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All That Heaven Will Allow: A Statistical Analysis of the Coexistence of Same-Sex Marriage and Gay Matrimonial Bans

ALL THAT HEAVEN WILL ALLOW: A STATISTICAL ANALYSIS OF THE COEXISTENCE OF SAME-SEX MARRIAGE AND GAY MATRIMONIAL BANS

DEIRDRE M. BOWEN[†]

ABSTRACT

This Article offers the first analysis to date of national data evaluating whether defense of marriage acts (mini or super-DOMAs) preserve and stabilize the family. After finding that they do not—just as same-sex marriage does not appear to destabilize families—the Article analyzes what variables are, in fact, associated with family stability. Specifically, those variables are: families below the poverty line; men and women married three or more times; religiosity; percent conservative versus liberal in a state; disposable income; percent with a bachelor's degree; and median age of first marriage. States that are more likely to have enacted a DOMA are also more likely to have high divorce or never-married rates. And in turn, these same states are more likely to include poor families, in which people marry young, are highly religious, and are politically conservative.

Next, the Article applies the sociological concepts of moral entrepreneurship and moral panic, defined, respectively, as the practice of political groups labeling certain behavior as deviant, and the reframing of a social phenomenon in moral terms to create an exaggerated sense of fear. These concepts serve as the theoretical explanation for mini-DOMAs' continued entrenchment, even in the face of the U.S. Supreme Court's *Windsor* decision that struck down Section 3 of the federal DOMA. Finally, the Article offers pragmatic recommendations for achieving family stability in light of mini-DOMAs' inability to succeed in this goal.

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INTRODUCTION

Gareth used to prefer funerals to weddings. He said it was easier to get enthusiastic about a ceremony one had an outside chance of eventually being involved in.

–Four Weddings and a Funeral¹

The evolving definition of marriage terrifies a lot of people.² Yet, for centuries, its meaning has constantly evolved.³ Broadening the definition of marriage to include same-sex couples is just the latest iteration. Within the past year,⁴ the United States Supreme Court struck down Section 3 of the federal Defense of Marriage Act⁵ (DOMA), thus allowing legally married same-sex couples to receive all the same benefits as straight couples.⁶ Specifically at issue in Section 3 was an overarching federal definition of 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.”⁷

The case rose on appeal from the Second Circuit, which determined that the statute contained an unconstitutional provision.⁸ The Court of Appeals applied an equal protection analysis, defining gays and lesbians

1. FOUR WEDDINGS AND A FUNERAL (PolyGram Filmed Entertainment 1994).

2. For a recent example, one needs to look no further than the violent response to the passage of a same-sex marriage law in France. Mark Memmott, *Violent Protests in Paris After Same-Sex Marriage Law Passes*, TWO-WAY: BREAKING NEWS FROM NPR (Apr. 24, 2013, 8:04 AM), <http://www.npr.org/blogs/thetwo-way/2013/04/24/178765718/violent-protests-in-paris-after-same-sex-marriage-law-passes>.

3. See generally STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 5–9 (2006) (arguing that love as the motivation for marriage actually weakened the institution).

4. The research for this Article is current as of February 5, 2014.

5. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

6. *Windsor*, 133 S. Ct. at 2683–84, 2696. However, at the time of this analysis, it is unclear which benefits from the over 1000 federal laws DOMA affected are transportable across state lines into states that do not recognize same-sex marriage. President Obama’s administration is currently working to clarify these laws. Jeremy W. Peters, *Federal Court Speaks, but Couples Still Face State Legal Patchwork*, N.Y. TIMES, June 27, 2013, at A22.

7. 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

8. On December 7, 2012, the United States Supreme Court granted a petition for a writ of certiorari for the Second Circuit cases combined under *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012). In addition, the Court heard California’s Proposition 8 case, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). However, before the Supreme Court decided *Windsor* and *Hollingsworth*, the First Circuit ruled that DOMA was a violation of the Equal Protection Clause. Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 10–11, 13, 15 (1st Cir. 2012); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Prior to this ruling, other U.S. district courts had ruled on the constitutionality of DOMA. See, e.g., *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 347 (D. Conn. 2012). The trial court in *Windsor* granted the plaintiffs’ motion for summary judgment. The trial court declined to hold that the plaintiffs deserved heightened scrutiny as a suspect class, but did hold that DOMA’s articulated goals do not pass even the most deferential rational basis review. *Windsor v. United States*, 833 F. Supp. 2d 394, 401–02, 406 (S.D.N.Y. 2012) (finding a state’s interests behind DOMA not based in reality and thus plaintiff’s motion for summary judgment was granted), *aff’d*, 699 F.3d 169 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013).

as a quasi-suspect class, to determine that the Bipartisan Legal Advisory Group (BLAG) could offer no legitimate reason for DOMA's enactment.⁹ The Supreme Court declined to speak to equal protection, but instead applied a federalism and an animus analysis.¹⁰ It concluded that the motivations behind the enactment of DOMA were hostile to a politically unpopular group.¹¹ Ultimately, the Court held that by injuring same-sex married couples, Section 3 of DOMA violated the Fifth Amendment.¹² Justice Scalia's scathing and colorful dissent proclaimed that such an analysis invites a challenge to all state DOMAs.¹³

Yet, like the supporters of the federal DOMA, supporters of state DOMAs consistently assert that a DOMA is needed to "protect" our society—to strengthen and protect traditional marriage, the cornerstone of civilization.¹⁴ In other words, banning same-sex marriage protects traditional marriage.

Does DOMA *really* protect the institution of marriage? This Article offers an empirical investigation of that question and concludes that DOMAs provide no measurable benefit to the protection of families.¹⁵ This conclusion raises the question whether a state DOMA could even pass a "rational basis plus" standard,¹⁶ much less the animus standard,

9. *Windsor*, 699 F.3d at 176, 185.

10. See *Windsor*, 133 S. Ct. at 2693. Animus herein refers to a legislative objective, but the "desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Id.* (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)) (internal quotation mark omitted).

11. *See id.*

12. *Id.* at 2696.

13. See *id.* at 2709–10 (Scalia, J., dissenting). The Supreme Court granted certiorari on a case that challenged the constitutionality of California's state DOMA amendment. However, the Court declined to hear the case and remanded it back to the Ninth Circuit for dismissal because the petitioners did not have standing. *Hollingsworth*, 133 S. Ct. at 2659. Mini-DOMA refers to those statutes that states enacted mirroring the federal DOMA statute. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165–94 (2005).

14. See, e.g., *Bishops' Committee for Defense of Marriage Disappointed over DOMA Ruling*, U.S. CONF. OF CATH. BISHOPS (June 1, 2012), available at <http://www.usccb.org/news/2012/12-096.cfm> (quoting Bishop Cordileone, who declared, "The federal appeals court in Boston did a grave injustice yesterday by striking down that part of the Defense of Marriage Act that reasonably recognizes the reality that marriage is the union of one man and one woman. DOMA is part of our nation's long-established body of law rooted in the true meaning of marriage. Hopefully, this unjust ruling will be overturned by the U.S. Supreme Court, for the benefit of our nation's children, and our nation as a whole." (internal quotation marks omitted)); Karla Dial, *1st Circuit Declares Part of Federal Marriage Law Unconstitutional*, CITIZENLINK (May 31, 2012), <http://www.citizenlink.com/2012/05/31/1st-circuit-declares-part-of-federal-marriage-law-unconstitutional/> (quoting Alliance Defense Fund Legal Counsel Dale Schowengerdt, who said, "Society should protect and strengthen marriage, not undermine it. The federal Defense of Marriage Act provides that type of protection, and we trust the U.S. Supreme Court will reverse the 1st Circuit's erroneous decision." (internal quotation marks omitted)).

15. I use the phrases "at-risk families" and "families-in-crisis" interchangeably to refer to the rhetoric employed around the weakening family structure—i.e. family formation without marriage or family cycles that include divorce and perhaps remarriage and perhaps divorce again.

16. "Rational basis plus" loosely refers to a fourth standard of review for laws challenged on equal protection or due process grounds. Rather than offering the traditional deference to the state's argument that that the alleged discrimination in the law serves a governmental interest, the courts

that at least one federal district court has applied.¹⁷ And, if future DOMA challengers adopt “animus” as a legal theory, this Article offers support for the notion that some level of hostility towards gay and lesbian couples may have inspired at least some of the enactors of state DOMAs.

Most importantly, the “DOMA as protectorate” discourse serves certain constituencies’ interests quite effectively.¹⁸ The reason why is fully explored in this Article because, in light of the *Windsor* decision, the discourse will remain a vibrant part of the same-sex marriage debate for some time to come.

Next, the Article examines another question: If DOMA is so clearly *not* associated with strengthening family (and marriage)—yet poverty, education, and economic opportunities clearly are—why, then, does DOMA carry the political and legal traction that it does? Understanding this analysis is crucial in the face of the Court’s decision and analysis. The federal DOMA is no longer applicable in states permitting same-sex marriage, yet the progeny of the federal DOMA are thriving in thirty-two states.¹⁹ The broadening definition of marriage and the evolution of family will remain in the forefront of our national, legal, political, and cultural consciousness. Thus, understanding how and why state DOMAs can-

demand a more searching explanation of the government interest. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631–35 (1996).

17. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 334–35 (D. Conn. 2012). In addition, the First Circuit court engaged in a novel analytical approach to determine that a demonstrated connection was missing between DOMA’s treatment of same-sex couples and its goal of strengthening the bonds and benefits of marriage. 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.” *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012). Indeed, only certain types of rationales with a certain level of “force” are acceptable under this “rational basis plus” standard of review. *Id.* at 8. However, applying the “rational basis plus” standard of review, the First Circuit decided that DOMA’s articulated goal was unacceptable. *Id.* at 15.

18. I posit that those who possess socio-economic political power benefit from focusing attention on DOMA as the key method of saving families in crisis. The discourse distracts from the stark reality that the lack of investment in the resources needed for these families contradicts with the concentration of wealth that the political elite have always enjoyed. Moreover, it distracts from the *divestiture* in social structures that would support not only families subsisting on the margins but also the dissipating lower middle class who used to make up the “settled working class.” *See* JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 155–56, 165 (2010).

This 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.,* Press Release, Office of the Mayor, City of Seattle, *City Formally Joins Effort to Challenge Constitutionality of Federal “Defense of Marriage Act”* (July 10, 2012), available at <http://mayormcginns.seattle.gov/city-joins-effort-to-challenge-federal-defense-of-marriage-act/> (“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.” (quoting City Attorney Pete Holmes) (internal quotation marks omitted)).

19. *See generally State-Level Marriage Equality*, MARRIAGE EQUALITY USA (Jan. 6, 2014), <http://www.marriageequality.org/sites/default/files/National%20Map%20%2320%20%2806-Jan-2014%29.pdf> (providing a map showing states still unwilling to fully accept marriage equality).

not offer a salve to the notion of the family “in crisis” is a focal point of the Article. In addition, the Article offers some novel recommendations for moving beyond the distraction that DOMAs appear to create, to allow for family stability regardless of whether or not states permit same-sex marriage.

When Congress passed DOMA, one of four reasons advanced for DOMA’s necessity was to defend and nurture the institution of traditional heterosexual marriage.²⁰ Indeed, the congressional report stated:

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.²¹

Congress went on to preempt 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.²² To permit the practice would further devalue an institution already reeling from no-fault divorce, the sexual revolution, and out-of-wedlock births.²³ Ultimately, Congress asserted in this report that the time had come to “rebuild a family culture based on enduring marital relationships.”²⁴

And certainly, one of the key rationales that BLAG offered in *Windsor* to support DOMA emphasizes this idea of rebuilding the family

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

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

22. *Id.* at 15; see also David J. Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 AKRON L. REV. 621, 656 n.244 (2011). “[N]o society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.” *Id.* (alteration in original) (quoting 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Tom Coburn)) (internal quotation marks omitted). “The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society. . . .” *Id.* (omission in original) (quoting 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Bob Barr)) (internal quotation marks omitted). See generally Brief for Attorney General, Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint and in Support of Commonwealth’s Motion for Summary Judgment at 7, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2010 WL 581804 (“Members of Congress repeatedly condemned homosexuality in the floor debates surrounding DOMA’s passage, calling [the practice] ‘immoral,’ ‘based on perversion,’ [(quoting 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn))] ‘unnatural,’ [(quoting 142 CONG. REC. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith))] ‘depraved,’ and ‘an attack upon God’s principles.’ [(quoting 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer))]”).

23. H.R. REP. NO. 104-664, at 15 (1996).

24. *Id.*; see also 142 CONG. REC. 22334 (Sept. 9, 1996) (statement of Sen. Jesse Helms) (arguing that DOMA “will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America’s moral fabric in the process”).

using the institution of traditional marriage.²⁵ During oral arguments, the topic of whether children are best raised in a stable heterosexual marriage was front and center for Justice Kennedy, the swing vote, and the author of the opinion.²⁶ And, frustrated with the intractable cultural and philosophical problem, the Court noted that the *Perry v. Schwarzenegger* district court found that “[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.”²⁷ But, what the Court ultimately considered, among other things, is the idea that a diversity of governance requires the federal government to respect states’ choices regarding marriage—including the choice to *allow* same-sex marriage.²⁸

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.”²⁹ And indeed, the Court’s language in the *Windsor* opinion makes quite clear that while it offers considerably broad deference to the states to define marriage as they see fit, each state’s motivation behind the definition may not necessarily be beyond constitutional reproach.³⁰ In signaling so, the Court has fueled the debate about mini-DOMAs’ actual ability to preserve family stability and marriage for the foreseeable future.³¹

The Supreme Court DOMA ruling has substantial historical and social significance.³² As observed above, the federal DOMA’s demise offers less immediate relief for those gay and lesbian families who wish to wed, but who reside in states with statutes or constitutional amendments barring same-sex marriage. Many of those states’ mini-DOMAs currently remain intact.³³ Given that twenty-nine states have statutes barring

25. See Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the United States House of Representatives at 12–15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

26. See Transcript of Oral Argument at 93, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

27. *Windsor*, 133 S. Ct. at 2718 n.7 (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010), finding of fact number 55). See also *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) (“DOMA does not . . . explain how denying benefits to same-sex couples will reinforce heterosexual marriage.”).

28. *Windsor*, 133 S. Ct. at 2691.

29. *U.S. Dep’t of Health & Human Servs.*, 682 F.3d at 16.

30. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

31. Recall, mini-DOMAs are state versions of the federal DOMA. See *supra* note 13.

32. See Daniel Fisher, *DOMA Is Dead. So Where Does That Leave Gay Couples?*, FORBES (Mar. 28, 2013, 11:04 AM), <http://www.forbes.com/sites/danielfisher/2013/03/28/doma-is-dead-so-where-does-that-leave-gay-couples/>.

33. William Saletan, *Gay Bells in Bondage: Most Americans Now Support Gay Marriage. But They Can’t Legalize It, Thanks to the Voters of 2004*, SLATE (June 28, 2011, 8:58 AM), http://www.slate.com/articles/news_and_politics/frame_game/2011/06/gay_bells_in_bondage.html. But see Anna Staver, *Same-Sex Marriage Amendment in Ohio Gets Green Light*, HUFFINGTON POST (Apr. 3, 2012, 6:44 PM), http://www.huffingtonpost.com/2012/04/03/same-sex-marriage-amendment-ohio_n_1400714.html?ncid=edlinkusaolp00000009 (explaining that Ohio may vote to overturn its 2004 Constitutional Amendment banning same-sex marriage).

same-sex marriage and twenty-nine states have constitutional amendments that prohibit the practice,³⁴ it is a worthy exercise to explore whether these states have reaped the benefits that they hoped to achieve by enacting mini-DOMAs.³⁵

The empirical analysis reveals two conclusions. First, states that enacted a mini-DOMA did so for virtually the same reasons as the federal government. Second, mini-DOMAs do not appear to be achieving their articulated goals. Moreover, it appears that states that possess DOMA statutes or constitutional amendments also espouse greater rates of religiosity, experience larger rates of poverty, divorce, and out-of-wedlock births, in addition to experiencing lower educational rates and marriage rates.³⁶

Thus, this Article discusses three issues: first, the methodology and results of the empirical research; second, a theory as to why the articulated mini-DOMA goals of family stability may persist despite the mini-DOMAs' inability to meet those goals; and third, recommendations on how we, as a country of states, can coexist with an evolving definition of marriage and family, while developing and executing an effective policy that supports all of these conceptions of family.³⁷

I. METHODOLOGY AND RESULTS

Soon after DOMA went into effect, states began enacting mini-DOMAs,³⁸ either by statute or state constitutional amendment, and sometimes both.³⁹ However, not all states adopted their own version of

34. See *infra* note 39. A notable example, Hawaii's Constitution's Second Amendment did not ban same-sex marriage. Rather, it gave the legislature the authority to define marriage as it sees fit. See HAW. CONST. art. I, § 23 (amended 1998) (permitting the Hawaii Legislature to authorize same-sex marriage by passing the Hawaii Marriage Equality Act of 2013, S.B. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013)). Hawaii Marriage Equality Act of 2013, § 572-x (2013).

35. 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 v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012).

36. This empirical analysis is discussed in detail *infra* Part I.C–D.

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

38. Mini-DOMAs preserve the word “marriage” to one man and one woman, “but not necessarily the attributes of civil marriage,” while super-DOMAs restrict terminology and deny all forms of relationship recognition, i.e. civil unions, domestic partnerships, and reciprocal benefits, to same-sex couples. Daniel R. Pinello, *Location, Location, Location: Same-Sex Relationship Rights by State*, LAW TRENDS & NEWS: PRAC. AREA NEWSL. (Am. Bar Ass'n), Fall 2009, available at http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/bl_feat5.html.

39. At the time of this analysis, thirty-three states have mini-DOMA legislation through their constitution or statutory law; many states overlap and have both statutory and constitutional mini-DOMAs. See *State-Level Marriage Equality*, *supra* note 19.

