive, structural inequalities—and so will many others. (In this respect, it is worth remembering that non-LGBT people are no less equal than LGBT people, regardless of whether they are allies.) This type of work was important long before same-sex marriage and will continue to be important long after.

Yet I am a Utahn now. As an activist and scholar working in one of the country's most Republican states, I cannot resist raising a red flag about the possibility of presenting "lived equality" as a new paradigm for the LGBT movement. After all, it is a model developed by LGBT activists living and working in places like Boston, New York, San Francisco, and Washington, DC—the country's most liberal enclaves. In these settings, the LGBT movement has already achieved full legal equality for LGBT people, and there is already substantial support for the broader progressive agenda. Under such circumstances, a wholesale shift toward lived equality makes perfect sense. It's the only thing left to do, and it seems likely to be successful.

But that is not where I live, and it is not where I work. As activists and scholars anticipate the dawn of marriage equality, we must remember that even the most basic conditions of legal equality still have not been achieved in most U.S. states. Although the Supreme Court has granted same-sex couples the freedom to marry, there are still twenty-eight states without antidiscrimination laws and another twenty states without hate crimes laws. In these states, same-sex couples can marry, but LGBT people have no specific protections from being fired from their jobs, evicted from their homes, denied public services, targeted in public schools, and assaulted or murdered—all because of who they are and who they love. Under such circumstances, exercising the freedom to marry may well exacerbate these risks, rather than mitigating them: By marrying a person of the same sex, LGBT people risk outing themselves to employers, landlords, and others, which could trigger a broad range of retaliation against them.¹⁶

To be sure, even the achievement of full equality under the law would not be perfect. Nothing is. If critical theory has taught us anything about law, it is that claims based on rights and identities are always perilous, as they are implicated in a larger system of inequality that law sanctifies and structures.¹⁸ For present purposes, we can use legal protections against employment discrimination as a case study of legal equality's limits. To win a claim under such a law, you would have to start by hiring a lawyer. This is already going to be difficult, because you have just been fired from your job, so you're out of work now. You've got bills to pay, and plenty of other pressing issues to worry about. Even if you find a lawyer, then you would still have an uphill battle, because you'll have to prove that your employer fired you because you are lesbian, gay, bisexual, or transgendered. This is going to be difficult, too, because very few employers are foolish enough to give illegal reasons for firing you. In light of these kinds of obstacles, it is not surprising that

workplace protections are no panacea for structural inequalities. Fifty years after the passage of the Civil Rights Act of 1964, our country still has massive wealth and income disparities based on race and sex.¹⁹

Yet even after we take law down a peg, there are still compelling reasons to work for legal equality, limited and flawed as it may be. For many years, studies have shown that LGBT people face discrimination in many settings—not only at work and at home but in the provision of public goods and services, and in the playgrounds and hallways of schools. When the government bans discrimination in these spheres, it reaches into the heart of everyday life, striking directly at the problems of unemployment, homelessness, and the provision of everyday needs.

Recent studies suggest that antidiscrimination laws have actually reduced discrimination against gay applicants and helped to reduce the wage gaps between gay and heterosexual workers.²⁰ Of course, there will always be complicated causal questions behind the assessment of any law's impact. But even if we assume that law is likely to lag behind public opinion, we might still believe that legal reforms might be used to secure and solidify social gains—and that in some circumstances, legal and social progress might support and reinforce one another.

Moreover, even when antidiscrimination laws are not enforced, they remain potent symbols. Among other things, they signal the public inclusion of LGBT people within the community itself, and they acknowledge the profound harm that discrimination inflicts upon LGBT people. In short, we should work for the right to work because we want it, and because we deserve it. When this principle is codified in our laws, it does not end discrimination altogether, but it gives us one more tool in our arsenal—one more source of power in our political, social, and cultural struggles. At the margins, it may make it a little bit harder for employers to discriminate, and a little bit easier for employees to come out.

Finally, there is little reason to think that legal equality and lived equality are mutually exclusive options for the LGBT movement. If anything, the two goals seem to complement one another: They call upon activists to engage in many of the same kinds of work, and they depend on many of the same ideals. Indeed, the LGBT movement's track record in blue states illustrates that the labor required to secure the passage of local and statewide antidiscrimination laws—i.e., grassroots campaigns to persuade and support community leaders, municipal officials, and state legislators—establishes the social, political, and financial foundation that allows activists to pursue more progressive, ambitious reforms in future years.

Indeed, it would be both ironic and tragic if marriage, of all things, were taken as legal equality's crowning achievement. For many years, left-leaning activists have criticized the LGBT movement for pursuing the right to marry at the expense of more basic protections, which would benefit many of the LGBT community's most vulnerable members.²¹ At the same time, right-leaning critics have long objected to the LGBT movement's emphasis on litigation, rather than legislation, on the ground that so-called judicial activism is undemocratic.²² While advocates and scholars have offered thoughtful responses to these objections, the LGBT movement has little reason to ignore them now that marriage equality has been secured. By achieving the passage of laws that directly address problems like unemployment and homelessness, the movement can address criticisms from the Right and the Left.

As LGBT activists and scholars ponder what's next, we must be realistic about the opportunities and obstacles for successfully exporting the paradigm of lived equality beyond the blue states. Among other things, we will confront challenges in framing and funding this work. Because legal equality appeals to values that are widely shared by a majority of Americans, it has traditionally been more effective at attracting supporters, persuading the moveable middle, and neutralizing opponents than other issues on the progressive agenda. In swing states and red states, activists cannot afford to dismiss or ignore these advantages. Conversely, the barriers to lived equality are

more structural, more entrenched, and more persistent in swing states and red states, where progressives do not enjoy electoral majorities.

In light of these concerns, this chapter considers how the LGBT movement might pursue legal equality—alongside lived equality—now that same-sex couples enjoy the freedom to marry across the United States. In particular, it focuses on the passage of antidiscrimination laws in swing states and red states. While this objective may sound familiar—perhaps even passé—the political dynamics and strategic dilemmas that it presents are unprecedented. As one activist admits, the challenges now facing LGBT people in swing states and red states are “unlike anything we’ve faced before.”²³

The chapter begins by explaining why the LGBT movement is likely to turn “back to work” after marriage equality by focusing on the passage of antidiscrimination laws. Next, it argues that the LGBT movement will undergo two strategic shifts in pursuing this work—first, an increased investment in local rather than national lobbying, and second, an increased investment in red states and swing states, as opposed to blue states. Finally, the chapter claims that the LGBT movement will confront two strategic dilemmas in pursuing this work—whether to lobby for piecemeal bills or package deals, and how to use litigation and lobbying in ways that support each other. Without attempting to resolve the first dilemma, it argues that lobbyists must not entertain exemptions that apply only to claims brought by LGBT plaintiffs—or more broadly, any protections that fall short of what might reasonably be achieved through litigation under existing antidiscrimination laws.

