

THESIS

NATIONALIZING SAME-SEX MARRIAGE:
ASSESSING THE EFFECT OF BAEHR V. LEWIN ON THE FEDERAL DEFENSE
OF MARRIAGE ACT

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Melissa L. Perez

Department of Political Science

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Master's Committee:

Advisor: Courtenay Daum

Marcela Velasco
Maricela DeMirjyn

ABSTRACT

NATIONALIZING SAME-SEX MARRIAGE: ASSESSING THE EFFECT OF BAEHR V. LEWIN ON THE FEDERAL DEFENSE OF MARRIAGE ACT

Since the Defense of Marriage Act, the issue of same-sex marriage has dominated the political discourse of lesbian, gay, bisexual, and transgender politics. Scholars claim that the litigation in Hawaii that took place in the 1990s was responsible for the subsequent political activity surrounding same-sex marriage in the United States, including the Defense of Marriage Act, but none has empirically tested this claim. This paper seeks to understand whether or not the litigation in Hawaii prompted congressional action that resulted in the introduction of the federal Defense of Marriage Act and if so, why. By using Kingdon's multiple streams framework as a guiding tool, this research evaluated different political participants and factors to understand how the litigation in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) connects to the federal Defense of Marriage Act. This paper finds that the litigation in Hawaii is the catalyst that prompted the subsequent activity that resulted in the Defense of Marriage Act by energizing a well organized coalition opposed to same-sex marriage to expand the political debate and move the issue of same-sex marriage from the state courts in Hawaii to Congress.

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CHAPTER 1

INTRODUCTION

The United States political debate over same-sex marriage has dominated the discourse of lesbian, gay, bisexual, and transgender (LGBT) rights for the past decade (Goldberg-Hiller, 2002; Anderson, 2005; Pierceson, 2005; Rom, 2007; Mucciaroni, 2008; Rayside, 2008; Smith, 2008; Rayside, 2010). Political discussions of LGBT issues have moved away from funding for AIDS treatment and prevention, work place discrimination, and sodomy statutes and are instead heavily concentrated on the issue of relationship rights. All political avenues, including the courts, legislatures, executives, and direct democracy mechanisms, have been utilized in the debate to resolve the question of whether same-sex marriage should be legally recognized by individual states and the federal government. The first state Supreme Court decision in *Goodridge v. Department of Public Health* (440 Mass. 309; 2003) that made it unconstitutional to deny same-sex couples the right to marry in Massachusetts set off a chain reaction throughout the United States that would focus proponents and opponents' attention on same-sex marriage as a political and social reality.

Today, five states and Washington D.C. grant same-sex marriage licenses and seven states recognize same-sex unions or provide the equivalent benefits of marriage to

same-sex couples (National Conference of State Legislatures, 2011). While some progress has been made to recognize same-sex marriages and award these couples the government privileges of marriage, overwhelmingly the states have rejected the legality of same-sex marriage. Thirty states have constitutional amendments that define marriage as the legal recognition of a relationship that can solely exist between one man and one woman, and 37 states have laws that refuse to recognize same-sex marriages performed in other states (Alliance Defense Fund, 2008).

While the issue of same-sex marriage has been heavily debated within the institutions of government for the past decade, the emergence of the issue of same-sex marriage onto the systemic and formal agenda came in the mid-1990s when Hawaii's courts were litigating the legality of same-sex marriage. Scholarly sources claim that the litigation in Hawaii was the catalyst that prompted the subsequent political debate and activity over same-sex marriage including the first major piece of federal legislation on same-sex marriage, the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 & 2420 (1996) (Hull, 2001, 207; Koppelman, 2002, 150).

Many scholars have noted the connection between the litigation in Hawaii and the Defense of Marriage Act or have given historical accounts of the developments in Hawaii in relation to the LGBT community's on-going fight for relationship rights (Chambers, 2000; Feldblum, 2000; Hull, 2001; Goldberg-Hiller, 2002; Koppelman, 2002; Mezey, 2007). Others have debated the legality of the decisions in the Hawaii courts and the Defense of Marriage Act (Keane, 1995; Ruskay-Kid, 1997; Strasser, 1997; Koppelman, 2002; Harvard Law Review, 2004). No research has been done though to understand specifically whether or not the litigation in Hawaii was responsible for same-sex

marriage's place on Congress's agenda in the 1990s. Scholars have not traced the developments in Hawaii and in Congress to understand why Congress took up the issue of same-sex marriage in the summer of 1996, when same-sex marriage was not legally recognized in any state and the Hawaiian case of *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) had yet to go to trial.

Understanding the emergence of same-sex marriage onto the agenda of Congress is important for several reasons. First, the Defense of Marriage Act is a unique piece of legislation. The Defense of Marriage Act is the first piece of federal legislation that defines marriage, which has historically and constitutionally been an area of policy reserved to the states. It is also the first of its kind to specify certain “public acts, records, and judicial proceedings” under the Full Faith and Credit Clause of the U.S. Constitution that do not have to be recognized by another state (H.R. 3396, 1996).¹ While Congress is allowed to “regulate the manner in which such acts, records, and proceedings shall be proved, and the effect thereof,” it has done so only on rare occasions to specify the manner in which an act should be recognized or extended protections to the states’ acts, records, and proceedings. Congress has never legislated which acts, records, or proceedings can be disregarded (H.R. 3396, 1996; Kersch, 1997). Both the congressional definition of marriage and the clarification of the Full Faith and Credit Clause may be considered by some to be an overreach of congressional authority (Keane, 1995; Ruskay-Kid, 1997; Strasser, 1997; Koppelman, 2002; Harvard Law Review, 2004).

¹ Article IV, Section I of the U.S. constitution states “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” (archives.gov).

Secondly, the Defense of Marriage Act is important as it implicates the civil rights of a particular group. Gays, lesbians, bisexuals, and transgenders historically have been discriminated against, and it can be argued that the Defense of Marriage Act continues to perpetuate that discrimination (Strasser, 2000). DOMA has been accused of violating the equal protection clause of the 14th Amendment by singling out a particular group, homosexuals, for unequal treatment before the law (Harvard Law Review, 2004). Some argue that DOMA is also animus-based legislation against a particular class, which was made unconstitutional in the Supreme Court case *Romer v. Evans* (517 U.S. 620; 1996) (Harvard Law Review, 2004; *Gill v. Office of Personnel Management* (699 F. Supp. 2d 374; 2010)).² It also denies a group the benefits and privileges of marriage on the basis of sexual orientation.

Lastly, the politicization of same-sex marriage in the 1990s has had profound implications for the LGBT community. Since the Defense of Marriage Act, LGBT interest groups have had to deal with the numerous repercussions of nationalizing the issue of same-sex marriage. Significant resources and attention have been diverted to the issue of marriage and relationship recognition, which originally may have been reserved for more popular LGBT community needs such as employment discrimination, open recognition in the military, the repeal of sodomy statutes, and recognition of and punishment for hate crimes based on sexual orientation (Goldberg, 1996; Egan & Sherrill, 2005).

² The opinion for *Romer v. Evans* (517 U.S. 620; 1996) was announced on May 20, 1996, a week after the federal Defense of Marriage Act was introduced in the House. The Supreme Court ruled 6-3 that Amendment 2 of Colorado's Constitution, responsible for repealing and prohibiting the passage of future anti-discrimination ordinances based on sexual orientation, was unconstitutional. Justice Kennedy, who wrote the opinion, argued that Amendment 2 did not meet the requirements for the rational basis test, as it was purely animus towards a particular group of people.

Marriage itself has been a point of contention for the LGBT community since the Stonewall Era, as those in the community are torn between acceptance and recognition into a historically patriarchal institution and the outright rejection of marriage as a mechanism of oppression in heterosexual relationships (Rimmerman, 2000; Pierceson, 2010; Rayside, 2010). The litigation in Hawaii and the subsequent passage of the Defense of Marriage Act also awakened a countermovement by religious conservatives against the LGBT efforts to achieve relationship recognition prompting the passage of several state statutes and constitutional amendments banning same-sex marriage (Eskridge, 2002; Ball, 2006; D’Emilio, 2007; Rayside, 2010). The issue of same-sex marriage has fortified a powerful social movement, creating a new barrier that the LGBT community must overcome in order to achieve equality and recognition before the law.

This research seeks to understand whether or not the political activity in Hawaii over same-sex marriage prompted congressional action that resulted in the federal Defense of Marriage Act, and if so, why it prompted this response. To answer this question, this study will specifically examine how the issue of same-sex marriage is conceptualized and framed at the national level. This study will also evaluate the influence of relevant participants and political factors that resulted in the emergence of same-sex marriage as a congressional agenda item. To do this, I will use John Kingdon’s multiple streams framework as a starting point. This framework focuses on agenda setting in the policy process, specifically evaluating the actors and conditions responsible for an issue’s formal agenda status (Kingdon, 2003). An in-depth exploration of the events in Hawaii and Congress can help elucidate trends and develop patterns that can help explain if and how the events in Hawaii specifically connect to DOMA.

Understanding the connection between the two events can help inform the state of LGBT political discussions and the agenda setting literature more generally which has been relatively silent when it comes to issues that concern rights and morality.

This paper finds that the political activity in Hawaii in the 1990s was the catalyst that prompted Congress to take up the issue of same-sex marriage with the introduction of the federal Defense of Marriage Act. The legal developments in Hawaii brought same-sex marriage onto the systemic agenda, as it created awareness among political elites of the impending reality of same-sex marriage. The litigation in Hawaii however is not solely responsible for the emergence of the issue onto Congress's formal agenda. The successful tactics of an organized anti same-sex marriage coalition and a complicit Congress both had a heavy hand in putting same-sex marriage onto the congressional agenda. The litigation in Hawaii was framed by an organized conservative movement as an impending threat to the traditional heterosexual institution of marriage, quickly propelling the issue of same-sex marriage onto the congressional agenda. A newly elected Congress with a Republican majority was willing to federalize the issue of same-sex marriage, as same-sex marriage was not popular with the public and the passage of the Defense of Marriage Act would hence be beneficial to the Republican Party. Electoral forces surrounding the 1996 presidential election were also a major contributing factor to same-sex marriage's place in federal politics, as these forces helped foster issue salience among the public and government officials, and constrained the actions of elected officials concerned with reelection in the fall. The litigation in Hawaii is important to understanding the nationalization of same-sex marriage as it prompted the response from an organized

conservative coalition and Congress, and with the help of salient electoral and partisan forces became a federal political issue with the introduction of DOMA.

To understand how the paper arrives at this conclusion, this work will start by giving a historical account of the events in Hawaii and Congress during the debate and passage of the Defense of Marriage Act. This will help contextualize the case study and provide the reader with a historical understanding of the events. This paper will then examine the policy process literature on agenda setting specifically evaluating the applicability of relevant theoretical approaches. It will also include a discussion of the literature on the important participants and conditions that influence the agenda setting process, examining the specific factors relevant to this case study. Next, a detailed account of the research design will be given. Thereafter, the paper will give a thorough analysis of the events and will conclude with a discussion of the findings.

CHAPTER 2

THE HISTORY OF BAEHR V. LEWIN AND DOMA

The History of Same-Sex Marriage in the State of Hawaii (1990-1999)

While the litigation in Hawaii was the first instance in which a court ruled in favor of same-sex marriage and the first to receive unprecedented national attention from the media and Congress, it was not the first time same-sex couples had filed for marriage licenses and upon denial of those licenses, filed a complaint or suit against the state. The 1970s and 1980s are marked by several cases in which same-sex couples sought relief for the denial of marriage licenses (e.g., *Baker v. Nelson* (291 Minn. 310; 191 N.W.2d 185; 1971), *Jones v. Hallahan* (501 S.W.2d 588; 1973), *Singer v. Hara* (530 F.2d 247; 1976), *Adams v. Howerton* (673 F.2d 1036; 1982), *De Santo v. Barnsley* (328 Pa. Super. 181; 476 A.2d 952; 1984). The cases took place in several states over the course of two decades, each plaintiff litigating on different constitutional grounds.

Many of the state courts used traditional dictionary or biblical definitions of marriage to argue that marriage was never intended to include same-sex couples. According to these courts, denial of marriage licenses was not sex discrimination or a denial of due process rights because same-sex couples were not entitled to marriage which was a heterosexual institution and were not guaranteed a fundamental right to

marry, as one had never existed for same-sex couples (Trosino, 1993; Mezey, 2007). They also cited the many state sodomy laws that prohibited homosexual sex, demonstrating that the laws would not legally recognize a relationship based on illegal activities. Ultimately, all litigation prior to 1993 had resulted in the denial of marriage licenses for same-sex couples, and all appeals by the plaintiffs were unsuccessful due to a concurrence with the lower court or dismissal by an appeals court. *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) would be the first case to show the promise of success for same-sex couples, which quickly propelled the local litigation in Hawaii to the attention of politicians and citizens across the United States.

On December 17, 1990, three couples – Ninia Baehr and Genora Dancel, Tammy Rodrigues and Antoinette Pregil, and Pat Lagon and Joseph Melilio – applied for marriage licenses with Hawaii’s Department of Health. Hawaii’s marriage statute contains certain requisites that a couple must meet in order to enter into a valid marriage contract. These requirements among others include an age minimum, a barring of certain marriage contracts based on relation, and a confirmation that each person is not lawfully married to another at the time of application (Hawaii Revised Statutes §572-1). While there are gendered terms throughout the text implying that individuals seeking a license should be of the opposite sex, no statute specifies that the couple entering marriage must be composed of individuals of the opposite sex.

On April 12, 1991, the three couples were all denied marriage licenses, as the Department of Health had interpreted the statute’s gendered terms to indicate that same-sex couples did not have the right to marry. On May 1, 1991, the couples filed a complaint for injunctive and declaratory relief with Hawaii’s First Circuit Court, arguing

that their right to privacy had been violated and that the couples were not afforded equal protection and due process of the law, which are explicitly written into the Hawaii State Constitution. Lambda Legal Defense and Education Fund, the largest and oldest national organization litigating on behalf of the LGBT community, after previously rejecting involvement with the case, chose to join as co-counsel. After several motions from both sides, in early October 1991, the First Circuit Court dismissed the plaintiffs' complaints, defending Hawaii's Department of Health Secretary, John Lewin, and the State's motion for judgment. The court claimed that the plaintiffs did not have a legitimate claim on which they could be granted relief (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 3).

The plaintiffs immediately appealed the case to the Hawaii Supreme Court. The court agreed to review the First Circuit Court's decision. In May of 1993, a divided court chose to vacate and remand the case back to the Circuit Court for trial (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 16). Judge Levinson in his judgment in which Chief Judge Moon joined, affirmed the plaintiff's complaints that their case had been erroneously dismissed. The Supreme Court threw out the plaintiff's claims of a violation of their right to privacy and due process as they argued the U.S. Constitution, the Hawaii Constitution, and previous precedent did not indicate that the fundamental right to marry extended to same-sex couples (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 4).

They did however argue that discrimination on the basis of sex, inherent in Revised Statute §572-1 and as interpreted by the Department of Health in the denial of marriage applications to the plaintiffs, violated the Hawaiian constitution's equal protection clause which states that "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated

against in the exercise thereof because of race, religion, *sex*, or ancestry" (Haw. Const. art. I, § 5; *Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 7). Using state and national precedent, along with the application of the Hawaii Constitution which contains an Equal Rights Amendment, the court argued that HRS §572-1's sex-based discrimination would be tested under the strict scrutiny standard which under the Hawaii Constitution would henceforth be considered a suspect classification (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 15). The case was vacated and remanded to the circuit court for trial, where the defendant, Lewin, would have to demonstrate a compelling state interest that was narrowly tailored to that interest in order to continue to bar same-sex couples from obtaining marriage licenses.

Justice Burns concurred, arguing that the case should be vacated and remanded to a trial court but the plaintiffs would first have to demonstrate that sexual orientation was biologically determined rather than a lifestyle choice in order for Hawaii's equal protection clause to be applicable to this case (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 16-18). One justice dissented on the grounds that same-sex marriage was not a fundamental right, and could not be extended to same-sex couples (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993, 18-22). Judge Heen argued that marriage was innately heterosexual, as its purpose was intimately tied to the begetting of children (*Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 1993).

Responding to the Hawaii Supreme Court's decision in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993), the Hawaii legislature held numerous public hearings on the issue of same-sex marriage in the fall of 1993 (H.R. 3396, 1996). Public opinion polls in Hawaii demonstrated that the majority of Hawaii residents were opposed to the

recognition of same-sex marriages with numbers against hovering around 70% (Yuen, 1998; Brewer & Wilcox, 2005). In response to the public's concern, during the following legislative session, the legislature passed Act 217, which revised the Hawaii statute §572-1 to include a clause that explicitly reserved the contract of marriage to a man and a woman and set up a commission to research same-sex marriage and the distribution of marriage benefits to same-sex couples. In December of 1995, the committee recommended that the legislature halt all interference with *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) and recognize marriage rights by extending them to same-sex couples (Dunlap, 1995; Guillerman, 1997; Goldberg-Hiller, 2002). The committee's decision was largely dismissed by the legislature.

