Law and the Culture of Marriage

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I

Culture is a human artifact, but not a tangible item like pottery or a hula hoop (even though such tangible items often reveal things—even important things—about human cultures). It is perfectly natural for people to create culture. But culture is not found in nature; it is not given to people by their environment; and it is not the inevitable manifestation of mental hardwiring or biological drives. Culture is the value added by people acting on the basis of reflection and choice to nature.

Anthropologist Clifford Geertz tells us that "[u]ndirected by cultural patterns... man's behavior would be virtually un gover nable, a mere chaos of pointless acts and exploding emotions, his experience virtually shapeless."¹ Culture gives shape, provides order, supplies the cognitive map. Culture is about meaning, or what Geertz and other scholars call "symbolism." The question (please excuse the Clintonian ring) is: what is the meaning of "meaning"? What does "symbol" here symbolize?

"Meaning" is what distinguishes occurrences in the physical world—matters of cause and effect in which choice plays no role—from human acts. Apples fall from trees due to atrophy in the branch; kids sitting in trees sometimes throw apples at passersby. An apple falling from a tree is a mere occurrence. An apple being thrown by a child intending to startle or hurt somebody is an expression of choice—it is a meaningful (wrongful) human act.

John Paul II told a UNESCO conference early in his pontificate that "culture is the realm of the human as such."² Culture does indeed have to do with something unique to human beings:

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their capacity for abstraction. This abstraction has to do with people's purposive and expressive activities, most of all with their choices. Culture is shaped by what people consider valuable, choice-worthy, worthwhile, good, as all human acts are intelligible according to their ends, aims, purposes—the matters for which we act.

Though woven out of abstraction and intention, culture is no gossamer tapestry. Studying culture, Geertz says, "is thus not to abandon social analysis for a Platonic shadow, to enter into a mentalistic world of introspective psychology or, worse, speculative philosophy." (Let the record show that I here emphasize Geertz's reticence about philosophy, not mine). Geertz rightly observes that culture is comprised of "social events . . . as public as marriage and as observable as agriculture." Culture is the by-product of so many human choices and acts. People do not (usually) act for the purpose of making a culture; they simply choose and act and speak and join. When they do so, they effectively build a culture. When they are done, they leave behind a culture. But the process is not really sequential. The deposit of meaning we call culture faces us, in season and out, as a given, as an objective reality within which we come to know the world, and think, choose, act, live. The culture (already out there) influences our choosing and acting, often powerfully and sometimes conclusively: we cannot choose what we cannot see and bring to mind as a live option for choice. One's cultural milieu—for better or for worse—makes certain options unavailable, even unthinkable.

Culture shapes options, but also eliminates some: the vast majority of us cannot believe in magic and astrology because we live in a scientific culture. Some of us do not believe in God for the same reason. Culture is the world we make; it is the world which makes us. Culture most profoundly makes us not by confronting us as a recognizably distinct other. Culture does its work more subtly, entering and shaping the mind silently, as does the very language we speak.

In all too many cultures genuine friendship between persons of different races or clans, for example, has been impossible due to false cultural beliefs about the indelible inferiority of some group. Stories as diverse as Romeo and Juliet and Driving Miss Daisy compellingly explore the difficulties of friendship across cultural divides. In many cultures today parents can scarcely regard baby girls as they do baby boys. Their culture tells them

3. Geertz, supra note 1, at 91.
4. Id.
to value their children, not intrinsically, but for what the kids can do—for the nation, for the parents, for the clan. And what girls can do (compared to boys) is limited by the surrounding culture’s sexist prejudices.

Some theorists of human society (including many law professors) assert or assume that human existence is determined the way apes’ lives are, and that we are just a bit more sophisticated than other primates. These theorists implicitly deny that the world of meaning and symbol we call culture matters. For them culture is all sound and fury signifying nothing more than imagination and fancy, a mental construct which amuses but which does not limit and shape people’s choices. There theorists think that people do not really make choices at all, at least not morally significant free choices.5

An astute critic of this view, Professor Peter Berkowitz, wrote in The New Republic of game theorists “suppose that the world is matter in motion and nothing more; that there is no greatest good or ultimate aim, no human perfection or salvation; that the primary and only salient motive for human conduct is rational self-interest.”6 Law, according to game theory—at least as it is typically deployed by practitioners of what is called “the economic analysis of law”—is, and can be nothing more than, a technique for the rational control of human behavior directed by and towards sub-rationally motivated ends.

This is not to deny that strategic reasoning can be a culturally hegemonic way of looking at the world. In our scientistic, technology-driven economy, we often reduce the reasonable to the rational, and equate the rational with the calculable. But morally significant free choice cannot be eradicated by culture; choosing is a fact about persons which persons are incapable of choosing to obliterate. Where a culture is organized around the denial of that freedom, one sees a grotesque deformation of freedom. The choosing and acting person operates as if in trance, mesmerized by the cultural imperative to “choose” according to rational self-interest.

Most of us do not conceive culture in terms of game theory. Most of us believe in morally significant free choice. We think of culture as arts, leisure, and entertainment, what the New York Times covers in a separate section each day, and in a very large

one on Sundays. Culture can be high-brow (like the Met or Matisse) or down-market, way beneath the Times' notice (NASCAR or nachos).

The difference is both great and small. Things of beauty there truly are, and great artistic achievements, too. But most of us recognize that culture in this sense involves legitimate differences in taste, and that a wide swath of arts, leisure, and entertainment choices do not have much to do with whether one's life is going well morally speaking. We are prone, too, to identify distinctive cultures by morally indifferent matters: cuisine, costumes, architecture, pageantry, folkways; and by a people's temperament: hot-blooded, melancholy, whimsical, artistic. This is the cultural diversity of National Geographic. In such venues, even morally corrupt cultural patterns, such as exploitative labor arrangements or vendettas or oppressive family relations, may be treated as curiosities.

Culture is much more than museums and art fairs and musicals. Culture is comprised most importantly of large social institutions and practices: marriage, religion, educational systems, public morality. These matters have great purchase upon persons' hearts and minds. These things are intimately related to whether persons' lives go well or poorly. That is, persons' decisions about God, marriage, the value of knowledge, and the like are central to their well-being.

Cultural formations mediate to each one of us the moral realities—marriage among them—to which they give expression. But these cultural formations also hold promissory notes from the lawgiver; that is, they are crucially affected by the law. Francis Cardinal George recently stated that "law has peculiar and unique cultural functions in American society."7

The many components of our culture are largely united by law, not by blood, not by race, not by religion, not even by language, but by law. It's the one principal cultural component we all have in common. . . . [L]aw is more important in teaching or instructing us than it is in directing us. . . . [O]ne must therefore ask how it is that law functions as a cultural carrier in [this country], and what does that mean for cultural institutions that are universal [i.e., objective, natural] but that are qualified by law: marriage, family [and others].8

The U.S. Supreme Court has spoken of this profound capacity of positive law to shape an entire culture. Affirming the cen-

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7. George, supra note 2, at 135.
8. Id.
tral holding of Roe v. Wade, the Court wrote in Planned Parenthood v. Casey that “[a]n entire generation has come of age free to assume Roe’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . .” With what effect?

