

NATION

THE BATTLE OF INDIANA

How a showdown over religion and gay rights is changing the culture war
BY DAVID VON DREHLE

Gov. Mike Pence addresses criticism of the Religious Freedom Restoration Act at a March 31 press conference in Indianapolis

In war—whether a shooting war or a culture war makes no difference on this point—only some of the battles are carefully planned.

Others explode as if from nowhere. A little skirmish or rearguard action can quickly turn into a major collision, a Battle of Gettysburg, for example.

Something like that happened in Indiana during the last days of March. A bill in the state legislature, a mostly symbolic last stand by routed conservatives opposed to same-sex marriage, triggered a massive response from gay-rights advocates. Governor Mike Pence's signature on his state's Religious Freedom Restoration Act (RFRA) looked at first like a successful raid on competing social conservatives in the crowded field of Republican presidential hopefuls.

But just over the ridge lay every weapon in the progressive arsenal, from the sniper fire of social media to the siege guns of business and celebrity. Apple CEO Tim Cook protested the law on behalf of the world's most valuable company. Basketball Hall of Famer Charles Barkley wondered if Indianapolis was still fit to host the NCAA's much watched Final Four, set to begin less than two weeks after Pence signed the bill into law. Suddenly, more than two decades of painstaking work to attract jobs and tourists to the Hoosier State was being pounded to rubble, moving the state's largest newspaper—the Indianapolis *Star*—to bugle retreat in a front-page editorial. **FIX THIS NOW**, the paper headlined in World War Three font. "Indiana is in a state of crisis," the editors warned the governor. "It is worse than you seem to understand."

As a shaken Pence and state lawmakers scrambled for a way out, in charged the Arkansas legislature like Tennyson's Light Brigade—at least that's how it looked to beleaguered traditionalists in search of defiant heroes. A bill virtually identical to the Indiana law landed on the desk of Governor Asa Hutchinson, a business-minded

Republican whose promise to sign it drew fire from the Bentonville battalions at Walmart headquarters. Citing "the benefits of diversity and inclusion," CEO Doug McMillon urged on behalf of the world's largest retailer that Hutchinson reverse course and issue a veto, and on April 1, the governor announced that he would insist on changes.

Why tangle with such foes? Given the apparent readiness of the U.S. Supreme Court to legalize same-sex marriage nationwide later this year, social conservatives have no prospect of a substantial victory. The culture war over gay rights is largely decided; what remains is the mainly rhetorical question of whether a florist or baker or photographer can refuse, on religious grounds, to supply a wedding bouquet where there is no bride, or a celebratory cake without a groom on top.

RFRA laws, in this context, are seen by supporters as protection for traditional convictions, and by opponents as a protection for bigotry. This conflict is mainly rhetorical because, with the exception of a very few exceedingly well-publicized cases

(none involving couples from Indiana or Arkansas), the businesses that make up America's \$50 billion wedding-industrial complex in fact appear delighted to welcome their new customers. The number of ceremonies rendered cakeless or flowerless by hatred is, as far as we know, zero.

But symbols count, and the ones at stake in this unexpected clash are significant in a number of ways. It's one thing for Cook, the openly gay leader of a high-end, design-conscious consumer-goods and retail company, to align himself, his board and his employees with LGBT priorities. It's another thing to see McMillon, a Jonesboro, Ark., native with a wife and two sons, do the same with a company whose roots are firmly in small-town America. While Apple recently announced a deal to do business in Saudi Arabia, where homosexuals are subject to being imprisoned, flogged or even executed, it is clear that corporate America has decided that in the U.S., gay rights are the future. Their judgment is shared by local politicians like Indianapolis Mayor Greg Ballard, a Republican who reacted to Pence's signature by reaffirming the city's antidiscrimination ordinance, and by local business leaders like the Little Rock Chamber of Commerce.

But if traditionalism is bad business, it may still be tempting politics for candidates navigating the tempest in the GOP. The race for the 2016 nomination is both crowded and wide open—rarely the case in Republican presidential politics. The eventual winner will likely be the candidate who galvanizes a fragment of the GOP's base—the country clubbers or the libertarians or the social conservatives—while minimizing the resentment stirred up inside the other factions.

Sounds easy enough, but the RFRA battle shows otherwise. Pence may have helped himself with social-issue Republicans by signing a bill in defense of their cherished symbols, but by doing so he damaged himself with Republicans from the Chamber of Commerce and libertarian factions. To cave or not to cave? Whether 'tis nobler in the GOP to embrace the changing mood of the country or fight to the last soldier for endangered values: that is the question, and Indiana is proof that it won't easily be answered.

