

Committee Reports 104th Congress (1995-1996) House Report 104-664

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

⁴¹ [Footnote 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 [Footnote 42: *Romer v. Evans*, 116 S. Ct. 1620, slip op. at 18 (1996) (Scalia, dissenting) (emphasis added).]

⁴³ [Footnote 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.').]

legal status.⁴⁴ Is it, as many advocates of same-sex '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 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

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

⁴⁵ [Footnote 45: See, 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).]

⁴⁶ [Footnote 46: Prepared Statement of Hadley Arkes, Ney Professor of Jurisprudence and America Institutions, Amherst College ('Arkes Prepared Statement') at 11, Subcommittee Hearing.]

⁴⁷ [Footnote 47: *Id.*]

⁴⁸ [Footnote 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.').]

⁴⁹ [Footnote 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).]

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 parenthood--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

⁵⁰ [Footnote 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.').]

⁵¹ [Footnote 51: See, 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.').]

⁵² [Footnote 52: Bennett, *The Washington Post*, May 21, 1996, at A19.]

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 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

[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*

⁵³ [Footnote 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.]

⁵⁴ [Footnote 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 [Footnote 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):]

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.

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 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

⁵⁶ [Footnote 56: Arkes 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 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.').]

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 fundamentally 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.

⁵⁷ [Footnote 57: Arkes 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.’).]

⁵⁸ [Footnote 58: Tom Prepared Statement at 3 (emphasis added).]

⁵⁹ [Footnote 59: Tom Prepared Statement at 4.]

⁶⁰ [Footnote 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.]