The Facts About SJR-13
Marriage Discrimination Amendment

WHY SJR-13, THE MARRIAGE DISCRIMINATION AMENDMENT, SHOULD BE REJECTED

Senate Joint Resolution 7 (SJR-7) has been replaced by Senate Joint Resolution 13 (SJR-13) which uses different terms but which proponents say clear up objections to the former language. Unlike SJR-7, the nature and impact of the altered words and phrases has not been widely covered by the media or otherwise part of significant public discourse. For that reason, given the serious economic and related issues facing this current legislative session, it is disappointing that proponents have insisted on bringing it back for even the limited serious scrutiny it is likely to receive.

In brief, SJR-13 is an ill-conceived proposal to amend Indiana's Constitution in a discriminatory manner. Though changed in wording, the revised terms in SJR-13 still present interpretation problems, and represent a basic and fundamental change for the worse from SJR-7.

- Despite representations otherwise that other states have had "no problems" with identical or very similar language, differing official opinions and decisions have been issued reaching opposite conclusions on the meaning of the same terms.
- While SJR-7 authors, sponsors and supporters insisted that the measure applied only to Indiana's courts, but not to its lawmakers, the revised measure would unabashedly strip the General Assembly of the ability to create civil unions and related rights and benefits for gay and lesbian couples.
- As with SJR-7, SJR-13's restriction on Indiana's courts is totally unnecessary because strong judicial precedent in Indiana.
- Adoption of SJR-13 as an amendment to Indiana's constitution will effectively disenfranchise future generations, with changing views on related cultural issues, from expressing them in the making of public policy.

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SJR-7 Becomes SJR-13: New Terms but Old Problems

First there was Senate Joint Resolution 7 (SJR-7):

> "Marriage in Indiana consists only of the union of one man and one woman. This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."

Prompting much debate over what "construed to require", "legal incidents of marriage" and other terms really meant and what would be their consequences, proponents have now replaced it with Senate Joint Resolution 13 (SJR-13):

> "Only a marriage between one man and one woman shall be valid or recognized in Indiana. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."

Those advocating for SJR-13 say it eliminates any objection opponents had to SJR-7. But while most of the disputed terms are gone, they've been replaced by terms equally, if not more problematic.

Proponents point out that the new text is virtually identical to that adopted in states like Kentucky and Wisconsin, and indeed terms and concepts like those in SJR-13 appear in a number of other states. It's claimed that there have been no problems in those states, but that's either misleading or simply untrue.

If "no problems" means "no litigation", the common sense reply is that where there's no law, there's no litigation over it. In other words, if a state legislature hasn't passed or even debated something like civil unions or more limited rights and benefits for same-sex couples, it's simple to say "no problems" over interpretation. That's the situation in states such as Oklahoma, Texas, Mississippi, and others where even introduction of such measures seems light-years away.

Even where there has been legislation, or establishment of such things like domestic partnerships, the meaning of such terms as "legal status", "recognition", and "similar to marriage" have and are being hotly contested. For example:

- Contrary to proponent representations, Attorney General opinions in Kentucky and Wisconsin sharply disagree on meaning. They draw very different lines as to what is and what isn't "substantially similar" to marriage. One view is that "substantially similar" applies to the quantity of associated rights and benefits. The other view is that even without any benefits, something like a domestic partnership registry would be unconstitutional if the relationship involved looked anything like marriage.
- The distinction is evident in proponents' claims that in Kentucky, state university domestic partnership benefits of same-sex couples haven't been lost after amendment passage. What they don't say is that only when these programs are substantially gutted to eliminate mention of a same-sex relationship will they pass constitutional muster. This has been the "bait and switch" tactic used in Michigan and elsewhere. They imply that current Indiana public university plans wouldn't be affected, but they will be. A similar issue is currently in the Wisconsin courts.
- In Louisiana, despite pre-amendment representations to the contrary, the Alliance Defense Fund argued that a simple domestic partnership registry only relating to health benefits, nothing more, was unconstitutional.

