The Same Sex Marriage Tax Shelter

Stephen Black, Professor, Texas Tech University School of Law

A massive tax shelter can be created by using the different state laws affecting same sex marriage and multiple marriages, and such a tax shelter will endanger the US tax system. Recent events (including the US v. Windsor decision, the recognition of same sex marriage by additional states, and the decision of the North Dakota Attorney General that multiple marriages may be legal) have created more confusion between the states, which do not have uniform laws regards same sex marriage. Where there is a lack of uniformity, tax planners go to work. This is especially ironic, since several of the cases were brought on claims of tax discrimination.

Marriage provides many opportunities to share, split and ignore income. If we, as a society, make it easier and more tempting for individuals to use “marriage” as a tax vehicle, will we like the result?

Since state laws regarding same sex marriages and unions are not uniform, they are ripe for use as a tax shelter. The definition of "marriage" is in flux, and we have seen at least one instance where a three person union would be valid. ("The state’s attorney general, Wayne Stenehiem, presented his opinion earlier this month that a resident in a same-sex marriage recognized by another state may enter a concurrent heterosexual marriage in North Dakota." Read more at http://www.westernjournalism.com/gay-marriage-brings-polygamy-north-dakota/#XKYTTZWQ3YrHgQQO.99)

Our federal tax code does not tax transfers between "spouses," which means that all kinds of business deals could transpire between "spouses" whose only purpose in "marriage" is to avoid tax. Rather than view this as an abuse of the system, many states could see this as a potential source for additional revenue, and they could encourage the practice. At that point, would the IRS and Congress be forced to curtail tax benefits to all marriages?

'Family Cycles' and the Future of American Law

Allan C. Carlson, President, The Howard Center for Family, Religion & Society

Most recent court decisions ruling in favor of same-sex marriage have relied, either openly or implicitly, on a distinctive theory of history: that marriage in America has "evolved" either to expand ever more broadly the "right to marry" or to meet new and changing societal needs, or both. This paper argues that such interpretation is an inaccurate understanding of family history in the United States. Instead, marriage and family life have moved in cyclical fashion, as a family system reflecting certain unchanging attributes (as evidenced in marriage, fertility, and dissolution rates) has moved through periods of strength and weakness. Indeed, the evidence points toward four such cycles in the American experience, each approximately a century in length: 1630 to 1730; 1730 to 1830; 1830 to 1930; and 1930 into the early 21st Century. The paper will define such measures of strength and weakness, and analyze...
in detail the first of these cycles-- from 1630 to 1730-- as an example of this process. The paper will also explain the implications for law deriving from this interpretation, as compared to the "evolutionary" model.

**Flight from Obligation: The Future of Families and of Family Law**  
*William C. Duncan, Director, Marriage Law Foundation*

Recently, interacting legal and social changes appear to be accelerating. Even in a time frame of years, we have seen the reemergence of substantive due process claims in family law, the replacement of levels of scrutiny with more transparently subjective legal standards, the unlikely appearance of legal arguments for non-monogamy, the rapid de-institutionalization of marriage, etc. What does this all portend?

Assuming no significant shift in legal trends, this presentation suggests three salient characteristics of family law, will emerge:

1. Family Life a la carte.
2. Purpose-less marriage.
3. Pervasive legalism

This presentation will try to provide some context for this prediction and fill out the details.

**Cheating Marriage**  
*John C. Eastman, Henry Salvatori Professor of Law & Community Service,  
Dale E. Fowler School of Law, Chapman University*

In his dissenting opinion in *United States v. Windsor*, Justice Scalia accused the Court of “cheating.” The cheating he was speaking about was that of inappropriately interfering with the political process, deciding an issue that by rights should have been decided by the people themselves. But the “cheating” that has occurred in the marriage cases is of the more traditional sort. In the Proposition 8 case out of California, the named defendants, particularly included the Attorney General of the State, had opposed the Proposition during the initiative campaign, and then not only refused to defend it in the court challenges but affirmatively joined in plaintiffs’ attack on its constitutionality, conceding points of fact and law that no competent lawyer would concede. The gambit paid off when the Supreme Court held in *Hollingsworth v. Perry* that it lacked jurisdiction to hear the appeal brought only by the proponents of the initiative, leaving in place an aggressive judgment by a single district court judge in a collusive suit that effectively invalidate the initiative’s operation statewide.

