What the law says vs. why it says it

By Steve Thorngate

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So much of the debate over Indiana's new religious freedom law revolves around the gap between the letter of the law and the politics behind it. Supporters note that the law doesn't mention gays and lesbians, and that similar laws (though not identical ones) have been on the books in other jurisdictions for years. Opponents point to the fact that the law's advocates organized support for it with arguments about protecting business owners who object to being vendors for same-sex weddings. They're both right, just about different things.

Legal interpretation, however, doesn't happen in a sociopolitical vacuum. So ultimately it doesn't prove all that much to say "no big deal, we've had laws like this for years," because during those years, times have changed—not just views on same-sex mariage, but with them the specific rhetorical and legal strategies of those who oppose it.

The best thing I've read on this is from Dale Carpenter:

> What I think the "nothing to see here" defense misses is the cultural, political, legal, and religious context in which these laws are being passed–a context that could easily lead courts to apply the laws in more aggressive ways. The newly energized effort to push mini [Religious Freedom Information Acts] like Indiana's is almost entirely a reaction to the gay-rights movement, including but not limited to the increasing acceptance and reality of same-sex marriage. One need only listen to the kinds of examples that RFRA supporters cite as "burdens" on religion to know that RFRAs nowadays are directed at validating and legitimizing antigay discrimination. What started out as a shield for minority religious practitioners like Native Americans and the Amish is in danger of being weaponized into a sword against civil rights.

> What's more, the effort to pass mini-RFRAs is now stimulated and fueled by a religious-litigation complex of groups and institutions that did not exist in anywhere near its present form, size, or sophistication when the original RFRA passed. It's perfectly legitimate for any group, including anti-gay legal groups, to organize and litigate for their purposes. But the changed context they have created through their prodigious efforts makes the passage of spacious and comprehensive "religious freedom" protection very different from what it was two decades ago, even if the words of the laws are the same. We haven't seen courts treat the strict scrutiny test in RFRA laws very seriously in the past, which is why we've avoided the "anarchy" Justice Scalia warned about in *Employment Div. v. Smith* (1990) (rejecting strict scrutiny of neutral laws that burden religion), but the increased litigation pressure and focus of anti-gay activists may lead courts–especially elected state court judges–in many places to break the dam.

In short, even if this law were nothing new—again, that's not quite true, but even if it were—the context in which it exists *is* new.

In any event, these religious freedom laws are comparatively small potatoes on the anti-discrimination front. The real game is establishing gays and lesbians as a protected class, as they are now in 22 states but not Indiana. Even a more limited anti-discrimination law like Utah's could have softened the blow in Indiana, as Jonathan Rauch argues. Or Indiana could have joined Missouri and Texas in including in their religious freedom law some explicit deference to civil rights laws, as Carpenter goes on to point out.

Instead, Indiana passed a farther-reaching law. It doesn't spell out a right to refuse to serve gays and lesbians, but it would not exist were it not for an interest in doing just that. Indiana governor Mike Pence announced yesterday his goal to clarify, via the legislature, that businesses can't use the new law to discriminate against people. It's not yet clear if this will happen, or what exactly it will mean if it does. Set such discrimination aside, after all, and the letter of the law might look much as it does now—but its actual purpose goes almost entirely away.

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UPDATE: Sounds like a deal is in the works that limits the ability of businesses and individuals (but not religious orgs) to refuse service on the basis of sexual orientation or gender identity. Tellingly, it's a deal not with, say, LGBT advocates, but with business leaders. And it doesn't go as far as establishing a protected class would. Still, this is encouraging: it looks like there will be a bona fide protection added for gays and lesbians, even if this leaves a lot of the people who pushed for the law in the first place pretty unhappy with it.