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An Amendment to Protect Marriage: Bad in Theory, Likely Worse in Practice

Mark Strasser*

I. INTRODUCTION

Passing a federal constitutional amendment to protect marriage was a bad idea when initially proposed and, given how some of the recent state constitutional amendments have been interpreted, is a worse idea now. The Federal Marriage Protection Amendment (FMPA) was so open to interpretation that individuals deciding whether to vote for it did not know what it included and thus whether it deserved their support. Further, when one considers how the federal courts have interpreted the plain language of an existing constitutional provision, one can see that even had the FMPA been better crafted, there would have been no basis for confidence that the current difficulties in interpretation would thereby have been averted.

Part II of this article examines some of the difficulties posed by the current amendment and suggests that the reach of the amendment is far from clear, protestations to the contrary notwithstanding. Part III considers some of the interpretations that have been offered of the Eleventh Amendment to the United States Constitution and of various state amendments, arguing that these interpretations foreshadow some of the broad interpretations of the amendment that will be offered by some courts. The Article concludes that the Federal Marriage Protection Amendment, both as it has been proposed and as it likely will appear if there is a modified proposal, should not be passed.

II. THE AMBIGUOUS FMPA

While seeming clear at first, the Federal Marriage Protection Amendment is open to a variety of interpretations that would significantly affect its reach. Commentators do not seem to appreciate the multiple interpretations that it might be given and thus both the range of interests that it might impact and the difficulties that would face anyone who wished to seriously consider whether the amendment should

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be passed. Until these difficulties are addressed, it will be impossible even for many of those who believe that marriage should be reserved for different-sex couples\textsuperscript{1} to make an informed decision about whether the amendment is worthy of support.

\textit{A. The Federal Marriage Protection Amendment}

This past year, the following amendment, mirroring the 2004 Federal Marriage Amendment, was proposed:

\begin{quote}
Marriage in the United States shall consist only of the union of a man and a woman. 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.\textsuperscript{2}
\end{quote}

On its face, the amendment appears to preclude a judge from finding that a state constitution or the United States Constitution protects the right of same-sex couples to marry or to receive benefits commonly understood to be reserved for married couples. However, the clarity of this amendment is illusory. Because there is no defined set of benefits which qualify as “the incidents of marriage,” individuals deciding whether to support the amendment have no way of knowing which fundamental interests of the unmarried would be precluded by the amendment from having constitutional protection.

The FMPA did not command the necessary majority when proposed although it seems likely that some version of the amendment will again be offered.\textsuperscript{3} While it is difficult to predict what the exact wording of any future amendment will be, it seems safe to assume that certain features of the FMPA will again be included when it or some version of it is considered in Congress.\textsuperscript{4} Thus, an examination of the FMPA may well be

\begin{footnotes}
\end{footnotes}
helpful in assessing the wisdom of future proposed amendments.

When construing a statute, one must first consider the text itself.\(^5\) Suppose we consider what the amendment would mean without the phrase “or the legal incidents thereof.” Presumably, it would be construed to mean that neither any state constitution nor the United States Constitution should be interpreted to require that the status of marriage be conferred upon any union of individuals not involving one man and one woman.\(^6\) While the focus of the discussion here will not be on this part of the amendment, one point might be made about the proposed amendment even if the legal incidents language has been removed, namely that it cannot correctly be characterized as simply preventing “activist judges” from imposing their will on the American people.\(^7\)

A common interpretation of the first sentence of the amendment is that no state will be permitted to recognize same-sex marriage.\(^8\) This does not merely mean that “activist judges” are precluded from holding, for example, that a state constitution protects this right, but also that the populace of a particular state will be precluded from amending their own state constitution to protect the right of same-sex couples to marry.

Commentators might point out that the FMPA says nothing about what individuals are permitted to do with respect to ballot initiatives and that the electorate of a particular state could, in fact, amend their own state constitution to include a right to same-sex marriage. That is true but irrelevant. Basically, if the FMPA were interpreted to preclude states from protecting the right of same-sex couples to marry,\(^9\) then the state wording or version, the gist of the FMA is that marriage is defined as a conjugal union exclusively, that the courts may not compel the extension of marital status or of marital incidents, benefits, duties, rights, and privileges that constitute the corpus of legal marriage to other kinds of domestic unions, but that legislatures may resolve questions about whether and if so what other status and/or what benefits may be extended to nonmarital relationships.

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\(^6\) A separate issue beyond the purview of this article is whether this amendment would permit a state to ignore a status already conferred.

