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Federal Marriage Amendment: Yes or No?

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Fides et Iustitia

ARTICLE

MARRIAGE, PARENTAL RIGHTS, AND PUBLIC POLICY: ON THE FMA, ITS PURPORTED JUSTIFICATION, AND ITS LIKELY EFFECTS ON FAMILIES

MARK STRASSER

I. INTRODUCTION

The proposed Federal Marriage Amendment (FMA) is unwise for several reasons, not the least of which is that its reach is ill-defined. To the extent that its reach can be predicted, there is either surprisingly little connection between what the amendment will do and the justification offered for it or surprisingly little discussion of the breadth of the amendment and the effects it likely would have. Several United States Supreme Court cases are briefly mentioned below, not to illustrate why such an amendment would be unconstitutional, but merely why such an amendment is poorly suited to achieve its purported ends and why the purported ends may not represent the real ends of the amendment's backers.

Part II of this paper examines the deceptively simple language of the amendment, suggesting that it is open to a variety of interpretations, claims to the contrary notwithstanding. Part III suggests that at least one of the rationales offered to justify the amendment's passage, namely, promoting the interests of children, is undermined rather than promoted by the amendment and thus does not plausibly explain either why the amendment should be adopted or even why proponents support its adoption. Part IV discusses an interpretation of the amendment which might well be offered by courts were the amendment ratified, suggesting that proponents should reconsider whether they really would support such a radical change in the current privacy jurisprudence. The Conclusion of this article suggests that adoption of the FMA would be a mistake for a variety of reasons and that those claiming to be interested in promoting the interests of families could better spend their time acting in ways which in fact promote rather than undermine those very interests.

II. WHAT DOES THE FEDERAL MARRIAGE AMENDMENT DO?

While the FMA might seem to be clear, an examination of both the language and the various interpretations of it reveal that the language is ambiguous in ways that might well be important to those considering whether to support it. Consider, for example, the following, which was included in the Senate version of the FMA—"Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."¹ The reach of such a statement is far from clear, claims to the contrary notwithstanding.²

Commentators argue that the statement is clear in that, for example, it would preclude any judge from finding same-sex marriages protected by the federal or any state constitution.³ Even if that interpretation is correct, the question is not whether there is some respect in which the amendment is clear but whether it is clear as a general matter with respect to what it precludes. For example, it would be important to know what qualifies as an incident of marriage if one wishes to figure out what effects the amendment might have. Are those incidents to be defined in terms of a particular state's law or, instead, is the amendment referring to a particular list of benefits including, e.g., the power to have an interest in property owned as a tenancy by the entirety?⁴ If the latter, how are the benefits included on that list to be determined? One might, for example, consider which benefits are reserved for married couples in all of the states at the time the amendment is passed and designate those as the incidents of marriage. Yet, that would yield an empty set, since Vermont does not reserve any benefits solely for married couples—couples in civil unions are not married but nonetheless have all of the benefits and responsibilities of marriage.⁵

The claim here is not that the only or even the best way to determine which are the incidents of marriage is to see which benefits are reserved exclusively for marital couples—were that the appropriate definition, Vermont citizens and courts might have to be informed of the rather surprising news that there are no incidents of marriage in the Green Mountain state.⁶

1. See Sen. Jt. Res. 40, 108th Cong. (July 7, 2004).

2. See e.g. 150 Cong. Rec. S8061-03 (daily ed. July 14, 2004) (written testimony of Teresa Collett).

3. See e.g. *id.*

4. See *U.S. v. Craft*, 535 U.S. 274, 280 (2002) ("A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons.").

5. Vt. Stat. Ann. tit. 15 § 1204(a) (2005) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

6. See *Lumbra v. Lumbra*, 394 A.2d 1139, 1142 (Vt. 1978) (suggesting that "[j]oint custody preserves some incidents of the marriage relationship that would be terminated by a decree of sole custody with visitation rights").

Yet, if that is not the appropriate criterion, then another one must be offered.

One might suggest that one can determine the incidents of marriage by considering what they were at common law. However, that might mean that benefits accorded to married couples in some states by statute, for example, stepparent adoption rights,⁷ might not be included. Were one to include all of the benefits conferred by statutes, rules, regulations, or the common law,⁸ then one would have amassed a large assortment of privileges and benefits for which non-marital couples would presumably have no constitutional protection.

Consider, for example, the right to visit a loved one in an intensive care unit.⁹ Often, visitation privileges are limited to members of the immediate family.¹⁰ This would include a spouse, sibling, parent, or child. While this benefit is not provided exclusively to spouses, it is one that is accorded by virtue of being a spouse and thus on one interpretation might be thought an incident of marriage. Yet, if the intent of this amendment would be to preclude any and all constitutional protections for the right of non-spouses to visit a loved one in an intensive care unit, this might result in detriment both to the patient and the would-be visitor and is a heartless proposal that should be roundly condemned.

It simply will not suffice for amendment proponents to suggest that even if the amendment would have that result, a legislature could avoid that cruel effect by specifying, for example, that non-marital partners might also be accorded visitation privileges. There are a variety of reasons that legislatures might not accord such a privilege to non-marital partners, e.g., because of other priorities or out of the mistaken notion that refusing to do so would strengthen rather than undermine families.

Were the FMA to be adopted, one might expect the following scenario to be played out in one or more states.¹¹ Realizing that hospital visitation is

7. See Cal. Fam. Code Ann. § 8548 (West 2005) (“‘Stepparent adoption’ means an adoption of a child by a stepparent where one birth parent retains custody and control of the child.”).

