Ties that bind: the irrelevancy and distraction of DOMA

Deirdre M Bowen
Ties that Bind: An Empirical Analysis of the Irrelevancy 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 DOMAs preserve and stabilize the family. After concluding that DOMA is not associated with this goal, the article explores what variables are correlated with family stability. Next, the article explores moral entrepreneurism and moral panic as a theoretical explanation for DOMAs continued attraction. Finally, the article offers pragmatic recommendations for achieving family stability.

Introduction

The Defense of Marriage Act1 (“DOMA”) became a focal point of attention earlier this year when the First Circuit ruled that the statute contained an unconstitutional provision.2 Supporters of DOMA cried the refrain that DOMA is needed to protect our society—to strengthen and protect traditional marriage, the cornerstone of civilization.3

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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 state-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).
3See, e.g., Bishop Cordileone of the United States Conference of Catholic Bishops 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.
But can DOMA really protect marriage? This article offers an empirical investigation of that question and concludes that DOMA provides no measurable benefit to protecting families at risk, but the “DOMA as protectorate” discourse serves other constituencies’ interests quite effectively. 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 novel analytical approach to determine that a demonstrated connection did not exist between DOMA’s treatment of same-sex couples and its goal of strengthening the bonds and benefits of marriage. While Attorney General Eric Holder announced last year that the Obama administration would no longer defend DOMA’s constitutionality because the Department of Justice determined that the

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4 The thrust of the article argues 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, the discourse 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 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.” City of Seattle Press Release, City Formally Joins Effort to Challenge Federal Defense of Marriage Act July, 10, 2012. http://www.seattle.gov/mayor/press/newsdetail.asp?ID=12915.

5 Id. at 14-15.

standard of review for the sexual-orientation classification demanded heightened scrutiny, the First Circuit rejected the heightened-scrutiny standard in favor of what it coined a “more careful assessment” than that offered by “conventional rational basis review.” Indeed, only certain types of rationales with a certain level of “force” are acceptable under this rationale basis plus standard of review.

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.” 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. Continuing, the Attorney General noted that Congress’ articulated purpose of DOMA would fail under a strict scrutiny standard, but could pass muster under a rationale basis review. However, applying the rational basis ‘plus’ standard of review, the First Circuit decided that DOMA’s articulated goal was unacceptable.

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 2nd, 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 Massachusetts, 682 F.3d at 11.
9 Id.
10 Id. at 8.
13 Id.
14 Massachusetts, 682 F.3d at 15-16.
When Congress passed DOMA, one of four reasons advanced for DOMA’s necessity was to defend and nurture the institution of traditional, heterosexual marriage.\textsuperscript{15} Indeed, the report stated:

\begin{quote}
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.\textsuperscript{16}
\end{quote}

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.\textsuperscript{17} To permit it would further devalue an institution already reeling from no-fault divorce, the sexual revolution, and out-of-wedlock births.\textsuperscript{18} Ultimately, Congress asserted in this report that the time had come to “rebuild a family culture based on enduring marital relationships.”\textsuperscript{19}

And certainly, one of the key rationales that the defendants offered in \textit{Massachusetts v. HHS} to support DOMA reiterates this theme. Essentially, children are

\textsuperscript{16} \textit{Id.} (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
best raised in a stable heterosexual marriage.\textsuperscript{20} However, the court observed that “DOMA does not . . . explain how denying benefits to same-sex couples will reinforce heterosexual marriage.”\textsuperscript{21} But, what the court ultimately rested its gaze on is the idea that a diversity of governance requires the federal government to respect the choices that states made regarding marriage—including the choice to allow same sex marriage.\textsuperscript{22} 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,”\textsuperscript{23} the First Circuit seemed to rely on the second part of this sentence as the focal point of its rationale.\textsuperscript{24} 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. And the state is entitled to do so, presumably, as an expression of its citizens’ will to preserve tradition.\textsuperscript{25} The question is do mini-DOMAs do that?

Whether DOMA survives a Supreme Court ruling has substantial historical and economic significance.\textsuperscript{26} But DOMA’s potential demise offers less relief for those gay

\textsuperscript{20} Massachusetts, 682 F.3d at 14.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 16.
\textsuperscript{23} Id.
\textsuperscript{24} 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 inference in state choice will be sanctioned.
\textsuperscript{25} Id.
\textsuperscript{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
and lesbian families who wish to wed, but reside in states with statutes or constitutional amendments that bar same-sex marriage. Given that nine states have statutes barring same-sex marriage and 29 states have constitutional amendments that prohibit same-sex marriage, it is a useful exercise to consider why states enacted their own DOMAs, and whether these individual states have enjoyed the benefits that they hoped to garner with the passage of their own DOMA legislation.