Since the Court’s decision in *Hollingsworth*, a number of other elected officials have refused to defend their state’s marriage laws, creating a troubling trend toward collusive suits in which the judicial process is manipulated to achieve a political end that the collusive “opposing” parties in the case could not achieve at the ballot box. This paper elaborates on the “cheating” that went on in both the *Hollingsworth* and *Windsor* cases in light of collusion precedent, reviews developments in the lower courts subsequent to those decisions, and offers some proposals for curtailing the collusion trend that is now threatening to undermine our adversarial system of justice.
The Family is, and Will Remain, a Unit of a Kinship System
Scott FitzGibbon, Professor, Boston College Law School

To discern the future of the family – the major topic of this symposium -- one must recognize those fundamental attributes which establish its perennial importance in carrying forward the human project. Only a structure which directs the family towards basic human goods – fidelity, for example – and is attentive to fundamental human concerns – biological affinity, for example – will perdure and flourish.

This paper identifies another feature, nearly universally possessed by families and one fundamental to their flourishing: membership in a kinship system.

Kinship relations, in our society and in most, are organized systematically. That is to say, each kinship connection is constructed, conducted, and considered, not in isolation but by reference to the others. Your uncle is your father’s brother, in just about the same way as your own sibling is your brother and your children are one another’s brothers and sisters. Your spouse is the mother or father of your children, in just about the same way as your mother and father are your parents and the parents of your siblings. One’s beliefs and expectations about what each kinship relationship entails are roughly the same as the beliefs and expectations of the other participants. Something similar can be said about brothers and parents not of one’s own family: the same sorts of relationship exist among them and, though they are not one’s relatives, one understands -- without having to investigate -- the commitment each of them has to the others, and especially to their own young and to their elderly. The rearing of the next generation of the family, and the care for its elderly, are to some extent the concern of all.

This paper proposes a definition of the term “kinship system,” and identifies the goods which it comprises.

Beyond the Expansion Framework: How Same-Sex Marriage Changes the Institutional Meaning of Marriage and Heterosexual Men’s Conception of Marriage
Alan J. Hawkins & Jason S. Carroll, Professors of Family Life, Brigham Young University

Social institutions profoundly affect human behavior. They provide human relationships with meaning, norms, and patterns, and in so doing encourage and guide conduct; they are the “humanly devised constraints that shape human interaction.” When the definitions and norms that constitute a social institution change, the behaviors and interactions that the institution shapes also change. Marriage is society’s most enduring and essential institution. As with any institution, changing the basic definition and social understanding of marriage—such as by nullifying its gendered definition—will change the behavior of men and women in marriage and even affect whether they enter marriage in the first place. Whether deemed good or bad, redefining marriage away from its historically gendered purposes will have significant consequences. We know this not only as a matter of sound theory, logic, and common sense but from experience with other changes to marriage and marriage-related expectations. Specifically, the advent of no-fault divorce changed the legal and social presumption of permanence in marriage. That change had profound consequences. While affording adults greater autonomy and facilitating an easier end to dangerous or unhealthy relationships, it also contributed to an unexpected increase in divorces from low-conflict marriages, created a tangible sense of fragility for all marriages, and left more children being raised without their fathers in their lives, with
attendant adverse consequences. Although it is too early to know exactly how redefining marriage to include same-sex couples will change marriage, we argue that such a significant change will likely further weaken heterosexual men’s connection to marriage. Marriage has been an important way that adult men establish their masculinity in a way that benefits women, children, communities, and society. A de-gendered conception of marriage likely weakens the institution’s power to channel men’s generative masculinity in child- and family-centered ways. This, in turn, will likely increase the risk that more children will be raised without the manifest benefits of having their fathers involved day to day in their children’s lives. These risks justify states’ caution in redefining marriage in non-gendered terms.

Family Law: A Cauldron for Our Principles and Beliefs

Gilbert Holmes, Dean, University of La Verne College of Law

I will be addressing how principles like separation of powers, rule of law, personhood (beyond the current personhood movement), and conflicts of individual Constitutional rights are played out in the Family Law arena. I find this topic interesting in part because many lawyers, judges, law students and legal systems consider Family Law to be a relatively minor area of the law.

