

NOTES

THE DEFENSE OF MARRIAGE ACT: CONGRESS'S USE OF NARRATIVE IN THE DEBATE OVER SAME-SEX MARRIAGE

CHARLES J. BUTLER*

All this rhetoric . . . is an attempt to evade the basic question of whether the law of this country should treat homosexual relationships as morally equivalent to heterosexual relationships. . . . Should we tell the children of America that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships? Shall we tell the children of America that in the eyes of the law, the parties to a homosexual union are entitled to all the rights and privileges and benefits that have always been reserved for a man and a woman united in marriage?

—Representative William Canady, sponsor,
Defense of Marriage Act, July 11, 1996

INTRODUCTION

President Clinton signed the Defense of Marriage Act¹ (DOMA) at midnight on September 21, 1996.² This law permits states to refuse recognition to "any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."³ Further, it defines the words "marriage" and "spouse," for purposes of federal statutes and regulations, to make clear that they refer solely to relationships between persons of the opposite sex.⁴ The House of Representatives passed the measure 342 to 67.⁵ The Senate passed it 85 to 14.⁶

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¹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C.A. § 1738C (West Supp. 1998) and 1 U.S.C.A. § 7 (West 1997)).

² See Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. Times, Sept. 22, 1996, at A22.

³ Defense of Marriage Act (DOMA) § 2(a), 28 U.S.C.A. § 1738C (West Supp. 1998).

⁴ See DOMA § 3(a), 1 U.S.C.A. § 7 (West 1997). This definition applies "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." *Id.*

⁵ See 142 Cong. Rec. H7505-06 (daily ed. July 12, 1996).

⁶ See 142 Cong. Rec. S10,129 (daily ed. Sept. 10, 1996).

DOMA represents an extraordinary act of Congress for two reasons. The first relates to Article IV of the Constitution, which confers to Congress the power to ensure that states grant full faith and credit to the acts, records, and proceedings of their sister states.⁷ Not only has Congress rarely passed legislation under this mandate to implement full faith and credit, it has never before passed legislation that—like DOMA—actually curtails full faith and credit for potential marriage laws. Second, the federal government seldom has ventured into the realm of domestic relations, which traditionally has belonged to the exclusive province of the states. Both Congress and the federal judiciary have practiced this deference for over two hundred years. In passing DOMA, then, Congress made rare use of its power under Article IV to regulate an area usually left to the states.

That Congress took this remarkable step when not a single state had yet legalized same-sex marriage highlights the peculiarity of Congress's action.⁸ In addition, by enacting DOMA, Congress and the President created the potential for an untenable system of conflicting obligations. If any state were to grant same-sex couples the right to marry, DOMA would deny such couples the legal entitlements that flow from marriage under federal law, while leaving those rights intact under state law.⁹ If Hawaii, for example, were to legalize same-sex

⁷ See U.S. Const. art. IV, § 1 ("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.").

⁸ When Congress passed DOMA, Hawaiian courts were considering a challenge to the state's refusal to grant three same-sex couples marriage licenses. See *infra* notes 131-36 and accompanying text (discussing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

⁹ See, e.g., William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* 66-67 (1996), listing the following legal benefits that marriage bestows, based on federal and state law in the District of Columbia:

[1.] The right to receive, or the obligation to provide, spousal support and (in the event of separation or divorce) alimony and an equitable division of property.

[2.] Preference in being appointed the personal representative of an intestate decedent.

[3.] Priority in being appointed guardian of an incapacitated . . . person in making health care decisions.

[4.] All manner of rights relating to the involuntary hospitalization of the spouse, including the right to petition, the right to be notified, and the right to initiate proceedings leading to release.

[5.] The right to bring a lawsuit for the wrongful death of the spouse and for the intentional infliction of emotional distress through harm to one's spouse.

[6.] The right to spousal benefits statutorily guaranteed to public employees, including health and life insurance and disability payments, plus similar contractual benefits for private sector employees.

marriage, two women who chose to marry one another in Hawaii would be married for state but not federal purposes. Thus, they could file as married on their state income tax returns, but would have to file as single on their federal returns. Benefits from state workers' compensation and disability insurance would accrue on the basis of their married status, but the federal government would tax those benefits according to single status. Since state and federal regulations often intertwine, the couple would exist as married and not married simultaneously. Furthermore, were this couple to take up residence in another state, such as California, that state would not have to recognize their valid marriage performed in Hawaii. California could reject the couple's married status, further complicating their inheritance, benefits, and property rights, as well as their custody rights if they have children.

Thus, if same-sex couples ever gain the right to marry in any state, DOMA creates a scheme in which their married status in one state could conflict with their single status in the eyes of both the federal government and other state governments. The ensuing confusion could not possibly constitute a rational goal in enacting DOMA. Why, then, would Congress take the extraordinary step of erecting such a plan?

This Note addresses that question by examining Congress's use of narratives in the debates over DOMA. Narratives are stories circulated within communities and institutions that both shape and reveal

[7.] The right to invoke special state protection for "intrafamily offenses."

[8.] The right to visit one's spouse on furlough while incarcerated in prison.

[9.] The right to claim an evidentiary privilege for marital communications.

[10.] A presumption of joint ownership of real estate as a tenancy in common and a right not to be held to a mortgage or assignment of rights to creditors without the spouse's written permission.

[11.] A right to priority in claiming human remains and to make anatomical donations on behalf of the deceased spouse.

[12.] Various inheritance rights, including priority in inheriting the property of an intestate decedent, the right to a family allowance, and the right to dower.

[13.] The right for one's non-American spouse to qualify as an "immediate relative" (i.e., receive preferential immigration treatment) and become an American citizen under federal law.

[14.] The right to receive additional Social Security benefits based on the spouse's contribution.

[15.] Survivor's benefits on the death of a veteran spouse.

[16.] [T]he right to adopt children [already available to same-sex couples in the District of Columbia].

society's attitudes toward issues, particularly polemic questions.¹⁰ In enacting DOMA, members of Congress used narratives to respond to what they perceived and portrayed as a menace posed by same-sex marriage. Because stories about gays and lesbians in relationships resembling heterosexual marriage have been gaining widespread attention in recent years, anxieties regarding homosexuality and traditional marriage notions have sharpened in certain segments of society, creating a breach in the prevailing social order. Members of Congress used narratives to mend this breach. In deliberations over DOMA, they related stories about gays and lesbians that countered the increasingly common story of same-sex marriage; by reinforcing apprehensions surrounding gays and lesbians and reasserting the familiar heterosexual version of the marriage narrative, Congress attempted to quell the threat posed by stories of same-sex marriage.

This Note analyzes Congress's manipulation of narratives to justify DOMA. Part I examines the novelty of Congress's action in passing DOMA. It explores Congress's rare use of the Full Faith and Credit Clause to pass this law that grants states powers they may already possess. Further, Part I probes the federal government's customary deference to the states in matters pertaining to marriage and domestic relations. It shows how Congress, in a unique departure from this traditional deference, went out of its way to enact a law detrimental only to gays and lesbians. Part II describes the utility of narratives in explaining why Congress legislated an issue usually left to the states. It analyzes the role of narratives in society and details the evolution of the gay and lesbian narrative. The gay and lesbian narrative has, over the last few decades, come to resemble conventional marriage stories, defying prevailing views of what constitutes marriage and thereby threatening the accepted order in society.

Part III examines DOMA's legislative history and argues that the Act's passage represents a reaction to this perceived threat to society. Congressional deliberations reveal an effort to discredit the same-sex marriage narrative by asserting what DOMA supporters characterized as the traditional marriage story, one that revolves around heterosexuality, procreation, and a moral code by which same-sex couples cannot abide. Part III asserts, however, that this particular marriage narrative neither matches the predominant story of heterosexual marriage nor correctly characterizes the story of lesbian and gay relationships. Congress thus enacted DOMA based on a narrative that lacks an accurate factual basis and contradicts the emerging dominant gay and lesbian narrative.

¹⁰ See *infra* Part II.A. (discussing role of narratives in society).

This Note concludes that Congress's construction of this narrative makes clear the genuine motivation behind DOMA—validating society's misplaced fears regarding homosexuality and pacifying those fears by denying marriage rights to gays and lesbians in an attempt to appear responsive to the nation's social ills. In promoting the conventional heterosexual marriage narrative, members of Congress sought to remedy an upheaval in society, which they attributed to the visibility of the same-sex marriage narrative. By doing so, however, these lawmakers exhibited a high degree of hostility toward lesbians and gays by propagating a narrative that lacks factual basis. Such hostility suggests that DOMA is based not on a rational purpose but on animus toward a particular, vulnerable group. If so, DOMA may be unconstitutional.¹¹

I DOMA:

CONGRESS'S RARE EXERCISE OF ARTICLE FOUR IN AN AREA TRADITIONALLY WITHIN THE STATES' EXCLUSIVE JURISDICTION

House Report No. 664 on the Defense of Marriage Act cites Article IV (the Full Faith and Credit and Effects Clauses) of the Constitution as the basis for Congress's authority to pass DOMA.¹² This action, though, stands as only the third occasion in recent time when Congress has invoked its powers under Article IV, and it may represent a superfluous grant of power to states. In addition, DOMA is a rare instance of federal legislation in the realm of domestic relations. This Part traces Congress's past exercises of its Article IV mandate and investigates the federal government's traditional deference to the states in matters involving domestic relations.

A. Congress's Power Under Article IV

DOMA allows states to deny recognition to same-sex marriages performed in other states.¹³ This provision, in effect, permits states to refuse to grant full faith and credit to certain valid laws of their sister states. Congress, however, grounded DOMA in its constitutional

¹¹ A discussion of unconstitutional laws based on animus toward a group is beyond the scope of this Note. I merely raise the possibility that Congress's use of narratives in the debates over DOMA suggests that DOMA may be based on animus toward lesbians and gays, which could make the law unconstitutional. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996) (finding that Colorado referendum derived primarily from animosity toward gays and lesbians and, therefore, violated Equal Protection Clause); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that government could not purposefully discriminate against "hippies" by denying them benefits under Food Stamp Act).

¹² See H.R. Rep. No. 104-664, pt. 3, at 6 (1996).

¹³ See DOMA § 2(a), 28 U.S.C.A. § 1738C (West Supp. 1998).

mandate to pass laws that *foster* full faith and credit. This mandate flows from the second part of the Full Faith and Credit Clause (Article IV, § 1), which provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."¹⁴ This so called Effects Clause authorizes Congress to pass legislation to insure that states give full faith and credit to the laws of other states. Regarding the precise powers the Effects Clause accords Congress, some scholars agree that it at least enables Congress to make binding choice-of-law rules for the states.¹⁵

Congress, though, has never enacted a single choice-of-law rule. Its rare legislative efforts under Article IV have generally outlined mechanical requirements for proof of public records or specified how to apply judgments from sister states. The two principal pieces of legislation in this area date back to 1790 and 1804. The first provides for methods of authenticating acts, records, and judicial proceedings of other states.¹⁶ The other does the same for nonjudicial proceedings.¹⁷

Since 1804, Congress has enacted only two other statutes under Article IV, both implementing full faith and credit between states: the Parental Kidnaping Prevention Act¹⁸ (PKPA) in 1980 and the Full Faith and Credit for Child Support Orders Act¹⁹ (FFCCSOA) in 1994. The PKPA evolved in response to the problem of parents taking their children across state lines to avoid enforcement of custody determinations.²⁰ It provides that child custody decrees issued by a court with valid jurisdiction in one state are entitled to full faith and credit in other states.²¹ The FFCCSOA directs states to enforce child support orders made by courts of other states and prohibits states from modifying such orders.²² Congress designed the FFCCSOA to prevent proliferation of conflicting child support orders in different states,

¹⁴ U.S. Const. art. IV, § 1.

¹⁵ See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L.J. 1, 24-28 (1991) (describing legal analysts' general interpretation of Effects Clause); see also Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 301 (1992) (examining Effects Clause).

¹⁶ See 28 U.S.C. § 1738 (1994).

¹⁷ See 28 U.S.C. § 1739 (1994).

¹⁸ Pub. L. No. 96-611, § 8(a), 94 Stat. 3569 (1980) (codified at 28 U.S.C. § 1738A (1994)).

¹⁹ Pub. L. No. 103-383, § 3(a), 108 Stat. 4064 (1994) (codified at 28 U.S.C. § 1738B (1994)).