The empirical analysis reveals two conclusions. First, states that enacted DOMA did so for virtually the same reasons that the federal government did. Second, DOMA does not appear to be associated with achieving the articulated goals. Thus, this article discusses three issues: the methodology associated with the empirical research as well as the results of the research; a theory as to why the articulated DOMA goals persist despite the legislations’ inability to meet those goals; and finally recommendations on how best to achieve the goal of developing and executing an effective policy that supports families.


28 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.

Soon after the federal law went into effect, thirty states began enacting mini-DOMAs, either by statute or state constitutional amendment, and sometimes both. 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 unions or domestic partnerships instead. 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. 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.


35 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 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 Jul. 29,
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? This query was answered by engaging in a context analysis of each state’s legislative history, statutory language, and media content surrounding the passage of DOMA legislation. After recording the context of each of these categories of data, themes were analyzed and categorized. Variations were explored based on the time at which the legislation passed, geographical location, and whether a state passed a statute (a mini-DOMA) followed by a constitutional amendment (a super-DOMA.) The subjects that emerged from the context analysis were then compared with the reasons articulated in Commonwealth of Massachusetts.

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. The second is that children need to be protected and/or raised...
in an optimal environment.\textsuperscript{40} The third is that “activist”\textsuperscript{41} or “new age”\textsuperscript{42} or “liberal”\textsuperscript{43} judges from out of state should not control state laws regarding traditions. Certainly sub-

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 suggest 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, concludes that not much 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. The Williams Institute, Economic Impacts by State. http://williamsinstitute.law.ucla.edu/economic-impact-reports-by-state. 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. San Francisco L. Rev. 313 (2011)(arguing that research demonstrates family instability can be attributed to lack of economic opportunities, particularly based on social class.)

A rich and passionate discussion of this theme exists in the literature. 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. \textit{See generally}, Glenn Stanton, “\textit{Are Kids Really All Right? What the Research Really Says About the Parents Kids Need,}” \textit{Focus on the Family} (2010)(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* (2001)(Claiming too little evidence to draw meaningful conclusions); Maggie Gallagher and Joshua Baker, “\textit{Do Mothers and Fathers Really Matter? The Social Science Evidence on Marriage and Child Well-being,}” Institute for Marriage and Public and Policy (2007)(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., “\textit{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);(summarizing data and concluding two parent biological households are best); Mary Parke, “\textit{Are Married Parents Really Better for Children?}” Center for Law and Social Policy, Policy Brief 1, May 2003; Concerned Women for America, “Rosie O’Donnell, In Her Own Words,“ Transcript of her interview with Diane Sawyer, Primetime Thursday, ABC News (aired March 14, 2002)(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, 139-140 (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 Social Science Research 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
themes emerge under each of these categories, but most remarkable is the consistency of message over the last decade and a half since states began enacting the legislation and soon after constitutional amendments were passed.

The idea behind protecting the definition of marriage has several subthemes that rely on the notion that marriage is an institution central to the foundation of society. The first subtheme is that marriage is grounded in biblical origins. Thus, redefining marriage

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 Magazine Posted June 11, 2012 9:08 a.m. http://www.Slate.com/articles/health_and_science/human_nature/2012. (Pointing out the flawed classification system, which 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 required. University of Texas Completes Investigation into Allegations of Misconduct, Press Release August 24, 2012 http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/.

41 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) (“Activist judges have re-written marriage laws and ignored the will of the people by legalizing same sex marriages.”). See also Alabama, voters approved a June 2006 constitutional amendment by 81 percent of the vote. 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.”).

42 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).


45 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.
is to fly in the face of religious liberties and morality. The second subtheme revolves around institutional consequences. If marriage is redefined around something other than heterogeneous norms, the institution will be weakened, creating instability in society.

In essence, the “family” in its idealized version must be preserved through heterosexual


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 45 (Supports 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 (N.Y., Jun. 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.).


“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).
marriage. Harly more than a thinly veiled version of the homosexuality will spread argument.

The next topic regarding marriage and children offers three sub-premises. The most consistent subtopic is that marriage creates the most optimal environment in which to raise children. Research is sometimes alluded to that concludes the outcomes for children are most favorable for offspring raised in a two (biological) parent household. Courts and legislatures have adopted this premise and call it a legitimate government interest. However, the sub-contextual inference is that children need protection from homosexual parents. Therefore, the 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 relied upon to demonstrate that children nurtured in same-sex households appear to experience negative consequences compared with

49 See Windsor, supra note 2, discussing Congress’ desire to preserve an ideal notion of what family should be. Also, gay marriage will wither traditional marriage. Forman, supra note 44 (“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, nosamesexmarriage.com/marriage/SCmarr.php (last visited Aug. 17, 2012); see also Measure 36, supra note 45 (needing to protect traditional marriage because marriage is a “building block” of society).

50 Marigny, supra note 41 (threatening a significant increase in the percentage of American culture to identify as homosexual).

51 Measure 36, supra note 45 (breakdown of marriage hurts children; and changing the importance of gender and the family would be bad).

