The First Amendment Defense Act:
An Appropriate Congressional Response to Real Threats to Freedom of Conscience

Matthew J. Franck[1]
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I. *Obergefell* v. *Hodges* and its Impact

The Supreme Court's decision in *Obergefell* v. *Hodges* in June 2015 changed the meaning of the Constitution in order to impose on the entire country a change in the meaning of marriage. This should not be regarded as a controversial characterization of the ruling. Justice Anthony Kennedy's opinion for the narrow majority in the case referred to the "new insight" into constitutional meaning that changing circumstances vouchsafe to the justices of the Court, who cannot "allow[] the past alone to rule the present,"[2] and he characterized marriage as an "institution" that has "evolved over time,"[3] the implication from these observations, taken together, being that the Supreme Court is in charge of the evolution that both the Constitution and marriage are to undergo in our country.

It is not surprising that such a sweeping decision, rendered by such a closely divided Court, lacks legitimacy in the minds of many Americans who believe that neither the Constitution nor the institution of marriage can be redefined on the motion of five members of an unelected, unaccountable judiciary. Today, a little more than a year later, there are many Americans who would reverse or overturn *Obergefell*, either politically or judicially, if they could. Over the short, medium, and long term, the numbers of such Americans may shrink or grow, and no one should be confident of what the long-term trend lines will be.

To compare our current situation with other watershed moments in American constitutional history, this is 1974 after *Roe* v. *Wade*, or 1858 after *Dred Scott* v. *Sandford*. Whichever opinion is in the ascendant at any given time, and whatever the relative strength of the contending views, deep divisions over *Obergefell* are bound to continue. And they are exacerbated by the nature of the decision itself, which took from the people the right of self-government over some of the most vital questions that the law can possibly address—the meaning of marriage, the nature of the family, and the rights of children to a mother and father.

While those divisions continue, how will today's victors in the struggle over marriage proceed to treat their fellow citizens who dissent from the ruling in *Obergefell*, and who regard it as a grievous error in law and morality from which they wish to keep their distance? A decent

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[1] Director, William E. and Carol G. Simon Center on Religion and the Constitution, the Witherspoon Institute, Princeton, N.J.; Professor Emeritus of Political Science, Radford University; Visiting Lecturer in Politics, Princeton University. My primary employment is with the Witherspoon Institute, a 501(c)3 research and educational institution that takes no positions on pending legislation; therefore I am testifying in my personal capacity as a constitutional scholar.
[2] *Obergefell* v. *Hodges*, 576 U.S. ___ (26 June 2015), slip op. at 11 (Kennedy, J., for the Court).
[3] Ibid., at 6.

respect for the consciences of other Americans should prompt them to model their treatment on the Church Amendments, adopted after *Roe* in the 1970s, which protect persons and institutions from any discrimination or adverse consequences of their refusal to perform or be complicit in any sterilization or abortion, on grounds of "religious beliefs or moral convictions" that prompt such refusal.[4]

The Church Amendments, and similar provisions of federal law,[5] evince a recognition on the part of Congress that some of our fellow citizens have legitimate, even though not universally shared, moral convictions about the sanctity of human life that it would be wrong to coerce them to betray. The freedom to follow the promptings of conscience in this matter is affirmed whether one's conscience is informed by religious faith or not—hence the typical statutory language of "religious beliefs or moral convictions." The proposed First Amendment Defense Act wisely echoes this language and partakes of the same breadth of coverage for those whose consciences are affected by changes in the legal landscape, but now in the context of those with a "sincerely held" conscientious belief, whether religious or not, that marriage is "the union of one man and one woman."

The impulse that the Church Amendments reject, namely that all should be compelled to conform their conduct to a notion that abortion is part of the public good, should be rejected in this new context as well. A policy of compulsory acceptance of the redefinition of marriage imposed by *Obergefell*, under the threat of the federal government's coercive authority, would be both a sign of political insecurity on the part of the victors in that case, and a reality of gratuitous intolerance, spurring needless conflict and inflicting widespread harm with no counterbalancing benefit other than the satisfaction of having oppressed others who think differently than oneself.

