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IT BECAME NECESSARY TO DESTROY MARRIAGE IN ORDER TO DEFEND IT

JUNE CARBONE[†]

Deidre Bowen's article, *All that Heaven Will Allow: A Statistical Analysis of the Co-existence of Same Sex Marriage and Gay Matrimonial Bans*,¹ simultaneously offers two things. First, she presents an empirical analysis that can be summarized as "defense of marriage—you must be kidding." As she points out, when states claim to be *defending* marriage by banning same-sex marriage, they distract attention from the forces genuinely undermining family stability. Second, she provides a profound, unsettling and not quite fully developed set of implications that can be stated as "leave family law to the states—you *really* must be out of your mind." The two aspects of her piece—the irrelevance of the purported defense of marriage and the role of the states in making things worse—are intricately linked.

This Essay will, first, applaud Bowen's documentation of the non-existent relationship between Defense of Marriage Act legislation (mini-DOMAs) and family stability. As she shows, the states that enacted mini-DOMAs had greater family instability than non-enacting states before the laws were passed, and the new laws, unsurprisingly, did nothing to make things better. Second, this Essay will consider the implications of the regional variations Bowen identifies. She shows that the states that enacted the mini-DOMAs tend to be poorer, less educated, and more religious than states that did not act, and these states in fact have reasons to be more concerned about family stability than regions that are more prosperous. Third, this Essay will argue that these regional variations in family patterns, which might otherwise suggest deference to the states, in fact counsel hesitation about too much reliance on federalism. Bowen explains how political demagogues exploit the anxiety family change creates in order to create support for candidates and policies that often have little (or worse, counterproductive) impact on the underlying problems.² This cynical creation of moral panic, however, contributes to re-

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1. Deirdre Bowen, *All that Heaven Will Allow: A Statistical Analysis of the Co-existence of Same Sex Marriage and Gay Matrimonial Bans*, 91 DENV. U. L. REV (forthcoming 2013).

2. Indeed, Karl Rove, President George W. Bush's chief political strategist, was instrumental in engineering placement of many of the mini-DOMA's on the ballot in 2004 in an effort to boost the turnout of voters who would then vote for Bush in a close presidential election. *See generally* JAMES MOORE & WADE SLATER, BUSH'S BRAIN: HOW KARL ROVE MADE GEORGE W. BUSH PRESIDENTIAL (2003) (describing Rove's role as Bush's political strategist); JAMES MOORE & WADE SLATER, THE ARCHITECT: KARL ROVE AND THE DREAM OF ABSOLUTE POWER, (2007).

inforcing cycles of needless legislation and new efforts to find convenient scapegoats. Only federal interventions are likely to address the underlying causes of economic decline and protect the politically marginalized; federalism, in contrast, conceals rather than illuminates the genuine issues underlying family change. This Essay will conclude that Bowen's proposal that family policy focus on children rather than marriage, while certainly sensible, is unlikely to succeed. Instead, family policy is likely to make progress only if a new political coalition directly takes on the economic forces that have worsened inequality—and family instability—in the first place.

I. SHOWING THAT THE “DEFENSE OF MARRIAGE” IS AN OXYMORON

Empiricists often get no respect. They must master statistical techniques beyond the understanding of most legal scholars and then use the techniques to prove things we either suspected all along or that we refuse to believe when they contradict our firmly held beliefs.³ Nonetheless, there are times when proving what many of us suspected is both important and satisfying. The first part of Bowen's article, which examines the impact of state efforts to “defend” marriage on the incidence of marriage and divorce, is just such a satisfying study. It provides empirical evidence of what many of us understood from the outset: The state constitutional amendments, statutes, and propositions banning same-sex marriage were unlikely to have much impact on family patterns and are better understood as cynical efforts to mobilize conservative voters.⁴ Bowen's notable contribution in this article is to document the impact of these measures now that enough time has passed to measure their effect.⁵

3. See Dan M. Kahan & Donald Braman, *Cultural Cognition & Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (analyzing how motivated readers interpret empirical data in ways that conform to their initial beliefs); Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

