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I Wanna Marry You: The Irrelevancy and Distraction of DOMA

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I Wanna Marry You: An Empirical Analysis of the Irrelevance and Distraction of

DOMAs

by

Deirdre M. Bowen*

Abstract: This article offers the only empirical analysis to date of national data evaluating the claim that defense of marriage acts (DOMAs) preserve and stabilize the family. After concluding that they do not, the article explores what variables are, in fact, correlated with family stability. Next, the article explores moral entrepreneurship and moral panic as a theoretical explanation for DOMAs' continued attraction. Finally, the article offers pragmatic recommendations for achieving family stability.

Introduction

The federal Defense of Marriage Act¹ (DOMA) became a focal point of attention early last year when the First Circuit ruled that the statute contained an unconstitutional provision.² Later in 2012, the Supreme Court granted certiorari to hear a pair of illustrative DOMA cases.³ Supporters of DOMA cried the refrain that DOMA is needed

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¹Pub. L. No. 104-199, 100 Stat. 2419 (Sept. 21, 1996).

²Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1 (1st Cir. 2012). Since this ruling, two other U.S. district courts have ruled on the constitutionality of DOMA. Pedersen et al v. Office of Personnel Management et al, ___ F.3d ___ (July 31, 2012). The court granted the plaintiff's motion for summary judgment. The court found that the plaintiffs deserved heightened scrutiny as a suspect class, but also found DOMA's articulated goals do not pass even the most deferential rational basis review. Windsor v. United States, ___ F.3d ___ (June 6, 2012) (finding a state's interests behind DOMA not based in reality, and thus, plaintiff's motion for summary judgment was granted).

³ On December 7, 2012, the Supreme Court granted a petition for a writ of certiorari for the 2nd Circuit cases combined under Windsor v. U.S., 699 F.3d 169, and California's Prop 8 case Hollingsworth v. Perry, 671 F.3d 1052. Argument is set for March 27, 2013. Supreme Court of the United States, Docket No. 12-307, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-307.htm>.

to protect our society—to strengthen and protect traditional marriage, the cornerstone of civilization.⁴ But does DOMA *really* protect marriage? This article offers an empirical investigation of that question and concludes that DOMA provides no measurable benefit to protecting “at risk” families, but the “DOMA as protectorate” discourse serves other constituencies’ interests quite effectively.⁵ After discussing the empirical results, the article explores why the discourse around DOMA has such staying power and offers some novel recommendations for moving beyond the distraction that DOMA presents.

The court engaged in a unique novel analytical approach to determine that a demonstrated connection was missing between DOMA’s treatment of same-sex couples and its goal of strengthening the bonds and benefits of marriage.⁶ While Attorney General Eric Holder announced last year that the Obama Administration would no longer defend

⁴ See, e.g., Bishop Cordileone of the United States Conference of Catholic Bishops, who declared, “The federal appeals court in Boston did a grave injustice yesterday by striking down that part of the Defense of Marriage Act that reasonably recognizes the reality that marriage is the union of one man and one woman. DOMA is part of our nation’s long-established body of law rooted in the true meaning of marriage. Hopefully, this unjust ruling will be overturned by the U.S. Supreme Court, for the benefit of our nation’s children, and our nation as a whole.” *Bishops’ Committee For Defense of Marriage Disappointed Over DOMA Ruling*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (June 1, 2012), <http://www.usccb.org/news/2012/12-096.cfm>; “Society should protect and strengthen marriage, not undermine it. The federal Defense of Marriage Act provides that type of protection, and we trust the U.S. Supreme Court will reverse the 1st Circuit’s erroneous decision.” Statement from Alliance Defense Fund Legal Counsel Dale Schowengerdt. Karla Dial, *1st Circuit Declares Part of Federal Marriage Law Unconstitutional*, CHRISTIAN CIVIC LEAGUE OF MAINE (May 31, 2012), <http://www.cclmaine.org/1st-circuit-declares-part-of-federal-marriage-law-unconstitutional>.

⁵ I posit that those that possess socio-economic-political power benefit from focusing attention on DOMA as the key method of saving families in crisis. The discourse distracts from the stark reality that the lack of investment in the resources needed for these families contradicts with the concentration of wealth that the political elite have always enjoyed. Moreover, it distracts from the *divestiture* in social structures that would not only support families subsisting on the margins, but also the dissipating lower middle class who used to make up the “settled working class.” JOAN C. WILLIAMS, *RESHAPING THE WORK FAMILY DEBATE: WHY MEN AND CLASS MATTER* 155-56 (2010). The article explores why, in spite of empirical evidence to the contrary, DOMA holds such an attraction to the very families who would most benefit from a radical shift in family policy rather than the empty shell of legislation written in the name of protecting families. See, e.g., Thomas Holmes, City of Seattle Attorney, “More fundamentally, we are joining large and small, public and private entities across the country that recognize that DOMA serves no good purpose - it just forces employers to treat valued employees unfairly, by denying them equality in important family resources such as COBRA, Social Security benefits and pensions.” Press Release, City of Seattle, City Formally Joins Effort to Challenge Federal Defense of Marriage Act (July 10, 2012), <http://www.seattle.gov/mayor/press/newsdetail.asp?ID=12915>.

⁶ *Massachusetts*, 683 F.3d at 14-15.

DOMA's constitutionality⁷ because the Department of Justice determined that the standard of review for the sexual-orientation classification demanded heightened scrutiny,⁸ the First Circuit rejected the heightened-scrutiny standard in favor of what it coined a "more careful assessment"⁹ than that offered by "conventional rational basis review."¹⁰ Indeed, only certain types of rationales with a certain level of "force" are acceptable under this rational basis plus standard of review.¹¹

Specifically at issue is Section 3 of DOMA, which defines marriage as a "legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."¹² Under a heightened-scrutiny review, the Attorney General wrote, any justification for the sexual-orientation classification must reflect actual state purposes and may not be newly manufactured after litigation begins.¹³ The Attorney General went on to note that Congress's articulated purpose of DOMA would fail under a strict scrutiny standard, but could pass muster under a rational basis review.¹⁴ However, applying the rational basis

⁷ Press Release, U.S. Attorney General Eric Holder, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>. The announcement led to considerable reaction in the U.S. House of Representatives. On March 3, 2011, Representative Vicky Hartzler sponsored a concurrent resolution condemning the Administration's decision to stop defending DOMA and demanding that the DOJ defend DOMA in all instances. H.R. Con. Res. 25, 112th Cong. (2011). Representative Louie Gohmert sponsored a resolution "[d]irecting the Speaker, or his designee, to take any and all actions necessary to assert the standing of the House to defend" DOMA in all federal litigation. H.R. Res. 143, 112th Cong. (2011). Additionally, on March 2, 2011, Representative Dan Burton introduced the Marriage Protection Act of 2011, which prohibits courts created by an Act of Congress from hearing or deciding challenges to the validity or interpretation of DOMA. H.R. 875, 112th Cong. (2011).

⁸ Letter from Attorney General Eric Holder to Hon. John A. Boehner (Feb. 23, 2011), *available at* <http://justice.gov/opa/pr/2011/February/11-ag-223.html>.

⁹ *Massachusetts*, 682 F.3d at 11.

¹⁰ *Id.*

¹¹ *Id.* at 8.

¹² 1 U.S.C. § 7 (2009).

¹³ See Letter from Attorney General Eric Holder to Hon. John A. Boehner, *supra* note 8 (quoting *United States v. Virginia*, 518 U.S. 515, 533, 535–36 (1996)).

¹⁴ *Id.*

“plus” standard of review, the First Circuit decided that DOMA’s articulated goal was unacceptable.¹⁵

When Congress passed DOMA, one of four reasons advanced for DOMA’s necessity was to defend and nurture the institution of traditional heterosexual marriage.¹⁶

Indeed, the report stated:

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.¹⁷

Congress went on to pre-empt the argument that the institution of marriage was already under attack by divorce when it proclaimed that same-sex marriage was an inherently flawed social experiment.¹⁸ To permit it would further devalue an institution already reeling from no-fault divorce, the sexual revolution, and out-of-wedlock births.¹⁹

¹⁵ *Massachusetts*, 682 F.3d at 15-16.

¹⁶ H.R. REP. NO. 104-664, at 12 (1996).

¹⁷ *Id.* (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

¹⁸ *Id.* at 15; see also David J. Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 AKRON L. REV. 621, 656 n.244 (2011) “[N]o society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.” - Rep. Tom Coburn, 142 CONG. REC. H7444 (daily ed. July 11, 1996); “The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of society.” Rep. Bob Barr 142 CONG. REC. S10068 (daily ed. Sept. 9, 1996); “Members of Congress repeatedly condemned homosexuality in the floor debates surrounding DOMA’s passage, calling it ‘immoral,’ ‘based on perversion,’ ‘unnatural,’ ‘depraved,’ and ‘an attack upon God’s principles.’” Brief for Attorney General, Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint and in Support of Commonwealth’s Motion for Summary Judgment at 7, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F.Supp.2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2010 WL 581804.

¹⁹ H.R. REP. 104-664, at 12 (1996).

Ultimately, Congress asserted in this report that the time had come to “rebuild a family culture based on enduring marital relationships.”²⁰

And certainly, one of the key rationales that the defendants offered in *Massachusetts v. HHS* to support DOMA reiterates this theme: essentially, children are best raised in a stable heterosexual marriage.²¹ However, the court observed that “DOMA does not . . . explain how denying benefits to same-sex couples will reinforce heterosexual marriage.”²² But, what the court ultimately rested its gaze on is the idea that a diversity of governance requires the federal government to respect states’ choices regarding marriage—including the choice to *allow* same-sex marriage.²³ Although the court observed that the Supreme Court has in the last fifty years demanded “closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern,”²⁴ the First Circuit seemed to rely on the second part of this sentence as the focal point of its rationale.²⁵ Thus, the court’s language suggests that while the federal government’s DOMA reasoning is unsupported when interfering with state business, this same logic might be valid at the state level precisely because the *federal government* is not imposing its will. Rather, *the state* is denying benefits to a group that has experienced a tradition of discrimination.²⁶ And the state is

²⁰ *Id.*

²¹ *Massachusetts*, 682 F.3d at 14.

²² *Id.*

²³ *Id.* at 16.

²⁴ *Id.*

²⁵ *Id.* This point appears most saliently in the court’s rejection of the argument that DOMA’s hidden but dominant goal was an expression of hostility toward homosexuals. Instead, the court observed that the crucial goal was to preserve marriage’s long-held heritage. “Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity—not on benefits firmly provable in court. The desire to retain them is strong and can be honestly held.” *Id.* The court seems to signal that states can reasonably articulate this goal, but that the federal government must meet a higher standard before its interference with state choice will be sanctioned.

²⁶ The Obama Administration, while agreeing with the First Circuit’s decision, requested that the Supreme Court clarify the issue. See *DOMA Appeal: Obama Administration Asks Supreme Court for Quick Review*

entitled to do so, presumably, as an expression of its citizens' will to preserve tradition.²⁷

The question is do mini-DOMAs do that?²⁸

Whether DOMA survives a Supreme Court ruling has substantial historical and social significance. But DOMA's potential demise offers less relief for those gay and lesbian families who wish to wed, but reside in states with statutes or constitutional amendments that bar same-sex marriage.²⁹ Given that nine states have statutes barring same-sex marriage and twenty-nine states have constitutional amendments that prohibit the practice,³⁰ it becomes necessary to consider why states enacted their own DOMAs and whether those who have, have reaped the benefits that they hoped to achieve.³¹

The empirical analysis reveals two conclusions. First, states that enacted DOMA did so for virtually the same reasons as the federal government. Second, DOMA does not appear to be associated with achieving the articulated goals. In particular, it appears that states that possess DOMA statutes or constitutional amendments also espouse greater

of Gay Marriage Law, HUFFINGTON POST (July 3, 2012, 7:15 PM), http://www.huffingtonpost.com/2012/07/03/doma-appeal-supreme-court-gay-marriage_n_1648119.html. The December 7, 2012, certiorari approval identified two key questions, "Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case." Supreme Court, *supra* note 3.

²⁷ *Id.*

²⁸ Mini-DOMA refers to those statutes that states enacted mirroring the federal DOMA statute. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2166-94 (2005).

²⁹ William Saletan, *Gay Bells in Bondage: Most Americans Support Gay Marriage but Can't Legalize It. Thanks to 2004 Voters*, SLATE (June 28, 2011, 8:58 AM), http://www.slate.com/articles/news_and_politics/frame_game/2011/06/gay_bells_in_bondage.html. But see Anna Staver, *Same-Sex Marriage Amendment in Ohio Gets Green Light*, THE HUFFINGTON POST (Apr. 3, 2012, 6:29 PM), http://www.huffingtonpost.com/2012/04/03/same-sex-marriage-amendment-ohio_n_1400714.html?ncid=edlinkusaolp00000009 (Ohio may vote to overturn its 2004 Constitutional Amendment banning same-sex marriage.). Maine will vote on whether to overturn a same sex-marriage ban passed originally in 2009. Jillian Rayfield, *The Fight for Marriage Equality Moves to State Ballots*, ROLLING STONE (June 8, 2012, 10:35 AM), <http://www.rollingstone.com/politics/blogs/national-affairs/the-fight-for-marriage-equality-moves-to-state-ballots-20120608>.

³⁰ See *infra* note 33.

³¹ The First Circuit opinion did not address Section 2 of DOMA, which frees states that ban same-sex marriage from having to recognize same-sex marriages performed in states that do license homosexual matrimony. *Massachusetts*, 682 F.3d at 6.

rates of religiosity, but experience larger rates of poverty, divorce, and out-of-wedlock births while encountering lower educational rates and marriage rates.³² Thus, this article discusses three issues: the methodology associated with the empirical research as well as the results; a theory as to why the articulated DOMA goals persist despite the legislations' inability to meet those goals; and recommendations on how best to achieve the goal of developing and executing an effective policy that supports families.³³

I. Methodology and Results

³² This empirical analysis is discussed in detail *infra*.

³³ I do not review the history and background of DOMA, which have been explored in depth elsewhere. See, e.g., Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 286-93 (1997-1998); Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC'Y 145, 146-54 (2009); Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.*, 25 GEO. IMMIGR. L.J. 407, 446-73 (2011).

Soon after the federal law went into effect,³⁴ states began enacting mini-DOMAs,³⁵ either by statute or state constitutional amendment, and sometimes both.

³⁴ Forty-one states have enacted mini-DOMA legislation through their constitution or statutory law; many states overlap and have both statutory and constitutional mini-DOMAs. Thirty-one states have constitutional mini-DOMAs. *See* ALA. CONST. art. I, §36.03 (2006); [ALASKA CONST. art. I, §25](#) (1996); ARIZ. CONST. art. XXX, §1 (2008); ARK. CONST. amend. 83, §1 (2004); CAL. CONST. art. I, §7.5 (2008); COLO. CONST. art. II, §31 (2006); FLA. CONST. art. I, §27 (2008); GA. CONST. art. I, §IV (2004); HAW. CONST. art. I, §23 (1998)(amendment empowers legislature “to reserve marriage to opposite sex couples” but does not explicitly ban same-sex marriages); IDAHO CONST. art. III, §28 (2006); KAN. CONST. art. XV, §16 (2005); KY. CONST. §233a (2004); LA. CONST. art. XII, §15 (2004); MICH. CONST. art. I, §25 (2004); MISS. CONST. art. XIV, §263-A (2004); MO. CONST. art. I, §33 (2004); MONT. CONST. art. XIII, §7 (2004); NEB. CONST. art. I, §29 (2000); NEV. CONST. art. I, §21 (2002); N.C. CONST. art. XIV, §6 (2012); N.D. CONST. art. XI, §28 (2004); OHIO CONST. art. XV, §11 (2004); OKLA. CONST. art. II, §24 (2004); OR. CONST. art. XV, §5a (2004); S.C. CONST. art. XVII, §15 (2006); S.D. CONST. art. XXI, §9 (2006); TENN. CONST. art. XI, §18 (2006); TEX. CONST. art. I, §32 (2005); UTAH CONST. art. I, §29 (2004); VA. CONST. art. I, §15-A (2006); WIS. CONST. art. XIII, §13 (2007). Thirty-five states have statutory mini-DOMAs. *See* ALA. CODE §30-1-19 (1998); ALASKA STAT. ANN. §§25.05.011, .013 (West 1996); ARIZ. REV. STAT. ANN. §§25-101,-112 (1996); ARK. CODE ANN. §9-11-109 (West 2005); CAL. FAM. CODE §308.5 (West 2000); COLO. REV. STAT. ANN. §14-2-104 (West 2006); DEL. CODE. ANN. tit. 13, §101 (West 2009); FLA. STAT. ANN. §741.212 (West 1997); GA. CODE. ANN. §19-3-3.1 (West 1996); IDAHO CODE. ANN. §32-201 (West 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 2006) (*But see* H.B. 5170, 97th Gen. Assemb., 2d Reg. Sess. (Ill. 2011) (proposed legislation H.B. 5170 provides that marriages between same-sex couples will be treated the same as marriages between opposite-sex couples); IND. CODE. ANN. §31-11-1-1 (West 1997); KY. REV. STAT. ANN. §§402.005, .020, .040, .045 (West 1998); LA. CIV. CODE ANN. art. 89 (1999); MICH. COMP. LAWS ANN. §§551.271, .271, .272 (West 1996); MINN. STAT. ANN. §§571.01, .03, 518.01 (West 1997) (*But see* H.F. 1761, 87th Leg. Reg. Sess. (Minn. 2011) (proposed legislation alters language, replacing the word “marriage” with “civil unions,” granting same-sex couples the same rights as opposite-sex couples); MO. ANN. STAT. §451.022 (West 2001); MONT. CODE ANN. 40-1-401 (1997); N.C. GEN. STAT. ANN. 51-1.2 (West 1996); N.D. CENT. CODE ANN. §§14-03-01, -08 (West 1997); OHIO REV. CODE ANN. §3010.01(A) (West 2004); OKLA. STAT. ANN. tit. 43, §3.1 (West 1997); 23 PA. STAT. ANN. §1704 (West 1996) (*But see* H.B. 1835, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (proposed legislation providing for same-sex marriages and repeal laws that prohibit them); S.C. CODE ANN. §20-1-10, -15 (1996); S.D. CODIFIED LAWS §§25-1-1, -38 (West 1996;2000); TENN. CODE ANN. §36-3-113 (West 1996); TEX. CODE ANN. §§2.001, 6.204 (West 1997; 2003); UTAH CODE ANN. §§30-1-2, -4.1 (West 1999; 2004); VA. CODE ANN. §§20-45.2, -45.3 (West 1997; 2004); WA. CODE ANN. §RCW 26.04.010; W. VA. CODE ANN. §48-2-603 (West 2001); WIS. STAT. ANN. §§765.001(2), 765.01 (West 2009); WYO. STAT. ANN. §20-1-101 (West 1977).

