The "Defense of Marriage Act" and Authoritarian Morality

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THE "DEFENSE OF MARRIAGE ACT" AND AUTHORITARIAN MORALITY

Alec Walen

The "Defense of Marriage Act" has defined marriage at the federal level for the purpose of denying recognition to same-sex marriages. It thereby perpetuates the unequal treatment of homosexuals, and does so by denying them a fundamental right—the right to marry. In this Essay, Dr. Walen examines the wide range of justifications offered in Congress for this law. Six categories of argument are assessed: (1) politics and economics, (2) history and tradition, (3) religion, (4) the essential nature of marriage and the family, (5) social decay, and (6) morality. Walen concludes that none of the justifications prove to be adequate to deny homosexuals equal access to the institution of marriage. In addition, he argues that they point to a moral rigidity that distorts one's perception of what it means to be a homosexual. Walen concludes that this rigidity or authoritarianism produces a form of intolerance incompatible with our professed commitment to political equality and to protecting basic rights and liberties.

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INTRODUCTION

It was a foregone conclusion that the "Defense of Marriage Act" ("DOMA") would become law. A majority in this country believe that gay marriage is wrong and demeaning to the institution of marriage, and our politicians do a reasonably good job of representing the interests of their constituents, at least on such non-technical matters as this. Rare indeed was the member of Congress who expressed concern over the fact that the DOMA's sole aim was to perpetuate the unequal treatment of homosexuals. 3

1 The DOMA defines marriage, for federal purposes, as "a legal union between one man and one woman" and aspires to assure states that they do not have to recognize any same-sex marriages that another state may decide to license. 1 U.S.C. § 7 (1996).
There are both constitutional and moral problems with perpetuating inequality. Because of the constitutional problems, we may yet be saved from the law by the Supreme Court (once again protecting our democracy from its worst instincts). The potential nullification or modification of the DOMA by the courts is not, however, my concern here. Instead, I argue that denying homosexuals the same right to marry that heterosexuals currently possess is immoral. As Representative Kennedy of Rhode Island stated, debate over the bill

is really about a simple question, a question of equal rights. Marriage is a basic right. . . . Love and commitment are essential pillars of marriage. They are qualities that do not discriminate on account of gender. . . . Love and commitment can exist between a man and a woman and it can and does exist between men and between women.

The DOMA stands as an unjust obstacle to equal rights for homosexuals unless it can be shown either that (1) love and commitment are not the only pillars of marriage and whatever else might be a pillar cannot exist between two men or between two women just as well as between a man and a woman; or (2) there is some social need pressing enough to deny homosexuals a basic right. Finding and justifying this extra pillar or social need is a moral burden that no supporter of the DOMA should take lightly.

Congressional supporters of the DOMA offered a wide range of arguments. The bulk of what follows is an examination of these arguments. Focusing on the Congressional debate may seem to mistake that which is nothing but political grandstanding for serious argument. Even if I were cynical enough, however, to believe that most Congressional supporters of the DOMA really do not endorse what they say, I still would assert that


6 I will not discuss states’ rights arguments because they do not bear on that part of the DOMA that defines marriage for federal purposes. As such, they fall beyond the scope of this Essay.
politicians are professional weather vanes, which means that their words provide a telling indicator of what the people want to hear and thus of what the people who elect them think.

After examining the arguments given by Congressional supporters of the DOMA and showing that none of the arguments carries the moral burden of supporting the legislation, I propose to answer the following question: If the DOMA cannot meet its moral burden, why is it supported with such morally righteous fervor? The easy answer is that we are a culture of homophobes, and homophobes make sense of their prejudices by laying them out as moral convictions.

A deeper answer lies in the claim that our culture is permeated by a current of authoritarian moral thinking. By this I mean that many in our culture think that questioning or revising certain received truths only leads to chaos and immorality; they believe that if the state does not enforce their values, disaster will follow. These individuals see no virtue in the state being neutral between competing moral conceptions, and this shows why paying attention to the passage of the DOMA is important. The DOMA not only comes at the expense of the homosexual minority, it symbolizes the extent to which we as a culture have not yet come to terms with the ideals of liberty and equality that we espouse.

I. ARGUMENTS REGARDING POLITICS AND ECONOMICS

A. Majority Rule

REPRESENTATIVE CANADY: “Those of us who support this bill reject the view that [the choice of a partner of the opposite sex or the same sex is] a matter of indifference. . . . [I]n doing so. . . . we have the overwhelming support of the American people.” Moreover, “[s]eventy percent of the American people are not bigots, 70 percent of the American people are not prejudiced, 70 percent of the American people are not mean spirited, cruel, and hateful.”

8 Though most arguments were given by more than one member of Congress, the scope of this Essay does not require the presentation of all versions.
9 Representative Charles T. Canady (R-Fla.) co-sponsored the DOMA in the House of Representatives. He also serves on the Committee on the Judiciary, which amended the legislation before referring it to the full House.
11 Id.
RESPONSE: Painting the opposition as insulting the people who elect you is good politics but bad history. For most of our two-hundred-year history, the clear majority of people in this country thought it was immoral for whites and blacks to marry. Yet, this sentiment was an expression of bigotry. What makes the majority in today’s America suddenly immune from bigotry? Is it the fact that the majority now tolerates interracial marriage? Although the acceptance of interracial marriage may evidence a good start, this fact does not show that we are all better now. Given the aim of perpetuating unequal treatment of homosexual couples, one can assert that the DOMA’s supporters are not bigots (or unduly tolerant and deferential to bigots) only if one can give the DOMA a more substantive moral justification.