The justices of the Supreme Court who wrote in the *Obergefell* decision foresaw the issues we are discussing today. In some ways this is striking, because the case had nothing in itself to do with religious freedom or the relation between church and state. But the historical intertwining of religious belief and legal principles respecting marriage placed the future of religious freedom prominently in the background of the ruling at hand. Chief Justice Roberts is worth quoting at some length:

> Today's decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.
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> Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may

[4] "Church Amendments, 42 U.S.C. § 300a-7," available at http://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf.

[5] See "Current Federal Laws Protecting Conscience Rights," Secretariat of Pro-Life Activities, U.S. Conference of Catholic Bishops, available at http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf.

> continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.
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> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.[6]

Similarly, Justice Thomas wrote: "Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect."[7] He observed that the First Amendment's protections were "far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice" such as the Religious Freedom Restoration Act.[8] Justice Thomas continued:

> Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.[9]

It is exactly such "ruinous consequences"—or some of them, at least—that the First Amendment Defense Act, in my opinion, is well designed to prevent.

Justice Alito also observed the potentially grave consequences for religious liberty that could unfold from the *Obergefell* decision, which he predicted

> will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.
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> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of

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[6] *Obergefell*, slip op. at 27-28 (Roberts, C.J., dissenting) (citations omitted).
[7] Ibid., slip op. at 14 (Thomas, J., dissenting).
[8] Ibid., at 15.
[9] Ibid., at 16.

> conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.
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> The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.[10]

The First Amendment Defense Act gives Congress the opportunity, with respect to those conscience rights within its reach to protect, to mitigate the harm caused by the Supreme Court's decision to short-circuit the political process and decree a nationwide right of same-sex marriage. Justice Alito rightly observed that in the process of legislation in each state, it was possible to "tie" conscience rights and same-sex marriage together. Indeed, in the small number of jurisdictions where same-sex marriage was established by legislation rather than judicial decree, this is generally what did happen.[11]

Justice Alito *seemed* to say that such accommodation had now been rendered "impossible" by the decision in *Obergefell*. But he said this in a particular context—namely, his critique of the majority's arrogation of power to constitutionalize the question of same-sex marriage, and to decree a result by adjudication rather than letting legislative action take its course. Legislation typically involves more give and take than adjudication, and in the legislative arena it was *possible* to "tie" marriage legislation and conscience protection closely together as a single package subject to a vote. This isn't how courts operate, and so the justices had given a complete victory to one party, without necessity of compromise or accommodation. But Justice Alito's comment by no means ruled out the possibility, or the legitimacy, of *post hoc* efforts to accommodate conscience rights by legislation. Likewise, whereas Chief Justice Roberts remarked (as already quoted above) that the Court's ruling "cannot, of course, create any such accommodations," he by no means averred that the Court's decision rules them out as disallowed by the Constitution. The First Amendment Defense Act represents just such an effort at accommodation, responding to the newly created constitutional status of same-sex marriage by creating a statutory safe haven for the exercise of conscientious dissent from this redefinition of marriage's meaning.

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[10] Ibid., slip op. at 6-7 (Alito, J., dissenting) (citations omitted).

[11] See Robin Fretwell Wilson, "The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom," in *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe*, ed. Timothy Samuel Shah, Thomas F. Farr, and Jack Friedman (New York: Oxford University Press, 2016), 132-80, esp. 145-50.

In the quotations above from *Obergefell*, we have seen the dissenting justices remark on the majority's passing mention of religious liberty. And it is true that in a crucial passage the majority seemed to express a cramped view of our first freedom. Justice Kennedy wrote:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.[12]

This is the passage of the majority's opinion that elicited the warnings of three of the dissenters. Here Justice Kennedy spoke of the freedom of religion only as the freedom to believe, and to express a belief in, an understanding of marriage as the conjugal union of a man and a woman. That view, on the other hand, was entirely disabled from being embodied in the law as a definition of marriage inasmuch as it kept same-sex couples from enjoying the legal status of marriage "on the same terms."