4. See Bowen, *supra* note 2 at 34, 41, (explaining the role of “moral entrepreneurs” and “moral panics”). This does not necessarily mean, however, that all opponents of same-sex marriage are disingenuous in their beliefs. Instead, it recognizes the existence of a coalition between cynical strategists like Karl Rove, motivated principally by a desire to influence political turnout, and those who oppose same-sex marriage for other reasons. See generally June Carbone, *What Does Bristol Palin have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313 (2011). One of the ways in which cultural opponents talk past each other is in the nature of the justifications they advance for their positions. See, e.g., Kahan & Braman, *supra* note 4. Social conservatives tend to oppose same-sex marriage because God forbids it, society has not traditionally recognized same-sex relationships, or they view it as unnatural. In short, they argue that same-sex intimacy is “wrong.” Indeed, in *United States v. Windsor*, Justice Scalia repeated his views that “the Constitution does not forbid the government to enforce traditional moral and sexual norms” precisely because they are traditional norms. *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting); see also *Lawrence v. Texas*, 539 U. S. 558, 599 (2003) (SCALIA, J., dissenting). On the other side, many would reject religious commands, tradition per se, and revulsion as grounds for state action. See Gerard Bradley, *Stand and Fight: Don't Take Gay Marriage Lying Down*, NAT'L REV. (July 28, 2003), available at <http://www.nationalreview.com/node/211453/print> (arguing that once opponents of same-sex marriage are required to provide reasons—as opposed to appeals to religion, tradition, or disgust—for their opposition, the battle will be lost).

5. Bowen, *supra* note 2 at 30. Of course, many still deny that such analyses are possible. See, e.g., Justice Alito's dissent in *Windsor*, which states that:

She provides a compelling statistical analysis that shows that following the enactment of mini-DOMAs, marriage rates fell further and divorce rates rose faster in states that adopted such measures than in states that took no such action (although she acknowledges the differences were not statistically significant).⁶ The legislation appears to have had little impact on marriage or divorce, and to the extent Bowen's figures suggest any correlation, they would be counterproductive.⁷

II. IDENTIFYING THE REAL ISSUE UNDERLYING FAMILY CHANGE: POVERTY AND INEQUALITY

Bowen, in fact, makes no claim that the mini-DOMAs had any impact on family patterns. Instead, she documents the far more important relationship between poverty, low education, and early marriage on family instability.⁸ She concludes that “the decreasing relevancy of marriage and the larger divorce rates in DOMA states for those individuals who actually *are* married (and remarry) seem to be related directly with poverty and indirectly with educational and economic opportunities.”⁹ She also observes that it is an issue that neither party addressed in the 2012 election.¹⁰

In her article, Bowen understandably does not provide a full explanation for why factors such as poverty and the lack of economic opportunity affect the family. These changes are linked not just to poverty but to growing inequality and the decimation of stable blue collar employment. Substantial research shows that increased societal disparities, not just low wages, account for some of the family changes.¹¹ Economists

Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time. We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.

Windsor, *supra* note 5, at 2715. Alito suggests that those who oppose same-sex marriage do so in part because of the mere possibility of unintended consequences, such as weakening marriage, consequences that are difficult to measure or predict. *Id.*

6. Bowen concludes that “non-DOMA states showed a smaller decrease in marriage rates and a greater decrease in divorce rates compared with states that passed DOMA legislation.” Bowen, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (citing Patrick H. Caddell & Douglas E. Schoen, *Romney, Obama Must Address Crisis of U.S. Families*, OPINION POLITICO (June 12, 2012, 9:27 PM), <http://www.politico.com/news/stories/0612/77338.html>).

11. See generally JUNE CARBONE & NAOMI CAHN, *FAMILY CLASSES: WHAT IS REALLY HAPPENING TO THE AMERICAN FAMILY* (forthcoming 2013–14) (arguing that greater inequality segments marriage markets, writes off a high percentage of men at the bottom as effectively unmarriageable, and alters the way men and women matchup); RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2009) (showing in a cross-cultural comparison that societies with greater inequality tend to have higher teen birth rates).

have demonstrated, for example, that teen birth rates correlate with the level of inequality between the incomes at the fiftieth and tenth percentiles, indicating that optimism about the future influences family patterns.¹² The result produces cycles of increasing inequality as greater disparities skew family form, and family form influences the resources available for investment in the next generation.¹³