In November 2012, mini-DOMAs in Maine, Maryland, and Washington were usurped by popular referenda legalizing same-sex marriage. *See generally A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. TIMES (Dec. 29, 2012), available at http://www.nytimes.com/2012/12/30/us/same-sex-marriage-becomes-legal-in-maine.html?_r=0; *see also Many weddings as gay marriage becomes legal in Md.*, USA TODAY (Jan. 1, 2013), available at <http://www.usatoday.com/story/news/nation/2013/01/01/same-sex-marriage-maryland/1801917/>; <http://www.cnn.com/2012/11/09/us/washington-passes-same-sex-marriage/index.html>

Prior to November’s vote, Maine and Maryland had the following statutory DOMAs in place: ME. REV. STAT. ANN. tit. 19-A, §701(5) (1997); MD. CODE ANN., FAM. LAW §2-201 (*But see* S.B. 241, 430th Gen. Assemb., Reg. Sess. (Md. 2012) (Civil Marriage Protection Act that defines marriage as between “two individuals,” rather than between “a man and a woman” as previously stated, effective Oct. 1, 2012).

³⁵ Mini-DOMAs limit marriage to one man and one woman, “but not necessarily the attributes of civil unions” while super-DOMAs deny all forms of relationship recognition i.e., civil unions, domestic partnerships, and reciprocal benefits, to same-sex couples. Daniel R. Pinnello, *Location, Location,*

However, not all states adopted their own version of DOMA, i.e. a mini- or super-DOMA, and, in the wake of the federal legislation, some states chose to find some parallel version of marriage in the form of civil unions³⁶ or domestic partnerships instead.³⁷ Furthermore, a select few states, mostly through court action, came to permit same-sex marriage or at least recognize same-sex marriages performed in other states even though, at one time, the state may have enacted a mini-DOMA.³⁸ Thus, differing state reactions to the conundrum of how to respond to same-sex marriage allows for an empirical analysis of how a state's DOMA legislation may have affected the culture of marriage and divorce in the United States.³⁹

Location: Same-Sex Relationship Rights by State, AMERICAN BAR ASSOCIATION LAW TRENDS AND NEWS PRACTICE AREA AND NEWSLETTER, Fall 2009, available at http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/b1_feat5.html.

³⁶ See HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/state_laws (last visited July 29, 2012). The following states recognize civil unions between same-sex partners: Delaware (S.B. 30, 146th Gen. Assemb., 1st Sess. (Del. 2011)); Hawaii (H.B. 2569, 26th Leg., Reg. Sess. (Haw. 2012)), Illinois (750 ILL. COMP. STAT. ANN. 75/10 (WEST 2011)), New Jersey (N.J. STAT. ANN. § 37:1-28 (2007)), Rhode Island (R.I. GEN. LAWS 1956 § 15-3.1.2 (2011)). The following states have not enacted mini-DOMA legislation: Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico (will recognize out-of-state same-sex marriages), New York, Rhode Island, Vermont, and the District of Columbia. Vermont, in 2000, was an early adopter of civil unions. *Act 91, An Act Relating to Civil Unions*, H. 847, 123rd Gen. Assemb., Reg. Sess. (Vt. 2000).

³⁷ *Id.* The following four states provide the equivalent of state-level spousal rights to same-sex couples in the form of domestic partnerships: California, CAL. FAM. CODE § 297-297.5 (2007); Nevada, NEV. REV. STAT. § 122A (2009); Oregon, OR. REV. STAT. § 106 (2001); and Washington, WASH. REV. CODE § 26.60. Three states provide limited spousal rights to same-sex couples: Colorado, CO. REV. STAT. § 15-22 (2009) (calling partners "designated beneficiaries"); Maine, ME. REV. STAT. ANN. tit. 22, § 2710 (2004) (domestic partnerships), obsolete after November 2012 ballot measure approving same-sex marriage, *supra* note 33; and Wisconsin, WIS. STAT. § 770 (2009) (domestic partnerships).

³⁸ *Id.* The following states issue marriage licenses to same-sex couples: Connecticut (S.B. 899, 2009 Gen. Assemb., Reg. Sess. (Conn. 2009)), District of Columbia (2010), Iowa (2009), Massachusetts (*Goodridge v. Dept. of Pub. Health*, 440 Mass. 309 (Mass., 2003) (ruling that allowing only heterosexual couples to marry is unconstitutional), New Hampshire (2010), New York (2011) and Vermont (2009). Two states recognize marriages by same-sex couples legally entered into in another jurisdiction: and Rhode Island (R.I. GEN. LAWS § 15-1-8 (2012)). Voter referenda legalizing same-sex marriage passed by narrow margins on the Nov. 2012 ballot in Maine (51.5% approve Question 1), Maryland (52.4% approve Question 6), and Washington (53.7% approve Referendum 74) BALLOTPEdia, <http://ballotpedia.org> (last retrieved Jan. 11, 2013).

³⁹ The theory behind the analysis is that while federal legislation may have some effect on a state's cultural consciousness, a state's decision to enact DOMA would play a greater role in expressing the cultural values and desires of that state's collective conscience and perhaps influence marital behavior. Likewise, a state's

A. Context Analysis

The first question that the research addresses is what reasons did states pronounce as the basis for the need to enact DOMA through statute or constitutional amendment? To answer this query, I analyzed, looking for common themes, each state's legislative history, statutory language, and media content surrounding the passage of DOMA legislation.⁴⁰ I also examined variations based on date of enactment, geographical location, and whether a state passed a statute (a mini-DOMA) followed by a constitutional amendment (a super-DOMA).⁴¹ I then compared what I found with the reasons articulated in *Commonwealth of Massachusetts*.⁴² Specifically, the court observed that "[T]he Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual

close proximity to other states that have taken action may influence state behavior. Some states respond in kind to a neighboring state, or one in close proximity. For example, Massachusetts's neighboring states—Vermont, New Hampshire, Connecticut, and New York—followed suit in permitting same-sex marriage. Maine attempted to do so, but a referendum quickly overturned the legislation. An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, L.D. 1020, 124th Me. St. Leg. (Me. 2009); *November 3, 2009 General Election Tabulations*, BUREAU OF CORPORATIONS, ELECTIONS & COMMISSIONS, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited July 29, 2012). New Hampshire is debating overturning its licensing of same-sex marriage. H.B. 437, 163rd Leg., 2nd Reg. Sess. (2012) (voted down 211-116 on Mar 21, 2012); see Michael K. Lavers, EDGE BOSTON, http://www.edgeboston.com/news/national/news/131180/nh_lawmakers_reject_marriage_equality_repeal_bill. See also NEW HAMPSHIRE REPUBLICANS FOR FREEDOM AND EQUALITY, <http://www.nhrfe.com> (last visited July 29, 2012) (Although the New Hampshire House rejected repeal of the state's gay marriage law in March, 2012, House Speaker Bill O'Brien announced that he will continue efforts to repeal the law allowing same sex couples to marry). On the other hand, soon after Washington, D.C. permitted same-sex marriage, Maryland followed suit by recognizing out-of-jurisdiction marriages. Two years later, Maryland would allow same-sex marriage with the Civil Marriage Act of 2012, but within months, a ballot referendum was certified for November to overturn the legislation. 2012 Petition Filings, MARYLAND STATE BOARD OF ELECTIONS, <http://www.elections.state.md.us/petitions/index.html> (last visited Aug. 15, 2012).

⁴⁰ KLAUS KRIPPENDORFF, *CONTEXT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY passim* (2nd ed. 2004); infra notes ____.

⁴¹ Pinnello, *supra* note 35.

⁴² *Massachusetts*, 682 F.3d at 914; see also H.R.REP. No. 104-664 at 12 (1996) ("[T]he Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.").

marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.”⁴³

Three key themes emerge from the content analysis regarding motivations for DOMA’s passage. The first is that the long-held traditions and definition of marriage need protection to thrive.⁴⁴ The second is that children need to be protected and/or raised in an optimal environment.⁴⁵ The third is that “activist”⁴⁶ or “new age”⁴⁷ or “liberal”⁴⁸

⁴³ H.R.REP. No. 104-664 at 12 (1996).

⁴⁴ Many proponents fall back on this premise: loosening the definition of marriage will cause the collapse of society. For example, Scott Moody, an economist, states that “the devaluation of marriage through same-sex marriage will eventually ensure a population in New Hampshire where the shrinking, younger generation will no longer be able to support the state’s economy.” Amanda Beland, *Foster’s Editorial Board: Economist Says Gay Marriage Undermines State’s Fiscal Stability*, FOSTER’S DAILY DEMOCRAT (Jan. 18, 2012), available at http://www.fosters.com/apps/pbcs.dll/article?AID=/20120118/GJNEWS_01/701189932 (last visited Aug. 16, 2012) (but empirical research to date on the effects of same-sex marriage suggests otherwise). See, e.g., M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE GAY MARRIAGE (2009) (After conducting statistical analysis, the author concludes there are not many changes in heterosexual marriage and divorce behavior in societies that recognize same-sex marriage, and in fact, attitudes about the irrelevancy of marriage have little to do with legalization of same-sex marriage.); The Williams Institute’s research on the economic effects of permitting same-sex unions suggest an economic boon to those state’s economies. For example, Iowa added over half a million dollars in additional tax revenue with the legalization of same-sex marriage in 2009. *Economic Impacts by State*, THE WILLIAMS INSTITUTE, <http://williamsinstitute.law.ucla.edu/economic-impact-reports-by-state> (last visited Jan. 24, 2013).

While some “suggest[] we learn from history, saying every single society who has weakened marriage or even eased divorce all came crumbling down[.]” *Constitutional Amendment re Marriage: Hearing on S.J.R. 42 Before the S. Judiciary*, (Mar. 9, 1998) [hereinafter Gordy] (statement of Tom Gordy, Chairman, Christian Coalition), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=20&beg_line=0139&end_line=0752&time=1335&date=19980309&comm=JUD&house=S (last visited Aug. 16, 2012) The research suggests that economic and social policies are associated with the long-term weakening of the family, not the introduction of same-sex marriage. See, e.g., June Carbone, *What Does Bristol Palin have to Do with Same-Sex Marriage?* 45 U.S.F. L. REV. 313 (2011) (arguing that research demonstrates family instability can be attributed to lack of economic opportunities, particularly based on social class). Holning Sherman Lau, *Do Marriage Amendments Really Protect Marriage? An Analysis of Data from 2000-2009* (Sept. 12, 2011), available at <http://www.acslaw.org/sites/default/files/pdf/Do%20Amendments%20Really%20Protect%20Marriage%20%28Distribution%20Copy%29.pdf> (arguing that marriage amendments appear to have no effect on increasing marriage rates or decreasing divorces rates; conversely allowing same-sex marriage neither increases divorce rates nor decreases marriage rates).

⁴⁵ A rich literature addresses this theme. Remarkably, most of the articles used to demonstrate the allegedly damaging effects of same-sex parenting do not contain new empirical data, but rather are summaries of the flaws of articles that suggest same-sex parenting does not harm children. See generally Glenn Stanton, *Are Kids Really All Right? What the Research Really Says About the Parents Kids Need*, FOCUS ON THE FAMILY (2010), available at http://www.focusonthefamily.com/about_us/focus-findings/parenting/are-the-kids-really-all-right.aspx (arguing that studies concluding that same-sex parenting does not harm children

are flawed); Robert Lerner and Althea Nagai, Ph.D., *No Basis: What the studies don't tell us about same-sex parenting*, MARRIAGE LAW PROJECT (2001), available at <http://www.marriagewatch.org/publications/nobasis>. (finding too little evidence to draw meaningful conclusions); Maggie Gallagher and Joshua Baker, *Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-being*, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY (2004), available at <http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf> (arguing that while same-sex parentage studies are scant, overwhelming evidence exists that children raised in a "natural" family made up of opposite sex biological parents fare far better than any other family form); Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?* Child Trends Research Brief, 1-2 (2002), available at <http://www.childtrends.org/files/marriagerb602.pdf> (summarizing data and concluding two-parent biological households are best); Mary Parke, *Are Married Parents Really Better for Children?* Center for Law and Social Policy, Policy Brief 1 (2003), available at http://www.clasp.org/admin/site/publications_states/files/0086.pdf; Concerned Women for America, Rosie O'Donnell, In Her Own Words, Transcript of her interview with Diane Sawyer, Primetime Thursday (ABC television broadcast Mar. 14, 2002) (asserting that lesbian's admission that child is curious about father as evidence of harm of being raised in lesbian household); MARK MATOUSEK, THE BOY HE LEFT BEHIND: A MAN'S SEARCH FOR HIS LOST FATHER 24-25 (2000) (used as support for the assertion that male children harmed when raised by lesbians); DAVID POPONOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 139-40 (1996) (children are harmed when not raised in household with one father and one mother). But see Mark Regnerus, *How Different are the Adult Children of Parents who have Same Sex Relationships? Findings from the New Family Structures Study*, 42 SOC. SCI. RES. 752 (2012) (concluding, among other things, that children who had a parent who engaged in a same-sex relationship at some point in the child's life did not thrive as well as children whose parents did not have such affairs). However, this study received a firestorm of criticism. William Saletan, *Back in the Gay: Does a new study indict gay parenthood or make a case for gay marriage?* SLATE (June 11, 2012), http://www.slate.com/articles/health_and_science/human_nature/2012 (pointing out that the flawed classification system ultimately reveals that broken homes harm children, not gay parenting). The study received such a degree of criticism that the author was the subject of an inquiry at the University of Texas for scientific inquiry. The university determined that no investigation was in order. Press Release, University of Texas, University of Texas Completes Investigation into Allegations of Misconduct (Aug. 24, 2012), available at http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/.

⁴⁶ E.g., Florida, in 2008 voters passed Amendment 2 when proponents were particularly concerned with recent judicial activism in Massachusetts and California usurping the will of the people. *Yes on 2*, STRONG MARRIAGES FLORIDA, <http://www.strongmarriagesflorida.org/mediafiles/fact-sheet.pdf> (last visited Aug. 10, 2012) ("[A]ctivist judges have re-written marriage laws and ignored the will of the people by legalizing same sex marriages."). See also Michael Foust, *Ala. Becomes 20th State to Pass Marriage Amendment*, BAPTIST PRESS, <http://www.bpnews.net/bpnews.asp?ID=23414> (last visited Aug 13, 2012) ("Judicial activism has put us in the posture of pre-emptive strikes to build a firewall around the state of Alabama.").

⁴⁷ Kentucky Rep. Sheldon Baugh sponsored his state's DOMA and said, same-sex marriage "flies in the face of what's served mankind for 1,000 years." Also, "[i]f we change that law, then what's to say we have to have an age limit, or not have multiple partners, or [limit marriage] to human beings." Jan E. Garrett, *The Debate over Same Sex Marriage: A Discussion of Martha Barnette's Letter* (Mar. 26 2001) (unpublished manuscript) (quoting PARK CITY DAILY NEWS (Mar. 21, 1998)), available at <http://www.wku.edu/~jan.garrett/ssm.htm> (last visited Aug. 16, 2012).