²⁰ See Linda M. DeMelis, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 Hastings L.J. 1329, 1335 (1994) (describing history behind PKPA).

²¹ See 28 U.S.C. § 1738A(a) (1994).

²² See 28 U.S.C. § 1738B(a) (1994).

since parents with a valid child support order in one state often found it impossible to gain enforcement of that order in another.²³

Although also enacted under Article IV, DOMA differs from the PKPA and the FFCCSOA in two ways. First, the PKPA and FFCCSOA both addressed significant conflicts between states that arose from the increasing number of marriages ending in divorce—problems that existed before Congress passed these laws. DOMA, on the other hand, addresses a conflict between states that has not yet arisen because no state has legalized same-sex marriage. Second, Congress intended the PKPA and FFCCSOA to expand the faith and credit states must accord certain laws of their sister states. DOMA, however, restricts, rather than expands, the faith and credit states must give to such marriage laws by granting states federal permission not to honor same-sex marriages performed in other states. In enacting DOMA, therefore, Congress has, for the first time, exercised its power under Article IV in a sort of reverse manner, to limit full faith and credit.

Yet this new restriction on full faith and credit may not add anything to the powers states already enjoy, considering the public policy exception to the Full Faith and Credit Clause.²⁴ Generally, every state recognizes the legitimacy of a marriage that is valid in the state in which the marriage contract was made.²⁵ The most common exception to this “place of celebration rule” centers on marriages deemed contrary to a forum state’s public policy. According to the Restatement (Second) of Conflict of Laws, a marriage that is valid according to the laws of the state in which it was performed is valid in every other state unless it violates the “strong public policy” of a state with “the most significant relationship to the spouses and the marriage at the time of the marriage.”²⁶ Traditionally, this exception has only applied, in Judge Cardozo’s words, where another state’s law violates “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”²⁷ Thus, states typically have turned to the public policy exception to

²³ See Margaret Campbell Haynes, *Federal Full Faith and Credit for Child Support Orders Act*, 14 Del. Law. 26, 26 (1996) (detailing legislative history behind FFCCSOA).

²⁴ See *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 104th Cong. 7 (1996) (statement of Rep. Frank) (discussing public policy exception).

²⁵ See Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 13.5 (2d ed. 1992); *Restatement (Second) of Conflict of Laws* § 283 (1971).

²⁶ *Restatement (Second) of Conflict of Laws* § 283(2) (1971); see also Scoles & Hay, *supra* note 25, § 13.5.

²⁷ *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918).

deny recognition of marriages involving incest, polygamy, minors, and remarriage after divorce.²⁸

The first part of DOMA, permitting states to deny full faith and credit to same-sex marriage laws of other states, may therefore be unnecessary. Presumably, if a state refused to honor a same-sex marriage performed in another state, it could do so based on the public policy exception. Consequently, Congress's first reverse-use of Article IV may have added nothing to states' powers.

B. The Federal Government's Historic Deference to the States in Domestic Relations Matters

DOMA did, however, make a definite change in federal law: it marks the first time Congress has defined marriage for all federal statutes and regulations. DOMA states that the words "marriage" and "spouse" refer exclusively to relationships between people of the opposite sex.²⁹ Through DOMA, then, Congress has ventured into the realm of domestic relations, an area that both Congress and the federal courts traditionally have left to the states to oversee. Over a century ago, for instance, the Supreme Court held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."³⁰

More recently, in *Ankenbrandt v. Richards*,³¹ the Court traced the foundations of this jurisdictional "domestic relations exception" and upheld its validity.³² Justice White, writing for the majority, rea-

²⁸ See Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages, 53 Md. L. Rev. 450, 455-63 (1994) (discussing applications of public policy exception); Candace L. Sage, Note, Sister-State Recognition of Valid Same-Sex Marriages: *Baehr v. Lewin*—How Will It Play in Peoria?, 28 Ind. L. Rev. 115, 118-20 (1994) (same); Linda Silberman, Letter to the Editor, Hawaii Decision on Gay Marriages Should Affect Only Hawaii, N.Y. Times, Apr. 11, 1996, at A24 (same). But see Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965 (1997) (arguing that public policy exception is unconstitutional).

²⁹ See DOMA § 3(a), 1 U.S.C.A. § 7 (West 1997).

³⁰ *In re Burrus*, 136 U.S. 586, 593-94 (1890). The Court affirmed this principle in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), pointing out that the states provide the "guiding hand" in controlling the validity, formation, and dissolution of civil marriages. See also *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) ("The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858) (holding that divorce and alimony matters are not to be heard in federal court).

³¹ 504 U.S. 689 (1992).

³² See *id.* at 693-704 (upholding exception's validity but declining to apply it to case at bar).

soned that "state courts are more eminently suited to work [related to domestic relations] than are federal courts," since federal courts lack the close association with state and local organizations that have the expertise to handle domestic relations issues.³³ This rationale undergirds the federal government's general deference to the states in this area, emphasizing the established state social service agencies that support work involving family matters.³⁴ Another reason for the exception centers on the view that issues pertaining to marital status lie outside the competence of the federal government because the smaller state and local governments have a better handle on their citizens' mores.³⁵

Traditionally, then, state laws have delineated marital status in domestic relations.³⁶ Federal laws have influenced the effect of marital status through requirements like differentiated taxation.³⁷ Federal laws, however, have neither established nor nullified the underlying status itself.³⁸ Indeed, prior to DOMA, Congress had never interfered with the states' definitions of married status. The word "marriage" appears over eight hundred times in federal statutes and regulations, and the word "spouse" appears more than 3,100 times.³⁹ In only one of those instances, however, does the statute provide a definition of one of those terms.⁴⁰ Federal courts thus have found it necessary to apply state definitions of marital terms to federal statutes, since no federal definitions existed in those statutes.⁴¹

³³ *Id.* at 704.

³⁴ See Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 *Iowa L. Rev.* 1073, 1088-89 (1994) (listing traditional rationales for deference to states in domestic relations); see also Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 *U. Kan. L. Rev.* 217, 240 (1996) (arguing that one reason for deference to states regarding domestic relations matters could be to maximize governmental efficiency by placing such matters in government with most expertise to deal with those issues).

³⁵ See Cahn, *supra* note 34, at 1122-23 (discussing belief that "family law is, and should be, an expression of community morality" and that local control "recognizes the interests of citizens in establishing the public goals of their own community").

³⁶ See *id.* at 1092-94 (discussing status issues related to domestic relations exception).

³⁷ See *Burnet v. Harmel*, 287 U.S. 103, 110 (1932) ("[S]tate law creates legal interests but the federal statute determines when and how they shall be taxed.").

³⁸ See *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal, law. . . . This is especially true where a statute deals with a familial relationship . . .").

³⁹ See 142 Cong. Rec. S10,111 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

⁴⁰ See *Family and Medical Leave Act*, 29 U.S.C. § 2611(13) (1994) (defining "spouse" as husband or wife).

⁴¹ See, e.g., *Huff v. Director, U.S. Office of Personnel Management*, 40 F.3d 35, 36-37 (3d Cir. 1994) (defining "spouse" for purposes of federal survivor benefits by reference to state law); *Albina Engine & Mach. Works v. O'Leary*, 328 F.2d 877, 878 (9th Cir. 1964)

Congress therefore took an extraordinary step in passing the Defense of Marriage Act. Congress used its powers under Article IV in an unprecedented manner by limiting, rather than expanding, the full faith and credit one state must accord the acts of another state, made even more unusual since DOMA may not even add anything to states' powers in light of the public policy exception. In addition, through DOMA, Congress established the first federal law defining marriage, reaching into an area traditionally governed by state law. Parts II and III examine the use of narratives to explain why Congress would take such action. They demonstrate that Congress passed DOMA to advance a counternarrative in response to a threat it perceived from the increasingly visible same-sex marriage narrative.

II

NARRATIVES AND CULTURAL CONFLICTS

Narratives furnish a means to understand Congress's peculiar use of Article IV and its involvement in domestic relations through the enactment of DOMA. This Part describes the role of narratives in communities as both reflections of and influences on society's attitudes toward significant issues. It explores the recent evolution of the lesbian and gay narrative, from stories of shameful, furtive affairs into stories of stable, monogamous relationships that mirror traditional heterosexual marriages. Because such stories have been gaining attention and challenging the conventional definition of marriage and family, Congress sought to quell society's anxieties by enacting DOMA and reasserting the traditional version of the heterosexual marriage narrative.

A. Narratives' Role in Society

Narratives are stories told within communities that both reflect and shape how individuals understand the world around them. They function as one of the principal mechanisms by which people sort out what they see and hear.⁴² Cultural narratives help communities estab-

(looking to state law to define "surviving wife" for purposes of federal workers' compensation benefits); *Davis v. College Suppliers Co.*, 813 F. Supp. 1234, 1237 (S.D. Miss. 1993) (defining "spouse" for purposes of Employee Retirement Income Security Act (ERISA) as person to whom one is married under state law); *Bell v. Tug Shrike*, 215 F. Supp. 377, 381 (E.D. Va. 1963) (holding that determination of valid legal status for merchant marine benefits is question of state law).

⁴² See Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in *The Writing of History: Literary Form and Historical Understanding* 129, 131 (Robert H. Canary & Henry Kozicki eds., 1978) ("[N]arrative is a primary cognitive instrument—an instrument rivaled . . . only by theory and by metaphor as irreducible ways of making the flux of experience comprehensible.").

lish cognitive control and make sense of inexplicable events.⁴³ Narratives begin with the breach of a norm—such as the risk to traditional family values posed by, among other things, same-sex marriage—resulting in a real or imagined crisis.⁴⁴ The objective of narrative creation is to remedy that rift and to effect either a return to the status quo or an acceptable reordering of society's values.⁴⁵ Narratives can thus build solidarity among groups of people, setting the boundaries for social conventions. Consequently, these boundaries define who is accepted in or rejected by such groups.⁴⁶

During times of change or trauma, therefore, narratives assume added significance in society. They can serve as protection against fears.⁴⁷ In the face of chaotic, disorienting forces of change, narratives impart some semblance of order, a means for reestablishing human connection.⁴⁸ Society's primary legal and social institutions—such as legislatures, courts, and religious institutions—function as vehicles for storytelling during these moments of crisis.⁴⁹ Religious narratives and their accompanying rituals, for instance, illustrate how an institution forms coherence out of death and other disturbing events.⁵⁰ Religious rites link people to their past and future by establishing enduring patterns.⁵¹ And religious narratives furnish explanations, through para-

⁴³ See Paul S. Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. Rev. 288, 318 (1994) (describing functions of narratives).

⁴⁴ See Victor Turner, *Social Dramas and Stories About Them*, in *On Narrative* 137, 146 (W.J.T. Mitchell ed., 1981) (“[A] social drama first manifests itself as the breach of a norm, the infraction of a rule of morality, law, custom, or etiquette . . .”).

⁴⁵ See *id.* at 146-47 (stressing that after breach, “a mounting crisis follows, a momentous juncture or turning point in the relations between components of a social field”).

⁴⁶ See James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 698 (1985) (discussing narratives as vehicles for establishing group bonds).

⁴⁷ See David I. Kertzer, *Ritual, Politics, and Power* 4 (1988) (stating that narratives, or “symbol systems,” can protect people from terror-filled world).

⁴⁸ See Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* 24 (1987) (“[N]arrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary.”).

⁴⁹ See Robert Hariman, *Performing the Laws: Popular Trials and Social Knowledge*, in *Popular Trials: Rhetoric, Mass Media, and the Law* 17, 19 (Robert Hariman ed., 1990) (explaining that disasters stimulate “pronouncements, prayers, eulogies, addresses, white papers, and other formal offerings that later dissolve back into the welter of conversation characterizing the ordinary business of living together”).

⁵⁰ See Claude Levi-Strauss, *The Effectiveness of Symbols*, in *Structural Anthropology* 186, 197-201 (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963) (describing use of narratives to encapsulate pain).