Baehr v. Lewin (74 Haw. 530; 852 P.2d 44; 1993), for procedural reasons, was changed to *Baehr v. Miike* (92 Haw. 634; 994 P.2d 566; 1999) to reflect the new director of the Department of Health, Lawrence Miike, and was scheduled for trial in September of 1996. By this point, several states and the national media had picked up on the legal battle in Hawaii (Haider-Markel, 2001). Many states, seeing Hawaii's contentious litigation as imminent in their state, preempted a similar legal battle by proposing legislation that would seek to bar the legalization of same-sex marriage and deny recognition of same-sex marriages from other states. By the end of 1996, 16 states had enacted legislation that would preempt them from having to recognize same-sex marriages performed in other states, 15 of which took place in 1996 alone (Barclay, 2010). Before the case was heard by the circuit court, a flurry of activity was also taking place in Congress that would quickly nationalize the issue of same-sex marriage to an unprecedented place on the national and state governments' agendas.

Moving from Hawaii to Congress: The Defense of Marriage Act

On May 7, 1996, Congressional Representative Bob Barr (R: GA-7) introduced H.R. 3396: The Defense of Marriage Act (DOMA) to the U.S. House of Representatives. The next day Senator Don Nickles (R: OK) introduced S.1740: The Defense of Marriage Act to the U.S. Senate. The identical bills proposed that

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. (H.R. 3396, 1996)

This would mean that states would not have to recognize same-sex marriages performed in other states under to the Full Faith and Credit Clause of the United States Constitution. The bill also amended the United States Code to clarify that marriage for federal purposes is defined as a “legal union between one man and one woman as husband and wife” and that the term spouse “refers only to a person of the opposite sex who is a husband or a wife” (H.R. 3396, 1996).

The bill was referred to the House Judiciary Committee and reported out on July 9, 1996. The report from the House Judiciary Committee cited the need for the Defense of Marriage Act as it was a direct response to the developing events in the state of Hawaii that were troubling for the traditional institution of marriage and the sovereignty of the states to choose to recognize same-sex marriages (H.R. Rep. No. 664, 1996, 1). The House Committee’s report discussed the “strong possibility” of the first legal recognition of same-sex marriage in Hawaii due to the application of the strict scrutiny standard that presumed the Hawaii marriage law to be unconstitutional. The report

claimed that this unprecedented ruling by an activist court would cause drastic implications for litigation in the area of marriage, as states would be forced to recognize same-sex marriages from other states by application of the Full Faith and Credit Clause (H.R. Rep. No. 664, 1996, 6-7). The committee also argued that the legal recognition of same-sex marriages in Hawaii would have drastic legal implications for the federal government, which has several statutory laws that use the word “marriage” and “spouse” to determine the allocation of rights and benefits of certain federal programs (H.R. Rep. No. 664, 1996, 11). This undue pressure on the states and the federal government along with the uncertainty of subsequent litigation was said to be the reason Congress drafted federal legislation that would protect the states from recognizing this type of marriage (H.R. Rep. No. 664, 1996).

Three days after it was reported out of committee, H.R. 3396 was passed and agreed to in the House by a landslide vote of 347-67 (U.S. House 104th Congress 2nd Session Roll Call Vote 316). Two months later, on September 10, 1996 the Senate passed the bill with a vote of 85-14 (U.S. Senate 104th Congress 2nd Session Roll Call 00280). Shortly thereafter, on Sept 21, 1996, President Clinton signed the bill making The Defense of Marriage Act law, preventing the federal government and other states from having to recognize same-sex marriages. While the Defense of Marriage Act is cited as a response to the litigation in Hawaii, it was largely a preemptive measure as the act was actually codified in law a few months before Hawaii’s Circuit Court ruled on the legality of same-sex marriage in the state of Hawaii (Hull, 2001; Koppelman, 2002; Mezey, 2007).

It was not until several months later in December 1996 that Judge Kevin Chang of the First Circuit Court issued the court's ruling that the Department of Health was unable to articulate a compelling state interest that would justify denying same-sex couples the right to marry. Ultimately, the court declared, "the sex based classification in HRS §572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of Article I, Section 5 of the Hawaii Constitution" (*Baehr v. Miike*, 1996 WL 694235, Hawaii Cir.Ct., 23). This was the first moment in United States history that same-sex couples were legally allowed to enter into a valid marriage contract and receive the same privileges as opposite sex couples.

While *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) was a major victory for the gay and lesbian community in Hawaii, the success of the case was short lived. While the decision was in the appeals process, the Hawaii legislature drafted and passed House Bill 117 proposing a constitutional amendment, pending voter approval, that would give the legislature the authority to enact a ban on same-sex marriage. In November of 1998, the voters approved the amendment by a margin of 69.2% to 28.6%, which in effect validated Act 217 of the legislature that revised the Hawaii statutes to define marriage as a relationship between a man and a woman (State of Hawaii: Office of Elections, 1998). The ambiguity between the First Circuit Court's ruling in *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) and the passage of the constitutional amendment made it necessary for the Hawaii Supreme Court to decide which application of the law carried weight. On December 9, 1999 the Supreme Court ruled that the passage of the marriage amendment made HR §572-1 a valid statute that was no longer in violation of the equal protection clause (*Baehr v. Miike*, 92 Haw. 634; 994 P.2d 566; 1999). Ultimately the

plaintiffs' complaint for relief was irrelevant in light of the passage of the marriage amendment.

Almost nine years to the day that Nina Baehr and the plaintiffs filed for marriage licenses, the three couples and the rest of the gay and lesbian community were still unable to receive a valid marriage license from the state of Hawaii. In many ways, they and the rest of the gay and lesbian community nationwide were in a worse predicament. The passage of the Defense of Marriage Act created yet another barrier to relationship recognition and prompted the subsequent passage of 26 state laws prohibiting same-sex marriages and 37 mini Defense of Marriage Acts (Alliance Defense Fund, 2008; Barclay, 2010). The ruling by the Hawaii Supreme Court in 1999 also highlighted the unnecessary consideration of same-sex marriage by Congress, as the litigation that allegedly prompted the discussion about same-sex marriage and the Defense of Marriage Act would ultimately leave same-sex couples in Hawaii without legal relationship recognition.

CHAPTER 3

LITERATURE REVIEW

The Defense of Marriage Act is unique because it is the first federal policy to deal specifically with the issue of same-sex marriage. Prior to its introduction in Congress, the states were solely responsible for the regulation of marriage, and no federal legislation specifically addressed the issue of marriage.³ Because same-sex marriage had not been a political issue at the national level prior to 1996, it is important to understand how it became an important policy problem that the federal government chose to address. Policy process literature will be most relevant to this study as it is used to understand how “problems are conceptualized and brought to government for solution” (Sabatier, 2007, 3). To understand this extremely complicated policy process, it is important to use a theoretical lens “to distinguish between the set of potentially important variables and casual relationships and those that can safely be ignored” (Sabatier & Jenkins, 1993, xi). Theories of the policy process allow us to examine this complex process by which issues come to be viewed as problems and the myriad ways in which those problems are solved through policy (Cobb & Elder, 1972, 14; Kingdon, 2003, 2). In particular this study will be best suited by applying theories of agenda setting, as this process can conceptualize how same-sex marriage became a political issue debated within the walls of Congress.

³ There are thousands of federal statutes that mention marriage for the purpose of doling out government benefits such as military policies and Social Security.

Several theoretical models have been constructed to analyze the process of agenda setting, and they will be useful to help understand the factors that culminate in the Defense of Marriage Act. These theories address the following questions: Why does the government address some issues at a particular time and not others? Why does a particular issue gain agenda prominence at a particular time? How is that issue defined? What are the mechanisms that lead to a government institution's interest in an issue?

The Agenda

To answer these questions we must first analyze what the agenda is and how issues gain prominence on that agenda based on different theoretical frameworks. Some refer to the agenda as “the group of political controversies that at a given point of time will be considered worthy of concern and attention from the polity” (Cobb & Elder, 1972, 85). Others conceptualize the agenda as a “list of subjects or problems to which government officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time” (Kingdon, 2003, 3). Cobb and Elder (1972) make two distinctions to help conceptualize the term “agenda”: the systemic agenda and the formal agenda. The systemic agenda refers to all issues that are on the radar of several different conglomerates of the political community, as these issues are perceived as relevant and within the scope of government jurisdiction (Cobb & Elder, 1972, 85). These issues are not necessarily ones that currently are being addressed by different government institutions but all have the potential to be moved from the systemic agenda to the more formal agenda. To be a part of the systemic agenda the issue must be well known or recognizable to the public, it must be considered a concern that merits

government attention, and is within the scope of legitimate government action to help rectify the problem or concern (Cobb & Elder, 1972, 86).

The formal agenda, which has also been characterized as the government agenda or the institutional agenda, consists of “a set of items explicitly up for the active and serious consideration of authoritative decision makers” (Cobb & Elder, 1972, 86). To be on the formal agenda the issue must be an active focus of government as illustrated by its presence on a court’s docket or a congressional timetable. A place on the formal agenda does not necessarily mean the creation or passage of policy will result. It only means that a venue or multiple venues of government have taken up an issue for serious consideration. The process of agenda setting examines how a particular issue becomes a part of the formal agenda. This is especially important given the fact that the government is limited to a finite group of people with limited resources and limited time to address all issues important to the public (Cobb & Elder, 1972; Hilgartner & Bosk, 1988; O’Toole, 1989). Not only are there limited resources available, but inherently a mobilization of bias also exists, created by historical tradition and those who control the agenda (Cobb & Elder, 1972, 10). This inherent bias works to legitimate particular issues as appropriate and important ones for the government to address, while excluding agenda access to others.

To examine how issues become a part of the formal agenda, several factors need to be taken into account. One must understand how an issue becomes defined as a problem deserving of a government solution. It also means examining the complex process by which many different factors interact with one another to result in the placement of an issue on the government agenda.

Several literatures have been written that develop propositions and frameworks that give scholars tools to analyze the agenda setting process. The following will give a theoretical account of some important and influential literature on the process of agenda setting.

Structural Frameworks

Several authors have created structural frameworks that scholars can use to assess how these different concepts interact to influence the agenda setting process. Each has its own theoretical value and conceptualizes the very messy process of policy making. A quick overview of some of the dominant frameworks will help show the variety of ways scholars link different influential factors and theorize about how issues are transformed into government policy. In this study, I evaluated each of these frameworks to assess which scholars' interpretation of the policy process would be most useful in understanding if and how the litigation in Hawaii relates to the Defense of Marriage Act. The following will give a brief account of these frameworks and justify the use of Kingdon's multiple streams framework in this study.

Baumgartner and Jones' Punctuated Equilibrium.

Baumgartner and Jones take issue with the fact that many authors see policymaking as a process of incrementalism in which policy is constructed in institutions and slowly developed among rather stable issue networks. Some authors do conceive of the more volatile changes in policy but those authors that do so, do not account for the more incremental nature of some policy areas. Baumgartner and Jones attempt to combine these two views to create a more long-term holistic theory of agenda setting and policymaking (True, Jones, & Baumgartner, 2007, 158; Baumgartner & Jones, 2009, 9-12). Baumgartner and Jones argue that policymaking is neither incremental nor episodic

but can instead be characterized by periods of stability or equilibrium in policy interrupted by periods of rapid and volatile instability that can drastically alter the previous policy landscape (Baumgartner & Jones, 2009, xvii). Policymaking subsystems, those that many authors claim are responsible for long periods of stability are themselves both evolutionary and dynamic bodies that can be dramatically altered by changes in the policy process. These subsystems – iron triangles, issue networks, policy subsystems, or issue niches – are only a snapshot of a much more dynamic policymaking process (True et al., 2007, 158; Baumgartner & Jones, 2009, 8). Understanding the policy process involves a thorough understanding of how periods of stability in strong policy subsystems quickly can be weakened or dismantled by critical junctures in the development of policy.

Two mechanisms are responsible for the changes in the process of policymaking, which oscillates between change and stability. Policy images are one of the significant mechanisms that have the ability to alter the process of policy making. These images and their manipulation are important for the determination and consolidation of subgovernments as well as the destruction of those subgovernments. Policy images, relying on both emotive appeals and factual information, are crafted to create different portrayals of an issue (Baumgartner & Jones, 2009, 26). These policy images frame an issue in a positive or negative manner so as to further the interests of a particular policy subgovernment. Policy images are integral to the stability of a policy subgovernment, as strategically crafted images in favor of the subgovernment will reinforce positive association among the public with those who currently control that policy arena. If a policy image is relatively uncontested in the public or among government officials, subgovernments will monopolize particular issues. On the other hand, the ability to

change the construction of policy images is a powerful tool by which policy entrepreneurs and other interested parties who are not a part of the subgovernment, can shape both the systemic and formal agenda (Baumgartner & Jones, 2009, 26-30). The change in image can shift the debate by creating a new lens that draws on new empirical information and new emotive sentiments. These changes can lead to the expansion of an issue that may disrupt or dismantle previous subgovernment, shifting the issue from the relative privacy of a particular subgovernment to more visible macro-political institutions leading to new and dramatic changes in policy (True et al., 2007, 163; Baumgartner & Jones, 2009, 79-80).

Change in institutional venue is another mechanism that affects policy process dynamics. Institutional venues that deal with policy formation are those that make authoritative decisions concerning policy. Certain policy images may be more receptive in one policy venue than another due to each institution's different membership composition, decisions rules, and informal norms (Baumgartner & Jones, 2009, 31). When an issue moves from one policy venue to another or becomes shared by multiple institutions, there can be drastic changes in the formation of policy. Hence secure policy subsystems are created by deliberate attempts to keep an issue within the jurisdiction of one policy arena. Changing policy subsystems may result from variations in institutional control. Baumgartner and Jones (2009) argue that the interaction between images and venues "can produce long periods of no change or dramatic reversals in outcomes in relatively short periods of time", illustrating their punctuated equilibrium theory (p. 37).

Sabatier and Jenkin's Advocacy Coalition Framework.

The advocacy coalition framework, another theoretical approach that examines public policy change, is built on three premises. The theory is based on the idea that understanding policy change involves a longitudinal understanding of a particular subset of policy. Studies that encompass a decade or more are essential to capture the dynamics at play in the shaping of policy. Another premise argues that policy subsystems, rather than individual policies or governmental entities, should be the primary unit of analysis. The third, in conjunction with the second, claims that policy subsystems need to have an intergovernmental dimension in order to capture all of the actors involved in the process of policymaking. Focusing primarily on a particular branch of government will only highlight one influence on policy (Sabatier, 1993, 16-18).

These policy subsystems that specialize in a particular area of policy are made up of elites from several different sectors of the population including government officials, policy specialists, agencies, state officials, journalists, and businesses who have an interest in influencing policy relevant to that policy subsystem (Sabatier, 1993, 18). These policy subsystems are further divided into advocacy coalitions that are made up of people within a policy subsystem that “share a particular belief system – that is, a set of values, casual assumptions and problem perceptions” who strategically coordinate to influence policy (Sabatier, 1993, 25). These actors pursue their interests in coordination with their shared belief systems focusing first on core beliefs and then on more secondary beliefs and values. These advocacy coalitions must strategize how to influence government while taking into account both relatively stable parameters of the system such as the legal structure of the system and fundamental cultural values, and more

dynamic system events such as governing coalitions and socioeconomic conditions (Sabatier, 1993, 20-23). The advocacy coalition framework is best at conceptualizing the policy learning element of advocacy coalitions and the intergovernmental dimension of policymaking.

The Limitations of Both

While each has its own theoretical value and has been influential in the field of public policy, both are not appropriate for this examination of agenda setting for the issue of same-sex marriage in this study. Both of these theoretical approaches call for long temporal studies to examine the dynamics of change over the course of several years, if not decades (Sabatier, 1993, 16; Baumgartner & Jones, 2009, 46-47). This study focuses specifically on the process of agenda setting of a new issue, same-sex marriage, by looking at the events in Hawaii, which are said to be responsible for the movement of the issue to the formal agenda of Congress. This time period lasts no more than five years, and much of the focus of this study centers on one particular year. Because this study looks at the micro-processes of events that lead to the Defense of Marriage Act, it would be difficult to apply either theory. A study that examines the issue of same-sex marriage over the past few decades would benefit from the use of either the advocacy coalition framework or punctuated equilibrium theory but that focus is beyond the scope of this study.

