

chef nous semblent inappropriés : il insiste longuement sur la constitutionnalisation des privilèges législatifs des législatures provinciales (à la p. 72) en négligeant d'ajouter que les législatures demeurent néanmoins souveraines pour en modifier la teneur et pourraient même en abolir l'existence; il présente aussi, à l'appui de sa thèse, le fait que le principe de la primauté du droit (rule of law) est fondamental à la Constitution du Canada (à la p. 71), ce qui est vrai. Néanmoins, on se souviendra qu'en Grande-Bretagne, jamais ce dernier principe ne peut servir à restreindre la souveraineté parlementaire!

Il se peut que les réflexions du juge en chef sur le rôle du préambule ne soient que des opinions ne liant pas les tribunaux (*obiter dicta*). En effet, n'a-t-il pas écrit, avant sa longue dissertation :

*Les présents pourvois ont tous été plaidés sur le fondement de l'al. 11d) de la Charte, disposition qui garantit l'indépendance et l'impartialité de la magistrature. Il ressort des termes mêmes de cette disposition que le droit qu'elle garantit est un droit d'application limitée - il ne s'applique qu'aux personnes qui font l'objet d'une inculpation. Malgré la portée limitée de l'al. 11d), il ne fait aucun doute que les pourvois peuvent et doivent être tranchés sur le fondement de cette disposition. Dans une large mesure, notre Cour est prisonnière du contexte que les parties et les intervenants lui ont présenté. (à la p. 63).*

Bref, l'avenir nous dira le sort que réserveront les tribunaux à cette opinion du juge Lamer!

Mais quel que puisse être le statut futur des dites « garanties implicites », que la réflexion du juge en chef Lamer ou que celle du juge La Forest soit consacrée, les restrictions au pouvoir parlementaire différeront grandement. La logique de l'un l'emportera sur celle de l'autre et le statut du pouvoir législatif en dépendra.

Chose certaine, la séparation des pouvoirs existe pour opposer des contre-pouvoirs; en plus, la formule d'amendement constitutionnel est rigide pour assurer que des modifications importantes ne puissent être apportées à la Constitution de façon unilatérale; or, lorsque le pouvoir judiciaire élargit unilatéralement sa compétence constitutionnelle, il ne souffre d'aucun contre-pouvoir pouvant freiner ses ambitions...!

Le contrôle judiciaire amène, évidemment, un recul de la souveraineté démocratique face à une institution non élue. Il est légitime, lorsque la Constitution est elle-même marquée du sceau de la légitimité (ce qui peut, au Québec, poser quelques problèmes!!). Mais les juges, en l'exerçant, doivent, à notre avis, faire preuve de retenue et ne restreindre l'élément démocratique que lorsqu'une disposition formelle et explicite de la Constitution l'impose.

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## Do guns deter crimes against property?

*Although the United States is exceptional among developed countries for its high crime rates, crime rose significantly in virtually all other non-Asian developed countries in approximately the same time period [1965 on]. Violent crime rose rapidly in Canada, Finland, Ireland, the Netherlands, New Zealand, Sweden, and the United Kingdom? With regard to crimes against property, a broader measure of disorder, the United States is no longer exceptional: Canada, Denmark, the Netherlands, New Zealand, and Sweden have ended up with theft rates higher than those in the United States over the past generation.*

*Francis Fukayama, Atlantic Monthly, May 1999.*

## Beef drain

*During the 1980s, on average, one in every ten head of live cattle produced in Canada was exported. During the 1990s, this ratio climbed to one in every three head. The bulk of these exports originated in Western Canada and was destined for the United States. Despite rising inventories in the United States, this expansion indicates a structural change in the Canadian cattle industry.*

*Statistics Canada, The Daily, Feb 22, 1999.*

# THE CASE FOR DOMESTIC PARTNERSHIP LAWS

*A society that values child-rearing and care-giving has every reason to provide special preferences for heterosexual marriages. That some married couples do not have children does not weaken this argument. On the other hand, society may also have an interest in encouraging permanent, caring relationships between people who do not engage in procreative sex — or any sex at all. Domestic partnership laws that allowed people of either sex and any sexual persuasion to form socially-sanctioned partnerships should therefore be considered. Groups who prefer that homosexual marriage be legalized should not regard them as a consolation prize.*