⁵¹ See Kertzer, *supra* note 47, at 9-11 (examining interplay of politics, symbolism, and ritual).

bles or affirmations of faith, that foster an understanding of the crisis event and healing of psychological wounds.⁵²

Through the stories told in courts and legislatures, law is another area in which narratives play a meaningful role.⁵³ Recently, narrative and storytelling have become important tools for minorities, women, and other marginal groups to oppose traditional modes of legal argument.⁵⁴ According to Professor Paul Gewirtz, "[N]arrative and storytelling pervade the law, from the competing narratives in trial court proceedings to the legal and historical narratives appearing in Supreme Court opinions."⁵⁵ Trials, for instance, create a way for the community to hear the plaintiff's and defendant's conflicting narratives before constructing a new, unifying story that permits the reordering and healing of society.⁵⁶ In addition, judges and jurors must often sort through detailed evidence, conflicting testimony, or competing legal principles. Narratives make the process of deciding these polemic questions easier for judges and jurors.⁵⁷

Narratives thus help shape our common law. In addition, they form the basis of our statutory law. The House and Senate Floors, for

⁵² See Berman, *supra* note 43, at 318 (discussing purpose of religious narratives).

⁵³ See Kim Lane Scheppele, Foreword: Telling Stories, 87 Mich. L. Rev. 2073, 2082-83 (1989) ("In law, both at trial and on appeal, all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events."). Robert Cover argues:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

Robert M. Cover, *The Supreme Court 1982 Term—Forward: Nomos and Narrative*, 97 Harv. L. Rev. 4, 4-5 (1983), reprinted in *Narrative, Violence, and the Law: The Essays of Robert Cover* 95, 95-96 (Martha Minow et al. eds., 1992) (citations omitted). For a general assessment of the place of narrative in the law, see *Law's Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gewirtz eds., 1996).

⁵⁴ See, e.g., Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 5-6 (1987) (describing narratives as method of struggle for racial minorities); Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991) (examining role of feminist narratives in legal discourse); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2440-41 (1989) (arguing for use of narrative theory in combating traditional legal arguments); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan. L. Rev. 607, 644-46 (1994) (promoting use of narratives to advance gay and lesbian causes).

⁵⁵ Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 Nw. U. L. Rev. 863, 864 (1996).

⁵⁶ See Victor Turner, *Process, Performance, and Pilgrimage* 63-64 (Ranchi Anthropology Series No. 1, L.P. Vidyarthi ed., 1979) (defining trials as performative rituals that allow communities to respond to breach of social norm).

⁵⁷ See W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* 4 (1981) (describing role of narratives in trials).

instance, as well as the various congressional committee rooms in which lawmakers debate issues, represent an arena of speakers and listeners, where competing attempts to shape and present narratives for a national audience create meaning through the laws Congress enacts. This Note examines our national legislature's use of narratives to fashion a legal argument justifying DOMA. It shows how Congress advanced a certain cultural narrative to remedy a rift in society caused by the evolution of the lesbian and gay narrative into a story of same-sex relationships that resemble traditional marriage.

*B. Evolution of Stories About Gay and Lesbian Lives
and Their Threat to Society*

Over the last few decades, narratives centering on gay and lesbian experiences have evolved from stories of shameful, clandestine encounters to stories of stable, monogamous relationships. This section chronicles that evolution in the gay and lesbian narrative, beginning in the 1930s and running through the 1990s.⁵⁸ It looks first at sources of popular culture—plays, novels, and movies, newspaper and magazine stories, and studies examining gay and lesbian lifestyles—that reveal this transformation in the gay and lesbian narrative. It then examines court cases that indicate how this development in the story of gays and lesbians began to challenge common conceptions about homosexuals, family, and marriage.

*1. Popular Culture and the Emergence of the Gay and Lesbian
Marriage Narrative*

Typically, narratives dealing with homosexuality have offended or at least unnerved many people due to the negative attitudes toward this issue that have prevailed over the years.⁵⁹ Such stories, consequently, have begun to surface in American culture only recently.⁶⁰ As late as the 1930s, few in this country spoke or wrote openly about

⁵⁸ I chose the 1930s as a somewhat arbitrary starting point, primarily because that decade marks the time when the gay and lesbian narrative seems to have become more visible to mainstream American society.

⁵⁹ According to Andrew Sullivan, former editor of the *New Republic*, the most common view of homosexuality, both today and particularly in the past, has revolved around twin notions that homosexuality is an aberration and that homosexual behavior is repugnant. Therefore, Sullivan writes, "to legitimize homosexuality is to strike at the core of the possibility of civilization—the heterosexual union and its social affirmation—and to pervert the natural design of male and female as the essential complementary parts of the universe." Andrew Sullivan, *Virtually Normal* 21 (1995).

⁶⁰ See Bruce Bawer, *A Place at the Table: The Gay Individual in American Society 194-98* (1993) (explaining subordination of explicit gay themes in films, novels, and poetry until relatively recent times).

gays, lesbians, or homosexuality.⁶¹ At that time, for instance, homosexuality posed a taboo issue for Hollywood movies.⁶² When the studios did produce a film version of the rare novel or play featuring a homosexual character, they would omit that character or turn him or her into a heterosexual.⁶³ Like much of mainstream American society, Hollywood viewed homosexuality with a mixture of fear and disgust.⁶⁴

Even playwrights and literary authors felt uneasy writing about homosexual themes in a straightforward manner.⁶⁵ Many obscured this topic by focusing their stories on other issues in order to make them more palatable to the general public.⁶⁶ Lillian Hellman, for instance, raised the issue of lesbianism in her play *The Children's Hour*,⁶⁷ but only through a character's false claim that two of her female teachers were engaging in a sexual relationship. Rather than concentrating on lesbianism, the play centered on how this accusation devastated the teachers' lives.

Radclyffe Hall, on the other hand, brought the homosexual narrative out in the open in *The Well of Loneliness*,⁶⁸ a novel about a woman's series of surreptitious sexual relationships with other women. While Hall painted lesbians in a somewhat sympathetic light, society's predominant attitudes toward homosexuality led many communities to censor the book as pornography.⁶⁹ Such attitudes, persist-

⁶¹ See *id.* at 196-97; see also Gore Vidal, *The City and the Pillar* and *Seven Early Stories* at xvi (Random House 1995) (1948) (describing refusal of major American newspapers and magazines to review Vidal's book about gay man).

⁶² See Vito Russo, *The Celluloid Closet: Homosexuality in the Movies* 45 (rev. ed. 1987) ("Homosexuality was denied as assiduously offscreen as it was on, a literally unspeakable part of the culture.").

⁶³ See Bawer, *supra* note 60, at 196 (discussing Lillian Hellman's play *The Children's Hour*, about two teachers accused of lesbianism, which became 1936 film *These Three*, about female teacher accused of romance with male student; Richard Brooks's novel *The Brick Foxhole*, about soldier who murders gay man, which became 1947 movie *Crossfire*, about soldier who murders Jew; and Truman Capote's novel *Breakfast at Tiffany's*, which has gay narrator who became Audrey Hepburn's love interest in film version).

⁶⁴ See, e.g., Russo, *supra* note 62, at 45 ("[*Turnabout*], about a married couple . . . who switch roles by wishing on an Oriental statue, was described by the Catholic Legion of Decency as dealing with 'subject matter which may provide references dangerous to morality, wholesome concepts of human relationships and the dignity of man.'").

⁶⁵ See Bawer, *supra* note 60, at 197 (stating that, until recently, few writers introduced homosexual themes explicitly into their fiction).

⁶⁶ See *id.* (describing how authors, such as Marcel Proust, Somerset Maugham, E.M. Forster, Glenway Wescott, Oscar Wilde, and Terence Rattigan, wrote nuanced stories to disguise homosexual themes).

⁶⁷ Lillian Hellman, *The Children's Hour* (1934).

⁶⁸ Radclyffe Hall, *The Well of Loneliness* (1928).

⁶⁹ See, e.g., *People v. Friede*, 233 N.Y.S. 565, 567 (Magis. Ct. 1929) (upholding police censorship of *The Well of Loneliness* because book "maintains" that lesbians "be accepted

ing twenty years later, did not prevent Gore Vidal from continuing the homosexual narrative in 1948, when he published *The City and the Pillar*.⁷⁰ This story, about a young man's struggle with his sexuality, portrayed gay relationships, like the portrayal of lesbian relationships in *The Well of Loneliness*, as veiled in secrecy and empty of the kind of love that exists between members of the opposite sex.⁷¹

Through stories like these, narratives about homosexual relationships began to surface in society. They centered on guilt, secrecy, and unfulfilled desires—elements that did not threaten traditional notions of heterosexual marriage.⁷² Such motifs persisted through the 1960s. By then, the homosexual narrative had become more common, both in novels and in movies, as society began at least to accept the existence of lesbian and gay relationships.⁷³ This narrative, however, still portrayed homosexuals in a negative light, treating them as aberrant outsiders in mainstream heterosexual society and, therefore, posing little threat to the accepted social order.⁷⁴ In Roman Polanski's 1967 comedy/horror, *The Fearless Vampire Killers*, for example, a gay character, Herbert the vampire, provides both the comedy and horror, dressing in women's clothes and terrorizing young men.⁷⁵ Other deviants, such as the two gay characters Vanity and Envy in *Bedazzled*, played similarly unsympathetic roles.⁷⁶

on the same plane as persons normally constituted, and that their perverse and inverted love is as worthy as the affection between normal beings").

⁷⁰ Vidal, *supra* note 61.

⁷¹ After a post-adolescent sexual encounter with his boyhood friend Bob, the protagonist, Jim, enters into a series of furtive relationships with other men. The story ends with Jim consoling himself over liquor following rejection by his old friend Bob, the longtime object of his genuine affection. See *id.*

⁷² In the 1959 novel *The Charioteer*, for example, Mary Renault relates a story about an injured British soldier, Laurie, who falls in love with a male hospital orderly. Both spend the entire novel concealing their sexual orientation not only from outsiders, but from each other as well. They also view the gay subculture with disdain, ashamed to be associated with the immorality and lack of courtship rituals which they find to be inherent aspects of that subculture. See Mary Renault, *The Charioteer* (1959); see also James Baldwin, *Giovanni's Room* (1956), which emphasizes these same themes common to homosexual narratives of the time.

⁷³ See Russo, *supra* note 62, at 52 (noting how "homosexuality had become literally speakable in the early 1960s").

⁷⁴ In movies, for instance, "gays dropped like flies, usually by their own hand, while continuing to perform their classically comic function in lesser and more ambiguous roles." *Id.*

⁷⁵ See *The Fearless Vampire Killers* (Twentieth Century Fox 1967).

⁷⁶ See *Bedazzled* (Twentieth Century Fox 1967); see also *Caprice* (Universal Studios 1967), in which the transvestite behavior of the murderous cosmetician leads to his final downfall, when Doris Day's upright character pushes him off a balcony; and *The Anderson Tapes* (Paramount Studios 1971), in which Martin Balsam's cowardice as the effeminate antique dealer and thief likewise results in his demise.

As the visibility of this gay narrative grew, negative though it was, reactionary efforts to suppress it did eventually emerge.⁷⁷ Perhaps as a result of such efforts, gay men and lesbians in the late 1960s began organizing to fight discrimination,⁷⁸ initiating the transformation of gay and lesbian narratives from stories of depraved outsiders to stories of "normal" members of society. This burgeoning gay rights movement gained nationwide attention in 1969, for instance, when New York City Police raided Stonewall, a bar in Greenwich Village frequented primarily by gays, prompting resistance that drew widespread media coverage for the gay movement.⁷⁹ This event further modified the gay and lesbian narrative, propelling it into mainstream American households in an unprecedented manner.⁸⁰

As a more positive lesbian and gay narrative began to materialize, homosexual rights and relationships began to gain some legitimacy. Lesbians and gays started living more openly, especially in large cities.⁸¹ Under pressure from gay rights groups, several jurisdictions around the country passed ordinances to protect homosexuals from discrimination.⁸² Popular music groups like the Village People brought some measure of acceptance and even trendiness to homosexuality.⁸³ In 1972, Jim Foster delivered the first speech at a major political convention dealing with the subject of gay rights.⁸⁴ The American Psychiatric Association removed homosexuality from its list of per-

⁷⁷ In New Jersey, for instance, the state attempted to close down any establishment that catered to homosexuals. See *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 13-15 (N.J. 1967) (detailing New Jersey's effort to shut down bars and liquor stores that served gay clientele).

⁷⁸ See John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970*, at 57-74 (1983) (detailing Los Angeles gay rights movement that grew into nationwide effort in response to increasing instances of anti-gay discrimination, as gays and lesbians became more conspicuous).

