

The Battle of Indiana and the Promise of Battles to Come

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The dust is clearing from the Twitter and Facebook battlefields, the people of Indiana are out from under the white-hot glare of the

national media, and both sides are taking stock. Who won the Battle of Indiana? Who lost? What's next for religious liberty in America?

While conservative pessimists looked at Indiana, watched its politicians immediately compromise, and saw defeat, a closer look shows something else: a cultural stalemate. Nobody truly won in Indiana. From the grassroots to the intellectual elite, conservatives are girding themselves for the long war, and a long war it will be.

Four truths are emerging: First, the battle is not between gay rights and religious liberty—although religious liberty is certainly at stake—but between the sexual revolution and Christianity itself. This means that Christians are faced not with allegedly “minor” or “insignificant” theological changes to gain leftist acceptance, but with wholesale changes to the historical doctrines of the church.

Second, not a single orthodox denomination is making or even contemplating such changes. This means that tens of millions of Americans will remain—indefinitely—opposed to the continued expansion of the sexual revolution.

Third, rather than going quietly, cultural conservatism is showing increasing strength at the grassroots—opposing leftist campaigns at the ground level, bypassing politics to support those most embattled by radical hate campaigns.

And fourth, the conservative grassroots and conservative public intellectuals are united—from Ross Douthat at his lonely perch at the *New York Times* to the pages of *National Review* and the *Weekly*

Standard, from First Things to the Ethics and Religious Liberty Commission of the Southern Baptist Convention, there is no wavering among America's most influential conservative writers and thinkers.

In short, if the cultural Left is hoping to dominate the culture—and feels strong in its coastal bastions—it is overreaching, extending beyond the limits of its power. It is exposing itself to embarrassing cultural defeats and succeeding mainly in hardening conservative resolve. In the fight over religious freedom, the Left will not prevail.

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First, a bit of history. The battle of Indiana began when Indiana's legislature passed a version of the Religious Freedom Restoration Act (RFRA), an act that provided, simply enough, that any state action that substantially burdens religious exercise is lawful only if it is the least restrictive means of furthering a compelling governmental interest. In other words—as Tim Carney of the *Washington Examiner* recently tweeted—when you can, you should avoid compelling people to act against their consciences.

This legal standard was common enough. In fact, it's the same general legal standard in the federal RFRA and in similar RFRA's in 19 other states. There were, however, two differences from the norm. First, the statute explicitly allowed for-profit businesses to assert religious liberty rights (something the Supreme Court allowed Hobby Lobby to do in its challenge, under the federal RFRA, to the Obamacare contraception mandate). Second, the statute allowed a

religious individual to utilize RFRA in defense against a lawsuit brought by a private party. In other words, if a person believed that his religious liberty could be substantially burdened by a court order resulting from private litigation, that person could assert that the court order would be lawful only if it met the RFRA test.

Neither provision is particularly groundbreaking. The Supreme Court allowed Hobby Lobby and other closely-held private, for-profit corporations to assert RFRA claims. Additionally, multiple federal circuits provide for the use of federal RFRA as a defense against a private right of action.

Moreover, RFRA and the compelling interest standard more broadly have long existed in American law. The compelling interest standard was not something invented by Congress when it passed RFRA in 1993. RFRA was passed to restore religious liberty to the same level of protection it received prior to the Supreme Court's controversial decision in *Employment Division v. Smith* (1990), which rejected decades of precedent to hold essentially that religious liberty claims are inferior to rules of general applicability. *Smith* caused a bipartisan outcry, and Congress moved quickly to overturn the decision, passing RFRA with overwhelming majorities. President Clinton proudly signed it into law.

Conservatives saw *Smith* as a threat to the constitutional order, a dangerous derogation of our nation's "first liberty." Liberals saw *Smith* as a threat to smaller, minority religions. The dispute in the case arose over the use of peyote, a hallucinogenic drug, in Native

American religious rituals. It's safe to say that there was no sense at the time that RFRA was a threat to civil liberties or civil rights. Indeed, RFRA was seen as necessary—again, by liberals and conservatives alike—to *protect* civil rights.

There was good reason for this belief. For decades, the compelling interest standard in religious liberty claims had existed side-by-side with the explosive growth of nondiscrimination laws, and religious liberty claims had never been successfully used to strike down nondiscrimination statutes. In fact, in *Newman v. Piggie Park Enterprises* (1968), the pre-*Smith* Supreme Court called a business owner's argument that he had a free exercise right to deny service to black customers "patently frivolous."

This comes as no surprise to religious liberty attorneys who actually read the law and know how it operates in real-life litigation. It's a historical fact that religious liberty claims did not protect or legally enable Jim Crow. The Civil Rights Acts were passed and prospered under the pre-*Smith* religious liberty regime.