But what of the space in between? If religious believers, and others sharing their view on non-religious grounds, wished to do more than merely *think* of marriage as a conjugal union of man and woman, but were now told they could not *legislate* that understanding, could they nonetheless *act* on that understanding in their interactions with fellow citizens in educational, charitable, social, and commercial settings? Could they do so, especially, because their beliefs about marriage are integrally bound up with their identity and integrity as believers or as morally conscientious persons?

The *Obergefell* dissenters were clearly worried that such a freedom of action was endangered in the new order the decision called forth. Chief Justice Roberts, as quoted above, gave several examples of concrete threats to such freedom that could be easily foreseen. And Justice Thomas, immediately before his reminder (also quoted above) about our history of providing more legal protection for religious freedom than the judicially interpreted Constitution may be said to require, put his finger on the same problem:

> Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Religious liberty is about *freedom of action* in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.[13]

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[12] *Obergefell*, slip op at 27 (Kennedy, J., for the Court).
[13] Ibid, slip op. at 15-16 (Thomas, J., dissenting) (emphasis added; citation omitted).

Is the *Obergefell* majority's seemingly more restrictive reading of religious freedom in the passage already quoted—mentioning only belief and expression, and omitting the "exercise" of religion that encompasses action in the world—the whole story? Did Justice Kennedy foreclose the possibility that religious freedom to dissent from the redefinition of marriage could go beyond speech to involve those *actions* that conscience must constrain in a person of strongly held religious or moral views?

I do not think he did foreclose that possibility. Consider the following, less frequently noticed, passage from his majority opinion:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.[14]

Although there are other passages in Justice Kennedy's opinion that drew the critical comment from Chief Justice Roberts that he had "sull[ied] those on the other side of the debate,"[15] in this particular passage there is an underappreciated symmetry in Kennedy's treatment of the contending points of view. The views of the supporters of conjugal marriage are not only "sincere" and "personal," they stem from both "religious" and "philosophical premises" that are "decent and honorable"—i.e., reasonable and worthy of respect. Kennedy claims that embodying those views in the law governing who may marry whom would "disparage [the] choices and diminish [the] personhood" of same-sex couples wishing to marry. But by the same token he disavows any reading of *Obergefell* in which the conjugal view of marriage is "disparaged here."

The five-justice majority for whom Justice Kennedy speaks has chosen a victor in this struggle—wrongly, as I and many others would argue—but here he appears to enunciate an evenhanded "no disparagement" principle. On the one hand, he argues, it would be wrongful disparagement of the choices and personhood of same-sex couples to deny them the civil status of marriage. On the other hand, he allows that it would also be wrongful disparagement of the "decent and honorable" views, central to their own personhood as conscientious moral actors, that are advanced by those who hold the conjugal view of marriage for religious or philosophical reasons, for the state to suppress those views. The possibility that Justice Kennedy neither considers *nor rejects*, but which is raised by Chief Justice Roberts and the other dissenters, is the potential for such suppression—amounting exactly to the "disparage[ment]" he disavows—when the government compels *conduct* that contradicts the dictates of conscience as it responds to these "decent and honorable religious or philosophical premises" about the meaning of marriage.

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[14] Ibid., slip op. at 19 (Kennedy, J., for the Court).
[15] Ibid., slip op. at 28 (Roberts, C.J., dissenting).

Justice Kennedy's recognition of these "decent and honorable" views opposed to his own is commendable. This is not the way indefensible bigotry is discussed, even in the detached language of judicial opinions.[16] And in light of this passage, we can justifiably take his opinion's narrower expression of the scope of religious freedom, several pages later, as expressing a minimum of such freedom and not a maximum—a floor and not a ceiling. Thus ample room is implicitly conceded for congressional action such as the First Amendment Defense Act, to protect exactly that freedom of conduct on the meaning of marriage that is the first target of those who would seek to suppress as well the viewpoint informing that conduct.