After Marriage: Back to Work

If we can safely assume that what’s past is prologue, then what’s next for the LGBT movement is already clear: After marriage, the passage of antidiscrimination laws is likely to attract the greatest investment of time and money from activists and donors. It is one of the oldest items on the LGBT movement’s agenda—and to date, it has been one of the most successful.

In 1972, East Lansing, Michigan, passed the country’s first law prohibiting discrimination based on “affectional or sexual preference.”²⁴ Within five years, antidiscrimination ordinances had already been adopted in more than forty municipalities across the United States.²⁵ Today, laws protecting lesbian, gay, and bisexual people from discrimination have been adopted by twenty-two states and more than three hundred municipalities. In recent years, nearly all of these laws have included parallel protections for transgender people.²⁶

Until the Supreme Court’s ruling in *Windsor*, the LGBT movement’s progress on employment and marriage had followed a consistent trend—first comes work, then comes marriage.²⁷ Before any state had granted official recognition to same-sex relationships—by legalizing same-sex domestic partnerships, civil unions, or marriages—that jurisdiction had previously adopted a law prohibiting employers from discriminating based on sexual orientation.²⁸ In seventeen of these twenty-two states, workplace protections were passed at the same time as fair housing and public accommodations laws.

By striking down the Defense of Marriage Act (DOMA) before Congress passed federal employment protections for LGBT people,²⁹ the Supreme Court broke this historical trend: Although federal law now recognizes the validity of same-sex marriages, it still does not specifically prohibit employers from discriminating against LGBT workers. Now that the Supreme Court has invalidated state laws against same-sex marriage, twenty-eight states find themselves in similar circumstances. Now that same-sex marriage has been legalized, the LGBT movement seems likely to experience significant losses in funding and staffing. In comparison to other LGBT issues, same-sex marriage has demonstrated a truly astonishing ability to mobilize resources. In 2008, the campaign against California’s Proposition 8 attracted more than \$44 million in contributions, including more

than \$13 million from other states.³⁰ Although ballot initiatives are relatively expensive, same-sex marriage has also proved to be an exceptionally powerful fundraising tool for litigation and lobbying efforts.³¹

As a matter of popular opinion and political support, there are good reasons to predict that after marriage equality, the LGBT movement will seek to sustain momentum by lobbying for federal and state antidiscrimination laws with renewed vigor. First, such laws are widely supported by the American public: While Americans remain roughly divided on the legalization of same-sex marriage, more than two-thirds support the adoption of federal laws banning discrimination against gay and transgender workers.³² Second, and relatedly, such laws enjoy an impressive degree of support among legislators: Although Congress has not passed federal employment protections for LGBT people, it has come relatively close in recent years. In 2014, for example, the bill known as the Employment Non-Discrimination Act (ENDA) boasted 55 supporters in the Senate and 190 supporters in the House.³³ Because of this widespread appeal, antidiscrimination has a greater potential than other issues to galvanize the LGBT movement's supporters, capture undecided voters, and neutralize or marginalize the movement's opponents.

Finally, there are more tactical, defensive reasons for the LGBT movement to reinvest in the passage of antidiscrimination laws after marriage. Given the path toward marriage equality in red states—through courts, instead of legislatures—the legalization of same-sex marriage was likely to trigger a legal and cultural backlash against LGBT people.³⁴ Capitalizing on the Supreme Court's ruling in *Burwell v. Hobby Lobby*,³⁵ this backlash has been framed as a defense of so-called religious liberties—e.g., the bakers, florists, and photographers who object on religious grounds to serving same-sex weddings.³⁶ Without a robust investment in antidiscrimination work, the LGBT movement will lose the opportunity to reframe this backlash in more favorable terms—as an attack against the equality and liberty of LGBT people, rather than a defense of religious freedom.

Federal Legislation: Betting on ENDA

In our federal system, there are always two options for pursuing legislative reforms—state and federal. If we take the push for same-sex marriage as a case study, then we might assume that the federal government offers the best way to bring legal equality to swing states and red states.

For many years, the campaign for same-sex marriage has followed a carefully orchestrated framework: The earliest cases were brought in state courts, under state constitutions, in the country's most favorable states. After a few early losses during the 1970s, this strategy yielded short-lived victories in Hawai'i and Alaska, followed by civil unions in Vermont and New Jersey and same-sex marriage in Massachusetts, Connecticut, California, Iowa, and New Mexico.³⁷ By bringing these early cases in favorable forums, litigators laid the groundwork for favorable rulings in other courts and favorable legislation in other states.³⁸ As momentum built, lobbyists were able to bring along the president and the attorney general,³⁹ and litigators have now achieved a nationwide victory in the Supreme Court. This "Roadmap to Victory" was most explicitly laid out by Evan Wolfson of Freedom to Marry,⁴⁰ but it required the cooperation of countless activists, litigators, and organizations over the course of more than twenty years.

Using marriage as a model, one might wonder whether antidiscrimination law is now poised for a national moment—namely, whether Congress is ready to pass antidiscrimination protections for LGBT people in the near future. Of course, predicting the behavior of Congress is always a risky business. But in light of recent experience, it does not seem likely that Congress will pass new antidiscrimination protections for LGBT people in the short term.

During the two decades between 1994 and 2014, many LGBT organizations had been working hard to secure the passage of ENDA, a bill that would have prohibited discrimination

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based on sexual orientation (and more recently, gender identity) in employment.⁴¹ Although ENDA had many supporters in both houses of Congress, it was never able to overcome three major obstacles—partisan politics, legislative gridlock, and gerrymandering. Because all of these obstacles are still present, the passage of federal antidiscrimination legislation may remain a long shot for the foreseeable future.

Partisan Politics

First, partisan politics: Of ENDA's 254 supporters in the House and the Senate, only a handful were Republicans—eight in the House and ten in the Senate.⁴² This is hardly surprising. While the Republican Party's platform opposes "discrimination based on sex, race, age, religion, creed, disability, or national origin," it makes no mention of discrimination based on sexual orientation or gender identity.⁴³ Indeed, in a remarkable demonstration of retrograde rhetoric, the party's platform still speaks derisively of the administration's attempt to impose "the homosexual rights agenda" on foreign countries.⁴⁴ By contrast, the Democratic Party's platform opposes "discrimination on the basis of . . . sexual orientation, [and] gender identity," among other characteristics—and it explicitly supports "marriage equality" and "the movement to secure equal treatment under law for same-sex couples."⁴⁵ In November 2014, Republicans expanded control of the House, while picking up control of the Senate.⁴⁶

Legislative Gridlock

Second, legislative gridlock.⁴⁷ In most instances, the Republican House has followed the "majority of the majority" rule, commonly known as the "Hastert Rule," which prohibits a vote on any bill that is not supported by a majority of Republicans.⁴⁸ And now that Democrats have lost control of the Senate, they would need fourteen Republicans to join them to invoke cloture, breaking a filibuster.⁴⁹ To satisfy these rules, ENDA would have needed to garner support from at least four more Republicans in the Senate and 110 more Republicans in the House.

