

DEFENSE OF MARRIAGE ACT

JULY 9, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY, from the Committee on the Judiciary,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3396]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3396) to define and protect the institution of marriage, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

To achieve these purposes, H.R. 3396 has two operative provisions. Section 2, entitled “Powers Reserved to the States,” provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex. And Section 3 defines the terms “marriage” and “spouse,” for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3396 is a response to a very particular development in the State of Hawaii. As will be explained in greater detail below, the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to “marry” in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.

More specifically, if Hawaii (or some other State) recognizes same-sex “marriages,” other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions. With regard to federal law, a decision by one State to authorize same-sex “marriage” would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. H.R. 3396 anticipates these complicated questions by laying down clear rules to guide their resolution, and it does so in a manner that preserves each State’s ability to decide the underlying policy issue however it chooses.

I. THE LEGAL CAMPAIGN FOR SAME-SEX “MARRIAGE”

Before discussing the Hawaiian lawsuit, the Committee believes it is important to place that development in its larger context. In particular, it is critical to understand the nature of the orchestrated legal assault being waged against traditional heterosexual

marriage by gay rights groups and their lawyers. Only then can the Committee's concerns that motivated H.R. 3396 be fully explained and understood.

The determination of who may marry in the United States is uniquely a function of state law. That has always been the rule, and H.R. 3396 in no way changes that fact. And while state laws may differ in some particulars—for example, with regard to minimum age requirements, the degree of consanguinity, and the like—the uniform and unbroken rule has been that only opposite-sex couples can marry. No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.¹

Some in our society, however, are not satisfied that marriage should be an exclusively heterosexual institution. In particular, same-sex “marriage” has been an explicit goal of many in the gay rights movement for at least twenty-five years. In 1972, for example, the National Coalition of Gay Organizations called for the “[r]epeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or numbers.”² This campaign, which has also included mass “wed-ins,” has been waged on religious, cultural, and legal fronts.³

Beginning in the early 1970s, gay rights advocates periodically filed lawsuits seeking to win the right to same-sex “marriage.” According to one commentator, “[o]ver the past twenty-five years, same-sex marriage advocates have mounted over a dozen substantial litigation campaigns seeking judicial legalization of same-sex marriages or judicial recognition of same-sex unions for purposes of qualifying for certain marital benefits.”⁴ Prior to the Hawaii case, none of these legal challenges succeeded.

In addition to lack of success in the courts, these efforts faced other difficulties. The most important of these has been a persistent reluctance by some within the gay and lesbian movement to embrace the objective of same-sex “marriage.”⁵ Initially, the major

¹In this, the United States is hardly unique; indeed, one authority on family law recently conducted an international survey of marriage laws and concluded that “[a]ll nations permit only heterosexual marriage. At present, same-sex marriage is allowed in no country or state in the world. . . .” See Lynn D. Wardle, “International Marriage and Divorce Regulation and Recognition: A Survey,” 29 Family L.Q. 497, 500 (Fall 1995).

²Quoted in William N. Eskridge, Jr., “The Case for Same-Sex Marriage” 54 (Free Press 1996). More recently, the Platform of the 1993 “March on Washington” called for the “legalization of same-sex marriage.” Quoted in Mark Blasius, “Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic” 175–78 (Temple Univ. Press 1994).

³See generally, Suzanne Sherman (ed.), “Lesbian and Gay Marriage: Private Commitments, Public Ceremonies” (Temple Univ. Press 1992); see also Eskridge, “The Case for Same-Sex Marriage” at 44–62.

⁴See Lynn D. Wardle, “A Critical Analysis of Constitutional Claims for Same-Sex Marriage,” 1996 B.Y.U. L. Rev. 1, 9. Among the leading cases are: *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (state law limiting marriage to heterosexual unions does not violate Ninth or Fourteenth Amendment to the U.S. Constitution); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (refusal to grant marriage license to lesbian couple does not violate constitutional right to marry, to associate freely, or to the free exercise of religion); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (traditional marriage law does not violate either state or federal constitution); *De Santo v. Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (declining to recognize right to common law same-sex marriage); and *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (D.C. Court of Appeals rejected statutory and federal due process and equal protection challenges to traditional marriage law).

⁵Notwithstanding the advances gay rights legal groups have made, the debate within the homosexual community continues, as prominent advocates of same-sex “marriage” still find it necessary to seek to persuade other homosexual activists to support their efforts. See, e.g., Eskridge,

national gay rights organizations—including the Lambda Legal Defense and Education Fund, a gay and lesbian legal group founded in 1973, and the American Civil Liberties Union, which launched a Lesbian and Gay Rights Project in 1984—were unwilling to make same-sex “marriage” a priority.⁶

But when a lawsuit filed by local gay activists in Hawaii began to show signs of promise, Lambda, the ACLU, and eventually the nation as a whole began to pay attention.⁷

II. THE HAWAII LAWSUIT: *BAEHR V. LEWIN*

The legal assault against traditional heterosexual marriage laws achieved its greatest breakthrough in the State of Hawaii in 1993. Because H.R. 3396 was motivated by the Hawaiian lawsuit, the Committee thinks it is important to discuss that situation in some detail.

In December 1990, three homosexual couples—two lesbian and one gay men—filed applications for marriage with the Hawaiian Department of Health (“DOH”), the agency responsible for administering the State’s marriage laws.⁸ The State denied the applications on the ground that its marriage laws did not permit same-sex couples to marry. In 1991, the three couples filed suit in state court challenging the denial of the marriage licenses as a violation of the Hawaii Constitution.

After the state trial court granted the State’s motion for judgment on the pleadings, the plaintiffs appealed to the Hawaii Supreme Court. In May 1993, a highly-fractured five justice Court issued an opinion that has already had profound implications—in Hawaii, to be sure, but also in the other States and, with the introduction of H.R. 3396, in the United States Congress.

Three of the five justices who heard oral arguments in the case before the Hawaii Supreme Court held that the trial court’s dismissal on the pleadings had to be reversed.⁹ In an opinion for himself and Acting Chief Justice Moon, Justice Levinson held that the denial of marriage licenses to same-sex couples constitutes discrimination on the basis of sex.¹⁰ The two-judge plurality also held that sex is a “suspect category” under the Equal Protection Clause of the Hawaii Constitution, and so ruled that the marriage statute (Haw. Rev. Stat. §572–1) could be upheld only if the State could satisfy the strict scrutiny test. As Judge Levinson summarized:

“The Case for Same-Sex Marriage,” Chapter 3 (entitled “The Debate Within the Lesbian and Gay Community”), and Evan Wolfson, “Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique,” 21 N.Y.U. Rev. L. & Soc. Change 567 (1994–95).

⁶See generally Patricia A. Cain, “Litigating for Lesbian and Gay Rights,” 79 Va. L. Rev. 1551, 1586 (1993) (noting that “[t]ogether with the ACLU, Lambda has helped to shape gay rights litigation across the country.”).

⁷See Paul M. Barrett, “I Do/No You Don’t: How Hawaii Became Ground Zero in Battle Over Gay Marriages,” *Wall Street Journal*, June 17, 1996, at A1 (describing reluctance of major gay rights legal organizations to support lawsuit seeking to win right of same-sex “marriage”). Despite this initial caution, Lambda has now signed on as co-counsel for the homosexual plaintiffs in the Hawaiian case, *id.*, and, as explained below, has emerged as the leading strategist in seeking to maximize the impact that case might have.

⁸Because Hawaii does not authorize common law marriages, see Haw. Rev. Stat. §572–1 (1985), the only way to get legally married in that state is to obtain a marriage license from the DOH.

⁹*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹⁰*Id.* at 60.

On remand, in accordance with the “strict scrutiny” standard, the burden will rest on [the State] to overcome the presumption that HRS §572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.¹¹

A third justice joined the plurality in voting to reverse the trial court’s dismissal,¹² and one justice filed a dissenting opinion.¹³

Following the Supreme Court’s ruling in *Baehr*, then, the State confronts a situation whereby their existing heterosexual-only marriage law is “presumed to be unconstitutional,”¹⁴ and the case has been sent back to the trial court to see whether the State can satisfy the very demanding strict scrutiny test. The trial date has been set for September 1996, and there is a strong possibility that the Hawaii courts will ultimately require the State to issue marriage licenses to same-sex couples.

It is, of course, no business of Congress how the Hawaiian Supreme Court interprets the Hawaiian Constitution, and the Committee expresses no opinion on the propriety of the ruling in *Baehr*. But the Committee does think it significant that the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers. As Hawaiian State Representative Terrance Tom, Chairman of the House Judiciary Committee, testified at a hearing on H.R. 3396:

Same-sex marriage was not an issue that arose by submission of proposed legislation to the people’s representatives. Instead, it arose because in May of 1993, two members of our state Supreme Court issued an opinion unprecedented in the history of jurisprudence.¹⁵

¹¹*Id.* at 68, 74.

¹²The third justice to vote for reversal, Justice Burns, concurred only in the result reached in Justice Levinson’s opinion. Justice Burns ruled that the “case involves genuine issues of material fact”—namely, whether or not homosexuality is “biologically fated”—that warranted further proceedings by the trial court. *Id.* at 70.

¹³Justice Heen—who, like Justice Burns, was sitting by designation to fill temporary vacancies on the Supreme Court—rejected the plurality’s conclusion that heterosexual-only marriage laws constitute sex discrimination because, he wrote, “all males and females are treated alike. . . . Neither sex is being *granted* a right or benefit that the other does not have, and neither sex is being *denied* a right or benefit that the other has.” *Id.* at 71 (emphasis in original). Accordingly, Justice Heen believed that the marriage law had only to pass the rational basis test; he would have held that it “is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage and bears a reasonable relationship to that purpose.” *Id.* at 74. Finally, he noted that, to the extent the plaintiffs were complaining about the inability to receive certain statutory benefits associated with marriage, “redress of those deprivations is a matter for the legislature. . . . Those benefits can be conferred without rooting out the very essence of a legal marriage.” *Id.* at 74.

Justice Heen’s dissent indicates that the fifth Justice, Retired Justice Hayashi, whose temporary appointment to the Court expired prior to the filing of the opinion, would have joined the dissent. *Id.* at 48. However, after the initial opinion was issued, the State filed a motion for reconsideration or clarification; by the time the Court ruled on that motion, a new Justice—Justice Nakayama—had joined the Court, and Justice Nakayama joined in Justice Levinson’s clarification of the mandate. *Id.* at 74–75. Accordingly, it appears that the final disposition was three justices forming a majority, with Justice Burns concurring in the result only, and Justice Heen dissenting.

¹⁴*Id.* at 67.

¹⁵Prepared Statement of Terrance Tom, Member and Chairman of Judiciary Committee, Hawaii House of Representatives (“Tom Prepared Statement”), at Hearing on H.R. 3396, the Defense of Marriage Act, before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (May 15, 1996) (“Subcommittee Hearing”).

Rep. Tom also testified that the Supreme Court's ruling has been met with strong resistance on the part of the Hawaiian public and their elected representatives:

In response to this judicial activism, the 1994 Hawaii Legislature, Democrat and Republican alike, overwhelmingly voted to reject this clearly erroneous interpretation of our State Constitution, and amended our marriage statutes to make clear that a legal marriage in our State can be entered into only by a man and a woman.¹⁶

This decision by the Legislature followed extensive public hearings throughout the Islands. Thousands of Hawaii citizens have submitted testimony to the state legislature over the last three years. *It was clear then, and it is clear now, that the people of Hawaii do not want the State to issue marriage licenses to couples of the same-sex.*

This Committee should understand that the people of Hawaii are not speaking out of ignorance or uncertainty. Both of our daily newspapers are strong supporters of same-sex marriage and have editorialized repeatedly in favor of issuing marriage licenses to couples of the same sex.