\(^7\) See Teresa Stanton Collett, Restoring Democratic Self-Governance through the Federal Marriage Amendment, 2 U. ST. THOMAS L.J. 95, 110 (2004) (“The amendment must do three things. First, it must protect the most important right of every citizen—the right of political self-governance.”); cf. Wardle, supra note 4, at 164-65 (“[A] significant minority of activist judges desire to force the states to accept same-sex marriage or marriage-like unions.”).

\(^8\) See Collett, supra note 7, at 112 (stating “the current language is clear in its prohibition of same-sex marriage”).

\(^9\) The amendment might be read only to preclude the federal government from protecting
constitutional amendment described above could be passed but would likely be held unenforceable by the courts because of the Supremacy Clause of the Federal Constitution. Yet, if the first sentence of the amendment precludes states from amending their own constitutions to protect same-sex marriage, then the FMPA may be thwarting, rather than protecting, self-government. Were FMPA proponents really concerned about protecting the right of self-determination, they would delete the first sentence of the proposed amendment.

Certainly, it might be pointed out that there does not seem to be a huge outpouring of support in any state for amending that state’s constitution to protect the right of same-sex couples to marry. That is beside the point. The question is not merely what people think now but what they may think in the future. Basically, the FMPA prevents the future electorate of any state from expressing its will by voting to extend constitutional protection to same-sex unions.

Let us bracket this anti-democratic effect of the amendment for the moment and instead ask, “What is added to the amendment by including the phrase involving the legal incidents of marriage?” At least two different points require clarification:

1. Which benefits and obligations in particular are picked out by the phrase “legal incidents of marriage?”
2. What effect would this amendment have with respect to these benefits?

Some commentators believe that the first question is not necessary to ask, claiming that the term “incidents of marriage” is used routinely and that its meaning is clear. Yet, the fact that the term is used often does not establish that the term is used in the same way each time. Indeed, some courts discussing the “incidents of marriage” have not been referring to particular benefits at all but instead have merely been discussing whether the court has jurisdiction to hear a particular matter.

Consider the following hypothetical: Jones is legally separated from her husband. She now is domiciled in State A, whereas her husband is still living in the state where he has always lived—State B. Jones can such a right.

10. See U.S. CONST. art. VI, cl. 2.
11. Cf. Collett, supra note 7, at 95 (“Public opinion polls show that Americans agree that marriage should be defined as only the union of one man and one woman—often by a margin of two to one.”).
12. See Scott Dodson, The Peculiar Federal Marriage Amendment, 36 ARIZ. ST. L.J. 783, 797 (2004) (“The FMA would add to the Constitution a provision which restricts the ability of the states to protect the fundamental right of marriage.”).
13. See Collett, supra note 7 at 111-12 (“Opponents also argue that the phrase ‘legal incidents’ of marriage is unclear and will require extensive judicial interpretation. Yet this is a phrase that has been used routinely in the discussion of marital rights.”).
divorce her husband in her current domicile, notwithstanding that her husband is not a domiciliary of State A and, indeed, has no contacts with the state. The State A court, when deciding that it has jurisdiction to grant the divorce, might use the term “incidents of marriage” to indicate that the marriage itself is before the court and thus that the court has jurisdiction to hear the case. 14

Sometimes, the term “incidents of marriage” is used quite broadly 15 and, it seems, this is the preferred interpretation of some commentators. Yet, even when the term is being used broadly, formulations may differ with respect to which benefits are included within the grouping “incidents of marriage,” and thus litigation would likely follow the passage of such an amendment, protestations to the contrary notwithstanding. 16

Consider the following formulations: Maggie Gallagher writes, “Most of what are now routinely described as marriage benefits are more accurately described as legal incidents of marriage: ways in which the law treats a couple differently if they are married than if they are not.” 17 Professor Collett offers a somewhat different description, suggesting that “‘Legal incidents of marriage’ is . . . a phrase that indicates the rights, privileges, duties, and responsibilities that arise from the legal relationship of marriage.” 18 Professor Wardle may be offering yet another definition of the phrase when suggesting that these are the “benefits, duties, rights, and privileges that constitute the corpus of legal marriage.” 19

While not making explicit which are the benefits, duties, etc., that “constitute the corpus of marriage,” Professor Wardle may be

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16. See Collett, supra note 7, at 111-12 (suggesting that extensive litigation would not be required to resolve the meaning of the term).


18. Collett, supra note 7, at 111-12.

19. Wardle, supra note 4, at 167.
distinguishing between what is essential to marriage and what simply happens to be accorded to married individuals. If so, that would mean that the benefits which merely happen to be accorded to married people would not be included among the incidents of marriage as he defines the term, whereas Professor Collett’s formulation offers no such qualification.

