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The 'Utah Compromise' as Seen After the Indiana Tipping Point

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When the news of the "Utah compromise" was broadcast in March, many LGBT activists, including me, were taken by surprise. It was shocking in and of itself -- Utah (Utah!) had become the 19th state with trans-inclusive protections in employment and housing -- but coming out of secret negotiations, and shortly after the community's failure in Arkansas, which had preempted local antidiscrimination protections, it was stunning. And before we had the chance to process the surprise, the Indiana super-Religious Freedom Restoration Act (RFRA) was upon us, and our attention was diverted.

This legislative compromise (S.B. 296/297) in Utah, coming soon after the multiple losses in Arkansas and just months before the Supreme Court rules on marriage in *Obergefell v. Hodges*, raises fascinating questions. Those questions become even more interesting now a month later, after the significant (though limited) LGBT victory in Indiana. What to think about the progress in the second-most-conservative state in the nation in light of Indiana being *penced*?

I see two major points to highlight, and one critical conclusion:

- While this has been called a general antidiscrimination law, it is a limited one in that it does not cover public accommodations. All the laws that protect trans and gay residents in the states include public accommodations as well as employment and housing; only Massachusetts and now Utah do not cover public accommodations. Given the religious-refusal campaigns occurring today, with fights over providing cakes, flowers and photography for gay couples, as well as trans bathroom access, Utah successfully dodged the very difficult conversations on these acutely emotional issues.
- Utah has more sweeping protections for religious belief than any other state and has had those protections since before the state RFRA laws came to legislative attention beginning in the late '90s. This law adds the LGBT community to the protected classes already covered in Utah, but those protections are severely limited by religious carve-outs already in place.

- The most important conclusion to me, particularly post-Pence, is that the actions of the local LGBT and Mormon communities over the past six years created an environment of growing trust where agreement, though limited, could occur. Gay people talked with religious Mormons and got something done, and the Mormons overcame their prejudices and did the same. That can only be a harbinger of better things to come elsewhere if we take advantage of the opening.

What this compromise is *not* is a model for other states. Utah, as previously mentioned, is a unique entity, and offering ever-increasing room for religious exceptions elsewhere would undermine the value of all antidiscrimination laws. Utah was not going to step back from its broad religious-liberty exceptions, but other states shouldn't expand theirs. What Indiana showed the country is that in America the dollar reigns supreme. This is not a news flash, but while corporate support for equality has been growing steadily and manifested its strength in Arizona in defeating their RFRA last year, the overwhelming show of support for the LGBT community in Indiana was exponentially more significant. The community catalyzed the effort, but once that was done, the reaction ran by itself. Why should the LGBT community now go back to February and take so much less than it deserves, now knowing how the culture has suddenly changed? Government officials are speaking out in some surprising places, such as North Dakota, Louisiana, and Georgia, not wanting to be seen as bigots by the business community. That is a huge change in the civil rights landscape in America.

There are several other factors about the bill itself worth noting. The first deals with freedom of speech, which annoys my friend Walter Olson, a senior fellow in constitutional studies at the Cato Institute, a libertarian think tank. Walter highlights this paragraph from the bill:

An employee may express the employee's religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer.

As he points out, this is a novel addition to American law, and quotes *The New York Times*:

The bill also would protect employees from being fired for talking about religious or moral beliefs, as long as the speech was reasonable and not harassing or disruptive.

Walter is primarily concerned that this law will infringe on an employer's ability to manage his workforce, and while I agree with that concern, I am more concerned about the free-for-all that will occur when the guy in the next cubicle starts preaching to you and claims protection under S.B. 296. What is "reasonable and not harassing or disruptive" to a conservative Mormon may not jive with the feelings of a secular Utahn. This is an invitation to chaos.

As far as the debate within the LGBT community goes, there has been precious little of it. HRC grabbed control of this bill and has been promoting it as a great compromise. Referencing the panel at the Brookings Institute where the legislation was recently discussed, Jonathan Rauch, long-time conservative gay activist, points out:

[HRC's] Warbelow said (I'm paraphrasing) that she can support religious-freedom protections that track with existing law and don't impose special burdens on LGBT people, and Diament [of the Jewish Orthodox Union] said (again I paraphrase) that he can support LGBT antidiscrimination protections that track with existing law and don't create special carve-outs for LGBT people. The devil is in the details (same-sex marriage, to name an obvious example, raises issues that don't apply to other minority groups), but the agreement on a neutral baseline seems like a good place to start talking.

Clearly, most will agree that any time you can get Orthodox Jews and HRC speaking civilly to one another, that's a good thing in and of itself, but, as Rauch says, the devil is in the details. Rauch also points out that simultaneity was key, but it took years to get there. When there was recently an opportunity in Indiana to add LGBT protections as the super-RFRA was being amended, the governor and state legislature demurred. So much for even an acknowledgment of the possibility of simultaneity.

Jay Michaelson takes the law to task by pointing out that this law, if applied elsewhere, would be a disaster for women and other minorities. It would downgrade the protections for race and sex that are already in place in other states that currently don't have LGBT protections. And HRC is imposing on the community its conception of how a religious exemption should look, a notion last summer vociferously opposed by most other national LGBT organizations.

Still, looking at the historic nature of the passage of this bill in a state where none thought it possible, most observers focused on the positive. The *Boston Globe* opined:

The bill shows that free-speech rights of religious Americans and the civil rights of gay people do not have to be in opposition to each other. Just as important, the Utah legislature just reminded politicians across the country that, in fact, half a loaf is often better than no loaf at all.

K. Hollyn Hollman, General Counsel for the Baptist Joint Committee for Religious Liberty, wrote positively:

It appears many in Utah did the hard work of listening, explaining, writing and compromising, so that different groups could get things they needed. If Utah is a pathway for other states, it will be because those who care about statutory protections for religious liberty work diligently and honestly to explain what and why legislation is needed and how others will be affected. That is an example worth following.

Bill Galston, a fellow congregant who works at the Brookings Institute, writing in *The Wall Street Journal*, adds:

In an interview after the event, Gov. Leavitt discussed the circumstances that made agreement possible. The threshold condition was a shared belief that the status quo was intolerable: "There was a lot of pain in Utah on both sides of this issue."

There is a lot of pain on both sides, but far more for the LGBT community, which still suffers disproportionate discrimination and abuse, compared with religious conservatives, who now

enjoy portraying themselves as victims, harkening back to the early centuries of the Christian Church. That might have worked in Byzantium, but it ultimately won't work in America. My Jewish denomination taught when I was a youth, "Be a Jew at home and a man out in the world." These Christians should hew to their universal ethical principles and leave their particularism behind when they're in the workplace. That way we can all get along and not become smothered in resentments. As the Jewish Sages said, "Meet every person with graciousness" (Pirkei Avot 1:15).

And then added, "And be humble when you're preparing their wedding cake, and be grateful to share in its enjoyment. It tastes really good!"

Or maybe not, but they could have.