⁴⁸ "We cannot let judges in Boston, or officials in San Francisco, define marriage for the people of Georgia." Andrew Jacobs, *Georgia Voters to Decide Gay-Marriage Issue in Fall*, N.Y. TIMES, Apr. 01, 2004 (statement of Rep. Bill Hembree), available at <http://www.nytimes.com/2004/04/01/us/georgia-voters-to-decide-gay-marriage-issue-in-fall.html?scp=5&sq=alabama+gay+marriage&st=nyt> (last visited Aug. 16, 2012); see also Lauretta Marigny, *Consider Gay Marriage Ramifications*, BISMARCK TRIBUNE, July 5, 2004, available at http://bismarcktribune.com/news/opinion/mailbag/consider-gay-marriage-ramifications/article_0986ab8a-

judges from out of state should not control state laws regarding traditions. Certainly sub-themes emerge under each of these categories, but most remarkable is the consistency of message over the last decade and a half when states began enacting legislation and passing constitutional amendments.

The central force behind protecting the definition of marriage is the notion that marriage is central to the foundation of society.⁴⁹ Because marriage is grounded in biblical origins,⁵⁰ redefining it is to fly in the face of religious liberties and morality.⁵¹ The second subtheme revolves around institutional consequences.⁵² If marriage is

520c-550a-86f7-d8a77f5a72f9.html (last visited Aug. 17, 2012) (Senators are reluctant to support a federal marriage amendment, "one ruling by the U.S. Supreme Court could make same-sex marriages legal in all 50 states.").

⁴⁹ See Gordy, *supra* note 44; and Jeremy J. Greenup, Identity as Politics, Politics as Identity: An Anthropological Examination of the Political Discourse on Same-Sex Marriage 39-40 (Jan. 12, 2006) (unpublished M.A. thesis, Georgia State University), available at http://digitalarchive.gsu.edu/anthro_theses/10/ (last accessed Aug. 16, 2012).

⁵⁰ Jeff Brown, Georgia State Representative, voted for DOMA because he believes that the historical and biblical definition of marriage is under attack, he believes that the institution of marriage must be preserved, or negative consequences will result, a constitutional amendment will stymie activist judges. Press Release, Jeff Brown, Ga. H. Rep., Defense of Marriage (Feb. 27, 2004), available at http://www.repbrown.org/press_releases_2004.htm#2-27-04 (last visited Aug. 16, 2012) (admitting he "would be remiss if [he] didn't admit that a major erosion of the institution of marriage is due to nearly 50% of heterosexual couples" divorce).

⁵¹ Some evolution has occurred in the use of religious or moral discourse. Initially, the discourse focused on the immorality of homosexuality. However, as that argument appears to lose traction over time as public opinion sways favorably towards same-sex marriage, opponents of same-sex marriage have successfully adopted the religious freedom argument, which has been an effective discourse tool in other arenas, such as health care reform. See, e.g., Tovia Smith, *Same-Sex Marriage May Hinge on Supreme Court* (National Public Radio broadcast Jan. 24, 2012), available at <http://www.npr.org/2012/01/24/145473719/same-sex-marriage-may-hinge-on-supreme-court>; Measure 36, *infra* note 51 (Supporters of Measure 36 argued that Oregon should not be the only place in America that allows gay marriage); but cf. Seth Forman, *Five arguments against gay marriage: Society must brace for corrosive change*, DAILY NEWS 1-2 (June 23, 2011), available at

http://articles.nydailynews.com/2011-06-23/news/29710731_1_gay-marriage-traditional-marriage-gay-advocates (last accessed Aug. 17, 2012) (Proponents of the sanctity of traditional marriage fear they may be seen by future generations in the same light as those opposed to desegregation.).

⁵² See generally Measure 36, Oregon Voters Guide (Nov. 2004), available at http://oregonvotes.org/pages/history/archive/nov22004/guide/meas/m36_fav.html (last accessed Aug. 17, 2012); see also Marigny, *supra* note 48 (skyrocketing health-insurance costs will overburden the system); Consequence is a societal cost of sending a message that heterosexual parents are irrelevant. "It's the societal message that same-sex marriage sends – that children do not need a mother and a father," says Kevin Smith, executive director of New Hampshire's Cornerstone Policy Research. Kathryn Perry, *The Cost of Gay Marriage*, CHRISTIAN SCIENCE MONITOR, May 27th, 2009, <http://www.csmonitor.com/USA/Society/2009/0527/p02s07-ussc.html>.

redefined around something other than heterogeneous norms, the institution will weaken, creating social instability.⁵³ In essence, the “family” in its idealized version must be preserved through heterosexual marriage.⁵⁴ Implicit in this concern is the fear that, if unchecked, *homosexuality will spread*.⁵⁵

With respect to marriage and children, the most consistent refrain is that marriage creates the optimal environment in which to raise children.⁵⁶ Research is sometimes cited that concludes that the outcomes for children are most favorable for offspring raised in a two-parent (opposite-sex, biological) household.⁵⁷ Courts and legislatures have adopted this premise and call it a legitimate government interest.⁵⁸ However, the sub-contextual inference is that children need protection *from* homosexual parents.⁵⁹ Therefore, the

⁵³ “Tennessee’s marriage-licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society.” TENN. CODE. ANN. § 36-3-113 (1996).

⁵⁴ See Windsor, *supra* note 2, discussing Congress’s desire to preserve an ideal notion of what family should be. Also, gay marriage will wither traditional marriage. Forman, *supra* note 51 (“even gay activists admit they are seeking to change the marriage ideal. It may be old-fashioned to believe women are still necessary to domesticate sexually predatory men. But most social arrangements in which men operate without attachment to women are deeply dysfunctional.”). Voters pamphlets contain different flavors of this same point. E.g., “For marriage to flourish in our culture, it must be protected from redefinition, for if marriage can mean anything, it will mean nothing;” it takes a mother and a father to raise healthy children. South Carolina Marriage Amendment, *available at* nosamesexmarriage.com/marriage/SCmarr.php (last visited Aug. 17, 2012); see also Measure 36, *supra* note 52 (needing to protect traditional marriage because marriage is a “building block” of society).

⁵⁵ Marny, *supra* note 48 (threatening a significant increase in the percentage of American culture to identify as homosexual).

⁵⁶ Measure 36, *supra* note 52 (breakdown of marriage hurts children; and changing the importance of gender and the family would be bad).

⁵⁷ *Supra* note 45.

⁵⁸ “Countless statistics and research attest to the fact that when marriage becomes less important because it is expanded beyond its traditional definition to include other arrangements, that untoward consequences such as out-of-wedlock births occur.” Brief for Intervenor-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives at 54 Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 6147004.

⁵⁹ But the American College of Pediatricians disagree with the district court’s assertion that “a consensus has developed among the medical, psychological, and the social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.” Brief Amicus Curiae, American College of Pediatricians in Support of Defendants-Appellants and in

concern is not about providing children with an optimal environment per se, but rather that children will be harmed if two people of the same sex raise them. Again, research is said to demonstrate that children nurtured in same-sex households experience negative consequences compared with children living in married, heterosexual households.⁶⁰ This theme of harm and children goes further, though. Children exposed to gay parents may come to think that homosexuality is normal. Second, children may be forced to learn about it in school.⁶¹ Finally, children may experiment with homosexuality and become homosexuals themselves.⁶²

A final recurrent strain has to do with fear of activist judges. States started adopting DOMAs in two main waves. The first wave was a response to the Supreme Court of Hawaii's 1993 decision that led to a surge of challenges to the practice of barring same-sex marriage.⁶³ The second wave came in reaction to the Massachusetts

Support of Reversal at 2 Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 494349.

⁶⁰ *Supra* note 45. See Forman, *supra* note 51 ("children living in gay homes [live] absent a relationship with at least one biological parent."). In fact, much debate arises around this question. The First Circuit chose not to engage in resolving this dispute from a legal standpoint because, as the court observed, same-sex couples are free to create families whether they are married or not. Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1 (1st Cir. 2012); see also Pederson, *supra* note 2.

⁶¹ See, e.g., Forman, *supra* note 51, at 2 (fearing that courts will impose a duty on schools to teach moral equivalency between homosexual and heterosexual relationships, not allowing parents to opt out); and Marigny, *supra* note 48 ("Textbooks will be required to show families with two mothers or fathers as they now depict the traditional family."). Similarly, proponents of Montana's CI-96 (DOMA Amendment) proclaim "we could lose the freedom to teach our children as we wish." 2004 Voter Information Pamphlet 23 (2004), available at <http://sos.mt.gov/elections/archives/2000s/2004/VIP2004.pdf> (last accessed Aug 16, 2012); see also THE PALM BEACH POST (Oct. 22, 2008) (original link dead; available at <http://rayslistglbtnews.blogspot.com/2008/10/florida-digest-october-23-2008.html>) ("Failing to ban gay marriage in the state constitution could result in the indoctrination of schoolchildren into a gay lifestyle."); LA Schools to Teach LGBT Curriculum in Anti-Bullying Effort, CBS LOS ANGELES, <http://losangeles.cbslocal.com/2011/09/14/la-schools-to-teach-lgbt-curriculum-in-anti-bullying-effort/> (last visited Aug. 13, 2012) ("Students in the Los Angeles Unified school district may soon be taught 'age-appropriate' curriculum promoting positive images of homosexuals and their contributions to society.").

⁶² E.g., Marigny, *supra* note 48 ("If we stamp the lifestyle with approval by sanctioning same-sex marriage, many more young people will be experimenting with homosexuality and end up as part of that subculture.").

⁶³ Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Hawaii, 1993); Massachusetts, 682 F.3d at 6 n.1-2.

Supreme Court decision in 2003.⁶⁴ The states expressed deep concern that judges, not citizens, would define foundational cultural norms surrounding marriage.⁶⁵ Judges could easily rely on little understood, seemingly esoteric legal principles to destroy a centuries-old foundational institution that goes to the root of civilization.⁶⁶

These concerns varied in intensity depending on geographical location. For example, some Southern states were more likely to express the desired goals using language that, at times, comes across as deeply homophobic.⁶⁷ Moreover, this same

⁶⁴ Goodridge v. Department of Public Health, 440 Mass. 309 (Mass., 2003). Many states responded to the Massachusetts decision by enacting mini-DOMA constitutional amendments in 2004; i.e., Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, Utah. Likewise, in 2005, Kansas and Texas followed suit with their own amendments. In 2006, Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin enacted amendments. Arizona, California, and Florida passed amendments in 2008. *State Policies on Same-Sex Marriage*, PEW FORUM FOUNDATION graphic (July 9, 2009), available at <http://www.pewforum.org> (search site for article title; last retrieved Aug. 17, 2012). Most recently, in May 2012, North Carolina approved its own constitutional amendment banning gay marriage. Campbell Robertson, *North Carolina Voters Pass Same-Sex Marriage Ban*, N.Y. TIMES (May. 08, 2012), available at <http://www.nytimes.com/2012/05/09/us/north-carolina-voters-pass-same-sex-marriage-ban.html> (last visited Aug. 16, 2012).

⁶⁵ Activist Judges, *supra* note 46; New-Age, *supra* note 47; Liberal, *supra* note 48. For example, “[p]roponents of Michigan Proposal 04-2 [to ban same sex marriage] believe that amending the Constitution is necessary to avert a judicial interpretation of law allowing same-sex marriage, as occurred last year in Massachusetts.” Patrick Affholter, *November 2004 Ballot Proposal 04-2*, SENATE FISCAL AGENCY (2004), available at <http://www.senate.michigan.gov/sfa/publications%5Cballotprops%5Cproposal04-2.pdf>.

⁶⁶ See, e.g., *In Iowa, Threats to Impeach Judges Renewed*, GAVEL GRAB (June 24, 2012), <http://www.gavelgrab.org/?cat=21> (In 2010, Iowa voters removed three Iowa Supreme Court Justices who ruled that Iowa’s ban on same-sex marriage was unconstitutional.); Conservatives Decry 'Bizarre' Ruling Finding DOMA Unconstitutional, Lament 'East Coast Liberal Freak Show'. Submitted by Brian Tashman on Thu, 05/31/2012 - 4:11pm, RIGHT WING WATCH, <http://www.rightwingwatch.org>.

⁶⁷ Two principal traditionalist arguments against same-sex marriage are the polygamy slippery-slope and the contagious-promiscuity arguments. The first is epitomized by Texas Rep. Warren Chisum. He said, “[i]t’s important not to enter into a social experiment that would change the definition of family. There’s a short step from homosexual marriage to polygamy.” Sandra Zaragoza, *Business Wary Over Prop 2*, DALLAS BUSINESS JOURNAL (Oct. 23, 2005), <http://www.bizjournals.com/dallas/stories/2005/10/24/story1.html?page=all>. The second suggests that gay men are more promiscuous than lesbians and straight individuals. Gay male couples will therefore be more promiscuous than other couples, as a result, the non-monogamous behavior of gay male couples will, by example, weaken the monogamous commitment of married heterosexual couples, which will eventually destabilize traditional marriage. Dale Carpenter, *Same-Sex Marriage: The Traditionalist Case – The Contagious-Promiscuity Argument*, THE VOLOKH CONSPIRACY (Nov. 2, 2005, 4:43 PM), http://www.volokh.com/posts/chain_1131164649.shtml. See also MISS. CODE ANN. § 93-1-1(2) (1997)

geographical area relies heavily on the discourse of God's law as the overriding principle for defining marriage.⁶⁸ Finally, a fascinating articulation of the need for marriage occurs in North Carolina and South Carolina, where the institution functions as a way to "contain male aggression and sexuality."⁶⁹ Thus, not only children, but women find protection through marriage. In fact, it turns out South Carolina's women are in need of protection. South Carolina ranks in the top ten states for domestic violence that results in femicide.⁷⁰

The cultural framing around the need for DOMA is significant in the urgency expressed regarding the integrity of the family and the role homosexuality appears to play in threatening the ideal notion of the family. Part II of this article discusses this point in more detail. Regardless of how the states express their DOMA goals, these goals mirror the goals stated in *Massachusetts*.⁷¹ Thus, the assertion that passage of these statutes and amendments is associated with the articulated, desired goals demands interrogation.

(Mississippi codified marriage between persons of the same gender as void under a sub-section titled and enumerating "Certain marriages declared incestuous and void."); cf. WASH. REV. CODE § 26.04.010 (1998) (titled the sub-section "Marriage contract – Void Marriages.").

⁶⁸ See Press Release, *supra* note 50; similarly, Harold Auxier, a Kentucky voter said, "It's God's law that woman was made for man and man for woman--not man for man and woman for woman." *Kentucky voters approve same-sex marriage ban amendment*, ASSOCIATED PRESS (Nov. 2, 2004), available at http://www.usatoday.com/news/politics/elections/vote2004/2004-11-02-ky-initiative-gay-marriage_x.htm (last accessed Aug. 17, 2012).

⁶⁹ The Alliance Defense Fund claims that a DOMA amendment in North Carolina will help encourage a decline in domestic violence in the state. RIGHT WING WATCH, http://www.rightwingwatch.org/category/organizations/alliance_defense_fund (last visited May 20, 2012).

⁷⁰ "South Carolina now ranks #7 in the nation for the number of women murdered by men according to the Violence Policy Center's September 2011 report, 'When Men Murder Women: An Analysis of 2009 Homicide Data.'" (South Carolina ranked #9 in the September 2010 report.) *When Men Murder Women: An Analysis of 2009 Homicide Data*, VIOLENCE POLICY CENTER, (Jan. 24, 2013, 2:43 PM), <http://www.vpc.org/studies/wmmw2011.pdf>;

"South Carolina Attorney General Alan Wilson identified domestic violence as the number one crime issue in the state. According to the State Attorney General's web site, more than 36,000 victims report a domestic violence incident to law enforcement statewide." *Criminal Domestic Violence in South Carolina*, SOUTH CAROLINA ATTORNEY GENERAL, (Jan. 24, 2013, 2:45 PM), <http://www.scatorneygeneral.org/fraud/cdv/index.html>.

⁷¹ *Massachusetts*, *supra* note 42.

B. Analysis of State DOMA's

Let us now consider whether passage of a DOMA statute, a constitutional amendment, or both correlates with the goals of strengthening marriage in that state compared with states that did not enact such legislation.⁷² To examine this correlation, I operationalized the goal of family stability/marital strength by measuring the year-over-year marriage and divorce rates from 1999 through 2010.⁷³ The slope is calculated for the years prior to adoption of the DOMA amendment and the years after the passage of the DOMA amendment for both marriage and divorce.⁷⁴

The key independent variable in the study is whether a state has amended its constitution to define marriage as between a man and a woman, i.e., to ban same-sex marriage.⁷⁵ States that had a statute banning same-sex marriage and also passed a constitutional amendment to the same effect or states that passed a constitutional amendment but did not enact a statute⁷⁶ during the time for which marriage and divorce rates were available were included in this category and coded as “0.”⁷⁷ Under the

⁷² One study examined the effects on states that allowed same-sex marriage with those that do not. It found no statistically significant difference in outcomes. L. Langbein & M. Yost, Same-Sex Marriage & Negative Externalities, 90 Social Science Q. 292 (2009); However, this study has been criticized because of operationalization errors, coding errors, and statistical power errors. Douglas W. Allen, *Let's Slow Down: Comments on Same-Sex Marriage and Negative Externalities* (Dec. 9, 2010), available at <http://ssrn.com/abstract=1722764>.

⁷³ These years are used because they represent the decade in which the vast majority of DOMA amendments passed. The end year, 2010, is the most recent year for which data are available. The start year, 1999, is the first year for which continuous year-over-year data is available.

