

THE FUTURE OF THE FAMILY: THE SOCIAL AND LEGAL IMPACTS OF LEGALIZING SAME-SEX MARRIAGE

Lynn D. Wardle[†]

INTRODUCTION

In predicting the future of the family it is important to understand to the extent possible—and, hopefully, be able to explain and quantify—the likely social effects of judicial decisions that invalidate, enjoin, overturn, or otherwise substantially change existing legal rules regarding family relations. Predicting such doctrinal changes and the resulting social consequences is difficult and problematic as such changes depend upon so many dynamic variables. Trying to ascertain and evaluate such changes in family laws and the consequences thereof is not, however, irrelevant or insignificant, nor can it responsibly be avoided by persons concerned about the welfare of their children and grandchildren, and their families and society.

In the spirit of seeking to understand and to be prepared for, and to help our posterity to understand and to be prepared for the challenges that may face families and family members in the future, this paper briefly reviews evidence of the trends in marriage and family relations primarily in the United States and with a few global comparative observations and perspectives. Such knowledge may help lawmakers establish prudent legal policies that will help families and family members to enjoy the maximum security, joy, flourishing and fulfillment possible.

There is no credible dispute that marriage and family forms, structures, relationships, and meanings have changed and are changing significantly in American society—and, to a lesser extent, in some other countries as well. As both an effect and partial cause of these social changes, family law, likewise, is becoming more turbulent and more confused. Sorting out what is

[†] Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT, USA. I express appreciation for the contributions of my research assistants, especially Sully Bryan, for the research underlying parts of this paper. This paper was presented at the Symposium on the Future of the Family at the J. Reuben Clark Law School at Brigham Young University on October 10, 2014.

the policy of any particular state regarding the forms, structures, and relations that are legally protected within the umbrella of family relationships, in these times of turbulent transition in family law, is not always clear or simple. One purpose of this paper, pursued in Part I, is to provide an accurate description of the current status (as of April 2015) and recent history of intimate relationships that are recognized family relationships in the American states (and, to lesser extent, the various nations in the world).

Part II considers the unique benefits and characteristics of marriage that make it appropriate for states to give it special, unique, legal status. The obvious question today is whether and why traditional marriages deserve to be given special, advantageous treatment in the law. Considering the unparalleled contributions that such marriages make to the welfare and happiness of individuals, families, and society in general, the justification for such legal status should be obvious. Part II provides just an overview and a few examples of why male-female traditional marriages merit legal preferences above other kinds of intimate adult relationships.

Part of the cause of the legal, conceptual commotion about family relationships can be attributed to controversial judicial decisions mandating new definitions of family relationships and significantly altering the meaning of marriage and other family relationships that were established by the politically-accountable branches. Courts can be political instruments, and judges, pursing their own political preferences, can exceed the roles and responsibilities constitutionally allocated to “the least dangerous branch.”¹ Activist federal courts mostly have been driving the redefinition of family relationships by judicial decrees in this nation. However, not all progressive judicial decisions about family law fall into the error of illegitimate promotion of political agendas by the judiciary.² Some important judicial

1. See generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962); THE FEDERALIST Nos. 78–82 (Alexander Hamilton); THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITYAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY 1, 2 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

2. In this article, the term “progressive” is meant in reference to judicial decisions. See William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L. J. 1251, 1251–52 (2011); Geoffrey R. Stone & William P. Marshall, *The Framers’ Constitution*, DEMOCRACYJOURNAL.ORG, Summer 2011, at 61, 62–63, available at http://www.democracyjournal.org/pdf/21/the_framers_constitution.pdf. Constitutional interpretation “requires recognition of the judiciary’s unique strengths and weaknesses, a proper appreciation of the reasons for judicial review, and a respectful understanding of our nation’s most fundamental constitutional aspirations and how we hope to achieve them.” *Id.* at 66. Furthermore, “Progressives are correct to worry that the conservative account of constitutional interpretation has dominated the public discourse for the past 40 years.” Doug Kendall & Jim Ryan, *The Case for New Textualism*, DEMOCRACYJOURNAL.ORG, Summer 2011, at 66.

reform decisions about family laws and policies have facilitated, and can ease and enable, the progressive development of the law in legitimate and appropriate ways. Therefore, another core purpose of this paper is to explain and illustrate the distinction between legitimate judicial progressivism and illegitimate judicial activism; thus, Part III of this paper examines several historical examples of major changes in family law, which were influenced (or driven) by judicial rulings. It contrasts the contemporary “illegitimate” movement to legalize same-sex marriage with the legitimate and successful judicial decisions to invalidate anti-miscegenation laws, and to recognize “palimony”—financial interests of non-marital cohabitants. Then, it compares the same-sex marriage jurisprudence with the dubious and still-controversial Supreme Court decisions that legalized abortion-on-demand. It also contrasts the ongoing national legalization of same-sex marriage with the national legalization of no-fault divorce. The legalization of no-fault divorce may be the last profound change in the structure of American families and of family law to be adopted primarily by legislative processes. It is proof that the normal democratic processes can implement major changes in family law and family relations. Contrary to popular opinion, the legalization of no-fault divorce occurred in a relatively short time, in less than five years in most states, and less than a decade in all states.

Thus, Part III of this paper briefly reviews *Loving v. Virginia*,³ *Marvin v. Marvin*,⁴ and *Roe v. Wade*.⁵ These examples of profound, judicially-decreed changes in family law had immediate, long-lasting, and profound direct and indirect effects upon family relations and family law, and upon society in general. This paper notes the significant policy and structural implications of the decisions that have mandated the legalization of same-sex marriage. It distinguishes *Loving* and *Marvin* in some significant ways. It also compares and contrasts the judicial movement to legalize same-sex marriage with *Roe* (which involved criminal law). It will conclude that in some very critical ways, judicial legalization of same-sex marriage is more like *Roe* than *Marvin* or *Loving*, and that the most lasting, effective, and legitimate law reform will be achieved if we follow the legislative reform process used to legalize no-fault divorce.

Finally, to persons familiar with the allocation and reservations of governmental powers in the Constitution of the United States, it may seem strange that federal courts should be deciding legal policy regarding so profound and fundamental an issue of state marriage policy as whether the

3. *Loving v. Virginia*, 388 U.S. 1 (1967).

4. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

5. *Roe v. Wade*, 410 U.S. 113 (1973).

legal concept, definition, and meaning of marriage in a particular state should be revised to include couples of the same gender. Indeed, the legalization of same-sex marriage in some states by federal judicial decrees seems to fly in the face of fundamental federalism principles (concerning whether the states or the national government should regulate domestic relations) and separation of powers issues (concerning whether unelected, life-tenured judges rather than politically accountable legislatures should determine state marriage policies such as whether to legalize same-sex marriage), as well as core democratic theory (regarding who should formulate significant domestic relationship laws and policies, and how they should be formulated). This anomaly will be the subject of Part IV of this paper, which examines whether we have a situation now of “judges gone wild” in radically revising marriage laws to promote their own preferred vision of how marriage should be defined in regard to whether same-sex couples should be allowed to marry.

Part V provides a brief conclusion. It reminds us that the past truly is prologue, but the critical question is: which past? Which precedents will guide how courts approach (or avoid) the extremely controversial political questions underlying the current debate regarding whether same-sex marriage should be legalized, and, if so, by what processes, and with what influence by the American judiciary?

I. TRENDS AND DEVELOPMENTS EVIDENCING SIGNIFICANT CHANGES IN FAMILIES

The shape, structure, composition, and meaning of American families have changed significantly in the past half-century.⁶ Today, almost half of children in single-mother homes live with never-married mothers; four decades ago, that figure was only one in sixteen, a mere one-seventh of today’s figure.⁷ One reason for the dramatic rise in the number of children being raised without a father is because marriage rates are declining. Since 1950, the percentage of adults who are married has declined among Americans of all races. The most dramatic decline has occurred among African-American adults, of whom less than 40% are married today; but for all races combined, the downward trajectory has been the same, and the rate of married adults has fallen from the early sixties when nearly 70% of all

6. Much of the data reported in this paper comes from FamilyFacts.org, a subsidiary of The Heritage Foundation. *See generally* FAMILYFACTS.ORG, <http://familyfacts.org/about> (last visited Jan. 25, 2015).

7. *Almost Half of Children in Single-Mother Homes Live with Never-Married Mothers*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/145/almost-half-of-children-in-single-mother-homes-live-with-never-married-mothers> (last visited Apr. 2, 2015).

American adults were married, to only 52–55% of adults married today.⁸ While the overall decline in marriage rates is not huge (down from 1996 to 2009 by only 2% for men and only 3% for women),⁹ the reduction is consistent among those married once, twice, or ever.¹⁰

Other indicia of declining social respect for and standing of marriage confirm that marriage is no longer the golden rule, the honored rite of passage to adulthood.¹¹ For example, more unmarried women are having babies out of wedlock today than in the past, and the gap between the birth rate of married mothers and unmarried mothers has closed dramatically, from 156.6 for married women compared to 21.6 for unmarried women in 1960, to 85.7 for married women and 50.5 for unmarried women in 2009.¹² “Today, the marriage rate—the annual number of marriages per 1,000 unmarried women—is less than half of what it was four decades ago.”¹³ The proportion of married adults has decreased steadily and profoundly. The reduction in marriage rates for younger adults is also reflected in data showing that a larger proportion of women of all racial and ethnic groups have been married for longer (at least fifteen years) than in previous times.¹⁴ Fewer men and women had ever been married in 2009 than had ever been married in 1996.¹⁵ The percentage of men and women married by age twenty-five had declined for women from 78% in 1940–44 to 47% in 1975–79, and from 66% to 34% for men.¹⁶ More men had been divorced in 2009 than in 1996.¹⁷ By age

8. *The Proportion of Married Adults Has Decreased*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/150/the-proportion-of-married-adults-has-decreased> (last visited Apr. 2, 2015).

9. *Id.*

10. *Id.*

11. Or, it may be that fewer young people care about becoming “adults” in the sense of being considered responsible and contributing members of their communities.

12. *The Gap Between Married and Unmarried Birth Rates Has Narrowed*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/213/the-gap-between-married-and-unmarried-birth-rates-has-narrowed> (last visited Apr. 2, 2015).

13. *The Annual Marriage Rate Has Declined Significantly in the Past Generation*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/105/the-annual-marriage-rate-has-declined-significantly-in-the-past-generation> (last visited Apr. 2, 2015).

14. *Most Currently Married Women Have Been Married for at Least Fifteen Years*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/159/most-currently-married-women-have-been-married-for-at-least-fifteen-years> (last visited Apr. 2, 2015).

15. *The Majority of Adults Have Been Married*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/100/the-majority-of-adults-have-been-married> (last visited Apr. 2, 2015).

16. *Both Men and Women Are Less Likely to Marry in Their Twenties*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/155/both-men-and-women-are-less-likely-to-marry-in-their-twenties> (last visited Apr. 2, 2015).