At the time of this study, twenty-nine states have constitutional mini-DOMAs. See ALA. CONST. art. I, § 36.03 (ratified 2012); ALASKA CONST. art. I, § 25 (approved 1998); ARIZ. CONST. art. XXX, § 1 (approved 2008); ARK. CONST. amend. 83, § 1 (approved 2004); COLO. CONST. art. II, § 31 (added 2006); FLA. CONST. art. I, § 27 (added 2008); GA. CONST. art. I, § 4 (ratified 2004); IDAHO CONST. art. III, § 28 (added and ratified 2006); KAN. CONST. art. XV, § 16 (added 2005); KY. CONST. § 233a (adopted 2004); LA. CONST. art. XII, § 15 (added 2004); MICH. CONST. art. I, § 25 (ratified 2004), *held unconstitutional* by *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); MISS. CONST. art. XIV, § 263A (added 2004); MO. CONST. art. I, § 33 (adopted 2004); MONT. CONST. art. XIII, § 7 (approved 2004); NEB. CONST. art. I, § 29 (adopted 2000); NEV. CONST. art. I, § 21 (added 2002) (proposed legislation to amend enrolled (S.J.R. 13, 77th Reg. Sess. (Nev. 2013))); N.C. CONST. art. XIV, § 6 (approved 2012); N.D. CONST. art. XI, § 28 (approved 2004); OHIO CONST. art. XV, § 11 (adopted 2004); OKLA. CONST. art. II, § 35 (adopted 2004); OR. CONST. art. XV, § 5a (added 2004); S.C. CONST. art. XVII, § 15 (effective 2007); S.D. CONST. art. XXI, § 9 (approved 2006); TENN. CONST. art. XI, § 18 (approved 2006); TEX. CONST. art. I, § 32 (adopted 2005), *held unconstitutional* by *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (proposed legislation to repeal introduced (H.J.R. 11, 83rd Leg., 2nd Sess. (Tex. 2013))); UTAH CONST. art. I, § 29 (adopted 2004), *held unconstitutional* by *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); VA. CONST. art. I, § 15-A (effective 2007), *held unconstitutional* by *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); WIS. CONST. art. XIII, § 13 (created 2007) (proposed legislation to repeal introduced (S.J.R. 74, 101st Leg., Reg. Sess. (Wis. 2014))). Four of those states currently afford partial marriage rights to same-sex couples: Colorado, Nevada, Oregon, and Wisconsin. See *State-Level Marriage Equality*, *supra* note 19.

At the time of this analysis, twenty-nine states have statutory mini-DOMAs. See ALA. CODE § 30-1-19 (2013) (effective 1998); ALASKA STAT. §§ 25.05.011, 25.05.013 (2013) (effective 1996); ARIZ. REV. STAT. ANN. §§ 25-101, 25-112 (2013) (effective 1996) (proposed legislation to amend introduced (S.B. 1165, 51st Leg., 1st Reg. Sess. (Ariz. 2013))); ARK. CODE ANN. § 9-11-109 (2013) (effective 1997); COLO. REV. STAT. § 14-2-104 (2013) (amended 2000); FLA. STAT. § 741.212 (2013) (effective 1997); GA. CODE ANN. § 19-3-3.1 (2013) (effective 1996); IDAHO CODE ANN. § 32-201 (2013) (effective 1996); IND. CODE § 31-11-1-1 (2013) (added 1997); KAN. STAT. ANN. § 23-2501 (2013) (effective 2011); KY. REV. STAT. ANN. §§ 402.005, 402.020, 402.040, 402.045 (West 2013) (effective 1998); LA. CIV. CODE ANN. art. 89 (2013) (amended 1999); MICH. COMP. LAWS §§ 551.271, 551.272 (2013) (effective 1996) (proposed legislation to amend introduced (H.B. 4909, 97th Leg., Reg. Sess. (Mich. 2013))); MISS. CODE ANN. § 93-1-1 (2013) (approved 1997); MO. REV. STAT. § 451.022 (2013) (amended 2001); MONT. CODE ANN. § 40-1-401 (2013) (amended 1997); N.C. GEN. STAT. § 51-1.2 (2013) (effective 1996); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2013) (effective 1997); OHIO REV. CODE ANN. § 3101.01(A) (West 2013) (effective 2004); OKLA. STAT. tit. 43, § 3.1 (2013) (effective 1997); 23 PA. CONS. STAT. § 1704 (2013) (effective 1996) (proposed legislation to amend introduced (H.B. 1686, 197th Gen. Assemb. (Pa. 2013-2014))); S.C. CODE ANN. § 20-1-10 (2013) (effective 1996); S.D. CODIFIED LAWS §§ 25-1-1, 25-1-38 (2013) (effective 1996 and 2000, respectively); TENN. CODE ANN. § 36-3-113 (2013) (effective 1996); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (2013) (effective 1997 and 2003, respectively) (proposed legislation to repeal introduced (H.B. 20, 83rd Leg., 2d Sess. (Tex. 2013))); UTAH CODE ANN. §§ 30-1-2, 30-1-4.1 (West 2013) (effective 1999 and 2004, respectively); VA. CODE ANN. §§ 20-45.2, 20-45.3 (2013) (effective 1997 and 2004, respectively); W. VA. CODE § 48-2-603 (2013) (effective 2001); WIS. STAT. §§ 765.001(2), 765.01 (2013) (effective 2009); WYO. STAT. ANN. § 20-1-101 (2013) (effective 1977) (proposed legislation redefining marriage introduced (H.B. 169, 62d Leg., Gen. Sess. (Wyo. 2013))). Despite their statutory mini-DOMAs, Colorado and Wisconsin afford partial marriage rights to same-sex couples. See *State-Level Marriage Equality*, *supra* note 19.

Recently, in *Kitchen v. Herbert*, Utah's constitutional and statutory mini-DOMAs were held unconstitutional. 961 F. Supp. 2d 1181 (D. Utah 2013). However, the United States Supreme Court granted a stay on the recognition of same-sex marriages in the state. *Herbert v. Kitchen*, 134 S. Ct. 893 (mem.) (2014).

In November 2012, mini-DOMAs in Maine, Maryland, and Washington were usurped by popular referenda legalizing same-sex marriage. See generally *A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. TIMES, Dec. 30, 2012, at A20; Ashley Fantz, *Washington Voters Pass Same-Sex Marriage*, CNN PROJECTS, CNN POLITICS (Nov. 9, 2012, 15:21 EST), <http://www.cnn.com/2012/11/09/us/washington-passes-same-sex-marriage/index.html>; Associated Press, *Many Weddings as Gay Marriage Becomes Legal in Md.*, USA TODAY (Jan. 1, 2013, 17:41 EST), <http://www.usatoday.com/story/news/nation/2013/01/01/same-sex-marriage-maryland/1801917/>.

DOMA, i.e. a mini- or super-DOMA,⁴⁰ and in the wake of the federal legislation, some states chose to find some parallel version of marriage in the form of civil unions⁴¹ or domestic partnerships instead.⁴² Furthermore, a select few states, initially through court action, later by voter referenda, 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.⁴³ Thus, differing state reactions

Prior to November 2012's vote, Maine, Maryland, and Washington had the following statutory DOMAs in place: ME. REV. STAT. tit. 19-A, § 701(5) (1997) (repealed 2012); MD. CODE ANN., FAM. LAW § 2-201 (West 1984) (repealed 2012); WASH. REV. CODE § 26.04.010 (1998) (repealed 2012). *But see* S.B. 241, 430th Gen. Assemb., Reg. Sess. (Md. 2012) (Civil Marriage Protection Act defines marriage as between "two individuals," rather than between "a man and a woman" as previously stated, effective Oct. 1, 2012).

40. For example, Colorado recognizes civil unions between same-sex partners. COLO. REV. STAT. ANN. § 14-15-102 (West 2013). To date, the following states have not enacted mini-DOMA legislation: Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and the District of Columbia.

41. Up through 2013, only two states, New Mexico and Rhode Island, recognized out-of-state same-sex marriages. N.M. STAT. ANN. § 40-1-4 (West 2013); R.I. GEN. LAWS § 15-1-8 (2013).

42. Nevada and Oregon provide the equivalent of state-level spousal rights to same-sex couples in the form of domestic partnerships. NEV. REV. STAT. ANN. §§ 122A.100, 122A.200 (West 2013); OR. REV. STAT. ANN. § 106.305 (West 2013). Washington voters approved same-sex marriage, but the state legislature recognized that marriage may still be impracticable for some couples. <http://www.courts.wa.gov/newsinfo/content/pdf/FLHBDomesticPartnershipEdition.pdf>. In response, Washington continues to recognize domestic partnerships. WASH. REV. CODE § 26.60.010 (2013) (effective until June 30, 2014) (to be replaced by Referendum Measure No. 74, approved Nov. 6, 2012)). Wisconsin provides *limited* spousal rights to same-sex couples in the form of domestic partnerships. WIS. STAT. ANN. § 770.05 (West 2013); Maureen McCollum, *State Supreme Court to Hear Challenge to Domestic Partnership Law*, WIS. PUB. RADIO (Oct. 21, 2013, 12:05 PM), <http://news.wpr.org/post/wi-supreme-court-hear-challenge-domestic-partnership-law> (listing some of the limited benefits granted to domestic partnerships including "hospital visitation rights, inheritance access, and family medical leave").

43. At the time of this analysis, the following states and jurisdictions issue marriage licenses (or an equivalent status) to same-sex couples: California, *see* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (holding that the appellants, opponents of same-sex marriage, did not have standing to challenge the ruling that Proposition 8 violated the California Constitution); Connecticut, *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that laws restricting civil marriage to heterosexual couples violated same-sex couples' state constitutional equal protection rights); Delaware, Civil Marriage Equality and Religious Freedom Act of 2013, Del. H.B. 75 (2013) (enacted); District of Columbia, D.C. CODE § 46-401 (2010); Hawaii, S.B. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013) (effective Dec. 2, 2013); Illinois, S.B. 10, 98th Gen. Assembly, Reg. Sess. (Ill. 2013) (effective June 14, 2014); Maine, ME. REV. STAT. tit. 19-A, § 701 (2013); Maryland, Civil Marriage Protection Act, H.B. 438, 430th Sess. (Md. 2012); Massachusetts, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ruling that allowing only heterosexual couples to marry is unconstitutional); Minnesota, MINN. STAT. § 517.01 (2013) (effective Aug. 1, 2013); New Hampshire, N.H. REV. STAT. ANN. § 457:1-a (2013) (effective Jan. 1, 2010); New Jersey, Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013); New Mexico, Griego v. Oliver, 316 P.3d 865 (N.M. 2013) (affirming marriage equality in the state, which had never expressly prohibited or allowed same-sex marriage); New York, N.Y. DOM. REL. LAW § 10-a (McKinney 2013) (effective July 24, 2011); Rhode Island, R.I. GEN. LAWS § 15-1-1 (2013) (effective Aug. 1, 2013); Vermont, VT. STAT. ANN. tit. 15, § 8 (2013-14) (amended 2009); Washington, WASH. REV. CODE § 26.04.10 (2013) (approved 2012).

In response to stagnant legislatures, voters began turning to referenda legalizing same-sex marriage. State referenda passed by narrow margins on the November 2012 ballot in Maine (51.5% approve Question 1), Maryland (52.4% approve Question 6), and Washington (53.7% approve Referendum 74). *Marriage and Family on the Ballot*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/Marriage_and_family_on_the_ballot (last modified Mar. 25, 2014).

to the conundrum of how to respond to same-sex marriage allows for a statistical analysis of how a state's mini-DOMA legislation may have affected the culture of marriage and divorce in the United States.⁴⁴ The analysis is rather simple. Changes in marriage and divorce trends as well as marriage rates and divorce rates are compared before and after an enactment of a mini- or super-DOMA, and changes in marriage and divorce trends and rates are compared between states that enacted DOMAs and those that permit same-sex marriage. But before arriving at that analysis, it is important to identify whether DOMA states employed the same reasoning as Congress did when it enacted the federal DOMA.

A. Context Analysis

The first question that the research addresses is what reasons did states pronounce as the basis for the need to enact a mini-DOMA through statute or constitutional amendment? To answer this query, I analyzed each state's legislative history, statutory language, and media content, looking for themes surrounding the passage of mini-DOMA legislation.⁴⁵ I also examined variations based on date of enactment, geographical location, and whether a state passed a statute (a mini-DOMA) followed by a constitutional amendment (a super-DOMA).⁴⁶ I then compared the results with the reasons articulated in *Massachusetts v. U.S. Department of*

44. 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 a mini-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 initially attempted to follow suit, but a referendum quickly overturned the legislation. See *An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom*, L.D. 1020, 124th Me. St. Leg. (2009); Department of the Sec'y of State, State of Me., *November 3, 2009 General Election Tabulations*, ME. BUREAU CORPS., ELECTIONS & COMMISSIONS, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited Apr. 12, 2014). Three years later, Maine voters approved same-sex marriage by approving Question 1. *An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom*, ME. REV. STAT. tit. 19-A, § 650 et seq. New Hampshire debated overturning its licensing of same-sex marriage. H.B. 437, 162d Sess. (2011). That bill was voted down 211–116 on March 21, 2012. Michael K. Lavers, *N.H. Lawmakers Reject Marriage Equality Repeal Bill*, EDGE BOSTON, MASSACHUSETTS (Mar. 21, 2012), http://www.edgeboston.com/news/national/news/131180/nh_lawmakers_reject_marriage_equality_repeal_bill.

On the other hand, soon after Washington, D.C., permitted same-sex marriage, Maryland followed suit by recognizing out-of-jurisdiction marriages. Mark Morgan, Editorial, *Maryland's Attorney General Strikes a Blow Against Discrimination with Opinion that Same-Sex Marriages Legal Elsewhere Should Be Recognized*, BALTIMORE SUN, Feb. 25, 2010, at 12A. Two years later, Maryland would allow same-sex marriage with the Civil Marriage Act of 2012, but within months a ballot referendum was certified for November to overturn the legislation. George P. Matysek, Jr., *Leaders Pledge to Overturn Same-Sex Marriage*, CATH. REV. (Feb. 23, 2012), available at <http://www.catholicreview.org/article/news/local-news/leaders-pledge-to-overturn-same-sex-marriage>.

45. See generally KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (2d ed. 2004); *infra* notes 131–44 and accompanying text.

46. See Pinello, *supra* note 38.

Health and Human Services explaining the federal DOMA.⁴⁷ Specifically, the court observed that “[T]he Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.”⁴⁸

Three key themes emerge from the content analysis regarding motivations for a state’s DOMA passage. The first is that the long-held traditions and definition of marriage need protection to thrive.⁴⁹ The second is that children need to be protected and/or raised in an optimal environment.⁵⁰ The third is that “activist”⁵¹ or “new age”⁵² or “liberal”⁵³ judges

47. 682 F.3d 1, 9–15 (1st Cir. 2012).

48. *Id.* at 14 (alteration in original) (quoting H.R. REP. NO. 104-664, at 12 (1996)).

49. Many proponents fall back on this premise: loosening the definition of marriage will cause the collapse of society. For example, Scott Moody, an economist, believes that “the devaluation of marriage through same-sex marriage will eventually ensure a population in New Hampshire where the shrinking, younger generation will no longer be able to support the state’s economy.” Amanda Beland, *Foster’s Editorial Board: Economist Says Gay Marriage Undermines State’s Fiscal Stability*, FOSTER’S DAILY DEMOCRAT, Jan. 18, 2012, available at http://www.fosters.com/apps/pbcs.dll/article?AID=/20120118/GJNEWS_01/701189932. But empirical research to date on the effects of same-sex marriage suggests otherwise. See, e.g., M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE 202–06 (2009) (concluding, post-statistical analysis, 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 suggests an economic boon to those states’ 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 Inst., *Extending Marriage Rights to Same-Sex Couples in Iowa Boosted the State and Local Economy by \$12 Million*, UCLA SCH. L. (Dec. 7, 2011), available at <http://williamsinstitute.law.ucla.edu/press/press-releases/marriage-rights-same-sex-couples-iowa-boosted-economy/>. 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: Comm. Minutes on SJR 42 Before the S. Judiciary*, 1997–98 Leg. (Alaska Mar. 9, 1998) (statement of Tom Gordy, Chairman, Christian Coalition) [hereinafter Gordy], 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, the research suggests that economic and social policies are associated with the long term weakening of the family, not the introduction of same-sex marriage. See, e.g., June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 317 (2010) (arguing that research demonstrates family instability can be attributed to lack of economic opportunities, particularly based on social class); Holning Lau, *Would a Constitutional Amendment Protect and Promote Marriage in North Carolina? An Analysis of Data from 2000 to 2009*, 2012 CARDOZO L. REV. DE NOVO 173, 186 (2012) (arguing that marriage amendments appear to have no effect on increasing marriage rates or decreasing divorce rates; conversely, allowing same-sex marriage does not increase divorce rates nor decrease marriage rates).

50. A rich literature addresses this theme. Remarkably, most of the articles used to demonstrate the allegedly damaging effects of same-sex parenting do not contain new empirical data, but rather are summaries of the flaws of articles that suggest same-sex parenting does not harm children. See generally MAGGIE GALLAGHER & JOSHUA K. BAKER, INST. FOR MARRIAGE AND PUB. POLICY, DO MOTHERS AND FATHERS MATTER? THE SOCIAL SCIENCE EVIDENCE ON MARRIAGE AND CHILD WELL-BEING, IMAPP POLICY BRIEF (Feb. 27, 2004), available at <http://www.marriedebate.com/pdf/MothersFathersMatter.pdf> (arguing that while same-sex parentage studies are scant, overwhelming evidence exists that children raised in a “natural” family made up of opposite-sex biological parents fare far better than any other family form); ROBERT LERNER &

ALTHEA K. NAGAI, MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES *DON'T* TELL US ABOUT SAME-SEX PARENTING 3–10 (Jan. 2001), available at <http://protectmarriage.com/wp-content/uploads/2012/11/nobasis.pdf> (finding the research is too flawed to draw meaningful conclusions); 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); KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT? (June 2002), available at <http://www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf> (summarizing data and concluding two-parent biological households are best); MARY PARKE, CTR. FOR LAW & SOC. POLICY, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING (May 2003), available at http://www.clasp.org/admin/site/publications_states/files/0086.pdf; DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 52–78 (1996) (children are harmed when not raised in a household with one father and one mother); GLENN T. STANTON, FOCUS ON THE FAMILY, ARE THE KIDS REALLY ALL RIGHT? WHAT RESEARCH REALLY SAYS ABOUT PARENTS CHILDREN NEED (June 2010), available at http://www.focusonthefamily.com/about_us/focus-findings/parenting/are-the-kids-really-all-right.aspx (arguing that studies concluding that same-sex parenting does not harm children are flawed). Diane Sawyer interviewed Rosie O'Donnell, who was crusading to legalize homosexual adoption in Florida in 2002. During the interview, O'Donnell "admitted that her adopted son, Parker, who was being raised by Rosie and her female partner, had expressed a desire for a dad." Alysse ElHage, FAMILY N.C., *Why Gender Matters to Parenting: All Families Are Not Created Equal* 3 (quoting the interview *Primetime Thursday: Rosie O'Donnell, In Her Own Words* (ABC News television broadcast Mar. 14, 2002) (observing that many homosexual activists disregard the child's desire for opposite-sex parents, dismissing them as childish whims, societal pressures, or something to get over)), available at <http://www.ncfamily.org/FNC/1104S1-GenderMatters.pdf> (last visited Apr. 12, 2014); Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012) (concluding, among other things, that children who had a parent who engaged in a same-sex relationship at some point in the child's life did not thrive as well as children whose parents did not have such affairs). However, Regnerus's study received a firestorm of criticism. William Saletan, *Back in the Gay: Does a New Study Indict Gay Parenthood or Make a Case for Gay Marriage?*, SLATE (June 11, 2012, 9:08 AM), http://www.slate.com/articles/health_and_science/human_nature/2012/06/new_family_structures_study_is_gay_parenthood_bad_or_is_gay_marriage_good.html (pointing out the flawed classification system, which ultimately reveals that broken homes, not gay parenting, harm children). The Regnerus study received such a degree of criticism that the author was the subject of an inquiry at the University of Texas. However, the university determined that no investigation was in order. Alan Price, *University of Texas at Austin Completes Inquiry into Allegations of Scientific Misconduct*, U. TEX. AUSTIN (Aug. 29, 2012), http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/.