Yet polls commissioned by the newspapers themselves show that *opposition to same-sex marriages has grown as the trial on this issue nears.*

The most recent poll taken in February shows that 71% of the Hawaii public believe that marriage licenses should be issued only to male-female couples. Only 18% believe the state should license same-sex marriages.¹⁷

Just as it appears that judges in Hawaii are prepared to foist the newly-coined institution of homosexual "marriage" upon an unwilling Hawaiian public, the Hawaii lawsuit also presents the possibility that other States could, through the protracted and complex process of litigation, be forced to follow suit. The Defense of Marriage Act is an effort by Congress to clarify the extremely complicated situation that may result from one State's recognition of same-sex "marriage." The Committee turns now to a brief description of the implications of *Baehr v. Lewin* for other States and the federal government.¹⁸

III. INTERSTATE IMPLICATIONS OF *BAEHR V. LEWIN*: THE FULL FAITH AND CREDIT CLAUSE

H.R. 3936 is inspired, again, not by the effect of *Baehr v. Lewin* inside Hawaii, but rather by the implications that lawsuit threat-

¹⁶Here, Rep. Tom is referring to the Legislature's enactment of a 1994 law which amended the marriage law to make it unmistakably clear that the Legislature intended to permit marriage only between one man and one woman. The Legislature also asserted that the marriage statute was "intended to foster and protect the propagation of the human race through male-female marriages." 1994 Haw. Sess. Laws 217.

¹⁷Tom Prepared Statement at 2.

¹⁸It has been suggested by some opponents of this Act that the legislation is premature on the ground that no State currently recognizes same-sex "marriage." Of course, to argue that this bill is premature concedes that such a measure at the right time might be appropriate. The Committee believes the right time is now. *Baehr v. Lewin* is poised for a final resolution, and the Committee believes it would be profoundly unwise—and even irresponsible—to permit the attendant uncertainty to stand.

ens to have on the other States and on federal law. The Committee will briefly explain here the interstate implications that the Hawaiian homosexual marriage case might have.

Simply stated, the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex “marriage.” And the primary mechanism for nationalizing their break-through in Hawaii will be the Full Faith and Credit Clause of the U.S. Constitution.

In a memorandum entitled “Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr v. Lewin?*,” Evan Wolfson, Director of the Marriage Project for the Lambda Legal Defense and Education Fund, Inc. (“Lambda”), sets forth the organization’s strategy for seeking to extend their impending victory in Hawaii nationwide.¹⁹ The memorandum is noteworthy both for what it reveals about the strategy the gay rights groups intend to pursue, and because it shows how plausible that strategy is.

First, as indicated by the title of the memorandum, Lambda is clearly optimistic that they will ultimately prevail in Hawaii. Second, the gay rights groups and gay men and lesbians across the country are preparing to take advantage of the Hawaii victory. As the Lambda memorandum states:

Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions.²⁰

Third, Lambda and other gay rights legal organizations are standing ready to assist same-sex couples who travel to Hawaii to obtain a marriage license to win full legal recognition of their newly-acquired status in their home State.²¹

¹⁹This March 20, 1996, memorandum (“Lambda Memorandum”), is included in the report of the May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution.

²⁰Lambda Memorandum at 2. In addition to Lambda’s expectations, there have been numerous media reports that gays and lesbians throughout the United States are eagerly awaiting the opportunity to “marry” in Hawaii. See, e.g., Dunlap, “Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door,” *New York Times*, March 6, 1996, at A13 (quoting one lesbian activist as stating that “California is going to have literally thousands of couples who are going to come back from Hawaii expecting their marriage to be treated with the respect and dignity given every other marriage.”)

²¹In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got “married,” returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian “marriage” license. As we discuss below, a state or federal court confronting such a claim would probably be justified in declining to give effect to the Hawaiian license. But assuming (as it seems reasonable to do) that gay rights groups will find a judge somewhere in Ohio to accept their arguments, what would the result be? In general, the Committee believes that at least two things would occur.

First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to male-female unions. Upholding traditional morality, encouraging procreation in the context of families, encouraging heterosexuality—these and other important legitimate governmental purposes would be undermined by forcing another State to recognize same-sex unions. Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of government marital benefits. For example, in *Baehr v. Lewin*, the court listed fourteen specific “rights and benefits” that are available only to married couples. 852 P.2d at 59 (listing benefits relating to income tax; public assistance; community property; dower, courtesy, and inheritance; probate; child custody and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce rights; evidentiary privileges; and others). The Committee would add that recognizing same-sex “marriages” would almost certainly have implications on the ability of homosexuals to adopt children as well.

Of course, in the likely event Hawaii ultimately is forced by its courts to issue marriage licenses to same-sex couples, it will be the only State in the country to do so. Accordingly, when homosexual couples from other States travel to Hawaii, obtain a marriage license, and return home demanding recognition of their license, an important and complex legal situation will be presented. At bottom, the issue reduces to a choice-of-law question: Which law governs—Hawaii’s, as represented by the “marriage” license, or the law of the forum state, which does not recognize same-sex “marriage”? That is, must a sister State adopt Hawaii’s policy, or may it follow its own?

Lambda phrases the issue slightly differently: “Will these [same-sex couples] validly-contracted [Hawaiian] marriages be recognized by their home states and the federal government, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?” Their response—“We at Lambda believe that the correct answer to these questions is ‘Yes.’”²²—is not without support.

The general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated.²³ States observing that rule would, of course, presumptively recognize as valid a same-sex “marriage” license from Hawaii. There is, however, an important exception to the general rule, well captured by the relevant section of the Restatement of Conflicts:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.²⁴

It is thus possible that a State, confronted with a resident same-sex couple possessing a “marriage” license from Hawaii, could decline to recognize that “marriage” on the grounds that to do so would offend that State’s “strong public policy.”

Because no State in the United States has ever recognized same-sex “marriages,” it would seem that courts in other States would be justified in invoking this exception. The matter is somewhat more complicated, however, as the U.S. Constitution speaks to this issue. The first sentence of the Full Faith and Credit Clause provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²⁵ Lambda believes, quite sensibly, that this clause provides

²²Lambda Memorandum at 2. The memorandum then proceeds to survey “the legal grounds for gaining nationwide recognition of the marriages same-sex couples contract in Hawaii. These grounds include the U.S. Constitution, the common law, and statutory law.” *Id.* at 2–3.

²³For example, the Uniform Marriage and Divorce Act, which has been adopted by twenty-three States, provides that “[a]ll marriages contracted . . . outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted . . . are valid in this State.” Unif. Marriage and Divorce Act § 210, 9A U.L.A. 147.

²⁴*Restatement (Second) of Conflicts of Law* § 283(2) (1971).

²⁵U.S. Const. art. IV, § 1. The second sentence of the Full Faith and Credit Clause states: “And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” The Committee will discuss this provision in detail below.

both their strongest and most advantageous argument for forcing other States to recognize same-sex “marriage” licenses issued by Hawaii.²⁶

Notwithstanding the seemingly mandatory terms of the Full Faith and Credit Clause, the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State’s laws.²⁷ Indeed, despite the presumption created by *lex celebrationis* and reinforced by the Full Faith and Credit Clause, the Committee believes that a court conscientiously applying the relevant legal principles would be amply justified in refusing to give effect to a same-sex “marriage” license from another State.²⁸

But even as the Committee believes that States currently possess the ability to avoid recognizing a same-sex “marriage” license from another State, it recognizes that that conclusion is far from certain. For example, there is a burgeoning body of legal scholarship—some of it inspired directly by the Hawaiian lawsuit—to the effect that the Full Faith and Credit Clause does mandate extraterritorial recognition of “marriage” licenses given to homosexual couples.²⁹ More significantly, Lambda agrees with that analysis, and clearly intends to press that argument in the course of its post-Hawaii, state-by-state litigation to nationalize same-sex “marriage.”³⁰

Most important of all, however, is the evident disquiet in the various States created by the Hawaii situation. The Committee is struck by the fact that so many States have been moved by the uncertain interstate implications of the Hawaii litigation to attempt to bolster their own public policy regarding traditional, heterosexual-only marriage laws. As of July 1, 1996, the Committee is informed that 14 States have enacted new laws designed to protect

²⁶Lambda Memorandum at 3–4 (“Successfully establishing that the Full Faith and Credit Clause requires all states to recognize a marriage legally contracted in another State would yield the most sweeping possible outcome, and, as a constitutional holding, the one most immune from legislative tampering. We believe that full faith and credit recognition is mandated by the plain meaning of the Full Faith and Credit Clause, and by basic federalist imperatives that unite this into one country and permit us to travel, work, and live in America as we have come to today. Simply put, all Americans, gay and non-gay alike, would be best served by assuring full faith and credit for marriages validly contracted in any U.S. state.”) (emphasis added); see also, e.g., Douglas Laycock, “Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law,” 92 Col. L. Rev. 249, 296 (1992) (“[T]he Clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives its own law—to treat the law of sister states as equal in authority to its own”).

²⁷See, e.g., *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (“the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.”); *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532, 547 (1935) (“A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum [State], would lead to the absurd result that, whenever conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”).

²⁸The Committee endorses, therefore, the conclusion of Professor Lynn Wardle, who testified before the Subcommittee on the Constitution that, in his professional opinion, “it would not violate the full faith and credit clause . . . for a second state to refuse to recognize a same-sex marriage legalized in Hawaii when the second state has a strong public policy against same-sex marriage and when the same-sex couple lives in or has some other significant contact with the second state.” See Prepared Statement of Lynn Wardle, Professor of Law, Brigham Young University (“Wardle Prepared Statement”), Subcommittee hearing.

²⁹For a partial list of such articles, see Wardle, 1996 B.Y.U. L. Rev. at 17, n.65.

³⁰See Lambda Memorandum at 9 (“[W]hen state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of *specific parties*, the other states *must* give those acts, records, or proceedings the same effect they would have at home. . . . Since a marriage . . . falls into the category of such adjudications or creations, there can be no policy balancing regarding their recognition.”) (Emphasis in original) That is to say, Lambda will argue that there can be no “public policy” exception to the claim that other States must give effect to the Hawaiian “marriage” licenses.

against an impending assault on their marriage laws.³¹ In addition, legislation has been defeated, withdrawn, or vetoed in 16 States, and is pending in 7 States.³²

The fact that these States are sufficiently concerned about their ability to defend their marriage laws against the threat posed by the Hawaii situation is enough to persuade the Committee that federal legislation is warranted. The States, after all, are best-positioned to assess the legal situation within their own State; that so many of them are not content to rely on the amorphous “public policy” exception reveals that congressional clarification and assistance is both necessary and appropriate.³³ Section 2 of H.R. 3396 responds to this need.

IV. IMPLICATIONS OF *BAEHR* v. *LEWIN* ON FEDERAL LAW

Recognition of same-sex “marriages” in Hawaii could also have profound implications for federal law as well. The word “marriage” appears in more than 800 sections of federal statutes and regulations, and the word “spouse” appears more than 3,100 times. With very limited exceptions,³⁴ these terms are not defined in federal law.

With regard to the issue of same-sex “marriages,” federal reliance on state law definitions has not, of course, been at all problematic. Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married. And the Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words “marriage” or “spouse” were thought by even a single Member of Congress to refer to same-sex couples.³⁵

But if Hawaii does ultimately permit homosexuals to “marry,” that development could have profound practical implications for federal law.³⁶ For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits. While there are literally hundreds of examples that would illus-

³¹The States are: Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah.

³²The Committee heard testimony from two state legislators regarding their efforts to enact legislation that would strengthen their State’s public policy against same-sex “marriage.” See Prepared Statement of Marilyn Musgrave, Member, Colorado State House of Representatives (“Musgrave Prepared Statement”), Subcommittee Hearing; Prepared Statement of Deborah Whyman, Member, Michigan State House of Representatives, Subcommittee Hearing.

³³Such assistance seems particularly appropriate in situations like Colorado. The Colorado Legislature passed legislation clarifying that their marriage laws restricted marriage to unions between one man and one woman, and would have declared that same-sex “marriage” offends the public policy of the States. Governor Romer, however, vetoed the bill. Accordingly, Colorado now stands particularly exposed to an argument—sure to be made by gay rights groups—that its laws currently do not evince a public policy sufficiently strong to ward off a Hawaiian same-sex “marriage” license. See Musgrave Prepared Statement at 2.