II. The Scale of the Problem

Virtually everyone who has examined the implications of same-sex marriage for religious freedom, and freedom of conscience more generally, has been compelled to recognize that the conflicts ahead of us—some of them playing out already—are very real. In a recent book to which I contributed, scholars from the United States, United Kingdom, and continental Europe examined the issues from a variety of perspectives. Some were for same-sex marriage, some against it. Some of those in favor of same-sex marriage were mindful of the legitimate claims of dissenters; others were more dismissive or unsympathetic toward those claims. But almost without exception the authors were aware of the reality of the conflict, and of the nature of the threat to freedom as the law is brought to bear on the conduct that our consciences will permit us to undertake.[17]

As Justice Thomas remarked in his *Obergefell* dissent, "In our society, marriage is not simply a governmental institution; it is a religious institution as well."[18] By this he did not mean that the laws of marriage previously embodied a purely religious perspective on the institution, much less that they constituted an "establishment of religion." In context, he plainly meant merely the commonplace observation that marriage and family are central features both of our political life, therefore governed by public policy, and of many, perhaps the great majority of, Americans' religious lives, answering morally to teachings and doctrines of faith. Hence, he continued:

> Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.[19]

If anything, the conflicts over religious liberty following in the wake of the Court's decision to redefine marriage threaten to be more numerous, and more acute, than those that followed the abortion decision in *Roe* v. *Wade*. Why is that? As I explained in the book to which I referred above:

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[16] Compare, for instance, the accurate characterization of anti-miscegenation laws as nothing more than "measures designed to maintain White Supremacy," in *Loving* v. *Virginia*, 388 U.S. 1 (1967), at 11.
[17] See *Religious Freedom and Gay Rights*. I rely in part for what follows on my Introduction to this volume, "Religious Freedom, Same-Sex Marriage, and the Dignity of the Human Person."
[18] *Obergefell*, slip op. at 15 (Thomas, J., dissenting).
[19] Ibid.

> [T]he adoption of same-sex marriage in the laws of the United States and the other western democracies is different in kind from previous developments that had relaxed or abandoned the legal enforcement of Christian (but not uniquely Christian) norms of sexual morality. When most of the Christian churches other than the Roman Catholic abandoned the historic condemnation of artificial contraception beginning some 80 years ago, and the laws gradually followed suit in dropping proscriptions of it, there was no inroad on the freedom of those who clung to the ancient teaching to continue following their consciences, as individuals or in their institutions. (Lately this has changed in the United States, with the Health and Human Services mandate for employer provision of contraception under the Affordable Care Act of 2010.)
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> Likewise, when adultery was decriminalized, or when sodomy laws fell into desuetude, no one who believed in the sinfulness or immorality of such acts was harmed in his own freedom to live conscientiously by such moral or religious norms. The American people's right of self-government—an underappreciated part of their liberty of acting together in community—was arguably harmed by the Supreme Court's invalidation of all sodomy laws in *Lawrence v. Texas* (2003), but religious freedom as such suffered no blow.
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> Even *Roe v. Wade* (1973), viewed by all who hold life sacred from conception to natural death as a legal horror, a grievous injustice against basic human rights, was not by the force of its own logic a threat to the religious freedom of the ruling's opponents. To be sure, there were medical institutions and others in need of a shield against any coerced complicity in abortions they conscientiously opposed, but in the main (while there were and still are flashpoints here and there) such a shield was ungrudgingly provided by legislators.
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> The redefinition of marriage, extending the civil status of the institution by law to same-sex couples, propels us into very different territory. As Justice Thomas noted, the claim that was victorious in *Obergefell* was not really, in the logic of the law, a "liberty" claim at all. It was a demand for government recognition and inclusion in an institution whose definition has always included some and excluded others. And marriage is an institution both civil and religious, as Justice Thomas also noted.
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> More than that, marriage's meaning permeates civil society generally—the economy, education, the structures and activities of intermediate associations generally, all of which are subject in varying degrees to the law's understanding of marriage and family relations. From schools to hospitals to social service agencies to charitable institutions to workplaces to market transactions of myriad kinds, any modern society presents countless micro-environments where conscience, moral choice, and claims of dignity regarding the meaning of marriage can potentially clash in ways that erupt into litigation, prosecution, and/or public administration of where the right should prevail.[20]

The fact that marriage is so interwoven with civil society across so many dimensions, and that it is central and prominent in any understanding of the common good, accounts in large part for its

[20] Franck, "Religious Freedom, Same-Sex Marriage, and the Dignity of the Human Person," 15-16.