SENATOR BYRD: “Many legal scholars believe that only after a majority of society comes to a consensus on the legality or illegality of one issue or another should that issue be written down in our legal institutions. The drive for same-sex marriage is, in effect, an effort to make a sneak attack on society by encoding this aberrant behavior in legal form before society itself has decided it should be legal.”

RESPONSE: Although this argument is generally applicable more to the courts than to Congress, it does not seem right even with regard to the courts. When the Supreme Court started to desegregate the schools of this country, and then went on to strike down laws banning interracial marriage, this same thought was expressed: it is wrong to force the people to accept laws before they are ready. History seems to call for the opposite assessment, however. Ridding the law of overt racism helped bring about a change in climate such that very few now favor the kind of segregation that only a generation ago was part of the majority will. If denying homosexuals such a fundamental right as the right to marry is as much an injustice as racial segregation, then it might be again time for the law to lead the way.

Even if governments usually ought to bend to the will of the majority,

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12 See generally Loving v. Virginia, 388 U.S. 1 (1967) (invalidating antimiscegenation laws after discussing their foundations and role in the social order).
13 Senator Robert C. Byrd (D-W.V.) serves on the Senate Appropriations, Armed Services, and Rules and Administration Committees. He supported the DOMA.
this statement alone says more about how those who wield power ought to relate to those in whose name they act than about what ultimately ought to be made law. If governments ought to follow the will of the people, then the buck gets passed to the people. We, the citizens of this country, ought not want unjust laws. The DOMA seems, on its face, unjust because it perpetuates unequal treatment of homosexuals.\textsuperscript{18} To meet the moral burden of supporting the DOMA, one has to show not only that the government followed the will of the people but that the will of the people was just. Appeals to the existence of majority consensus do not establish the justice of that consensus.

B. Costs

**REPRESENTATIVE WELDON**\textsuperscript{19}: “I think it would be wrong to take money out of the pockets of working families across America and use those tax dollars to give Federal acceptance and financial support to same sex-marriage.”\textsuperscript{20}

**RESPONSE:** If homosexuals have just as much right to the benefits that accrue to married couples, this argument is quite sinister. Why not point out that Jews take up benefits as well, benefits that cost the taxpayer money and that could go to nice Christian couples? One answer is obvious: Jews are taxpayers too, and they have just as much right to those benefits as Christians. Likewise, homosexuals are taxpayers, and unless a separate argument shows that they are not entitled to the benefits, this argument is just as evil if applied to them as if applied to Jews.

C. Forcing Support of What People Do Not Want To Support

**REPRESENTATIVE FUNDERBURK**\textsuperscript{21}: “If you are a devout Christian or Jew, or merely someone who believes homosexuality is immoral and harmful, and the law declares homosexuality a protected status, then your

\textsuperscript{18}The DOMA defines “marriage” exclusively in terms of “a legal union between one man and one woman” and “spouse” as referring “only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C §7 (1996). These terms, given their plain meaning, necessarily preclude homosexual couples from qualifying as married under the law.

\textsuperscript{19}Representative Curt Weldon (R-Pa.) serves on the House of Representatives’ National Security and Science Committees. He co-sponsored H.R. 3396, which ultimately became the Defense of Marriage Act.


\textsuperscript{21}Representative David Funderburk (R-N.C.) serves on the House Agriculture, Economic and Educational Opportunities, and International Relations Committees. He strongly supported the DOMA.
personal beliefs are now outside civil law. . . . Businessmen would have to subsidize homosexuality or face legal sanctions; schoolchildren will have to be taught that homosexuality is the equivalent of marital love; and religious people will be told their beliefs are no longer valid.”

RESPONSE: There is no sound general principle here. It cannot be that sincere ethical beliefs ought never be “outside the law.” Currently, homosexuals who want to marry are “outside the law,” as are pacifists, ethical vegetarians, segregationists, and even those devout Christians and Jews who do not believe in divorce. Life in a pluralistic society requires that some sincere ethical beliefs not be represented in the law. The question is, whose beliefs should be represented in the law? Unequal treatment of homosexuals with regard to a fundamental right puts the moral burden on supporters of the DOMA. To meet it, more substantial reasons than the ones proffered so far are required.

Of course, society ought not suppress freedom of religious expression. But that is not what state recognition of same-sex marriage would do. Consider the analogy of abortion. Religious adherents are not told that their beliefs are no longer valid. Instead, they are told no more than that their views will not be allowed to restrict the freedom of women who would choose otherwise. Choice does not suppress religion, but revoking the right to choose because of religious objections might amount to an establishment of religion. Likewise, allowing homosexual marriage would not suppress religion; it would be nothing more than a refusal to establish the views of some religions.

As for businesses, some businesses likely would have to provide the same benefits for same-sex spouses as for different-sex spouses. As with all civil rights regulation, however, a proper balance between private interests and social fairness would be sought. Small family businesses could be left fairly free to hire and give benefits as they choose, whereas large corporate businesses would have to meet stricter fairness standards. Just as this balance works in the rest of civil rights law, there is no reason why it cannot work if civil rights are extended to homosexuals and same-sex couples.

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24 The First Amendment to the United States Constitution provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.
II. HISTORY AND TRADITION

A. American Cultural Tradition

SENATOR NICKLES: "The definitions of [the DOMA] are based on common understanding rooted in our Nation's history, our statutes, and our case law. They merely reaffirm what Americans have meant for 200 years when using the words marriage and spouse."