Suppose that a state were to accord particular benefits to all household members. Would such a benefit be considered an incident of marriage because it is something to which one might become entitled as a result of marrying, or would it not be an incident of marriage because unmarried individuals would also be entitled to it? If the incidents of marriage are those benefits which one receives by virtue of marrying and, for example, one is treated as a household member by virtue of marrying someone, then benefits accorded to household members might be thought of as incidents of marriage. If, on the other hand, the incidents of marriage are limited to those benefits which capture some essential element of marriage, then the fact that unmarried individuals, e.g., people who were merely living together, might also be entitled to a particular benefit would speak to the benefit’s not being classified as an incident of marriage.

If the incidents of marriage must be associated with an important or, perhaps, an intrinsic element of marriage, then it will be necessary to decide which benefits meet that standard. Presumably, this matter would have to be worked out in the courts, which means that there would likely have to be a substantial amount of litigation to determine which benefits would count as incidents and which would not.

Suppose that we adopt Maggie Gallagher’s proposal and just see which benefits accorded to married couples are not accorded to non-marital couples. This would have some unusual implications, one of which is that some states simply would not have incidents of marriage. For example, consider Connecticut and Vermont, whose legislatures have passed legislation creating civil unions. Civil unions accord to same-sex couples all of the benefits and obligations that are accorded to married couples. In these states, where no benefits are specially reserved for married couples, there would seem to be no incidents of marriage using Maggie Gallagher’s definition.

Perhaps this is not an unwelcome result. In some states, the phrase

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20. See VT. STAT. ANN. tit. 15 § 1204(a) (“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.”); see also Susan Haigh, Connecticut OKs gay civil unions; Grants same-sex pairs the rights of married couples; bars weddings, REC. N. J., Apr. 21, 2005, 2005 WLNR 6298288 (noting that Connecticut will start recognizing civil unions as of October 1, 2005).
“incidents of marriage” would not pick out any particular benefits, which would mean not only that the legislature could accord those benefits, but also that a court might find that those benefits had to be accorded as a matter of constitutional right. In other states, however, the phrase “incidents of marriage” would pick out particular benefits. In those states, unmarried individuals would be barred from claiming those benefits as a matter of constitutional right.

Commentators might disagree with the analysis set forth here. They might suggest that the FMPA would preclude a Vermont court from finding that a particular benefit of marriage had to be extended to non-marital couples as a matter of constitutional right. After all, the amendment states that no “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,” and it might turn out that the majority of states consider the right to elect against a will, for example, as an incident of marriage.

Yet, the focus of discussion here is how to determine which benefits are incidents of marriage. If the incidents of marriage involve those benefits reserved by a state for married couples, then it will not matter what other states do—it will only matter which benefits are reserved for married individuals by the particular state whose law is being challenged. It is precisely for this reason that the FMPA puts no limitation on what the Common Benefits Clause of the Vermont Constitution protects, since no state benefits are reserved exclusively for married couples in Vermont. Of course, there might well have been a limitation on the courts before the Vermont Legislature passed the civil union bill, which means that had the FMPA been in effect at the time Baker v. State was issued, the decision might have been much different.

Were we to have a federal law which determined who could marry whom and which benefits were included among the incidents of marriage, then we might refer to that statute to see whether a particular benefit was an incident of marriage and thus could be reserved for married couples without offending constitutional guarantees. Of course, this would not resolve all of the issues, since a separate question would be whether the amendment would be referring to those benefits considered incidents of marriage at the time of the amendment’s

24. At the very least, the Baker court would have to have argued that the Vermont Constitution guaranteed to all Vermont citizens certain benefits, none of which qualified as “incidents of marriage” as the term was being used in the FMPA.
adoption or instead, for example, at the time the cause of action accrued. In any event, because we do not have a national marriage law, we must use some other method to determine which benefits count as incidents of marriage.

In a different context, Professor Collett suggests:

Some of the existing arrangements that would still be possible under the FMA include Vermont civil unions, Hawaii reciprocal beneficiaries, and New Jersey and California domestic partnerships. Each is distinctive and responsive to the concerns of the people in the state in which the laws were adopted. The FMA does not, and should not, preclude such experimentation by the states where it represents the will of the people, and is not imposed upon the people through some act of willfulness by the judiciary.

The issue of interest here is not whether a legislature could accord a variety of benefits to individuals but whether a legislature’s doing so might either change the character of the benefit or, perhaps, make clear that the benefit in question was never an incident of marriage. Thus, suppose a legislature decides to grant Benefit A to unmarried singles or couples, not because it was forced to do so by a court but because it believed its doing so was good public policy. If “incidents of marriage” are reserved for married couples, then Benefit A could not be thought an incident of marriage.