*Une société qui valorise l'éducation et le soin des enfants a toutes les raisons d'accorder un traitement préférentiel aux mariages hétérosexuels; et le fait que certains couples mariés n'aient pas d'enfants n'affaiblit pas cet argument. D'autre part, la société peut aussi avoir intérêt à encourager l'établissement de relations permanentes entre des personnes qui n'ont aucune relation sexuelle ou dont la sexualité n'est pas orientée vers la procréation. Il y a donc lieu d'envisager l'adoption de lois permettant à deux personnes de contracter une union reconnue par la société, sans égard à leur sexe ou à leur orientation sexuelle. Les groupes qui favorisent la légalisation des mariages homosexuels ne devraient pas voir là un prix de consolation.*

## Rainer Knopff

Working through the courts, gay-rights activists have pushed the issue of same-sex marriage to the top of the Canadian policy agenda. With respect to one law after another, gays and lesbians have challenged opposite-sex definitions of the legal term “spouse,” hoping thereby to gain access to a variety of “spousal benefits” — such as survivor pensions — and, ultimately, to achieve the full status of legal marriage.

In response, Canadian legislatures have begun to consider passing the kind of “domestic partnership” law pioneered in Scandinavia and Hawaii. Partners registered under such laws enjoy many of the benefits, rights, and obligations of married couples, but their legal status falls short of full marriage, which remains the preserve of heterosexual couples. Reform Party MP Ian McClelland has proposed a sexually indifferent partnership law, under which any two people,

whether they are sexually involved or not, and regardless of their sexual orientation, can register a partnership, with all of its attendant rights and obligations. Recently, the Alberta government announced it would consider the idea.

Some gay-rights activists maintain that domestic partnership laws are the last refuge — or gasp — of homophobic prejudice, a final attempt by a losing force to draw its line in the sand and make a futile last stand. I want to suggest, in contrast, that domestic partnership laws are a plausible response to a truly perplexing policy issue. Such laws address what is attractive in the argument for same-sex marriage — parts of which should attract even conservatives — while respecting the equally legitimate case for heterosexual marriage. Domestic partnership laws will be caught in a predictable crossfire from the extremes, but they should find favour with the moderate middle.

Marriage, as traditionally conceived, makes three major sexual distinctions, only one of which is challenged by the advocates of same-sex marriage. First, it distinguishes between sexual and non-sexual relationships, with only the former qualifying for marriage. Mere friendship or cohabitation is not enough. In the old days, this expectation was formalized in the norm that a marriage became valid only when it was sexually “consummated.” Consummation is no longer necessary, and in any case, purely “platonic” marriages were always possible if neither partner complained. Nevertheless, the general expectation was, and is, that marriage is grounded in a sexual relationship. Advocates of same-sex marriage simply seek to bring another kind of sexual relationship under the umbrella of marriage, not to extend the status and benefits of marriage to roommates.

Second, marriage distinguishes between casual and committed sex. The marriage ceremony is centred on a solemn commitment by both partners to forsake all others and to commit to a permanent union. Again, advocates of same-sex unions generally accept this aspect of marriage. Homosexuals want to get married for the same reasons that heterosexuals do: to publicly consecrate a long-term commitment.

Third, marriage has traditionally distinguished between heterosexuality and homosexuality. Only heterosexual relationships qualify for marriage. This, of course, is the facet of marriage that must be overcome for publicly recognized same-sex marriages to occur.

In sum, the traditional institution of marriage exalts long-term, committed, actively heterosexual relationships over all other kinds of relationships. According to traditionalists, it does so because of society’s special stake in the generation and rearing of children. A child is necessarily the product of one man and one woman, and, on average, biological parents who live in a stable and committed relationship rear children most effectively. No better way of replacing and socializing the next generation has yet been discovered.