8. Cf. *Vasquez v. N.J. Dept. of Corrections*, 791 A.2d 281, 284 (N.J. Super App. Div. 2002) (noting that “marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children out of wedlock)” and then calling these “incidents of marriage”).

9. Professor Sunstein mentions this example in his testimony. See Sen. Jud. Comm., *On Amending the Constitution to Define Marriage* (Mar. 23, 2004) (testimony of Cass R. Sunstein) (available at http://judiciary.senate.gov/testimony.cfm?id=1118&wit_id=3185) (accessed Jan. 8, 2005).

10. See Sarah C. Courtman, Student Author, *Sweet Land of Liberty: The Case against the Federal Marriage Amendment*, 24 Pace L. Rev. 301, 338 (2003) (“Intensive Care Units often limit the people who can visit a critically ill person to immediate family.”).

11. Cf. Katie Cristol, *Vague Law, Certain Discrimination*, Cavalier Daily (U. Va.) (Sept. 3, 2004) (available at 2004 WL 89965243) (discussing “an amendment to the 1997 Marriage Affirmation Act, which became law last month, signaling an era of anti-gay discrimination to outrival nearly any other state in its antagonism of gays and lesbians”).

an incident of marriage and wanting to encourage marriage, legislatures in one or more states would pass legislation according some but not other not-legally-recognized spouses the statutory right to visit loved ones in the hospital. For example, individuals who had made firm wedding plans (according to some stated criteria) might be entitled to visit their loved ones in the hospital but individuals who had been romantic partners for years, but who either could not or would not marry, would not have those same visitation rights.

Suppose that the not-legally-recognized spouses who had no visitation rights were to challenge the legislation as a violation of equal protection or due process guarantees. Bracketing whether such a challenge would be successful on the merits, courts might simply dismiss the challenge by suggesting that interests that might otherwise have been subject to equal protection or due process challenge are immune from constitutional scrutiny if involving the incidents of marriage. If that is the proper interpretation of the amendment, its adoption might well result in needless and undeserved pain and suffering.

Interpretation of the FMA is even more difficult when one considers the House version, which states, "Neither this Constitution, nor the constitution of any State, *nor state or federal law*, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."¹² Some contend that the House bill, like the Senate bill, would permit legislatures to recognize civil unions, although others disagree.¹³

Representative Musgrave has reportedly suggested that the House version of the amendment would permit a legislature to recognize civil unions—by virtue of the legislature's having accorded those privileges and benefits to such unions, they would not be "incidents of marriage" and thus would not be subject to the amendment.¹⁴ If that is the correct interpretation, then "incidents of marriage" refers only to those benefits that are *reserved* for marital spouses—privileges to which spouses and others are entitled would not count as incidents of marriage and, for example, nothing counts as an incident of marriage in Vermont.¹⁵

Representative Musgrave's view is not persuasive. Indeed, after noting that the term is commonly used by courts, commentators have suggested that the meaning of "incidents of marriage" is clear and

12. See H.R. Jt. Res. 56 § 1, 108th Cong. (May 21, 2003) (emphasis added); a different House version mirroring the Senate version was also introduced into the House, see H.R. Jt. Res. 106 § 2, 108th Cong. (Sept. 23, 2004), however, for purposes here, the House version will refer to proposed amendment H.R. Jt. Res. 56, 108th Cong. at § 1, which includes the italicized words.

13. See Melissa A. Glidden, *Federal Marriage Amendment*, 41 Harv. J. on Legis. 483, 484 (2004) (discussing this lack of consensus).

14. See *id.* at 484 n. 19.

15. See Vt. Stat. Ann. tit. 15, § 1204(a).

unambiguous.¹⁶ Yet, courts do not use the term in the way that Representative Musgrave uses it, and there is cause for grave concern if one of the amendment's *sponsors* does not understand what it means or what it might do.

Courts use the term "incident of marriage" very broadly, often referring to the benefits or privileges that one acquires by virtue of marrying.¹⁷ This usage implies that there are a whole host of benefits that would qualify as incidents of marriage, notwithstanding that individuals who are not married might also be entitled to them, for example, the hospital visitation rights acquired by virtue of being married.¹⁸

The question at hand is whether, according to the House version, such rights could also be possessed by others. Would the House version mean that because a spouse might have a right to visit someone in the hospital, the legislature could not afford such a right to other family members? The language of the amendment suggests that a legislature's according the incidents of marriage to a non-spouse would be unenforceable. Because neither state nor federal law can be construed to require that the incidents of marriage be afforded to those who are unmarried, a non-spouse who sought to enforce her statutorily granted visitation rights might find that courts could not construe the statute at issue as having afforded her the contested benefit, explicit language conferring such a right notwithstanding. Thus, the amendment might be much more restrictive with respect to the kinds of (enforceable) laws that legislatures might pass than might initially be understood.¹⁹

Perhaps it would be argued that hamstringing legislatures is not the intent of the amendment.²⁰ Yet, this should not provide consolation either to the proponents or the opponents of the amendment. First, even if it were possible to discern the intent behind the amendment, it is not at all clear that the United States Supreme Court would interpret it in light of that intention.²¹ Second, given that this amendment not only would have been approved by two-thirds of the House and Senate, but also by three-quarters of

16. See Collett, *supra* n. 2.

17. *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage . . ."). Here, the Court gave a non-exhaustive list of the incidents of marriage. See *Doe v. Coughlin*, 518 N.E.2d 536, 540 (N.Y. 1987) (noting that the list was non-exhaustive).