52 Supra note 40.

53“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 54 (September 22, 2011.)

54 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 Support of Reversal (January 25, 2011).
children living in married, heterosexual households. This theme of harm and children goes one step further, though. The third sub-premise asserts that allowing for same-sex marriage threatens children in other ways. First, they may think homosexuality is normal. Second, children may be forced to learn about it in school. Finally, children may experiment with homosexuality and become homosexuals!

The last theme focuses heavily on the rationale behind the DOMA amendments. States started adopting DOMAs in two main waves. The first was a response to the Supreme Court of Hawaiʻi’s 1993 decision that led the forefront challenging the constitutionality of barring same-sex marriage. The second wave came in reaction to the Massachusetts Supreme Court decision in 2003. The states expressed deep concern that

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55 Supra note 40. See Forman, supra note 44 (“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.

56 See, e.g., Forman, supra note 44, 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 41 (“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) argue “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.”).

57 E.g., Marigny, supra note 41 (“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.”).

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

judges, not citizens, would define foundational cultural norms surrounding marriage. A consistent theme expressed is the disdain for judges that rely on little understood, seemingly esoteric legal principles to destroy a centuries-old foundational institution that goes to the root of civilization.

Certainly, variations in the themes expressed are present based on geographical location. For example, some Southern states are more likely to express the desired goals using language that, at times, comes across as deeply homophobic. Moreover, this same geographical area relies heavily on the discourse of God’s law as the overriding principle for defining marriage. Finally, a fascinating articulation of the need for marriage occurs


60 Activist Judges, _supra_ note 39; New-Age, _supra_ note 40; Liberal, _supra_ note 41. 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, SENATE FISCAL AGENCY, _November 2004 Ballot Proposal 04-2 at 3_ (2004), _available at http://www.senate.michigan.gov/sfa/publications%5Cballotprops%5Cproposal04-2.pdf._

61 See, e.g., Iowa, Threats to Impeach Judges Renewed. 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.

62 Two principle 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, 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/post_1131164649.shtml. See also MISS. CODE ANN. § 93-1-1(2) (1997) (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) (titling the sub-section “Marriage contract – Void Marriages.”)._  

63 See _Press Release_, supra note 43: 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_
in North Carolina and South Carolina—where the institution functions as a way to
“contain male aggression and sexuality.” Thus, not only children, but women are
protected with marriage. Sadly, South Carolina’s women are in need of protection.

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. Thus, the assertion that passage of these statutes and
amendments is associated with the articulated desired goals demands interrogation.

B. Analysis of state DOMA’s

This part of the study seeks to answer the question of whether a state passing a
DOMA statute, or adopting a constitutional amendment, or both, correlates with the goals
of strengthening marriage in that state compared with states that did not enact such
legislation. To achieve this goal, I operationalized the goal of family stability/marital

approve same-sex marriage ban amendment, ASSOCIATED PRESS, Nov. 2, 2004, 6:11 PM, available at
(last accessed Aug. 17, 2012).

64 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 May 20, 2012

65 “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.)
“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.”

66 Massachusetts, supra note 36.

67 One study has 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, statistical power errors. Douglas W. Allen, Let’s Slow Down:
strength by measuring the year-over-year marriage and divorce rates from 1999 through 2010.\footnote{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 is available. The start year, 1999, is the first year for which continuous year-over-year data is available.} 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.\footnote{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., \textit{Do We Have a Linear Trend?} \textit{FAMILY HEALTH OUTCOMES PROJECT.} October 2005. On file with author.}

The key independent variable in the study is whether a state has amended its constitution to define marriage as between a man and a women, or, in other words, to ban same-sex marriage.\footnote{Recall, that a state constitutional amendment defining marriage is this way is called a super DOMA.} 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 statute\footnote{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. \textit{Current Status – Marriage Map (U.S.), MARRIAGE EQUALITY USA}, \url{http://www.MarriageEquality.org/current-status-map} (last visited Aug. 10, 2012).} during the time for which marriage and divorce rates were available were included in this category and coded as “0.”\footnote{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 has having a super DOMA.} Under the 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.\footnote{Recall that marriage was open to attack if procreation was perceived as acceptable outside of marriage or open to interpretation by judges. \textit{See supra} notes 39, 40, 41, and 57.}
States, on the other hand, that did not have a constitutional amendment, but rather, possessed a statute banning same-sex marriage during the dates of the data analyzed were included as a separate category and were coded as “1.” 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 the rock-solid confidence around the meaning of marriage as an institution in its state if “activist” judges could overturn the statutory definition, resulting in a more fluid definition of marriage. Finally, those states that have no statute or amendment banning same-sex marriage are coded as “2.” We can hypothesize that the institution of marriage, according to the DOMA rationale, is most vulnerable to attack in these states. The citizenry has not collectively expressed a codified position regarding the definition of marriage, or in some cases, it has, and determined that a broader definition of marriage, which includes same-sex couples, is appropriate.