RESPONSE: Indeed, the American Heritage Dictionary defines marriage as "the legal union of a man and woman as husband and wife." But languages change, and so do dictionary definitions. Definitions cannot be based only on past usage; they also have to reflect current trends and newly evolving uses. Likewise, tradition itself does not say to us, "this is how it has been, and so this is how it must be." Tradition too can be dynamic. Consider the words of Senator Moseley-Braun: "[O]ur history has been a history of making progress, albeit sometimes in fits and starts, but making progress toward full implementation of . . . American values for all of us." Given this tradition of progress, we are now called upon to extend equal treatment to homosexuals, in part by acknowledging their right to marry. If the traditional definition of marriage is to be maintained, it has to be because a proper understanding of equality does not call for extending to homosexuals the right to same-sex marriage.

B. Universal Exclusion of Anything but Traditional Marriage

SENATOR GRAMM: "[T]he traditional family has stood for 5,000 years. . . . In every major religion in history, from the early Greek myths of the "Iliad" and the "Odyssey" to the oldest writings of the Bible to the oldest teachings of civilization, governments have recognized the traditional family as the foundation of prosperity and happiness. . . . Human beings have always given traditional marriage a special sanction. . . . Are we so
wise today that we are ready to reject 5,000 years of recorded history? I do not think so.”

    RESPONSE: If this argument, based on humility, were remotely grounded in history, it would be worth serious consideration. It simply is not true, however, that all societies throughout history have given “special sanction” to marriage defined as a legal union between one man and one woman.

    Polygamy has tremendous historical credentials. Jacob, son of Isaac, married two wives, Leah and Rachel, and had children through them and their handmaids. Solomon had seven hundred wives and three hundred concubines and this was considered sinful only because the wives and concubines were foreign, not because there were so many. Muslims still allow men to marry more than one wife. In Tibet, some women marry two or more men.

    As one commentator noted,

    Same-sex unions were an integral part of the cultures of classical Greece and republican Rome, and imperial Rome recognized same-sex marriages. During the Middle Ages the Greek Orthodox and Roman Catholic Churches celebrated same-sex unions, as did imperial China. . . . Marriages in the so-called berdache tradition of gender-crossing effeminate men and “amazon” women have been documented for dozens of other cultures in Africa, Australia, and Asia.

    C. History of Social Decline and Homosexuality

    SENATOR BYRD: “[A]s history teaches us[,] too often in the past, when cultures waxed casual about the uniqueness and sanctity of the marriage commitment between men and women, those cultures have been shown to be in decline. This was particularly true in the ancient world in Greece and, more particularly, in Rome. In both . . . , same-sex relationships were not uncommon. . . . [T]he Emperor Nero, who reigned between 54 and 68 A.D., took the marriage vows with a young man named Sporus, in a very public ceremony . . . .”

33 Genesis 29:15 to 29:30, 30:1 to 30:8.
34 1 Kings 11:1 to 11:3.
35 DR. GAMAL A. BADAWI, POLYGAMY IN ISLAMIC LAW 4-9 (1972).
RESPONSE: First, that is factually inaccurate. Homosexuality was approved not in periods of decline but in the golden ages of both Greece and Rome.39 (Not to sing Nero’s praises, but the Roman Empire lasted another four hundred years after his reign.40) Indeed, under Roman law, homosexual marriage between men was possible until at least 342 A.D.41 Second, even if there is some truth to the claim that Rome fell because of the decadence and corruption of the people, the connection between homosexual marriage, on the one hand, and decadence and corruption, on the other, is far from clear. Presumably, allowing homosexuals to marry would enable them to be more serious, not more decadent. Perhaps the concern is that if marriage is defined so loosely as to allow for same-sex unions, it ceases to be a serious institution. I will return to this theme,42 but it is worth pointing out here that same-sex marriage is inherently degrading and corrupting only if homosexual behavior is essentially licentious. Homosexuality is not essentially licentious, but the belief that it is, I will argue, is central to the ultimate justification (or lack of justification) of the DOMA.

III. RELIGION

REPRESENTATIVE HUTCHINSON43: “[M]arriage is a covenant established by God wherein one man and one woman are united for the purpose of founding and maintaining a family.”44

REPRESENTATIVE CANADY: “I believe that the traditional family structure-centered on a lawful union between one man and one woman—comports with . . . our Judeo-Christian moral tradition.”45

RESPONSE: The appeal to the Judeo-Christian tradition allows one to dismiss certain practices, such as those of the Greeks and Romans, as alien

39 See, e.g., THE OXFORD CLASSICAL DICTIONARY 720-23 (3d. ed. 1996) (referring to the act of sex as requiring a polarization of sexual partners into categories of penetrator and penetrated, rather than an act specifically between a male and a female). “[A]ttraction [by men to boys] was deemed normal and natural.” Id. at 723.
40 Nero was emperor from 54 to 68 A.D., and the Roman Empire lasted until late into the 4th century. Id. at 1037, 1332.
42 See infra Part V.
43 Representative Tim Hutchinson (R-Ark.) serves on the House Transportation and Infrastructure, Veterans’ Affairs, and Economic and Educational Opportunities Committees. He supported the DOMA.
and benighted because of ignorance of the Word of God. The Word of God also may seem to have more stability and authority than the American tradition on its own. But this is an immensely problematic argument for several reasons.