While both of these models have made significant contributions to the field of public policy and are important to understand the agenda setting process, Kingdon's multiple streams framework is most applicable for understanding the complex factors involved in explaining the emergence of same sex marriage as an issue worthy of

Congress's attention. Kingdon's multiple streams model does not focus on coalitions or subsystems but instead focuses on processes that can show more intricate dynamics of how different actors, conditions, and structures affect the agenda setting process. Because this study focuses on a short time frame and seeks to capture the more acute dynamics of agenda setting, this process would benefit most from an in-depth analysis of the many factors relevant to the agenda setting process. To that end, this study will use Kingdon's multiple streams model to examine if and how the events in Hawaii lead to the federal Defense of Marriage Act.

Kingdon's Multiple Streams Model

Kingdon's multiple streams model is constructed to explain why some issues attain agenda status and why some policy alternatives are selected rather than others. Kingdon's model is based on the premise that policy processes, particularly agenda setting, cannot be funneled down to a single casual explanation (Kingdon, 2003, 76). It is impossible to pinpoint the origin of an issue, as each topic has its own historical development that would lead scholars down a path of infinite regress. It is also impossible to pinpoint a particular casual relationship between an independent variable and a dependent variable as the policy process is littered with multiple causations (Kingdon, 2003, 76). These multiple causations exist due to the fragmented nature of U.S. policy making in which many structures are responsible for a policy's existence. Because no monopoly on the decision process, information, or the goals of policymaking exists, there are bound to be multiple factors that influence the agenda and policy change (Kingdon, 2003, 77). Understanding agenda setting in the context of this project involves

an in-depth exploration of how several different factors, working in several different process streams interact with one another to produce agenda status of a particular item.

The multiple streams framework is based on March, Cohen, and Olsen's garbage can model that conceptualizes organizations as organized anarchies that have problematic preferences, unclear technology and fluid participation making the decision making process of any one of these organizations dynamic (Cohen, March, & Olsen, 1972). These structures have different streams, problems, solutions, participants, and choice opportunities running through them, which influence the shape of the decisions that are made in these organizations (Cohen, March, & Olsen, 1972). Kingdon, borrowing from this approach conceptualizes the federal government as organized anarchy that contains several different streams (Kingdon, 2003, 84-85). Instead of focusing on subsystems or coalitions as the unit of analysis, this model focuses on the entire system to see how processes interact with one another to affect the agenda of a particular issue and influence policy change. The model conceptualizes three processes or streams that each independently operate according to their own rules and dynamics (Kingdon, 2003, 88).

The first stream, the problem stream, conceptualizes how problems are defined and framed. It also captures how these problems grab the attention of the public and government officials. These problems can be defined by focusing events, indicators, or powerful symbols that demonstrate on their own or with the strategic interpretation of a policy entrepreneur that a problem exists (Kingdon, 2003, 98). The second stream, the politics stream, is made up of the political events, conditions and actors that have an influence on the policy process. Kingdon argues that the national mood, organized interests, and government processes are integral in the policymaking process and have a

significant effect on what items will and will not gain formal agenda status (Kingdon, 2003, 145-146). The last stream, the policy stream, captures the process by which alternative policy proposals are created. This stream is based on Kingdon's assertion that policy proposals are not necessarily tied to particular problems but are instead formulated as desired policy by an interested party who utilizes a particular problem or political climate to introduce their policy alternative (Kingdon, 2003, 143-144). All of the streams while operating with their own dynamics are still endogenous to the policy process.

These three streams are assumed to be largely independent of one another and operate simultaneously until a policy window opens. This policy window, which opens for only a short period of time, is activated by changes in the problem or politics stream, which creates an opportunity for an issue to move towards active consideration on the agenda (Kingdon, 2003, 168). It is in this policy window that a policy entrepreneur can use his or her skills to couple the various streams together. Coupling means linking the streams by creating cognitive links between problems, solutions, and politics and is integral for successful policy change. Kingdon claims that while it is not necessary for all three streams to converge, it is more likely legislation will pass when all three streams are coupled (Kingdon, 2003, 178-179).

This study will focus primarily on the politics and problem stream. Because policy windows are opened through the politics stream and problem stream and because this model shows how these two streams influence agenda status, they will be most important to understand this case. While it is important to explore how the Defense of Marriage Act was constructed in the policy stream, it is beyond the scope of this analysis.

Hypothetically, many other versions of this bill could have been introduced, but it is not relevant to the discussion of how same-sex marriage became a formal agenda item.⁴

Kingdon discusses several participants both inside and outside of government that have a potential impact on the system and policy change. These include actors that are a part of government such as members of Congress, the president, the administration, bureaucrats, and congressional staff and those outside of government such as interest groups, election related participants, the media, and academics. Kingdon specifically distinguishes between participants and processes to capture the influence of these participants in each separate stream. This means that all of these participants can be influential within one or several of the streams and can be found in multiple areas of policy development (Kingdon, 2003, 21-65).

The list of participants and stream influences is extensive, but for issues of brevity, this literature review will only highlight the ones that may be relevant to the study of the agenda setting process in relation to this case study of same-sex marriage and the Defense of Marriage Act. These participants will include members of Congress, the President, the media, and interest groups. The factors related to the politics stream include public opinion, election influences, and partisanship. While Kingdon's study is thorough in his discussion of participants and processes, his case studies of transportation and health in the U.S. Congress lead him to dismiss some variables as unimportant or irrelevant. Kingdon finds that the media has very little influence on the agenda setting process (Kingdon, 2003, 57-61). This project will include an analysis of the influence of

⁴ I would speculate that any policy created would have been both detrimental to the gay and lesbian community and would not have extended its reach much farther, as this act itself is already considered an overreach of the federal government's power into the issue of marriage.

the media, as the issue of same sex marriage is presumably an issue that would obtain a greater degree of media salience compared to transportation and health issues due to the topic's controversial and symbolic nature. This analysis will also look at the influence of states, which Kingdon leaves out of his analysis. Because marriage is considered a state issue, it is important to see the degree to which state agendas influenced the national agenda with regards to same-sex marriage. Examining each of these participants and stream influences on the policy process is important to understand how each is responsible for the emergence of same-sex marriage onto the formal agenda.

The Problem Stream: Definition and Attention

In order for an issue to become part of the formal agenda, the issue must be defined as a problem that requires attention. Deborah Stone (1997) argues that policy is meant to obtain objectives in light of particular goals or aims. These goals are defined by overarching, more nebulous concepts by which government decision makers are able to construct legitimate policy. She argues that equity, efficiency, security, and liberty are contested "goals" that are continuously constructed and reconstructed in the polity (Stone, 1997, 37). Each person has a different interpretation of each concept and assigns a different value to each concept in relation to the others, making these goals subject to a continuous debate in the construction of public policy. Because these goals are disputed, problem definition is not always a simple unanimous understanding that change is necessary to get to a stated goal. Problems may be self evident and uncontested among the public, such as the occurrence of a natural disaster that leaves thousands homeless without fresh water or food. Others may be less obvious, and many will not have the public's unanimous recognition that a problem exists. Problem definition can be disputed

by differing segments of society who assign different levels of importance to different issues. An example would be the issue of homelessness. Some might argue that homelessness is a condition that is not a problem but a fact of life. Others may say that homelessness is a problem but that the government does not have a responsibility to address the issue. Still others may say that homelessness is a problem that the government must try to strategically alleviate. Each group has used value judgments about equity, efficiency, security, and liberty to decide how the issue will be defined and whether it is deserving of government attention.

Problems are “strategic representations of situations” constructed by actors who “deliberately and consciously fashion portrayals so as to promote their favored course of action” (Stone, 1997, 133). Problem definition is in itself a political process by which government officials assign importance to particular goals and values, and then frame issues to be problems deserving of government attention so as to legitimate their particular goals. It is critical to define a condition or issue as a problem in order to increase an issue’s chance of promotion to the formal agendas of government (Kingdon, 2003, 207).

Problems can be defined in several different manners, each of which has ramifications for the likelihood that people will view that issue as an important problem that necessitates government intervention. Because everyone does not agree on the importance of different goals, it is important for those who control the passage of public policy to convince the public that the problems they are attending to are important and legitimate. Government officials often focus on indicators within society to demonstrate the existence of a particular problem (Kingdon, 2003, 95). There are several ways that

this can be done. Problems can be represented by numerical indicators such as statistics and measurements that can demonstrate pervasive issues that exist such as the cost of an out of control government budget or declining literacy rates among adults (Stone, 1997, 163; Kingdon, 2003, 98).

Focusing events are another indicator that can help define a problem or focus attention on a particular issue. These events are often sudden and dramatic events that grab the attention of the public and government officials. Often these take the form of natural disasters (e.g., earthquakes, floods) or large man made accidents (e.g., oil spills or plane crashes). They can also be more subtle events that politicians strategically frame to demonstrate what they consider to be a pressing problem (Birkland, 1997). These focusing events can be considered powerful symbols that people argue represent a larger more pervasive problem that exists within society and must be addressed immediately (Kingdon, 2003, 102). Often focusing events need to be supplemented by other indicators in order to help promote them to formal agenda prominence. This can include additional numerical indicators, other symbols, a preexisting perception among the public, or feedback from previous policy related to the issue. Most of the time though, it is not just the construction and recognition of a problem that propels an issue to the formal agenda. Often it takes the combination of problem definition and recognition from several other political forces to create the conditions necessary for an issue to reach the formal agenda. Understanding the influence of each of these political forces is important to understand the many different influences that can play on the agenda setting process.

The Politics Stream

Public opinion.

Public opinion refers to the conglomeration of public sentiments relating to a particular issue in a given jurisdiction (Converse, 1987). Due to our idealistic conceptions of a republican democracy in which representatives are elected to reflect the opinions and wishes of their constituencies, it would be normatively pleasing to find that public opinion is an important factor influencing what issues appear on the formal agenda. Scholars argue that there exists a large degree of congruence between policy and public opinion but they are unsure how one influences the other (Verba & Nie, 1972; Page & Shapiro, 1983). A plethora of literature points to the influence of public opinion on changes in public policy (Downs, 1957; Page & Shapiro, 1983; Dahl, 1989). Studies have shown that changes in public opinion in many cases precipitate policy changes and that legislatures largely respond to those pervasive changes in the public (Stimson, MacKuen, & Erikson, 1995). Scholars claim that public opinion has a greater effect on policy where morality issues are concerned due to the fact that they are both “easy” issues (e.g. morally right vs. morally wrong) and politically salient among the public (Carmines & Stimson, 1980; Gormley, 1986; Haider-Markel & Meier, 1996; Haider-Markel, 1999; Mooney, 1999; Norrander & Wilcox, 1999). Issues about the LGBT community are often framed as morality issues and therefore may be more influenced by public opinion.

There is mixed evidence though about the degree to which public opinion truly affects the policy process. Several scholars argue that politicians and policies are actually affecting public opinion, rather than the other way around (Key, 1961; Mill, 1962; Manza, Cook, & Page, 2002). Because the public is largely uneducated about issues or

has little time to concern itself with them, especially those that are complex, politicians may give cues to ordinary citizens that can help them construct their own opinions on issues. In the agenda setting process, while it is important that some segment of the public believes a problem exists, which can be alleviated by governmental action, often the public may be retroactively legitimating the actions of government.

The studies above largely reflect the relationship between public opinion and the policy as enacted into law. Agenda setting is a part of the process of any successfully enacted policy and hence there may be some connection between public opinion and the agenda. Soule and King (2006) argue that public opinion has very little impact on the beginning stages of the policy process, including agenda setting for two reasons. First, because public opinion may be the result of policy change itself, the processes leading up to policy enactment would not be affected by the public. Secondly, the earlier stages of public policy are less consequential for policy makers in terms of reputation, so representatives will not be overly concerned with public opinion until the final stages of the policy process (Soule & King, 2006). When representatives vote, the public is able to hold representatives accountable for that vote. As rational actors seeking re-election, public opinion will be a major determining factor in the way they choose to vote, not in what issues they choose to address.

Electoral forces.

Campaigns and elections undoubtedly play a large role in both the changes in institutional makeup of government and the actions of individuals in government, which in turn may have a significant impact on the agenda. During an election year, those up for re-election will be focused on their reputations and the likelihood of being elected

back into office (Mayhew, 1974). There may be more pressure to vote along party lines or vote with the pervasive consensus among the public in order to guarantee a favorable spotlight around election time. This may mean the strategic introduction of an issue on to the agenda by both incumbents and new candidates in order to amass support among constituents. Candidates can introduce topics to the election agenda that are of their party's strong suit, helping to amass further support (Abbe, Goodliffe, Herrnson, & Patterson, 2003). Incumbents can also make strategic moves to pressure an opposing party by putting legislation on the agenda that may have detrimental effects for the other party (Sulkin, 2005). Election years also have higher levels of media coverage which will have an effect on the election agenda, potentially influencing the make up of the formal agenda once new politicians have been elected to office (Shaw, 1999). While these dynamics may be complicated, understanding what was happening during that election year can show why some issues attained agenda status while others did not.

After elections take place, the turnover of government representatives can have an immediate impact on the agenda. This turnover will open up opportunities for new actors to contribute to the agenda and may give control of the agenda to a new party. A drastic change in partisanship within Congress or the White House may have profound effects on the make-up of the agenda, as the different parties will use the agenda to their own advantage. This may mean that new issue items arrive on the formal agenda, while others that may have been considered only months prior will be quickly swept off the list of agenda items. An example of the effects of legislative turnover occurred after the election of 1964, which saw a dramatic change in the make-up of Congress, giving Lyndon B. Johnson the opportunity to bring new issue items to the agenda and enact his Great

Society programs which were unprecedented in both issue and scope (Kingdon, 2003, 101).

Participants

Several different actors can have an instrumental role in the process of agenda setting. People are ultimately responsible for the policy making process and hence are influential at all stages of policymaking by constructing and defining issues, creating policy alternatives, and attempting to propel or block government actions. The public policy literature highlights a plethora of actors who can influence the process.

Policy entrepreneurs.

Many scholars of public policy discuss the importance of certain people who advocate for a particular policy or institutional attention to a particular issue. These actors are considered policy entrepreneurs who invest their resources including time, energy, and money to advocate their goals (Kingdon, 2003, 129). Policy entrepreneurs can be a single person or group of people that exist within or outside of government to promote a particular issue. Because these people need certain skills to practically advance their goals, policy entrepreneurs are often people who have some access to the political arena and certain negotiating skills and wherewithal of political timing to promote an issue or policy (Zahariadis, 2007, 74). Those most skilled policy entrepreneurs are able to dominate the process of issue definition and policy proposal by understanding which tactics will be most successful (Baumgartner & Jones, 2009, 29). This limits most policy entrepreneurs to government officials, policy specialists, interest group members, and other similar political actors. Policy entrepreneurs often have particular goals in mind when they try to advance policy. Some may seek change in government policy in pursuit

of altruistic goals; others use their skills to advance their own interests including promotions and re-election.

A particular type of policy entrepreneur that may be relevant to the discussion of agenda setting in the case of same-sex marriage and the Defense of Marriage Act is a moral entrepreneur. These entrepreneurs promote a moral agenda that attempts to define what is socially acceptable and what is deviant (Becker, 1963). Social construction policy scholars argue that moral entrepreneurs use their access and influence, as they normally reside in dominant institutions such as churches and government, to construct or reinforce public perceptions of a group that they proscribe as deviant and then use these frames to promote a particular policy agenda (Ingram, Schneider, & deLeon, 2007, 108).

Intergovernmental actors.

Public policy literature, especially literature that focuses on federal legislation, must explore the actors within government that are undeniably influential in the formation of policy. Intergovernmental actors such as the courts, Congress, the President, and the bureaucracy are instrumental in the creation of both the systemic and formal agendas and are hence some of the most important aspects when examining the agenda setting process. Policymakers have control over the construction of the formal agenda and are a force to be reckoned with when it comes to agenda setting. Policy makers have an interest in keeping certain things on the agenda and leaving certain things off, making the construction of the formal agenda a contested political process (Cobb & Elder, 1972). Groups outside of government must be able to obtain access to these actors in order to stand a chance of getting their issues placed on the formal agenda for consideration. The emergence of same-sex marriage onto the formal agenda of Congress in 1996 requires

looking at two intergovernmental actors that are key to understanding the issue's agenda access: Congress and the President.

Congressional representatives.

Understanding the process of agenda setting would be incomplete without examining the role that the legislative branch plays in constructing the agenda. Many argue that Congress is integral in the agenda setting process (Kingdon, 2003; Baumgartner & Jones, 2009). Members of Congress are responsible for filtering through the issues that different actors argue are important government issues and ultimately decide which issues will be present on the formal agenda. This does not mean that they have complete and uninhibited control of the agenda as pressure from several different powerful actors can greatly influence what issues will be agenda issues. Members of Congress do however have the legal authority to craft public policy and have several reasons to actively participate in the agenda setting process. Because representatives are elected, they have some responsibility to represent their constituencies by listening to their demands or following up on campaign promises. By introducing a new policy or crusading for a favorable district policy, a representative can help assure a good reputation with his or her constituency that can help in future elections (Arnold, 1990). Representatives also may pursue an active role in agenda setting to show others in the political community that they are a force to be reckoned with (Kingdon, 2003, 42). Introducing an important piece of legislation that becomes law can help enhance a representative's reputation. A representative may enter the agenda setting process in order to promote a policy that the representative sees as important and worthwhile

(Fenno, 1973). With access to the agenda, representatives may see their time in office as an opportunity to create change in line with their policy values.

