

## LOVE V. VIRGINIA:

### The Constitutionality of the Marshall/Newman Amendment

*They are educators, architects, police officers, fire officials, doctors, lawyers, electricians, and construction workers. They serve on township boards, in civic organizations, and in church groups that minister to the needy. They are mothers and fathers. They are our neighbors, our co-workers, and our friends. In light of the policies reflected in the statutory and decisional laws of this State, we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples.<sup>1</sup>*

#### I. INTRODUCTION

On November 7, 2006, battles were waged across the country in what Justice Scalia referred to as a “culture war;”<sup>2</sup> generally perceived to be fought between liberal Democrats and conservative Republicans. One key battle took place in the Commonwealth of Virginia, where the Democrat Jim Webb scored a victory against Republican George Allen in the Senate race with 49.59% of the votes.<sup>3</sup> Conservative Virginians did not suffer a total defeat however; 57.06% of the voting population said “No” to gay marriage and “Yes” to Proposed Constitutional Amendment 1.<sup>4</sup>

The battle between gay rights and “traditional family values”<sup>5</sup> has become increasingly heated in the face of American societal changes. For example, in 1970, there were approximately 523,000 unmarried heterosexual couples cohabiting in the United States; in 2005 the number rose to 4.85 million couples.<sup>6</sup> In Virginia alone, there are

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<sup>1</sup> Lewis v. Harris, 188 N.J. 415, 453 (2006).

<sup>2</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

<sup>3</sup> Commonwealth of Virginia, *November 7th 2006 – General Election: Voter Turnout Reports*, at <http://sbe.virginiainteractive.org/> (last visited Dec. 13, 2006).

<sup>4</sup> *Id.*

<sup>5</sup> See e.g., American Family Association, *Marriage & Family*, at <http://www.afa.net/family/> (last visited Dec. 15, 2006); The Traditional Values Coalition, *Traditional Values Defined*, at <http://www.traditionalvalues.org/defined.php> (last visited Dec. 15, 2006).

<sup>6</sup> U.S. Census Bureau, Table UC-1, Unmarried-Couple Households, by Presence of Children: 1960 to Present (2006), available at <http://www.census.gov/population/socdemo/hh-fam/uc1.pdf>; U.S. Census Bureau, Table UC-3, Opposite Sex Unmarried Partner Households by Presence of Own Children Under 18, and Age,

130,000 unmarried couples who cohabitate, and 89% percent of all unmarried couples in Virginia are heterosexual.<sup>7</sup> These couples are already denied 1,138 of the federal rights made available to married individuals,<sup>8</sup> and have been increasingly targeted by state legislatures. There are now twenty-six states that have constitutional amendments banning same-sex marriage,<sup>9</sup> seven of which were adopted in the last election.<sup>10</sup>

The Marshall/Newman Amendment, which became effective on January 1, 2007, will amend the Virginia Bill of Rights. Among other things, the Amendment seeks to ban gay marriage and civil unions between unmarried heterosexuals. It also precludes Virginia from recognizing such arrangements formed in other states.<sup>11</sup> One of the purported aims of the Amendment is to prevent “activist state judges” from invalidating Virginia’s existing

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Earnings, Education, and Race and Hispanic Origin of Both Partners: 2005, *available at* <http://www.census.gov/population/www/socdemo/hh-fam.html>.

<sup>7</sup> Tavia Simmons & Martin O’Connell, U.S. Census Bureau, Married Couples and Unmarried Partner Households: 2000, *available at* <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

<sup>8</sup> See Letter from GAO General Counsel to Bill Frist, U.S. Senate, *at* <http://www.gao.gov/new.items/d04353r.pdf>.

<sup>9</sup> Idaho, Utah, Montana, Colorado, Texas, Oklahoma, Kansas, South Dakota, North Dakota, Missouri, Arkansas, Louisiana, Mississippi, Tennessee, Georgia, Kentucky, South Carolina, Ohio, Michigan, Virginia, Wisconsin, Hawaii, Alabama, Kentucky, Missouri and Alaska. The Heritage Foundation, *Issues: Family and Marriage*, <http://www.heritage.org/Research/Family/Marriage50/Dataforall50States.cfm> (accessed Dec. 13, 2006); *See* Ala. Const. art. I, § 25; Ark. Const. amend. 83, § 1; Ga. Const. art. I, § 6; Haw. Const. art. I, § 23; Kan. Const. art. XV, § 16; Ky. Const. § 233; La. Const. art. 12, § 15; Mich. Const. art. I, § 25; Miss. Const. art. XIV, § 263; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Nev. Const. art. I, § 21; Or. Const. art. XV, § 5; N.D. Const. art. IX, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. 2, § 35; Tex. Const. art. 1, § 32; Utah Const. art. I, § 29.

<sup>10</sup> Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. *See* S.J. Res. 101, 58th Leg., 1st Reg. Sess. (Idaho 2005); S.J. Res. 3133, 116th Leg., Reg. Sess. (S.C. 2005); S.J. Res. 1001, 80th Leg., Reg. Sess. (S.D. 2005); S.J. Res. 81, 104th Leg., 2d Sess. (Tenn. 2005); S.J. Res. 53, 97th Leg., Reg. Sess. (Wis. 2005). Arizona the only state in which an amendment appeared on the ballot and was defeated. An attempt to add an amendment to the November ballot in Illinois recently failed and is on appeal, *see* S. Res. 869, 94th Leg., 2d Sess. (Ill. 2005).

<sup>11</sup> 2006 Va. Acts ch. 828 (effective Jan. 1, 2007) (hereinafter “Amendment”).

prohibitions on same-sex marriage.<sup>12</sup> The other is to reserve marriage for one man and one woman.<sup>13</sup>

The current prohibitions on same-sex marriage come in the form of two legislative enactments: 1) The Defense of Marriage Act of 1996<sup>14</sup> and; 2) The Marriage Affirmation Act of 2004.<sup>15</sup> Together, this Amendment and the pre-existing statutes demonstrate the determination of many Virginians to cling to tradition. However, as Justice Harlan once wrote, “tradition is a living thing.”<sup>16</sup> The Constitution simply does not permit the discrimination manifested in the Marshall/Newman Amendment.

#### **A. RELEVANT STATUTES: THE DEFENSE OF MARRIAGE ACT AND THE MARRIAGE AFFIRMATION ACT**

The two statutory provisions enacted by Virginia’s state legislature only affect same-sex couples and not all unmarried individuals. Section 20-45.2 of the Code of Virginia was enacted in 1975, and amended in 1997; it now reads:

*A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.*<sup>17</sup>

The italicized portion of the text was introduced in 1997 to complement the federal Defense of Marriage Act,<sup>18</sup> which was enacted to negate the operation of the Full Faith and

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<sup>12</sup> See Virginia 4 Marriage, *Common Questions*, <http://www.va4marriage.org/faqs.htm> (accessed Dec. 13, 2006); Memo. from Melissa Glidden et al., Arnold & Porter LLP, *Potential Impact of the Proposed Marshall/Newman Amendment to the Virginia Constitution*, 1 (Aug. 11, 2006) (available at [http://www.votenova.org/files/final1651081\\_3.pdf](http://www.votenova.org/files/final1651081_3.pdf)) (hereinafter “Memo”).