First, one of the foundational commitments of this country is the separation of church and state. If a particular religion does not want to sanction same-sex marriage, the government should not force it to do so. As Senator Robb noted, "government has a role only in the civil institution, separate and distinct from marriage as a religious ceremony." The fact that certain religious groups do not want to give religious sanction to homosexual marriages cannot justify the government following suit. The government can justify denying civil sanction to same-sex marriages only if there is a legitimate secular reason for doing so. No such reason has been offered.

Second, as already noted, the Bible does not represent marriage as necessarily monogamous. Moreover, the Bible says not only "You shall not lie with a male as with a woman," but "You shall not approach a woman to uncover her nakedness while she is in her menstrual uncleanness." Indeed, the Bible says, "If a man lies with a woman having her sickness and uncovers her nakedness ... both of them shall be cut off from their people." This punishment is almost as severe as the death penalty called for if two males have sex together. Where, then, are the calls for denying the benefits of marriage to those who have intercourse while the woman is menstruating?

Finally, most religions recognize that they have to pick and choose which of the Bible’s injunctions to follow, and many presumably take as their guiding principle the ideal of love. Accordingly,

the Unitarian Universalist Association now affirms the growing practice of some of its ministers of conducting services of union of gay and lesbian couples and urges member societies to support their ministers in this practice. The Society of Friends leaves all issues to congregational decision, and thousands of same-sex marriages have

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46 See supra note 24.
47 Senator Charles S. Robb (D-Va.) serves on the Senate Armed Services, Foreign Relations, Select Intelligence, and Joint Economic Committees. He opposed the DOMA.
49 See supra notes 33-37 and accompanying text.
50 Leviticus 18:22.
51 Leviticus 18:19.
52 Leviticus 20:18.
53 Leviticus 20:13 (“If a man lies with a male as with a woman, ... they shall be put to death ....”).
54 3 THE ANCHOR BIBLE DICTIONARY 149 (1992) (referring to “hermeneutics,” the method and technique used to interpret written texts).
been sanctified in Quaker ceremonies since the 1970s. . . . The General Assembly of the Union of American Hebrew Congregation (Reform Jewish synagogues) adopted a resolution in 1993 advocating legal recognition of same-sex unions.\textsuperscript{55}

Same-sex marriages "have been sanctified by representatives of virtually all of America's leading religions."\textsuperscript{56}

IV. ESSENTIAL NATURE OF MARRIAGE AND FAMILY

A. The Essence or Definition of Marriage

SENATOR COATS\textsuperscript{57}: "The definition of marriage is not created by politicians and judges, and it cannot be changed by them. . . . It is the union of one man and one woman. This fact can be respected, or it can be resented, but it cannot be altered."\textsuperscript{58}

RESPONSE: This argument is too rigid and implausibly narrow. It is too rigid because a specific concept is more open to debate and less a matter of fact than this argument allows. Consider the concept "____ is a sport." Tennis is a sport, but what about jump rope, tai chi, or chess? People will disagree on whether to include each of these activities within the classification of "sport." Their disagreement shows that the concept of "sport" has a fuzzy boundary. For some purposes it makes sense to restrict the concept to competitive events; for others, to events that involve exertion. Insisting that one has insight into the pure essence of a concept only obscures the background presumptions and purposes one brings to a debate.

Senator Coats's claim for the definition of marriage is too narrow because it is implausible that our general concept of marriage does not extend to polygamous marriages. Reasons, not mere assertions, are required to establish that marriage cannot include same-sex couples.

REPRESENTATIVE BARR\textsuperscript{59}: "To [extremist homosexual groups] marriage means just two people living together alone. . . . In other words, it means absolutely nothing."\textsuperscript{60}

\textsuperscript{55} ESKRIDGE, \textit{supra} note 37, at 47 (internal quotations omitted).
\textsuperscript{56} \textit{Id.} at 46.
\textsuperscript{57} Senator Daniel R. Coats (R-Ind.) serves on the Senate Armed Services and Labor and Human Resources Committees. He supported the DOMA.
\textsuperscript{58} 142 CONG. REC. S4947 (daily ed. May 9, 1996) (statement of Sen. Coats).
\textsuperscript{59} Representative Bob Barr (R-Ga.) serves on the House Judiciary, Veterans' Affairs, and Banking and Financial Services Committees. He supported the DOMA.
RESPONSE: Supporters of same-sex marriage actually can endorse a number of substantive necessary conditions on the proper use of the concept of marriage. Certainly supporters of same-sex marriage believe that a man and a woman are not married simply by virtue of living together. A couple must make a commitment to be with each other. The commitment must not have a time limit and the commitment must be serious—"for better or for worse." Likewise, they must want to be with each other as lovers, not just as friends—"to have and to hold." Finally, they must feel a level of affection not shared by mere roommates—"to love, to honor, and to cherish." Supporters of same-sex marriage can acknowledge that these are the essential ingredients of a marriage between a man and a woman. They simply point out that none of these ingredients will be lost if the marriage is between people of the same sex.

Because this response is so obvious, it is necessary to question what point Senator Barr intended to establish. Perhaps it was one of the following three claims.

B. Procreation

SENATOR BYRD: "The purpose of this kind of union [marriage] between human beings of opposite gender . . . [is to] bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large. . . . Of course, children do not always result from marriages as we have traditionally known them. But out of same-sex relationships no children can result."

RESPONSE: Out of same-sex relationships children can and do result. Lesbian couples can use sperm donors; gay couples can use surrogate mothers. Lesbian and gay couples can cooperate, producing children for both. And both types of couples can adopt.