For two decades ... people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.11

Note well: Casey was not talking about just, or even mainly, the millions of women who have had abortions. The Casey Court was talking instead about how Roe altered the psychology and self-understanding, the dreams and potential achievements, of every woman. All women, according to the Roe Court, benefit from the control which abortion assertedly gives them. The abortion liberty is much like unemployment insurance or Medicaid, or any other strand in the social safety net: no matter what chances one takes with one’s money or job, no matter how bad one’s luck turns, one knows that one is not going to starve, or be left to die with no doctor to lend a hand. Casey effectively tells women (and men): no matter what chances you take with sex—even if contraception fails-abortion is your safety net. According to the Court, Roe would have transformed our world, even if no one had abortions.

II

Civil law often enters into creative partnerships with cultural institutions and practices it does not make. Public authority helps these practices and institutions in various ways—it recognizes, ratifies, regulates, promotes, supports, and protects. Law supervenes upon these institutions, and by so doing creates, within limits, a legal version or dimension of a particular social practice or institution. The state’s partnership with marriage and family is the most important example. And the law’s version of marriage (and family) is a powerful influence (as we have seen) on what marriage is for the people whose law it is.

11. Id. at 856.
This partnership is quite one-sided: law exists for these institutions because law is for the persons whose well-being and flourishing is dependent upon them. Marriage does not exist for law, or for the polity, or for the success of the nation-state as a world historical actor, or for the GNP.\textsuperscript{12} Things are the other way round. Law supports certain institutions of civil society for the sake of the common good. The common good is that ensemble of social conditions which make it more or less easy for persons to perfect themselves, to live worthwhile lives. Law supports these institutions for the sake of genuine human flourishing. For the sake of genuine human flourishing, then, the law must shape its "version" of marriage around the truth about marriage. The civil law has always recognized that marriage possesses foundational features beyond human choosing. Even the Supreme Court has often made grateful references to marriage as the precondition of American political institutions. This universal recognition is manifest in the Court's many declarations in favor of the choice, or opportunity, to marry as a natural right which the state must respect, and which it may never abridge.\textsuperscript{13} All of this is ultimately an acknowledgment that marriage is a pre-political moral and cultural institution upon which the law supervenes. The law recognizes marriage, regulates it, promotes it, protects it. But law does not create marriage. Even where our law refers to marriage as a "civil contract," it is mainly to emphasize that persons must freely consent to marriage for the marriage to be valid.

Public authority in America has traditionally protected all the constitutive features of marriage: monogamous, heterosexual, sexually exclusive, the legitimate context for having children. William cannot legally marry his male neighbor, or the two sisters next door, for neither same-sex marriage nor polygamy is possible. No one in the United States is able, legally speaking, to marry another so long as one's spouse is alive. "Bigamists" and "polygamists" are not persons with more than one spouse, for no one can have more than one spouse. Marriage is, in reality, monogamous; it is for couples only. A "bigamist" is someone who, with a spouse still living, attempts to marry another.

The law has never recognized any same-sex couples as married because notwithstanding their subjective hopes, dreams, and beliefs, marriage between a man and another man, or between two women, is objectively impossible. Marriage, being a two-in-

\textsuperscript{12.} George, supra note 2, 136–37.

\textsuperscript{13.} See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (stating that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society' ").
one-flesh communion oriented toward procreation, is available only to couples comprised of man and woman.¹⁴

Oxford legal philosopher Joseph Raz says, "[m]onogamy, assuming that it is the only morally valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."¹⁵ Corrupt culture and law conspire to deprive people of the opportunity to choose (real) marriage where, for example, polygamy is the social norm, or where wives are treated as chattel, and not as equal spouses. In the latter situation, where true equality and mutuality between spouses is unimaginable due to false beliefs about the inferior nature of women, marriage as a two-in-one-flesh communion is simply not available for choice.

Raz does not suppose that, in a culture whose law and public morality do not support monogamy, someone who happens to believe in it will be unable to restrict himself to having one wife or will be required to take additional wives. The point, as expressed by Princeton's Robert George, is rather that even if monogamy is a key element of a sound understanding of marriage, large numbers of people will fail to understand that or why that is the case—and will therefore fail to grasp the value of monogamy and the intelligible point of practicing it—unless they are assisted by a culture which supports, formally and informally, monogamous marriage.

Marriage is the type of good which can be participated in, or fully participated in, only by people who properly understand it and choose it with a proper understanding in mind; yet people’s ability properly to understand it, and

¹⁴. Prohibited marriages based upon consanguinity are a good example of legally declaring some possible marriages unlawful. The Indiana Supreme Court succinctly explained the law in the 1910 case of State v. Tucker, 93 N.E. 3 (Ind. 1910). “Incest,” the Tucker court said, “is broadly defined as ‘sexual intercourse between persons so nearly related that marriage between them would be unlawful.’” Id. at 3. The court continued:

It is generally agreed that marriages between persons in the direct line of consanguinity, and also between brother and sister, are unlawful as against the law of nature, independent of any church canon or statutory prohibition. This inflexible rule arises from the institution of the family, the basis of civilized society; and, the rights, duties, habits, and affections, flowing from that relation. Family intermarriages and domestic licentiousness would inevitably confuse parental and filial duties and affections, and corrupt the moral sentiments of mankind.

thus to choose it, depends upon institutions and cultural understandings that transcend individual choice.\footnote{16}

Someone who chooses to marry for life to the exclusion of sex with all others enters into a \textit{different} relationship than someone who does not really choose fidelity unto death. Someone who enters into a marriage understanding it as procreative enters into a different relationship from one who does not. All these persons may, as far as our law is concerned, be married. But the relationships which these married couples participate in is different because—at least partly—of what the law about marriage is.

Legal recognition of same-sex marriage, for example, would \textit{not} signal to our country's young people that their government had reconsidered some matter of policy, had recalculated costs and benefits, had acted upon new information or the latest techniques—and changed its mind about some regulation. Recognizing same-sex marriage would instead be a state broadcast of a new (putative) truth about marriage (correcting an ancient prejudice or lie): marriage is not really ordered to procreation. What was off the menu of available options, is now on it. What could not be chosen, now can be. Culture, popular practice, and individual choices—the whole reality of marriage on offer in the state—would thus be transformed, even if few same-sex couples chose to legally marry.