A number of control variables are incorporated into the analysis. 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

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75 Recall, that a statute banning same-sex marriage is referred to as a mini-DOMA.

76 Strong Marriages Florida, supra note 53.
below the poverty line. 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 in the state. 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. Finally, the variable of other legal recognition of relationships was added to the analysis. 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.

A. Results

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. Following this group, by

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79 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.
80 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).
81 Supra note 29. 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
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.82

To engage in this analysis, I conducted four separate statistical examinations. The first series looks 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 with those that did not.83 The next analysis explores the average marriage rates in the years before and after DOMA passage for both groups of states.84 The third examination of data explores any statistically-significant differences that may have emerged in the declining divorce trends for either group of states. Finally, 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.

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82 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.

83 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.

84 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.
To begin, I calculated the slopes for each state. Next, I conducted a paired-samples-means-T-test analysis 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 existed between two time periods. The first time period captures the years before the enactment of the amendments for both the DOMA and non-DOMA states. The second time 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 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.

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 does 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.

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).

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.

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 80. 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
Another way of considering the trend analysis is to look at the average rate of marriage for the time before and after the amendments’ passage.\textsuperscript{89} 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.\textsuperscript{90} 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. These different average rates are statistically significantly for both pre and post-DOMA ratification.

Thus, two important contextual 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.\textsuperscript{91}

\textbf{Table One}

\begin{center}
\begin{tabular}{ll}
\textbf{Year} & \textbf{Mark in Marriage} \\
Max Planck Institute (2007). Massachusetts is the one case 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. \\
\textsuperscript{89} 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. \\
\textsuperscript{90} Nevada is excluded from the mean marriage-rate analysis because it is a significant outlier that disproportionally increases the marriage rate for DOMA states. \\
\textsuperscript{91} These points are important in exploring why DOMA could not solve the perceived issue of declining marriage rates. 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, is explored in the next section. \textit{See infra} Part II.
\end{tabular}
\end{center}
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 possessed a statute barring same-sex marriage. However, the reduced decline can most likely be attributed to fewer marriages occurring during this same time period.\(^{92}\)

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.\(^{93}\) Nonetheless, on average, citizens of non-DOMA states tend to get divorced less than individuals living in states that have DOMA laws. 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

\(^{92}\) Note the lower mean rate of marriage during this period. See *supra* Table 1.
\(^{93}\) See note 84 *supra.*
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**

<table>
<thead>
<tr>
<th>Rate</th>
<th>Avg. Decline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre</td>
<td>Post</td>
</tr>
<tr>
<td>Pre</td>
<td>Post</td>
</tr>
<tr>
<td>n</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>DOMA</th>
<th>4.1</th>
<th>3.78</th>
<th>xx*</th>
<th>31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-DOMA</td>
<td>3.72</td>
<td>3.34</td>
<td>xx*</td>
<td>19</td>
</tr>
</tbody>
</table>

*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 rates, in the two time periods, pre and post DOMA amendment passage, is statistically different between the two groups of states: those states 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.

Again, using SPSS, I conducted an independent-sample-means T-test to determine whether statistically-significant differences existed between DOMA and non-DOMA states for pre and post-DOMA marriage trends and pre and post-DOMA divorce trends.94 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 post DOMA amendment enactment compared to states that did not pass such legislation. Furthermore, the second hypothesis would predict that the average rate of decline for divorce would be greater in those states that passed an amendment or statute than those states that did not. The results demonstrate otherwise.

Table three indicates that no statistically-significant difference exists between 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. For average rate of change in divorce trends, the analysis reveals that DOMA states actually had a greater rate of decline compared with non-DOMA states, -.1 versus -.09, respectively. But again, these slight substantive differences do not amount to statistical significance.

<table>
<thead>
<tr>
<th></th>
<th>Marriage Trend</th>
<th>Divorce Trend</th>
<th>n</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOMA</td>
<td>-0.22</td>
<td>-0.1</td>
<td>31</td>
</tr>
<tr>
<td>Non-DOMA</td>
<td>-0.25</td>
<td>-0.09</td>
<td>19</td>
</tr>
</tbody>
</table>

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

state the distance the slope is from the mean of the slopes) the Welch-Satterthwaite equation was used to calculate the t-test.