Consider also the implications of this emphasis on child bearing. If we deny same-sex couples the right to marry because they cannot reproduce without the aid of others, we could deny heterosexual couples, one or both of whom is infertile, the right to marry. And if a couple has no children before the woman exceeds child-bearing age, we could annul the marriage. If these limits on marriage seem ludicrous, then we should not deny same-sex couples the benefits of marriage because of their inability to reproduce without outside aid.

C. Parenting

SENATOR BYRD: “If same-sex marriage is accepted, ... America will have said that children do not need a mother and a father, two mothers or two fathers will be just as good. This would be a catastrophe.”

RESPONSE: Senator Byrd’s argument is that even if same-sex couples can procreate (with the help of third parties), they cannot parent well. At least three problems are apparent with this argument. First, procreation is not essential to marriage. Therefore one’s child-rearing capacity cannot be a prerequisite to marriage.

Second, a legal marriage for heterosexual couples does not require any testing of parenting skills. Surely a child-abuser’s parenting skills are highly questionable, yet child-abusers have a constitutional right to marry. Therefore, it seems senseless to deny a right of marriage to same-sex couples because of putative parental shortcomings.

Finally, Senator Byrd’s argument wants for evidence. According to Professor William Eskridge, “Studies have repeatedly shown that children raised in gay and (especially) lesbian households are as well socialized, as psychologically adjusted, and as capable of forming healthy peer relationships as children raised in different-sex or single-parent households.” And in the recent Hawaii gay marriage case Baehr v. Miike, the judge, after hearing the testimony of several experts for both sides, held that gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.

D. Homosexuals’ Alleged Inability to Commit

REPRESENTATIVE COBURN: “[T]here are studies to say that over

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63 See, e.g., Baker v. Nelson, 191 N.W.2d 185 (1971) (acknowledging that the state did not require heterosexuals desiring to marry to show an intent or ability to procreate).
64 See, e.g., Rodriguez v. State, 378 So.2d 7 (Fla. Dist. Ct. App. 1979) (holding that defendant could not be denied the right to marry or procreate as a condition of her probation).
65 ESKRIDGE, supra note 37, at 112-13.
67 Id. at *17.
68 Representative Tom Coburn (R-Okla.) serves on the House Commerce Committee. He supported the DOMA.
43 percent of all people who profess homosexuality have greater than 500 partners."

RESPONSE: Perhaps the claim that some homosexuals cannot commit to one individual is meant to suggest that homosexual couples cannot form a stable family unit and therefore cannot be good parents. Or perhaps this is a self-standing argument that homosexuals ought not to be allowed to marry because they cannot commit, and marriage requires commitment. The argument is insufficient to justify the DOMA under both interpretations.

First, many heterosexuals are unable to commit to one partner, yet they are not denied the right to marry. Second, some homosexuals can, and do, commit; lesbian couples in fact are known for their monogamous, long-term relationships. Third, presumably only those same-sex couples that really want to commit to each other would seek to marry. Fourth, such statistical probabilities clearly could not be used to prohibit a marriage between a man and a woman. Finally, the problem that some gay couples have in committing should be an argument for, not against, gay marriage. If commitment to one person is a virtue, and marriage is the institution by which society recognizes and agrees to support such a commitment, then homosexuals should be allowed to marry.

E. A Slippery Slope: Drawing the Line at Polygamy, Incest, and Child Marriage

REPRESENTATIVE LARGENT: "What logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child, or any other odd combination that we want to have?"

RESPONSE: If we agree that marriage is a fundamental right, then the only acceptable limitations on the exercise of that right are either those that can be given a strong justification or those that are very limited in scope. If there is nothing wrong with polygamy, incest, and child marriage,

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72 Representative Steve Largent (R-Okla.) serves on the House Budget and Science Committees. He supported the DOMA.
and if negative reactions to these practices reflect nothing but unreasonable prejudice, then these practices also should be allowed. If, however, there are real problems with these practices, and the restrictions placed on them are not disproportionate to the problems, then there is no reason to fear a slippery slope.

I believe that there are sound reasons almost everyone would recognize to reject polygamy, incest, and child marriage. Nevertheless, it is important to recognize that the restrictions on these types of marriages are fairly limited in scope. None of the restrictions are likely to have the effect of preventing certain classes of people from ever having the opportunity to marry.

The restriction on child marriage is easy to justify. This restriction can be likened to the restrictions placed on driving, drinking, and voting, each of which is based in part on the fact that the judgment of minors does not fully develop until the age of majority.75 Eskridge noted that children “lack the experience necessary to evaluate data and consequences, tend to sacrifice future benefits for present pleasure much more than adults do, and respond extravagantly to immediate stimuli and peer pressure.”76 Additionally, because the restriction is temporary in nature, it does not require a strong justification.

Similarly, two reasons can be given for prohibiting polygamy. First, there is a strong state interest in promoting and protecting the equality of women in our culture. Eskridge surmised, “In a society such as ours, where men not only hold more economic and political power than women but are also less numerous, the typical pattern would be that a man would take more than one wife but a woman would take only one husband.”78 Polygamy thus would tend to increase the power of men, who could pit their wives against each other. Therefore, “polygamy could be a major setback for women’s equality in the United States.”79 Second, the problem of line drawing must be considered. How would we determine how many wives is too many?80 We do not want to make the benefits of marriage

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76 ESKRIDGE, supra note 37, at 147.
77 In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court created an intermediate scrutiny standard of review for gender-based classifications. According to the Court, “[T]o withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.” Id. at 197.
78 ESKRIDGE, supra note 37, at 149.
79 Id.
80 Many Muslims think the right number is four. After a battle that left many widowed women, Muhammad had a revelation that allowed up to four wives. He later had another revelation exempting himself from this limit. GERALDINE BROOKS, NINE PARTS
available to any number of partners. Given the problem of exacerbating the inequality of women, it is reasonable to insist that one spouse suffices for the companionship and support that another wishes to secure. The difference between one spouse and no spouse is, after all, much greater than the difference between one spouse and more than one spouse.