\section*{III}

How does marriage contribute to the political common good, such that public authority rightly aims to foster a certain culture of marriage? Why is marriage unlike other friendships, which do \textit{not} call forth a protective legal regime? Most exactly, why should the \textit{procreative} orientation of marriage—which explains its sexual complementarity—be insisted upon by public authority?

It should be because marriage \textit{is} truly the procreative communion of spouses; because this constitutive feature of marriage is vulnerable to legally promoted cultural decay; and because marriage understood as a procreative union offers great and irreplaceable benefits to society.

Marriage is the uniquely appropriate context for having children, for their coming to be. This unique appropriateness is \textit{not} a raw societal interest in population replacement. It is not a matter of a pro-natalist legislative policy, or of worries about having

enough soldiers and workers. This unique appropriateness does not depend upon statistical verification of claims about children's grades, emotional adjustment, or some other measure of social well-being when they live in traditional mother and father homes. It is not about providing adequate shelter, food, and nursing care for children (though taking care of children in these ways is part of being a good mother or father). Likewise, the imprudence of public policies encouraging the formation of families headed by same-sex couples does not depend upon claims about the comparative disadvantages—by the same statistical measures—of such households as environments for raising children. Much less is it about median incomes or quality of medical care available.

This unique appropriateness is not about social scientific findings at all. It has rather to do with the valuable human relationships which the reproductive union of man and woman makes possible: the married couple as husband and wife; mother and father; father and daughter; father and son; mother and daughter; mother and son.

The necessary sexual complementarity of marriage goes well beyond the biological unity possible for man and woman. It is, however, partly that. By their marital acts the couple actualize, or express, in a profound and special way their whole married life together. When their marital acts bear the fruit of children, these children are (literally) the issue of their marriage: embodiments and thereby extensions into space and time of their parents' marriage. Mother and father are equally and exclusively parents of all their children. All the children are, one compared to the others, equally and wholly the offspring of the same parents. This family-wide equality, mutuality, and natural bond of identity is the wellspring and ground of love, duty, loyalty, caregiving—the whole matrix of family life. Nothing can replace it.

This complementarity is also partly psychological. It results in a unique combination of male and female psyches, temperaments, and culturally shaped roles for the husband/father, wife/mother, daughter/sister, son/brother. One need not and we do not endorse all features of our culture's—or any culture's—gender role definition. But some such rough definition and differentiation according to gender is found in every culture, for some such differentiation is endemic to our experience of life as embodied males or females.

No society's conception of how a husband, or an eldest daughter, for example, is to behave is beyond criticism. But being a wife and mother is scarcely a matter of assuming a socially constructed type. It is a natural moral reality upon which culture—
and law—rightly supervene, and in so doing structure, specify, reinforce, protect. And in doing so that culture—and law—promote these great (natural, morally valuable) opportunities for human flourishing, keeping them alive, intact, and available for choice of persons within the culture.

These principles of mutuality and equality are no more subtle or beyond the state’s concern than is the correct judgment that the factor of equality of marital friendship lies at, or very near, the heart of the state’s legitimate judgment that polygamy is not supportable, even to the point of making criminal a person’s attempts at plural marriage.

The procreative orientation of marriage not only explains its sexual complementarity, but the monogamous character of marriage, too. Once marriage is no longer a bodily communion oriented towards procreation, then three or more persons could as readily constitute a marriage as could two. As one court recently said, “[t]here is no inherent reason why . . . theories, [of same-sex marriage] including the encouragement of long-term, stable relationships, the sharing of economic lives, the enhancement of emotional well-being . . . could not equally be applied to groups of three or more.”

Someone might object: the civil law already has denied the procreative orientation of marriage. The law does not require married couples to have children. Infertile couples have always been able to marry. Many couples marry without a firm intention to have children and some marrying couples are known to be sterile. As an Indiana court said, “not all opposite-sex couples may be able to reproduce on their own, or may wish to have children at all.” The objection concludes: to deny same-sex couples a license to marry at this point in history is arbitrary.

It is surely true that couples unable or presently unwilling to have children are permitted to marry. Not every couple marrying must have children in order for marriage to be procreative. Man and woman, even if infertile, are perfectly able to engage in the kind of act which is procreative—sexual intercourse. It is instructive to note that infertility has never been a bar to marriage but that impotence has been. That is, the inability of one or the other spouse to engage in the marital act, even where children are not in view, vitiates the marriage. Barrenness does not. The law has always sought to treat marriage as a two-in-one-flesh

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18. Id. at 10.
communion actualized by the reproductive-type acts of the couple, not as a baby factory.

Our culture has in recent years undermined the institution of marriage and the moral understandings upon which it rests. But longstanding features of our legal and religious traditions still testify to the intrinsic value of marriage as a two-in-one-flesh communion. Consummation has traditionally (though, perhaps, not universally) been recognized by civil as well as religious authorities as an essential element of marriage. "Physical defects and incapacities which render a party unable to consummate the marriage, existing at the time of the marriage, and which are incurable are, under most statutes, grounds for annulment . . . ."19 This requirement for the validity of a marriage, where in force, has never been treated as satisfied by an act of sodomy, no matter how pleasurable. Nothing less (or more) than an act of genital union consummates a marriage;20 such an act consummates a marriage even if the act is not particularly pleasurable. Unless otherwise impeded, couples who know they are sterile can lawfully marry so long as they are capable of consummating their marriage by performing such an act.21 The way our law contributes to the cultural maintenance of marriage as the procreative communion of husband and wife is precisely by limiting it to one man and one woman.

Another objection: in a diverse society such as our own, the civil institution of marriage should swing free from all moral conceptions of it, even if those conceptions are accepted (for sake of argument) as objective, and even true. The idea might be to expand, or flatten out, the legal contours of marriage, so as to make it available to everyone on his own terms. The idea might be, in other words, to privatize marriage.

Even this revised suggestion must be rejected. One wonders about the intelligibility of "privatized" civil marriage: what could it mean to say that there is a public interest in marriage, but we do not know what marriage is. Strange as it may sound, this is the view on offer from Justice Brennan: "Even if we can agree . . . that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do."22 On this proffered view, public authority cannot reason about its treatment of

20. Id. § 32.
21. Id. § 30.
marriage, for marriage is a cipher. Given Justice Brennan’s sup-
positions, one could only be promoting an expansive (and
unrealistic) notion of an individual’s liberty to define certain
matters as they wish. Justice Brennan anticipated, in other
words, the Mystery Passage of Planned Parenthood v. Casey, the
notion at the heart of the Court’s decision in Lawrence v. Texas.23

To that case I turn.