<sup>13</sup> See H.J.R. 528 (Va. 2005) (available at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HJ528>).

<sup>14</sup> Va. Code § 20-45.2 (2006).

<sup>15</sup> Va. Code § 20-45.3 (2006).

<sup>16</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Douglas, J., dissenting); See also *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977).

<sup>17</sup> § 20-45.2 (emphasis added).

<sup>18</sup> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a

Credit Clause of the Constitution.<sup>19</sup> It allows states to refuse to recognize the same-sex marriages formed in other states. This Virginian statutory provision bans same-sex marriage, as well as the recognition of such marriages.

In 2004, Section 20-45.3 of the Code of Virginia was promulgated; it states:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

This provision effectively prevents same-sex couples from effectuating any private agreements they may have formed in order to acquire some of the rights denied to them. Some states allow such couples to acquire these rights through common law marriage, but Virginia has never allowed common law marriages to form within its jurisdiction. However, the state has extended comity to common law marriages validly-formed in another jurisdiction.<sup>20</sup> With the new Amendment, however, even this protection is lifted.<sup>21</sup>

## **B. THE MARSHALL/NEWMAN AMENDMENT**

### **1. Legislative History**

On January 12, 2005, two constitutional amendments were proposed to the Virginia General Assembly. The first one stated: “[t]o be valid or recognized in this Commonwealth, a marriage may exist only between one man and one woman. No

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relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. Defense of Marriage Act, 28 U.S.C. § 1738C (2006).

<sup>19</sup> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. U.S. CONST. art. I, § 1.

<sup>20</sup> See *Kelderhaus v. Kelderhaus*, 467 S.E.2d 303 (Va. Ct. App. 1996).

<sup>21</sup> See Amendment, *supra* n. 11.

provision of this Constitution shall be interpreted to require the Commonwealth to recognize or permit marriage between individuals of the same sex.”<sup>22</sup> The other draft was lengthier, and stated in part that a “right, privilege, or obligation *may be bestowed* on an unmarried person by statute even if it is among the whole number of rights, privileges, and obligations of marriage, but no imitation of marriage may be created by the government.”<sup>23</sup>

In addition it provided a statement of purpose –

That marriage is essential to the liberty, happiness, and prosperity of a free and virtuous people and is the natural and optimal institution for uniting the two sexes in a committed, complementary, and conjugal partnership; for begetting posterity; and for providing children with the surest opportunity to be raised by their mother and father.

Neither of these restrictions significantly infringed on the rights of unmarried heterosexual individuals to create arrangements that would impose and assign marital obligations and rights.

The first version of the constitutional amendment to pass the House of Delegates and the Senate stated:

That in this Commonwealth, a marriage shall consist exclusively of the union of one man and one woman. Neither the Commonwealth nor its political subdivisions shall create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

*Any other right, benefit, obligation, or legal status pertaining to persons not married is otherwise not altered or abridged by this section.*<sup>24</sup>

Again, this proposal is careful to preserve contractual arrangements and the like between unmarried couples, and only sought to restrict the ability of Virginians to form civil unions and same-sex marriages.

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<sup>22</sup> H.J.R. 528 (Va. 2005) (*available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HJ528>).

<sup>23</sup> H.J.R. 584 (Va. 2005) (*available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HJ584>) (emphasis added).

<sup>24</sup> Va. Acts. ch. 946 (2005).

## 2. The Final Version of the Amendment

The Amendment, which was officially adopted following the election, deviates from these past drafts by explicitly widening the scope of its prohibitions to all unmarried persons and any ‘legal status’ they may attempt to create with their partner. It states:

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. *Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.*<sup>25</sup>

The Amendment is most effectively analyzed in three parts: the first part bans same-sex marriage; the second part prohibits civil unions and common law marriages; and the third part (italicized above), invalidates all forms of arrangements that may be construed to allocate the rights and benefits normally attributable to marriage.

The first part of this Amendment denies homosexuals the fundamental right to marry an individual of their choice; a right guaranteed under the Due Process Clause of the Fourteenth Amendment. The second part of this Amendment denies unmarried Virginians an important liberty interest, as well as equal protection under the law, in violation of the Fourteenth Amendment.<sup>26</sup>

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<sup>25</sup> Amendment, *supra* n. 11 (emphasis added).

<sup>26</sup> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV.

**II. THE FIRST PROVISION OF THE AMENDMENT IS UNCONSTITUTIONAL BECAUSE THE FOURTEENTH AMENDMENT MANDATES THAT HOMOSEXUALS BE ALLOWED TO EXERCISE THEIR RIGHT TO MARRY WITHOUT GOVERNMENTAL INTRUSION.**

The first part of the Amendment provides that: “only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”<sup>27</sup> This provision violates the Due Process rights of homosexuals by infringing on their fundamental right to marry, as well as abridging their Equal Protection rights. These violations are committed by the State with no legitimate purpose, and therefore, must be invalidated as a matter of federal constitutional law.

To begin our analysis we must first ask whether there is a fundamental right, under the United States Constitution, to marry an individual of our choosing, irrespective of that individual’s race, age, or sex. Then we must determine whether or not this restriction is constitutional. These questions must be answered in the affirmative if we are to respect and follow Supreme Court precedent and the Constitution. Furthermore, since a fundamental right is involved, we must also demand that regulation limiting these rights be justified by a compelling state interest,<sup>28</sup> a standard that is not met in this particular situation. This level of scrutiny is also required by an equal protection analysis when a legislative classification impermissibly interferes with the exercise of a fundamental right.<sup>29</sup>

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<sup>27</sup> Amendment, *supra* n. 11.

<sup>28</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>29</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

## A. COMMITTED SAME-SEX COUPLES HAVE A FUNDAMENTAL RIGHT TO MARRY.

It is well-established that there exists a fundamental, constitutional right to marry.<sup>30</sup> Disputes arise when it is argued that same-sex marriage does not warrant protection because it has never been “deeply rooted in this Nation's history and tradition.”<sup>31</sup> Framing the issue in this way is a convenient, but misguided approach. In substantive due process cases, one must carefully describe the asserted fundamental liberty interest.<sup>32</sup> The asserted fundamental liberty interest in this case can be described as *marriage*.