³⁴See, e.g., 29 U.S.C. 2611(13) (1965) (provision of the Family and Medical Leave Act defining “spouse” as “a husband or wife, as the case may be.”).

³⁵Wardle Prepared Statement at 9 (“[I]t is beyond question that Congress has never actually intended to include same-sex unions when it used the terms ‘marriage’ and ‘spouse.’”).

³⁶See *id.* (“Since the differences in state marriage laws (though numerous) were relatively minor, and since no state allowed such radical reconstruction of marriage as same-sex marriage, the passive presumption of adoption of state law has worked quite well. If some state legalized same-tax marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely, the essential fungibility of the concepts of marriage from one state to another.”).

trate this point, the Committee will recount two that relate to events that have actually occurred.

In the 1970s, Richard Baker, a male, demanded increased veterans' educational benefits because he claimed James McConnell, another male, as his dependent spouse. When the Veterans Administration turned down his request, Baker filed suit. The outcome turned on the federal statute (38 U.S.C. § 103(c)) that made eligibility for the benefits contingent on his State's (Minnesota's) definition of "spouse" and "marriage." The federal courts rejected the claim for additional benefits on the ground that the Minnesota Supreme Court has already determined that marriage (which it defined as "the state of union between persons of the opposite sex") was not available to persons of the same sex.³⁷

In a similar fashion, the Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6, requires that employees be given unpaid leave to care for a "spouse" who is ill. Shortly before passage of the Act in the Senate, Senator Nickles attached an amendment defining "spouse" as "a husband or wife, as the case may be."³⁸ The amendment proved essential when the regulations were written.

When the Secretary of Labor published the proposed implementing regulations, he noted that a "considerable number of comments" were received urging that the definition of "spouse" "be broadened to include domestic partners in committed relationships, including same-sex relationships." The Nickles amendment, however, precluded such an expansive redefinition of "spouse." The Secretary quoted Sen. Nickles' floor statement on the amendment:

This is the same definition [of "spouse"] that appears in Title 10 of the United States Code [10 U.S.C. § 101]. Under this amendment, an employer would be required to give an eligible female employee unpaid leave to care for her husband and an eligible male employee unpaid leave to care for his wife. No employer would be required to grant an eligible employee unpaid leave to care for an unmarried domestic partner. This simple definition will spare us a great deal of costly and unnecessary litigation. Without this amendment, the bill would invite lawsuits by workers who unsuccessfully seek leave on the basis of illness of their unmarried adult companions.

"Accordingly," the Secretary continued, "given this legislative history, the recommendations that the definition of spouse be broadened cannot be adopted."³⁹

These two episodes highlight the potential impact that a change in Hawaiian marriage law could have on federal law.⁴⁰ Section 3 of H.R. 3396 responds to these considerations.

³⁷ See *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (relying on *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971)).

³⁸ 29 U.S.C. § 2611(13)(1995).

³⁹ 60 Fed. Reg. 2180, 2191-92 (Jan. 6, 1995).

⁴⁰ For some other examples, see Wardle Prepared Statement at 10-14.

V. THE GOVERNMENTAL INTERESTS ADVANCED BY H.R. 3396

Of course, the foregoing discussion would hardly support—much less necessitate—congressional action if the Committee were supportive of (or even indifferent to) the notion of same-sex “marriage.” But the Committee does not believe that passivity is an appropriate or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process. H.R. 3396 is a modest effort to combat that strategy.

In this section of the Report, the Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

A. H.R. 3396 ADVANCES THE GOVERNMENT’S INTEREST IN DEFENDING AND NURTURING THE INSTITUTION OF TRADITIONAL, HETEROSEXUAL MARRIAGE

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.⁴¹

When Justice Scalia recently quoted this passage in his dissenting opinion in *Romer v. Evans*, he wrote: “I would not myself indulge in such official praise for heterosexual monogamy, because I think it is no business of the courts (*as opposed to the political branches*) to take sides in this culture war.”⁴² Congress, of course, is one of the “political branches,” and the Committee believes that it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.

H.R. 3396, is appropriately entitled the “Defense of Marriage Act.” The effort to redefine “marriage” to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.⁴³ To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status.⁴⁴ Is it, as many advocates of same-sex

⁴¹ *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added)(rejecting constitutional challenge to a federal statute that denied the right to vote in federal territories to persons involved in polygamous relationships).

⁴² *Romer v. Evans*, 116 S. Ct. 1620, slip op. at 18 (1996) (Scalia, dissenting) (emphasis added).

⁴³ See, e.g., William J. Bennett, “But Not a Very Good Idea, Either,” *The Washington Post*, May 21, 1996, at A19 (“Recognizing the legal union of gay and lesbian couples would represent a profound change in the meaning and definition of marriage. Indeed, it would be the most radical step ever taken in the deconstruction of society’s most important institution.”).

⁴⁴ See, e.g., *Baehr*, 852 P.2d at 59 (providing partial list of marital benefits provided under Hawaiian law).

“marriage” claim, to grant public recognition to the love between persons?⁴⁵ We know it is not the mere presence of love that explains marriage, for as Professor Hadley Arkes testified:

There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves because they are not . . . expressed in marriage.⁴⁶

No, as Professor Arkes continued:

The question of what is suitable for marriage is quite separate from the matter of love, though of course it cannot be detached from love. The love of marriage is directed to a different end, or it is woven into a different meaning, rooted in the character and ends of marriage.⁴⁷

And to discover the “ends of marriage,” we need only reflect on this central, unimpeachable lesson of human nature:

We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, *it is hard to detach marriage from what may be called the “natural teleology of the body”*: namely, *the inescapable fact that only two people, not three, only a man and a woman, can beget a child.*⁴⁸

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.

Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the connection between marriage and children:

The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throughout history. Why is marriage our most universal social institution, found prominently in

⁴⁵See, e.g., Prepared Statement of Andrew Sullivan (“Sullivan Prepared Statement”) at 2, Subcommittee hearing (gay advocate of same-sex “marriage” stating: “People ask us why we want marriage, but the answer is obvious. It is the same reason that anyone would want marriage. After the crushes and passions of adolescence, some of us are lucky enough to *meet the person we truly love*. And we want to commit to that person in front of our family and country for the rest of our lives. It’s the most natural, the most simple, the most human instinct in the world.”) (emphasis added).

⁴⁶Prepared Statement of Hadley Arkes, Ney Professor of Jurisprudence and America Institutions, Amherst College (“Arkes Prepared Statement”) at 11, Subcommittee Hearing.

⁴⁷*Id.*

⁴⁸*Id.* at 11–12 (emphasis added); see also Bennett, *The Washington Post*, May 21, 1996, at A19 (“‘Marriage’ is not an arbitrary construct; it is an ‘honorable estate’ based on the different, complementary nature of men and women—and how they refine, support, encourage, and complete one another.”).

virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity.⁴⁹

And from this nexus between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:

Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.⁵⁰

That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

There are two standard attacks on this rationale for opposing a redefinition of marriage to include homosexual unions. First, it is noted that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children.⁵¹ But this is not a serious argument. Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so. Such steps would be both offensive and unworkable. Rather, society has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children.

Second, it will be objected that there are greater threats to marriage and families than the one posed by same-sex “marriage,” the most prominent of which is divorce. There is great force in this argument—as the Council on Families has noted:

The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed par-

⁴⁹*Marriage in America: A Report to the Nation* 10 (Council on Families in America 1995), reprinted in David Popenoe, et al., eds., “Promises To Keep: Decline and Renewal of Marriage in America” 303 (Rowman & Littlefield 1996).

⁵⁰*Id.*; see also Arkes Prepared Statement at 12 (“We do not need a marriage to mark the presence of love, but a marriage marks something matchless in a framework for the begetting and nurturance of children. It means that a child enters the world in a framework of lawfulness, with parents who are committed to her care and nurturance for the same reason that they are committed to each other.”); Barbara Dafoe Whitehead, “The War Between the Sexes,” *The American Enterprise* 26 (May/June 1996) (“Marriage is the central cultural resource for reconciling men and women’s separate natures and different reproductive strategies. Indeed, the most important purpose of marriage is to unite men and women in a formal partnership that will last through the prolonged period of dependency of a human child.”); Hillary Rodham Clinton, “It Takes a Village” 50 (Simon & Schuster 1995) (“Although the nuclear family, consisting of an adult mother and father and the children to whom they are biologically related, has proven the most durable and effective means of meeting children’s needs over time, it is not the only form that has worked in the past or the present.”).

⁵¹See, e.g. Sullivan Prepared Statement at 4 (“You will be told that marriage is only about the rearing of children. But we know that isn’t true. We know that our society grants marriage licenses to people who choose not to have children, or who, for some reason, are unable to have children.”).

enthood—has failed. It has created terrible hardships for children, incurred insupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

But the fact that marriage is embattled is surely no argument for opening a new front in the war. Indeed, it is precisely now, when marriage and the family are most in need of nurturing and care, that we should be most wary of conducting new experiments with the institution. As William Bennett, commenting on same-sex “marriage,” has observed:

The institution of marriage is already reeling because of the effects of the sexual revolution, no-fault divorce and out-of-wedlock births. We have reaped the consequences of its devaluation. It is exceedingly imprudent to conduct a radical, untested and inherently flawed social experiment on an institution that is the keystone in the arch of civilization.⁵²

In short, government has an interest in defending and nurturing the institution of traditional marriage, and H.R. 3396 advances that interest.⁵³

B. H.R. 3396 ADVANCES THE GOVERNMENT’S INTEREST IN DEFENDING TRADITIONAL NOTIONS OF MORALITY

There are, then, significant practical reasons why government affords preferential status to the institution of heterosexual marriage. These reasons—procreation and child-rearing—are in accord with nature and hence have a moral component. But they are not—or at least are not necessarily—moral or religious in nature.

For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This

⁵² Bennett, *The Washington Post*, May 21, 1996, at A19.

⁵³ Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality. While there is controversy concerning how sexual “orientation” is determined, “there is good reason to think that a very substantial number of people are born with the potential to live either gay or straight lives.” E.L. Pattullo, “Straight Talk About Gays,” *Commentary* 21 (December 1992). “[R]eason suggest[s] that we guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop.” *Id.* at 22; see also Bennett, *The Washington Post* A19 (May 21, 1996) (“Societal indifference about heterosexuality and homosexuality would cause a lot of confusion.”); Deneen L. Brown, “Teens Ponder: Gay, Bi, Straight? Social Climate Fosters Openness, Experimentation,” *The Washington Post* A1 (July 15, 1993) (recounting interviews with dozens of teenagers, school counselors, and parents regarding increased “sexual identity confusion” apparently reflecting increasing social acceptance of homosexuality). Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality, for as Dr. Pattullo notes, “to the extent that society has an interest both in reproducing itself and in strengthening the institution of the family . . . there is warrant for resisting the movement to abolish all societal distinctions between homosexual and heterosexual.” Pattullo, *Commentary* at 23.

judgment entails both moral disapproval of homosexuality,⁵⁴ and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. As Representative Henry Hyde, the Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396: “[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate. . . . And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral.”⁵⁵

It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government’s legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

C. H.R. 3396 ADVANCES THE GOVERNMENT’S INTEREST IN PROTECTING STATE SOVEREIGNTY AND DEMOCRATIC SELF-GOVERNANCE

The Committee is struck by the fact that this entire issue of same-sex “marriage,” like so much of the debate related to matters of sexual morality, is being driven by the courts. Of course, by declaring the right to an abortion to be constitutionally protected, the federal courts have largely assumed control over the course of abortion law in this country. And whether one agrees or disagrees with the Court’s jurisprudence in that area, all must concede that as the degree of court involvement increases, to that extent democratic self-governance over such matters is diminished.

In some contexts, of course, it is legitimate for courts to take precedence over decision-making by the representative branches of government. But what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-assigned or authorized role. As Professor Arkes testified before the Subcommittee on the Constitution, in the area of sexual morality, “we have a campaign [being] waged to transform the culture through the law, or through the control of the courts.” He suggests, further, that this “program of cultural change cannot be accompanied through legislatures and elections.”