Marriage, in short, is society’s way of giving special status to the procreative sex that produces children and to the family stability that best nurtures them. This purpose makes sense of all three sexual distinctions at the root of marriage and it especially justifies restricting marriages to heterosexual relationships.

Marriage has purposes other than the procreation and rearing of children, of course. Jonathan Rauch, a strong advocate of same-sex marriage, identifies two: “domesticating men and providing reliable caregivers.” He says that “civilizing young males is one of any society’s biggest problems,” and for this purpose

“marriage is unmatched.” Marriage is similarly unmatched as a way of ensuring that “most people have someone whose ‘job’ is to look after them” in times of crisis or infirmity.

If its procreative and child-rearing functions tilt marriage toward heterosexuality, its domestication and care-giving functions do not. Certainly, gay men need “taming” as much as heterosexual men do, and marriage can have the same beneficial effect in both cases.

Similarly, homosexuals have no less need than anyone else for committed partners to see them through hard times and old age. And since devoted spouses do this job so much better than the state, society has an interest in casting the net of marriage as widely as possible. Far better, the argument goes, to encourage interdependence and mutual care through the civil-society institution of marriage than to end up with individuals dependent on the impersonal state.

These are attractive arguments in favour of same-sex marriage and spousal benefits, arguments that, as noted, should resonate powerfully even with social conservatives.

But while social conservatives might concede the domestication and care-giving benefits of same-sex marriage, they worry about sending the message that society has no more stake in procreative sex than in non-procreative sex, that the two are perfectly equal in status. This is not a message sent by the drift from formal marriage to common-law relationships among heterosexuals, or by the legal recognition of heterosexual common-law relationships; but it is the unavoidable message of legally recognized homosexual marriage. Is this a message society can afford to send at a time when a variety of social forces seem already to be undermining the inclination to have children or to shoulder the burdens and responsibilities of effective parenthood?

Advocates of same-sex marriage have a ready response to this concern. If non-procreative sex undermines a fundamental purpose of marriage, they ask, why do we grant marriage licenses to clearly infertile heterosexual couples? Why don’t we refuse to grant a marriage license to a post-menopausal woman, for example? And if non-procreative sex is so bad, why do we permit the sale and use of contraceptives? Moreover, we don’t require that a commitment to have children be part of the marriage ceremony even for fertile couples, who may freely choose to remain childless. Finally, we clearly recognize that sex has important non-procreative purposes even for couples who have children; it promotes intimacy and

## The official recognition of same-sex marriage would leave absolutely no doubt that society had abandoned any public distinction between procreative and non-procreative sexuality.

bonding, for example, things that are good in themselves, and thus equally good for homosexuals. (This last argument seems especially relevant in an era when, because of birth control and increasing longevity, reproduction and child-rearing occupy less of peoples’ lives.)

If homosexuality is incompatible with marriage, the argument goes, it can only be for reasons that apply with equal force to heterosexual couples who cannot or will not procreate, and the latter should thus also be denied the right to marry. By the same token, if we allow non-procreative heterosexuals to marry — presumably for domestication or care-giving reasons — we have no good reason to deny the same benefits to homosexuals.

Or have we? Non-procreative sex and childlessness among married heterosexuals certainly challenge society’s effort to give higher status to procreative sex, but they do not completely undermine it. They take procreative sex down a peg or two, but do not totally eradicate the traditional hierarchy between procreative and non-procreative sexuality. The official recognition of same-sex marriage, by contrast, would leave absolutely no doubt that society had abandoned any public distinction between procreative and non-procreative sexuality. If it is legitimate for society to give higher status to procreative sex, in other words, this purpose continues to be served by limiting marriage to heterosexuals, despite the fact that married couples engage in a lot of non-procreative sex.

It might, of course, be objected that one shouldn’t put too much stock in something so insubstantial as the educational message of the law. But proponents of same-sex marriage cannot make this objection: Their whole project is based on the power of legal education. They want official, legally recognized marriage because it is more powerful in its effects than purely private commitments. It is even more powerful than

“domestic partnership” laws that give a kind of “common law” status to homosexual unions. “There is no substitute,” says Rauch, “Marriage is the *only* institution that adequately serves” the domestication and care-giving functions. “It shrewdly exploits ceremony (big, public weddings) and money (expensive gifts, dowries) to deter casual commitment and to make bailing out embarrassing. Stag parties and bridal showers signal that what is beginning is not just a legal arrangement but a whole new stage of life. ‘Domestic partner’ laws do none of these things.”