17. *The Majority of Adults Have Been Married*, *supra* note 15. Interestingly, the percentage of women who had ever been divorced was the same in 2009 (22%) as it was in 1996. *Id.*

forty-five, about one in three Americans born in the 1950s had been divorced at least once.¹⁸

Still, overall, more than two-thirds of all men and nearly three-fourths of all women in America are now or have been married.¹⁹ One reason for the decline in marriage rates may be due to postponement of marriage. Only 34.4% of men and 47.3% of women born in 1975–79 were or had ever been married by age twenty-five, compared to 66.1% of men and 78.2% of women in 1940–44.²⁰ Likewise, the increased social acceptance for and resultant explosion of non-marital cohabitation²¹ drives many of these demographic developments that are or can be viewed as being indicia of the disintegration of marriage and of marital families in the United States in the first fifteen years of the twenty-first century.

The significant reduction in marriage rates raises profoundly disturbing concerns. Children constitute the most vulnerable and detrimentally impacted population group harmed by the general non-formation of marriage.²² In a debate about marriage in the House of Lords in the United Kingdom, Lord Jonathan Sacks, then serving as the Chief Rabbi of the United Kingdom, explained:

Children lucky enough to be born into strong families are advantaged in almost every area for the rest of their lives: school attendance, educational achievement, getting and keeping a job. They will earn more. They will be healthier. They will be more likely to form strong marriages of their own. Children who do not have that good fortune will be disadvantaged for the rest of their lives.²³

18. *By Age 45, About One in Three Americans Born in the 1950s Had Divorced*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/165/by-age-45-about-one-in-three-americans-born-in-the-1950s-had-divorced> (last visited Apr. 2, 2015).

19. *The Majority of Adults Have Been Married*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/100/the-majority-of-adults-have-been-married> (last visited Apr. 2, 2015) (67% of men were or had ever been married in 2009, compared to 69% in 1996; 73% of women were ever married in 2009, compared to 76% in 1996).

20. *Both Men and Women Are Less Likely to Marry in Their Twenties*, *supra* note 16.

21. The social acceptance of non-marital cohabitation itself is linked to, and may, to some significant degree, be attributed to state court decisions giving legal recognition to significant financial aspects of non-marital cohabitation, beginning with the California Supreme Court decision in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). See *infra* Part IV.B.

22. Helen Alvare, *Beyond the Sex-Ed Wars: Addressing Disadvantaged Single Mothers' Search for Community*, 44 AKRON L. REV. 167, 169 (2011) ("Marriage is associated with a host of economic, emotional and social advantages.").

23. William Rees-Mogg, *Reward Marriage and Rescue British Society*, THE TIMES (London), (Feb. 18, 2011) (quoting Chief Rabbi, Lord Sacks), available at <http://www.thetimes.co.uk/tto/opinion/columnists/williamreesmogg/article2917987.ece#>.

Likewise, the highly respected English Family Law Professor Baroness Ruth Deech (formerly principal of St. Anne's College, Oxford) declared: "It is marriage that makes all the difference."²⁴ She added, "[T]he best thing for children is to live with two married parents."²⁵

High divorce rates continue to reshape the American family, as they have for nearly two generations. By age forty-five, nearly one-third of Americans who were born in the 1950s had divorced.²⁶ The percentage of unmarried couples living together has increased ten-fold, from slightly more than 1% of all couples in 1960 to nearly 12% in 2011.²⁷ However, there seems to be a trend toward fewer divorces (at least early divorces). Nearly 77% of men who were married for the first time in the early 1990s reached their tenth anniversary, three percentage points higher than men who married a decade earlier.²⁸ Similarly, 74.5% of married women reached their tenth anniversary, and 56.6% of married women reached their twentieth anniversary. Couples are postponing and avoiding marriage. In the past fifty years, the median age of marriage has risen by over six years for both men and women to nearly twenty-nine years of age for men, and twenty-six and a half years for women.²⁹ On the other hand, the rate of non-marital cohabitation has steadily risen. By 2010, nearly twelve percent (11.6%) of couples living together were not married, compared to just 1.1% fifty years earlier, in 1960.³⁰

The deterioration of the culture of marriage in the United States has directly affected millions of American children. By 2011, nearly one-third

24. Baroness Deech, *Marriage-Debate, House of Lords debates*, (February 10, 2011), available at <http://www.theyworkforyou.com/lords/?id=2011-02-10a.357.0&s=%28%28marriage%29%29+speaker%3A13322#g374.0>. See also Martin Beckford, *Baroness Deech: English Law No Longer Has a Clear Concept of Marriage*, THE TELEGRAPH (UK), (Mar. 16, 2010, 7:25 AM), <http://www.telegraph.co.uk/news/uknews/law-and-order/7449696/Baroness-Deech-English-law-no-longer-has-clear-concept-of-marriage.html>.

25. *Id.* (alteration in original). Deech, *supra* note 24 (alteration in original).

26. *By Age 45, About One in Three Americans Who Were Born in the 1950s Had Divorced*, FAMILY FACTS.ORG, <http://familyfacts.org/charts/165/by-age-45-about-one-in-three-americans-born-in-the-1950s-had-divorced> (last visited Apr. 2, 2015).

27. *Nearly 12 % of Couples Living Together Are Unmarried*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/110/nearly-12-%of-couples-living-together-are-unmarried> (last visited Apr. 2, 2015).

28. *Recent Marriages Are Slightly More Lasting for Men*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/161/recent-marriages-are-slightly-more-lasting-for-men> (last visited Apr. 2, 2015).

29. *Men and Women Are Marrying Later*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/102/men-and-women-are-marrying-later> (last visited Apr. 2, 2015).

30. *Nearly 12 Percent of Couples Living Together Are Unmarried*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/110/nearly-12-percent-of-couples-living-together-are-unmarried> (last visited Apr. 2, 2015).

(31.1%, to be exact) of American children were living apart from one or both parents.³¹ That means that over 30% of American children are semi-orphans.

Same-sex marriage is now (at least temporarily) legal or in the process of becoming legal in more than half of the states (thirty-five states and counting).³² While relatively few same-sex marriages are performed, their legalization conveys a policy values and social acceptance message that influences contemporary notions of the institution of marriage itself—what marriage is, what it means, and what is expected of married couples.

The most notable, most controversial, and potentially most significant contemporary change in family law in the past decade has been the legalization of same-sex marriage in most of the states. On Monday, October 6, 2014, the Supreme Court of the United States denied petitions for writ of certiorari filed by five states in five separate cases in which lower federal courts had ruled that those states were constitutionally required to legalize same-sex marriage.³³ As a result of the Court's refusal to review those federal appellate court decisions, the states of Utah, Virginia, Oklahoma, Wisconsin, and Indiana were required by federal courts to allow same-sex marriage despite (and effectively overturning) democratically-enacted state laws that allowed only male-female couples to marry.³⁴ The total number of states in which same-sex marriage was allowed, as of October 6, 2014 (the date of the Supreme Court's denial of review), was twenty-four states and the District of Columbia.

31. *More than One in Four Children Live in a Single-Parent Home*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/135/more-than-one-in-four-children-live-in-a-single-parent-home> (last visited Apr. 2, 2015). Statistics show that 3.9 % live with neither parent, 3.4% live with their father only, and 23.6% live with their mother only. African-American children grow up apart from one or both parents in nearly twice the ratio as other American children: only 39.4% of them were living with both parents in 2011, 49.8% were living with their mother only, 3.5% with their father only, and 7.3% with neither parent. See *More than Half of All African-American Children Live in a Single-Parent Home*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/171/more-than-half-of-all-african-american-children-live-in-a-single-parent-home> (last visited Apr. 2, 2015).

32. Brad Heath, *What Happens Next in the 20 States that Still Ban Gay Marriage?*, DESERET NEWS, (Oct. 8, 2014, 10:25 PM), <http://www.deseretnews.com/article/865612684/What-happens-next-in-the-20-states-that-still-ban-gay-marriage.html> ("The court's decision [not to review the lower courts that mandated same-sex marriage] leaves unchanged 20 state laws blocking same-sex unions. Each is already under legal attack, facing challenges in state or federal court, and sometimes both.") (alteration in original).

33. *Order List*, SUPREMECOURT.GOV 8, 39 (Oct. 6, 2014), available at <http://www.supremecourt.gov/orders/courtorders/100614zor.pdf> (last visited Mar. 18, 2015) (denying certiorari on No. 14-124, *Herbert v. Kitchen*).

34. Brett Snider, *Supreme Court Passes on Gay Marriage (for Now): 5 Things to Know*, FINDLAW (Oct. 6, 2014, 11:06 AM), http://blogs.findlaw.com/law_and_life/2014/10/supreme-court-passes-on-gay-marriage-for-now-5-things-to-know.html?DCMP=NWL-pro_top.

Then, the day after the Supreme Court refused to review the lower court orders mandating legalization of same-sex marriage, the Ninth Circuit Court of Appeals struck down male-female marriage laws in Idaho and Nevada, and ordered the legalization of same-sex marriage in those two states,³⁵ raising the total of states in which same-sex marriage could be celebrated legal to twenty-six states.³⁶ Justice Kennedy issued a stay against immediate enforcement of the Ninth Circuit ruling.³⁷ However, two days later Justice Kennedy clarified that the stay did not apply to Nevada,³⁸ and just two days later the stay against the judicial mandate requiring same-sex marriage in Idaho was lifted.³⁹

The rulings of the five federal courts of appeals mandating same-sex marriage in several states that the Supreme Court let stand without review quite predictably and quickly led to the judicial legalization of same-sex marriage in nine other states that did not allow same-sex marriage. Those nine states were in the same circuits that, in other cases, already have ruled against such laws in other states. Moreover, the momentum and practical dimensions of these federal court rulings, and the Supreme Court's tacit approval of those rulings, "almost certainly made it harder" for federal courts, including the Supreme Court, "to reverse course in the future. . . . If they do, . . . the court would have to do more than simply prohibit some couples from marrying; it would have to invalidate marriages that have already taken place. 'It will become very hard for the Supreme Court to take that back.'"⁴⁰

Since the Supreme Court, on October 6, 2014, declined to review the lower court orders compelling legalization of same-sex marriage, only two federal courts have rejected claims for same-sex marriage. Federal district

35. *Federal Appeals Court Overturns More Gay-Marriage Bans*, WASH. POST (Oct. 7, 2014) http://www.washingtonpost.com/national/gay-marriage-bans-in-idaho-nevada-struck-down/2014/10/07/35e20f2c-4e5f-11e4-877c-335b53ffe736_story.html?wpisrc=nl-eve&wpmm=1.

36. *States, Winning the Freedom to Marry: Progress in the States*, FREEDOMTOMARRY.ORG, <http://www.freedomtomarry.org/states/> (last updated Mar. 4, 2015).