centrality in religious traditions as well. All the major world religions in their most traditional or orthodox forms hold that marriage is a union of man and woman, because of the sexes' complementarity and because of the importance of the generation and upbringing of children. At the Humanum Colloquium, a major international, inter-religious meeting held at the Vatican in November 2014, prominent representatives of the Catholic, Evangelical, Anglican, Pentecostal, Eastern Orthodox, Anabaptist, Mormon, Jewish, Muslim, Jain, Buddhist, and Hindu faith communities attested to their shared understanding of the importance of sexual complementarity in marriage.[21]

In many, perhaps most of these faith communities, certainly in those in the historic mainstream of Judaism and Christianity, believers hew to doctrines on marriage and sexual relations that are considered central to the faith's moral teachings, coming to them with all the force and obligation of divine commandments. Marriage is imbued with a sacred character, even a sacramental one.

This is a commonplace observation that I will not belabor further. What bears pointing out, however, is the nature of the consensus across all of these religious traditions. What can account for the agreement of the Jewish and the Jain traditions, the Mormon and the Hindu, the Anabaptist and the Buddhist? These traditions, while differing on so much else, are in agreement on the nature of marriage as a union of complementary sexes because that understanding is fully defensible as a rational matter without recourse to revelation or divine authority. A compelling case for "what was" (in the late Justice Scalia's words), "until 15 years ago, the unanimous judgment of all generations and all societies"[22] can be made entirely without employing theological categories of any kind.[23]

The rational, non-religious case for conjugal marriage is, as it were, self-sufficient. This is why, as with the belief that unborn human life is deserving of protection, it is appropriate for the law to protect a conscientiously held "moral conviction" of no particularly religious character, as well as "religious belief" on the subject. And this is why Justice Kennedy, in *Obergefell*, was able to refer in the same breath to "decent and honorable religious *or philosophical* premises" for the pan-civilizational, historically normative understanding of marriage. Here religion and philosophy do not inhabit different domains so much as they partake of the same practical reason about human relationships and the common good.

To take the tradition that I know best, the historic teachings of Christianity have been a "package deal" of the following interwoven elements: first, a teaching of human freedom, including religious freedom, springing from the *imago Dei*, the scriptural teaching that we are all made in

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[21] See the contributions to the Humanum Colloquium collected in *Not Just Good, But Beautiful: The Complementary Relationship Between Man and Woman*, ed. Steven Lopes and Helen Alvaré (Walden, NY: Plough Publishing, 2015).

[22] *Obergefell*, slip op. at 7 (Scalia, J., dissenting).

[23] See, e.g., Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter, 2012); Patrick Lee and Robert P. George, *Conjugal Union: What Marriage Is and Why It Matters* (New York: Cambridge University Press, 2014).

the image and likeness of God, as rational creatures with free will;[24] second, the understanding of marriage as a union of man and woman and the exclusive scene of morally permissible sexual relations, an ethic advanced as basic to the good of children, women, and men alike;[25] and third, an ethic of service to others through works of charity and mercy, as well as in the marketplace and social relations generally.

From the point of view of the historic mainstream of Christianity, these things are inextricable parts of a whole. The religious faith that impels people to serve their neighbors, in commerce, social action, and good works, is the same faith that agrees with reason in concluding that our consciences must be free and uncoerced, and is also the *same faith* that reinforces and, for many, renders sacred the altogether reasonable moral conviction that marriage is the conjugal union of a man and a woman.

Five justices of the Supreme Court have now said the law of the land is otherwise on the subject of marriage. But if it is treated as compulsory for those who resist this change, and who hold to the older view, to conform their actions in the marketplace and civil society to the new dispensation on marriage, in flat contradiction of their sincerely held religious and moral convictions on the subject, then the "new normal" will amount to an all-out assault on the whole package of the beliefs that constitute their identities. It will be an assault on these believers' ability to participate on an equal footing with others in the marketplace and civil society, and above all an assault on their freedom of conscience.