At least a few points are suggested by the above:

(1) What is an incident of marriage in one state might not be an incident of marriage in another, and thus the FMPA might immunize

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25. Perhaps the closest is the Defense of Marriage Act, which specifies some unions which will not be considered marriages for federal purposes. See 1 U.S.C.A. § 7 (2005).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Id.

26. Collett, supra note 7, at 110; see also Wardle, supra note 4, at 152.

[T]he Federal Marriage Amendment clearly preserves the authority of legislatures, state and federal, to enact laws providing “that (1) marital status or (2) the legal incidents thereof be conferred upon unmarried couples or groups.” Thus, it does not prohibit the creation of another legal status equivalent to marriage—called, perhaps, “Civil Unions” or “Domestic Partnerships” or “Reciprocal Beneficiaries”—nor does it prohibit the extension of the same benefits given married couples to such alternative quasi-marital unions, or the extension of any particular marital benefits and “incidents” to any heterosexual or same-sex nonmarital couples—so long as it is done by the legislature.

Wardle, supra note 4, at 152.
from constitutional attack a refusal to accord particular benefits to unmarried persons in one state but not in another.

(2) What once was viewed as an incident of marriage might no longer be so viewed once the state accorded the benefit at issue to any unmarried individuals. Thus, a legislature that accords particular benefits to some unmarried individuals would be making the refusal to accord those benefits to other unmarried individuals potentially subject to constitutional attack, i.e., would nullify the immunity from constitutional attack offered by the FMPA.

(3) Assuming that (2) does not involve a one-way ratchet of some sort, a state legislature might be able to reclassify particular benefits as incidents of marriage by reserving them only for married individuals. There would presumably be some limit on what could be (re)classified as an incident of marriage. For example, the state could not classify the right to vote as an incident of marriage. However, it is simply unclear how that limitation would be spelled out.

By including the term “incidents of marriage” within the proposed amendment without spelling out what the phrase means, the amendment framers have given the courts a great deal of latitude when determining which benefits fall within this category. Perhaps courts will do a state-by-state analysis, perhaps they will consider which benefits were considered incidents of marriage at common law, or perhaps they will use some other method. The amendment does not specify, which means that it would be difficult for someone deciding whether to favor the amendment to know what it is that the amendment immunizes from constitutional review. Indeed, some of the benefits that FMPA proponents believe are paradigmatic incidents of marriage might not be so viewed in a state that permits non-married individuals to receive those benefits as well.

B. What May be Included as Incidents of Marriage

While the amendment does not specify any incidents of marriage or even offer a criterion by which courts could make that determination, commentators are willing to offer examples of incidents of marriage.


28. See, e.g., Krotoszynski, Jr. & Spitko, supra note 3, at 648 (suggesting that they include
Regrettably, it is sometimes difficult to tell why certain benefits are thought to be incidents of marriage. It could be, for instance, that some benefits are thought to be incidents of marriage because a particular state treats them as such, because they were viewed at common law as incidents of marriage, or because most states treat the benefits at issue as incidents of marriage. Yet, without any elaboration or specification on this matter, it is difficult to tell which benefits would be treated as incidents of marriage as a federal constitutional matter, should that be important to determine in the future.

Professor Wardle suggests that “the FMA would limit the ability of state courts to extend particular benefits of incidents of marriage to nonmarital homosexual or heterosexual couples, such as marital testimonial privileges, custody, adoption, support, and property division.”29 Regrettably, he fails to explain whether, for example, this list would be applicable in Vermont, where none of these benefits is reserved only for those who have married, or whether, instead, this list would only be applicable in a state in which all of these benefits are reserved for married couples.

Let us consider the issue of adoption. Most states permit non-married individuals to adopt,30 so adoption is presumably not an incident of marriage. In a state permitting second-parent adoptions,31 it would be difficult to classify as an incident of marriage an adoption whereby two unmarried adults would now be recognized as the parents of the same child. Thus, it might be more difficult than first appears to determine which benefits would be affected by the amendment.

The above point can be illustrated by considering a law like Florida’s, which precludes many gays and lesbians from adopting.32 Because Florida permits singles to adopt,33 adoption itself is presumably not an incident of marriage. Because it is not an incident of marriage, the refusal to permit gays and lesbians to adopt would at least potentially be

“rights to visit a significant other in a hospital, to help make medical decisions if a loved one becomes incapacitated, to have the state recognize the existence of parental rights”).

29. Wardle, supra note 4, at 167.
32. See Fla. Stat. Ann. § 63.042(2)(c)(3) (West 2002) (“No person eligible to adopt under this statute may adopt if that person is homosexual.”). The statute has been construed only to limit those who have been sexually active during the past year with someone of the same sex. See Lofton v. Sec’y of the Dept. of Children and Fam. Servs., 358 F.3d 804, 806-07 (11th Cir. 2004).
subject to constitutional challenge even if the FMPA was adopted (although a separate issue would be whether the challenge itself would be successful).)