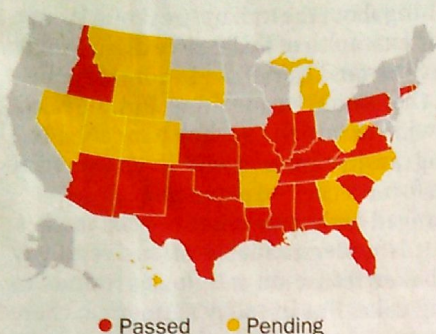
Another lesson could be drawn from the whiplash that traditional religious Americans may be feeling in the last

Whose rights are most at risk? Is it the believer whose religious convictions are out of step with political power? Or is it the person whose freedoms run afoul of the believer's faith?

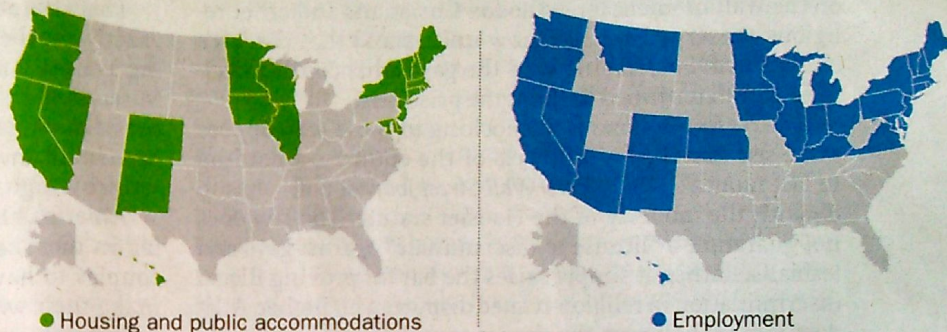
The State of State Laws

Most states do not have laws explicitly prohibiting a baker or florist from turning away a customer because he or she is gay or transgender. Critics of religious-freedom measures worry that the protections will be used as a legal way to bypass existing antidiscrimination laws

States with Religious Freedom Restoration Acts



States that prohibit discrimination based on sexual orientation and/or gender identity



Public accommodations include government entities and private businesses like restaurants, theaters, libraries and stores. Does not include private clubs.
Sources: National Conference of State Legislatures; Human Rights Campaign

weeks before one of the world's central institutions—marriage—appears set to receive its official revision in the Supreme Court. This revolution has been 25 years coming, but a quarter of a century is a finger snap in the millennia of human history. And for half of those 25 years, the traditionalists had reason to believe that they were winning. Now this issue divides Republicans, but for many years it split the Democrats. It was Democratic President Bill Clinton who signed the original RFRA in 1993 and the traditionalist Defense of Marriage Act in 1996. Another Democrat in the White House, President Barack Obama, opposed same-sex marriage until 2012. And the current front runner for the 2016 party nomination, Hillary Clinton, kept up her opposition even longer.

When advocates for same-sex marriage were a small but vocal minority, they were at pains to say that they weren't interested in changing the religious definition of marriage—only the civil laws. The Battle of Indiana shows how difficult it is to draw such a clear line. Scripture speaks to every historical hot-button issue, from slavery to dietary laws, from veils to virginity, from vengeance to forgiveness. The sacred texts bump up against the civil law, not always gently.

From its earliest days, the U.S. has struggled to balance church and state, religious faith and individual freedom,

the sacred and the secular. With so much wind under their wings, proponents of LGBT rights have moved the goalposts—as human-rights movements naturally do.

But after Indiana, if you happen to be a traditionalist on the topic of marriage, if the passages of the Bible or other sacred books speaking of marriage between a man and a woman still compel you, well, you might conclude that your very freedom to believe is at stake.

Whose Rights?

THE HOT HEART OF THIS CONTROVERSY IS a question as old as the *Mayflower*: Whose rights are most at risk? Is it the believer whose religious convictions are out of step with political power? Or is it the person whose freedoms run afoul of the believer's faith? From the Pilgrims to the Mormons, from lunch-counter protesters to abortion-clinic blockaders, Americans of many stripes have taken great risks and sacrificed much for the idea that God's laws are superior to the laws of mere humans.

