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"Respect for Marriage Act" Unconstitutional and Unenforceable: A Constitutional Analysis

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As the so-called Respect for Marriage Act, HR 8404, moves through the Senate with a likely destination of the desk of Joe Biden, many pundits are prattling about the pros and cons of a congressional act defining (re-defining) the concept of marriage. Additionally, many are offering opinions on the constitutionality of such an act.

Remarkably, many of those coming out in support of the act point to the Full Faith and Credit Clause of the Constitution as evidence that states are obliged to recognize unions — same-sex or otherwise — recognized in any other state.

Even the text of the act itself relies on the Full Faith and Credit Clause for its claim to constitutionality. Section 3 of HR 8404 reads in part:

> No person acting under color of State law may deny —
>
> (1) full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals; or
>
> (2) a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on the basis of the sex, race, ethnicity, or national origin of those individuals.

Wrong.

Let's look to the text of the Constitution.

Article IV, Section 1 of the Constitution reads:

> Full Faith and Credit shall be given in each State to the public Acts, 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.

In this matter of fundamental constitutional importance, it is crucial to understand precisely what the Full Faith and Credit Clause was — and was not — intended to do.

First, as a matter of indisputable historical record (although some argue that such exceptions would disrupt the smooth and unregulated movement of citizens), states have occasionally refused to acknowledge marriages legally entered into in other states. According to the Supreme Court's

interpretation of the Full Faith and Credit Clause, states that have valid public-policy exceptions to legal acts of other states do *not* have to recognize those acts.

There is an additional aspect of the Full Faith and Credit Clause that would protect states from being constitutionally forced to give legal effect to homosexual unions contracted in other states. The exact wording of the Full Faith and Credit Clause requires that states give "full faith and credit" to the "public acts, records, and judicial proceedings of every other state."

Marriages, strictly speaking, are not judicial acts; they are licensing acts, and as such they do not fall under the Full Faith and Credit umbrella, any more than a license to practice law in one state guarantees that same right in a neighboring state.

The Full Faith and Credit Clause, then, does not require one state to validate a same-sex union entered into in another, but actually protects it from having to do so.

Much is to be learned from James Madison's explanation of the clause in question. As he writes in *The Federalist*, No. 42:

> The power of prescribing by general laws the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.

Read that again.

Notice how Madison repeats the language from Article IV regarding which parts of the law or legal proceedings of other states shall be afforded full faith and credit in sister states.

(He also calls the courts of other states in the union "foreign jurisdiction[s]," but that's a subject for a separate article.)

There is a Latin legal maxim with which the Founders would have been familiar — *ejusdem generis* — which declares that where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned.

The way this applies to the Respect for Marriage Act is that if the those who constructed and those who ratified the Constitution had intended to include licenses on the list of items that would be entitled to Full Faith and Credit by sister states, then licenses would have been included in Article IV, Section 1. They aren't, so they aren't. Simple.

Finally, if the federal government decides to try to use the Full Faith and Credit Clause as a crowbar to force states to recognize same-sex unions, states retain the power to refuse to recognize any unconstitutional act of the federal government.

States are not left defenseless in the battle to fight the cancer of federal overreach. There is a remedy — a "rightful remedy" — that can immediately retrench the federal government's constant

overreaching. This antidote can stop the poison of all unconstitutional federal acts and executive orders at the state borders and prevent them from working on the people.

The remedy for federal tyranny is *nullification*, and applying it liberally will leave our states and our nation healthier and happier.

The ratifying conventions called throughout the thirteen states understood that the delegates sent to Philadelphia in the summer of 1787 created a general government of limited power, retaining for themselves the undiminished right to resume all political power they exercised successfully for over a century.

If nullification is to be successfully deployed and defended, states' lawmakers must remember that the Constitution is a creature of the states, and that the federal government was given very few and very limited powers over objects of national importance. Any act of Congress, the courts, or the president that exceeds that small scope is null, void, and of no legal effect. No exceptions.

James Madison said it best in *The Federalist*, No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

And one more quotation from *The Federalist*, this time from No. 46, also written by James Madison:

> Should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union.…

There you have it.

The Full Faith and Credit Clause most certainly does not require states to recognize same-sex unions recognized in sister states, and if the federal government tries to force states to give equal status to traditional marriage and same-sex unions, state legislatures can simply take Madison's advice and refuse to cooperate with the feds.

Senator Chuck Schumer (D-N.Y.) said he expects the Senate to vote on the Respect for Marriage Act this week, taking advantage of the Democratic Party's lame-duck control of Congress.