Big public ceremonies, expensive gifts, and the like can, of course, be organized on a purely private basis, or in the context of domestic partnership laws. But this is not enough for Rauch. What gives all the ceremonial devices of marriage their oomph is official legal recognition of the marriage contract.

The educational message of the institution of marriage is obviously supremely important to advocates of gay marriage. If society’s recognition is important to them, however, they cannot logically discount the possible reciprocal effect of that recognition on society. Is it more likely, in other words, that gay marriage would strengthen marriage generally by “reaffirm[ing] society’s hope that people of all kinds settle down into stable unions,” as *The Economist* thinks, or that it “would call even more seriously into question the role of marriage at a time when the threats to it, ranging from single-parent families to common divorces, have hit record highs,” as James Q. Wilson maintains? Traditionalists believe the latter is more likely, and oppose homosexual marriage for this reason.

But to oppose gay marriage on the grounds that it might further weaken heterosexual marriage, says same-sex marriage activist Andrew Sullivan, is to sacrifice a minority to the utility of the majority. In his view, “it’s not at all clear why, if public disapproval of homosexuals is indeed necessary to keep families together, homosexuals of all people should bear the primary brunt of the task.”

In response, a traditionalist might ask why the public preference of heterosexual marriage necessarily entails “public disapproval” of homosexuals. After all, society prefers heterosexual marriage to all kinds of cohabitation arrangements among singles — e.g., cohabiting siblings, adult children and parents, friends — without subjecting the latter to “public disapproval.” In fact, immediately after raising his “public disapproval” objection, Sullivan himself recommends such a nuanced approach to social ordering. “Is it inconceivable,” he asks, “that a society can be subtle in its public indications of what is and what is not socially preferable? Surely, society can offer a hier-

Once the link with procreative sexuality — is broken, it is not at all clear why the status and benefits of marriage should be restricted to couples involved in sexual relationships.

archy of choices, which, while preferencing one, does not necessarily denigrate the others, but accords them some degree of calibrated respect. It does this in many other areas. Why not in sexual arrangements?"

Sullivan fleshes this out with an analogy to what already happens in families with homosexual members. In such circumstances, he points out, parents are often "disappointed" that their homosexual children are unlikely to carry on the family line, but nevertheless "prefer to see that child find someone to love and live with and share his or her life with."

Quite so. But follow the analogy through. Just as parents who would prefer a heterosexual marriage for their child now endorse the second choice of a loving, but unmarried, homosexual relationship, so it ought to be possible for society at large to prefer heterosexual marriage without disapproving stable homosexual relationships. Indeed, polls suggest that this is precisely how many people actually view the issue. If Sullivan is indeed open to a "hierarchy of choices," why could heterosexual marriage not remain at the top of the hierarchy? If stable, "assimilated" homosexual relations need some form of public sanction, why would a domestic partnership law not be an appropriately "calibrated" response?

In fact, the kind of sexually indifferent partnership law advocated by Ian McClelland solves one of the knotty problems raised by the same-sex marriage movement. To repeat, advocates of same-sex marriage generally want actively homosexual couples to be eligible for legally recognized marriage; they do not propose to extend marriage to relationships that are not sexually based. A long-term household formed by, say, bachelor brothers would not qualify. But once the link with heterosexuality — that is, with procreative sexuality — is broken, it is not at all clear why the status and benefits of marriage should be restricted to couples involved in sexual relationships. Once procreation is removed as a primary purpose of legal status and benefits, any remaining restrictions must be justifi-

fied by other purposes of marriage, such as the caregiving function. But, as a letter to the *Globe and Mail* once pointed out, if the purpose of spousal benefits is "to foster stability, love and caring for each other," those benefits should be provided to non-sexual as well as sexual partnerships. "Why," asks the writer, should a society that rejects procreation as the chief purpose of spousal benefits, remain "so mesmerized with sex [as] to make a potential for sexual intercourse the criterion for selecting relationships deserving a special legal and economic recognition?" If we wish to encourage people to take care of each other at the level of civil society, rather than depending on the state, why would we provide incentives for such behaviour only to couples who have sex with each other? Why, for example, should a single adult not be able to designate a dependent sibling or even close friend as the recipient of employee benefits or survivor pensions? A sexually indifferent domestic partnership law could easily permit such non-sexual arrangements.