37. Associated Press, *Justice Kennedy Blocks Gay Marriage Ruling*, FINDLAW (Oct. 8, 2014), http://news.findlaw.com/ap/webfeeds/w/10-08-2014/be1f3a0961fb4a4cb8cd3a76e7f115ce.html?DCMP=NWL-pro_top.

38. *Justice Kennedy Issues Clarifying Order: No Stay on Nevada Marriage*, LAMBDA LEGAL (Oct. 8, 2014), http://www.lambdalegal.org/news/nv_20141008_no-stay-on-nv-marriage.

39. Adam Liptak, *Supreme Court Allows Same-Sex Marriage in Idaho*, N.Y. TIMES (Oct. 10, 2014), http://www.nytimes.com/2014/10/11/us/politics/supreme-court-lifts-stay-on-same-sex-marriages-in-idaho.html?_r=0.

40. See generally Heath, *supra* note 32 (quoting Yale Law Professor William Eskridge).

court judges in Louisiana⁴¹ and in Puerto Rico⁴² ruled that the Constitution does not require the legalization of same-sex marriage in a state or federal jurisdiction.⁴³

Thus, as of November 15, 2014, same-sex couples could marry in at least thirty-five states and the District of Columbia.⁴⁴ Laws disallowing same-sex marriage in the remaining states were being challenged in federal court lawsuits. Appendix I shows, in map form, the current status of same-sex marriage in the United States (as of November 20, 2014).⁴⁵ According to the Williams Institute at UCLA Law School, as of October 2014, nearly 70% of all same-sex couples were living in states where same-sex marriage is permitted.⁴⁶

Moreover, because the federal appellate court rulings that were allowed to stand will have strong precedential value in other cases seeking same-sex marriage in other states in those circuits, it was unsurprising that other states in those circuits soon were judicially required to allow same-sex marriage as well. Thus, Alaska, Arizona, Colorado, Kansas, Montana, North Carolina, South Carolina, West Virginia, and Wyoming were susceptible to litigation and have been, or soon are likely to be, required to legalize same-sex marriage under circuit precedents as well.⁴⁷ That brings the total number of states with same-sex marriage up to thirty-five states—without any expansion of same-sex marriage outside of the federal circuits that have already ruled for same-sex marriage.⁴⁸

41. Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014) (“The State of Louisiana has a legitimate interest under a rational basis standard of review for addressing the meaning of marriage through the democratic process.”).

42. Conde-Vidal v. Garcia-Padilla, 2014 WL 5361987 (D.P.R. Oct. 21, 2014).

43. Andy Grimm, *New Orleans Judge Not Alone in Upholding Gay Marriage Ban After Puerto Rico Ruling*, THE TIMES-PICAYUNE (Oct. 22, 2014, 5:24 PM), http://www.nola.com/politics/index.ssf/2014/10/gay_marriage_ban_in_puerto_ric.html (“U.S. District Judge Martin Feldman is no longer the only federal judge to uphold a gay marriage ban following the landmark Supreme Court ruling striking the Defense of Marriage Act. A federal judge in Puerto Rico on Tuesday dismissed a lawsuit by a same-sex couple seeking to have their marriage recognized by the U.S. territory, the Associated Press reported. U.S. District Judge Juan M. Perez threw out the constitutional challenge to the territory’s ban.”).

44. See *infra* Appendix V.

45. November 20, 2014 is the latest date on which the National Conference of State Legislatures (NCSL) has compiled data about how same-sex marriage has been legalized (by legislative, judicial, or executive action). See *Same-Sex Marriage Laws*, NCSL (Nov. 20, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#1>.

46. *Ninth Circuit Court of Appeals Decision Opens Marriage To Nearly 7 in 10 Same-Sex Couples in the U.S.*, THE WILLIAMS INSTITUTE (Oct. 7, 2014), <http://williamsinstitute.law.ucla.edu/press/press-releases/7-oct-2014/>.

47. *Id.*

48. See *infra* Appendix V (listing the states in which same-sex marriage had been legalized by the middle of November 2014).

Furthermore, the “writing on the wall” from the Court’s refusal to stop the judicial legalization of same-sex marriage is likely to liberate, if not motivate, other federal courts (and, perhaps, even some state courts) in other states to rule that same-sex marriage must be legalized in additional states as well. Who knows where the trend will end? While there may be some state “hold-outs” in the short run, it is likely that even more states will have same-sex marriage within two or three years, and within five or ten years, the jump-on-the-bandwagon tendency may lead all states to permit same-sex marriages.

However, there is also a chance for some judicial and political push-back. For example, a news story in *USA Today* dated October 8, 2014, noted that, while no federal court of appeals has yet upheld a state law allowing only traditional (male-female) marriage,

judges on a Sixth Circuit panel hearing a challenge to four state laws earlier this year expressed skepticism that the Constitution requires states to recognize those marriages. And two of the lawsuits are now in front of the conservative judges of the Fifth Circuit. If either of those courts upholds a state ban, the justices might be faced with a marriage case that would be harder to sidestep.⁴⁹

As the map prepared by the National Conference of State Legislatures shows in Appendix I, same-sex marriage has been legalized by legislation (the usual democratic process for creating family laws) in only eleven states plus the District of Columbia.⁵⁰ In one additional state, voters approved of a ballot measure legalizing same-sex marriage.⁵¹ In the other states, federal court rulings have judicially decreed the legalization of same-sex marriage.⁵² In 2014 alone, federal courts ruled in eighteen cases holding or affirming that

49. Heath, *supra* note 32.

50. *States that Allow Same-Sex Marriage*, NCSL (Sept. 7, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>. The states are New York, Vermont, New Hampshire, Rhode Island, Connecticut, Delaware, Maryland, Illinois (2013), Minnesota, Washington, Hawaii (2013), and the District of Columbia.

51. Voter approval of same-sex marriage was required under the Maine Constitution because earlier voters had vetoed (overturned) a legislative bill that would have legalized same-sex marriage.

52. The states with same-sex marriage as a result of judicial decrees are California (2013), Oregon, Utah (2014), New Mexico (2013), Oklahoma (2014), Iowa, Wisconsin, Indiana, Virginia (2014), Pennsylvania, New Jersey, and Massachusetts. Also, a judge entered a same-sex marriage order in Texas (2014), but the ruling has been stayed pending appeal. See Greg Botelho & Bill Mears, *Texas Ban on Same-Sex Marriage Struck Down by Federal Judge*, CNN POLITICS (Feb. 27, 2014, 8:37 AM), <http://www.cnn.com/2014/02/26/politics/texas-same-sex/index.html> (59% support and 34% oppose “allowing gays and lesbians to marry legally”; 50% believe the Constitution “give[s] gays and lesbians the legal right to marry”).

eighteen states had to legalize same-sex marriage.⁵³ Thus, in two-thirds of the states where same-sex marriage is allowed, the legalization of same-sex marriage was the result of judicial mandate, not legislative or other normal democratic or grassroots processes.

Interestingly, marriage laws (or judicial mandates about marriage) in the United States of America are substantially more approving of same-sex marriage than are the laws in most of the other nations of the world. While same-sex marriage now is legal in about 70% of the American states, globally fewer than 10% of the sovereign nations in the world permit same-sex marriage. As Appendix III shows, only seventeen nations currently allow same-sex marriage out of 193 sovereign nations. Within a year, one more nation (Luxembourg) is expected to implement legislation previously enacted to allow same-sex marriages, but even counting that country, the net total will remain fewer than 10% of all of the countries on earth that will then have authorized or permitted same-sex marriage.

Moreover, in no region of the world does a majority of the nations in that region allow same-sex marriage. Most of the countries in all regions of the world ban same-sex marriage. For example, as Appendix III indicates, no nation in Asia, no nation in Central America, no nation in Central Europe, and no nation in Eastern Europe allows same-sex marriage. Only one nation in Africa, just one nation in the Pacific, only one nation (and some parts of two other nations) in North America, and just three nations in South America allow same-sex marriage. In only one region of the world—Western Europe—is there a significant concentration of nations that permit same-sex marriage, and even in Western Europe, only a minority of the nations in the region have legalized same-sex marriage. Yes, contrary to common folklore, most of the nations in Western Europe still do *not* permit same-sex marriage. (And if only states that have adopted same-sex marriage by legitimate processes—legislation or voter initiative—were counted, under one-quarter, only 22% of American states would have same-sex marriage.)

Thus, as a simple matter of comparative family law at the global-international level, the states in the United States of America are dramatically out of step with the laws and policies in the rest of the world regarding same-sex marriage. Whether the American states are merely marginal, ideological “outliers” regarding marriage policies, or are “leading the way,” is an unanswered question, but as of the end of the year 2014, the evidence strongly suggests that the American trend toward legalizing same-sex marriage is an “outlier” or “polar extreme” position, not representative of what is happening in the rest of the world. It remains to be seen whether

53. See Condon v. Haley, 21 F. Supp. 3d 572, 582 n.8 (D.S.C. Nov. 12, 2014).

many other nations will follow the American movement to legalize same-sex marriage or not. At present, clearly, there is a huge gap between American states' marriage laws regarding same-sex marriage and the marriage laws of the vast super-majority of 192 other sovereign nations.

However, in the United States, popular opinion has been shifting in favor of allowing same-sex marriage as well. To what extent that polling shift reflects manipulations and to what extent it represents real change is not clear, but the polling certainly shows numerical changes. In March 2014, a *Washington Post/ABC News* poll reported that half of Americans surveyed supported same-sex marriage.⁵⁴ Likewise, a May 2014 Gallup Poll showed similar results with 55% of the respondents favoring same-sex marriage and 42% opposing it.⁵⁵ The historic change in public opinion about same-sex marriage is extraordinary. "When Gallup first asked Americans this question about [legalizing] same-sex marriage in 1996, 68% were opposed to recognizing marriage between two men or two women, with slightly more than a quarter supporting it (27%). Since then, support has steadily grown."⁵⁶ In the past decade, support for same-sex marriage in Gallup polls has increased from 42% to 55%, while opposition to same-sex marriage has fallen from 55% to 42%.⁵⁷ Seventy-eight percent of persons ages eighteen to twenty-nine supported same-sex marriage in 2014, thirty-seven percentage points higher than the same group in 1996.⁵⁸ Similarly, the *Post/ABC* poll noted above reported that most respondents favored allowing gay or lesbian couples to adopt a child, while more than three-fourths agreed that "gay people can be as good parents as straight people."⁵⁹

Age is a major variable influencing support for or opposition to same-sex marriage. Most respondents age fifty or older consistently still do not support legalization of same-sex marriage in 2014 according to the latest

54. Peter M. Craighill & Scott Clement, *Support for Same-Sex Marriage Hits New High; Half Say Constitution Guarantees Right*, WASH. POST (Mar. 5, 2014), http://www.washingtonpost.com/politics/support-for-same-sex-marriage-hits-new-high-half-say-constitution-guarantees-right/2014/03/04/f737e87e-a3e5-11e3-a5fa-55f0c77bf39c_story.html; see also *Gay Issues Find Increasing Acceptance*, WASH. POST (Apr. 17, 2014), http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2014/03/05/National-Politics/Polling/release_301.xml.

55. Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP POLITICS (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>.

56. *Id.* (alteration in original).

57. *Id.*

58. *Id.*

59. See Craighill & Clement, *supra*, note 54. (Sixty-one percent of those responding said that they supported allowing gay or lesbian couples to adopt, while 34% opposed; 78% agreed that "gay people can be as good parents as straight people," while only 18% said, "[n]o, [they] cannot be as good.") (alteration in original).

Gallup poll.⁶⁰ Similarly, a Pew Research poll in 2014 found that only 35% of the silent generation (born 1928–45) support same-sex marriage, and only 46% of the Baby Boomers (1946–64) support same-sex marriage, while 53% of Generation X (born 1965–80) favor same-sex marriage, and 67% of Millennials (born 1981 or later) support same-sex marriage.⁶¹

So, in summary, in the United States and a small number of other affluent (mostly Western European) nations, there are fewer traditional married couples and more unmarried, cohabiting male-female couples and same-sex couples today than previously. Those couples are older and they have fewer children, and more of those children are born to unmarried women (single or cohabiting out of wedlock). There are slightly fewer early divorces than previously—probably because there are fewer marriages and because so many fragile unions are formed by cohabitation, not marriage. Same-sex marriages are well known (if controversial) in all states; they are performed and legally recognized in about three-fourths of the states—albeit they have been legalized by processes (judicial mandates) that many consider illegitimate.

II. THE UNIQUE BENEFITS OF MARRIAGE FOR INDIVIDUALS, FAMILIES, AND SOCIETIES

Careful examination of the claims for same-sex marriage shows their weakness. Same-sex marriage advocates argue that the principle of equality and fairness compel equal treatment for same-sex relations, including legal status equal to the status of marriage. They claim that same-sex relationships are just as important, just as fulfilling, and just as valuable as heterosexual marriages are.⁶² Those feelings and beliefs are important for the individuals who assert them. That must be acknowledged at the outset.

However, there are two major flaws in this claim. First, public laws are intended to protect and effectuate public interests, not private lifestyle preferences. The question is whether the social interest—the public good—is served, not whether some private emotional interest is advanced by public legislation. Just because some person or people prefer a particular form or style of intimate relationships does not turn that into a constitutionally

60. See McCarthy, *supra* note 55. See also *Changing Attitudes on Gay Marriage*, PEW RESEARCH RELIGION & PUBLIC LIFE PROJECT (Sept. 24, 2014), <http://www.pewforum.org/2014/09/24/graphics-slideshow-changing-attitudes-on-gay-marriage/>.

61. See *Changing Attitudes on Gay Marriage*, *supra* note 60.

62. The following discussion abbreviates ideas developed at greater length, see, e.g., Lynn D. Wardle, *Legal Claims for Same Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 SO. TEX. L. REV. 735 (1998).

protected relationship. Legal marriage is a *public* institution established to achieve *public* purposes. It is not the private interests (however intensely felt and valued), but the public interests and consequences that are relevant to the public policy issue of whether a particular relationship should be given the public status of marriage.

To the extent that this equality claim asserts that same-sex relationships are just as valuable to society—just as important to the public good—as heterosexual marriages, advocates of same-sex marriage present a more direct and substantial challenge. If it were true that same-sex relationships were just as valuable to society as heterosexual marriages, and if the public interest and public welfare were served equally well by both committed same-sex and heterosexual unions, then equality principles, including the Equal Protection Clause of the Fourteenth Amendment, logically would require that each be given the same, or at least equivalent, legal status.

Thus, the claim for same-sex marriage raises some serious questions about equality: what is it about the special committed relationship between a man and a woman that lawmakers for centuries, indeed millennia, and in all cultures, have conferred upon this relationship the *special, preferred* legal status of marriage? Why have most nations chosen to make marriage between a man and a woman (and no other kind of intimate relationship) a *unique* public institution and give it special legal benefits to the marital relationship and its spouses?

The answer is that heterosexual marriages have been given special legal preference because lawmakers (and the public, generally) have believed that male-female marital unions make uniquely valuable contributions to the state, to society, and to individuals, unmatched by the contributions of other kinds of intimate relationships. Heterosexual marriages have been singled out from all kinds of adult relationships for preferred status because they are so important and valuable to society, to the stability and continuity of the state, and to achieving the purposes for which the state exists.

Ultimately, the equality claim for same-sex marriage turns upon whether heterosexual marriages really do make unique contributions to society, advancing the social purposes for which the state has established the preferred legal institution of marriage, or whether same-sex unions make the same or equivalent contributions towards the achievement of the social purposes of marriage. There are many social interests in and public purposes for legal marriage for which heterosexual marriages today still provide tremendous benefits to society, unequalled by those flowing from homosexual unions. Some of the most important of these purposes relate to society's interests in the public welfare concerning (1) safe sexual relations, (2) procreation and childrearing, (3) the status of women, (4) the stability,

strength, and security of the family union, (5) the integrity of the basic unit of society, (6) civic virtue and public morality, (7) interjurisdictional comity, and (8) government efficiency.

Thus, first, committed heterosexual unions of marriage provide the best setting for the safest and most beneficial expression of sexual intimacy.

Second, heterosexual marriage provides the best environment into which children can be born and reared, the profound benefits of dual-gender parenting to model intergender relations, and shows children how to relate to persons of their own and opposite gender are lost in same-sex unions.

Third, heterosexual marriage provides the best security for the status of women (who take the greatest risks and invest the greatest personal effort in maintaining families).

Fourth, heterosexual marriage provides the strongest and most stable companionate unit of society, and the most secure setting for intergenerational transmission of social knowledge and skills.

Fifth, social stability is also supported by heterosexual marriage in ways that same-sex marriage would undermine; marriage is of such profound importance to society that there is great danger if its meaning and definition become ambiguous. Marriage is the most beneficial, secure, healthy foundation for the most important social unit in society—the family.

Sixth, heterosexual marriage provides the best seed-ground for democracy and the most important schoolroom for self-government.

Seventh, heterosexual marriage facilitates interjurisdictional comity in ways that would be threatened by legalizing same-sex marriage.

Eighth, and finally, significant government economies are linked to heterosexual marriage and would be lost if same-sex marriage were legalized.

Overall, gender-integrating marriages contribute much more to the social interests in and public policy reasons for legalized marriage than do same-sex unions, and overall, the benefits and value of heterosexual marriages to society far exceed those of same-sex unions. Thus, from the perspective of the important social interests that underlie the legal recognition and status of marriage, the equality claim that same-sex unions are equivalent to heterosexual marriage fails. That may be why even some gays and lesbians have criticized the “sweeping comparisons between the gay rights movement and the Civil Rights Movement for African Americans” as “far too easy to come by and far too hard to justify.”⁶³

63. Chelsea Jennings, *Comparing the Fight for Gay Equality to the Civil Rights Movement Glosses over the Unique Experience of African Americans*, MARRIAGE & FAM. RES. GRANT (May 25, 2006), http://www.law2.byu.edu/marriage_family/news/5.26.6.htm.

Marriage provides valuable, long-term benefits for men, women, and children. For example, married mothers in intact families tend to acquire more education than unmarried mothers. “Married mothers in intact families tend to be the most educated—more than 38[%] have at least a college degree. By comparison, about 21[%] of mothers in married stepfamilies have at least a college degree, and less than 15[%] of single mothers are college educated.”⁶⁴ Marriage tends to discourage detrimental lifestyles and behaviors. For example, significantly fewer married adults smoke (14.6%) than those never-married (21.7%), widowed (25.4%), divorced or separated (28.2%), or those living with a partner without marriage (34.2%).⁶⁵ The median value of assets (\$144,580) is higher for married families than it is for unmarried male (five times higher) or unmarried female households (nearly more than 4.5 times higher).⁶⁶ The rate of home ownership (53.5%) also is higher for married persons. Married white women have significantly higher incomes than never-married women (and only slightly lower income than divorced women who are expected to be or become fully self-supporting).⁶⁷ Also, married African-American families have significantly higher incomes than any and all other African-American family forms.⁶⁸ Juvenile delinquency and crime rates are lowest for children raised in married families.⁶⁹

As teenage pregnancy can go a long way toward derailing and limiting life opportunities, it is significant that teens raised in intact (married) families—both boys and girls—have substantially lower rates

64. *Intact Marriage Positively Associates with the Mother’s Education*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/130/intact-marriage-positively-associates-with-the-mothers-education> (alteration in original). For further reflections about the purposes of marriage, see Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 B.Y.U. J. PUB. L. 287 (2011); Lynn D. Wardle, *The “constitution” of Marriage and the “Constitution” of Nations*, 45 U. SAN FRANCISCO L. REV. 437 (2010) [hereinafter *The “constitution” of Marriage*]; Lynn D. Wardle, *Marriage and Other Domestic Relationships: Comparative and Critical Equality Analysis of Differences in Form and Substance*, 26 ST. JOHN’S J. CIV. RTS & ECON. DEVELOP. 663 (2012); Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. STATE L. REV. 1385 (2013).

65. *Married Adults Are the Least Likely to Smoke*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/415/married-adults-are-the-least-likely-to-smoke> (last visited Apr. 2, 2015).

66. *Married Households Have More Assets*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/350/married-households-have-more-assets> (last visited Apr. 2, 2015).

67. *Among Whites, Married Women Have Higher Incomes than Never-Married Women*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/363/among-whites-married-women-have-higher-incomes-than-never-married-women> (last visited Apr. 2, 2015).

68. *Married African-American Families Have Higher Incomes*, FAMILYFACT.ORG, <http://familyfacts.org/charts/344/married-african-american-families-have-higher-incomes> (last visited Apr. 2, 2015).

69. See Lynn D. Wardle, *The Fall of Marital Stability and the Rise of Juvenile Delinquency*, 10 J. L. & FAM. STUDS. 83 (2007).

of sexual experience than do children raised in non-intact families.⁷⁰ Since 1988, the difference amounts to between a 17% and 35% difference in sexual experience between children in intact families and those in non-intact families.⁷¹

Moreover, a recent nationwide survey of a variety of important life outcomes for children raised in eight different types of family relationships showed that children raised by divorced parents and single-parents, had significantly lower mean scores on most positive variables (educational attainment, family-of-origin security, closeness to biological mother and father, self-reported health and happiness, etc.) and higher mean scores on most negative outcomes (e.g., anxiety, use of marijuana, use of alcohol, smoking, arrests, number of sex partners, etc.) than children raised in intact biological families.⁷² In sum, by nearly all measures, traditional male-female marriage improves the lives of men, women, and children of all races, and benefits all of society.