Gerrymandering

Third, gerrymandering. After the 2010 census, Republicans controlled redistricting in a majority of states. As a result, the newly established boundaries of electoral districts heavily favor Republicans, creating a larger number of districts that are "safe" for the party's incumbents. In 2012, for example, Republican House candidates lost the national vote by more than one million votes but still managed to hold onto 220 of 228 seats.⁵⁰ In 2014, Republicans won the national vote by more than four million votes, so they now hold a majority of 247 to 188—the largest Republican majority in the House since the Great Depression.⁵¹

Party Primaries

Finally, the combination of these three factors presents a fourth obstacle to the passage of antidiscrimination laws: When Republicans run in safe districts, they are more vulnerable in primaries than general elections. If they were to support ENDA, Republican incumbents would expose themselves to Tea Party challengers. In Republican primaries, voters are more likely to be libertarian, conservative, and religious—in short, Tea Party voters—and as a result, they are more likely to oppose the passage of antidiscrimination laws that protect LGBT people. As a result of this

electoral dynamic, it remains challenging for LGBT lobbyists to win over Republicans and secure the passage of antidiscrimination laws.

State Legislation: Beyond the Blue States

If antidiscrimination work is stalled out in Congress, then perhaps it's time to return to the states? Until recently, however, the LGBT movement's progress on antidiscrimination laws had been strictly limited to state legislatures controlled by Democrats—specifically, to twenty-one of the country's bluest states.⁵² In 2012, for example, the map of President Obama's victory included every state that had adopted an antidiscrimination law to protect LGBT people.⁵³

To sustain the progress of this work after marriage equality, the LGBT movement will be forced to invest in working with Republicans— venturing into more hostile territory, beyond the blue states. Presumably, the movement will begin by focusing on the remaining swing states that lack antidiscrimination laws, such as Pennsylvania, Virginia, Ohio, and Florida. As further victories are tallied, the work seems likely to proceed along the political spectrum from swing states to red states, such as Alabama, Idaho, Oklahoma, and Wyoming. Indeed, national LGBT organizations such as the Gill Foundation, the Human Rights Campaign, the Gay and Lesbian Victory Fund, and the American Civil Liberties Union's LGBT Project have already announced multi-million-dollar campaigns to win the passage of antidiscrimination laws in southern and western states.⁵⁴

A Movement Divided

I have already indicated the most obvious impact of this new dynamic: After marriage equality, the objectives and operations of LGBT organizations will diverge in blue states and red states. In fact, this shift started years ago. Once the first blue states succeeded in passing antidiscrimination laws and legalizing same-sex marriage, local LGBT groups in these states began to consider what type of work to do next.

The most striking example of this shift came from Connecticut, where the state's LGBT group (known as Love Makes a Family) closed down shortly after same-sex marriage was legalized.⁵⁵ More subtle shifts occurred in Massachusetts and Maine, where organizations have pivoted toward the pursuit of "lived equality," based on the recognition that "discrimination lives on, often in subtle ways."⁵⁶ At MassEquality, for example, the organization adopted a new tagline, "Equal, safe, and free, from cradle to grave."⁵⁷ Under this banner, MassEquality has moved into "new policy areas that focus on community well-being rather than specific protections for LGBTQ people."⁵⁸

By contrast, LGBT groups in swing states and red states will still have much work left to do after marriage, and much of that work will seem all too familiar. In such states, same-sex couples will have the freedom to marry, but they will not have protections under the state's antidiscrimination laws.

Post-Marriage Equality PACs

To protect LGBT people from discrimination at work, at home, and in the market, LGBT groups will have to reach out to Republicans in swing states and red states. Sadly, in contemporary U.S. politics, "reaching out" to politicians involves offering political endorsements and campaign contributions through Political Action Committees. Indeed, some national LGBT organizations have already helped state organizations support Republican candidates, in an effort to win new legislative victories at the state level. In 2012, for example, the *New York Times* reported that "[g]ay

rights advocates from Wall Street to Hollywood poured donations into the coffers of four little-known Republican state senators after the lawmakers provided the decisive votes for same-sex marriage in New York.”⁵⁹

Yet this model is not so easily replicated in swing states and red states. Now that same-sex marriage has been elevated to the top of the LGBT community’s agenda, it is rarely tenable for LGBT PACs to endorse Republicans in general elections. In most cases, the local LGBT community will not stand for it. The dividing line is that most Democrats are willing to publicly support same-sex marriage, as the party’s national platform indicates. In liberal and moderate districts, viable Republican candidates have been willing to support employment and housing protections, and perhaps civil unions. But for now, most Republicans still oppose to same-sex marriage in red states—or at least, they are still unwilling to publicly support it. Even if a Republican candidate personally believes in marriage equality, the political benefits of publicly acknowledging that stance as a Republican are likely to be outweighed by the political costs.

Now that same-sex marriage is legal in swing states and red states, this dynamic may shift, as moderate Republicans feel free to accept same-sex marriage as a *fait accompli*. But the dynamic is not likely to disappear altogether. Barring any sea change in party platforms, Democrats will still be more likely than Republicans to support broader protections for LGBT people in the vast majority of electoral contests. Even though the validity of same-sex marriage is resolved, this tension between the LGBT community and the Republican Party will resurface in debates over more ambitious, progressive LGBT issues—e.g., public accommodations, safe schools, and perhaps affirmative action for LGBT people.

To resolve this dilemma, the LGBT movement will have to find ways to support Republicans without alienating the LGBT community that it claims to represent, or the donors on which it has come to depend. If existing LGBT organizations cannot support this effort, then new LGBT organizations may be formed to pursue it.

Today, the most prominent example of such an organization is American Unity PAC. Founded in 2012 by a \$1 million donation from a major Republican donor, American Unity is a so-called Super PAC “focused exclusively on protecting and promoting candidates for U.S. House and U.S. Senate who support freedom for all Americans, regardless of their sexual orientation.”⁶⁰ Putting aside this organization’s particular limitations,⁶¹ American Unity represents a strategic framework that may be vital to the LGBT movement’s success in a two-party system: In order to secure the passage of pro-LGBT reforms, LGBT activists must identify pro-LGBT Republicans and donors who are willing to support them.

Better Dead Than Red?

Given the Republican Party’s mistreatment of LGBT people, the prospect of building such relationships may well be challenging (not to mention distasteful) for many of the current leaders of the LGBT movement. And in principle, at least, there is another way out of this dilemma: After marriage equality, the LGBT movement can wed itself to the fate of the Democratic Party, as it has effectively done for so many years. In this scenario, LGBT PACs would work to bring state legislatures across the country under Democratic control, as a way of regaining control of the redistricting process in a majority of states by 2020. Unless LGBT PACs can find ways to support Republican candidates, then redistricting in 2020 may well turn out be the most consequential item on the LGBT movement’s agenda in the near future. Once we step back from single issues, it is hard to imagine a single political achievement that is more likely to improve the overall welfare of LGBT people.

