



President Joe Biden signs the Respect for Marriage Act, Tuesday, Dec. 13, 2022, on the South Lawn of the White House in Washington. (AP photo: Andrew Harnik)

Making ‘room for everyone’

Minnesota experts assess how marriage act balances interests

By: Samantha Stetzer December 23, 2022

On Dec. 13, 2022, thousands of people witnessed history on the White House lawn as President Joe Biden signed the Respect for Marriage Act into law, codifying the recognition of same-sex and interracial marriage.

Among the attendees was Minnesota law professor Tom Berg, who co-authored a letter that played a small role in the bill’s passage.

“It was fun to go and see people’s happiness,” Berg said. “I’m a bystander who had a little bit of involvement in the act. The people who worked for marriage equality over the years were there, rightly, to celebrate.”

Berg is an expert on religious liberties and constitutional law, and he is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas. To know Berg is to know religious liberties and same-sex marriage protections are rights he and his colleagues have long supported. In his work, Berg has testified before Congress, written articles, and filed motions on this very topic, including a motion he filed during *Obergefell v. Hodges*.

In *Obergefell*, the Supreme Court ruled same-sex marriage was a right afforded by the Constitution.

"We can only make advances if we make room for everyone," Berg said.

In November, Berg and his colleagues co-authored a letter to senators, praising and explaining the bill's efforts to protect both religious freedoms and same-sex marriage.

Berg said the letter swayed at least two Republican senators to vote in favor of the bill, which gained 61 votes in the Senate.

The Respect for Marriage Act was created in response to the U.S. Supreme Court's summer decision to overturn *Roe v. Wade* on the grounds that the post-Civil War authors of the 14th Amendment to the U.S. Constitution — the amendment upon which *Roe* and other pivotal cases were decided — did not intend that it would include access to abortion and same-sex and interracial marriages, according to Jill Hasday.

Hasday is a Distinguished McKnight Professor and Centennial Professor at the University of Minnesota Law School, and she is an expert on constitutional, anti-discrimination, and family law, as well as women's legal history.

Cases such as *Obergefell* and *Loving v. Virginia*, the 1967 ruling that upheld interracial marriage, could be overturned using the same precedent set by the recent *Roe* decision.

In response, the Respect for Marriage Act does not guarantee the rights established by *Obergefell* and *Loving*; however, the bill states the federal government must recognize same-sex and interracial marriages. States must also honor legal same-sex and interracial marriages from other states, Hasday explained.

The portion of the bill Berg and his colleagues explained and praised in their letter stated religious organizations, such as churches, will not be required to perform or recognize same-sex marriages, nor will they be punished financially if they do not support same-sex marriage.

This amendment may appear discriminatory to some, but Joshua Newville, an anti-discrimination lawyer with Minneapolis' Madia Newville, LLC, who helped overturn South Dakota's same-sex marriage ban prior to *Obergefell*, disagrees.

Newville praised the amendment as fair for everyone.

"I think it's the right call," Newville said. "There's been a tendency, I think, among social justice advocates to sort of forget the bigger picture when we demand some of these changes. ... Do we really want the government to engage in a particularized conduct that is so personal?"

Additionally, Newville, who is starting Newville PLC, explained the religious protections may not have an impact on every religious organization.

"Religion and religious beliefs, although those concepts have been used in the past as swords against gay people, we do have to be careful not to sweep so broadly to presume that anyone who is religious ... that they harbor some ill will toward gay and lesbian people,"

Newville said.

As for the lasting implications, Hasday suggested the passage of the Respect for Marriage Act could signal a shift from previous legal precedents regarding religious beliefs and other personal rights.

“I think it’s fair to say the current six-judge conservative majority [on the Supreme Court] is very sympathetic to religious liberty claims and is open to making exemptions to anti-discrimination laws,” Hasday said. “Time will tell.”

The history of this, Berg explained, can be traced back to the 1970s, when the IRS denied tax exemption status to schools with racist policies shortly after school desegregation.

This practice came up during the *Obergefell* hearing, when then-Solicitor General Donald Verrilli was uncertain as to whether legalizing same-sex marriage would lead the IRS to take the same action against religious organizations with anti-same-sex marriage policies. This instilled fear among religious organizations.

As such, the Respect for Marriage Act would have struggled to reach its historic signing without religious protections, Berg stated. He cited The Equality Act, which would adapt current civil rights laws to include gender identity and sexual orientation, as an example because it has stalled in Congress and includes no religious protections.

“It doesn’t happen unless there is some bipartisanship,” Berg said, later adding, “We live in a closely divided society between Republicans and Democrats.”

Hasday pointed out the bill’s passage also reflects a major change in popular political opinion. In 1996, 85 senators voted in favor of the Defense of Marriage Act (DOMA), which stated that no state is required to recognize same-sex marriages that are legally binding in other states.

The Respect for Marriage Act is a resounding counter move less than 30 years later.

“It’s remarkable and wonderful that Congress has affirmed same-sex marriages [and] repealed DOMA,” Berg said. “It’s hopeful for the future that it’s done so in a way that respects religious liberty and might give a model for the future.”

Along with optimism, Berg and Hasday also emphasized various components of the law that are worth monitoring.

Hasday pointed out that the bill explicitly states polygamous marriage is not legally recognized. Given the ways stances on marriage and religious rights have shifted in recent decades, Hasday said this view could also change.

Furthermore, while the bill requires states to recognize marriages performed legally in other states, both Hasday and Berg said this is complex. If *Obergefell* were overturned, there would likely be a slew of cases to challenge the Respect for Marriage Act, Berg explained.

Regardless, all three of these legal experts said the act is a legal victory for everyone.

“I think this is a win for Americans,” Newville said. “When we’re talking about these kinds of rights – the right to marry, the right to hold these sincerely religious beliefs without being concerned that the government is going to force you to do something — these sorts of things, the way they interact with each other, have always been important to Americans.”

RELATED:

Respect for Marriage Act has key limitations

RELATED



Court: Deputy's suicide could be classified as 'in line of duty'

ATTORNEYS
OF THE **YEAR**

Minnesota Lawyer announces Attorneys of the Year
⌚ December 22, 2022



Man seeks review of \$7M adultery award in postnup

⌚ December 23, 2022



Duluth man faces wire fraud charge over law firm that doesn't exist

⌚ December 22, 2022



Former law dean Vischer is new St. Thomas president

⌚ December 23, 2022



Preferred pronouns at Menards

⌚ December 21, 2022