⁷⁴ Slope refers to the average rate of change for the period of years measured. It is the central measurement of a trend model. Linda Remy et al., *Do We Have a Linear Trend?* FAMILY HEALTH OUTCOMES PROJECT, October 2005 (on file with author).

⁷⁵ Recall that a state constitutional amendment defining marriage in this way is called a super DOMA.

⁷⁶ Four states, California, Nebraska, Nevada and Oregon, responded to either the Hawaii Supreme Court decision or the Massachusetts Supreme Court decision by directly amending their constitutions. *Current Status – Marriage Map (U.S.)*, MARRIAGE EQUALITY USA, <http://www.MarriageEquality.org/current-status-map> (last visited Aug. 10, 2012).

⁷⁷ For example, California passed its amendment in 2008. However, a federal district court ruled that it was unconstitutional in 2010. Thus, for purposes of this analysis, California is treated as having a super DOMA. The challenge in categorizing states with evolving legislation or legal precedent is determining

rationale behind DOMA, the institution of marriage would be least vulnerable in these states because the citizenry has clarified the definition of marriage in its constitution—clearly expressing the state’s values regarding this bedrock social structure.⁷⁸

States, on the other hand, that did not have a constitutional amendment, but rather, possessed a statute banning same-sex marriage during the period in question⁷⁹ were included as a separate category coded as “1.”⁸⁰ These states’ marital vulnerability is considered slightly higher under the DOMA rationale because these statutes are open to constitutional challenges. Thus, the citizenry may not have rock-solid confidence around the meaning of marriage as an institution in these states because “activist” judges could overturn the statutory definition, resulting in a more fluid definition of marriage.⁸¹ Finally, those states that have no statute or amendment banning same-sex marriage were coded as “2.” We can hypothesize that the institution of marriage, according to the DOMA rationale, is weakest and most vulnerable to attack in these states. The citizenry either has not collectively expressed a codified position regarding the definition of marriage, or it has determined that a broader definition of marriage, which includes same sex couples, is appropriate.

how long the state held a particular status such that the citizenry would have time to experience a cultural shift in light of the legal changes to marriage definitions.

⁷⁸ Recall that marriage was open to attack if procreation was perceived as acceptable outside of marriage or open to interpretation by judges. *See supra* notes 40, 41, 42, and 58.

⁷⁹ Two states fall into this category: Washington and Maryland. The Washington State Legislature overturned its 1998 statute banning gay marriage by enacting a statute permitting same-sex marriage in early February, 2012. WASH. REV. CODE § 26.04.010 (1998); S.B. 6239, 62nd Leg., 2012 Reg. Sess. (Wa. 2012), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6239>. The law was to take effect June 7th, but the decision has been stayed by Referendum 74 on the November 6, 2012, ballot. *Proposed Referendum Measures – 2012*, WASHINGTON SECRETARY OF STATE, <http://www.sos.wa.gov/elections/initiatives/referendum.aspx?y=2012> (last visited Aug. 10, 2012). Therefore, Washington State is included in the statutory-ban group for purposes of this analysis. Maryland is similarly situated for this analysis. H.B. 438, 2012 Leg., 429th Sess. (Md. 2012); *2012 General Election Ballot Questions*, Maryland State Board of Elections, http://www.elections.state.md.us/elections/2012/ballot_questions.html (last visited Aug. 10, 2012).

⁸⁰ Recall that a statute banning same-sex marriage is referred to as a “mini-DOMA.”

⁸¹ Strong Marriages Florida, *supra* note 46.

The analysis incorporates a number of control variables. Variables known to affect marital stability are median age of first marriage, percent of state's population with a bachelor's degree, median disposable income, and percent of population living below the poverty line.⁸² Four other variables are included in the analysis because they are likely to influence a state's view of marriage or to reflect the current state of marital stability there. The variables are comprised of percent of male and percent of females married three or more times; percent of population who view religion as an important part of daily life; percent of single-parent households, and the conservative-advantage points over liberals in the state.⁸³ Finally, the variable of other legal recognition of relationships was added to the analysis.⁸⁴ Other variables initially included in the analysis were foreclosure rates and unemployment rates. However, these variables appeared to have no effect on the marriage and divorce trends.⁸⁵

A. Results

⁸² See generally NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).

⁸³ Data for analysis are derived from the U.S. Census with exception of the last few variables. Those data came from the American Community Survey and Gallup polls. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICAN COMMUNITY SURVEY (2009), available at http://www.census.gov/acs/www/data_documentation/data_main/ (last visited Aug. 14, 2012); *State of the States*, GALLUP, <http://www.gallup.com/poll/125066/State-States.aspx?ref=interactive> (last visited Aug. 14, 2012); *State of the States: Importance of Religion*, GALLUP (Jan. 28, 2009), <http://www.gallup.com/poll/114022/state-states-importance-religion.aspx#1> (last visited Aug. 14, 2012).

⁸⁴ Some states, like Washington, for example, during the time of the study, did not permit gay marriage, but provided rights very similar to marital rights through domestic partnerships. Other states allow for similar rights by providing for civil unions. Still others allow for same-sex marriage.

⁸⁵ These results are consistent with the other analysis on the topic of the economy and divorce. See generally Philip N. Cohen, *Recession and Divorce in the United States: Economic Conditions and the Odds of Divorce, 2008–2010* (Maryland Population Research Center, Working Paper 2012-008, 2012); Lisa Belkin, *Postponing Divorce in a Down Market*, N.Y. TIMES (Mar. 23, 2010), <http://parenting.blogs.nytimes.com/2010/03/23/postponing-divorce-in-a-down-market> (parents postpone divorce during economic hardship); Catherine New, *Divorce Too Expensive For Poorest Americans*, *New Study Says*, HUFFINGTON POST (Aug. 20, 2012), http://www.huffingtonpost.com/2012/08/20/divorce-expensive-americans_n_1811821.html; Carol Mithers, *What to Do When you Can't Afford a Divorce*, OPRAH (May 2009), available at <http://www.oprah.com/relationships/What-to-Do-When-You-Cant-Afford-a-Divorce>.

The first hypothesis under the DOMA rationale is that those states that have both constitutional amendments and statutes or just constitutional amendments would be associated with the greatest decline in divorce rates.⁸⁶ Following this group, by comparison, those states with just a DOMA statute might not experience as radical a decline in their divorce rates. Finally, those states without a DOMA statute or amendment would likely have the lowest decline in divorce.⁸⁷ The same hypothesis applies for patterns of marriage, but in the converse. In DOMA-amendment or amendment-plus-statute states, one might expect to see the greatest increases in marriage rates, followed by lesser increases in DOMA-statute or no-DOMA states.

To engage in this analysis, I conducted four separate statistical examinations. The first series looked at a comparison in the trends of marriage decline before and after DOMA enactment for the group of states that passed a DOMA amendment compared

⁸⁶ *Supra* note 34. States with both constitutional amendments and statutes currently banning same-sex marriage are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia, WI. States with a constitutional amendment currently banning same-sex marriage, but having no matching statute, are Oregon (OR. REV. STAT. § 106.010 (1975) defines marriage as “a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age,” but OR. REV. STAT. § 106.020 (1989) does not expressly prohibit same-sex marriages.), and Wisconsin. States with statutes currently banning same-sex marriage, but no constitutional provisions, are Delaware, Illinois, Indiana, Maine, Minnesota, Pennsylvania, West Virginia, Wyoming, Maryland and Washington (the Maryland and Washington legislatures passed bills in February 2012 permitting same-sex marriage, but the legislation is stayed pending a referendum in November in both states). States not banning same-sex marriage by either statute or constitutional amendment are New York, Rhode Island, Vermont, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey (Gov. Christie vetoed the Feb. 2012 same-sex marriage bill, the matter is stayed pending a public referendum on the Nov. 2012 ballot), New Mexico (New Mexico law makes no mention of same-sex marriage. In 2008, ‘09, and ‘10, state legislators introduced bills to allow same-sex marriage. Each has either been defeated or died. Alternatively, in 2008, a bill was introduced to prohibit same-sex marriage, but it failed as well. The District of Columbia also does not have laws banning same-sex marriage.

⁸⁷ To create a meaningful “before” and “after” comparison to the states that enacted amendments, states with a statute or no statute had their marriage and divorce trends grouped between 1999-2004 and 2005-2010.

with those that did not.⁸⁸ The next analysis explored the average marriage rates in the years before and after DOMA passage for both groups of states.⁸⁹ The third examination of data explored any statistically significant differences that may have emerged in the declining divorce trends for either group of states. An exploration of any statistically significant differences in the average divorce rates in the year prior to and after DOMA ratification between the DOMA and non-DOMA states concludes the analysis.

To begin, I calculated the slopes for each state.⁹⁰ Next, I conducted a paired-samples-means-T-test analysis⁹¹ using the Statistical Package for the Social Sciences (SPSS). This analysis revealed whether a statistically significant difference for the average decline in marriage and divorce trends marked the two time periods. The first period captures the years before the enactment of the amendments for both the DOMA and non-DOMA states,⁹² and the second period captures the years after the passage of DOMA amendments regardless of whether the states enacted an amendment. The results showed that, for either category of state, the marriage rate consistently declined

⁸⁸ Trend analysis provides the most accurate measure *of change* in marriage or divorce in a particular state or group of states. However, it does not reveal the number of people in the state that engage in the behavior.

⁸⁹ Rates provide a standardized measurement of divorce or marriage in a particular state or group of states based on a population unit over a given period of time. It measures how much of the state's population engages in the behavior.

⁹⁰ Alaska and Nebraska are excluded from both the marriage and divorce analysis because they enacted amendments in 1998 and 2000, respectively. Thus, the data available do not allow for meaningful review of trends in those states. Further, Oklahoma does not have marriage and divorce data available prior to 2004, so it is not included in the marriage trends. Likewise, California has no divorce data available; Georgia has no divorce data after 2003; Hawaii only provided divorce data through 2002; Indiana has no divorce data; Louisiana has virtually no divorce data available; Minnesota has no divorce data after 2004. Therefore, these states are excluded or partially excluded from the analysis. Each state's slope was analyzed for linearity. The following states revealed curvilinear trends: Washington D.C., Massachusetts and Montana.

⁹¹ A paired-sample t-test is used in "before-after" studies, comparing the population means of two correlated samples to determine whether a significant difference exists between the average values of the same measurement made under two different conditions. *See, e.g.*, FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES 353–54 (8th ed. 2009).

⁹² Recall that the non-DOMA states' marriage and divorce trends are divided similarly to the time trends in the DOMA states in order for the former states to act as a control—or as a comparison group with the DOMA states.

throughout both the pre- and post-amendment time periods. Moreover, the average difference in decline before and after the amendment passage was not statistically significant.⁹³

Another way of considering this outcome is to look at the average rate of marriage for the time before and after the amendments' passage.⁹⁴ The mean rate of marriage gives a sense of how many people were likely to marry in a particular type of state—either a DOMA or non-DOMA state for our purposes. Prior to the passage of DOMA amendments, the average marriage rate in DOMA states was 7.83 per 1000 people.⁹⁵ In non-DOMA states, the rate was 8.67 per 1000 people. Even though the rate of marriage declines for both groups after a DOMA amendment enactment, the average marriage rate remains lower in DOMA states than in non-DOMA states. In DOMA states, the marriage rate is 6.96 per 1000 people compared to 7.93 per 1000 people in non-DOMA states.

⁹³ Statistical significance is an assessment indicating the likelihood that the results obtained reflect a pattern or occurred due to chance. *See, e.g.,* JEREMY MILES & PHILIP BANYARD, UNDERSTANDING AND USING STATISTICS IN PSYCHOLOGY 87-88 (2007). Statistical significance most likely did not emerge for the before and post-DOMA enactment for either of these groups of states because the trend was consistently downward for the ten-year period measured. No major historical events occurred that have had measurable effects on the states as groups. Although, one would have expected that the Great Recession would have affected marriage and divorce trends, it does not appear to have done so. Cohen, *supra* note 85. However, an individualized analysis of each state reveals that certain states, with the passage of laws that permit same-sex marriage, experience a sharp uptick in their marriage rates. However, this new marriage rate does not sustain itself. The question of whether this uptick affects divorce rates remains an open question. A five-year delay between marriage and divorce trends is expected given the mean number of years (five) that must pass before a marriage is likely to end in divorce. *Risk of Divorce Greatest at Five Year Mark in Marriage*, MAX PLANCK INSTITUTE (2007). Massachusetts is the one state that does provide enough data for a preliminary examination. Indeed, the results show that after a consistent (and low) divorce rate in the time period between 2004 and 2009, a sharp increase in the divorce rate begins in 2010—five years after the steep hike in marriage rates.

⁹⁴ The average rate does not measure the change or trend year over year, but rather defines the average number of people per one thousand people in the population who married in the state during a particular time period.

⁹⁵ Nevada is excluded from the mean marriage-rate analysis because it is a significant outlier that disproportionately increases the marriage rate for DOMA states. Please note that the data presented in the charts is for the different permutations of DOMA options. However, the data discussed in the text combines the DOMA statute-only states with non-DOMA states in order to isolate the Amendment states and compare them to states that did not respond so definitively to banning same sex marriage. The idea was also to create sample sizes that might create enough statistical power to find statistical significance.

These different average rates are statistically significant for both pre- and post-DOMA ratification.

Thus, two important points emerge. First, non-DOMA states include a population of individuals who, on average, are more likely to marry than their counterparts in DOMA states. Second, the trend of declining marriage is present in both categories of states, but it is not statistically significant from the trend prior to the passage of DOMA amendments.⁹⁶

Table One
Marriage Rates and Trends for DOMA and non-DOMA States

	Rate/1000 in the pop		Avg. Decline		n
	Pre	Post	Pre	Post	
DOMA amendment and statute	8.50	7.59	-0.358	-0.256	26
DOMA statute only	13.13	10.58	-0.053	-0.223	12
No DOMA	7.01	6.46	-0.076	-0.134	7

On the other hand, the divorce-rate trend also declines for both groups, but the average rate of decline in the time period before DOMA versus the time period after DOMA is statistically significant for both groups. In other words, both groups experience *a smaller* decline in divorce rates in the years *after* the political discourse and enactments of DOMA amendments regardless of whether a state enacted an amendment or a statute

⁹⁶ These points are important in exploring why DOMA could not solve the perceived issue of declining marriage rates. The next section offers an explanation of why DOMA is irrelevant to shoring up the institution of marriage, particularly for those states that do possess legislation barring same-sex marriage. *See infra* Part II.

barring same-sex marriage. However, the reduced decline can most likely be attributed to fewer marriages occurring during this same time period.⁹⁷

Adding context to this trend data, the mean divorce rates for the DOMA and non-DOMA states reveal that the mean rate of divorce was slightly lower after the passage of DOMA for both groups. However, these differences are not statistically significant from the average rates of divorce for either group prior to DOMA's passage.⁹⁸ Nonetheless, on average, citizens of non-DOMA states tend to get divorced less than individuals living in states that have DOMA amendments. Specifically, prior to DOMA's passage, the average rate of divorce in DOMA states was 4.1 compared to 3.72 in non-DOMA states. After the enactment of DOMA amendments, the average divorce rate dropped to 3.78 in DOMA states and 3.34 in non-DOMA states. Thus, one can conclude that, while less divorce occurs in non-DOMA states, both types of states experienced a statistically significant rate of change in divorce after the passage of DOMA regardless of whether the state has the amendment. Simply put, the decline in divorce slowed in the years after DOMA for both types of states.

Table Two
Divorce Rates and Trends for DOMA and non-DOMA states

	Rate/1000 pop.		Avg. Decline		N
	Pre	Post	Pre	Post	
DOMA amendment	4.08	3.82	-0.125	-0.001*	

⁹⁷ Note the lower mean rate of marriage during this period. *See supra* Table 1.

⁹⁸ *See supra* note 85.

and statute					24
DOMA statute only	3.92	3.49	-0.096	-0.004*	12
No DOMA	3.99	3.62	-0.036	-0.041*	6

*Statistically significant at $p=0.05$

The more compelling question, though, is whether the mean difference in the trend of decline for divorce and marriage in the two time periods, pre- and post-DOMA amendment passage, is statistically different *between* the two groups of states: those that enacted an amendment or statute, and those that did not. This question amplifies whether the passage of DOMA is associated with any differences in the change in marriage and divorce trends compared with those states that did not pass DOMA amendments or laws. Put another way, this analysis seeks to identify whether states that passed DOMAs experienced greater marriage rates and reduced divorce rates compared to those states that remained DOMA-free.

Again, using SPSS, I conducted an independent-sample-means T-test to determine whether statistically significant differences marked DOMA and non-DOMA states for pre- and post-DOMA marriage trends and pre- and post-DOMA divorce trends.⁹⁹ Recall, the hypothesis is that the DOMA-amendment states or DOMA-statute states would experience a slower decline (or possibly an increase) in marriage rates after DOMA amendment enactment compared to states that did not pass such legislation.

⁹⁹ An independent sample mean T test compares two independent groups to determine whether the average measurement for a particular characteristic differs for these two groups. *Tests of Means Statistics Workshops*, WADSWORTH CENGAGE LEARNING, http://www.wadsworth.com/psychology_d/templates/student_resources/workshops/stat_workshp/test_means/test_means_15.html (last visited Jan. 24, 2013 3:13 PM). Because the sample sizes are different and the variance (differences from state to state in the distance the slope is from the mean of the slopes), I used the Welch-Satterthwaite equation to perform the t-test.

