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Constitutional Thematics and the Peculiar Federal Marriage Amendment

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I. INTRODUCTION

Thank you, and thank you to the law school for hosting this conference and to Professor Wardle for inviting me here today. I am honored to be a part of this panel. I look forward to sharing my ideas with you, and to a lively debate on this important topic.

As an aside, I must say that I find it intriguing that several panelists have alluded to the prevalence of marriage protection provisions in foreign nations. It strikes me that perhaps they have stumbled upon a rather clever basis for our Supreme Court to *protect* marriage: let's just call traditional marriage a matter of international law and be done with it!

Humor aside, I am *not* going to take a position on whether banning same-sex marriage is right or wrong as a matter of social policy. I leave that to others today. Instead, I want to focus on the Constitution itself, and how that document could change if the current form of the Federal Marriage Amendment, or FMA, banning same-sex marriage, is appended to it.

The FMA, in its current form, consists of two sentences. The first states: "Marriage in the United States shall consist only of the union of a man and a woman."[1] This sentence would prohibit any state—whether by judicial decree, gubernatorial effort, legislative process, popular

* Assistant Professor of Law, University of Arkansas School of Law. I presented the substance of this paper at a symposium titled "A Federal Marriage Amendment" held at the J. Reuben Clark Law School, Brigham Young University. More information on that symposium, including an audio recording of the presentations, responses, and questions, can be found at http://www.law2.byu.edu/OrganizationsNew/Marriage_Family/conferences.php. The views expressed herein are mine and do not necessarily reflect those of any other person or entity.

1. S.J. Res. 40, 108th Cong. § 2 (2004); H.J. Res. 106, 108th Cong. § 2 (2004). The Senate version died when cloture failed (forty-eight to fifty) on July 14, 2005. *See* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=2&vote=00155 (last visited Aug. 31, 2005). The House version reached a vote but failed to pass by the required two-thirds supermajority (227 to 186) on September 30, 2004. *See* http://clerk.house.gov/evs/2004/roll484.xml (last visited Aug. 31, 2005). A similar proposal was introduced in the 109th Congress. *See* S.J. Res. 1 § 1, 109th Cong. (1st Sess. 2005), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:sj00001:@@@L&summ2=m&>; H.R.J. Res. 39 § 1, 109th Cong. (1st Sess. 2005), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:hj00039:@@@L&summ2=m&.

referendum, or state constitutional amendment—from granting marital status to, or recognizing the marital status of, same-sex couples.

The second sentence originally stated: "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."[2] However, this sentence has been subsequently altered and now states: "No court of the United States or any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman."[3] Either way, this second sentence in the FMA prohibits a state from constitutionally extending the legal benefits of marriage to same-sex couples.[4]

There is something quite remarkable about this FMA. It takes power away from the states. Well, that is no big deal; the Constitution takes many powers away from the states. But the FMA takes power away from the states in derogation of individual liberty and equality. This is a very peculiar power shift. Indeed, I can find nothing else like it in the Constitution.

II. CONSTITUTIONAL THEMATICS

Our Constitution is thematic. Generally, it paints with broad strokes based on recognizable and coherent themes. You could probably name a few off the top of your head: separation of powers is one that comes readily to mind. This is a particularly good illustration because although no one really questions that it is a part of the constitutional structure and meaning, the phrase "separation of powers" is not explicitly mentioned or mandated.[5]

I am taking this opportunity to talk about how the FMA could affect

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2. S.J. Res. 40 § 2 (2004); H.R.J. Res. 106 § 2, 108th Cong. (2004); *see also* S.J. Res. 1 § 1, 109th Cong. (2005).

3. H.R.J. Res. 39 § 2, 108th Cong. (2005).

4. Technically, the FMA only prevents state courts from "construing" their own constitutions in a particular way and does not prevent the citizens of a state from adopting a particular state constitutional amendment. But, say a state adopted a state constitutional amendment that required that the legal incidents of marriage be extended to same-sex couples, precisely what the FMA prohibits. The FMA would then prevent the state's courts from giving the state constitutional amendment its literal interpretation.

5. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856) (holding that a legislative court may not decide a suit at common law or in equity or admiralty because such a suit is inherently judicial); INS v. Chadha, 462 U.S. 919 (1983) (striking down a law which authorized either House of Congress to veto an executive decision made by the Attorney General); Clinton v. City of New York, 524 U.S. 417 (1998) (stating that Congress could not delegate a line-item veto to the President because such power was legislative rather than executive).

existing constitutional themes and why we ought to care. But, first, I will outline the particular themes that the FMA affects. There are at least three of them: a commitment to state power over local matters, individual liberty, and equality. I doubt that I need to convince anyone here that these are recognizable themes in our Constitution, but just to make sure, I'll make a brief offer of proof.

First, state power. The Constitution's commitment to state power over local matters is an important component of federalism and state sovereignty. Article I limits congressional power to those specifically enumerated grants in Section 8, which generally focus on national issues. Apart from somewhat more ambiguously described executive and judicial powers, all other powers, including the general police power, are reserved to either the people or the states, as confirmed by the Ninth and Tenth Amendments. Under this division of power, the people of the several states are, for the most part, free to legislate or constitutionalize their local affairs as they prefer.[6] These local affairs traditionally include the definition, scope, and effect of marriage.[7] The normative benefits of this federalist structure should be clear: local governance permits discrete citizenries to develop the laws that suit them best.

Second, liberty. The commitment to individual liberty permeates the Constitution, which prevents the national government from suspending the writ of habeas corpus.[8] The Constitution prevents the states from passing ex post facto laws or impairing contracts.[9] It provides for trial by jury;[10] limits the definition, punishment, and proof of treason;[11] and gives the President a broad pardoning power.[12] In addition, the Bill of Rights guarantees the individual freedoms of religion and speech, due process of law, privacy from searches and seizures, and a host of specific protections for the criminally accused. After the Civil War, the Due Process Clause of the Fourteenth Amendment significantly broadened the constitutional commitment to individual liberty by applying most of the libertarian principles in the Bill of Rights to the states.

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6. *See* Scott Dodson, *The Peculiar Federal Marriage Amendment*, 36 ARIZ. ST. L.J. 783, 784 (2004).

7. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995) (including marriage within the ambit of state authority over family law); Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992) (stating that states are more suited to handling issues that arise out of divorce); Loving v. Virginia, 388 U.S. 1, 7 (1967) (stating that regulation of marriage is within the states' police power). *But see* Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894) (requiring Utah to outlaw polygamy as a condition to admission into the United States).

8. U.S. CONST. art. I, § 9, cl. 2-3.

9. *Id.* art. I, § 10, cl. 1.

10. *Id.* art. III, § 2, cl. 3.

11. *Id.* art. III, § 3, cl. 1-2.

12. *Id.* art. II, § 2, cl. 1.

Third, equality. Although equality features far less prominently than liberty, the Constitution prohibits both the national government and the states from granting any "Title of Nobility."[13] The Privileges and Immunities Clause mandates that the citizens of each state be entitled to the benefits of the citizens in the several states. In addition, the qualifications for officers and representatives of the national government are quite sparse;[14] a manifestation of the Framers' visions of a meritocracy.[15] After the Civil War, the Thirteenth Amendment's abolition of slavery and the Fourteenth Amendment's Equal Protection and Privileges or Immunities Clauses signaled a far stronger commitment to equality that has continued to this day with steady reminders such as the Voting Amendments.

Now, I am *not* saying that these principles are absolute—that just because they show up prominently they are unabridgeable or unmalleable. Nor am I saying that their boundaries or scopes are always cleanly defined or discrete. For example, the Voting Amendments simultaneously furthers at least two of these constitutional themes simultaneously.[16] What I am saying is that they are recognizable themes, and they exist in a thematic document. But, why do we care whether the Constitution is thematic or not?

III. THE IMPORTANCE OF CONSTITUTIONAL THEMES

Constitutional themes and their inter-coherence are important for at least two reasons: First, constitutional themes identify fundamental values of our governing structure. They are the basis of our understanding of our own government and how it is supposed to work. Take the one-two punch of liberty and equality, for example. These form the roots of the modern conception of the Constitution as a defender of civil rights. We, as a people, wholeheartedly believe in a way that helps define our nation that the Constitution's commitments to liberty and equality set limits on unjustified governmental overreaching into our civil rights. This modern sentiment has ushered in an unprecedented era of individual freedom and tolerance for minorities, women, and other

13. *Id.* art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1.