Bowen offers her empirical analysis of the link between economic conditions and family patterns less as a critique of family developments than to explain the political role of the mini-DOMAs. She demonstrates how “moral entrepreneurs” exploit public anxiety for their own ends. First, they define the problem, in this case the genuine decline of marriage and increase in single-parent families that decrease the resources available to children.¹⁴ Second, they identify scapegoats, such as same-sex couples, and arouse public fears about the supposed threat from these scapegoats.¹⁵ Third, they use such fears to advance their own ends, which often have little to do with the genuine issue—increasing inequality and the decline of the middle class—and no hope of making it better, whether the issue is defined in terms of the decline of marriage or the increased acceptance of same-sex relationships.¹⁶ Indeed, the same parties associated with the opposition to same-sex marriage also champion policies—evisceration of the tax base, restriction of voting rights, disinvestment in infrastructure and higher education, and slashing programs for children—likely to make the economy and the plight of the poor and the middle class even worse.¹⁷ As these policies (including the mini-DOMAs) fail, the failure further exacerbates understandable public con-

See also Eric D. Gould & M. Daniele Paserman, *Waiting for Mr. Right: Rising Inequality and Declining Marriage Rates*, 53(2) J. URB. ECON. 257, 257–81 (2003).

12. Melissa Kearney & Phillip B. Levine, *Income Inequality and Early Nonmarital Childbearing: An Economic Exploration of the Culture of Despair* (Nat'l Bureau of Econ. Research, Working Paper No. 17157, 2011); see also Melissa Kearney & Phillip B. Levine, *Explaining Recent Trends in the U.S. Teen Birth Rate* (Nat'l Bureau of Econ. Research, Working Paper No. 17964, 2012); Melissa Kearney & Phillip B. Levine, *Why Is the Teen Birth Rate in the United States so High and Why Does It Matter?* (Nat'l Bureau of Econ. Research, Working Paper No. 17965, 2012).

13. See, e.g., Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, CTR. FOR EDUC. POLICY ANALYSIS, STANFORD UNIV. (July 2011), <http://cepa.stanford.edu/sites/default/files/reardon%20whither%20opportunity%20-%20chapter%205.pdf> (on the relationship between the growing gap in investment in children and children's performance).

14. An intense debate exists about whether marriage is an important social good in its own right, but few dispute that the emergence of marriage as a marker of class, which skews the resources available to children, contributes to growing inequality. See Bowen, *supra* note 2.

15. *Id.*

16. *Id.* For an account of such actions in the 2004 presidential election, see Todd Donovan, Caroline Tolbert, Daniel Smith & Janine Parry, *Did Gay Marriage Elect George W. Bush?* 5 (State Politics and Policy Conference, Jan. 2005), available at http://polisci.msu.edu/sppc2005/papers/fripm/dtsp_sppc05.pdf (providing an account of such actions in the 2004 presidential election).

17. See, e.g., *A Comparison of Obama and Romney's Positions on Top Issues*, STAR-TELEGRAM (Nov. 4, 2012), <http://www.star-telegram.com/2012/11/03/4386310/a-comparison-of-obama-and-romneys.html>.

cern, setting the stage for new attack on the powerless, the unpopular, and the marginalized.¹⁸ In this setting, the demonstrated ineffectiveness of legislation, such as the mini-DOMAs, serves to make the ground that much more fertile for the demagoguery that inspired it in the first place.

III. RECONSIDERING FEDERALISM

Bowen's analysis has potentially profound implications for federalism, in both economical and political terms. First, it indicates that the states genuinely face different circumstances in dealing with the family. If all other things were equal, this would support leaving family law to the states. In the majority opinion in *United States v. Windsor*, Justice Kennedy approached, but then backed off, federalism as a justification for the opinion.¹⁹ Bowen's analysis, without addressing the constitutional issue directly, would seem to support such an approach. Yet, at the core of the correlation she shows between economic circumstances and the family is a dynamic with the potential to produce reinforcing cycles of winners and losers. The winners in an era of growing inequality are those states that were richer to begin with and that used their riches to invest in the new economy. Massachusetts, for example, has long been a leader in research and higher education, and it is a tech center today that attracts highly educated migrants.²⁰ Bowen's analysis, which links both support for mini-DOMAs and higher rates of divorce to poverty and lack of education, makes it unsurprising therefore that Massachusetts became one of the first states to adopt same-sex marriage. What Bowen doesn't say is that the same analysis suggests why Massachusetts will continue to be wealthier than the states enacting defense of marriage measures, and the inequality among the states is likely to increase.²¹

This is true, in part, because the political dynamic Bowen identifies is likely to make things worse in enacting states for reasons that have nothing to do with marriage equality. In describing the role of the moral