Furthermore, the second hypothesis would predict that the average rate of decline for divorce would be greatest in those states that passed an amendment compared with those states that passed only a statute or nothing at all. The results demonstrate otherwise.

Table three indicates that no statistically significant difference separated the DOMA and non-DOMA states in the divorce and marriage trends *prior* to enactment of DOMA legislation. The average rate of decline of marriage was greater for the DOMA states than the non-DOMA states prior to the enactment of any amendments, -.25 and -.22 respectively.¹⁰⁰ And for divorce trends, the analysis reveals that DOMA states actually had a greater rate of decline compared with non-DOMA states, -.1 versus -.09, respectively.¹⁰¹ These slight differences do not rise to the level of statistical significance or substantive significance. Instead, the results are important in establishing a baseline that prior to DOMA-amendment passage and the significant publicity associated with it, the states were behaving fundamentally similarly with regard to family formation and dissolution.

Table Three

Comparison Marriage and Divorce Trends between DOMA and non-DOMA States Prior to Amendment Passage

	Marriage Trend	Divorce Trend	n
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¹⁰⁰ While all measurements discussed *infra* represent average or mean rates of decline, for ease of reading, the text uses the shorthand decline to represent this measurement.

¹⁰¹ However, despite a trend with smaller decline in divorce rates prior to DOMA amendment ratifications for non-DOMA states, these states, on average, have lower divorce rates to begin with than DOMA states. It is important not to confuse the average divorce and marriage rates with the average rate of *change* in the divorce and marriage rates. Put another way, DOMA states, prior to the passage of DOMA amendments, had a greater rate of decline in divorce than non-DOMA states, but these states also have lower marriage rates and *greater* divorce rates than non-DOMA states. DOMA states start from a place of greater marital instability than non-DOMA states.

DOMA	-0.22	-0.1	31
Non-DOMA	-0.25	-0.09	19

More importantly, no statistically significant difference marked the two groups of states *after* the passage of DOMA. The average decline in marriage or divorce after DOMA does not differ in any statistically meaningful way between those that adopted an amendment and those that did not. Post-DOMA, the decline in marriage was greater for DOMA states than non-DOMA states, -.26 versus -.12. On the other hand, the falling off of divorce rates was greater in non-DOMA states rather than DOMA states, -.011 and -.008, respectively.

It is perhaps surprising that DOMA states, after the passage of DOMA, have a lower rate of decline in divorce *and* a higher rate of decline in marriage compared to non-DOMA states. However, these results are not statistically significant. They do, however, suggest some crisis around the institution of marriage in DOMA states because these states have lower rates of marriage, which appear to be declining further, while possessing higher divorce rates compared with non-DOMA states. Thus, the data suggest that the institution of marriage is more vulnerable in DOMA states.¹⁰²

While no statistically significant differences emerge between the two groups of states in the analysis, the substantive differences are worth noting. Post-DOMA, the decline of marriage varies intensely between the two groups of states While in all other areas the trends are negligible; the average drop in marriages post-DOMA for DOMA states is more than double that of non-DOMA states.

¹⁰² Possible reasons are discussed *infra*.

Table Four

Comparison Marriage and Divorce Trends between DOMA and non-DOMA States after Amendment Passage

	Marriage Trend	Divorce Trend	n
DOMA	-0.26	-0.008	31
Non-DOMA	-0.12	-0.011	19

This preliminary¹⁰³ analysis suggests that DOMA is not statistically associated with increases in marriage-rates or decreases in divorcerates.¹⁰⁴ In other words, the analysis does not support either hypothesis. Specifically, DOMA does not appear relevant to the narrative of why marriage plays an increasingly less visible role in family formation in the United States, particularly in DOMA states.¹⁰⁵

¹⁰³ I use the word preliminary because this trend data contains a maximum of ten years of analysis. More data is always ideal to truly capture whether trends are emerging. See Langbein & Yost, *supra* note 72.

¹⁰⁴ Given how large the standard deviations were for each group of slopes, and the relatively small, but inflexible sample size, achieving enough statistical power to find statistical significance would be incredibly challenging. I ran alternative analyses eliminating outliers in an attempt to decrease the standard deviation and increase the chance of detecting an effect should one exist. But even under the most conservative testing, the sample size must also decrease to accommodate eliminating outliers. Thus, the more compelling story is one of substantive significance rather than statistical significance. Statistical power refers to the possibility making a Type II error, in which we conclude that no difference exists between the means of the two groups when one does. Social science, by convention, recommends no more than a .2 chance of this occurring. William M. K. Trochim, *Research Methods Knowledge Base* (2006), available at <http://www.socialresearchmethods.net/kb/power.php>.

¹⁰⁵ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT, available at <http://www.census.gov/population/socdemo/hh-fam/tabCH-1.xls>. Data for years 1900–1960 are available at <http://www.census.gov/prod/www/abs/statab1901-1950.htm>.

Such a conclusion raises another question, however. If DOMA amendments or statutes are irrelevant to the institution of marriage, what does appear to be associated with predicting marriage and divorce rates and trend changes in states?¹⁰⁶

Marriage Trends

We begin with marriage. Prior to the passage of DOMA, three variables predict, with statistical significance, a state's marriage trend. First, the percent of families living below the poverty line has a moderate correlation, $-.47$, with the declining marriage trend such that the greater the number of families living in poverty, the greater the decline in a state's marriage rate.¹⁰⁷ In other words, those living in poverty are increasingly less likely to marry than their counterparts with greater resources. Similarly, with a correlation of $-.36$, the greater the proportion of people in a state who say that religion plays an important role in daily life, the greater the reduction in the state's marriage rate. Put another way, more religiosity in a state's population means fewer marriages. Finally, a correlation of $-.35$ exists between children living in a single-parent household and the larger the decrease in marriages in that state.¹⁰⁸ Not surprisingly, more children live in

¹⁰⁶ This question is noteworthy because while the rates of change don't appear to be statistically significant pre and post DOMA for DOMA states over non-DOMA states, the average marriage rates are statistically significant. Marriage seems to be a more robust institution in states that do not have DOMA laws.

¹⁰⁷ Correlation refers to the strength of an association between two variables. The coefficient ranges from zero to one, with zero representing no correlation and one representing a perfect correlation. DAVID W. STOCKBURGER INTRODUCTORY STATISTICS: CONCEPTS, MODELS, AND APPLICATIONS (2d. 1998). Correlations in the $.4$ to $.7$ range are considered moderate to strong. *Wading through the Data Swamp* Program Evaluation 201, http://pathwayscourses.samhsa.gov/eval201/eval201_4_pg9.htm.

¹⁰⁸ It might appear that single-parent households are an obvious consequence of the decision not to marry or to marry and then divorce. However, out-of-wedlock births play a significant role in access to and stability of marriage in a number of important ways. An out-of-wedlock birth significantly decreases the chances of every marrying. Births prior to marriage significantly increase the odds that a marriage will end earlier than births that occur after marriage. Casey E. Copen, Kimberly Daniels, Jonathan Vespa, and William D. Mosher, *First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth*, 49 National Health Statistics Report (Mar. 22, 2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf>.

single-parent households in states that see a steady decrease in the number of people marrying.

However, a much richer profile of marriage can be developed by examining other characteristics that are associated with the variables correlated with the marriage-decline trend and marriage rates generally. For example, the percent of families living below the poverty line is significantly associated with the number of males and females living in the state who have been married three or more times; the percent who say religion is an important part of daily life; and the number of single-parent households. In each of these relationships, the correlation is positive. In other words, those with families who live below the poverty line are more likely to have married three or more times, to view religion as important to daily life, and to live in a single-parent household with children.

Conversely, a negative correlation links the percent of families living below the poverty line with two other variables-- disposable income and the percent of the population with a bachelor's degree. Thus, the greater the median disposable income in the state and the greater the percent of the population in the state with a bachelor's degree, the fewer the percent of families living below the poverty line are present in the state. Not surprisingly, an extremely strong correlation happens between median disposable income and percent of population with a bachelor's degree.

The next variable, religion as an important part of daily life, also possesses statistically significant correlations with other traits that flesh out the profile of why certain states have lower or higher declining marriage trends. The median age of marriage for men and women in a state, the median disposable income, and the percent of population with a bachelor's degree are all negatively related with the percent of

population who view religion as an important part of daily life. Conversely, a positive link emerges between religion as an important part of daily life and the percent of men and women married three or more times, and the percent of conservatives over liberals living in a state.

Thus, an individual who views religion as an important part of daily life is more likely to have married three or more times, to identify as conservative, to have married young, to have little disposable income or to be living below the poverty line, and unlikely to have a college degree.

An analysis of the data after the passage of DOMA reveals almost identical results. Poverty rates and proportion of single-parent households in a state best predict how rapid the decline of marriage is in a state. The only variable that is no longer directly associated with post-DOMA marriage trends is religion as an important part of daily life. However, that particular variable strongly mediates every other variable in the profile.¹⁰⁹ Therefore, we can conclude that the passage of state DOMA amendments has no measurable association with stemming the decline of marriage, but, in fact, other variables do.¹¹⁰

Divorce

The divorce-trend analysis reveals almost identical patterns with those for marriage. Pre-DOMA divorce is negatively correlated with the proportion of the population with families living in poverty or single-parent households. These associations

¹⁰⁹ Mediated is a statistical term of art that means one variable is not directly associated with another, but may affect a third variable through its association with the second one. R. M. Baron & D.A. Kenny, *The moderator-mediator variable distinction in social psychological research: Conceptual, strategic, and statistical considerations*. 51 J. OF PERS. & SOC. PSYCH. 1173-82 (1986).

¹¹⁰ A full description of the correlations of all of these variables appears in Appendix C.

are moderate, -.4 for both.¹¹¹ As with the marriage analysis, the same variables exhibit an indirect relationship with divorce, which are mediated through the poverty and single-parent household variables. Thus, states with a higher percentage of individuals who have a bachelor's degree also have a higher percentage of individuals with a larger amount of disposable income, individuals who marry at a later age, individuals who are less likely to marry three or more times, individuals who are less likely to be conservative, and individuals who are less likely to believe religion is an important part of daily life. And in turn, these states have fewer families living in poverty and children living in single-parent households. States that meet this profile have lower divorce rates even though the average trend in the decline of divorce is not statistically significantly different from those states that have a larger portion of their population without a college degree, with less disposable income, who marry young, who view religion as an important part of daily life, who marry three or more times, and who are more likely to be conservative.¹¹² Stated simply, both types of states are experiencing a trend in which divorce is decreasing; but overall, impoverished states have fewer marriages, but more divorces than those states with greater resources.

Discussion

The analysis suggests that DOMA states do not fare any better than non-DOMA states in terms of the strengthening of the “bonds and benefits to society of heterosexual marriage.”¹¹³ In fact, the analysis offers an alternative conclusion. DOMA states tend to

¹¹¹ Importance of religion no longer has a direct relationship with divorce trends. However, it has an indirect relationship with the two key variables as well as the other mediated variables.

¹¹² Recall that achieving statistical significance with a small sample that includes very large standard deviations is virtually impossible when the possible effects are marginal to begin with, but the analysis does reveal what is statistically significantly associated with marriage and divorce trends as discussed above.

¹¹³ See *Massachusetts*, *supra* note 42 (articulating goals of enacting DOMA).

have lower marriage rates, larger declines in the trend towards marriage, and greater divorce rates. Moreover, the decreasing relevancy of marriage and the grander divorce rates in DOMA states for those individuals who actually *are* married (and re-marry) seem to be related directly with poverty and indirectly with educational and economic opportunities.

These results raise the following question: If DOMA is so clearly *not* associated with the strength of marriage—yet poverty, education, and economic opportunities clearly are—why then does DOMA carry the political and legal traction that it does in response to the concern around family instability?¹¹⁴ The next section addresses this question.

II. The Enduring Attraction of DOMA

A. Moral Entrepreneurism

Howard Becker developed the idea that the construction and application of deviance labels (in the case at hand, homosexuals demanding access to marriage) is a moral enterprise.¹¹⁵ Individuals draw on power and resources from social structures and cultural institutions to create the abstract notion of something or someone as deviant.¹¹⁶ Those who define certain behaviors or characteristics as deviant are known as moral entrepreneurs.¹¹⁷ Relying on interest groups, moral entrepreneurs engage in a multistep process to label a group or behavior as deviant because of the moral entrepreneurs' fear,

¹¹⁴ See, e.g., Patrick H. Caddell & Douglas E. Schoen, *Romney, Obama Must Address Crisis of U.S. Families*, POLITICO (June 12, 2012, 9:27 PM), <http://www.politico.com/news/stories/0612/77338.html> (arguing that the hidden election issue is the crisis of the family and the serious implications that arise from it, which both parties and candidates are ignoring, as well as other cultural institutions. The key concern is that only 52% of the U.S. population is married—the lowest rate ever recorded in the census.).

¹¹⁵ HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 56 (1963).

¹¹⁶ PATRICIA ADLER & PETER ADLER, *CONSTRUCTIONS OF DEVIANCE: SOCIAL POWER, CONTEXT, AND INTERACTION* 135 (5th ed. 2006).

¹¹⁷ *Id.* at 136.

distrust, or suspicion of this group.¹¹⁸ The stages include awareness and moral conversion.¹¹⁹

Moral entrepreneurs define a problem and create public consciousness of it by generating danger messages.¹²⁰ In the present case, the problem is the institution of marriage and family, which are supposedly embattled. The danger message is that marriage is under attack by an already well-defined deviant group—homosexuals—who wish to further undermine matrimony’s meaning as a union between opposite-sex individuals. Observe, though, that the social ills defined as attacking the institution of marriage all implicate women.¹²¹

To increase the credibility of their claims, moral entrepreneurs engage experts, with specific knowledge of the social problem, to package and present facts via media outlets in an attempt to show that the social problem’s origins are associated with another social issue.¹²² Here, the social problem is the vulnerability of marriage as a central institution of the family, and the connected social issue is homosexual couples.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Recall, the federal DOMA legislation was prefaced with language that stated, “to permit [same sex marriage] would be to devalue an institution already reeling from no fault divorce, sexual revolution, and out of wedlock births.” *Supra* note 19. After all, the National Association of Women Lawyers drafted legislation to promote no fault divorce. Sharon Johnson, *No-Fault Divorce: 10 Years Later, Some Virtues, Some Flaws*, N.Y. TIMES, March 30, 1979, sec. A, p. 22. Women were the key drivers behind the sexual revolution. *See generally*, BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); MARGARET SANGER, *WHAT EVERY GIRL SHOULD KNOW* (1915). Finally, women seem to be blamed for the rise in out of wedlock births. *See generally* Isabel Sawhill, *Twenty Years Later, It Turns Out Dan Quayle Was Right about Murphy Brown and Unmarried Moms*, WASHINGTON POST (May 25, 2012), http://www.washingtonpost.com/opinions/20-years-later-it-turns-out-dan-quayle-was-right-about-murphy-brown-and-unmarried-moms/2012/05/25/gJQAsNCJqU_story.html. (The author, a Brookings Institute Fellow, argues that Dan Quayle was correct in criticizing women for raising children without the father present and calling it just another “lifestyle choice.”).

¹²² Adler & Adler, *supra* note 116.

With regard to the assault on marriage by same-sex couples, a multitude of social science research¹²³ is employed by a variety of experts¹²⁴ touting statistics showing the rise in incidence of divorce, decline in marriage, increase in adultery, etc.¹²⁵ in order to bring about a moral conversion.¹²⁶ A few key ingredients make conversion particularly effective. First is the linkage of the social ill—the decline of the married family—with a “dangerous class”¹²⁷—homosexuals desiring same-sex marriage.¹²⁸ The next ingredient is what Reinerman refers to as “A Kernel of Truth.”¹²⁹ The perceived social ill has some basis of truth to it. Specifically, marriage rates had been declining and the divorce rate did rise in the two decades preceding the moral entrepreneurs’ perceived need to respond to “families in crisis” in the early 1990s.¹³⁰

¹²³ See, e.g., Mark R. Schneider, *In Defense of Marriage: Preserving Marriage in a Postmodern Culture*, 17 TRINITY L. REV. 125, 142, 151 (2011); Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose & the Definition of Marriage*, 25 BYU J. PUB. L. 287, 308-09 (2011).

¹²⁴ For example, Brian Brown for the National Organization for Marriage, Tony Perkins, President of the Family Research Council, Dale Showengert, President of the Alliance Defense Fund, and Jim Daly, President of Focus on the Family all hold themselves out as experts on the issue.

¹²⁵ See, e.g., Brief of amici curiae Brief of Amici Curiae U.S. Conference of Catholic Bishops; National Association of Evangelicals; the Church of Jesus Christ of Latter-Day Saints; the Ethics and Religious Liberty Commission of the Southern Baptist Convention; the Lutheran Church-Missouri Synod; the Union of Orthodox Jewish Congregations of America; the Massachusetts Catholic Conference; the Brethren in Christ Church; the Christian and Missionary Alliance; the Conservative Congregational Christian Conference; the Evangelical Free Church of America; the Evangelical Presbyterian Church; the International Church of the Foursquare Gospel; the International Pentecostal Holiness Church; the Missionary Church; Open Bible Churches [USA]; the United Brethren in Christ Church; the Wesleyan Church in Support of Reversal in Support of Defendants-Appellants and in Support of Reversal, *Massachusetts v. Office of Personnel Management*, __ F.3d __ (2012).