No voting public in this country has ever voted to install abortion on demand at every stage of pregnancy, and it is hard to imagine a scheme of same-sex marriage voted in

⁵⁴ See, e.g., *Bowers v. Hardwick* 478 U.S. 186, 196 (1986) (rejecting constitutional challenge to Georgia law criminalizing homosexual sodomy and holding that the law served the rational purpose of embodying “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”); “The Homosexual Movement; A Response by the Ramsey Colloquium,” *First Things* 15 (March 1994) (noting that “the Jewish and Christian traditions have, in a clear and sustained manner, judged homosexual behavior to be morally wrong.”).

⁵⁵ “Markup Session: H.R. 3396, the Defense of Marriage Act,” Committee on the Judiciary, Subcommittee on the Constitution, 104th Cong., 2d Sess. 87 (May 30, 1996) (Statement of Chairman Hyde); see also Remarks by President Bill Clinton at the National Prayer Breakfast, 32 Weekly Comp. Pres. Doc. 135 (Feb. 5, 1996) (emphasis added):

[W]e know that ultimately this is an affair of the heart—an affair of the heart that has enormous economic and political and social implications for America, but, most importantly, *has moral implications, because families are ordained by God as a way of giving children and their parents the chance to live up to the fullest of their God-given capacities.* And when we save them and strengthen them, we overcome the notion that self-gratification is more important than our obligations to others; we overcome the notion that is so prevalent in our culture that life is just a series of response to impulses, and instead is a whole pattern, with a fabric that should be pleasing to God.

by the public in a referendum. These things must be imposed by the courts, if they are to be imposed at all, and that concert to impose them has been evident, on gay rights, over the past few years.⁵⁶

The Defense of Marriage Act is motivated in part by a desire to protect the ability of elected officials to decide matters related to homosexuality, Again, Professor Arkes captures the point:

Against the concert of judges, remodeling on their own laws on marriage and the family, the Congress weighs in to supply another understanding, and a rival doctrine. But it happens, at the same time, to be an ancient understanding and a traditional doctrine. The Congress would proclaim it again now, and suggest that the courts take their bearing anew from this doctrine, state anew, brought back and affirmed by officers elected by the people.⁵⁷

By taking the Full Faith and Credit Clause out of the legal equation surrounding the Hawaiian situation, Congress will to that extent protect the ability of the elected officials in each State to deliberate on this important policy issue free from the threat of federal constitutional compulsion.

The Committee was favorably impressed by Rep. Tom's testimony on this point of democratic self-governance:

. . . I do know this: No single individual, no matter how wise or learned in the law, should be invested with the power to overturn fundamental social policies against the will of the people.

If this Congress can act to preserve the will of the people as expressed through their elected representatives, it has the duty to do so. If inaction by the Congress runs the risk that a single judge in Hawaii may re-define the scope of federal legislation, as well as legislation throughout the other forty-nine states, *failure to act is a dereliction of the responsibility you were invested with by the voters.*⁵⁸

And again:

Changes to public policies are matters reserved to legislative bodies, and not to the judiciary. It would indeed be a fundamental shift away from democracy and representative government should a single justice in Hawaii be given the power and authority to rewrite the legislative will of this Congress and of the several states, based upon a fun-

⁵⁶Arkes Prepared Statement at 18. Professor Arkes' statement was prepared before the Supreme Court issued its decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), a decision that must serve as Exhibit A is supported of the phenomenon he describes. See *infra* "A Short Note on *Romer v. Evans*"; see also *Romer*, slip op. at 1 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite."); *id.* at 2 ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are elected, pronouncing that 'animosity' toward homosexuality is evil.").

⁵⁷Arkes Prepared Statement at 25; see also *id.* at 26 ("The Congress, with this move, brings this issue back into a public arena of deliberation; it makes this a subject of discussion on the part of citizens, and not merely of judges and lawyers.").

⁵⁸Tom Prepared Statement at 3 (emphasis added).

damentally flawed interpretation of the Hawaii State Constitution.

Federal legislation to prevent this result is both necessary and appropriate.⁵⁹

The Committee fully endorses the views expressed by Rep. Tom. It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. H.R. 3396 advances this most important government interest.

D. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PRESERVING SCARCE GOVERNMENT RESOURCES

Government currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the institution of marriage. While the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal obligations on the federal government.⁶⁰ For example, survivorship benefits paid to the surviving spouse of a veteran of the Armed Services plainly cost the federal government money.

If Hawaii (or some other State) were to permit homosexuals to "marry," these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and surviving spouses of homosexual "marriages" on the same terms as they are now available to opposite-sex married couples and spouses. To deny federal recognition to same-sex "marriages" will thus preserve scarce government resources, surely a legitimate government purpose.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on H.R. 3396 on May 15, 1996. Testimony was received from thirteen witnesses: Honorable Terrance W.H. Tom, Hawaii State House of Representatives; Honorable Edward Fallon, Iowa State House of Representatives; Honorable Marilyn Musgrave, Colorado State House of Representatives; Honorable Ernest Chambers, Nebraska State Senate; Honorable Deborah Whyman, Michigan State House of Representatives; Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College; Andrew Sullivan, Editor, *The New Republic*; Dennis Prager, Author and Radio Talk Show Commentator, KABC/Los Angeles; Nancy McDonald, Tulsa, Oklahoma; Lynn Wardle, Professor of Law, Brigham Young University Law School; Elizabeth Birch, Executive Director, Human Rights Campaign; Rabbi David Saperstein, Director, Religious Action Center, Union of American Hebrew Congregations; Jay Alan Sekulow, Chief Counsel, American Center For Law and Justice; with additional material submitted by Maurice Holland, Professor of Law, University of Oregon School of Law.

⁵⁹ Tom Prepared Statement at 4.

⁶⁰ For a partial list of federal government programs that might be affected by state recognition of same-sex "marriage," see "Compilation and Overview of Selected Federal Laws and Regulations Concerning Spouses," American Law Division, Congressional Research Service to the Honorable Tom DeLay, June 20, 1996.

COMMITTEE CONSIDERATION

On May 30, 1996, the Subcommittee on the Constitution met in open session and ordered reported the bill H.R. 3396, by a vote of 8 to 4, a quorum being present. On June 11 and 12, 1996, the Committee met in open session and ordered reported favorably the bill H.R. 3396 without amendment by a vote of 20 to 10, a quorum being present.

VOTE OF THE COMMITTEE

The committee then considered the following amendments, none of which was adopted.

1. An amendment by Mr. Frank to strike the definition of “marriage” and “spouse” (Section 3) from the bill. The amendment was defeated by a 13–19 rollcall vote.

ROLLCALL VOTE NO. 1

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mr. Conyers	Mr. Moorhead
Mrs. Schroeder	Mr. Sensenbrenner
Mr. Frank	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Mr. Becerra	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
Ms. Waters	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher

2. An amendment by Mrs. Schroeder, as amended by Ms. Jackson-Lee, to modify the definition of "marriage" as set forth in the bill. The amendment was defeated by a 9–20 rollcall vote (1 vote present).

ROLLCALL VOTE NO. 2

AYES	NAYS	PRESENT
Mrs. Schroeder	Mr. Hyde	Mr. Frank
Mr. Berman	Mr. Moorhead	
Mr. Boucher	Mr. Sensenbrenner	
Mr. Reed	Mr. McCollum	
Mr. Scott	Mr. Gekas	
Mr. Becerra	Mr. Coble	
Ms. Lofgren	Mr. Smith (TX)	
Ms. Jackson-Lee	Mr. Gallegly	
Ms. Waters	Mr. Canady	
	Mr. Goodlatte	
	Mr. Buyer	
	Mr. Hoke	
	Mr. Bono	
	Mr. Heineman	
	Mr. Bryant (TN)	
	Mr. Chabot	
	Mr. Flanagan	
	Mr. Barr	
	Mr. Nadler	
	Mr. Watt	

3. An amendment by Mr. Flanagan to strike the words “between persons of the same sex” from Section 2 of the bill, thereby authorizing States to decline to give effect to any marriage celebrated in another State. The amendment was defeated by a 9–19 rollcall vote.

ROLLCALL VOTE NO. 3

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mrs. Schroeder	Mr. Sensenbrenner
Mr. Frank	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Nadler	Mr. Coble
Mr. Scott	Mr. Smith (TX)
Mr. Becerra	Mr. Gallegly
Ms. Jackson-Lee	Mr. Canady
Ms. Waters	Mr. Goodlatte
	Mr. Buyer
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher
	Mr. Watt
	Ms. Lofgren

4. An amendment by Mr. Frank to insert language which would suspend the bill’s definition of “marriage” and “spouse” in any State that has, by legislation or citizen initiative or referendum, otherwise defined the terms. The amendment was defeated by a rollcall vote of 8–14.

ROLLCALL VOTE NO. 4

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mrs. Schroeder	Mr. Gekas
Mr. Frank	Mr. Coble
Mr. Berman	Mr. Smith (TX)
Mr. Reed	Mr. Gallegly
Mr. Nadler	Mr. Canady
Mr. Scott	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher

5. An amendment by Mrs. Schroeder. The Schroeder amendment would have disqualified legal unions following a “no fault” divorce of either husband or wife from the definition of “marriage” for purposes of the bill. The amendment was defeated by a 3–22 rollcall vote (1 vote present).

ROLLCALL VOTE NO. 5

AYES	NAYS	PRESENT
Mrs. Schroeder	Mr. Hyde	Mr. Frank
Mr. Reed	Mr. Moorhead	
Ms. Jackson-Lee	Mr. Sensenbrenner	
	Mr. McCollum	
	Mr. Gekas	
	Mr. Coble	
	Mr. Smith (TX)	
	Mr. Gallegly	
	Mr. Canady	
	Mr. Goodlatte	
	Mr. Buyer	
	Mr. Hoke	
	Mr. Bono	
	Mr. Heineman	
	Mr. Bryant (TN)	
	Mr. Chabot	
	Mr. Flanagan	
	Mr. Barr	
	Mr. Berman	
	Mr. Nadler	
	Mr. Scott	
	Mr. Watt	

6. Final passage. Mr. Hyde moved to report H.R. 3396 favorably to the whole House. The bill was adopted by a rollcall vote of 20–10.

ROLLCALL VOTE NO. 6

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorhead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Frank
Mr. McCollum	Mr. Berman
Mr. Gekas	Mr. Nadler
Mr. Coble	Mr. Scott
Mr. Smith (TX)	Mr. Watt
Mr. Gallegly	Mr. Becerra
Mr. Canady	Ms. Lofgren
Mr. Goodlatte	Ms. Jackson-Lee
Mr. Buyer	
Mr. Hoke	
Mr. Bono	
Mr. Heineman	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Flanagan	
Mr. Barr	
Mr. Boucher	
Mr. Reed	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3396, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 18, 1996.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3396, the Defense of Marriage Act, as ordered reported by the House Committee on the Judiciary on June 12, 1996. CBO estimates that enacting H.R. 3396 would result in no cost to the federal government. Because enactment of H.R. 3396 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would define “marriage” under federal law as the legal union between one man and one woman. H.R. 3396 also would allow each state to decide for itself what legal status it would give to another state’s same-sex marriages. Under current law, the federal government recognizes marriages as defined by state laws for purposes of providing certain federal benefits to spouses. Currently, no states recognize same-sex marriages. Enacting this bill would prohibit any future federal recognition of such marriages and would maintain the current status of federal programs that provide benefits to spouses. Hence, CBO estimates that enacting H.R. 3396 would result in no cost to the federal government.

This bill would impose no intergovernmental or private-sector mandates as defined in Public Law 104-4, and would have no direct impact on the budgets of state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O’NEILL, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3396 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section provides that this Act may be cited as the “Defense of Marriage Act.”

SECTION 2. POWERS RESERVED TO THE STATES

Section 2 of the Defense of Marriage Act would amend chapter 115 of Title 28 of the United States Code by adding after section 1738B a new section—section 1738C—entitled “Certain acts, records, and proceedings and the effect thereof.” This section authorizes States to decline to give effect to marriage licenses from another State if they relate to “marriages” between persons of the same sex.

