I. 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 prior existing legal rules regarding family relations. Predicting such resulting social consequences is difficult and problematical. It is not, however, irrelevant or insignificant, nor can it responsibly be avoided.

My paper briefly reviews evidence of the trends in marriage and family relations. There is no credible dispute that marriage and family forms, structures, relationships and meanings have changed and are changing significantly in American society and law. Similarly, as both an effect and partial cause of these social changes, family law, likewise, is turbulent and confused.

Part of the cause of the conceptual commotion about family relations can be attributed to activist judicial decisions. Courts can be political and judges pursuing their own political
preferences can exceed constitutional judicial roles and responsibilities. But not all progressive judicial decisions about family law fall into the error of political promotion.

I compare and contrast the movement to legalize same-sex marriage with the movement to invalidate anti-miscegenation laws, to recognize “palimony” (quasi-spousal financial rights), and to legalize abortion-on-demand.

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 major changes in family law and family relations can be implemented by the normal democratic processes. 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.

I also will briefly review *Loving v. Virginia*, 388 U.S. 1 (1967), *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) and *Roe v. Wade*, 410 U.S. 113 (1973). 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. My paper suggests 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 distinguishes *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*, and that it would achieve the most lasting, effective, and legitimate law reform if it were to follow the legislative reform process used to legalize no-fault divorce.

II. Trends and Developments Evidencing Significant Changes in Families and Family Law
The most notable, most controversial, and potentially most significant contemporary change in family law has been the legalization of same-sex marriage in half of the states in the past decade. Just this week, 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.¹ As a result of the Court’s refusal to review those federal appellate court decisions, the states of Utah, Virginia, Oklahoma, Wisconsin, and Indiana now must allow same-sex marriage despite (and effectively overturning) state laws that allow only male-female couples to marry,² bringing the total of states in which same-sex marriage was allowed to twenty-four (24) states and the District of Columbia.

Then, the next 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,³ raising the total of states in which same-sex marriage can be celebrated legal to twenty-six (26) states.⁴ However, Justice Kennedy issued a stay against immediate enforcement of the Ninth Circuit ruling.⁵

¹ Order List, Monday, October 6, 2014, 574 U.S. ___, available at http://www.supremecourt.gov/orders/courtorders/100614zor.pdf (last viewed 7 October 2014). See id. at 8 (“certiorari denied”) and id. at 39 (No. 14-124, Herbert v. Kitchen); * * * *.
The rulings of the Federal Courts of Appeals that the Supreme Court let stand without review could also effectively and soon lead to legalization of same-sex marriage in nine other states that do not allow same-sex marriage. Those states are in the circuits which in other cases already have ruled against such laws in other states. Moreover, the momentum and practical dimensions of these federal court rulings “almost certainly made it harder” for federal courts, including the Supreme Court, “to reverse course in the future, Yale law professor William Eskridge said. If they do, he said, 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,’ Eskridge said.”

Thus, same-sex couples now may marry in twenty-six states and the District of Columbia. Same-sex marriage will also be legal soon in two other states when the stay against the Ninth Circuit ruling is lifted. Laws disallowing same-sex marriage in the remaining states are being challenged in federal court lawsuits. Appendix I shows in map form the current status of same-sex marriage in the United States. According to the Williams Institute at UCLA Law School, nearly seventy percent (70%) of all same-sex couples now live in states where same-sex marriage is permitted.

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

---


7 Id.

8 The Williams Institute, Ninth Circuit Court of Appeals Decisions Opens Marriage to Nearly 7 in 10 Same-Sex Couples in the US, 8 October 2014, available at [https://mail.google.com/mail/u/0/?ui=2&ik=fdfb51a1e&view=pt&search=inbox&th=148ed3f9c3e37e62&siml=148ed3f9c3e37e62](https://mail.google.com/mail/u/0/?ui=2&ik=fdfb51a1e&view=pt&search=inbox&th=148ed3f9c3e37e62&siml=148ed3f9c3e37e62) (viewed 8 October 2014).
circuits, it is very likely that other states in those six circuits will be judicially required to allow
same-sex marriage as well. Thus, Alaska, Arizona, Colorado, Kansas, Montana North Carolina, South Carolina, West Virginia and Wyoming are susceptible to litigation and are likely to be
required to legalize same-sex marriage under circuit precedents as well.  That would bring the
total of states with same-sex marriage up to thirty-five states.

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, perhaps all states.

However, there is also a chance for some judicial and political push-back. For
example, a news story in USA Today dated October 8 noted that, while no federal court
of appeals has yet upheld a state law allowing only traditional (male-female) marriage,
judges on a 6th 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 5th 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.  