51. See, for example, 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: Fact Sheet*, YES2MARRIAGE.ORG (2008), <http://ccpefl.org/Voter-Guides/2008/2008MarriageAmend2.pdf> ("[A]ctivist judges have re-written marriage laws and ignored the will of the people by legalizing same[-]sex marriages."); Jennifer Mooney Piedra, *Florida's Amendment 2 Marriage Vote: Are Domestic Partners at Risk?*, MIAMI HERALD, <http://miamiherald.typepad.com/gaysouthflorida/2008/10/floridas-amendm.html> (voters worried existing state law would be overturned by a judge). See also Alabama, where voters approved a June 2006 constitutional amendment by 81 % of the vote. Michael Foust, *Ala. Becomes 20th State to Pass Marriage Amendment*, BAPTIST PRESS (June 7, 2006), <http://www.bpnews.net/bpnews.asp?ID=23414> ("Judicial activism has put us in the posture of preemptive strikes to build a firewall around the state of Alabama." (quoting Michael Ciamarra) (internal quotation marks omitted)).

52. See, for example, Kentucky Representative Sheldon Baugh who sponsored his state's DOMA and said same-sex marriage "flies in the face of what's served mankind for 1,000 years." Jan Garrett, *The Debate over Same Sex Marriage: A Discussion of Martha Barnette's Letter* (Oct. 2000) (unpublished manuscript) (quoting PARK CITY DAILY NEWS (Mar. 21, 1998)) (internal quotation marks omitted), available at <http://www.wku.edu/~jan.garrett/ssm.htm>. He also noted that "[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." *Id.* (internal quotation marks omitted).

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

The central force behind protecting the definition of marriage is the notion that marriage is central to the foundation of society.⁵⁴ Because marriage is grounded in biblical origins,⁵⁵ redefining it is to fly in the face of religious liberty and morality.⁵⁶ The second subtheme revolves around institutional consequences.⁵⁷ If marriage is redefined around

53. See, e.g., Andrew Jacobs, *Georgia Voters to Decide Gay-Marriage Issue in Fall*, N.Y. TIMES, Apr. 1, 2004, at A14 (“We cannot let judges in Boston, or officials in San Francisco, define marriage for the people of Georgia.” (statement of Rep. Bill Hembree) (internal quotation marks omitted)); see also Lauretta Marigny, Letter to the Editor, *Consider Gay Marriage Ramifications*, BISMARCK TRIB. (July 5, 2004, 7:00 PM), available at http://bismarcktribune.com/news/opinion/mailbag/consider-gay-marriage-ramifications/article_0986ab8a-520c-550a-86f7-d8a77f5a72f9.html (explaining that senators are reluctant to support a federal marriage amendment because “one ruling by the U.S. Supreme Court could make same-sex marriages legal in all 50 states”).

54. See Gordy, *supra* note 49; Jeremy Jay Greenup, Identity as Politics, Politics as Identity: An Anthropological Examination of the Political Discourse on Same-Sex Marriage 39–42 (Jan. 12, 2006) (unpublished M.A. thesis, Georgia State University), available at http://digitalarchive.gsu.edu/anthro_theses/10/.

55. E.g., BILL BRADBURY, OR. SEC’Y OF STATE, VOTERS’ PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 2, 2004, at 80 (2004) [hereinafter OREGON VOTERS’ PAMPHLET], available at <http://oregonvotes.org/doc/history/nov22004/guide/vpvo11.pdf> (citing to God’s creation of the institution of marriage, “God’s purpose,” and Biblical citation to *Romans* 1:18–32). However, note that that Jeff Brown, a Georgia State Representative, voted for DOMA because he believed that the historical and biblical definition of marriage is under attack. He argued for a federal constitutional amendment that would better stymie activist judges. Press Release, Jeff Brown, Ga. House of Representatives, Defense of Marriage (Feb. 27, 2004) (on file with author) (admitting he “would be remis[s] if [he] didn’t admit that a major erosion of the institution of marriage is due to nearly 50% of heterosexual couples” who divorce).

56. 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. See, e.g., Seth Forman, Op-Ed., *Five Arguments Against Gay Marriage: Society Must Brace for Corrosive Change*, DAILY NEWS (June 23, 2011, 4:00 AM), http://articles.nydailynews.com/2011-06-23/news/29710731_1_gay-marriage-traditional-marriage-gay-advocates (explaining that proponents of the sanctity of traditional marriage must face the risk that they may be seen by future generations in the same light as those who opposed desegregation); see also Tovia Smith, *Same-Sex Marriage May Hinge on Supreme Court*, NAT’L PUB. RADIO (Jan. 24, 2012, 4:12 PM), <http://www.npr.org/2012/01/24/145473719/same-sex-marriage-may-hinge-on-supreme-court>. See generally OREGON VOTERS’ PAMPHLET, *supra* note 55 (demonstrating that some supporters of Measure 36 argued that Oregon should not be the only place in America that allows gay marriage).

57. See Marigny, *supra* note 53 (arguing that same-sex marriage will cause health insurance costs to skyrocket because of new dependents that would be added, which could overburden the system). According to opponents of same-sex marriage, one consequence of same-sex marriage is the societal cost of sending a message that heterosexual parents are irrelevant. “‘It’s the societal message that same-sex marriage sends—that children do not need a mother and a father,’ says Kevin Smith, executive director of New Hampshire’s Cornerstone Policy Research.” Kathryn Perry, *The Cost of Gay Marriage—In Dollars and Cents*, CHRISTIAN SCI. MONITOR (May 27, 2009), <http://www.csmonitor.com/USA/Society/2009/0527/p02s07-ussc.html>. See generally OREGON VOTERS’ PAMPHLET, *supra* note 55 (relaying that many opponents of same-sex marriage argued that it would negatively affect institutions and societal values).

something other than heterogeneous norms, the institution will weaken, creating social instability.⁵⁸ In essence, the “family” in its idealized version must be preserved through heterosexual marriage.⁵⁹ Implicit in this concern is the fear that, if unchecked, *homosexuality will spread*.⁶⁰

With respect to marriage and children, the most consistent refrain is that marriage creates the optimal environment in which to raise children.⁶¹ Research is sometimes cited that concludes that the outcomes for children are most favorable for offspring raised in a two-parent (opposite-sex, biological) household.⁶² Courts and legislatures have adopted this premise and call it a legitimate government interest.⁶³ However, the sub-contextual inference is that children need protection *from* homosexual parents.⁶⁴ 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 said to demonstrate that children nurtured in same-sex households experience negative consequences compared with children living in married, heterosexual

58. See, e.g., TENN. CODE ANN. § 36-3-113(a) (2013) (effective 1996) (“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.”).

59. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (discussing Congress’s desire to preserve the notions of traditional heterosexual marriage and family). Gay marriage will likely change the notion of traditional marriage. Forman, *supra* note 56 (“[E]ven 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.”). Voter pamphlets contain different flavors of this same point. “For marriage to flourish in our culture, it must be protected from redefinition; for if marriage can mean anything, it will mean nothing.” *South Carolina Marriage Amendment*, NO SAME SEX MARRIAGE, <http://nosamesexmarriage.com/marriage/SCmarr.php> (last visited Apr. 12, 2014). And it takes a mother and a father to raise healthy children. *Id.*; see also OREGON VOTERS’ PAMPHLET, *supra* note 55, at 79 (needing to protect traditional marriage because marriage is a “building block” of society).

60. Marigny, *supra* note 53 (threatening a significant increase in the percentage of American culture to identify as homosexual).

61. OREGON VOTERS’ PAMPHLET, *supra* note 55, at 81 (arguing that the breakdown of marriage hurts children, that same-sex marriage challenges the notion of gender roles within the family, and that changing the importance of gender and the family would be bad). See also *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 815–20 (holding that though ‘exemplary’ gay foster parents formed a ‘deeply loving,’ and ‘interdependent’ relationship with their foster children, they held no constitutional right to adoption as a same-sex family structure was not an ‘optimal’ placement).

62. See sources cited *supra* note 50.

63. “[C]ountless 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 greater out-of-wedlock births occur.” Brief for Intervenor-Appellant at 53, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10–2204, 10–2207, 10–2214) (alteration in original) (quoting 150 Cong. Rec. 15074 (2004)) (internal quotation marks omitted) (statement of Sen. Cornyn).

64. The American College of Pediatricians disagrees with the district court’s assertion that “a consensus has developed among the medical, psychological, and 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 of Amicus Curiae, American College of Pediatricians in Support of Defendants-Appellants at 2, *Massachusetts*, 682 F.3d 1 (Nos. 10–2204, 10–2207, 10–2214) (quoting *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010)) (internal quotation marks omitted).

households.⁶⁵ This harming-the-child theme goes further, though. The reasoning goes that children exposed to gay parents may come to think that homosexuality is normal. Second, children may be forced to learn about it in school.⁶⁶ Finally, children may experiment with homosexuality and become homosexuals themselves.⁶⁷

A final recurrent strain has to do with fear of activist judges. States started adopting DOMAs in two main waves. The first wave was a response to the Supreme Court of Hawaii's 1993 decision⁶⁸ that led to a surge of challenges to the practice of barring same-sex marriage.⁶⁹ The second wave came in reaction to, *Goodridge*, the Massachusetts Supreme Court decision in 2003.⁷⁰ The states expressed deep concern that judges, not citizens, would define foundational cultural norms surrounding mar-

65. See *supra* note 50; see, e.g., Forman, *supra* note 56 (“[C]hildren 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. *U.S. Dep’t of Health and Human Servs.*, 682 F.3d at 14; see also *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 340–41 (D. Conn. 2012) (noting that “DOMA bears no rational relationship to the purported goal of ensuring that children are reared by opposite-sex parents” because DOMA cannot prevent same-sex couples from raising children (citing *U.S. Dep’t of Health and Human Servs.*, 682 F.3d at 14)).

66. See, e.g., Forman, *supra* note 56 (fearing that courts will impose a duty on schools to teach moral equivalency between homosexual and heterosexual relationships with no obligation to let parents opt out); Marigny, *supra* note 53 (“Textbooks will be required to show families with two mothers or fathers as they now depict the traditional family.”). Similarly, proponents of Montana’s CI-96 (DOMA Amendment) proclaim, “[W]e could lose the freedom to teach our children as we wish.” BOB BROWN, MONT. SEC’Y OF STATE, 2004 VOTER INFORMATION PAMPHLET 23 (2004), available at <http://sos.mt.gov/elections/archives/2000s/2004/VIP2004.pdf>; see also Dara Kam, *If Amendment 2 Fails, Backers Say Kids Will Be Led in ‘Gay Lifestyle,’* PALM BEACH POST (Oct. 22, 2008), available at <http://pridetb.homestead.com/10IfAmendment2FailsBackersSayKidsWillBeLedInGayLifestyle10-22-08PBPost.htm> (“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 L.A. (Sept. 14, 2011, 10:56 PM), <http://losangeles.cbslocal.com/2011/09/14/la-schools-to-teach-lgbt-curriculum-in-anti-bullying-effort/> (“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.”).

67. E.g., Marigny, *supra* note 53 (“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.”).

68. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

69. E.g., *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 682 F.3d at 6 & nn.1–2.

70. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the state may not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry”). Many states responded to the Massachusetts decision by enacting mini-DOMA constitutional amendments in 2004, including Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *State Policies on Same-Sex Marriage*, PEW RES. CENTER (July 9, 2009), <http://www.pewforum.org/2009/07/09/state-policies-on-same-sex-marriage/>. Likewise, in 2005, Kansas and Texas followed suit with their own amendments. *Id.* In 2006, Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin enacted amendments. *Id.* Arizona, California, and Florida passed amendments in 2008. *Id.* In May 2012, North Carolina approved its own constitutional amendment banning gay marriage. Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

riage.⁷¹ Judges could easily rely on little understood, seemingly esoteric legal principles to destroy a centuries-old foundational institution that goes to the root of civilization.

These concerns varied in intensity depending on geographical location. For example, some citizens in Southern states may be more likely to express the desired goals using language that, at times, comes across as homophobic.⁷² Moreover, this same geographical area includes some individuals who may rely on the discourse of “God’s law” as the overriding principle for defining marriage.⁷³ Finally, a fascinating articulation of the need for marriage occurred in North Carolina,⁷⁴ (but the same may also hold true for South Carolina)⁷⁵ where heterosexual marriage func-

71. See *supra* notes 51–53 (discussing judges as “activists,” “new age,” and “liberal”); Brian Tashman, *Conservatives Decry ‘Bizarre’ Ruling Finding DOMA Unconstitutional, Lament ‘East Coast Liberal Freak Show,’* RIGHT WING WATCH (May 31, 2012, 4:11 PM), <http://www.rightwingwatch.org/content/conservatives-decry-bizarre-ruling-doma-unconstitutional>. For example, proponents of Michigan Proposal 04-2 to ban same-sex marriage “believe that amending the [state] 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>. Furthermore, in 2010, Iowa voters removed three Iowa Supreme Court Justices who voted to allow same-sex marriage in the state. Peter Hardin, *In Iowa, Threats to Impeach Judges Are Renewed*, GAVEL GRAB (June 14, 2012), <http://www.gavelgrab.org/?p=37494>.

72. Two principal traditionalist arguments against same-sex marriage are the polygamy slippery-slope and the contagious-promiscuity arguments. The first is epitomized by Texas Rep. Warren Chisum. He said, “It’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 BUS. J. (Oct. 23, 2005, 23:00 CDT) (internal quotation marks omitted), <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 notorious example, weaken the monogamous commitment of married heterosexual couples, which will eventually destabilize traditional marriage. Dale Carpenter, *The Traditionalist Case—The Contagious-Promiscuity Argument*, VOLOKH CONSPIRACY (Nov. 2, 2005, 4:43 PM), http://www.volokh.com/archives/archive_2005_10_30-2005_11_05.shtml#1130971386; see also MISS. CODE ANN. § 93-1-1(2) (2013) (effective 1997) (Mississippi codified marriage between persons of the same gender as void under a section titled “Incestuous Marriages Void”). Cf. WASH. REV. CODE § 26.04.010 (1998) (titling the section “Marriage Contract – Void Marriages”).

73. See Press Release, *supra* note 55. Similarly, Harold Auxier, a Kentucky voter, said, “It’s God’s law that woman was made for man and man for woman—not man for man and woman for woman.” *Kentucky Voters Approve Same-Sex Marriage Ban Amendment*, USA TODAY (Nov. 3, 2004, 2:26 AM), http://www.usatoday.com/news/politicsselections/vote2004/2004-11-02-ky-initiative-gay-marriage_x.htm.

74. Alliance Defense Fund claims that a DOMA amendment in North Carolina will help encourage a decline in domestic violence in the state. Brian Tashman, *ADF: ‘North Carolina Marriage Amendment Will Help Promote’ the Decline of Domestic Violence*, RIGHT WING WATCH (May 8, 2012, 12:15 PM), <http://www.rightwingwatch.org/content/adf-north-carolina-amendment-one-domestic-violence>.

75. In fact, it turns out South Carolina’s women may be in need of protection too. In the past ten years, South Carolina has ranked in the top ten states for the highest rate of women murdered by men. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2011 HOMICIDE DATA 5, 18 (2013) [hereinafter 2011 HOMICIDE DATA], available at <http://www.vpc.org/studies/wmmw2013.pdf>. In 2009, South Carolina ranked 7th in the United States for female homicides by male offenders with 90% of the women murdered by someone they knew. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2009 HOMICIDE DATA 22

tions as a way to contain male aggression and sexuality. Thus, not only children, but also women find protection through marriage.

The cultural framing around the need for DOMAs 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*⁷⁶ and in the petitioner's brief in *Windsor*.⁷⁷ Thus, the assertion that passage of these statutes and amendments is associated with the articulated, desired goals demands interrogation.

B. Analysis of State DOMAs

This next section considers whether states' passage of a DOMA statute, a constitutional amendment, or both, correlated with the goal of strengthening marriage compared with states that did not enact such legislation.⁷⁸ In other words, did DOMAs increase marriage and decrease divorce over time in states that enacted the legislation compared with states that shunned DOMAs?⁷⁹

To examine this correlation, I operationalized the goal of family stability/marital strength by measuring the year-over-year marriage and divorce rates from 1999 through 2010.⁸⁰ The slope, or average rate of change, is calculated for the years prior to adoption of a state's DOMA

(2011), <http://www.vpc.org/studies/wmmw2011.pdf>. In 2010, South Carolina ranked 2nd for homicides committed against females. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2010 HOMICIDE DATA 6, 17 (2012), <http://www.vpc.org/studies/wmmw2012.pdf>. In 2011, South Carolina ranked first in the nation. 2011 HOMICIDE DATA, *supra*, at 15. Indeed, "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 website, more than 36,000 victims report a domestic violence incident to law enforcement statewide." Anomaly, *Domestic Violence Is the Number One Crime Issue in S.C., Nikki Haley Vetoes Funding, Calls It a "Distraction,"* FREAKOUTNATION (July 10, 2012), available at <http://freakoutnation.com/2012/07/10/domestic-violence-is-the-number-one-crime-issue-in-s-c-nikki-haley-vetoes-funding-calls-it-a-distraction/>.

76. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14–15 (1st Cir. 2012).

77. Petition for Writ of Certiorari Before Judgment, *Windsor v. United States*, No. 12-63, 2012 WL 2904038 (July 16, 2012).

78. One study examined the negative externalities, or effect, on the institution of heterosexual marriage in states that allowed same-sex marriage with the effects on those states that did not, finding no statistically significant difference in outcomes. Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 292, 293 (2009). However, this study has been criticized because of operationalization errors, coding errors, and statistical power errors. Douglas W. Allen, *Let's Slow Down: Comments on Same-Sex Marriage and Negative Externalities* (Dec. 9, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1722764>.

79. This analysis is based on the state of the law at the time for which the data was collected: 1999–2010.

80. 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.

amendment and the years after the passage of the DOMA amendment for both marriage and divorce.⁸¹

The key independent variable in the study was whether a state had amended its constitution to define marriage as between a man and a woman, i.e., to ban same-sex marriage.⁸² States that had enacted both a statute banning same-sex marriage and a constitutional amendment to the same effect or states that had passed a constitutional amendment, but did not enact a statute⁸³ during the time for which marriage and divorce rates were available were included in this category and coded as “0.”⁸⁴ Under the rationale behind DOMA, the institution of marriage would be least vulnerable in these states because its citizenry has clarified the definition of marriage in its constitution—clearly expressing the state’s values regarding this bedrock social structure.⁸⁵

On the other hand, states that did not have a constitutional amendment at the time that I collected the data, but rather had enacted a statute banning same-sex marriage during the period in question⁸⁶ were included as a separate category coded as “1.”⁸⁷ These states’ marital vulnerability might be considered slightly higher under the DOMA rationale because these statutes were open to constitutional challenges. Thus, the citizenry

81. “Slope” is the statistical term that refers to the average rate of change for the period of years measured and analyzed. It is the central measurement of a trend model. LINDA L. REMY ET AL., UCSF FAMILY HEALTH OUTCOMES PROJECT, DO WE HAVE A LINEAR TREND? A BEGINNER’S APPROACH TO ANALYSIS OF TRENDS IN COMMUNITY HEALTH INDICATORS 3 (2005), available at <http://familymedicine.medschool.ucsf.edu/fhop/docs/pdf/mcah/trend13b.pdf>.

82. Recall that a state constitutional amendment defining marriage in this way is termed a “super-DOMA.” See *supra* note 38 and text accompanying note 46.

83. 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. See *supra* note 39.

84. For example, California passed its amendment in 2008. CAL. CONST. art. I, § 7.5 (2008). However, a federal district court ruled that it was unconstitutional in 2010. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Thus, for purposes of this analysis, California is treated as having a super-DOMA. The challenge in categorizing states with evolving legislation or legal precedent is determining how long the state held a particular status such that the citizenry would have time to experience a cultural shift in light of the legal changes to marriage definitions.

85. Recall that marriage was open to attack if procreation was perceived as acceptable outside of marriage or open to interpretation by judges. See *supra* notes 51–53 and 70.

86. Two states fall into this category: Washington and Maryland. The Washington State Legislature overturned its 1998 statute banning gay marriage by enacting a statute permitting same-sex marriage in early February 2012. WASH. REV. CODE § 26.04.010 (2013); S.B. 6239, 62d Leg., 2012 Reg. Sess. (Wash. 2012), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6239.pdf>. The law was to take effect June 7th, 2012, but the decision was stayed by Referendum 74 on the November 6, 2012, ballot. *Proposed Referendum Measures—2012*, WASH. SECRETARY ST., <http://www.sos.wa.gov/elections/initiatives/referendum.aspx?y=2012> (last visited Apr. 13, 2014). Therefore, Washington State is included in the statutory-ban group for purposes of this analysis. Maryland is similarly situated for this analysis. See H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); *2012 General Election Ballot Questions*, MD. ST. BOARD ELECTIONS, Question 6, http://www.elections.state.md.us/elections/2012/ballot_questions.html (last visited Apr. 13, 2014). For information on the state of the law in these jurisdictions as of February 5, 2014, see *supra* note 39.

87. Recall that a statute banning same-sex marriage is referred to as a mini-DOMA. See *supra* note 38 and the text accompanying note 46.

may not have had rock-solid confidence around the meaning of marriage as an institution in these states because “activist” judges could have overturned the statutory definition, resulting in a more fluid definition of marriage.⁸⁸

Finally, those states that had no statute or amendment banning same-sex marriage were coded as “2.” This coding structure allowed me to hypothesize that the institution of marriage, according to the DOMA rationale, would be weakest and most vulnerable to attack in these states. The citizenry either had not collectively expressed a codified position regarding the definition of marriage, or it had determined that a broader definition of marriage, which includes same-sex couples, is appropriate—again at the time that I collected the data.

The analysis incorporated a number of control variables. Variables known to affect marital stability are: median age of first marriage, percent of state’s population with a bachelor’s degree, median disposable income, and percent of population living below the poverty line.⁸⁹ Four other variables were included in the analysis because they are likely to influence a state’s view of marriage or to reflect the current state of marital stability there: percent of males 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 points⁹⁰ over liberals in the state.⁹¹ Finally, the variable of state recognition of alternative legal relationships (i.e. domestic partnerships) was added to the analysis.⁹² Other variables initially included in the analysis were foreclosure rates and unemployment rates. However, in this study, these variables appeared to have no effect on the marriage and divorce trends.⁹³

88. See *supra* note 51.

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

90. “Conservative-advantage points” refers to the number of conservative voters greater than the number of liberal voters in a state. For example, if a state had 45% conservative voters and 30% liberal voters, the conservative advantage would be 15 points.

91. Data for these variables were obtained from the U.S. Census Bureau, with exception of religiosity and conservative-advantage points, which came from Gallup polls. *American Community Survey*, U.S. CENSUS BUREAU http://www.census.gov/acs/www/data_documentation/data_main/ (last visited May 21, 2014); Frank Newport, *State of the States: Importance of Religion*, GALLUP (Jan. 28, 2009), <http://www.gallup.com/poll/114022/state-states-importance-religion.aspx#1> (religiosity); *State of the States*, GALLUP, <http://www.gallup.com/poll/125066/State-States.aspx?ref=interactive> (last visited Apr. 13, 2014) (interactive map, select “Conservative advantage” metric).

92. The state of the law involving same-sex marriage is constantly evolving. Thus, the data relied on the state of the law between 1999–2010. Much has changed since then. For example, some states, like Washington, did not permit same-sex marriage at the time of this analysis, but provided rights very similar to marital rights through domestic partnerships. *E.g.*, WASH. REV. CODE § 35.21.980 (2009). See generally *supra* note 42 (enumerating states offering comparable rights). Other states allow for similar rights by providing for civil unions. *Supra* note 40.

93. These results are consistent with the other analysis addressing the statistical link between economy and divorce. Philip N. Cohen, *Recession and Divorce in the United States, 2008–2011*

1. Results

The first hypothesis 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.⁹⁴ Following this logic, by comparison, those states that had 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 have likely had the lowest decline in divorce.⁹⁵ The same hypothesis applies for patterns of marriage but in the converse. In DOMA-amendment or amendment-plus-statute states, one might expect to see the greatest increases in marriage rates, followed by lesser increases in DOMA-statute or no-DOMA states.

(Md. Population Research Ctr., Working Paper No. 008, 2014), available at <http://papers.cpr.ucla.edu/papers/PWP-MPRC-2012-008/PWP-MPRC-2012-008.pdf> (concluding that unemployment rates had no effect on the odds of divorce, and while foreclosure rates were positively associated with divorce, the correlation was not statistically significant); see also Jeff Grabmeier, *Marital Separations an Alternative to Divorce for Poor Couples*, OHIO ST. U. RES. NEWS (Aug. 13, 2012), <http://researchnews.osu.edu/archive/maritalsep.htm> (concluding that other factors—such as a racial or ethnic minority status, family income, family education, and the presence of young children—are predictive of long-term separation). But, the public discussion emerging from media suggests that the economy is a substantial cause for declines in divorce rates. Lisa Belkin, *Postponing Divorce in a Down Market*, N.Y. TIMES MOTHERLODE (Mar. 23, 2010, 10:47 AM), <http://parenting.blogs.nytimes.com/2010/03/23/postponing-divorce-in-a-down-market> (discussing the affordability of divorce and how hardships imposed by excessive debt may postpone separation); Carol Mithers, *What to Do When You Can't Afford a Divorce*, O, OPRAH MAG. (May 2009), available at <http://www.oprah.com/relationships/What-to-Do-When-You-Cant-Afford-a-Divorce>.

94. States with both constitutional amendments and statutes banning same-sex marriage at the time of this study were 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. States with a constitutional amendment banning same-sex marriage at the time of this study, but having no matching statute, were Oregon and Wisconsin. See, e.g., OR. REV. STAT. § 106.010 (enacted 1975) (defining 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 see OR. REV. STAT. § 106.020 (enacted 1989) (prohibiting certain marriages but not expressly prohibiting same-sex marriages). States with statutes banning same-sex marriage at the time of this study, but with no constitutional provisions, were Delaware, Illinois, Indiana, Maine, Minnesota, Pennsylvania, West Virginia, Wyoming, Maryland, and Washington. The Maryland and Washington legislatures passed bills in February 2012 permitting same-sex marriage, but the legislation was stayed pending referendums in November in both states. See *supra* note 86. States that did not ban same-sex marriage by either statute or constitutional amendment at the time of this study were New York, Rhode Island, Vermont, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, and New Mexico. New Jersey’s governor, Governor Christie, vetoed the February 2012 same-sex marriage bill, and the matter was stayed pending a public referendum on the November 2012 ballot. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19. New Mexico law made no mention of same-sex marriage at the time of this study. *New Mexico, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/states/entry/c/new-mexico> (last visited June 12, 2014) (“New Mexico’s laws do not explicitly allow or prohibit marriage for same-sex couples.”). In 2007, 2008, and 2010, New Mexico state legislators introduced bills to allow same-sex marriage. *Id.* Each was either defeated or died. *Id.* Alternatively, in 2008, a bill was introduced to prohibit same-sex marriage, but it failed as well. The District of Columbia also did not have laws banning same-sex marriage at the time of this study. See note 39 for the state of the law as of February 5, 2014.

95. To create a meaningful “before” and “after” comparison to the states that enacted constitutional amendments, states with or without a statute had their marriage and divorce trends grouped between 1999–2004 and 2005–2010.

To engage in this analysis, I conducted four separate statistical examinations. The first series looked at a comparison in the trends of marriage before and after DOMA enactment for the group of states that passed a DOMA amendment compared with those that did not.⁹⁶ The next analysis explored the average marriage rates in the years before and after DOMA passage for both groups of states.⁹⁷ The third examination of data explored any statistically significant differences that may have emerged in the divorce trends for either group of states. An exploration of any statistically significant differences in the average divorce rates in the years prior to and after DOMA ratification between the DOMA and non-DOMA states concluded the analysis. At this point in the Article, it is important to note that during the years captured for the analysis, regardless of the state, both marriage and divorce rates were on the decline everywhere.⁹⁸ The question becomes: by how much?

To begin, I calculated the slopes for each state.⁹⁹ Next, I conducted a paired-samples-means-t-test analysis¹⁰⁰ using the Statistical Package for the Social Sciences (SPSS). This analysis revealed whether a statistically significant difference for the average decline in marriage and divorce trends marked the two time periods. The first period captures the years before the enactment of the amendments for both the DOMA and non-DOMA states,¹⁰¹ and the second period captures the years after the passage of DOMA amendments regardless of whether the states enacted an amendment. The results showed that, for either category of state, the

96. 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.

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

98. *National Vital Statistics System: National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited June 12, 2014).

99. Alaska and Nebraska are excluded from both the marriage and divorce analysis because they enacted amendments in 1998 and 2000, respectively. ALASKA CONST. art. I, § 25 (approved 1998); NEB. CONST. art. I, § 29 (adopted 2000). Thus, the data available do not allow for meaningful review of trends in those states. Further, Oklahoma does not have marriage and divorce data available prior to 2004, so it is not included in the marriage trends. Likewise, California has no divorce data available; Georgia has no divorce data after 2003; Hawaii only provided divorce data through 2002; Indiana has no divorce data; Louisiana has virtually no divorce data available; and 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. By curvilinear, we mean that the trends do not follow a straight path consistently increasing or decreasing over time. Instead, the data shows trends that are more circular in which the rates increase and decrease unevenly.

100. 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 taken under two varying conditions. *See, e.g.*, FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES 353–56 (8th ed. 2009).

101. 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. *See supra* note 95.

marriage rate consistently declined throughout the pre- and post-amendment time periods. Moreover, the average difference in decline before and after an amendment passage was not statistically significant.¹⁰²

Another way of considering this outcome is to look at the average rate of marriage for the time before and after the amendments' passage.¹⁰³ 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.¹⁰⁴ In non-DOMA states, the rate was 8.67 per 1000 people. Even though the rate of marriage declined for both groups after a DOMA amendment enactment, the average marriage rate remained lower in DOMA states than in non-DOMA states. In DOMA states, the marriage rate was 6.96 per 1000 people compared to 7.93 per 1000 people in non-DOMA states. These different average rates, though quite small, were statistically significant for both pre- and post-DOMA ratification.

Thus, two important points emerge. First, the data analysis reveals that non-DOMA states included a population of individuals who, on average, are slightly more likely to marry than their counterparts in DOMA states. Second, the trend of declining marriage was present in both categories of states, but it was not statistically significant from the trend prior

102. 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: A PRACTICAL INTRODUCTION 86–88 (2007). Statistical significance most likely did not emerge for the pre- 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. *See* Cohen, *supra* note 93. 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. Steve Doughty, *The Five-Year Itch: Crisis Point for the Modern Marriage Is Arriving Sooner*, DAILY MAIL (U.K.), Oct. 29, 2007, at 25 (discussing a study by the Max Planck Institute). Massachusetts is the one state that does provide enough data for a preliminary examination. Indeed, the results show that after a consistent (and low) divorce rate in the time period between 2004 and 2009, a sharp increase in the divorce rate began in 2010—five years after the steep hike in marriage rates. *See* Appendix A.

103. 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.

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

to the passage of DOMA amendments.¹⁰⁵ In other words, people in the United States, generally, were increasingly less likely to get married during the time that the analysis was conducted regardless of whether a given state had a DOMA amendment.¹⁰⁶

TABLE ONE

MARRIAGE RATES AND TRENDS FOR DOMA AND NON-DOMA STATES

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

On the other hand, the divorce-rate trend also declined 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 experienced a lesser decline in divorce rates in the years *after* the political discourse and enactments of DOMA amendments. Thus, regardless of whether or not a state enacted an amendment or a statute barring same-sex marriage, fewer of its citizens chose to divorce. However, the reduced decline can most likely be attributed to fewer marriages occurring during this same time period.¹⁰⁷

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 DOMAs' passages. Nonetheless, on average, citizens of non-DOMA states tend to get divorced less than individuals living in states that have DOMA amendments. Specifically, prior to DOMA's passage, the average rate of divorce in DOMA states was 4.1 compared to 3.72 in non-DOMA states. After the enactment of

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

106. Data on national divorce rates is still only available through 2010. *Marriage and Divorce*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/divorce.htm> (last updated Nov. 21, 2013).

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

DOMA amendments, the average divorce rate dropped to 3.78 in DOMA states and 3.34 in non-DOMA states. Thus, one can conclude that, while less divorce occurs in non-DOMA states, both types of states experienced a statistically significant rate of change in divorce after the passage of DOMA regardless of whether the state has the amendment. Simply put, the decline in divorce slowed in the years after DOMA for both types of states, and an incredibly small difference in divorce rates existed between the two types of states.

TABLE TWO

DIVORCE RATES AND TRENDS FOR DOMA AND NON-DOMA STATES

	Rate/1000 pop.		Avg. Decline		N
	Pre	Post	Pre	Post	
DOMA amendment and statute	4.08	3.82	-0.125	-0.001*	24
DOMA statute only	3.92	3.49	-0.096	-0.004*	12
No DOMA	3.99	3.62	-0.036	-0.041*	6

*Statistically significant at $p=0.05$

The more compelling question, though, was whether the mean difference in the *trend* of decline for divorce and marriage in the two time periods, pre- and post-DOMA amendment passage, was statistically different *between* the two groups of states: those that enacted an amendment or statute, and those that did not. The next analysis sought to identify whether states that passed DOMAs experienced greater marriage rates and reduced divorce rates compared to those states that remained DOMA-free.

Again, using SPSS, I conducted an independent-sample-mean-t-test to determine whether statistically significant differences marked DOMA and non-DOMA states for pre- and post-DOMA marriage trends and pre- and post-DOMA divorce trends.¹⁰⁸ Recall, the hypothesis was that the DOMA impacts marriage and divorce rates differently in DOMA states and non-DOMA states, as discussed *supra*. The second hypothesis pre-

108. An independent-sample mean t-test compares two independent groups to determine whether the average measurement for a particular characteristic differs between two groups. *Statistics Workshops: Tests of Means*, WADSWORTH CENGAGE LEARNING (2005), http://www.wadsworth.com/psychology_d/templates/student_resources/workshops/stat_workshp/test_means/test_means_15.html. I used the Welch-Satterthwaite equation to perform the t-test because the sample sizes differ and the samples possess unequal variances (a measure of dispersion, represented as the average squared distance between the sample's mean and each data-point in the sample).

dicted that the average rate of decline for divorce would be greatest in those states that passed an amendment compared with those states that passed only a statute or nothing at all. The results demonstrated otherwise.