Regardless, the sexual revolution marches on and the Left's definition of "civil rights" has expanded—not only does it prohibit class-based discrimination in places of public accommodation, it now requires conscription into the revolution itself.

For example, it's no longer enough for employees to have access to low-cost contraceptives and abortifacients. It's the Obama administration's position that employers must provide them free of charge. It's no longer enough for bakers, florists, and photographers

to provide service to everyone, regardless of sexual orientation. They must participate in and facilitate any kind of action or ceremony their customers desire—no matter how offensive to their beliefs—so long as those ceremonies further the ideals of the sexual revolutionaries.

So, when Indiana passed its RFRA, the bipartisan consensus of years past was gone—long gone. The mainstream media exploded. Twitter exploded. Major corporations like Apple and Cummins—and Wal-Mart, when similar legislation passed the Arkansas legislature—condemned RFRA. The NCAA followed suit. Deep-blue city governments, including those whose states had RFRA laws on the books for years, banned official travel to Indiana.

When reporters went searching for an Indiana business—anywhere in the state—that wouldn't cater a gay wedding, it found Memories Pizza, a small-town pizza joint that had never been asked to cater a gay wedding, but whose owner answered that if it was, it couldn't participate. An avalanche of hate, including alleged death threats, caused the owners temporarily to close their doors.

Critics disingenuously raised the specter of Jim Crow, recalled memories of the old South, and otherwise claimed that gay people were about to be sent to the back of the bus. Facts didn't matter. Legal precedents didn't matter. All that mattered was the thought that someone, somewhere, might try to raise RFRA as a defense for refusing to participate in a gay wedding.

Under pressure from activists and the national media, Indiana

modified its law to state that it could not authorize a provider to deny services to anyone on the basis of multiple protected criteria, including race, sex, and sexual orientation. The “Indiana fix” soon led to a different “Arkansas fix.” Both fixes mollified the media and most gay rights activists, infuriated many conservatives—who saw them as cowardly—and placated the major corporations. The battle was over.

The battle may be over, but the war rages on. While many conservatives saw the quick capitulations by Indiana and Arkansas politicians and despaired (just as leftist activists exulted), the reality was far more complex and the presumed leftist victory far less clear. In reality, the battle lines are drawn, and there is little or no reason to believe that either side will triumph anytime soon.

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To understand the future, let’s revisit and explain the four truths of the modern culture war.

First, the conflict is not between gay rights and religious liberty, but between the sexual revolution and Christianity. The fury of the gay rights movement was so palpable during the Indiana controversy that it’s easy to forget the Hobby Lobby RFRA case, a case that had nothing to do with gay rights. Abortion battles continue to rage, sometimes with an intensity that matches or exceeds the arguments over gay marriage. (The Wendy Davis filibuster in Texas captured the imagination of the Left just as much as the battles over gay wedding cakes.) And just over the horizon are new, widespread battles over the very definition of what it means to be male or female. Simply put,

the sexual revolution questions *everything* about sexual morality and identity—demanding changes in every aspect of traditional sexual morality and, consequently, orthodox Christian theology.

The gay rights movement is inseparable from the sexual revolution, and the sexual revolution is inseparable from the gay rights movement. The principles of radical sexual autonomy, freedom from any form of moral judgment, and government support to ameliorate the consequences of sexual libertinism are present in the fights over abortion, gay rights, and now transgender issues. Those who surrender on one issue tend to surrender on others as well. With similar moral principles implicated, similar moral outcomes result.

Second, not a single major orthodox Christian denomination is reconsidering its stance on sexual revolution issues. While the media reports on the “progress” of the gay rights movement in mainline denominations—for example, the Presbyterian Church (USA) recently changed its definition of marriage to include same-sex unions—this movement is irrelevant to the much larger Evangelical and orthodox Catholic communities. None of the large orthodox Protestant denominations are changing their stance on human sexuality. Neither is the Catholic Church. Neither are the various branches of Orthodoxy. And these institutions collectively dwarf the liberal, mainline churches when it comes to churchgoing adherents.

Given this reality, the rapid advances of the gay rights movement and its allied sexual revolutionaries—coming as they do largely from liberal and less churchgoing segments of the population—will soon

stagnate as they face the challenge of persuading tens of millions of Bible-believing Americans that there is nothing wrong with same-sex marriage. Given the absence of scriptural support for this position, the gay rights movement will face many of the same challenges as the abortion lobby, and will likely meet with a similar lack of success.