14. *Id.* art. I, § 3, cl. 3; *id.* art. I, § 2, cl. 2; *id.* art. II, § 1, cl. 4; *id.* art. III, § 1; *id.* art. VI, § 1, cl. 3.

15. *See, e.g.*, ALEXANDER HAMILTON OR JAMES MADISON, THE FEDERALIST No. 52, at 294 (Clinton Rossiter ed. 1961) ("Under these reasonable limitations, the door of this part of the federal government [the House of Representatives] is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.").

16. They further both equality and representative democracy.

groups. In other words, the Constitution reflects—and affects—the fundamental values we hold as a people.

Second, constitutional themes assist with constitutional interpretation. Phrases like "due process," "freedom of speech," "cruel and unusual punishment," and "equal protection" defy uniform or certain definition. As an interpretive aid, jurists rely heavily on the established themes running through the Constitution for guidance when applying these phrases.

As an example of what I mean by the importance and effect of constitutional thematics, I quote from *Bolling v. Sharpe*, which held that the Fifth Amendment, despite lacking an equal protection clause, incorporated an equality component into its Due Process Clause:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. . . . In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.[17]

And just to show that constitutional thematics are important to and used by both liberals and conservatives alike, let me provide a second example: state sovereign immunity. The text of the Eleventh Amendment immunizes states only from suit in federal court by citizens of different or foreign states.[18] But the constitutional principle of state sovereignty—of which the Eleventh Amendment is just one manifestation—extends that immunity to suits in state court, to administrative proceedings, and to suits brought by a state's own citizens.[19]

In short, the sums of the prominent constitutional themes are greater

17. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

18. U.S. CONST. amend. XI ("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.").

19. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996). Yet, at the same time, Eleventh Amendment immunity surrenders to congressional legislation enforcing the equality principles of the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

than their parts and give life and meaning to the individual provisions of the Constitution. They radiate from its text like echoes from a set of notes that take on different tones and volumes from the surrounding environment.[20]

Because of the importance of thematic coherence and consistency, whenever a constitutional provision runs contrary to a particular theme, it usually does so only in furtherance of another. Take state power, for example. Of all of the active Amendments that limit state power beyond what the original Constitution established, all but the Seventeenth do so in furtherance of liberty or equality. And the Seventeenth—which provides for direct election of Senators—furthers another recognizable theme in the Constitution: representative democracy.

IV. THE PECULIARITY OF THE FMA

Juxtaposed against this coherent, thematic constitutional backdrop, the proposed FMA is incongruent because it undermines the embedded constitutional themes of state power, liberty, and equality. For example, the FMA contradicts the theme of state power by usurping the definition of marriage, a matter historically reserved to the states under traditional notions of federalism[21] and by removing from the states the power to constitutionalize equal benefits to same-sex and opposite-sex couples.[22]

The FMA is also contrary to the theme of liberty because it would restrict the ability of individuals to marry whom they choose. Now, I am

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20. Note that I am not advocating for expansive, rather than strict, construction of the Constitution here. Constitutional thematics can support a textualist or even an originalist interpretative view, as the textualists and originalists on the Court have proven in the state sovereign immunity cases.

21. Some contend that the FMA is pro-federalism, not anti-federalism. *See*.Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439 (2006); John C. Eastman, *Full Faith and Republican Guarantees: Gay Marriage, FMPA, and the Courts*, 20 BYU J. PUB. L. 243 (2006). What they really rail against, however, is judicial activism, which is not a disruption of federalism but rather, if anything, a disruption of separation of powers. Given the restrictions that the FMA imposes on the states to regulate or constitutionalize their own conceptions of marriage and the legal incidents thereof, I think that the FMA's hostility to federalism cannot seriously be disputed.