Table Three indicates that no statistically significant difference separated the DOMA and non-DOMA states in the divorce and marriage trends *prior* to enactment of DOMA legislation. The average rate of decline of marriage was greater for the DOMA states than the non-DOMA states prior to the enactment of any amendments, $-.25$ and $-.22$ respectively.¹⁰⁹ And for divorce trends, the analysis revealed that DOMA states actually had a greater rate of decline compared with non-DOMA states, $-.1$ versus $-.09$, respectively.¹¹⁰ These extremely slight differences were not surprising and do not rise to the level of statistical significance or substantive significance. Instead, the results established a baseline that prior to DOMA-amendment passage, and the significant publicity associated with it, states of each category were behaving fundamentally similarly with regard to family formation and dissolution—i.e. fewer marriages and fewer divorces.

TABLE THREE

COMPARISON MARRIAGE AND DIVORCE TRENDS BETWEEN DOMA AND NON-DOMA STATES PRIOR TO AMENDMENT PASSAGE

	Marriage Trend	Divorce Trend	n
DOMA	-0.22	-0.1	31
Non-DOMA	-0.25	-0.09	19

But the key question is: What happened after DOMA's enactment? No statistically significant difference marked the two groups of states *after* the passage of DOMA. The average decline in marriage or divorce after DOMA does not differ in any statistically meaningful way between those states that adopted an amendment and those that did not. Post-DOMA, the decline in marriage was *greater* for DOMA states than non-DOMA states, $-.26$ versus $-.12$. Moreover, the falling divorce rates were

109. While all measurements discussed *infra* represent average or mean rates of decline, for ease of reading, the text uses the shorthand "decline" to represent this measurement.

110. However, despite a trend of lesser decline in divorce rates prior to DOMA amendment ratifications for non-DOMA states, these states, on average, began with lower divorce rates 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. Accordingly, DOMA states start from a place of greater marital instability than non-DOMA states. See *infra* Part I.D.1.

greater in non-DOMA states than DOMA states, $-.011$ and $-.008$, respectively.

It was perhaps surprising that DOMA states, *after* the passage of a DOMA, appear to have a slower rate of decline in divorce *and* an increased rate of decline in marriage compared to non-DOMA states. Put another way, non-DOMA states showed a smaller decrease in marriage rates and a greater decrease in divorce rates compared with states that passed DOMA legislation. However, these results were not statistically significant; however, they were of some social significance: the results suggested some intriguing evolution around the institution of marriage in DOMA states. Specifically, these states, compared with non-DOMA states, already had lower marriage rates, which appeared to be declining further, while also possessing higher divorce rates. Thus, the data suggested that the institution of marriage might be slightly more vulnerable in DOMA states.¹¹¹

While no statistically significant differences emerged between the two groups of states in the analysis, the substantive differences are worth noting. Post-DOMA, the decline of marriage varied quite a bit between the two groups of states. While in all other areas the trends were negligible, the average drop in marriages post-DOMA enactment for DOMA states was more than double that of non-DOMA states. Certainly, the results should be read with caution, but they do raise some skepticism about the power of DOMAs to create family stability. Put simply, DOMAs did not appear to be associated with increased marriages, and for those marriages that did occur, DOMA did not reduce the risk of divorce.

TABLE FOUR

COMPARISON MARRIAGE AND DIVORCE TRENDS BETWEEN DOMA AND NON-DOMA STATES AFTER AMENDMENT PASSAGE

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

This preliminary¹¹² analysis suggested that DOMA is not statistically associated with increases in marriage rates or decreases in divorce

111. See *infra* Part II.C–D (discussing this study’s results regarding marriage and divorce rates and trends).

112. 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 78, at 306–07.

rates.¹¹³ In other words, the analysis did not appear to support either hypothesis. Specifically, DOMA does not appear relevant to the narrative of why marriage plays an increasingly less visible role in family formation in the United States, particularly in DOMA states.¹¹⁴

Such a conclusion raises another question, however. If DOMA amendments or statutes are possibly irrelevant to the institution of marriage, what *does* appear to be associated with predicting marriage and divorce rates and trend changes in states?¹¹⁵

C. Marriage Trends

We begin with marriage. Prior to the passage of DOMA, three variables predicted, with statistical significance,¹¹⁶ a state's marriage trend.¹¹⁷ First, the percent of families living below the poverty line had 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.¹¹⁸ In other words, those living in poverty were increasingly less likely to marry than their counterparts with greater resources. Similarly, with a correlation of -.36, the greater the proportion of people in a state who said that religion plays an important role in daily life, the greater the reduction in the state's marriage rate. Thus, more religiosity in a state's population tended to mean fewer marriages. Finally, a correlation of -.35 existed between children living in a single-parent household and the variable, marriage trends. In other words, the greater

113. Given how large the standard deviations were for each group of slopes, and the relatively small but inflexible sample size, achieving enough statistical power to find statistical significance would be incredibly challenging. I ran alternative analyses eliminating outliers in an attempt to decrease the standard deviation and increase the chance of detecting an effect should one exist. But even under the most conservative testing, the sample size must also decrease to accommodate eliminating outliers. Thus, the more compelling story is one of substantive significance rather than statistical significance. "Statistical power" refers to the possibility of 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 & JAMES P. DONNELLY, RESEARCH METHODS KNOWLEDGE BASE 256-60 (3d ed. 2007).

114. U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT (2004), available at <http://www.census.gov/population/socdemo/hh-fam/tabCH-1.xls>.

115. This question is noteworthy because, while the rates of change do not appear to be statistically significant before and after DOMA enactments 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.

116. For each correlation in this section $p < .01$.

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

118. "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 positive correlation. DAVID STOCKBURGER, INTRODUCTORY STATISTICS: CONCEPTS, MODELS, AND APPLICATIONS 158 (2d ed. 2001). Correlations in the .4 to .7 range are considered moderate to strong. See B. BURT GERSTMAN, SAN JOSÉ STATE UNIV., STATPRIMER 14: CORRELATION, at 14.5, available at <http://www.sjsu.edu/faculty/gerstman/StatPrimer/correlation.pdf>.

the proportion of children living in single parent households in a state, the greater the decline in marriage in that state.¹¹⁹

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

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

The next variable, religion as an important part of daily life, shares 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 the population with a bachelor's degree were all negatively related with the percent of the population who view religion as an important part of daily life. Conversely, a positive connection emerged between religion as an important part of daily life and the percent of men and women married three or more times, and the percent of conservatives over liberals living in a state.

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

119. 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 ever marrying. Births prior to marriage significantly increase the odds that a marriage will end earlier than births that occur after marriage. CASEY E. COPEN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 7–8 (2012).

An analysis of the data after the passage of DOMA revealed almost identical results. Poverty rates and proportion of single-parent households in a state best predict how rapidly the rate of marriage declines in a state. The only variable that was no longer directly associated with post-DOMA marriage trends was religion as an important part of daily life. However, that particular variable strongly mediates¹²⁰ every other variable in the profile. Therefore, we can conclude that the passage of state DOMA amendments had no measurable association with stemming the decline of marriage, but, in fact, other variables most certainly did.

D. Divorce

The divorce-trend analysis revealed almost identical patterns to those for marriage. Pre-DOMA divorce was negatively correlated with the proportion of the population with families living in poverty or in single-parent households. These associations are moderate, -.4 for both.¹²¹ As with the marriage analysis, the same variables exhibited an indirect relationship with divorce, which were 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, who marry at a later age, who are less likely to marry three or more times, who are less likely to be politically conservative, and who are less likely to believe religion is an important part of daily life. And, in turn, these states had fewer families living in poverty and children living in single-parent households.

States that meet this profile had lower divorce rates even though the average *trend in the decline of divorce* is not statistically significantly different from those states that had a larger portion of their population without a college degree, with less disposable income, who marry young,¹²² who view religion as an important part of daily life, who marry three or more times, and who are more likely to be conservative.¹²³ Stated simply, both types of states were experiencing a decreasing divorce trend (and continue to do so); but overall, impoverished states had fewer marriages, but more divorces than those states with greater resources.

120. "Mediates" is a statistical term of art that means one variable is not directly associated with another, but may affect a third variable through its association with the second one. Reuben M. Baron & David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERSONALITY & SOC. PSYCHOL. 1173, 1176 (1986).

121. 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.

122. "Young" refers to an age of marriage below the national median for age of first marriage.

123. 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. See *supra* note 113.

1. Discussion

The analysis suggests that DOMA states did not fare any better than non-DOMA states in terms of the strengthening of the “bonds and benefits to society of heterosexual marriage.”¹²⁴ In fact, the analysis offers an alternative theory. In this study, DOMA states tended to have lower marriage rates, larger declines in the trend towards marriage,¹²⁵ and greater divorce rates. Moreover, the decrease in the relevancy of marriage and the greater divorce rates in DOMA states for those individuals who actually were married (and remarry) seem to be directly related with poverty and indirectly related with educational and economic opportunities.

These results raise the following question: If DOMA is so clearly *not* associated with the strength of marriage—yet poverty, education, and economic opportunities clearly are—why then, does DOMA carry the political and legal traction that it does as a response to the concern around family instability?¹²⁶ The next section attempts to address this question with a moral entrepreneurship theoretical model.

II. THE ENDURING ATTRACTION OF DOMA

A. Moral Entrepreneurism

Howard Becker developed the idea that the construction and application of deviance labels (in the case at hand, homosexuals demanding access to marriage) is a moral enterprise.¹²⁷ Individuals draw on power and resources from social structures and cultural institutions to create the abstract notion of something or someone as deviant.¹²⁸ Those who define certain behaviors or characteristics as deviant are known as moral entrepreneurs.¹²⁹ 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.¹³⁰ The stages include generating awareness and moral conversion.¹³¹

124. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 14–15 (1st Cir. 2012) (articulating the goals of enacting DOMA).

125. Recall that trend analysis looks at average changes in the rates of marriage from one year to the next over a specific time period. Rate analysis looks at one period of time. *See supra* notes 96 and 103.

126. *See, e.g.*, Patrick H. Caddell & Douglas E. Schoen, *Romney, Obama Must Address Crisis of U.S. Families*, POLITICO (June 12, 2012, 21:27 EDT), <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, and expressing the key concern that only 52% of the U.S. population is married—the lowest rate ever recorded in the census).

127. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 162–63 (1963).

128. PATRICIA A. ADLER & PETER ADLER, *CONSTRUCTIONS OF DEVIANCE: SOCIAL POWER, CONTEXT, AND INTERACTION* 149 (7th ed. 2012).

129. *Id.*

130. *Id.* at 150.

131. *Id.* at 150–52.

Moral entrepreneurs define a problem and create public consciousness of it by generating danger messages.¹³² In the present case, the problem is the perceived weakening of the institution of marriage and family, which are supposedly embattled. The danger message is that marriage is under attack by an already well-defined deviant group—homosexuals—who wish to further undermine matrimony's meaning as a union between opposite-sex individuals.¹³³

To increase the credibility of their claims, moral entrepreneurs engage experts with specific knowledge of the social problem to package and present facts via media outlets in an attempt to show that the social problem's origins are highly influenced by another social issue.¹³⁴ Here, the social problem is the vulnerability of marriage as a central institution of the family, and the connected social issue is homosexual couples.¹³⁵

With regard to the assault on marriage by same-sex couples, a multitude of social science studies¹³⁶ employed by a host of statistic-touting experts¹³⁷ showing the rise in incidence of divorce, decline in marriage,

132. *Id.*

133. Observe, though, that the social ills defined as attacking the institution of marriage all implicate women. Recall, the federal DOMA legislation was prefaced with language that stated to the effect that, to permit same-sex marriage “would further devalue an institution already reeling from no-fault divorce, the sexual revolution, and out-of-wedlock births.” See *supra* note 23 and accompanying text. After all, the National Association of Women Lawyers drafted legislation to promote no-fault divorce. SELMA MOIDEL SMITH, STANFORD U., WOMEN'S LEGAL HIST., A CENTURY OF ACHIEVEMENT: THE CENTENNIAL OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS (1998), available at <http://wlh.law.stanford.edu/wp-content/uploads/2011/01/smith-a-century-of-achievement.pdf>; see Sharon Johnson, *No-Fault Divorce: 10 Years Later, Some Virtues, Some Flaws*, N.Y. TIMES, Mar. 30, 1979, at A22. Women were the key drivers behind the sexual revolution. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); MARGARET SANGER, *WHAT EVERY GIRL SHOULD KNOW* (1916). Finally, women seem to be blamed for the rise in out-of-wedlock births. See generally Isabel Sawhill, *20 Years Later, It Turns out Dan Quayle Was Right About Murphy Brown and Unmarried Moms*, WASH. POST OPINIONS (May 25, 2012), http://www.washingtonpost.com/opinions/20-years-later-it-turns-out-dan-quayle-was-right-about-murphy-brown-and-unmarried-moms/2012/05/25/gJQAsNCJqU_story.html (the author, a Brookings Institute Fellow, arguing that Dan Quayle was correct in criticizing women for raising children without the father present and calling it just another “lifestyle choice”).

134. ADLER & ADLER, *supra* note 128, at 150–51.

135. In support of his animus analysis, Justice Kennedy cited to the following passages from DOMA's legislative history: “The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting H.R. REP. NO. 104-664, at 12–13 (1996)) (internal quotation mark omitted). “The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” *Id.* (quoting H.R. REP. NO. 104-664, at 16 (1996)).

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

137. For example, Brian Brown, President of the National Organization for Marriage, Tony Perkins, President of the Family Research Council, Dale Showengerdt, legal counsel for the Alliance Defense Fund, and Jim Daly, President of Focus on the Family, all hold themselves out as experts on the issue. See, e.g., Brian Brown, *NOM Blog*, NAT'L ORG. FOR MARRIAGE, <http://www.nomblog.com/> (last visited June 12, 2014); *FRC Staff: Tony Perkins: President*, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=by03h27> (last visited June 12, 2014); *Why Protect Marriage: The Key to Understanding the Fight for Marriage*, CENTER FOR ARIZ. POL'Y (July 29,

increase in adultery, etc.¹³⁸ to bring about a moral conversion.¹³⁹ 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,”¹⁴⁰ homosexuals desiring same-sex marriage.¹⁴¹ The next ingredient is what Reinerman refers to as “A Kernel of Truth.”¹⁴² The perceived social ill has some basis of truth to it. Specifically, marriage rates had been declining and the divorce rate did rise in the two decades preceding the moral entrepreneurs’ perceived need to respond to “families in crisis” in the early 1990s.¹⁴³

Also, the media play a key role in the “routinization of caricature.”¹⁴⁴ In other words, episodic events appear as epidemic; additionally, worst-case scenarios appear as typical ones, which dramatize the social problem.¹⁴⁵ Applying this concept here, we need to look no further than the context analysis described in the prior section, which outlines the discourse behind the rationales for passing a state DOMA amendment.¹⁴⁶ The most recent state to pass a DOMA amendment, North Carolina, provides two good examples of these techniques.¹⁴⁷ First, an issue policy brief asserted that in same-sex-marriage states, teachers are required to teach homosexuality to elementary school children as part of a set cur-

2011), <http://blog.azpolicy.org/marriage-family/why-protect-marriage-the-key-to-understanding-the-fight-for-marriage/>; Jim Daly, *Messages from Our President*, FOCUS ON FAM., http://www.focusonthefamily.com/about_us/profiles/jim_daly/messages.aspx (last visited June 12, 2014).

138. See, e.g., Brief for U.S. Conference of Catholic Bishops et. al. as Amici Curiae Supporting Defendants-Appellants at 16–21, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2011) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 494356.

139. ADLER & ADLER, *supra* note 128, at 152.

140. CRAIG REINERMAN, *THE SOCIAL CONSTRUCTION OF DRUG SCARES* (1994), reprinted in *CONSTRUCTIONS OF DEVIANCE: SOCIAL POWER, CONTEXT, AND INTERACTION* 159, 165 (Patricia A. Adler & Peter Adler eds., 7th ed. 2012). Although Reinerman has developed a theory related to drug scares, I assert that this model has equal application to the same-sex marriage issue.

141. Reinerman observes that drug scares are about the use of a drug by particular groups of people who are typically *already* perceived by powerful groups as some kind of threat. *Id.* (citing TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1970)). Reinerman observes that Prohibition was motivated by the alcohol usage of immigrant, Catholic, working-class drinkers, not alcohol consumption generally. *Id.* Likewise, drug laws in California came about not because of opiate usage by the masses, but because of Chinese opium dens. *Id.* 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. *Id.* In each instance, the social problem is linked to a group perceived as a threat. *Id.*

142. *Id.* at 163.

143. COONTZ, *supra* note 3, at 263 (pointing out that by the end of the 1970s, the divorce rate’s effect was exacerbated by alternatives to marriage and the radical reduction in remarriages, generally); Amitai Etzioni, *The Family: Is It Obsolete?*, 14 J. CURRENT SOC. ISSUES 4 (1977) (asserting that if the divorce rate continued at its current pace, not one American family would remain intact by the 1990s).

144. REINERMAN, *supra* note 140, at 163 (emphasis omitted).

145. *Id.*

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

147. N.C. CONST. art. XIV, § 6 (approved 2012).

riculum.¹⁴⁸ However, this assertion relied on one extreme example for support.¹⁴⁹ Second, the policy brief alleged that religious leaders have been jailed for speaking out against homosexuality.¹⁵⁰ For support, the brief cites to a general assertion that this jailing occurs in Canada.¹⁵¹ What is particularly compelling with this technique is the idea that a vulnerable population is at risk, and the effects of the social problem are spreading to that population.¹⁵² In the instant case, children are at risk if same-sex marriage is allowed.¹⁵³ Not just children of same-sex couples, mind you, but *all* children are threatened.¹⁵⁴

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.¹⁵⁵ Moreover, these effects

148. "In states where same-sex 'marriage' is legal, such as Massachusetts, children are taught in school that homosexuality is normal, and that same-sex unions are the legal and moral equivalent of traditional marriage." N.C. FAMILY POLICY COUNCIL, THE MARRIAGE PROTECTION AMENDMENT: TEN REASONS WHY LEGISLATORS SHOULD LET THE PEOPLE VOTE 4, *available at* <http://ncfamily.org/issuebriefs/110301-IB-MarProtAmdt.pdf> (last visited Apr. 13, 2014).

149. The brief states:

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."

Id.