Proponents of the Amendment will likely cite *Michael H. v. Gerald D.*, for the proposition that unconventional, nontraditional families are not protected under substantive due process.<sup>33</sup> In that case, Justice Scalia framed the issue as whether the adulterous relationship between persons who have a child together, but are not married, is “a protected family unit under the historic practices of our society,” or whether our traditions have protected the marital family against a claim by a biological father.<sup>34</sup> On a superficial level, this language does seem to suggest that, because same-sex couples and their family units have not been historically protected, they do not require protection now. This argument has three primary flaws.

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<sup>30</sup> See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *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 pursuits of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”)

<sup>31</sup> *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); See also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) (“implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed”); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (“so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

<sup>32</sup> *Reno v. Flores*, 507 U.S. 292, 302 (1993).

<sup>33</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>34</sup> *Id.* at 124.

Examination of the first flaw necessitates a philosophical response – “tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”<sup>35</sup> For example, in *Moore v. East Cleveland*, the Court held it was improper for a state to cut off protection of family rights at the “arbitrary boundary” of a nuclear family.<sup>36</sup> That case involved the far less controversial situation of a grandmother asserting her rights to live with her grandchildren, but the same principle applies – “[w]hen a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate.”<sup>37</sup> A state cannot oppress in the name of tradition.<sup>38</sup>

The second problem with using tradition to uphold this statute is that tradition *mandates* that this statute must fail. The liberty interest asserted in *Michael D.* was that created by “biological fatherhood plus an established parental relationship,” and that was not traditionally protected.<sup>39</sup> The liberty interest asserted in *Moore v. East Cleveland* was the right to live together as an extended family, and that interest was not traditionally protected either.<sup>40</sup> The liberty interest in this case is the right to marry, and this interest has been held time and again to be both fundamental and traditionally protected under the Constitution.

Thirdly, the Court has already warned against extended the reasoning of *Michael H. v. Gerald D.* to cover all family situations that do not comport with the Framers’ original

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<sup>35</sup> *Moore*, 431 U.S. at 501.

<sup>36</sup> *Id.* at 502.

<sup>37</sup> *Id.* at 499.

<sup>38</sup> See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (“times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

<sup>39</sup> *Michael D.*, 491 U.S. at 123.

<sup>40</sup> *Moore*, 431 U.S. at 504-05.

meaning. In *Planned Parenthood v. Casey*, the Court criticized *Michael H.*, saying that the Due Process Clause protects more than those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified, contrary to what Justice Scalia had suggested.<sup>41</sup>

*Zablocki v. Redhail* reiterated the importance of being free to exercise one's right to marry.<sup>42</sup> In that case, a man was prevented from marrying because he was behind in his child support obligations.<sup>43</sup> The Court held that this was an unacceptable infringement on the right to marry, which was of "fundamental importance for all individuals."<sup>44</sup> The Court reviewed several other cases which had stressed the significance of marriage to the individual – *Maynard v. Hill*,<sup>45</sup> where the Court characterized marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress."<sup>46</sup> In *Meyer v. Nebraska*,<sup>47</sup> the Court again recognized that the right "to marry, establish a home and bring up children" was a central part of the liberty protected by the Due Process Clause.

One of the most relevant right-to-marry cases is *Loving v. Virginia*.<sup>48</sup> In this case, the statute in question was promulgated by the Virginia state legislature, like the statutory provisions being buttressed by this Amendment, and tended to reflect some of the same

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<sup>41</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (citing *Michael H.*, 491 U.S. at 127-128).

<sup>42</sup> *Zablocki*, 434 U.S. 374.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 383.

<sup>45</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>46</sup> *Id.* at 211.

<sup>47</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>48</sup> *Loving*, 388 U.S. at 12.

fears manifested in this Amendment.<sup>49</sup> The case involved an interracial couple who had been convicted of violating Virginia's anti-miscegenation laws, and who challenged the statutory scheme on both equal protection and due process grounds.<sup>50</sup> The Court found the couple had been deprived of substantive due process because “the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>51</sup>

Supporters of the Amendment will argue that these Supreme Court cases do not apply here, because they deal with opposite-sex marriage, and not same-sex marriage. Marriage in *Griswold v. Connecticut* was defined as the “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.”<sup>52</sup> There is no mention of this being a purely heterosexual experience. It is true that this limitation may have been contemplated or understood, but it is also understood that the right to marry is an *individual* right, and must be protected as such, regardless of which group the person belongs.

The right to marry is protected because of its inherent nature – it is an intimate union. This conclusion is derived from the right-of-privacy cases, and therefore, our inquiry begins in 1965, when the Court invalidated a law that imposed a criminal penalty on those who used contraceptive drugs and devices, as well as those who counseled and

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<sup>49</sup> That provision was found in § 20-57 of the Virginia Code, and it automatically voided all marriages between ‘a white person and a colored person’ without any judicial proceeding. *See Loving v. Virginia*, 388 U.S. 1, 4 (1967).

<sup>50</sup> *Loving*, 388 U.S. at 4.

<sup>51</sup> *Id.* at 12.

<sup>52</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

aided in such use.<sup>53</sup> In *Griswold v. Connecticut*, the Court held that the Third, Fourth, Fifth, and Ninth Amendments created “zones of privacy,” which could not be invaded by the government.<sup>54</sup> The Justices placed emphasis on the sanctity of the marital relationship and its corresponding rights of privacy.<sup>55</sup>

This right to privacy was extended in *Eisenstadt v. Baird* to unmarried individuals, who demanded the same access to contraceptives as married couples.<sup>56</sup> In finding a violation of the Equal Protection Clause, the Court first clarified that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>57</sup> This holding was reiterated in *Planned Parenthood v. Casey*,<sup>58</sup> and again in *Lawrence v. Texas*.<sup>59</sup>

In *Planned Parenthood v. Casey*, the Court found that there were some decisions that were so personal and central to a person’s individuality, that they could not be abridged by the State.<sup>60</sup> Among the important personal decisions the Court included were those involving marriage and “family relationships.”<sup>61</sup> The Justices agreed that they could not effectuate any moral disapproval they might have felt in deciding this case – “[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 484-85.

<sup>55</sup> *Id.* at 486.

<sup>56</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>57</sup> *Id.* at 453.

<sup>58</sup> *Casey*, 505 U.S. 833.

<sup>59</sup> *Lawrence*, 539 U.S. 558.

<sup>60</sup> “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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.” *Casey*, 505 U.S. at 851.

<sup>61</sup> *Id.*

cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>62</sup> Similarly, the existence of same-sex marriage cannot be conditioned on moral judgments, but must be rooted in legal conclusions.