22. In their presentations, Prof. Wardle and Prof. Eastman—citing Supreme Court decisions limiting the states' power to define marriage, such as *Loving*—suggest that the federal government already regulates marriage and question why the FMA would then be so peculiar. *See*.Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439 (2006); John C. Eastman, *Full Faith and Republican Guarantees: Gay Marriage, FMPA, and the Courts*, 20 BYU J. PUB. L. 243 (2006). I respond that the difference lies in the effects of the regulation. *Loving*, which outlawed bans on interracial marriage, *broadened* the scope of marriage in furtherance of individual liberty and equality. Because it furthers two other existing constitutional themes, *Loving* is not peculiar at all. The FMA, by contrast, would *limit* the scope of marriage in derogation of individual liberty and equality. Because it would disparage three existing constitutional themes while furthering no other, the FMA is peculiar indeed.

not saying here that the right to marry someone of the opposite sex is or should be protected by the Constitution. What I am referring to here are themes, not specific rights. So, the FMA can be contrary to a theme in the Constitution without necessarily being contrary to a protectable right. However, the Constitution's liberty principle does extend to decisions about marriage,[23] so even though the question of same-sex marriage remains open[24] the theme of individual liberty at a minimum supports it. At least in this respect, the FMA would emphatically curtail the reach of the liberty principle.

Likewise, the FMA is also contrary to the theme of equality because it denies a specified group the benefits and privileges granted to a different group.[25] In *Romer v. Evans*, the Supreme Court struck down a provision of the Colorado constitution that specifically disadvantaged homosexual persons in the political process for no other reason than anti-gay sentiments.[26] The constitutional theme of equality does not permit such a result.[27] Likewise, the FMA, by affirmatively disadvantaging homosexual persons, would also be adverse to the theme of equality.

Finally, the FMA—unlike even the Seventeenth Amendment—does not further any other recognizable theme. No existing constitutional provision is contrary to all three established themes while furthering no other, which is why I have argued that the FMA would be a rather "peculiar" amendment.[28] Indeed, the only Amendment that even comes close is the infamous Eighteenth Amendment, which abridged two of these themes (liberty and state power) but furthered no other. And, as we all know, the Eighteenth Amendment was a social disaster that has the dubious distinction of being the only Amendment ever expressly repealed.

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23. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (stating that personal decisions relating to marriage, "are central to the liberty protected by the Fourteenth Amendment."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

24. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (declining to address whether the Constitution's commitment to liberty necessarily provides a right to same-sex marriage); *id.* at 585 (O'Connor, J., concurring) (suggesting that, for Equal Protection Clause analyses, the state would have a legitimate interest in preserving traditional marriage).

25. *See* Dodson, *supra* note 7, at 785.

26. 517 U.S. 620, 635-36 (1996).

27. *Id.* at 623 (stating that the Constitution embodies "a commitment to the law's neutrality where the rights of persons are at stake" and that "[t]he Equal Protection Clause enforces this principle").

28. *See* Dodson, *supra* note 7.

V. THE EFFECT OF THE FMA ON CONSTITUTIONAL THEMATICS

Adopting an amendment that is so contrary to established constitutional themes could have serious implications for our identification of fundamental values and, therefore, coherent constitutional interpretation. There are at least two questions of constitutional thematics that the FMA implicates: First, what impact will the FMA have on the themes that it disparages: state power, liberty, and equality? Second, what impact will the FMA have on the development of new constitutional themes, such as an emphasis on marriage or even, more broadly, on traditional family values?

With respect to the first issue, the disparagement of existing constitutional themes, does the FMA signal a popular shift away from these values? Have we as a society determined that social mores are more important than individual liberty and equality? If so, how will the FMA affect the interpretation of other libertarian or equality provisions of the Constitution? For example, will it be construed to narrow the Equal Protection Clause or the Due Process Clause or any of the other clauses that I have discussed? How will the FMA affect the treatment of gay couples in the workplace and in society in general as we as a society assimilate the broader, more subtle implications of the FMA into everyday life?

With respect to the second issue, the development of a new constitutional theme, does the FMA suggest that we as a people view marriage as a sacred and unalterable institution? Does it more broadly signal a tacit overturning of *Lawrence v. Texas*, or at least an affirmation of the dissenting position in that case that moral legislation is permissible?[29] Would these characterizations then affect the way other constitutional provisions are interpreted?