150. *Id.*

151. *Id.*

152. For example, Richard McCorkle and 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." Richard C. McCorkle & Terance D. Miethe, *The Political and Organizational Response to Gangs: An Examination of a "Moral Panic" in Nevada*, 15 JUST. Q. 41, 48 (1998). 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. *Id.* at 49–50. Finally, a school shooting in a high school cafeteria was described by police as a "gang-related slaying," although such conclusion was never confirmed. *Id.* at 50 (internal quotation marks omitted).

153. Sarah Wildman, *Children Speak for Same-Sex Marriage*, N.Y. TIMES, Jan. 21, 2010, at E1 (discussing the debate over the effects of same-sex marriage on children and referencing the following position shared by same-sex marriage opponents: "'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.A (detailing the ways in which children will be harmed by same-sex marriage according to DOMA proponents).

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

155. A closely related term refers to scapegoats as "folk devils" because their behaviors are deemed selfish and harmful to society. *Id.* at 29. It becomes paramount to neutralize their actions so society can return to normal. *Id.*

usually precede the alleged causal connection between the social problem and the identified deviant group.¹⁵⁶ Reinerman argues that scapegoating may be the most essential element of the process because “it gives great explanatory power and thus broader resonance to claims about the horrors of [the social problem].”¹⁵⁷ Scapegoating same-sex families is equally cogent in the DOMA campaign.

B. Moral Panics

Blaming homosexual couples as the source of the United States’ ongoing family crisis was particularly effective because the social problem was acutely ripe for a moral panic.¹⁵⁸ The public was predisposed to believe the notion that the “family in crisis” had hit epidemic proportions, especially when infamous or noteworthy individuals declared it so.¹⁵⁹ In turn, legislators responded to the moral panic with the rapid en-

156. 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. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). While the issue of family in crisis had always had political attraction, the redefining of marriage by a court to include same-sex couples gave it new life. Recall that during the 1992 Clinton campaign, families were in crisis because of “welfare queens.” Clarence Page, *Romney’s Welfare Queen*, CHI. TRIB., Aug. 12, 2012, at 25. Another interesting example comes from Great Britain. In 1968, Mary Bell, at the age of 11, killed two toddlers. Ann Bradley, *A Morality Play for Our Times*, 63 LIVING MARXISM 10, 13 (1994). 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. *Id.* at 10. The result was a series of legislative enactments to solve the problem of children murdering children. David Smith & Kiyoko Sueda, *The Killing of Children by Children as a Symptom of National Crisis: Reactions in Britain and Japan*, 8 CRIMINOLOGY & CRIM. JUST. 5 (2008), available at <http://www.sagepub.com/lawrencestudy/articles/intro/Smith.pdf>. And, as is the case with DOMA and same-sex marriage, evidence that the enacted solutions would solve the “crisis” was irrelevant.

157. REINERMAN, *supra* note 140, at 165.

158. “Moral panic” refers to a situation in which public fears and state response greatly exaggerate the alleged threat attributed to the target group. The concept emerged from studies Stanley Cohen conducted in Britain in the 1960s on the “Mods and Rockers.” Cohen characterized a moral panic as a situation where a social ill or group of persons is identified as a “threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, [and] politicians . . .” McCorkle & Miethe, *supra* note 152, at 43 (quoting STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF MODS AND ROCKERS* 9 (1972)).

159. For example, Dr. James Dobson, founder of 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 its blessing, the younger generation becomes confused about sexual identity and quickly loses its understanding of lifelong commitments, emotional bonding, sexual purity, [and] the role of children in a family

JAMES DOBSON, *MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS BATTLE* 47 (2004). Judson Phillips, founder of the Tea Party Nation, was quoted in an article as declaring that:

[M]arriage 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 under class, born and raised in poverty, unlikely to escape

actment of DOMA at the federal level with individual states quickly following suit.

Moral panics can play a crucial role for those possessing political, economic, or religious power.¹⁶⁰ Often, the creation of such a panic can distract from a more intractable social issue. For example, when Britain was suffering from a severe recession in the 1970s, the ruling class created a moral panic around street crime to distract the public from the country's declining economic situation. "By exploiting the public's fear of crime, the ruling class shifted the focus from an ailing British economy to street muggings, thereby protecting their own economic interests"¹⁶¹ Similarly, one might argue that emphasizing same-sex marriage as the cause of what ails the American family served the power elite. It diverted attention away from the glaring reality of economic policies that benefited the power elite at the expense of particular types of American families.¹⁶²

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."¹⁶³ Indeed, even one of the attorneys arguing against the legalization of same-sex marriage before the Supreme Court invoked the term.¹⁶⁴ The Institute for American Values observes that a clear dividing line demarcates marital access and stability between

poverty and encouraged to engage in the same behaviors that landed their parents in poverty.

Tashman, *supra* note 71 (quoting Judson Phillips in a statement to Tea Party Nation members on May 31, 2012).

160. Often these power roles work in tandem. For example, many politicians hold political power along with a significant largesse and use this power to express unabashed religious views—George W. Bush, Mitt Romney, and Sarah Palin, to name a few. Indeed, the most successful moral crusaders are those in the upper strata of society. Research conducted on the pro-life movement and anti-pornography revealed that the crusaders originated in the lower class, thus explaining their limited success—until recently—to have these issues reframed as legally unacceptable. Justin L. Tuggle & Malcolm D. Holmes, *Blowing Smoke: Status Politics and the Shasta County Smoking Ban*, 18 *DEVIANT BEHAV.* 77, 79 (1997).

161. McCorkle & Miethe, *supra* note 152, at 44 (citing STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* (1978)). Moral Panics certainly take on a phenomenological life of their own, but beforehand individuals or groups carefully put the key ingredients in place.

162. Professor Carbone observes that "[t]he family crisis is tied to a changing economy; yet that economy is largely invisible in the moral-values debate." Carbone, *supra* note 49, at 355. She goes on to note that "[same-sex marriage bans] simply serve to keep anxiety about the American family alive without doing anything 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." *Id.* at 356.

163. UNIV. OF VA. NAT'L MARRIAGE PROJECT, *WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA* 15 (W. Bradford Wilcox & Elizabeth Marquardt eds., 2010), available at <http://stateofunions.org/2010/SOOU2010.pdf>. *But see* Carbone, *supra* note 49, at 356 (arguing that the ability to marry and stay married is defined by educational attainment and class).

164. Steven T. Dennis & John Gramlich, *12 Best Gay Marriage Moments at the Supreme Court*, ROLL CALL (Mar. 26, 2013, 4:22 PM), http://www.rollcall.com/news/12_best_gay_marriage_moments_at_the_supreme_court-223456-1.html.

the classes.¹⁶⁵ However, the dividing line 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 floundering.”¹⁶⁶ The report couches the lack of access to marriage as a “retreat”¹⁶⁷—perhaps unintentionally—suggesting that 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 class and upper-middle class.¹⁶⁸ Thus, one might be tempted to conclude that DOMA was especially needed in those states that lacked educational and economic resources to stave off the impending attack on a set of marriages already weakened and becoming increasingly rarified. Taken to its logical conclusion, the argument might go like this: of course states with higher educated populations, with more income, and with delayed age of first marriage could withstand same-sex marriages amongst its population. These are not the types of states with the most marriages at risk.

Therein lies the appeal of the moral panic to the family in crisis question.¹⁶⁹ Status politics play out an efficient and effective one-two

165. 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. See generally UNIV. OF VA. NAT’L MARRIAGE PROJECT, *supra* note 163; ELIZABETH MARQUARDT, INST. FOR AM. VALUES, *THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS* (2006), available at <http://www.americanvalues.org/search/item.php?id=48>. In fact, these reports could serve as a textbook for how to create a moral panic around family crisis. They contain the requisite academic experts explaining how middle America’s attitudes and behavior do not serve them well, as such attitudes seek to adopt a “‘soul mate’ model of marriage” over the “older ‘institutional’ model of marriage.” UNIV. OF VA. NAT’L MARRIAGE PROJECT, *supra* note 163, at 28. Marquardt discounts studies demonstrating that same-sex marriage is not harmful. MARQUARDT, *supra*, at 19–22. Moreover, Marquardt devotes a significant portion of her report to establishing that a vulnerable population exists when she writes, “[I]n both the sciences and in the voices of children we learn that biology *does* matter.” *Id.* at 21. She discusses the safety of children—and the risks of stepparents who lack biological connection to children in the household. *Id.* at 20. She then equates these violent stepparents with same-sex parents. *Id.* at 21–22. However, citing recent developments in artificial reproduction that involve creating eggs and sperm from stem cells, she cautions, “The technique raises the possibility that gay couples will be able to have biological children.” *Id.* at 27 (quoting Maxine Firth, *Stem Cell Babies Could Have Single Parent*, N.Z. HERALD, June 21, 2005) (internal quotation marks omitted). Seemingly, same-sex couples cannot win. They are unacceptable parents without both having a biological connection to the child, and frankly, 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.

166. UNIV. OF VA. NAT’L MARRIAGE PROJECT, *supra* note 163, at ix.

167. *Id.* at 15.

168. *Id.* at 16.

169. Moral panics allow for selective application of the scapegoat to the social ill according to where it conveniently fits to support the narrative being offered. Power is central to this enterprise.

[L]aws . . . are a product of political action by moral entrepreneurial interest groups that are connected to society’s power base. . . .

....

punch. First, the power elite can define certain kinds of families as lacking in social mores, i.e. poor and middle class single-parent families, while at the same time, 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.”¹⁷⁰ In other words, the power elite legitimizes 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”¹⁷¹ because these couples were “viewed as intractably denying the moral and status superiority of the [political-economic-religious elites’] symbolic-moral universe.”¹⁷² And, at the same time, this “reform” distracted families who were experiencing their own massive instability from examining the cause of their own plight.

Thus, a fair conclusion to draw might be that same-sex couples’ desire to marry has little to do with the current state of marginalized families and perhaps has much to do with a carefully crafted moral panic for political expediency.¹⁷³ In other words, DOMA could very well be a by-product of a fallacy.

The next query becomes, then, given the variables associated with marital instability and given DOMA’s apparent ineffective role in promoting marital stability (and its possible demise), how should society respond to the middle class’s weakened marital state?

III. RECOMMENDATIONS

Given that marriage, as an institution, has become a less viable option, especially for the middle and lower classes, one may be tempted to lay blame at their feet. The nature of this blame may come in a variety of forms. These forms are discussed below, followed by my recommendations for solving the effects of the middle class’s weakened marital state.

A. Moral Failure

One approach might be to adopt the reasoning of the conservative elite—both within the academy and political arenas—that middle and

... [T]hose positioned closer to the center of society, holding the greater social, economic, political, and moral resources, can turn the force of the deviant stigma onto others less fortunately placed.

ADLER & ADLER, *supra* note 128, at 155–56.

170. Tuggle & Holmes, *supra* note 160, at 79.

171. *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. *Id.* at 79–80.

172. *Id.*

173. Admittedly, I do not have direct evidence that pro-DOMA interest groups developed a purposeful strategy to create a moral panic, but rather, I infer from the discourse that theoretically, it appears this sociological phenomenon emerged.

lower classes do not act consistently with their best interests.¹⁷⁴ For instance, the National Marriage Project and Institute for American Values diagnose the problem as follows: Marriage has eroded in the middle class because “moderately educated Americans are markedly less likely than are highly educated Americans to embrace the bourgeois values and virtues.”¹⁷⁵ To put it bluntly, the report explains that lower middle class individuals are less likely to engage in self-control, delayed gratification, and hard work.¹⁷⁶ 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.¹⁷⁷

The culpability of the “shiftless”¹⁷⁸ certainly has its appeal—particularly when academics or politicians can point to the models of marriage that are appropriate for one social class, but not the other. *The State of the Union* report observes that while a “soul mate” model of marriage may work for upper class Americans, middle class Americans must abide by the “traditional” model of marriage in which “poor and Middle Americans of a generation or two ago would have . . . been markedly more likely to get and stay married, even if they did not have much money or a consistently good relationship.”¹⁷⁹ According to the

174. Ronald Reagan often played up the concept of the “welfare queen” in his stump speeches during his 1976 election bid to describe women who were scamming the government to obtain benefits and services for themselves and their children instead of working for pay. See *‘Welfare Queen’ Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51. While Reagan is often credited for coining the term “welfare queen”, this is likely apocryphal as no actual record exists of Reagan’s use of the term. In actuality, the inventor of the term seems to be Linda Taylor at “the *Chicago Tribune*, not the GOP politician.” Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013), 12:41 AM, http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.

175. UNIV. OF VA. NAT’L MARRIAGE PROJECT, *supra* note 163, at 34.

176. *Id.*

177. *Id.*

178. “Shiftless” is a term that came about during the slavery era to describe African-American slaves as lazy, unambitious, and slow, but it currently has wider application to poor people. See David Pilgrim, *The Coon Caricature*, FERRIS ST. U. (Oct. 2000), <http://www.ferris.edu/jimcrow/coon/> (last updated 2012).

179. UNIV. OF VA. NAT’L MARRIAGE PROJECT, *supra* note 163, at 38–39. The soul mate model of marriage is couple-centered, demanding “emotional intimacy” and “shared consumption” with the “happiness of both spouses” as central to its survival. *Id.* at 38. Conversely, the traditional model of marriage focuses on “parenthood, economic cooperation, and emotional intimacy in a permanent union.” *Id.* at 38. However, consider Stephanie Coontz’s assessment of marriages and families from a generation or two ago, when the conservative elite would wax on about the ideal approach for middle America. “Not only was the 1950s family a new invention; it was also 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, 30–39 (1992). Coontz observed that, in reality, families during this period were characterized as one or both partners experiencing daily misery; families hiding the sexual or physical abuse that occurred within the family from the outside world; women who had been pushed out of the workforce became alienated wives and mothers. The media’s depiction of the 1950s American family ignored the poor communities and minorities, who continued to face brutal discrimination. The period consisted of a consistent heightened number of teen pregnancies, which resulted in marriage, as well as high rates of prescription drug and alcohol abuse. *Id.* at 29–39. Moreover, while the American Values Institute

Institute for American Values, the poor and middle classes don't have the economic resources needed to succeed in an emotionally intensive soul-mate union.¹⁸⁰

This analysis suggests shades 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.¹⁸¹ The report has since been criticized for its failure to examine all the data on black families available at the time, and in particular, for its failure to acknowledge the adaptive strategies that family formation will take in response to destabilized institutions, especially the economy.¹⁸² 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.¹⁸³

Another explanation of middle class families' plight is the cultural class-warfare syndrome as expressed in volumes such as *What's the Matter with Kansas?*¹⁸⁴ Under this model, middle class Americans are at fault for their circumstances because they vote against their own interests.¹⁸⁵ Frank observes that we have a "French Revolution in reverse."¹⁸⁶ The wealthy elite, politically conservative establishment developed a highly effective discourse he calls "latte libel."¹⁸⁷ Instead of focusing on policy

criticizes the soul mate model as valuing consumption, Coontz points out that the "traditional family" of the 1950s was defined by consumer consumption. *See id.* at 27–29.

180. UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163, at 38–40.

181. *See generally* DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), *available at* <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm>.

182. Herbert J. Gans, *The Moynihan Report and Its Aftermaths: A Critical Analysis*, 8 DUBOIS REV. 315, 318–20 (2011) (arguing that the report lacked the positivism required for such analysis to have a meaningful effect).

183. In the early part of the twentieth century, sociologists Robert Park and Ernest Burgess developed the Concentric Zone theory. *See* ROBERT E. PARK ET AL., THE CITY 50–55 (1925). The theory explains that competition for resources means that certain land areas with limited social structures will lead to adaptations by individuals living in those areas subject to the same ecological pressures. *See id.* at 63–66. Thus, the idea that individuals develop characteristics in response to the environment and resources available to them is not a new one.

184. *See generally* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA (2004). Although culture as an expression of class has long been debated by sociologists, Frank's book describes how the political mapping of the 2000 election brought the intersection of politics and class warfare into sharp relief as mediated through culture. For an earlier discussion of the cultural class-warfare syndrome, see MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES 14–17 (1962). The idea of culture as an expression of class has captured the imagination of family law scholars more recently. *See generally* CAHN & CARBONE, *supra* note 89; WILLIAMS, *supra* note 18.

185. Recent data, however, suggests otherwise. A report released by the PEW Foundation reveals that 50% of its respondents who stated that they were middle class identified as Democrats, compared to 39% who identified as Republicans. PAUL TAYLOR ET AL., PEW RESEARCH CTR., THE LOST DECADE OF THE MIDDLE CLASS: FEWER, POORER, GLOOMIER 6 (2012), *available at* <http://www.pewsocialtrends.org/files/2012/08/pew-social-trends-lost-decade-of-the-middle-class.pdf>.

186. FRANK, *supra* note 184, at 8.

187. *Id.* at 16–17.

as the framework for voting in political parties, the economic and political powerhouses shifted politics into a cultural class war.¹⁸⁸

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 United States—the cars they drive, the food they eat, the clothes they wear, the music they listen to, the places where they vacation, the churches they do not attend, etc.¹⁸⁹ The net result, according to Thomas Frank, is that:

Here is a movement whose response to the power structure is to make the rich even richer; whose answer to the inexorable degradation of working-class life is to lash out angrily at labor unions and liberal workplace-safety programs; whose solution to the rise of ignorance in America is to pull the rug out from under public education.¹⁹⁰

But Frank and those of his persuasion cast blame more broadly. They point to the liberal, political, and economic elite as culpable too.¹⁹¹ 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.¹⁹² The Left has engendered a deep-seated bitterness in middle-America that is aimed at the once progressive platform of the Democratic party.¹⁹³ Joan Williams goes further: “A precondition for permanent political change is a changed relationship between the white working-class and the reform-minded elite. It is disheartening that . . . the upper-middle class remains supremely uninterested in rethinking its relationship with the Missing Middle.”¹⁹⁴ Thus, these authors argue that the liberal elite drove middle class Americans away with their condescension and intellectual analysis, and into the hands of the Republican Party, which was willing to embrace their anger—or more accurately, manipulate it for political gain.¹⁹⁵

The result is that the nation has economic and family policies that have led to a high level of inequality. To be sure, the last thirty years has seen the distance grow between the social classes.¹⁹⁶ But during the Great Recession and subsequent recovery, in 2010 alone, the top 1% of America’s most wealthy gained 93% of the *additional* income created in the

188. See *id.* at 5–6.

189. See *id.* at 16–20.

190. *Id.* at 7.