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 DOMA states.
More importantly, no statistically-significant difference exists between the two groups of states after the passage of DOMA. The decline in marriage or divorce rates after DOMA does not differ in any meaningful way between those that adopted an amendment and those that did not. Post DOMA, the average rate of decline in marriage was greater for DOMA states than non-DOMA states, -.26 versus -.12. On the other hand, the average rate of decline for divorce was greater in non-DOMA states rather than DOMA states, -.011 and -.008, respectively.\(^96\)

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

<table>
<thead>
<tr>
<th></th>
<th>Marriage Trend</th>
<th>Divorce Trend</th>
<th>n</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOMA</td>
<td>-0.26</td>
<td>-0.008</td>
<td>31</td>
</tr>
<tr>
<td>Non-DOMA</td>
<td>-0.12</td>
<td>-0.011</td>
<td>19</td>
</tr>
</tbody>
</table>

This preliminary\(^97\) analysis suggests that DOMA is not associated with increases in average marriage-rate trends or decreases in average divorce-rate trends.\(^98\) The analysis

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\(^96\) 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 suggests that the institution of marriage is more vulnerable in DOMA states. Possible reasons why are discussed infra Part III.

\(^97\) 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 53.

\(^98\) 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
does not support either hypothesis. DOMA does not appear relevant to the narrative of why marriage plays an increasingly less visible role in family formation in the United States.\textsuperscript{99} Such a conclusion raises another question. 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 changes in states?\textsuperscript{100}

\textit{Marriage Trends}

We begin with marriage. Prior to the passage of DOMA, three variables predict, with statistical significance, a state’s marriage trend. 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.\textsuperscript{101} Similarly, with a correlation of -.36, the greater the proportion of people in a state who state that religion plays an important role in daily life, the greater the decline in the state’s marriage rate. Finally, a correlation of -.35 exists between 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). http://www.socialresearchmethods.net/kb/power.php.


\textsuperscript{100} 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.

\textsuperscript{101} 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. \textit{Wading through the Data Swamp} Program Evaluation 201 http://pathwayscourses.samhsa.gov/eval201/eval201_4_pg9.htm.
children living in a single-parent household and the increased decline the marriage rate in that state.102

However, a much richer profile of marriage can be developed by examining other characteristics that are associated with the variables correlated with the decline in marriage trend and marriage rates. For example, the percent of families living below the poverty line is statistically 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, a positive correlation is present. 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 exists between the percent of families living below the poverty line, and one’s disposable income, and 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.

102 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 (March 22, 2012).
The next variable, religion is 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 exists between religion as an important part of daily life and the percent of the 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, unlikely to have much disposable income, unlikely to have a college degree, and most likely to be living below the poverty line.

An analysis of the data after the passage of DOMA reveals almost identical results. Poverty rates and percent 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 is an important part of daily life. However, that particular variable strongly mediates every other variable in the profile. Therefore, we can conclude that the passage of state DOMA amendments has no

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103 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 variable. 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.1173-1182 (1986).
measurable association with stemming the decline of marriage but other variables provide valuable insight into how to address the issue.\textsuperscript{104}

**Divorce**

The divorce-trend analysis reveals almost identical patterns with the marriage analysis. Pre-DOMA divorce is negatively correlated with the percent of population with families living in poverty and percent of population with single-parent households. These associations are moderate, -.4 for both.\textsuperscript{105} As with the marriage analysis, the same variables have 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.\textsuperscript{106}

\textsuperscript{104} A full description of the correlations of all of these variables can be found in appendix A.
\textsuperscript{105} 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.
\textsuperscript{106} 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.
Conclusion

The analysis suggests that DOMA states do not fare any better than non-DOMA states in terms of the strengthened “bonds and benefits to society of heterosexual marriage.” In fact, the analysis might offer an alternative conclusion. DOMA states tend to have lower marriage rates, larger declines in marriage trends, and larger divorce rates. Moreover, the decreasing relevancy of marriage and the greater divorce rates in DOMA states for those individuals who are married (and re-marry) seem to be related directly with poverty and indirectly with educational and economic opportunities.

These results force 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? A theory is explored in the next section.

Part II. The Enduring Attraction of DOMA

A. Moral Entrepreneurism

Howie 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. Individuals draw on power and resources from social structures and cultural institutions to literally manufacture the abstract notion of something or someone

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107 See, Massachusetts, supra note 56. (Articulating goals of enacting DOMA.)
108 See, e.g. Patrick H. Caddell & Douglas E. Schoen, Romney, Obama Must Address Crisis of U.S. Families, Opinion 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.).
Those individuals who define certain behaviors or characteristics as deviant are known as moral entrepreneurs, according to Becker. 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, distrust, or suspicion of this group. The stages include awareness and moral conversion.

Moral entrepreneurs define a problem and create public consciousness of the problem by generating danger messages through claims makers. In the present case, the problem is the institution of marriage and family. 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. In order to increase the credibility of the 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. Here, the social problem is the vulnerability of

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111 Id. at 136.
112 Id.
113 Id.
114 Id.
115 Id.
116 Adler, Supra note 98.
marriage as a central institution of the family; and the connected social issue is homosexual couples.