This mandate was made explicit in *Lawrence v. Texas*, where the Court invalidated a law making private sexual conduct a crime because the Court reasoned that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>63</sup> The majority of the population could not use its power to oppress a minority and enforce its moral views.<sup>64</sup> This conclusion is directly relevant to the case at hand, because the Court held that when an important liberty interest is involved, “religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family” are not legitimate reasons to prohibit that conduct.<sup>65</sup>

The Court explicitly warned States against defining “the meaning of the relationship or . . . set[ting] its boundaries absent injury to a person or abuse of an institution the law protects,”<sup>66</sup> and held that “[p]ersons in a homosexual relationship may seek autonomy for . . . purposes [of defining “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”], just as heterosexual persons do.”<sup>67</sup> These cases teach us that, despite our moral views and beliefs, the rights of the individual

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<sup>62</sup> *Id.* at 850.

<sup>63</sup> *Lawrence*, 539 U.S. at 562 (The statute provided that “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”).

<sup>64</sup> *Id.* at 571.

<sup>65</sup> *Id.* at 562. (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (“practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from a constitutional attack . . . individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause . . . this protection extends to intimate choices by unmarried as well as married persons.”)).

<sup>66</sup> *Id.* at 567.

<sup>67</sup> *Id.* at 574.

to access to marriage must be the same for heterosexuals and the homosexuals alike, because the right to marry is so fundamental, it cannot be constrained without a compelling governmental interest.<sup>68</sup>

**B. THE GOVERNMENT DOES NOT HAVE A COMPELLING INTEREST THAT JUSTIFIES ABRIDGEMENT OF SUCH A FUNDAMENTAL RIGHT.**

Both the Equal Protection Clause, as well as the Due Process Clause of the Fourteenth Amendment demands that this part of the Amendment must be strictly scrutinized to determine whether there is a compelling state interest that justifies abridgement of the fundamental right of marriage.<sup>69</sup> Some objectives, such as a “bare . . . desire to harm a politically unpopular group,”<sup>70</sup> “deterrence of premarital sexual relations,”<sup>71</sup> disadvantaging homosexuals,<sup>72</sup> and preserving the racial integrity of citizens,<sup>73</sup> have already been found to be illegitimate by the Supreme Court. Identification of state interests in this case necessitates a certain degree of speculation because we cannot consult a government brief.

However, in an initial draft of the Amendment, legislators stated:

That marriage is essential to the liberty, happiness, and prosperity of a free and virtuous people and is the natural and optimal institution for uniting the two sexes in a committed, complementary, and conjugal partnership; for begetting posterity; and for providing children with the surest opportunity to be raised by their mother and father.<sup>74</sup>

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<sup>68</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

<sup>69</sup> See *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Murgia*, 427 U.S. at 312; *Eisenstadt*, 405 U.S. at 453.

<sup>70</sup> *Eisenstadt*, 405 U.S. at 446.

<sup>71</sup> *Id.* at 452.

<sup>72</sup> *Romer*, 517 U.S. at 627.

<sup>73</sup> *Loving*, 388 U.S. at 7.

<sup>74</sup> H.J.R. 584 (Va. 2005) (available at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HJ584>) (emphasis added).

The legislature here admits that marriage is an essential liberty interest, and then denies it to 14,300 residents.<sup>75</sup> In *Goodridge v. Dept. of Pub. Health*, the Massachusetts government asserted three, very similar, legislative rationales for prohibiting same-sex couples from marrying: (1) providing a “favorable setting for procreation”; (2) ensuring the optimal setting for child rearing, which the department defines as “a two-parent family with one parent of each sex”; and (3) preserving scarce State and private financial resources.<sup>76</sup> The court easily rejected the procreation argument, pointing out that neither fertility nor an active sex life is a condition of marriage, and that many married couples adopt children or use assistive technology to conceive.<sup>77</sup>

The court then addressed the argument that a same-sex couple cannot provide the optimal setting for child rearing, noting that the state conceded same-sex couples may make “excellent” parents.<sup>78</sup> The court then held that it is not “rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”<sup>79</sup> It noted that part of the reason heterosexual couples can provide a favorable environment for their children is not because of any inherent advantage, but because the State has bestowed upon them so many benefits – benefits not extended to same-sex couples.<sup>80</sup>

Lastly, the court analyzed the legitimacy of the argument that same-sex couples are less financially dependent on each other than opposite-sex couples, determining that this

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<sup>75</sup> Memo, *supra* n. 12, at 20.

<sup>76</sup> *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309, 331 (2003).

<sup>77</sup> *Id.* at 331-333.

<sup>78</sup> *Id.* at 334.

<sup>79</sup> *Id.* at 336.

<sup>80</sup> *Id.* at 335-36.

generalization ignored the basic reality that this was simply not always true, and that the financial benefits of marriage were not tailored to ‘need’ but rather to sexuality.<sup>81</sup>

In the New Jersey case of *Lewis v. Harris*, the state moved away from these traditional justifications, conceding that limiting marriage to heterosexual couples was not necessary for procreative purposes or providing the optimal environment for raising children.<sup>82</sup> There the state relied on the historical view of marriage as being a union between a man and a woman, and argued that any changes to that foundational family unit must come from the consent of the people through elected officials in the legislature, and not the unaccountable judicial branch.<sup>83</sup> The court appeared to accept this argument.<sup>84</sup>

The essential defect in this argument is that same-sex couples are not trying to abolish marriage, change its binary nature, amend its consanguinity provisions, or any other gate-keeping provisions.<sup>85</sup> If there are to be any changes to the definition of a traditional family, it is only that it will expand into a more gender-neutral concept, but this does not threaten or attack a heterosexual couple’s rights to form whatever they consider to be a ‘traditional’ family unit. So while there are certainly some situations where it is more prudent and preferable to effect change through the legislature, when fundamental rights are involved, often it is the *duty* of the courts to step in and make sure the state is following constitutional mandates.<sup>86</sup>

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<sup>81</sup> *Id.* at 336-337.

<sup>82</sup> *Lewis v. Harris*, 188 N.J. 415, 432 (2006).

<sup>83</sup> *Id.* at 432-33.

<sup>84</sup> *Id.* at 441 (“we must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State.”).

<sup>85</sup> *Goodridge*, 440 Mass. at 337.

<sup>86</sup> See e.g., *Lawrence*, 539 U.S. at 571; *Moore*, 431 U.S. at 501; *Brown v. Board of Education*, 347 U.S. 483 (1954).

If we recognize that committed same-sex couples share the same intimacy, love, family unity and companionship as opposite-sex married couples, creating a separate-but-equal distinction only denies same-sex couples many of the rights and privileges accorded opposite-sex couples, and stamps them with a “badge of inferiority.”<sup>87</sup> Denying homosexual couples the right to participate in a key societal institution and all of its corresponding benefits and privileges “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>88</sup> This was the reasoning in the Canadian case of *Vriend v. Alberta*, where the court stated:

the implicit message conveyed by the exclusion, [is] that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in . . . society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.<sup>89</sup>

Therefore, because marriage is a fundamental, individual right under the Constitution, and because there are not compelling reasons justifying its abridgment, the first provision of the recent Amendment in Virginia must be invalidated under the Fourteenth Amendment of the federal Constitution.