The U.S. is a place where dissent is protected, up to a point; Americans have "the right to be wrong," as the religious-liberty lawyer Kevin Seamus Hasson once put it. An Associated Press-GfK poll released in February found that a majority of respondents—57%—in states that have legalized gay marriage would give wedding-related business owners permis-

sion to refuse service to same-sex customers if they have religious objections. The challenge is to find the point where the right of dissent overburdens other rights of other Americans. "Nobody in her right mind says that religious liberty is unlimited," says Hasson, the founder of the Becket Fund for Religious Liberty, a nonpartisan, interfaith law firm. "Freedom of speech is limited by laws of defamation. Freedom of the press is limited in the same way. So is freedom of religion. The difficult question is not whether there's a line, it is how you draw it."

Freedom of religion protects the Jehovah's Witness who sits through the Pledge of Allegiance and the Muslim prisoner who refuses to shave his beard. But it doesn't protect the Muslim or Mormon man who wants to marry multiple wives or the biblical literalist who believes that God ordained slavery and racial segregation. On which side of the line is the conservative Christian or Orthodox Jew who believes that homosexual behavior is a sin and sin is to be shunned?

The answers to these questions have long been in dispute, but their power to bring us together and pull us apart is well known. And yet in the last weeks of March, Pence was assuring political allies and anxious business executives that the furor around Indiana's RFRA bill was mere special-interest spin

Are These Laws Necessary?

YES. Traditional Christians find themselves under siege

BY ROD DREHER

THE CURRENT FIGHT OVER INDIANA IS A REAL HANDWRITING-on-the-wall moment for orthodox Christians and other religious conservatives, who now understand that the left's culture warriors, having won the gay-rights conflict decisively, are determined to shoot the prisoners.

The reason Indiana is so shocking to those who oppose same-sex marriage—still 33% of the country, according to last month's NBC News/*Wall Street Journal* poll—has to do with the modesty of the Hoosier statute. The law does not guarantee a "license to discriminate" against gays and lesbians. Rather, it simply raises the bar for proving illegal discrimination in religion-related disputes a bit higher. All it does is grant believers the chance to make their case.

What is so alarming about the opposition's moral panic over the law is its inability to accept that there could possibly be a legitimate religious defense of discrimination at all. To progressives, we are all Bull Connors.

I understand that most liberals view homosexuality as entirely analogous to race. Abrahamic religion does not see it that way. Sexual expression has moral meaning that race does not. You don't have to agree with Orthodox Jews, Muslims and traditional Christians, but this goes down to the foundational beliefs of our religions.

We may be wrong. But the Constitution gives us the right to be wrong. It is a right so precious it was guaranteed in the First Amendment, alongside free speech.

Religious liberty, like free speech, is not an absolute right, but it is at the core of what it means to be an American. And like free speech, it matters more when the religious expression is unpopular.

The impetus for the federal Religious Freedom Restoration Act of 1993, which was passed with enormous bipartisan support, was a case involving a tiny Native American sect of peyote users. The RFRA's overwhelming backing came not because members of Congress favor drug use but because they—and religious leaders both liberal and conservative—recognized that religious liberty means

standing up for unpopular religious expression within constitutionally appropriate bounds. The peyote users showed that the drug was key to their well-established religious practice and that there was no compelling government interest in violating that practice. They were right. So are the Hoosier Christians who, in theory, would decline to bake a cake for a gay wedding.

That's the other thing about the Indiana freakout: Where exactly are the many examples of businesses discriminating against same-sex patrons? If Indiana in 2015 were like Mississippi in 1956, that would be one thing. But the number of cases nationwide in which this has happened has been small, involving rare instances in which a commercial service is arguably a form of coerced expression.

America has changed on homosexuality—for the better, in most cases. It is understandably offensive to gay couples to have a baker refuse on religious grounds to make their wedding cake. But in today's America, there are many more bakers who would love their business. Besides, a country in which gay rights is enjoying landslide approval is a country that can afford to give a modicum of protection—a day in court—to religious dissenters from popular sentiment.

But it's an open question whether the country can afford the scorched-earth policy of the left's culture warriors. Is it really the case that 33% of the American people are Jim Crow bigots because of their sincerely held principles—principles that were nearly universal only a generation ago? As a practical matter, is it really necessary for the new majority, which has decisively won the culture, to drive religious dissenters out of the public square as pariahs?

Believe it or not, many of us orthodox Christians are grateful to live in a country where gays and lesbians are freer. But the illiberal liberalism on display in Indiana is absolutely chilling to us. We know how vulnerable that leaves us and our institutions going forward.