Finally, there is the question of incest. One of the traditional justifications for disallowing incestuous marriages—that inbreeding causes genetic problems—is inadequate. First, it is not clear that the genetic problem is as serious as once thought, and second, this justification for denying a marriage license is inapplicable if one of the relatives is infertile.

A better justification is that the family is full of extremely potent power structures and expectations, and it would allow too much room for improper coercive pressure if immediate family members could marry. It could be that this justification is insufficient to cover cases such as those in which two adults discover, after falling in love, that they are related. If better justifications for the prohibition on incestuous marriage cannot be found, we might be obliged to relax the prohibition in some cases. But in general, we should not be too concerned about the prohibition on incest because the restriction rules out only a few specific people as potential spouses for each person.

The relevance of these arguments for assessment of the DOMA is twofold. First, the restriction on same-sex marriage is much more sweeping. The restriction has the effect of prohibiting a whole class of people from finding a suitable spouse. Second, unless some similar, but more compelling, substantive reasons can be produced to explain why homosexuals should not marry, the DOMA will remain an unjustified attempt to perpetuate inequality.

V. SOCIAL DECAY

A. Encouraging Homosexual Behavior

REPRESENTATIVE CANADY: “Should this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same-

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81 See Eskridge, supra note 37, at 150 (quoting Caroline S. Bratt, Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free To Marry?, 18 Fam. L.Q. (1984)).

82 John Sayles’s movie “Lone Star” provides a compelling contemporary example of incestuous relationships and reasons for such a relaxation. LONE STAR (Sony Pictures Classics 1996).
RESPONSE: Presumably, the worry here is that if we permit homosexual marriage, we will cause more children to grow up to engage in homosexual behavior. For this to be a valid objection, it must be shown that homosexual behavior is harmful either to those who engage in it or to others. No valid evidence exists in support of this contention.  

Perhaps the underlying worry is that if the rejection of the DOMA is perceived as condoning homosexuality, most people will “become” homosexual, and most of them will not have children, causing society to implode. I do not know of any evidence that there was ever a society that became predominantly homosexual, even in times when homosexuality was fashionable. Moreover, if homosexuals can discover that they are attracted to members of the same sex despite all the pressures to be heterosexual, it stands to reason that heterosexuals would be able to discover that they are attracted to members of the opposite sex in an environment which tolerates homosexual marriages.

B. The Destruction of Family and Society

REPRESENTATIVE HUTCHINSON: “[O]ur country can survive many things, but one thing it cannot survive is the destruction of the family unit which forms the foundation of society.”

SENATOR BYRD: “The suggestion that relationships between members of the same gender should ever be accorded the status or the designation of marriage flies in the face of the thousands of years of experience about the societal stability that traditional marriage has afforded human civilization.”

RESPONSE: This argument echoes the argument which attempts to correlate homosexuality with social decline and encapsulates the concerns of supporters of the DOMA, many of whom worry about the divorce rate, the

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84 I do not assert that declaring oneself to be homosexual never has negative consequences; homosexuals often face discrimination. See, e.g., Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. REV. 197 (1994); Christopher B. Turcotte, Comment, When “Coming Out of the Closet” Means Being Tossed Out of the Military: Homosexual Discrimination in the Armed Forces, 2 SETON HALL CONST. L. J. 197 (1994). Nevertheless, homosexuality has not been shown to be intrinsically harmful, and avoiding homosexuality because of the prejudice of others should be anathema to a proud person.
large number of single mothers, and other related phenomena. Once again, however, historical perspective is completely lacking.

First, the argument implies that there is a correlation between the traditional family and social stability. Yet, this century, one in which the traditional family was, until recently, the only option in North America and Western Europe, cannot be described as stable. We experienced World War I, World War II, the communist revolutions, and the end of colonialism. Women won the right to vote, joined the workforce, and minorities struggled for civil rights. The previous century, also one in which the traditional family was the only form of family available to most people in North America and Western Europe, saw the Napoleonic Wars, the United States Civil War, the end of slavery, the Industrial Revolution, labor unrest, and the vast transformation of society as the majority of the population migrated from farmlands to cities. We have the same Constitution, Civil War Amendments notwithstanding, but “stability” simply does not characterize our country’s history.

Second, supporters of the DOMA assert that disallowing same-sex marriages will help families “remain” stable. This assertion is groundless. Forbidding homosexual marriage does nothing to help married couples deal with the problems of violence or drug abuse and provides no resources for education or counseling. It makes it more likely that same-sex couples will break up. It makes it more likely that homosexuals who want to marry will marry a member of the opposite sex, thereby creating marriages that are highly susceptible to divorce or infidelity when the homosexual partner realizes that he or she is not satisfied in the heterosexual relationship. Family stability does not seem to be the aim of this law.

Perhaps the underlying idea is that if marriage is not defined narrowly, it will not be taken seriously, and the family will fall apart. Insofar as this has any plausibility, the relevant narrowness is in the seriousness of the commitment. The threat is the “Hollywood marriage”: all glitter and no substance. As was already argued, however, the idea that the commitment must be serious is in no way incompatible with extending to same-sex couples the right to marry.