Senate proponents of SJR-7 frequently talked about the discarded term "legal incidents of marriage" in terms of a "market basket". The basket could only get so full before a law bestowing the benefits would be too close to marriage and therefore unconstitutional. The same uncertainty exists concerning "substantially similar". What happens, for example, if Indiana's legislators one year provided a handful of benefits which didn't cross the line, but later added more? Would that make the whole "market basket" fail the test, taking back benefits? If not, which item tipped the scale?

Instead of leaving it to guesswork as to what "substantially similar" really means, why don't proponents just provide a list of market basket items (presumably few) they don't believe Hoosier committed same-sex couples should have under the law?

Otherwise somebody is going to have to figure out where is the line.

Ironically it's the same despised "unelected activist judges" on the Indiana Supreme Court that are ultimately going to have to decide

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Revising the "Indiana Marriage Protection Amendment"
The major flip-flop proponents hoped nobody would notice

The proponents who failed to persuade the Indiana General Assembly to pass Senate Joint Resolution 7 (SJR-7) and send it to referendum have come back with Senate Joint Resolution 13 (SJR-13), which they say is just a better and less controversial way of laying out what SJR-7 was designed to do.

Except that it's not all as straightforward as they'd like legislators to believe. Besides some new issues about the meaning of words like "substantially similar to marriage", there's the very BIG issue of what would happen to legislative authority.

When opponents of SJR-7 claimed that its convoluted wording didn't just keep "unelected activist judges" from "making law", but also completely tied the hands of the legislature itself, SJR-7's supporters pulled in some legal resources to deny that was true. Now SJR-13's restrictive language applies to BOTH the courts and to the legislature, a major change that proponents are reluctant to acknowledge. Here are the details:

In early 2007, two pieces were prepared for presentation in an Indiana House committee. One came from the Marriage Law Foundation, which described SJR-7 as follows:

> "Like the federal amendment, it [SJR-7] is drafted narrowly and does not limit the legislature from extending the legal incidents of marriage to unmarried persons, either as individual benefits or as complete "civil unions" type package." [Underscoring added for emphasis].

The other came from the Catholic University of America's Marriage Law Project:

> "As we read it, the Indiana amendment will not prohibit the Indiana *legislature* from doing what the Vermont and New Jersey *legislatures* did; the Indiana amendment *will* prohibit the Indiana *courts* from doing what the Vermont and New Jersey *courts* did."

Both legal opinions were intended to help convince the General Assembly that its own power would be preserved. Proponents also said that their proposal was more moderate than measures from other states, a reference to the very language SJR-13 now copies.

This idea that SJR-7 not only would, but should, apply only to Indiana's courts and not the General Assembly was reinforced by affiliates of the Indiana Family Institute, a key organization promoting SJR-13:

On September 17, 2007, VERITAS REX, IFI's website, carried this comment by Sue Swayze, IFI Program Coordinator, saying after addressing a situation in California:

> "In Indiana, however, Ryan [IFI's Operations and Public Policy Director Ryan McCann] and I have been consistent that SJR 7 wouldn't prevent the legislature from passing things other than marriage, like civil unions, because they are an elected representative body and should have that right. Then, of course, citizens have the right to throw them out if they don't like what they do - just like on any other law. Many of our conservative friends wish that SJR 7 would tie the legislature as well as the courts, and don't think it goes far enough. But the core of what we don't want is an activist judiciary that we have no recourse for (or one that doesn't really work)." [Underscoring for emphasis]

On the following day, Swayze added:

> "And we'd surely oppose civil union legislation, as well. But I'm confident we would hold to our belief, however, that SJR 7 is an instrument to tie the hands of the courts so they can't "construe to REQUIRE" anything under any current law, as has been done in other states right under the noses of the helpless electorate. And the Indiana General Assembly, while held to 'marriage' between a man and a woman, could try to enact laws to call different arrangements different terminology. Then, the voters could speak. That's the way it should be, even though arguably it makes us uncomfortable."

From this it's clear that despite the supporters of SJR-13 continuing to emphasize the need to reign in "unelected activist judges", their rewrite now goes much further and would also muzzle democratically elected lawmakers.