Congressional committees in particular may have a substantial effect on the formal agenda of Congress as these committees are responsible for the legislation that will be reported out of committee and on to the floor of the House or Senate for deliberation. Committees have the formal authority to construct the issues of a particular area of specialization that will be debated by the larger body of Congress and hence have a great degree of control in etching out the parameters of issue importance (Sinclair, 1986).

It is difficult though to assess to what degree Congress impacts the agenda setting process because there are so many actors, both known and hidden that affect what gets on the agenda. Congress is made up of hundreds of actors each with his or her own unique interests and agenda, making it difficult to follow how issues arrive on the formal agenda (Kingdon, 2003, 34). Interest groups, the president, think tanks, and different actors within government institutions all attempt to exert their own influence on the system as well. It is critical to understand how these other actors interact with members of Congress and the institution itself to capture the relationships or coalitions that exist to propel issues onto the agenda.

The president.

The president, due to his position within the branches of government, is an important political force, if not the most important, in the process of agenda setting (Huntington, 1965; Moe & Teel, 1970; Kingdon, 2003; Baumgartner & Jones, 2009). The president has the ability to single handedly set the agenda by pushing his policy agenda onto the other branches of government, particularly Congress and the bureaucracy. The

president exerts substantial control of the agenda for several reasons. The president has decisive and unitary control over the executive branch and can more easily fashion a policy agenda, relative to the other branches of government (Neustadt, 1991; Kingdon, 2003, 24-25). Another institutional resource for the president is the advantage of prestige of office, which gives him several advantages over Congress in the agenda setting process. The president is able to command greater media coverage and public attention, giving him the unique ability to communicate his ideas and positions to the public (Kernell, 2007). The State of the Union address is an example of one of the many tools the president has to communicate his agenda ideas to the public. If the president enjoys a great degree of popularity among the public or other institutional leaders, he has the capacity to exert influence on the process of agenda setting. This is especially true in times of unified government when the President is able to make meaningful connections with many of the leaders in Congress who share the same party affiliation (Kingdon, 2003, 25).

While the president has a great deal of resources to influence the process of issue definition and agenda setting, the president does not have as much control over the outcomes of the agenda setting process. While he may be able to define what issues will be a part of the formal agenda, he loses a significant degree of power in the formation of policy and the outcomes that will arrive at his desk to be signed into law. This means that the President has the greatest degree of control at the beginning stages of agenda setting and slowly loses that advantage once an issue has reached the formal agenda (Kingdon, 2003, 23).

Organized interests.

Organized interests have been integral throughout American history in the process of interest articulation. Different conglomerates of citizens for different purposes have organized themselves in order to coordinate efforts to influence the policy making process by entering the political debate over both issues and policy. While these groups have come in several different forms, most have been formed for the same particular reason: influence on the processes and outcomes of government. Interest groups and social movements, two of the most prominent organized political forces, will be examined in this study. Interest groups “refer to any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in society for the establishment, maintenance, or enhancement of forms of behavior that are implied by those shared attitudes” (Truman, 1951, 204). Truman included all interest groups, both potential and institutionalized. He argued that interest groups would become political once that group attempts to influence government to advocate those desired claims (Truman, 1951; Walker, 1991). Interest groups simultaneously have been hailed for their ability to effectively represent citizens in government, while at the same time have been despised for their ability to control politics in favor of an elite model of pluralism. Whether normatively appealing or displeasing, interest groups have had an influence on the agenda setting process and the passage of policy.

Interest groups are able to influence the policy making process, particularly the agenda setting process with a variety of lobbying tactics. Interest groups can focus on several different institutions but the majority of efforts to affect the agenda setting process are done through legislative lobbying tactics. An interest group’s most powerful

weapon is its ability to provide expertise on issues to help members of Congress understand and make decisions on complex topics (Leyden, 1992; Wright, 1996). This can be done by testifying in congressional committees or by contacting individuals within Congress to try to sway their votes. These groups can also use grassroots strategies during the agenda setting process to foster awareness among the public and mobilize constituents to contact representatives (Wright, 1996). Public relations campaigns and media advertising can help increase awareness about an issue among the public. Interest groups also attempt to engage the public for later electoral mobilization.

In contrast, a social movement can be defined as

a collectivity acting with some continuity to promote or resist a change in society or organization of which it is part. As a collectivity, a movement is a group with indefinite and shifting membership and with leadership whose position is determined more by informal response of adherents than by formal procedures of legitimizing authority. (Turner & Killian, 1987, 223)

A social movement is often a collectivity of multiple actors, both organizations and individuals, that informally works to promote or resist social change in congruence with that movement's collective beliefs and values. This more amorphous and diffuse form of political organization will utilize both the formal access points of government along with other non-traditional tactics outside of established government channels to influence social change. Social movements are able to influence government via two important mechanisms (Andrews, 2001; Soule, 2004). Social movements, like other organized interests, are able to help shape the agenda setting process by drawing attention to issues with new frames and information that can help attract attention to an issue previously discarded or neglected from the agenda (King, Bentele, & Soule, 2007, 142). They also

can threaten political elites by using disruptive tactics to put pressure on policymakers to act in their favor (Piven & Cloward, 1977; King, Bentele, & Soule, 2007).

The proliferation of organized groups, both interest groups and social movements, in the 1960s brought about dramatic changes in the arena of policy making (Sinclair, 1989). Policymaking debates would be moved from stable subgovernments of tightly knit groups of organized interests and government officials, in many cases classified as iron triangles, to more diffuse conglomerates of issue networks. These issue networks allow for more participation among a wide variety of groups and actors that specialize in a particular area (Berry, 1993, 34). This participation has also made policymaking a much more contentious and conflictual process as more people with more opinions continue to flood the policymaking process (Hecl, 1979; Wright, 1996). It also has an affect on the agenda. The proliferation of interest groups and the expanding size of government have made the systemic agenda larger and the space for formal agenda items appears smaller (Coughlin, Mueller, & Murrell, 1990). Interest groups seeking to get their issues on the formal agenda must use valuable resources to compete to secure formal agenda recognition.

The states.

When examining the agenda setting process in the federal government, it is important to understand the role that the states may play in the development of the agenda. The states are not complacent actors in a hierarchical system taking orders from above. Each state has its own agency and its own dynamics within the U.S. federal system, giving states the opportunity to develop new policy. Some scholars argue that issues and policy initiatives can spread from one state to another by a process of diffusion

(Walker, 1969; Rogers, 1983; Berry & Berry, 1990; Berry & Baybeck, 2005). Scholars define diffusion as “the process by which an innovation is communicated through certain channels over time among the members of a social system” (Rogers, 1983, 5). Diffusion models of the states conceptualize the states as a social system that communicates new policy issues and policy ideas based on several different methods of diffusion. This diffusion can happen based on geographical closeness, similar political, social, and economic state characteristics, or hierarchically (Berry & Berry, 1990; Mintrom, 1997; Grossback, Nicholson-Crotty, & Peterson, 2004). A successful program in one state or a sudden concern for an issue in one state can prompt other states to take action as well.

The literature on diffusion also examines the role that the national government plays as a superior “state” that is able to influence the issues and policies of other states (Welch & Thompson, 1980; Berry & Berry, 2007; McCann, Shipan, & Volden, 2010). Less literature exists on how the states can influence the agenda of the national government (Boeckelman, 1992; Mossberger, 1999; Karch, 2007; Weissert & Scheller, 2008). If several states begin to put specific issues on the agenda, it is likely that the national government will take notice, although studies find that the influence of state policy on the federal government is limited (Boeckelman, 1992; Thompson & Burke, 2007)

The media.

The media, as a communication channel between the distant workings of government and the people, must be considered a part of the agenda setting process. The media is not an unbiased, neutral entity but is instead a business that strategically maneuvers to attract viewers with interesting and attractive stories. Because the media is

manipulative in its dissemination of stories, it is important to determine if this manipulation influences the formal agendas of government. Several studies have explored the agenda setting function of the mass media focusing primarily on the media's effects on the public's issue and policy priorities (McCombs & Shaw, 1972; McLeod, Becker, & Byrnes, 1974; Cook, Tyler, Goetz, Gordon, Protes, Leff, & Molotch, 1983; McCombs, 2006). Because the public's attention to issues stems from its exposure to them, the media should influence how the public views issues (Page & Shapiro, 1992). Studies have found inconclusively that the media does exhibit an agenda setting capacity (Cook et al., 1983; McCombs & Shaw, 1972; MacKuen & Coombs, 1981). This media agenda setting theory argues that the media's strategic reporting of issues will influence the way the public views the importance of particular issues (Cook et al., 1983). The media can do this by highlighting an issue with increased media exposure, such as lead story status (Behr & Iyengar, 1985).

While this is important research in itself, there is an implied assumption that the mass media's influence on the public will in turn lead to changes in the formal agendas of government. As was mentioned earlier, it is unclear how public opinion influences the agenda, and so it is important to also understand how the media shapes the agenda through the influence of other actors, primarily government actors who are responsible for the construction of the formal agenda. Some studies find that the media does affect government decision makers, which can be done by drawing their attention to a shift in the public's issue priorities influencing a government official's perception of an issue's salience (Rogers & Dearing, 1994; Cook et al., 1983). Others argue the media has a minimal, if any effect on policy makers (Kingdon, 2003). Because the media is often

reporting on issues that the government is addressing, it is difficult for the media to focus policy makers' attention on an issue before they have already noticed it (Kingdon, 2003). The media's emphasis on dramatic issues that will increase viewership also mediates any effect that the media might have because issues on the agenda will quickly wane in media attractiveness causing attention to be intense but short-lived (Downs, 1972).

The previous literature on agenda setting and the factors that influence the process will be instrumental in the construction of the research design and analysis of the data for this study. Using Kingdon's Multiple Streams framework, the following chapters will evaluate the effect of each of these variables on the agenda setting process for the issue of same-sex marriage, as the issue transcends the politics of Hawaii and moves into the halls of Congress.

CHAPTER 4

RESEARCH DESIGN

This paper seeks to answer the following question: Does the litigation in Hawaii over same-sex marriage prompt congressional action that results in the Defense of Marriage Act? If so, why does the litigation catalyze congressional action? The research will also address three additional research questions that will help answer if and/or why the litigation in Hawaii results in DOMA. These questions are as follows. How is the problem of same-sex marriage conceptualized and framed? Who is responsible for putting same-sex marriage on the congressional agenda and to what extent is each force in the politics stream responsible for DOMA's agenda status? These questions were guided by Kingdon's multiple streams framework to help organize the data theoretically and conceptually. The question of problem conceptualization and framing encompasses the problem stream, while the questions pertaining to the influence of political forces and participants involved in the process of agenda setting relate to the political stream. Kingdon's framework will be used as a theoretical tool to help answer these research questions.

To answer the question of whether or not the activity in Hawaii over same-sex marriage prompts congressional action that results in the Defense of Marriage Act, I employ a historical case study analysis to examine the events, forces, and participants

responsible for the elevation of same-sex marriage to the national agenda. Historical analysis can be used to obtain knowledge about previously unexamined historical events and can help establish patterns and possible cause and effect relationships (Marshall & Rossman, 2011, 184). It is used in this study to develop an in-depth look at processes and phenomena that may not have been previously articulated or described accurately (Marshall & Rossman, 2011, 91). This method of analysis is grounded in a larger qualitative methodology that is best at capturing the complex dynamics involved in the process of agenda setting to highlight the important variables that can explain the cause of same-sex marriage's movement to Congress's formal agenda (McNabb, 2004, 344). A mixture of qualitative and quantitative content analysis will be used in this study to focus on quantifying important patterns and exploring "the presence, meanings, and relationships of... words and concepts, and then make inferences about the messages" (Busch et al., 2005).

This research expects to find that the events in Hawaii are integral to the definition of the problem of same-sex marriage and its place on the formal agenda of Congress. Because the media and political elites at the time of the introduction of the Defense of Marriage Act, along with several scholars, cite *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) as the impetus for congressional action, I would expect to find that the data largely conforms to this hypothesis.

The dependent variable for this study will be the introduction of the Defense of Marriage Act onto the formal agenda of Congress, which represents same-sex marriage's introduction to federal politics. Several variables will be examined to understand their influence on same-sex marriage's national agenda status. All, with the exception of the

state variable, have been derived from Kingdon's theoretical model. Variables are included in this study that Kingdon found to exert little to no influence on the agenda setting process. The following will explain how each of the research questions will be answered. This will include the operationalization of each variable, the sources used to evaluate their influence, and the justification for examining each variable in the context of this study.

How is the problem of same-sex marriage conceptualized and framed?

The first question informs the larger research question addressed in this study by specifically examining how the litigation in Hawaii connects to the definition of the problem of same-sex marriage. To understand how an issue is defined or framed, two criteria must be assessed: selection and salience (Entman, 1993). This involves examining the selection of "some aspects of a perceived reality" with an attempt to make them "more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described" (Entman, 1993, 52). Evaluating the selection and salience of frames can help us understand how the problem of same-sex marriage is rhetorically constructed and how *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) is connected to this definition. These frames can help capture the influence that the litigation in Hawaii had on the elevation of same-sex marriage to Congress's agenda. The evaluation also can show the resilience of particular frames that represent the dominant conceptualization of the issue, illustrating the "winners" in the contestation of frames.

To capture how the issue of same-sex marriage is framed, a qualitative and quantitative content analysis was conducted on two congressional documents and 160

newspaper articles. The first, the congressional testimony from the House Subcommittee of the Constitution, documents the debate on H.R. 3396: The Defense of Marriage Act. This document contains relevant testimony from representatives, interest groups, and other interested parties about the appropriateness, legality, and necessity of the bill. The other document is the House Judiciary Committee's Report with Dissenting Views that accompanied the bill when it was voted out of committee and onto the House floor. This document summarizes some of the testimony but also gives rationales for the bill and contains the opposition's arguments against the bill. Both documents capture extensive dialogue by several political elites in the battle over same-sex marriage's issue definition, making both valuable to understand how same-sex marriage is defined and framed. Committee documents are also most fruitful for this study because committees are the place where the most debate takes place within Congress about an issue, making them best able to capture discussions about problem definition.

Newspaper articles were obtained from Lexis Nexis. A key word search on Lexis Nexis for relevant newspaper articles between January 1990 and December 1996 was done for three separate terms: "same-sex marriage," "gay marriage," and "The Defense of Marriage Act." The search sought to reveal all newspaper articles that referenced "same-sex marriage" or "gay marriage" prior to December 31, 1996, when the Defense of Marriage Act had been signed into law and the decision in *Baehr v. Miike* (1996 WL 694235, Hawaii Cir.Ct.) had been handed down by the First Circuit Court. This was done to capture the saliency of the issue of same-sex marriage during the debate over the federal Defense of Marriage Act but was also done to assess earlier frames about same-sex marriage. The key word phrases were chosen to capture the problem definition of

same-sex marriage and gay marriage, two common terms used to articulate marriage between people of the same sex. The phrase “The Defense of Marriage Act” was used, as its introduction to Congress’s agenda is the dependent variable of this study. Gathering articles on the Defense of Marriage Act also could help draw a comparison between the congressional documents and the media’s portrayal of those discussions.

The search results for the phrase “same sex marriage” revealed 53 news articles within the specified time period. “Gay marriage” reported 16 relevant news articles and “The Defense of Marriage Act” reported 251 articles. In order to make these news articles manageable, every other news article from each phrase was used, cutting the number of news articles in half to 160. This was done to make the data set more manageable while still keeping the data temporally relevant. News articles were used from a variety of domestic newspapers (61 in total) across the country to capture the reporting of same-sex marriage from all geographic areas of the United States. This was done to ensure that no single area of the United States dominated the discussion about the events. It was also done in order to amass enough articles to ensure reliability of the data. Newspapers were used in the analysis to capture the contestation of arguments about same-sex marriage. Evaluating newspapers can help capture the salience of frames used by elites and can highlight temporal variation of those frames.

These sources were coded openly to establish the varied conceptualizations of the problem of same-sex marriage. This open coding method allowed me to thoroughly capture all of the relevant frames so that categories were exhaustive and mutually exclusive (Guba, 1978; Patton, 2001, 453; Marshall & Rossman, 2011, 214). Seventeen

frames were derived from this open coding and applied in a second reading to the documents (Table 4.1).