Nonetheless, there is at least one respect in which adoption might be considered to be an incident of marriage if a state does not permit second-parent adoptions. To see this point, a little background is required. Traditionally, whenever someone adopted a child, the biological parents had to surrender their parental rights. However, there is an exception to this rule—every state permits stepparent adoptions, i.e., permits a spouse of a parent to adopt the parent’s child without forcing the parent to surrender parental rights. For example, assume that Wanda lost her husband years ago and has now remarried. Her current husband, William, wishes to adopt her children. Assuming that Wanda supports the adoption and that the adoption would promote the interests of the children, William will be permitted to adopt the children without Wanda being forced to give up her own parental rights. This is quite sensible, given that both Wanda and William will be raising the children.

Suppose, for purposes of illustration, that Wanda lives next door to another widow named Sandy. Sandy is living with—but not married to—a man, Samuel, who wants to adopt her children. Suppose further that (1) Sandy supports the adoption, (2) the adoption would promote the best interests of her children, and (3) Sandy and Samuel are as committed to each other as are Wanda and William. The issue of interest here is whether there would be any significance to a state’s refusal to extend the stepparent exception so that Samuel could adopt Sandy’s children without Sandy’s having to surrender parental rights, i.e., whether a state’s refusal to permit second-parent adoptions might have any implications for what might be considered an incident of marriage.

Again, let us consider Florida law, which permits a stepparent to adopt his or her spouse’s child without the spouse being forced to surrender parental rights. While there seems to be no statute or reported case law directly on point, it seems unlikely Florida would permit an

34. See Lofton, 358 F.3d 804 (upholding Florida’s adoption law).
35. Mark Strasser, Marriage, Parental Rights, and Public Policy: On the FMA, Its Purported Justification, and Its Likely Effects on Families, 2 U. ST. THOMAS L.J. 118, 128 (2004) (“Traditionally, whenever a child was adopted, the parental rights of the biological parents were terminated.”).
37. FLA. STAT. ANN. § 63.042(2)(c)(1) (West 2005).
38. The Florida statute does not address this kind of case, see id. at § 63.042, and a Westlaw search does not reveal any cases dealing with the issue.
unmarried individual to adopt his or her partner’s child without that partner’s being forced to surrender parental rights. If Florida would not allow that kind of adoption, then a stepparent adoption would likely be viewed as an incident of marriage under Florida law.

Recently, Florida’s law banning gays and lesbians from adopting children was upheld by the Eleventh Circuit.\textsuperscript{39} Suppose, however, that the Eleventh Circuit had reached a different conclusion or, perhaps, that the United States Supreme Court decided in a different case that such bans violated federal constitutional guarantees. A separate question would be whether the FMPA would immunize a state’s refusal to permit second-parent adoptions from constitutional review. Arguably, it would. Thus, even if a state’s prohibiting adoptions by gays or lesbians would violate equal protection guarantees, the FMPA might immunize from constitutional review a decision by a state to preclude the members of a non-marital couple from each establishing parental rights to the same child. Basically, according to one interpretation of the amendment, the FMPA would carve out from federal or state constitutional review a state’s decision not to accord the incidents of marriage to any non-marital couple, even assuming that the decision could not pass muster under equal protection or due process analysis.\textsuperscript{40}

Suppose that it were claimed that the incidents of marriage should not be determined in light of which benefits are reserved for married couples by a particular state but, instead, should be understood to involve certain core areas, such as custody, adoption, support, and property division.\textsuperscript{41} This might mean that a state’s refusal to permit non-married individuals to have benefits in these areas would be immune from constitutional review.\textsuperscript{42} Indeed, not only might a state’s refusal to allow all unmarried individuals to adopt or have custody be immune from constitutional scrutiny, but a state’s decision to allow only certain unmarried individuals to adopt or have custody might be immune from constitutional scrutiny. In short, a possible interpretation of the FMPA is that states’ decisions with respect to which unmarried individuals would

\textsuperscript{39} See Lofton v. Sec’y of the Dep’t of Children and Family Servs., 358 F.3d 804, 827 (11th Cir. 2004).

\textsuperscript{40} Cf. Krotoszynski, Jr. & Spitko, supra note 3, at 615 (“This drastic step—repealing the protections of the Equal Protection and Due Process Clauses—is, of course, what the proponents of a Federal Marriage Amendment implicitly have proposed.”).

\textsuperscript{41} See generally Wardle, supra note 4, at 167.