191. *Id.* at 242–48.

192. *Id.*

193. *Id.* at 8–9, 176–77.

194. WILLIAMS, *supra* note 18, at 211.

195. See *id.* at 212.

196. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 2–3 (2012).

United States.¹⁹⁷ 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 243.¹⁹⁸ Put another way, the top 1% had an average annual income of \$1.3 million while the bottom 20% earned an average of \$17,800 annually—and that was before the recession hit.¹⁹⁹ It seems implausible to maintain that such incredible economic injustice does not hurt the stability of the family.

A recent study released by the PEW Foundation catalogues the losses experienced by the middle class. Of the 1,287 adults surveyed for the study, 85% stated that it was more difficult to maintain a standard of living than a decade ago.²⁰⁰ For the first time since World War II, income has declined across all income tiers except the very top.²⁰¹ The size of the middle class has actually shrunk over each of the last four decades.²⁰² For the upper class, the period has proved lucrative. Their incomes rose from 29% to 46% of the nation's pie.²⁰³ For the middle class, four decades ago, their income made up 62% of the share.²⁰⁴ Now, it is only 45%.²⁰⁵ The lower class has remained relatively stable in its minimal share of the nations' income—10% in 1971, 9% in 2011.²⁰⁶

Wealth remains a crucial, yet elusive safety net for any family. Wealth provides access to resources in times of economic hardships, but even more so, it offers economic opportunities. However, wealth has plummeted for middle- and lower-class families—specifically, by 28% for the middle class and 45% for the lower class over the last four decades.²⁰⁷ Once again, if you were lucky enough to be born in the upper class, your opportunities improved substantially. Upper-class families acquired a greater portion of the nation's wealth during this same time period.²⁰⁸

B. The Elusive Traditional Family

A frequent refrain in the conservative party is a return to the traditional family values of the 1950s—with images of *Leave it to Beaver* re-runs fresh in our collective memories.²⁰⁹ Nostalgic stories of low divorce

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 4.

200. TAYLOR ET AL., *supra* note 185, at 166.

201. *Id.* at 1.

202. *Id.* at 1–2.

203. *Id.* at 2.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 2–3.

208. *Id.*

209. Kevin Noble Maillard, *The Myth of the Traditional Family*, Contribution to *The Opinion Pages: Room for Debate*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2012/04/24/are-family-values-outdated/the-myth-of-the-traditional-family> (last updated Aug. 9, 2012, 11:35 AM).

rates, high marriage rates, high fertility rates, and economic growth—with the largest movement of poor people into the middle class—all certainly have resonance and appeal. However, the family of the 1950s was not the last vestige of a long tradition of the stable American family.²¹⁰ It was a new and rare phenomenon born of massive economic growth spurred on by housing starts and consumer spending—particularly for household furnishings and appliances.²¹¹

Even more so, the traditional family of the 1950s was the invention of American economic and family policy. Keith Olson observes that the GI Bill was one of the most successful social programs ever created, at least for whites.²¹² Veterans received free college tuition, a stipend, and extra money if they had a family.²¹³ No loans, just grants. Mortgages were available at very low rates.²¹⁴ A rewritten tax code provided advantages to married couples.²¹⁵ Such policies created the middle class, and in turn, the possibility of family stability.

Economic stability did not create the cultural phenomena of the nostalgic “traditional” two-parent, male breadwinner, female home-maker family. The media did.²¹⁶ However, the recommendation that we provide economic and educational opportunities to create economic stability is an obvious one that Nobel Prize winner Joseph Stiglitz analyzes forcefully.²¹⁷ Nevertheless, the ability to *create family stability* means discarding

210. ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 13–14* (2008) (“[The 1950s family] was not . . . the last gasp of ‘traditional’ family life with roots deep in the past. Rather, it was the first wholehearted effort to create a home that would fulfill virtually all its members’ personal needs . . .”).

211. See Keith W. Olson, *The G. I. Bill and Higher Education: Success and Surprise*, 25 AM. Q. 596 (1973) (discussing the implementation of the GI Bill as an anti-depression measure); COONTZ, *supra* note 179, at 24–25.

212. Olson, *supra* note 211, at 610; COONTZ, *supra* note 179, at 223.

213. Olson, *supra* note 211, at 610 n.18; COONTZ, *supra* note 179, at 223.

214. See COONTZ, *supra* note 179, at 223.

215. *Id.* at 223–24. See generally MADELEINE M. KUNIN, *THE NEW FEMINIST AGENDA: DEFINING THE NEXT REVOLUTION FOR WOMEN, WORK, AND FAMILY* 23–24 (2012); STIGLITZ, *supra* note 196, at 4–5.

216. COONTZ, *supra* note 3, at 229–32.

217. Educational opportunities should be carefully assessed to match the growth areas in the economy. For example, regulation of for-profit educational institutions is essential for the protection of lower and middle classes seeking access to higher education—an area where they are frequently shut out. Stiglitz cites data showing that 74% of students in the nation’s most selective colleges come from the top quartile of income earnings, while only 9% come from the bottom half of the country’s income earners. STIGLITZ, *supra* note 196, at 19. The effects of inequality for a child are pervasive. In fact, a child born in an environment with few resources will find it difficult to ever move out of poverty. *Id.* at 17–20. Recent data reveals that the middle class, who used to believe that the American Dream was achievable, are increasingly alienated from the notion that working hard is all it takes. TAYLOR ET AL., *supra* note 185, at 5. Finally, education cannot be the salve to childhood poverty and family instability. Research shows that the predominant growth area for jobs in the United States in the next decade will be in the service industry—low-paying jobs like home health workers or social service providers, as well as business services. Richard Henderson, *Industry Employment and Output Projections to 2020*, MONTHLY LAB. REV. 65, 65–69 (Jan. 2012), available at <http://www.bls.gov/opub/mlr/2012/01/art4full.pdf>. Therefore, policy must address ways for low-income families to garner support other than through wage income.

a singular notion of a family model²¹⁸ that thrived for *only one* decade in our history.²¹⁹

To be sure, a two-parent household offers certain economic advantages.²²⁰ These advantages, however, can be mirrored in a national economic policy without necessarily demanding a two-parent household model. Thus, other family structures can receive these benefits.²²¹ It is clear from the analysis above that, regardless of one's educational or economic resources, marriage and fertility rates are both declining.²²² America can be a hostile place to raise a child. As of December 2011, 57% of the nation's children are living in low income or poor households.²²³ The United States exhibits the "highest child poverty rate in the developed world."²²⁴ Unlike our European neighbors, we seem to focus on marriage, not children.²²⁵ In a nation where "[p]oor kids who succeed academically are less likely to graduate from college than richer kids who do worse in school,"²²⁶ and where we know education strengthens family stability, a new moral panic demands addressing the causes, not the symptoms, of family crisis. Thus, this last section of the paper shifts the focus from marriage and divorce rates to child outcomes. The analysis above suggests that marriage and divorce play an increasingly less visible role in family formation and stability. Thus, concentrating on a child's quality of life is likely to create a setting that will increase family stability.

C. Possible Solutions

1. Reformulate Resources with Children in Mind

As Stiglitz observes, this country virtually eradicated poverty for the elderly through social programs like Social Security and Medicare.²²⁷ The decision to do nothing to eradicate child poverty should be viewed as political as well as moral.²²⁸ I argue that refocusing on children's access to resources will go a long way toward creating family stability,

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

219. See COONTZ, *supra* note 3, at 229, 243–44.

220. See Wendy D. Manning & Susan Brown, *Children's Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & FAM. 345, 351 (2006).

221. In fact, families with three or more parents exist and may receive legal recognition in California. Ian Lovett, *Measure Opens Door to 3 Parents, or More*, N.Y. TIMES, July 14, 2012, at A9.

222. JOYCE A. MARTIN ET AL., NAT'L VITAL STATISTICS SYS., BIRTHS: FINAL DATA FOR 2010, at 1 (2012), available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf; see *id.* at Table 1.

223. KUNIN, *supra* note 215, at 223.

224. *Id.* at 11.

225. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND 15–16* (2010).

226. STIGLITZ, *supra* note 196, at 19.

227. *Id.* at 17.

228. *Id.*

while undermining the scapegoating arguments behind DOMA. Research reveals that Americans strongly value fairness.²²⁹

The discourse of fairness must enter the family-in-crisis discussion.²³⁰ Other countries have chosen to create a wealth distribution system that still allows for rewards, but reduces the amount of inequality present in society, particularly by focusing on investing in resources for children.²³¹ In doing so, the Left must respect, if not adopt, the morality discourse with which the Right has become adept. It must re-engage middle- and lower-class America—where the most destabilized families are found.²³²

229. *Id.* at 153–54.

230. The idea of tax dollars going to assist other adults who we perceive as making life decisions that we would not creates cognitive dissonance for some when it comes to the notion of fairness. *See, e.g., Myth—The Rich Don't Pay Their Fair Share*, CONST. CONSERVATISM, <http://constitutionalconservative.wordpress.com/myth-the-rich-dont-pay-their-fair-share/> (last visited Apr. 13, 2014).

231. For example, policies in Australia, the UK, France, and Brazil are known for reducing inequality. *See, e.g.,* KUNIN, *supra* note 215, at 34–35, 44–55, 225–30; STIGLITZ, *supra* note 196, at 5, 18–19, 21–23.

232. 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 reveals, but social justice for families is a moral theme. Moreover, the Left must also be mindful of recent research demonstrating that cognitive functioning may play a significant role in political attitude, and thus should focus on finding common ground rather than demanding “conversion” of position. *See, e.g.,* Michael D. Dodd et al., *The Political Left Rolls with the Good and the Political Right Confronts the Bad: Connecting Physiology and Cognition to Preferences*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B 640, 640 (2012), available at <http://rstb.royalsocietypublishing.org/content/367/1589/640.full.pdf> (finding that left-leaning individuals prefer pleasing images while right-leaning individuals prefer unpleasant images); Scott Eidelman et al., *Low-Effort Thought Promotes Political Conservatism*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 808, 808–09, 815, 817 (2012) (“[P]olitical conservatism is promoted when people rely on low-effort thinking. When effortful, deliberate responding is disrupted or disengaged, thought processes become quick and efficient; these conditions promote conservative ideology. . . . [L]ow-effort thought might promote political conservatism because its concepts are easier to process, and processing fluency increases attitude endorsement. . . . Four studies support our assertion that low-effort thinking promotes political conservatism. . . . Our findings suggest that conservative ways of thinking are basic, normal, and perhaps natural.” (citation omitted)); Peter K. Hatemi et al., *Genetic and Environmental Transmission of Political Attitudes over a Life Time*, 71 J. POL. 1141, 1141 (2009) (“[A]t the point of early adulthood (in the early 20s), for those who left their parental home, there is evidence of a sizeable genetic influence on political attitudes which remains stable throughout adult life.”); Erik G. Helzer & David A. Pizarro, *Dirty Liberals! Reminders of Physical Cleanliness Influence Moral and Political Attitudes*, 22 PSYCHOL. SCI. 517, 517 (2011) (“[R]eminders of physical purity influence specific moral judgments regarding behaviors in the sexual domain as well as broad political attitudes.”); Ryota Kanai et al., *Political Orientations Are Correlated with Brain Structure in Young Adults*, 21 CURRENT BIOLOGY 677, 677–79 (2011) (finding that left-leaning individuals are more tolerant of uncertainty while conservatives have greater sensitivity to fear as demonstrated in different parts of the brain); Natalie J. Shook & Russell H. Fazio, *Political Ideology, Exploration of Novel Stimuli, and Attitude Formation*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 995, 995–96 (2009) (stating that, compared to liberals, conservatives are less open to new experiences and learn better from negative stimuli than positive stimuli); Jacob M. Vigil, *Political Leanings Vary with Facial Expression Processing and Psychosocial Functioning*, 13 GROUP PROCESSES & INTERGROUP REL. 547, 552 (2010) (“Republican sympathizers were more likely to interpret the faces as signaling a threatening expression . . . as compared to Democrat sympathizers Group differences were also found for dominance perceptions, . . . whereby Republican sympathizers were more likely to perceive the faces as expressing dominant emotions . . . than

One way to re-engage the middle class is to discuss the value of human life. Rather than pour political energy into birth control and abortion (both important and necessary social policies—but also potentially alienating issues amongst the religious middle class), we should focus on the need to invest in children from the start. Recall, this study shows a strong correlation between DOMA states and its citizens reporting conservatism and religion as an important part of daily life.²³³ Thus, a discussion of policy reform must reframe the discussion in such a way that is respectful to the religious and moral views of the middle class; for example, prioritize prenatal and early childhood care.

By adopting a “trickle up” policy, money invested in children can mitigate some of the weak income levels of their parents.²³⁴ And how do we pay for these investments? Revise the tax code to address the massive and growing economic injustice in this country. Government may not be able to dictate the ratio of pay between worker and CEO, but government can redistribute resources and income through tax policy.²³⁵ The earned income tax credit is one of the most effective tax policies to benefit families.²³⁶

One highly effective investment is supporting low-income parents in developing strong relationships with their children. Research demon-

were Democrat sympathizers . . .”); Darren M. Schreiber et al., *Red Brain, Blue Brain: Evaluative Processes Differ in Democrats and Republicans* 2–3 (2009) (unpublished APSA Toronto meeting paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451867 (“[I]t appears in our experiment that Republican participants, when making a risky choice, are predominantly externally oriented, reacting to the fear-related processes with a tangible potential external consequence. In comparison, risky decisions made by Democratic participants appear to be associated with monitoring how the selection of a risky response might feel internally.”); Kevin B. Smith et al., *Disgust Sensitivity and the Neurophysiology of Left-Right Political Orientations*, PLOS ONE (Oct. 19, 2011), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0025552> (“[I]ndividuals with marked involuntary physiological responses to disgusting images [measured by change in mean skin conductance], such as of a man eating a large mouthful of writhing worms, are more likely to self-identify as conservative and, especially, to oppose gay marriage than are individuals with more muted physiological responses to the same images.”).

233. See *supra* Part I.C.

234. This Article offers a couple of the multitude of policies that will need addressing. Welfare reform, for example, demands significant attention if poor children are to gain access to resources that mirror children in two-parent households. Greg Kaufmann, *This Week in Poverty: The Invisibles in Mississippi and the US*, NATION (Sept. 28, 2012, 09:01 EST), <http://www.thenation.com/blog/170222/week-poverty-invisibles-mississippi-and-us#>. Social security reform represents another area that significantly impacts poor children. Christopher R. Tamborini et al., *A Profile of Social Security Child Beneficiaries and Their Families: Sociodemographic and Economic Characteristics*, 71 SOC. SECURITY BULL. 1, 1, 11 (2011), available at <http://www.ssa.gov/policy/docs/ssb/v71n1/v71n1p1.html>.

235. A report by the Center on Budget and Policy Priorities identified some actions that could improve the lives of the poor and reduce inequality. First among them was reforming state tax policy to make it progressive rather than regressive. ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POLICY PRIORITIES, ECON. POLICY INST., PULLING APART: A STATE-BY-STATE ANALYSIS OF INCOME TRENDS 10, 52–54 (2012), available at <http://www.cbpp.org/files/11-15-12sfp.pdf>. Next, improve unemployment insurance and raise and index the minimum wage. *Id.* at 10, 49–51.

236. CHUCK MARR & CHYE-CHING HUANG, CTR. ON BUDGET & POLICY PRIORITIES, EARNED INCOME TAX CREDIT PROMOTES WORK, ENCOURAGES CHILDREN’S SUCCESS AT SCHOOL, RESEARCH FINDS 1–2 (2014), available at <http://www.cbpp.org/files/6-26-12tax.pdf>.

strates that the characteristics necessary for a child's success in life are not based on genetics, but on brain chemistry.²³⁷ Children who grow up under chronic stress are less likely to possess strong executive functioning.²³⁸ Executive functioning is a key predictor of a child's ability to succeed in school.²³⁹ Yet, chronic stress is strongly correlated with living in poverty.²⁴⁰ Thus, it would appear that poor children are destined to repeat the cycle of poverty. Not so.

A fascinating study measuring the effects of environmental stress on children found that their cortisol levels—a hormonal response to stress—spike when they experienced stress.²⁴¹ However, a child's cortisol level did not spike when encountering a stressful environment if the parent was attentive and responsive to the child.²⁴² In other words, parents who can develop nurturing relationships with their children can mitigate the effects of stress associated with living in a harsh environment, and in turn, increase their children's executive functioning and ability to succeed in school.²⁴³

Thus, neuroscientists don't point to a particular type of family form to ensure a child's chances of success, but rather a particular type of *parent-child* relationship.²⁴⁴ One study revealed a 77% success rate at predicting whether a child would graduate from high school based on the parental care the child received in his or her early years.²⁴⁵ As expected, though, developing these parenting skills in a harsh environment is not an easy task. Such programs exist, but demand an investment in resources. Early childhood programs like Head Start, long considered one of the most successful federal government "War on Poverty" programs created, works with parents to support family stability.²⁴⁶ One forty-year longitudinal study that followed children into adulthood who had attended the Perry Preschool Project in a poverty-stricken neighborhood in Michigan, found that the program led to profound social and economic benefits.²⁴⁷ The graduates of the preschool program were "more likely to

237. Gary W. Evans & Michelle A. Schamberg, *Childhood Poverty, Chronic Stress, and Adult Working Memory*, 16 PROC. NAT'L ACAD. SCI. U.S. 6545, 6545, 6548 (2009).

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

239. *See* TOUGH, *supra* note 238, at 18.

240. *Id.* at 20.

241. Clancy Blair et al., *Salivary Cortisol Mediates Effects of Poverty and Parenting on Executive Functions in Early Childhood*, 82 CHILD DEV. 1970, 1970, 1979 (2011).

242. *Id.* at 1970, 1978–80.

243. *See id.*

244. *See id.*

245. L. ALAN SROUFE ET AL., *THE DEVELOPMENT OF THE PERSON: THE MINNESOTA STUDY OF RISK AND ADAPTATION FROM BIRTH TO ADULTHOOD* 210–11 (2005).

246. *See Head Start of Morris County, NJ*, HEAD START COMMUNITY PROGRAM MORRIS COUNTY, INC., <http://headstartmc.org/> (last visited Apr. 13, 2014).