IV

The Supreme Court in Lawrence v. Texas addressed the con-
stitutionality of a statute which made it a crime for two persons of
the same gender to perform certain sexual acts. The Court’s
holding was limited to the validity of the challenged statute and
rested upon the view that, as the majority reasoned, the statute
“demean[ed]” homosexuals by making their private, consensual
intimacies a crime.24 In the course of its opinion, however, the
majority observed that persons in a homosexual relationship
“may seek autonomy” for various “personal decisions”—includ-
ing marriage—“just as heterosexual persons do.”25

Commentators on both sides of the same-sex marriage ques-
tion—as well as the dissenting justices—think Lawrence is a pre-
view of the majority’s views on so-called “gay marriage.”
Whatever else one might say about such speculation, nothing in
Lawrence logically precludes state limitation of marriage to the
union of man and woman.

First, the expansive language in the Lawrence majority opin-
ion is dictum. The decision’s ratio does not imply or entail that
same-sex marriage is constitutionally required. The majority con-
cluded that the Texas statute furthered no legitimate state inter-
est, that it was a meddlesome “intrusion into the personal and
private life of the individual.”26 But no one doubts that the legal
definition of marriage is a great public matter. Declining to
endorse certain relationships as marriages is not a meddlesome
interference in anyone’s bedroom activities.

Second, the Lawrence majority repeatedly said that it took no
position on the marriage question. “The present case does not
involve,” said the Court, “whether the government must give for-
mal recognition to any relationship that homosexual persons

505 U.S. 833, 851 (1992)).
24. Id. at 2484.
25. Id. at 2481–82.
26. Id. at 2484.
seek to enter." 27 Elsewhere the majority said that the law ought to steer clear of consensual sexual intimacies, absent "abuse of an institution the law protects." 28 The Lawrence court clearly did not want its ruling, however portentous some claim it to be, to be authoritative in a case such as this.

Third, the reasoning behind the most expansive comments of the Lawrence Court must be treated with great caution. The majority relied chiefly upon the Mystery Passage of Planned Parenthood v. Casey, an abortion liberty case in which three justices joined to claim that:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. 29

This passage supports the individual's liberty to come to his deepest beliefs without coercion and without being punished for the conclusions he reaches. But Indiana has taken no steps to deny anyone's beliefs in the value or desirability of certain relationships. No same-sex couple is precluded from believing that they are married, or from seeking and obtaining private or religious recognition of their partnership as a marriage. In fact, none of the Plaintiffs in the Indiana case Morrison v. Sadler complained of coercion, or of molestation, or of any discrimination whatsoever, save that in the marriage law itself: man and woman, only. 30

The Supreme Court's post-Casey (but pre-Lawrence) decisions make it clear, moreover, that philosophical abstractions such as the Mystery Passage are not founts of fundamental rights. Abstractions such as personal autonomy are, at most, useful descriptions of some of the Court's holdings.

By choosing the language [of the Mystery Passage] the Court's opinion in Casey described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. . . . That many of the rights and liberties protected by the Due Process

27. Id.
28. Id. at 2478.
29. Id. at 2481 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, . . . and *Casey* did not suggest otherwise.\(^3^1\)

*Glucksberg* was, until *Lawrence*, the Court’s standing order on Due Process methodology. *Glucksberg* established beyond doubt that fundamental rights do not arise from the urgency or intensity with which proponents advance their claims on behalf of them, from the asserted importance of the matter to them, or from any subjective basis at all. Rather, “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted’ in this Nation’s history and tradition.”\(^3^2\) A glance at that history and tradition conclusively shows that there is no fundamental right to same-sex marriage. This history and tradition are decisive here, notwithstanding the fervent hopes and beliefs of the *Morrison* Plaintiffs.

Fourth, the *Lawrence* Court’s reliance upon *Casey* is, at most, suggestive, if it is not merely incautious rhetoric. The majority asserted that homosexual couples have the same interests as heterosexuals do with regard to “contraception” and “procreation.”\(^3^3\) The assertion is absurd. Same-sex couples have no interest in contraception, much less one comparable to opposite-sex couples. That is because same-sex couples can engage in no act which might result in pregnancy. Contraception, by definition, has to do with preventing a new life from coming to be by acts of sexual intercourse.

Same-sex couples have no interest comparable to heterosexuals in “procreation.” “Procreation” refers in both legal and common usage to the natural generation of new life through acts of sexual intercourse. It may be that same-sex couples can cooperate with other people in the production of a new human life which bears a genetic relationship to one of them. But no issue of the *couple* is possible; neither two men nor two women can conceive a child of their own.

In no case does a same-sex couple stand on the same footing as a heterosexual couple reproducing by assisted artificial means. Married couples sometimes produce their genetic child with artificial assistance at say, an *in vitro* fertilization (IVF) clinic. But in IVF the gametes of husband and wife spontaneously fuse in a dish. The resulting embryo is then implanted and nurtured in


\(^{32}\) Id. at 720–21 (citations omitted).

the wife/mother's uterus. In this resort to IVF, a baby comes to be just as it would in the wife's fallopian tubes; the baby is genetically a unique and unrepeatable combination of the couple, and is nurtured in the womb as is any other child. Same-sex couples necessarily have to rely upon third (and maybe fourth and fifth) parties for production of a baby, thus implicating the rights of persons outside the couple.

Lastly, *Lawrence* is an opinion torn at its center. The majority separated legal protection and preservation of opposite-sex marriage from the question—there decided—of complete sexual liberty for consenting adults. The majority strived to preserve state authority to protect marriage against "abuse" by non-marital sexual conduct. But these justices seem to have forgotten what Justice Harlan said on behalf of the whole legal tradition: public morals laws regarding sex are not meddlesome interferences in persons' bedrooms. They are not oppressive denials of autonomy. They are justified, wholly and entirely, by their tendency to protect marriage against abuse.\(^3^4\)

V

The *Lawrence* dictum signals that the Court will soon declare that marriage may not be limited to the union of man and woman. This is most likely to be a Full Faith and Credit controversy, in which two men or two women married in Massachusetts (in the wake of the *Goodridge* decision\(^3^5\)) unsuccessfully seek marital benefits in a domicile state. The question then will be, does the U.S. Constitution require interstate portability of Massachusetts "same-sex marriage"? Either way there is a very real prospect, if not probability, that "same-sex marriage" will be judicially imposed upon the nation in the near future.

The only sure way to preserve marriage in this litigation environment is by constitutional amendment.

The Federal Marriage Amendment (FMA) as introduced into the House of Representatives reads:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal inci-


dents thereof be conferred upon unmarried couples or groups.\textsuperscript{36}

In my judgment, the FMA deserves support. Since almost everyone who favors “same-sex marriage” opposes the FMA for that reason, I chiefly address objections to the FMA by those opposed to “same-sex marriage.” There are several such objections.