\textsuperscript{42} But see Granholm v. Heald, 125 S.Ct. 1885, 1903 (2005) (“[T]he Twenty-first Amendment does not supersede other provisions of the Constitution . . . .”); Krotoszynski, Jr. & Spitko, supra note 3, at 602 (“Because a Federal Marriage Amendment would contravene the deeply embedded constitutional ideals of equal protection and due process, it would invite a narrow interpretation that might undercut its effectiveness at preserving marriage rights for heterosexual relationships only.”).
receive any of the benefits within the “incidents of marriage” category would be free from constitutional challenge: States could discriminate on the basis of orientation, sex, race, religion, etc., without fear that their laws would be struck down as violating state or federal constitutional guarantees.

There might be significant ramifications were the FMPA interpreted to exempt the non-awarding of certain core benefits to the unmarried from constitutional review. Not only might equal protection guarantees be rendered inoperable with respect to the withholding of benefits to particular unmarried individuals, but substantive due process guarantees might be similarly so treated. Consider the right to custody of one’s biological child, a fundamental interest with which the state cannot interfere without compelling justification. If custody is an incident of marriage, then statutes adversely affecting the custodial rights of the unmarried might be immunized from state and federal constitutional scrutiny. Were a state legislature to decide that the parental rights of never-married parents should be terminated so that their children could be placed in marital homes, there would be no recourse to constitutional protections.

Suppose that the FMPA had been adopted and the facts of Stanley v. Illinois were before the Court. The mother of three children dies. The father of the children with whom she had been living but whom she had never married is presumed by the state’s laws to be an unfit parent. He challenges the law. While the Stanley Court struck down the statute, the Supreme Court might now have to uphold the law, because the equal protection and due process guarantees of the Federal Constitution.

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43. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").
44. 405 U.S. 645 (1972).
45. Id. at 646.
46. See id. at 647 ("The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children.").
47. See id. at 649.
48. The Stanley Court struck down the law as a violation of equal protection guarantees. See id. at 649 ("[B]y denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.").
49. The Stanley Court suggested that the Due Process Clause also established the unconstitutionality of the statute in question. See id. at 657-58.

We think the Due Process Clause mandates a similar result here. The State’s interest in caring for Stanley’s children is de minimis if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley’s unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his
would simply be inapplicable when the custodial rights of an unmarried parent were at issue. The Court might recognize that the application of this law would result in the children’s losing both of their parents—one through death and the other through the operation of law—but would note that this regrettable result speaks to the wisdom of the statute, a matter to be addressed to the Legislature rather than the Court.

Perhaps the FMPA would not permit invidious discrimination. This would depend upon how it was interpreted and whether, for example, it would be interpreted to repeal all constitutional guarantees with respect to a defined set of benefits for those who were not married. Given how some state and federal constitutional provisions have been interpreted, it seems clear that some members of the Court would interpret the FMPA to permit states to pass arguably invidiously discriminatory legislation, although it is simply unclear whether that view would be shared by a majority on the Court.

III. CONSTITUTIONAL INTERPRETATION

Recently, several states amended their state constitutions to preclude the recognition of same-sex marriage. Those amendments have required interpretation, and some interpretations now appear in case law. Further, during the past several years, the United States Supreme Court has been significantly revising its interpretation of the Eleventh Amendment. The state and federal courts’ interpretations of these amendments should not give comfort to anyone predicting that the FMPA will be construed in a particular way. On the contrary, the interpretations offered of some of the state amendments and the current Eleventh Amendment jurisprudence should make everyone wary of how the FMPA might be interpreted by the courts.

A. State Constitutional Interpretation

In 2004, several states adopted constitutional amendments respecting marriage. While each was designed to prohibit same-sex marriages, the

50. In both Romer v. Evans, 517 U.S. 620 (1996), and Lawrence v. Texas, 539 U.S. 558 (2003), the majority struck down what it viewed as invidiously discriminatory legislation. In both cases, Justices Scalia, Rehnquist, and Thomas believed the legislation permissible, even without the FMPA. See Romer, 517 U.S. at 636 (Scalia, J., dissenting); Lawrence, 539 U.S. at 586 (Scalia, J., dissenting). It would not be difficult to imagine that these Justices would read the amendment as immunizing certain kinds of restrictions from constitutional review.

51. Same-sex marriage: Simply put, he explained, Economist 82, 3/19/05, 2005 WLNR
content of the various amendments differed and their scope required interpretation by the courts. Some of the state court interpretations should give pause to those pushing for the adoption of the FMPA.