Sexually indifferent domestic partnership laws extend the incentives for civil-society partnerships as widely as possible, without eradicating the traditional status distinction between procreative and non-procreative sex. This should make such partnership laws comparatively attractive to marriage-law traditionalists. Moderate homosexuals might also find them an attractive alternative because they are likely to be more acceptable to the public, and thus more likely to be enacted, than laws targeted to the homosexual community. That such laws will draw fire from radicals on both the left and the right is itself a signal to moderate that they should be considered seriously.

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### The vanishing middle

*The Ontario low-income tax rate reduction can reach a fair amount up the income scale; some individuals with a number of children receive this reduction and also pay the Ontario high-income surtax.*

*Alan Macnaughton, Thomas Matthews, and Jeffrey Pittman, Canadian Tax Journal, December 1998.*

# THE BENEFITS OF UNIVERSALITY

*This summary of the authors' forthcoming paper in the Canadian Journal of Economics argues that targeted social programs, which came to dominate Canadian social policy in the 1990s, are both unfair and inefficient. Unfair because if Canadians decide people shouldn't have to bear the entire cost of raising children, having a hip replacement or acquiring an education, their exemption from cost shouldn't vary according to their income. Inefficient because clawbacks add to the effective marginal tax rate faced by the recipients of social programs, thus increasing the distortion of their work, leisure, investment and saving choices.*

*Cet article constitue le résumé d'un texte à paraître dans la Revue canadienne d'économique. Les auteurs estiment à la fois injustes et inefficaces les programmes sociaux ciblés qui ont dominé la politique sociale canadienne au cours des années 1990. Injustes parce que, bien que les Canadiens aient décidé qu'une personne n'avait pas à assumer la totalité des coûts que représentent, par exemple, l'éducation d'enfants, l'implantation d'une hanche artificielle ou l'acquisition d'une formation spécialisée, l'exemption accordée varie selon le revenu de chacun. Inefficaces en ce que les dispositions de récupération s'ajoutent au taux d'imposition marginal en vigueur – ce qui restreint indûment les choix des Canadiens en matière de travail et de loisir, d'investissement et d'épargne.*

## Nicholas Rowe and Frances Woolley

Twenty years ago, Canada had a wide range of universal programs, from health care and education to universal transfers to the elderly and to families with children. Growing deficits and increasing demands on government resources, arising, for instance, from widespread child poverty, made universal programs appear unsustainable. Targeting benefits efficiently became the vogue. As Kenneth Boessenkool put it in earlier this year, "One must ask the question: Do we really want to make cash payments to families making \$30,000, \$50,000 or more? Doing so appears to be very bad social policy."

The pursuit of "target efficiency" led to the replacement of family allowances and other universal provisions for children with a targeted child tax benefit, making Canada almost unique internationally in its failure to provide all families with at least some fiscal recognition for the costs of raising children. Target

efficiency has also led to the clawback of Old Age Security payments from better-off Canadians, although a federal initiative to create a targeted seniors benefit was eventually abandoned in the face of strong opposition. Universality in health care has been maintained by the federal government's enforcement of the *Canada Health Act*. However the erosion of transfers to the provinces has blunted the federal government's spending power, and the universality of health care can no longer be taken for granted.

The point we wish to make here is, not that there should be universally provided health insurance, old age security benefits, or child benefits, but rather that if Canadians choose to provide health insurance, benefits to children, or other social programs, universal benefits are more efficient than targeted benefits. Our argument for universality does not depend upon administrative costs, the stigma of targeted benefits,