Some people think that the meaning of sentence one (S1) is symbolic or semantic. They think that the FMA is no obstacle to giving the substance of marriage to unmarried couples. Their position is like that of the Vermont Supreme Court which in 1999 reduced marriage to a word, a verbal distinction.\textsuperscript{37} That court held that precisely the same legal benefits had to be extended to all couples wishing to marry, including two men or two women.\textsuperscript{38} The court allowed that same-sex unions might be called something else.\textsuperscript{39} They are. In Vermont same-sex couples may not “marry,” but they may enter “civil unions”—and between the two there is no legal difference whatsoever.

Some political leaders are delighted to hold this view of the FMA. It allows them to seem both traditional—marriage, they say, is special and just for man and woman—and progressive at the same time. They insist that there be no discrimination in benefits and privileges when it comes to gay and lesbian couples and their families! A few traditionalist supporters of marriage hold the semantic view and are happy, too. They think that a symbolic victory is worth the effort, and that nothing more is possible. But most traditionalists who think S1 is symbolic are critics of the FMA. They complain that marriage by any other name is still marriage. They say that any amendment worth fighting for must reserve the substance of marriage to man and woman.

Occasionally, it is said that the FMA authorizes civil unions. This is surely mistaken. Nothing in the FMA can plausibly be read to authorize anything. The FMA contains no grant of power. No duty to enact anything is imposed upon any branch or level of government. The FMA is prohibitory only.

The question is, how far does the prohibition go? Looking only at S1, the FMA goes a lot further than the semanticists think it does. Looking at the whole FMA, I think it concedes nothing to homosexuals and lesbians, or to any other unmarried, sexually intimate couple.

\textsuperscript{38} Id. at 886.
\textsuperscript{39} Id.
Let us look first at S1 by itself. There is no reason a priori to think that it is about a word, or that it is a symbolic gesture. In other legal contexts a reference to a long-standing and well-defined institution—say, to the “navy,” the “legislature,” “trial by jury,” or a “corporation”—would not be taken as symbolic, or as an invitation to play word games. No one thinks that a constitutional provision prohibiting states from having a “navy” allows the governor to have as many battleships as he wants, so long as he called them his “armada” or his “yacht club.” In our nation criminal defendants are guaranteed “trial by jury.” This has never been thought to mean that a judge could decide a case alone, just by calling himself the “jury.”

The most natural reading of S1 is the mirror-opposite of the semantic trivialization: marriage is, wholly and entirely, reserved to the union of man and woman. Our governor is not allowed any battleships. (Maybe he gets a few small gunboats to catch harbor bandits. But that is it.) The jury we have is pretty much the jury as it has always been. “Trial by jury” is a large, complex institution. When we say it is guaranteed, we presumably mean that the whole thing is.

The second sentence (S2) of the FMA confirms—and modifies—this reading of S1. S2 implies that some “legal incidents” may be legislatively granted to unmarried couples. S2 evidently presupposes that otherwise S1 might be read to prohibit all such concessions. S2 is the FMA’s way of telling us that S1 is no symbol.

Would the FMA invalidate the Vermont civil union law? The text is probably subject to contrary interpretation. My view is that S1 does invalidate “civil unions.” Here is why.

Vermont civil union is simply marriage by another name. S1 renders unconstitutional the legal recognition of any non-marital relationship defined, even partly, by the sexual acts of the participants. The typical same-sex benefits lawsuit describes the Plaintiffs’ relationship as “loving, committed, intimate”—plainly describing a sexual relationship. S1 bars government recognition of that relationship. Sometimes they are described as a “couple,” indicating a life together well beyond the platonic. This is not to say that no benefit could be extended to those two people, as discussion of S2 shortly makes clear. But any such concession would have to be under another, non-sexual description, so that the benefit was not limited to unmarried couples engaging in sex.

Let me make the point plainly. Suppose two elderly widowers and life-long friends share quarters and household chores.
They generally take care of each other. Let's call them Bob and Bill. Next door to them reside Jack and Joe. They share a house, checkbook, and a bed. Should the state legislature decide to facilitate the household life (and community) of persons not bound by marriage or family ties, the FMA requires them to be inclusive, non-discriminatory: they may not exclude Bill and Bob because they do not engage in non-marital sex.

Critics on both sides of the FMA complain that it would impose a single definition of marriage on all fifty states (and the federal government, too). Just so, at least regarding the number of persons in a marriage—two—and their gender—man and woman. Critics claim that defining marriage has always been the business of the states, and that it should remain so. The claim about state authority is false and, in any event, I do not think the objection is a sound one: even if it were the case that defining marriage has been the state’s job, the same-sex marriage threat is national, and so should be the response. As Robert Bork said, "One way or another federalism is going to be overridden. The only question is whether the general rule will permit or prohibit the marriage of same-sex couples."40

"Federalism" is shorthand for the "let-the-states-continue-defining-marriage" criticism. By "federalism" the critics (and Judge Bork) mean mainly the limited autonomy of the fifty states from the national government based in Washington, D.C. (They may also refer to the states' freedom concerning each other.) But this is not all there is to federalism. Besides autonomy there is comity among the states. Interstate respect and deference make possible the necessary cooperation among the fifty parts of the one political community. This aspect of federalism threatens marriage, and calls for the FMA. For interstate comity, as enforced by the constitutional norm that each state give full faith and credit to the public acts of sister states, means that any one state could spread "same-sex marriage" throughout the land.

Here is the problem. If you are married, you were married in one state. When (if) you moved to another state, you did not marry again. You acted and were treated as if you were married without going through a local ceremony. In fact, you could move from one to all fifty states, and never have to say "I do" again. No matter what anyone thinks about marriage and the law, no one thinks it is really local; unlike, say, handgun privileges or tax liabilities, marriage does not change—stop and

start—because you cross from Ohio into Indiana. That is why the constitutional rule is: "married here, married everywhere."

Nobody knows for sure if that is how it will work when the first Massachusetts same-sex couples "marry."41 There are limited exceptions to the rule of interstate portability; the legal doctrine is unclear, and it has never been applied to same-sex marriage (since there have been no same-sex marriages). But it is easy to see that the threat is real, that it is grave, and that it is imminent. In these circumstances, it would be imprudent to rely upon courts, and ultimately the Supreme Court, to halt the spread of "same-sex marriage" by creating an exception to the rule of "married here, married everywhere."

Is it true that we have always left the definition of marriage to the states? The strongest statement to that effect in our constitutional law is from an 1877 Supreme Court case called Pennoyer v. Neff: a state has an "absolute" right to decide, not quite what marriage is, but the "conditions upon which the marriage relation . . . shall be created."42 By 1971 the Supreme Court in Boddie v. Connecticut43 found the state's power much less "absolute": marriage was under the control of the states, "absent some specific federal constitutional or statutory provision."44 By now the claim that states define marriage is grossly mistaken. For better or worse, the national government, principally the courts, have taken the power to define marriage out of the states' hands. The Supreme Court's promissory note in Lawrence—that it will require same-sex marriage as part of everyone's liberty to express oneself sexually, without suffering discrimination—would be the final stage of this takeover.