### **III. THE SECOND HALF OF THE AMENDMENT IS UNCONSTITUTIONAL BECAUSE THE FOURTEENTH AMENDMENT REQUIRES THAT COMMITTED UNMARRIED INDIVIDUALS SHARE THE SAME RIGHTS AND PRIVILEGES AS MARRIED INDIVIDUALS.**

The second part of the Amendment states that the “Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried

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<sup>87</sup> *Casey*, 505 U.S. at 863 (citing *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

<sup>88</sup> *Brown*, 347 U.S. at 494.

<sup>89</sup> [1998] S.C.R. \*38 (available at 1998 Can. Sup. Ct. LEXIS 19).

individuals that intends to approximate the design, qualities, significance, or effects of marriage.”<sup>90</sup> The third portion adds: “[n]or shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”<sup>91</sup> These provisions violate the right of unmarried individuals to equal protection under the law, and abridge the exercise of a significant liberty interest to the disadvantage of unmarried individuals.

**A. UNMARRIED INDIVIDUALS HAVE A LIBERTY INTEREST IN DECIDING HOW THEY WISH TO DEFINE THEIR COMMITTED RELATIONSHIP WITH ANOTHER INDIVIDUAL THAT CANNOT BE ABRDIGED UNDER THE DUE PROCESS CLAUSE.**

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>92</sup> The Due Process Clause, like its Fifth Amendment counterpart, “guarantees more than fair process;” it “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>93</sup> While the civil unions implicated by this Amendment may not have the deep roots in tradition that marriage does, and therefore may not warrant strict scrutiny, the Amendment does impair a liberty interest. The interference with a liberty interest demands a “reasonable fit” between governmental purpose and the means chosen to advance that purpose.<sup>94</sup>

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<sup>90</sup> Amendment, *supra* n. 11.

<sup>91</sup> *Id.*

<sup>92</sup> U.S. CONST. XIV.

<sup>93</sup> *Glucksberg*, 521 U.S. at 719-720.

<sup>94</sup> *Flores*, 507 U.S. at 305.

Unmarried Virginians have a liberty interest in being able to protect their intimate relationships from governmental intrusion. “Liberty” in the Fourteenth Amendment “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>95</sup> The Amendment arbitrarily, and squarely, interferes with many of these liberty interests shared by unmarried individuals in committed relationships, such as the freedom to contract, to engage in common occupations of life, and to establish a home.

This liberty interest is defined and created by the intimate relationship these couples share. In *Griswold v. Connecticut*, the Court first recognized that there are relationships that can be formed in “zones of privacy,” and that there are laws that are capable of having “maximum destructive impact upon that relationship.”<sup>96</sup> *Griswold* dealt with the marital relationship, but the Court has extended its reasoning to other intimate relationships, affording them special protection under the law.

For example, in *Roe v. Wade*, the Court determined that “the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>97</sup> The Court supported this conclusion by citing numerous psychological and physical

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<sup>95</sup> *Meyer*, 262 U.S. at 399 (internal citations omitted).

<sup>96</sup> *Griswold*, 381 U.S. at 485.

<sup>97</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

hardships implicated by this choice.<sup>98</sup> This decision was premised on the individual’s personal autonomy and intimate relationship with one’s body.<sup>99</sup>

In *Belle Terre v. Boraas*, the Court examined a law that interfered with a relationship that was not intimate in nature.<sup>100</sup> Following a rule established in a prior case,<sup>101</sup> the Court upheld a regulation that restricted land use to one-family dwellings, where “family” was defined to mean one or more related persons or a number of persons but not exceeding two that were not related.<sup>102</sup> The Court believed this limitation was justified by “family needs” such as “[a] quiet place where yards are wide, people few, and motor vehicles restricted,” and where a zone was created to protect “family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”<sup>103</sup>

In a vigorous dissent, Justice Marshall argued that the ordinance “reaches beyond control of the use of land or the density of population, and undertakes to regulate the way people choose to associate with each other within the privacy of their own homes.”<sup>104</sup> In his view, the village was acting to fence out individuals with a different lifestyle than its current residents.<sup>105</sup> Three years later, Justice Marshall joined in an opinion authored by Justice Powell, which held that where individuals were related through “blood, adoption,

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<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974)

<sup>101</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that land-use regulations violate the Due Process Clause if they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”)

<sup>102</sup> *Belle Terre*, 416 U.S. at 2.

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Id.* at 17.

<sup>105</sup> *Id.* at 16-17.

or marriage,” the judicial deference given by *Belle Terre* and *Euclid* to the legislature was inappropriate.<sup>106</sup>

This distinction was supported by the fact that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.<sup>107</sup> The Court in *Moore v. East Cleveland* thus concluded that “when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”<sup>108</sup>

*Moore*, as well as countless other governmental regulations, burden individuals who are not related through blood, marriage or adoption, and deny them legal protections otherwise afforded relationships based on those connections. However, associations through blood, adoption and marriage are not the end-all and be-all of protected liberty interests. The Supreme Court has stressed that the importance of a familial relationship “stems from emotional attachments that derive from the intimacy of daily association,” and not solely from the fact of blood relationship.<sup>109</sup> It is undisputed that there are many occasions in which the blood-marriage-adoption distinction serves important governmental objectives, such as orderly property distribution through intestacy laws. However, even in the area of intestacy, societal norms and values have been questioned by Supreme Court precedent.

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<sup>106</sup> *Moore*, 431 U.S. at 499.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (internal citations omitted).

For example, in *Trimble v. Gordon*, the Court recognized that a law allowing illegitimate children to inherit by intestate succession only from their mothers, while legitimate children were permitted to inherit from both parents, was invalid.<sup>110</sup> In that case, an argument was posited that will surely be raised again should this Amendment be challenged in court – unmarried *heterosexual* individuals who are unhappy with the Amendment are free to marry and thus share in the benefits afforded them under the law. In *Trimble* the lower court had asserted: “Labine could have left a will; he could have legitimated the daughter by marrying her mother; and he could have given the daughter the status of a legitimate child by stating in his acknowledgment of paternity his desire to legitimate her.”<sup>111</sup> These arguments were rejected by the Court, who found that “[h]ard questions cannot be avoided by a hypothetical reshuffling of the facts.”<sup>112</sup> Furthermore, even if we are to accept this argument, it only highlights that the second provision of the Amendment will have a disparate impact on same-sex couples, indicating that the purpose behind the law is not legitimate, but based on animus to that group.