This section provides that “[n]o State . . . shall be required to give effect” to same-sex “marriage” licenses issued by another State. The Committee would emphasize the narrowness of this provision. Section 2 merely provides that, in the event Hawaii (or some other State) permits same-sex couples to “marry,” other States will not be obligated or required, by operation of the Full Faith and Credit Clause of the United States Constitution, to recognize that “marriage,” or any right or claim arising from it. It will not forestall or in any way affect developments in Hawaii, or, for that matter, in any other State. Indeed, nothing in this (or any other) section of the Act would either prevent a State on its own from recognizing same-sex “marriages,” or from choosing to give binding legal effect to same-sex “marriage” licenses issued by another State.⁶¹

Instead, Section 2 is concerned exclusively with the potential interstate implications that might result from a decision by one State to issue marriage licenses to same-sex couples. The Committee is concerned that, if Hawaii recognizes same-sex “marriages,” gay and lesbian couples will fly to Hawaii, get “married,” and return to their home State to seek full legal recognition of their new status. In furtherance of that strategy, gay rights lawyers will argue that such recognition is required by the terms of the Full Faith and Credit Clause.

This may or may not be the case. Because no State has ever recognized homosexual “marriage,” we simply cannot know exactly how courts will rule on the Full Faith and Credit Clause issue. As a result, we are confronted now with significant legal uncertainty concerning this matter of great importance to the various States.⁶² While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same-sex “marriages” celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.

The Committee therefore believes that this situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation prescribing what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual “marriage.” The Full Faith and Credit Clause reads:

Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every

⁶¹The effect of Section 2 flows from its purpose. Section 2 is intended to permit each State to decide this important policy issue for itself, free from any possible constitutional compulsion that might result from the Full Faith and Credit Clause. Thus, if a State were ever to choose (either through the legislative process or by popular vote) to permit homosexual couples to marry, Section 2 would have no effect on that decision in that State. Section 2 would simply mean that no other State would be required to give effect to the resulting same-sex “marriage” licenses. Likewise, if a State is forced by its own courts to issue “marriage” licenses to homosexual couples (as Hawaii’s courts are prepared to do), again, Section 2 in no way affects that development. Finally, if a State, applying its own choice of law or other principles, decides (legislatively or through the judicial process) to recognize as valid same-sex “marriages” celebrated in a different State, in that situation too Section 2 has no effect.

⁶²*See, e.g.*, Wardle Prepared Statement at 22–24; Prepared Statement of Jay Alan Sekulow, Chief Counsel, The American Center for Law and Justice, at 10–11, Subcommittee hearing. (“It is not possible to predict with certainty, however, how courts will apply this [public policy] exception to same-sex marriages.”).

other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*⁶³

The second sentence of this Clause—the “Effects Clause”—has not been frequently invoked by Congress;⁶⁴ indeed, as one respected treatise notes regarding the Effects Clause, “there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the full faith and credit clause.”⁶⁵

But this much is clear: The Effects Clause is an express grant of authority to Congress to enact legislation to “prescribe” the “effect” that “public acts, records, and proceedings” from one State shall have in sister States. To state it slightly differently, Congress is empowered to specify by statute how States are to treat laws from other States. Read together, the two sentences of Article IV, section 1 logically suggest this interpretation: While full faith and credit is the rule—that is, while States are generally obligated to treat laws of other States as they would their own—Congress retains a discretionary power to carve out such exceptions as it deems appropriate.⁶⁶ Professor Maurice Holland summarized the role of the Effects Clause as follows:

[The Framers] understood that there would be occasions when the legislative power of two or more states would overlap, thus engendering actual or potential conflict. The delicate, and largely political, task of resolving such conflicts was therefore [assigned] to Congress, with the expectation that it would function as a kind of referee for their settlement when required.⁶⁷

The Founders, in short, wanted to encourage, even to require the States to respect the laws of sister States, but they were aware that it might be necessary to protect against the laws of one State effectively being able to undermine the laws of others under force of the Full Faith and Credit Clause.

That is precisely the situation we now confront with regard to the Hawaii homosexual “marriage” lawsuit. Gay rights lawyers are intending to try to use their victory in Hawaii to undermine the marriage laws of the other 49 States. Because none of the other

⁶³U.S. Const. art. IV, § 1 (emphasis added).

⁶⁴See Act of May 26, 1790, ch. 11, 1 Stat. 122, codified at 28 U.S.C. § 1738; Parental Kidnapping Prevention Act of 1980, Pub. L. 96–611, 94 Stat. 3569, codified at 28 U.S.C. § 1738A (requiring States to grant full faith and credit to child custody determinations of other States if consistent with criteria established by Congress); Full Faith and Credit for Child Support Orders Act of 1994, Pub. L. 103–383, 108 Stat. 4064, codified at 28 U.S.C. § 1738B (same with respect to child support orders); Safe Homes for Women Act of 1994, Pub. L. 103–322, title IV, § 40221(a), 108 Stat. 1930, codified at 18 U.S.C. § 2265 (full faith and credit to be given to protective orders issued against a spouse with respect to domestic violence).

⁶⁵*The Constitution of the United States of America Annotated*, Doc. No. 99–16, 99th Cong. 1st Sess. at 870 (1987).

⁶⁶See, e.g., James D. Sumner, Jr., “The Full Faith and Credit Clause—Its History and Purpose,” 34 Ore. L. Rev. 224, 239 (1955) (“The writer is of the opinion that the members of the Constitutional Convention meant the clause to be self-executing, but subject to such exceptions, qualifications, and clarifications as Congress might enact into law.”); Walter Wheeler Cook, “The Powers of Congress Under the Full Faith and Credit Clause,” 28 Yale L. J. 421, 421–26 (1919) (discussing framing history of the Clause in manner consistent with this interpretation); Laycock, 92 Colum. L. Rev. at 292 (the effect of the language ultimately adopted at the Convention “was to make the clause self-executing, commanding full faith and credit in the constitutional text and making congressional action discretionary”).

⁶⁷See Prepared Statement of Maurice J. Holland, Professor, University of Oregon School of Law (“Holland Prepared Statement”) at 3, Subcommittee Hearing.

States currently recognize same-sex “marriage,” they will be confronted with a classic choice-of-law question—which law governs the validity of a Hawaiian same-sex “marriage” license, Hawaii’s or their own?⁶⁸ Consistent with the governmental interests described above, the Committee believes that it is important that States be able to apply their own laws, expressing their own public policy, on this matter. Section 2 does not, of course, determine the choice-of-law issue; when a State that does not itself permit homosexual couples to “marry” is confronted with a same-sex “marriage” license from another State, that State will still have to decide whether to recognize the couple as “married.” But Section 2 does mean that the Full Faith and Credit Clause will play no role in that choice of law determination, thereby improving the ability of various States to resist recognizing same-sex “marriages” celebrated elsewhere. This, the Effects Clause plainly authorizes Congress to do.⁶⁹

Notwithstanding the seemingly incontrovertible conclusion that the Section 2 of the Defense of Marriage Act falls within Congress’ authority under the Effects Clause of the Full Faith and Credit Clause, it has been argued by some Members (for example, during the Subcommittee and Full Committee markups) and by some commentators that Section 2 is unconstitutional. The arguments advanced by those who take this view are well-summarized in a letter dated May 24, 1996, from Professor Laurence Tribe of the Harvard University Law School to Senator Edward M. Kennedy of Massachusetts.⁷⁰

Professor Tribe’s somewhat perplexing analysis has two central themes. On the one hand, Professor Tribe believes that Section 2 of the Defense of Marriage Act is “. . . plainly unconstitutional,”

both because of the basic “limited-government” axiom that ours is a National Government whose powers are confined to those that are delegated to the federal level in the Constitution itself, and because of the equally fundamental

⁶⁸ Indeed, the Committee believes that Section 2 is best understood as a choice-of-law provision. Professor Laycock has argued that the Full Faith and Credit Clause “requires full faith and credit to applicable law required under choice-of-law rules that are presupposed but not codified”. Laycock, 92 Colum. L. Rev. at 300–01. And of the Effects Clause, he writes that “[t]he Constitution expressly grants Congress power to specify the ‘Effect’ of sister-state law, and almost everyone agrees that that includes power to specify choice-of-law rules.” *Id.* at 301.

⁶⁹ Twice during the Committee’s consideration of H.R. 3396, the Department of Justice has indicated that it believes the Defense of Marriage Act to be constitutional. See Letter from Assistant Attorney General Andrew Fois to The Honorable Henry J. Hyde, May 14, 1996, and Letter from Assistant Attorney General Andrew Fois to The Honorable Charles T. Canady, May 29, 1996. Both letters are reproduced in full in the section of this Report entitled “Agency Views.” See also Holland Prepared Statement at 1 (“There seems to me not the slightest room for doubt but that the enactment of Section 2 would be within the constitutional authority of the Congress”); Wardle Prepared Statement at 27 (“[I]t is clear that Congress has the authority under the Constitution to declare the ‘effect’ which the acts, records or judicial proceedings of states that legalize same-sex marriage must be given in other states, and that is precisely what Section 2 of H.R. 3396 would do.”).

⁷⁰ Senator Kennedy subsequently entered Professor Tribe’s letter into the Congressional Record. See 142 Cong. Rec. S5931–33 (June 6, 1996) (statement of Sen. Kennedy). In the course of introducing the letter into the record, Senator Kennedy stated that Professor Tribe “has concluded unequivocally that enactment of S.1740 [the Senate version of F.R. 3396] would be an unconstitutional attempt by Congress to limit the full faith and credit clause of the Constitution”, and, in a reference to the bill’s title, suggested that “assaulting the Constitution is hardly defending marriage”. *Id.* Many of the same points made in the letter to Senator Kennedy are also included in an editorial Professor Tribe published in the *New York Times*. See Laurence H. Tribe, “Toward a Less Perfect Union, *New York Times*, May 26, 1996, at A11.

“states’-rights” postulate that all powers not so delegated are reserved to the States and their people.⁷¹

The premise for this line of argument is that the Full Faith and Credit Clause was intended to be the Constitution’s “most vital unifying provision,” and that Section 2 is “legislation that does not unify or integrate but divides and disintegrates.”⁷²

But even as we are told that Section 2 is flagrantly unconstitutional and constitutes a fundamental assault on the Constitution’s grand project of unifying the States into one union—even as, in other words, we are warned of the cataclysmic implications of this narrow, targeted relaxation of the Full Faith and Credit Clause—Professor Tribe also tells us that, in light of the “public policy” exception to the Full Faith and Credit Clause, Section 2 is probably unnecessary. In light of that exception, he writes, Section 2, if enacted, would “be entirely redundant and indeed altogether devoid of content.”⁷³

A few brief points in response are in order. First, Professor Tribe believes that although the States are authorized under the nebulous “public policy” exception to decline to recognize certain sister-state laws, Congress may not invoke its express constitutional power to clarify that the States have that authority. But the result is the same in both cases, and so there cannot be a constitutionally significant difference between these mechanisms. The Committee, however, believes that it is far preferable to have Congress set forth specific statutory guidelines to direct the courts in this complicated area, rather than to leave it to the uncertain and inefficient prospect of litigation to determine what the States are authorized or obligated to do. That is what the Constitution contemplates, and that is what Section 2 constitutes.