The danger of this approach is that Democrats have a long history of taking the LGBT community for granted. As Urvashi Vaid recently quipped, “the Democrats see us as an ATM; the Republicans, as a punching bag.”⁶² Yet even in today’s landscape, an ATM may still be better than a punching bag. After all, a party that newly embraces the legal equality of LGBT people is a far cry from a party that continues to reject it. As long as Republicans decry the advancement of “the homosexual rights agenda,” the best hope for LGBT people may be the long-term project of turning red states purple and swing states blue.

Strategic Dilemmas: Piecemeal Reforms, Package Deals, and the Delicate Relationship between Lobbying and Litigation

Beyond party politics, the LGBT movement will confront two additional dilemmas in pursuing antidiscrimination reforms: whether to present antidiscrimination bills as piecemeal reforms or package deals, and how to manage the delicate relationship between lobbying and litigation. Without attempting to resolve the first dilemma, this part of the chapter argues that LGBT lobbyists should not entertain exemptions that apply only to claims brought by LGBT plaintiffs—or more broadly, any protections that fall short of what might realistically be achieved through litigation under existing antidiscrimination laws.

All Aboard: HRC’s Omnibus Bill

The first issue is illustrated by a recent announcement from Chad Griffin, the president of the Human Rights Campaign (HRC).⁶³ For the last twenty years, HRC has been one of the country’s leading lobbyists for the passage of ENDA. In September 2014, Griffin told a gathering of transgender activists “how many thousands of hours and millions of dollars we put into the campaign for a fully inclusive ENDA.”⁶⁴ Looking ahead, Griffin promised that HRC would remain committed to the passage of ENDA: “First things first: an inclusive ENDA. . . . It will change millions of lives for the better. And as an organization, HRC will continue to invest in and fight for an inclusive ENDA.”⁶⁵

In the very next sentence, however, Griffin candidly admitted that “even a broad, inclusive ENDA isn’t enough.”⁶⁶ Stressing the importance of fair housing and safe schools, he explained, “If you’re trans, a fully-inclusive ENDA doesn’t do much good if you’re living on the street because you’ve been kicked out of your apartment . . . [or] if you haven’t been able to finish school.”⁶⁷

To address these broader concerns, Griffin then announced a significant addition to HRC’s legislative agenda: “That’s why, in the next session [of] Congress, HRC will lead the campaign for a fully inclusive, comprehensive, LGBT civil rights bill.”⁶⁸ This bill, Griffin explained, will include “non-discrimination protections that don’t stop at employment, but that finally touch every aspect of our lives—from housing, to public accommodations, to credit, to federal funding, to the education we all need to succeed and thrive.”⁶⁹ On July 23, 2015, the Human Rights Campaign joined Democratic legislators and other national LGBT organizations to announce the introduction of the Equality Act, a bill to add sexual orientation and gender identity to the protections of the Civil Rights Act of 1964 and other federal antidiscrimination laws.⁷⁰

In the abstract, it’s impossible to say which proposal is a better strategy for the LGBT movement: an employment-only bill or an omnibus bill. On the one hand, an employment-only bill is more feasible, because it’s more modest, and it may well pave the way for more ambitious bills in subsequent years. On the other hand, an omnibus bill is more inspiring precisely because it’s more ambitious. Even if the passage of an omnibus bill “is not going to be an easy fight,” it might more effectively mobilize the LGBT community and educate the general public about the many legal

inequalities that persist now that same-sex marriage is legal. In this respect, even the legislative defeat of an omnibus bill may prove helpful.⁷¹

If we look at the passage of antidiscrimination laws, the LGBT movement's track record does not weigh clearly in favor of package deals or piecemeal reforms. In seventeen of the twenty-two states that have adopted antidiscrimination laws, the legislature passed employment, housing, and public accommodations laws in the same year, as a package deal. In the remaining five states, the legislature initially passed an employment law, while deferring the passage of housing and public accommodations laws.⁷² In the long run, however, these piecemeal reforms seem no less successful than package deals: In all but one of these states, the legislature subsequently passed housing and public accommodations laws.⁷³

Moreover, as Griffin's speech implies, it may be possible to gain the benefits of each strategy while minimizing each strategy's drawbacks. Rather than introducing all of the movement's objectives within a single bill, LGBT organizations could launch public education campaigns that push multiple bills under the umbrella of a single, unified theme. For example, a campaign for the passage of antidiscrimination protections might be framed not only as providing LGBT people with a chance "to earn a living" and "pay the rent," but as giving all Americans a chance to participate in the free market, contribute to the economy, and pursue the American Dream.⁷⁴ Even when bills address a diverse range of separate subjects, they can still be presented as advancing the LGBT movement's broader goals.

However this dilemma is resolved, it is important to recognize that it is qualitatively different than an earlier dilemma faced by the LGBT movement—whether to include protections for gender identity, in addition to sexual orientation, within antidiscrimination bills. In 2007, the House of Representatives passed a version of ENDA that included only sexual-orientation protections, because some members of the House majority were not willing to support gender-identity protections.⁷⁵ ENDA's primary sponsor, Representative Barney Frank, attempted to justify this proposal as a piecemeal reform that would pave the way for gender-identity protections in subsequent years.⁷⁶ As many LGBT organizations recognized, however, this justification was problematic, because the bill failed to protect a particular class of persons, namely, transgender workers. It is one thing to pursue protections in one domain (e.g., employment), while putting off protections in other domains (e.g., housing); it is quite another to pursue protections for one group (e.g., lesbian, gay, and bisexual workers), while putting off protections for other groups (transgender workers). So long as the LGBT movement insists upon equal treatment for LGBT people, there is no obvious reason why it must insist upon the passage of all antidiscrimination laws (let alone all pro-LGBT laws) in one package deal.

Legislation, Litigation, and Symbiosis

In the struggle for same-sex marriage, legislation and litigation have often paved the way for each other.⁷⁷ In some states, courts have relied on the legislature's adoption of antidiscrimination laws as a basis for concluding that sexual orientation is legally irrelevant—and thus, for invalidating the state's laws against same-sex marriage.⁷⁸ In other states, the failure of same-sex marriage litigation has triggered legislative responses—not only limited partnerships in Hawai'i but full marriage equality in New York. More generally, a string of high-profile judicial and legislative victories in states like Massachusetts, Iowa, California, and New York established a sense of momentum, which likely bolstered subsequent ballot initiatives in states like Maine, Maryland, and Minnesota.

As Douglas NeJaime has shown, however, the relationship between legislation and litigation has not always been symbiotic.⁷⁹ To secure the passage of statutes that recognize same-sex

relationships, LGBT lobbyists have accepted religious exemptions that would not otherwise exist. In 2011, for example, Rhode Island passed a law permitting civil unions, but the law allowed all religious organizations—including hospitals, schools, and community centers—to refuse to treat any civil union “as valid.”⁸⁰ In a similar vein, the laws of several other states now “exempt religious entities from providing ‘services, accommodations, advantages, facilities, goods, or privileges’ relating to ‘the solemnization or celebration of a marriage.’”⁸¹

In a recent article in the *Stanford Law Review*, Mary Anne Case identified a similar tension between lobbying for the passage of ENDA and litigating sex discrimination claims under Title VII.⁸² As Case observed, the most recent version of ENDA included a handful of troubling exemptions: Most notably, it contained language suggesting that employers may impose “dress codes” that distinguish between males and females, and it included an exemption for religious employers. Depending on how these clauses were interpreted, they might have been used to carve out sweeping exceptions to Title VII. This would have been especially unfortunate, because transgender employees have recently begun winning sex discrimination claims under Title VII.⁸³ The irony is evident: After fighting so hard with gay lobbyists to be included in ENDA’s protections, transgender litigants may fare better off without them.