⁷⁹ See Bawer, *supra* note 60, at 31 (describing impact of Stonewall raid on gay rights movement). For a thorough discussion of the incident, see generally Martin Duberman, *Stonewall* (1993).

⁸⁰ See D'Emilio, *supra* note 78, at 231-33 (portraying Stonewall uprising as "the birth of gay liberation"); Jerry Lisker, *Homo Nest Raided, Queen Bees Are Stinging Mad*, N.Y. Daily News, July 6, 1969, at 2 (stating that "[l]ast weekend the queens had turned commandos and stood bra strap to bra strap against an invasion").

⁸¹ See Bawer, *supra* note 60, at 52 (describing post-Stonewall period of greater gay visibility and openness, especially in New York, San Francisco, and Los Angeles).

⁸² See William B. Rubenstein, *Cases and Materials on Sexual Orientation and the Law* 469 n.1 (2d ed. 1997) ("The first municipal ordinances protecting against discrimination on the basis of sexual orientation were adopted in the early 1970s and in 1983 Wisconsin became the first state to pass a gay rights law.").

⁸³ See Bawer, *supra* note 60, at 53.

⁸⁴ See *id.*

sonality disorders in 1973.⁸⁵ In 1975, the federal government lifted its Eisenhower-era ban on homosexual employees in the civil service,⁸⁶ and the cover of *Time* featured the picture of Leonard Matlovich, an ousted air force sergeant, above the words "I am a Homosexual."⁸⁷ The following year, Armistead Maupin began writing his *San Francisco Chronicle* column, "Tales of the City," in which he treated the lives of homosexuals in the same matter-of-fact manner as the lives of heterosexuals.⁸⁸

Despite this attention and more positive treatment of gays and lesbians, narratives still treated gays and lesbians as marginalized members of society. Matt Crowley's 1970 movie, *The Boys in the Band*, for example, featured all gay lead characters, but reinforced the common stereotype of gay men as effeminate, sexually promiscuous degenerates.⁸⁹ Similarly, the 1980 film *Cruising* portrayed gay men as perverted individuals, incapable of "normal" relationships.⁹⁰ Gay men protested against this movie,⁹¹ however, signaling to those crafting gay and lesbian narratives that they would no longer allow such depictions to go unchallenged. Beginning in the 1980s, gays and lesbians began demanding that popular culture tell their stories in a realistic, sympathetic manner. Consequently, plays and movies such as *Torch Song Trilogy*, which presents a same-sex couple in a compassionate light,⁹² began playing before mainstream audiences.

The homosexual narrative took another turn with the onset of the AIDS crisis. Gay male narratives, in particular, began highlighting monogamous relationships. As the disease ravaged the gay community, several young men found themselves either facing a painful, early death or playing the role of caretaker to dying friends.⁹³ Thus, many gay men found the values intrinsic to stable relationships, such as

⁸⁵ See Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 129, 137 (1981) (describing Association's evolving view of homosexuality).

⁸⁶ See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 566 n.254 (1991) (discussing government's lift of ban).

⁸⁷ See *People Making News: The Last Word*, U.S. News & World Rep., July 4, 1988, at 12 (chronicling life of Leonard Matlovich).

⁸⁸ See Alice Kahn, *Out on the Edge with the Divine Mr. M*, S.F. Chron., Oct. 13, 1992, at B3 (discussing Armistead Maupin's "Tales of the City").

⁸⁹ See *The Boys in the Band* (Leo Productions, Ltd. 1970); see also *Dog Day Afternoon* (Warner Brothers 1975), which, while spotlighting an openly gay protagonist, uses the sensational aspects of a true story to present something of a freak show to audiences.

⁹⁰ See *Cruising* (Warner Brothers 1980).

⁹¹ See Russo, *supra* note 62, at 179 (discussing reaction of gays to production of *Cruising*).

⁹² See *Torch Song Trilogy* (New Line Cinema 1988).

⁹³ See Bawer, *supra* note 60, at 53-54 (describing gay community's response in 1980s to AIDS crisis).

committed companionship, particularly appealing in this context.⁹⁴ In addition, both gays and lesbians sought to promote these values in order to stem the spread of AIDS in the gay community.⁹⁵ Movies such as *Longtime Companion*⁹⁶ and *And the Band Played On*⁹⁷ chronicled the incipience of the AIDS crisis, as it touched both those gay men with promiscuous lifestyles as well as those in solid, monogamous relationships centered on love and devotion to their partners. Both movies related narratives demonstrating how gay men can live in life-long, committed relationships. Professor William Eskridge points out how 1980s gay literature also reflected this shift toward narratives about monogamous relationships.⁹⁸ Around that time, for example, Paul Monette wrote an autobiographical book about his committed relationship to Roger Horwitz, his same-sex partner,⁹⁹ as well as a fictional novel relating a story of love and commitment between two gay men.¹⁰⁰

Homosexual narratives in the 1990s continued to depict gays and lesbians in relationships that appeared strikingly similar to heterosexual marriages—bringing gays and lesbians closer to mainstream society's conception of what is "normal." Recently, for instance, a number of popular television programs and big screen movies started featuring lesbian and gay characters in committed relationships, thrusting the homosexual marriage narrative into the public eye. On the highly rated sitcom *Mad About You*, two lesbians in a monogamous relationship regularly appeared on the show.¹⁰¹ Another sitcom, *Ellen*, made history when the title character announced to the world that she is gay and the show began focusing on Ellen's lesbian relationships.¹⁰² Two of the most popular sitcoms—

⁹⁴ See Eskridge, *supra* note 9, at 74 (discussing how AIDS crisis "illustrated the value of interpersonal commitment for gay people generally" for sake of both safety and companionship).

⁹⁵ See *id.*

⁹⁶ *Longtime Companion* (Samuel Goldwyn Co. & American Playhouse Theatrical Films 1989).

⁹⁷ *And the Band Played On* (HBO Pictures 1993).

⁹⁸ See Eskridge, *supra* note 9, at 74.

⁹⁹ See Paul Monette, *Borrowed Time: An AIDS Memoir* (1988).

¹⁰⁰ See Paul Monette, *Halfway Home* (1991).

¹⁰¹ See, e.g., *Mad About You* (NBC television broadcast, Sept. 17, 1996); see also Jeff Rubio, *Comedian's Sexuality Not an Issue*, Orange County Reg., Feb. 9, 1996, at F50, available in LEXIS, News Library, Oreg File (noting recurring role for lesbian character on *Mad About You*).

¹⁰² See *Ellen* (ABC television broadcast, Apr. 30, 1997); see also Alan Bash, 'Ellen' is Out and Ratings are Still Strong, *USA Today*, May 9, 1997, at D3 (noting that 36 million people viewed "coming out" episode).

*Friends*¹⁰³ and *Roseanne*¹⁰⁴—spotlighted sincere, even romantic same-sex wedding ceremonies to record ratings and minimal negative response.¹⁰⁵ And *The Birdcage*¹⁰⁶—a movie glorifying a gay couple's twenty-year bond and the son they raised—received similar attention, opening as the number one movie on the weekend of its premiere.¹⁰⁷

During the summer of 1996, when Congress was debating DOMA, stability and commitment—values common to traditional marriage narratives—had become prominent themes in gay and lesbian relationship narratives. A segment from the June 12 airing of the *CBS Evening News*, for instance, focused on two gay men talking about their nineteen-year relationship with each other.¹⁰⁸ A portion of the next evening's broadcast again highlighted committed same-sex couples.¹⁰⁹ Joe Melillo noted about his relationship with another man, Pat Lagon, that "[u]nfortunately—or maybe fortunately for us—we met . . . a person of the same gender and we just love each other and want to get married."¹¹⁰

Such stories about the devotion and commitment shared by two men describe relationships identical to those portrayed by the conventional heterosexual marriage narrative. Contrasted with narratives like those in *The Well of Loneliness* and *The City and the Pillar*, they show how the gay and lesbian narrative has evolved over the last few

¹⁰³ *Friends* (NBC television broadcast, Jan. 19, 1996); see also Bruce Fretts & Ken Tucker, *The Week*, *Ent. Weekly*, Jan. 19, 1996, at 44, available in LEXIS, News Library, Entwkl File (discussing same-sex wedding episode).

¹⁰⁴ *Roseanne* (ABC television broadcast, Dec. 12, 1995); see also Matt Roush, *Critic's Corner*, *USA Today*, Dec. 12, 1995, at D12 (discussing same-sex wedding episode).

¹⁰⁵ See Frank Rich, *Beyond the Birdcage*, *N.Y. Times*, Mar. 13, 1996, at A19 (noting popularity of *Friends* and *Roseanne* episodes dealing with same-sex marriage).

¹⁰⁶ *The Birdcage* (Metro-Goldwyn-Mayer/United Artists 1996).

¹⁰⁷ See Rich, *supra* note 105, at A19 (describing success of *The Birdcage*).

¹⁰⁸ See *CBS Evening News* (CBS television broadcast, June 12, 1996), transcript available in 1996 WL 3467072. One of the men emphasized, "[A]ll we want everybody to know is that we love each other and we just want to be like everybody else—you know, equal." His partner added, "We've been together nineteen years and we haven't been able to enjoy that marriage right. It's a right and a . . . benefit that . . . we've been denied." *Id.*

¹⁰⁹ See *CBS Evening News* (CBS television broadcast, June 13, 1996), transcript available in 1996 WL 3467086.

¹¹⁰ *Id.* The week after the House of Representatives passed DOMA, two men, aged 72 and 74, appeared on National Public Radio's Weekend Edition to discuss their 50-year-old "marriage" to one another. Scott Simon, the host, explained:

Richard Maloy and Tucker Bobst have spent the past fifty years together in most of the important permutations possible in human relationships—friends, lovers, companions. One morning in 1946, the men went to early mass in New York's Saint Patrick's Cathedral. There, under the eyes of God, if not in the eyes of their church, Mr. Maloy and Mr. Bobst sat in a pew and spoke vows to one another they now find too personal to repeat to strangers.

Weekend Edition: Gay Men Discuss Their Marriage in 1946 (National Public Radio broadcast, July 20, 1996), transcript available in 1996 WL 7992877.

decades, from stories centering on guilt and deception to stories revolving around stable, monogamous relationships. Gay and lesbian relationships have begun, consequently, to challenge common notions of what constitutes marriage and family, threatening certain social norms.

2. *Legal Culture and the Gay and Lesbian Narrative's Challenge to the Social Order*

The most salient depiction of how this challenge has developed lies in the legal system. As the homosexual narrative began prominently featuring gay men and lesbians in relationships similar to heterosexual marriage, the various existing laws and practices that marginalized homosexuals began to come under more scrutiny. With increasing frequency, gays and lesbians contested policies like the military's ban on homosexuals and bisexuals, discriminatory housing and employment practices, anti-homosexual educational policies, and anti-sodomy statutes.¹¹¹ In upholding some of these laws and in response to the lesbian and gay narrative related through litigators' arguments, courts have employed language similar to that used by members of Congress in the debate over DOMA.¹¹²

The Supreme Court, for instance, did so in *Bowers v. Hardwick*.¹¹³ *Bowers* told the story of Michael Hardwick, who was in his bedroom engaging in consensual sex with another adult male when a policeman entered and arrested him for violating Georgia's anti-sodomy statute.¹¹⁴ In finding the statute constitutional, the Court, like members of Congress arguing in favor of DOMA, portrayed homosexuals as outside conventional moral standards. The Court, for instance, stressed that "[p]roscriptions against [homosexual] conduct have ancient roots"¹¹⁵ and called "facetious" the claim that the right to engage in homosexual conduct is "implicit in the concept of ordered liberty."¹¹⁶

Despite this setback for gay rights, the 1990s saw continued efforts by gays and lesbians to acquire equal rights, further advancing a positive homosexual narrative before mainstream society. Challenges

¹¹¹ See William N. Eskridge, Jr., *Outsider-Insiders: The Academy of the Closet*, 71 Chi.-Kent L. Rev. 977, 981-82 (1996) (discussing debate over matters pertaining to gays and lesbians sparked by challenge to Georgia anti-sodomy law); Developments in the Law—Employment Discrimination, 109 Harv. L. Rev. 1568, 1625-47 (1996) (examining issues related to state laws protecting gays and lesbians against employment discrimination).

¹¹² See *infra* Part III (examining language used in DOMA hearings).

