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Respect for Marriage Act offers welcome protections but won't codify Obergefell into law: Mark R. Brown

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Jim Obergefell in a March 2015 file photo in front of the U.S. Supreme Court. In June 2015, the high court legalized same-sex marriage in the landmark case, Obergefell v. Hodges. The Obergefell ruling could be in jeopardy, however, after the Supreme Court's decision this year overturning Roe v. Wade, when Justice Clarence Thomas suggested the same-sex marriage case was among other precedents the court might revisit. That's driven the Senate to pass the Respect for Marriage Act, but in a guest column today, law professor Mark R. Brown warns the Respect for Marriage Act, if enacted into law, will not fully codify Obergefell, even though it provides some welcome protections for same-sex

marriage (AP Photo/Andrew Harnik) AP

By

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COLUMBUS, Ohio -- Congress appears poised to pass its [Respect for Marriage Act](#), legislation that protects same-sex marital rights. Necessitated by Justice Clarence Thomas' credible threat this past spring in [Dobbs v. Jackson Women's Health Organization](#) (which overturned [Roe v. Wade](#)) to overrule the fundamental right to same-sex marriage, this new federal legislation is a welcome development.

But be forewarned, this act does not mirror the fundamental right to same-sex marriage that was recognized seven years ago in [Obergefell v. Hodges](#). Under that holding, all states must recognize same-sex marriages. The proposed federal law, in contrast, only requires that states give full faith and credit to same-sex marriages that are performed elsewhere. States (like Ohio) are not prevented by the act from reverting to their old ways (and refusing to license same-sex marriages) should Obergefell be overturned. While the act makes same-sex marital licenses portable, couples in states that revert to pre-Obergefell prohibitions will need to travel to obtain them (not unlike patients seeking abortions after Dobbs).

Nor does the act create a federal licensing alternative for same-sex couples. It instead borrows state marital laws (as it always has) for purposes of federal programs, with the proviso that same-sex marriages performed in states that recognize them also qualify.

Why this half-measured congressional effort? Why not simply codify the protections of Obergefell? Politics is part of the problem.

Democrats in the House and (especially) the Senate need Republican support. Ensuring full faith and credit (as the act does) is one thing; ensuring equality for all (which it should do but does not) is another. Notwithstanding the many inroads made by the LGBTQ community these past years, evangelical opposition remains strong -- especially among Republicans.

The other problem is legal; that is, having to face what has become an ideologically drugged Supreme Court. Any court willing to overturn a fundamental right after just seven years would likely be equally willing to invent constitutional reasons to prevent its statutory replacement. One suspects that may happen even with the act as written.

Would federal legislation that fully recognizes a right to same-sex marriage, if enacted, survive constitutional scrutiny by the Supreme Court? In normal times, with a less-disruptive Supreme Court, the answer would be yes. Congress has long possessed the power to license activities that affect interstate commerce. Discrimination against same-sex couples affects interstate commerce in myriad ways, just as racial discrimination does. Congress has prohibited the latter under the [Commerce Clause](#), with the Supreme Court's blessing, [since 1964](#). State laws to the contrary are pre-empted by the Constitution's [Supremacy Clause](#). A federal definition of marriage and accompanying licensing system could be constructed to operate in the same way.

[Tenth Amendment](#) zealots are sure to protest in the name of "states' rights," but this often-offered bogeyman would have been readily rejected before the monumental changes to Supreme Court personnel these past five years. In the absence of a federal "commandeering" of state personnel, the 10th Amendment does

not prevent Congress from regulating private parties (like married couples). It could thus itself define marriage and supply its own licenses, which would join to pre-empt state prohibitions.



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Congress could also simply use its “section five power” under the [14th Amendment](#), which authorizes it to protect fundamental rights. So long as some semblance of same-sex marital rights under Obergefell remain in place (either in terms of marriage or LGBTQ equality), Congress can protect them. Barring a total overhaul of not only Obergefell, but also [Lawrence v. Texas](#) (recognizing a right to same-sex intimacy), and [Romer v. Evans](#) (prohibiting discrimination against the LGBTQ community), Congress should remain able to protect same-sex marriage.

Because that is precisely what Thomas has in mind, of course, the reality is that anything Congress chooses will be challenged. Better (in my opinion) to be on the right side of history and pass the legislation needed to fully protect same-sex marriage. Let the chips (and Thomas) fall where they may.

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