With regard to the assault on marriage by same sex couples, a multitude of social science research is employed by a variety of experts touting statistics showing the rise in incidence of divorce, decline in marriage, increase in adultery, etc. in order to bring about a moral conversion. 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”—homosexuals desiring same sex marriage. The next ingredient is what Reinarman refers to as “A Kernel of Truth.” The perceived social ill has some basis of truth to it. Specifically, marriage rates had been declining and the divorce rate

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118 See, e.g. 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.
119 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).
120 Adler, Supra note 98.
121 Craig Reinarman, The Social Construction of Drug Scares (1994)(on file with author); (Although Reinarman has developed a theory related to drug scares, I assert that this model has equal application to the same sex marriage issue.)
122 Reinarman 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 Judgement (1970). 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.
123 Id. at 6.
did rise in the two decades preceding the moral entrepreneurs’ perceived need to respond to “families in crisis” in the early 1990s.\(^\text{124}\)

Next, the media plays a key role in the “routinization of caricature.”\(^\text{125}\) In other words, episodic events are cast as epidemic, and worst case scenarios are redefined as typical scenarios in order to dramatize the social problem.\(^\text{126}\) Applying this concept here, we need to look no further than the context analysis described in the prior section, which describes the discourse behind the rationales for passing a DOMA amendment.\(^\text{127}\) The most recent state to pass a DOMA amendment, North Carolina, provides two good examples of these techniques. First, an issue policy brief claims that in same sex marriage states, teachers are forced to teach homosexuality to elementary school children. The assertion relies on one extreme example for support.\(^\text{128}\) Second, the policy brief alleges that religious leaders have been jailed for speaking out against homosexuality. For support, the brief cites to a general assertion that this event occurs in Canada.\(^\text{129}\) What is particularly compelling with this technique is the idea that a vulnerable population is at

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\(^{124}\) Amitai Etzioni, *The Family: Is It Obsolete?* 14 J. of Current Social Issues 4 (1977)(Asserting that if the divorce rate continued at its current pace, not one American family would remain intact by the 1990s.);
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.)

\(^{125}\) Reinarman, *supra* note 107 at 6.

\(^{126}\) Id.

\(^{127}\) See Part I. *supra* for a detailed discussion of the content and language employed in the media to rationalize the passage of DOMA amendments.

\(^{128}\) 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*, 4 North Carolina Family Council Brief http://ncfamily.org/issuebriefs/110301-IB-MarProtAmndt.pdf

\(^{129}\) Id.
risk, and the effects of the social problem are spreading to that population.\textsuperscript{130} In the instant case, children are at risk if same sex marriage is allowed.\textsuperscript{131} Not just children of same sex couples, mind you, but \textit{all} children are threatened.\textsuperscript{132}

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.\textsuperscript{133} Moreover, these effects usually \textit{precede} the alleged causal connection between the social problem and the identified deviant group.\textsuperscript{134} Reinarman argues that scapegoating may be the most essential element of the process because “it gives great

\textsuperscript{130} 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, \textit{Response to Gangs: An Examination of a ‘Moral Panic’ in Nevada}. 15 Justice Q. 7-10 (1998).

\textsuperscript{131} Children Speak for Same Sex Marriage Sarah Wildman New York Times January 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.

\textsuperscript{132} 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, \textit{Moral Panics: The Social Construction of Deviance} 36 (1994).

\textsuperscript{133} A closely related term is referring to the scapegoat as the ‘folk devil’ 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.

\textsuperscript{134} 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, \textit{Romney’s Welfare Queen}, The Chicago Tribune August 12, 2012 available at 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, \textit{A Morality Play for our Times} 63 Living Marxism 2-4 (1994).
explanatory power and thus broader resonance to claims about the horrors [of the social problem].”  

Scapegoating same sex families is equally cogent in the DOMA campaign as it is in the drug scares Reinarman describes.

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. The public was inclined to believe the notion that the “family in crisis” had hit epidemic proportions, especially when infamous or noteworthy individuals declared it so. In turn, the legislators responded to the moral panic with the rapid enactment of DOMA at the Federal level with individual states eventually following suit.

Moral Panics can play a crucial role for those in power—i.e. those possessing political, economic and/or religious power. Often, the creation of a moral panic can

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135 Reinarman, supra note 98 at 7.
136 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 114 at 3.
137 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.” Alliance Defense Fund, Right Wing Watch 5/31/2012 4:11 PM http://www.rightwingwatch.org/category/organizations/alliance-defense-fund.
138 Often these power roles work in tandem. For example, many politicians hold politic 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 crusades are led by 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
distract from a more intractable social issue. For example, when Britain was suffering from a severe recession in the 1970s, the ruling class created a moral panic around street crime to distract the public from the seriousness of the country’s 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.” 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.

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.” The Institute for American Values observes that a clear dividing line exists in marital access and stability between the classes. However, the dividing line

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139 Supra note 114 McCorkle & Miethe at 4 citing S. Hall et al., Policing the Crisis; Mugging the State, and Law & Order (1978).

140 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. of San Francisco Law Rev. 43, 44 (2011).