VI. MORALITY

REPRESENTATIVE BARR: “The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foun-
dations of our society: the family unit.”

REPRESENTATIVE BUYER\textsuperscript{91}: “There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they want, as long as it feels good and does not hurt others.”\textsuperscript{92}

REPRESENTATIVE COBURN: “I come from a district in Oklahoma [where people have] very profound beliefs that homosexuality is wrong. . . . They base [those] belief[s] on what they believe God says about [homosexuality]. . . . They believe . . . homosexuality is immoral, that it is based on perversion, that it is based on lust.”\textsuperscript{93}

RESPONSE: The moral argument is the real underlying theme for supporters of the DOMA. It appeals to two sources of moral authority: religious doctrine and the secular idea that homosexual behavior is a form of licentiousness. The religious argument was examined previously\textsuperscript{94} and found to be wanting. Not all religions agree that homosexuality is immoral. In addition, this country is founded on the principle of separation of church and state.\textsuperscript{95} Accordingly, the moral burden of justifying the inequality perpetuated by the DOMA can be carried only if the licentiousness argument has merit.

I accept the premise that licentiousness is bad. If homosexuality were based on perversion, lust, hedonism, or narcissism, it would be morally undesirable. Any respectable morality must be more than self-centered and must invoke standards with more substance than “do it as long as it feels good and does not hurt others.” Any acceptable moral position must also emphasize the cultivation of virtues such as courage, love, wisdom, kindness, and commitment. But what reason is there to think that homosexuality is incompatible with the cultivation of such virtues?

Let us focus first on lust, hedonism, and narcissism. Some homosexuals act on the basis of lust, but so do some heterosexuals. Some homosexuals are hedonistic and narcissistic, but so are some heterosexuals. Even if these traits were found more often among homosexuals than heterosexuals, how can one justify painting homosexual behavior as essentially based on these motives? How can one justify such a sweeping claim in the face of com-

\textsuperscript{91} Representative Coburn (R-Okla.) serves on the House Commerce and Science Committees. He supported the DOMA.
\textsuperscript{94} See supra Part III.
mitted, loving, courageous, kind, and otherwise virtuous homosexual unions?

One cannot. Homosexuality is not based essentially on lust, hedonism, or narcissism. The nature of the attraction and the reasons for forming relationships are essentially the same for homosexuals as for heterosexuals. Some do it for lust, pleasure, or ego gratification, but serious, mature adults form loving relationships that transcend these motives. Whether homosexual or heterosexual, the range of possibilities from shallow and base motives to deep and virtuous ones is exactly the same. Sexual orientation determines the pool of people with whom one may form an intimate relationship, but it in no way determines the quality of the relationship one may form.

Perversion is a more difficult category to discuss because it is unclear what is meant. The term conveys the idea that homosexuality is in some way unnatural, but in what way? Animals engage in homosexual behavior, as do members of all human societies. Perhaps the point is teleological, that we are given a sex drive to reproduce. But if reproduction is the issue, then all sexual intimacy that is not directed at reproduction should be considered perverse.96 Some people may hold this narrow view, but it is so broadly condemning of much heterosexual as well as homosexual behavior that I believe it has very limited appeal. Besides, is the overriding purpose of our lives to reproduce? This is a morality for rabbits, not humans. Anything more generous than this lapine morality, such as a morality that praises love and affection, has another way to make sense of non-reproductive sexual activity—it can be a profound way of showing love and affection.

Finally, I am not relying on the common, but unsound, argument that homosexuality is not immoral because it is not a choice. Homosexual orientation may be an inalienable characteristic, but one does not have to engage in homosexual activity. Pedophilia also may be an inalienable characteristic, but such a fact would not, and does not, justify having sex with children. What distinguishes homosexuality from pedophilia is not the presence or absence of choice but the fact that there is no sound argument that something is morally wrong with homosexual behavior.

VII. CONCLUSION

The main question raised by the preceding review of the arguments in favor of the DOMA is, why do many people think there is a deep connection between homosexuality and licentiousness? The underlying theory must be that homosexuality is obviously wrong, and one would engage in it only if one were driven by lust or if one substituted a hedonic principle for morality. This is so implausible, however, that one must wonder why the theory seems to have captured the imagination of so many.

96 See supra Part IV.B.
My answer is that those who share this belief are moral authoritarians. They are so certain and dogmatic about their moral convictions that they cannot see other moral points of view as reasonable alternatives. They cannot recognize the position that values homosexual love as highly as heterosexual love as a serious moral point of view. They feel compelled to dismiss homosexuality as relying on a crude hedonistic principle unworthy of being dignified under the concept of morality.

This analysis also fits with their belief that the family and society are on the brink of disaster. The belief seems to be that if we, as a society, cease to endorse their moral principles, then there will be a moral free-for-all, chaos without norms. They cannot abide the thought of being merely one moral view among many; if society and the law are not shaped by their moral outlook, then disaster, they are certain, will follow.

The moral uncertainty and social instability that moral authoritarians interpret as moral chaos and imminent social collapse are actually the growing pains of real moral progress: the growth of political equality. Among the most profound changes during this century were the emergence of the voices of, and the extension of greater authority to, women, blacks, and all those previously denied positions of power. These changes were necessarily disruptive to the norms of the old hierarchical order according to which the woman ruled over the children, the man over the woman, the white man over the black man, and the propertied white man over the poor white man. In such a world, everyone knew the role expected of him or her, and such knowledge was probably comforting for many. That world, however, was one in which people were forced into roles regardless of how well they fit. It was a world of unjustifiable privilege and authority for some and poverty and powerlessness for others. Breaking down the hierarchy that defined that world was, and continues to be, possibly the most profound moral progress in the history of mankind.