This fear is real, it's substantive, and it will have destructive consequences for the common good. An America where the majority casts aside religious liberty and treats orthodox Christians as outcasts, as gays were once wrongly treated, is an America in which it is hard to have faith.

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that would fade once the facts emerged.

The law was not, he insisted, a license to discriminate against homosexuals. But the ink was barely dry before his prediction proved hollow. Several Democratic governors announced that they would not permit state employees to spend tax dollars on travel to Indiana. The national business-referral site Angie's List put an announced expansion in Indiana on

hold. The NCAA, headquartered in Indianapolis, denounced the law, joining other sports governing bodies lured to the capital as part of a long-term economic-development strategy to make the city a mecca of amateur sports. University of Southern California athletic director Pat Haden announced that he would boycott an upcoming meeting in Indianapolis "as the proud father of a gay son."

As the damage began to pile up, panicky lawmakers, civic leaders and business bigwigs gave the governor a bracing assessment. Pence had a feeling the drama would die down. "In fact," says Mark Fisher, a vice president at the Indianapolis Chamber of Commerce, "it was just ramping up."

A veteran of conservative talk radio—a decaf Rush Limbaugh, he liked to say—

NO. Utah has shown us a better way to protect liberty

BY JONATHAN RAUCH

YOU GOTTA FEEL BAD FOR MIKE PENCE. THE REPUBLICAN governor of Indiana signs a religious-freedom bill. It's only a bit more capacious than a long-established federal law, the 1993 Religious Freedom Restoration Act. It's only a bit more sweeping than similar laws in 19 other states. And yet half the world comes screaming down on Indiana's head. Who could have imagined?

Only anyone who reads the news. Perhaps Pence missed that Arizona's legislature passed a similar law (ultimately vetoed by the governor) in 2014 and got exactly the same national firestorm by way of reaction.

The problem with Indiana's new religious-freedom law, and for that matter with Arizona's proposed law and with similar legislation advancing in other states, isn't what's written in the statute; it's the intent with which the statute was written. The laws are now seen, not inaccurately, as targeting gay and lesbian Americans. As a result, religious freedom, once a cause that commanded broad bipartisan support, is becoming tainted with the stain of discrimination. And that's too bad—especially for friends of religious freedom.

When the federal Religious Freedom Restoration Act was enacted more than 20 years ago, it was about protecting, say, an Indian church that wanted to use peyote in a ceremony. No one's ox was gored. Or what if someone wanted to wear a yarmulke to work? Accommodating such requests, where possible, seemed only reasonable.

Then came LGBT rights and gay marriage, followed by religious conservatives' realization that on both fronts they were losing the public argument. They decided that if they could not ban gay marriage in civil law, they could at least refrain from participating in it—which, in practice, might mean a commercial business would refuse service to a gay couple buying flowers for a same-sex wedding, or to a student group wanting a rainbow cake baked for Pride Day.

True, what's written in the statute page in Indiana is not a blanket "license to discriminate." The law provides a

legal defense against discrimination claims, not immunity from legal action. And true, the law's proponents generally say they want to discriminate against gay weddings, not gay people (though some have said they intend to do both).

But those caveats, while important, miss the point. Today, for the first time, Religious Freedom Restoration Act laws are being passed with the specific intent to discriminate against the specific needs of a specific group. That makes all the difference.

Even worse, Indiana, like most other states, does not protect LGBT people from discrimination. One side has state protection for its lifestyle and values, the other side has zilch. As Robin Fretwell Wilson of the University of Illinois College of Law told PolitiFact: "If there's a license to discriminate in Indiana, it's the fact there's an absence of a statewide law that makes a promise to the LGBT community." It's no wonder that to gay Americans and their allies, the outcome looks hostile, sinister and outrageously one-sided.

Gay people, of course, see themselves as the losers when one-sided laws like Indiana's pass. It is not they, however, who will pay the steepest price. No, that dubious honor belongs to the religious conservatives who have chosen this one-sided state strategy. By lobbying for businesses' right to boycott gay customers, they are writing a suicide note to Americans under 30, whose first commandment is: Thou Shalt Not Discriminate. And by identifying religious-liberty protections with the intent to discriminate, they are demolishing the social consensus for the very accommodations they seek.

There's a better path. We saw it taken in Utah just a few weeks ago. The state passed new religious-conscience accommodations, but they were tied to new gay-rights protections. Both sides walked away feeling freer to live according to the lights of their consciences. Both got a win and supported the outcome.