The FMA's disregard of traditional constitutional themes and adoption of new ones, taken together, portends dramatic shifts in the way the Constitution could be interpreted. Take, as just one example, the possibility that the FMA's emphasis of marriage as a nascent theme and de-emphasis of state autonomy will expand the Commerce Clause in a way that allows Congress to begin legislating marriage in order to protect it from erosion in other ways. Specifically, could the FMA provide a basis for upholding the constitutionality of a federal law outlawing divorce? How about a law that restricts adoption (or even procreation)

29. *See* Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

only to married persons? What about a condition that requires that any candidate for federal office be married?

Now, my guess is that a substantial number of Americans, including people at this symposium, would answer "yes" to some of these questions and, in fact, would go further to state that these are not just effects but *goals* of the FMA. I am not here to argue that these results are right or wrong. Indeed, if your counterargument is that, on balance, even fully considering all of the consequences, the protection of marriage is too valuable a fight to lose, then I will leave our debate for another day. For now, I merely am saying that the FMA could have far-ranging consequences that we should do our best to recognize beforehand and attempt to minimize.

Regardless of your persuasion as to the concept on an FMA, I hope you will recognize that the FMA raises serious and difficult questions with uncertain answers. I invite you to query whether, in light of them, it would be wise to consider carefully, if an FMA is to be had, what language could minimize the risk of unintended adverse impact on our Constitution's themes.

VI. ANOTHER OPTION

So, I propose a kinder, gentler amendment; one which disrupts existing constitutional themes far less than the proposed FMA and one which actually furthers other existing constitutional themes. If the true impetus behind the amendment is to prevent the federal courts from defining marriage,[30] then those who support it should consider striking the first sentence altogether and striking the reference to state constitutions in the second. In effect, the FMA could read simply: "This Constitution shall not be construed to require that marriage or the legal incidents thereof must be conferred upon any union other than the union of a man and a woman."

This language, which affects only the interpretation of the federal Constitution, would reaffirm that the states have primacy over matters of marriage. Indeed, if a state so wished, it could constitutionalize same-sex marriages. In that respect, this version of the FMA would further federalism values.

In addition, this language would divest federal courts of their ability to use the ultimate super-legislative authority, the U.S. Constitution, to create a same-sex marriage right or to overturn legislation to the

30. *See* Robert H. Bork, *Stop Courts from Imposing Gay Marriage*, WALL ST. J., Aug. 7, 2001, at A14.

contrary. By better defining judicial power, it arguably furthers separation of powers, another constitutional theme that I noted earlier.

Although this version of the FMA would still be in tension with the themes of liberty and equality, the tension is muted without the first sentence and is countered by its furtherance of the constitutional themes of federalism and separation of powers.

And for those who fear that states will have to recognize same-sex marriages granted in other states, this FMA—with its emphasis on the importance of marriage *and* federalism—goes a long way towards ensuring the constitutionality of DOMA, the federal statute that permits states to refuse to recognize same-sex marriages performed in other states.[31]

Now, I am not saying that I support such an amendment, nor am I saying that it will avoid all of the problems that I have discussed or that Professor Strasser raised in his presentation.[32] I merely propose it as an alternative for consideration among those who support some form of the FMA.

In sum, then, those who are intent on pursuing some form of the FMA should take a close look at the amendment and its possible effects on the Constitution. Such a peculiar amendment could have undesirable consequences. If there must be one at all, let's have an FMA that damages existing constitutional themes as little as possible.

31. *See* Defense of Marriage Act, 28 U.S.C. § 1738 (1996).

32. Professor Mark Strasser argued in his presentation for this symposium that the vague term "incidents of marriage" will create interpretive difficulties. *See* Mark Strasser, *An Amendment to Protect Marriage: Bad in Theory, Likely Worse in Practice*, 20 BYU J. PUL. L. 387 (2006) (making the same argument). I agree with Prof. Strasser's comments and add that even the kinder, gentler FMA would present other interpretative difficulties. For example, what would be the court of last resort for interpreting this phrase? If it is the U.S. Supreme Court, then the FMA authorizes that federal court to "construe" state constitutions, something that our federalist system has generally disallowed. If it is the state courts, then the term may be subject to 51 different interpretations.