Consider the defining features of marriage (besides sexual complementarity). These features are, first, that marriage requires the knowing consent of the man and the woman; that marriage is monogamous; sexually exclusive; the morally legitimate context for raising kids; (more or less) permanent. What is the autonomy of the states with regard to each of these defining features?

Let us start with consent. States are doubtlessly free to specify the principle of consent in different ways. Is sixteen years old enough to freely and knowingly enter marriage? Is eighteen? Is this (or that) proof enough of minimal mental competence

42. 95 U.S. 714, 734–35 (1877).
44. Id. at 389 (Black, J., dissenting).
enough? There is not and need not be a single national answer to these questions. But no state is constitutionally free to disregard the principle of consent. No state could impose the duties of marriage upon anyone who was not really—that is, voluntarily—married due to duress or incompetence. Any person against whom an action to enforce marital obligations is instituted would have a constitutional defense, namely, involuntariness.

The ubiquity of consent may seem unexceptional, and in our country it is uncontroversial. States do a good job of protecting the right not to be duped or cajoled or coerced into marriage. On the other hand, some societies still respect forced marriages, and that we are protected by our Constitution against it is important, if taken for granted.

Before considering the other defining marital features listed, let us examine two special cases of national intervention in marriage. One is *Loving v. Virginia*, the 1967 Supreme Court case which told states they could not ban interracial marriage. The language of the case as well as constitutional logic extend the Court's holding from racial distinctions to ethnic, national, color, and religious barriers to marriage. *Loving* means that race (and ethnicity, color, nationality) has nothing to do with the definition of marriage. A white person can marry a black person just as two whites or two blacks can marry each other. No state can say or suggest that your son ought to marry an Italian girl from Cleveland, however much you devoutly wish for it.

The second special case is *Roe v. Wade*. Along with earlier contraception cases, *Roe* effectively bars states from acting on the view that marital acts ought to be open to new life. And *Roe* (perhaps, more exactly, *Roe and its progeny*) does something else to marriage which is potentially devilish: the abortion liberty means that one spouse—the wife—may unilaterally decide to destroy the unborn issue of the marriage, the child of the father/husband. No state can do a thing about it. *Roe* is bad enough for giving our land legal abortion. But its destruction of the mutuality proper to spouses is monstrous, too.

Monogamy was effectively decreed by the national government towards the end of the nineteenth century, in the course of its protracted struggle with the Mormons over polygamy. Read any one of the Supreme Court opinions upholding the muscular anti-polygamy laws then passed by Congress, and you will surely

45. 388 U.S. 1, 12 (1967).
46. 410 U.S. 113 (1973).
think polygamy violates our Constitution. In a sense it may, but that may not be a precisely accurate rendition of the cases. But those holdings do establish that no one has a right, even on the basis of sincere religious belief, to enter a polygamous marriage.

47. In Reynolds v. United States, the Supreme Court addressed, among other questions, whether federal legislation prohibiting polygamous marriages in federal territories violated the First Amendment by criminalizing behavior that was sanctioned by the defendant's religion, namely Mormonism. 98 U.S. 145, 161-62 (1878). The Court found that the Constitution was not violated by the law stating that laws "cannot interfere with mere religious belief and opinions" but holding that such laws "may [interfere] with practices." Id. at 166. More interesting however, was the language the Court used in reaching this conclusion. The importance of the institution of marriage was precisely why the guarantees of religious freedom could not be seen as to protect polygamy. The Court stated that "[p]olygamy has always been odious among northern and western nations of Europe" and that the practice had been relegated to Asia and Africa until the establishment of the Mormon Church. Id. at 164. The Court continued:

[T]here never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. ... [P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Id. at 165-66.

Years later, in Murphy v. Ramsey, the Court addressed a Congressional statute which barred polygamists and bigamists from voting or from holding office. 114 U.S. 15, 17-20 (1884). The Court was unequivocal in its support of traditional, monogamous marriage. The Court declared that

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

Id. at 45.
The worry after Lawrence, moreover, is that the logic of same-sex marriage leads to polygamous marriage. If two women can marry, why not three? Or more? Why not a group of men and women? In this extension of Lawrence's logic, states would be powerless to limit marriage to couples—of any sort.

Marriage is distinctively the sexual communion of man and woman, and this communion is geared to having children. This is the central presupposition of many Supreme Court cases, among them the Court's condemnation (in 1942) of an Oklahoma law which punished certain career criminals with sterilization. The Court there referred to "marriage and procreation" as "one of the basic civil rights of man." The states have always and, until Lawrence, without constitutional inhibition protected marriage through laws against non- and extra-marital sex. This protective mantle also included, until the Court stepped in, laws concerning illegitimacy, designed to limit procreation to married couples.

The two types of laws are mutually reinforcing: limiting sex to marriage increases the chance that kids will be born to married couples; discouraging procreation outside of marriage and discouraging non-marital intercourse helps to accomplish the same goal. Even now states defending marriage against the same-sex onslaught argue that they are upholding the time-honored link among marriage, sexual activity, and procreation. Vermont unsuccessfully pressed this argument in 1999. Indiana has so far successfully deployed it against same-sex marriage in pending litigation. "Marriage, sex, kids" is the standing marriage defense policy.

The Supreme Court has disassembled these three goods. In the first wave of disruption the Court ruled (beginning in 1968) that most legal distinctions based upon illegitimacy are unconstitutional. The seminal case was Levy v. Louisiana. The state laws then challenged were justified as attempts to make marriage the basis of family relationships. The Court brushed aside these arguments. Apart from uncomprehending or inflamed rhetoric, the Levy Court's main idea seems to have been that these unfair burdens had no social value at all. They must have, Justice Doug-

49. Id. at 541 (emphasis added).
52. 391 U.S. 68 (1968).
53. See id. at 69 n.1.
las said in one of his most thoughtless opinions, originated in a concern for "sin"—Douglas's scare quotes.\textsuperscript{54}

Among the many sins of \textit{Lawrence} is this: the Court stripped from the states the authority to make marriage the principle of sexual morality. By this "principle" I refer chiefly to the principle of legally enforced public morality about sex: marriage is the only morally appropriate setting for sexual activity. Justice John Harlan provided a perfect illustration of what I mean, in his opinion in the 1961 dress rehearsal of the \textit{Griswold} case.\textsuperscript{55} Harlan then and later voted with the liberals on marital privacy and contraceptives; he was by that era's standards no old-fogey. Harlan wrote that the laws about marriage provided "both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . "\textsuperscript{56} Marriage was the basis for banning "adultery, fornication, and homosexual practices," Harlan concluded, because these immoralities "express the negative of the proposition" that marriage is the context for sex.\textsuperscript{57}