In November of 2004, the following constitutional amendment was passed by referendum in Ohio:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.\(^{52}\)

Ohio courts have tried to spell out the effects of this amendment. For example, one issue on which courts have not been able to agree is whether the amendment invalidates the application of the state’s domestic violence statute to non-marital couples. Some courts have concluded that the second sentence of the amendment precludes the state from extending to non-marital, cohabiting partners the protections that would be extended to a spouse,\(^{53}\) while others have concluded that the amendment does not preclude the extension of such benefits.\(^{54}\)

The claim here is not that being free from domestic violence should be thought a benefit reserved for married couples. Indeed, at common law, one spouse would be immune from civil suit by the other spouse for injuries which would have been actionable had the individuals never married,\(^{55}\) so protection from domestic violence does not seem to be one of the paradigmatic incidents of marriage. Nonetheless, if the language of the Ohio amendment can be construed to preclude protection against domestic violence for non-marital couples, the FMPA would likely be analogously construed by some courts, e.g., to suggest that a failure to provide domestic violence protection to the unmarried is immune from

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4227351 (“Of the 17 states that have changed their constitutions to ban same-sex marriages, only Nebraska, Nevada, Alaska and Hawaii did so before 2004. The other 13 did so in 2004—the year not just of the San Francisco change but also of same-sex legalisation in Massachusetts.”).

52. O HIO CONST. art. XV, § 11.


constitutional challenge.

If the FMPA could be interpreted to immunize the failure to extend domestic violence protections to non-marital couples, one might wonder what other benefits might also be so treated. For example, consider the Nebraska constitutional amendment, which is as follows: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”

The Nebraska Attorney General interpreted the amendment as precluding the legislature from giving a domestic partner the right to control the disposition of a decedent’s remains. A host of other benefits, e.g. hospital visitation and medical decision-making, were also at least arguably affected by the State Attorney General’s broad interpretation of the amendment.

It is unclear whether the Nebraska amendment was intended to be given this broad scope. Suppose, however, that it had been so intended and suppose further that it had been adopted for invidious reasons. If the FMPA were passed, such broad statutes or amendments, if drafted in a particular way, might be immunized from constitutional review.

The FMPA language targets the “incidents of marriage” and does not even mention same-sex relationships. If a state adopted legislation which precluded same-sex but not different-sex unmarried couples from receiving certain benefits, the FMPA presumably would not apply and the classification might be challenged on constitutional grounds. However, if instead the state decided to reserve certain benefits only for married couples, that legislative decision might be immune from constitutional scrutiny, even if that classification were enacted for invidious reasons.

Proponents of the FMPA often claim that it is necessary to preserve different-sex marriage. Suppose that we bracket that permitting same-
sex couples to marry will not somehow preclude different-sex couples from marrying. Suppose that we also bracket the implausibility of the claims either that different-sex couples will not marry if same-sex couples are permitted to do so or that different-sex couples will divorce when they otherwise would not have if same-sex couples are permitted to marry.61 It should be clear that passing an amendment which could remove possible constitutional protections for visiting loved ones in the hospital or, perhaps, for disposing of the remains of a loved one is not only not going to save marriage but is heartless and cruel.

If the sole issue were the importance of preserving marriage for different-sex couples,62 one would expect that the “incidents of marriage” language in the second sentence of the FMPA would be unnecessary. Indeed, some commentators have suggested that the majority of Americans wish to preserve marriage for different-sex couples but do not feel the same way with respect to the allocation of the benefits of marriage.63

B. How Would a Carefully Crafted Amendment Be Interpreted by the Federal Courts?

While the state constitutional amendments have been construed in a variety of ways, it might be thought that a federal amendment would be narrowly construed. Yet, a brief consideration of Eleventh Amendment jurisprudence illustrates that even a better–crafted amendment might be interpreted in a variety of ways.

The Eleventh Amendment to the United States Constitution reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”64

This amendment might seem relatively straightforward.65 On its face,
it suggests that the federal courts will not have jurisdiction to hear a suit by a citizen of one state against another state. The amendment says nothing about a citizen suing her own state nor does it say anything about a state’s being able to confer jurisdiction on the federal courts by agreeing to be sued there. Yet, the Court has interpreted the amendment to bar suits by citizens against their own states\textsuperscript{66} and to not bar suits by citizens of other states if the state has no objection to appearing in federal court.\textsuperscript{67}

A consideration of the historical context in which the amendment was adopted suggests that the amendment might have been adopted to limit the federal courts’ diversity jurisdiction.\textsuperscript{68} Be that as it may, the current Eleventh Amendment jurisprudence does not closely follow the text.\textsuperscript{69}

What implications does this have for the FMPA? First, the Court may well not feel bound by the text,\textsuperscript{70} which means that the Court might offer a broad range of interpretations of the text. For example, the Court might read the amendment as a partial limitation on Fourteenth Amendment protections or, perhaps, might take a very different approach and read the amendment as imposing restrictions on different-sex marriages because of equal protection guarantees.\textsuperscript{71}

At least one of the lessons of Eleventh Amendment jurisprudence is that the Court may not feel constrained by the words of the amendment and instead may try to capture what it symbolizes.\textsuperscript{72} This means that it much less clear than might originally be supposed, see Mark Strasser, Hans Ayers, and Eleventh Amendment Jurisprudence: On Justification, Rationalization and Sovereign Immunity, 10 GEO. MASON L. REV. 251, 254-56 (2001).