Table 4.1

Frames	
Children	Justice
Diversity	Love
Economy	Morality
Election	Nature
Equality	Religion
Family	Rights
Freedom	State's Rights
Intolerance	Tradition
Judges	

Data was recorded for the number of times that same-sex marriage was defined using one of these frames. If a sentence had one frame, it was coded with that frame. If a sentence made reference to multiple frames, each of those frames was accounted for. The total count for each frame includes arguments made by both proponents and opponents of same-sex marriage. This means that when opponents of same-sex marriage claim that same-sex marriage will be destabilizing and detrimental to the family unit and proponents of same-sex marriage claim that same-sex marriage will not be detrimental but instead will help strengthen the family, both will be coded as a family frame. The sources were coded in this manner because while both argue opposite points, one is refuting the other's use of the same frame. A frame is determined a dominant frame of either the proponents or opponents of same-sex marriage if it is used primarily by one coalition. To clarify, the proponents will be considered the coalition of interest groups and elite actors that favor same-sex marriage. The opponents will be the coalition of interest groups and elite actors that oppose same-sex marriage. These frames were analyzed quantitatively to pick up the resonance of dominant frames. The frames were also analyzed qualitatively to examine

trends and patterns in the study. One inter-coder reliability test was done on 5 newspaper articles “to check for consistency of meaning and application” in the codes (Marshall & Rossman, 2011, 221). The coder was able to recode 91% of the data accurately.

An examination of the influence of Hawaii’s litigation was also done in this part of the study. The study documents the number of times Hawaii is mentioned in connection with the Defense of Marriage Act. This was done by coding for all of the times that Hawaii was mentioned in newspaper articles that contain the phrase “The Defense of Marriage Act.” The codes “state’s rights” and “judicial activism” were used to depict the specific procedural issues that define the problem of same-sex marriage in relation to the litigation in Hawaii. These indicators will measure the degree to which the litigation in Hawaii is perceived as a focusing event that draws national attention to the issue of same-sex marriage and helps propel it to the congressional agenda. The only way to truly measure the influence that the litigation in Hawaii has on the congressional agenda will involve a qualitative analysis that interprets all of the other relevant variables to assess the degree to which the political activity in Hawaii is actually a major factor in the nationalization of same-sex marriage.

To what extent is each force in the politics stream responsible for DOMA’s agenda status?

The second question that helps answer the overarching research question addresses the influences of forces in the political stream that contribute to the creation of DOMA. While actors are essential to the movement of an issue onto the agenda, these forces constrain the actions of these political elites, structuring the decisions they make and their ability to strategically maneuver to achieve their ends. These forces can also be

used or manipulated to an actor's advantage to help propel an issue onto the formal agenda. The following variables will be assessed in this section: public opinion, electoral forces, and partisanship.

Public opinion poll data will be used from three polling entities: The Pew Research Center, Gallup, and Newsweek. All of these polls ask the public whether same-sex marriage should or should not be legal. These polls were taken between March and May of 1996, capturing the public sentiment before and after the Defense of Marriage Act was introduced to Congress. This data is used to assess the national mood about same-sex marriage when the Defense of Marriage Act was introduced which has the potential to constrain the actions of elected officials.

Because 1996 is a presidential election year, it is important to assess the influence that the upcoming elections and campaigns have on same-sex marriage's movement to Congress's agenda. The electoral forces that play on the actors will be measured by the number of times the congressional documents or newspaper articles reference the upcoming election. This number will establish the salience of the election year forces embedded in the discussions of the Defense of Marriage Act. The prevalence of election references will point to influence of electoral factors on the trajectory of the legislation. Election year forces will also be assessed by examining the party platforms of both the Democratic and Republican Party. This will establish the issue salience in each document. The partisan forces will be measured by coding the cosponsors and votes of the Defense of Marriage Act based on party affiliation, capturing the distribution of partisanship.

Who is responsible for putting same-sex marriage on the congressional agenda?

The last question addresses who is responsible for elevating same-sex marriage to the formal agenda. This question is important to address, as agency is central to understanding how same-sex marriage ends up on the national agenda. Certain actors, often policy entrepreneurs who are interested in promoting a particular issue, will use their resources to promote issue salience and establish an issue such as same-sex marriage on the formal agenda. To understand how we get from Hawaii to DOMA, we must understand who helped move the issue of same-sex marriage from one venue to another. This question will be answered by understanding the relative influence of congressional representatives, the president, the states, the media, and interest group coalitions on the agenda status of same-sex marriage.

Congressional representatives are undoubtedly central to answering the question of how same-sex marriage arrived onto Congress's formal agenda. These representatives were responsible for drafting, sponsoring, debating, and passing the Defense of Marriage Act, which ultimately expands the controversy of the same-sex marriage from state institutions to the federal government. It is difficult to measure or quantify the influence of these actors because of their central role in this process. It is difficult to remove the representatives from the discussion of the Defense of Marriage Act to evaluate their influence, as the body of Congress is integral to the Defense of Marriage Act's existence. It is also difficult to measure due to the fact that several other factors including public opinion, electoral forces, and organized interests influence the actions of congressional representatives, making it difficult to disentangle the discussion of congressional influence from these other factors. The influence of these actors will be evaluated based

on the saliency of the issue in Congress by examining the cosponsors of the legislation and the number of hearings on the bill. These indicators can help show the levels of support for the bill and same-sex marriages place on Congress's agenda. While this can only capture part of Congress's influence, a qualitative assessment will also be given to understand how Congress and the actors in Congress contribute to the nationalization of same-sex marriage.

Measuring the influence of the president on the agenda is also difficult to assess, as the existence of the president in the agenda setting process does not necessarily correlate to influence. This study will examine the party identifications of Congress and the president, the shared policy preferences or lack thereof between the Congress and the president, and the level of presidential popularity. All will be used to assess the degree to which the president influences the agenda. Party affiliations will be measured by the partisan distributions in Congress compared to the President's party identification to assess the degree to which party identification is shared. This data will be gathered from the House and Senate website archives on previous sessions of Congress. This can help measure the degree to which the president can influence the agenda by utilizing party allies in Congress. Shared policy preferences will be examined by a qualitative content analysis of statements made by the President to assess his position on the issue and compare it to the preferences of Congress to assess whether the President could seek out allies that had a similar position on the issue. Presidential popularity, measured by Gallup polls on approval ratings can help show the degree to which the President can set the agenda with his public prestige and popularity in government. These indicators will be

assessed in light of the other variables to determine the degree to which the President was able to influence the elevation of same-sex marriage to the formal agenda.

The states' influence is not included in Kingdon's, framework, which is a limitation of the framework. Because marriage has traditionally been a state issue, it is necessary to assess the activity at the state level, as these states can have a powerful influence on the national government. Operationalizing the influence of the states will include an examination of the legislative activity in the states focusing on the introduction and passage of mini DOMAs or state "Defense of Marriage Acts" in 1996. The existence of introduced and passed state legislation prior to the introduction of the federal Defense of Marriage Act will demonstrate the degree to which the states were the first actors to act on the issue of recognizing same-sex marriages, which may be a proxy for influence at the national level.

The influence of organized interests will be measured by a variety of indicators to try and triangulate all possible proxy indicators of influence. Due to the breadth of this study, this research will not assess the individual influence of particular interest groups but will assess holistically the degree to which larger coalitions of proponent interest groups and opponent interest groups influence the elevation of same-sex marriage. It is difficult to collect data on interest group strategies that can help assess influence due to the fact that this study covers a vast geographical expanse over a period of time. Lobbying strategies, such as meeting with individual representatives, are also difficult to measure, as there are often no accessible records of these meetings.

The salience of interest groups throughout the data sources can help establish the degree to which certain interest group coalitions were present in the process, which can

have some correlation to influence on the process. This will be measured by coding for all interest groups mentioned in the newspapers and congressional documents. Interest groups were coded as either proponents of same-sex marriage or opponents of same-sex marriage and quantified based on the number of times they appear within the documents. Data was also collected from other sources including newspaper articles and books about events in Hawaii and DOMA to measure interest group influence based on the tactics used. This data can capture those interest groups that testified in Congress, directly lobbied representatives, and used a variety of grassroots mobilization strategies. In the same way, previous research on the influence of interest groups at the state level on the issue of same-sex marriage was evaluated (Haider-Markel, 2001). The frames that define the problem of same-sex marriage were also used to capture interest group influence as dominant frames in the discussion of same-sex marriage and DOMA can help capture those salient themes that were perpetuated by interest group coalitions. Together these indicators were analyzed and interpreted to assess the degree to which interest group coalitions influence the introduction of DOMA to Congress.

The influence of the media was qualitatively assessed based on the timing of events and the media's reporting of same-sex marriage and the Defense of Marriage Act more generally. If the media was influential in setting the systemic or formal agenda on this issue, the reporting on the issue of same-sex marriage would predate the introduction of the federal Defense of Marriage Act. If most of the articles were created after the federal Defense of Marriage Act, this is one indicator that the media is following the lead of political elites. The newspaper articles were also qualitatively analyzed to examine the

degree to which new information is presented in the articles, as opposed to a reiteration of dialogue of other political elites.

Once all of the data was collected and measured, the variables were assessed in line with the original research questions. Understanding how the issue is framed, the actors involved, and the political forces present helped answer the overarching question of the research study: Does the litigation in Hawaii lead to the emergence of the Defense of Marriage Act on the congressional agenda and if so why? This was done through a qualitative assessment of the data. Analytic themes emerged connecting the variables and these connections were assessed. From my analysis of the data, I have offered some interpretations of my findings that “bring meaning and coherence to the themes, patterns, and categories by developing linkages and a storyline” (Marshall & Rossman, 2011, 219).

While this study does try to pinpoint the variables responsible for the elevation of same-sex marriage to Congress’s formal agenda, this paper does not try to establish causality. Kingdon acknowledges that his theory is designed to capture the process of agenda setting but does not try to create casual links or establish casual mechanisms, as it is likely that several variables are responsible for an issue’s emergence onto the formal agenda. Because this is a case study, the findings are also not generalizable and can only be useful to describe and explain this phenomenon more clearly. The following chapter articulates the findings from this study.

CHAPTER 5

ANALYSIS

The following chapter will utilize the data collected and Kingdon's multiple streams framework as a theoretical guide to answer the four questions proposed at the beginning of this research. To explain the very complicated phenomena in this study, this chapter will first answer the three sub questions that will help inform the overarching question in this study about the variables responsible for same-sex marriage's movement to Congress's formal agenda. After thoroughly answering these three questions, the last part of the chapter will use the findings to answer the question of whether or not the litigation in Hawaii is responsible for the congressional action on the issue of same-sex marriage.

How is the problem of same-sex marriage conceptualized and framed?

An issue must be considered a problem worthy of government attention for it to make it to the formal agenda. As a result, the public and government officials must be convinced that an issue is a problem in order to move it onto the agenda. One must remember that problem definition is an interpretive and subjective process. Conditions exist throughout the world, but not all conditions are considered problems. The process by which a condition is transformed into a problem involves coordinated efforts to rhetorically and socially construct a problem so that people consider it an issue worthy of

government intervention (Kingdon, 2003). Same-sex marriage had been a topic of discussion prior to its movement onto the national systemic and formal agenda in 1996. The prior litigation in a few states in the 1970s and 1980s, a few minor actions by state governments, and discussions in interest group inner circles illustrate the existence of the issue prior to the initiation of *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993). These incidents did not garner substantial attention. While same-sex marriage may have been a political priority to some, it was not previously seen as a problem that the government must immediately address. *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) on the other hand led to an eruption of government activity in response to the new problem of same-sex marriage.

There is a consensus in the literature and amongst government officials involved in the passage of the Defense of Marriage Act that the litigation in Hawaii is considered the event that caused Congress to take up the issue of same-sex marriage with the introduction of the Defense of Marriage Act (H.R. 3396, 1996; Hull, 2001; Koppelman, 2002). All of the reports and congressional testimony from Congress point to the litigation in Hawaii and the repercussion of the impending trial court decision in 1996 as the reason for the introduction and passage of DOMA (H.R. 3396, 1996; H.R. Rep. No. 664, 1996). One hundred thirty-seven of the 251 news articles (54%) from Lexis Nexis that reference the Defense of Marriage Act also mention the events in Hawaii, demonstrating a relationship between the two developments. Sixty-five percent of these articles explicitly reference the litigation in Hawaii as cause for DOMA's consideration in Congress. Scholars also point to the litigation in Hawaii as a catalyst for subsequent activity surrounding same-sex marriage and relationship recognition, including DOMA

(Chambers, 2000; Feldblum, 2000; Hull, 2001; Goldberg-Hiller, 2002; Koppelman, 2002; Mezey, 2007). The following chapter will examine how same-sex marriage came to be defined as a problem that captured the attention of government officials.

The on-going litigation in Hawaii was the first to attract substantial national attention to the issue of same-sex marriage. The Hawaii Supreme Court's decision to vacate and remand the trial back to the First Circuit Court signified a radical departure from previous court rulings. The Hawaii Supreme Court's decision to classify the Hawaii marriage statute as a sex-based classification that warranted strict scrutiny gave the plaintiffs a substantial advantage in the trial. Putting the state in a position to prove a compelling state interest, with the prior assumption of unconstitutionality, made it likely that same-sex marriages would be legal for the first time in U.S. history.

While the decision in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) was monumental and if the litigation is responsible for the emergence of same-sex marriage onto the congressional agenda, the litigation itself could not move the issue of same-sex marriage from the events taking place thousands of miles from the mainland onto the formal agenda of Congress. Prior to the introduction of DOMA, very few states were dealing with the issue of same-sex marriage in the courts and only 26 of the 251 news articles discuss same-sex marriage or gay marriage prior to the introduction of DOMA (Hull, 2001). There was also no definitive decision from the Hawaii courts about the legality of same-sex marriage, making DOMA a largely preemptive measure on the part of Congress to a phenomenon that would not exist until several years later. The events in Hawaii needed to be constructed as a problem that was deserving of government

regulation, in order to foster pressure for the federal government, an institution that had not previously dealt with the issue of marriage, to address it.

An analysis of the frames used by the proponent and opponent coalitions to define the problem of same-sex marriage highlights the dominant frames that define same-sex marriage and the events in Hawaii. The distribution of frames from the congressional documents and newspapers are displayed in Table 5.1. Two dominant overarching themes emerged from the coding scheme. The frames that define same-sex marriage were either frames that defined the problem by alluding to the implications that would arise from the litigation in Hawaii or the frames defined the issue of same-sex marriage more generally. The following will analyze each of these overarching themes and the frames that constitute them to help answer the question of how same-sex marriage is conceptualized and framed.

Frames in relation to Hawaii's litigation.

Ninety-three of the 660 frames coded in the study alluded to the problem in terms of the implications of the Hawaii litigation for the rest of the United States. Part of the problem with the legality of same-sex marriage in Hawaii would be the procedural implications stemming from the U.S. Constitution's Full Faith and Credit Clause that might "impose" same-sex marriage on other states. The state's rights frame highlights this fear, as many in the opposition coalition argue that the states should have the right to decide whether or not to recognize same-sex marriage. Lynn Wardle, a professor at Brigham Young University who testified in front of the House Subcommittee on the Constitution sums up the state's rights frame with the statement, "It is important that advocates of same-sex marriage, not be allowed to use federal conflicts law as a tool, as a

wedge, as a vehicle to force other states to recognize same-sex marriages and deprive those states of the right to make the decision themselves” (H.R. 3396, 1996).

Table 5.1: Distribution of Same-Sex Marriage Frames

Frames	Description	Source: Congress	Source: Newspapers	Total
Morality	Deviancy of gays and lesbians; Marriage is demeaned by allowing same-sex couples to marry.	57	76	133
Tradition	Protecting the traditional institution of marriage; Resist radical redefinition of marriage.	37	30	67
State's Rights	Force states to recognize marriages.	43	20	63
Election	Wedge issue, election year politicking	14	49	63
Family	Strengthening or erosion of the family unit.	21	36	57
Intolerance	Intolerance of others. Discrimination against a group. Marriage is a fundamental/civil/equal rights issue.	17	34	51
Right	Recognize relationships that are based on love.	20	20	40
Love	Allowing unelected judges to determine policy.	23	12	35
Judges	Tying justifications to religious rhetoric.	25	5	30
Religion	Children will/will not be harmed by having parents of the same sex.	8	19	27
Children	Same-sex couples should be on the same footing as heterosexual couples. Equality of the law.	13	11	24
Equality	Freedom to choose who to marry/Freedom to marry.	10	9	19
Freedom	The naturalness of male and female couples based on biology.	12	6	18
Nature	Costs of including same-sex couples to receive the benefits of marriage.	8	5	13
Economy	Only fair or right to include same-sex couples in the institution of marriage.	5	2	7
Justice	Diversity strengthens society.	3	4	7
Diversity		5	1	6

The judges frame also highlights another conceptualization of the problem as some argue that the judges in Hawaii are using undemocratic means to achieve their own agendas. Some in the opposition coalition blame the Hawaiian judges for the problem as they complain that, “three judges are about to determine the fate of perhaps the most stabilizing institution we have in this country” (H.R. 3396, 1996).