¹¹³ 478 U.S. 186 (1986).

¹¹⁴ See *id.* at 187-88 (explaining criminal charge).

¹¹⁵ *Id.* at 192.

¹¹⁶ *Id.* at 194.

to the military's policy excluding gays, lesbians, and bisexuals gained considerable attention when Margaret Cammermeyer, a lieutenant colonel in the Army Reserves who had served in Vietnam, announced that she was a lesbian and was consequently discharged. A federal court in Washington State found the Army's regulation governing homosexuals unconstitutional and ordered Colonel Cammermeyer reinstated.¹¹⁷ On appeal, the Ninth Circuit agreed with the lower court's ruling that the Army should not have discharged Colonel Cammermeyer on the basis of her statement.¹¹⁸

The military's policy of exclusion drew further notice when the U.S. Naval Academy asked a model student, Joseph Steffan, to leave the Academy on the eve of his graduation, after he had confided to a classmate his attraction to men.¹¹⁹ President Clinton later modified this policy to permit homosexuals to serve their country so long as they concealed their sexual orientation.¹²⁰ However, a number of gay and lesbian servicemembers contested this compromise as a continuation of their treatment as second class citizens.¹²¹

The visibility of homosexual narratives centering on people like Steffan and Cammermeyer showed mainstream society that gay men and lesbians share many of the same values and pursue many of the same activities as heterosexuals. Combined with the increasingly conspicuous story of same-sex couples living in traditional marriage settings, the homosexual narrative began to threaten accepted norms in society that had treated gays and lesbians as outcasts. Those comfortable with denying gays and lesbians certain rights because they did not conform to society's moral standards had to rethink that position in the face of narratives portraying gays and lesbians as normal people who serve in the military, raise children, and live in stable relationships. The evolving gay and lesbian narrative thus disrupted common notions about homosexuality, family, and marriage.

¹¹⁷ See *Cammermeyer v. Aspin*, 850 F. Supp. 910, 929 (W.D. Wash. 1994) (holding that Cammermeyer's discharge based on sexual orientation violated her equal protection and due process rights), appeal dismissed as moot, 97 F.3d 1235 (9th Cir. 1996).

¹¹⁸ See *Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (upholding lower court's order, but dismissing appeal as moot because Army had replaced regulation in question).

¹¹⁹ See generally Joseph Steffan, *Honor Bound: A Gay American Fights for the Right to Serve His Country* (1992); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

¹²⁰ President Clinton promulgated this new "Don't Ask, Don't Tell" policy on July 19, 1993. See Jeffrey H. Birnbaum, *Clinton Adopts Policy to Ease Military Gay Ban*, *Wall St. J.*, July 20, 1993, at A2 (relating President's new policy).

¹²¹ See, e.g., *Holmes v. California Nat'l Guard*, 124 F.3d 1126, 1127-28 (9th Cir. 1997) (denying homosexual servicemembers' challenge to "Don't Ask, Don't Tell" policy); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996) (same).

Consequently, this narrative created a breach in society's generally accepted sense of order. Efforts in several states to limit gay and lesbian rights through popular referenda as well as to outlaw same-sex marriage (although not legal in any state) reflect how this rift has engendered widespread trepidation in society. Since 1992, groups in Arizona, Colorado, Florida, Idaho, Maine, Michigan, Missouri, Nevada, Oregon, and Washington have attempted to pass statewide voter initiatives that would prohibit the passage of any legislation or policy protecting lesbians, gays, and bisexuals from discrimination.¹²² Oregon's Measure 9 sought in addition to declare homosexuality to be "abnormal, wrong, unnatural and perverse."¹²³ Similar movements also flourished in communities such as Cincinnati, Ohio; Lewiston, Maine; Springfield, Missouri; and Austin, Texas.¹²⁴ Furthermore, as of September 1996, fifteen states had passed bills denying same-sex couples the right to marry, two states had such legislation pending, and twenty states had considered same-sex anti-marriage bills that failed to pass.¹²⁵

Of the statewide anti-gay initiatives mentioned above, only Colorado's Amendment 2 passed.¹²⁶ The Supreme Court, however, subsequently overturned this measure in *Romer v. Evans*.¹²⁷ Relying in part on *United States Department of Agriculture v. Moreno*,¹²⁸ which stated that equal protection at the very least means that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,"¹²⁹ the *Romer* Court found that Amendment 2 derived primarily from animosity toward gays and lesbians and, therefore, violated the Equal Protection Clause.¹³⁰ *Romer* thus signaled a shift in the legal culture, recognizing the legitimacy of the gay and lesbian narrative after fifty years of evolution and further aggravating the rift in society caused by this narrative.

¹²² See Jim Simon, *Gay-Rights Fight Takes National Stage: Conservative Groups See 'Clash of Two Belief Systems'*, *Seattle Times*, May 29, 1994, at B1 (detailing anti-gay voter initiative campaigns).

¹²³ Timothy Egan, *Anti-Gay Backlashes Are on 3 States' Ballots*, *N.Y. Times*, Oct. 4, 1992, § 4, at 4 (describing Oregon's Measure 9).

¹²⁴ See Simon, *supra* note 122, at B1.

¹²⁵ See Marriage Project, Lambda Legal Defense & Educ. Fund, Inc., *Anti-Marriage Bills: State-by-State Status Report*, Sept. 4, 1996 (on file with the *New York University Law Review*).

¹²⁶ See Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 *Fordham Urb. L.J.* 1057, 1057 (1994) (noting that citizens of Colorado passed Amendment 2 to state constitution on November 3, 1992).

¹²⁷ 116 S. Ct. 1620 (1996).

¹²⁸ 413 U.S. 528 (1973).

¹²⁹ *Id.* at 534 (holding that government could not purposefully discriminate against "hippies" by denying them benefits under Food Stamp Act).

¹³⁰ See *Romer*, 116 S. Ct. at 1628.

Most telling of this rift has been Congress's reaction to *Baehr v. Lewin*.¹³¹ Ninia Baehr—the named plaintiff—wanted to put her same-sex partner on her health insurance policy and make the kind of legal and financial commitments to her that married couples enjoy.¹³² For this reason, she and her partner applied to the state of Hawaii for a marriage license.¹³³ When these two, along with another lesbian couple and a gay couple, were denied a marriage license because they were not an opposite-sex couple, they sued the state, contending that its refusal to issue the license amounted to a denial of their privacy, equal protection, and due process rights.¹³⁴ The Hawaii Supreme Court ruled that the state's ban on same-sex marriages would violate both the U.S. and Hawaii Constitutions unless the State could demonstrate a compelling interest in maintaining the restriction.¹³⁵ It remanded the case to the lower court to determine whether that state interest existed, and the court found it did not.¹³⁶

Hawaii's courts thus provided a potential opportunity for lesbians and gays to obtain the right to marry, bringing the lesbian and gay narrative closer to the heterosexual marriage narrative and thereby exacerbating the breach in society. This section has shown how this narrative has presented a challenge to the social order, underscored by the possibility that, for the first time, a state may establish the legality of same-sex marriage. Some segments of society now view same-sex couples as a threat to their conception of marriage and family. The next Part demonstrates how Congress sought to remedy this perceived danger to society.

¹³¹ 852 P.2d 44 (Haw. 1993).

¹³² See Morning Edition: Trial in Hawaii Could Legalize Same-Sex Marriages (National Public Radio broadcast, Sept. 10, 1996), transcript available in 1996 WL 12730060 (describing background behind *Baehr* case).

¹³³ See *id.* For a detailed narrative relating the evolution of Ninia Baehr's and Genora Dancel's relationship into a committed, loving union, see Eskridge, *supra* note 9, at 1-5.

¹³⁴ See *Baehr*, 852 P.2d at 48-50.

¹³⁵ See *id.* at 63-67; see also Susan Essoyan, Hawaiian Wedding Bells Ring Alarm Bells, L.A. Times, Sept. 8, 1996, at A1 (discussing details of *Baehr* case).

¹³⁶ See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *18 (Haw. Cir. Ct. Dec. 3, 1996) (determining that State had no compelling interest in denying marriage licenses to same-sex couples). In the Spring of 1997, the Hawaii legislature passed a proposed amendment to the state constitution that would allow the legislature to refuse marriage licenses to same-sex couples. See Lynn D. Wardle, DOMA: Protecting Federalism in Family Law, 45 Fed. Law. 30, 35 n.7 (1998). Hawaiian citizens will vote on this amendment in the November 1998 elections. See *id.* at 32. If the Hawaii Supreme Court affirms the *Miike* decision before then, same-sex couples may have an opportunity to marry legally in Hawaii.

III

CONGRESS'S USE OF NARRATIVES IN RESPONSE
TO THE GAY AND LESBIAN MARRIAGE NARRATIVE

By enacting DOMA, Congress took the unusual step of legislating a domestic relations issue through its power under Article IV, using narratives to counter the story of same-sex marriage and to assuage society's anxieties regarding homosexuality, marriage, and family. That story, prominently related through *Baehr v. Lewin*, had been posing a growing threat to the social order. This Part examines the legislative history behind DOMA, which tells another narrative—the traditional story of heterosexual marriage. Congress promoted this narrative to remedy the rift in society and to force a return to the status quo of treating lesbians and gays as marginalized citizens. It manifests Congress's attempt to codify society's ideal model of marriage as a heterosexual institution focused on procreation, devoid of adultery, and never ending in divorce.

On May 8, 1996, Senator Don Nickles took to the Senate Floor, on behalf of himself and Senator Bob Dole, and introduced to Congress the Defense of Marriage Act.¹³⁷ He described the purpose of the bill as an articulation of traditional marriage notions: "This bill says that marriage is the legal union between one man and one woman as husband and wife, and spouse is a husband or wife of the opposite sex. There is nothing earth-shattering there."¹³⁸ The bill was necessary, according to Senator Nickles, because of "challenge from courts, lawsuits and an erosion of values."¹³⁹

In advancing this familiar marriage narrative, defenders of DOMA sought to discredit the same-sex marriage story by emphasizing three principal themes: (1) the story of marriage as limited to heterosexuals has ancient roots going well beyond America's short history; (2) the primary purpose of marriage is procreation, which same-sex couples cannot accomplish; and (3) gays and lesbians are incapable of engaging in the kind of moral activity necessary for their relationships to earn the same recognition society grants heterosexual relationships through marriage. These three points, however, do not accurately reflect either the heterosexual marriage narrative or the gay and lesbian narrative. This Part will prove this inaccuracy by showing the following: (1) the ancient roots of the marriage story include homosexual unions; (2) marriage does not center on procreation, and, in any event, same-sex couples do raise children; and (3) gay

¹³⁷ See 142 Cong. Rec. S4869 (daily ed. May 8, 1996) (statement of Sen. Nickles).

¹³⁸ *Id.* at S4870.

¹³⁹ *Id.*

and lesbian couples already demonstrate the kind of moral behavior typically associated with heterosexual marriage. Congress, therefore, enacted DOMA based on narratives about homosexuals and marriage that have little foundation in reality and contradict the prevailing American narratives.

A. The Traditional Marriage Narrative as Rooted Deep in History

Opening debate on the Defense of Marriage Act in the House Committee on the Judiciary, Congressman Canady identified traditional marriage as confined to a heterosexual relationship: "Families are not merely constructs of outdated convention, and traditional marriage laws were not based on animosity toward homosexuals. Rather, I believe that the traditional family structure—centered on a lawful union between one man and one woman—comports with nature and with our Judeo-Christian moral tradition."¹⁴⁰

Supporters of DOMA repeatedly portrayed this marriage narrative as the only traditional story of marriage going far back into history, as if no other marriage narrative had ever existed. Senator Gramm of Texas, for instance, spoke in general terms about historical eras that presumably espoused this notion of marriage as restricted to heterosexual unions:

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, and in democratic societies, as the foundation of freedom. Human beings have always given traditional marriage a special sanction. . . . [T]his is something that every civilized society in 5,000 years of recorded history has recognized.¹⁴¹

Senator Gramm, as well as others seeking to heal the rift in society by depicting the heterosexual marriage narrative as the only such story with historical foundations,¹⁴² ignored evidence that civilized societies and religious traditions throughout history have included same-sex couples in narratives about marriage-like relationships. Stories told through scenes depicted on Egyptian tombs from as far back as

¹⁴⁰ 142 Cong. Rec. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady).