Here we are confronted with the situation of same-sex couples who *cannot* marry, and heterosexual couples who, for whatever reason, do not *want* to marry.<sup>113</sup> If one of these individuals affected by the Amendment falls gravely ill, his/her partner would undoubtedly feel the same grief and anxiety as the married spouse, and hypotheticals do

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<sup>110</sup> *Trimble v. Gordon*, 430 U.S. 762 (1977).

<sup>111</sup> *Id.* at 773.

<sup>112</sup> *Id.* at 774.

<sup>113</sup> A famous example of such a couple is that of Brad Pitt and Angelina Jolie; Pitt has explained their reasons for not wanting to marry as wanting to wait until “everyone else in the country who wants to be married is legally able,” and Jolie has also said; “[w]e both have been married before, so it's not marriage that's necessarily kept some people together.” She stressed; “[w]e are legally bound to our children, not to each other, and I think that's the most important thing.” Nie Peng, “*It was amazing*”: Jolie spills chemistry with Pitt, China View News (Dec. 13, 2006) (available at [http://news.xinhuanet.com/english/2006-12/13/content\\_5479671.htm](http://news.xinhuanet.com/english/2006-12/13/content_5479671.htm)).

not provide a solution when the unmarried individual is barred from entering her partner's hospital room. This is an example of the Amendment's unjust infringement on an individual's liberty interest. In an 1884 case involving common law marriage, the Court said:

The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills, and other formal instruments.<sup>114</sup>

So when parties choose not to (or cannot) get married, but fulfill many of this indicators of commitment listed above, they are entitled, under the Fourteenth Amendment, not to have their agreements abridgement without any overriding and compelling state interest.

**B. DENYING UNMARRIED INDIVIDUALS EQUAL PROTECTION UNDER THE LAW IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE INTEREST.**

Even if the second half of the Amendment withstood an attack based on substantive due process grounds, it cannot survive one based on Equal Protection. In every case arising under the Equal Protection Clause, we must first determine what level of judicial scrutiny applies. In *City of Cleburne v. Cleburne Living Ctr.*, the Court held that zoning ordinance in question violated the Equal Protection Clause because it rested on an irrational prejudice against the mentally retarded.<sup>115</sup> The Court explained the different levels of scrutiny and/or deferential treatment it accorded legislation, depending on what basis of classification the statute uses.<sup>116</sup> If the statute classifies by race, alienage, national

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<sup>114</sup> *Travers v. Reinhardt*, 205 U.S. 423, 440 (1907) (citing *Maryland v. Baldwin*, 112 U.S. 490, 495 (1884)).

<sup>115</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985)

<sup>116</sup> *Id.* at 440-42.

origin, or gender, it must receive *heightened* judicial review.<sup>117</sup> When a statute's differentiation is based on age, however, the Equal Protection Clause requires only a rational means to serve a legitimate end, i.e. a rational basis.<sup>118</sup>

In summary, if the classification is based on “distinguishing characteristics relevant to interests the State has the authority to implement,” the state need only assert a rational purpose. On the other hand, when a statute differentiates on the basis of a trait that frequently bears no relation to ability to perform or contribute to society, that statute must withstand heightened or strict scrutiny if it is to survive an Equal Protection challenge.<sup>119</sup>

The Court then declined to apply heighten scrutiny to cases involving the mentally retarded, claiming that the predicate for increased judicial oversight is not present where the classification deals with mental retardation.<sup>120</sup> It is likely that the Court would similarly not extend heightened scrutiny to the second portion of the Amendment, since it does not interfere with a fundamental right, nor does it classify on the basis of a suspect class. Nevertheless, *City of Cleburne* clarified that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,”<sup>121</sup> and therefore this Amendment has no rational purpose, because it only seeks to disapprove of nontraditional unions.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation

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<sup>117</sup> *Id.* at 440.

<sup>118</sup> *Id.* at 441-42.

<sup>119</sup> *Id.* at 440-41.

<sup>120</sup> *Id.* at 442-43.

<sup>121</sup> *Id.* at 446 (citing *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding that “[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.”)).

classifies for one purpose or another, with resulting disadvantage to various groups or persons.<sup>122</sup> Therefore, the general rule for Equal Protection challenges is that if a law neither burdens a fundamental right nor targets a suspect class, legislation drawn by elected officials is presumed to be valid, and will be sustained if the classification imposed by the statute is rationally related to a legitimate state interest.<sup>123</sup> By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.<sup>124</sup> A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>125</sup>

The legislation here does not meet this standard. The Amendment imposes a broad and undifferentiated disability on unmarried individuals, and because none of the purported interests appear to be compatible with the extensive and sweeping restrictions it inflicts, the only explanation is that the Amendment is motivated by animus toward unmarried individuals joined through nontraditional arrangements.<sup>126</sup> The Amendment identifies affected individuals by very specific traits – they are unmarried, in love, and seek to protect that love – and then denies them numerous protections and benefits.

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<sup>122</sup> See *Romer*, 517 U.S. at 631; *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-272 (1979); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, (1920).

<sup>123</sup> See *Romer*, 517 U.S. at 631; *Cleburne Living Ctr.*, 473 U.S. at 440.

<sup>124</sup> *Romer*, 517 U.S. at 633.

<sup>125</sup> *Eisenstadt*, 405 U.S. at 447 (citing *Royster Guano Co.*, 253 U.S. at 415).

<sup>126</sup> See *Romer*, 517 U.S. at 632.

## 1. Virginia Does Not Have a Legitimate Interest in Banning All Forms of Nontraditional Unions

In *Eisenstadt v. Baird*, the Court analyzed an issue very similar to the one propounded in this situation – “whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons” when there was an important liberty interest involved.<sup>127</sup> That law prohibited single persons from obtaining contraceptives to prevent pregnancy.<sup>128</sup> The Court rejected the State’s claim that discouraging premarital sex was a legitimate purpose behind this classification, since the effect of the law had only marginal relation to its purported objective.<sup>129</sup> Compelling this conclusion were inconsistencies between the criminal penalty for fornication, an exception for disease prevention, and the fact that it did not deter married persons from engaging in sexual relations with unmarried individuals.<sup>130</sup>

Similarly, due to the injustices that will occur, as this Amendment is litigated, we will begin to see so much inconsistency, and so many exceptions formulated, that the Court will realize there is no legitimate purpose behind this Amendment.

In *Romer v. Evans*, the Court confronted an amendment in Colorado that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons from discrimination.<sup>131</sup> The State attempted to frame the Amendment as a “measure [that] does no more than deny homosexuals special

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<sup>127</sup> *Eisenstadt*, 405 U.S. at 447.

<sup>128</sup> *Id.* at 442.