\textit{Lawrence} blasts all this out of the water. For the first time in history, the Supreme Court held that the unmarried have a constitutional right to have sex.\textsuperscript{58} Even the \textit{Eisenstadt} case (1972),\textsuperscript{59} which recognized some right of access to contraceptives for single persons,\textsuperscript{60} expressly affirmed states' authority to punish non- and extra-marital sex acts as crimes.\textsuperscript{61} The \textit{Eisenstadt} court evidently saw itself as eliminating the additional penalty of pregnancy by making contraceptives available to single people.\textsuperscript{62}

After \textit{Lawrence}, the constitutional principle of sexual morality is consent, not marriage. It is a good measure of our elites' incomprehension of marriage and the law that Justice O'Connor said that Texas' sodomy law had no rational basis, while affirming

\begin{itemize}
\item \textsuperscript{54} \textit{See} \textit{King v. Smith}, 392 U.S. 309, 335 (1968) (Douglas, J., concurring).
\item \textsuperscript{55} \textit{Poe v. Ullman}, 367 U.S. 497 (1961).
\item \textsuperscript{56} \textit{Id.} at 546 (Harlan, J., dissenting).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{See} \textit{Lawrence v. Texas}, 123 S. Ct. 2472, 2484 (2003) (holding that petitioners were entitled to engage in private "sexual practices common to their homosexual lifestyle").
\item \textsuperscript{59} \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972).
\item \textsuperscript{60} \textit{See id.} at 454–55.
\item \textsuperscript{61} \textit{Id.} at 448 ("[c]onceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as 'evils . . .'") (citing \textit{Williamson v. Lee Optical}, 548 U.S. 483, 489 (1955)).
\item \textsuperscript{62} \textit{Id.} ("It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . ").
\end{itemize}
that "preserving the traditional institution of marriage" was a rational basis.\footnote{123 S. Ct. at 2487–88 (O'Connor, J., concurring).} As Justice Harlan would say, that is the basis of all the laws which Lawrence struck down.

After this long march through the maze of legal authority over marriage in the United States, we finally reach an unspoiled state preserve: divorce. Or do we? On the legal landscape we see a familiar pattern: the principle of no-fault marital dissolution in place all across the country, with state variations. In this case, however, the pattern of national principle/state specification is not the result of an overriding Supreme Court decision. No Supreme Court decision contradicts the black-letter principle: "divorce is a state concern." (This principle is subject, of course, to constitutional side-constraints conditioning the exercise of all state power. Thus, no state may condition a divorce decree upon a confession of faith, or make divorce more difficult for Hispanics to obtain than it is for non-Hispanics.)

The Lawrence "sweet-mystery-of-life" passage\footnote{Id. at 2481 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).}—everyone has a constitutional right to live in his own moral universe—should not be ignored. After Lawrence one should doubt whether the sexually-expressive free agent "at the heart of liberty" could be denied a marital exit. It seems likely that, at least where both spouses consent, no state could deny them a divorce.

Even if it were the case that states are in charge of defining marriage, the federalism argument would not be compelling. One common justification for federalism is that, rather than straitjacket the whole nation with a single legal template, it is better to allow states to experiment with different legal solutions to social problems. That way, we can eventually figure out what really works and what does not. Another common justification is that problems vary a lot from state to state and that these local variations demand different responses. One response might be right in Utah, an incompatible response right in Arizona, and both could be wrong in New Jersey.

Neither of these virtues of federalism has any traction on the marriage question. There is one problem, and one solution. The question is whether men can marry men, and women, women. The common good requires everywhere this answer: no. Nothing peculiar to New York or to Wyoming makes any difference: same-sex marriage is impossible everywhere, and should be legally prohibited all over. There is no need to experiment,
either. The solution to the problem is singular, plain, and simple: no same-sex marriage.

At one time in our history states did indeed enjoy almost total control over marriage. This was part of a much wider reticence of national power. States controlled education, health, welfare, and the economy in ways scarcely imaginable to us. This autonomy was not all to the good: slavery was another "domestic institution" shielded from federal regulation.

State control over marriage and family is not morally necessary. No moral norms lead through sound reasoning, either deductively or by strong inference, to the conclusion: marriage is something to be regulated exclusively, or even mainly, by local authorities. It is generally better for smaller units of operation to do the jobs within their competence. But this principle of subsidiarity does not provide criteria of "competence": what if the smaller unit (the states, for example) are unable to protect marriage from outside threats, save by calling for national help? This is our situation now, for the FMA will not become law unless thirty-eight states ratify it. That would be a pretty good showing that the states want outside help.

Non-lawyers might well say about the federalism criticism: so what? Non-lawyers might think that the marriage question needs to be answered rightly, not (wrongly) by the (assertedly) right authority. Non-lawyers might even think that any authority which gets the answer wrong is the wrong authority.

The non-lawyers have a point: getting the law about marriage right is profoundly important. Where public authority gets this law wrong, it does great and perhaps irreparable damage to the common good. Persons' opportunities for genuine human flourishing are significantly diminished. Now, if it is the case that, according to the controlling positive law, a task is unambiguously given exclusively to a particular governmental unit, that is it. Failure to tend properly to the chore does not, by itself, forfeit competence or cause a transfer of authority. The Constitution plainly says that the Senate shall have "sole power to try all impeachments."

No one seriously believes that states' control over marriage is exclusive ("sole") or clear in anything like the way the Senate's

power over impeachment is. In a case of this type—shared, blurred lines of authority, at most—the states' unwillingness or inability to do the job right properly enters into the question of where power lies. Put differently, there is surely reason to doubt that the sexual complementarity of marriage is, or should be, or has been, wholly for states to maintain. I think it better to give benefit of this doubt to a protection that will really protect: the FMA.

VI

Let us take stock. For at least a generation states have had little authority over the basic definition of marriage. The FMA is neither unusual nor unprecedented, and it is necessary. States have always had—and still have—autonomy when it comes to the "incidents" of marriage—the benefits, duties, privileges of the married state. These packages are particular to each state. State authority over incidents is affirmed by the FMA.

I turn to whipsawing criticisms of S2 of the FMA.

The first criticism of S2 is made by people I call "liberationists." They complain that effective concessions to same-sex couples are impossible. Judges will not be able to "construe" (read: "apply," "enforce") statutes conceding benefits to unmarried couples, because S2 blocks them from doing so. The second criticism is made by "traditionalists." They say that S2 recognizes real legislative authority, much more than is appropriate. "Traditionalists" would concede very little, if anything, to unmarried couples, and say that S2 fails by that measure. The criticisms cannot be both correct. In truth, both are mistaken, the liberationist completely so, and the traditionalist largely so. They are mistaken for basically the same reason.