¹⁴¹ 142 Cong. Rec. S10,106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm).

¹⁴² Congressman Sensenbrenner, a sponsor of DOMA, for instance, said before the House Subcommittee on the Constitution, "Traditional heterosexual marriage, in one form or another, has been the preferred alternative by every religious tradition in recorded history." Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 104th Cong. 33 (1996) (statement of Rep. Sensenbrenner). Like Senator Gramm, Sensenbrenner did not identify these religious traditions or disclose how he had derived this information.

2600 B.C. indicate that same-sex relationships had been officially recognized¹⁴³ and that at least one pharaoh had a male consort.¹⁴⁴ Plato's *Symposium* from classical Greek culture stands as the first recorded essay with love and bonding between men as its principal theme.¹⁴⁵ And narratives from imperial Rome reveal that even Roman emperors, as well as other Roman citizens, engaged in open same-sex relationships.¹⁴⁶

Same-sex narratives mirroring the traditional marriage story persisted through the genesis of nations and religious traditions after the fall of the ancient European civilizations. Medieval historian John Boswell discovered several manuscripts in libraries and ecclesiastical collections throughout Europe, detailing different versions of Christian same-sex union liturgies.¹⁴⁷ According to Professor Eskridge, the existence of Roman Catholic and Greek Orthodox rituals of "brother-making" and "enfraternization" has been known in the academic literature for decades.¹⁴⁸ These accounts of same-sex relationships sanc-

¹⁴³ See David F. Greenberg, *The Construction of Homosexuality* 130 (1988) (providing example of tomb with bas-reliefs of two men holding hands and embracing, with noses touching, indicating that State approved of homosexual relationships since only pharaoh could have supplied tomb).

¹⁴⁴ See *id.* at 130 (discussing tomb of Ikhnaton, also known as Akhnaton, which features figures of pharaoh with male consort in intimate poses). Along similar lines, a well known epic of Near Eastern mythology relates the story of the powerful male ruler Gilgamesh who falls in love with Enkidu, a man created by the gods. See David M. Halperin, *One Hundred Years of Homosexuality* 81 (1990).

¹⁴⁵ See Eskridge, *supra* note 9, at 21 (discussing Plato's *Symposium*).

¹⁴⁶ The Roman historian Suetonius reported that first-century emperor Nero celebrated a traditional wedding ceremony with another male, Sporus. See Gaius Suetonius Tranquillus, *The Twelve Caesars* 224-25 (Robert Graves trans., 1964). Dio Cassius, a contemporary of Suetonius, provided accounts of the same-sex and opposite-sex marriages of third-century emperor Elagabalus. See 1 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* 168 (David Womersley ed., 1994) (1776). And several stories about emperor Hadrian from the second century relate his legendary love for the youth Antinous. See generally Royston Lambert, *Beloved and God: The Story of Hadrian and Antinous* (1984); Marguerite Yourcenar, *Memoirs of Hadrian* (1954).

¹⁴⁷ See John Boswell, *Same-Sex Unions in Pre-Modern Europe* 162-217 (1994).

¹⁴⁸ See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419, 1450 (1993). These rituals closely paralleled traditional wedding ceremonies, consisting of a mass with the usual marriage readings from the New Testament, distribution of Holy Communion for the same-sex couple, and the exchange of a kiss in conclusion. See *id.* at 1450-51 (detailing enfraternization ceremony).

In other cultures the same-sex marriage narrative has been even more prevalent. See, e.g., *id.* at 1453-58 (detailing stories about same-sex marriages among early Native Americans); *id.* at 1465-66 (pointing to stories by Li Yu, seventeenth century Chinese author, centering on affairs between men, as evidence of institutionalized same-sex unions in southern China); Denise O'Brien, *Female Husbands in Southern Bantu Societies, in Sexual Stratification: A Cross-Cultural View* 109 (Alice Schlegel ed., 1977) (describing custom of female husband long observed in over 30 African cultures, in which woman assumes legal and social roles of husband and father by marrying another woman).

tioned in one form or another by societies throughout history demonstrate that heterosexual marriage has not been the only kind of sexual union to receive special recognition from mainstream societies and that the heterosexual marriage narrative is not the only story of marriage to have deep foundations in history. In fact, as this evidence illustrates, *traditional* marriage narratives include gays and lesbians as well as heterosexuals.

B. Procreation as the Main Purpose of Marriage

In order to counter the same-sex marriage story, proponents of DOMA advanced another contention about the traditional marriage narrative that, like the argument from history, placed same-sex couples outside the bounds of marriage, but did not accurately depict the complete marriage narrative. These individuals claimed that the main purpose of marriage centers on the procreative—not unitive—function of human coupling. They asserted that narratives relating to traditional marriage, including current narratives, describe the point of marrying as to beget and raise children. Since same-sex couples cannot reproduce with each other and thus cannot conform to this picture of marriage, they should not be permitted to marry.

House Report No. 664 on the Defense of Marriage Act specifies as one of the principal government interests in passing DOMA the need to defend and nurture “the institution of traditional, heterosexual marriage” in order to “encourag[e] responsible procreation and child-rearing.”¹⁴⁹ This statement suggests that society’s definition of marriage—manifested through the narratives society tells about marriage—revolves around procreation. Senator Byrd, speaking on the Senate Floor, supported this theme by relating a narrative from the Bible: “[W]hen God used the word ‘multiply,’ he wasn’t talking about multiplying your stocks, bonds, your bank accounts or your cattle on a thousand hills or your race horses or your acreages of land. He was talking about procreation, multiplying, populating the Earth.”¹⁵⁰

¹⁴⁹ H.R. Rep. No. 104-664, pt. 5, at 12-13 (1996).

¹⁵⁰ 142 Cong. Rec. S10,109 (daily ed., Sept. 10, 1996) (statement of Sen. Byrd). Others pressing this procreation theme also sought to place the homosexual narrative outside their version of the traditional marriage story. David Zwiebel of the orthodox Jewish group Agudath Israel of America, for instance, claimed, “Legalizing same-sex marriages, which, by biological definition, can never have anything to do with procreation, would obscure further still the vital link between marriage and children. It would convey the message that childbearing and childrearing are matters entirely distinct from marriage. The message is subtle, but it is devastating.” Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. 52-53 (1996) (statement of David Zwiebel, General Counsel and Director of Government Affairs, Agudath Israel of America).

While true that same-sex couples cannot reproduce with each other, this argument portrays the same-sex narrative incorrectly. It fails to account for the significant number of gay and lesbian couples who do produce children, through insemination, surrogate parenthood, adoption, or previous marriages—methods used by some heterosexual couples as well. DOMA's proponents refused to acknowledge that legalizing same-sex marriage would grant official recognition to gay and lesbian relationships that *already* focus on raising children. In the late 1980s, approximately three million gays and lesbians in the United States were parents, and between eight and ten million children were being raised in gay or lesbian households.¹⁵¹

Same-sex couples raise children in three general circumstances.¹⁵² The most common situation involves a person already the biological parent of a child (usually through a prior relationship with someone of the opposite sex), who enters a committed relationship with another person of the same sex. The new partner then assumes the role of stepparent.¹⁵³ This stepparent situation mirrors that created by many heterosexual couples, with one major difference—same-sex couples face far greater difficulty than heterosexual couples cementing a stepparent's custody of the child through the legal guarantees of marriage.¹⁵⁴ And at times, the law treats even the biological parent differently than parents with the legal insulation of marriage.¹⁵⁵

The second situation in which same-sex couples have children arises when both partners agree to raise a child together, with one of them as the biological parent. In the case of a lesbian couple, this process entails one of the partners undergoing artificial insemination, usually through anonymous sperm banks but increasingly through

¹⁵¹ See Developments in the Law—Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1629-60 (1989) (examining law concerning parenting by gays and lesbians).

¹⁵² See David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 461-70 (1996) (describing contexts in which gay and lesbian couples raise children).

¹⁵³ See *id.* at 461 (identifying stepparent situation as most common circumstance in which same-sex couples raise children).

¹⁵⁴ See *id.* at 463-65 (describing lack of legal rights in homosexual stepparent relationship).

¹⁵⁵ The story of Sharon Bottoms illustrates this point. After Sharon entered a monogamous lesbian relationship, her mother, Pamela Bottoms, sued her for custody of her son, alleging that Sharon was an unfit mother because she lived with another woman. The Virginia courts ultimately upheld Pamela Bottoms's claim, removing the child from the custody of his biological mother. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 278-79 (Va. Ct. App. 1994) (describing background of case), *rev'd*, 457 S.E.2d 102 (Va. 1995); Stephen B. Pershing, "Entreat Me Not to Leave Thee": *Bottoms v. Bottoms* and the Custody Rights of Gay and Lesbian Parents, 3 Wm. & Mary Bill of Rts. J. 289, 289-91 (1994) (same).

known male (usually gay) donors.¹⁵⁶ In the case of gay men, the process involves surrogacy arrangements.¹⁵⁷ The third setting in which same-sex couples raise children involves adoption.¹⁵⁸ Currently, a small number of states forbid lesbians and gays from adopting children under any circumstances.¹⁵⁹ Many others make adoption quite difficult in practice for people who are openly gay or lesbian.¹⁶⁰ In many cases, for example, both partners in a same-sex couple cannot obtain legal custody of an adopted child. Only one partner can legally adopt, complicating matters if that person dies or if the couple separates.¹⁶¹ By contrast, legally married couples have a far better chance of adopting a child in any state, and both partners can obtain joint custody.¹⁶² That does not mean, however, that adoption for gay or lesbian couples is impossible. The New York Court of Appeals, for instance, has ruled that same-sex couples may adopt, with both partners retaining legal custody of the child.¹⁶³ New Jersey recently set-

¹⁵⁶ See Eskridge, *supra* note 9, at 110 (mentioning artificial insemination option available to lesbians).

¹⁵⁷ See *id.* (mentioning surrogacy option available to gay men). Professor Eskridge relates a narrative about two same-sex couples who have raised a child in this context:

Not atypical is the story of Susan Silber and Dana Naparsteck. . . . They have been a couple for eighteen years. Early in their relationship, Silber and Naparsteck decided to have a child, with Chris, a gay friend of theirs Danielle Rachel Naparsteck Silber is now thirteen years old. Raised in Silber and Naparsteck's household, Danielle knows Chris as her father, whom she calls Papa. Chris and his former partner, Art (Danielle's other dad), have taken an active interest in Danielle's upbringing.

Id. at 110-11.

¹⁵⁸ See Chambers, *supra* note 152, at 461 (listing adoption and foster parenting as one context in which same-sex couples raise children).

¹⁵⁹ Florida and New Hampshire prohibit adoptions by gay men and lesbians. See Fla. Stat. ch. 63.042(3) (1993); N.H. Rev. Stat. Ann. § 170-B:4 (1994). In other states, courts have declared homosexuals unsuitable to be adoptive parents. See Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 Am. U. J. Gender & L. 183, 197 n.53 (1995) (explaining difficulties confronting gay men who wish to adopt).

¹⁶⁰ See Wendell Ricketts & Roberta Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, in *Gay and Lesbian Parents* 89, 94-105 (Frederick W. Bozett ed., 1987) (illustrating legal and practical difficulties gays and lesbians encounter in adopting children).

¹⁶¹ See *id.* at 97-99 (noting that, until recently, all states required that unmarried persons adopt only as individuals, and discussing need for joint or "second-parent" adoption procedure for unmarried couples).

¹⁶² See Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* 62, 66-67, 71 (1993) (highlighting more favorable treatment of married couples in adoption process).

¹⁶³ See *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995) (holding that unmarried couples, whether heterosexual or homosexual, may adopt children jointly under New York's adoption statute).

ted a lawsuit by agreeing to the same adoption rights for same-sex couples as those that exist in New York.¹⁶⁴

Several models of gay and lesbian relationships thus fit within the parameters of marriage narratives that focus on procreation and child-rearing as the central purpose of marriage. Consequently, supporters of DOMA who sought to discredit the homosexual narrative by suggesting that gay men and lesbians cannot have and raise children, and therefore do not comport with the traditional marriage narrative, disregarded reality. In addition, those espousing the procreation theme overlooked the many purposes in getting married outside of procreation. Without the protection marriage provides, same-sex couples must deal with many hurdles related to child custody and inheritance¹⁶⁵ as well as issues unrelated to children for which marriage provides legal guarantees. Other than legal advantages, however, marriage bestows a certain symbolism of societal recognition upon a relationship, which many couples devoted to each other also seek. For these reasons, heterosexuals who cannot or do not intend to have children may still marry. Yet supporters of DOMA failed to account for such couples and the reasons they marry in their version of the traditional marriage narrative.