III. DISTINGUISHING THREE CONTRASTING CASES THAT SIGNIFICANTLY CHANGED FAMILY LAW

Advocates for same-sex marriage often argue that legalization of marriage between persons of the same gender is just a logical extension of the principles underlying highly respected judicial decisions regarding family relations. Two prominent examples offered as models for the judicial legalization of same-sex marriage are *Loving v. Virginia*,⁷³ the United States Supreme Court decision ruling that anti-miscegenation laws were unconstitutional, and *Marvin v. Marvin*,⁷⁴ the California Supreme Court decision authorizing the award of “palimony” to unmarried cohabitants based on contract, quasi-contract, and several other equitable theories.

Opponents of same-sex marriage cite Supreme Court (and sometimes other) decisions forcing unjust and immoral policies upon the states. Chief among the examples of dubious and discredited radical law reform judicial rulings is *Roe v. Wade*,⁷⁵ in which the Supreme Court provoked

70. *Teens in Intact Families Are Less Likely to be Sexually Experienced*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/254/teens-in-intact-families-are-less-likely-to-be-sexually-experienced> (last visited Apr. 2, 2015).

71. *Id.*

72. 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, 762 tbl.3 & 4 (2012).

73. *Loving v. Virginia*, 388 U.S. 1 (1967).

74. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

75. *Roe v. Wade*, 410 U.S. 113 (1973).

enormous public criticism by interpreting the Constitution as requiring all states to legalize abortion on demand, at least until the unborn child is deemed by a doctor to be “viable.” All three of these cases are reviewed below and compared to the movement to legalize same-sex marriage in the United States.

A. Loving v. Virginia Does Not Compel Legalization of Same-Sex Marriage

In 1967, the Supreme Court ruled in *Loving v. Virginia*⁷⁶ state laws forbidding interracial marriage (specifically in Virginia marriages between African-Americans and Caucasians) violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and were unconstitutional. Some advocates of same-sex marriage assert that *Loving* means the Fourteenth Amendment also forbids states to prohibit same-sex marriage by restricting marriage to male-female couples. However, that is a very dubious and weak claim on close examination.

State anti-miscegenation laws that were rejected by the Court in *Loving* are readily distinguishable from male-female marriage laws in terms of the equal protection doctrine. The Virginia law that prohibited inter-racial marriage that the Court struck down in *Loving* dealt directly and specifically with the core concern of the Civil Rights Amendments. The Civil War Amendments undeniably were intended to abolish racial discrimination by the government. Those amendments reflected a national consensus that had been achieved at an incredibly high price. We sometimes forget how high the cost of that consensus rejecting racial discrimination was. The Civil War lasted four years and left hundreds of thousands of American fighting men dead on the battlefields—a death toll nearly as high as the combined total of all American soldiers killed in all of the other American wars fought in the past 239 years (since 1775).⁷⁷ The Civil War was the bloodiest, most deadly, most destructive, most awful war in American history as brothers killed brothers, and fathers killed sons for four long years. “Roughly [two percent] of the population, *an estimated 620,000 men*, lost their lives in the line of duty. Taken as a percentage of today’s population, the [death] toll would have risen to as high as [six] million souls.”⁷⁸ “Approximately one in four soldiers that went to war [in the American Civil War] never returned home.”⁷⁹ The total casualties in the Civil War (soldiers who died, were

76. *Loving*, 388 U.S. 1.

77. See *Civil War Casualties*, CIVIL WAR TRUST, <http://www.civilwar.org/education/civil-war-casualties.html> (last visited Apr. 2, 2015).

78. *Id.* (alteration in original) (emphasis added).

79. *Id.* (alteration in original).

wounded, were captured, or were missing was nearly 1.5 million men.⁸⁰ Thus, the price behind the abolition of racial discrimination was extremely high and forged a national consensus that cannot be doubted today. A similar strong national consensus (far greater than just the latest public opinion poll or two) simply does not exist for mandatory legalization of same-sex marriage. So the analogy to *Loving* not only fails as a matter of legal principle, but as a matter of historical facts.

“In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia.”⁸¹ These are almost the first words from the pen of Chief Justice Earl Warren who wrote the unanimous opinion in *Loving v. Virginia*. The Court’s language was entirely commonplace and clear because the case was about a man and a woman who married. Nowhere in the opinion is there even the slightest notion that the case tells us anything about persons of the same sex who desire to “intermarry” (the felicitous term used in the statute and the Supreme Court opinion that suggest joining together two things that are different, not of the same kind).⁸²

The difference between race and gender is a significant constitutional distinction. In what is perhaps the leading case on sex discrimination, *United States v. Virginia*,⁸³ the State of Virginia operated the Virginia Military Institute (“VMI”) that was open only to men. When the United States Department of Justice sued for the admission of women, the State respond by saying that the admission of women would *not* allow the school to continue its method of “adversative” education, the heart of which is the “rat line” where first-year cadets are broken down by a harsh regimen of physical, emotional, and mental demands (starting with shaved heads)—only to be built back up as VMI men.⁸⁴

The Supreme Court of the United States ordered VMI to begin admitting women, and the first regular graduating class to include women received diplomas in May 2001. In her opinion for the Court, Justice Ruth Bader Ginsburg wrote:

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has

80. *Id.*

81. *Loving*, 388 U.S. at 2.

82. *Id.* at 4, 11 n.11.

83. *United States v. Virginia*, 518 U.S. 515 (1996).

84. See PHILLIPPA STRUM, WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS 43–47 (Univ. Press of Kansas 2002) (description of the rat line and graduation from it in what is known as “break out”).

carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.⁸⁵

Thus official imposition of a badge of gender inferiority was the crux of the problem in the VMI case. On the other hand, recognition of real gender differences and of their relevance to the critical social institutions of marriage presents no comparable problem or stigma.

Another important distinction between judicial invalidation of anti-miscegenation laws and judicial invalidation of male-female marriage laws is the different relevance of race and gender to marriage. Race is irrelevant to any legitimate state interest in the regulation of marriage. Gender, on the other hand, goes to the very core of the historic American—and global—understanding and regulation of marriage. For millennia—across cultures and continents and generations—marriage has been consistently understood

85. *Virginia*, 518 U.S. at 532–34 (alteration in original) (emphasis added) (citations omitted).

to be the main social institution for uniting the opposite genders—male and female—for critical social, family, and personal purposes. Recognition of those realities is neither invidious nor improper.

Another important distinction that renders reliance upon *Loving* useless and impotent to advance the case for same-sex marriage is the eugenic political context for the laws that barred inter-racial marriage. The Virginia antimiscegenation law that was invalidated in *Loving* was enacted in 1924 as part of a comprehensive scheme of eugenic regulation that also included the authorization of involuntary sterilization—the infamous law that was notoriously upheld in *Buck v. Bell* with Justice Holmes uttering his infamous dictum that “[t]hree generations of imbeciles is enough.”⁸⁶ The Virginia prohibition against interracial marriage was but one part of a multi-part eugenic legislative scheme to prevent “polluting” the White race.⁸⁷

Finally, *Loving* was about the rejection of an attempt to “capture marriage” for the purpose of promoting a social-political ideology (that of “White Supremacy”). Ironically, the attempt to have courts order American states to legalize same-sex marriage is just another example of an effort—discredited in *Loving*—to capture marriage and press it into service of a dangerous and dubious social-political movement. The movement behind the 1924 Virginia law barring interracial marriage was the White Supremacy movement. Today the movement to legalize same-sex marriage is behind the political litigation seeking and often leading to judicial decisions mandating legalization of same-sex marriage. In both cases, legal coercion (then legislative, now judicial) is the means, and in both cases, marriage is merely the interim tool, a prize captured and put into service (disservice) of a dubious and disreputable cause.

Thus, *Loving* is weak precedent for interpreting the Equal Protection Clause (or Due Process) Clause of the Fourteenth Amendment to the Constitution to require states to legalize same-sex marriage for several reasons.⁸⁸ As General Colin Powell succinctly expressed it: “Skin color is a benign, non-behavioral characteristic. . . . Sexual orientation is perhaps the

86. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

87. See generally Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Robert A. Destro, *Introduction: 1998 Symposium: Law and the Politics of Marriage: Loving v. Virginia After 30 Years*, 47 CATH. U. L. REV. 1207, 1220 (1998); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 843-59 (1986); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1 (1996).

88. See Lynn D. Wardle, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 HOWARD L. J. 117 (2007); see also Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 HOWARD L. J. 289 (1998).

most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.”⁸⁹

B. Marvin v. Marvin Does Not Compel Legalization of Same-Sex Marriage

In 1976, the California Supreme Court sent shock waves through the legal profession and through society in general when it ruled that a woman, Michelle Triola,⁹⁰ who had lived for six years out of wedlock with actor Lee Marvin (who happened to be married to another woman at the time he began to live with Michelle) could assert a legal claim for “palimony”—ongoing support (like “alimony”) after the termination of their nonmarital relationship. In *Marvin v. Marvin*,⁹¹ the court held, *inter alia*, that express contracts between non-marital partners regarding sharing of assets and income must be enforced to the extent that those agreements are not “explicitly founded on the consideration of meretricious sexual services,”⁹² and that in the absence of such an express contract, financial recovery may be based upon, “and court[s] should inquire” about, whether the parties’ conduct “demonstrates [an] implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties” that would justify some financial award.⁹³ Ultimately, Ms. Triola Marvin lost her case,⁹⁴ but the claim for “palimony” survived and was adopted, in one form or another, in most other states.

89. COLIN L. POWELL, MY AMERICAN JOURNEY 547 (1995).

90. Ms. Triola legally changed her name to “Michelle Marvin” about the same time that her live-in relationships with Marvin ended. See Elaine Woo, *Michelle Triola Marvin Dies at 75; Her Legal Fight with Ex-lover Lee Marvin Added ‘Palimony’ to the Language*, L.A. TIMES (Oct. 31, 2009), <http://www.latimes.com/local/obituaries/la-me-michelle-triola-marvin31-2009oct31-story.html>.

91. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

92. *Id.* at 106.

93. *Id* (alteration in original).

94. See Woo, *supra* note 90.

In the end, Judge Arthur K. Marshall denied her \$1.8-million claim, ruling that there was neither an express nor an implicit contract obligating the actor to share his wealth with her.

He awarded her \$104,000, a sum equivalent to her highest weekly salary for two years.

He said the money was “rehabilitative,” intended to pay for training, “so that she may return from her status as a companion of a motion picture star to a separate, independent . . . existence.”

Lee Marvin’s attorney, David Kagon, called the award a “magnanimous gesture” from a compassionate judge. Michelle Marvin found the concept of “rehabilitation” demeaning, but said she felt she had “accomplished something really wonderful.”

In 1981 a state Court of Appeal overturned the \$104,000 award and the California Supreme Court refused to reinstate it.

Id.

Marvin and the movement to allow “palimony” are quite obviously distinguishable from the federal judicial movement to force states to legalize same-sex marriage. For example, a state court decided *Marvin*, while primarily federal courts are imposing same-sex marriage. Other state courts relied upon and retrospectively (not prospectively) adopted the *Marvin* principles, while same-sex marriage is a movement to prospectively legalize significant social changes. *Marvin* provoked enormous public debate that preceded most states’ decision on the issue, while the movement for same-sex marriage seeks to cram down a political result before the debate has happened, or at least before it has matured, developed, or completed.