These frames that define the issue in terms of the Hawaii litigation only constitute 14% of the frames in these documents. This means that the legal developments in Hawaii and the repercussions of these court decisions were not the main frames used to define the problem of same-sex marriage. This low number is surprising given the fact that the Hawaii litigation is said to have caused Congress to take up the issue of same-sex marriage. If the issues with the Hawaii litigation (i.e. the states rights and judicial activism issues) are the reasons for the introduction of the Defense of Marriage Act, there ought to be substantially more references in the newspapers and congressional documents to the problems associated with the ruling in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993). Instead the other frames that represent arguments for and against same-sex marriage more generally are primarily responsible for the definition of the problem.

The remaining frames, 567 in total, are used to define the problem of same-sex marriage more generally. These frames capture both proponent coalition and opponent coalition frames that are used to define the issue in an attempt to create issue salience. Proponent coalition frames include love, freedom, rights, justice, equality, diversity and intolerance/discrimination. Opponent coalition frames include tradition, family, children, morality, economy, religion, and nature. The following will analyze the frames most frequently used by each coalition.

Opponent coalition frames.

The most common frame utilized by the opponent coalition to define the problem of same-sex marriage is the morality frame. Over 20% of the frames used to define the issue were couched in value laden terms about same-sex marriage (see Table 5.2).

Table 5.2 Opposition Coalition Frames

Frame	Description of Frame	Percentage of Total Frames
Morality	Deviancy of gays and lesbians; Marriage is demeaned by allowing same-sex couples to marry.	20.0%
Tradition	Protecting the traditional institution of marriage; Resist radical redefinition of marriage.	10.0%
State's Rights	Force states to recognize marriages.	9.5%
Family	Strengthening or erosion of the family unit.	8.6%
Judges	Allowing unelected judges to determine policy.	4.5%
Religion	Tying justifications to religious rhetoric.	4.1%
Children	Children will/will not be harmed by having parents of the same sex.	3.6%
Nature	The naturalness of male and female couples based on biology.	2.0%
Economy	Costs of including same-sex couples to receive the benefits of marriage.	1.0%

Most of these frames addressed two facets of morality. The first captured the immorality of homosexual behavior by framing the LGBT community as deviant, evil, and extreme. Bob Barr, the Republican representative from Georgia who introduced the legislation in the House asked in his testimony, “What more does it take America... to see that this is an issue being shouted at us by extremists intent – bent – on forcing a tortured view of morality on the rest of the country?” (Lochhead,1996b). Others spoke of “decrying homosexual lifestyles” comparing same-sex marriage to polygamy and incest (Lochhead, 1996b; Smith, 1996; H.R. 3396, 1996). The second facet spoke to the perceived moral consequences that would arise from legally recognizing same-sex

marriage. Several sources argue that marriage would be besieged, derogated or demeaned by the inclusion of same-sex marriages (H.R. 3396, 1996; Feder, 1996; Aquino, 1996).

Many of these morality frames are intimately tied to two other prominent themes: tradition and family. Many of the morality frames encompass these other frames by addressing the erosion of values associated with traditional heterosexual marriage and the family unit. Tradition, family, and morality are intimately connected in this analysis as tradition and family are considered institutions that foster and promote morality. The tradition frame is the second most common frame that specifically captures the historical context of marriage as a traditional heterosexual institution. This frame discusses the potential radical redefinition of marriage or revolutionizing aspect of including same-sex marriage in the “traditional structure of marriage” (H.R. 3396, 1996).

One of the other common frames, the family frame, is very similar to the other two, as the family frame also focuses on the erosion or derogation of the institution. To a lesser extent, the religion frame is also intimately tied to concepts of morality. Many of these frames conceptualize the issue of same-sex marriage as “an attack on a God given principle” and a practice that would “offend the religious and moral sensibilities of millions of Americans” (Yang, 1996; Lowy, 1996). Twenty-seven of the frames used draw on these religious references that are tied closely to morality and values articulated in the Bible. Overall, three frames: morality, family, and tradition are predominantly used by the opposition coalition to define the problem of same-sex marriage.

Proponent coalition frames.

On the other hand, one of the most common frames used by the proponent coalition is the discrimination/intolerance frame (see Table 5.3).

Table 5.3 Proponent Coalition Frames

Frames	Description of Frames	Percentage of Total Frames
Election	Wedge issue, election year politicking	9.5%
Intolerance	Intolerance of others. Discrimination against a group.	7.7%
Right	Marriage is a fundamental/civil/equal rights issue.	6.0%
Love	Recognize relationships that are based on love.	5.3%
Equality	Same-sex couples should be on the same footing as heterosexual couples. Equality of the law.	2.9%
Freedom	Freedom to choose who to marry/Freedom to marry.	2.7%
Justice	Only fair or right to include same-sex couples in the institution of marriage.	1.0%
Diversity	Diversity strengthens society.	0.9%

This frame highlights discrimination and intolerance inherent in the Defense of Marriage Act and the conceptualization of same-sex marriage as a problem more generally.

Elizabeth Birch, head of the Human Rights Campaign, captures this sentiment when she argues that discrimination against gays and lesbians is discrimination against sons, daughters, brothers, and sisters (Overall, 1996). The most common frame used by proponent groups is the election frame. This frame does not define the issue of same-sex marriage but tries to redirect the debate to define the problem of same-sex marriage by demonstrating the strategic introduction of this issue during an election year. This frame was consistently used throughout the proponent coalitions arguments for same-sex marriage. Because 1996 was a presidential election year, many politicians, LGBT organizations, and editorials point out the strategic placement of same-sex marriage onto the national agenda in an election year. Same-sex marriage is depicted as a “wedge issue” to use the LGBT community as a scapegoat, divide Americans, and split moderates from the Democratic Party (H.R. 3396, 1996; Lochhead, 1996b; Rich, 1996).

Most of the other frames utilized by the proponent coalition are infrequently used and rarely utilized by the opposition coalition. The third most frequently used pro same-sex marriage frame, the rights frame, constitutes only 6% of the frames used. This is a departure from previous literature tracing same-sex marriage frames which find the rights frame is the primary frame utilized by pro-same-sex marriage groups (Hull, 2001; Fisher, 2009). This may mean that the proponent coalition tried to subsume and refute the opposition's frames instead of constructing their own frames. This may also mean that these frames were unsuccessful at creating issue salience and mobilizing allies and were abandoned by proponent groups. The frames used by the proponents are also relatively reactive. The dominant frames, or the most frequent frames, used by proponents – the discrimination/intolerance frame and the election frame – both do not define same-sex marriage but instead are refutations to the arguments made by those in the opponent coalition. Neither positively highlights the issue of same-sex marriage but instead attempts to depict the opponent coalition as manipulative and divisive.

Analysis.

Overall, the conceptualization and framing of same-sex marriage found in this study does not by itself answer the question of whether or not the litigation in Hawaii prompted congressional action that resulted in the Defense of Marriage Act but does reveal some patterns that may be relevant when the political forces and participants are analyzed. The minimal use of frames that specifically address the Hawaii litigation signifies that these frames were not the primary way to define the problem of same-sex marriage. The opposition chose not to frame same-sex marriage by the litigation in Hawaii but rather the consequences of those events to the moral, traditional, and familial

structures of society. These frames are more deep seeded issues with same-sex marriage itself, rather than contextual and time specific frames about the possibility of same-sex marriage in the 1990's. These frames may have been used to develop issue salience among a sympathetic public that was able to relate to the religious and traditional rhetoric used to define the problem of same-sex marriage.

In addition, the problem of same-sex marriage is conceptualized and framed primarily by the opponent coalition that defines the problem in terms of threats to tradition, family, and morality. These three frames represent almost 40% of the frames referenced, while the other 14 frames represent only 60%. This dominance in the contestation of frames signifies how the opposition coalition was able to dominate the discussion about same-sex marriage, which is reflected in the introduction and passage of DOMA. The types of frames utilized by the proponent coalition also signify the opposition coalition's dominance in the discussion of same-sex marriage, as the proponent's frames are largely reactive responses to the opposition's frames.

Regardless of the frames used, same-sex marriage was defined and framed at the national level in response to the litigation that took place in Hawaii. The existence of frames that define the problem in relation to Hawaii's litigation acknowledges the fact that the litigation is integral to this response from the opposition. The absence of these frames does not dismiss the fact that the litigation in Hawaii is still central to the emergence of the issue of same-sex marriage onto the formal agenda of Congress. The dominant frames used, particularly the morality, tradition, and family frames were all used to frame the issue of same-sex marriage in order to attract attention to the issue of

same-sex marriage, as these frames touch on deep seeded values about American society that would resonate with the public.

Baehr v. Lewin (74 Haw. 530; 852 P.2d 44; 1993) and the looming decision in *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) that was likely to legalize same-sex marriage gave the opponents of same-sex marriage the opportunity to transform same-sex marriage into an important and imminent national problem that would disturb the moral, traditional, and familial sentiments of American culture. The litigation in Hawaii was both a focusing event and a symbol of the impending reality of same-sex marriage. The Hawaii Supreme Court's decision in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) caught the attention of those opposed to same-sex marriage as it was the first legal decision that applied strict scrutiny in a discrimination case against gays and lesbians, making same-sex marriage all but legal in Hawaii. The upcoming trial represented the approaching legalization of same-sex marriage in the first U.S. state. Opponents could use *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) as a symbol of the necessity for a federal policy to address the legal complications that would arise at both the state and federal level with this new union between couples of the same sex. If the litigation in Hawaii did not exist, it is unlikely that this mobilization against same-sex marriage and its place on Congress's agenda would not have happened at this particular time.

Understanding how the problem is conceptualized, framed, and captured the attention of government officials can only partially explain how the events in Hawaii lead to congressional action that results in the Defense of Marriage Act. The political stream must also be assessed to understand how participants and political forces influence the

agenda setting process and propel the events in Hawaii to the formal congressional agenda.

To what extent is each force in the politics stream responsible for DOMA's agenda status?

Kingdon's political stream, operating largely independently of the problem stream, is made up of electoral, partisan, and public opinion forces that influence the policy making process (Kingdon, 2003). These forces exist independently of the policy process but have the ability to affect the development of the agenda and subsequent policy. The following will examine the influence of public opinion, partisanship, and electoral forces on the movement of the same-sex marriage issue from Hawaii to Congress.

Public opinion.

Few public opinion polls before 1996 document the public sentiment on the topic of same-sex marriage. 1996 is the first year that the public's opinion on same-sex marriage is captured in multiple opinion polls (see Table 5.4). This is evidence of same-sex marriage's arrival onto the systemic agenda, as opinion polls signify the salience of an issue within the public that allows political elites to gauge the public's opinion. Questions about whether same-sex marriage should or should not be recognized legally from Gallup, the Pew Research Center, and Newsweek in 1996 all show responses that heavily oppose the recognition of same-sex marriage. All of the polls have over 50% of the sample rejecting the legality of same-sex marriage, and two of the three polls are well over 60%, signifying the public's disagreement with legalizing same-sex marriages. Later

in this chapter, I will examine how public opinion interacts with the other forces, which will help clarify the degree to which public opinion is a significant factor in this study.

Table 5.4 Public Opinion Polls

Gallup Poll* : Do you think marriages between homosexuals should or should not be recognized by the law as valid, with the same rights as traditional marriages?				
Date	Should Be Valid (%)	Should Not Be (%)	No Opinion (%)	N
3/15-3/17/96	27	68	5	1,008
Pew Research Center* : Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?				
Date	Favor (%)	Oppose (%)	Don't Know (%)	N
5/31-6/9/96	27	65	8	1,975
Newsweek* : Do you think there should be or should not be... legally sanctioned gay marriages?				
Date	Should (%)	Should Not (%)	Don't Know (%)	N
5/22-5/23/96	33	58	9	779

* Polling Data is taken from Brewer and Wilcox's article "Trends: Same-Sex Marriage and Civil Unions" which cites the polling data from the Roper Center at the University of Connecticut, The Polling Report, and the websites of the poll sponsors (Brewer & Wilcox, 2005, 606).

Partisanship.

Prior to *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993), several courts had previously been forced to wrestle with the issue of same-sex marriage. It was not the first time that couples had pursued litigation in response to the denial of their marriage certificates, and it was not the first time that the courts had ruled on the issue. While none of the previous rulings had been in favor of same-sex couples, *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) was also not a clear victory for the proponents of same-sex marriage. While it was monumental in the sense that strict scrutiny was applied to a case involving discrimination of gays and lesbians, it was by no means a legal victory when the Hawaii Supreme Court vacated and remanded the case to trial. The case was also

remanded in May of 1993 and did not go to trial until September of 1996, five months after the introduction of the Defense of Marriage Act in the House. This begs the question of how the Hawaii litigation prompted Congress to take up the issue of same-sex marriage in the summer of 1996.

In 1996, Congress had a Republican majority that had come to power for the first time in 40 years in the 1994 congressional elections. The 1994 election marked a substantial Republican victory that turned over 54 seats in the House and 8 seats in the Senate to the Republican Party (Office of the Clerk; Senate Historical Office). The election was a symbol of a Republican revolution that would lead to a more conservative agenda and drastic changes in policy, especially in light of the fact that the success of the Republican Party was partially attributed to the large evangelical Christian turnout in the 1994 election (Campbell & Davidson, 2000; Wald, 2000). This was a significant level of turnover resulting from the 1994 election which brought with it new agenda items, including the Defense of Marriage Act. While representatives are not divided along partisan lines when it comes to LGBT issues, the fact that many Republicans are social conservatives makes it more likely that a bill against gays and lesbians would be passed in a Republican dominated legislature.⁵ In 1996, when the Defense of Marriage Act was introduced, Republicans made up 54% of the House and 53% of the Senate.⁶

While a Republican majority might have been necessary for DOMA's introduction, it is not necessarily sufficient to explain same-sex marriage's arrival on the

⁵ Ideology rather than party identity tends to be a more reliable indicator when predicting a representative's vote on an issue that concerns morality politics. While party is not synonymous with ideology, it can be considered a proxy for ideology.

⁶ These numbers represent the partisan distributions when Congress voted on the Defense of Marriage Act. These numbers were cited due to changes in distribution after the 1994 election. All of the changes to the distribution were made prior to 1996, except for Congressman Bill Emerson (R) who passed away on June 22, 1996.

congressional agenda. The politics of 1996 were also marked by divided government. President Clinton, an advocate of LGBT rights in his 1992 campaign and originally a champion for the removal of the military ban for gays and lesbians, would seem an unlikely candidate to vote in favor of DOMA, which is arguably a discriminatory piece of legislation against the LGBT community.

Electoral forces.

While the public's strong opposition to same-sex marriage and the partisan distribution of Congress resulting from the turnover in 1994 laid the seeds allowing for same-sex marriage to reach the formal agenda, electoral forces also are responsible for propelling same-sex marriage to the federal level. The politics of a presidential election year are what separate this year from other years surrounding the decade long litigation in Hawaii. President Clinton was up for reelection and the new Republican coalition in government sought to oust the president for a Republican counterpart in the White House. The newspapers and documents in Congress point to the salience of election year politics throughout the discussions of the federal Defense of Marriage Act demonstrating the pivotal role that the election played in the nationalization of same-sex marriage. The following will highlight the plethora of evidence that demonstrates the critical role electoral forces play in same-sex marriage's formal agenda status.

In 119 newspaper articles and two congressional documents, election year references are cited 65 different times, demonstrating the prevalence of election year politics in discussions about the Defense of Marriage Act. Because almost half of the sources contain references to the election's effect on the issue, we can say that there does exist a relationship between the Defense of Marriage Act and the election year. The

proponents of same-sex marriage, including several congressional representatives refute the arguments of those that supported the bill by claiming that DOMA was “a desperate attempt to find an issue,” a “wedge in the political tool box,” and an “election year ploy” (H.R. 3396, 1996; Goodman, 1996; Lochhead, 1996a). Many in the proponent coalition accused the drafters and supporters of the bill of using gay Americans as “political fodder in an election year,” and engaging in a form of “election year gay bashing” (Rich, 1996; Hennessy, 1996). Others termed the bill “The Defense of Incumbents Act” or “The Dole Campaign Rehabilitation Act of 1996” (Lanpher, 1996; H.R. 3396, 1996). On the other hand, the opponents of same-sex marriage do not reference the election throughout the documents and newspaper articles unless to refute the proponent’s of same-sex marriage references to it. Opponents dismiss the timing of the Defense of Marriage Act as an electoral strategy and instead suggest that the timing of the bill coincides with the imminent decision in *Baehr v. Miike* (1996 WL 694235, Hawai’i Cir.Ct.), highlighting the importance of the Hawaii litigation to the emergence of same-sex marriage onto the congressional agenda.