18. Sen. Jud. Comm., *Proposed Constitutional Amendment to Preserve Traditional Marriage* (Mar. 23, 2004) (testimony of Cass R. Sunstein) (available at 2004 WL 576635) (wondering whether this would affect the right to visit a same-sex partner in a hospital).

19. See testimony of Robert Bork, 2004 WL 1080321 (F.D.C.H.) (May 13, 2004) (suggesting that the House version might be thought to mean that legislatures could not pass civil union laws).

20. *Id.* ("Critics say that, read literally, the sentence would forbid courts to implement legislatively-enacted civil unions. That was not the intent.")

21. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 16-18 (Princeton U. Press 1997) (suggesting that judges must decide on the basis of what the legislature said rather than what it allegedly meant).

the states,²² it would seem especially difficult to establish what those voting for the amendment had intended. Presumably, some would have voted for the amendment even if interpreted as broadly as possible while others would have voted for the amendment only if interpreted relatively narrowly.²³ It might thus seem difficult to establish the intent of those framing and ratifying the amendment except through judicial fiat.²⁴

It might be thought that these interpretation difficulties would disappear if only the language of the amendment were clearer. Yet, given the Court's interpretation of the language of the Eleventh Amendment, it seems clear that amendments may well not be read literally and, further, that the Court might claim that those framing and ratifying the amendment intended something other than the literal meaning of the text.²⁵ All of this is to say that ultimately the amendment will have to be construed by the courts. Insofar as the amendment involves an attempt to prevent "activist" judges from working mischief,²⁶ such an ambiguous amendment would seem a poor choice for effectuating such a goal.

A separate issue is whether judges act contrary to their appropriate role whenever they issue a decision which might be called "activist." While the term "activist" is a dirty word in some lexicons, it can be a term of praise in others. For example, *Loving v. Virginia*²⁷ and *Zablocki v. Redhail*²⁸ were decisions invalidating state marriage limitations and thus should presumably be viewed as activist decisions as well. Many who deride "activist" judges for recognizing the rights of the lesbian/gay/bisexual/transgender (LGBT) community would presumably applaud "activist" judges who recognize the rights of other groups, e.g., the right of interracial couples,²⁹ the indigent,³⁰ or prisoners³¹ to marry. At least some individuals who use the

22. U.S. Const. art. V.

23. Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954)

The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

24. Cf. Scalia, *supra* n. 21, at 18 (suggesting that attempts at discerning intent ultimately involve the judge's deciding what the language at issue "ought to mean").

25. See *Tenn. Student Assistance Corp. v. Hood*, 124 S.Ct. 1905, 1909 (2004) ("For over a century, however, we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment.").

26. See e.g. Sen. Jud. Comm., *A Proposed Constitutional Amendment to Preserve Traditional Marriage* (Mar. 23, 2004) (testimony of Katherine Shaw Spaht) (available at http://judiciary.senate.gov/testimony.cfm?id=1118&wit_id=3184) (suggesting that activist judges will invalidate traditional marriage laws); H.R. Subcomm. on Const. of the Jud. Comm., *Federal Marriage Amendment* (May 13, 2004) (testimony of Robert H. Bork) (available at 2004 WL 1080321).

27. 388 U.S. 1 (1967).

28. 434 U.S. 374 (1978).

29. See *Loving*, 388 U.S. at 1.

30. See *Zablocki*, 434 U.S. at 374.

term “activist” pejoratively, probably do not object so much to activism per se as to according members of the LGBT community the particular rights at issue. Others might use the term “activist” to describe any judge who issues decisions with which they substantively disagree.

Presumably, some but not all who criticize the reasoning and result in *Goodridge v. Dept. of Public Health*³² nonetheless agree with the reasoning and result in *Loving* and *Zablocki*. Thus, some will criticize all of these as “activist” decisions, while others will applaud one or more while criticizing one or more on substantive grounds or, perhaps, as examples of judicial overreaching.

In any event, judicial activism is not new³³ and, further, may well be part of our system. One of the functions of the courts is to protect the rights of minorities,³⁴ lack of popularity of such a function or those decisions notwithstanding. Indeed, insofar as the “activism” label is affixed to courts whose decisions are not in accord with the general will, e.g., as reflected through the laws, the label may merely indicate that the courts are performing their function.

Certainly, judges can err and charges of judicial activism are not always simply reducible to substantive disagreements. That said, however, the criterion to determine whether courts are being “activist,” where that term has a negative connotation, should surely not merely be whether the decision is unpopular, but rather whether the decision can be justified in light, for example, of the statute at issue, the past decisions in the area, etc.

Suppose that we could agree about who would qualify as a non-activist judge. What would she say about the amendment and its implications for one of the paradigmatic examples of an incident of marriage, namely, the right to custody or visitation?³⁵ Assuming that either the Senate or the House version were adopted, at least one issue would be whether both the federal and the state constitutions would cease to protect the parental rights of never-been-married parents.

It is simply unclear how the amendment would be interpreted, but the issue raised here should not be dismissed out of hand. After all, the amendment does not only preclude those with a same-sex orientation from having

31. See *Turner*, 482 U.S. at 78.

32. 798 N.E.2d 941 (Mass. 2003).

33. See William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 Wake Forest L. Rev. 733, 785 (2003) (noting that Felix Frankfurter and Learned Hand complained about judicial activism before 1937).

34. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. Pa. L. Rev. 1361, 1361 (2004) (“Our courts were entrusted with the responsibility of judicial review, in large part, to protect individuals and minorities in their fundamental rights against abridgement by both government and majorities.”) (quoting Justice Arthur J. Goldberg, *The Court Sits—In the Center of the Storm*, 6 N.Y. Times 30 (Nov. 8, 1964)).