That win-win, negotiated model, not Indiana's heads-I-win, tails-you-lose model, is the path to a social consensus that safeguards religious freedom. And in America, lest we forget, real civil rights protections, the kind that last, come not from laws or courts but from consensus.

Rauch is a senior fellow at the Brookings Institution

Pence, 55, is not known for such flagrant misreadings of the public mood. Through six terms in the House of Representatives, Pence patrolled the right flank of the GOP, often going beyond the Republican George W. Bush Administration on issues ranging from the bank bailout to federal education policy to new prescription-drug benefits attached to Medicare. His knack for knowing when to pick a fight inside the party

helped propel Pence to a coveted perch atop the House Republican conference.

His sparkling conservative credentials, battle-hardened résumé and gig as a Midwestern governor made Pence a credible dark horse in the 2016 presidential race. But while flashier, younger men like Senators Ted Cruz and Marco Rubio shouldered through the crowd, Pence tended to the legislative session in Indianapolis.

For a man who barely makes a blip on the presidential radar, there are worse ways to raise a national profile than to land in the middle of a national controversy. "It puts Pence right back in the center of the storm," one GOP strategist notes. Social conservatives dominate the first-in-the-nation Iowa GOP caucus next year. Were Pence to stand firm behind RFRA, he could win their loyalty, says Mike Farris, a

conservative lawyer who helped draft the federal RFRA in 1993. "But if he weasels out of this in order to please the clamor from the mainstream media, he will lose any chance whatsoever."

Perhaps without meaning to, Pence has opened the GOP debate over the party's future. Should the GOP shelve the social issues that have been a part of the platform since the divisive 1960s? Or should the party double down on social-conservative values? None of the GOP hopefuls was eager to split with the traditionalists, though some were more enthusiastic than others about wading into the fray. "Indiana is giving voice to millions of courageous conservatives across this country who are deeply concerned about the ongoing attacks upon our personal liberties," Cruz declared. "I'm proud to stand with Mike."

Step off the presidential treadmill, however, and you can find Republicans willing to offend the traditionalist base. More than 300 elected officials, operatives and policy-makers inside the GOP have signed an amicus brief supporting same-sex-marriage rights in the Supreme Court. But White House wannabes are caught between the tide of public opinion and the risk of being outflanked on the right. If a Mike Pence, as governor, must weigh the wishes of business leaders and the threat of lost convention bookings, a Mike Huckabee, to name one social-conservative darling, holds no office and is free to pander purely.

Some Republicans hope—mostly in private conversations—that a Supreme Court ruling in favor of same-sex marriage might bury the issue and let the party move on, much as the issue of interracial marriage evaporated after the high court protected such unions in 1967. But the battle over RFRA suggests that the issue may not be settled so definitively.

A Changed Law

PENCE MAY HAVE BEEN LULLED INTO HIS miscalculation by the fact that RFRA laws have been around for more than two decades without stirring much controversy until recent years. The first statute, a federal law, flew through Congress in response to a Supreme Court ruling against the use of peyote in Native American religious rituals. It set a high bar for government interference with religious beliefs. If, for instance, a jurisdiction wanted to require that vehicles be visible at night, the law could protect Amish farmers from being



Bad for business Under pressure to veto a religious-freedom bill, Arkansas Governor Asa Hutchinson asked legislators to amend a statute he had promised to sign

forced to use electricity if reflective tape on their buggies would suffice. At the bill signing in 1993, then Vice President Al Gore quoted the colonial pamphleteer Thomas Paine, whose writing helped inspire the American Revolution: "It is the will of the Almighty that there should be diversity of religious opinions among us."

In subsequent years, 19 states passed their own versions of RFRA. When Pence signed the Indiana bill on March 26, Indiana became the 20th state in this rather uncontroversial lineage—but the ground had shifted dramatically. The federal RFRA was at the heart of a polarizing Supreme Court decision last year, in which Hobby Lobby and certain other privately owned corporations were exempted from

a part of the Affordable Care Act because of their owners' religious convictions. Meanwhile, state laws restricting marriage to male-female couples were struck down by courts from coast to coast in the wake of a 2013 high court ruling on same-sex marriage. Social conservatives turned to RFRA as a last redoubt for resisting the tide of change. "The motivation for pushing the bills is to try to do something to help people of faith who are being targeted by the government simply because they don't go along with this idea that same-sex marriage is an appropriate policy," says Frank Schubert, a consultant for the traditionalist National Organization for Marriage.