The demise of the old hierarchy set a challenge for institutions such as marriage. Marriage will not be stable until it accommodates the equality of women. For this purpose, homosexual marriage, rather than being a threat, may actually provide a model. Same-sex partners will not be as tempted as different-sex partners to assume that one person should do one kind of work while the other does another. Same-sex partners will be more likely to share responsibility in an equitable way, dividing it flexibly, aiming to accommodate the real rather than the stereotyped differences in their skills and prefer-


ences. Same-sex marriages may mimic the sex roles of different-sex marriages and may suffer from a lack of broad social support, but they are at least more likely than most to form true egalitarian relations.

I do not expect everyone to agree that homosexual marriages could be a model for heterosexual marriages. Nevertheless, the current state of the law, perpetuated by the DOMA, does not acknowledge that possibility. Instead, it establishes the moral beliefs of the majority as official state doctrine. Ultimately, this is no different from the establishment of a state religion. It flies in the face of our core American commitment to the proposition that basic rights and liberties, those essential to leading what one considers to be a good life, should be restricted only as far as necessary to preserve those things that almost everyone agrees are important.

Is marriage a fundamental right? If not, the state could decide to limit the right to marry in order to achieve all types of goals. It could deny marriage licenses to people with known drug or alcohol problems, to people who were adulterous in past marriages, or to people who we learn from social science are unlikely to make a lasting bond. That we would not tolerate such attempts at social engineering shows that we think marriage is a fundamental right. Thus, we should recognize that the state cannot justify restricting the right to marry unless the restrictions are narrowly tailored and necessary to achieve compelling and, I would add, generally recognized social goals.\footnote{Cf. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that antimiscegenation laws could not survive strict scrutiny) (“Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the state.”).}

Helping families provide stable homes for children is at least an important social goal. The connection between this goal and the suppression of homosexual unions, however, is so dubious that it cannot possibly support the sweeping restriction on all such unions. Likewise, the goal of suppressing homosexuality as an intrinsic evil is not a generally recognized social goal. Although a majority of Americans currently opposes same-sex marriage,\footnote{See, e.g., Marriage—Toughest Battle Lies Ahead, HRC Q., Winter 1996, at 16 (citing a survey indicating that 56% of Americans oppose the legalization of same-sex marriages).} such a majority pales in comparison to the general consensus on the importance of values like love and commitment. That is why the supporters of the DOMA try to depict homosexuality as essentially incompatible with those values. No such incompatibility exists, however, and thus the supposed justifications fail.

Moral authoritarians refuse to accept the moral burden of justifying restrictions on basic rights and liberties. They see society as either for them or against them, and they seek to make it for them. The moral authoritarian supporters of the DOMA erroneously think that allowing homosexuals to
marry would advantage homosexuals. But, by allowing same-sex marriages, the state would not thereby favor homosexual marriages or the views of those who support them, it simply would extend to those in nontraditional marriages the privileges currently afforded solely to those in traditional marriages. Different views on marriage could then vie for adherents, just as different religions do, without appeal to the coercive power of the state.

Admittedly, neutrality may not have neutral effects. Some values will flourish more than others in a free environment. Some values may need the state to prop them up if they are to survive or stay prominent. But such is not the business of the state, at least not when basic rights and liberties are at issue. Those who embrace traditional values are free to sell their wares in the marketplace of ideas, but they have no just claim for protectionist measures.

Just as I accuse those who oppose homosexual marriage of moral authoritarianism, others might accuse me of the same, because I still am willing to endorse certain substantive values on which not all agree. I think marriage ought to be supported by the state, but not everyone agrees on the value of commitment and marriage. Libertarians do not believe the state should support marriage over any other form of social union; they would allow the state to interfere with personal liberty only insofar as it is necessary to protect against certain specific harms. But their critique is much more radical than mine. I believe that people who accept that marriage is a fundamental right cannot describe substantive values on which they would all agree and by appeal to which they could justifiably denying homosexuals the right to marry. The libertarian critique does not rely on any such agreement about fundamental rights; it assumes a radical conception of liberty according to which our laws as a whole are unjust.

Ultimately, the state must decide the proper balance between liberty and the enforcement of particular values. The liberal position is a moderate one between the libertarian and the communitarian extremes. According to the liberal, the state can enforce values that not everyone shares, but it should seek, insofar as there is general agreement on basic rights and liberties, to limit these basic rights and liberties as little as possible and to impose only those limitations that rest on very widely shared values.

The supporters of the DOMA won by huge margins in both the House of Representatives and the Senate. It is tempting to shrug and say that the DOMA is simply a small setback for homosexual rights. At bottom, 

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102 See 142 CONG. REC. D735-01 (daily ed. July 12, 1996) (reporting that the House of Representatives passed the DOMA by a vote of 342 to 67, with two voting “present” (Roll No. 316)); 142 CONG. REC. D912-02 (daily ed. Sept. 10, 1996) (reporting that the Senate passed the DOMA by a vote of 85 to 14 (vote No. 280)).
however, it represents a failure to follow the progress of political equality, a failure to live up to our commitment to protecting basic rights and liberties, and a retreat into moral authoritarianism.