35. Cf. *Lumbra*, 394 A.2d at 1142.

constitutional protection of certain rights but, instead, seeks to preclude the unmarried more generally from having such constitutional protections.³⁶ Indeed, the United States Supreme Court has already suggested that mere biological connection to a child does not establish parental rights to that child, even where those rights and responsibilities are desired.³⁷ The amendment at issue here would certainly do nothing to augment the parental rights of unmarried parents—the issue is only whether such an amendment would do more to undermine those rights.

The proposed amendment does not mention parental rights explicitly. However, there are at least two reasons that this failure to mention such rights explicitly should do little to reassure those who would object to a constitutional amendment that undermined the parental rights of never-married parents.³⁸ First, the amendment explicitly refers to the incidents of marriage and since parental rights would seem to be a paradigmatic example of an incident of marriage, these rights would seem to be a paradigmatic example of what the amendment is addressing. Second, if one considers the rationale offered in support of the amendment, namely, promoting the interests of children,³⁹ two very different analyses of the amendment and its proffered justification jump to mind: (1) a non sequitur is being offered to justify the adoption of the amendment;⁴⁰ or (2) those seeking passage of the amendment hope to modify the constitutional protections afforded to parental rights.⁴¹ The next two sections deal with each of these possibilities in turn.

III. WHAT IS THE JUSTIFICATION FOR THE AMENDMENT?

Amending the United States Constitution is a difficult process and is not to be taken lightly.⁴² One would expect, then, that the justification for the amendment would be very strong, indeed, to warrant such a drastic step. Yet, on its face, the justification offered does not plausibly support passage

36. See Sen. Jt. Res. 40, 108th Cong. (July 7, 2004) (suggesting that no state or federal constitutional provisions will be construed as requiring that the incidents of marriage be conferred upon any non-marital union regardless of whether the individuals involved are of the same sex or of different sexes).

37. See *Lehr v. Robertson*, 463 U.S. 248 (1983) (biological father precluded from blocking adoption of his daughter).

38. A separate issue would be whether the amendment would have implications for the parental rights of divorced individuals. It is unclear whether they would be thought more like unmarried individuals (because they are not now married and thus, for example, might be raising a child alone) or more like married individuals (in that the protected parental rights were created during the marriage and would be thought to continue even after the marriage had ended).

39. See e.g. Shaw Spaht, *supra* n. 26 (suggesting that “marriage is about children”).

40. See *infra* nn. 49-61 and accompanying text.

41. See *infra* nn. 79-82 and accompanying text.

42. See H.R. Subcomm. on Const. of the Comm. on Jud., *Defense of Marriage Act: Gay Marriage Amendment* (May 13, 2004) (testimony of Jay Sekulow) (available at 2004 WL 1080324) (amending Constitution not to be taken lightly).

of the amendment and indeed makes one wonder whether the proffered reason is the real one. Either a non sequitur has been offered to justify the amendment or the amendment is much more robust than anyone seems to be suggesting and would really trigger a debate if people understood its breadth.

Consider the reason offered to support the amendment. Proponents claim that the amendment is to protect the nation's children.⁴³ Indeed, Professor Collett has noted that "we know that children flourish when raised by their mother and father united in marriage."⁴⁴ The difficulty presented is not that Professor Collett is incorrect about that, but merely that we also know that children are thriving when raised by same-sex parents as well. Child rearing experts have noted how well gay and lesbian parents are doing.⁴⁵ Commentators may argue about whether same-sex parents are better than, as good as, or worse than different-sex parents,⁴⁶ but that is beside the point, since it is of course true that marriage is not reserved only for those people who will be the best possible parents.

Not only is marriage not reserved only for the best possible parents, but even adoption is not reserved for the best possible parents, which is eminently reasonable given how few adoptions would take place were that the criterion employed. In most states, less-than-perfect would-be parents, regardless of sexual orientation or marital status, are permitted to adopt children, and, as a general matter, children are better off when they are adopted—indeed, one of the criteria for approval of adoptions is that the child's best interests would thereby be promoted.⁴⁷ At the risk of stating the obvious, children's lives can be improved immensely when they are adopted by less-than-perfect parents, whether those adoptive parents have a same-sex or a different-sex orientation.

When determining whether an adoption would indeed promote the interests of the child to be adopted, the standard is not whether the would-be

43. See e.g. Shaw Spaht, *supra* n. 26 (suggesting that "marriage is about children").

44. See Sen. Jud. Comm., *Proposed Constitutional Amendment to Preserve Traditional Marriage* (Mar. 23, 2004) (testimony of Teresa Stanton Collett) (available at 2004 WL 576637).

45. See Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 Hum. Rts. Q. 3, 7 (2003) (pointing out that "child-rearing experts in the American Academy of Pediatrics, the American Psychiatric Association, and the American Psychological Association . . . point to thirty-five years of studies showing that children of gay and lesbian parents are normal and healthy on every measure of child development.").

46. Compare e.g. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833 (1997) (arguing that same-sex parents are bad for children) with Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. Ill. L. Rev. 253 (1998) (arguing that Wardle is incorrect).