In her article, Case acknowledged that lesbian and gay plaintiffs have been less successful than transsexual plaintiffs under Title VII—but she found “some reason for optimism” in recent rulings from the Equal Employment Opportunity Commission, the agency charged with enforcing federal antidiscrimination laws.⁸⁴ In the past few years, the EEOC has begun to reverse the dismissal of sex discrimination claims brought by lesbian and gay plaintiffs—even when the plaintiff’s claim is based only on the “choice of a same-sex partner,” or the plaintiff’s “homosexual orientation.”⁸⁵ More recently, the EEOC issued a formal decision holding that “sexual orientation is inherently a ‘sex-based consideration’” and that “discrimination based on sexual orientation is necessarily . . . sex discrimination under Title VII.”⁸⁶

Whether or not federal courts end up adopting this framework, Case’s analysis offers a powerful indictment of the exemptions in ENDA, and a cautionary tale about the kinds of compromises that lobbying so often entails. At the very least, it now seems clear that the LGBT movement should not support the passage of antidiscrimination laws that would significantly jeopardize progress that LGBT plaintiffs have already made, or progress that plaintiffs seem likely to make in the near future. In particular, Case’s analysis tips the scales against accepting any new exemptions that apply specifically to claims based on sexual orientation or gender identity—or any other exemptions that are not already recognized under well-settled interpretations of existing federal or state antidiscrimination laws. If litigation still harbors the hope of full inclusion within the country’s antidiscrimination laws, then legislation should not settle for anything less.

Conclusion

Now that marriage equality exists across the United States, the LGBT movement is confronted with two Americas—one blue and one red. In a minority of states, LGBT people enjoy legal equality, but not lived equality: They have formal equality under our laws, but they do not experience themselves as equal in many aspects of everyday life. But in a majority of states, LGBT people do not enjoy equality of any kind, beyond equality in marriage itself. Although the goals of legal equality may seem old-fashioned, they are still unfilled for most LGBT Americans.

This chapter has argued that for the near future, the passage of antidiscrimination laws is an attractive target for the LGBT movement to pursue. Because this issue has widespread appeal, it seems likely to energize the movement’s base, win over moderate voters, and neutralize the movement’s most strident opponents. But after marriage equality, this work will be transformed in

two ways—first, it will shift from national to local legislatures, and second, it will shift from blue to red and swing states. In order to successfully navigate this political transition, the LGBT movement will need to build relationships with Republican legislators, or rewrite the electoral map across the United States. Unless and until the movement achieves at least one of these goals, LGBT people will not be equal in law or life.

Epilogue

As this book was going to press, Utah generated more headlines in the struggle for LGBT rights: On March 11, 2015, the Utah legislature passed SB 296, a law that prohibits discrimination against LGBT people in employment and housing.⁸⁷ Utah is the first state in which a Republican-controlled legislature passed an antidiscrimination law that protects LGBT people. With a Republican majority of 89 percent in both chambers, it is one of the country's most Republican legislatures. In addition, it is one of the country's most religious and conservative states. Because I was personally involved in drafting and lobbying for SB 296, I will let others decide the extent to which it lives up to (or falls short of) the standards of advocacy that I have articulated in this chapter. In light of my involvement, it seems more useful to share a few lessons that I learned from my experience, rather than to attempt a detailed explanation or justification of the bill's provisions.

First, the passage of Utah's law illustrates that LGBT organizations can capitalize on popular backlash against anti-LGBT campaigns, reforms, and initiatives. Shortly after the Church of Jesus Christ of Latter-day Saints (LDS Church) joined the campaign to pass Proposition 8, the church began issuing a series of statements responding to "allegations of bigotry and persecution."⁸⁸ In these statements, the church attempted to distinguish between "opposition to same-sex marriage" and "hostility toward gays and lesbians."⁸⁹ Specifically, the church noted that it did not object to "rights for same-sex couples regarding hospitalization and medical care, fair housing and employment rights, or probate rights, so long as these do not infringe on the integrity of the traditional family or the constitutional rights of churches."⁹⁰

Although the LDS Church had acknowledged that these rights were "already established in California,"⁹¹ they were still vitally needed by LGBT Utahns. To publicize the church's new statement, Equality Utah launched the "Common Ground Initiative"—a package of bills based on the church's positions that garnered overwhelming support in opinion polls.⁹² In 2009, Salt Lake City adopted municipal ordinances prohibiting employment and housing discrimination against LGBT people, after receiving the church's official endorsement.⁹³ In each of the following years, new antidiscrimination ordinances were adopted by more cities and counties. In March 2015—five months after same-sex marriage became legal—SB 296 was passed by overwhelming margins in both houses of the Utah Legislature, after another official endorsement from LDS leaders.⁹⁴

As the timing of SB 296 suggests, marriage litigation is shaping the way that lobbying is conducted in state legislatures—for good and for ill. On the one hand, the astonishing success in federal marriage litigation since *Windsor* has instilled the LGBT community with a new sense of empowerment and inevitability—and a new set of aspirations and expectations for the LGBT movement. Because marriage litigation takes place in courts, within a constitutional framework, it is an all-or-nothing endeavor: In contrast to legislation, it offers advocates and opponents less room for compromises and fewer opportunities to negotiate incremental gains. (For example, compare how frequently courts granted same-sex couples the right to marry, rather than offering the half-measure of civil unions or domestic partnerships.)⁹⁵ After witnessing so many unmitigated victories in federal courts, many LGBT people now seem emboldened to insist upon equally unmitigated

victories in state legislatures. It remains to be seen how long this fortitude will last, especially if legislative victories do not materialize early and often in the next several years.