The liberationist criticism presupposes that there is a transcendent set of benefits, not tied to the law of any particular jurisdiction, called "the incidents of marriage." The legal treatises and academic wise men compile lists of these common or typical "incidents." Wherever legislators seek to extend a member of this free-floating set of goods to unmarried couples, S2 stands in the way. On this account of S2, a court could not even apply a statute which makes no reference to marriage, spouses, husbands, wives. So long as the statute dealt with a canonical "incident"—say bereavement leave or dependent health benefits or a testimonial privilege—S2 prevents courts from treating it as law.

The presupposition is correct. The treatises do list common marital incidents, with growing disagreement about what remains on this shrinking list. But the treatises and leading cases
also list the common property crimes, the duties of a corporate trustee, an estate executor, as well as the jobs of surety, a third-party contractual beneficiary, along with the typical marital incidents.

But there is no crime against property in, say, Indiana, unless it is listed in the current Indiana Penal Code. Corporate trustees in Arkansas have those duties and only those duties which Arkansas law actually imposes. Any lawyer who submitted a brief to the New York Court of Appeals on suretyship citing only treatises and digests would be guilty of malpractice.

The conclusion is therefore wrong. Nothing is an incident of marriage unless extant state law makes it so. There are no "stateless" incidents of marriage. "Marital incidents" are not goods floating free of the positive law. They do not form a brooding omnipresence in the sky. State law makes this or that benefit a marital incident by, and only by, saying that it is. The state says that it is by saying that the beneficiary is one's "lawful spouse" or "husband" or "wife," or by saying that the privilege accrues to lawfully married couples. Where these words are used, there is a marital incident. Where these (or cognate) words are used, no court may extend the benefit to unmarried couples or groups. (See S2.) Where some such formula is not used, there is no incident of marriage.

A legislature which wants to give unmarried people some benefit previously reserved to the married (something hitherto an "incident of marriage") may do so under the FMA. Legislators so inclined would have to identify the benefit, and then define the beneficiary class without using terms such as "marriage" and "spouse." These lawmakers accomplish two things: they abolish an "incident of marriage," and they pass a new law, or social welfare measure, or rule of evidence, or tax provision. These two things may happen at once and are intended to be in tandem. But they are conceptually quite distinct.

To illustrate: desiring to extend to unmarried couples the bereavement leave presently reserved for spouses, the Iowa legislature writes a new law. It says (in effect): any state worker is entitled to a day off to grieve when an individual within the worker's household dies. S2 is no obstacle to judicial enforcement of this hypothetical law, because it involves no marital incident.

Another illustration: the Montana legislature wants to extend a host of financial benefits, currently enjoyed by married couples, to unmarried couples and even to their children (where they have custody of kids). S2 requires that the legislators do so
by writing a law for, say, households, defined by financial interdependence and co-habitation, leaving marriage and cognate words out of the bill. Judges may apply and enforce ("construe," if you like) this law without hindrance by S2.

There are more illustrations. Husbands and wives typically make each other health-care proxies. But anyone can be your healthcare proxy, and a same-sex couple can do what husband and wife do. That does not make them married; they are simply mutual proxies. Any two people can sign a lease or co-sign a mortgage these days, and married couples typically do. Two men leasing a flat are not therefore married; they are joint tenants.

One side-effect of this understanding of the FMA is that the thorny question of legally recognizing same-sex relationships by name can be put aside. Are they parties to a "civil union"? Are they "domestic partners"? If neither, what are they to be called? Do any such names convey approval of what is, in truth, an immoral sexual relationship?

S1 forbids recognizing any non-marital relationship by any name if the relationship is defined, even in part, by sex. S2 requires legislators to extend benefits, if they choose to extend them at all, one-by-one, establishing generic legal relationships (joint tenants, beneficiaries) as they go. There does not arise a need to name the whole relationship.

Clarifying the "liberationist" mistake helps us to see what is wrong with a leading "traditionalist" criticism. Traditionalists want to keep all (or almost all) marital benefits marital: the unmarried need not apply. S1 of their ideal amendment would be the same as S1 of the FMA. But traditionalists think that S2 is way too permissive. Their second sentence of the FMA would say something like, "Neither marriage nor its legal incidents shall be given to unmarried couples or groups."

The precise effect of S2 is just what traditionalists want—no incidents of marriage to the unmarried, period. Though literally true, this response is misleading. S2 allows state legislators to do what traditionalists say they should not—effectively to extend marital incidents to a wider group, including some unmarried couples. It is worth noting, however, that the pace of this retail reform likely will be deliberate, if not slow, and that it will stop well short of a fire sale of marital incidents.

There are two problems with the traditionalists’ approach, besides its deep affront to federalism. The first problem is the more severe: their second sentence is impotent. It prohibits the states from extending marital incidents, but it does not prevent states from abolishing them. The conceptual two-step of my hypo-
Theoretical Iowa and Montana legislators would pass muster under the traditionalist amendment.

The second problem is vagueness. Like the first, the problem arises from the mistake common to liberationists and traditionalists: both camps think there are "state-less" incidents. But the traditionalists' amendment pivots upon the idea. It is therefore no more definite than is the notion of free-floating marital incidents.

I observed earlier that this set grows more unstable by the day; experts disagree strenuously on what is really, or inescapably, an incident of marriage anymore. The most important incidents of marriage are those which link procreation and sex to marriage. The crimes listed by Justice Harlan helped everyone to abstain from sex until marriage, reduced temptation to stray from marital commitments, and punished those who interfered with spouses' vows. Another vastly important incident was the fault-based divorce regime, which gave the blameless spouse real leverage in any divorce and child custody situation. But these incidents are off every expert's list, often due to overriding Supreme Court precedent. Do the traditionalists mean to restore some, or all, of these incidents? Their language would not do so. Revised language that might solve both problems could list all the incidents never to be extended to unmarried couples. But that would make the amendment unwieldy, plunge it to depths of minutiae unbecoming the Constitution, and spark more disagreement than it would settle.

**Conclusion**

The FMA will surely not cure all that ails marriage. The FMA will forestall legal recognition of same-sex couples as spouses. But the "same-sex marriage" movement is more a symptom than a cause of marriage's malaise. We are forty or so years into a continuing heterosexual rebellion against chastity, and against the challenges of married life. The startling progress of this rebellion explains why the case for "same-sex marriage" is as plausible as it seems. The FMA nonetheless will staunch the bleeding of marriage, perhaps long enough for another generation of Americans—our children—to rebel against their elders' rebellion.