<sup>129</sup> *Id.* at 448.

<sup>130</sup> *Id.* at 450.

<sup>131</sup> *Romer*, 517 U.S. 620.

rights,” a position rejected by the Court.<sup>132</sup> The Court found that this law put homosexuals into a solitary class in both private and governmental spheres, and effectively changed their legal status.<sup>133</sup> They were forbidden safeguards others could freely access.<sup>134</sup>

These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.<sup>135</sup>

Finally, the Court concluded that the amendment violated the Equal Protection Clause for two reasons: 1) it imposed a broad and undifferentiated disability on a single named group and; 2) its breadth was so discontinuous with the reasons offered for that it seemed inexplicable by anything but animus toward the class it affected.<sup>136</sup>

Similarly, the second half of the Amendment imposes a disability on all “unmarried individuals” who are in committed relationships, but not married.<sup>137</sup> The objective proffered is to reserve the institution of marriage for one man and one woman, in order for it to remain in its traditional form.<sup>138</sup> In her concurrence in *Lawrence v. Texas*, Justice O’Connor suggested that “preserving the traditional institution of marriage” may constitute a legitimate state interest.<sup>139</sup> The majority, represented by Justice Kennedy, appeared to disagree with Justice O’Connor. In its examination and eventual overturning of *Bowers v.*

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<sup>132</sup> *Id.* at 626.

<sup>133</sup> *Id.* at 627.

<sup>134</sup> *Id.* at 629-631 (“Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education and employment.”).

<sup>135</sup> *Id.* at 631.

<sup>136</sup> *Id.* at 632.

<sup>137</sup> Amendment, *supra* n. 11.

<sup>138</sup> “That marriage is essential to the liberty, happiness, and prosperity of a free and virtuous people and is the natural and optimal institution for uniting the two sexes in a committed, complementary, and conjugal partnership; for begetting posterity; and for providing children with the surest opportunity to be raised by their mother and father.” H.J.R. 528 (Va. 2005) (*available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HJ528>).

<sup>139</sup> *Lawrence*, 539 U.S. at 585.

*Hardwick*, the majority cited “respect for the traditional family” as one of the driving forces behind the moral condemnation that motivated the *Bowers* holding,<sup>140</sup> before concluding that their responsibility was to “define the liberty of all, not to mandate our own moral code.”<sup>141</sup>

In *Marvin v. Marvin*, the California Supreme Court similarly held that nontraditional unions were to be protected; the court delineated the advantages of cohabitation agreements; legal instruments that will be rendered invalid under this Amendment. The primary holding in that case was that courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.<sup>142</sup> The court based its holding on the changing face of American society, acknowledging that a court cannot impose a standard based on alleged moral considerations that have been abandoned by so many.<sup>143</sup> The court reasoned that cohabitants are “competent as any other persons to contract respecting their earnings and property rights.”<sup>144</sup>

Lastly, the court came to a conclusion that directly undermines the conclusion reached by the Virginian legislature – cohabitation agreements are necessary to upholding the institution of marriage, because a failure to recognize such agreements would only result in an inequitable distribution of property accumulated during a nonmarital relationship.<sup>145</sup> In addition to disallowing such agreements through the Amendment,

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<sup>140</sup> *Id.* at 571.

<sup>141</sup> *Id.* (citing *Casey*, 505 U.S. at 850).

<sup>142</sup> *Marvin v. Marvin*, 18 Cal. 3d 660, 665 (1976).

<sup>143</sup> *Id.* at 684.

<sup>144</sup> *Id.* at 674.

<sup>145</sup> *Id.* at 683.

Virginia has made it illegal for unmarried individuals to cohabit.<sup>146</sup> This statute is rarely enforced,<sup>147</sup> however, and there does appear to be a movement toward recognizing cohabitation agreements.<sup>148</sup>

This Amendment would completely halt any such recognition. The 130,000 unmarried couples in Virginia<sup>149</sup> would presumably not break up because of this Amendment, but one partner would be left vulnerable should the wage-earner decide to avoid having to support the less sophisticated partner. These are protections that marriage automatically bestows upon couples, and that couples who do not wish to get married should be able to privately contract into receiving from one another. The Amendment prevents these couples from pursuing this very basic form of protection, solely based on reasons of moral disapproval.

## **2. The Amendment is Not Rationally Related to its Purported Purpose**

Even if reserving marriage for one man and one woman was a legitimate state purpose, this portion of the Amendment is not rationally related to that purpose. It is too broad because it affects those people who cannot or will not have anything to do with marriage, and it stops them from pursuing transactions and goals that would allow them to lead an “ordinary civic life in a free society.”<sup>150</sup> Furthermore, this Amendment does not target couples who choose not to divorce and yet live apart, couples who married for convenience, couples who have married before – all ‘deviations’ from the concept of a

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<sup>146</sup> Va. Code Ann. § 18.2-345.

<sup>147</sup> *Doe v. Duling*, 782 F.2d 1202, 1204-05 (4th Cir. 1986) (“The last recorded conviction for private, consensual cohabitation occurred in 1883.”).

<sup>148</sup> *Cooper v. Spencer*, 218 Va. 541 (1977).

<sup>149</sup> Memo, *supra* n. 12, at 20.

<sup>150</sup> *Romer*, 517 U.S. at 631.

traditional marriage. Ultimately, infringing the liberty interests of other citizens is not going to preserve the traditional institution of marriage.

In order to determine whether there is a rational basis behind legislation, it is helpful to compare the effects of the legislation to its objectives. So what exactly are these “rights, benefits, obligations, qualities, or effects of marriage” that this class is being denied? They include some of the most “basic decisions about family and parenthood,”<sup>151</sup> including who is to have custody of your children, who is to enter your hospital room in an emergency, who is to receive life insurance payments at your death – rights, benefits, qualities and effects that are *automatically* conferred upon receipt of a marriage license.

Recently the law firm of Arnold and Porter was asked to prepare a memo outlining the potential legal consequences of the proposed Marshall/Newman Amendment. The firm looked at various provisions of domestic law that could be affected by the Amendment, such as domestic violence laws, employee benefits rights, private contracts, child custody and visitation rights, and end-of-life arrangements.<sup>152</sup> The firm admitted that it could take years to gauge the Amendment’s implications.<sup>153</sup> Potentially, however, anyone who could establish that protection under domestic law or contract is a right, benefit, or effect of marriage, or that approval of an agreement would recognize a ‘legal status’ between unmarried individuals, could automatically invoke the Amendment, because under its

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<sup>151</sup> *Casey*, 505 U.S. at 849.

<sup>152</sup> Memo, *supra* n. 12, at i-ii.