141 W. Bradford Wilcox, When Marriage Disappears: The New Middle America 15 The State of Our Unions Marriage in America 2010 Institute for American Values & University of Virginia The National Marriage Project available at http://www.virginia.edu/marriageproject. But see, Carbone supra note 141 arguing that the ability to marry and stay married is defined by educational attainment and class. Id. at 44.

142 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, et al (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 141 at 38. Moreover, Marquardt devotes a significant portion
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.” The report’s author couches the lack of access to marriage as a “retreat.” 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. 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 delayed age of first marriage could withstand same sex marriages amongst its population. These are not the types of marriages at risk.

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 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.

143 Id. at ix.
144 Id. at 17.
145 Id. at 16.
Therein lays the appeal of the moral panic to the family in crisis question. 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 and moral mores, i.e. poor and middle class single parent families, while implicating other kinds of families as exacerbating the first 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.” 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” because same sex couples were “viewed as intractably denying the moral and status superiority of the [political-economic-religious] elite’s symbolic-moral universe,” and at the same time, distracted families experiencing massive instability from examining the true cause of their plight.

Thus, a fair conclusion to draw is that same sex couples desire to marry has nothing to do with current state of marginalized families, and everything 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

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146 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. The role of power is central to this enterprise. “[L]aws...are a produce 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 111 at 138.
147 Tuggle, supra note 139 at 3.
148 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.
149 Id.
role in promoting marital stability, who or what is to blame for the middle class’ weakened marital state, and how should we respond?

Part III. Recommendations

Given that marriage, as an institution, has become a less viable option for family formation more so in 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. 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.\textsuperscript{150} For instance, the National Marriage Project and Institute for American Values diagnose the problem as follows. Marriage is 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.”\textsuperscript{151} 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.\textsuperscript{152}

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

\textsuperscript{150} 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.

\textsuperscript{151} W. Bradford Wilson, \textit{The State of our Unions} at 34.

\textsuperscript{152} Id.
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 married, even if they did not have much money or a consistently good relationship.”

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.

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. 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.

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.

153 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 as the ideal approach for middle America above. “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.)

154 Id. 40.


156 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.)

157 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
Another approach offered to explain middle class families’ plight is the cultural class warfare syndrome as expressed in volumes such as *What’s the Matter with Kansas?* Under this model, middle class Americans are somewhat to blame for their circumstances because they vote against their own interests. 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.—cars they drive, food they eat, clothes they were, music they listen to, places they vacation, churches they don’t attend, etc. The net result, Frank writes 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.”

But Frank, and others, under this paradigm, cast blame on others as well as the middle class. They point to the liberal political and economic elite as a culpable party,

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159 Frank, supra note 159 at 8.
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 progressive Democratic Party. 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.”

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.

The result is that the nation has economic and family policies that have led to incredible inequality. To be sure, the last thirty years has since incredible 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. 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. Put another way, the top 1% had an annual income of $1.3 million while the bottom 20% earned $17,800 annually—and that was before the recession hit. It is impossible to claim that such incredible economic injustice does not impact the stability of the family.

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160 Williams supra note 159 at 211.
161 Id.
163 Id. at 4.
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* fresh in peoples’ collective memories. 164 Nostalgic stories of low divorce rates, high marriage rates, high fertility rates, and economic growth, the largest movement of people into the middle class certainly have resonance. However, the family of the 1950s was not the last vestige of a long tradition of the stable American family.165 It was a new phenomenon born of massive economic growth spurred on by housing starts and consumer spending—particularly for household furnishings and appliances.166

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 created. Veterans received free college tuition, a stipend, and extra money if they had a family. No loans, just grants. Mortgages were made available at very low rates. The tax code was rewritten to make it more advantageous to married couples.167 Such policies created the middle class, and in turn, the possibility of family stability.

Allow me to clarify. Economic stability did not create the cultural phenomena of the nostalgic “traditional” two parent, one breadwinner, one differently gendered house maker family. The media did.168 The recommendation that we provide economic and

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165 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…”)
166 Coontz * supra* note 124 at 25.
168 Id.
educational opportunities to create economic stability is an obvious one that Nobel Prize
winner Joseph Stiglitz discusses so eloquently. However, the ability to create family
stability means discarding a singular notion of a family model that thrived for one decade
only in our U.S. history. Two key elements are needed to create family stability. A two
parent household offers certain economic advantages. However, these advantages can be
mirrored in national policy, without necessarily demanding a two parent household.\footnote{In
fact, families with three or more parents exist and may receive legal recognition in California. Ian
Lovett, \textit{Measure to Open Door to Three Parents, or Four} The New York Times July 13, 2012 available at
http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf.}}

It is clear from the analysis above, regardless of educational or economic resources,
marrige rates are declining. Moreover, fertility rates are declining.\footnote{Andrew Cherlin, \textit{The Marriage Go Round} (2009).}