On the other hand, the LGBT movement's rapid gains in federal marriage litigation have already precipitated a backlash from opponents. In Indiana and Arkansas, state legislatures have passed so-called Religious Freedom Restoration Acts (RFRA), which were expressly crafted as measures to legalize discrimination against LGBT people.⁹⁶ Fortunately, the legislatures amended both laws in response to public pressure,⁹⁷ which is further evidence of the movement's ability to capitalize on backlash against anti-LGBT measures. But both laws remain problematic—especially the Arkansas law—and neither state has adopted any laws to protect LGBT people from discrimination of any kind.⁹⁸ Similar “religious freedom” bills are still pending in many states—all of them swing states or red states.⁹⁹

In this emerging contest between LGBT rights and religious liberties, symbolism may turn out to be as significant as substance: In addition to negotiating the language of bills, LGBT organizations will be forced to negotiate how bills are presented to legislators and voters, many of whom have different concerns than most LGBT people. In Utah, for example, the LDS Church presented SB 296 as a “compromise” that “balances religious freedom and antidiscrimination”—a “fair, balanced approach” that achieves “fairness for all.”¹⁰⁰ Meanwhile Equality Utah, the state's leading LGBT advocacy group, presented the same legislation as a bill that “adds the words ‘sexual orientation’ and ‘gender identity’ to Utah’s anti-discrimination laws in order to establish workplace and housing protections for LGBT Utahns”—without creating “new exemptions for religious individuals or businesses owned by religious individuals,” or “any exemptions that apply only to LGBT people.”¹⁰¹ While both of these messages were valid, the tension between them allowed misinformation to spread about what the bill provided, how it would be interpreted, what it signified, and whether it could be adopted as a model by other states. Similar tensions surfaced in Arizona, Arkansas, and Indiana when LGBT groups described state RFRA as granting a “license to discriminate,” while opponents described them as protecting “religious liberties.” The question of how the LGBT movement might organize public education campaigns to address these challenges is not any less complex—nor any less vital—than the other strategic dilemmas explored in this chapter. In order to establish full equality for LGBT Americans—in law and in life—the LGBT movement may need to tackle each of these new challenges in swing states and red states.

Notes

1 Letter from First Presidency of Church of Jesus Christ of Latter-day Saints to Church Leaders in California, <http://www.mormonnewsroom.org/article/california-and-same-sex-marriage>, accessed April 2015.

2 See Luke Perry, *Mitt Romney, Mormonism, and the 2012 Election* (New York: Palgrave, 2014), pp. 67–69.

3 *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013).

4 *Evans v. Utah*, 21 F.Supp.3d 1192 (D. Utah 2014).

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

6 *Evans v. Utah*, No. 14–4060 (10th Cir. July 11, 2014).

7 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

8 See, e.g., Rebecca Isaacs, “The LGBT Movement after Marriage,” *Advocate.com*, June 12, 2014, <http://www.advocate.com/commentary/2014/06/12/op-ed-lgbtmovement-after-marriage>, accessed April 2015.

- 9 Fran Hutchins, “What’s Next? Building Stronger LGBTQ Organizations beyond the Marriage Milestone,” Equality Federation Institute 2014, http://equalityfederation.org/sites/default/files/Whats_Next.pdf, accessed April 2015.
- 10 See, e.g., Isaacs, “The LGBT Movement after Marriage.”
- 11 Lisa Duggan, “Beyond Formal Equality,” in “What’s Next for the LGBT Movement?” Nation, June 27, 2013.
- 12 Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* (New York: Doubleday, 1995), p. 2.
- 13 See, e.g., Hutchins, “What’s Next?” p. 4; Urvashi Vaid, “Be Transformative, Not Transfixed!” in “What’s Next for the LGBT Movement?” Nation, June 27, 2013; Hayley Gorenberg, “Beyond Marriage: What’s Next for the LGBT and HIV Rights Movement,” April 13, 2013, <http://www.lambdalegal.org/blog/beyond-marriage>, accessed April 2015.
- 14 See Hutchins, “What’s Next?” pp. 4, 5, 17; Gorenberg, “Beyond Marriage.”
- 15 See Vaid, *Virtual Equality*, p. 285–303; Duggan, “Beyond Formal Equality.”
- 16 See Michael Paulson, “Gay Marriages Confront Catholic School Rules,” New York Times, Jan. 23, 2014, at A1 (describing “a wave of firings and forced resignations of gay men and lesbians from Roman Catholic institutions across the country, in most cases prompted not directly by the employees’ sexuality, but by their decisions to marry as same-sex marriage becomes legal in an increasing number of states”); Bob Shine, “Catholic Jobs Lost over LGBT Issues on the Rise,” National Catholic Reporter, Sept. 25, 2014 (noting that “[f]ive dioceses have revised teacher contracts explicitly banning employees from supporting same-sex relationships in both their professional and their personal lives”).
- 17 Vaid, *Virtual Equality*, p. 2.
- 18 See, e.g., Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995).
- 19 To add insult to injury, such laws are often invoked to justify the same disparities that they were intended to target: If you have the right to work, the logic goes, then problems like homelessness and unemployment must be your fault. And finally, campaigning for employment discrimination laws often masks the intersection of LGBT identity with other traits. For simplicity’s sake, these campaigns often focus on the singular injustice of being fired “just for being gay” or “just for being transgendered.” While this rhetoric is effective with the moveable middle, it presents a very narrow, privileged picture of who “we” are. If we’re being fired “just for being gay,” then we must be white, wealthy, male, young, and able—i.e., people who are not subject to other forms of discrimination based on race, class, sex, age, or disability, among other things.
- 20 Marieka Klawitter, “Multilevel Analysis of the Effects of Antidiscrimination Policies on Earnings by Sexual Orientation,” 30 *Journal of Policy Analysis and Management* 334–58 (2011); Gary Gates, “The Impact of Sexual Orientation Anti-Discrimination Policies on the Wages of Lesbians and Gay Men,” 2009 (unpublished), available at <http://papers.ccpr.ucla.edu/abstractphp?preprint=544>, accessed April 2015.
- 21 See, e.g., Paula Ettelbrick, “Since When Is Marriage a Path to Liberation?” *Out/ Look*, Fall 1989, pp. 9, 14–17.
- 22 See, e.g., Robert P. George, “Gay Marriage, Democracy, and the Courts,” *Wall Street Journal*, Aug. 3, 2009.
- 23 Hutchins, “What’s Next?” p. 24.
- 24 Lillian Faderman et al., eds., *Great Events from History: Gay, Lesbian, Bisexual, and Transgender Events, 1848–2006* (Ipswich, MA: Salem Press, 2007), p. 228.

25 William Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: Harvard University Press, 1999), pp., 328–37, 356–61.

26 No state has passed a law that bans discrimination based on sexual orientation, but not gender identity, since 2002. N.Y. Exec. Law § 296 (2003). In 2008, however, the U.S. House of Representatives passed a version of ENDA that did not include gender identity protections. See Final Vote Results for Roll Call 1057,

H.R. 3685. And in 2011, Massachusetts banned discrimination based on gender identity in employment and housing, but refused to ban discrimination based on gender identity in public accommodations. Compare Mass. Gen. Laws ch. 151B, § 4 (1989), with Mass. Gen. Laws ch. 272 § 92A (1989).

27 Indeed, the same pattern has been repeated in European countries. Kees Waaldijk, “Eight Major Steps in the Legal Recognition of Homosexual Orientation: A Chronological Overview of National Legislation in the Member States of the European Union,” <https://openaccess.leidenuniv.nl/handle/1887/12684>, accessed April 2015.

28 In Maine, the sequence of these events was unusual. In 1997, the legislature passed an employment law, but it was then narrowly repealed by voters. In 2004, the state legalized civil unions. In 2005, the state passed a comprehensive antidiscrimination law. Me. Rev. Stat. Ann. tit. 5, § 4572, § 4582, § 4592 (2005).