To critics of the laws, the approach is a thin cover for bigotry. "They say that they need to protect religious freedom from the state. But no one has been able to cite a local case in Arkansas where the state has infringed on anyone's religious beliefs," says Kendra Johnson, who works



for the local chapter of the Human Rights Campaign, an organization that promotes LGBT rights. "The real motivation is to create a license to discriminate."

Legal experts say it's unclear how much license the laws provide. So far, the tiny number of business owners who have refused to serve homosexual customers in other states have found no legal protection from existing RFRA laws. But in much of Indiana and Arkansas—indeed, in all or parts of a majority of states—there are no laws or ordinances prohibiting discrimination based on sexual orientation or gender identity. And though most Americans—some polls have put the number at near 90%—believe that it is illegal to fire someone because they are gay or deny them housing because they are transgender, federal law offers no blanket protections. Some courts have ruled that federal law against sex discrimination can protect same-sex couples or transgender

people. But critics of RFRA are worried that individuals and businesses could use them as ammunition to resist antidiscrimination laws.

The fact that sponsors of the new RFRA laws were unwilling to accept amendments that would protect LGBT rights deepened fears that they might incite bigotry—and not just on wedding days. Would employers be able to fire homosexual employees on religious grounds? Would landlords be allowed to bar gay renters? These aren't far-fetched concerns, says Indiana University law professor Jennifer Drobac, who worries that an employer might be able to fire a woman for taking birth control. (In Detroit recently, a pediatrician declined to accept a lesbian couple and their baby as patients, explaining that she reached her decision after "much prayer.")

Social-conservative activist Tony Perkins, president of the Family Research Council, says that his people are the ones whose rights are most endangered. Conservatives are being forced to condone a social revolution that compromises their faith, and so states are passing RFRA laws as "a response to this increased threat." He predicts that the spread of same-sex marriage will keep "religious freedom" at the top of the social-conservative agenda, because "it simply provides a protection for religious citizens that they cannot be forced to engage in something that violates their faith."

Finding Common Ground

IS THERE ANY HOPE OF COMPROMISE? Leaders of the Church of Jesus Christ of Latter-day Saints believe they can find one. Few religious groups have more experience in handling collisions between state and faith than the Mormons, and when the 10th Circuit Court of Appeals last autumn upheld a lower-court ruling in favor of same-sex marriage in Utah, the church was prepared. In an unusual public pro-

nouncement this January, the LDS church offered its support for legislation to protect LGBT rights in housing, employment and other policy areas. In exchange, religious institutions were given some legal clearance from portions of the new measures. The combination would signal tolerance for differing beliefs while empowering courts to resolve any cases where these freedoms come into conflict.

"If the religious community can argue for religious freedom only from the point of view of restricting or eliminating legitimate rights for another group, then the religious community is going to be identified with discrimination and bigotry, and that would be a disaster for all faith groups," says Michael Otterson, managing director of public affairs for the LDS church. "We will all be labeled with that if we don't find a way to communicate that religious freedom doesn't mean you have to take away somebody else's freedom."

LDS leaders are hopeful that this strategy could build common ground with other religious groups. They are in talks with the U.S. Conference of Catholic Bishops and are exploring possible conversations with Jewish and Muslim groups, as well as with historically black churches.

But not everyone is buying the idea of a middle ground. Russell Moore, president of the Southern Baptist Convention's Ethics and Religious Liberty Commission, has called the LDS project "well-intentioned but naive." Perkins too thinks the Utah solution is futile. "What we see happening here is this collision course between religious liberty and this newly defined sexual liberty, and as long as sexual liberty is trying to force religious liberty to embrace that, it is not going to happen," Perkins says.

Who would bet on compromise in today's political environment? One can wish the Mormons well in their hunt for a middle way, but it would be wise to brace for more conflict. As long as social conservatives are able to influence early presidential competitions in states like Iowa and South Carolina—while winning elections in polarized congressional districts—their voices will be heard. Their opponents, as we have seen in Indiana and Arkansas, are determined that those voices not be heeded. —WITH REPORTING

BY KATY STEINMETZ/SAN FRANCISCO AND ALEX ALTMAN, ELIZABETH DIAS AND SAM FRIZELL/WASHINGTON

'The real motivation is to create a license to discriminate.'

—KENDRA JOHNSON,
ARKANSAS DIRECTOR OF THE
HUMAN RIGHTS CAMPAIGN