On the side of coercing rather than accommodating conscientious dissenters from the redefinition of marriage, the claim is typically made that a "dignitarian harm" to gays and lesbians is remedied thereby.[26] The cause of the harm to one's dignity is evidently the felt sense that others evince an "animus" toward one's identity. But as Robin Wilson, a supporter of same-sex marriage, has written:

> Refusals to assist with a same-sex marriage, however are different [from the discrimination targeted by earlier civil rights statutes]—they can stem from something other than anti-gay animus. For many people, marriage is a religious institution and wedding ceremonies are a religious sacrament. . . . Without explicit protection in the non-discrimination or same-sex marriage law, many will be faced with a cruel choice: your conscience or your livelihood.[27]

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[24] For an exploration of the Christian development of the idea of religious freedom, see Matthew J. Franck, "Two Tales of Freedom: Getting the Origins of Religious Liberty Right Matters," *Touchstone: A Journal of Mere Christianity*, July/August 2016, 19-26. See also Ronald Osborn, "The Great Subversion: The Scandalous Origins of Human Rights," *Hedgehog Review* 17:2 (Summer 2015): 90-100; Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Cambridge: Harvard U.P., 2014).

[25] On this point see Kyle Harper, *From Shame to Sin: The Christian Transformation of Sexual Morality in Late Antiquity* (Cambridge: Harvard U.P., 2013).

[26] See Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124 (2015): 2516, 2574-78. But see Sherif Girgis, "Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel," *Yale Law Journal Forum* 125 (2016): 399, available at http://www.yalelawjournal.org/pdf/Girgis_PDF_v7w4z24v.pdf.

[27] Wilson, "The Politics of Accommodation," 164.

More pointedly, religious liberty scholar Steven Smith has written:

> Although there is no uncontroversial metric for assessing relative burdens . . . it seems clear that the risks faced by the opposing sides are different, and asymmetrical. . . . The major risk faced by religious conservatives . . . is that of being put to the choice of violating their convictions or commitments—of being unfaithful to their God, as they perceive the matter—or instead of being increasingly relegated to the margins of society. . . . [P]ossibly with some minor qualifications, the secular citizen [who favors same-sex marriage] is permitted to act on all his beliefs and convictions, but the religious citizen [who opposes it] is commanded to bracket her most essential beliefs and convictions.[28]

The way forward that would honor all Americans' freedom to live according to their beliefs and convictions, so far as it is in Congress's power to honor it, is the First Amendment Defense Act. The Act is fully in keeping with Justice Kennedy's "no disparagement" principle, and it will go far in assuaging the concerns raised by the dissenting justices in *Obergefell*.

III. Answering Objections

FADA has been widely misunderstood and mischaracterized in various quarters. Here I would like to summarize and respond to some of the most prominent criticisms lodged against it.

Objection: That the Act would grant special protection to those who "discriminate" against others on the basis of their status or identity as LGBT persons, sending a message that federal law "disapproves" of them.

Response: There is no ground, in the text or evident purposes of FADA, for concluding that the act offers any protection for, or expresses agreement with, discriminatory conduct toward *persons as persons*. The law protects persons and institutions from compulsory acceptance of the new meaning of *marriage*, if they have sincere religious beliefs or moral convictions about that.

Such a misreading of the statute stems from the same ideological impulse that leads some people to see "anti-gay bigotry" in every case of wedding vendors who decline on religious grounds to offer their services for a same-sex marriage ceremony. But as Ryan T. Anderson has noted, none of the cases documented so far has involved "discrimination against gays and lesbians as such. None of these citizens has ever said, 'I don't serve gays.' No, each of these cases involves the conscientious decision not to facilitate a same-sex *wedding*."[29]

Objection: That FADA somehow involves the federal government in making judgments about or intruding into people's sexual morality or relationships.

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[28] Steven D. Smith, "Die and Let Live? The Asymmetry of Accommodation," in *Gay Rights and Religious Freedom*, 190-92.

[29] Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, DC: Regnery, 2015), 92.

Response: To the contrary, FADA would *prevent* the federal government from endorsing a particular set of hotly contested views and compelling everyone within its reach to conform their conduct to those views of marriage and sexual ethics. FADA would leave all those affected by it perfectly free to live as they please, and would deprive those who wish to impose their view on others of any leverage for that imposition that they can derive from the federal government's power. FADA gets the government out of the discrimination business, and is the most significant pro-liberty legislation to be considered by Congress in recent memory.