America is a hostile place to raise a child. As of December 2011, 57\% of the nation’s children are
living in households classified as low income or poor.\footnote{Kunin, \textit{supra} note 168 at 223.} The United States has the
highest child poverty rate in the developed world.\footnote{Id. at 11.} Unlike our European neighbors, we
obsess over marriage, not children.\footnote{Andrew Cherlin, \textit{The Marriage Go Round} (2009).} In a nation where, “poor kids who succeed
academically are less likely to graduate from college than richer kids who do worse in
school,”\footnote{Economic Mobility Project Economic Policy Institute available at \url{http://www.economicmobility.org}}

and yet, we know education mediates family stability, a new moral panic is in order.\footnote{The United States has higher rates of child poverty and lower rates of child wellbeing than other wealthy
nations because of the significant earnings inequality, low cash spending on children, hostile tax policy,
and low rates of pay for women. Julia B. Isaacs, \textit{A Comparative Perspective on Public Spending on Children} Brookings Institute Center on Children and Families November 2009 (on file with author.)}

As Stiglitz observed, this country virtually eradicated poverty in the elderly
through social programs like social security and Medicare. The decision to do nothing to
eradicate child poverty is a political decision.\textsuperscript{176} It is also a moral decision. Refocusing our attention on child stability will offer much in the way of creating family stability, while undermining the scapegoating arguments in support of DOMA. Research reveals that Americans possess a strong cultural value around fairness.\textsuperscript{177} The discourse of fairness must enter the family in crisis discussion. Other countries have chosen to create a wealth distribution system that still allows for rewards, but minimizes the amount of inequality present in society, particularly focusing on resources for children.\textsuperscript{178} In doing so, the left must adopt the morality discourse which with the right has become so adept. The left must re-engage middle-America—where the most destabilized families exist.\textsuperscript{179}

The second element that must be the focus of attention if the family, in whatever forms it takes, 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.\textsuperscript{180} But even more pragmatically, we should interact with our political, religious, and socioeconomic

\textsuperscript{176} Stiglitz supra note 167 at 17.
\textsuperscript{177} Id. at 153-54
\textsuperscript{178} See e.g. policies in Australia, UK, France, and Brazil. See, e.g. Kunin supra note 156; Stiglitz supra note 165.
\textsuperscript{179} 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 around self-regulation seems to be associated with political ideology. Thus, predisposition to a political attitude is associated with brain structure. Therefore, key differences beyond environmental or cultural responses may be at play in reframing this debate. Ryota Kanai et al \textit{Political Orientations Are Correlated with Brain Structure in Young Adults} 21 Current Biology 677-680 (2011).
\textsuperscript{180} 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. <http://act.weareultraviolet.org/sign/erickson/?source=so>
pluralities with respect. Indeed, we should interact with our children and our children’s’ parents with respect.

Research reveals that the concept of respect, more so than any other traditional measure of relationship success, determines relationship satisfaction—more so than love, likeability, personality or attachment.\(^\text{181}\) In Frei and Shaver’s study, the results showed that regardless of whether respondents whether considering a definition of respect 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, and was accepting of other viewpoints.\(^\text{182}\) Moreover, the researchers observed that the practice of respect actually engendered more respect.\(^\text{183}\) Other research by Lawrence-Lightfoot demonstrated that respect had reciprocal benefits.\(^\text{184}\) 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—even when the party’s status was not equal.\(^\text{185}\) All the researchers agreed that respect was the opposite of contempt.

Reinvigorating the concept of respect at the micro level may better serve us in moving towards a policy that supports social structures that will promote family stability. However, respect must operate at the macro level and micro 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


\(^{182}\) Id.

\(^{183}\) Id.


\(^{185}\) Id.
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.”

Conclusion

This article has empirically explored the issue of whether state DOMA’s are associated with its intended goal of increasing family stability. After examining the rationales for why DOMA was enacted, the article goes on to theorize why DOMA has held the political traction that it does through the lens of moral entrepreneurism and moral panics. Finally, the article suggests alternative approaches to considering how to achieve family stability in the absence of meaningful legislation. The goal of the article is move the discourse and legal analysis beyond whether any rational basis exists for DOMA (it does not) to considering a meaningful micro-macro cultural structural model for achieving family stability within a moral framework.

\footnote{Coontz \textit{supra} note 169 at 22.}
Appendix A

Marriage Calculated Slopes for each State

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Appendix B

Divorce Slopes Calculated for each State

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Appendix C

- Marriage and divorce trends
- Children living in single parent households
- Religion as an important part of daily life
- % of family below poverty line
- % of male and female married 3 or more times
- % of population with bachelor’s degree
- Median disposable income
- Median age of marriage
- Dependent variable
- Independent variable
- Directly correlated with the DV
- Mediating variables
- Negatively correlated with IV
- % conservatives vs. liberals on an important part of daily life
- Children living in single parent households