

Images and Illusions of Progressive Change in American Family Law

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Paper Abstract

*For Presentation at the Association of American Law Schools
Midyear Meeting
June 22-24, 2015
Orlando, FL*

Recent changes in the definition and structure of relationships recognized legally as family relationships often are portrayed as images of significantly progressive, egalitarian, and beneficial social advances. My paper will present a critical analysis of such interpretations. It will consider, for example, whether *United States v. Windsor* altered substantially the traditional structural allocation of family-regulating authority as between the states and the federal government, and, if so, how? Also, have *Windsor* and the subsequent federal courts that have mandated the legalization of same-sex marriage in the states altered the basic principle of federal judicial deference to state regulation of family relations, and, if so, how? Have those recent judicial rulings significantly changed the meaning of marriage in the United States, and, if so, how? Such changes often have been justified or supported by claims that they will benefit children raised by parents in such relationships; is there evidence clearly supportive of that claim, or is the evidence contrary, or ambiguous, or incomplete? Finally, my paper will provide comparative international perspectives matching and contrasting a comprehensive review of such recent family law developments in the United States with the status and trends in family law in other nations.

We are witnessing the redefinition of marriage and family relationships in many nations. The legalization of same-sex marriage is the most well-known, but hardly the only significant change in family demographics in industrialized nations. For example, in the USA today almost half of children in single-mother homes live with never-married mothers; four decades ago, that figure was one in 16, just one-seventh of today's figure.

The percentage of couples living together without marriage has increased ten-fold, from slightly more than one percent of all couples in 1960 to nearly 12 percent in 2011. The percentage of adults who are married has fallen - from about 70% in 1960 to about 44% in 2010. The percentage of marriage that last 20 years has dropped from 67% to about 56% in just twenty years (through 2005). Marriage is not a priority for either Gen-X-ers or for Millennials. The percentage of children who are born out of wedlock has stabilized at about 40% for all

Americans. These indicators suggest that the traditional male-female marital family is in decline in the United States, and other family forms are replacing it. The implications of that family demographic shift for life as we and our children and grandchildren know it and expect it to be, for the economy, for the well-being of future generations has not been considered much by family law scholars.

Demographers have been predicting a “demographic winter” is coming in many affluent nations as birth rates have fallen below replacement level (far below in some nations) while the aged are living longer. Additionally, an economic seismic shift may occur when the ratio of workers to non-workers in a given society falls below levels capable of sustaining retirement, pension, social security and welfare programs as they are now operated.

Many other social influences – including immigration, education, employment, generational work-ethic, and religiosity, to name a few – can magnify or minimize the potential detrimental effects of these family demographic factors. Put them all together – and you have the makings of a demographic-socio-economic-political “perfect storm.” If preparations are not made now to deal with the confluence of such developments, the consequences for the next four generations may be devastating.

This paper will consider the possibilities and implications of these developments. It also will discuss what legal policies might be adopted now that would help future generations of Americans to be prepared to cope with and not be overwhelmed by these coming developments.