¹²⁶ Adler & Adler, *Supra* note 116.

¹²⁷ Craig Reinerman, *The Social Construction of Drug Scares* (1994) (on file with author). Although Reinerman has developed a theory related to drug scares, I assert that this model has equal application to the same-sex marriage issue.

¹²⁸ Reinerman observes that drug scares are about the use of a drug by particular groups of people who are, typically, *already* perceived by powerful groups as some kind of threat. *Id.* at 7 (citing TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1971)). He observes that Prohibition was motivated by the alcohol usage of immigrant, Catholic, working-class drinkers, not alcohol consumption generally. Likewise, drug laws in California came about not because of opiate usage by the masses, but because of Chinese opium dens. Finally, the drug war of the 1980s emerged not when college kids started snorting cocaine, but when crack cocaine could be linked to lower class African-Americans. In each instance, the social problem is linked to a group perceived as a threat.

¹²⁹ *Id.* at 6.

¹³⁰ Amitai Etzioni, *The Family: Is It Obsolete?* 14 J. CURR. SOC. ISSUES 4 (1977) (asserting that if the divorce rate continued at its current pace, not one American family would remain intact by the 1990s);

Next, the media play a key role in the “routinization of caricature.”¹³¹ In other words, episodic events appear as epidemic; additionally, worst case scenarios appear as typical ones, which dramatizes the social problem.¹³² Applying this concept here, we need to look no further than the context analysis described in the prior section, which outlines the discourse behind the rationales for passing a DOMA amendment.¹³³ The most recent state to pass a DOMA amendment, North Carolina, provides two good examples of these techniques. First, an issue policy brief asserts that in same-sex-marriage states, teachers are forced to teach homosexuality to elementary school children.¹³⁴ However, this assertion relies on one extreme example for support.¹³⁵ Second, the policy brief alleges that religious leaders have been jailed for speaking out against homosexuality.¹³⁶ For support, the brief cites to a general assertion that this event occurs in Canada.¹³⁷ What is particularly compelling with this technique is the idea that a vulnerable population is at risk, and the effects of the social problem are spreading to that

STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 263 (2005) (pointing out that by the end of the 1970s the divorce rate’s effect was exacerbated by the radical reduction in remarriages and alternatives to marriage, generally).

¹³¹ Reinerman, *supra* note 127, at 6.

¹³² *Id.*

¹³³ See Part I. *supra* for a detailed discussion of the content and language employed in the media to rationalize the passage of DOMA amendments.

¹³⁴ *The Marriage Protection Amendment: Top Ten Reasons Why Legislators Should Let the People Vote* (Jan. 25, 2013, 3:44 PM), NORTH CAROLINA FAMILY POLICY COUNCIL, <http://ncfamily.org/issuebriefs/110301-IB-MarProtAmdt.pdf>.

¹³⁵ For example, a lesbian teacher in Massachusetts, who teaches sex education to 8th graders, told National Public Radio (NPR) that she answers students’ questions about homosexuality using a chart listing different sexual activities, and then asks them whether two people of the same sex can engage in those activities. She told NPR she asks students, “Can a woman and a woman have vaginal intercourse, and they will all say no. And I’ll say, ‘Hold it. Of course, they can. They can use a sex toy.’” She also said her response to any challenges from parents would be, “Give me a break. It’s legal now.” *The Marriage Protection Amendment: Top*

Ten Reasons Why Legislators Should Let the People Vote (Jan. 25, 2013, 3:44 PM), NORTH CAROLINA FAMILY POLICY COUNCIL, <http://ncfamily.org/issuebriefs/110301-IB-MarProtAmdt.pdf>.

¹³⁶ *Id.*

¹³⁷ *Id.*

population.¹³⁸ In the instant case, children are at risk if same-sex marriage is allowed.¹³⁹

Not just children of same-sex couples, mind you, but *all* children are threatened.¹⁴⁰

The final ingredient in this moral enterprise is scapegoating. Scapegoating blames the effects of a social problem on a particular group who are only tangentially related to the social ill.¹⁴¹ Moreover, these effects usually *precede* the alleged causal connection between the social problem and the identified deviant group.¹⁴² Reinerman argues that scapegoating may be the most essential element of the process because “it gives great explanatory power and thus broader resonance to claims about the horrors [of the social

¹³⁸ Richard McCorkle & Terance Miethe noted in their study on the response to gangs through moral panics that attention to the alleged problem grew rapidly when the media reported the “apparent movement of gang activity . . . from the traditionally ‘troubled’ neighborhoods to recreation centers, theaters, and public schools across the city.” The authors also observed that attention increased once again when an outbreak of high school violence was attributed to gang movement from the street to high school campuses. Finally, a school shooting in a high school cafeteria was described by police as a ‘gang-related slaying’, although such conclusion was never confirmed. Richard McCorkle & Terance Miethe, *Response to Gangs: An Examination of a ‘Moral Panic’ in Nevada*. 15 JUSTICE Q. 7-10 (1998).

¹³⁹ Sarah Wildman, *Children Speak for Same Sex Marriage*, N.Y. TIMES (Jan. 20, 2010), <http://www.nytimes.com/2010/01/21/fashion/21kids.html?pagewanted=all> (“The real question is whether same-sex relationships benefit children to the same extent that living with a married mother and father does, and we believe they do not,” said Peter S. Sprigg, senior fellow for policy studies at the Family Research Council, the conservative Christian organization. “Children do best when raised by their own biological mother and father who are committed to one another in a lifelong marriage.”) See *supra* Part I, detailing the ways in which children will be harmed by same sex marriage according to DOMA proponents.

¹⁴⁰ Creating this illusion is crucial because according to Goode & Ben-Yehuda, disproportionality, or the degree that the public focuses concern on the problem, here, same-sex marriage as the cause of family disintegration to the exclusion of far more damaging (and realistic) sources of the crisis, such as poverty, access to education and stable employment, determines the viability of the moral panic. ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 36 (1994).

¹⁴¹ A closely related term is referring to scapegoats as the ‘folk devils’ because their behaviors are deemed selfish and harmful to society. It becomes paramount to neutralize their actions so society can return to normal. *Id.* at 29.

¹⁴² Volatility is also a crucial ingredient. The issue seems to erupt suddenly. Same-sex marriage as the cause of family crisis erupted suddenly when the Hawaii Supreme Court’s decision striking down legislation that barred same-sex couples from marrying. While the issue of family in crisis had always had political attraction, the redefining of marriage by a court to include same-sex couples, gave it new life. Recall that during the 1992 Clinton campaign, families were in crisis because of welfare queens. Clarence Page, *Romney’s Welfare Queen*, CHI. TRIB. (Aug. 12, 2012), <http://www.chicagotribune.com/news/columnists/ct-oped-0812-page-20120812,0,5718812.column>.

Another interesting example comes from Great Britain. In 1968, Mary Bell, at the age of 11, killed two toddlers. In contrast, when in the early 1990s two boys killed a toddler, a moral panic ensued because the act was emblematic of the decline of British society. The result was a series of legislative enactments to solve the problem of children murdering children. And, as is the case with DOMA and same-sex marriage, evidence that the enacted solutions would solve the “crisis” was irrelevant. Anne Bradley, *A Morality Play for our Times*, 63 LIVING MARXISM 2-4 (1994).

problem].”¹⁴³ Scapegoating same-sex families is equally cogent in the DOMA campaign.

B. Moral Panics

Blaming homosexual couples as the source of the United States’ ongoing family crisis was particularly effective because the social problem was acutely ripe for a moral panic.¹⁴⁴ The public was predisposed to believe the notion that the “family in crisis” had hit epidemic proportions, especially when infamous or noteworthy individuals declared it so.¹⁴⁵ In turn, legislators responded to the moral panic with the rapid enactment of DOMA at the federal level with individual states quickly following suit.

Moral panics can play a crucial role for those possessing political, economic, or religious power.¹⁴⁶ Often, the creation of such a panic can distract from a more intractable social issue. For example, when Britain was suffering from a severe recession

¹⁴³ Reinerman, *supra* note 127, at 7.

¹⁴⁴ Moral panic refers to a situation in which public fears and state response greatly exaggerate the alleged threat attribute to the target group. The concept emerged from studies Cohen conducted in Britain in the 1960s on the Mods and Rockers. Cohen characterized moral panics as a social ill or group of persons identified as a threat to societal values; the targeted group is presented in stereotypical fashion by the mass media. Morality reframed with the help of editors, bishops, and politicians. McCorkle, *supra* note 138, at 3.

¹⁴⁵ See, e.g., Dr. Dobson from the organization on Focus on the Family asserted in 2004, at the height of DOMA amendment campaigns that “the legalization of homosexual marriage will quickly destroy the traditional family.... [W]hen the State sanctions homosexual relationships and gives them blessing, the younger generation becomes confused about sexual identity and quickly loses its understanding of lifelong commitments, emotional bonding, sexual purity, the role of children in a family.... JAMES DOBSON, MARRIAGE UNDER FIRE 47 (2004); Judson Phillips of the Tea Party Nation declared that marriage equality for gays and lesbians is part of the east coast liberal freak show bent on ruining America. While there are many religious and moral arguments that can be made about this, the simple fact is for the last sixty years or so; the left has been attacking the basic family unit. The end result of this has been the creation of poverty where none existed before. It has been the creation of an underclass, born and raised in poverty, unlikely to escape poverty and encouraged to engage in the same behaviors that landed their parents in poverty.” *Right Wing Watch*, ALLIANCE DEFENSE FUND (May 31, 2012, 4:11 PM), <http://www.rightwingwatch.org/category/orgnizations/alliance-defense-fund>.

¹⁴⁶ Often these power roles work in tandem. For example, many politicians hold political power along with a significant largesse and use this power to express unabashed religious views—George W. Bush, Mitch Romney, Sarah Palin to name a few. Indeed, the most successful moral crusaders are those in the upper strata of society. Research conducted on the pro-life movement and anti-pornography revealed that the crusaders originated in the lower class, thus explaining their limited success—until recently—to have these issues reframed as legally unacceptable. Justin L. Tuggle & Malcolm D. Holmes, *Blowing Smoke: Status Politics and the Smoking Ban*, 18 *DEVIANT BEHAVIOR* __ (1997).

in the 1970s, the ruling class created a moral panic around street crime to distract the public from the country's declining economic situation. "By exploiting the public's fear of crime, the ruling class shifted the focus from the then ailing British economy to street muggings, thereby protecting their own economic interests...."¹⁴⁷ Similarly, in the case at hand, it could be argued that emphasizing same-sex marriage as the cause of what ails the American family served the power elite in its desire to divert attention away from the glaring reality of economic policies that benefited the power elite at the expense of particular types of American families.¹⁴⁸

Most fascinating is the framing that the conservative family policy groups employ to implicate what has occurred over the last few decades as an "American Experiment."¹⁴⁹ The Institute for American Values observes that a clear dividing line demarcates marital access and stability between the classes.¹⁵⁰ However, the dividing line

¹⁴⁷ McCorkle *supra* note 138, at 4 (citing S. HALL ET AL., *POLICING THE CRISIS; MUGGING THE STATE, AND LAW & ORDER* (1978)).

¹⁴⁸ Professor Carbone observes that, "The family crisis is tied to a changing economy; yet that economy is largely invisible in the moral-values debate." She goes on to note that, "[same-sex marriage bans] simply serve to keep anxiety about the American family alive without doing anything about it to address the country's real needs. A genuine family agenda would take the initiative in addressing the country's changing economic circumstances, starting with employment." June Carbone, *What Does Bristol Palin Have to do with Same-Sex Marriage?* 45 U.S.F. L. REV. 43, 44 (2011).

¹⁴⁹ W. Bradford Wilcox, *When Marriage Disappears: The New Middle America*, INSTITUTE FOR AMERICAN VALUES & UNIVERSITY OF VIRGINIA THE NATIONAL MARRIAGE PROJECT, available at <http://www.virginia.edu/marriageproject>. But see Carbone, *supra* note 44 (arguing that the ability to marry and stay married is defined by educational attainment and class. *Id.* at 44).

¹⁵⁰ The institution's report in combination with another one it authored, *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs*, is emblematic of moral entrepreneurs effectively creating a moral panic. Elizabeth Marquardt, *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs*, INSTITUTE FOR AMERICAN VALUES (2006), available at <http://www.americanvalues.org>. In fact, it could serve as the text book for how to create a moral panic around family crisis. It contains the requisite academic experts explaining how middle America's attitudes and behavior do not serve them well as they seek to adopt a "soul mate" model of marriage over "older institutional" model of marriage. It discounts studies demonstrating that same-sex marriage is not harmful. Wilcox, *supra* note 149, at 38. Moreover, Marquardt devotes a significant portion of her report establishing that a vulnerable population exists when she writes, "in both science and the voices of children we learn that biology does matter." She discusses the safety of children—and the risks of step-parents who lack biological connection to children in the household. She then equates these violent step-parents with same-sex parents. Marquardt at 21. However, citing recent developments in artificial reproduction that involve creating eggs and sperm from stem cells, she cautions that, "The technique raises

has clearly shifted in the last few decades such that the middle class now find themselves shut out at the proverbial church door. “The most consequential marriage trend of our time concerns the broad center of our society, where marriage, that iconic middle class institution, is foundering.”¹⁵¹ The report’s author couches the lack of access to marriage as a “retreat,”¹⁵² as if the middle class made a conscious decision to try out what it would be like to not marry for a generation or so.

Conversely, marriage stability has remained consistently strong for the last four decades amongst the educated upper and upper-middle class.¹⁵³ Thus, one might be tempted to conclude that DOMA was especially needed in those states that lacked educational and economic resources to stave off the impending attack on a set of marriages already weakened and becoming increasingly rarified. Taken to its logical conclusion, the argument might go like this: of course states with higher educated populations, with more income, and with delayed age of first marriage could withstand same-sex marriages amongst its population. These are not the types of marriages at risk.

Therein lays the appeal of the moral panic to the family in crisis question.¹⁵⁴ Status politics play out an efficient and effective one-two punch. First, the power elite can define certain kinds of families as lacking in social mores, i.e. poor and middle class single-parent families, while implicating other kinds of families as exacerbating the first

the possibility that gay couples will be able to have biological children.” Id. at 27. Seemingly, same-sex couples cannot win. They are unacceptable parents without both having a biological connection to the child, and frankly, just unfit parents because, as selfish folk devils, they view “human lives as fit for laboratory experimentation for the benefit of others.” Id. at 27-28.

¹⁵¹ Id. at ix.

¹⁵² Id. at 17.

¹⁵³ Id. at 16.

¹⁵⁴ Moral panics allow for selective application of the scapegoat to the social ill according to where it conveniently fits to support the narrative being offered. Power is central to this enterprise. “[L]aws . . . are a product of political action by moral entrepreneurial interest groups that are connected to society’s power base. . . . [T]hose positioned closer to the center of society, holding greater social, economic, political, and moral resources can turn the force of the deviant stigma onto others less fortunately placed.” Adler & Adler, *supra* note 116, at 138.

social ill, i.e. same-sex families. Second, the condemnation of both groups “symbolically enhances the status of the abstinent through the degradation of the participatory.”¹⁵⁵ In other words, the power elite legitimize its superior moral value and superior position in the social stratification through such discourse. In the case of same-sex couples’ demand for marriage, moral entrepreneurs engaged in “coercive reform”¹⁵⁶ because these couples were “viewed as intractably denying the moral and status superiority of the [political-economic-religious] elite’s symbolic-moral universe,”¹⁵⁷ and, at the same time, distracted families experiencing massive instability from examining the cause of their plight.

Thus, a fair conclusion to draw is that same-sex couples’ desire to marry has little to do with the current state of marginalized families and has much to do with a carefully crafted moral panic for political expediency. In other words, DOMA is a byproduct of a fallacy.

The next query becomes, then, given the data analysis above revealing the variables associated with marital instability and given DOMA’s ineffective role in promoting marital stability, who or what is to blame for the middle class’s weakened marital state, and how should society respond?

III. Recommendations

¹⁵⁵ Tuggle, *supra* note 146, at 3.

¹⁵⁶ Id. Coercive reform refers to the enactment and enforcement of laws to force a particular group to comply with moral views espoused by the moral entrepreneur.

¹⁵⁷ Id.

Given that marriage, as an institution, has become a less viable option, especially for the middle and lower classes, one may be tempted to lay blame at their feet. The nature of this blame may come in a variety of forms.