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


\[^9\] Id. 
\[^{10}\] See generally Heath, What happens next, supra note 6.
for creating family laws) in only eleven states plus the District of Columbia. In one additional state voters approved of a ballot measure legalized same-sex marriage. In the fourteen other states, federal court rulings have judicially decreed the legalization of same-sex marriage. Thus, in more than half of the states where same-sex marriage is allowed, the legalization of same-sex marriage is the result of judicial mandate, not legislative or other normal democratic processes.

Interestingly, marriage law in the United States of America is substantially more accepting 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 over half of the American states, it is legal in less than ten percent (10%) of the sovereign nations in world. As Appendix III shows, only sixteen nations currently allow same-sex marriage out of 193 sovereign nations. Within a year, two more nations are expected to implement legislation previously enacted to allow same-sex marriages, but even counting those countries, the net total remains fewer than ten percent (10%) of all of the countries on earth that permit or recognize same-sex marriage.

Moreover, in no region of the world do 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.

12 Maine. 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. *
13 The states with same-sex marriage as a result of judicial decrees are California (2013j), Oregon, Utah (2014j), New Mexico (2013j), Oklahoma (2014j), Iowa, Wisconsin, Indiana, Virginia (2014j), Pennsylvania, New Jersey and Massachusetts. Also a judge entered a same-sex marriage order in Texas (2014j) 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, available at http://www.cnn.com/2014/02/26/politics/texas-same-sex/index.html (last viewed 7 October 2014) (59% support and 34% oppose “allowing gays and lesbians to marry legally); id. (50% believe the Constitution “give[s] gays and lesbians the legal right to marry”).
For example, no nation in Asia, no nation in Central America, no nation in Central Europe or in Eastern Europe, only one nation in Africa, just one nation in the Pacific, only one nation (and some parts of two others) 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 there only a minority of the nations in the region have legalized same-sex marriage. Even in Western Europe most of the nations in that region do not permit same-sex marriage.

Thus, as a simple matter of comparative family law, the U.S. states 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 ideological marriage policy “outliers” or are “leading the way” that many other nations will follow remains to be seen in the decade ahead. Clearly, at present, there is a huge gap between American state’s marriage law regarding same-sex marriage and the marriage laws of the other 192 sovereign nations.

Popular opinion also has been shifting in favor of allowing same-sex marriage in the United States. Earlier this year, a Washington Post-ABC News poll reported that half of Americans surveyed support same-sex marriage. Likewise, a May 2014 Gallup Poll showed similar results with 55 percent of the respondents favoring same-sex marriage and 42 percent opposing it. Nearly 80 percent (78%) of persons age 18-29 supported same-sex marriage in

---

2014, 37 percentage points higher than the same group in 1996. 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 . . . .” Age is a major variable, however, with most respondents age 50 or older consistently still not supporting legalization of same-sex marriage in 2014 in polls. For example, 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.

Thus, the shape, structure and composition and meaning of American families have changed significantly in the past half-century. Today, almost half of children in single-mother homes live with never-married mothers; four decades ago, that figure was one in 16, one-seventh of today’s figure. 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 steadily declined among Americans of all races. The most dramatic decline has occurred among African-American couples, of whom less than 40 percent are married.

---

16 Id.
17 See Craighill & Clement, supra, note 5. (Sixty-one percent of those responding said that they supported allowing gay or lesbian couples to adopt, while 34% opposed); id. (78 percent agreed that “gay people can be as good parents as straight people”; while only 18% said “No, [they] cannot be as good.”).
19 Id.
20 Much of the data reported in this paper comes from FamilyFacts.org, a subsidiary of The Heritage Foundation. See About FamilyFacts.org, available at http://familyfacts.org/about (viewed 7 October 2014).
today.\textsuperscript{22} Still, overall, more than two-thirds of all men and nearly three-fourths of all women in America are now or have been married.\textsuperscript{23} One reason for the decline in marriage rates may be due to postponement of marriage. Only 34.4 percent of men and 47.3 percent of women born in 1975-79 were or had ever been married by age twenty-five, compared to 66.1 percent of men and 78.2 percent of women in 1940-44.\textsuperscript{24}

High divorce rates continue to reshape the American family, as they have for nearly two generations. By age 45, nearly one-third of Americans who were born in the 1950s had divorced.\textsuperscript{25} The percentage of unmarried couples living together has increased ten-fold, from slightly more than one percent of all couples in 1960 to nearly 12 percent in 2011.\textsuperscript{26} However, there seems to be a trend toward fewer divorces (at least early divorces). Nearly 77 percent of men who were married for the first time in the early 1990s reached their 10th anniversary, three percentage points higher than men who married a decade earlier.\textsuperscript{27} Similarly, 74.5 percent of married women reached their 10\textsuperscript{th} anniversary, and over 56 percent (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 29 years of age for men, and 26.5 years for women.\textsuperscript{28}

