Written by **Selwyn Duke** on November 17, 2022

Killing the "Respect for Marriage Act" Is Simple: Make Respect for the Constitution More Than Just an Act

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When the Supreme Court issued the *Obergefell v. Hodges* opinion in 2015, which claimed that states must recognize and perform same-sex "marriages," then-Ohio governor John Kasich said that "the court has ruled and it's time to move on." This reflected how even many GOP politicians were no doubt happy that judges freed them from having to take a stand on a controversial issue. Now they could just say, "Well, we tried! But the courts have ruled! Let's talk about nation-building — overseas!"

Seven years on and sinking ever further, 12 liberal Republican senators have joined all their Democratic colleagues to advance the misnamed Respect for Marriage Act (RFMA) to their chamber's floor for formal debate. The bill, HR 8404, would "codify" *Obergefell*, giving it the imprimatur of law in a move that only makes sense as a tacit admission that a SCOTUS opinion *isn't law* (and, of course, it isn't). Yet there's something else that isn't law, at least in spirit: an unjust law.

For this reason, judges can judge and Congress can codify copiously, but it means nothing if states simply echo Augustine of Hippo and say, *lex iniusta non est lex* (an unjust law is no law at all) — and it *will* be nullified.

There's good reason to nullify the RFMA should it become law (most likely), too. Not only is it unconstitutional, but critics claim that it poses a threat to religious liberty. As LifeSite wrote last Thursday:

> The bill repeals the unenforced Defense of Marriage Act, which recognized marriage at the federal level as a union of one man and one woman and guaranteed states' right to uphold traditional marriage, and requires the federal government and all 50 states to recognize homosexual "marriages" lawfully performed in any state.
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> It also poses grave threats to religious freedom, as numerous social conservative and religious liberty organizations have repeatedly warned.
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> The Respect for Marriage Act includes a "private right of action" clause that allows anyone who is "harmed by a violation" of the bill to bring civil action against a person who violated it "for declaratory and injunctive relief." Attorneys general would also be able to bring civil

action against alleged violators.

Whether this interpretation is valid is questionable. HR 8404 appears to state that its prohibitions are limited to people acting "under color of State law," which mainly applies to government officials. As Upcounsel informs, the quoted phrase covers "not only acts done by an official under a State law, but also acts done by an official under any ordinance of a county or municipality of the State, as well as acts done under any regulation issued by any State or County or Municipal official, and even acts done by an official under color of some State or local custom."

But here's where it gets sticky. Upcounsel also tells us that a "person may be found guilty [under color of State law] even though he was not an official or employee of the State, or of any county, city, or other governmental unit if the essential elements of the offense charged have been established and the person was a willful participant with the state or its agents in the doing of such acts."

It thus appears that HR 8404 shouldn't apply to a private person or entity unless he or it participated with the government in denying what the bill prohibits. But readers can review the RFMA (found here), which is quite short, and draw their own conclusions.

This said, it wouldn't be unprecedented for an unscrupulous attorney general to interpret or apply the RFMA "creatively," which is one reason such matters so often end up in court — to be settled by sometimes equally "creative" judges.

What certainly seems unfounded is the concern that HR 8404 would compel states to recognize polygamous "marriages" performed in other states, as the bill's text specifically says that only proceedings "pertaining to a marriage between 2 individuals" are covered.

What the RFMA doesn't specify, however, is anything about the *age* of those "2 individuals." It thus follows that if a state decided to allow an adult to wed a 12-year-old, that marriage would have to be recognized by other states.

Whatever the particulars of the legality, the morality is clear. And it was expressed, in part, by Archbishop Salvatore Cordileone of San Francisco this summer. "'The health and socioeconomic benefits of stable family life with a mother and a father are well-established, as are the positive outcomes for children raised in such a home,' and children have a 'basic right' to be raised by a mother and father in an exclusive, lifelong marriage whenever possible, he wrote," related LifeSite August 2.

"'Same-sex civil marriage has further diminished the fulfillment of that right, both directly and indirectly[,] as it further disassociates marriage and sexual actions from the responsibilities of childbearing,' Archbishop Cordileone lamented," the site continued.

Also clear about the RFMA is the largest legal question. That is, the act "is unconstitutional," as nonprofit Liberty Counsel put it last week. This brings us back to the main point. While Liberty Counsel also asserts that the bill does gravely threaten religious freedom, all this arguing about what HR 8404 says and doesn't say is rendered largely irrelevant if we just accept that simple principle:

An unjust law is no law at all.

Such a law should be nullified, too, as Thomas Jefferson insisted, calling that the "rightful remedy" for all federal overreach.

If the states won't stand up for their powers and stand against federal tyranny, then the RFMA is the least of our problems. For with state obeisance status quo, Washington will simply become more and

more despotic over time and impose dictates that will make these RFMA days seem appealing.

Only power negates power. Talk is cheap.