29 DOMA was a federal law that defined marriage as the union of one man and one woman, thereby banning the federal government from recognizing same-sex marriages. Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C. The most recent bill to include federal employment protections for LGBT people was known as the Employment Non-Discrimination Act (ENDA). See 113th Congress, H.R. 1755; S.B. 815. ENDA was a federal bill to prohibit employment discrimination based on sexual orientation and gender identity. See 113th Congress, H.R. 1755; S.B. 815.

30 Although the Prop 8 campaign was more costly than others, similar campaigns in other states have attracted impressive contributions. In 2012, supporters of same-sex marriage raised \$12 million in Minnesota, \$9 million in Washington, and \$4 million in Maryland, which helped secure successful ballot initiatives in these states.

31 See, e.g., Annual Report of American Foundation for Equal Rights; Danny Hakim, “Money Flows to G.O.P. Backers of Same-Sex Marriage,” *New York Times*, Jan. 17, 2012, <http://www.nytimes.com/2012/01/18/nyregion/money-flows-to-gop-backers-of-gay-marriage-in-new-york.html>, accessed April 2015.

32 Maggie Haberman, “Poll: Big Support for Anti-Discrimination Law,” *Politico*, Sept. 30, 2013.

33 See U.S. Senate Roll Call Votes, 113th Congress—1st Session, Vote Summary, on Passage of the Bill (S. 815 As Amended), Nov. 7, 2013; U.S. House of Representatives, 113th Congress—2nd Session, Discharge Petition No. 0011, Motion to Discharge a Committee from the Consideration of House Resolution 678, providing for the consideration of Senate Bill 815, Sept. 17, 2014. In 2013, sixty-four senators voted in favor for ENDA, but nine of these senators were Democrats subsequently replaced by Republicans.

34 See Michael Klarman, “*Brown* and *Lawrence* (and *Goodridge*),” 104 *Michigan Law Review* 431 (2005).

35 134 S.Ct. 2751 (2014).

36 See, e.g., *Elane Photography v. Willock*, 296 P.3d 491 (N.M. 2012).

37 *Baehr v. Lewin*, 852 P.2d 44 (Hawai’i 1993); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Sup. Ct. Feb. 27, 1998); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003);

Kerrigan v. Commission of Public Health, 957 A.2d 407 (Conn. 2008); In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

38 Thomas M. Keck, “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” 43 Law and Society Review 151 (2009).

39 Letter of United States Attorney General Eric Holder to Speaker John A. Boehner dated February 23, 2011, available at <http://www.justice.gov/opa/pr/letterattorney-general-congress-litigation-involving-defense-marriage-act>, accessed April 2015.

40 See Roadmap to Victory, Freedom to Marry, <http://www.freedomtomarry.org/pages/roadmap-to-victory>, accessed April 2015.

41 Alex Reed, “Abandoning ENDA,” 51 Harvard Journal of Legislation 277, 281–82 (2014).

42 Lauren Fox, “GOP House Leaders Still Oppose ENDA: Republicans who Support ENDA Urge Leaders in the House to Act,” U.S. News & World Report, June 16, 2014.

43 Republican National Platform 2012, “We Believe in America,” at 9.

44 Republican National Platform 2012, “We Believe in America,” at 46.

45 Democratic National Platform 2012, “Moving America Forward,” at 17–18.

46 Jonathan Weisman & Ashley Parker, “G.O.P. Takes Senate,” New York Times, Nov. 5, 2014, at A1.

47 See generally Michael J. Teter, “Congressional Gridlock’s Threat to the Separation of Powers,” 2013 Wisconsin Law Review 1097.

48 Molly Ball, “Even the Aide Who Coined the Hastert Rule Says the Hastert Rule Isn’t Working,” Atlantic, July 21, 2013.

49 See Senate Comm. on Rules & Admin., Standing Rules of the Senate, S. Doc. No. 110–9, R. XXII.2, at 15–16 (2007).

50 See Federal Election Commission, Federal Elections 2012, Elections Results for the U.S. President, the U.S. Senate, and the U.S. House of Representatives, at 11, available at <http://www.fec.gov/pubrec/fe2012/federalections2012.pdf>, accessed April 2015.

51 See Jonathan Martin, “Voters’ Second Thoughts on Hope and Change,” New York Times, Nov. 4, 2014, at P6 (observing that “the Republican hold on the House may be impregnable until after district lines are redrawn again in the next decade— largely because of the party’s enlarged majority and gerrymandered seats”).

52 As this chapter was going to press, Utah became the first state in which a Republican-controlled legislature passed an antidiscrimination law that protects LGBT people. This development is described in the epilogue.

53 In a remarkable demonstration of this link, Colorado passed antidiscrimination laws in 2007 and 2008, shortly before it flipped from red to blue in November 2008. See Colo. Rev. Stat. § 24–34–402 (2007) (employment); Colo. Rev. Stat. § 24–34–502 (2008) (housing); Colo. Rev. Stat. § 24–34–601 (2008) (public accommodations); Rob Witwer & Adam Schrager, *The Blueprint: How the Democrats Won Colorado (and Why Republicans Everywhere Should Care)* (Golden, CO: Fulcrum Publishing, 2010).

54 See Nicholas Confessore & Jeremy W. Peters, “Gay Rights Push Shifts Its Focus South and West,” New York Times, Apr. 27, 2014.

55 Hutchins, “What’s Next?” p. 15.

56 Hutchins, “What’s Next?” p. 13.

57 Hutchins, “What’s Next?” p. 12.

58 Hutchins, “What’s Next?” p. 12.

59 Danny Hakim, “Money Flows to G.O.P. Backers of Same-Sex Marriage,” *New York Times*, Jan. 17, 2012, <http://www.nytimes.com/2012/01/18/nyregion/money-flowsto-gop-backers-of-gay-marriage-in-new-york.html>, accessed April 2015.

60 See www.americanunitypac.com, accessed April 2015.

61 A few limitations stand out: First, the PAC’s contributions are exclusively limited to candidates who support same-sex marriage. Second, the PAC’s contributions are largely limited to Republican candidates running in blue states. Third, and most troubling, the PAC’s materials support only the rights of “gay and lesbian Americans,” while making no mention of the rights of bisexual or transgender Americans. See www.americanunitypac.com, accessed April 2015.

62 Urvashi Vaid, “Be Transformative, Not Transfixed!” in “What’s Next for the LGBT Movement?” *Nation*, June 27, 2013.

63 Rebecca Juro, “Transcript: HRC President Chad Griffin Apologizes to Trans People at Southern Comfort,” *Advocate.com*, Sept. 5, 2014, <http://www.advocate.com/print/politics/transgender/2014/09/05/transcript-hrc-president-chadgriffin-apologizes-trans-people-speech>, accessed April 2015.

