

THE RESPECT FOR MARRIAGE ACT: LIVING TOGETHER DESPITE OUR DEEPEST DIFFERENCES

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Part I. Why Study the Respect for Marriage Act (RMA)²? BIG PICTURE Items

What makes the RMA unusual and interesting is that the legislation is that rare blend of LGBTQ equal-treatment and religious liberty for dissenters. The Trade-Off: Nationwide interjurisdictional recognition of same-sex marriage (“SSM”) vs. religious liberty for religious organizations and persons holding a traditional view of marriage.

1st -The RMA is a civil rights law. It is narrow but important. Marriage is the sole subject matter, not other LGBTQ rights in a context of discrimination in employment, public accommodations, or housing. Marriage is pre-political.

2nd -The RMA is 80% preserving the status quo w/r/t the law of SSM.
-The RMA is 80% defensive w/r/t religious liberty. This is often done by Rules of Construction saying what the RMA does not do.

3rd -There are interesting constitutional limits on Congressional Power: e.g., Congress cannot define marriage; Congress cannot order a state to recognize SSM in its own law.

4th -CAUTION: Do Not Conflate the law on SSM -with- what religion teaches about SSM. -not everything that is immoral should be illegal vs. you can’t legislate morality.

Part II. The BACK STORIES

A. *Dobbs*, 142 S. Ct. 2228 (June 2022) - Justice Thomas, concurring.
What if *Obergefell v. Hodges*, 576 U.S. 644 (2015), was reversed?

House RMA bill passed July 2022, with 47 R votes
Senate: -Relig. Lib. Added to bill -Tammy Baldwin, Sinema Collins, Portman, Tillis, Lummis Nov. 17 got 12 Rs in test vote signaling filibuster could be broken. Signed Dec. 13th -lightning speed

B. *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) case; IRS 501(c)(3) tax-exempt status depends on organization having “charitable” status. -*Obergefell* oral argument, Donald Verrilli SG.

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² Public Law 117-228, 136 Stat. 2305 (HR 8404, as amended) (signed December 13, 2022).

Part III. Brief Section by Section Overview

A. Marriage Equality

Sec. 3 -repeals DOMA sec. 2 (state may refuse ff&c to a sister state same-sex marriage)

Sec. 4(a) -must give ff&c to sister state's same-sex marriages (race, sex or nat'l origin)

Sec. 5 -when marital status is a factor in eligibility for a federal benefit, then look to state law where marriage performed.

B. Religious Liberty

Secs. 6(a) and 7(a) -two Rules of Construction

Sec. 6(b) -a little bit of new substantive right

Sec. 2(2) & (3) -two findings: SSM v. racial distinction

Part IV. Three RMA Positives for SSM

1. Sec. 3 – repeals § 2 of the Defense of Marriage Act (“DOMA”) (a state may refuse ff&c to a sister state’s SSM).

-*U.S. v. Windsor*, 570 U.S. 744 (2013), struck § 3 of DOMA (fed’l definition of marriage) violated Due Process Clause of 5th Amend.

2. Sec. 4 – state can’t deny ff&c to a sister state’s marriage on basis of sex, race, nat’l origin

-congressional authority: full faith & credit clause, U.S. Const. Art. IV, sec. 1

Brainteaser: in-state SSM gap if *Obergefell* is overruled

-U.S. Att’y General’s suit in equity to enforce this section

-Private suit in equity vs. conduct under “color of state law” *Cf.* 42 U.S.C. 1983 claim.

3. Sec. 5 – Choice of Law rule – “Marriage” for purposes of federal benefits: federal gov’t looks to state law of where the marriage was entered into.