Wollstonecraft and Mozart: Insights on Marriage and Family Life in Two Enlightenment Works

Paul Kerry, Associate Professor of History, Brigham Young University

This paper attempts to unpack ideas on marriage and family in two major, late eighteenth-century works: Mary Wollstonecraft's *A Vindication of the Rights of Woman: with Strictures on Moral and Political Subjects* (1792) and Mozart's *The Magic Flute* (1791). *The Magic Flute* is not usually examined in the light of marriage and family, yet these can be seen to be central to the highest ideals of the opera. Scott Yenor has recently published an important book, *Family Politics: The Idea of Marriage in Modern Political Thought*. This book examines the political philosophy of Locke and Hegel (and others) with respect to marriage and family. Out of necessity, Yenor had to leave out the ideas of other significant thinkers, including Mary Wollstonecraft. This is a painful omission because of her iconic status in the history of feminist thought. In addition, Wollstonecraft's views on these matters are in some key ways in tension with modern feminism. Therefore, it is crucial to explore Wollstonecraft's thinking on motherhood, children, and family life. My paper will build on the work of Barbara Taylor to show the relevance of Wollstonecraft's insights today.
A Prospective Analysis of Family Fragmentation
Lynne Marie Kohm, John Brown McCarty Professor of Family Law, Regent University School of Law

“Single women have a dreadful propensity for being poor – which is one very strong argument in favor of matrimony...” The advice and insight of 19th century novelist Jane Austen two hundred years ago is salient today in a prospective analysis of family fragmentation. Described as the socio-legal phenomenon of broken or never-formed families, family fragmentation has significant societal effects on family law. Some of those effects, worked into a prospective analysis with a focus on never-formed families, may prove helpful in considering the future of American families and family law. This article considers the scope, direction and pace of changes in families and family law in terms of never-formed families to discuss what effects those changes may produce in America and in American law in the future. Part I considers the law and economics of never-formed families as manifested in single motherhood. Child birth statistics and parental obligations are examined in the context of societal economics. In the context of single motherhood characterizing the lion’s share of never-formed families the article then examines fatherlessness and its effect on children and society at large. Part II then considers marriage law trends, the marriage market and income inequality in the context of family fragmentation and never-formed families. Finally, the conclusion attempts to look down the road ahead for the future of the family in light of the never-formed family trend. The changes effected in America and American family law due to family fragmentation are illustrated in the magnified consequences of never-formed families to children and to society. A prospective analysis gives us a better idea of how to avert some of that jeopardy to both.

The Evolution of Family Law: Changing the Rules or Changing the Game?
Carlos Martínez de Aguirre, Professor of Civil Law, University of Saragossa (Spain)

If a lawyer of the early 20th century woke up from his hibernation in our days, he would find a lot of new words he would not understand (internet, wifi, microwave, and so on). But when reading, or talking, about family and family law, he probably would feel comfortable: “this I know,” he would think (“this” being words like marriage, husband, wife, spouses, son, daughter, parents and so on). But soon he would realize that even though the words are the same ones he knew, their current meaning is completely different. My paper tries to deal with this evolution, mainly from the European point of view: an evolution that has changed not only some of the rules of the game, but the game itself. It also tries to suggest some ways to recover the real meaning of family, and family law.

The Virtue of Judicial Humility
Richard S. Myers, Professor, Ave Maria School of Law

Since the United States Supreme Court invalidated a portion of the Defense of Marriage Act in United States v. Windsor, many lower courts have addressed the constitutional issues raised by state laws prohibiting same-sex couples from marrying. Most lower courts have struck down such laws. Most observers believe that the Supreme Court will consider the issue in the
very near future. In thinking about the constitutional issues, I think it would be useful to recall the Court’s relatively recent experience with another contentious social issue that the Constitution does not address with any clarity. In its 1997 decisions in Washington v. Glucksberg and Vacco v. Quill, the Court surprised many observers and upheld state laws banning assisted suicide. I think that these decisions were correctly decided. Perhaps more importantly, these decisions reveal the benefits of judicial humility. The decisions have not ended societal debate about assisted suicide and the law has moved slowly in favor of legalizing assisted suicide. But because the Supreme Court did not purport to resolve the issue with a stroke of the pen, this ongoing debate has been better informed. I think the Supreme Court should take the same approach when it considers the constitutionality of laws prohibiting same-sex couples from marrying. Such an exercise of judicial humility would allow the societal debate on this issue to continue without the distorting effects of the Court’s intervention.

Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes

Michael New, Assistant Professor of Political Science, University of Michigan-Dearborn

The recent mandate by the U.S. Department of Health and Human Services requiring private health insurance plans to cover all FDA-approved contraceptive drugs has generated a considerable amount of controversy. Much of the analysis has centered around whether this mandate violates the conscience rights of religious employers. However, there has been considerably less discussion as to whether these contraception mandates offer any significant public health benefit. Since the late 1990s, approximately 30 states have required that privately bought health insurance plans cover contraception. A time series-cross sectional analysis of state level public health data can offer important insights as to what impact these contraceptive mandates have on public health outcomes. Preliminary results indicate that state contraception mandates have little impact on either unintended pregnancy rates or abortion rates.