\textsuperscript{66} Idaho v. Coeur D’alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (“[W]e have extended a State’s protection from suit to suits brought by the State’s own citizens.”).

\textsuperscript{67} Id. at 267 (rejecting “that the Eleventh Amendment, like the grant of Article III, § 2, jurisdiction, is cast in terms of reach or competence, so the federal courts are altogether disqualified from hearing certain suits brought against a State”).


\textsuperscript{69} Cf. Alden v. Maine, 527 U.S. 706, 729 (1999) (“Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, ‘we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition... which it confirms.’” (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991))).

\textsuperscript{70} Cf. Krotoszynski, Jr. & Spitko, supra note 3, at 620 (2005) (“The lesson here is quite clear: the Supreme Court does not hold itself bound to traditional canons of statutory interpretation when interpreting constitutional text.”).

\textsuperscript{71} Id. at 625 (“We conclude that neither version of the Federal Marriage Amendment would preclude a future Supreme Court from holding that a state’s failure to recognize same-sex marriage while recognizing mixed-sex marriage constitutes invidious sex discrimination in violation of the Equal Protection Clause.”).

\textsuperscript{72} Blatchford, 501 U.S. at 779 (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it
might be very difficult for those proposing the amendment to achieve particular defined ends, even if they are very careful in how they craft the language of the amendment. Yet, the FMPA is not particularly well crafted, since it leaves so much open to interpretation. No one can say what the Court would do if forced to interpret the amendment—the only safe bet is that some would be very surprised by the Court’s decision.

IV. CONCLUSION

The proposed Federal Marriage Amendment is unwise for a variety of reasons. Its scope is extremely unclear, as is illustrated by some of the interpretations that have been given to state marriage amendments. Further, there is reason to believe that the United States Supreme Court would not feel particularly constrained by the amendment’s language, even were it not so open to interpretation.

FMPA proponents have offered a variety of reasons for the amendment, but many of those reasons do not withstand scrutiny. Were federalism really the goal, the amendment would not attempt to tie the hands of the states in how they amended their own constitutions. Were protecting marriage the goal, the amendment (1) would do something which was more likely to protect marriage in fact, and (2) would not enable states to impose cruel burdens on disfavored minorities.

Because the focus of this discussion has been on whether passage of the FMPA is wise, very little attention has been paid to the merits of recognizing same-sex marriage. Perhaps a few words on that matter should be included.

Maggie Gallagher argues that married couples receive certain benefits because of the “law’s perception of spouses as each others’ closest kin. The law is doing justice to the relation that actually exists between spouses . . . , rather than creating a basket of legal goodies to help reward married couples.”73 This is at least one of the reasons that same-sex couples should have the right to marry—the law should do justice to the relation that actually exists. Same-sex couples have the same kinds of relationships that different-sex couples have. They may have children to raise or elderly parents who need their care. They may wish to cement their union as a matter of religious belief and, indeed, may be able to celebrate their union within their faith tradition. They seek to marry for many of the same reasons that different-sex couples seek to marry and have many of the same roles, e.g., as caring parent,

child or helpmate, as do members of other couples.

Some FMPA proponents suggest that it is anti-family to point out that many married couples do not have children, and that many children are not being raised by both of their biological parents.\(^74\) Such a suggestion is regrettable for several reasons. The United States Supreme Court has recognized that the “demographic changes of the past century make it difficult to speak of an average American family” and that the “composition of families varies greatly from household to household.”\(^75\) Pretending that the “average American family” is other than what it is will not change the nature of that family. However, it may result in many American families having a much harder time staying together and in many parents having a much harder time providing for their children, results which no one should want.

The FMPA is exactly the sort of amendment which should not be proposed and certainly should not be adopted. One can only hope that the Congress and the American people will continue to have the wisdom to reject this Pandora’s box, whose foreseeable consequences are not pleasant to contemplate and whose currently unforeseeable consequences would likely produce lamentations even from those who had once been its supporters.

\(^{74}\) Id. at 61 (suggesting that the importance of procreation and its relationship to marriage are downgraded by the observation that many children are raised by single parents and in homes in which one of the parents has no biological connection to the child).

\(^{75}\) Troxel v. Granville, 530 U.S. 57, 63 (2000).