

Abstracts

**for the *Symposium on Same-Sex Marriage and Gay Adoptions: Inclusion, Compromise, Protection, and Consequences*,
at BYU Law School, November 2, 2007**

**The Endurance of Biological Connection:
Traversing Old and New Family Values through Open Adoption**

by

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The so-called traditional family is increasingly supplanted and augmented by newer family arrangements, including those formed after dissolution and remarriage and through reproductive technology and adoption when couples cannot or choose not to procreate. These new family forms are created and protected by law, but still reflect the traditional value of marital, two-parent-birth-child families. Yet these families in fact have more than two parents. Family law and practice have struggled with the tensions between protecting parental rights and recognizing parental relationships that are outside the traditional two-parent family template. In light of these tensions, some form of open adoption has become the norm in most adoptions and nearly half the states have enacted adoption with contact laws. These adoptions reflect the growing recognition that adoptive families are unique, organic and dynamic entities which include within their constellations actual, if not ghosts of, birth family members. The paper will explore how lesbian and gay adoption has followed the traditional norms while adoption with contact has both reflected and challenged these norms.

Same-Sex Marriage: Tax Incentives and Costs

by

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The tax code contains provisions that benefit only married individuals and families. If the definition of marriage be changed nationwide, those provisions would be applicable to a larger number of taxpayers. All other things being equal, this would be the equivalent of a tax subsidy to those individuals who would now qualify.

Using the tax expenditures estimates prepared by the Treasury Department, it is possible to estimate and quantify the cost, in terms of forgone tax revenue, of increasing the base of people who would qualify for these tax provisions.

The Future of Marriage

by

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This paper will review and reprise the major arguments made in "The Future of Marriage" (Encounter Books, New York, 2007) by Mr. Blankenhorn. It will also consider and respond to some of the critiques of those arguments.

The Unconservative Effects of Conservative Opposition to Gay Marriage

by

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Conservative opposition to gay marriage is having unconservative effects, helping to push the boundaries of family law into new territory that challenges the primacy of marriage itself. By opposing gay marriage, conservatives are forcing gay families to seek refuge through untraditional means that could undermine marriage or destabilize family concepts in ways that gay marriage itself would not. Examples of this include the increasing availability of second-parent adoptions for same-sex and opposite-sex couples alike; the increasing frequency of “triple-parenting” arrangements; the unprecedented availability of parental visitation rights for non-parents; and adult adoptions as a substitute for marriage.

Left-leaning reformers would regard many or all of these innovations as good; in fact, they are championing them. Conservatives eye them suspiciously because they bring with them the potential to undermine marriage and traditional parental forms and presumptions. Gay marriage might relieve some of the pressure to concoct alternatives. Many conservatives may conclude in the end that the collateral damage being done to stability and tradition is worth it to keep gay couples from marrying. But they should at least weigh the unconservative consequences.

A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate

by

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In the past decade American marriage law has been the arena for a major controversy regarding same-sex marriage. Typically, liberals tend to support same-sex marriage, while conservatives oppose it. The liberal-conservative dispute concerning Same Sex Marriage is usually related to a broader debate on the legitimacy of limiting the possibilities for marrying: liberals present marriage as a private arrangement between the partners, and they therefore oppose restricting the right to marry with classic liberal arguments about individual freedom. The opponents of single-sex marriage, in contrast, legitimize legal limits to the right to be married by presenting marriage as a public institution.

Based on the unique experience amassed in Israel on this question, I seek to reveal the potential consequences of the struggle between liberals and conservatives regarding limitations of the right to marriage for an additional liberal-conservative confrontation concerning the uniqueness of legal marriages, and the difference between them and alternative family types.

The conservative position limiting entry to marriage won a decisive victory in Israel. Accordingly, partners of the same sex, like partners from different religious communities, are not allowed to formally marry. Generally speaking, the right to marry is subject to a broad range of civil and religious restrictions. Ironically, the strict limitations on the right to marry were a trigger for the development of the institution of cohabitation as a substitute for formal marriage. Accordingly, the array of the rights and obligations of cohabitants is approaching that of married partners, and at times even exceeds the latter. I will argue for the existence of a similar dynamic in the United States, where the distress of same-sex partners serves as the basis for notions and proposals, both in the academic realm and in the more general public realm, for strengthening the institution of cohabitation, the weakening of the institution of marriage, and at times even the abrogation of marriage as a legal institution.

On the background of this developing dynamic, and taking into account the aggregate Israeli experience, I will advance three arguments: First, I will present a conservative critique of the conservative position against same-sex partners. I will argue that, in the final analysis, the conservative camp's relative success in negating the possibility of same-sex marriages harms this camp's broader agenda for the preference of legal marriages. Second, I will present a liberal critique of the liberal camp. My proposition is that, despite the essentially liberal motivation for weakening legal marriages in order to decrease the gap between them and cohabitation, in many instances this activity harms the liberal values of freedom of choice and autonomy in the name of which they act. Finally, I will argue on behalf of democratic compromises such as civil union in the United States and spousal registry in Israel.