64 Juro, “Transcript.”

65 Juro, “Transcript.” Admittedly, it was not clear precisely what Griffin meant by “ENDA” in this speech. On July 8, 2014—two months before Griffin spoke—several of the country’s leading organizations had already issued a joint statement withdrawing support for the current version of ENDA, because of the bill’s broad exemptions for religious organizations that applied only to LGBT workers. See American Civil Liberties Union et al., Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People, available at https://www.aclu.org/sites/default/files/field_document/joint_statement_on_enda.pdf, accessed April 2015.

66 Juro, “Transcript.”

67 Juro, “Transcript.”

68 Juro, “Transcript.”

69 Juro, “Transcript.”

70 Sophia Tesfaye, “‘The Equality Act’: Democrats Push Bill Banning LGBT Discrimination,” *Salon*, July 23, 2015.

71 Cf. Douglas NeJaime, “Winning through Losing,” 96 *Iowa Law Review* 941 (2011); Thomas M. Keck, “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” 43 *Law & Society Review* 151 (2009).

72 See Haw. Rev. Stat. § 378–2 (2011) (employment, originally passed in 1991); Haw. Rev. Stat. § 515–3 (2011) (housing, originally passed in 2006); Haw. Rev. Stat. § 489–3 (2011) (public accommodations, originally passed in 2011); Cal. Gov’t Code

§ 12940 (employment, originally passed in 1993); Cal. Gov’t Code § 12955 (housing, originally passed in 1999); Cal. Civ. Code § 51 (public accommodations, originally passed in 2005); Nev. Rev. Stat. § 613.330 (2011) (employment, originally passed in 1999); Nev. Rev. Stat. § 118.100 (2011) (housing, originally passed in 2011); Nev. Rev. Stat. § 651.070 (2011) (public accommodations, originally passed in 2009); Colo.

Rev. Stat. § 24–34–402 (2007) (employment); Colo. Rev. Stat. § 24–34–502 (2008) (housing); Pa. Colo. Rev. Stat. § 24–34–601 (2008) (public accommodations).

73 The only exception is Utah, which passed employment and housing protections while this book was going to press. Utah’s antidiscrimination law is addressed in the epilogue of this chapter.

74 I thank Troy Williams, executive director of Equality Utah, for suggesting this theme for the organization’s post–marriage equality agenda.

75 See 110th Congress, House Resolution 3685.

- 76 “ENDA to Be Separated into Two Bills: Sexual Orientation and Gender Identity,” Advocate, Sept. 28, 2007 (quoting Rep. Barney Frank’s prediction that “moving forward on this bill now will also better serve the ultimate goal of including people who are transgender than simply accepting total defeat today”).
- 77 Thomas M. Keck, “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” 43 Law & Society Review 151 (2009).
- 78 See, e.g., *Varnum v. Brien*, 763 NW 2d 862, 890–892 (Iowa 2009).
- 79 Douglas NeJaime, “Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination,” 100 California Law Review 1169 (2012).
- 80 NeJaime, “Marriage Inequality,” p. 1188.
- 81 NeJaime, “Marriage Inequality,” p. 1187.
- 82 Mary Anne Case, “Legal Protections for the ‘Personal Best’ of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of *Price Waterhouse v. Hopkins*, and the Prospect of ENDA,” 66 Stanford Law Review 1333 (2014). See also Reed, “Abandoning ENDA.”
- 83 *Smith v. City of Salem*; *Glenn v. Brumby*; *Macey v. EEOC*.
- 84 Case, “Legal Protections,” p. 1353.
- 85 Case, “Legal Protections,” p. 1353.
- 86 *Baldwin v. Foxx*, Appeal No. 0120133080 (July 15, 2015), available at <http://www.eeoc.gov/decisions/0120133080.pdf>.
- 87 Senate Bill 296, Antidiscrimination and Religious Freedom Amendments, available at <http://le.utah.gov/~2015/bills/static/SB0296.html>. The bill was signed by the governor of Utah on March 12, 2015, and went into effect on May 11, 2015.
- 88 “Church Responds to Same-Sex Marriage Votes,” Nov. 5, 2008, <http://www.mormonnewsroom.org/article/church-responds-to-same-sex-marriage-votes>, accessed April 2015.
- 89 “Church Responds to Same-Sex Marriage Votes.”
- 90 “Church Responds to Same-Sex Marriage Votes.”
- 91 Carrie A. Moore, “LDS Church Issues Statement on Same-Sex Marriage,” Deseret News, Sept. 10, 2008 (quoting LDS Church statement, “The Divine Institution of Marriage,” posted on Aug. 13, 2008).
- 92 Lisa Duggan, “What’s Right with Utah,” Nation, June 24, 2009.
- 93 Statement Given to Salt Lake City Council on Nondiscrimination Ordinances, Nov. 10, 2009, <http://www.mormonnewsroom.org/article/statement-given-to-salt-lake-city-council-on-nondiscrimination-ordinances>, accessed April 2015.
- 94 Niraj Chokshi, “Gay Rights, Religious Rights, and a Compromise in an Unlikely Place: Utah,” Washington Post, Apr. 12, 2015; “Utah Lawmakers Introduce Bill Balancing Religious Freedom and Nondiscrimination Protections,” Mar. 4, 2015, <http://www.mormonnewsroom.org/article/utah-lawmakers-introduce-bill-balancing-religious-freedom-and-nondiscrimination-protections>, accessed April 2015.
- 95 Only two courts have held that the legalization of civil unions is constitutional, because it provides equal benefits to same-sex couples. See *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). By contrast, dozens of federal and state courts have now found that anything less than marriage is unconstitutional, typically because it denies same-sex couples the equal protection of the laws.
- 96 Garrett Epps, “The Next Steps in the Battle over Religious-Freedom Laws,” Atlantic, Apr. 2, 2015.
- 97 Monica Davey et al., “Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts,” New York Times, Apr. 2, 2015.

98 Arkansas' law is especially problematic because it does not clarify whether it can be invoked as a license to discriminate against third parties. Moreover, Arkansas recently passed another law that repeals existing antidiscrimination ordinances passed by municipalities, and prohibits municipalities from adopting such ordinances in the future. See Jeff Guo, "Everything You Need to Know about the Gay Discrimination Wars in 2015," Washington Post, Feb. 25, 2015.

99 See American Civil Liberties Union, "Anti-LGBT Religious Refusals Legislation around the Country," available at <https://www.aclu.org/anti-lgbt-religiousrefusals-legislation-across-country?redirect=lgbt-rights/anti-lgbt-religiousrefusals-legislation-across-country>, accessed April 2015.

100 Church of Jesus Christ of Latter-day Saints, "Church Applauds Passage of Utah Senate Bill 296," available at <http://www.mormonnewsroom.org/article/churchissues-statement-on-utah-house-bill-296>, accessed April 2015.

101 Equality Utah and the ACLU of Utah, "FAQ: SB 296, Utah's New Law Protecting LGBT People from Discrimination," available at http://www.equalityutah.org/images/docs-pdfs/FAQ_SB296_Digital.pdf, accessed April 2015.