<sup>153</sup> *Id.* at 3.

definitions, that constitutes an assignment of the benefits of marriage to unmarried individuals.<sup>154</sup>

Thus, the primary consequence of the Amendment may be a complete denial of protections to couples already facing a multitude of problems. The New Jersey Supreme Court delineated obstacles faced by couples who were not recognized under the law:

some plaintiffs had to endure the expensive and time-consuming process of cross-adopting each other's children and effectuating legal surname changes. Others . . . have had to . . . pay[] excessive health insurance premiums because employers did not have to provide coverage to domestic partners, not having a right to 'family leave' time, and suffering adverse inheritance tax consequences. When some plaintiffs have been hospitalized, medical facilities have denied privileges to their partners customarily extended to family members.<sup>155</sup>

Under the Amendment, domestic partners will not even be able to attempt equalization of protections. For example, the cross-adoption process mentioned above could be construed as assigning a quality or obligation of marriage. Most Virginia voters probably did not anticipate this result.

On the November 7 ballot, the text of the Amendment was accompanied by the following disclaimer:

There are other legal rights, benefits, and obligations which will continue to be available to unmarried persons, including the naming of an agent to make end-of-life decisions by an Advance Medical Directive, protections afforded under Domestic Violence laws, ownership of real property as joint tenants with or without a right of survivorship, or disposition of property by will.<sup>156</sup>

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<sup>154</sup> See e.g., *id.* at 36 (“eligibility to petition for custody or visitation rights is seemingly a ‘legal status.’”); *id.* at 47 (“If a challenger could establish that protection under domestic abuse law is a right, benefit, or effect of marriage, and that the statute recognizes a ‘legal status’ for cohabitants, application of the law to unmarried persons would be unconstitutional regardless of intent because it assigns the benefits of marriage to unmarried victims.”); *id.* at 70 (“Amendment will provide additional evidence of Virginia’s public policy against recognition of unmarried relationships and increase the likelihood that courts will decide that conferring employee benefits on the unmarried partners of employees is void as against public policy, regardless of whether such benefits are provided by public employers or private employers.”).

<sup>155</sup> *Lewis*, 188 N.J. at 426.

<sup>156</sup> Amendment, *supra* n. 11.

However, as the Arnold and Porter memo explains, because the explanation is considered to not be a neutral statement, a presiding court may look at this explanation as part of the legislative history, but will likely review the text of the Amendment and come to its own conclusions.<sup>157</sup> Furthermore, after extensive research the firm concluded that because court enforcement of private contracts, conveyances or other legal instruments constitutes state “recognition,”<sup>158</sup> this Amendment may have the effect of invalidating the assignment of “property rights, survivorship rights, rights to make medical decisions on behalf of another, are those traditionally provided through marriage, such an agreement would seem to be a legal status ‘to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.’”<sup>159</sup>

I do not seek to examine the impacts of the Amendment as the firm did, but it is useful to borrow their researched conclusion that the “effects go far beyond the claimed purpose of the Amendment: to reserve marriage for one man and one woman.”<sup>160</sup>

### **3. The Amendment’s True Purpose is to Discriminate Against an Unpopular Group in Violation of the Equal Protection Clause.**

As in the *Cleburne Living Ctr.* and *Romer*, the scope of this Amendment suggests that the true purpose of this law is to disadvantage a politically unpopular group. In *Cleburne Living Ctr.* the court looked at the fact that:

the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201

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<sup>157</sup> Memo, *supra* n. 12, at 17.

<sup>158</sup> *Id.* at 9.

<sup>159</sup> *Id.* at 25.

<sup>160</sup> *Id.* at iii.

Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.<sup>161</sup>

In *Romer v. Evans*, the court concluded:

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.<sup>162</sup>

In both these cases, the enormous reach of the legislation into the lives of a particular group “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>163</sup> The same inference is raised here – the Amendment seeks to reserve marriage for one man and one woman by imposing sweeping restrictions banning a class of people from pursuing the “safeguards that others enjoy or may seek without restraint.”<sup>164</sup> This legislation is under-inclusive because it is not aimed at couples who are trying to abolish marriage, change its monogamous nature, or amend its consanguinity provisions or any other gate-keeping provisions.<sup>165</sup> It is similarly over-inclusive, because has the potential to revoke protection afforded cohabitants under the domestic violence statutes,<sup>166</sup> an effect that was purportedly not intended.<sup>167</sup>

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<sup>161</sup> *Cleburne Living Ctr.*, 473 U.S. at 450.

<sup>162</sup> *Romer*, 517 U.S. at 635.

<sup>163</sup> *Id.* at 634.

<sup>164</sup> *Id.* at 631.

<sup>165</sup> *Goodridge*, 440 Mass. at 337.

<sup>166</sup> Memo, *supra* n. 12, at 47.

<sup>167</sup> Amendment, *supra* n. 11.

Therefore, because this legislation's objective is to preserve the traditional institution of marriage, and targeting unmarried individuals does not rationally relate to this purpose, the Amendment violates Equal Protection Clause of the Fourteenth Amendment.

#### **IV. CONCLUSION**

The Marshall/Newman Amendment is demonstrably inconsistent with the mandates of the Fourteenth Amendment of the federal Constitution. The first provision seeks to ban same-sex marriage. This is an impermissible objective under the Due Process Clause, which guarantees the right to marry for all individuals. The second provision attacks all nontraditional unions in violation of Due Process and Equal Protection.

It was less than forty years ago that the Lovings were arrested for what was an illegal marriage under Virginia law. Today, it is universally accepted that such anti-miscegenation statutes are unconstitutional. Even Thomas Jefferson anticipated that attitudes would change; he once wrote:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the same coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>168</sup>

The Framers understood that times change. It is time that Virginia accepted this same truth. This Amendment is going to undermine faith in Virginia's legal system, encourage

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<sup>168</sup> Letter to Samuel Kercheval (July 12, 1810) (*available at* <http://www.monticello.org/reports/quotes/memorial.html>).

litigation, drive away same-sex and unmarried couples, and even affect the ability of businesses to attract employees should the provision of employee benefits to domestic partners be invalidated under the Amendment.<sup>169</sup>

My fear is that it will only be after all these injustices and consequences are felt that the Amendment will be seen as the oppressive piece of legislation it is. It denies homosexuals their fundamental right to marry, and strips protections from those who do not wish to marry. This is the ultimate example of the State stepping inside your bedroom and telling you that you are not wanted, and not free. The Constitution was created to prevent such intrusions; it anticipated fundamentally differing views would be shared by its constituency, and it provided for this conflict. Time and again, the courts have held that there are certain rights that cannot be abridged by the State. The majority simply cannot enforce its views on the minority in a way this Amendment will do.<sup>170</sup>

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<sup>169</sup> See *Memo*, *supra* n. 12.

<sup>170</sup> *Lawrence*, 539 U.S. at 571.