\textsuperscript{22} The proportion of married adults has decreased, available at \url{http://familyfacts.org/charts/150/the-proportion-of-married-adults-has-decreased} (viewed 7 October 2014).
\textsuperscript{23} The majority of adults have been married, available at \url{http://familyfacts.org/charts/100/the-majority-of-adults-have-been-married} (viewed 7 October 2014) (67\% of men were or had been ever-married in 2009, compared to 69\% in 1996; 73\% of women were ever-married in 2009 compared to 76\% in 1996).
\textsuperscript{24} Both men and women are less likely to marry in their twenties, available at \url{http://familyfacts.org/charts/155/both-men-and-women-are-less-likely-to-marry-in-their-twenties} (viewed 7 October 2014).
\textsuperscript{25} By age 45, about one in three Americans who were born in the 1950s had divorced \url{http://familyfacts.org/charts/165/by-age-45-about-one-in-three-americans-born-in-the-1950s-had-divorced} (viewed 7 October 2014).
\textsuperscript{26} Nearly 12 percent of couples living together are unmarried, available at \url{http://familyfacts.org/charts/110/nearly-12-percent-of-couples-living-together-are-unmarried} (viewed 7 October 2014).
\textsuperscript{27} Recent marriages are slightly more lasting for men, available at \url{http://familyfacts.org/charts/161/recent-marriages-are-slightly-more-lasting-for-men} (viewed 7 October 2014).
\textsuperscript{28} Men and women are marrying later, available at \url{http://familyfacts.org/charts/102/men-and-women-are-marrying-later} (viewed 7 October 2014).
Same-sex marriage is now legal (or in the process of becoming legal) in more than half of the states (thirty states and counting). While relatively few same-sex marriages are performed, their legalization conveys a communicative and social acceptance message that influences contemporary notions of what marriage is, means, and what is expected of marriages.

So, in summary, there are fewer traditional married couples and more unmarried cohabiting male-female 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. Same-sex marriages are performed and legally recognized in half of the states and they are well-known (if controversial) in all states.

**

III. Principles of Equality and the Uniqueness of Marriage

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

---

29 See generally Heath, What happens next gay marriage, supra note 6. See further id. (“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.”).
heterosexual marriages are. 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 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 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 are, advocates of same-sex marriage presents a more formidable challenge. If it were true that same-sex relationships were just as valuable to society as heterosexual marriages are, 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, 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

---

30 The following discussion abbreviates ideas developed at greater length in Lynn D. Wardle, Legal Claims for Same Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 So. Tex. L. Rev. 735-768 (1998).
centuries, indeed millennia, and in all cultures, have conferred upon this relationship the *special, preferred* legal status of marriage? Why has the state chosen to make marriage between a man and a woman (and no other kind of intimate relationship) a *unique* public institution and given 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 they make uniquely valuable contributions to the state, to society, and to individuals. Heterosexual marriages have been singled out from all kinds of adult relationships for preferred status because they are so important and valuable to society and 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. In brief, there are many social interests in and public purposes for legal marriage for which heterosexual marriages today still provide tremendous benefits to society that are 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 show children how to relate to persons of their own and the 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 that 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.”

IV. Distinguishing Three Contrasting Cases That Significantly Changed Family Law

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

In 1967, the Supreme Court ruled in Loving v. Virginia that state laws forbidding interracial marriage (specifically in Virginia marriage 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 antimiscegenation laws that were rejected by the Court in Loving are readily distinguishable from male-female marriage laws in terms of 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 an 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). 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 2% 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 6 million souls.”

“Approximately one in four soldiers that went to war [in the American Civil War] never returned home.” The total casualties in the Civil War (soldiers who died, were wounded, were captured, or were missing) was nearly 1.5 million men. Thus, the price behind the abolition of racial discrimination was extremely high and forged a consensus that cannot be doubted. 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. . . .” These are almost the first


33 Id. (emphasis added).

34 Id.

35 Id.

36 388 U.S. at 2.
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).\(^{37}\)

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*,\(^ {38}\) the State of Virginia operated the Virginia Military Institute which 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.\(^ {39}\)

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 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

\(^{37}\)88 U.S. at 4; *id.* at 11 n. 11.  
\(^{39}\)The rat line (and graduation from it in what is known as “break out”) is described in PHILLIPPA STRUM, WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS 43-47 (Univ. Press of Kansas 2002).
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. See Loving v. Virginia, 388 U.S. 1 (1967). 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.” Ballard v. United States, 329 U.S. 187 (1946).