The Future of Justice Scalia’s Prophecies of Family Law Doom

Robert E. Rains, Professor Emeritus, Pennsylvania State University Dickinson School of Law

Over the last two decades, the Supreme Court has handed down three groundbreaking decisions concerning the rights of homosexual persons: Romer (1996), Lawrence (2003), and Windsor (2013). Each majority opinion was authored by Justice Kennedy, and each case featured a vehement dissent by Justice Scalia, indicating that the logic of the majority would lead to the striking down of state laws regulating sexual morality. And, in the months following Windsor, several federal district court judges have indeed used Justice Scalia’s words and reasoning in his Lawrence and Windsor dissents as a basis to rule state laws prohibiting same-sex marriage to be unconstitutional.

In his dissents, Justice Scalia went further and suggested that the majority’s reasoning undercut state laws prohibiting: bigamy and polygamy (Romer); bigamy, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity (Lawrence); and, indirectly, polygamy again (Windsor).

Our great national debate on same-sex marriage is not resolved either politically or constitutionally at this writing. And, notwithstanding the current trend in the lower courts, it is
far from certain how the Supreme Court will rule on a claimed federal constitutional right to same-sex marriage when that issue, seemingly inevitably, comes before it.

But what of Justice Scalia’s other “horribles”? Is he correct that these three Supreme Court precedents logically dictate that state laws banning bigamy, polygamy, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity, can no longer survive constitutional scrutiny?

My article will address the ongoing validity of such state laws regulating sexual morality in light of the Romer-Lawrence-Windsor trilogy and Justice Scalia’s prophecies.

Marriage at the Crossroads: The Profound Implications of Defining the Choice of a Marriage Partner as a Fundamental Right

Robert Smith, Managing Director, International Center for Law and Religion Studies

Over the past decade we have witnessed a profound change in family law: the redefinition of marriage to include same-gender couples. This redefinition is premised on the newly promoted understanding that 1) marriage is most importantly about the ability to choose an intimate partner with whom to share life together and 2) the choice of a marriage partner may not be denied on the basis of normative legislative judgments. Based on this understanding over the past year a nearly unanimous string of federal and state courts have determined that the federal Constitution requires state endorsement of same-gender marriage as a fundamental right. If the Supreme Court ultimately adopts this view, the implications beyond same-gender marriage could be profound. For example, would states continue to have sovereign authority to set marriage policy or would marriage policy become largely a federal question? Further, would historically forbidden forms of consensual adult marriage continue to be prohibited or would a fundamental right to choose one’s marriage partner require further expansion of permissible marriages? This presentation will explore the implications flowing from the premises of recent court rulings that the choice of a marriage partner should be considered a fundamental right.

Windsor and Its Progeny

Mark Strasser, Trustees Professor of Law, Capital University Law School

This article discusses Windsor as well as the same-sex marriage decisions issued by the Fourth and Tenth Circuits. It also discusses what the hypothesized decision striking down same-sex marriage bans would likely say, and the kinds of changes that such a decision is likely to cause. The article concludes that were the Court to hold that the right to marry is protected under the Federal Constitution, the likely effects on family law in particular are relatively minor and the likely effects on particular families will be quite positive.
Biology and Child Well-Being: The Irreducible Difference of Same-Sex Families
Paul Sullins, Professor of Sociology, The Catholic University of America

Recent work has challenged the widely-held claim that children with same-sex parents suffer no disadvantage in well-being compared to those with opposite-sex parents as a product of subjective measures and small samples. I test this question using 1.6 million cases from the National Health Interview Survey offering well-validated psychometric measures on 207,000 sample children, including over 500 in same-sex families. I find that on ten of fourteen measures the relative risk of clinical emotional problems, developmental problems, or related treatment services is more than twice as high for children with same-sex parents than for children with opposite-sex parents. Contrasts are adjusted for sex, age and race of child and parent education and income, and are statistically significant, most at 1%. The opposite-sex parents versus same-sex parents prevalence of serious child emotional problems is 7.5% versus 17.1%; difference is highly significant (.001). Logistic regression models exploring four explanatory hypotheses—stability, stigmatization, parent emotional problems and biological attachment—find that differences in biological parentage account almost fully for varying rates of emotional problems by family structure. As a result, though married improves on cohabiting, neither form of same-sex family can achieve the low rate of child emotional problems found among children raised by both biological parents.