The question is why, and why the reversal?

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DEBUNKING THE IDEA OF INDIANA'S "ACTIVIST JUDGES" REDEFINING MARRIAGE
IT'S JUST NOT GOING TO HAPPEN….AND WHY

Senate Joint Resolution 13 (SJR-13) supporters look with alarm at states like Massachusetts and warn that without the amendment, Indiana's courts will redefine marriage here. But that simply isn't true.

All states have "equal protection" type clauses. They require that the laws treat all classes of people in similar circumstances in the same way. But many have different wording, as well as widely different state histories, judicial precedents and how much courts scrutinize laws to see if they meet that "equal protection" mandate. This produces quite different results throughout the country.

In Indiana, we have a strong and long-standing precedent case known as Collins v. Day. It reflects a type of very light legal scrutiny called the "rational basis test". Indiana's test is considered even easier to meet than similar tests in other states.

Here's why: Indiana's courts give extreme deference to our lawmakers. Judges don't look at motive; if there is any conceivable rational reason to treat different classes differently, even if the lawmakers didn't think of it themselves, our courts will rubber-stamp it.

That's what happened in the Morrison v. Sadler decision, which upheld Indiana's current law defining marriage. While SJR-13 proponents say this Indiana Appeals Court decision wasn't one from our highest court, all of the judges agreed that the strong Collins v. Day principles governed. No serious legal observer, "left" or "right" disagrees with this.

States whose courts have found laws limiting marriage to heterosexual couples have very different judicial precedents when it comes to equal protection tests. They just don't defer to the legislature for the lightest of reasons. Instead, they put a heavy burden ("strict scrutiny") on the state itself to show a compelling reason for treating people differently, not the other way around. Indiana's traditional precedent is poles apart from such an approach.

So proponents of SJR-13 are grossly exaggerating and simply wrong when they warn that "activist judges" on the Indiana Supreme Court stand ready to redefine marriage in Indiana if their amendment is not adopted.

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Why A Constitutional Amendment on Marriage in Indiana?
Shutting Out the Changing Views of Future Hoosier Generations

Senate Joint Resolution 13 (SJR-13), unlike what proponents claimed for Senate Joint Resolution 7 (SJR-7), not only limits the Indiana courts from ruling in the marriage equality area, but now would clearly also tells Hoosier lawmakers "Don't even go there".

Tampering with the traditional role of the judicial branch as a check-and-balance protector of the minority against the "tyranny of the majority" is very unwise in and of itself – and in the case of marriage equality arena unnecessary because of strong Indiana court precedents.

But telling democratically elected Hoosier lawmakers that they can't enact such things as civil unions or anything close is even worse in a representative democracy.

It is one thing to elect and try to persuade legislators to enact or oppose laws concerning the legal rights and benefits accorded to Indiana's gay and lesbian citizens. There is popular division on the cultural and social issues involved. But it's something else entirely for a constitutional amendment to take those matters off the legislative table.

Proponents read the polls. They know that popular attitudes towards such things as civil unions and related rights for gay and lesbian couples are changing, especially among those under age 35. Our children may well feel differently than their parents. Hoosiers may rightly want to shelter their children from burdensome debt in the future; but do we really want to stifle their own freedom to decide social and cultural matters by freezing our own views into Indiana's constitution?

Those trying to advance SJR-13 may reply that there's no loss of representative democracy because the next generation can always undo it by the amendment process. That's technically true, but practically not.

In almost all other states, including those with "Marriage Protection Amendments", constitutions can be amended by a single vote of the people in a referendum – in some cases without prior legislative action; in others with only a single pass through the legislature.

But in Indiana that process is longer and much more arduous. The same amendment language must pass in identical form in two successively elected legislatures, and then be passed by popular vote. Virtually no amendments, once passed, have been reversed.

To the simplistic cry of "Just Let Me Vote", one should also hear the aspirations of the next generation, proclaiming "Just Preserve My Vote, and My Legislator's Vote" to reflect its changing views.