Loving is also clearly distinguishable. *Loving* brought to a head a century of judicial evasion of (and a decade of discussion about) racial equality. *Loving* came more than a decade after the groundbreaking civil rights decision of *Brown v. Board of Education*.⁹⁵ The same-sex marriage movement is just a fraction of a century old, and the Supreme Court only spoke about the issue collaterally (in a federalism context) for the first time less than two years ago.⁹⁶

C. Roe v. Wade Does Not Strongly Support Legalization of Same-Sex Marriage

In many ways, the legalization of abortion-on-demand by judicial fiat in *Roe v. Wade*⁹⁷ is the most troubling and, disturbingly, the most comparable family law development to the contemporary judicial legalization of same-sex marriage. Like the contemporary judicial movement for same-sex marriage, the imposition of a policy of abortion-on-demand on the states in *Roe* was the creation of federal courts, not state courts. *Roe* effectively invalidated abortion restrictions in all fifty states. Because same-sex marriage is linked legally to many collateral legal relations and issues, even in those states that have legalized same-sex marriage, a judicial interpretation that the Constitution mandates legalization of same-sex marriage carries with it collateral implications for many other laws and legal policies (many relating to parentage, for example). *Roe*, however, impaired the reputation of the Court in many ways. While *Roe* was effective at the level of political outcome, the legal/constitutional analysis in the opinion was very weak and unpersuasive, and many scholars (including many supporters of the permissive abortion result in the case) were extremely critical of the Court’s

95. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

96. See *United States v. Windsor*, 133 S.Ct. 2675 (2013).

97. *Roe v. Wade*, 410 U.S. 113 (1973).

opinion. “[L]egal scholars began to criticize the [*Roe*] decision shortly after its release. [Justice Blackmun’s] Biographer Tinsley Yarbrough wrote, ‘Roe’s rationale has been subjected to more sustained and scathing scholarly and popular criticism than any other Supreme Court opinion, even by those supportive of the Court’s recognition of a constitutional abortion right.’”⁹⁸ For example, Laurence H. Tribe commented: “One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”⁹⁹

Harvard Law School Professor (and Watergate Special Prosecutor) Archibald Cox wrote that “the [*Roe*] opinion fails even to consider what I would suppose to be the most compelling interest of the State in prohibiting abortion: the interest in maintaining respect for the paramount sanctity of human life which has always been at the centre of western civilization.”¹⁰⁰ Liberal Professor Mark V. Tushnet wrote, “[i]t seems to be generally agreed that, as a matter of simple craft, Justice Blackmun’s opinion for the Court was dreadful.”¹⁰¹ Likewise, Fordham Law School Professor Robert Byrn wrote, “*Roe v. Wade* is in the worst tradition of a tragic judicial aberration that periodically wounds American jurisprudence.”¹⁰² Professor John Hart Ely accused the Supreme Court of “mistak[ing] a definition for a syllogism,”¹⁰³ and declared, “[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”¹⁰⁴ Professor Ely concluded that “[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”¹⁰⁵ University of

98. Sarah Primrose, *An Unlikely Feminist Icon?: Justice Harry A. Blackmun’s Continuing Influence on Reproductive Rights Jurisprudence*, 19 CARDozo J. L. & GENDER 393, 415 (2013) (alteration in original) (quoting TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE xi (2008)).

99. Laurence H. Tribe, *The Supreme Court 1972 Term: Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973). “Should not the question then have been left to the political process[?]” ALEXANDER BICKEL, THE MORALITY OF CONSENT 28 (1975) (alteration in original).

100. ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 53 (1976) (alteration in original).

101. Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 820 (1983).

102. Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORD. L. REV. 807, 809 (1973).

103. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973) (alteration in original).

104. *Id.* at 935–36.

105. *Id.* at 947 (alteration in original).

Chicago Professor Richard Epstein criticized, “*Roe v. Wade* is symptomatic of the analytical poverty possible in constitutional litigation,”¹⁰⁶ and he stated, “in the end we must criticize both Mr. Justice Blackmun in *Roe v. Wade* and the entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to ‘define’ and to ‘balance’ interests on the major social and political issues of our time.”¹⁰⁷ Harvard Law Professor Mary Ann Glendon asserted that *Roe* imposed a rule of abortion-on-demand that made American abortion law the most extreme of any Western nation and similar to the kinds of abortion laws found in nations with which the United States had little in common in terms of commitment to democratic values and to protection for legal due process:¹⁰⁸

Opposition to the [privacy justification use in *Roe*] . . . began almost immediately. In 1981, a Justice Department memo written by a young attorney named John Roberts openly mocked the “so-called ‘right to privacy’” as unfounded. His criticism reverberated in the Justice Department’s Guidelines on Constitutional Litigation, in the halls of academia, and in the High Court, in Justice Scalia’s dissent in *Lawrence v. Texas*. But complaints were not lodged only by those who opposed abortion; even those in support of the right questioned the “abstract” concept of “privacy.” Perhaps most illustrative was Justice Ruth Bader Ginsburg’s criticism of the way privacy was used within *Roe* as an “incomplete justification.”¹⁰⁹

While *Roe* involved a criminal abortion law, it had immediate, long-lasting, and profound direct and indirect effects upon family relations and family law. In contrast to same-sex marriage, the legalization of abortion-on-demand (*Roe*) was a matter of criminal law where concerns about uniformity in application may be especially significant. In contrast, marriage law has varied significantly from state to state from the beginnings of the Republic. Indeed, such state-by-state differences in family laws were not just contemplated and approved by the Founders of the American Republic, but protection of such state differences was critical to obtaining approval by the states for the Constitution of 1787.¹¹⁰

106. Richard Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUPR. CRT. REV. 159, 184 (1973).

107. *Id.* at 185.

108. See generally MARY ANN GLENDON, ABORTION AND DIVORCE IN AMERICAN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987).

109. Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After Gonzales v. Carhart*, 36 HARV. J. L. & GENDER 123, 131 (2013) (alteration in original).

110. See generally THE FEDERALIST, No. 17 (Alexander Hamilton)

IV. JUDGES GONE WILD

The legalization of same-sex marriage in the United States is overwhelmingly the fruit of the federal courts. “Before the U.S. Supreme Court ruling on Oct. 6, 2014, declining to hear cases on same-sex marriage, thirty-one states had either constitutional or statutory provisions that explicitly defined marriage as between a man and a woman and just nineteen states and the District of Columbia allowed same-sex marriage.”¹¹¹ As Appendix II shows, when the Supreme Court on October 6, 2014 declined to review the five federal court decisions based on *Windsor* that mandated legalization of same-sex marriage in Virginia, Utah, Ohio, Indiana, and Wisconsin, same-sex marriage was permitted in only twenty-four states and the District of Columbia—and in most of those states same-sex marriage had been legalized by judicial mandate. Just two months later, same-sex marriage was legal in thirty-five states and the District of Columbia—as Appendix III shows—and in *all* of the additional states same-sex marriage has been legalized by judicial decree.¹¹² The people themselves, citizens, voters, have approved a ballot measure providing for the legalization of same-sex marriage in only *one* lone state: Maine. State legislatures have approved the legalization of same-sex marriage in eleven other states: seven (plus the District of Columbia) in the Northeast,¹¹³ two in the Midwest,¹¹⁴ and two Pacific coastal states.¹¹⁵ Thus, the people, either directly or through their state legislatures, have been a part of the process of changing the long-settled state legislative marriage policies permitting only gender-integrative

There is one transcendent advantage belonging to the province of the state governments, which alone suffices . . . I mean the ordinary administration of criminal and civil justice. . . . It is that which, being the immediate and visible guardian of life and property, . . . regulating all those personal interests and familiar concerns [makes the people attached to the government]. This [is the] great cement of society.”

Id. (alteration in original). See also *The “constitution” of Marriage*, *supra* note 61, at 438–47.

111. *Same-Sex Marriage Laws*, *supra* note 45.

112. The latest National Conference of State Legislatures’ report on states with same-sex marriage laws indicates that: “The U.S. Supreme Court on November 12, 2014, lifted its hold on issuing same-sex marriage licenses in Kansas. A South Carolina State Supreme Court and federal judge in Montana are the latest to rule overturning same-sex marriage bans. With these changes, at least 35 states and D.C. recognize same-sex marriage.” *State Same-Sex Marriage Laws: Legislature and Courts*, NCSL (Nov. 20, 2014), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Human%20Services/StateSameSexMarriageLaws_24378_11.gif.

113. The states are: New Hampshire, Vermont, New York, Rhode Island, Connecticut, Delaware, Maryland, and the District of Columbia.

114. The states are: Minnesota and Illinois.

115. Washington and Hawaii are the only states west of the Mississippi River border to allow same-sex marriage.

male-female couples to marry in merely one-third of the states where same-sex marriage has been legalized in the United States. In the remaining twenty-three states where same-sex marriage has been legalized by or before December 1, 2014, that profound change in the state marriage laws was mandated entirely and solely by judicial decrees.

Thus, the legalization of same-sex marriage in the United States has been accomplished through the dubious (and arguably illegitimate) process of judicial “legislation” for the most part—led by a Supreme Court decision that enthusiastically celebrated and promoted same-sex marriage, and directly mandated by judicial decrees by federal courts in two-thirds of the states in which same-sex marriage has been made legal.¹¹⁶ Just like the legalization of abortion-on-demand in *Roe v. Wade*, the legalization of same-sex marriage in the United States has been accomplished (to date) primarily by judicial mandate, not by democratic processes such as by legislation, voter-approved initiative, etc. And if the record of social acceptance of legalized abortion-on-demand following judicial mandates is the model for predicting the future acceptance and legitimization of same-sex marriage following judicial activist rulings, the future is bleak for those who champion social acceptance of same-sex marriage. Abortion has remained an extremely controversial and divisive topic for over four decades, and public opinion about whether abortions should be legal under any circumstances has remained essentially unchanged for nearly forty years (with about 20–35% agreeing, compared to 13–21% responding that it should be illegal in all circumstances, and between 50–60% of respondents saying it depends upon the circumstances, with respondents self-identifying as prochoice 47–51% of the time, and as pro-life 40–46% of the time).¹¹⁷ Judicial resolution of the same-sex marriage issue will resolve nothing just as judicial resolution of the abortion issue has settled nothing, but the exercise of judicial coercion to compel same-sex marriage will (as it has in the abortion context) only fuel the flames and prolong the intensity and the life of the controversy.

Thus, judicial resolution of the controversy about whether same-sex marriage should be legalized is a dangerous and flawed model. The issue should receive the full benefit of the democratic processes—from

116. The judicial power behind the legalization of same-sex marriage is even deeper than this analysis suggests because the legislative legalization of same-sex marriage in several states was pushed, if not driven, by threatened, pending, or ongoing federal court litigation seeking judicial orders mandating the allowance of same-sex marriage.