Evidence from the cosponsors and roll call votes is also informative to understand the importance of electoral forces. The table below shows cosponsors and roll call votes for DOMA organized by party and chamber. There were 117 cosponsors for the House version of the bill and 24 sponsors for the Senate version of the bill. To create a comparison, on average House bills have 22.2 cosponsors while the Senate bills on average have 7.2 cosponsors (Wilson & Young, 1997). Both the House and Senate were able to garner almost 25% of each chamber’s membership to cosponsor, showing a strong level of support for the bill.

Table 5.5

Partisan Distributions in Congress			
	Republican	Democrat	Independent
Partisan Make Up of House*	235	198	1
Partisan Make Up of Senate*	53	47	
Cosponsors in House	105	12	
Cosponsors in Senate	24	0	
Votes For DOMA in House	224	118	
Votes Against DOMA in House	1	65	1
Votes for DOMA in Senate	53	31	
Votes Against DOMA in Senate	0	14	
Abstain or Not Present in either chamber of Congress	9	16	

Almost 90% of the cosponsors in the House are Republican and all of the cosponsors in the Senate are Republican demonstrating strong Republican support for the legislation. Scholars argue that cosponsorship is a signal sent to constituents, interest groups, and donors to demonstrate support for their causes. It is also a cue to chamber leaders, who have immense power over the agenda setting process in Congress, to put legislation on the calendar that can politically benefit the majority party (Koger, 2003). The high level of Republican cosponsors may have been a signal to the judiciary committee and majority party leaders of the support for this bill to move through Congress. While the House and Senate could have passed DOMA without the help of Democrats, DOMA represents a bipartisan piece of legislation. Both chambers passed the bills by a supermajority of 78% and 84% (Office of the Clerk; United States Senate Archives).

The lack of Democratic cosponsors but the large level of Democratic support in passage is another confirmation that electoral forces are responsible for the nationalization of same-sex marriage. Voting against DOMA would have been detrimental to Democrats given the high levels of public opposition to same-sex

marriage. Many members' constituencies would have a majority opposed to same-sex marriage, making it politically unadvisable to vote against DOMA, even if a member's political beliefs would have led him to vote against it. Once the issue was introduced in Congress, it was politically important to end up on the right side of the issue, regardless of personal stance (Kingdon, 1989; Haider-Markel, 2001). The same holds true for President Clinton, who had to walk a fine line between his allies in the LGBT community and the larger public sentiment that opposed same-sex marriages.

The influence of electoral forces is also evident in the 1996 Democratic and Republican Party platforms. The Democratic Party platform makes no references to same-sex marriage or the Defense of Marriage Act. The only mention of the LGBT community is referenced in the discussion about fighting discrimination and protecting civil rights where the Democratic Party claims to continue to fight its ongoing battle to end discrimination based on sexual orientation. The rhetoric of the platform also distances itself from the rhetoric that defines the problem of same-sex marriage, focusing on ideas such as community, opportunity, and responsibility (Democratic Party Platform, 1996). The Republican Party platform on the other hand is littered with rhetoric similar to that used in the discussion of same-sex marriage and DOMA. The Republican Platform often references morality, values, and the importance of the institution of family. It also makes two references to the Defense of Marriage Act both in support of its passage. They also explicitly reference the LGBT community as the Republican Party "rejects the distortion of anti-discrimination statutes to cover sexual preference" (Republican Party Platform, 1996). The platforms demonstrate the use of DOMA and same-sex marriage as

issues of Republican strength, which are used to help garner votes for the 1996 presidential election.

The significant influence that electoral forces have on elevation of same sex marriage to the formal agenda runs contrary to Kingdon's assessment of electoral participants and forces. His study finds that the electoral forces only indirectly affect the agenda due to the fact that elections bring about a turnover of government officials who may bring with them new priorities for the agenda (Kingdon, 2003, 62). While the turnover in personnel is significant from the 1994 elections, the 1996 electoral forces that play on the movement of same-sex marriage to the formal agenda are substantial. The evidence above substantiates the point that the election was key to the introduction of the issue of same-sex marriage in 1996 and arguably may not have taken place in the same dramatic fashion had this not been a presidential election year.

Who is responsible for putting same-sex marriage on the congressional agenda?

While the forces in the politics and problem streams are important to understanding the agenda setting process, it is crucial to examine the actors responsible for problem definition, issue salience, and issue introduction. The following will assess the relevant actors and their influence on same-sex marriage's place on the formal agenda in light of the previous analysis of problem definition and influential political forces.

Congressional representatives.

Congress's influential role in this study cannot be underscored. Kingdon finds in his study that members of Congress are one of the two most influential actors in the agenda setting process and this study follows in line with that finding (Kingdon, 2003, 34). It is the support of members of Congress who have the legal authority to create,

sponsor, and pass the legislation that made same-sex marriage a formal agenda item. Congressional representatives, particularly Representative Bob Barr (R: GA) and Senator Don Nickles (R: OK), are responsible for the introduction of the Defense of Marriage Act, which is a major contributing factor to the nationalization of same-sex marriage.

The popularity of the bill and the salience of the debate about same-sex marriage with regards to the Defense of Marriage Act in Congress are two of the indicators that point to the congressional membership's complicity in nationalizing the same-sex marriage debate. The high level of cosponsors shown in Table 5.3 and the high support for the bill's passage at 78% in the House and 84% in the Senate are evidence of this. This data shows that the majority of Congress was supportive of the bill, alluding to acceptance or approval of same-sex marriage's place on the formal agenda. Five hearings were held on H.R. 3396: The Defense of Marriage Act in the House and two were held in the Senate between its introduction on May 7, 1996 and its passage on September 21, 1996 showing a moderate level of debate over the issue. While this is not definitive, when coupled with the quick introduction and passage of DOMA, it is apparent that members of Congress supported the bill and its implications for nationalizing the issue of same-sex marriage. While the members of Congress are undoubtedly a major player in this study, it is important to remember that these actors are not free wheeling agents but are constrained by other actors and political forces. The partisan distributions in Congress, electoral forces, public opinion and interest groups in this study do put significant pressure on members of Congress, making it necessary to assess these other relevant factors.

The president.

In the same way, the President is considerably constrained, as he is largely influenced by the partisan and electoral forces surrounding same-sex marriage's movement to the formal agenda. While Kingdon finds that the president is often the most influential agenda setter, this study is an example of the President's inability to control or shape the agenda (Kingdon, 2003, 23). During this period of divided government in which Republicans controlled both chambers of Congress, leaders in the legislature were able to forge ahead with their own agenda without consulting the President. The President had few allies with substantial power within Congress to try to influence the trajectory of the agenda and instead had to largely respond to the decisions of Republican representatives. These partisan forces made it difficult for the President to wield any power over the make up of the formal agenda.

The second is that despite the president's substantial amount of resources to try to influence the trajectory of the legislation, the election year forces constrained his ability to respond. President Clinton's approval ratings between May and September range from 53% to 60%, showing a fair amount of support for the President during the debate over the Defense of Marriage Act in Congress (Gallup, 1996). This level of support ought to have been somewhat of an advantage for Clinton but same-sex marriage's controversial nature made it difficult for President Clinton to choose a position. A week after the Defense of Marriage was introduced in the House, President Clinton's White House spokesman said that Clinton would most likely sign the bill as it was "consistent with his personally stated view that he opposes same-sex marriage" but clarified "that the bill was 'designed to provoke hostility towards gays and lesbians' and is being used by

Republicans as a ‘wedge issue’ to ‘divide Americans’” (Lochhead & Tuller, 1996). Prior to signing the bill on September 20, 1996 President Clinton was clear that the bill was meant to “confirm the right of each state to determine its own public policy with respect to same gender marriage” but that it was not meant to condone any discrimination based on sexual orientation (Strobel, 1996). President Clinton also signed the bill on September 21, 1996 just after midnight to minimize the press and commotion over his signature, illustrating his attempt to discretely pass the bill into law without further alienating his LGBT allies (Kurtz, 1996).

Ultimately the president would take a backseat role on the issue of same sex marriage. Clinton’s statements and reservations about the bill show how the introduction of the bill in the heat of an election year constrained his ability to combat or redirect the issue. The president had to walk a fine line on the issue so as to not alienate large constituencies before the election. Unable to control the agenda, his only politically viable option was to sign the bill to dilute the Republican’s attempt to garner substantial votes from moderates over the issue of same-sex marriage.

The states.

Another actor that must be assessed is the states and their effect on the congressional agenda. Prior to the 1993 Hawaii Supreme Court ruling in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993), only three states, Wyoming, New Hampshire, and Maryland had statutory language prohibiting the recognition of out of state same-sex marriages, also known as a mini DOMA (Barclay, 2010; National Conference of State Legislatures, 2011). Before the year 1996, only one state, Utah, had successfully passed a mini DOMA (Lambda Legal Defense and Education Fund, 2011). By the end of 1996,

state legislatures had introduced a plethora of mini DOMAs, 15 of which passed that same year. The table below shows all of the states that introduced mini DOMAs in the year 1996.

Table 5.6 State Defense of Marriage Acts (1996)

State	Bill Number	Date of Introduction into One House of State Legislature	Date of Passage
Alaska	HB 308; SB 30	3/14/96	5/7/96
Alabama	HB 1942; SB 396	Introduced before 4/16	No Passage
Arizona	SB 1038	??	5/5/96
California	AB 1982; AB 3227	9/15/95	No Passage
Colorado	HB 1291	1/31/96	No Passage
Delaware	HB 503	4/4/96	6/21/96
Florida	HB 2369	3/6/1996; 12/30/96	No Passage
Georgia	HB 1580	2/14/96	4/2/96
Idaho	HB 658	1/12/96	3/18/96
Illinois	SB 1773	2/9/96	5/24/96
Kansas	SB 515	??	4/10/96
Kentucky	HB 500	Introduced before 4/16	No Passage
Maryland	HB 1268	2/15/96	No Passage
Michigan	HB 5662; SB 937	3/7/96	6/26/96
Mississippi	HB 1210; SB 2863	Failed by 4/16	No Passage
Missouri	HSSB 786	5/17/96	7/3/96
Nebraska	LB 1260	??	No Passage
New Jersey	AB 2193; SB 1376	??	No Passage
New Mexico	SJR 10	1/31/96	No Passage
New York	AB 9861; 7345	??	No Passage
North Carolina	HB 1302	5/23/96	6/20/96
Oklahoma	SB 73	4/1/96	4/29/96
Pennsylvania	SB 434; HB 2604	5/7/96	10/16/96
South Carolina	R388; H4502	1/25/96	5/20/96
South Dakota*	HB 1143	??	2/21/96
Tennessee	SB 2306; HB 2907	1/17/96	5/22/96
Washington	HB 2262	1/8/96	No Passage
West Virginia	HB 4730	Failed by 4/16	No Passage
Wisconsin	AB 1042	3/18/96	No Passage

* The data for this table was collected from a variety of sources including Lambda Legal, newspaper articles found on Lexis Nexis, and State Legislature Archive Websites. All “??” represent dates that could not be found.

* South Dakota’s statute is somewhat different from other mini DOMAs in that it solely states, “Be it enacted by the legislature of the State of South Dakota: Any marriage between persons of the same gender is null and void from the beginning” (S. D. House Bill 1184).

If the states were concerned with the events in Hawaii and the possible legal repercussions that might ensue from the Full Faith and Credit Clause, one would expect to see many states introduce legislation after the Hawaii Supreme Court's decision in 1993. It would also be logical to predict that states might emulate the federal government by introducing legislation similar to the federal DOMA shortly after the introduction or passage of DOMA in Congress. Instead, many of the states introduce their mini DOMAs in the early months of 1996. Most states introduced legislation prior to the introduction of the federal Defense of Marriage Act demonstrating how states were actually the first to develop the policy ideas of DOMA. The introduction of the issue in the state legislatures in 1996 may also point to the salience of electoral forces that made the strategic introduction of the issue in an election year beneficial to those that opposed same-sex marriage.

While the proliferation of state Defense of Marriage Acts in 1996 contributed to the nationalization of the same-sex marriage debate, it is difficult to pinpoint if the states influence the movement of same-sex marriage to the congressional agenda. The sponsors of the Senate and House Defense of Marriage Acts, Senator Don Nickles (R:OK) and Congressman Bob Barr (R:GA), both had mini DOMAs introduced in their states earlier that year which may have influenced their choice to sponsor the bills in Congress. The proliferation of mini DOMAs in the states in early 1996 would have created substantial issue salience over same-sex marriage, which had not previously existed. Congress may have been more aware of the issue's salience in state governments, which possibly prompted them to take action.

Organized interests.

Interest group coalitions in Kingdon's study are found to be one of the prominent, influential actors on agenda setting. My research also finds that interest groups are influential in shaping the agenda. It is important to first note the existence of interest group participation in the process and then assess the relative influence that the proponent coalition and the opponent coalition have on the formal agenda of Congress with regards to same-sex marriage.

The evidence is clear that interest groups participated in the process of putting same-sex marriage on the formal agenda. Interest groups were clearly involved in the litigation in Hawaii as The Lambda Legal Defense and Education Fund joined the plaintiffs as co-counsel prior to the trial in 1996, and both proponent interest groups and opponent interest groups submitted amicus briefs to the Hawaii Supreme and Circuit Court.⁷ Some of these proponent and opponent groups testified in Congress during the hearing before the House Subcommittee of the Constitution, including Elizabeth Birch, the executive director of the Human Rights Campaign (pro same-sex marriage), Nancy McDonald, the Vice President of Parents Families and Friends of Lesbians and Gays (pro same-sex marriage) or submitted statements, such as the National Gay and Lesbian Task Force (pro same-sex marriage), and Jay Sekulow of the American Center for Law and Justice (anti same-sex marriage). Reverend Lou Sheldon of the Traditional Values Coalition was even present and involved in the drafting of the federal Defense of Marriage Act (anti same-sex marriage).

⁷ The following are some of the organizations that submitted amicus curiae during the Hawaii litigation on same-sex marriage: American Civil Liberties Union of Hawaii Foundation, Coral Ridge Ministries Media, Inc., Lambda Legal; Concerned Women for America, American Family Association Law Center, Specialty Research Associates, Alaskans Opposed to Pro-homosexual Policies, Christian Family Network, Traditional Values Coalition, Free Congress Research & Education Foundation and Coalitions for America.

Media coverage is an indicator that points to the salience of interest groups, as these groups are mentioned 98 times in 119 news articles, as quoted sources or mentioned for their involvement in the events surrounding the federal DOMA. This itself shows the prevalence of interest groups in the process of agenda setting. Table 5.5 lists the groups mentioned and the frequency with which they are mentioned.

Table 5.7

Interest Group Frequency	
Proponents	Opponents
American Civil Liberties Union (4)	American Center for Law and Justice (1)
Gay and Lesbians for Individual Liberty (1)	American Family Association (2)
Hawaii Equal Rights Marriage Project (2)	Christian Civic League (1)
Human Rights Campaign (33)	Christian Coalition (6)
Lambda Legal (10)	Concerned Women of America (2)
Lobby for Freedom and Equality (1)	Family Research Council (10)
National Center for Lesbian Rights (1)	Focus on the Family (3)
National Education Association (1)	The Report (2)
National Freedom to Marry Coalition (1)	Traditional Value's Coalition (6)
National Gay and Lesbian Task force (5)	U.S. Catholic Conference (1)
People for the American Way (2)	
Religious Center for Reform (1)	
The Republican Log Cabin Club (1)	
Universal Fellowship of Metro Churches (1)	

In total, 98 interest groups are mentioned in the newspapers with 34 attributed to opponent interest groups while 64 are attributed to proponent interest groups. Proponent interest groups represent almost double the number of opponent interest groups in the media. This does not indicate influence however as proponent interest groups were relatively ineffective at blocking same-sex marriage from the formal agenda of Congress or defeating the bill once it was introduced. The salience of opponent coalitions frames discussed in the section addressing the problem stream and framing is further evidence of the fact that proponent interest groups were unable to mobilize effectively. The frames that define the issue in terms of tradition, morality, and family eclipse the other

arguments, showing the dominance of the opposition's definitions of same-sex marriage. While the prevalence of interest groups in the newspapers and an examination of the frames do give some indication of interest group influence, a more in-depth look reveals the coordinated efforts, particularly of the Christian Right's mobilized constituency to define same-sex marriage as a problem that necessitated government action. Opposition groups were instrumental in creating issue salience about same-sex marriage that led to Congress's decision to address the issue of same-sex marriage.