“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.40

Thus, Loving is weak precedent for interpreting the Equal Protection Clause (or Due Process) Clause of Constitution to require states to legalize same-sex marriage for several reason.41

40United States v. Virginia, 518 U.S. at 532-34 (emphasis added, citations omitted).
B. Marvin v. Marvin Does Not Compel Legalization of Same-Sex Marriage

*Marvin* is also quite distinguishable from the federal judicial movement to force states to legalize same-sex marriage. For example, *Marvin* was decided by a state court; relied upon and retrospectively [not prospectively] legalized social changes. It also distinguishes *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*, and that it would achieve the most lasting, effective, and legitimate law reform if it were to follow the legislative reform process used to legalize no-fault divorce.

One of the most well-known examples of a profound judicial decision causing significant change in the substance of family law in America was the opinion of the California Supreme court nearly forty years ago in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). In *Marvin*, the court held, *inter alia*, that express contracts between nonmarital 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,” and that in the absence of such an express contract, financial recovery may be based upon (“and courts 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. While the plaintiff in *Marvin* (whom actor Lee Marvin cast aside) ultimately did not obtain any financial recovery (“palimony”), the case had very profound and far-reaching consequences for social attitudes and practices in the United States, and even abroad.

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

troubling and the most comparable to the contemporary judicial legalization of same-sex marriage in many ways. 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 invalidate abortions 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 analysis was very weak and unpersuasive and many scholars (including many supporters of the permissive abortion result in the case) were very critical of the case. “[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.’”\(^{42}\) For example, Yale Law School Professor Alexander Bickel 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.”\(^{43}\)

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 center of western civilization . . . .”\(^{44}\) Liberal Professor Mark V. Tushnet wrote: “‘It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful.’”\(^{45}\) 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 . . . .”\(^{46}\) Professor John Hart Ely accused the


\(^{43}\) Alexander Bickel, *The Morality of Consent* 27-29 (1975). *Id.* (“Should not the question then have been left to the political process . . . ?)


Supreme Court of “mistak[ing] a definition for a syllogism,”\footnote{47 John Hart Ely, \textit{The Wages of Crying Wolf: A Comment on \textit{Roe v. Wade}}, \textit{82 Yale L.J.} 920, 924 (1973);} and declared: “What is frightening about \textit{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.”\footnote{48 \textit{Id.} at 935-36.} Professor Ely concluded that “[\textit{Roe}] is bad because it is bad constitutional law, or rather because it is \textit{not} constitutional law and gives almost no sense of an obligation to try to be.”\footnote{49 \textit{Id.} at 947.} University of Chicago Professor Richard Epstein criticized: “\textit{Roe v. Wade} is symptomatic of the analytical poverty possible in constitutional litigation,”\footnote{50 Richard Epstein, \textit{Substantive Due Process By Any Other Name: The Abortion Cases}, 1973 Supr. Crt. Rev. 159, 184.} and he stated: “[\textit{I}]n the end we must criticize both Mr. Justice Blackmun in \textit{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.”\footnote{51 \textit{Id.} at 185.} Harvard Law Professor Mary Ann Glendon asserted that \textit{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 values and protection for legal process.\footnote{52 Mary Ann Glendon, Abortion and Divorce in American Law \textit{passim} (1987)}

Opposition to the [privacy justification use in \textit{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 \textit{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.”

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.

**

IV. Conclusion: The Past is Prologue

My 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.

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), the judicial provision of marriage-like financial rights and claims

to non-marital cohabiting couples (*Marvin*), and the judicial legalization of abortion on demand (*Roe*).

*Roe v. Wade* is the case of legally-imposed change in family law that is perhaps the most troubling of the three precedents. As 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 40 years after the case was decided). Similar 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.

*Marvin* is the most readily distinguishable from the same-sex marriage revolution that is occurring (recently at break-neck speed) in the federal courts. *Marvin* was decided by a *state court*; 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 concerning the issue of same-sex marriage.

Which approach the courts will take will have significant implications for how the issue ultimately is resolve and how it is received by the people of America, especially those who disagree with the policy position imposed by judicial decision. Grass-roots (state court) initiated family law reforms (like *Marvin*) have the best likelihood of success. Form and substance are linked in family law. So imprudent, impulsive or impatient judicial action (ala *Roe v. Wade*) may
complicate the process of resolving the issue, delay the social outcome, provoke long-lasting hostility, and diminish respect for the courts in the process.

May we hope (and work) for a better resolution of the controversy over legalization of same-sex marriage?
Appendix I: State Same-Sex Marriage Laws: Legislatures and Courts (NCSL)


** UPDATE TO ADD NEV & IDA.
Appendix II: Washington Post Map of State Same-Sex Marriage Status

Apppendix III. Freedom to Marry Map (October 7, 2014)

Winning the Freedom to Marry: Progress in the States

Appendix IV

18 Countries that have legalized gay marriage (and Year approved)

1. Netherlands – (2001)
15. France – (2013)
17. Scotland (end of 2014 estimated)\textsuperscript{54}
18. Luxembourg – (2015 estimated)\textsuperscript{55}