Part V. Three RMA Positives for Religious Liberty

1. Secs. 6(a) and 7(a) – Two Rules of Construction: reads as defensive or in the negative

-sec. 6(a) -not “diminish or abrogate” religious liberty protected by federal law
-fed’l religious liberty not diminished by RMA

-sec. 7(a) -no impact on any benefit or exemption “which does not arise from a marriage”
- fed’l benefits not diminished by RMA

-Read “the list”: any benefit, status, tax exemption or tax treatment, educational funding, grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim or defense

2. Sec. 6(b) -gives rise to a new substantive right; a right vested in religious nonprofits

“solemnization or celebration”

e.g., Christian college chapel, conference center, or summer camp lakeside pavilion

-conflict preemption of state and local laws; e.g., municipal public accommodation ord.

-Congressional authority: § 5 of the 14th Amendment, church autonomy and Fr. of Assoc.

3. Sec. 2, Findings by a bipartisan Congress:

-sec. 2(2) diverse views on SSM; the two Ps: people and premises

Reasonable, sincere **people** –decent, honorable, religious **premises**

-sec. 2(3) Contrast: when it comes to interracial marriage, any resistance is NOT due respect

-Hence **no moral equivalency** between racism and opposition to SSM

Part VI: SUMMING-UP

No future for one-sided legislation, such as The Equality Act or the First Amend. Defense Act (FADA)

Pluralism or Polarization– living together despite our deepest differences

- reliance on SSM vs. legitimatization of SSM
- breathing space for the church's sphere of operations

Religious Liberty harmed by extreme partisanship

Religion harmed, Generation Z – nones & dones

For a more detailed study of the Respect for Marriage Act, see Laycock, Douglas, Berg, Thomas C., Esbeck, Carl H., and Wilson, Robin Fretwell, *The Respect for Marriage Act: Living Together Despite Our Deepest Differences*, forthcoming at 2024 U. OF ILL. L. REV. ____ (2024), and available now at <https://ssrn.com/abstract=4394618> (social science research network, 2023). A copy of this article will be provided to those requesting a copy via email to Prof. Carl H. Esbeck at esbeckc@missouri.edu.

Public Law 117-228, 136 Stat. 2305
[HR 8404, as amended]
Signed by President Biden on December 13, 2022

RESPECT FOR MARRIAGE ACT

An Act To repeal the Defense of Marriage Act and ensure respect for State regulation of marriage, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title *(codified as a note to 1 U.S.C.A. § 1).*

This Act may be cited as the “Respect for Marriage Act”.

Section 2. Findings *(codified as a note to 1 U.S.C.A. § 7).*

Congress finds the following:

(1) No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.

(2) Diverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent and honorable religious or philosophical premises. Therefore, Congress affirms that such people and their diverse beliefs are due proper respect.

(3) Millions of people, including interracial and same-sex couples, have entered into marriages and have enjoyed the rights and privileges associated with marriage. Couples joining in marriage deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children.

Section 3. Repeal of Section Added to Title 28, United States Code, by Section 2 of the Defense of Marriage Act *(codified as a note to 28 U.S.C.A. § 1738C).*

Section 1738C of title 28, United States Code, is repealed.

Section 4. Full Faith and Credit Given to Marriage Equality *(codified at 28 U.S.C.A. § 1738C).*

Chapter 115 of title 28, United States Code, as amended by this Act, is further amended by inserting after section 1738B the following:

§ 1738C. Certain acts, records, and proceedings and the effect thereof

(a) IN GENERAL.—No person acting under color of State law may deny—

(1) full faith and credit to any public act, record, or judicial

proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals; or

(2) a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on the basis of the sex, race, ethnicity, or national origin of those individuals.

(b) ENFORCEMENT BY ATTORNEY GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates subsection (a) for declaratory and injunctive relief.

(c) PRIVATE RIGHT OF ACTION.—Any person who is harmed by a violation of subsection (a) may bring a civil action in the appropriate United States district court against the person who violated such subsection for declaratory and injunctive relief.

(d) STATE DEFINED.—In this section, the term ‘State’ has the meaning given such term under section 7 of title 1.”.

Section 5. Marriage Recognition *(codified at 1 U.S.C.A. § 7).*

Section 7 of title 1, United States Code, is amended to read as follows:

§ 7. Marriage

(a) For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual’s marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State.