A. *Moral Failure*

One approach might be to adopt the reasoning of the conservative elite—both within the academy and political arenas—that middle and lower classes do not act consistently with their best interests.¹⁵⁸ For instance, the National Marriage Project and Institute for American Values diagnose the problem as follows. Marriage has eroded in the middle class because “moderately educated Americans are markedly less likely than are highly educated Americans to embrace the bourgeois values and virtues.”¹⁵⁹ To put it bluntly, the report explains that middle class individuals are less likely to engage in self-control, delayed gratification, and hard work. These virtues, the report claims, are the key to accessing a college education, and in turn, adopting an appropriate life planning sequence—education, work, marriage, and childbearing in that order.¹⁶⁰

The culpability of the shiftless certainly has its appeal—particularly when academics or politicians can point to the models of marriage that are appropriate for one social class, but not the other. The State of the Union report observes that while a “soul mate” model of marriage may work for upper class Americans, middle class Americans must abide by the “traditional” model of marriage in which “poor and Middle Americans of a generation or two ago . . . [would have] been markedly more likely to get and stay

¹⁵⁸ Ronald Reagan used the term “welfare queen” in a speech in 1976 to describe women who were scamming the government to obtain benefits and services for themselves and their children instead of working for pay.

¹⁵⁹ W. Bradford Wilson, *The State of our Unions* 34 (2011), available at http://www.stateofourunions.org/2011/social_indicators.php.

¹⁶⁰ *Id.*

married, even if they did not have much money or a consistently good relationship.”¹⁶¹

According to the Institute for American Values, the poor and middle classes don’t have the economic resources or emotional capacity to succeed in a soul-mate union.¹⁶²

This analysis smacks of the 1965 Moynihan report in which then Assistant Secretary of Labor, Daniel Moynihan, concluded that the pathology of the African-American community had its origins in the destabilized “Negro” family.¹⁶³ The report has since been criticized for its failure to examine all the data on black families available at the time, and in particular, its failure to acknowledge the adaptive strategies that family formation will take in response to destabilized institutions, especially the economy.¹⁶⁴ Similarly, here, one might conclude that a destabilized family is a consequence, not a cause—no more than same-sex marriage would be a cause—of weakened social structures.¹⁶⁵

¹⁶¹ *Id.* at 39. The soul mate model of marriage is couple centered, demands emotional intimacy, and shared consumption with the happiness of both spouses as central to its survival. Conversely, the traditional model of marriage focuses on parenthood, economic integration, and emotional intimacy for a permanent union. *Id.* at 38. However, consider Stephanie Coontz’ assessment of marriages and families from the generation or two ago waxed about by the conservative elite as the ideal approach for middle America. “Not only was the 1950s family a new invention; it was a historical fluke, based on a unique and temporary conjuncture of economic, social, and political factors.” STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 28 (1992) (observing that families during this period were characterized as one or both partners experiencing daily misery, hiding the sexual or physical abuse that occurred within the family from the outside world, alienated wives and mothers who had been pushed out of the workforce, ignoring the poor and minorities who continued to face brutal discrimination, consistent teen pregnancies, which resulted in marriage, and high rates of prescription and alcohol abuse. Moreover, while the American Values Institute criticizes the soul mate model as valuing consumption, Coontz points out that the “traditional family” of the 1950s was defined by consumer consumption.”

¹⁶² *Id.* 40.

¹⁶³ Daniel Patrick Moynihan, *The Case of the Negro Family: A Call for Action* (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm>.

¹⁶⁴ Herbert Gans, *The Moynihan Report and its Aftermaths*, 8 DUBOIS REVIEW 367 (2011) (arguing that the report lacked the positivism required for such analysis to have a meaningful effect).

¹⁶⁵ In the early part of the last century, sociologists Robert Parks and Ernest Burgess developed the Concentric Zone theory. The theory explains that competition for resources means that certain land areas with limited social structures will lead to adaptations by individuals living in those areas subject to the same ecological pressures. Thus, the idea that individuals develop characteristics in response to the environment and resources available to them is not a new one. See generally R. Parks & E. Burgess, *The City* (1925).

Another explanation of middle class families' plight is the cultural class-warfare syndrome as expressed in volumes such as *What's the Matter with Kansas?*¹⁶⁶ Under this model, middle class Americans are at fault for their circumstances because they vote against their own interests.¹⁶⁷ Frank observes that we have a French Revolution in reverse. The wealthy elite politically conservative establishment developed a highly effective discourse he calls *latte libel*. Instead of focusing on policy as the framework for voting in political parties, the economic and political powerhouse shifted politics into a cultural class war.

In this cultural war, middle class Americans were duped into creating a backlash against their own economic interests based on judgments about liberal elitism that comes from the coastal regions of the U.S.—the cars they drive, the food they eat, the clothes they wear, the music they listen to, the places they vacation, the churches they do not attend, etc. The net result, according to Thomas Frank, is that, “Here is a movement whose response to the power structure is to make the rich even richer; whose answer to the inexorable degradation of working-class life is to lash out angrily at labor unions and liberal workplace-safety programs; whose solution to the rise of ignorance in America is to pull the rug out from under public education.”¹⁶⁸

¹⁶⁶ THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVE WON THE HEART THE HEART OF AMERICA* (2004). Although culture as an expression of class has long been debated by sociologists, Frank's book describes how the political mapping of the 2000 election brought the intersection of politics and class warfare in to sharp relief as mediated through culture. See e.g., MICHAEL HARRINGTON, *THE OTHER AMERICA* (1962). The idea of culture as an expression of class has captured the imagination of family law scholars more recently. JUNE CARBONE & NAOMI CAHN, *RED FAMILIES V. BLUE FAMILIES LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE WHY MEN AND CLASS MATTER* (2010).

¹⁶⁷ Recent data, however, suggest otherwise. A report just released by the PEW Foundation reveals that 50% of its respondents who stated that they were middle class identified as Democrats compared to 39% who identified as Republicans. *The Lost Decade of the Middle Class: Fewer, Poorer, Gloomier*. PEW FOUNDATION, available at <http://www.pewsocialtrends.org/2012/08/22/the-lost-decade-of-the-middle-class>.

¹⁶⁸ Frank, *supra* note 166, at 8.

But Frank and those of his persuasion cast blame more broadly. They point to the liberal political and economic elite as a culpable party too. Frank argues that the Left made an inexcusable error in refusing to talk about class; in attempting to reframe itself as a party friendly to business; and abandoning the issues that made the Democratic Party appealing. The Left has engendered a deep-seated bitterness in middle-America that is aimed at the once progressive platform of the Democratic Party. Joan Williams goes further: “A precondition for permanent political change is a changed relationship between the white working-class and the reform-minded elite. It is disheartening that . . . the upper-middle class remains supremely uninterested in rethinking its relationship with the Missing Middle.”¹⁶⁹ Thus, the liberal elite drove middle class Americans away with their condescension and intellectual analysis, and into the hands of the Republican Party, who were willing to embrace their anger—or more accurately, manipulate it for political gain.¹⁷⁰

The result is that the nation has economic and family policies that have led to a high level of inequality. To be sure, the last thirty years has seen the distance grow between the social classes. But during the Great Recession and subsequent recovery, the top 1% of America’s most wealthy gained 93% of the additional income created in the U.S. in the year 2010 alone. During this same year, the ratio of pay between a typical worker (a person lucky enough to have a job) and a CEO’s annual compensation was one to 243.¹⁷¹ Put another way, the top 1% had an annual income of \$1.3 million while the

¹⁶⁹ Williams, *supra* note 166, at 211.

¹⁷⁰ *Id.*

¹⁷¹ JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE 3 (2012).

bottom 20% earned \$17,800 annually—and that was before the recession hit.¹⁷² It is implausible to maintain that such incredible economic injustice does not hurt the stability of the family.

A recent study released by the PEW Foundation catalogues the losses experienced by the middle class. Of the 1287 adults surveyed for the study, 85% stated that it was more difficult to maintain a living standard than a decade ago.¹⁷³ For the first time since World War II, income has declined across all income tiers. The size of the middle class has actually shrunk over each of the last four decades.¹⁷⁴ For the upper class, the period has proved lucrative. Their incomes rose from 29% of the pie to 46% of the nation's pie. For the middle class, four decades ago, their income made up 62% of the share. Now, it is only 45%. The lower class has remained relatively stable in its minimal share of the nations' income—ten percent in 1971, nine in 2011.¹⁷⁵ Wealth remain a crucial, yet elusive safety net for any family, both in terms of providing access to resources in times of economic hardships, but even more so, providing economic opportunities. However, wealth has plummeted for middle and lower class families—specifically, 28% for the middle class and 45% for the lower class over the last four decades. Once again, if you were lucky enough to be born in the upper class, your opportunities improved substantially. Upper class families enjoyed a 19% increase in wealth.¹⁷⁶

B. The Elusive Traditional Family

¹⁷² *Id.* at 4.

¹⁷³ *The Lost Decade*, *supra* note 167.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

A frequent refrain in the conservative party is a return to the traditional family values of the 1950s—with images of *Leave it to Beaver* re-runs fresh in peoples' collective memories.¹⁷⁷ Nostalgic stories of low divorce rates, high marriage rates, high fertility rates, and economic growth—with the largest movement of poor people into the middle class—all certainly have resonance. However, the family of the 1950s was not the last vestige of a long tradition of the stable American family.¹⁷⁸ It was a new phenomenon born of massive economic growth spurred on by housing starts and consumer spending—particularly for household furnishings and appliances.¹⁷⁹

Even more so, the traditional family of the 1950s was the invention of American economic and family policy. Coontz observes that the GI bill was one of the most successful social programs ever created, at least for whites. Veterans received free college tuition, a stipend, and extra money if they had a family. No loans, just grants. Mortgages were available at very low rates. A rewritten tax code provided advantages to married couples.¹⁸⁰ Such policies created the middle class, and in turn, the possibility of family stability.

Economic stability did not create the cultural phenomena of the nostalgic “traditional” two-parent, one male breadwinner, one female home-maker family. The media did.¹⁸¹ However, the recommendation that we provide economic and educational

¹⁷⁷ Kevin Noble Maillard, *The Myth of the Traditional Family*, N.Y. TIMES (Aug. 9th, 2012), available at <http://www.nytimes.com/roomfordebate/2012/04/24/are-family-values-outdated/the-myth-of-the-traditional-family>.

¹⁷⁸ ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR* 11 (1990) (the 1950s family was not the “last gasp of ‘traditional’ family life with deep roots in the past. Rather, it was the first wholehearted effort to create a home that would fulfill virtually all its members’ personal needs”)

¹⁷⁹ Coontz, *supra* note 160, at 25.

¹⁸⁰ STEPHANIE COONTZ, *MARRIAGE, A HISTORY HOW LOVE CONQUERED MARRIAGE* 223-24 (2005). See generally Stiglitz, *supra* note 171; MADELINE M. KUNIN, *THE NEW FEMINIST AGENDA DEFINING THE NEXT REVOLUTION FOR WOMEN, WORK, AND FAMILY* 23-24 (2012).

¹⁸¹ *Id.*

opportunities¹⁸² to create economic stability is an obvious one that Nobel Prize winner Joseph Stiglitz analyzes forcefully. Nevertheless, the ability to *create family stability* means discarding a singular notion of a family model¹⁸³ that thrived for *only one* decade in our history.¹⁸⁴

A two-parent household offers certain economic advantages. These advantages, however, can be mirrored in a national economic policy without necessarily demanding the two parent household model so that other family structure can receive these benefits.¹⁸⁵ It is clear from the analysis above, regardless of one's educational or economic resources, marriage and fertility rates are both declining.¹⁸⁶ America is a hostile place to raise a child. As of December 2011, 57% of the nation's children are living in low income or poor households.¹⁸⁷ The United States exhibits the highest child poverty

¹⁸² Educational opportunities should be carefully assessed to match the growth areas in the economy. For example, regulation of for-profit educational institutions is essential for the protection of lower and middle classes seeking access to higher education—an area where they are frequently shut out. Steiglitz cites data showing that 74% of students in the nation's most selective colleges from the top quartile of income earnings while only nine percent come from the bottom half of the country's income earners. The effects of inequality for a child are pervasive. In fact, a child born in an environment with few resources will find it difficult to ever move out of poverty. Steiglitz, *supra* note 171, at 19-20. Recent data reveal that the middle class, who used to believe that the American Dream was achievable, are increasingly alienated from the notion that working hard is all it takes. Pew Foundation, *supra* note 167. Finally, education cannot be the salve to childhood poverty and family instability. Research shows that the predominant growth area for jobs in the United States in the next decade will be in the service industry—low paying jobs like home health workers or social service providers, as well as business services. Richard Henderson, *Employment outlook: 2010–2020 Industry employment and output projections to 2020* MONTHLY LABOR REVIEW 19 (January 2012), available at <http://www.bls.gov/opub/mlr/2012/01/art4full.pdf>. Therefore, policy must address way for low income families to garner support other than through wage income.

¹⁸³ Indeed, the trend of marriage continues to decline, especially amongst the least educated. Richard Fry, *No Reversal in Decline of Marriage*, PEW RESEARCH AND DEMOGRAPHIC TRENDS (Nov.) 20, 2012), available at <http://www.pewsocialtrends.org/2012/11/20/no-reversal-in-decline-of-marriage/#src=prc-newsletter>.

¹⁸⁴ Coontz, *supra* note 180.

¹⁸⁵ In fact, families with three or more parents exist and may receive legal recognition in California. Ian Lovett, *Measure to Open Door to Three Parents, or Four*, N.Y. TIMES, July 13, 2012, available at <http://www.nytimes.com/2012/07/14>.

¹⁸⁶ Births: Final Report 2010, 61 NATIONAL VITAL STATISTICS REPORT CENTER FOR DISEASE CONTROL, available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf.

¹⁸⁷ Kunin, *supra* note 180, at 223.

rate in the developed world.¹⁸⁸ Unlike our European neighbors, we obsess over marriage, not children.¹⁸⁹ In a nation where “poor kids who succeed academically are less likely to graduate from college than richer kids who do worse in school,”¹⁹⁰ and, where we know education strengthens family stability, a new moral panic demands addressing the causes, not the symptoms, of family crisis.¹⁹¹

C. Possible Solutions

1. Reformulate resources with children in mind

As Stiglitz observes, this country virtually eradicated poverty for the elderly through social programs like Social Security and Medicare. The decision to do nothing to eradicate child poverty is political as well as moral.¹⁹² Refocusing on children’s access to resources will go a long way toward creating family stability, while undermining the scapegoating arguments in support of DOMA. Research reveals that Americans strongly value fairness.¹⁹³ The discourse of fairness must enter the family-in-crisis discussion.¹⁹⁴ Other countries have chosen to create a wealth distribution system that still allows for rewards, but reduces the amount of inequality present in society, particularly by focusing

¹⁸⁸ *Id.* at 11.

¹⁸⁹ ANDREW CHERLIN, *THE MARRIAGE GO ROUND* (2009).

¹⁹⁰ ECONOMIC MOBILITY PROJECT ECONOMIC POLICY INSTITUTE, <http://www.economicmobility.org> (last visited Jan. 25, 2013).

¹⁹² Stiglitz, *supra* note 171, at 17.

¹⁹³ *Id.* at 153-54

¹⁹⁴ The idea of tax dollars going to assist other adults who we perceive as making life decisions that we would not creates cognitive dissonance for some when it comes to the notion of what is fair. *See, e.g., Myth: the rich don’t pay their fair share*, CONSTITUTIONAL CONSERVATISM, (Jan. 25, 2013 4:57 PM), <http://constitutionalconservative.wordpress.com/myth-the-rich-dont-pay-their-fair-share/>.

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on investing in resources for children.¹⁹⁵ In doing so, the left must adopt the morality discourse with which the right has become adept. It must re-engage middle and lower class-America—where the most destabilized families are found.¹⁹⁶

¹⁹⁵ See, e.g., Policies in Australia, UK, France, and Brazil. See, e.g., Kunin, *supra* note 180; Stiglitz, *supra* note 171.