117. *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/Abortion.aspx> (last visited Apr. 3, 2015). As of the latest report from May 8–11, 2014, 28% of Americans agreed that abortion should be legal under any circumstances, 21% responded that abortion should be illegal in all circumstances, and 50% indicated that abortion should be legal only under certain circumstances. *Id.*

preliminary discussion to proposal, to debate, to deliberation, to enactment, or to rejection by legislative or popular initiative process. Those processes enlighten the public, refine the debate, create bonds of shared commitment, reduce or filter out the extremes, and ultimately mature the nation. To neglect those processes to try to provide a “quick fix” by judicial decree deprives the nation of the core civic benefits that our republican form of government was established to protect.

V. CONCLUSION: THE PAST IS PROLOGUE

This paper has shown that in the past American federal courts and a few state supreme courts in big and influential states have profoundly altered family law in America by decisions in particular family law cases. I have cited three examples, *Loving* (1967), *Roe* (1973), and *Marvin* (1976), all decided within a ten-year span (1967–1976). All three of those precedents significantly altered prior-existing family law principles and practices. But the collateral effects of how the courts did that differed profoundly. But the social reaction to judicial heavy-handedness in one case (*Roe*) turned a controversial social issue into an incredibly divisive, once-in-a-lifetime political disaster, exacerbating and complicating the matter immeasurably.

In ten years from today (or sooner), the consequences of the currently ongoing judicial legalization of same-sex marriage probably will have ripened to complete fruition. The current judicially-mandated family law revolution (requiring states to legalize same-sex marriage) then may be viewed reflectively. It may be compared to the judicial invalidation of laws prohibiting interracial marriage (*Loving*), or the judicial provision of marriage-like financial rights and claims to non-marital cohabiting couples (*Marvin*), or to the judicial legalization of abortion on demand (*Roe*).

Sadly, *Roe v. Wade* is the case of legally imposed change in family law that is the most troubling of the three precedents, and the most similar to the same-sex marriage issue. As an example of radical judicial change to law regarding family relationships, *Roe v. Wade* still remains controversial. Every year on the anniversary of its decision, despite freezing weather and often rain, sleet, or snow, tens of thousands (sometimes hundreds of thousands) of protesters march in Washington, D.C. to express their anger about *Roe* (more than forty years after the case was decided).¹¹⁸ Similar

118. See generally Natalie DiBlasio, *March for Life Draws Thousands to Snowy D.C.*, USA TODAY (Jan. 22, 2014, 7:18 PM), <http://www.usatoday.com/story/news/nation/2014/01/22/march-for-life/4769667/>; *Tens of Thousands Rally Against Abortion on ‘Roe v. Wade’ Anniversary*, VOICE OF AM. (Jan. 22, 2014, 1:00 PM), <http://www.voanews.com/content/tens-of-thousands-rally-against-abortion-on-roe-v-wade-anniversary/1835429.html>.

protests occur in other cities around the nation on the same day, providing coast-to-coast evidence of what clearly is one of the most bungled, least competent rulings of the Supreme Court in its 225-year history.¹¹⁹

Marvin is the most readily distinguishable from the same-sex marriage revolution that is occurring (recently at break-neck speed) in the federal courts. A *state court* decided *Marvin*; its influence came from other states *voluntarily* adopting or imitating what the California Supreme Court did in that case. It legitimated *past cultural developments* and gave legal recognition to *already-existing social changes*, rather than creating and imposing by judicial decree new social change. For those reasons, *Marvin* may be the best model for responsible nationwide changes in marriage laws, including the issue of same-sex marriage.

Loving also is distinguishable from judicial decisions mandating legalization of same-sex marriage. *Loving* ended a century of controversy and a century of judicial evasion and neglect of the Civil War Amendments adopted by the people of the United States. *Loving* came after generations had considered and wrestled with controversial social issues regarding racial equality and integration. The recent judicial decisions mandating legalization of same-sex marriage do not just come near the beginning of the social controversy about whether same-sex marriage should be legalized in a community; in many cases, they are the beginning of the controversy and they have become the core of the controversy. The same-sex marriage judicial rulings have settled nothing, but they may intensify disrespect for and distrust of the courts.

Which approach the courts will take will have significant implications for how the issue ultimately is resolved and how the people of America receive it, especially those who disagree with the policy position imposed by judicial decision. Grassroots (state court) initiated legislative family law reforms (like *Marvin*) have the best likelihood of success. Form and substance are linked in family law. So imprudent, impulsive, or impatient

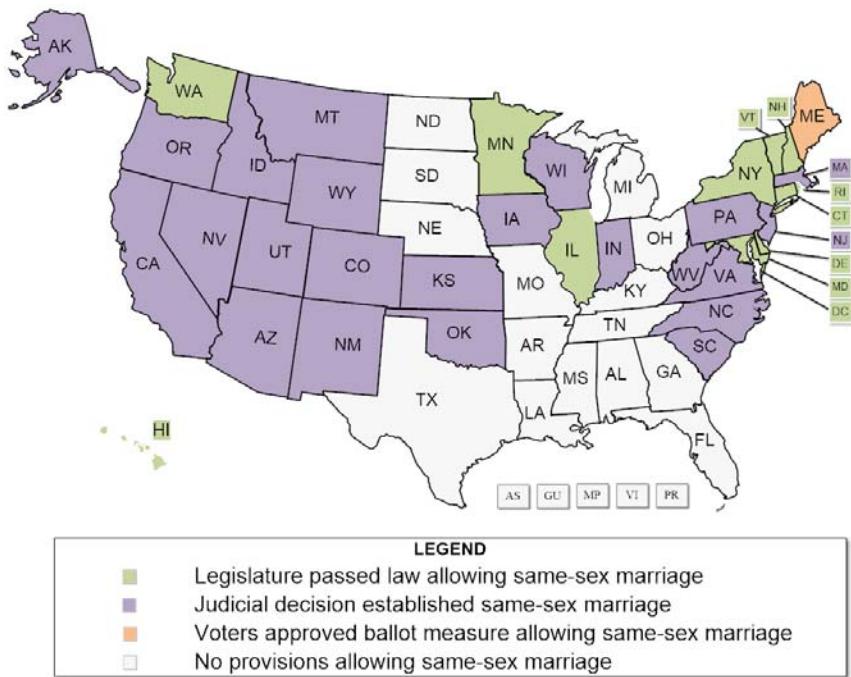
119. See generally Activists March to Protest Abortion in San Francisco, USA TODAY (Jan. 25, 2014, 7:55 PM), <http://www.usatoday.com/story/news/nation/2014/01/25/anti-abortion-activists-march-in-san-francisco/4901011/> ("Marchers stretched across more than a mile of Market Street in San Francisco to call for an end to abortion."); Salvador Guerrero, Thousands Protest Roe vs Wade in March for Life, KANSAS CITY INFOZINE (Jan. 24, 2012), <http://www.infozine.com/news/stories/op/storiesView/sid/50461/>; Sarah Horner, Abortion Foes Rally at State Capitol on 40th Anniversary of Roe v. Wade, TWINCITIES.COM (Jan. 22, 2013, 12:01 AM), http://www.twincities.com/ci_22427373/thousands-rally-at-state-capitol-40th-anniversary-roes; Sarah Karush, Thousands Protest Roe v. Wade Decision, FOXNEWS.COM (Jan. 23, 2008), http://www.foxnews.com/printer_friendly_wires/2008Jan22/0,4675,AbortionAnniversary,00.html; Naureen Khan, Massive Abortion Rallies Mark Anniversary of Roe v. Wade, ALJAZEERA AMERICA (Jan. 22, 2014, 10:36 AM), <http://america.aljazeera.com/articles/2014/1/22/massive-abortiondemonstrations mark41stanniversaryofroevswade.html>.

judicial action (aka *Roe v. Wade*) is likely to complicate the process of resolving the issue, delay the social outcome, provoke long-lasting hostility, and diminish respect for the courts in the process. We may hope and we must work for a better resolution of the controversy over legalization of same-sex marriage than occurred regarding the legalization of abortion. To that end, judicial restraint should be strongly encouraged, and effective reasonable incentives to promote that virtuous kind of public service by the judiciary should be explored and implemented. Our nation and its judiciary will achieve the most lasting, effective, and legitimate law reform and most secure, positive, and cohesive resolution of the same-sex marriage controversy if they will follow the legislative reform process (with light judicial input) used to legalize no-fault divorce.

APPENDIX I

STATE SAME-SEX MARRIAGE LAWS: LEGISLATURES AND COURTS
(NCSL)¹²⁰

NOVEMBER 20, 2014

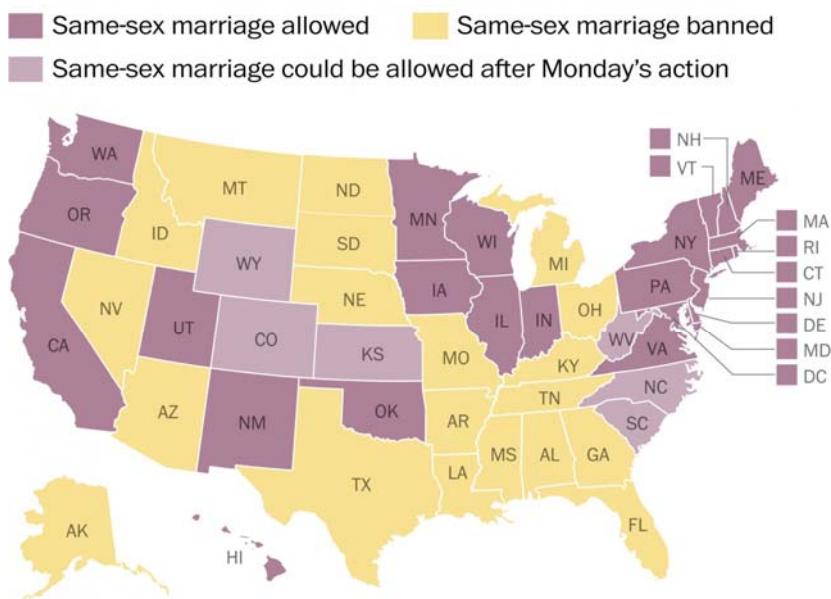


120. *State Same-Sex Marriage Laws: Legislature and Courts*, NCSL (Nov. 20, 2014), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Human%20Services/StateSameSexMarriageLaw_s_24378_11.gif.

APPENDIX II

WASHINGTON POST MAP OF STATE SAME-SEX MARRIAGE STATUS¹²¹

THE LANDSCAPE OF GAY MARRIAGE



Sources: SCOTUS blog, news reports.