Objection: That FADA itself violates the equal protection principle of the Constitution and runs afoul of precedents like *Romer* v. *Evans* (1996).[30]

Response: *Romer* was a case about the state of Colorado's placing a disability on a particular interest group's chances of achieving its aims in the political process. FADA, by contrast, is about protecting a conscientious freedom of action in the *private* sphere of civil society with respect to strongly held views on marriage.

Some might say that the Act would create a kind of "state-sanctioned discrimination." But that way of talking obscures the fact that the operative field of FADA is entirely the field of conduct *in the private sector* that is motivated by religious or moral convictions about marriage. Even accepting the dubious proposition (already noted above) that FADA condones or protects "discrimination" against LGBT persons in the private sector, it would not follow that the Act itself denies equal protection of the law to anyone. Instead, FADA should be understood as protecting freedom of conscience in the same way that the Church and Weldon Amendments, and Title VII of the Civil Rights Act do.

FADA would protect the traditional freedom of action in the public square of thousands of religious nonprofits, educational, and charitable institutions, and the millions of people who benefit from their good works in civil society, from compulsion to betray their religious and moral convictions in order to keep serving their fellow citizens. Most notably, it would lift the threat that Justice Alito identified in oral argument in the *Obergefell* case, and that Solicitor General Verrilli admitted could be a real one, of depriving such institutions of their tax exemptions for being true to their beliefs.

Preserving the place such institutions have in our society is a blow *for* the equal protection of the laws, not against it.

Objection: That FADA is somehow an unconstitutional establishment of religion contrary to the First Amendment.

Response: This is the most absurd criticism I have heard about conscience protection legislation. FADA goes above and beyond current interpretations of the free exercise of religion clause of the First Amendment, as all the justices of the Supreme Court have recognized is a legitimate thing for Congress to do. But giving additional legal protection to freedom of religion is in no way an "establishment" of religion.

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[30] 517 U.S. 620.

The argument seems to be that laws like FADA give an "official preference" to a certain set of religious views, informing those who do not share them that they're second-class citizens. But this inverts the reality. Since *Obergefell*, the danger has become acute that it is dissenters from the redefinition of marriage who are being told that their views are unwelcome, unworthy of good Americans. If a law that says people are free to act on their own views of marriage is an "establishment of religion," then obviously an even stronger case can be made that the legal order defining marriage is an establishment of religion—*whatever the definition is*. In that case we had an "establishment of religion" on marriage the day before *Obergefell—and the day after*. And no court has ever seriously entertained such an absurd view.

In addition, FADA speaks of "religious belief or moral conviction" about marriage. As I noted above, strongly held moral convictions about marriage can be held on entirely non-religious grounds. This was recognized by Justice Kennedy, speaking for the Court in *Obergefell*. A view of marriage held across all major faith communities, and among people of no religion at all, which stands *against* the present legal definition of marriage, and only claims the freedom to believe and to act on that belief in private dealings with fellow citizens, is just about the furthest thing I can imagine from an "establishment of religion."

Conclusion

The First Amendment Defense Act is an altogether appropriate, indeed urgent, congressional response to the threats to religious liberty, and to conscience more generally, that have arisen in the aftermath of *Obergefell* v. *Hodges*. As more than one dissenting justice pointed out, legislative enactment of same-sex marriage could have been (and as we've seen, sometimes was) accompanied by simultaneous and linked protections of those religious and moral convictions about marriage that dissent from the redefinition of this key social institution. The Supreme Court majority decided the marriage question without any such protections accompanying its ruling. Nor could it really have done so.

But the possibility, and the justification, of doing so remain open for congressional action. Many millions of Americans continue to believe that marriage is the conjugal union of a man and a woman, and some of them will find themselves (as some already have) under pressure in their businesses and workplaces, their schools and colleges, their charities and other vital institutions of civil society, to conform their actions to the redefinition of marriage, contrary to the constraints of their consciences. Such a controversial decision as *Obergefell* threatens to open what Justice Alito called "bitter and lasting wounds."[31] Even the Court's opinion by Justice Kennedy remarked on the injustice of "disparaging" the "decent and honorable" views of conjugal marriage supporters, and thereby rejected the view that such people should be treated like bigots or racists. An enactment like FADA can help immeasurably to heal some of those wounds, and assure that people on both sides of this issue are treated justly.