¹⁹⁶ The empirical data show that religion plays a central role for these families experiencing destabilization. Thus, reframing the family crisis as one involving a moral crisis around fairness, greed, and hypocrisy can capture the imagination of these families. The Left is inclined to eschew religion, as the data here reveal, but social justice for families is a moral theme. Moreover, the Left must also be mindful of recent research demonstrating that cognitive functioning may play a significant role in political attitude and thus, finding common ground rather than demanding “conversion” of position. See e.g., Ryota Kanai et al., *Political Orientations Are Correlated with Brain Structure in Young Adults*, 21 CURRENT BIOLOGY 677-80 (2011) (finding that left-leaning individuals are more tolerant of uncertainty while conservatives have greater sensitivity to fear as demonstrated in different parts of the brain); Michael D. Dodd, Amanda Balzer, Carly Jacobs, Michael Gruscynski, Kevin B. Smith, and John R. Hibbing, *The Left Rolls with the Good; The Right Confronts the Bad*, PHYSIOLOGY AND COGNITION IN POLITICS (2012), available at rstb.royalsocietypublishing.org (finding that left-leaning individuals prefer pleasing images while right-leaning individuals prefer unpleasant images); Scott Eidelman, Christian S. Crandall, Jeffrey A. Goodman, and John C. Blanchard, *Low-Effort Thought Promotes Political Conservatism*, SOC. PERS. & SOC. PSYCHOL. 11 (2012) (“... [P]olitical conservatism is promoted when people rely on low-effort thinking. When effortful, deliberate responding is disrupted or disengaged, thought processes become quick and efficient; these conditions promote conservative ideology. . . . low-effort thought might promote political conservatism because its concepts are easier to process, and processing fluency increases attitude endorsement. Four studies support our assertion that low-effort thinking promotes political conservatism . . . Our findings suggest that conservative ways of thinking are basic, normal, and perhaps natural”); Kevin B. Smith, Douglas Oxley, Matthew V. Hibbing, John R. Alford, and John R. Hibbing, *Disgust Sensitivity and the Neurophysiology of Left-Right Political Orientations*, 6 PLOS ONE 10 (2011), available at www.plosone.org (“... individuals with marked involuntary physiological responses to disgusting images [measured by change in mean skin conductance], such as of a man eating a large mouthful of writhing worms, are more likely to self-identify as conservative and, especially, to oppose gay marriage than are individuals with more muted physiological responses to the same images”); Erik G. Helzer and David A. Pizarro, *Dirty Liberals! Reminders of Physical Cleanliness Influence Moral and Political Attitudes*, PSYCHOLOGICAL SCIENCE (2011) (“... [R]eminders of physical purity influence specific moral judgments regarding behaviors in the sexual domain as well as broad political attitudes”); Jacob M. Vigil, *Political Leanings Vary with Facial Expression Processing and Psychosocial Functioning*, GROUP PROCESSES & INTERGROUP REL 3(2010) (Republican sympathizers were more likely to interpret the faces as signaling a threatening expression as compared to Democrat sympathizers. Group differences were also found for dominance perceptions, whereby Republican sympathizers were more likely to perceive the faces as expressing dominant emotions than were Democrat sympathizers”); Darren Schreiber, Alan N. Simmons, Christopher T. Dawes, Taru Flagan, James H. Fowler, and Martin P. Paulus, *Red Brain, Blue Brain: Evaluative Processes Differ in Democrats and Republicans*, AMERICAN POLITICAL SCIENCE ASSOCIATION, Toronto Meeting Paper (2009), available at SSRN: <http://ssrn.com/abstract=1451867> (“... [I]t appears in our experiment that Republican participants, when making a risky choice, are predominantly externally oriented, reacting to the fear-related processes with a tangible potential external consequence. In comparison, risky decisions made by Democratic participants appear to be associated with monitoring how the selection of a risky response might feel internally”); Peter K. Hatemia, Carolyn L. Funka, Sarah E. Medlanda, Hermine M. Maesa, Judy L. Silberga, Nicholas G. Martina and Lindon J. Eavesa, *Genetic and Environmental Transmission of Political Attitudes Over a Life Time*, J. POL., July 2009, at 1141 (“... at the point of early adulthood (in the early 20s), for those who left their parental home, there is evidence of a sizeable genetic influence on political attitudes which remains stable throughout adult life”); Natalie J.

One way to re-engage the middle class is to discuss the value of human life.

Rather than obsess over birth control and abortion (both important and necessary social policies—but also alienating issues amongst the religious middle class) we should focus on the need to invest in children from the start. Recall, this study shows a strong correlation between DOMA states and its citizens reporting conservatism and religion as an important part of daily life. Thus, a discussion of policy reform must reframe the discussion in such a way that is respectful to the religious and moral views of the middle class; for example, prioritize prenatal and early childhood care.

By adopting a “trickle up” policy, money invested in children can mitigate some of the weak income levels of their parents.¹⁹⁷ And how do we pay for these investments? Revise the tax code to address the massive and growing economic injustice in this country. Government may not be able to dictate the ratio of pay between worker and CEO, but government can redistribute resources and income through tax policy.¹⁹⁸ The earned income tax credit is one of the most effective tax policies to benefit families.¹⁹⁹

Shooka and Russell H. Fazio, *Political Ideology, Exploration of Novel Stimuli, and Attitude Formation*, EXPERIMENTAL SOC.PSYCHOL., Apr. 3, 2009 (compared to liberals, conservatives are less open to new experiences and learn better from negative stimuli than positive stimuli).

¹⁹⁷ This article offers a couple of the multitude of policies that will need addressing. Welfare reform, for example, demands significant attention if poor children are to gain access to resources that mirror children in two parent households. Greg Kaufmann, *This Week in Poverty: the Invisibles in Mississippi and the U.S.*, THE NATION, (Sept. 28, 2012 8:01 AM), available at <http://www.thenation.com/blog/170222/week-poverty-invisibles-mississippi-and-us#>. Social security reform represents another area that significantly impacts poor children. Christopher Tamborini, et al., *A Profile of Child Social Security Beneficiaries and their Families: Sociodemographic and Economic Characteristics*, 71 SOCIAL SECURITY BULLETIN (2011), available at <http://www.socialsecurity.gov/policy/docs/ssb/v71n1/v71n1p1.html>.

¹⁹⁸ A report by the Center on Budget and Policy Priorities identified three actions that could improve the lives of the poor and reduce inequality. First among them was reforming state tax policy to make it progressive rather than regressive. Next, improve unemployment insurance and raise and index the minimum wage. Elizabeth McNichol & Douglas Hall, *Pulling Apart: A State by State Analysis of Income Trends*, CENTER ON BUDGET AND POLICY PRIORITIES (Nov.) 15, 2012), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3860#stateInfographics>.

¹⁹⁹ Jimmy Charite, Indivar Dutta-Gupta & Chuck Marr, *Studies Show Earned Income Tax Credit Encourages Work and Success in School and Reduces Poverty*, CENTER OF BUDGET AND POLICY PRIORITIES, (June 26, 2012), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3793>.

One highly effective investment is supporting low-income parents in developing strong relationships with their children. Research demonstrates that the characteristics necessary for a child's success in life are not based on genetics, but on brain chemistry.²⁰⁰ Children who grow up under chronic stress are less likely to possess strong executive functioning.²⁰¹ Executive functioning is a key predictor of a child's ability to succeed in school. Yet, chronic stress is strongly correlated with living in poverty.²⁰² Thus, it would appear that poor children are destined to repeat the cycle of poverty. Not so.

A fascinating study measuring the effects of environmental stress on children found that their cortisol levels—a hormonal response to stress—spike when the children experienced stress. However, a child's cortisol level did not spike when encountering a stressful environment if the parent was attentive and responsive to the child.²⁰³ In other words, parents who can develop nurturing relationships with their children can mitigate the effects of stress associated with living in a harsh environment, and in turn, increase their children's executive functioning and ability to succeed in school.²⁰⁴

Thus, neuroscientists don't point to a particular type of family form to ensure a child's chances of success, but rather a particular type of *parent-child* relationship. One study revealed a 76% success rate at predicting whether a child would graduate from high school based on the parental care the child received in his or her early years.²⁰⁵ As

²⁰⁰ Gary W. Evans & Michelle A. Schamberg, *Childhood Poverty, Chronic Stress, and Adult Working Memory*, 16 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 106 (2009).

²⁰¹ *Id.* Executive functioning refers to the ability of the brain to manage confusing and conflicting information. The type of information that children encounter and must negotiate all the time in school. PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* 18 (2012).

²⁰² *Id.* at 20.

²⁰³ Clancy Blair et al., *Salivary Cortisol Mediates Effects of Poverty and Parenting on Executive Functioning in Early Childhood*, 82 CHILD DEVELOPMENT 6 (2011).

²⁰⁴ *Id.*

²⁰⁵ L. ALAN SROUFE ET AL., *DEVELOPMENT OF THE PERSON* 211, 228 (2005).

expected, though, developing these parenting skills in a harsh environment is not an easy task. Such programs exist, but demand an investment in resources. Early childhood programs like Head Start, long considered one of the most successful federal government “War on Poverty” programs created, partner with parents to support family stability.²⁰⁶ One forty-year longitudinal study that followed children into adulthood, who had attended the Perry Preschool Project in a poverty-stricken neighborhood in Michigan found that the program led to profound social and economic benefits. The graduates of the preschool program were more likely to graduate from high school, have a job at age twenty-five, more likely to earn over \$25,000 at age forty, and less likely to be arrested or dependent on welfare than children who had not attended the program.²⁰⁷ Recall that education and income were significant predictors of family stability. Thus, the cycle of family instability that seems to plague poor families is not inevitable.

We do not need to reinvent the wheel. It can seem overwhelming and hopeless to believe that any kind of meaningful redistribution of resources is likely to occur. In fact, it may appear naïve to believe that even modest increased funding for social support networks is possible in our current economic climate. Yet, research shows that this kind of resource investment actually yields tangible returns. Heckman et al. analyzed the Perry Preschool Project and found that for every dollar invested in the program seven to twelve dollars of benefit to the economy resulted.²⁰⁸ These children developed non-cognitive skills like curiosity, social fluidity, and social control that served them well throughout

²⁰⁶ HEAD START COMMUNITY PROGRAM OF MORRIS COUNTY, <http://headstartmc.org/> (last visited Jan. 25, 2013).

²⁰⁷ Tough, *supra* note 201, at xvii-xx.

²⁰⁸ *Id.* at 196.

life.²⁰⁹ These are the same skills mirrored in affluent family structures, which contribute to a child's success in life. Institutional support at the macro level, though, will not succeed alone in creating family stability. At the micro level, a cultural shift in individual interactions must occur—the focus of the next section.

2. Renewing the Cultural Value of Respect

The second element that must be the focus of attention if the family, in whatever forms, is to experience stability is the resurgence of the cultural value of respect. The desire for a marginalized group to speak out and ask for the same rights and access to resources should not be met with condemnation or scapegoating.²¹⁰ But even more pragmatically, we should interact with our political, religious, and socioeconomic pluralities with respect. As Harvard Political Science Professor Michael Sandel observed, “A better way to mutual respect is to engage directly with the moral convictions citizens bring to public life, rather than to require that people leave their deepest moral convictions outside politics before they enter.”²¹¹ Indeed, we should interact with children and parents with respect because structural reform is not enough. Interpersonal behaviors matter too.

Research reveals that the concept of respect, more so than any other traditional measure of relationship success, determines relationship satisfaction—more so than love,

²⁰⁹ *Id.* at xx.

²¹⁰ Something very wrong is present in a culture in which the media pays an individuals to write or declare contemptuous things about others—especially those with less social power. For example, after observing the speeches of the first night of the Democratic National Convention, in which Michelle Obama, Lilly Ledbetter, and Tammy Buckworth spoke, CNN commentator Erick Erickson tweeted “First night of the Vagina Monologues going as expected.” Such comments can be viewed as nothing more than contempt. When Sandra Fluke spoke up demanding access to birth control in the new health care law, Rush Limbaugh called her slut. *CNN: Fire Erick Erickson, ULTRA VIOLET*, <http://act.weareultraviolet.org/sign/erickson/?source=so> (last visited Jan. 25, 2013).

²¹¹ Michael Sandel, The Lost Art of Democratic Debate, Ted Talks, June 2010, *available at* http://www.ted.com/talks/michael_sandel_the_lost_art_of_democratic_debate.html.

likeability, personality, or attachment.²¹² In Frei and Shaver's study, the results showed that, regardless of whether respondents were considering what respect means for the general public or for a romantic partner, five key concepts emerged. Respect was associated with a person who had good morals, was considerate, listened, was honest, and was accepting of other viewpoints.²¹³ Moreover, the researchers observed that the practice of respect actually engendered more respect.²¹⁴ Other research by Lawrence-Lightfoot demonstrated that respect brought reciprocal benefits.²¹⁵ Based on her research results, she encouraged a reformulation of the concept of respect as not something accorded to someone in power, but rather grounded in empathy and connectedness in a place of equality—regardless of each party's social or economic status.²¹⁶ All the researchers agreed that respect was the opposite of contempt.²¹⁷

Reinvigorating the concept of respect may better serve us in moving towards a policy that supports social structures that will promote family stability. However, respect must operate at both the individual and group level in order for the necessary individual and social structural pieces to interact and find success. As Coontz observed, "The problem is not to berate people for abandoning past family values, nor exhort them to adopt better values in the future—the problem is to build institutions and social support networks that allow people to act on their best values rather than on their worst ones."²¹⁸

Conclusion

²¹² J. Frei & P. Shaver, *Respect in Close Personal Relationships: Prototype, Self Report Assessment, and Initial Correlates*, 9 PERSONAL RELATIONSHIPS 121-39 (2002).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ SARAH LAWRENCE-LIGHTFOOT, RESPECT: AN EXPLORATION (2000).

²¹⁶ *Id.*

²¹⁷ Frei & Shaver, *supra* note 212.

²¹⁸ Coontz, *supra* note 180, at 22.

This article has explored the extent to which state DOMAs are associated with their intended objective of increasing family stability. The goal of the article is to move the discourse and political-legal analysis beyond whether any rational basis exists for DOMA (it does not) to considering means for achieving family stability within a moral framework. It may be that those in power seek to maintain it through the use of moral panics, but the discourse of same-sex marriage as a threat to “traditional families” has run its course. It is a distraction, as well as irrelevant. After all, polls now show that from 1988 to 2010, the gap between support versus opposition to gay marriage has narrowed rapidly and significantly;²¹⁹ but the gap between well to-do versus hard-off and family stability and family volatility has widened considerably. Other industrial countries have managed to welcome other family forms—including same-sex marriage—and yet maintain family stability through the use of child-centered economic and social policies.²²⁰ Our goal should be policy that lets families thrive.²²¹ Marriage should not be a social objective in itself, but rather one possible outcome of many from a family and child-oriented policy.

²¹⁹ Nate Silver, *Opinion on Same-Sex Marriage Appears to Shift at Accelerated Pace*, (Aug. 12, 2010) available at <http://www.fivethirtyeight.com>.

²²⁰ 60% of Norwegian families are married couples with children, despite allowing for same-sex marriage. 55% of Finnish families include married couples with children, despite allowing for same-sex marriage. 63% of Canadian families have married parents with children, despite allowing for same-sex marriage. 78% of families in the Netherlands comprise of married parents with children, despite allowing for same-sex marriage. 51% of Icelandic families contain married parents with children, despite allowing for same-sex marriage. Various family structures thrive and do not threaten “traditional” models of family because these countries have far more generous economic and social policies devoted to children. Data on file with author.

²²¹ See generally Clare Huntington, *Flourishing Families: Harnessing Law to Foster Strong, Stable, Positive Relationships* (manuscript in progress) (on file with author.); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* (2008).

Appendix A

Marriage Calculated Slopes for each State

State	Pre	Post
AK		
AL	-0.190	-0.240
AR	-0.371	-0.486
AZ	-0.201	0.300
CA	0.033	0.000
CO	-0.143	-0.080
CT	0.011	0.060
DC	-0.286	0.770
DE	-0.132	-0.170
FL	-0.085	-0.200
GA	-0.190	-0.139
HI	0.625	-1.220

IA	-0.075	
ID	-0.200	-0.420
IL	-0.193	-0.140
IN	-0.164	-0.050
KS	-0.146	-0.120
KY	-0.360	-0.251
LA		
MA	0.029	-0.090
MD	-0.111	-0.250
ME	-0.064	-0.170
MI	-0.126	-0.131
MN	-0.154	-0.190
MO	-0.200	-0.109
MS	-0.306	-0.214
MT	0.006	-0.006
NC	-0.193	-0.180
ND	0.043	-0.071
NE		
NH	-0.179	-0.040
NJ	-0.050	-0.120
NM	-0.218	0.120
NV	-4.730	-4.012
NY	-0.104	-0.110
OH	-0.271	-0.146
OK		0.039
OR	0.026	-0.183
PA	-0.036	-0.120
RI	-0.057	-0.210
SC	-0.401	-0.150
SD	-0.174	-0.190
TN	-0.705	-0.490
TX	-0.275	-0.130
UT	-0.003	-0.271
VA	-0.173	-0.240
VT	-0.164	0.160
WA	-0.121	-0.140
WI	-0.106	-0.150
WV	-0.111	-0.180
WY	-0.139	-0.440

Appendix B

Divorce Slopes Calculated for each State

State	Pre	Post
AK		
AL	-0.123	-0.020
AR	-0.049	-0.063
AZ	-0.081	-0.100
CA		
CO	-0.071	-0.050
CT	-0.014	-0.060
DC	-0.304	0.240
DE	-0.089	-0.070
FL	-0.091	0.200
GA	-0.260	
HI	-0.020	
IA	-0.096	
ID	-0.075	0.110
IL	-0.132	0.010
IN		
KS	-0.057	0.140
KY	-0.091	-0.049
LA		

MA	-0.050	0.030
MD	-0.011	-0.050
ME	-0.168	-0.010
MI	-0.080	-0.003
MN	-0.077	
MO	-0.143	0.040
MS	-0.109	-0.080
MT	0.111	-0.117
NC	-0.089	-0.060
ND	-0.229	0.011
NE		
NH	-0.196	-0.070
NJ	-0.018	-0.030
NM	-0.025	-0.090
NV	-0.750	-0.128
NY	-0.054	-0.070
OH	-0.086	-0.034
OK		-0.025
OR	-0.120	-0.037
PA	-0.093	-0.030
RI	0.043	0.060
SC	-0.144	0.050
SD	-0.094	0.110
TN	-0.189	-0.060
TX	-0.089	-0.020
UT	-0.014	-0.071
VA	-0.064	-0.010
VT	-0.111	-0.010
WA	-0.100	0.010
WI	-0.043	0.020
WV	0.014	0.020
WY	-0.111	0.020

Appendix C