The House report on DOMA, for example, maintains that the only reason society bestows special recognition upon marriage is to promote procreation:

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

That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, so-

¹⁶⁴ See Judith Havemann, N.J. Allows Gays to Adopt Jointly; Activists Say Settlement Puts Unmarried Couples on Equal Footing, *Wash. Post*, Dec. 18, 1997, at A1 (discussing New Jersey's new adoption policy).

¹⁶⁵ Speaking in support of DOMA, Gary Bauer actually emphasized this point, enumerating the critical protections marriage provides for people raising children:

Marriage establishes bloodlines, kinship, the passage of family traditions and values through the generations, the passing on of family names and property and it is the most important source of social stability. If we all existed for only one generation, we would not have as strong a case for creating legal and cultural safeguards for marriage. But the protection of marriage is not only about social harmony. It is about creating a future for our children.

Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. 22 (1996) (statement of Gary L. Bauer, President, Family Research Council).

ciety would have no particular interest in encouraging citizens to come together in a committed relationship.¹⁶⁶

Contrary to this legislative history, however, marriage serves a unitive, not simply procreative, function. Part of this unitive function involves bringing two people together in a legal bond. As the gay and lesbian narratives indicate, marriage establishes a legal status that carries a broad range of associated rights and benefits for the couple, unrelated to procreation.¹⁶⁷ The unitive purpose of marriage also involves bringing two people together in a spiritual bond that the community officially recognizes. Indeed, the symbolism of legal recognition is perhaps more important to lesbians and gays than the actual legal benefits that flow from marriage. In the United States and throughout the world, marriage stands as the most meaningful event denoting a sense of belonging to the community.¹⁶⁸ For this reason, extending the legal right to marry to same-sex couples would represent society's treatment of lesbians and gays as equal citizens more powerfully than any other nondiscrimination measure. According to the late Professor Tom Stoddard, a leading proponent of same-sex marriage, "[M]arriage is . . . the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men."¹⁶⁹

¹⁶⁶ H.R. Rep. No. 104-664, pt. 5, at 14 (1996) (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)).

Hadley Arkes, a professor at Amherst College, speaking in support of DOMA, expounded on this procreation theme: "We do not need marriage to mark the presence of love, but a marriage marks something matchless in a framework for the begetting and nurturance of children." *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 104th Cong. 100 (1996) (statement of Hadley Arkes, Professor, Amherst College). Congressman Canady, the chairperson of the House Subcommittee on the Constitution, stressed this point in his opening remarks: "Marriage exists so that men and women will come together in the type of committed relationships that are uniquely capable of producing and nurturing children." *Id.* at 1-2 (statement of Rep. Canady).

¹⁶⁷ See Eskridge, *supra* note 9, at 66-67 (listing practical benefits of marriage).

¹⁶⁸ See Chambers, *supra* note 152, at 450 ("[Marriage] marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity.").

¹⁶⁹ Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK Nat'l Lesbian & Gay Q.*, Fall 1989, at 9, 12, reprinted in *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies* 13, 17 (Suzanne Sherman ed., 1992) [hereinafter *Lesbian and Gay Marriage*]; see also Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 *N.Y.U. Rev. L. & Soc. Change* 567, 581-610 (1994) (arguing that legal recognition of same-sex marriage is central to equality for lesbians and gay men).

Not everyone within the lesbian and gay community espouses this view that marriage rights would signify equal rights for lesbians and gays. Paula Ettelbrick, legislative counsel for the Empire State Pride Agenda, for instance, claims that marriage would not lead to liberation. Ettelbrick believes that marriage represents male dominance and the subjugation

Thus, marriage means far more than simply a state sponsored method of encouraging procreation. It represents the community's recognition of the love two people share as well as an extension of substantial legal entitlements for those two people. Society has long acknowledged these unitive values in marriage, which explains why no state mandates the ability or desire to procreate as a prerequisite for obtaining a marriage license. The large number of heterosexual married couples who do not have children illustrates this point,¹⁷⁰ as does the number of parents raising children outside of marriage.¹⁷¹ Since both of these family arrangements are legal, defenders of DOMA who advanced the procreation argument had no rational basis for doing so. The only grounds for their argument lay in emphasizing that society should treat gays and lesbians differently than it treats heterosexuals.

C. Gay and Lesbian Relationships as Immoral and Inferior to Heterosexual Relationships

By portraying the traditional marriage narrative as exclusively heterosexual, grounded in history, and centered on procreation, proponents of DOMA sought to place gays and lesbians outside the bounds of conventional mores. They attempted to remedy the breach in society caused by the increasingly widespread story of homosexual unions resembling marriage by painting that story as one anchored in immorality and perversion. According to these individuals, gays and

tion and loss of individual identity for women. Furthermore, she resists the notion of assimilating same-sex couples through marriage into mainstream heterosexual society with its associated roles and domesticity, preferring instead to transform society out of its patriarchal tradition. See generally Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK Nat'l Lesbian & Gay Q., Fall 1989, at 9, reprinted in *Lesbian and Gay Marriage*, supra, at 20.

Despite arguments along these lines, surveys of lesbians and gays reveal that the majority of them would like the legal right to marry someone of the same sex. See Elizabeth Rhodes, *New Ties That Bind—Same-Sex Couples Challenge the System to Gain Legal Recognition of Their Commitments to Each Other*, *Seattle Times*, July 21, 1991, at K1 (discussing survey showing overwhelming support among lesbians and gays for same-sex marriage). The *Advocate*, a publication with primarily gay and lesbian readership, conducted a poll in 1994 and found that almost two-thirds of gay men interviewed supported same-sex marriage, with 85% open to the idea and 15% uninterested. See Janet Lever, *Sexual Revelations*, *Advocate*, Aug. 23, 1994, at 16.

¹⁷⁰ In 1990, of 93.3 million households in the United States, 27.8 million (29.8%) consisted of married couples with no children under age 18. See Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 *Cardozo L. Rev.* 1299, 1311 n.60 (1997). In 1995, that number had increased to 28.6 million. See *Today's Family*, *St. Louis Post Dispatch*, May 28, 1997, *Everyday Mag.*, at 4E, available in 1997 WL 3344567.

¹⁷¹ See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 *Harv. Women's L.J.* 19, 21-22 (1995) ("Single-parent families now constitute twenty-six percent of all families with minor children and are the most rapidly growing family form in America.").

lesbians should not be permitted to marry because homosexual activity is inimical to the norms defined by America's dominant culture. Thus, homosexual relationships do not deserve the same recognition as those between heterosexuals.

The House report on DOMA reflects this viewpoint. According to the report, in addition to safeguarding traditional marriage for purposes of procreation, DOMA advances the government's interest in defending "traditional [notions of] morality."¹⁷² Those traditional notions embrace the familiar story of heterosexual marriage, but reject those narratives outside the norm: "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."¹⁷³ Throughout the debates on DOMA, advocates of the bill attempted to construct these collective moral judgments by impugning the lesbian and gay narrative, propounding myths about lesbians and gays that, like the history and procreation arguments, do not accurately reflect prevalent stories about gays, lesbians, or marriage.

One of the most popular myths portrayed same-sex relationships as a threat to children and families. Congressman Stearns articulated this point by directly addressing Congressman Frank, an openly gay member of Congress: "You do not threaten my marriage but you do threaten the moral fiber that keeps this Nation together. You threaten the future of families which have traditional marriage at their very heart . . . [C]hildren will suffer because family will lose its very essence."¹⁷⁴ Other proponents of DOMA played on emotions regard-

¹⁷² H.R. Rep. No. 104-664, pt. 5, at 16 (1996).

¹⁷³ *Id.* at 15-16.

¹⁷⁴ 142 Cong. Rec. H7488 (daily ed. July 12, 1996) (statement of Rep. Stearns). Several DOMA backers, through their telling of narratives, similarly played on fears surrounding children. Congressman Hutchinson, for instance, stated, "[O]ne thing [our country] cannot survive is the destruction of the family unit which forms the foundation of our society. Those among us who truly desire a strong and thriving America for our children and grandchildren will defend traditional heterosexual marriage and will vote for final passage of this bill." 142 Cong. Rec. H7442 (daily ed. July 11, 1996) (statement of Rep. Hutchinson). In announcing himself as co-sponsor of DOMA, Senator Coats stressed, "Our society has a compelling interest in respecting [the definition of marriage]. The breakdown of traditional marriage is our central social crisis—the cause of so much anguish and suffering, particularly for our children." 142 Cong. Rec. S4947-03 (daily ed. May 9, 1996) (statement of Sen. Coats). Unlike his colleagues, Congressman Funderbunk fed more directly into anxieties about gay men and children, relating a narrative about the Boy Scouts:

[The Boy Scouts of America], a private group, are being told to abandon their moral code of 80 years and to place young boys under homosexual men on camping trips—or face financial ruin. If homosexuals achieve the power to pretend that their unions are marriages, then people of conscience will be told

ing children by intimating, through their slant on the homosexual narrative, that same-sex couples lack the same ability to raise children that heterosexual couples possess.¹⁷⁵ Congressman Largent, for instance, asserted this position before the Senate Judiciary Committee: "Homosexual couples by definition create motherless and fatherless families and we know that to deliberately create motherless or fatherless families is not in the best interest of children."¹⁷⁶ The former Secretary of Education, William Bennett, picking up on the adoption issue, wrote, "Homosexual couples will also have equal claim with heterosexual couples in adopting children, forcing us . . . to deny what we know to be true: that it is far better for a child to be raised by a mother and a father than by, say, two male homosexuals."¹⁷⁷

Actually, what these individuals claimed as fact—that children develop better in heterosexual households than they do in those run by same-sex parents—is not grounded in reality. According to *U.S. News & World Report*, researchers have discovered that most children

to ignore their God-given beliefs and support what they regard as immoral and destructive.

142 Cong. Rec. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderbunk).

¹⁷⁵ Several members of Congress challenged this contention that same-sex couples threaten families and children. Congressman Kennedy, for instance, highlighted the "traditional" values found in same-sex relationships:

Proponents of this curiously titled bill say that we need legislation to protect the family. Nothing could be further from the truth. Families are not threatened when two adults who love each other make a lifelong commitment to one another. Families will not fall apart if gay men and women are allowed to marry, if they are allowed the same basic legal right to marry that is already enjoyed by heterosexuals.

142 Cong. Rec. H7442 (daily ed. July 11, 1996) (statement of Rep. Kennedy). Similarly, Congressman Frank related the positive, harmless nature of same-sex relationships by telling a personal narrative:

We [Congressman Frank and his same-sex partner Herb] entertained 21 of our relatives. A large majority of them were, in fact, heterosexual couples and the children of those heterosexual couples. I must tell you that having spent several hours in Herb's and my company, none of them left with their marriages in jeopardy.

In no case were the marital bonds any weaker than before. In no case did these people who range in age from a couple of toddlers, who might be too young, but from a 4-year-old to a 20-year-old and on to Herb's parents—in no case was this disruptive.

Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 104th Cong. 7 (1996) (statement of Rep. Frank).

¹⁷⁶ Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, available in 1996 WL 10829445 (statement of Rep. Largent).

¹⁷⁷ William J. Bennett, Editorial, . . . But Not a Very Good Idea, Either, Wash. Post, May 21, 1996, at A19, reprinted in 142 Cong. Rec. H7480 (daily ed. July 12, 1996).

of gay and lesbian parents possess an unusually healthy self-image.¹⁷⁸ A recent American Psychological Association survey of more than forty studies on gay parenting concluded that children raised in gay and lesbian households "are likely to be just as well adjusted as the progeny of traditional unions."¹⁷⁹ Research reveals that these children play with the same toys as other boys and girls, have similar IQs, cultivate typical friendships, possess a normal sense of well-being, and are no more inclined to be confused about their sexual identity than children with heterosexual parents.¹⁸⁰

DOMA's backers, though, not only claimed that gay men and lesbians lack the same ability as heterosexuals to raise children, they also maintained that gays and lesbians offer poor examples for children through their immoral behavior. In so doing, they asserted that the gay and lesbian narrative revolves around unhealthy, destructive behavior, and thus runs counter to values intrinsic to the heterosexual narrative. For that reason, same-sex relationships do not deserve the same special treatment as heterosexual relationships.