Same-sex Unions and the Adoption of Children – Reflections on Recent Developments in South Africa

by

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The change to a democracy in South Africa in 1994 has not only had a definite impact on the political dispensation in the country, but has also impacted radically on various aspects of private law. In this regard legal prescripts currently reflect a substantially different approach to homosexuality. A radical new line of thinking has also developed in respect of the relationship between children and their gay/lesbian parents and their adoption of children.

In this contribution the influence of homosexuality of a parent in matters pertaining to adoption of a child will be reflected upon. Emphasis will also be placed on custody of children under these circumstances since the argument in adoption and custody litigation seems to follow more or less a similar approach. The discussion will be done against the background of constitutional values and norms which have come into operation since 1994, first in the interim constitution, Constitution of the Republic of South Africa 200 of 1993, followed by the final constitution, Constitution of the Republic of South Africa 108 of 1996. The radical impact of the constitutional dispensation is borne out by the characterization of legal rules in the period before 1994 as “inherited from a bygone age, reflective of outmoded mores ...”

The South African *Civil Union Act 17 of 2006*:
A good example of the dangers of rushing the legislative process¹
by
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Following a ground-breaking judgment handed down by the Constitutional Court on 1 December 2005, the possibility of the conclusion of a valid marriage between two persons of the same-sex became a reality in the Republic of South Africa. The Court elected not to amend the legal position immediately, but instead opted to give Parliament one year within which to promulgate appropriate legislation. In response, Parliament allowed the *Civil Union Bill* to see the light of day in August 2006. This Bill was followed by a second (more simplified) Bill that appeared in November of the same year, which was eventually promulgated as the *Civil Union Act 17 of 2006*.

While it can be accepted that the Act allows persons of the *same* sex to conclude a civil union, the position of heterosexual persons appears to be less certain – a situation which requires urgent attention due to the lack of legal protection currently afforded to cohabitants who have not formalized their relationships. This problem is exacerbated by a number of anomalies created by judicial intervention (prior to the promulgation of the Act), in terms of which certain benefits of civil marriages (e.g. relating to maintenance and adoption) were extended to same-sex unmarried couples while their heterosexual counterparts were left out in the cold.

This contribution aims to elucidate the interpretative difficulties caused by the Act and also to shed some light on a number of the anomalies alluded to above.

¹ This paper is based on an article entitled “The *Civil Union Act* of 2006: A good example of bad legislative drafting” which was written by BS Smith and JA Robinson and is in the process of being submitted for publication.

Same-sex Marriage and Adoptions and the Tragedy of the Commons

by

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In *The Tragedy of the Commons*, Garrett Hardin popularized a valuable metaphor concerning lack of personal responsibility regarding public stewardships. Hardin's article focused specifically on overgrazing on public land and other environmental issues. This paper will apply Hardin's metaphor to the public institutions of marriage and parenthood, and will suggest that the same dynamic of loosening or abandonment of personal responsibility in the regulation of these important-but-taken-for-granted public institutions.

This paper will review the current status of the law in the United States and internationally regarding same-sex marriage and adoptions by same-sex couples and partners. It will also review recent developments in American law in these two areas, evaluate the latest legal analysis used to accept or reject the proposed claims, and also identify and analyze the constancies and changes in the law-reform tactics and strategies.

**Refusals to Place Children With Same-Sex Couples:
What Medicine Can Offer For a Live-and-Let live Solution**

by

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Goodridge v. Department of Public Health and the growing number of states recognizing same-sex civil unions have opened up a battle line over whether private parties have a right to refrain from facilitating same-sex unions or a duty to assist. The leading edge of this litigation considered whether representatives of the state or the church would be required to solemnize same-sex unions, but it quickly spilled over into other questions. Last year, Catholic Charities of Massachusetts, a private, not-for-profit adoption agency associated with the Catholic Church, walked away from the adoption business after serving Massachusetts families for more than 20 years. It had sought permission from the state to exclude gay and lesbian parents from adopting children through their social service agency, a request the Governor of Massachusetts denied. Rather than bending to the State's will, Catholic Charities simply shuttered its placement operations for good.

This paper explores how policymakers should think about these refusals, drawing heavily from the healthcare context—where nearly every state in the nation has carved out a space for medical providers to continue in their professional roles without participating in acts they find immoral. These legislative accommodations in medicine offer a number of approaches for resolving the clash between same-sex couples who want a service and those who have moral objections to assisting them.