247. TOUGH, *supra* note 238, at xix–xx.

graduate from high school, more likely to be employed at age twenty-seven, more likely to be earning more than twenty-five thousand dollars a year at age forty, less likely ever to have been arrested, and less likely to have spent time on welfare” than children who had not attended the program.²⁴⁸ Recall that education and income were significant predictors of family stability.²⁴⁹ Thus, the cycle of family instability that seems to plague poor families is not inevitable.

We do not need to reinvent the wheel. It can seem overwhelming and hopeless to believe that any kind of meaningful redistribution of resources is likely to occur. In fact, it may appear naïve to believe that even modest increased funding for social support networks is possible in our current economic climate. Yet, research shows that this kind of resource investment actually yields tangible returns.²⁵⁰ Heckman analyzed the Perry Preschool Project and found that for every dollar invested in the program, a yield of seven to twelve dollars found its way into the economy.²⁵¹ These children developed non-cognitive skills like curiosity, social fluidity, and social control that served them well throughout life.²⁵² These are the same skills mirrored in affluent family structures, which contribute to a child’s success in life.²⁵³ Institutional support at the macro level, though, will not succeed alone in creating family stability. At the micro level, a cultural shift in individual interactions must occur—the focus of the next section.

2. Renewing the Cultural Value of Respect

The second element that must be the focus of attention if the family, in whatever form, 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.²⁵⁴ But even more pragmatically, we should interact with our political, religious, and socioeconomic plurali-

248. *Id.* at xx.

249. *See supra* Part I.D.

250. TOUGH, *supra* note 238, at 196.

251. *Id.*

252. *Id.* at xx.

253. *See id.* at 76.

254. Something very wrong is present in a culture in which the media pays an individual 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.” *CNN: Fire Erick Erickson*, ULTRA VIOLET, <http://act.weareultraviolet.org/sign/erickson/?source=so%3E> (last visited Apr. 13, 2014) (quoting Erick Erickson, TWITTER (Sept. 4, 2012, 5:31 PM), <https://twitter.com/EWErickson/status/243144183529996288>) (internal quotation marks omitted). 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 a slut. Jack Mirkinson, *Rush Limbaugh: Sandra Fluke, Woman Denied Right to Speak at Contraception Hearing, a ‘Slut,’* HUFFINGTON POST (Feb. 29, 2012, 9:26 PM), http://www.huffingtonpost.com/2012/02/29/rush-limbaugh-sandra-fluke-slut_n_1311640.html.

ties with respect. As Harvard political philosopher Michael Sandel observed, “a better way to mutual respect is to engage directly with the moral convictions citizens bring to public life, rather than to require that people leave their deepest moral convictions outside politics before they enter.”²⁵⁵ Indeed, we should interact with children and parents with respect because structural reform is not enough. Interpersonal behaviors matter too.

Research reveals that the concept of respect, more so than any other traditional measure of relationship success, determines relationship satisfaction—more so than love, likeability, personality, or attachment.²⁵⁶ In Frei and Shaver’s study, the results showed that, regardless of whether respondents were considering what respect means for the general public or for a romantic partner, five key concepts emerged.²⁵⁷ Respect was associated with a person who had good morals, was considerate, listened, was honest, and was accepting of other viewpoints.²⁵⁸ Moreover, the researchers observed that the practice of respect actually engendered more respect.²⁵⁹ Other research by Sara Lawrence-Lightfoot demonstrated that respect brought reciprocal benefits.²⁶⁰ Based on her research results, she encouraged a reformulation of the concept of respect not as something accorded to someone in power, but rather grounded in empathy and connectedness in a place of equality—regardless of each party’s social or economic status.²⁶¹ All the researchers agreed that respect was the opposite of contempt.²⁶²

Reinvigorating the concept of respect may better serve us in moving towards a policy that supports social structures that will promote family stability. However, respect must operate at both the individual and group level in order for the necessary individual and social structural pieces to successfully coalesce. As Coontz observed, “The problem is not to berate people for abandoning past family values, nor to exhort them to adopt better values in the future—the problem is to build the institutions and social support networks that allow people to act on their best values rather than on their worst ones.”²⁶³

255. Michael Sandel, Anne T. & Robert M. Bass Professor of Gov’t, Harvard Univ., Talk presented at official TED Conference: The Lost Art of Democratic Debate (Feb. 2010), available at http://www.ted.com/talks/michael_sandel_the_lost_art_of_democratic_debate.html.

256. Jennifer R. Frei & Phillip R. Shaver, *Respect in Close Relationships: Prototype Definition, Self-Report Assessment, and Initial Correlates*, 9 PERS. RELATIONSHIPS 121, 135 (2002).

257. *Id.* at 125.

258. *Id.* at 125, 128.

259. *Id.* at 122, 128.

260. SARA LAWRENCE-LIGHTFOOT, RESPECT: AN EXPLORATION 9–10 (2000).

261. *Id.*

262. Frei & Shaver, *supra* note 256, at 121–22.

263. COONTZ, *supra* note 179, at 22.

CONCLUSION

This Article has explored the extent to which state DOMAs are associated with their intended objective of increasing family stability. The goal of the Article is to move the discourse and political-legal analysis beyond whether DOMAs can promote family stability (they do not) to considering means for achieving family stability for *all* family types within a broad moral framework in a post-DOMA America. It may be that those in power seek to maintain their power through the use of moral panics, but the discourse of same-sex marriage as a threat to “traditional families” seems off the mark. It is a distraction. After all, polls now show that from 1988 to 2010, the gap between support of or opposition to gay marriage has narrowed rapidly and significantly;²⁶⁴ but the gap between well-to-do versus hard-off and family stability and family volatility has widened considerably.²⁶⁵ Other industrial countries have managed to welcome other family forms—including same-sex marriage—and yet maintain family stability through the use of child-centered economic and social policies.²⁶⁶ Our goal should be to develop a policy that lets families thrive.²⁶⁷ Marriage should not be a social objective in and of itself, conceived from a singular hetero-normative notion. Rather, marriage should be one possible outcome of many from within an evolving family and child-oriented policy.²⁶⁸

264. Nate Silver, *Opinion on Same-Sex Marriage Appears to Shift at Accelerated Pace*, FIVETHIRTYEIGHTPOLITICS (Aug. 12, 2010, 12:44 PM), <http://www.fivethirtyeight.com/2010/08/opinion-on-same-sex-marriage-appears-to.html>. In fact, 51% of Americans are now in favor of same-sex marriage, and 72% believe that it is inevitable that it will become the law of the land. PEW RESEARCH CTR., IN GAY MARRIAGE DEBATE, BOTH SUPPORTERS AND OPPONENTS SEE LEGAL RECOGNITION AS ‘INEVITABLE’ 1 (2013), available at <http://www.people-press.org/files/legacy-pdf/06-06-13%20LGBT%20General%20Public%20Release.pdf>.

265. STIGLITZ, *supra* note 196, at 19; *see supra* Part I.B.1.

266. Sixty percent of Norwegian families are married couples with children, despite allowing for same-sex marriage. Fifty-five percent of Finnish families include married couples with children, despite allowing for same-sex marriage. Sixty-three percent of Canadian families have married parents with children, despite allowing for same-sex marriage. Seventy-eight percent of families in the Netherlands comprise of married parents with children, despite allowing for same-sex marriage. Fifty-one percent of Icelandic families contain married parents with children, despite allowing for same-sex marriage. Various family structures thrive and do not threaten “traditional” family models because these countries have far more generous economic and social policies devoted to children.

267. *See generally* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 10 (2008); Clare Huntington, Flourishing Families: Harnessing Law to Foster Strong, Stable, Positive Relationships (unpublished manuscript), available at <http://www.law.ubalt.edu/centers/cafi/pdf/Huntington.pdf>.

268. The *Windsor* decision moves us one small step closer in that direction. *See United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

APPENDIX A

MARRIAGE CALCULATED SLOPES FOR EACH STATE

State	Pre	Post
AK		
AL	-0.190	-0.240
AR	-0.371	-0.486
AZ	-0.201	0.300
CA	0.033	0.000
CO	-0.143	-0.080
CT	0.011	0.060
DC	-0.286	0.770
DE	-0.132	-0.170
FL	-0.085	-0.200
GA	-0.190	-0.139
HI	0.625	-1.220
IA	-0.075	
ID	-0.200	-0.420
IL	-0.193	-0.140
IN	-0.164	-0.050
KS	-0.146	-0.120
KY	-0.360	-0.251
LA		
MA	0.029	-0.090
MD	-0.111	-0.250
ME	-0.064	-0.170
MI	-0.126	-0.131
MN	-0.154	-0.190
MO	-0.200	-0.109
MS	-0.306	-0.214
MT	0.006	-0.006
NC	-0.193	-0.180
ND	0.043	-0.071
NE		
NH	-0.179	-0.040
NJ	-0.050	-0.120
NM	-0.218	0.120
NV	-4.730	-4.012

NY	-0.104	-0.110
OH	-0.271	-0.146
OK		0.039
OR	0.026	-0.183
PA	-0.036	-0.120
RI	-0.057	-0.210
SC	-0.401	-0.150
SD	-0.174	-0.190
TN	-0.705	-0.490
TX	-0.275	-0.130
UT	-0.003	-0.271
VA	-0.173	-0.240
VT	-0.164	0.160
WA	-0.121	-0.140
WI	-0.106	-0.150
WV	-0.111	-0.180
WY	-0.139	-0.440

APPENDIX B

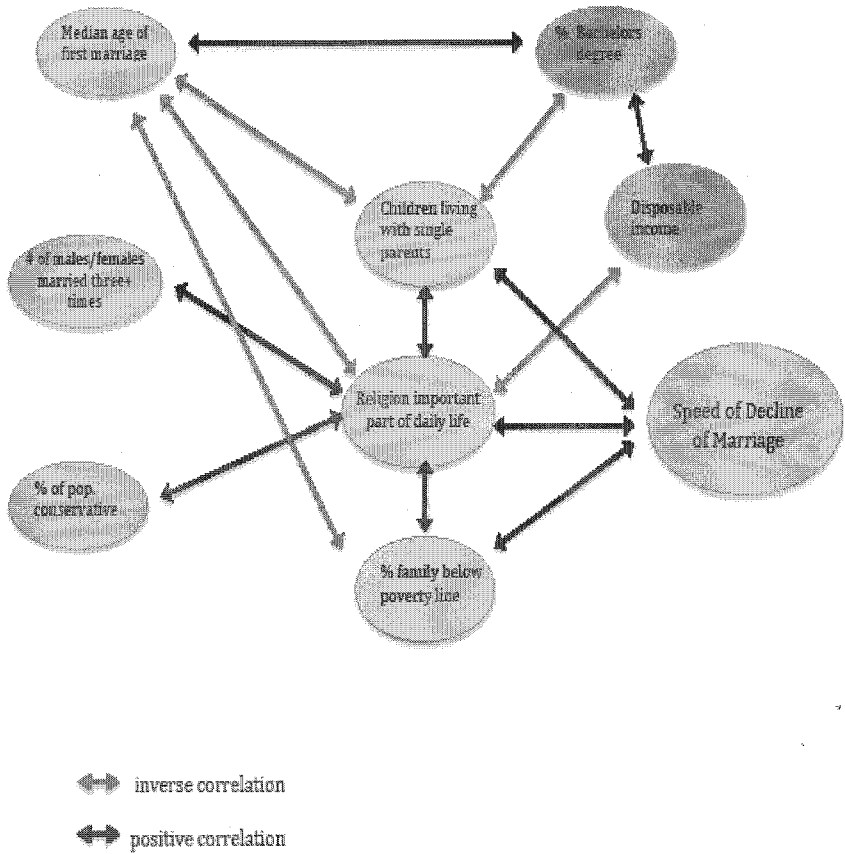
DIVORCE SLOPES CALCULATED FOR EACH STATE

State	Pre	Post
AK		
AL	-0.123	-0.020
AR	-0.049	-0.063
AZ	-0.081	-0.100
CA		
CO	-0.071	-0.050
CT	-0.014	-0.060
DC	-0.304	0.240
DE	-0.089	-0.070
FL	-0.091	0.200
GA	-0.260	
HI	-0.020	
IA	-0.096	
ID	-0.075	0.110
IL	-0.132	0.010
IN		
KS	-0.057	0.140
KY	-0.091	-0.049
LA		
MA	-0.050	0.030
MD	-0.011	-0.050
ME	-0.168	-0.010
MI	-0.080	-0.003
MN	-0.077	
MO	-0.143	0.040
MS	-0.109	-0.080
MT	0.111	-0.117
NC	-0.089	-0.060
ND	-0.229	0.011
NE		
NH	-0.196	-0.070
NJ	-0.018	-0.030
NM	-0.025	-0.090
NV	-0.750	-0.128

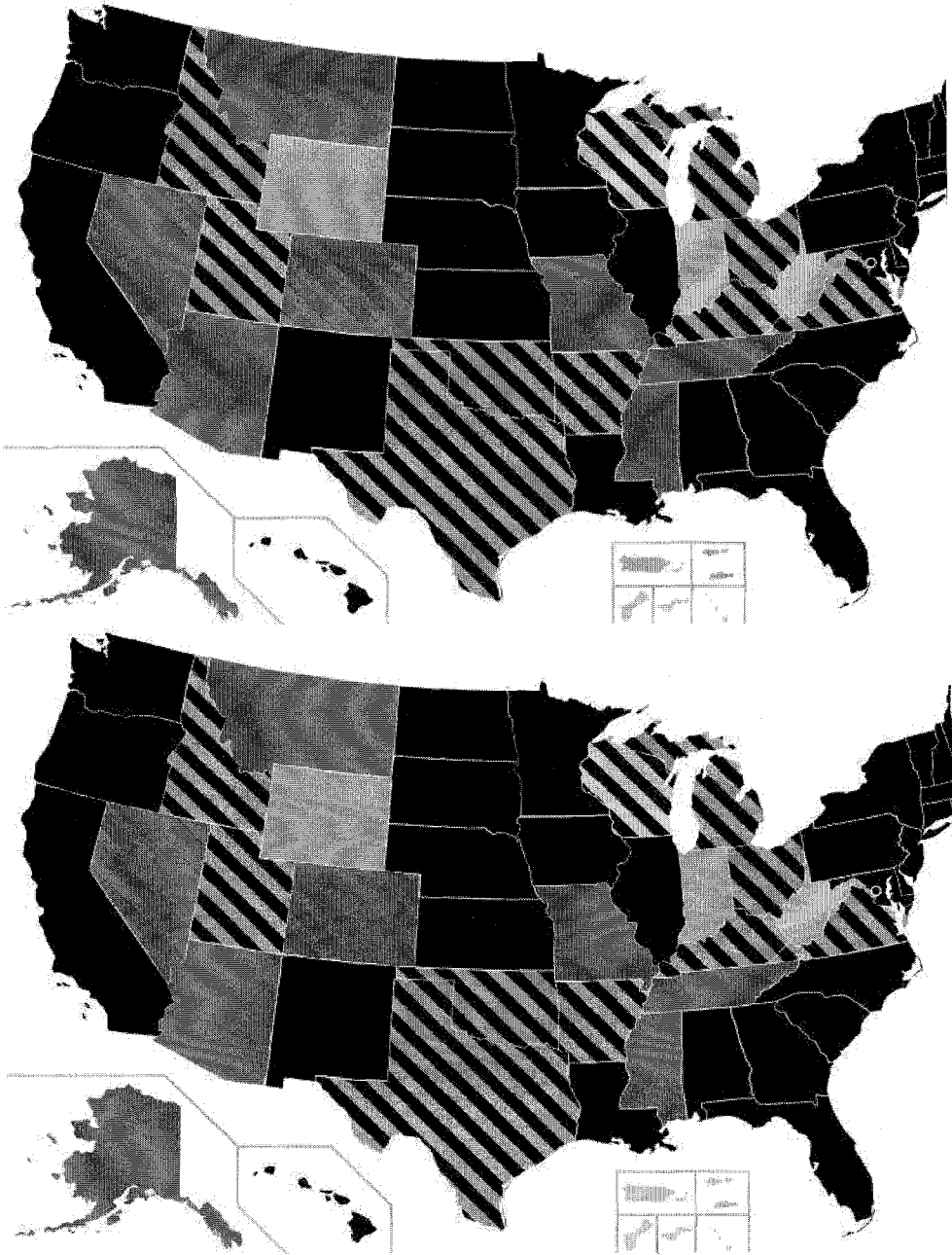
NY	-0.054	-0.070
OH	-0.086	-0.034
OK		-0.025
OR	-0.120	-0.037
PA	-0.093	-0.030
RI	0.043	0.060
SC	-0.144	0.050
SD	-0.094	0.110
TN	-0.189	-0.060
TX	-0.089	-0.020
UT	-0.014	-0.071
VA	-0.064	-0.010
VT	-0.111	-0.010
WA	-0.100	0.010
WI	-0.043	0.020
WV	0.014	0.020
WY	-0.111	0.020

APPENDIX C

Fig. 1 Model of Variables Correlated Directly and Indirectly with Declining Marriage



APPENDIX D



APPENDIX E

	Amendment	Statutory	Civil Unions	Domestic Partnership	Same-Sex
AK	1996	1996			
AL	2006	1998			
AR	2004	2005			
AZ	2008	1996			
CA	2008	2000		2007	
CO	2006	2006	2013	2009	
CT					2009
DC					2010
DE		2009	2011		2013
FL	2008	1997			
GA	2004	1996			
HI	1998		2012		
IA					2009
ID	2006	1996			
IL		2006	2011		
IN		1997			
KS	2005				
KY	2004	1998			
LA	2004	1999			
MA					2003
MD		2006			2012
ME		1997		2004	2012
MI	2004	1996			
MN		1997			
MO	2004	2001			
MS	2004				
MT	2004	1997			
NC	2012	1996			
ND	2004	1997			

NE	2000				
NH					2010
NJ			2007		
NM					Other Jdx
NV	2002			2009	2011
NY					
OH	2004	2004			
OK	2004	1997			
OR	2004			2011	
PA		1996			
RI			2011		2013
SC	2006	1996			
SD	2006	2000			
TN	2006	1996			
TX	2005	2003			
UT	2004	2004			
VA	2006	2004			
VT			2000		2009
WA		1998		2009	2012
WI	2007	2009		2013	
WV		2001			
WY		1977			