47. See *In re Leitch*, 732 So.2d 632, 635 (La. App. 2d Cir. 1999) (noting that an "adoption should only be granted if it is in the best interest of the child; the best interest of the children is the paramount consideration").

adoptive parents are the best possible parents, e.g., are the richest,⁴⁸ most loving parents in the world. That such a standard is not used is quite sensible if only because the richest, most loving parents in the world might not be interested in adopting the child at issue. Rather, what is considered is whether this parent or these parents can provide the child with a loving home in which the child would flourish even if, for example, there might exist other parents who, while not interested in adopting this child, are nonetheless in some sense more loving or would be able to provide that child with an environment in which she might flourish even more.

A different way to cash this out is to suggest that when determining whether a particular child's best interests would be promoted by being adopted by this particular person or these particular persons, the issue is not who in some abstract sense would be the best parent but who would be the best parent for this particular child. Included within that calculation might be a consideration of who already has a positive relationship with that child or who is willing to have a positive parent-child relationship with that child.

Most states do not follow Florida's lead precluding gays and lesbians from adopting,⁴⁹ because they realize that gays and lesbians can provide wonderful homes for children who might otherwise be much worse off. Further, one might expect those with a same-sex orientation to continue to become parents through means other than adoption, e.g., artificial insemination or surrogacy. Yet, if this is so, there are implications for the amendment.

On one understanding of what the amendment says and does, the purported justification for its adoption involves a non sequitur. At this moment, Massachusetts is the only state in which the supreme court of the state has held that marriage licenses must be issued to same-sex couples.⁵⁰ Yet, gays and lesbians are becoming parents in many states, almost all of which preclude them from marrying. There is no reason to think that an amendment precluding constitutional protection of marriage would induce fewer gays and lesbians to parent. It is thus not at all clear how the purported justification for the amendment, namely, that the interests of children should be protected, provides a reason for the amendment to be adopted.

Indeed, adoption of the amendment might harm many adults and any children whom they might be raising. The adults might be harmed in that those who would marry if they could might thereby be denied the benefits

48. See Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 L. & Inequality 1, 66 (1995) (noting the "negative problems associated with childhood poverty").

49. Fla. Stat. Ann. § 63.042(3) (West 2004).

50. See Goodridge, *supra* n. 32.

that they would have derived from marrying.⁵¹ The children might be harmed in a few different ways.

Suppose, for example, that marriage adds stability to the family, thereby making a more secure environment in which children might be raised. By barring same-sex parents from marrying, the amendment might be depriving some children of the added stability and security that might have been achieved through the marriage of their parents.

There might be other harms as well, especially if the jurisdiction does not permit second-parent adoptions.⁵² To see why this is so, a little background about stepparent adoptions may provide needed perspective.

Stepparent adoptions are the most frequently performed adoptions in this country today.⁵³ A paradigmatic example of a stepparent adoption involves the following scenario: An individual with a child from a previous marriage remarries. After a few years, the new spouse wishes to adopt the child. The former spouse no longer has parental rights, e.g., because of death, abandonment, or unfitness. The question is whether the new spouse will be able to adopt the child without the biological parent being forced to surrender her parental rights.

Traditionally, whenever a child was adopted, the parental rights of the biological parents were terminated.⁵⁴ That *may* have made sense when the child was going into a new family.⁵⁵ However, when the child is going to remain with her parent, it obviously would not make sense to require that the biological parent surrender her parental rights so that the parent's new spouse could be legally recognized as the child's (other) parent. Through either statute or case law, states recognized the absurdity of such a result and created an exception to the general rule that the biological parents' rights would have to be terminated before an adoption could take place. By making this exception, states made it possible for stepparents to adopt without their spouses having to surrender their parental rights.⁵⁶ That way, both parents who were raising the child would have parental rights.

51. "Might" rather than "would" be harmed because even without the amendment same-sex couples might not be allowed to marry if the federal Constitution is interpreted as not protecting that right, especially in states that have state constitutional provisions declaring such unions void.

52. See e.g. *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002) (holding that Nebraska does not recognize second-parent adoptions).

53. See Ala. Code 1975 § 26-10A-27 Comment (1975) (noting that stepparent adoptions are the most frequently performed type of adoption).

54. See *In re Adoption of T.K.J.*, 931 P.2d 488, 492 (Colo. App. 1996) ("[T]he general rule is that a decree of adoption terminates the parental rights and duties of a child's natural parents and bestows those rights and duties on the adoptive parent or parents."); see also *Humphrey v. Pannell*, 710 So.2d 392, 403 (Miss. 1998) (McRae, J., dissenting) (noting that "as a matter of law, a decree of adoption terminates the parental rights of the child's biological parents").

55. But see Judy E. Nathan, Student Author, *Visitation after Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. Rev. 633 (1984) (arguing that visitation between the adopted child and her blood relatives promotes her best interests).

56. See Cal. Fam. Code Ann. § 9306(a) (West 2005) ("Except as provided in subdivision (b), the birth parents of a person adopted pursuant to this part are, from the time of the adoption,

Recently, courts and legislatures have been forced to grapple with a related issue. Suppose that two individuals are raising a child together and they cannot or will not marry.⁵⁷ Suppose further that only one of the adults is the biological parent of the child. Should the non-biologically-related parent be allowed to adopt the child without the biological parent being forced to surrender parental rights so that each parent could be legally recognized as the parent of the child? Just as is true in the scenario involving a stepparent adoption, the adults in this scenario will be raising the child together so it would hardly be sensible to force the biological parent to give up her parental rights so that her partner could establish them.