FADA is not about "licensing discrimination" against any persons because of who they are, nor about inviting "animus" or generating "dignitarian harms." It is narrowly tailored to protect a "religious belief or moral conviction" about the nature of marriage, and that is all. Given the

[31] *Obergefell*, slip op. at 7 (Alito, J., dissenting).

central place that marriage occupies in both religious and philosophical systems of morality, across virtually every faith community existing today, it would be unjust for any government to coerce this new, post-*Obergefell* class of "marriage dissenters" to conform their conduct to this redefinition, just as it is unjust to coerce pro-lifers to facilitate abortions.

Thanks to FADA, no one will be prevented from getting married. No one will be prevented from obtaining the goods and services that go into a successful wedding day. No one will be discriminated against by the state, and no one's personhood will be demeaned or diminished. No one's dignity will be affronted by a government policy, and no one will be compelled to behave as though he approves of moral undertakings of which he actually, conscientiously disapproves. As Justice Kennedy said for the majority in *Obergefell*, there are "decent and honorable religious or philosophical premises" at work in the defense of the traditional, conjugal view of marriage, and our legal order should not gratuitously "disparage" that view. It is not "animus" or disrespect for others that drives the defenders of the now-displaced understanding of marriage, as even the fair-minded advocates of same-sex marriage recognize. It is the call of conscience that drives them.

Finally, there is no "establishment of religion" in statutes like FADA. Only a cramped view of religious freedom, and an overtly or covertly hostile perspective on the place of religious faith in American public life, can account for such an unwarranted conclusion. The First Amendment Defense Act is urgent, freedom-protecting legislation. It does not establish religion in any way, shape, or form. It establishes only the space to dissent, free from the coercive effort to stamp it out that is inimical to a free society.

Matthew J. Franck
Short biographical statement

Matthew J. Franck is the Director of the William E. and Carol G. Simon Center on Religion and the Constitution at the Witherspoon Institute in Princeton, New Jersey, a position he has held since July 2010. He is Professor Emeritus of Political Science at Radford University, in Virginia, where he taught constitutional law, American politics, and political philosophy from 1989 to 2010, and was Chairman of the Department of Political Science from 1995 to 2010. He is also a Visiting Lecturer in Politics at Princeton University.

Franck earned his B.A. in political science from Virginia Wesleyan College, and his M.A. and Ph.D. in political science from Northern Illinois University. He has taught at Marquette University and Southern Illinois University, and was a Fulbright Professor of American Studies at the Graduate School of International Studies, Yonsei University, Seoul, Korea, in 1998, and a Visiting Fellow in the James Madison Program in American Ideals and Institutions at Princeton University, in 2008-09.

He is the author, editor of, or contributor to several books on religious freedom, constitutional law, the Supreme Court, and American politics, and has published essays and reviews in numerous academic journals, as well as many general-interest articles and commentaries in newspapers, magazines, and online, including the *Washington Post*, *First Things*, *National Review*, *Touchstone*, *The New Atlantis*, *National Affairs*, and *Public Discourse*, the daily online essay publication of the Witherspoon Institute.

Franck has been an invited speaker at the University of Virginia, Princeton University, the University of London, the University of Notre Dame, Utah Valley University, Hillsdale College, St. Vincent College, the University of Colorado, Georgetown University, Oglethorpe University, Neumann University, Regent University, and Rutgers University. He has presented many times at meetings of the American Political Science Association and other professional societies, has assisted in the selection of current and future high school teachers as recipients of fellowships from the congressionally-chartered James Madison Memorial Fellowship Foundation, and has taught in continuing education programs for high school teachers and attorneys. He has taught and written on American politics, the Constitution, and constitutional law for over thirty years.

Committee on Oversight and Government Reform
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Name: Matthew J. Franck

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am testifying only on my own behalf.

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