Conservative religious groups prolifically organized to "defend" the institution of marriage in the 1990s (D'Emilio, 2000). These groups, in response to the litigation in Hawaii organized a national campaign to make same-sex marriage a salient political issue to preempt the likely legalization of same-sex marriage in Hawaii. The implications of the Full Faith and Credit Clause of the U.S. Constitution made it important to federalize the issue of same-sex marriage to protect other states from being forced to recognize same-sex marriages performed in other states. In January of 1996, several conservative religious groups met in a Memphis Church to organize a coordinated plan to propel the issue of same sex marriage onto the formal agendas of the state and federal governments (Johnson, 1996; Walker, 1996). On February 10, 1996, several groups, including the American Family Association, the Eagle Forum, the Christian Coalition, the Traditional Values Coalition, The Report, and The Concerned Women of America sponsored a campaign rally to promote the newly founded coalition, The National Campaign to Protect Marriage (CSPAN, 1996). This rally was attended by many Republican presidential nominees and was designed to expand the conflict surrounding same-sex marriage and coordinate efforts to push for same-sex marriage bans throughout the states.

In many ways this campaign is a tangible representation of the larger Christian Right social movement that developed in the late 1970s to defend traditional moral values (Green, 2000). This social movement, along with several key political allies, was able to coordinate on a large scale a substantial backlash to the litigation that took place in Hawaii.

Haider-Markel's study of policy diffusion of same-sex marriage examines the influence of conservative religious groups at the state level and finds that all of the states that introduced legislation banning same-sex marriage had conservative groups lobbying for the bill, 25 states had these groups help draft the bill, and 39 states had established connections between the sponsor of the bill and a conservative religious group (Haider-Markel, 2001).⁸ This entrenched involvement at the state level may be a possible indicator of the involvement of these conservative groups at the national level. Some scholars argue that the states were a more favorable battleground for those opposed to same-sex marriages and that the diffusion of policy from one state to another was a coordinated effort by opposition interest groups to increase the salience of the issue of same-sex marriage and geographically expand the arena of conflict with the ultimate goal of putting it on the national agenda (Johnson, 1996; Haider-Markel, 2000, 2001; Blomquist, 2007). The introductions of state Defense of Marriage Acts in 1996 were a coordinated effort for opposition interest groups to create issue salience that resulted in same-sex marriage's place on the formal agendas of state legislatures. The geographical

⁸ Haider-Markel's study measures the "links between the bill sponsor and religious group" as one of the following: "the bill sponsor held a press conference with a religious interest group, that a bill sponsor was a member or leader of a religious interest group, or that a bill sponsor made financial contributions to a religious group, such as the Traditional Values Coalition or the Christian Coalition" (Haider-Markel, 2001, 22).

expansion of the issue of same-sex marriage in early 1996 could have been taken by Congress as a signal of the necessity to address the issue.

The media.

Kingdon's analysis dismisses the importance of the media's impact on the government's agenda. Kingdon's argument that the media is largely responding to government officials and the formal agenda is apparent in the case of same-sex marriage. Media coverage in U.S. newspapers on "same-sex marriage" and "gay marriage" in a search on Lexis Nexis only found 20 articles predating the introduction of DOMA to Congress, demonstrating that the media was not following the issue of same-sex marriage until same-sex marriage was introduced to the formal agenda. The document analysis also revealed that most of the articles reiterated the story of DOMA superficially and used quotes from congressional testimony or relevant interest groups to substantiate the points made about same-sex marriage. Even for a salient issue such as same-sex marriage, the media was not responsible for the issue's agenda status. The media may have had a more indirect influence on the public, as the media most likely informed the public of same-sex marriage's place on the formal agenda, which could have in turn created greater issue salience. Establishing this connection empirically is difficult and beyond the scope of this research. The last part of this chapter will tie together the findings of this study to answer the overarching question.

Does the litigation in Hawaii over same-sex marriage prompt congressional action that results in the Defense of Marriage Act?

This research sought to answer the question of whether or not the political and legal developments in Hawaii result in the introduction of the Defense of Marriage Act to

Congress. I expected to find evidence of how the legal developments in Hawaii spurred members of Congress to introduce the Defense of Marriage Act, symbolizing the nationalization of same-sex marriage that had previously been a state issue. Political elites, the media, and scholars claim that the litigation in Hawaii over same-sex marriage is responsible for the congressional action that resulted in the Defense of Marriage Act. The explicit references in the congressional documents to the litigation in Hawaii as a catalyst for the bill makes the connection between the two seem obvious and explicit.

The research in this study finds that the litigation in Hawaii is partially responsible for congressional action that results in the introduction of the federal Defense of Marriage Act. The decision by the Hawaii Supreme Court in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) to apply strict scrutiny to the sex discrimination inherent in Hawaii's Revised Statutes §572-1 which barred same-sex couples from obtaining marriage licenses in the state of Hawaii, made it likely that same-sex marriage would be legal for the first time in U.S history. This monumental decision acted as a focusing event, capturing the attention of those that opposed same-sex marriage. Faced with the likely legalization of same-sex marriage, the opponents took action to prevent the spread of same-sex marriage to other states. While the litigation in Hawaii was a catalyst that prompted congressional action that resulted in the Defense of Marriage Act's introduction to Congress, the litigation in Hawaii is not solely responsible for DOMA. Kingdon argues that the agenda setting process is littered with multiple causalities that affect an issue's movement to the formal agenda and this study finds that it is the interaction effects of multiple variables that result in same-sex marriage's place on Congress's formal agenda (Kingdon, 2003). Understanding how same-sex marriage

becomes a federal issue with the introduction of DOMA requires looking not only at the litigation in Hawaii and DOMA but at the various participants and forces that contribute to same-sex marriages place in federal politics.

The organized interests that opposed same-sex marriage were integral to the movement of the issue of same-sex marriage from the distant litigation in Hawaii to the agenda of Congress. Interest groups and key political elites who were opposed to the legalization of same-sex marriage strategically responded to the imminent threat of same-sex marriage with the looming decision in *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) by coordinating a campaign to push same-sex marriage onto the formal agenda of the federal and state legislatures. These interest groups and political elites purposefully introduced the issue of same-sex marriage to both the systemic and formal agenda by using a variety of tactics. Those that opposed same-sex marriage framed the problem of same-sex marriage as a morality, family, and tradition issue to develop issue salience among government officials and the public that were overwhelmingly opposed to the legalization of same-sex marriage. The litigation in Hawaii was used less frequently to frame the problem of same-sex marriage but was nonetheless used to stress the urgency of government action to prevent the spread of same-sex marriage to other states. The opposition groups also used the state legislatures as a tool to geographically expand the conflict of same-sex marriage to develop substantial issue salience among political elites and the public. These opposition groups also heavily lobbied the state and federal governments to further their aims of preventing the legalization and recognition of same-sex marriage by the federal and state governments.

Members of Congress are also important participants that had a hand in moving same-sex marriage to its place on the formal agenda. Although there may have been substantial pressure from the opposition coalition to take on the issue, the members of Congress ultimately decided to introduce, support, and pass the Defense of Marriage Act. The support for DOMA in Congress, evidenced by the high levels of sponsorship and votes for passage, demonstrate Congress's willingness to legislate in an area normally reserved to the states and expand the scope of conflict about same-sex marriage from the state level to the national level. Partisanship forces also play a part in the movement of the issue of same-sex marriage to Congress's agenda, as the new Republican majority may have been key to introducing this new agenda item. Conservative religious groups, who were largely responsible for the mobilization against same-sex marriage and the lobbying activities associated with the Defense of Marriage Act, found sympathetic ears with a Republican majority and utilized this opportunity to introduce a bill that rejected the legalization of same-sex marriage at the federal level and gave states the ability to ignore the Full Faith and Credit Clause of the U.S. Constitution to disregard same-sex marriages performed in other states.

The electoral forces in this presidential election year are also an important factor that helped place same-sex marriage on Congress's agenda. The prevalence of electoral frames in the documents demonstrates the salience of the election, which was embedded in discussions about same-sex marriage and the Defense of Marriage Act. The electoral considerations in introducing the issue to formal legislative agendas is evidenced by the fact that in the first half of 1996 almost half of the states and Congress introduced legislation to prevent the recognition of out of state same-sex marriages. By introducing

the issue of same-sex marriage to legislatures in an election year, elected officials were further constrained by the public's opinion as pleasing the public in an election year can be key to reelection in the fall. Election years are also characterized by additional media attention, creating more issue salience for same-sex marriage, a new and controversial political issue. Due to the high levels of public opposition to same-sex marriage and the higher levels of media coverage on the issue, more elected officials would vote in favor of the Defense of Marriage Act, even if it went against their preferences. President Clinton's rhetoric demonstrates this dilemma that many elected officials were faced with when it came to the Defense of Marriage Act's passage. Had electoral forces not been present, we may have seen a different outcome with regards to the issue of same-sex marriage and the Defense of Marriage Act.

Overall, it is the interaction of multiple factors that are responsible for the introduction of DOMA to Congress. The legal developments in Hawaii are responsible for same-sex marriage's movement to Congress's agenda because the litigation raised awareness about the issue and prompted those who opposed same-sex marriage to take action to preempt the decision in *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) and prevent the spread of same-sex marriages to other states. The opponents of same-sex marriage took advantage of the partisan and electoral forces to introduce the issue of same-sex marriage in 1996 when it would foster the most issue salience and have the most likely chance of passage. Members of Congress, both constrained and emboldened by the electoral consequences associated with the issue of same-sex marriage, were responsible for introducing the issue of same-sex marriage to Congress with the Defense of Marriage Act, supporting same-sex marriage's place on the formal agenda. The

combination of the litigation in Hawaii, the electoral and partisanship forces present in 1996, the participation of members of Congress, and an organized conservative coalition are responsible for the emergence of same-sex marriage onto the formal agenda with the introduction of the federal Defense of Marriage Act to Congress.

CHAPTER 6

CONCLUSION

This study sought to answer the question: Did the litigation over same-sex marriage in Hawaii prompt congressional action that resulted in the Defense of Marriage Act? This study finds that the litigation in Hawaii acted as a catalyst that prompted the introduction of the federal Defense of Marriage Act to Congress. While the litigation in Hawaii was responsible for focusing attention on the issue of same-sex marriage, the decision in *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) did not cause the introduction of DOMA to Congress. It was the convergence of multiple factors that resulted in same-sex marriage's place on Congress's agenda.

The opponents of same-sex marriage, composed of both political elites and interest groups, responded to the litigation in Hawaii by coordinating a national effort to foster issue salience and move the issue of same-sex marriage to the formal agendas of legislatures. Those that opposed same-sex marriage used the pending court case in *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct.) to signify an immediate threat to the traditional institution of marriage, which had to be resolved with quick congressional intervention. These actors purposely introduced the issue to a Republican Congress in an election year to intensify issue salience and increase the chances that same-sex marriage would make it onto the formal agenda and lead to the passage of DOMA. Overall the

opposition coalition's organization in response to the litigation in Hawaii, Congress's willingness and desire to federalize the issue of same-sex marriage, and the salient electoral and partisan forces that surrounded the events in 1996 were responsible for bringing same-sex marriage to the national agenda.

Limitations

While this study does highlight specific participants – the opposition coalition and members of Congress – and specific factors – the litigation in Hawaii, partisanship, and electoral forces -- that influence same-sex marriage's place on the formal agenda, this study does not establish casual relationships. Studies of the policy process make it close to impossible to develop specific causalities due to the fact that so many factors can influence the process (Kingdon, 2003). This study instead tested a popularly held assumption that *Baehr v. Lewin* (74 Haw. 530; 852 P.2d 44; 1993) was responsible for same-sex marriage's movement to Congress. This study's finding that the litigation in Hawaii is integral to same-sex marriage's placement on the formal agenda of Congress, also finds that several other factors played a part in this process. While this study cannot say with certainty which variables caused the introduction of the federal Defense of Marriage Act, the study tries to capture the more complicated process of agenda setting and delineate the variables that are responsible for the Defense of Marriage Act.

Other limitation of this study include restraints on time, access to data, and resources that made it difficult to operationalize some of the variables and find data to test the hypothesis. While I am confident that these variables' indicators help us understand the influence of each variable, a more in-depth look at each variable may yield even more reliable results. The triangulation of the data with the use of interviews

with actors involved with the events in Hawaii and the Defense of Marriage Act may help us better answer the questions in this study. This study also has the possibility for slight inaccuracies in the data due to human error. This should not detract from the study though as this research was systematic, deliberate, and methodical.

Implications and Future Research

The findings in this study have implications for both policy and theory. The common assumption that the litigation in Hawaii causes the nationalization of same-sex marriage with the introduction of the federal Defense of Marriage Act displaces the fact that other factors are important to understanding how issues end up on the congressional agenda. This study highlights the importance of electoral forces that are strategically used to introduce an issue to the formal agenda and pass policy. Kingdon's study downplays the importance of electoral forces on the agenda setting process and this study questions that finding. The findings in this research indicate that it is important to understand how electoral implications can influence the introduction and passage of policy. This is especially important in light of the fact that the legislation examined in this study is considered by some to be an unconstitutional application of the law and an overstepping of congressional authority. Knowing how electoral forces shape the trajectory of the policy process can help us understand how new issues end up on the agenda, and can help inform strategies to block arguably discriminatory and hasty legislation that results from electoral constraints.

There are also theoretical implications that arise from this case. Kingdon's framework was useful to organize the confusing and complicated agenda setting process examined in this paper but it is not necessarily useful for explaining which variables were

significant. Separating the politics and problem streams may be organizationally useful but it does not necessarily describe the process of agenda setting accurately here. The problem stream and politics stream are significantly blurred in this study as the construction of the problem and the political forces that influence this process often influence one another. This may be due to the fact that the issue of same-sex marriage is a morality issue that is relatively distinct from other types of policy. Morality issues are defined by “clashes of first principle” or arguments over fundamental values on “technically simple and salient public policy issues with high citizen participation” (Mooney, 1999, 676). Because morality politics are a different realm of policy, it may not be prudent to use theoretical frameworks that are based on distributive and redistributive policies. Morality policy has developed a loose theoretical framework that focuses on several key variables including partisanship, public opinion, and issue salience but this framework needs to be systematically tested to create a useful framework for understanding the agenda setting process of morality issues which often have profound implications for the rights and liberties of individuals (Glick & Hutchinson, 1999; Haider-Markel, 1999; Mooney, 1999). Future research should focus on developing a framework to help explain the policy process, particularly agenda setting in relation to morality issues.

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APPENDIX A

CODING SCHEME

- Morality:** Same-sex marriage is immoral.
Bill reflects national social mores.
The push for same-sex marriage encodes deviant behavior in legal form.
Same-sex marriage is an attack on American values.
Same-sex marriage demeans or assaults the institution of marriage.
- Tradition:** Overturn years of tradition on the issue of marriage.
Radical shift in the oldest institution of civilization.
Same-sex couples want to change the definition of marriage.
Attempt to defend marriage against a radical assault.
- State's Rights:** Application of Full Faith & Credit Clause forces states to recognize same-sex marriages.
States should have the right to decide on the question of same-sex marriage.
One state should not set the standards for all other states.
- Election:** Introduce issue in the heat of a presidential campaign.
Same-sex marriage was introduced to garner support for Republicans.
Wedge issue.
Campaign issue.
Gay issue used as a political weapon.
Desperate search for a political issue.
- Family:** Uphold family values.
Affirmation of the traditional nuclear family.
The legalization of same-sex marriage alters the basic unit of the family.
Blow to the American family.
- Intolerance:** The bill is a form of gay-bashing or gay-baiting.
Discrimination against the LGBT community is illegal and unconstitutional.
Republicans are displaying bigotry against our most unpopular minority.
Bill is a form of hate against a particular group.
- Rights:** Gay couples should be given the right that everyone else enjoys.
Grant equal rights to all of our citizens.
Homosexuality is the last unfinished chapter of civil rights history.
Equal rights.
- Love:** Same-sex couples have the same committed loving relationship as heterosexual couples.
Important lifetime commitment to one another.
- Judges:** Allowing unelected judges to make policy.
Judicial activism.
Liberal judges to legislate morality.
Supreme Court of Hawaii cannot decide these issues for everyone.

- Religion:** It goes against the holy scriptures.
Religious beliefs say that being gay is wrong.
The institution of marriage between male and female is set forth in the Holy Bible.
A God given principle is under attack.
- Children:** A threat to the children's wellbeing.
Children should be raised in heterosexual households.
Marriage was created for the begetting of children.
- Equality:** Everyone is the same and should be treated the same.
Gays and lesbians are treated as second-class citizens.
- Freedom:** Same-sex couples are denied the freedom to marry.
Same-sex couples are denied the freedom to choose who they want to marry.
Bill denies the right to liberty and pursuit of happiness.
- Nature:** It is natural for men and women to be together, not same-sex couples.
We are biologically fated and cannot escape it.
Homosexuality is unnatural.
- Economy:** The cost of giving marriage benefits to same-sex marriages is not practical.
Fiscal rationale of the bill does not allow for same-sex marriage.
- Justice:** Need to fulfill the promise of justice.
- Diversity:** Same-sex marriage promotes diversity which is good for our society.