But what is most striking about Professor Tribe’s analysis in his effort to portray the Defense of Marriage Act as an assault on state sovereignty. He claims, for example, that it is the “basic axiom” expressed in the Tenth Amendment—that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”—

⁷¹ 142 Cong. Rec. at S5932. Professor Tribe rejects, therefore, the Committee’s view that Section 2 falls within the scope of Congress’ powers under the Effects Clause. Indeed, he characterizes that argument as “a play on words, not a legal argument,” for it is, he believes, “as plain as words can make it that congressional power to ‘prescribe . . . effect’ of sister-state acts, records, and proceedings . . . includes no congressional power to prescribe that some acts, records, and proceedings that would otherwise be entitled to full faith and credit under the Full Faith and Credit Clause as judicially interpreted shall instead be entitled to no faith or credit at all!” *Id.* Put aside the fact, which Professor Tribe apparently recognizes, that, at least in some contexts, the “public policy” exception permits precisely that outcome. What is most wrong-headed about Professor Tribe’s *ipse dixit* is his facile assumption—wholly unsupported by common usage, constitutional history, or case law—that the power of Congress to “prescribe the effects” of sister-state laws only authorizes Congress to impose on States obligations above and beyond those inherent in the full faith and credit obligation. But the power “to prescribe” does not distinguish between laws that would *add to* and those that would *detract from* the force of that obligation; indeed, it seems to the Committee as plain as words can be that the express grant of congressional authority permits both types of laws. It is even clearer that the Effects Clause authorizes the type of law proposed here, which, in the Committee’s understanding, neither augments nor relaxes the free-standing constitutional obligation, but merely clarifies a very murky and complicated legal situation.

⁷² *Id.* at S5933.

⁷³ *Id.* Professor Tribe elaborates as follows: “The essential point is that States need no congressional license to deny enforcement of whatever sister-state decisions might fall within any judicially recognized full faith and credit exception.” *Id.*

that “most clearly condemns the proposed statute.”⁷⁴ He elaborates as follows:

The claim of [the bill’s] supporters that this measure would somehow defend states’ rights by enlarging the constitutional authority of States opposing same-sex marriage at the expense of the constitutional authority of States accepting same-sex marriages rests on a profound misunderstanding of what a dedication of “states’ rights” means.⁷⁵

The Committee respectfully suggests that it is Professor Tribe who fails to understand state sovereignty. To the extent our disagreement turns on the precise question of whether Section 2 is within Congress’ delegated powers, we simply have a different understanding of the Effects Clause, and it suffices to repeat that the Committee is confident that this legislation falls within that grant of congressional authority.

But on the more general question of which position comports with a decent respect for state sovereignty, there can be no reasonable dispute. Recall the situation we confront: Hawaii is on the verge of being forced by its courts to issue marriage licenses to homosexual couples, many of whom will come from States that choose not to recognize same-sex “marriages.” In Professor Tribe’s view, a concern for state sovereignty entails forcing the other 49 States—States, it must be emphasized, that have made the democratic choice not to recognize same-sex “marriage”—to suppress their policy preferences and to honor those licenses. Apparently, Professor Tribe believes that respecting state sovereignty means supporting the “right” of Hawaii (and in particular, three justices on the Hawaii Supreme Court) to decide this most sensitive issue for the entire country, and to do so in a way the overwhelming majority of the American public rejects.

The Committee takes a different view. The Committee believes that Section 2 of the Defense of Marriage Act strongly supports a proper understanding of federalism and state sovereignty. Section 2 is an effort to protect the right of the various States to retain democratic control over the issue of how to define marriage. It does so in a moderate fashion, intruding only to the extent necessary to forestall the impending legal assault on traditional state marriage laws. It does so in reliance on an express constitutional grant of congressional authority. And it does so by making clear the fact that States, in this narrow context, do not have to abandon their settled public policy.

In addition to the issue of constitutional authority for enacting Section 2, there is one particular interpretive issue that should be addressed. Section 2 applies to “any public act, record, or judicial proceeding” of another State respecting same-sex “marriage.” The Committee is aware, of course, that “public records”—for example, marriage licenses—are typically accorded less weight by sister States than are judicial proceedings.⁷⁶ While the Committee expects that the issue of sister-state recognition affected by Section

⁷⁴*Id.* at S5932.

⁷⁵*Id.*

⁷⁶*Compare, e.g., Fauntleroy v. Lum*, 210 U.S. 230 (1908) with *Williams v. North Carolina*, 317 U.S. 287 (1942).

2 will typically concern marriage licenses, it is possible that homosexual couples could obtain a judicial judgment memorializing their “marriage,” and then proceed to base their claim of sister-state recognition on that judicial record.⁷⁷ Accordingly, Section 2 applies by its terms to all three categories of sister-state laws to which full faith and credit must presumptively be given.

But the Committee would emphasize two points regarding Section 2’s application to judicial orders. First, as with public acts and records, the effect of Section 2 is merely to authorize a sister State to decline to give effect to such orders; it does not mandate that outcome, and, indeed, given the special status of judicial proceedings, the Committee expects that States will honor judicial orders as long as it can do so without surrendering its public policy against same-sex “marriages.” Second, and relatedly, if—notwithstanding a sister State’s policy objections to homosexual “marriage”—there is some constitutional compulsion (whether under the Due Process Clause or otherwise) to give effect to a judicial order, Section 2 obviously can present no obstacle to such recognition.

SECTION 3. DEFINITION OF MARRIAGE

Section 3 of the Defense of Marriage Act amends Chapter 1 of title 1 of the United States Code by adding a new Section 7 entitled, “Definition of ‘marriage’ and ‘spouse’.” The most important aspect of Section 3 is that it applies to federal law only; in the words of the statute, these definitions apply only “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.” It does not, therefore, have any effect whatsoever on the manner in which any State (including, of course, Hawaii) might choose to define these words. Section 3 applies only to federal law, and will provide the meaning of these two words only insofar as they are used in federal law.

In defining “marriage” as “only a legal union between one man and one woman as husband and wife,” and “spouse” as “only a person of the opposite sex who is a husband or a wife,” Section 3 merely restates the current understanding of what those terms mean for purposes of federal law. Prior to the Hawaii lawsuit, no State has ever permitted homosexual couples to marry. Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex “marriage.” And as Professor Wardle has noted, “it is beyond question that Congress never actually intended to include same-sex unions when it used the terms ‘marriage’ and ‘spouse’.”⁷⁸ But now that Hawaii is prepared to redefine “marriage” (and, presumably, “spouse”) as a matter of Hawaiian law, the federal government should adopt explicit federal definitions of those words.

⁷⁷ Again, this is no mere fanciful scenario. Lambda has expressly indicated that it would pursue this strategy if sister States decline to recognize same-sex “marriages” based solely on a marriage license. See Lambda Memorandum at 9–10 (“[P]eople could easily have a ‘judgment’ outright were Hawaii to accompany its celebration of marriages with a mechanism whereby married couples could speedily obtain . . . a declaratory judgment of marriage. Couples could then return home with their certificate, their newly-wed status, their snapshots, and a court order.”) (emphasis in original).

⁷⁸ Wardle Prepared Statement at 9.

There is, of course, nothing novel about the definitions contained in Section 3. The definition of “marriage” is derived from a case from the State of Washington, *Singer v. Hara*, 522 P.2d 1187, 1191–92 (Wash. App. 1974); that definition—a “legal union of one man and one woman as husband and wife”—has found its way into the standard law dictionary.⁷⁹ It is fully consistent with the Supreme Court’s reference, over one hundred years ago, to the “union for life of one man and one woman in the holy estate of matrimony.” *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). The definition of “spouse” obviously derives from and is consistent with this definition of “marriage.”⁸⁰

If Hawaii or some other State eventually recognizes homosexual “marriage,” Section 3 will mean simply that that “marriage” will not be recognized as a “marriage” for purposes of federal law. Other than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law. Whether and to what extent benefits available to married couples under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question.

A SHORT NOTE ON *ROMER V. EVANS*

In the wake of the Supreme Court’s recent decision in *Romer v. Evans*,⁸¹ it has been suggested that laws distinguishing between heterosexuality and homosexuality are constitutionally suspect.⁸² Because traditional marriage laws plainly grant preferred status to heterosexual unions, the Committee believes a brief discussion of the *Romer* case is warranted.

In *Romer*, the Court held that Amendment 2, a popularly-enacted amendment to the Colorado Constitution, violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Amendment 2 would have prohibited the State or any of its political subdivisions from granting homosexuals protected class status or any form of preferential treatment. By a 6–3 vote, the Court held that Amendment 2 failed to satisfy the rational basis test—that is, that it bore no rational relation to a legitimate government purpose. The majority was dismissive of Colorado’s assertion that Amendment 2 served the interest of “respect[ing] . . .

⁷⁹ *Black’s Law Dictionary* 972 (6th ed. 1990). The definition of “marriage” in *Black’s* continues: Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. A contract, according to the form prescribed by law, by which a man and a woman capable of entering into such contract, mutually engage with each other to live their whole lives (or until divorced) together in state of union which ought to exist between a husband and wife.

⁸⁰ *Id.* The word “marriage” is defined, but the word “spouse” is not actually defined, but rather “refers . . . to.” This distinction is used because the word “spouse” is defined at several places in the United States Code to include substantive meanings, *see e.g.*, 42 U.S.C. §§ 416(a), (b) and (f) (containing long definition of “spouse”), and Section 3 is not meant to affect such substantive definitions. Rather, Section 3 is meant to ensure that whatever substantive definition of “spouse” may be used in Federal law, the word “refers only to” a person of the opposite sex.

⁸¹ 116 S. Ct. 1620 (1996).

⁸² For example, in his letter to Senator Kennedy, Professor Tribe refers to *Romer* and raises but does not answer the question whether the Defense of Marriage Act “violate[s] . . . the Due Process Clause of the Fifth Amendment . . . on the ground that it singles out same-sex relationships for unfavorable legal treatment for no discernable reason beyond public animosity to homosexuals.” 142 Cong. Rec. at S5932.

other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."⁸³ Indeed, the Court said, Amendment 2 was so unrelated to this rationale as to "raise the inevitable inference" that it was "born of animosity" toward homosexuals.⁸⁴ The Court concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."⁸⁵

Romer is, to put it charitably, an elusive decision. Under the Court's own recent articulation of the rational basis test, a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."⁸⁶ Parties challenging such laws have the burden of negating "every conceivable basis which might support it," regardless of whether each rationale was actually relied upon by the enacting authority.⁸⁷ In short, federal courts considering an equal protection challenge may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."⁸⁸

It is difficult to fathom how, applying this standard, the Court majority concluded that Amendment 2 is unconstitutional. As even the majority recognized, Amendment 2 was motivated by the enactment in several Colorado municipalities (and several agencies at the State level) of laws or policies outlawing discrimination against homosexuals. As a result of those laws, Colorado citizens who have moral, religious, or other objections to homosexuality could be forced to employ, rent an apartment to, or otherwise associate with homosexuals. It is most assuredly "conceivable" that Amendment 2 would advance the State's interest in protecting the associational freedom of such persons. And as the freedom of association is a constitutionally protected right, it is self-evident that protecting that freedom is a legitimate government purpose. On this ground alone, it is inconceivable how Amendment 2 could fail to meet the rational basis test.

But the Court in *Romer* did not undertake even a cursory analysis of the interests Amendment 2 might serve. Rather, in an opinion marked more by assertions—highly questionable ones, at that—than analysis, the Court simply concluded that Amendment 2 "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons for its own sake, something the Equal Protection Clause does not permit."⁸⁹

What makes *Romer* even more unsettling is the Court's failure to distinguish or even to mention its prior opinion in *Bowers v. Hardwick*.⁹⁰ In *Bowers*, of course, the Court only ten years earlier held that there was no constitutional objection to a Georgia law

⁸³ *Romer*, slip op. at 14 (May 20, 1996).

⁸⁴ *Id.* at 13.

⁸⁵ *Id.* at 14.

⁸⁶ *Federal Communications Comm'n v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993); see also *Heller v. Doe*, 113 S. Ct. 2637, 2642–43 (1993).

⁸⁷ *Beach Communications*, 113 S. Ct. at 2102.

⁸⁸ *Heller*, 113 S. Ct. at 2642 (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

⁸⁹ *Romer*, slip op. at 14.

⁹⁰ 478 U.S. 186 (1986).

criminalizing homosexual sodomy. *Bowers* would seem to be particularly relevant to the issues raised in *Romer*, for in the earlier case, the Court expressly held that the anti-sodomy law served the rational purpose of expressing “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”⁹¹ If (as in *Bowers*) moral objections to homosexuality can justify laws criminalizing homosexual behavior, then surely such moral sentiments provide a rational basis for choosing not to grant homosexuals preferred status as a protected class under antidiscrimination laws.