Browbeating Christians into submission is not a new tactic, and it is a tactic that has largely failed in the abortion arena—despite the existence of legal doctrines that are dramatically skewed against the pro-life movement. Yet the pro-life movement is as strong as it has ever been, and political outcomes are finally starting to reflect that strength, with jurisdiction after jurisdiction passing ever-stronger pro-life laws.

Third, the religious liberty movement is showing increasing, not decreasing cultural strength. While it is easy to grow discouraged in the face of events like Brendan Eich's departure from Mozilla, the wave of threats directed at vendors like Memories Pizza, Republican politicians' continued timidity on "culture war" issues, and the climate of intolerance that exists on campuses and in the mainstream media, the Left's prominent failures are starting to outnumber its recent successes.

Consider the following:

- Cultural conservatives answered the Left's attempted Chick-fil-A boycott with a "buycott" that swamped stores nationwide, even causing some to run out of food for customers eager to show their support for a beloved restaurant, owned by people who share

their moral principles.

- Leftist pressure against Hobby Lobby failed. Customers were either supportive of the owners or indifferent to politics, and boycotts had no effect on Hobby Lobby's bottom line or its willingness to fight. Not only did Hobby Lobby win its Supreme Court case, its owners are set to open a massive new Museum of the Bible near the National Mall.
- Efforts to drive Phil Robertson—of *Duck Dynasty* fame—off the air after controversial comments on sexual morality failed, giving cultural conservatives a victory in a medium (cable television) seen as almost uniformly hostile to orthodox Christianity. While Robertson has remained a polarizing figure (and often says things that make many of his supporters uncomfortable), there has been no serious repeat effort to remove him from the air.
- In Houston, leftist government officials were forced to backtrack within days after issuing subpoenas requiring area pastors to turn over the contents of their sermons and other communications. The public outcry was so swift and so great that the city capitulated even before a judge could rule on motions to quash.
- Even in Indiana, as Republican politicians quickly caved to corporate and media pressure, the grassroots response in support of Memories Pizza soon swamped the Left. A GoFundMe account set up to support the owners raised more than \$800,000 in small donations in a matter of days (including over \$200,000 in one day), putting the pizza restaurant in a far superior financial position than it had enjoyed before the controversy. The

message was clear: Cultural conservatives are not, in fact, culturally isolated but rather have the support of millions of Americans who oppose leftist bullying.

While the Left has proven adept at using social media, so have cultural conservatives. And now when the Left overreaches, attempting to drive Christians out of work, there is often an opposite (and greater) reaction.

Fourth, conservative public intellectuals are holding firm in defense of life and religious freedom. Throughout the Battle of Indiana, there was striking unity among leading conservative thinkers. The consensus was clear even among those who support gay marriage: The Left had become illiberal and dangerous. A pluralistic nation must have room for cultural dissenters, and the desire to shame and blacklist individuals and destroy businesses had to be opposed, and opposed vigorously.

In fact, one was more likely to read about discomfort on the Left at some of the mob tactics than about discomfort among conservatives at the defense of religious liberty. This unanimity left Republican politicians relatively isolated, in the familiar position of abandoning their culturally conservative constituents to do the bidding of their corporate supporters.

Yet even this is likely to change. Most politicians are cultural followers, not cultural leaders, and if the base and the intellectual core of the conservative movement remain relatively united, Republican politicians will eventually bend. Once again, the abortion

example is instructive. The pro-life movement has been gathering strength for more than a generation, but it is only in recent years that politicians have taken truly meaningful action. The pro-abortion Guttmacher Institute estimates that there were more pro-life bills passed in the last three years than in the previous decade.

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The combination of high stakes—with the sexual revolution confronting Christianity itself—and the continued resolve of Christian churches, church members, and conservative public intellectuals, means that the Battle of Indiana is not only indecisive in the larger struggle, it will soon be forgotten as new battles inevitably erupt. These battles will stop only if Christians abandon their historic faith on a truly national scale or if the Left decides that it is content to “live and let live”—to work, attend school, and share the public square with people who express moral disagreement and who work actively to promote a cultural return to traditional morality.

For the time being, however, neither side looks ready to yield. So conservatives should be prepared for more—more battles over weddings, more campus intolerance, more boycotts, more buycotts, and more cultural anger and division.

To be sure, this is not the future that anyone desires, but for Christians, it is a far better future than one of isolation, censorship, and marginalization. In fact, for Christianity, this is nothing new. Cultural rejection is a scriptural promise and a longtime historical

fact. As Christians in the Middle East and Africa face hideous violence, American Christians shouldn't feel overwhelmed in the face of relatively minimal persecution. Christianity has survived lions. It is surviving beheadings. It can certainly withstand Twitter.

When it comes to the core of their faith, millions of Christians will echo, by word and deed, the words of Martin Luther: Here we stand. We can do no other.