(b) In this section, the term ‘State’ means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

(c) For purposes of subsection (a), in determining whether a marriage is valid in a State or the place where entered into, if outside of any State, only the law of the jurisdiction applicable at the time the marriage was entered into may be considered.”.

Section 6. No Impact on Religious Liberty and Conscience *(codified as a note to 1 U.S.C.A. § 7).*

(a) IN GENERAL.—Nothing in this Act, or any amendment made by this Act, shall be construed to diminish or abrogate a religious liberty or conscience protection otherwise available to an individual or organization under the Constitution of the United States or Federal law.

(b) **GOODS OR SERVICES.**—Consistent with the First Amendment to the Constitution, nonprofit religious organizations, including churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, religious educational institutions, and nonprofit entities whose principal purpose is the study, practice, or advancement of religion, and any employee of such an organization, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any refusal under this subsection to provide such services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action.

Section 7. Statutory Prohibition (*codified as a note to 1 U.S.C.A. § 7*).

(a) **NO IMPACT ON STATUS AND BENEFITS NOT ARISING FROM A MARRIAGE.**—Nothing in this Act, or any amendment made by this Act, shall be construed to deny or alter any benefit, status, or right of an otherwise eligible entity or person which does not arise from a marriage, including tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim, or defense.

(b) **NO FEDERAL RECOGNITION OF POLYGAMOUS MARRIAGES.**—Nothing in this Act, or any amendment made by this Act, shall be construed to require or authorize Federal recognition of marriages between more than 2 individuals.

Section 8. Severability (*codified as a note to 1 U.S.C.A. § 7*).

If any provision of this Act, or any amendment made by this Act, or the application of such provision to any person, entity, government, or circumstance, is held to be unconstitutional, the remainder of this Act, or any amendment made thereby, or the application of such provision to all other persons, entities, governments, or circumstances, shall not be affected thereby.

* * *

Finding These Provisions in the United States Code

In printed volumes of statutes, sections codified as notes are printed below the main body of the statutory text.

To find sections codified as notes on Westlaw, go to the statutory section to which the section you are looking for has been appended as a note. Near the top of the screen, and towards the left (but not all the way to either the top or the left), click on “History.” This will reveal a menu, and one item on the menu will be “Editor’s and Reviser’s Notes.” Click on that and you will find the statutory sections codified as notes. You may have to scroll down to find them. Westlaw, of course, could change the structure of its screens at any time, but any new structure is likely to be similar.

You can also find these sections in Statutes at Large, where they are printed as part of the

main body of the statutes. The Respect for Marriage Act appears at 136 Stat. 2305.

Despite their odd codification, the sections printed as notes are fully enacted as part of the law of the United States. They are all printed in statutory text in the Statutes at Large, which is fully authoritative. “The United States Statutes at Large shall be legal evidence of laws ... therein contained, in all the courts of the United States, the several states, and the Territories and insular possessions of the United States.”³ The Statutes at Large are actually more authoritative than the United States Code. As the Court has explained:

Though the appearance of a provision in the current edition of the United States Code is “prima facie” evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the “legal evidence of laws,” § 112, and despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictates.⁴

For a more detailed study of the Respect for Marriage Act, see Laycock, Douglas, Berg, Thomas C., Esbeck, Carl H., and Wilson, Robin Fretwell, *The Respect for Marriage Act: Living Together Despite Our Deepest Differences*, forthcoming at 2024 U. OF ILL. L. REV. ____ (2024), and available now at <https://ssrn.com/abstract=4394618> (social science research network, 2023). A copy of this article will be provided to those requesting a copy via email to Prof. Carl H. Esbeck at esbeckc@missouri.edu.

³ 1 U.S.C. § 112 (2018).

⁴ U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) (enforcing a provision from the Statutes at Large that had been omitted from the United States Code for many years because the codifiers mistakenly thought that it had been repealed).