The benefits that would accrue to the child if both adults were recognized as her parents should not be underestimated. Suppose, for example, that two adults are raising a child together and the legal parent dies. The child may not only have lost that parent but may also lose contact with the other adult who has been functioning as a parent, because the latter may be a stranger to the child in the eyes of the law.⁵⁸ Or, suppose that two unmarried individuals are raising a child together but the couple decides to split up. The legal parent may decide to preclude the child from seeing the other adult to the child's detriment.⁵⁹ In both of these kinds of cases, the child would have been benefited had her relationship with each of these adults been recognized by the law.

The benefits to the child of having the relationship with the second parent legally recognized are not limited to those times when the relationship between the adults ends. Consider two unmarried adults who are raising a child together. Only one of them is legally recognized as the child's parent. Suppose that the non-legally-recognized parent is working outside of the home. Her employer might well offer insurance or education benefits

relieved of all parental duties towards, and all responsibility for, the adopted person, and have no right over the adopted person."); *id.* at § 9306(b) ("Where an adult is adopted by the spouse of a birth parent, the parental rights and responsibilities of that birth parent are not affected by the adoption."); *see also* Wis. Stat. § 48.835(3)(b) (2004) ("If the person filing the adoption petition is a stepparent with whom the child and the child's parent reside, the stepparent shall file only a petition to terminate the parental rights of the parent who does not have custody of the child.").

57. According to the contemporary jurisprudence, both of these individuals would have parental rights if they were both raising the child and both were biologically related to the child. *See Lehr*, 463 U.S. at 262 ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."); *but see Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (individual who is most likely the father of the child at issue denied any parental rights, notwithstanding his having had a relationship with her).

58. *Cf. Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993) ("[W]hen the functional parents of children born in circumstances similar to Tammy separate or one dies, the children often remain in legal limbo for years while their future is disputed in the courts.").

59. *See Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (Cal. App. 1991) (partner could visit with children whom she helped to raise with her ex-partner only if her partner, the biological parent, consented to the visitation).

that would improve the life of the child. However, if the child is not legally recognized as a dependent of this worker, the child might not be entitled to those benefits.⁶⁰

In some states, second-parent adoptions are permitted and individuals who are not married may nonetheless each have a legal relationship with a child even when they are not both biologically related to that child.⁶¹ In those states which do not recognize second-parent adoptions, however, the only way that a child in some families might receive the benefits of being the legally recognized child of each of her parents is if her parents might marry and thus take advantage of the possibility of a stepparent adoption. Insofar as the amendment would preclude that option, it might well harm rather than help children.

Some amendment proponents suggest that marriage is for children and that this is why the amendment must be adopted.⁶² Yet, the above suggests that promotion of the interests of children is one of the many reasons that the amendment should not be adopted. Many non-marital couples, both of the same sex and of different sexes, are raising children.⁶³ If marriage promotes the interests of children, then precluding these adults who are raising children from marrying⁶⁴ undermines rather than promotes the interests of children. Further, if according some of the incidents of marriage to non-marital couples might improve the lives of children, then precluding legislatures from according such incidents to non-marital couples might well worsen the lives of children. The amendment's supporters seem to be offering a non sequitur to support their position.

It might be claimed that the number of same-sex couples who are raising children is so small that the points here are of mere theoretical interest. Yet, such a claim would be mistaken. A large number of children are being raised by same-sex parents, a number which has been estimated to be in the hundreds of thousands or in the millions.⁶⁵

60. Cf. *Adoption of Tammy*, 619 N.E.2d at 320 (child would be entitled to receive a variety of benefits not otherwise available were she adopted by her mother's same-sex adult partner).

61. See e.g. *id.* (recognizing second-parent adoptions); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (same); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (same).

62. See e.g. Shaw Spaht, *supra* n. 26 (suggesting that "marriage is about children").

63. D'Vera Cohn, *Live-Ins Almost as Likely as Married to be Parents; Census Looks at Gay Households*, Washington Post A1 (Mar. 13, 2003) ("Unmarried men and women who live together are nearly as likely as married couples to be raising children, according to a census report to be released today.").

64. See Bork, *supra* n. 26 (the amendment would prevent federal, state and local governments from recognizing same-sex marriages.).

65. See Eileen Ogintz, *Go Your Own Way: Extended Family Vacations Come Out of the Closet; On Trips for Gay Families, Kids Don't Have to Explain Why They Have Two Mommies or Two Daddies*, Miami Herald (July 4, 2004) (available at <http://www.Miami.com/mid/miamiherald/living/travel/9053630.htm?lc>) ("More than 2.6 million gay and lesbian households include children, and more than 3.1 million children live with gay and lesbian parents, according to a report from MarketResearch.com and Witeck-Combs Communications that's based on U.S. Census data.").

Those children who are being or will be raised by same-sex couples provide a compelling reason that this amendment should not be adopted. Yet, marriage is not only about children. On the contrary, marriage is also about the adults who wish to marry and about other family members as well.

The stereotypical picture of the 1950s' home involved marital partners who divvied up responsibilities—one worked outside of the home while the other played the predominant role in raising the children.⁶⁶ That picture does not reflect many current American homes.⁶⁷ For example, many different-sex couples are choosing to be childless.⁶⁸ Further, many adults are caring for their parents,⁶⁹ and it may well be that same-sex and different-sex couples would be benefited were one covered by the other's insurance so that he or she could stay home to take care of a parent in need. According these incidents of marriage to non-marital couples would not only help the parties themselves but might also help other family members and the state, for example, by making it possible for elderly relatives to remain with loved ones rather than having to go into nursing homes or other facilities.