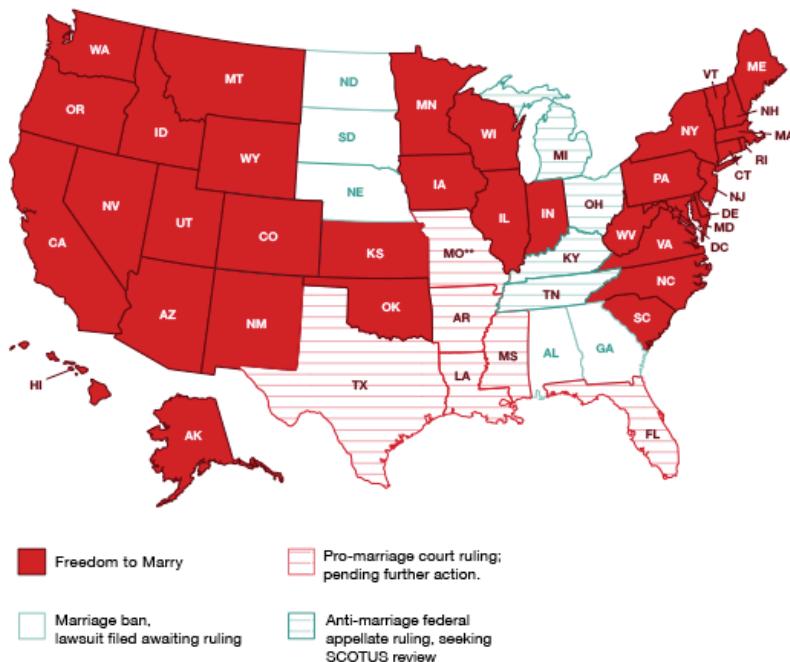
THE WASHINGTON POST

121. Robert Barnes, *Supreme Court Declines to Review Same-Sex Marriage Cases, Allowing Unions in 5 States*, WASH. POST (Oct. 6, 2014), http://www.washingtonpost.com/politics/courts_law/supreme-court-declines-to-review-same-sex-marriage-cases/2014/10/06/ee822848-4d5e-11e4-babe-e91da079cb8a_story.html?wpisrc=nl-headlines&wpmm=1.

APPENDIX III

FREEDOM TO MARRY MAP OF SAME-SEX MARRIAGE STATES (DECEMBER 4, 2014)¹²²

Winning the Freedom to Marry: Progress in the States



¹²²Respects marriages legally performed in other states

Last Updated December 4, 2014

122. *States, Winning the Freedom to Marry: Progress in the States*, FREEDOM TO MARRY (Oct. 7, 2014), <http://www.freedomtomarry.org/states/>.

APPENDIX IV

EIGHTEEN COUNTRIES THAT HAVE LEGALIZED GAY MARRIAGE (AND YEAR APPROVED)¹²³

1. Netherlands – (2001)
2. Belgium – (2003)
3. Spain – (2005)
4. Canada – (2005)
5. South Africa – (2006)
6. Uruguay – (2008)
7. Norway – (2009)
8. Sweden – (2009)
9. Argentina – (2010)
10. Iceland – (2010)
11. Portugal – (2010)
12. Denmark – (2013)
13. Brazil – (2013)
14. New Zealand – (2013)
15. France – (2013)
16. England and Wales – (2014) and Scotland (December 16, 2014)¹²⁴
17. Luxembourg – (2015)¹²⁵

123. Ross Toro, *Where Gay Marriage Is Legal*, LIVESCIENCE (Apr. 26, 2013, 4:55 PM) <http://www.livescience.com/29099-states-where-gay-marriage-is-legal-infographic.html>; see also, *Gay Marriage Around the World*, PEW RESEARCH RELIGION & PUBLIC LIFE PROJECT, <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/> (last updated Mar. 9, 2015).

124. Kashmira Gander, *First Same-Sex Marriages Take Place in Scotland*, THE INDEPENDENT (UK) (Dec. 19, 2014), <http://www.independent.co.uk/news/uk/home-news/first-samesex-marriages-take-place-in-scotland-9928795.html>.

125. *Luxembourg Approves Same Sex Marriage*, AP (June 18, 2014, 5:44 PM), <http://news.yahoo.com/luxembourg-approves-same-sex-marriage-203510157.html>.

APPENDIX V

SAME SEX MARRIAGE – LEGAL IN 35 STATES & DC

Sully Bryan and Lynn D. Wardle
 (24 states by judicial order, 11 by legislation)
 (Current as of Dec. 14, 2014)

STATE	LAW	CASELAW	DATE
Massachusetts		Goodridge v. Department of Public Health, 440 Mass. 309 (Mass. 2003).	17-May-04
Connecticut		Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).	12-Nov.-08
Iowa		Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).	3-Apr.-09
Vermont		VT. STAT. ANN., tit. 15; Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (Civil Unions).	1-Sept.-09
D.C.	Religious Freedom and Civil Marriage Equality Act of 2009, D.C. Code § 46–401 (2009) (Licenses became available March 3, 2010).		18-Dec.-09
New Hampshire	N.H. REV. STAT. ANN. § 457:1-a; Legalizing Same Sex Marriage, H.R. 436, 2009 Gen. Assemb. (N.H.)		1-Jan.-10

	2009).		
New York	N.Y. DOM. REL. LAW ANN. § 10-a (McKinney 2011); A.B. 8354, 234th Gen. Assemb., Reg. Sess. (N.Y. 2011).		24-July-11
Maine	ME. REV. STAT. tit. 19-A, § 650-A (2012), I.B. 3, § 1, adopted at election Nov. 6, 2012.		6-Nov.-12
Washington	Engrossed Substitute S. Res. 6239, 62nd Leg., 2012 Reg. Sess. (Wash. 2012) (Ref. 74 was passed by voters which approved the passage of the bill); WASH. REV. CODE § 26.04.010; 2012 Wash. Leg. Serv. Ch. 3 (S.S.B. 6239) (West).		6-Dec.-12
Maryland	MD CODE ANN., FAM. LAW § 2-201 (West 2013), <i>amended by</i> 2012 Md. Laws Ch. 2 (H.B. 438); Civil Marriage Protection Act, H.R. 438, 2012 Gen. Assemb., Reg. Sess. (Md. 2012).		1-Jan.-13

California		United States v. Windsor, 133 S. Ct. 2675 (2013).	28-June-13
Delaware	DEL. CODE ANN. tit. 13, § 101 (West 2013); H.R. 75, 147th Gen. Assemb., 1st Sess. (De. 2013).		1-July-13
Minnesota	Ch. 74, 2013 Minn. Laws.		1-Aug.-13
Rhode Island	H. Substitute R. 5015, 2013 Gen. Assemb., Reg. Sess. (R.I. 2013) (enacted).		1-Aug.-13
New Jersey		Garden State Equal. v. Dow, No. MER-L-1729-11., 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012) <i>stay denied</i> , 79 A.3d 1036 (N.J. 2013).	21-Oct.-13
Hawaii	HAW. REV. STAT. § 573-1 (1987), <i>repealed by</i> 1987 Haw. Laws ch 46 § 4; Hawaii Marriage Equality Act of 2013, S. Res. 1, 27th Leg. 2d Spec. Sess. (Haw. 2013).		2-Dec.-13
New Mexico		Griego v. Oliver, 316 P.3d 865 (N.M. 2013)	19-Dec.-13
Utah		Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), <i>stay</i>	20-Dec.-13

		<i>denied</i> , No. 2:13-CV-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013), <i>aff'd</i> , 755 F.3d 1193 (10th Cir. 2014), <i>stay lifted</i> , No. 13-4178, 2014 WL 4960471 (10th Cir. Oct. 6, 2014).	
Idaho		Latta v. Otter, 19 F. Supp. 3d 1054, (D. Idaho 2014).	13-May-14
Oregon		Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014).	19-May-14
Pennsylvania		Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).	20-May-14
Illinois	750 ILL. COMP. STAT. 5/213.1 (2014), <i>repealed by</i> P.A. 98-597, § 10; S. Res. 10, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).		1-June-14
Colorado		Brinkman v. Long, Nos. 13-CV-32572, 14-CV-30731, 2014 WL 3408024 (D. Conn. July 9, 2014).	9-July-14

Virginia		Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D.Va. 2014), <i>aff'd</i> , 760 F.3d 352 (4th Cir. 2014), <i>cert. denied</i> , McQuigg v. Bostic, 135 S.Ct. 31 (2014).	6-Oct.-14
Oklahoma		Bishop v. United States <i>ex rel.</i> Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), <i>aff'd</i> , <i>stay granted sub nom.</i> Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014).	6-Oct.-14
West Virginia		Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va.), <i>aff'd sub nom.</i> Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), <i>cert. denied sub nom.</i> Rainey v. Bostic, 135 S. Ct. 286 (2014), <i>cert. denied sub nom.</i> Schaefer v. Bostic, 135 S. Ct. 308 (2014), <i>cert. denied sub nom.</i> McQuigg v. Bostic, 135 S. Ct. 314 (2014).	6-Oct.-14

Wisconsin		Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis. 2014), <i>aff'd sub nom.</i> Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), <i>cert. denied sub nom.</i> Walker v. Wolf, 135 S. Ct. 316 (2014).	6-Oct.-14
Nevada		Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012), <i>aff'd sub nom.</i> Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), <i>cert. denied sub nom.</i> Walker v. Wolf, 135 S. Ct. 316 (2014), <i>stay denied sub nom.</i> Otter v. Latta, 135 S. Ct. 345 (2014).	10-Oct.-14
North Carolina		General Synod of the United Church of Christ v. Cooper, No. 3:14-CV-213, 2014 WL 3939331 (W.D.N.C. Aug. 12, 2014), <i>motion to intervene denied sub nom.</i> General Synod of the United Church of Christ v. Resinger, 2014 WL 5094093 (W.D.N.C. Oct. 10, 2014).	10-Oct.-14

Alaska		Hamby v. Parnell, 56 F. Supp. 3d. 1056 (D. Alaska 2014).	12-Oct.-14
Arizona		Connolly v. Jeanes, No. 2:14-CV-00024 JWS, 2014 WL 5320642 (D. Ariz. Oct. 17, 2014); Majors v. Horne, 14 F. Supp. 3d 1313 (D. Ariz. 2014).	17-Oct.-14
Wyoming		Guzzo v. Mead, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014).	21-Oct.-14
Kansas		State <i>ex rel.</i> Schmidt v. Moriarty, No. 122,590, 2014 Kan. LEXIS 570 (Kan. Oct. 10, 2014).	12-Nov.-14

South Carolina		Bradacs v. Haley, 2014 U.S. Dist. LEXIS 142240 (D.S.C. Oct. 7, 2014).	12-Nov.-14
Florida		Pareto v. Ruvin 21 Fla. L. Weekly Supp. 899a (Fla. 11th Jud. Cir., Miami-Dade Co., July 25, 2014); Huntsman v. Heavilin, 21. Fla. L. Weekly Supp., 916a (Fla. 16th Jud. Dist., Monroe Co., July 22, 2014) (enforcement stayed pending appeal).	
Montana		Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014).	19-Nov.-14