The Committee belabors these aspects of *Romer* to highlight the difficulty of analyzing any law in light of the Court’s decision in that case. But of this much, the Committee is certain: nothing in the Court’s recent decision suggests that the Defense of Marriage Act is constitutionally suspect. It would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2) motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing.

By extension, the Defense of Marriage Act is also plainly constitutional under *Romer*. The Committee briefly described above at least four legitimate government interests that are advanced by this legislation—namely, defending the institution of traditional heterosexual marriage; defending traditional notions of morality; protecting state sovereignty and democratic self-governance; and preserving government resources. The Committee is satisfied that these interests amply justify the enactment of this bill.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 14, 1996.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Attorney General has referred your letter of May 9, 1996 to this office for response. We appreciate your inviting the Department to send a representative to appear and testify on Wednesday, May 22 at a hearing before the Subcommittee on the Constitution concerning H.R. 3396, the Defense of Marriage Act. We understand that the date of the Hearing has now been moved forward to May 15.

H.R. 3396 contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would essentially provide that for purposes of federal laws and regulations, the term “marriage” includes only unions between one man and one

⁹¹*Id.* at 196.

woman and that the term “spouse” refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that H.R. 3396 would be sustained as constitutional, and that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department.

Sincerely,

ANDREW FOIS, *Assistant Attorney General.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 29, 1996.

Hon. CHARLES T. CANADY,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I write in response to your letter of May 28 requesting updated information regarding the Administration’s analysis of the constitutionality of H.R. 3396, the Defense of Marriage Act.

The Administration continues to believe that H.R. 3396 would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. As stated by the President’s spokesman Michael McCurry on Wednesday, May 22, the Supreme Court’s ruling in *Romer v. Evans* does not affect the Department’s analysis (that H.R. 3396 is constitutionally sustainable), and the President “would sign the bill if it was presented to him as currently written.”

Please feel free to contact this office if you have further questions.

Sincerely,

ANN M. HARKINS
(For Andrew Fois, Assistant Attorney General).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART V—PROCEDURE

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CHAPTER 115—EVIDENCE; DOCUMENTARY

Sec.

1731. Handwriting

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1738B. Full faith and credit for child support orders.

1738C. *Certain acts, records, and proceedings and the effect thereof.*

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§ 1738C. *Certain acts, records, and proceedings and the effect thereof*

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

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TITLE 1, UNITED STATES CODE

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CHAPTER 1—RULES OF CONSTRUCTION

Sec.

1. Word denoting number, gender, etc.

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7. *Definition of “marriage” and “spouse”.*

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§ 7. *Definition of “marriage” and “spouse”*

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

* * * * *

DISSENTING VIEWS ON H.R. 3396

Supporters of the legislation which they have named the “Defense of Marriage Act” assert that it is necessary essentially as a states rights measure. That is, they claim that if we do not pass this bill into law this year, states all over the country will be compelled by a decision of the courts in Hawaii to legalize same sex marriage. Very little of this is in fact true, and one of the major problems with this bill is that, contrary to its supporters assertions that it is intended to defend the rights of states, the bill will severely undercut state authority in the area of marriage, in part explicitly and in part implicitly.

DESCRIPTION OF LEGISLATION AND SUMMARY

H.R. 3936 has two distinct parts. Sec. 2 amends 28 U.S.C. 1738 by adding a new section, 1738C, to provide that “[n]o State, territory or possession shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”

Sec. 3 defines marriage for Federal purposes, by providing that “‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

The first thing that should be noted is that there is no emergency here. The legislation is offered as a “response” to a Hawaii Supreme Court case, *Baehr v. Lewin*,¹ issued more than three years ago, which remanded a same sex marriage claim back to a Hawaii trial court for a determination of whether denial of a marriage license was a violation of the Hawaii Constitution’s equal protection guarantee based on gender. The trial court is not scheduled to begin hearing the case until September of this year, with appeals continuing for well beyond next year. Thus, while H.R. 3396 is characterized as a response to an “imminent” threat of same sex marriage being forced on the nation by several judges of the Hawaii Supreme Court (and to the rest of the nation through the claimed legal compulsion of the of the Full Faith and Credit clause), in fact there is nothing imminent. There is no likelihood that Hawaii will complete this process until well into next year at the earliest, giving us plenty of time to legislate with more thought and analysis.

In no jurisdiction in this nation is same sex marriage recognized by law. To the contrary, as of today, 14 states have enacted laws which in some fashion make explicit those states’ objection to same

¹ 852 P.2d 44 (Haw. 1993)

sex marriages. This federal legislation is therefore an unwarranted response to a non-issue.

Second, the argument that if Hawaii does finally decide to recognize same sex marriages, this legislation is necessary—or even useful—in helping other states reject that as their own policy is not only wrong, it is a proposition which the sponsors of this legislation do not themselves genuinely believe.

The legal history of the full faith and credit clause which is central to this dispute is a sparse one, and no one can speak with absolute certainty about all aspects of this matter. But one thing is quite clear: whatever powers states have to reject a decision by another state to legalize same sex marriage, and to refuse to recognize such marriages within its own borders, derives directly from the Constitution and nothing Congress can do by statute either adds to or detracts from that power. That is, the prevailing view today is that states can by adopting their own contrary policies deny recognition to marriages of a type of which they disapprove, and it is incontestable that states have in fact done this on policy grounds in the past. Support for this fact is so clear that constitutional scholars not often in agreement on this point agree. See, e.g., Professor Laurence Tribe's letter to Senator Kennedy, May 23, 1996, and Bruce Fein's "Defending a Sacred Covenant," *The Legal Times*, June 17, 1996. And most relevant for the purposes of this discussion is that states have in the past been free to reject the demand that they recognize marriages from other states because of policy reasons without any intervention whatsoever by the federal government.

Indeed, given that the power that states have to reject marriages of which they disapprove on policy grounds derives directly from the Constitution and has never previously been held to need any Congressional authorization, the fact that Congress in this proposed statute presumes to give the states permission to do what virtually all states think they already now have the power to do undercuts states rights. If entities—individuals, states, or any other—have a Constitutional right to take certain actions, then the effect of Congress passing a statute which gives them permission to do what they already have the right to do serves not to empower them, but to undercut in the minds of some the power they already have. This point has been argued with particular force by Professor Laurence Tribe in the letter he sent to Senator Kennedy, a copy of which has been inserted into the record of the proceedings on this bill in the Judiciary Committee. A more detailed legal analysis of this matter is as follows.

TREATMENT OF OUT OF STATE MARRIAGES GOVERNED GENERALLY BY
CHOICE OF LAW RULES

Notwithstanding the language of the Full Faith and Credit clause, Article IV, Section 1:

Full Faith and Credit shall be given in each State to the public Act, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

The clause has had its principal operation in relation only to judgments.

It is settled constitutional law that the final judgment of one state must be recognized in another state, and that a second state's interest in the adjudicated matter is limited to questions of authenticity, and personal jurisdiction, i.e., notwithstanding the first court's assertion of jurisdiction, proof that the first court lacked jurisdiction may be collaterally impeached in a second state's court.²

Again, notwithstanding the plain language of the clause, recognition of rights based upon State Constitutions, statutes and common laws are treated differently than judgments. "With regard to the extrastate protection of rights which have not matured into final judgments, the full faith and credit clause has never abolished the general principle of the dominance of local policy over the rules of comity."³

*Alaska Packers Assn v. Comm.*⁴ elaborated on this doctrine, holding that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly.

Marriage licensure is not a judgment.⁵ Therefore, the Full Faith and Credit clause does not, under traditional analysis, have anything to say about sister state recognition of marriage.

The Supreme Court has not yet passed on the manner in which marriages per se are entitled to full faith and credit, even though it would appear from the face of the clause they should be afforded full faith and credit as either Acts or Records. In the absence of an express constitutional protection under full faith and credit, state courts (and Federal courts) rely on traditional choice of law/conflict of law rules. The general rule for determining the validity of a marriage legally created and recognized in another jurisdiction is to apply the law of the state in which the marriage was performed.⁶

There are two strong exceptions to this choice of law rule: first, a court will not recognize a marriage performed in another state if a statute of the forum state clearly expresses that the general rule of validation should not be applied to such marriages, and, second, a court will refuse to recognize a valid foreign marriage if the recognition of that marriage would violate a strongly held public policy of the forum state.⁷

Those states which desire to avoid the general rule favoring application of the law where the marriage was celebrated will rely on an enumerated public policy exception to the rule: through state

² *Williams v. North Carolina II*, 325 U.S. 226 (1945). See also, *Esenwein v. Commonwealth*, 325 U.S. 279 (1945).

³ Congressional Research Serv., Library of Congress, *The Constitution of the United States of America, Analysis and Interpretation*, at 859 (1987), citing, *Bond v. Hume*, 243 U.S. 15 (1917).

⁴ 294 U.S. 532 (1935).

⁵ That is not to say that marriage could not in some cases be converted to a judgment, as when a marriage is in dispute and the parties go to court and seek a decree validating the marriage.

⁶ Ehrenzweig, *A Treatise on the Conflict of Laws*, sec. 138 (1961).

⁷ Restatement (Second) Conflict of Laws sec. 283 (1971).

statute, common law, or practice the state will show that honoring a sister state's celebration of marriage "would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense."⁸ The rhetoric notwithstanding, the public policy exception has not been a difficult hurdle to overcome for states, subject to the limitations of other constitutional provisions, to wit, equal protection, substantive due process, etc. States could show their public policy exception to same sex marriage by offering gender specific marriage laws, anti-sodomy statutes, common law, etc.

Different courts have required different levels of clarity in their own states expression of public policy before that exception could be sustained in that states' court. Some have required explicit statutory expression,⁹ while others much less clearly so.¹⁰

Courts have considered a marriage offensive to a state's public policy either because it is contrary to natural law or because it violates a positive law enacted by the state legislature. Courts have invalidated incestuous, polygamous, and interracial foreign marriages on the ground that they violate natural law.¹¹ For invalidation based on positive law, some courts have required clear statutory expressions that the marriages prohibited are void regardless of where they are performed,¹² and sometimes a clear intent to preempt the general rule of validation.¹³ Other courts have set up not so high a hurdle, such that a statutory enactment against the substantive issue was sufficient.¹⁴ Those states that are enacting anti-same sex marriage statutes may well find they have satisfied the first exception to the choice of law rule validating a marriage where celebrated.

Interracial marriages were, before *Loving v. Virginia*, treated with the above choice of law analysis, and "courts frequently determined the validity of interracial marriages based on an analysis of the public policy exception. Early decisions treated such marriages as contrary to natural law, but later courts considered the question one of positive law interpretation."¹⁵

Other examples of common public policy exception analyses include common law marriages, persons under the age permitted by a forum's marriage statute, and statutes which prohibit persons from remarrying within a certain period.

The Uniform Marriage and Divorce Act, effective in at least seventeen states, provides that "[a]ll marriages contracted within this State prior to the effective date of the act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State."¹⁶ The Act specifically drops the public policy exception: "the section expressly

⁸ *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 212 (N.Y. 1964).

⁹ *Etheridge v. Shaddock*, 706 S.W.2d 396 (Ark. 1986).

¹⁰ *Condado Aruba Caribbean Hotel v. Tichel*, 561 P.2d 23, 24 (Colo. Ct. App. 1977).

¹¹ See, e.g., *Earle v. Earle*, 126 N.Y.S. 317, 319 (1910).

¹² *State v. Graves* 307 S.W.2d 545 (Ark. 1957).

¹³ See, e.g., *Estate of Loughmiller*, 629 P.2d 156 (Kas. 1981).

¹⁴ *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961)(finding express prohibitions in a marriage statute and the criminalization of incestuous marriages sufficient to invalidate an out of state marriage).

¹⁵ Hovermill, 53 Md. L. Rev. 450 (1994), at 464.