As the right-to-marry jurisprudence reveals, marriage is also about the relationship between the adults who wish to marry. Consider, for example, some of the benefits of marriage described in *Turner v. Safley*,⁷⁰ for example, that marriages “are expressions of emotional support and public commitment . . . [and can have] spiritual significance.”⁷¹ These interests do not depend on whether the couple has or plans to have children. When the *Griswold* Court described marriage as “an association that promotes a way of life . . . a harmony in living . . . [and] a bilateral loyalty,”⁷² it was deemphasizing the procreational aspect and instead emphasizing the companionate aspect of marriage.

The point in mentioning these cases is merely to suggest that people marry for a number of legitimate reasons and the reasons that different-sex couples marry—love for each other, desire to raise children, etc.—are also

66. Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J. L. & Pol. 241, 280 n. 129 (1997) (“In traditional family working patterns, the husband worked full-time and the wife stayed at home, raising children, doing housework and rarely working outside of the home for economic benefit.”).

67. *Cf. Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”).

68. Richard C. Dujardin, *2003 in Religion—A Year of Love and War*, Providence J.-Bull. D01 (Jan. 3, 2004) (available at 2004 WL 59109320) (noting that “large numbers of married couples [are] now choosing to go childless”).

69. Andrea Petersen, *Health Watch: Programs Offer a Break for Caregivers*, Wall St. J. Sun. 4 (June 20, 2004) (available at 2004 WL 61192657) (noting “the growing number of adult children caring for their parents”).

70. 482 U.S. 78.

71. *Id.* at 95-96.

72. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

reasons that same-sex couples would marry. The state does not require that couples be willing or able to have children before they are permitted to marry so it is not at all clear why this would be an appropriate reason to prevent same-sex couples from marrying even were they not having children.

It seems safe to assume that one of the reasons that some oppose same-sex marriage is that they believe such unions contravene God's will.⁷³ Yet, it may be helpful to remember that the same claim was made about interracial marriage. Indeed, in *Loving v. Virginia*,⁷⁴ in which the United States Supreme Court struck down Virginia's anti-miscegenation statute, the Court explicitly noted the trial court's suggestion that interracial marriage was against God's will.⁷⁵ Presumably, the trial court was representing the sincere views of many Virginians at the time. Sincerity of such views notwithstanding, an amendment to the United States Constitution removing state and federal constitutional protection of the right to marry someone of another race would have been wrong.

It might be pointed out that only some, rather than all, religions disapproved of interracial unions. Yet, the same point might be made about same-sex unions. Some traditions recognize such unions while others do not,⁷⁶ and it would be inaccurate to claim that religions uniformly condemn such unions. Just as it would have been wrong to amend the United States Constitution to remove federal and state constitutional protection of interracial marriages, it would be wrong to amend the Constitution to remove constitutional protection of same-sex unions.

It has perhaps been forgotten that one of Virginia's claimed justifications for its anti-miscegenation statute was that it was interested in promoting the best interests of children—the state sought to prevent “a mongrel breed of citizens.”⁷⁷ The State further argued that because the scientific evidence was in doubt with respect to whether children produced and raised in interracial homes would be the equal of children produced and raised in single-race homes, the United States Supreme Court should defer to the wisdom of the Virginia Legislature on this matter and permit the State to continue to discourage interracial marriage.⁷⁸ The Court rejected Virginia's argument, suggesting that the State's purported justification was really an

73. Brenda Godsey, *Forefathers did not Want Religion to be Part of Law*, *Kansan.com*, (Apr. 14, 2004) (available at http://www.thekansan.com/stories/041404/vie_0414040049.shtml) (“Many people believe that same-sex marriage is against God's will.”).

74. 388 U.S. 1.

75. *See id.* at 3.

76. Sandra Cavazos, *Harmful to None: Why California Should Recognize Out-of-State Same-Sex Marriages under Its Current Marital Choice of Law Rule*, 9 *UCLA Women's L.J.* 133, 166 (“several religions now recognize same-sex unions”).

77. *Loving*, 388 U.S. at 7.

78. *Id.* at 8.

attempt to mask the real reasons for the amendment.⁷⁹ Both the Congress and the states should reject the claim that the amendment would promote the interests of children—the interests of children would be undermined by the amendment and so cannot plausibly justify supporting it.

Some amendment proponents think that it is important for the people to be allowed to vote on whether same-sex couples will be permitted to marry.⁸⁰ Yet, *Loving* illustrates an additional point, namely, that some things should not be left up to a popular vote in a constitutional democracy, since it is far from clear that *Loving* would have been ratified had it been submitted to a popular referendum in 1967.⁸¹

Indeed, who would be willing to let people vote on whether his marriage should continue to be recognized or whether, instead, he should be forced to look for a new (type of) mate? Who would be willing to let the public decide that she not be married to her current partner but instead should look for someone else who was older or younger or of a different religion or race or with a different political perspective, etc.?

By the same token, who would be willing to subject her parent-child relationship to a popular vote, knowing that the voters might suggest that the best interests of the child might be promoted were he raised by someone else who would give the child a more religious or less religious education, a more conservative or a more liberal upbringing, etc.? Presumably, those who trumpet the benefits of democracy in this context might approve of *others'* relationships being subjected to popular ratification but would be unwilling to have their own relationships subjected to a similar fate.

Family rights are simply too important to be left up to a popular vote, which is yet another reason that the amendment should not be adopted. Thus, there are a number of reasons that it should fail, including that the most plausible effect of its enactment would be to undermine rather than promote the interests of the hundreds of thousands or perhaps millions of children raised by same-sex parents.