18. *United States v. Windsor*, 133 S. Ct. 2675, 2691–92 (2013). Others have argued that economic decline creates a more fertile climate for such appeals. *See, e.g.*, MARKUS BRÜCKNER & HANS PETER GRÜNER, ECONOMIC GROWTH and THE RISE OF POLITICAL EXTREMISM: THEORY and EVIDENCE (March 2010), available at www.cepr.org/pubs/dps/DP7723.asp; Rory McVeigh & Maria-Elena D. Diaz, *Voting to Ban Same-Sex Marriage: Interests, Values, and Communities*, 74 AM. SOC. REV. 891 (2009) (linking strength of the vote for the mini-DOMAS to recent rises in crime or unemployment).

19. He concluded that it was unnecessary to reach the issue of whether the federal DOMA that precluded federal recognition of otherwise valid state marriages constituted an unconstitutional interference with state authority over the family. *Windsor*, 133 S. Ct. at 2692–96 (2013).

20. *See, e.g.*, Michael B. Sauter & Alexander E.M. Hess, *America's Best (and Worst) Educated States*, FOX BUSINESS (Oct. 15, 2012), <http://www.foxbusiness.com/personal-finance/2012/10/15/americas-best-and-worst-educated-states/> (showing Massachusetts has the highest number of college graduates).

21. Bowen, *supra* note 2. *See also* James K. Galbraith & J. Travis Hale, *The Evolution of Economic Inequality in the United States, 1969-2007: Evidence from Data on Inter-industrial Earnings and Inter-regional Incomes* (Univ. of Tex. Inequality Project, Working Paper No. 57), available at http://utip.gov.utexas.edu/papers/utip_57.pdf. (showing that income inequality is increasing among regions, with the technology and finance sectors showing the greatest gains).

entrepreneurs who promoted the mini-DOMAs for their own ends, she describes political leaders who have worked systematically to divert attention away from the economic changes remaking the American landscape.²² These moral entrepreneurs do not just target gays and lesbians. Although the Supreme Court struck down the federal legislation that blocked recognition of same-sex marriages in states that have authorized them, it also eviscerated the Voting Rights Act protection that opened the door to broader political participation in the states that tend to be the biggest supporters of traditional marriage.²³ This suggests that the dynamic Bowen identifies—well-funded moral entrepreneurs who use demagoguery to find new political scapegoats to deflect attention—will continue, even if same-sex marriage ultimately wins out nationally. Republican Presidential candidate Mitt Romney, after all, was caught on tape before an audience of wealthy donors complaining about the 47% of Americans who were mooching off the rest.²⁴

Federalism, to the extent that it is defined in terms of deference to the states, is not likely to break the downward cycle exacerbating regional inequality. Instead, federal intervention, both to share the dividends that come from the successes of the wealthier states and to protect the politically powerless likely to be the victims of moral scapegoating, becomes even more critical to national well-being.

This means that Bowen's proposal to focus on the well-being of children rather than marriage cannot succeed on its own terms. It is hard to stem moral panics, generated by genuine fear of downward mobility, with reason or a nine-point plan. Instead, fighting the political dynamic that seeks out moral scapegoats requires identifying the real culprits underlying the cultural anxiety and creating new political coalitions. Such a coalition needs to take on the rise of the 1%, the weakening of the middle class, and the disappearance of well-paying jobs for the middle of American society.²⁵ If such a coalition were to prevail, generating increased support for children would shift from politically impossible to unremarkable; without a coalition committed to the middle of American society, neither protection of the politically marginalized nor improvement in family stability is likely to occur.

22. See, e.g., JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010) (arguing that greater inequality is a function of a political system that has become less responsive to the needs of the middle class and the poor).

23. See *Shelby County v. Holder*, 570 S. Ct. 2612, 2618–20 (2013); NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION & THE CREATION OF CULTURE (2010) (analyzing state views on same-sex marriage).

24. See David Corn, *SECRET VIDEO: Romney Tells Millionaire Donors What He REALLY Thinks of Obama Voters*, MOTHER JONES (Sept. 17, 2012), <http://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser>.

25. Indeed, Bowen acknowledges the criticism that liberals have failed to make class an issue, and more particularly failed to call those promoting the interests of the plutocracy to account. See Bowen, *supra* note 2.