¹⁶ 9A U.L.A. sec. 210 (1979).

fails to incorporate the ‘strong public policy’ exception to the Re-statement and thus may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated of many marriages which would have been invalidated in the past.”¹⁷ Of course, any state that wants to re-assert a public policy exception for same sex marriages retains the right to so legislate, or not. The proposed federal bill has no effect on that.

CONSTITUTIONAL RESTRAINTS

There are several possible Constitutional limits on a states’ ability to invoke a public policy exception to the general rule of validating foreign marriages: the due process clause, equal protection, the effects clause of the Full Faith and Credit clause, or substantive due process.

For due process, the second state must before it can apply its own law satisfy that it has “significant contact or a significant aggregation of contracts” with the parties and the occurrence or transaction to which it is applying its own law.¹⁸ The contacts necessary to survive a due process challenge have been characterized as “incidental.”¹⁹

Substantive due process and equal protection can bar a state’s application of a public policy exception as well. For the former, a court would have to find that there is a fundamental right for homosexuals to marry. There is complete agreement that there is a fundamental right to marry,²⁰ and the argument will be pursued that this incorporates marriage of homosexuals to each other. There has been never been such a holding in any federal or state court, including even the Hawaii case, *Baehr v. Lewin*.²¹

For equal protection analysis a state’s anti same sex marriage statute could be subjected to one of three levels of scrutiny.²² If it is viewed as almost all statutory enactments, under rational basis, the state will in all likelihood have to show more than animus motivates the restrictive legislation. If an argument can be persuasive that the anti same sex marriage statute is discrimination based on gender, it may well receive intermediate scrutiny. No court has been persuaded that anti same sex marriage laws are gender based discrimination.²³ For strict scrutiny, the court would have to for the first time elevate classifications based on homosexuality to that of strict scrutiny, a level which may be due, but nowhere operative.

If the Full Faith and Credit clause requires recognition, as it does for judgments, there is no Constitutional exception to that requirement, and most certainly Congress could not create one by statute. Professor Tribe makes this point and then argues that the attempt to do so legislatively is itself unconstitutional. And Congress’ disability is the same for substantive due process: if there were found to exist a substantive due process bar to a state’s prohibition of same-sex marriage, no Congressional enactment could af-

¹⁷ Id., official comment.

¹⁸ *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

¹⁹ 53 Md. L. Rev. at 467.

²⁰ *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²¹ 852 P.2d 44, 57 (Haw. 1993).

²² *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

²³ See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

fect that, it would be a matter between the States and the Supreme Court interpreting the United States Constitution.

The policy/doctrinal analog to Professor Tribe's constitutional argument is the following: while the proponents purport to be protecting States' rights and interests, they are in fact diluting those rights and interests. The clear expression in this legislation that the Congress has a role in determining when a state may not offer full faith and credit creates a standard of Federal control antithetical to conservative philosophy and the Tenth Amendment: that powers not enumerated for the Federal Government are reserved to the States. This legislation enumerates a Federal power, namely the power to deny sister state recognition, grants that power to the state, and therefore dangerously pronounces, *expressio unius est exclusio alterius*, that the Federal government in fact retains the power to limit full faith and credit. And it only need express that power substantive issue by substantive issue. This is an arrogation of power to the federal government which one would have assumed heretical to the expressed philosophy of conservative legislating. Under the guise of protecting states' interests, the proposed statutes would infringe upon state sovereignty and effectively transfer broad power to the federal government.

As to the second prong of Full Faith and Credit, only rarely has Congress exercised the implementing authority which the Clause grants to it. The first, passed in 1790,²⁴ provides for ways to authenticate acts, records and judicial proceedings, and repeats the constitutional injunction that such acts, records and judicial proceedings of the states are entitled to full faith and credit in other states, as well as by the federal government. The second, dating from 1804, provides methods of authenticating non-judicial records.²⁵

Since 1804 these provisions have been amended only twice, the Parental Kidnapping Prevention Act of 1980²⁶, which provides that custody determinations of a state shall be enforced in different states, and 28 U.S.C.A. Sec. 1738B, "Full Faith and Credit for Child Support Orders" (1994). Neither of these statutes purported to limit full faith and credit; to the contrary, each of these statutes reinforced or expanded the faith and credit given to states' court orders.

Full Faith and Credit, discussed above, provides little break on the application of a sister states' policies, as opposed to judgments.²⁷ Again, full faith and credit with respect to states' policies (not judgments) has merged with due process analysis, and as long as a state has significant contacts it may apply its own law.

The privileges and immunities clause²⁸ is irrelevant here because of the various interpretations one could imbue to the face of the language, the Supreme Court has settled on that which merely forbids any State to discriminate against citizens of other States in

²⁴ 28 U.S.C.A. sec. 1738.

²⁵ 28 U.S.C.A. sec. 1739.

²⁶ 28 U.S.C.A. sec. 1739A.

²⁷ *Carroll v. Lanza*, 349 U.S. 408 (1955) ("Arkansas can adopt Missouri's policy if she likes. Or * * * she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned").

²⁸ The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

favor of its own. It is this narrow interpretation which has become the settled one.²⁹

Section three of the bill, ironically for legislation which has been hailed as a defender of states rights, represents for the first time in our history a Congressional effort, if successful, to deny states full discretion over their own marriage laws. Section three of this bill says that no matter what an individual state says, and no matter by what procedure it does it, Congress will refuse to recognize same sex marriages. In debating against an amendment by Congresswoman Schroeder, described below, one of the Senior Republicans on the Committee said that her amendment would make certain marriages “second class marriages” by denying them federal recognition. This acknowledgment that denying a marriage federal recognition substantially diminishes its legal force applies to this bill. If Hawaii or any other state were to allow people of the same sex who were deeply and emotionally attached to each other to regularize that relationship in a marriage, this bill says that the federal government would refuse to recognize it. Note that this is the case whether such decision is made by a State Supreme Court, a referendum of the state’s population, a vote of the state’s legislature, or some combination thereof. Thus, the bill is exactly the opposite of a states rights measure: the only real force it will have will be to deny a state and the people of that state the right to make decisions on the question of same sex marriage.

Our final ground for opposing this bill is our vehement disagreement with the notion that same sex marriages are a threat to marriage. By far the weakest part of this bill logically is its title, but its title is not simply accidental, but rather reflects the calculated political judgment that went into introducing this bill at this time, months before a national election, and rushing it through with inadequate analysis of its impact. That this bill’s consequences are not adequately analyzed was conceded by members of the majority who spoke in its defense, when they argued that we must deny recognition to same sex marriages declared by states to be legal because we do not know what the implications of this will be for various federal programs. In a rational legislative atmosphere not shaped largely by electoral considerations, committees of the Congress would be holding hearings on the various aspects of this so that we would not have to use ignorance as an excuse for haste.

The notion that allowing two people who are in love to become legally responsible to and for each other threatens heterosexual marriage is without factual basis. Indeed, when pressed during Subcommittee and Committee debate, majority Members could give no specific content to this assertion. The attraction that a man and a woman feel for each other, which leads them to wish to commit emotionally and legally to each other for life, obviously could not be threatened in any way, shape or form by the love that two other people feel for each other, whether they be people of the same sex or opposite sexes. There are of course problems which men and women who seek to marry, or seek to maintain a marriage, confront in our society. No one anywhere has produced any evidence, or even argued logically, that the existence of same sex cou-

²⁹ *Whitfield v. Ohio*, 297 U.S. 431 (1936).

ples is one of those difficulties. And to prove that this is simply an effort to capitalize on the public dislike of the notion of same sex marriages, as noted below, when Congresswoman Schroeder attempted to offer amendments that deal more directly with threats to existing heterosexual marriages, the majority unanimously and vehemently objected.

JUDICIARY COMMITTEE CONSIDERATION

During Judiciary Committee consideration of the legislation, four amendments were offered, none of which was approved. One amendment, offered by Mr. Frank of Massachusetts, would have struck from the bill Section 3, which defines for Federal purposes marriage as a legal union between a man and woman.

Supporters of this amendment recognized that the Federal government has always relied on the states' definition of marriage for Federal purposes, and that it is unwarranted and an intrusion on states rights to change that practice now. The Federal government has no history in determining the legal status of relationships, and to begin to do so now is a derogation of states' traditional right to so determine. One objection to this amendment centered around the argument that several justices of the Hawaii Supreme Court could possibly determine policy for the nation (which assumes an interpretation of the Full Faith and Credit Clause with respect to marriages which has no current foundation), so the Federal government must put the brakes on "judicial activism."

Mr. Frank met this objection with a subsequent amendment, which provided that were a state to determine by citizen initiative, referendum or legislation that the definition of marriage for that state would be different than that which is enumerated in H.R. 3396, that states' definition would apply for its own residents for Federal purposes. This amendment obviated the non-argument about "judicial activism," and placed a clear question of states rights before the Judiciary Committee. That is, were a state to decide through its normal legislative process that same sex marriage was valid in that state, Federal application would follow accordingly for citizens of that state.

In addition to the fact that nowhere is same sex marriage ready to be enacted into law, if the citizens of Hawaii determine that they disagree with their Supreme Court, the mechanism to undo that possible Supreme Court ruling is clear: Hawaii law provides that a constitutional amendment may go to the voters if both Chambers of the Hawaii legislature pass it by 2/3 majority, or, if in two successive sessions both Chambers pass it by simple majority. In fact, the legislature of Hawaii has responded to the pending litigation there. In 1996 the Hawaii House of Representatives passed, 37-14, an amendment to Hawaii's constitution which would have defined marriage as a lawful union between a man and a woman. The Hawaii Senate then defeated the House passed amendment, 15-10.

The second Frank amendment was defeated in Committee, and the supporters of H.R. 3396 were confronted with the unadorned core of their motives: they are not at all interested in giving citizens the effect of their democratic choices or even in respecting what are historically states rights, rather, supporters of the legislation are using the Congressional process as a platform to express

their moral objection to people of the same sex committing to each other, loving each other, expressing love and mutual responsibility for each other, and agreeing to provide for each other.

Mrs. Schroeder offered two amendments which were intended to address real threats to marriage. One amendment would have modified the Federal definition of marriage within the legislation to include "monogamous", such that a marriage, otherwise a legal union in a state, would not be eligible for that status for Federal purposes if the relationship between the man and the woman was not monogamous. Ms. Jackson Lee offered a friendly amendment to the amendment, which modified "monogamous" with the words "non-adulterous". Mrs. Schroeder argued that same sex relationship were no threat to heterosexual marriages, but non-monogamous and adulterous relationships were.

Mrs. Schroeder offered a second amendment which would have also narrowed the Federal definition of marriage or exclude those legal unions between man and women in which either of the parties has previously been granted a divorce which was not determined on fault grounds and in which property and support issues were not resolved in accordance with fault findings. Mrs. Schroeder argued, again, that same sex marriage was no threat to any heterosexual marriage, but that if supporters of the legislation in fact wanted to "defend" marriage, that the ease with which people could exit marriage should be examined. Her argument was that too lax rules ("no-fault", in some circumstances) permitted a system in which significant numbers of people were abandoned by former spouses who then were left without financial contributions from the departing spouse, coupled with too lax intervention by state and federal governments for the collection of alimony and child support left many people without adequate support, and relying on the Government for their welfare. If one was truly interested in defending the institution of marriage, Mrs. Schroeder argued, then support for tightening the procedure for exiting that institution, or in this case, narrowing the Federal status of marriage for any person who benefited from the lax exit rules, was in order. Her amendment was defeated, but in the process supporters of the legislation admitted that their purported motivation to "defend" marriage was somewhat narrower than the title of the legislation implies.

CONCLUSION

The "Defense of Marriage Act" is insupportable. It is legally unnecessary and as a policy matter unwise. The effect of the legislation will be not to protect heterosexual marriage, an institution we strongly support, but rather to divide people needlessly and to diminish the power of states to determine their own laws with respect to marriage. For these reasons, we oppose the measure.

JOHN CONYERS, Jr.
BARNEY FRANK.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
ZOE LOFGREN.
MAXINE WATERS.
PATRICIA SCHROEDER.
XAVIER BECERRA.