IV. HOW BROADLY SHOULD THE AMENDMENT BE INTERPRETED?

It is suggested above that passage of the amendment would not deter same-sex couples from having children and that the likely effect on children's lives would be to undermine rather than promote their interests. Yet, there is a way in which the amendment might have a chilling effect on non-marital couples having or raising children and detrimentally affect chil-

79. *Id.* at 11. ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.")

80. See Sekulow, *supra* n. 42 (should allow states to vote).

81. See Andrew Sullivan, *Introduction*, in *Same-Sex Marriage: Pro and Con* xvii, xxi (Andrew Sullivan ed., Vintage Books 1997) ("In 1968, the year that interracial marriage became legal across the United States, a Gallup poll found that some 72 percent of Americans still disapproved of such marriages.").

dren's interests in yet another respect. The amendment might be construed to limit the constitutional protections afforded to the parental rights of the never-married.

Given the language of and the justification offered for the amendment, as well as the context in which it arose,⁸² it would not be surprising for a court to treat the amendment as not only overruling *Lawrence v. Texas*⁸³ but, in addition, overruling the line of cases that would include, for example, *Stanley v. Illinois*⁸⁴ and *Eisenstadt v. Baird*.⁸⁵ Basically, the interpretation of the amendment might be that the family protections that the Court has recognized as being part of the right to privacy only apply to married individuals.

Custody and visitation or, more generally, parental rights are viewed as paradigmatic incidents of marriage.⁸⁶ The amendment suggests that neither state constitutions nor the federal Constitution can be construed to protect the incidents of marriage, e.g., parental and conjugal rights, outside the confines of marriage. This might mean that never-married parents, regardless of sexual orientation, would have to rely on legislative rather than constitutional protections of their parental rights. By the same token, an individual who wished to engage in consensual, non-marital, sexual relations would be able to do so legally only if the state legislature were willing to permit such behavior—no federal or state constitutional provisions would protect the relations or even the contraception that individuals might wish to use while engaging in such relations. Basically, the privacy rights of the Fifth and Fourteenth Amendments to the United States Constitution might have to be reinterpreted to apply to the married but not the never-married.

Doubtless, some amendment supporters would support the proposed amendment even more once those possible ramifications became clear. Those who believe it important for children to be raised in homes by a husband and wife might welcome the removal of state and federal constitutional protections of families who do not mirror their preferred paradigm. They might even note that the amendment would facilitate adoptions, because single parents unwilling to surrender their children to be raised in two-parent homes could not rely on state or federal constitutional guarantees to protect their parent-child relationships. Either single parents would

82. Here, the context refers to the Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), rather than the amendment being promoted by a President who was in the midst of a hotly contested campaign during an increasingly unpopular war.

83. 539 U.S. 558.

84. 405 U.S. 645 (1972) (striking the Illinois presumption that unwed fathers are unfit parents).

85. 405 U.S. 438 (1972) (striking Massachusetts law preventing distribution of contraceptives to the unmarried).

86. See e.g. *Lumbra*, 394 A.2d at 1142 (suggesting that custody is one of the incidents of marriage).

have to marry or they might risk losing their children to others who would provide a setting in which there was a mother and a father.

Amendment opponents would presumably suggest that presenting single parents or LGBT parents with the choice of marrying or of possibly losing their children might lead to many unhappy marriages with an increased incidence of adultery, as former Governor McGreevey has so publicly illustrated,⁸⁷ or perhaps to an increase in domestic violence because victims might fear that they might lose their children unless they stayed with or even married their abusers.⁸⁸

The removal of constitutional protection of the privacy rights of the unmarried could have disastrous effects on nontraditional families. Overzealous legislators might decide that it would be better for children to be raised by a husband and wife, even if that would mean taking children out of loving single-parent or nontraditional dual-parent homes and putting them into the homes of strangers. Regrettably, the fact that children's interests and well-being might be undermined in yet another way were the amendment adopted will likely not sway some amendment proponents, as is made clear when one considers the support for an amendment that, even narrowly interpreted, might adversely affect the lives of hundreds of thousands or millions of children.

V. CONCLUSION

The Federal Marriage Amendment is much less clear than proponents suggest. Most of the focus of the debate has been on preventing the recognition of same-sex marriages. However, by precluding constitutional protection of the incidents of marriage for those who are unmarried, the amendment has the potential to subject extremely important aspects of private life to the whims of legislatures.

What would legislatures do if freed from the limitations imposed by state and federal constitutional guarantees? That is unclear. Some legislatures would likely offer statutory protections of all of those interests no longer constitutionally protected, assuming that the amendment would permit such legislation to be passed and enforced. Other legislatures would likely take the opportunity to re-enact legislation: (1) limiting or prohibiting access to contraception for the unmarried; (2) proscribing adult, voluntary non-marital relations; and (3) undermining the parental rights of the unmarried. In short, some legislatures would take this opportunity to return to the laws of a bygone era.

87. Stevenson Swanson, *New Jersey Governor to Quit over Gay Affair*, Chic. Trib. (Aug. 13, 2004) (available at 2004 WL 89473131).

88. Cf. Leslye E. Orloff, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women; A History of Legislative Responses*, 10 Am. U.J. Gender Soc. Policy & L. 95, 123 (2001) ("Research has found that more than half of battered women report that they stay with their abusers because they did not feel they could support themselves and their children if they left.").

If adopted, the FMA could have devastating effects on nontraditional families generally and on children in particular. It could lead to an increased balkanization of the states and increased divisiveness within the states. In either of its versions, the FMA is the kind of amendment that should never have been proposed and certainly should not be adopted. The interests that would be detrimentally affected by it are simply too important to be made subject to legislative whim.