**Pluralism Has Life Left in It Yet**

*The Respect for Marriage Act, and the harmony between religious liberty and LGBTQ rights.
By David French NOVEMBER 18, 2022*

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(*[*https://newsletters.theatlantic.com/the-third-rail/6377fb0dce44df0038de4c62/respect-for-marriage-same-sex-religious-freedom/)*](https://newsletters.theatlantic.com/the-third-rail/6377fb0dce44df0038de4c62/respect-for-marriage-same-sex-religious-freedom/)

It’s been called the “[oral argument that cost the Democrats the presidency](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/).” On April 28, 2015, Solicitor General Donald B. Verrilli Jr. stood up in the Supreme Court and argued that the Court should recognize a constitutional right to same-sex marriage. During that argument, Justice Samuel Alito asked him a question that voiced the concern of millions of people of faith. Here was the key exchange:

Justice Samuel Alito: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same­-sex marriage?

Solicitor General Verrilli: You know, I—I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue. I don’t deny that. I don’t deny that, Justice Alito. It is—it is going to be an issue.

With that response, General Verrilli confirmed a growing sense of alarm in theologically conservative Christian circles. If they continued to maintain that marriage is a union between a man and woman, would they be treated as bigots? As the equivalent of white supremacists?

Ever since a 1983 case called [*Bob Jones University v. United States*](https://www.oyez.org/cases/1982/81-3)—an 8–1 decision—the IRS has had the power to strip tax exemptions from educational institutions (including religious educational schools) that enact racist policies. The government, the court said, has a “fundamental, overriding interest in eradicating racial discrimination in education.”

The proper answer to Justice Alito’s question should have been “No, it will not be an issue, Justice Alito. The government does not view the traditional teachings of the Catholic Church, the Orthodox Church, and the vast majority of the Protestant Church to be the equivalent of white supremacy, and the government has a fundamental and overriding interest in protecting the free exercise of religion.”

But because of General Verrilli’s response, when same-sex-marriage advocates have asked opponents, “What does my marriage have to do with your life?” there’s been an obvious answer from people of faith: “Changing the law could strip me of my religious freedom. It could destroy the school where I educate my kids, and it could damage the institutions that represent and advance my core values and deepest beliefs.”

This did not have to be the outcome of recognizing same-sex marriage, and so far, it has *not* been the outcome of recognizing same-sex marriage. Thanks to more than a decade of religious-freedom victories at the Supreme Court, people of faith enjoy more freedom from government suppression than at any time in the nation’s history.

At the same time, thanks to *Obergefell v. Hodges* and [*Bostock v. Clayton County*](https://www.oyez.org/cases/2019/17-1618),the latter of which held that Title VII of the Civil Rights Act of 1964 protects Americans from employment discrimination on the basis of sexual orientation, LGBTQ Americans now enjoy more rights to form their own family and greater protection from workplace discrimination than at any other time in American history.

That’s how pluralism is supposed to work. It is possible for people with profoundly different worldviews to enjoy both individual liberty and freedom from workplace discrimination. (Title VII also protects people of faith from discrimination.)

But if there’s an oral argument that haunts conservative people of faith, there’s a court opinion that haunts LGBTQ Americans. In [*Dobbs v. Jackson Women’s Health Organization*](https://www.oyez.org/cases/2021/19-1392), Justice Clarence Thomas wrote a concurring opinion calling on the Court to “reconsider all of this Court’s substantive due process precedents,” including *Obergefell*.

Even though Justice Alito’s majority opinion explicitly stated, “Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion,” Thomas’s concurrence sent an understandable shudder through the LGBTQ community. Could *Obergefell* fall? Could the relationships people had built their lives around suddenly be stripped of legal recognition?

My own assessment of legal precedent leads me to the conclusion that neither the liberty of religious organizations nor *Obergefell* faces acute legal threat. There is no sign that a majority of the court is set to roll back religious liberty, and the majority has explicitly refused to “cast doubt” on *Obergefell*. There are very [strong reasons to believe](https://newsletters.theatlantic.com/the-third-rail/627535eb95033600218457a5/roe-v-wade-obergefell-gay-marriage/) the Court won’t touch *Obergefell*, including the reliance of millions of Americans on the Court’s ruling.

At the same time, however, I understand the concerns—in both directions. In a functional Congress, it would be an issue ripe for compromise, for a legislative solution that eases the worst fears of competing constituencies.

And that brings me to the [Senate version of the Respect for Marriage Act](https://www.sinema.senate.gov/sites/default/files/2022-11/RFMABillText.pdf). On Wednesday, a bipartisan coalition of senators (50 Democrats and 12 Republicans) voted to block a filibuster of legislation that *both* protects same-sex marriage if *Obergefell* falls and contains religious-freedom protections for religious dissenters, including explicit protections for tax exemptions.

The bill doesn’t give either side everything, but it still contains crucial provisions that can comfort (almost) everyone. First, it states that “no person acting under color of State law” can deny “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.”

In plain English, that means if your marriage was legal in the state where you’re married, then government officials from other states and localities can’t refuse to recognize the validity of that marriage on the basis of sex, race, ethnicity, or national origin.

And what of religious freedom? The bill does two important things. First, it declares that “[n]othing 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.”

This is an important provision and distinctly different from the Democratic approach to the [Equality Act](https://www.congress.gov/bill/116th-congress/house-bill/5/text), which limited the reach of the Religious Freedom Restoration Act. In other words, the bill explicitly diminished religious-freedom protections under federal law. The Respect for Marriage Act does no such thing.

But the bill goes even farther. A key provision deals explicitly with tax exemptions and other federal financial benefits:

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, including tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim, or defense, provided such benefit, status, or right does not arise from a marriage.

In other words, this bill cannot provide a basis for revoking the tax exemptions of religious organizations. Similarly, the bill also explicitly states that nonprofit religious organizations cannot be compelled to “provide services, accommodations, advantages, facilities, goods, or privileges” for “the solemnization or celebration of a marriage.”

The provisions, taken together, roughly preserve the legal status quo. At the risk of being overly simplistic, advocates for same-sex marriage are concerned that the Supreme Court could take a sledgehammer to *Obergefell*. Advocates of religious liberty are concerned that Congress could take a sledgehammer to religious freedom. The bill addresses both concerns.

It does not purport to address every religious-liberty issue related to same-sex marriage. For example, it doesn’t address the conflict between the First Amendment rights of for-profit businesses and state nondiscrimination laws—a conflict that SCOTUS will partially address this very term when it decides [*303 Creative v. Elenis*](https://www.scotusblog.com/case-files/cases/303-creative-llc-v-elenis/), a case involving a clash between a Christian web designer’s free-speech rights and Colorado’s public-accommodations statute. [The question is simple:](https://www.scotusblog.com/case-files/cases/303-creative-llc-v-elenis/) Whether “applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.”

(Full disclosure: I filed an [amicus brief](http://www.supremecourt.gov/DocketPDF/21/21-476/226910/20220602120922780_21-476%20Amicus%20Brief%20of%2015%20Family%20Policy%20Organizations.pdf) on the case, arguing in favor of the First Amendment rights of the web designer).

The magic of the American republic is that it can create space for people who possess deeply different world views to live together, work together, and thrive together, even as they stay true to their different religious faiths and moral convictions. The Senate’s Respect for Marriage Act doesn’t solve every issue in America’s culture war (much less every issue related to marriage), but it’s a bipartisan step in the right direction. It demonstrates that compromise still works, and that pluralism has life left in it yet.