“I Now Pronounce You Husband and Wives”: The Case for Polygamous Marriage After United States v. Windsor and Burwell v. Hobby Lobby Stores
Peter N. Swisher, Professor, University of Richmond Law School

Polygamous marriage, like same-sex marriage, traditionally has been held to be a void ab initio marriage in the vast majority of American states. However, unlike same-sex marriage, polygamous or plural marriage has enjoyed a rich historical tradition throughout the world, including the United States, where plural marriage still exists today, either overtly or covertly. Polygamous marriage was prohibited in the 1879 United States Supreme Court case of Reynolds v. United States, which continues to be recognized as binding legal authority in America today. However, based upon recent constitutional developments, Reynolds v. United States should be overruled, and polygamous marriage should be validated, for a number of compelling reasons. First, the archaic and moralistic Victorian rationale of Reynolds v. United States no longer is supportable based upon significant doctrinal developments since the Reynolds case was decided in 1879, and polygamous marriage should now be recognized under a fundamental right to marry. Second, polygamous marriage should be protected under a first amendment right to freedom of religion, as found in a number of subsequent Supreme Court cases as well as the Religious Freedom Restoration Act of 1993. And third, polygamous marriage arguably is protected by the due process clauses of the fifth and fourteenth amendments of the United States Constitution. Accordingly, proponents of polygamous marriage today have a very strong case, in my opinion, for validating polygamous or plural marriage on cultural, religious, and constitutional grounds.
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 problematic. It is
not, however, irrelevant or insignificant, nor can it responsibly be avoided.

My paper will briefly review 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 pursing 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 will compare and contrast the movement to legalize same-sex marriage with the
movement to recognize “palimony” (quasi-spousal financial rights) and to legalize abortion-on-
demand. I will briefly review Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) and Roe v. Wade, 410
U.S. 113 (1973). These examples of radical 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 will suggest the significant policy and structural implications of the decisions
that have mandated the legalization of same-sex marriage. It will distinguish Marvin in some
ways (decided by a state court; relied upon and retrospectively [not prospectively] legalized
social changes). It also will distinguish Roe (criminal law). It will conclude that in some very
critical ways, judicial legalization of same-sex marriage is more like Roe than Marvin.

The Fluid Family Theory

Jessica Dixon Weaver, Assistant Professor,
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In most American law schools, family law is taught using one particular prototype of
family – a white, middle-class, heterosexual married couple with children. The problem is that
the majority of Americans no longer live in such a unit, and if one were to dig a little deeper – it
would be revealed that they actually never did. Families have always been more complex, more
unstable than the presentation of the ideal. The presentation of family law is missing something
– a collective story, an essential truth, a fluid construct, perhaps a common language that all
citizens can understand and speak.

This article introduces the fluid family theory. The concept of the fluid family embraces
the fact that family structure and composition are ever-changing. Cohabitation, divorce, having
children outside of marriage, assisted reproduction technology, and the termination of parental
rights create a revolving door for entry to and exit from the family. A host of people are either
bonded to one another by blood, function, or the law, although these three types of relations are
not always aligned. As couples split, the functional and emotional ties of adults and children often rupture, but in some instances the connections are fostered and continue beyond the break-up without legal recognition. The fluid family also includes ‘kinfolk’ or persons who are like family members but do not share a consanguineous or legal bond. For many American families, slavery adds a powerful yet understated twist to family composition, and there are a number of white and black families whose family tree is expanded because of African-American descendants of whites during that time period. The concept of the fluid family allows for family members to move in and out of families over a lifetime, and while it accounts for entrances and exits, it also acknowledges that some family members remain part of the family even though the legal tie was perhaps never there or has been severed.

The theory of the fluid family is the opposite of the fixed traditional model of family from the past, and it counters the disjointed way in which race is currently inserted in the canon of family law. Many family law textbooks do not mention the significance of laws that impacted both white families and families of color when presenting the history of family law. The construct of both race and family share similar traits – they are fluid, complex, and replete with drama. The intersection of the two has yet to be nailed down within the family law canon. Rather than note the ways in which the legal concept of race was foundational to the legal concept of family, family law presents an incomplete structure of the composition of American families.

The ways in which families have been either historically recognized or unacknowledged by court systems is important in the debate regarding what groups legally qualify as families and the rights particular types of families possess under the law. Fluidity in family law allows for the existence of complex family law structures, and it provides a universal context whereby family units that have been deemed extralegal or alternative have a rightful place. This article will explore how current legal doctrine can embrace the fluid family theory.