Congressman Largent emphasized these points in testimony before the Senate: "If our law determines that homosexual marriage is permitted, the law is actually declaring to society and to our children that homosexual marriage is desirable and good. . . . Unfortunately, the practice of homosexuality is not healthy and is actually destructive to individuals."¹⁸¹ David Zwiebel echoed the view that same-sex relationships occupy a lower rung on the ethical ladder: "[M]illions of Americans reject the notion that homosexual conduct is merely an alternative life-style, no more objectionable, no less acceptable than the traditional heterosexual lifestyle. These Americans

¹⁷⁸ See Joseph P. Shapiro & Stephen Gregory, *Kids with Gay Parents: As Lawmakers Battle Gay Marriages, a Look at How the Children Fare*, *U.S. News & World Rep.*, Sept. 16, 1996, at 75-76 (discussing research).

¹⁷⁹ *Id.* at 76.

¹⁸⁰ See *id.* The story of Alex Tinker, told by *U.S. News & World Report*, illustrates the import of these studies and lends more plausibility to the gay and lesbian marriage narrative:

Alex Tinker knows what people say about kids like him, kids with gay or lesbian parents: You'll probably turn gay yourself. Your life is going to be a mess. But the 13-year-old is doing just fine as he steps onto the stage along with 260 other Oregon seventh graders being honored for scoring higher on the Scholastic Assessment Test than most high school seniors. As the students' names are called, Alex stands on a chair and points happily to his two proud moms. "Not to brag or anything," he says later, "but if you compared me with an average kid in a normal household, I probably get better grades; I'm probably more athletic; I'm probably equally mentally healthy."

Id. at 75.

¹⁸¹ Defense of Marriage Act: Hearings on S. 1740 Before the Sen. Comm. on the Judiciary, available in 1996 WL 10829445 (statement of Rep. Largent).

strive hard to raise their children to recognize that not all expressions of sexuality are morally equivalent."¹⁸²

While these DOMA advocates failed to identify specific reasons why same-sex relationships are so objectionable, some offered a more explicit basis for placing homosexuals outside the moral parameters of the "traditional" marriage narrative—the inability of gays and lesbians to engage in monogamous relationships. Congressman Largent cited one gay author, Andrew Sullivan, as support for this theory: "Sullivan writes that homosexuals reflect a 'greater understanding of the need for extramarital outlets between two men than between a man and a woman.'"¹⁸³ Largent then explained how Sullivan's opinion translated into the source of Largent's fear that same-sex marriage would destroy the traditional family: "If my children grow up believing there is nothing wrong with two men living together in a supposed 'marriage' while entertaining extramarital affairs, the lesson to them is that chastity is old fashioned and that marriage is only about roommates—not lifetime commitments."¹⁸⁴

This argument suggests that society should deny homosexuals the right to marry because they are more promiscuous than heterosexuals and thus morally inferior. While this claim stems from the writing of one man, most gays and lesbians would at least acknowledge that until recently, many stories about gay men (not lesbians) often emphasized their propensity to engage in promiscuous relationships.¹⁸⁵ This promiscuity, real or perceived, could stem either from biology (if men are

¹⁸² Defense of Marriage Act: Hearings on S. 1740 Before the Sen. Comm. on the Judiciary, 104th Cong. 53 (1996) (statement of David Zwiebel, General Counsel and Director of Government Affairs, Agudath Israel of America). Talkshow host Armstrong Williams also suggested that society should prevent children from believing that homosexuality is okay. Speaking at the youth forum of the 1996 Republican National Convention, Williams declared, "It's an insult . . . to think that some day your child may be born, walking—watching two men and two women walking on the street kissing in holy matrimony sanctioned by our government, legitimizing their immoral behavior, because that's exactly what it is." Weekend Edition: Republican Party Sees the Value of the Youth Vote (National Public Radio broadcast, Aug. 18, 1996), transcript available in 1996 WL 7997484.

¹⁸³ Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary, available in 1996 WL 10829445 (statement of Rep. Largent) (quoting Andrew Sullivan, *Virtually Normal* 202 (1995)).

¹⁸⁴ *Id.* William Bennett reiterated these fears. See Bennett, *supra* note 177 ("Even Andrew Sullivan, among the most intelligent advocates of same-sex marriage, has admitted that a homosexual marriage contract will entail a greater understanding of the need for 'extramarital outlets.'").

¹⁸⁵ See Frank Browning, *The Culture of Desire: Paradox and Perversity in Gay Lives Today* 91 (1993) ("The image of the insatiable man obsessed AIDS researchers . . . in the early days of the epidemic. And it is the image they repeated over and over to the public: the men who had sex with ten, twenty, thirty men a night, hundreds a year, thousands per decade."); Eskridge, *supra* note 9, at 9 ("Since at least the nineteenth century, gay men have been known for their promiscuous subcultures.").

inherently more promiscuous than women, male couples would magnify this characteristic) or acculturation (the particular way our society equates virility with sexual prowess).¹⁸⁶ Living in the closet leads to further promiscuity since furtive behavior becomes not only practically necessary but also enticingly erotic.¹⁸⁷

Contrary to Largent's contention, same-sex marriage could work to remedy this problem. By bestowing upon gays and lesbians society's acceptance of their committed relationships, marriage would encourage gays and lesbians to enter such relationships, since short-lived, closeted encounters would no longer be necessary. Reverend William H. Carey, the pastor of Lighthouse Apostolic Church in Schenectady, New York, performs same-sex commitment ceremonies for this precise reason:

[W]hen a group of people are forbidden to marry and are forced to hide their sexual orientation to protect jobs, housing, etc., we have little right to expect them to follow any type of moral standard of monogamy or celibacy. By performing weddings for same-sex couples, I offer them the opportunity to live according to a moral standard that many of them obviously do believe in.¹⁸⁸

However, even if same-sex marriage would not reduce the level of promiscuity among gays and lesbians, that does not justify denying them the right to marry. No state currently denies marriage licenses to heterosexuals based on their perceived propensity toward promiscuity or adultery. Furthermore, no reliable evidence even exists to show that gays and lesbians are more promiscuous than heterosexuals. Largent constructed his narrative about homosexuals' promiscuity based solely on the reflection of Andrew Sullivan. And in propounding his version of the traditional marriage narrative, he mischaracterized heterosexual marriage. While claiming that marriage embodies lifelong commitments, Largent ignored that at least fifty percent of marriages end in divorce.¹⁸⁹

Like other advocates of DOMA, Largent and others attempted to construct certain narratives about heterosexual marriage and about same-sex relationships that do not accurately reflect the predominant narratives about either subject. In addressing the rift caused by the gay and lesbian marriage narrative, they sought to discredit that narra-

¹⁸⁶ See Eskridge, *supra* note 9, at 9.

¹⁸⁷ See *id.* at 9-10.

¹⁸⁸ Letter from Reverend William H. Carey to Judge Shellie Bowers, D.C. Super. Ct. (1991), reprinted in Eskridge, *supra* note 9, at 208-09.

¹⁸⁹ See *The World Almanac and Book of Facts 962* (Robert Famighetti et al. eds., 1998) (reporting statistics that show one of two marriages now ends in divorce); see also Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. Rev. 1103, 1103 (1989) ("Each year more married couples across the country end their unions in dissolution than in death.").

tive and create a heterosexual narrative to reflect "traditional" morals, while depicting same-sex relationships as the cause of decline in those morals.¹⁹⁰ To bolster their narratives portraying same-sex couples as scapegoats for society's problems, some DOMA advocates weaved religious stories into their argument. Congressman Hutchinson, for example, expressed his belief that "marriage is a covenant established by God wherein one man and one woman are united."¹⁹¹ Others simply portrayed homosexuality as immoral and perverse. Congressman Smith, for instance, asserted that same-sex marriages would "legitimize unnatural and immoral behavior."¹⁹² And Congressman Coburn related the following narrative about his constituents' beliefs: "I come from a district in Oklahoma who [sic] has very profound beliefs that homosexuality is wrong. They base that belief on what they believe God says about homosexuality[:] . . . that homosexuality is immoral, that it is based on perversion, that it is based on lust."¹⁹³

What these pro-DOMA assertions amounted to was a desire on the part of several members of Congress to treat gays and lesbians differently because of their sexual orientation. Supporters of DOMA did not posit any other justification for passing this anti-marriage legislation, raising questions regarding whether DOMA is based on any rational purpose. Their anti-gay promptings became so obvious that some members of Congress, including those who voted for DOMA, noted the harsh tenor of arguments like these and urged their colleagues to adopt a more tolerant attitude toward the gay and lesbian story while debating DOMA.¹⁹⁴

¹⁹⁰ Gary Bauer, president of the Family Research Council, for instance, decried the "devastation caused by a lack of support for marriage" resulting from "out-of-wedlock pregnancies, sexually-transmitted diseases, alcohol and drug abuse, educational failure, community decline, and . . . a frightening epidemic of crime." *Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 22 (1996) (statement of Gary L. Bauer, President, Family Research Council). Among these "destructive social problems," Bauer included the danger of same-sex marriage. *Id.*

¹⁹¹ 142 Cong. Rec. H7442 (daily ed. July 11, 1996) (statement of Rep. Hutchinson). Other examples include Congressman Buyer, who stressed that "God laid down that one man and one woman is a legal union," 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer), and Senator Byrd, who characterized the story of heterosexual marriage as the oldest institution "set forth in the Holy Bible," 142 Cong. Rec. S10,111 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

¹⁹² 142 Cong. Rec. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith).

¹⁹³ 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

¹⁹⁴ Senator Kassebaum, for instance, urged that "the tone we set in our deliberations is one which will be echoed around kitchen tables and worksites throughout the Nation. Let that tone be one which honors our democratic traditions of reasoned debate, responsible decisionmaking, and respect for all individuals." 142 Cong. Rec. S10,120 (daily ed. Sept. 10, 1996) (statement of Sen. Kassebaum).

CONCLUSION

This rhetoric in support of DOMA, advancing the traditional marriage narrative and deprecating the same-sex marriage narrative, boiled down to an attack on gays and lesbians in an effort to suppress the emergence of the gay and lesbian narrative. Congress played on society's anxieties, using narratives to remedy the disorder that Congress attributed to the increasing visibility of narratives about monogamous same-sex couples, and thereby justifying federal intervention into domestic relations law through reverse use of the Full Faith and Credit Clause. But in so doing, DOMA advocates proposed a version of the marriage narrative—heterosexual marriage as the one story grounded in history, marriage as centered on procreation, and marriage as morally beyond the reach of gays and lesbians—that contradicted prevailing cultural narratives and lacked a strong factual foundation. Furthermore, this attack on gays and lesbians revealed what may constitute the principal motivation behind enacting DOMA—purposeful discrimination against a politically unpopular group—which raises constitutional issues.

DOMA represented a narrative exercise in diversion. By manipulating narratives, Congress diverted attention away from the difficult election-year issues that plagued society, such as crime, poverty, and lack of education, and its inability to solve those issues.¹⁹⁵ It then focused concern on same-sex couples as the source of society's problems, playing on fears regarding homosexuals in an attempt to appear responsive to these social ills. By enacting DOMA in this manner, however, Congress singled out a politically unpopular group and passed a law based on little more than popular animus against this group. Such animus explains why Congress would make a rare venture into the realm of domestic relations and enact a law under its Article IV powers to limit, rather than expand, full faith and credit. Yet the anti-gay sentiment that members of Congress expressed in relating their narratives suggests that DOMA may violate the Equal Protection Clause. If gays and lesbians do attain marriage rights, therefore, DOMA may fail to withstand a constitutional challenge.

¹⁹⁵ Rabbi David Saperstein, during the DOMA hearings, pointed out what he thought signified the real risks to American families—poverty, unemployment, stagnant wages, inadequate child care, deficient education, and pollution. These are all problems, according to Rabbi Saperstein, that Congress had done little to nothing to remedy. This last point, noted Saperstein, "is what [DOMA] is all about. It is about saying to the American people, 'Pay no attention to these truly anti-family policies; gay men and lesbians are the real threats to the security and sanctity of your marriages, your homes, and your communities.'" *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 104th Cong. 210 (1996)* (statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism).