MINORITY REPORT

For the Commission established by

SB 427

to Study Same Sex Marriage
and its Legal Equivalents

Submitted Wednesday, November 30, 2005

I. INTRODUCTION.

The foregoing majority and minority reports of this Commission[1] should not bear the imprimatur of a "study" commissioned by the Legislature because the findings were preordained and are not the by-product of any studied, deliberative analysis. The findings do not cover the substantive topics one would expect from a state commission tasked to study state laws; the evidence purportedly relied upon by the Majority in reaching its conclusions is largely absent from these conclusory reports; and the Legislature will be hard pressed to discern from the foregoing reports how the state's present laws actually affect New Hampshire's gay and lesbian families. Simply put, the Legislature and the citizens of New Hampshire deserve more than they got from this Commission.

Though the Legislature intended a meaningful study of the needs of New Hampshire's gay and lesbian families and the impact of the state's marriage laws on these families, the Majority's report, and its conduct throughout the proceedings, make clear that the Majority itself never operated with the same intent. The Commission was charged with a mandate to study all issues relating to the extension of the "rights and responsibilities of marriage to same-sex couples" and to examine "all issues … related to same-sex unions."[2] We in the Minority believe that the Majority report evidences nearly a complete failure to address the Commission's mandate. As explained in Section IV of this Minority Report, the Majority's "Findings" are meager and essentially irrelevant to the Legislature's mandate.

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[1] We, the commissioners who support equality, write this "Pro-Equality Minority Report" in response to the Majority's report (Sections I-VIII). The minority report in Section VIII (i.e., the "Mooney, Earnshaw, Fredyma, Brassard Minority Report") is sponsored by a subset of the commissioners in the Majority, and consequently, we will refer to the Majority and the "Mooney, Earnshaw, Fredyma, Brassard Minority" collectively as "the Majority."

[2] The genesis of the Commission is SB427, a legislative compromise enacted in May 2004.[2] SB427 commissioned a study of marriage for same-sex couples while simultaneously denying recognition of legal marriages of same-sex couples from other jurisdictions. The Legislature's mandate to the Commission was unmistakable:

> 100:4 Duties. The commission shall examine all aspects of same sex civil marriage and the legal equivalent thereof, whether referred to as civil unions, domestic partnerships, or otherwise. The commission's study shall include, but shall not be limited to:
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> I. All the legal and policy implications of extending some or all of the rights and responsibilities of marriage to same sex couples.
>
> II. Examination of all issues of civil rights, responsibilities, laws, and legal obligations related to same sex unions, including the applicability of the laws of other states to New Hampshire.

See SB427.

In part, the Majority accomplished so little because the Commission sought more to put gay people on trial than to consider the full scope of policy issues before it. Throughout its proceedings, the Majority forced the Commission to plod through antiquated and demonizing debates about whether gay men and lesbians are psychologically stable, transmit disease through acts of sexual intimacy, or are biologically aberrant. Though admittedly less apparent from the final, sanitized reports themselves, the commissioners in the Majority embraced and encouraged the Commission to become absorbed in demonstrably anti-gay notions.[3] The Majority dedicated precious hours of testimony to discussions of intimate sexual acts, all to the effect of depriving gay people of equal dignity and respect for no discernable civic purpose. Further, by embracing the testimony of Dr. John Diggs and so-called "ex-gays" on what can only be called the "junk science" of so-called "reparative therapy" that purports to fix gay people by making them heterosexual, the Majority has exposed its deep discomfort with gay people. This discomfort may account for the Majority's apparent discounting of the witnesses before them who identified themselves as lesbian or gay.[4]

The anti-gay inclinations of the Majority existed from the outset. The Commission's politically-driven appointment process stacked the Commission with an overwhelming number of commissioners who are demonstrably and ideologically opposed to providing legal protections for gay and lesbian couples and their children.[5] Having embraced this anti-gay approach to the study of legal

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[3] An exemplar of the Commission's absorption in anti-gay rhetoric is provided in Commissioner Jack Fredyma's proposed findings to this Commission. See "Proposed Findings for Legal and Social Issues for SB427 Commission." Commissioner Fredyma's proposal recommends, in addition to a constitutional amendment to ban marriage for same-sex couples, findings that same-sex couples are pre-disposed to mental illness (at p. 9), that some gay men are "bug chasers that intentionally want to catch HIV and AIDS and intentionally spread HIV and AIDS" (at p. 8), and that same sex unions do not reduce sexual frequency, as if that should be the outcome-determinative factor on whether civil union legislation is sound public policy (at p.9).

[4] When the Majority Report reviews the public testimony offered at the six public hearings around the state, for example, it resorts to head counts: this many spoke "for" and this many "against," but of the "fors," it identifies the exact number whom it contends were gay people. See Majority Report, Section III.

[5] For example, Commissioners Russell Prescott, Jack Barnes, and Paul Brassard were three of the sponsors of the original SB427 legislation, which in its initial phases sought to ban, for gay people, marriage, civil unions, domestic partnerships, and any other protections that are automatically given to married people. Notably, Commissioner Russell Prescott was appointed to the Commission twice: first as a representative of the Senate, and later, after losing his senate seat in the November, 2004 election, as a public representative.

Other commissioners in the Majority have been on record opposing the inclusion of sexual orientation protections in the state's non-discrimination statute in 1997 (Commissioner Jack Barnes voted no on HB421); opposing the repeal of the ban on adoption and foster care by gay people in 1999 (Chairman Tony Soltani voted no on HB90); and opposing the recognition of marriages and civil unions for same-sex couples from other jurisdictions (Chairman Tony Soltani and Commissioners Maureen Mooney, Paul Brassard, Russell Prescott, Ted Gatsas and Robert Odell voted in favor SB427; Chairman Soltani also voted in favor of HB1293 in 2000 and HB454 in 2001).

protections for same-sex couples, it is little wonder that the Majority did not analyze the laws adversely affecting New Hampshire's gay and lesbian citizens; did not attempt to describe in its report the multi-faceted ways in which these gay and lesbian citizens are harmed by the state's present laws; and did not engage in any meaningful discussion of ways to address these harms.

Instead, at its first deliberative meeting following months of lay and expert testimony, the Commission voted to recommend the adoption of a constitutional amendment to ban marriage for same-sex couples. Instructively, this vote occurred before the Commission ever discussed or "studied" the testimony presented over the preceding months, confirming that none of it ever mattered.[6] The Majority's recommendation to amend the constitution exposes the true divide on the Commission: those that see gay and lesbian citizens as deserving equal treatment under the law, including the ability to seek redress from their elected government and those who do not and indeed seek to penalize gays and lesbians.

Those of us who now identify with this Minority previously held out hope that the Commission would provide a forum for intelligent discussion of the issues arising from state's on-going denial of marriage rights for same-sex couples. However, in the first eight months of its existence, the Commission met only once, in July 2004, and that was merely an administrative meeting. In the face of repeated refusals by the Commission's Chairman to convene substantive meetings of the Commission, members of the House and Senate filed legislation -- HB283 -- to force the Commission to deliberate.[7] Though HB283 had the indirect effect of

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The other citizen commissioners in the Majority are also ideologically opposed to extending rights to gay and lesbian couples. Commissioner Scott Earnshaw heads New Hampshire's Traditional Marriage and Family Institute (TMFI) which has circulated a petition urging New Hampshire's citizens to oppose any form of legal recognition for same- sex couples. See Beverly Wang, "Some wonder if gay marriage commission will find its feet," Associated Press, May 8, 2005; TMFI petition available at: http://www.nhcornerstone.org/downloads/ Marriage_petition-102105%20_2_.pdf. Commissioner Jack Fredyma filed an amicus brief to the Massachusetts Supreme Judicial Court in GLAD v. Attorney General, 436 Mass. 132 (2002), arguing that consensual conduct in private between adults of the same sex should be a "crime against nature." Moreover, in March 2004, Commissioner Fredyma wrote a letter to the editor in support of the passage of SB427 that eerily forecasts many of the exact findings now embraced by the Majority. See Jack Fredyma, Portsmouth Herald (April 16, 2004), available at http://www.seacoastonline.com/2004news/04162004/letter_t/10920.htm.

[6] See Daniel Barrick & Meg Heckman, Gay marriage panel scores big surprise, Concord Monitor, October 9, 2005. The proponents of the constitutional amendment openly admit that the proposal has more to do with election year politicking than with its substantive merits. See Daniel Barrick, Proposed gay marriage ban faces high hurdle, Concord Monitor, October 7, 2005.

[7] See Lawmakers want civil union panel to get to work, Associated Press, February 2005.

spurring the Commission into action, the conservative majority continued to define and direct the proceedings.[8]

Not only was meaningful discussion of the issues absent from the Commission's deliberative sessions, but the Majority's report itself does not provide a springboard for an intelligent discussion of the issues on the part of the Legislature or New Hampshire's citizenry. For the most part, the Majority's report simply recites its conclusions. For the most part, the "evidence" on which its conclusions rest is either absent or misrepresented. For example, in at least three instances, the Majority has mischaracterized the testimony of witnesses supportive of positions taken by this Minority. It implies that Biologist Dennis Bobilya refuted any biological basis for same-sex sexual orientation when his testimony made clear that genetics and hormonal components combine with a variety of other factors to influence a person's orientation.[9] The Majority implies that Dr. Ellen Perrin, a renowned child development expert, testified in favor of the Majority's conclusion that child-rearing data is too inconclusive to support the extension of legal recognition of same-sex parents when her testimony unequivocally refuted that notion.[10] It implies that Historian Nancy Cott testified in favor of regulating marriage to exclude same-sex couples based on religious grounds when, instead, her testimony made clear that the civil institution of marriage is separate from religious marriage and that the historical evolution of marriage would support the inclusion of same-sex couples and make the institution itself all the more resilient.[11] Moreover, in advancing its ideology concerning the optimal environment for the rearing of children, the Majority fails to cite a single study that would allow the Legislature or the citizens of New Hampshire to verify its conclusions or weight their relevancy.[12]

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[8] For example, at the first substantive meeting of the Commission on April 4, 2005, the Chairman arrived forty-five minutes late and created a political sideshow by refusing to recognize the new Governor's appointee to the Commission, Raymond Buckley, an openly gay man. See Beverly Wang, "Same-sex marriage commission gets to work," Associated Press, April 4, 2005. At the second meeting, the Majority surprised the Minority with a belated announcement that it would accept public testimony -- after having agreed not to -- and invited the purposefully stacked audience of equal marriage opponents to dominate the proceedings. Most recently, in framing its report, the Majority defined, over the Minority's,objections, a schedule that compromised the ability of the Minority to address the findings of the Majority. Under this schedule, the Majority committed to release its "final" report to the Minority on Friday, November 18, 2005, and granted the Minority only one week to respond. Perhaps not coincidentally, the week granted to the Minority fell over the Thanksgiving holiday, and the report finally tendered (after business hours on November 18th) was merely a draft.

[9] Compare Majority Report V(C) with Testimony of Dennis Bobilya on September 12, 2005.

[10] Compare Majority Report V(D) with Testimony of Dr. Ellen Perrin on September 12, 2005 ("There is ample evidence to show that children raised by gay and lesbian parents fare just as well as those raised by heterosexual parents.").

[11] Compare Majority Report VI(B)(G) with Testimony of Nancy Cott on September 19, 2005.

[12] See Majority Report V(D).

Tellingly, the Majority did not invite any economists to the Commission to discuss the economic effects of either recognizing, and alternatively not recognizing, the relationships of same-sex couples, though the economist proffered by this Pro-Equality Minority, M.V. Lee Badgett, performed ably in this regard. The Majority did not invite any legal experts to examine New Hampshire's legal and constitutional landscape as it applies to same-sex couples married in other jurisdictions, though conflicts of law professor Barbara Cox helped to fill that gap. Though the Majority purported to respect history and tradition, it invited no historians to testify before the Commission, though Harvard history professor Nancy Cott, proffered by this Pro-Equality Minority, provided the sorely needed historical context. Moreover, the Commission did not invite any persons expert in state programs and processes like vital records, Healthy Kids, taxation, insurance, or business regulation to talk about the effect recognition of same-sex couples would have. Thus, when it came time for the Majority to propose the possibility of extending some protections to same-sex couples, commissioners in the Majority offered these justifications for not extending even a meaningful fraction of the protections and obligations automatically available through marriage:

> Areas selected do not involve areas of regulation that are complex, require large-scale legislative review, and require overhaul of existing public systems.
> …
> Areas selected must not involve regulation of commerce that are complex, require large scale legislative review, and require overhaul of practices [sic] private employers, small business, and other institutions that will effect economics of the State and financial growth of private enterprises.[13]

Even a cursory review of the reports commissioned by other legislative bodies reveals that New Hampshire's Majority Report fails mightily by neglecting to address the legitimate issues it was charged with studying.[14]

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[13] See "Statement on Hawaii Model for Reciprocal Benefits for Classes Persons That Cannot Marry In NH," a document presented by Commissioner Maureen Mooney on October 31, 2005. This document undergirds the recommendation by a subset of the commissioners in the Majority to provide a small sliver of marital protections to same-sex couples and siblings.

[14] No public body that has studied the questions presented to this Commission has so comprehensively ignored the harms encountered by same-sex couples or anchored its analysis on bias and junk science. By way of comparison, the Minority note: (1) The 1995 report of a Hawaii Study Commission on Marriage for Same-Sex Couples, which recommended that same-sex couples be allowed to marry and obtain all the benefits and obligations of marriage, available at http://www.hawaii.gov/lrb/rpts95/sol/soldoc.html; (2) the Connecticut Office of Legislative Research

There is no doubt that the Majority -- and thus this Commission as a whole -- has lost an opportunity for a meaningful legislative contribution to protecting families in New Hampshire as they exist today. We in this Pro-Equality Minority will try to salvage what remains of this opportunity and report the basis for our conclusion that the State of New Hampshire is not presently meeting its obligations to its gay and lesbian citizens. Rather than follow the Majority's lead in asking the Legislature to withdraw protections from some of New Hampshire's citizens, we urge the members of the Legislature to abide by their oath to uphold our present constitution.

II. COMMON GROUND

While our conclusions are diametrically opposite those of the Majority, there is sufficient consensus about the factors that should dictate the outcome here – whether as a matter of policy or constitutional command.

We all agree on the Legislature's role in our body politic: to act for the public health and welfare, guided always by the constitutional promises of equality and liberty for all. The constitutional landscape in New Hampshire and under our federal system requires the equal liberty of all citizens. It rejects the notion that there are classes of citizens entitled to more or less from their government than their neighbors.[15] Nonetheless, the Majority seeks to upend that bedrock principle and enshrine classes into law by virtue of a proposed amendment to the New Hampshire Constitution denying the legal rights of marriage to gay and lesbian couples.[16] Moreover, its conduct over the last 19 months suggests it has failed to accept the basic citizenship of gay people by deliberate attempts to pathologize gay people and families.[17]

The importance of marriage in the laws and traditions of New Hampshire citizens is another source of common ground between this Pro-Equality Minority

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has presented over 30 reports on the topic of same-sex relationships, which reports can be found at http://www.cga.ct.gov/olr/samesexrelationshipER.asp; (3) the 1998 Colorado Commission on the Rights and Responsibilities of Same-Sex Relationships recommended that same-sex couples be extended parallel marital rights and responsibilities, see Peggy Lowe, Rights for Gay Couples Backed: Colorado Report Urges Legal Framework, The Denver Post (July 8, 1998), A-1; and (4) the 2004 comprehensive report of the New York State Bar Association analyzing marriage for same-sex couples, available at http://nysba.org/Content/ ContentGroups/Reports3/Same-Sex_Marriage_Report/Same-SexIssuesReport2004.pdf.

[15] See Section II (A).

[16] See Majority Report, VI (B).

[17] See, e.g., Majority Report, V (C) (affirmatively citing testimony to the effect that "homosexual acts" are "biologically unnatural").

and the Majority.[18] There is no substantive disagreement about the historical and legal context that frames this discussion. For our state's entire history, marriage is and has been a government institution separate and distinct from religious marriage (or more accurately, the religious rite of marriage). See Section II (B)(1). In addition, we all agree that the legal institution has changed over the years to reflect our society's changing conceptions of equality, whether with respect to ending race or sex discrimination in marriage. See Section II (B)(2). As a legal institution, marriage is simultaneously many things. It is one of our society's basic civil rights – equally available to all who are of the proper age, are not presently married, and are not closely related. See Section II, (B)(3) below. More concretely, marriage is also a legal framework and gateway to public and private legal protections for families, many of them extended exclusively to married families. See Section II (B)(4). We in the Minority believe the overwhelming weight of history, law and policy favors one conclusion: it is time to stop denying the legal rights of civil marriage to same-sex couples, and we address each of the Majority's alleged concerns in Section IV of this Minority Report.

A. Equal Liberty.

The starting point for this Commission -- as well as for our Legislature -- is the powers and duties of each branch of government, as explicated in the constitutions of this State and of the United States. Those documents, ratified by the people of this state and of the United States, are both a source and constraint of power. Under New Hampshire law, each of the three branches of government has limited authority to exercise action on behalf of the sovereign people[19] and "[i]t is [the Court's] constitutional duty…to review whether laws passed by the legislature are constitutional…"[20]

Of particular concern to this Commission is the legislative power. "Part II, article 5 of the Constitution of New Hampshire provides that the 'general court' or legislature may pass all reasonable laws, subject to one powerful proviso--that 'the same be not repugnant or contrary to this constitution.'" N.H. CONST. pt. II, art. 5 (emphasis added)." State v. LaFrance, 124 N.H. at 176. Because all actions of the Legislature must be guided by the higher law of the constitution, each member of

[18] See Section II (B).

[19] State v. LaFrance, 124 N.H. 171, 176 (1983).

[20] Baines v. N.H. Senate President, 152 N.H. 124, 129 (2005). See also State v. Farrow, 118 N.H. 296, 305 (1978) ("The function of the legislature is to make the law; the function of the judiciary is to interpret the law and apply it."); In re Opinion of the Justices, 85 N.H. 562, 154 A. 217, 223 (1931) ("The executive department is the active agency to carry laws into effect and enforce them.").

the Legislature must, consistent with their oath, support and defend the constitution. Id. ("It is the constitution that all officials take an oath to uphold, and that governs all of our actions.").

1. The State Constitution.

The detailed provisions in both documents (i.e., the state and federal constitutions), both ratified by the people, state a foundational commitment to equal justice under law. These documents state no exceptions: they do not say equality is for all people, except gay and lesbian people.[21]

As to liberty, for example, Part I, article 2 of the New Hampshire Constitution acknowledges and protects rights inherent to all of us:

> All men have certain natural, essential, and inherent rights – among which are, the enjoying and defending of life and liberty; … and, in a word, of seeking and obtaining happiness.

These rights include the right to raise and care for one's child, In re Kerry D., 144 N.H. 146 (1999), the right to privacy, In re Caulk, 125 N.H. 226, 229-30 (1984), and the right to use and enjoy one's property, Buskey v. Town of Hanover, 133 N.H. 318 (1990).

In addition to these due process or liberty rights, our constitution zealously safeguards the guarantee of equal treatment under the law:

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for

[21] While the government, particularly the legislature, routinely engages in classifying and line drawing to determine eligibility for government programs and the like, it must always have at least a legitimate state interest for doing so, and the classification drawn must be at least rationally related to serving that interest. See Cargill's Estate v. City of Rochester, 119 N.H. 661, 667 (1979) (recognizing that "[a]ny statute that confers either benefits or burdens necessarily creates a class of persons who may be worse off as a result of the legislation than they would have been without it" and that such line drawing is a legislative function); Merrill v. City of Manchester, 124 N.H. 8, 14-15 (1983) (explaining constitutional review). Moreover, assuming that the many cases holding marriage to be a "fundamental right" apply in this context, then the state restriction on marriage eligibility require even more weighty state interests and the wholesale exclusion of gay people must more demonstrably serve those interests. See also, Petition of Hamel, 137 N.H. 488, 490 (1993) ("We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy, or affects a fundamental right."). For the reasons set out in Section IV below, we think that New Hampshire has no legitimate interest in denying the legal rights of marriage to same-sex couples.

> the private interest or emolument of any one man, family, or class of men; …. N.H. Const., Part 1, art. 10

.An additional, and more recent equality guarantee also provides:

> Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin. N.H. Const., Part 1, Article 2

.As Professor Emeritus Richard Hesse explained to the Commission: "the clear meaning of the equality provisions of the constitution is that the State may not withhold benefits from some of its citizens while conferring those benefits on others." See also Gazzola v. Clements, 120 N.H. 25, 29 (1980).

2. The Federal Constitution.

Binding on us is the United States Constitution's pledge to equal protection of the laws and due process of law. U.S. Const., amend. 14. Two decisions of the United States Supreme Court in the last ten years confronted state measures singling out gay people for unfavorable treatment. Each time, the U.S. Supreme Court stood squarely on the side of liberty and equal citizenship and struck the offending laws. Those cases, and the principles that underlie them, are the direction our country will and must take no matter how determined any group, such as the Majority of this Commission, is to create a "gay exception" to the Constitution.

a. Romer v. Evans.

The Romer v. Evans[22] case struck down a Colorado constitutional amendment that banned state and local governments from enacting any laws or policies that prohibited discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[23] The U.S. Supreme Court held that the amendment was "a denial of the equal protection of the laws in the most literal sense."[24] Writing for a 6-member majority, Justice Kennedy began with a declaration of the equal citizenship rights of all of us, including gay people:

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[22] Romer v. Evans, 517 U.S. 620 (1996).

[23] Romer, 517 U.S. at 624.

[24] Romer, 517 U.S. at 635.

> One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Plessy v Ferguson… Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and … requires us to hold invalid a provision of Colorado's Constitution.[25]

The Court's reasoning condemning the measure springs from the declaration of equal citizenship. Among the measure's constitutional flaws were that it imposed "a special disability" on gay people, who alone "are forbidden the safeguards that others enjoy or may seek without constraint" and does so "no matter how local or discrete the harm, no matter how public and widespread the injury."[26] We take from this that when we take the drastic step of proposing a change to our fundamental charter and compact with our citizens, that we must not do so in a way that explicitly or implicitly singles out classes of citizens and denies them the rights that the rest of us take for granted.

The U.S. Supreme Court in Romer was also concerned about how the amendment could be interpreted, and that it could deprive "gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[27] We, too, are concerned about how any amendment abridging our basic compact of fairness for all could be interpreted by public and private actors, and the burdens both of uncertainty and stigma that it would impose on same-sex families.

Finally, the nature of the law, *i.e.*, one denying rights,

> raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.[28]

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[25] Romer, 517 U.S. at 623.

[26] Romer, 517 U.S. at 631.

[27] Romer, 517 U.S. at 630.

[28] Romer, 517 U.S. at 634.

Could it be more obvious that when we bring to bear the awesome power of the state, we must do so on an even-handed basis, leaving our discomfort with or even "animus" toward others at the state house door? This proposed amendment would cause great harm, including heaping stigma on our gay, lesbian, bisexual and transgender citizens and their families.

Without a legitimate purpose, the Colorado amendment, like the amendment proposed by the Majority, "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[29]

b. Lawrence v. Texas.

In 2003, the U.S. Supreme Court decided another watershed case of enormous relevance here. In Lawrence v. Texas, the Court faced a law that made some forms of sexual intimacy a crime for same-sex couples but not for others.[30] Texas said it had passed the law to uphold its sense of "morality," a morality that obviously only applied to gay people.

The Court could not have been more emphatic in its rejection of the Texas law and the state's attempted justification of it. The Texas law attempted to "control a personal relationship" that people have the liberty to choose "without being punished as criminals."[31] For that reason, the Court went out of its way to overrule Bowers v. Hardwick,[32] a 1986 decision that had cast as "facetious at best" the claim that gay people have the right to equal dignity and equal respect in their relationships, as "not correct when it was decided, and … not correct today."[33]

By overruling Bowers, the Court was eliminating it, root and branch, from our constitutional conception of equal liberty under law for all, including for gay people. The flaw in Bowers, the Court said, lay in its crabbed conception of the liberty at stake. The liberty protected by the Constitution allows individuals to choose to enter relationships with people of the same sex "and still retain their

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[29] Romer, 517 U.S. at 635.

[30] Lawrence v. Texas, 539 U.S. 558 (2003). Five members of the Court joined the majority opinion. Justice O'Connor concurred in the result on different grounds. 539 U.S. at 579 (O'Connor, J, concurring).

[31] Lawrence, 539 U.S. at 567.

[32] Bowers v. Hardwick, 478 U.S. 186 (1986).

[33] Lawrence, 539 U.S. at 578.

dignity as free persons."[34] Gay people "are entitled to respect for their private lives."[35] Using a Due Process analysis, and weighing Texas' law against the constitutional protection of those relationships, the Court held that the Texas law furthered no legitimate purpose -- including selectively applied morality -- that could "justify its intrusion into the personal and private life of the individual."[36]

We readily acknowledge that the Lawrence court was addressing a claim about the state's power to "control a personal relationship" through the criminal laws and that the case did not squarely raise or decide the issue of marriage. At the same time, we note that the Court specifically included gay people within the circle of those who are free to make personal and relational decisions that are normally accorded constitutional respect, a point Justice Scalia treated with alarm concerning marriage in particular.[37] The Court stated:

> [O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
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> > '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.'
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> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[38]

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[34] Lawrence, 539 U.S. at 567.

[35] Lawrence, 539 U.S. at 578.

[36] Lawrence, 539 U.S. at 567, 578.

[37] Lawrence, 539 U.S. at 590, 601 (Scalia, J., dissenting).

[38] Lawrence, 539 U.S. at 574 (internal citations and quotations omitted)(emphasis added).

3. The New Hampshire Constitution and Romer and Lawrence Together.

It speaks volumes that these cases reached the United States Supreme Court and that both were decided on principles of equality and liberty under law applicable to all of us. In both instances, the U.S. Supreme Court ruled that the government may not enact laws to disadvantage gay people. The fact that issues specific to gay people and families are also now a staple in our state, as well as in the legislatures and courts of other states, all counsel that we are all players in an unfolding chapter of New Hampshire and American history. This chapter of history addresses whether or not we will acknowledge that gay and lesbian people are among "we the people"[39] and that like all others, gay people have natural and inalienable rights, and a right to equal treatment under law. It bears repeating: our state and federal constitutions do not promise equality and liberty for all except gay and lesbian people. Ironically, it is perhaps because the Majority and Pro-Equality Minority agree on this point that the Majority has proposed a constitutional amendment to re-write the rules and deny to New Hampshire's gay and lesbian citizens that foundational right promised by our government and ratified by our citizens.

B. The Civil Nature, Historical Context, and Legal Dimensions of Marriage.

We all agree that marriage is a vitally important legal and social institution. As our high court stated recently, "There are few, if any, relationships more respected and important than marriage…"[40] As a civil institution, it belongs to all of us. As a corollary, religious faiths may set their own terms for marriage within their faith traditions.[41] As an historical and social institution, marriage acknowledges the existence of families and protects those families precisely because others understand and respect the institution of marriage. That institution has changed legally and socially to reflect our evolving notions of fairness and equality.[42] The choice of marital partner is a protected constitutional right, in large part because for many individuals, the choice of partner is a critical part of one's self-definition and an expression of deep personal commitment and fidelity to

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[39] This point was made eloquently by Commission witness, the Honorable Byron Rushing, a state representative in Massachusetts, in his testimony on September 19, 2005.

[40] State v. Pelletier, 149 N.H. 243, 247 (2003).

[41] See Section II (B)(1).

[42] See Section II (B)(2).

another person[43] that has no substitute.[44] Making concrete its unique legal and cultural status, marriage is also the gateway (under both state and federal law) to a vast architecture of rights, benefits and obligations that protect couples and their children. Protections provided through marriage consist of far more than a package of legal and economic benefits, important as they are. Those protections themselves reinforce that the marital couple is in a uniquely loving and committed relationship.[45]

1. Civil Marriage.

The foundations and reality of marriage as a legal matter means our Commission must be solely concerned with the civil law and not the religious practices or religious teachings of any group of citizens. Marriage has always been a civil matter in New Hampshire.[46] According to historian Nancy Cott,

> Although marriage is often thought of as a religious institution, in fact, marriage in the United States has always been authorized by civil law. To be sure, marriage is invested with religious significance for many Americans. Though religious bodies may wish to impose their views of what marriage is and should be on the broader society, marriage in the United States has always been a legal status, an institution authorized by civil law and controlled by state authorities to serve the purposes of civil society.[47]

At the same time, state licensing of marriage does not impair the religious autonomy of any church or religious faith. Every religious faith remains absolutely free to decide whom to marry within that faith and on what terms because of strong state and federal constitutional guarantees around religious freedom. U.S. Const.,

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[43] As the Lawrence court stated, reducing the personal rights at issue in that case to a right "to engage in sodomy" is just as "demean[ing] as saying "marriage is simply about the right to have sexual intercourse." Lawrence, 539 U.S. at 567.

[44] See Section II (B)(3).

[45] See Section II (B)(4).

[46] The government has long recognized the civil nature of marriage, most often referring to it as a "civil contract." See, e.g., Clark v. Clark, 10 N.H. 380, 1839 WL 1476 at *3 (1839); Heath v. Heath, 84 N.H. 419 (1932); Gatto v. Gatto, 79 N.H. 177 (1919) ("marriage is deemed to be a civil contract, and not a sacrament").

[47] Testimony of Professor Nancy Cott on September 19, 2005.

1st amend.; N.H. CONST. Part 1, arts. 5 and 6.[48] In fact, eligibility to marry within some faiths is more restrictive than state law eligibility. For example, some faiths reject interfaith marriages or re-marriages after divorce. Even so, an atheist can marry in a civil ceremony if otherwise qualified.

2. Marriage Law Reflects Changing Conceptions of Equality and Social Norms.

As Professor Cott's testimony also highlighted, marriage "in the United States has been a flexible rather than a static or immutable institution."[49] While changes were often greeted with dismay, they were necessary "to reflect changes in society at large" and "to preserve the value and relevance of marriage in our dynamic society." Although marriage has changed in many ways, there are three types of changes that demonstrate the enormous shifts within the institution to "reflect and embody societal norms": (a) women's status within marriage; (b) racial regulation of marriage; and (c) divorce. We think this testimony provides critical context for the current debate and thus quote and paraphrase it at some length.

a. Women's Status within Marriage.

Considering the status of women in marriage requires looking back to our country's inheritance of the European "coverture" system. In that system, "marriage law was based on the legal fiction that married couples were a single entity, with the husband serving as the legal, economic and political representative of that unit." Under coverture,

> husbands and wives could not enter into enforceable agreements between themselves, because the wife had no separate legal existence. According to law, married women could not own or dispose of property, earn money, or sue or be sued in their own name. This legal regime reflected society's view of the marital couple as a unit naturally headed by the husband, a view that, in turn, reflected society's views about the

[48] Concerns for people whose faiths oppose marriage for same-sex couples will be addressed in Section IV (A)(5) below.

[49] All quoted material in this section is taken from the written testimony of Professor Nancy Cott to this Commission, unless the text or context indicates otherwise.

proper role of men and women in society.

During the Industrial Revolution in,

> the 1800s, with women increasingly making their own voices heard and needing to earn wages, the notion that married women had no legal individuality apart from their husbands began to clash with the realities of the developing society. Rather than view marriage as immutable in definition, courts and legislatures altered marriage rules to take account of spouses' actual relationships with each other and society. Coverture, which had for hundreds of years been understood as basic and essential to marriage, was eliminated.

Specifically in this state, "[t]he rule of coverture was rejected by the New Hampshire legislature as early as 1846 (Acts 1846, c. 347, 1846 Comp St. ch. 158, sec. 15; Laws, June session, 1846, p. 308), with the first married women's property act. This had the effect of recognizing married women as legal and economic individuals." Changing the legal notion that the husband and wife were one "was seen by opponents as causing an absolute revolution in marriage. Nonetheless, by 1890, the New Hampshire high court asserted that 'it is not open to question that the tendency of legislation in this state for many years has been to put the husband and wife upon an exact equality before the law.' Seaver v. Adams, 66 N.H. 142, 19 A. 776 (1890)." It took many efforts by the courts and the Legislature to change all of the laws necessary to make marriage an equal partnership with mutual and identical rights and responsibilities between the parties.

b. Racial Regulation.

Racial regulation of marriage is particularly prominent with respect to eligibility to marry:

> Before the emancipation of slaves in the United States, slaves could not legally marry…[S]laves could not marry because they lacked all civil rights and did not have the legal capacity to consent…But even after emancipation, most states still had laws prohibiting marriage between a white person and a person who was defined as a Negro or mulatto. New Hampshire was unusual in never having such a law – for these laws were

> widespread, existing in forty-one states or territories for some time in their histories. In addition to laws preventing white people from marrying either Negroes or mulattos, some states also had laws about criminalizing marriages between white people and Native Americans, or, in some Western states, Asians of certain descriptions. These laws were justified on several grounds, but were usually said to enact what nature or God dictated and to prevent "corruption" of the institution of marriage.

They were also seen as "an intrinsic part of marriage law." A variety of forces led to change in this area. First,

> over time, these laws were deemed to be based on invalid cultural stereotypes and inconsistent with the equal rights of non-whites. In addition, laws restricting interracial marriage were seen as antithetical to the concept of marriage as founded on consent and choice. The right to marry was determined to be a fundamental civil right. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942). California was the first state to find that restrictions on interracial marriages were unconstitutional. In 1948, the California Supreme Court recognized that the right to marry is a "fundamental right" that is "essential to the orderly pursuit of happiness by free men," Perez v. Sharp, 32 Cal. 2d 711, 714 (1948), and therefore struck down that state's legislation banning interracial marriage. The Perez case sparked debate in other states about whether marriage laws should be changed to reflect society's evolving views about racial equality. Eventually, in 1967, the U.S. Supreme Court struck down all laws banning interracial marriage in Loving v. Virginia, 388 U.S. 1 (1967). "[In so doing], the Supreme Court decision overturned a custom and legal practice in marriage that had been in place for three centuries, since its origin in the American colonies. Affirming that freedom of choice of one's partner was basic to the civil right to marry, the Court strengthened and validated the institution of marriage within

society."[50]

c. Divorce Regulation.

According to Professor Cott, "[t]he laws regulating divorce also have evolved to reflect society's views about equality of the sexes and about marriage as an embodiment of choice and consent." Expansion of divorce laws,

> was hotly debated all through the nineteenth century. Critics viewed divorce as anathema to the institution of marriage, and major religions opposed divorce entirely or accepted only adultery as justification for divorce. Proponents of legal modes of divorce did not intend to undermine marriage, but rather sought to preserve and protect it by establishing rules designed to ensure that people did what they were supposed to do in a marriage, i.e., that they fulfilled the obligations that society expected of a husband or wife. Proponents also wanted to provide a vehicle for legal separations, rather than countenance informal desertions and marital breakups that occurred in the absence of divorce laws.

The idea of marriage as "a civil matter joined by consent" lay at the heart of expansion proposals:

> Some Protestant leaders as early as the sixteenth century believed that if one party in marriage was not observing the contractual obligations, the contract ought to be able to be terminated. Most American states allowed divorce soon after the American Revolution. Divorce originally was an adversarial proceeding, which recognized that state authorities had set the terms of valid marriage. To obtain divorce one spouse had to show in court that the other spouse, the guilty party, had broken the terms the state set -- by deserting, for instance, or failing to provide, or committing adultery. Divorce

[50] For many years, New Hampshire prohibited marriage of persons of specified ages who were "epileptic, imbecile, feeble-minded, idiotic, or insane." Patey v. Peasley, 99 N.H. 335, 337 (1955). The New Hampshire Supreme Court made clear the purpose of these laws: "The object of the statute is merely to prevent procreation by the feeble-minded." Lau v. Lau, 81 N.H. 44, 122 A. 345, 346 (1923). The Legislature repealed its regulation of epileptics in 1959, Laws ch. 99 (repealing RSA 457:16a-16e), and its prohibition of marriage for people with mental incapacities in 1975. Laws 1975, ch. 69:1.

> grounds expanded gradually, as states recognized that people were breaking up their marriages for many reasons: states wanted to set the terms of separation to make things more orderly and to have some control over post-divorce support obligations.

As divorce became more common during the twentieth century, "some spouses whose marriages had simply broken down on both sides began colluding to make it look as if the requisite conditions had been met." Rather than create fictitious adversarial proceedings,

> [t]he move to 'no-fault' divorce in the 1960s and 1970s intended to bring the law into synch with what was happening in practice. With no-fault divorce, the couple gets to say what the reasons are that the marriage ought to end. This approach was quickly embraced as a way to deal honestly with marital breakdown. By 1977, all but three U.S. states had adopted some form of no-fault divorce, reflecting society's ascendant view that spouses themselves should judge how adequately they were fulfilling their marital roles. This represented a vast change from the nineteenth century view, in which the state's requirements were the determinant in the question whether a marriage might end. The state now leaves it up to the spouses whether they want the marriage to continue. Notably, the state is still involved in approving the separation terms and making sure that children, especially, will still have means of support.

Although many assume that our present experience with the institution of marriage is the same as those of our parents and grandparents, history reveals that marriage has been in constant evolution, taking into account shifting societal attitudes and changing needs of families. All of the elements that were once considered essential or natural to a marriage (that women be subservient to men; that it be lifelong; that it be between people of the same race) have fallen away based on our growing respect for equality and individual freedom. It is clear that marriage has changed from an institution that literally required one man and one woman in order to be complete (coverture) to an institution of legal equals with identical, reciprocal and mutual rights and responsibilities. Each of these changes were radical in their time and were accompanied by unfounded claims that the alteration would lead to the death of marriage itself. But as Professor Cott's

testimony shows, just as change has been a fact of marriage law, so is marriage's resilience a cultural fact.

3. An Individual's Choice to Marry the Person of His or Her Choice is a Protected Constitutional Right.

The right to marry, including the right to choose one's martial partner, is an essential and inherent right -- meaning that it is "fundamental" -- under federal constitutional principles of liberty. As such, it may not be abridged by the state without a compelling state interest. The view that the right to marry is a fundamental liberty interest has a long history in American law.[51] The California Supreme Court became the first in the nation to strike a law prohibiting interracial marriage as violating the fundamental right to marry under the federal constitution nearly twenty years before the Supreme Court's unequivocal declaration of marriage as a fundamental right in Loving.[52]

Although the Majority challenges whether gay people may invoke this same fundamental right to marry in support of their claim to marry someone of the same sex,[53] it is beyond argument that marriage is an institution that implicates the most personal and intimate decisions and relationships in our society.[54] Whether and whom to marry, expressions of personal intimacy, and whether and how to establish and maintain a family are basic liberties. See Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals"); Turner v. Safley, 482 U.S. 78, 95-96 (1987) (ruling that the right to marry applies to prisoners). State courts throughout the country have similarly found that the right to marry is

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[51] Beginning with Meyer v. Nebraska, 262 U.S. 390 (1923), a line of cases placed the "right to marry" as a liberty interest "essential to the orderly pursuit of happiness by free men." Id. at 399. See also Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage characterized as "the foundation of the family and of society, without which there would be neither civilization nor progress"); Skinner v. State of Oklahoma, ex. rel. Williamson, 316 U.S. 535, 541 (1942) (characterizing marriage as "fundamental to the very existence and survival of the race"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred… it is an association for as noble a purpose as any involved in our prior decisions.").

[52] See Perez v. Sharp, 198 P.2d 17, 18-19 (Cal. 1948) ("Marriage is…more than a civil contract …; it is a fundamental right of free men.").

[53] See Majority Report, V (B).

[54] In Section IV (A)(2) below, we address the Majority's unfounded assertion that the fundamental right to marry does not apply to gay men and lesbians.

fundamental and protected under state constitutional provisions that contain language similar to the New Hampshire Constitution.[55]

These cases powerfully demonstrate that the mutual love, respect, commitment, and intimacy that define the marital relationship are integral to the dignity and happiness of couples and are valuable to society as a whole. Direct state intrusion into these core decisions inevitably impose an intolerable indignity on an individual. As both the U.S. Supreme Court and other courts have made clear, the constitutional right to privacy and autonomy, of which the right to marry is a part, is a recognition that some decisions are so intimate and so central to human dignity and individual identity that they must be protected from undue government interference.[56]

4. Marriage is the Gateway to Tangible Rights and Responsibilities That Help Stabilize Couples and Families and Leave Families Without Access to these Protections Legally, Financially, and Socially Vulnerable.

Marriage is not just about ideals of love, commitment, and personal responsibility. It is an enormous legal institution -- it is our major legal institution for recognizing and protecting families. Marriage conveys a unique legal status recognized by governments and private entities around the world and is the gateway to tangible protections and responsibilities. At the federal level, there are at least 1,138 laws in which marital status is a factor.[57] Similarly, the State of New Hampshire treats married people different from single people when it comes to protections and responsibilities available under state law.

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[55] For example, the Texas Appeals Court found a right to marry under a constitutional provision strikingly similar to Part I, Article 10. See Bailey v. City of Austin, 972 S.W.2d 180, 189 (Ct. App. Tex. 1998) ("Under both the federal and state constitution, the freedom to marry is recognized as a fundamental right."). Similarly, a Louisiana Appellate Court ruled that the state and federal constitutions "recognize the fundamental liberty interest or right of personal privacy in decisions relating to marriage..." Reinhardt v. Reinhardt, 720 So. 2d 78, 79 (La. App. 1st Cir. 1998).[55] See also Beeson v. Kiowa County Sch. Dist., 567 P.2d 801, 805 (Colo. Ct. App. 1977) (finding public policy that "the creation of a 'marriage relationship' is a fundamental right in this jurisdiction"); Fabio v. Civil Service Comm'n of Pennsylvania, 489 Pa. 309, 323 (1980) (constitutional right to privacy encompasses activities relating to marriage);[55] In re Appeal of Alfie Coats, 849 A.2d 254, 262 (Pa. Super. 2004) ("It is settled that marriage is a fundamental right under both the United States Constitution and the Pennsylvania Constitution"); In the Matter of Baby M., 109 N.J. 396, 447 (1988) (referring to the "rights of personal intimacy, of marriage, of sex, of family, of procreation," and declaring that "[w]hatever their source, it is clear that they are fundamental rights protected by both the federal and state Constitutions");[55] Boynton v. Kusper, 494 N.E.2d 135, 140 (Ill. 1986) ("[f]reedom to marry has been recognized as a fundamental right").[55]

[56] See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[57] A report issued by the United States General Accounting Office on January 23, 2004 reported "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges." See GAO-04-353R, Defense of Marriage Act, at http://www.gao.gov/.

a. Analysis of the Rights and Responsibilities Granted to Married Couples in New Hampshire.

The New Hampshire Attorney General's Office provided the Commission with a list of over 800 sections or subsections in the New Hampshire statutes that contain terms related to marriage, spouses or parenting ("marriage", "husband", "wife", "relative", "family", "spouse", "parent", "father", "mother" and "divorce"). A substantive analysis of New Hampshire statutes provided to the Commission by Gay & Lesbian Advocates & Defenders (GLAD), a non-profit legal rights organization, reveals a total of 399 New Hampshire statutory provisions in which rights and responsibilities are contingent on marital status or in which marital status is a factor in the allocation of rights, benefits and responsibilities under state law.

The Commission has not undertaken its own study of New Hampshire laws as they relate to and affect same-sex couples. Though charged with the obligation to "study all aspects of same sex civil marriage and the legal equivalents thereof, whether referred to as civil unions, domestic partnerships, or otherwise," SB 427, Chapter 100:2, Laws of 2004, the Commission has not, and cannot, report on the full range of protections available to married couples or on the myriad of ways same-sex couples and New Hampshire communities are harmed by denying same-sex couples access to these legal protections and obligations. It has speculated, based upon GLAD's analysis, that only 250 or so New Hampshire statutes provide express rights, privileges, or restrictions that relate to marriage and/or kinship and that only 200 or so provide advantages to married persons.[58] Whatever the count, one thing is clear: the vast majority of New Hampshire's statutory protections and obligations are simply off limits to gay and lesbian couples and their children absent marriage, even though these same protections and responsibilities are good for all families.

While analysis of the full range of these protections has been beyond the scope of the Commission's work to date, the ways in which New Hampshire law

[58] In crafting various proposals to extend to same-sex couples only a small sliver of the rights and obligations available to married couples, the Majority stated that some areas of that law were "complex" and "required large-scale legislative review" before same-sex couples could be granted rights and obligations associated with such areas of law. See, e.g., Statement on Hawaii Model for Reciprocal Benefits for Classes Persons That Cannot Marry In NH (presented by Commissioner Maureen Mooney for discussion on October 31, 2005). Of course, this was precisely the purpose of the commission.

treats married people different from single people breaks down into three basic categories.

b. The Law Protects the Deep Emotional Attachment and Commitment of Married Couples.

First, many protections recognize that people who marry form deep emotional attachments to one another that make it inappropriate to treat them as mere acquaintances or strangers. Examples of these types of protections include:

- A spouse has priority in determining how to dispose of the remains of a deceased spouse.[59]
- The right of a married person to bring a suit for loss of consortium against a person who has wrongfully injured his or her spouse for the loss of his or her companionship.[60]
- The right of a married couple, if both spouses are in the same nursing home facility, to share a room (unless medically contraindicated).[61]
- The right to a spouse to learn of the circumstances of a fatal motor vehicle accident involving his or her spouse.[62]
- The right of a surviving spouse to receive mental health services at the expense of the criminal defendant responsible for the spouse's death.[63]
- A surviving spouse's place as first in priority in a list of persons who can decide to make an anatomical gift, recognizing both that the surviving spouse is the person having the strongest claim to the remains of the deceased and that the surviving spouse is the person most likely to know what the deceased would have wanted if the 5 spouse had expressed his or her wishes during his or her lifetime.[64]

c. The Law Protects the Financial Interdependency of Married Couples.

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[59] NH Rev. Stat. Ann. §§290:11, 16. If a person had contracted for disposal of his remains before death, or if a guardian or conservator had been appointed before death, then that contract or appointment would take precedence over the surviving spouse. NH Rev. Stat. Ann. §290:17.

[60] NH Rev. Stat. Ann. §507:8(a)

[61] NH Rev. Stat. Ann. §151:21.

[62] NH Rev. Stat. Ann. §264:26.

[63] N.H. Rev. Stat. Ann. §651:62.

[64] NH Rev. Stat. Ann. §291-a:4.

The second category of protections is those acknowledging that people who marry form integrated economic units that make it inappropriate to treat them as separate. Examples of these protections include:

- The right of spouses of employees injured or killed on the job to receive dependency benefits from the worker's compensation system.[65]
- The ability of a married spouse to remain in the home following his or her spouse's death and to protect his or her spousal interest in the home from creditors.[66]
- The duty that husbands and wives owe to third parties for the necessary expenses for food, shelter, and medical care.[67]
- The assurance that pension and disability payments will continue for the spouses of state employees following the employees' deaths.[68]
- The multitude of protections a surviving spouse receives upon his or her loved one's death, including that a surviving spouse is entitled to automatically receive wages due to the deceased at time of death;[69] that a surviving spouse may receive support from the estate if the assets are sufficient to so provide;[70] that after estate debts and obligations are paid, if any surplus remains in the estate, the surviving spouse is entitled to receive an automatic share of the real and personal estate of the deceased spouse including one-third of the total estate if there are children and up to $20,000 plus one-half of the remainder if there are no children.[71]
- The divorce laws' recognition of both the intermingled financial relationships of married couples and the financial dependencies that often arise during marriage, including the requirement of equitable property division,[72] and the provision of alimony when a spouse lacks sufficient income to provide for reasonable needs.[73]
- Spouses have access to family health and auto insurance policies.[74]

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[65] N.H. Rev. Stat. Ann. §281-a:2 et seq.

[66] NH Rev. Stat. Ann. §§480:1-9, 477:27-29, 44.

[67] N.H. Rev. Stat. Ann. §§126-A:36, 165:19, 167:2, 167:28; 546-A:2, 639:4.

[68] N.H. Rev. Stat. Ann. §§ 100-a:1 et seq.

[69] N.H. Rev. Stat. Ann. §560:20

[70] N.H. Rev. Stat. Ann. §§554:19, 560:1.

[71] N.H. Rev. Stat. Ann. §560:10.

[72] N.H. Rev. Stat. Ann. §458:16-a.

[73] N.H. Rev. Stat. Ann. §458:19, 19-a, 21.

[74] N.H. Rev. Stat. §§ 21-I:26 (group insur.); 415:5 (accident and health insur.); 100-A:52 (retiree medical benefits); 407-B:3 (motor vehicles); 415:21 (catastrophic loss insur.); 420-A:1 (health insur.).

d. The Laws of Marriage Can Bring Additional Security to Children

The third category of marital protections recognizes that marriage is often the setting in which children are raised, and that the law should take account of that to assure the well being of children. While many of the benefits and responsibilities of parenting turn not on a person being a married parent but simply on being a biological or adoptive parent (whether or not the person is married), marriage establishes a framework through which spouses may secure their legal status as parents to a child, and provides economic and social stability that inure to the children of the marriage as well as to the spouses themselves.[75] The protections marriage provides include a married stepparent's ability to adopt a spouse's child,[76] which allows a legal relationship to form between the child and step-parent with concomitant protections to the child in the event of the death or disability of the stepparent, or in the event of divorce.

Beyond the establishment of a legal parental relationship, however, children of married parents benefit from employment benefits of their non-biological or non-adoptive parents, such as the ability of that parent to take leave to care for the child in times of illness, and the ability of that parent to obtain health insurance for the child.[77] Being married can also enable a parent who wishes to remain at home with the children to do so by providing access to health insurance for that parent through his or her spouse's employer.[78] A child born to married parents may gain inheritance rights upon the death of his or her non-biological parent, as well as access to social security survivor benefits.[79] Other laws provide survivor benefits to the spouse as well as the children of a marriage. Children of married parents have the security of the divorce laws, which guarantee a forum for determination of child support, as well as custody and visitation by the non-biological or non-adoptive parent.[80] Finally, children of married parents know that their family fits

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[75] N.H. Rev. Stat. Ann. §168-b:3, 4 and 9.

[76] N.H. Rev. Stat. Ann. §170-B:4. The same provision requires that when a married person petitions to adopt a child, the spouse must also consent to the petition. This provision appears to be designed to protect both the child (by making sure both adults in the home are welcoming) and the other spouse (to ensure obligations are not imposed upon him or her unwillingly).

[77] N.H. Rev. Stat. Ann. § 21-I:26 (state employees' families' access to group insurance); N.H. Rev. Stat. Ann. § 21-I:30-d (same); N.H. Admin. R. (Per.) 1204.05 (state employees' use of sick leave to care for dependent child).

[78] Id.

[79] N.H. Rev. Stat. Ann. § 561:1 (distribution upon intestacy); 42 U.S.C.A. § 402 (social security benefits).

[80] N.H. Rev. Stat. Ann. §§ 458:35 (orders for support, custody); 458-a:2 (divorce actions as custody proceedings).

within the common vocabulary of love and commitment that permeates our society. They know that their parents love each other just as much as their friends' parents, and are secure about their family's future.

e. Same-Sex Couples Cannot Obtain These Rights and Responsibilities In Other Ways.

Any two people, including gay and lesbian families, can protect themselves in part by executing certain legal documentation between the partners (e.g., wills, durable powers of attorney, medical authorizations, burial instructions). Carrying a briefcase of documents, however, fails to substitute for the automatic protections and peace of mind that a marriage certificate confers. People cannot contract their way into pension laws, survivorship rights, worker's compensation dependency protection, or the tax system, to name just a few. It is only through marriage that New Hampshire citizens can secure critical economic and legal protections for their families. In addition, the testimony before the Commission revealed that gay men and lesbians pay -- on average -- approximately $1,500 to obtain legal documentation that grants them only a handful of the protections available to married couples automatically.[81]

f. New Hampshire's Marriage Restrictions Places Federal Marital Rights and Obligations Off Limits.

By controlling access to marriage, the state of New Hampshire also controls access to federal benefits for married couples since the federal government generally defers to state laws on that point.[82] Though marriage for same-sex couples would not presently result in the extension of these rights and obligations under federal law because of a discriminatory law at the federal level,[83] it is also true that New Hampshire's refusal to allow same-sex couples to marry closes the

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[81] Moreover, many couples testified that the existence of a valid Health Care Power of Attorney or Medical Authorization were of little assistance to them when they needed access to their loved one in a medical emergency either because the forms were not immediately available during the unexpected medical crisis or because medical personnel were inconsistent in recognizing the legal authority conveyed by the documentation. See Section III (C) (1) below.

[82] See, e.g., 29 C.F.R. § 825.113 (providing family medical leave to spouse recognized by law of employee's state of residence); 20 C.F.R. § 404.345 (looking to state law to determine Social Security claimant's status as insured's husband or wife); 20 C.F.R. § 416.1806 (determining whether someone is married for purposes of Social Security Insurance based on law of home state).

[83] This discriminatory marriage law, known as the Federal Defense of Marriage Act, is now codified at 1 U.S.C. § 7 (definition of "marriage" and "spouse") and 29 U.S.C. § 1738C (purporting to exempt states from obligations under full faith and credit clause of U.S. Constitution). Many people believe that the federal law is unconstitutional and vastly exceeded the powers of Congress.

door on New Hampshire resident same-sex couples' abilities to access these federal marital rights and obligations at some point in the future. By denying marriage, the state places same-sex couples in a more disadvantageous position vis-à-vis federal law. As the Commission heard, the harms encountered under federal law include bread and butter issues like access to social security survivor benefits, immigration spousal sponsorship rights, the ability to transfer property between partners without tax consequences, the right to file joint tax return, access to the marital tax deduction for inheritance, and many others.

III. NEW HAMPSHIRE'S GAY AND LESBIAN FAMILIES: A PORTRAIT.

Today, we find ourselves in a debate about real families, real people, and real lives. From Census 2000, we know that same-sex couples live in 100% of all counties in New Hampshire (and in 99.3% of all counties in the United States).[84] See Testimony of economist M. V. Lee Badgett, Ph.D., University of Massachusetts Amherst, on September 19, 2005. There are at least 2,703 same-sex couples in New Hampshire, and one in four of these same-sex couples are raising a child under the age of 18 in their homes. Id. Though experts agree that the Census data undercounts the quantity of same-sex couples and their children,[85] at a minimum, more than 1,600 New Hampshire children live with parents in same-sex couples and that number is only expected to grow.[86]

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[84] David Smith and Gary Gates, Gay and Lesbian Families in the United States: Same-sex Unmarried Partner Households, (Wash., DC 2001), Human Rights Campaign Foundation, available at http://www.hrc.org/content/contentgroups/familynet/documents/census.pdf.

[85] It is estimated that the U.S. Census Bureau missed at least 16 to 19% of all gay or lesbian couples in the 2000 count. Badgett, MV L, & Rodgers, MA, Left out of the count: Missing same-sex couples in Census 2000, (Amherst, MA 2003), The Institute for Gay and Lesbian Strategic Studies. Available online at: http://www/igless.org/media/files/c2k_leftout.pdf.

[86] "Lesbian and gay adults choose to become parents for many of the same reasons heterosexuals do," including because "[t]he desire for children is a basic human instinct and ... may satisfy people's desire to provide and accept love and nurturing from others." See Ellen C. Perrin, M.D. & the Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents 109 Pediatrics 341, 341 (February 2002) available at http://www.aap.org/policy/020008t.html. The increase in the number of children raised by lesbians outside the context of heterosexual relationships has been well documented. See, e.g., Charlotte J. Patterson, Ph.D., Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex-Role Identity, in Contemporary Perspectives on Lesbian & Gay Psychology: Theory Research, & Application 156, 156 (B. Green & G. Herek eds., 1994) (citing numerous studies and noting that the numbers of lesbians bearing or adopting children in the context of their lives as lesbians are consistently described as growing); Charlotte J. Patterson, Ph.D., Family Relationships of Lesbians and Gay Men 1053, 1058 (2000).

Fortunately, New Hampshire has a history of recognizing the reality of its gay and lesbian citizens. See Section III (A) below. Moreover, this Commission's proceedings have revealed an even richer portrait of our fellow citizens. See Sections III (B) and (C) below. The composite picture that has emerged is this: New Hampshire's present law, including its on-going exclusion of same-sex couples from marriage, has worked a deep and scarring hardship on a segment of our society that has persevered in establishing strong, loving, and committed families in the face of a legal system that pretends they are legal strangers to one another. Sound public policy -- including our commitment to help and strengthen New Hampshire's families -- commands that New Hampshire remove the legal obstacles that create instability and stand in the way of these gay and lesbian families. Of course, our commitment to the constitutional principles of equality and liberty commands the same.

A. New Hampshire's Recognition of Its Gay & Lesbian Citizens.

Even a cursory review of how New Hampshire has interacted with its gay and lesbian citizens reveals that New Hampshire citizens know and embrace their gay and lesbian family, friends, and neighbors. Indeed, same-sex couples would not have fared as well as they have in the University of New Hampshire's polling on the extension of legal protections for same-sex couples but for the support of the New Hampshire citizens who have borne witness to the contributions these gay and lesbian citizens have made to our communities. For example, in 2004, a University of New Hampshire poll revealed that 55% of New Hampshire residents favor a law extending marriage rights to same-sex couples and, alternatively, 64% oppose a constitutional amendment banning states from issuing marriage licenses to same-sex couples. See University of New Hampshire Survey Center Poll, Residents support gay marriage, Associated Press (February 26, 2004); see also http://www.nhftm.org/news/poll04.html.

A similar University of New Hampshire poll in 2003 also revealed that 88% of New Hampshire residents believe that same-sex couples should have the same hospital visitation rights as close relatives; 85% say that a same-sex spouse should be allowed to make medical decisions for an incapacitated partner; 70% say that same-sex couples should have automatic inheritance rights without inheritance taxes; 68% say that same-sex couples should have the same pension and social security benefits as married couples; and 78% say that same-sex couples should be allowed family medical leave time for each other and their children. See University of New Hampshire Survey Center Poll, New Hampshire Residents

Favoring Law for Same-Sex Marriages, The Associated Press (May 23, 2003); see also http://www.nhftm.org/news/ PR_Poll_May03.htm.

Certainly, the New Hampshire Legislature has long recognized the reality of gay and lesbian people, and it has taken steps to end discrimination in discrete areas for these individuals. In 1990, New Hampshire became one of the first states to enact a law that imposed stiffer penalties on those convicted of a hate crime on the basis of sexual orientation. See HB 1299, An act relative to enhanced sentences for "hate crimes," Act 1990, ch. 68. In 1997, the Legislature enacted a comprehensive law that prohibited discrimination based on sexual orientation in employment, public accommodations and housing. See HB 412, "Amending the law against discrimination to prohibit discrimination on account of a person's sexual orientation," Acts of 1997, ch. 108. In 1999, the Legislature enacted a law to repeal the then-existing prohibition on gay men or lesbians acting as adoptive or foster parents. See HB90, "Removing the prohibition on adoption and foster parenting by homosexual persons," Acts of 1999, ch. 18.

In addition, the Legislature has not completely shut the door on the ability of non-married persons to obtain -- through admittedly cumbersome means -- a handful of the rights and responsibilities that are automatically extended to married persons. For example, same-sex couples can execute (1) a durable power of attorney for financial decision-making authority, under R.S.A. 506:6, to ensure that they can care for each other in the event that one of them becomes incapacitated; (2) a durable power of attorney for health care decision-making (and a living will), under R.S.A. 137-J and 137-H, to allow them to make medical decisions for each other when one of them becomes incapacitated, and (3) a declaration of final burial arrangements, under RSA 290:17, to allow the surviving partner to maintain custody and control of their partner's body and make final funeral arrangements.[87] In addition, with respect to parenting, a legal parent can pursue a co-guardianship proceeding, under R.S.A. 463:10, to enable the non-biological co-parent to act as

[87] Without these documents, New Hampshire law will ignore the reality of the partner's relationship to the incapacitated or deceased person and instead allow the legal "next of kin" or "family" to make the decisions. To further help establish their intentions vis-à-vis each other and the rest of the world, same-sex couples may choose to hold property as joint tenants with right of survivorship and may execute other documents like: (1) a "Nomination of Guardian" form to pre-empt guardianship proceedings by other family members under R.S.A. 506:7; (2) a "HIPPA Release" and "Medical Visitation Authorization" form in the hope that medical professionals will utilize their discretion to allow one partner to visit the other and talk with their health care providers about their non-incapacitated partner's care; (3) a co-parenting agreement to set out their intentions in providing for their child, even though there is no statutory basis for this agreement and it may not be given effect by a court; and (4) a will to work around the lack of intestacy rights and divergent preferences found in the probate statutes.

legal authority for the parent (on a non-permanent basis and subject to court-reporting requirements).[88]

This rich history reveals that New Hampshire has rightfully taken into account the legal, economic, and social harms that have befallen New Hampshire's gay community in the past. The Commission's present inquiry into how gay and lesbian families are faring in the state in the absence of marriage rights is simply the next chapter in that history.

B. The Portraits of LGBT Citizens.

Citizens of New Hampshire from all walks of life and from all parts of the state came forward to testify in support of recognizing the relationships of same-sex couples. Some testified as individuals -- whether gay or straight -- and some testified from the perspective of a couple – whether same-sex or different-sex. Others who testified were parents of gay children. Several ministers spoke in support of their gay and lesbian parishioners. The commitment of New Hampshire's citizens to fairness was clear.

1. Couples – Gay and Straight.

a. Married Heterosexual Couples.

Some of the strongest testimony the Commission heard came from heterosexual, married couples. They spoke to the genuine meaning of marriage as a lifetime commitment of love, respect, and care between two people. A persistent argument against allowing same-sex couples to marry is that this would somehow threaten or erode the institution of marriage. Many who testified disputed this perspective.

Bill Bilodeau of Keene testified:

> Personally, I see no way in which my family would be harmed if the gay pair down the street or two towns away that already live as a couple were suddenly allowed to marry or join civilly. My kids aren't going to come racing home from school in a

[88] For the reasons set forth in Section II (B)(4)(e) above, the availability of these limited opportunities to "lawyer" around some of the legal disabilities imposed on same-sex couples by virtue of their exclusion from marriage do not come close to rectifying (or justifying) that exclusion.

> tizzy or question the meaning of their existence because people they don't know (or maybe some they do) have a piece of paper saying their union is recognized by the state. They've been raised to know people are different in all sorts of ways, and that doesn't make any of them better or worse than others-just as they themselves aren't better or worse for their own unique qualities.
>
> My marriage certainly isn't going to become devalued because someone else is admitted to the "club" whose sexual orientation is different than mine. It suffers far more from those who treat marriage as a convenience to be discarded the first time it becomes work.[89]

Sandra Van de Kauter agreed:

> I am a middle-aged, married, churchgoing mother of two. Anyone who says his or her marriage is threatened or devalued by same-sex marriage either has an incredibly unfortunate, unstable marriage or he/she is lying.
>
> Churchgoing and other people who are concerned about the sanctity of marriage have legitimate concerns. But those of use who are truly concerned about the sanctity of marriage should not be seeking to harass those who want to contribute to the sanctity by voluntarily shouldering and upholding the responsibilities of marriage.[90]

Other married people testified that to them, it is a matter of simple fairness to extend all the benefits, rights, and responsibilities of marriage to same-sex couples.

Patrick D. Boswell of Chocorua testified:

> I am a 37-year-old white guy, happily married, with one stepson. I'm independent, perhaps more "conservative" than "liberal" on most issues, so I tend to vote Republican more than

[89] See Testimony of Bill Bilodeau on July 25, 2005.

[90] See Testimony of Sandra Van de Kauter on July 27, 2005.

> Democrat, but I do not vote party line. I'm a five-year Navy veteran (First Gulf War era), and a lifetime member of the NRA, a hunter and an angler.
>
> However, neither I, nor my government has any right whatsoever under our Constitution to deny ANY segment of the citizenry equal treatment under the law. The fact is, gay couples victimize no one by choosing to marry, and we have no business victimizing them by denying them the right to marry any consenting adult they choose. In fact, you and your colleagues, as elected lawmakers, have an obligation to work to preserve the rights of gay people every bit as diligently as you have sworn to protect mine. You are the front line defense against such infringements of individual rights.[91]

Some likened the unfairness to that experienced by mixed-race couples in the past.

Joe Lane and Stacy Luke testified:

> In the early 1960's when my parents (Stacy's) met, there were still states in which they could not legally marry or, if they were married, legally live together. Luckily, New Hampshire was not one of those states. My father is Chinese and my mother is of French-Canadian descent. In the end, they had four children and were wonderful parents. Back then, the same arguments were made against inter-racial marriage as is being made now against gay marriage. I've read and studied the vague parts of the Bible that say marrying another race is bad, about as vague as the Leviticus passage and about as easy to interpret in many ways. My parents were also told that their children wouldn't be well adjusted, would be picked on, and not fit in to society. I believe on all counts the naysayers were wrong, just as I think they are wrong now.[92]

Jeanne B. Eaton of Peterborough echoed this point in her testimony:

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[91] See Testimony of Patrick D. Boswell on July 29, 2005.

[92] See Testimony of Joe Lane and Stacy Luke on October 4, 2005.

> I would like to point out that during my lifetime (I am 79) it was illegal for a white person to marry a black person. When we adopted our Chinese daughter in 1962, it was illegal for white couples to adopt black children and it was illegal below the Mason-Dixon line for white couples to adopt Oriental children. We change and then we change the law. Think of slavery, think of women's right to vote, to own property.

b. Same-Sex Couples.

The Commission heard from same-sex couples who have been together for anywhere from 5 to 28 years. Couples were from towns all over the state, including Brookline, Keene, Portsmouth, Easton, Tilton, Bedford, Jaffrey, Bethlehem and Nottingham. Among those who testified were professors, a state representative, a teacher, a social worker, state employees, a nurse, a stay-at-home mom, a nurse, an airline worker, a lawyer, and small business owners. The portrait that emerged showed the couples to be, in significant ways, typical New Hampshire residents with deep roots in the state.

Pauline Chabot testified:

> My name is Pauline Chabot, daughter and granddaughter of French-Canadian Americans all born in Manchester. I grew up in Wilton, NH where my Republican father, Paul Chabot, worked for Whiting Milk and Abbot's Woolen Mill and my mother raised 9 kids. I had a large Union Leader paper route with my siblings and learned how to work hard from both of my parents (now 88 & 87). All of my relatives in Manchester had large families. No one got divorced or admitted they were different back then. Because of my education at Rivier College, I learned to make honest choices with my life.
>
> On April 1st, Gail Morrison and I celebrated our 23rd anniversary of our life together. I now live in Tilton, NH, where Gail and I have owned a home since 1986. We have helped raise each other's children, all four of whom are grown and married. We have helped plan and have participated in all

> four weddings in the manner of blended families. Gail was the Justice who married my son Eric Tanguay and his wife, Liza.[93]

Jean Kennard of Easton is similarly grounded in New Hampshire:

> My name is Jean Kennard and I've been a resident of Easton for 23 years. I'm retired now but I was a professor at UNH for 32 years. I taught your children, your sisters and brothers, some of you I expect and probably some of your mothers and fathers. My partner taught Governor Lynch. He got a B+ by the way but that was in the days before grade inflation.
>
> I have been in a committed relationship for the last 28 years. We have been each other's best friend, lover, supporter…we have honored and cherished each other. There have been good times and bad as in any relationship, successes, failures, better and worse. We have seen each other through accidents, loss of vision, cancer…sickness as well as health. In all the ways that matter, we are truly married whether the state acknowledges it or not. But I should like my civil rights. [94]

Couples testified about all the ways in which they contribute to their communities, as workers, good neighbors, and volunteers.

Neil Blair and Jeffrey Burr of Easton testified:

> We are a committed couple, who own a small local business together and are residents of Easton, NH. We pay our taxes, support our community and local businesses, and live lives like everyone else around here.[95]

Maria Doyle of Bethlehem testified:

> I moved here nearly 4 years ago in order to be with my partner, Grace Newman. We have been together for 8 years as committed partners. We have come to consider each other

[93] See Testimony of Pauline Chabot.

[94] See Testimony of Joan Kennard.

[95] See Testimony of Neil Blair and Jeffrey Burr on May 31, 2005.

> family and love our life here in New Hampshire. Grace moved here 22 years ago and took an uninhabitable building and turned it into a thriving business that has contributed to the economy and vitality of this community for 22 years. When I moved here 4 years ago, I became a social work supervisor in a private child welfare agency and helped to establish the agency's presence in North Country to work on behalf of some of our most vulnerable children. We'd like to think we are doing our part to make the community a better place.[96]

Many of the same-sex couples who testified are raising children – like many of their non-gay neighbors, friends and relatives.

Karen A. McCarthy of Portsmouth testified:

> My partner and I have been together for eleven years. For the first nine of those years we both worked professionally in the public education system. Two years ago, I left my career to stay home and raise our daughter. Because, as a lesbian, I do not have the rights afforded by civil marriage, I do not qualify for insurance under my partner's policy. As a result, we have extra financial burdens when trying to provide for our daily well-being, our future, and the future of our child. These burdens do not exist for heterosexual and would not exist if we were allowed to engage in civil marriage.[97]

Those with children expressed how hard they work -- like all parents -- to provide their kids with love and stability. They contend with the additional burden of the state's non-recognition of their families.

Jennifer Saylor of Charlestown testified:

> My name is Jennifer Saylor and my wife, Shelly Saylor and I stand before you today to convey our meaning of family. We have two children ages fourteen and five. They are fortunate in many ways to be surrounded by love and strong commitment to family which is conveyed to them through our parenting. Our

[96] See Testimony of Maria Doyle on May 31, 2005.

[97] See Testimony of Karen A. McCarthy.

> children have formulated their own definition of family. They see two individuals who love each other deeply and convey the meaning of family not only through their actions but through words.[98]

Shelley added:

> I feel so fortunate in my life. I have two wonderful, beautiful kids and the best wife in the world. We have so much love in our family. Our youngest son says, "That's why we have hearts right mom? To hold all the love." I only wish the state could recognize that we are no different than any other couple and that we deserve the same rights as any married couple.[99]

The thoughts of other, older couples, are turned toward retirement and end-of-life issues.

Carrie Blake and Didi Wallace of Portsmouth testified:

> My name is Carried Blake and this is my partner of 22 years Didi Wallace. For the past 22 years we have accepted and live up to all the responsibilities of marriage. We promise to care for, love, and honor each other until our death, and we renew this vow daily knowing that at any moment, one of us, or our happiness, could be swept away.
>
> In 1984, a year and a half after we met, we purchased our Portsmouth home and settled in to build a wonderful life together.[100]

2. Parents of Gay & Lesbian Children.

[98] See Testimony of Jennifer Saylor on April 4, 2005.

[99] See Testimony of Shelley on April 4, 2005.

[100] See Testimony of Carrie Blake and Didi Wallace on June 22, 2005.

The Commission heard from many parents of gay men and lesbians, who testified in support of equal rights for their children.

Joan D. Reed of Bethlehem submitted written testimony which read in part:

> I am writing this as a mother. I have been blessed with three daughters and a son. We all grew up in a family that experienced prejudice. About seventeen years ago, one of our daughters came to us individually and told us she was a lesbian. I think we probably all knew in our hearts. As her 80+-year-old grandmother said to us at the time, "is she any different today than yesterday?" For us all, she was and is our remarkable daughter, granddaughter, sister and friend whose life has been dedicated to the service of the handicapped and retarded populations. However, it was at this time that we all knew what prejudice meant.[101]

Gordon R. Sherman, Jr., of Concord testified about his son:

> As the father of 3 children, all in their 40's, all I demand is equal treatment for all of them! The right to marry with its attendant rights from the State and Federal Governments; rights the other 2 can take for granted because they enjoy them. My gay middle son, however, must not only put up with wise cracks and fear of harassment and the lack of 100's of protections under the law, so that he and his partner in a beautiful and harmonious relationship of 11 ½ years sought the "thinking" country of Canada to marry in safety.[102]

Leonard F.B. Reed of Bethlehem, spoke on behalf of his daughter and as a veteran with 25 years of service in the Army:

> I am an American. I am a husband, father and grandfather. I love my family and I love my country. My wife and I have three daughters and one son. We have eight grandchildren. They all love each other. The families are to close to each other… One of our daughters is a lesbian. She did not choose

[101] See Testimony of Joan D. Reed.

[102] See Testimony of Gordon R. Sherman.

to be, but she is. She is also the mother of two beautiful and talented daughters. She is a devoted partner in a civil union. She is a leader in her church, in the school where she works and in her neighborhood where she lives.

I believe that all human beings are born to be respected and to be treated equally. All Americans are meant to have the same rights and responsibilities. My life was dedicated to public service. I was in the Army from 1950-1975. For 25 years, I was proud to have served and to have protected those rights from threats and attacks by hostile neighbors elsewhere in the world. I am here now to say that I served and fought so that all Americans will share all rights and responsibilities.[103]

3. The Support of Ordinary Citizens.

Many ordinary citizens stepped forward to speak up for fairness for their gay & lesbian neighbors, co-workers, friends, and relatives.

Wendy Scott Keeney of Marlborough testified:

> Gay Americans serve in the military, keep our communities safe as firefighters and police officers, staff our hospitals, build our cities, and pay taxes. Denying gay couples the right to legally marry takes away legal rights in pensions, health insurance, hospital visitations, and inheritance that other long-term committed couples enjoy. We should end this discrimination.[104]

Some referred to cherished American values -- and New Hampshire values -- in expressing their support for same-sex couples.

Susan Forman of Intervale said in written testimony:

> Our state motto, Live Free or Die, is a source of Pride to me. My husband and I raised our four children to believe they were fortunate to grow up in a country that, in theory, cherishes equal

[103] See Testimony of Leonard F.B. Reed on May 31, 2005.

[104] See Testimony of Wendy Scott Keeney on July 25, 2005.

> rights. However, denying gays and lesbians the right to marry makes it clear that equal rights, at this point in time, exist only in theory. I would be ashamed of myself if I did not speak out in favor of gay marriage; and I mean the truly equal right of marriage, not civil unions which are in no way equal to marriage.[105]

In fact, the views of some people, like 64-year-old Frank Murphy of Keene, have changed over time. He testified:

> I grew up in a far less tolerant time and community. Gays were not hated but they were looked down upon. Verbal slurs were common and nobody, including myself, rushed to protest them as unfair…As the years went by, I've known gay people who were friends, co-workers, employers and public figures…I benefited from what some of them had to offer as human beings both to myself and society. In my view, America's a better place for having moved away from the poorly informed prejudices of my youth.[106]

Carrie Doyle of Dover, argued that strengthening gay & lesbian families is a benefit to everyone in society:

> This is a very good thing for the people involved and if their lives are enhanced in a positive way, this can only be a positive for their families, children, workplaces, organizations, churches, etc.[107]

Jeffrey A. Jones of Lisbon concurred:

> …All families contribute to society and, therefore, strengthening any family strengthens society…Same-sex couples should bear the same responsibilities to each other and to their families as straight couples. And their families deserve equal benefits.[108]

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[105] See Testimony of Susan Forman on May 31, 2005.

[106] See Testimony of Frank Murphy.

[107] See Testimony of Carrie Doyle on June 22, 2005.

[108] See Testimony of Jeffrey A. Jones on May 31, 2005.

C. The Realities: Same-Sex Couples Who Cannot Access the Protections of Marriage Are Harmed, Both Tangibly and Intangibly.

In the course of its six public hearings and two expert hearings, the Commission learned an incredible amount about how living outside of marriage harms law-abiding, tax-paying same-sex couples and their children, in both tangible and intangible ways. Given the degree to which New Hampshire uses marriage as a vehicle to provide a comprehensive economic, legal, and social safety net for committed couples and their children, it is no wonder that the absence of this safety net exposes families to legal, financial, and social instability.

The testimony before the Commission so clearly demonstrates the harm from being denied the legal rights of marriage that even the Majority makes no effort to dispute it. Yet, the Majority also makes no effort to identify the specific harms endured by New Hampshire's gay families (aside from acknowledging that gay families suffer when they are denied the right to visit each other -- and their children -- in the hospital). The Majority has seemingly concluded that all or most of the problems experienced by gay families are not worthy of consideration given the Majority's single-minded goal of using the constitutional amendment process (beyond what has already been done in statute) to restrict marriage to different-sex couples only. Because New Hampshire's Legislature and its citizens may strike a different balance between the real harms experienced by gay and lesbian families and the ideological preferences of the Majority, what the Commission learned from New Hampshire's citizens during the life of the Commission should not have been given short shrift.

Here is what the Commission actually heard about how New Hampshire citizens are being affected by the marriage ban on same-sex couples:

1. Disrespect of Same-Sex Relationships During Medical Emergencies and Interventions.

Many gay and lesbian families relayed the extreme difficulties they encountered when interfacing with a healthcare system that, by most accounts, repeatedly fails to acknowledge relationships that are not based on blood or marriage. At a time of emergency, the trauma of a loved one's injury or illness is thus compounded by having to search for a piece of paper -- the Medical

Authorization form or the Health Care Power of Attorney -- that will allow a gay or lesbian person to be by his or her partner's side.

Brian Rater of Brookline has been with his partner Brendan for 9 years. He testified about a medical emergency that landed him in the emergency room:

> When I was just coming out of some odd state of consciousness, I was groggy and confused. I didn't know what was going on, but I saw Brendan there in the emergency room and I knew that it was going to be OK. He was there to make sure the doctors knew what they needed to know about me and was able to make medical decisions when I wasn't able to…He was able to do this because of the very unromantic legal documents that we had a lawyer draw up for us in her office. They cost us $1,000 rather than the $45 marriage license fee and they only provide 8 of the 400 protections of marriage under New Hampshire law.[109]

Many gay and lesbian partners recounted their inability to see their loved one in the emergency room or the anxiety created by their not knowing whether the nurse or doctor on duty would question the legitimacy or the whereabouts of the authorizing documentation. Moreover, many relayed the frustrations involved in getting a health care professional to recognize their relationship, only to have to start the process over with a shift change.[110]

2. Barriers to Health Care Access.

Numerous families spoke of the difficulties encountered because of their inability to obtain health care for their spouse or their spouse's children.

Didi Wallace and Carrie Blake of Portsmouth have been together for 22 years. Carrie Blake testified:

> I have worked for the same company for 25 years. And just this past year they finally offered domestic partner benefits so I

[109] See Testimony of Brian Rater on August 29, 2005.

[110] In response to this acknowledged harm, the Majority proposes to "clarify" what is already existing law – that the wishes of a conscious patient should be respected when it comes to visitation at a health care facility. This "clarification" does not remedy the harms described above, as discussed in Section IV (B)(2) below.

> can put Didi on my insurance. I can tell you how much of a personal toll it has taken for me to have to constantly fight for these rights without putting too much pressure on my employer that I risked my job.[111]

Many employers, including many public employers in the state, extend family employment benefits to marital partners and legal dependents. Restricting family benefits to married couples affects the financial well-being of many families who are denied the right to marry. Moreover, because same-sex couples cannot marry and cannot become the legal parents of their partners' children, many partners must live without coverage in order to care for their children at home.

Shelley Saylor of Charlestown testified:

> Not only can I not receive health benefits through my wife's employers, but one of our children (my biological son) also does not have health insurance. It is difficult to explain to my son why his brother and other mother can be considered a family and be entitled to certain benefits, but he and I are not.[112]

Many children in this situation, like Shelley Saylor's son, find themselves enrolled in the state's Healthy Kids program as their last resort, even though the recognition of that child's family as a legal family would relieve the state of responsibility to pay for that child's health care.[113]

3. Inability to Establish Legally Recognizable Relationships between a Child and Both of His or Her Parents.

Witnesses also spoke of the difficulties encountered by the near impossibility of establishing a legal relationship between children and both of their same-sex parents. While some New Hampshire courts have granted second-parent adoptions -- allowing both members of a same-sex couple to be the legal parents of

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[111] See Testimony of Carrie Blake on June 22, 2005.

[112] See Testimony of Shelley Saylor on April 4, 2005.

[113] In her testimony, economist Lee Badgett aptly stated the problem: "Same-sex couples are more likely to have health insurance if they could marry. Most people under 65 get health insurance through their job or a spouse's job. However, nationally 86% of employers who provide health insurance do not cover their employees' same-sex partners. As a result, as two recent studies show, people in same-sex couples are almost twice as likely to be uninsured as married people. Marriage would make same-sex partners eligible for employer-provided health coverage, saving thousands of dollars in insurance premiums and health care expenses." See Testimony of Lee Badgett on September 19, 2005.

their children -- there is no clear, state-wide precedent for second parent-adoption. See, e.g., Testimony of attorney Susan Hassan on September 19, 2005. Absent such an adoption, the child is a "legal stranger" to his or her second parent, and thus the non-legal parent has no right to obtain emergency medical care for the child, no right to participate in the child's schooling, and no right to obtain medical insurance for the child through his or her employer. Thus, if the non-biological parent were to die, the child would not be able to receive legal protections provided to surviving children, such as access to inheritance in the absence of a will or social security survivor benefits.[114]

Karen McCarthy and her partner, who have been together for eleven years, have a daughter. When Karen McCarthy testified, she said:

> I am also here for my daughter. Currently she has one legal parent. It is unbearable to think of the mess that would occur if something happened to my partner. The rights afforded through civil marriage were designed to help families through difficult, unimaginable times…I am in the process of seeking parental rights. This process, like the process of being a stay-at home-mom, creates extra burdens for our family. We, in effect have had to go through the adoption process twice. That means two times the cost, two times the paperwork, and two times the scrutiny.[115]

4. Children and Parents Lack Access to Protections and Obligations to Sustain Them Upon Dissolution of the Parental Relationship.

At present, non-marital families and children are not protected in the event the relationship dissolves. Though married couples can readily access the divorce system to address property and monetary issues, as well as issues relating to the custody and visitation of children, same-sex families cannot. See generally Testimony of attorney Susan Hassan on September 19, 2005.

The processes and institutions that help separated and divorced different-sex couples access each other's property and commonly owned property are not

[114] The Majority's recommendation that the law "clarify" the right of same-sex couples to enter into "co-guardianships" does not rectify (nor justify) these harms. See Section IV (A)(6) and IV (B)(2) below.

[115] See Testimony of Karen McCarthy.

available to same-sex couples if they become estranged. No matter how financially interdependent the same-sex couple may have been, a same-sex partner is not empowered by law to seek on-going financial support from the other partner, no matter how long the couple had been together, how intertwined their personal finances had become, or how much one partner relied on the other for financial support. Regardless of the parties' relative bargaining positions vis-à-vis each other, same-sex partners lack the ability to access divorce courts for assistance with the unwinding of the couple's affairs. Simply put, the law pretends that same-sex partners are legal strangers to each other, both during and after the relationship.

This lack of a formal, legal process to dissolve a relationship has an insidious effect on the children of unmarried partners. Biological or adoptive parents are not guaranteed the right to seek child support from his or her ex-partner (when that ex-partner lacks a direct legal relationship with the child), even if the non-bio partner bore primary financial responsibility for the family or equal parenting responsibilities. In addition, a non-biological, non-adoptive child also has no way to secure for himself or herself ongoing access to his or her parent, regardless of the role that non-legal parent may have played during the life of the family.

Similarly, the non-biological, non-adoptive parent is not guaranteed on-going access to his or her child. Although some courts have allowed a non-biological or non-adoptive parent to file a petition for custody or visitation based on the non-legal parent's standing as a "de facto" parent, such claims are equitable in nature and are not expressly authorized in the law. These equitable proceedings to establish a parent's "de facto" status, and the rights and obligations that may flow from that status, are exceedingly difficult in New Hampshire. Id. Moreover, when they are pursued, they occur in Superior Court, which has less expertise in determining the best interest of the children than the Family Court, which is where married couples' custody and visitation issues are regularly handled. Simply put, without access to the state's divorce system, the children of same-sex couples are left without proper financial protections and respect for their families and parental relationships. Similarly, unrecognized parents are left with little or no recourse if they wish to remain in, and contribute to, the life of the child they raised.

5. Surviving Same-Sex Partners Are Legally Invisible.

It is in times of tragedy and crisis that people are reminded of the comprehensive protections that marriage provides for families. Virtually every couple who testified before the Commission worried about what will happen when

one of them dies. The Commission heard about surviving partners whose connection with their partner was completely severed upon their partner's death by the lack of a will, the lack of funeral instructions, or the deceased partners' biological family's unwillingness to have anything to do with the surviving partner. Despite long-term relationships based upon mutual responsibility and love, the surviving partner was not considered "next of kin" under New Hampshire law, even though the partner was demonstrably closer to the deceased than the deceased's estranged, biological family. The biological family in these stories refused to allow the surviving partner to attend the funeral services, and in some cases, made it exceedingly difficult for the surviving partner to extricate his or her personal property from the couples' co-mingled assets.

Ronnie Sandler testified about friends Jean and Dodie:

> Jean and Dodie had shared their lives for over 30 years…When Dodie died last summer, her body was brought to a funeral home late Thursday night. They had signed all the papers gays and lesbians are told to have. On Friday, Jean went to the funeral home to make arrangements for the release of Dodie's body before the weekend. She was told that Dodie had "next of kin.[116]

Despite the fact that Jean and Dodie had drawn up powers of attorney, living wills and other legal documents, none of them made mention of the release of a body – and Jean was told she would need a certified letter from Dodie's brother before the body could be released.

Even for those partners who have not had to endure these collateral attacks to their "emotional" status as a surviving partner, the world at large has no vocabulary to describe the status of a surviving same-sex partner -- as widow and widower are generally reserved for married couples -- and thus the world at large pretends that the surviving partner has suffered no recognizable, societal loss. That same-sex partners cannot file claims for loss of consortium or wrongful death; take advantage of the marital estate tax deduction; or obtain the financial protections that social security and private pensions extend to spouses is only part of what same-sex surviving partners are forced to endure on account of their non-marital status.

[116] See Testimony of Ronnie Sandler.

6. The Impossibility of Attributing Harm to A Few Discrete Legal Obstacles.

Even a cursory analysis of New Hampshire's laws relating to marriage reveal that marriage rights and obligations extend much farther than that readily evident from the stories of harm illustrated above. For example, many persons spoke of the ways in which they were harmed by not having the right to employment leave to care for their non-biological child or partner or the right to bereavement leave if their partner were to pass away. Others reported that their surviving partners would receive lower or non-existent pension benefits (as compared to married partners), and still others complained of their inability to claim the homestead protections and tax exemptions available to married couples under state law.

Carol Pynn expressed this concern in her testimony:

> My partner and I have been together for 24 years. That's a long-term commitment of love and trust. We purchased our home, brought up a teenager (who is a very well-adjusted young adult), saved for retirement with pensions and investments, gave public service to our town and contributed to the system just as you have. We have worked together for all these years looking forward to retirement. We never thought much about the legal status of our investments. But the time has come to face the fact that if one of us dies, the other will have to pay inheritance taxes on half of what we already own. Legally married spouses do not have this burden.[117]

The Commission also heard that the ban on marriage for same-sex couples has a stigmatizing effect.

Maria Doyle of Bethlehem testified:

> Despite the most sincere intentions and best efforts of both my partner and me, we are not able to be full participants in our community.[118]

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[117] See Testimony of Carol Pynn.

[118] See Testimony of Maria Doyle, May 31, 2005.

Because much of our society talks about marriage as the ultimate in family and commitment, same-sex couples who embrace that same paradigm are forever thwarted in their full, emotional commitment to each other and excluded from participation in the institutions held dear within our communities.

Robert Worden of North Swanzey wrote to the commission:

> Marriage equality is about people loving and caring for each other. I myself have always dreamed of having a big wedding, and when I fall in love with the right man, I would like to get married.

Witnesses explained that no word besides "marriage" would allow those interacting with a same-sex couple to understand immediately who and what they are to one another and to their children. The inability to make a public, legal commitment to one another -- backed by the legal obligations that such a commitment would impose upon them -- rendered many same-sex couples who came before the Commission powerless to communicate to their families, friends, and communities, the permanency of their mutual commitment to one another. Many gay and lesbian couples expressed that their inability to make the same legal commitment made by their siblings and friends rendered them outliers, even within their own families and communities. Other same-sex couples found themselves in the unfortunate situation of having to explain to their children -- when their non-marital status raised in their children a concern about the transient nature of their family -- that they love each other as much as married people do. Some gay and lesbian witnesses testified to the security and respect they felt when previously married to a person of the opposite-sex and recounted the paradox of having later found their true love in someone of the same-sex but being unable to marry and express that commitment to the world at large as they had previously done through marriage. Simply put, being denied marriage has thrust upon many same-sex couples the unwanted and unfortunate label of "less than."

Roderick Forsman of Conway, a psychologist specializing in child and adult development, testified about the harmful impact of prejudice on individuals and society:

> In my view, the arguments against same-sex marriage boil down to prejudice…We do not need to be mental health professionals to be aware of the destructive effects of prejudice on society's individual citizens. Its negative effects are painful

> and destructive enough when expressed at the level of person-to-person. At least then the victim can chalk it up to individual ignorance. It is vastly more destructive, in my view, when written into law and applied to entire categories of people.[119]

Indeed, Tawnee Walling of Seacoast Outright sees this destructiveness in her work with gay and lesbian youth:

> For glbt youth and young adults, this issue is particularly pertinent. As they are attempting to grow up in a world that much of the time alienates and discriminates against them, and to develop healthy, meaningful relationships in this climate, they are constantly aware that their relationships are not now and might not ever be legally recognized. And this is profoundly confusing since they pay taxes, and participate in their communities in a variety of ways and yet they are persistently and perpetually treated as second-class citizens solely based upon who they choose to love and be in a relationship with.[120]

College student Justin Drake testified:

> Unfortunately, as I step out into the real world, I will not have access to one of the principle joys many find. While the majority of my friends have the freedom to marry the person they fall in love with, that freedom will not apply to me simply for who I am…When I first realized I was gay I would never have dreamed I could live an even remotely normal or happy life, because society didn't accept me for who I was. Now I am given hope that this will change.[121]

The testimony made it clear that same-sex couples seek more than a subset of the marital rights and obligations that have thus far eluded them; they seek equality.

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[119] See Testimony of Roderick Forsman.

[120] See Testimony of Tawnee Walling.

[121] See Testimony of Justin Drake on June 22, 2005.

7. New Hampshire's Denial of Recognition to the Legal Relationships of Same-Sex Couples From Other States Harms Same-Sex Couples and New Hampshire.

SB427 (now codified as R.S.A. 457:3, New Hampshire's non-recognition statute) forces legally married same-sex couples to involuntarily "divorce" at the border. See Testimony of conflicts of laws professor Barbara Cox on September 19, 2005. It does not alert couples to the fact that their entire world has turned upside down. It does not put alternative legal protections in place to make sure that the couple's vested expectations of their rights vis-à-vis each other, their children, and their property are maintained. Those who have the freedom to marry have probably never considered the implications of New Hampshire's marriage non-recognition statute (enacted by SB427 in 2004),[122] but same-sex couples from other jurisdictions now must grapple with the fact that their legally recognized relationship from another jurisdiction may not survive a vacation, business trip, or a relocation to New Hampshire.

If a legally married same-sex couple were to travel to New Hampshire (either temporarily or permanently) and become involved in an accident, the non-injured spouse may no longer be able to make medical decisions for their injured spouse, inherit intestate from their spouse should she or he pass away, claim and bury her or his spouse's remains, or sue the person who injured her or his spouse for wrongful death. Id. If their relationship were to survive the accident but dissolve years later, the spouses may face the double trouble of having to obtain a divorce, which may not be easy in light of SB427's mandate that the relationship not be recognized within New Hampshire.[123]

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[122] Prior to SB427, New Hampshire followed the general rule of marriage recognition (i.e., that a marriage valid where celebrated was valid in New Hampshire even if it could not have been legally contracted there in the first instance). See Testimony of conflicts of law professor Barbara Cox on September 19, 2005.

SB427's legislative history reveals that SB 427's seismic shift from general marriage recognition to express statutory non-recognition came only a few days before same-sex couples would be eligible to marry in Massachusetts under Goodridge v. Dept. of Pub. Health, 440 Mass. 308 (2003). Though SB427 also purports to deny marriage recognition to legally married first-cousins from other states as well as same-sex couples, there can be no doubt that legally married same-sex couples were the intended victims of SB427, thus placing SB427 on dubious constitutional ground. See Romer v. Evans, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); Hunter v. Underwood, 471 U.S. 222, 232 (1985) (finding equal protection violation where evidence proved state had enacted a provision for the purpose of disenfranchising blacks and the law had a discriminatory effect on blacks, even though some poor whites were also affected).

[123] Consistent with the state's long-standing marriage recognition principles, it may well be that the marriage may be respected in whole or in part for some purposes, notwithstanding SB427. See Testimony of Professor Barbara Cox on September 19, 2005.

Though civil unions are not within the reach of SB427, the experience of civil union spouses may be instructive on this point. Gil Martinez and Max Mitchell of Jaffrey have a Vermont civil union. Since their relationship broke apart, they have lived in a legal limbo. They testified:

> Vermont will not divorce us because we do not live there, and New Hampshire won't do it either because the state claims there is nothing to dissolve. Unfortunately, other countries such as Canada do not recognize this union as valid, [but]…because it is not a real marriage whether they would dissolve it remains unclear…We deserve the right to rebuild our lives and perhaps find someone with whom we can form a family again.[124]

Even if all goes well for the couple, simply by crossing the state border, SB427 makes it harder for the couple to obtain simple protections for each other like health and life insurance, even if they continue to work for the same employer.

The involuntary "divorce" at the border also raises the stakes for a married family with children, as the refusal to recognize the marriage may mean that the children have lost their legal connection to their non-biological parent. As Professor Cox explained, SB427 does not, and cannot, unwind adoption decrees entered in other states, even if that adoption legally created same-sex parents, because the Full Faith and Credit Clause of the federal constitution requires New Hampshire to recognize both parents on an adoption decree as the legal parents of that child. That constitutionally mandated recognition would give the non-biological parent access to medical and school decision-making during the life of the relationship; and perhaps more importantly, it would also tie (one or both) of the non-biological parent(s) to the child upon death or dissolution of the relationship, making inheritance in the absence of a will, social security survivor benefits, custody, visitation, and child support options that would not otherwise be available to support the child.

Couples who legally marry (or have civil unions) in other jurisdictions need not pursue a formal adoption decree in that other jurisdiction because a child born into that marital relationship would be a child of both spouses as a matter of law, making a second-parent adoption legally redundant. It is for these couples that SB427 could deprive a child of his or her legal connection to his or her parent. For

[124] See Testimony of Gil Martinez and Max Mitchell on July 25, 2005.

example, if an accident were to occur while in New Hampshire, the non-biological child may not be able to inherit from his or her non-biological parent, obtain her social security survivor benefits, make medical decisions for him or her (if old enough to participate in the care), or sue for wrongful death.

The Majority recommends that gay families whose marriage is negated by SB427 be recognized as joint guardians.[125] Yet, a co-guardianship does not come close to providing the automatic protections that come only from marriage (and that are snatched from gay families when SB427 operates to negate the parents' marriage from another jurisdiction). Though a co-guardianship would allow the non-biological parent to act as a decision-making parent for some period of time, it is not a permanent legal protection (i.e., it can be unilaterally withdrawn by the biological parent or the court); it does not assure ongoing protection for the parent and child upon death or dissolution of the relationship (e.g., it does not ensure automatic inheritance rights, Social Security survivor protections, child support, or rights of custody or visitation); and it needlessly interjects the court into a supervisory role over the family's established arrangements.[126] In the "accident" scenario presented above, if the parent were injured, the ward would have no legal rights to speak for the parent-guardian during her life or any right to inherit from her upon her death. Moreover, if the parents were to survive the accident but later separate, even if a co-guardianship had been in place, the non-biological parent and child could be deprived of custody and visitation options, and the biological parent and child could be deprived of on-going financial support.

Given that New Hampshire law will recognize the non-biological parent-child relationship if a formal adoption exists, SB427's refusal to recognize the same purposefully chosen family simply because the legal relationships arose through an out-of-state marriage makes a mockery of what is in the best interest of that child.

This painful reality for gay and lesbian families also portends badly for the prospects of New Hampshire. As economist M.V. Lee Badgett explained in her testimony,

> New Hampshire's employers and communities at risk of losing its gay, lesbian, and bisexual citizens to friendlier locations,

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[125] See Majority Report, VI(E).

[126] See Section III (C)(7) above. See also In the Matter of Nelson, 149 N.H. 545, 556 (2003) (Nadeau, J. dissenting).

since the gay and lesbian community appears more willing than others to move, perhaps in search of friendlier environments. More than 55% of individuals in same-sex couples moved in the five years prior to Census 2000 compared to only 42% of those in different-sex couples. Furthermore, same-sex couples in neighboring states might be unwilling to visit New Hampshire if the state maintains its policy of unequal treatment of same-sex couples. Married same-sex couples in Massachusetts, for instance, might avoid New Hampshire for fear that their relationship will not be recognized if some accident occurs or to protest unequal treatment. So the state might lose out if same-sex couples opt for vacations in friendlier policy climates.

The long-term strength of the state's economy will depend on its ability to attract and retain a talented workforce, which includes gay, lesbian, and bisexual people as well as heterosexual people who want to live and work in an environment that welcomes diversity.[127]

8. There Was a Noticeable Absence of Testimony on Certain Matters Relevant to the Majority.

To fully understand what the Commission heard, we must mention what the Commission did not hear. For example, the Commission did not hear from any witness that the State actually benefits from having struggling families in its midst. Moreover, the Commission did not hear how the marriages of different-sex couples would be harmed by allowing same-sex couples to marry.

In addition, not one person identified himself as a heterosexual person who would choose to be gay if legal recognition were extended to same-sex couples; and similarly, no gay person announced that they would marry a person of the opposite sex if the state were to continue its discrimination against gay people in marriage.

Also absent from the testimony was any request for marriage or marital benefits from any other family group. In other words, there was no outcry or even a whisper from siblings, grandparent/grandchild families, aunt/nephew or

[127] See Testimony of Lee Badgett on September 19, 2005.

uncle/niece families, or any other pairing described in R.S.A. 457:1-2. None came forward to explain how they are harmed by their inability to marry; to compare their legal, social, and economic situation to that of gay and lesbian families or married, different-sex families; or to identify themselves as someone who would partake in the benefits contemplated by a subset of the commissioners in the Majority.[128]

To be clear, there were witnesses who alleged, more generally, that the recognition of gay relationships would contribute to the downfall of civilization. Yet, the harms alleged were amorphous in nature and were rooted in the demonization, dislike, and ignorance of the lives of gay people.

Al Goodwin of Pittsfield testified:

> This very issue is a reflection of, or an extension of the age old contest between Good and Evil, the age old contest between God and Satan. This is a "frontline" issue. The family has been under spiritual attack since the Garden of Eden and Women especially have been singled out as being hated with supernatural hatred. Men need to be taught to take their proper place as the head of a family and the protector of Women but not all are up to the challenge of the task for even Adam himself fell short. It is my contention that there are powerful unseen forces at work here and now the future of our normal families and the societal atmosphere of this state of New Hampshire seems to be hanging in the balance on this issue.
> …
> Hidden not very far behind this "smiley face" of acceptable homosexuality presented here are homosexual relationships that are very much not characterized by monogamy or noble sentiments of commitment but by rampant promiscuity, moral degradation, sexual predation, eventual bestiality and other forms of insanity which are grossly offensive to normal heterosexual humans.

Margaret Carnahan of Concord:

[128] As a technical matter, these other close familial relationships were beyond the scope of the Commission's assignment. See SB427 (restricting inquiry to "all aspects of same-sex civil marriage and the legal equivalents thereof."). Nonetheless, the Majority's proposal to link any legal protections for same-sex couples with those of different-sex relationships that are purposefully excluded from marriage is discussed in Section IV (B)(2) below.

> Tolerance of a person's sexual preference is one thing; but to make legislation for a sexual perversion is shortsighted. It will not create a more liberal country, but will open the door to even more perversions. Do not be appalled if one day a man demands the right to have multiple wives, or to marry his sister, mother, or daughter, or perhaps he will demand the right to marry an animal! Will these demands end before man destroys himself; before our future comes to an end?
> …
> It is our nation's future at stake today. I submit that if a person chooses a sexual behavior that is contrary to nature, let it be his own life and his own future he risks.[129]

Chris Nissen of Merrimack testified before the Commission:

> Right reason appeals to our moral conscience to recognize the objective disorder and intrinsic moral evil of homosexual union. We cannot allow the imposition of iniquity on society – something so obviously iniquitous is not "right" simply because it is a law. Society has an obligation to conscientiously object to such evil that destroys the very fabric of society and culture.[130]

Arthur Turner of Carlisle, Massachusetts traveled to New Hampshire to share his thoughts on gay people with the Commission:

> Homosexual persons as a group have no responsibility toward the general population and we should feel no obligation toward them, particularly no obligation to advocate legalization of same-sex marriage.[131]

To cast a blanket of "immorality" on gay people as some witnesses have is simply a way of dressing up a personal dislike of (or ignorance about) gay people. Yet, government is not permitted to disadvantage a group of people, even gay people, simply because some people dislike them.[132] Access to the legal rights of marriage cannot be denied on that basis.

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[129] Testimony of Margaret Carnahan of Concord on April 25, 2005.

[130] Testimony of Chris Nissen of Merrimack on August 29, 2005.

[131] Testimony of Arthur Turner of Carlisle, Massachusetts on August 29, 2005.

[132] See Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). See also Section IV (B) (4) below.

Those testifying against legal recognition for gay families also rooted their concerns in their faith-traditions, as if the witnesses' deeply-held personal or religious beliefs views should, in all cases, trump the civil right of gay people to be treated as equal citizens.

Thelma Burt of Exeter rooted her objections to legal recognition in her personal religious beliefs:

> Homosexuality and lesbianism are part of the list of sins we commit. In no way should we legalize sin in our society. [133]

Karen Towle provided written testimony:

> Same-sex marriages do not reproduce so this is an abomination of the Lord.

Mark and Judith Race of Loudon submitted written testimony:

> God's position on homosexuality is clear in the Bible - … God calls it an abomination and a perversion.
>
> Will we – His creation cross God and not suffer the consequences He has clearly warned us about?
>
> This country was formed on godly principles. We must return to godliness and ask God to heal our land …

Pastor Peter Preston also testified:

> [N]o one has to remain in bondage to homosexuality or lesbianism. God clearly states that it is unnatural and He has not made anyone to be that way.
> …
> God hasn't changed His mind, so let's not try to change our laws.

We in the Minority do not discount these views because they are based in morality or religion. Rather, because the beliefs of individuals and religious

[133] Testimony of Thelma Burt on April 25, 2005.

institutions will remain unaffected by the extension of legal rights to same-sex couples,[134] we question why such views on gay people should dictate what legal rights can and should be extended to New Hampshire's gay families. Put differently, the Commission's mandate was to explore the legal needs of same-sex couples. Concerns about the religious views of non-gay citizens can be part of the discussion but they should not alone derail an analysis of the harms that flow to gay families by virtue of their ban from marriage and the associated legal rights and obligations that flow from marriage.

9. Summary of Oral Testimony to the Commission.

In sum, gay and lesbian couples live and work in our communities. They volunteer and worship side-by-side with us. They pay taxes. Their children attend the same schools as our children. They have formed stable, long-lasting, intimate relationships that are comparable in quality to those of different-sex couples, despite the legal obstacles that have made that feat all the more challenging. They work very hard to establish security, safety, health and happiness for their kids – just like all parents do. As same-sex couples are, in all relevant respects, the same as different-sex couples, ending the exclusion of same-sex couples from the legal rights of marriage would serve the same purposes for gays and lesbians as marriage does for heterosexuals: enhancing and fortifying the stability of relationships between two adults that are based on commitment, love, and mutual support and care.

IV. The Commission's Work Does Not Present Credible Reasons to Justify the Continuation of A State Marriage Policy that Withholds the Promises of Equal Justice Under Law From New Hampshire's Gay and Lesbian Families.

We believe that the Majority's report evidences a nearly complete failure to address the Commission's mandate. The Majority has chosen to attack gay people and challenge whether gay families deserve legal protection rather than pursue the Legislature's mandate to conduct a detailed study of the laws that are causing hardships for New Hampshire's gay and lesbian families. Omitted from the Majority's report is an analysis of the legal landscape affecting same-sex couples and any recitation of the harms that have befallen gay families as a result of their

[134] See Section IV (A) (5) below discussing the sanctity of religious belief and the protections afforded religious practice in our constitutional democracy. See also Section I (B)(1) discussing the civil nature of marriage in New Hampshire.

exclusion from the legal rights associated with marriage. It is unfortunate that the preceding sections of this Minority Report have no parallel in Majority report.

Equally disappointing is the fact that the work the Majority did pursue does little to advance the Legislature's understanding of the relevant issues. Rather than fulfill the Legislature's request for a comprehensive study of all "rights, responsibilities, laws, and legal obligations" relating to same-sex couples,[135] the Majority makes six "Findings:"

1. That the Massachusetts Goodridge decision was "incorrectly decided."[136]
2. That the United States Supreme Court decision in Loving v. Virginia is not instructive as to the question of same-sex couples' quest for marriage equality.[137]
3. That there is no consensus on whether sexual orientation is a matter of "nature or nurture," and the resolution of that question is believed by some commissioners as bearing on whether gay people present a "civil rights" question.[138]
4. That "an intact family including both the biological mother and father is the optimal vehicle for raising children" while acknowledging at the same time that studies concerning children raised by "same-gender parents" are "encouraging."[139]
5. That marriage for same-sex couples raises concerns regarding "cascade effects" on religious freedom, parental rights in schools, "private groups and public access" and "medical issued involving public health."[140]
6. That any grant of rights to New Hampshire same-sex couples would not be recognized by either the federal government or 44 states in the nation.[141]

It takes little effort to see that these "Findings" are essentially beside the point. Findings 1 and 2 are responses or legal arguments concerning court

[135] See SB427.

[136] See Majority Report, V(A).

[137] See Majority Report, V(B).

[138] See Majority Report, V(C).

[139] See Majority Report, V(D).

[140] See Majority Report, V(E).

[141] See Majority Report, V(F).

decisions. They do not speak at all to an assessment of the needs of the lesbian and gay community in New Hampshire and what role the Legislature should take in addressing those needs.

Similarly, Finding 6 is a legal opinion and says nothing about what the New Hampshire legislature can and should do within New Hampshire for New Hampshire's citizens. Moreover, many of the legal assertions in Finding 6 are open to debate and are not necessarily a correct statement of the law.

As to Finding 3, "nature v. nurture", the commission heard repeatedly from citizens and experts that homosexuality is not chosen; that it occurs throughout nature and in all cultures. The majority simply ignores these testimonies. Furthermore this analysis is perhaps an interesting theoretical or philosophical discussion in some quarters; but it hardly addresses the practical questions that the Commission was mandated to study about the very real members of the lesbian and gay community in New Hampshire and their needs and their families' needs. On these practical questions, the Majority is totally silent.

Again, Finding 4 has two parts: (a) a "male female intact married structure" is the "gold standard" for childrearing; and (b) studies on "same gender parenting" are "encouraging." While the "gold standard" finding can be debated perhaps endlessly, the mandate for the Commission was to study something quite different – something that remains a pressing question regardless of how one views the "gold standard" – that is, how to address the needs of the children of families headed by same-sex couples. Again, on this vital question, the Majority is totally silent.

Finally, Finding 5 is, by definition, totally unrelated to the question of addressing the needs of New Hampshire's lesbian and gay citizens. Rather, it is solely about the non-gay citizens of New Hampshire and the fears of a very small minority of those non-gay citizens. Again, regardless of how one assesses the "cascade effect," it is certainly a classic case of the "cart before the horse" to make a finding about the feared consequences of something that the Majority never addresses, i.e., the needs of New Hampshire's lesbian and gay citizens and their families and the legislative means of addressing those needs.

In sum, the Majority Report has simply made no findings of any relevance to guide the Legislature in assessing and addressing the needs the Commission was mandated to study. Whether or not the Commission's work will have long-term value, one thing is clear: the Commission has presented no justifiable reason to

withhold the legal rights of marriage from same-sex couples given the constitutional promises of equal justice under law. We turn to each of the Majority's "Findings" in subsection A below. Then, in subsection B, we address many of the underlying assertions embedded within the Majority's "Findings." Simply put, the Commision has offered nothing constructive

A. The Majority's "Findings" Are Specious.

1. Attacking Goodridge Does Not Justify the Exclusion of Same-Sex Couples From Marriage in New Hampshire.

We reject the Majority's "Finding" that the Massachusetts Supreme Judicial Court overstepped its bounds in deciding the case of Goodridge v. Dept. of Public Health, 440 Mass. 308 (2003), a case which found unconstitutional under that state's constitution the denial of marriage licenses to same-sex couples. It is the Massachusetts Supreme Judicial Court, not this Commission, that is the ultimate arbiter of what that Constitution means. We note that the citizens of Massachusetts ratified a constitution in 1780 with three distinct branches of government, specifically acknowledging the judicial power. Mass. Const., art. I, sec. 30.

We further note the Court's leadership over the years in defining human rights. One of that Court's earliest acts under the state constitution was to abolish slavery.[142] Many surmise that the Court's leadership in this area provided the context for the state Legislature to become the first to repeal a ban on interracial marriage in 1843.[143]

It has long been part of our federal system that "a single courageous State may serve as a laboratory" for other states.[144] We observe that the Commonwealth to our south is alive and well. Over 6000 same-sex couples have married, and as they have done so, public support for their marriages has increased.[145] Moreover, a

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[142] Inhabitants of Winchendon v. Inhabitants of Hatfield, 4 Mass. 123, 128 (1808) (referring to action of Supreme Judicial Court in holding slavery "was no more" in light of the Massachusetts Declaration of Rights); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 209 (1836) (reiterating the principle with respect to a slave brought to Massachusetts by her Louisiana "owner").

[143] Mass. Acts 1843, ch. 5. See also Louis Ruchames, Race, Marriage, and Abolition in Massachusetts, 40 J. Negro History 250 (1955).

[144] Santosky v. Kramer, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting)(quoting New State Ice Co., v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[145] See Raphael Lewis, Gay Marriage Ban Expected to Fail, The Boston Globe September 12, 2005 at B1.

Massachusetts constitutional convention rejected a proposed amendment to deny marriage rights to same-sex couples and replace marriage with civil unions.[146]

While this Minority believes that the courts have a proper role to play in protecting and enforcing constitutional guarantees,[147] the Majority's recommendation that any change in our marriage laws must be made by the Legislature and the people is a red herring.[148] This Study Commission was created to address what the Legislature should do. The Majority chooses to engage in an ideological skirmish about the courts while ignoring the legislative task at hand. We all agree that the Legislature has a role and can and should act.

2. The Right to Marry is a Civil Right For Gay People Too.

The Majority's second "Finding" is a rejection of "the notion that same-sex marriage is comparable to civil rights and consistent with Loving v. Virginia, 388 U.S. 1 (1967)."[149]

Although the Majority has rejected the notion that gay people should not have the right to marry because the discrimination against them is not rooted in racial discrimination, we note that the Majority's view is not universally held. For example, Coretta Scott King and Julian Bond, Chairman of the NAACP, embrace marriage rights for same-sex couples even though the oppression at the heart of the discrimination turns on sexual orientation rather than race.[150] The Honorable Byron Rushing, a prominent African-American Massachusetts legislator who testified before the Commission, eloquently explained that a civil right is a legal prerogative to receive equal treatment before the law and that those who have

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[146] See Raphael Lewis, After Vote, Both Sides in Debate Energized, The Boston Globe, September 15, 2005 at A1.

[147] As discussed at Section II (A), above, any and all laws enacted by the Legislature are subject to constitutional review, and in appropriate cases, the courts can and must decide them. See also Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 163 (1803) ("The very essence of civil liberty …consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.")

[148] See Majority Report VI (A).

[149] See Majority Report, V(B). In Loving, the U.S. Supreme Court struck down a state ban on interracial marriages. In addition to ruling that the law was an unconstitutional racial classification on equal protection grounds, the Court unequivocally declared that the right to marry is fundamental under the Due Process Clause of the Fourteenth Amendment. Loving, 388 U.S. at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[150] See Julian Bond's Speech at the Human Rights Campaign Anniversary Dinner available at http://www.hrc.org/dinner/speech_jbond.htm; Associated Press Staff Writer, "Coretta Scott King gives her support to gay marriage," USA Today, March 3, 2004, available at http://www.usatoday.com/news/nation/2004-03-24-king-marriage_x.htm.

access to that right cannot legitimize the exclusion of others simply by declaring that the denial of access doesn't deprive the oppressed group.[151] Stated differently, the Majority cannot legitimize its belief that same-sex couples should not have access to marriage by simply declaring that marriage is not a civil right for gay people.

We believe that the right to marry belongs to all individuals, including gay and lesbian individuals and that Loving is instructive on this point. Yet, before turning to our specific analysis, we note that the Legislature's ability to rectify the real harms that same-sex couples are experiencing by virtue of their exclusion from marriage does not require us to be right on this point. Matters need not rise to the level of a fundamental deprivation for the Legislature to have the authority to act. The Legislature may act now with or without the support of Loving.[152]

In any event, the right to marry is a protected liberty interest and that right does not turn on the presence or absence of racial discrimination. There are numerous precedents recognizing marriage as a protected right apart from a claim of racial discrimination. For example, the U.S. Supreme Court unequivocally made clear in Zablocki v. Redhail that marriage is fundamental even when sought by persons whose exclusion does not turn on race: "Although Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."[153] Notably, in striking down a law forbidding marriage by parents who were delinquent in child support payments, the Court was not addressing a race-based suspect class (as in Loving).[154] Similarly, in Turner v. Safley, the Court ruled that the right to marry applies to prisoners (regardless of race) even though inmates' constitutional rights -- in contrast to ordinary civilians -- may be compromised by legitimate penological objectives.[155]

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[151] See Testimony of Representative Byron Rushing on September 19, 2005

[152] Telling to this debate is the Majority's insistence that the constitution be amended so that they do not have to bet on the accuracy of their legal analysis that the fundamentality of marriage turns upon the presence or absence of a race-based classification.

[153] Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (emphasis added).

[154] Id. at 400-402.

[155] The Turner Court invalidated on its face a Missouri regulation banning nearly all inmate marriages (except those where the birth of a child was expected) as "not reasonably related to legitimate penological objectives." 482 U.S. 78, 99 (1987). The Court emphasized that marriages are "expressions of emotional support and public commitment" and these attributes are "an important and significant aspect of the marital relationship" for inmates just as for others. Id. at 95-96. In addition, the Court pointed to the "spiritual significance" of marriage for many individuals, the expectation of intimacy upon parole and release that informs many inmate marriages, and that marital status is often a precondition to the receipt of government benefits. Id. At 96.

Marriage is uniformly included within the litany of protected individual rights. It is now a predicate of the relationship between the individual and the state that the Constitution protects against unwarranted state interference with a range of personal decisions, including "decisions relating to marriage." See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). See also Lawrence v. Texas, 539 U.S. at 574 ("persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); and Goodridge, 440 Mass. at 329.[156]

In a sleight of hand, the Majority report seeks to redefine the legal inquiry by characterizing the right at issue here as a right to "same-sex" marriage. This is contrary to the U.S. Supreme Court's long-established analysis of the fundamental right to marry. In Loving, the U.S. Supreme Court did not determine whether there was a fundamental, historic right to "miscegenic" or mixed-race marriages. Neither did the Court in Zablocki ask whether there was a fundamental right for the poor to marry. Nor did the Turner Court assess whether there was a fundamental right of "inmate marriage." In these cases, only after acknowledging the well-established and general fundamental right to marry did the Supreme Court consider the application of the right in the context of the state's denial of marriage to a particular class of people. See Turner, 482 U.S. at 97 (looking at "whether the regulation impermissibly burdens the right to marry"); Zablocki, 434 U.S. at 383 (broadly proclaiming that "the right to marry is of fundamental importance"); Loving, 388 U.S. at 12 ("freedom to marry has long been recognized as one of the vital personal rights.").[157]

Our conclusion that the broad fundamental right to marry extends to same-sex couples has been recognized in cases challenging the exclusion of same-sex

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[156] The Massachusetts Supreme Judicial Court held in Goodridge that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family -- these are among the most basic of every individual's liberty and due process rights." 440 Mass. at 329.

[157] See also Goodridge, 440 Mass. at 348 "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question … this case calls for a higher level of legal analysis." (Greaney, J. concurring); Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004) ("[t]he question, then, is not whether marriage is a fundamental right -- it is. The question is whether inter-race marriages can be banned, or whether inmate marriages can be banned, or whether same sex marriages can be banned? The answer to the question depends on the rationale for the state action"); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004) (observing that there was no "deeply rooted tradition of interracial marriage at the time of the U.S. Supreme Court's consideration of anti-miscegenation statutes in Loving," and noting that "the Court analyzed the issue of their constitutionality in terms of the broad right to marry;" applying similar analysis to the lack of any "deeply rooted tradition" of "marriage while delinquent in child support payments" in Zablocki or "inmate marriage" in Turner).

couples from marriage.[158] In addition, many state constitutional decisions describe marriage as a vital and fundamental social institution, even where the court does not find it necessary to decide directly whether there is a fundamental right to marriage under the state constitution.[159]

The contentions that the right to marry is not a civil right and that same-sex couples cannot invoke Loving in support of their claim to marry someone of the same sex is simply unfounded and, perhaps more important to the task at hand, beside the point when it comes to the question of whether the Legislature should act to address the harm caused to gay families by the state's marriage laws.

3. The "Nature/Nurture Conclusions" Present No Justification for Withholding Marriage From Same-Sex Couples

The Majority's "Finding" entitled "Nature v. Nurture Conclusions" fails to definitively "conclude" anything about the biological basis of same-sex sexual orientation. In fact, the Majority misquotes the expert testimony of Dr. Bobilya, who said that homosexuality is likely caused by a variety of determining factors, including primarily genetic and hormonal components. In the Majority's own words, "uncertainty persists" as to whether same-sex sexual orientation is innate, a matter of choice, or some combination.[160] The Commission heard from many gay

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[158] See Coordination Proceedings, The Marriage Case, No. 4365, 2005 WL 583129, at *10 (Cal. Sup. Mar. 14, 2005) (appeal pending) (case brought under California Constitution declaring that "marriage is a fundamental constitutional right"); Hernandez v. Robles, 794 N.Y.S.2d 579, 593 (N.Y. Sup. Ct. 2005) ("Under both the federal and New York State Constitutions, it is beyond question that the right to liberty, and the concomitant right to privacy, extend to marriage"); Castle, 2004 WL 1985215, at *12 (finding that "[t]here seems little, if any, disagreement that the right to marry is a fundamental right … the question is not whether marriage is a fundamental right – it is."); Andersen, 2004 WL 1738447, at *5 ("all agree that precedent firmly establishes the broad right to marry as a fundamental right"); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 IC, 1998 WL 88743, at *5 (Alaska Super. 1998) (in case under Alaska Constitution, finding that "[t]here is no dispute that the right to marry is recognized as fundamental"). See also Baehr v. Lewin, 875 P.2d 44, 56 (Hawaii, 1993) (finding fundamental right to marry but declining to find right for same-sex couples).

[159] See e.g., Goodridge, 440 Mass. at 327, 326 ("The right to marry means little if it does not include the right to marry the person of one's choice"; "[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion."); Baker v. State of Vermont, 744 A.2d 864, 883 (1999) ("The Supreme Court's observations in *Loving* merely acknowledged what many states, including Vermont, had long recognized. One hundred thirty-seven years before Loving, this Court characterized the reciprocal rights and responsibilities flowing from the marriage laws as the 'natural rights of human nature.'").

[160] Curiously, the bulk of the testimony cited to substantiate the Majority's equivocal conclusion has nothing to do with the topic at hand (e.g., that the number of gay people is something less than 10% of the U.S. population, and that "homosexual acts are prone to transmitting disease and are biologically unnatural"). The alleged health risks were presented by Dr. John Diggs, an anti-gay extremist whose views have made him the subject of student protests as he has traveled the country to give his talk, "The Medical Effects of Homo-Sex." See Staff Writer, "Gonzaga

and lesbian citizens in the public hearings that they believe that their sexual orientation is innate; not something "learned," but rather an integral part of their being. Furthermore it is well established that homosexuality is a normal variant of sexual behavior, not a mental disorder. See Testimony of Harvard psychiatry professor Dr. Marshall Forstein, MD, on September 12, 2005. Social science research has established that same-sex sexual orientation is neither uncommon nor unnatural and has been expressed throughout history and in all cultures. See Stephen F. Morin & Esther D. Rothblum, Removing the Stigma, 46 Am. Psychologist 947, 947 (1991). "Studies from around the world, in the fields of anthropology, sociology, psychiatry, psychology have shown that homosexuality exists in every culture, and in almost all animal species as well." See Testimony of Harvard Psychiatry Professor Dr. Marshall Forstein, MD, on September 19, 2005; see also Testimony of UNH biologist Dennis Bobilya on September 12, 2005.

Second, although the Majority asserts that this so-called "nature versus nurture" issue affects whether marriage should be extended to same-sex couples, it fails to explain why this debate has anything to do with whether marriage is a civil right. Just as our constitution provides protection for the freedom to practice a religion that is freely chosen, the freedom of persons to choose their marital partner should not turn on whether that choice is biologically compelled. In Loving, for example, the right of a white person to marry a person of another race did not turn on whether the person's selection of a partner across the race line was biologically compelled. It is the choice of marital partner that is protected, not the complex factors that go into a person's selection of a particular life partner.

Third, the Majority's findings neglect to mention what has been undisputed in the scientific community: sexual orientation, whatever its source, is generally impervious to interventions to change it. Interventions to change sexual orientation -- that is, to eliminate individuals' sexual desires for members of their own sex -- are sometimes referred to as "reparative therapy" or "conversion therapy." The American Academy of Pediatrics, the American Counseling Association, the American Psychiatric Association, the American Psychological Association, the National Association of School Psychologists, and the National Association of Social Workers, together representing more than 477,000 health and mental health professionals, have all taken studied positions against reparative therapy because not one study in a reputable scientific journal has provided

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under fire over conservative speaker called anti-gay," Associated Press, October 31, 2005, available at http://seattlepi.nwsource.com/local/246527_antigay31.html.

evidence that it is clinically warranted, effective, or safe.[161] Policy statements from these organizations are available at http://www.apa.org/pi/lgbc/publications/justthefacts.html. See also Testimony of Dr. Marshall Forstein on September 19, 2005. The American Medical Association has reached a similar conclusion.[162]

These scientific findings echo the real life difficulties encountered by Mark Perriello, a former New Hampshire resident, who testified before this Commission on September 12, 2005 about the pain and anguish he experienced as he underwent therapy for many difficult years in "ex- gay" programs. Despite having committed himself to these programs, they did not alter his orientation towards men, although, in the process, they fomented self-loathing, fear of intimacy, and years of personal anguish. Though parroting the stories of "ex-gays" in its Majority report, the Majority omitted reference to Mark Perriello's testimony.

In sum, requiring law-abiding gay and lesbian citizens to choose a person of the opposite sex as a condition of marriage is not scientifically sound nor is it compassionate.

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[161] The potential risks of reparative therapy are substantial. The American Psychiatric Association notes that the risks of depression, anxiety, and self-destructive behavior are great. See Position Statement: Psychiatric Treatment and Sexual Orientation, American Psychiatric Association, 1998. Available at http://www.apa.org/pi/lgbc/publications/ justthefacts.html. It also observes that "[m]any patients who have undergone 'reparative therapy' relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction." Id. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of the societal stigmatization discussed. The policy statement of the American Academy of Pediatrics advises that "[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." Policy Statement: Homosexuality and Adolescence, American Academy of Pediatrics, 1993, available at http://www.apa.org/pi/lgbc/publications/justthefacts.html. Not surprising, therefore, is the American Psychiatric Association policy of 2000:

> As a general principle, a therapist should not determine the goal of treatment either coercively or through subtle influence. Psychotherapeutic modalities to convert or "repair" homosexuality are based on developmental theories whose scientific validity is questionable. ….APA recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to "First do no harm."

See also Testimony of Dr. Marshall Forstein on September 19, 2005.

[162] See American Medical Association, Policy Statement: Health Care Needs of the Homosexual Population, H-160.991, available at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-160.991.HTM&s_t=H160.991&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=1&.

4. Research on Children Supports the Legal Recognition of Same-Sex Couples, Notwithstanding the Majority's Claim to the Contrary.

The welfare of children and families is profoundly important to all of us on the Commission. We applaud the Legislature for creating this Commission so that we can assist them in their critical work of enacting policies to help families. Our Legislature has created important programs and initiatives to help children (approximately 310,000 of them) [163] and families living in New Hampshire, including the successful public-private partnership between the State and NH Healthy Kids Corp. to provide access to affordable health coverage to uninsured children.[164] Historically, the Legislature has embraced marriage as one of the preferred vehicles for providing economic, social and legal protections to families, with the expectation that these protections redound to the benefit of the children in those marital families. See Section II (B)(4) above. Following in the Legislature's footsteps, the Commission is seemingly unanimous in its view that civil marriage assists parents in raising children.

From this point of consensus, the issue of marriage for same-sex couples has devolved for the Majority into one about child development: what kinds of families are good for children.[165] Before we respond to the Majority's specific stated concerns about gay and lesbian parents in subsection (b) below, however, we want to put the discussion in the larger context of those matters affecting child welfare, about which child welfare professionals and researchers agree.

a. The Consensus on Child Rearing: What Types of Families Are Good For Children.

Research conducted over the last fifty years has firmly established that it is the quality of parenting and the parent-child relationship, rather than the gender or

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[163] NH Children's Advocacy Network, Foundation Priority 2005 at 2, available at www.ChildrenNH.org/nhcan.php.

[164] We note that this program is in jeopardy at this time. NH CAN, Fact Sheet, Health: Child health insurance coverage, available from www.ChildrenNH.org/nhcan/php.

[165] To be clear, the question raised by the Majority is not asking about "married" versus "non-married" families because that debate has been resolved by all concerned in favor of married families. Rather, the question the Majority appears to be grappling with concerns the underlying structure of the family itself. Though we will engage the inquiry, we question its relevancy given that the Majority has presented no evidence to suggest that gay parents are bad parents or are somehow undeserving of parenthood. To the contrary, the Majority admits that the existing studies on gay parenting are "encouraging" (Majority Report, V(D)) and that co-guardianships should be extended to same-sex couples to facilitate their co-parenting arrangements (Majority Report, VI(E)).

sexual orientation of parents, that predict healthy children's adjustment.[166] Parental effectiveness has been shown to depend overwhelmingly upon such qualities as responsibility, reliability, consistency, affection, responsiveness and emotional commitment, as well as on the quality and character of the relationship between parents and the sufficiency of economic resources.[167] This is the case regardless of the family structure in which children are reared.[168]

Studies comparing heterosexual parents who are married against those who are single shows that children raised in single parent families are at greater risk of numerous negative outcomes (for example, dropping out of school, delinquency, unwed teenage pregnancy, substance abuse) than children raised in married-couple families. Most researchers conclude that it is the number and economic resources of the parents as well as the disruptive effects that parental desertion or divorce can inflict on children's lives that account for these differential risks.[169]

There is also considerable consensus among researchers that a disproportionate cause of the greater risks suffered by children in single-parent families derives from the lesser economic and education resources that one adult, as compared to two, can offer a child.[170] At the same time, numerous large-scale studies show that with adequate socioeconomic resources, most children who grow up in single-parent families do well.[171]

Finally, it is important to understand the effect of family disruption on children, as divorce is the most common route to single-parent family life for most

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[166] See generally, Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 Quinnipiac L. Rev. 529 (2004).

[167] See, e.g., Michael Lamb, The Role of the Father in Child Development (3d ed. 1997); Louise B. Silverstein & Carl F. Auerbach, Deconstructing the Essential Father, 54 Am. Psychol. 397 (1999); Diana Baumrind, Parental Disciplinary Patterns and Social Competence in Children, 9 Youth & Society 239 (1978); Diana Baumrind, New Directions in Socialization Research, 35 Am. Psychologist 639 (1980); Vern L. Bengston et al., How Families Still Matter: A Longitudinal Study of Youth in Two Generations (2002).

[168] See Michael E. Lamb, ed., Parenting and Child Development in 'Non-Traditional Families' (1999).

[169] See, e.g., Sara McLanahan, Family Structure and the Reproduction of Poverty, 90 Am. J. Soc. 878 (1985); Sara McLanahan & Gary Sandefur, Growing Up with a Single Parent: What Hurts, What Helps (2d printing 1996); Frank F. Furstenberg, Jr. & Andrew J. Cherlin, Divided Families: What Happens to Children When Parents Part (1991).

[170] See, e.g., Paul R. Amato, The Consequences of Divorce for Adults and Children, 62 J. Marriage & Fam. 1269 (2000)(reviewing the literature); McLanahan & Sandefur, supra n. 139; Kelly Musick & Robert D. Mare, Recent Trends in the Inheritance of Poverty and Family Structure (2004), available at http://repositories.cdlib.org/cgi?article+1026&context=ccpr.

[171] See McLanahan, supra n. 139; Scott Boggess, Family Structure, Economic Status, and Educational Attainment, 11 J. Population Econ. 205 (1988).

children. Divorce, for example, often involves parental conflict both preceding and following the separation, rejection by one parent, lesser quality parenting by the custodial parent, loss of resources, and dislocations such as moving to a new neighborhood and school.[172] Research documents that negative consequences on children's adjustment that can flow from these circumstances.[173]

b. The Consensus on Gay Parenting: Children of Gay and Lesbian Parents Do as Well as Children from Heterosexual Parents.

Notably, the Majority presents no evidence to say that gay parents are bad or unfit parents. This evidentiary omission is not accidental. Over twenty-five years of scientific research into the psychosocial development of children in gay or lesbian homes has established that there is no scientifically credible reason to believe that there is any risk to children as a result of growing up in a family that includes two loving, responsible, and committed parents who are gay or lesbian.[174]

The consistency of the scientific research is so robust that the American Academy of Pediatrics,[175] the American Academy of Family Physicians,[176] the Child Welfare League of America,[177] National Association of Social Workers,[178]

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[172] See, e.g., Amato, supra at n. 140; Abigail J. Stewart et al., Separating Together: How Divorce Transforms Families (1997); Ronald L. Simons et al., Understanding Differences Between Divorced and Intact Families: Stress, Interaction, and Child Outcome (1996).

[173] See, e.g., Amato, supra n. 140; Daniel S. Shaw et al., A Prospective Study of the Effect of Marital Status and Family Relations on Young Children's Adjustment among African American and European American Families, 70 Child Dev. 742 (1999); Alan Booth et al. eds., Transition to Adulthood in a Changing Economy: No Work, No Family No Future? 69-102 (1999).

[174] See Testimony of Dr. Ellen Perrin, professor of pediatrics at the Floating Hospital for Children at Tufts-New England Medical Center and a recognized expert in child development, on September 12, 2005 (including a research bibliography); see also Fiona Tasker, Lesbian mothers, gay fathers, and their children: a review, Journal of Developmental & Behavioral Pediatrics 26.3 (June 2005): 224 (17); Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 Quinn. R. R. 529, 530 (2004); American Academy of Pediatrics Committee on the Psychosocial Aspects of Child and Family Health, Technical Report and Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 339 (February 2002), available at http://aappolicy.aappublications.org/cgi/content/ full/pediatrics;109/2/339 and http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341.

[175] See American Academy of Pediatrics, supra n. 144.

[176] Jane Stover, FP Report: Delegates Vote for Adoption Policy (October 17, 2002), available at http://www.aafp.org/fpr/assembly2002/1017/7.html.

[177] Child Welfare League of America, CWLA Standards of Excellence for Adoption Services 56 (2000).

[178] See National Association of Social Workers, Policy Statement: Lesbian, Gay, and Bi-sexual Issues, Social Work Speaks: NASW Policy Statements 198-209 (4th ed. 1997).

North American Council on Adoptable Children,[179] American Psychological Association,[180] American Psychiatric Association[181], the American Psychoanalytic Association,[182] and the American Academy of Child and Adolescent Psychiatry,[183] and the American Academy of Family Physicians,[184] have all adopted policies and opinions to the effect that: "(1) same-sex parents have parenting abilities at least equal to those of heterosexual parents; and that (2) children of same-sex parents are as healthy, happy and well-adjusted, and fare as well on all measures of development, as their peers." See Testimony of Dr. Ellen Perrin on September 12, 2005. Thus, the Majority's assertion that "the major studies on this topic are encouraging" (Majority Report V(D)) is an understatement. No scientific research to date calls into question the suitability or capability of gay or lesbian parents.

As it turns out, the only bearing that research comparing heterosexual single-parent and married two-parent families has on the discussion about gay and lesbian parents and marriage is that it suggests that, all other things being equal, children would tend to do better with two gay or lesbian parents than one, and that children of gay parents, like their peers, would be likely to benefit if their parents were allowed to choose to marry. As Dr. Ellen Perrin explained to the Commission, "[c]hildren thrive better in families that include two loving, responsible and committed parents. … [C]onscientious and nurturing adults, whether they are men

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[179] North American Council on Adoptable Children Position Statements: Gay and Lesbian Adoptions and Foster Care, (amended April 19, 2005), available at http://www.nacac.org/pub-statements.html#gay.

[180] In July, 2004, the American Psychological Association's Council of Representatives adopted a "Resolution on Sexual Orientation, Parents and Children" which, among other things, recognized that "There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children." The Resolution is available at http://www.apa.org/pi/lgbc/policy/parentschildren.pdf. See also American Psychological Association and Charlotte Patterson, "Lesbian and Gay Parenting: A Resource for Psychologists" (1995), available at http://www.apa.org/pi/parent.html.

[181] American Psychiatric Association, Policy Statement: Adoption and Co-Parenting of Children of Same-sex Couples, APA Reference No. 200214 (Approved, November 2002), available at http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf.

[182] Most recently, in June 2005, the American Medical Association's House of Delegates overwhelmingly endorsed a policy to "support legislation and other efforts to allow adoption of a child by the same-sex partner" who "functions as a second parent or co-parent to that child." See American Medical Association, H-60.940: Partner Co-Adoption (Res. 204, A-04) (June 2005), available at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-60.940.HTM&s_t=H-60.940&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=1&.

[183] See AACAP Policy Statement: "Gay, lesbian and bisexual parents," (June, 1999), available at http://www.aacap.org/publications/policy/ps46.htm.

[184] See also Statement of American Academy of Family Physicians (agreeing to "establish policy and be supportive of legislation which promotes a safe and nurturing environment, including psychological and legal security, for all children, including those of adoptive parents, regardless of the parents' sexual orientation."), http://www.aafp.org/fpr/assembly2002/1017/7.html.

or women, heterosexual or gay or lesbian, can be excellent parents." See Testimony of Dr. Ellen Perrin on September 12, 2005.

Despite the treasure-trove of data, the Majority of the Commission criticizes the existing science on gay parenting as somehow incomplete and, on that basis, implies -- without any empirical studies to support it -- that children still might be harmed by having gay parents and/or giving their gay parents the option to marry.[185] The Majority's quibbling with individual studies -- whether based on size, sampling method, or some other claim -- [186] does not diminish the accepted scientific analysis underlying the conclusions of Dr. Ellen Perrin,[187] the American Academy of Pediatrics and others. The criticism lobbed by the Majority simply does not change the fact that the Majority lacks a basis to suggest that children raised in same-sex households are in any way disadvantaged. In any event, even with the wealth of research and the consistency of results, there will always be avenues of research left to explore, and it is in the nature of science itself requires constant analysis and re-evaluation.[188]

We do not dispute the observation that adoption and guardianship proceedings are geared toward the best interest of the child; rather, our quarrel with the Majority is simply that it lacks any basis to claim that gay and lesbian parents -- as a defined class of people -- should not be able to marry, jointly adopt, or pursue second parent adoptions when all the evidence shows that legal recognition of same-sex parents is in the best interest of the child. The Majority has no basis on which to imply that extending legal recognition to two gay or lesbian parents is

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[185] Though the politics of this position is obvious, the logical reasoning is not. The Majority's refusal to accept conclusions from existing science due to the never-ending nature of the science is much like certain right-wing evangelical organizations' refusal to believe in evolution because there remain "gaps" in the fossil record or in our understanding of some complex biological processes. That more work admittedly can be done does not refute the solid and consistent scientific results that have been obtained over the past 25 years.

[186] The Majority does not deny the existence of longitudinal studies, only that long term effects have not been studied "well enough." See Majority Report V(D). To be clear, there are been studies on the so-called "long-term effects." See, e.g., Golombok, S., Tasker, F., & Murray, C., Children raised in fatherless families from infancy: Family relationships and the socioemotional development of children of lesbian and single heterosexual mothers, 38 Journal of Child Psychology/Psychiatry, 783-791 (1997).

[187] The Majority mischaracterizes Dr. Ellen Perrin's testimony by implying that she has embraced the Majority's notion that insufficient data exists to draw reliable conclusions about the well-being of children of gay parents. She does not embrace the Majority's view of the last 25 years worth of data. To the contrary, a fair recitation of her testimony would reveal both her acknowledgement that further study is underway as well as her conclusion: "In sum, there is ample evidence to show that children raised by gay and lesbian parents fare just as well as those raised by heterosexual parents." See Testimony of Dr. Ellen Perrin on September 12, 2005.

[188] See Fiona Tasker, Lesbian mothers, gay fathers, and their children: a review, Journal of Developmental & Behavioral Pediatrics 26.3 (June 2005): 224 (17) (suggesting further research to explore whether children are advantaged by having same-sex parents; to diversify samples ethnically; to conduct random sampling; etc).

never in the best interest of the children of these parents. For example, how does it further any child's interests to have a rule denying a child a legal relationship with one of her parents that has helped bring her into the world and raised her since birth? When it comes to adoption and guardianships, a court is able to evaluate whether the particular parents before the court are, in fact, in the best interests of that child. Sexual orientation in and of itself is irrelevant to that analysis.

c. The Majority's Assertion that Two Biologically-Related Parents Are Optimal for Child Rearing is Both Wrong and Irrelevant.

Relying on the framework and rhetoric provided by the majority Commission witness Maggie Gallagher, a journalist and leading advocate against marriage for same-sex couples, the Majority has asserted that the preferred setting for raising children is a marital household involving a biological mother and a biological father. From this first proposition, it implies that same-sex couples should be excluded from marriage because their households generally do not include a biologically-related mother and father. This assertion should not be the basis for the State's public policy on marriage for same-sex couples for two reasons. First, there is no science to support the outcome determinative role that biology is claimed to play. Second, at the heart of the contention is a non-sequitur: prohibiting same-sex couples from marriage does nothing to promote the so-called "optimal setting" for raising children.

On the first point, there is no scientific evidence to support the Majority's premise that optimal child development requires a male and female, biologically-related parent.[189] Neither the Majority nor Ms. Gallagher have provided any verifiable proof or even a bibliography of the so-called "1000+" studies that are alleged to substantiate this assertion, and in fact it is likely grounded on those studies comparing two-parent and single-parent families, especially post-divorce. Child welfare researchers who have investigated these same claims by Maggie Gallagher have concluded that assertion "conflates and confuses research findings on four distinct variables -- the sexual orientation, gender, number, and the marital status of parents" in reaching her conclusion. Id. Among other things, the claim that one parent of each sex is best "lacks social scientific support."[190] None of the assertions made by Maggie Gallagher reference the studies finding equivalence

[189] See sources discussed in e.g., Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 Quin. L Rev. 529, 530 (2004).

[190] Stacey, 23 Quin. L. Rev. at 533.

between heterosexual and lesbian and gay parenting; instead, the assertions are based on comparisons of single-parent and married two-parent families.[191]

Second, even accepting the baseless conclusions of the Majority and Maggie Gallagher for purposes of argument, the exclusion of same-sex couples from marriage does nothing to promote the so-called optimal setting for child-rearing. With or without marriage, same-sex couples are having and raising children together.[192] Thus, the real issue is whether those children will be raised by parents who have the choice to marry or not, and to access the legal protections that children of married couples can take for granted. Excluding same-sex couples from marriage simply denies the children of gay and lesbian parents an equal opportunity to obtain the economic, social, and legal stability that flows from marriage, all of which is believed to be so central to all children's optimal development. Further, there is nothing to suggest that more different-sex couples will marry and raise children in the so-called "optimal setting" if same-sex couples cannot marry.[193]

In sum, the interest of creating an optimal environment for child-rearing cannot justify excluding gay and lesbian couples from marriage. There is an inextricable link between the health and well-being of all children and the legal protection afforded to the family relationships. Moreover, there is nothing about same-sex couples to suggest that their children would not equally benefit from the legal protections presently afforded to different-sex parents. All children benefit from the economic benefits, legal protections, stability and social legitimacy that parental marital status bestows. See Testimony of Dr. Ellen Perrin on September 12, 2005. Ending the prohibition on marriage for same-sex couples is in the best interest of the children being raised by these parents. See Testimony of Steve Varnum for the Children's Alliance of New Hampshire on September 12, 2005.[194]

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[191] Stacey, 23 Quin. L. Rev. at 531.

[192] See Section III.

[193] Notably, the State does not presently regulate marriage (or parenting) on the basis urged by the Majority. That is, neither "biologically-driven child-rearing" nor "optimal child-rearing" dictates this State's marriage or adoption policies. Divorced persons with children are able to marry even though that marriage may thrust a non-biologically-related parent (i.e., a step-parent) into the child-rearing process. Similarly, step-parents are given access to second parent adoptions even though they are not biologically related to the child they intend to raise. Moreover, persons are eligible to marry without consideration of their actual parenting skills or other external factors that may compromise their ability to parent. Of course, the science on gay and lesbian parents is that they are just as good as heterosexual couples at raising children. But, the notion that they should be denied access to marriage unless they are better than heterosexual parents is surely wrong.

[194] See also. Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 Quinn. R. R. at 539; Testimony of Dr. Ellen Perrin on September 12, 2005.

5. The Majority's "Cascade Effect" Finding Advances Various Objections to a Gay Friendly World And Is a Red Herring in this Equal Marriage Discussion.

At its core, the Majority's "Finding" on the "cascade effect" (see Majority Report, V (E) is based on the mistaken concern that the moral and religious beliefs of people and institutions opposed to gay people and families will be interfered with if gay people gain further legal recognition in society. Drawing on largely unidentified sources, the Majority implies that legal recognition of gay and lesbian families will impinge upon religious freedom, induce schools to discuss sexual orientation against the wishes of parents, and threaten the jobs of "persons [who] have objected to homosexuality from the confines of their own homes and outside their employers[.]" Id. This concern, even if sincerely held, is misguided for three basic reasons. First, no matter what, a person's right to hold deep and profound moral or religious objections to gay people and families cannot be trampled by the government. See subsection (a) below. Second, the extension of the legal rights of marriage, though objectionable to some, raises no new issue in the so-called culture war described by the Majority: it is the government's already-existing protection of gay people against sexual orientation discrimination that challenges those who would prefer that gay and lesbian people never be recognized as full and equal citizens. See subsections (b) and (c) below. Third, the Majority has neglected to consider that its proposal will squelch religious freedom for all by anchoring into law one belief rather than embracing the freedom of all people to believe as they see fit. See subsection (d) below.

a. The Freedom of Belief Is Absolute.

New Hampshire citizens' right to hold religious and moral beliefs for or against gay people and gay families is absolute. The First Amendment protects the right of an individual to believe as she chooses and to express those beliefs. See Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 877 (1990). As the U.S. Supreme Court made clear long ago, the government cannot compel citizens to affirm any particular belief:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (holding that school authorities could not compel the flag salute and pledge of allegiance).

Thus, whatever may be at stake in this marriage debate, no person can be compelled to believe any particular thing about same-sex couples or their children – either pro or con. A state cannot regulate the beliefs of those who oppose legal rights for gay people nor can it single out any particular belief for adverse treatment. Accordingly, the extension of rights to gay and lesbian families would work no legal hardship on those who fervently oppose that action.

b. The Freedom to Act Can Be Circumscribed by Non-Discrimination Laws Without Infringing Upon Religion.

Although the First Amendment provides absolute protection to the freedom to believe, its protection of conduct dictated by religious or moral beliefs is more limited. Because a person's conduct remains subject to regulation for the protection of society as a whole, the government can enforce laws of general application that certain members of the populace find objectionable, even though the government may not compel individuals to embrace any particular idea. Thus, the government can regulate conduct under neutral laws even if the regulations affect the religious practices of some portion of the population.[195] As the U.S. Supreme Court recognized long ago: "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." Smith, 494 U.S. at 879.

Thus, even though constitutional solicitude for religious practices is well-recognized, religiously motivated conduct has no privilege against legitimate governmental concerns like, for example, protecting citizens against irrational discrimination. [196] Given the government's strong interest in preventing individual

[195] For example, the government may criminalize peyote use even if that law may have an adverse effect on the ability of Native Americans to use peyote in their religious services, see Smith, 494 U.S. at 876; it may operate a selective service system, see Gillette v. United States, 401 U.S. 437 (1971); or require the use of social security numbers to obtain public benefits, see Bowen v. Roy, 476 U.S. 693 (1986).

[196] Cf. Bob Jones Univ. v. United States, 461 U.S. 574, 604, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (holding that the governmental interest in eradicating racial discrimination was sufficiently compelling to justify withholding tax exempt status from a university on the basis of its religiously motivated, racially discriminatory policies, despite the claimed harm to the university's right to free exercise of religion); Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003) (concluding that while the Boy Scouts may be constitutionally permitted to discriminate based on

acts of discrimination in employment, public accommodations, and housing based on irrelevant characteristics like sexual orientation, allowing individuals to exempt themselves from compliance would undermine the government's regulatory aims.[197]

New Hampshire's anti-discrimination law has already struck the balance between freedom of religion and the right to be free from discrimination based on sexual orientation in employment, public accommodations, and housing. New Hampshire's statute expressly exempts religious institutions from compliance with its mandates.[198] Moreover, its application to religiously motivated individuals cannot be said to infringe upon anyone's free exercise rights for the reasons just discussed. Thus, the Majority's contention that extending legal protections to gay people may infringe on the religious beliefs of religious organizations or individuals mischaracterizes the state of the law.

Though the balancing of the government's regulation of conduct and an individual's freedom of belief may be a matter of legitimate concern to the Majority, this concern is not new and is not contingent on the extension of legal recognition to same-sex couples. These types of conflicts have long been resolved under the general principles outlined above. The government's refusal to extend the legal rights of marriage to same-sex couples will not remedy the Majority's

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sexual orientation, public entities are not required to give them any special privileges to help further that discrimination).

[197] See Jasniowki v. Rushing, 678 N.E.2d 743, 750-51 (1997) (finding that government's interest in preventing housing discrimination outweighed any burden on the exercise of landlord's religious belief cause by obligation to rent to an unmarried, cohabitating couple); Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274, 280-81 (Alaska 1994) (finding that landlord violated non-discrimination law by refusing to rent to unmarried couples despite object that compliance undermine religious beliefs of landlord); Blanding v. Spots & Health Club, Inc., 373 N.W.2d 784, 791 (Minn. Ct. App. 1985) (upholding non-discrimination law to health club owner who sought to exclude gay customer due to owner's religious objections to gay sex); Smith v. Fair Employment & Housing Commission, 913 P.2d 909 (cal. 1996), cert den., 117 S.Ct. 2531 (1997) (plurality finding that landlord's religious exercise would not be substantially burdened by having to rent apartment to unmarried heterosexual couple). But see Attorney General v. Desilets, 418 Mass. 316 (1994) (remanding to allow state to establish that it has a compelling interest that can only be fulfilled by denying landlord's exemption to non-discrimination law based on sexual orientation).

[198] See R.S.A. 354-A:13 and 18. Moreover, the First Amendment to the U.S. Constitution and Part I, Arts. 5 and 6 of the New Hampshire Constitution already serve to protect religious institutions from performing marriages that do not meet their religious tenets. See Testimony of law professor Marcus Hurn on April 4, 2005; See Testimony of Professor Emeritus Richard Hesse on September 12, 2005. By guaranteeing religious freedom, these provisions allow each faith community to set its own requirements for which marriages will be performed. While R.S.A. 5-C:49 and 457:31-37 grant the authority and set forth the terms for the solemnization of marriages by religious entities, these provisions by no means mandate that clergy must perform weddings outside the dictates of their faith traditions.

stated fears any more than the extension of the legal rights of marriage to same-sex couples will rationally exacerbate it.

c. How Real Families Are Discussed in the Schools Is a Question Unrelated to the Equal Marriage Discussion.

Of course, we agree with the Majority that any discussions of New Hampshire's already existing gay families in our schools must occur in appropriate ways with parental input. New Hampshire does have statute or regulations authorizing parents to opt-out of certain educational discussions in the schools, and such matters have been traditionally handled without incident by our local schools and school boards who are best situated to respond to the needs of parents on a case-by-case basis. The Majority's stated concerns have no demonstrable foothold in any testimony about New Hampshire's real life experience with these already existing issues.

Whether New Hampshire grants legal recognition to same-sex couples or not, gay and lesbian people are a distinct, recognizable group within our communities. Issues affecting gay people play a role in current affairs locally, nationally, and internationally. As a result, it is natural that discussions of gay people and families are going to arise in schools. While there are better and worse ways to engage these issues, the freedom to learn assures students access to information and ideas and the authority to deal with such issues is best reserved to our local school boards.

Whatever concern the Majority has about acknowledging gay and lesbian families in our schools, this issue is already engaged and extending marriage to these couples will not change that reality. The examples cited by the Majority as the basis for its fears about school curriculum concern the existence of gay and lesbian families, not whether these families should have marriage rights.[199]

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[199] The Lexington, Massachusetts parent that the Majority claimed was arrested for voicing an objection to family diversity materials was actually arrested for trespassing after he refused to leave school grounds at the repeated request of school officials. See Maria Cramer and Ralph Ranalli, Arrested Father Had Point to Make, The Boston Globe, (April 29, 2005), available at http://www.boston.com/news/local/articles/2005/04/29/arrested_father_had_point_to_make/; see also Related Press Release of Lexington Superintendent of Schools and Lexington Chief of Police http://www.lexingtoncares.org/LPSPressRelease2005-05-02.pdf. His objection did not concern materials relating to marriage rights for same-sex couples but merely to the acknowledgement that there are many types of families, including gay families. Id. Though the school system provided parents with the right to elect to exclude their children from certain educational discussions surrounding various books placed in a segregated "book bag" for parental consideration, Mr. Parker's complaint was not about the discussion of any particular text but simply the acknowledgement of gay families. Additional information on the school system and Mr. Parker's ties to anti-gay extremists can be found at www.lexingtoncares.org.

Moreover, the impression painted by the Majority that chaos has reigned in the schools following the availability of marriage for same-sex couples in Massachusetts is unfounded.[200]

Again, how gay people are addressed in our schools is not a reason to deny legal protections to our already existing gay families in New Hampshire who need them.

d. Beliefs in Particular Church Doctrines Should Not Drive Public Policy Underlying Civil Marriage.

Reliance on church canons to further the exclusion of same-sex couples from civil marriage would unconstitutionally elevate one religious view over all others and provoke concerns about the unconstitutional establishment of religion. See Testimony of Professor Emeritus Richard Hesse on September 12, 2005; County of Allegheny, et al. v. American Civil Liberties Union Greater Pittsburgh Chapter, et al., 492 U.S. 573, 590 (1989) ("this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization").

Importantly, many faiths and religious communities in New Hampshire and around the world already accept and perform religious wedding ceremonies for same-sex couples. Many also fully support the recognition of marriage for same-sex couples under the law. A diverse spectrum of religious communities, houses of worship and individual clergy who either support civil marriage for same-sex couples, perform same-sex unions in their congregations, or do both, testified before this Commission in favor of extending marriage to same-sex couples. These individuals represented the Unitarian Universalists ("UU") and United Church of Christ ("UCC"), American Friends Service Committee ("AFSC") and other Quaker institutions, the Reform Jewish movement, and the Universal Fellowship of Metropolitan Community Churches.

In sum, enshrining one religious view as the basis for the state's interpretation of the civil marriage laws would be particularly problematic given the widespread support for marriage rights for same-sex couples from several communities of faith.

6. The Majority's Findings on the So-Called "Interstate

[200] See Oral Testimony of Representative Byron Rushing on September 19, 2005.

Commerce Effect" Concede that Gay Families Are In Danger and Do Not Justify Their Ongoing Exclusion from Marriage.

The Majority's finding on the so-called "interstate commerce effect" has nothing at all to do with "interstate commerce" as that term is traditionally used. Rather, the finding relates to SB427 and the state's present policy to refuse respect to legal marriages from other jurisdictions. The Majority seemingly concedes that legally married same-sex couples from other jurisdictions are harmed when the state forces them into an involuntary divorce as they cross into New Hampshire territory, and for that reason proposes to mollify the impact of non-recognition on same-sex couples. See Section III (C)(7) above for a discussion of the effects of non-recognition on these couples and their children. Although the Majority claims that the associated "legal issues are complex and evolving," it fails to explain why they are complex or why it would harm New Hampshire to recognize these legally valid marriages.

The Majority recommends that couples, affected by the non-recognition of their marriage, contract with one another to address the state's disrespect of their relationship. For the reasons set forth in Section II (B)(4)(e) above, this is a legal impossibility. As for the affected children, the Majority offers the suggestion that the State convert legal rights of parentage obtained through marriage into a statutory "co-guardianship." Though a co-guardianship would allow the non-biological parent to act as a decision-making parent for some period of time, it is not a permanent legal protection (i.e., it can be unilaterally withdrawn by the biological parent or the court); it does not assure ongoing protection for the parent and child upon death or dissolution of the relationship (e.g., it does not ensure automatic inheritance rights, Social Security survivor protections, child support, or rights of custody or visitation); and it needlessly interjects the court into a supervisory role over the family's established arrangements.[201]

Finally, the Majority contends that nothing can be done about SB427's non-recognition of these legal marriages because other states and the federal government will not recognize these marriages either. This is a non-sequitor. Discrimination at the federal level or in other states does not excuse New Hampshire from the discrimination, which it imposes on same-sex couples directly. It is antithetical to the principles of equal protection for the Majority to

[201] See Section III (C)(7) above. See also In the Matter of Nelson, 149 N.H. 545, 556 (2003) (Nadeau, J. dissenting).

suggest, as it has, that discrimination against a class of persons is acceptable simply because the laws of another jurisdiction discriminate against the same class.[202]

Thus, this "finding" on the so-called "interstate commerce effect" does not justify the denial of marriage, it merely acknowledges the underlying problem of denying legal marriage and respect to same-sex couples.

B. No Other Subsidiary Rationale Advanced by the Majority Justifies the On-Going Denial of Legal Rights of Marriage to Same-Sex Couples.

1. Procreation Interests Do Not Justify Excluding Same-Sex Couples From the Legal Protections of Marriage.

Marriage in New Hampshire is not reserved to those who "naturally" procreate, and it is inappropriate to deny the legal protections of marriage to same-sex couples based on whether or how they choose to procreate. Different-sex couples can marry even though many procreate through reproductive technologies, adopt, or choose not to have children. If the marriage laws were amended to reserve marriage only for those different-sex couples that were willing to procreate in this fashion, the Majority's insistence that marriage furthers an interest in natural procreation would make more sense. Yet, this is not contemplated. Instead, what is contemplated is simply to use this alleged distinction in procreative capacities as grounds to exclude only same-sex couples from marriage. Given that same-sex couples also procreate through reproductive technologies, adopt, or choose not to have children, the exclusion of same-sex couples from marriage because they might procreate differently from some of those presently allowed to marry is not credible. The procreation objection to marriage rights of same-sex couples has everything to do with finding an excuse to exclude same-sex couples and nothing

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[202] This "one discrimination justifies another" approach has been rejected by courts and commentators. See, e.g., Orr v. Orr, 440 U.S. 268, 280 n. 9 (1979) (argument that common law discrimination justifies sex-based classifications "reveals its own weakness"); Parham v. Hughes, 441 U.S. 347, 361 n. 2 (1979) (White, J., dissenting) ("It is anomalous, at least, to assert that sex discrimination in one statute is constitutionally invisible because it is tied to sex discrimination in another statute, without subjecting either of these classifications on the basis of sex to an appropriate level of scrutiny."); William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 207 (1998) (noting, in analyzing Hirabayashi v. United States, 320 U.S. 81 (1943), that "there is considerable irony, of course, in relying on previously existing [race-based] laws discriminating against Japanese immigrants to conclude that still further disabilities should be imposed upon them . . ."). See also Goodridge, 440 Mass. at 340-341 (resistance of federal government or other states cannot curtail extending "to their fullest extent" the rights guaranteed by the state constitution); Opinions of the Justices, 440 Mass. at 1209 (same). Thus, discriminatory federal laws provide no safe harbor for the state to defend its own exclusion of same-sex couples from marriage.

to do with furthering any actual interest in the procreative capacities of New Hampshire citizens. Because different-sex couples will be able to marry and procreate even if same-sex couples are permitted to marry, it is not clear how "natural" procreation, in and of itself, would be better protected by excluding same-sex couples from marriage.[203] New Hampshire has not made procreation a precondition to marriage,[204] and it cannot reverse course now, particularly given the fundamental right to not procreate.[205] Put simply, the state's interest in procreation does not justify the continued exclusion of same-sex couples from marriage. See Testimony of Professor Emeritus Richard Hesse on September 12, 2005.

2. Extending Some or All of the Tangible Protections of Marriage -- Even Under the Label of Civil Unions – Is a Positive Step, but Falls Short.

Given the absence of any deliberative discussion on the real needs of same-sex couples and the laws adversely affecting them, the Majority's discussion of whether and how to extend a limited set of protections to same-sex couples rings hollow. This Commission never seriously considered whether to extend meaningful legal protections to gay families. The proposal by a subset of the commissioners in the Majority to extend "reciprocal benefits" to same-sex couples and other non-marital, family pairings is woefully inadequate in providing even a base level of protections for same-sex couples.[206]

Some have suggested that the more comprehensive status of civil unions would have been a good way to begin to address the needs of same-sex couples. Civil unions are an alternative legal status created by the Vermont legislature in 2000 and recently embraced by the Connecticut legislature in 2005. Civil unions

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[203] See, e.g., Halpern v. Attorney General of Canada, 172 O.A.C. 276, ¶ 121 (App. 206) ("Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry.").

[204] See N.H. Rev. Stat. §§ 457:1 et seq. (procreation absent from requirements for a valid marriage); 458:1 (procreative incapacity not among grounds for annulment); 458:7 (procreative incapacity not among grounds for divorce).

[205] See Griswold, 381 U.S. at 485-486.

[206] For example, it does not treat reciprocal beneficiaries as spouses when it comes to many key protections of marriage, including without limitation, favorable taxation rights, public or private health insurance coverage, pension benefits, parenting rights (e.g., second parent adoption, joint adoption, child support, or access to custody and visitation), or access to the divorce laws (e.g., rights to equitable distribution of property or spousal support). Notably, the Majority's desire to extend rights to non-marital family pairings is not objectionable in and of itself. What is objectionable is its insistence that same-sex couples be denied the legal rights of marriage and that the state link its treatment of same-sex couples to whatever limited protections it may choose to extend to closely-related family members whose numbers and needs have yet to be assessed.

in those states provide every legal, tangible right, benefit and responsibility of marriage, but not marriage itself.[207] The extension of 100% of the state-provided tangible benefits of marriage would be a significant step forward for same-sex couples in New Hampshire and would go a long way to eradicating the disparities between same-sex couples and different-sex couples. Short of marriage itself, a civil union law would be the strongest possible legislative declaration that same-sex couples and their children need and are worthy of the same rights and protections that married different-sex couples have.

Having never engaged in a sincere discussion of civil unions, we cannot say whether civil unions would be a good idea for New Hampshire. Yet, it is critical to recognize that gay men and lesbians in New Hampshire still will not be treated equally under law if civil unions are enacted. Civil unions are a separate institution from marriage with a separate name, and, therefore, a separate legal status. The core issue raised by the separate status for same-sex couples embodied in a civil union law is analogous to the issue faced by the U.S. Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896), and Brown v. Board of Education, 347 U.S. 483 (1954): can the Constitution tolerate segregation mandated by law for it's own sake? Plessy affirmed a statute that segregated train passengers by race. 1890 La. Acts 111. In his famous dissent, Justice Harlan first articulated the principles of equality that are now commonly accepted in American constitutional jurisprudence. Justice Harlan insisted that the Constitution prohibits distinctions "implying inferiority in civil society" because "there is in this country no superior, dominant or ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." Plessy, 163 U.S. at 556, 559. Justice Harlan explained that this is true even of laws that confer equal rights and benefits. As Justice Harlan explained, "The thin disguise of 'equal' accommodations … will not mislead anyone, nor atone for the wrong this day done." Id. at 562. Subsequently, in Brown v. Board of Education, the Supreme Court rejected the idea that "equality of treatment is accorded when races are provided substantially equal facilities." Id. at 488. The Court reasoned that segregation "generates a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. Since Brown, the tenet that equality is fundamental and

[207] See Connecticut Public Act No. 05-10, § 14 (effective October 1, 2005): "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in marriage, which is defined as the union of one man and one woman." (Emphasis added); see also Vt. Stat. Ann. 15 § 1204.

essential for its own sake has been a consistent and bedrock principle of American constitutional jurisprudence.

Courts considering constitutional challenges to the exclusion of same-sex couples from marriage have also recognized that a separate status for same-sex couples, even if such status in fact provided all of the tangible benefits of marriage, offends constitutional equality guarantees. See Opinions of the Justices, 440 Mass. at 1207 ("The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex … couples to second-class status … ."). [208]

Moreover, as a practical matter, civil unions slam the door on access to bread and butter federal protections. See Section II (B)(4)(f). The myriad federal benefits of marriage will remain largely off limits to couples joined in civil union.

Couples joined in a civil union may also be compromised in their ability to have their relationship recognized beyond New Hampshire's borders. Although states are free to reach their own conclusions about what legal relationships each will recognize within its borders, it has traditionally been the case in New Hampshire and elsewhere that a marriage valid where celebrated is valid everywhere. Many have argued that this rich tradition of respect, and the legal conflicts of law principles on which it is based, leave civil union couples doubly exposed to non-recognition elsewhere because civil unions do not have this legal history of respect to call upon. Though fifty states provide benefits to couples, only two states provide civil unions (Vermont and Connecticut) and only two expressly recognize civil unions from another jurisdiction in their statutes (Connecticut and California).

While civil unions do offer immediate refuge to New Hampshire families, they can never deliver the full protections and equality that are unique to marriage. Ultimately, marriage is the best and only fair way to fully provide for thousands of New Hampshire's families and couples, but it is lamentable that this Commission

[208] See also Barbeau v. Attorney General of Canada, 2003 B.C.C.A. 251, ¶ 156 (2003) ("[a]ny other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions."); Halpern v. Toronto, 172 O.A.C. 276, ¶¶ 102-107 (2003) (separate status for same-sex relationships insufficient; right to equality requires access to "fundamental societal institutions"). So long as marriage remains exclusive to different-sex couples, gay men and lesbians will continue to fall short of the status of full citizenship, marking them and their children with a stamp of inferiority.

could not even recommend civil unions as a short-term, stop gap measure to provide for the gay and lesbian families that need help now.

3. Concerns about Polygamy Do Not Justify Excluding Same-Sex Couples from the Legal Protections of Marriage.

The suggestion that the Legislature's ending marriage restrictions on gay and lesbian couples will lead to polygamy is simply fear mongering and a diversion. See Majority Report, VI (B)(B). One does not follow the other; there is nothing to compel the Legislature to embrace polygamy if it ends discrimination against gay people. First, there are significant questions about whether plural marriage fits within the constitutional values that make marriage a protected right. Second, there is the further question about whether such a ban is supported by sufficient state interests. In sum, ending sex discrimination in marriage will no more make inevitable legalization of multiple partner marriages than ending race discrimination did. This same specter of polygamy was raised by the dissent in Perez, and at oral argument in Loving, but legal claims for polygamy have not advanced. [209]

4. The Desire to Communicate That Same-Sex Relationships Are Less Deserving Cannot Justify the Exclusion of Same-Sex Couples from the Legal Protections of Marriage.

The desire to exclude same-sex couples from marriage simply to communicate a message about the disfavored status of same-sex coupling is not a legitimate state purpose. The U.S. Supreme Court has repeatedly admonished that biases and negative attitudes toward gay and lesbian people must have no place in our constitutional system. In Lawrence, the U.S. Supreme Court explained that laws that impose a "stigma" on gay people are constitutionally suspect in that they operate to demean them and deprive them of dignity. 539 U.S. at 575. Relatedly, in Romer, 517 U.S. at 635, the Supreme Court struck down a law aimed at precluding gay and lesbian citizens from seeking state discrimination protections because it was undertaken to classify gays and lesbians for the sake of classification alone. Id. at 650. See also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("[t]he Constitution cannot control such prejudices but neither can it

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[209] See Perez, 198 P.2d at 761 (Shenk, J., dissenting) (multiple marriages); Peter Irons & Stephanie Guitton eds., May It Please the Court, 227, 282-283 (oral arguments in Loving v. Virginia) (1993) in which Virginia Assistant Attorney General R.D. McIlwaine argued "[T]he state's prohibition of interracial marriage ... stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent.")

tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Thus, the desire to communicate that gay people deserve less than other citizens cannot be a justification for denying them the legal protection of marriage.

5. Preserving A Historical And Traditional Definition of Marriage as between One Man and One Woman Is Not a Legitimate Reason to Exclude Same-Sex Couples from the Legal Protections of Marriage.

The belief that marriage is between one man and one woman -- simply because that is the way it is and has always been -- is not a constitutionally adequate basis to bar same-sex couples from marriage. What has been done as a matter of history is not correct for that reason alone.[210] Courts ruling that anti-miscegenation laws were unconstitutional and a denial of the fundamental right to marry would never have done so had they deferred to notions of tradition and past history.[211] The framers of the Constitution knew that "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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence, 539 U.S. at 579. Thus, simply because discriminatory practices may be long-standing does not make them legally appropriate.

6. Conservation Of Resources Is Not a Legitimate Reason to Deny Same-Sex Couples Access to the Legal Rights of Marriage.

The denial of the legal rights of marriage to same-sex couples cannot be justified on a cost basis. The testimony before the Commission has demonstrated that extending marriage to same-sex couples would not have an adverse affect on

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[210] As the Massachusetts Supreme Court noted in Goodridge, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." 440 Mass. at n. 23; Coordination Proceedings, The Marriage Cases, 2005 WL 583129 (Cal. Superior 2005) ("A statute lacking reasonable connection to a legitimate state interest cannot acquire a connection simply by surviving unchallenged over time.")

[211] To the contrary, the Court in Perez acknowledged that these bans on interracial marriage were based on long-standing views that mixed-race marriages were "unnatural," but nonetheless ruled that "the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." Perez, 198 P.2d at 27. Nor did the U.S. Supreme Court in Loving give weight to the fact that 16 states outlawed interracial marriage at the time that the Court struck down bans on marriage by people of different races as violative of equal protection. See Loving, 388 U.S. at n. 5.

the state's financial resources; rather, extending marriage to same-sex couples would have a net positive effect on the public fisc and could actually save the state as much as $600,000 dollars per year in the first few years, in addition to the additional $63 million in tourist spending that could be generated in the first few years if the state were to be one of the first to extend marriage to out-of-state, same-sex couples. See Testimony of M.V. Lee Badgett on September 19, 2005.[212] The evidence suggests that same-sex couples would benefit from the financial protections of marriage as much as different-sex couples, and moreover, marital protections have never been allocated based upon a couple's financial status, whatever that may be.

V. CONCLUSION.

Despite our diametrically opposed conclusions, there is a degree of consensus between ourselves and the Majority on key foundational principles. All sides seemingly agree that the Legislature has a vital role to play in formulating state policy on marriage and in protecting the rights of New Hampshire citizens. No one disputes that the issue of marriage rights for same-sex couples has profound significance on personal, legal, and for some, religious levels. We all believe in the importance of marriage and the role it plays in helping to provide stability and coherence to families. We also agree, or at least we should, that the governing legal principles of equality and liberty have no exception for the unequal and unfair treatment of New Hampshire's gay and lesbian families. Moreover, there appears to be uniform acknowledgement that gay and lesbian families are harmed by New Hampshire's ongoing denial of the legal rights of marriage to same-sex couples.

We in the Pro-Equality Minority believe that the common ground between us and the Majority shows that we are on the right side of this issue. Having reviewed our collective commitment to equal liberty of all citizens, we conclude that gay and lesbian people also presumptively enjoy a right to marry the person of their choice. Examining the civil nature of marriage, i.e., that it is a state-licensed and regulated institution, we are bound by the Constitution's commands, and not those of any faith. What is rightly within the domain of religious faiths and in accord with our commitment to free exercise of religion is the ability of each faith

[212] Even if there were significant costs associated with issuing marriage licenses to nonresidents, cost alone cannot absolve New Hampshire of its constitutional obligation to provide equal access to the civil institution of marriage. See Plyer v. Doe, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification [to exclude nonresidents from school enrollment]. The State must do more than justify its classification with a concise expression of an intention to discriminate.").

to regulate marriage within its own traditions. History teaches us that ending the exclusion of same-sex couples from marriage is another manifestation of ending sex discrimination in marriage, just as we have ended race discrimination within marriage. Moreover, marriage has already transformed into an institution of legal equals into which same-sex couples easily fit. The protections of marriage -- legal, practical, social, cultural -- are so profound that if this restriction were imposed on any of us who are not gay or lesbian, we would find it utterly intolerable. We think it obvious that the restriction is not justified and that marriage is the only long-term fair and equitable solution.

At the same time, understanding the incremental nature of legislative bodies, we in this Minority would have welcomed a meaningful discussion of legislative options to rectify the profound harms imposed on the gay and lesbian community by virtue of the marital barrier that separates same-sex couples from the legal rights that flow from marriage. Had the Commission engaged in a meaningful discussion of options, some of us would have sincerely and genuinely participated in that discussion. Unfortunately, the Majority never allowed or welcomed that discussion.

Instead of advancing any meaningful discussion of positive steps that can be taken to help New Hampshire's gay families, the Majority proposes a constitutional amendment -- rewriting the Constitution -- in order to repeal existing constitutional protections to gay people. We reject the call to amend the constitution. When a class of our citizens has demonstrated that they are being denied equality under present constitutional principles, the response from our State should not be to re-write our governing precepts to cement this constitutional disparity for perpetuity.

The Majority proposes to "clarify" the law concerning hospital visitation and co-guardianships, simply repackaging, or tinkering with, the rights everyone already has. While we have no objection to legal clarifications as a general matter, we reject any notion that the proposal is sufficient to alleviate the harms that same-sex couples are experiencing on account of this state's laws.

Moreover, though the state is constitutionally constrained from making laws based on religious views, the Majority proposes to erode, if not eliminate, the line between church and state by permitting public officials to refuse to perform their public duties based on religious beliefs. This is also ironic given that the Majority has no intention of changing the marriage laws and the Majority seeks to exempt public officials from their duties only with respect to beliefs about gay men and

lesbians marrying.[213] This also raises Establishment Clause concerns[214] because the proposed exemption addresses only sexual orientation and not other prohibited bases of discrimination. As the Commission is not prepared to provide the exemption for discrimination against every class of persons who may marry, we will not seriously entertain this proposal to discriminate on the basis of sexual orientation alone.

Regrettably, the Majority of this Commission has squandered an historic opportunity to make meaningful study into, and recommendations about, advancing the welfare of the gay and lesbian families of this state and of their children. Yet, the members of the Legislature can still fulfill their solemn duty to further the welfare of our families as they exist today. For the reasons set forth above, we urge them to take steps now to end the State's ongoing-denial of the legal rights, responsibilities and protections of marriage to gay and lesbian couples and their children.

Respectfully submitted,
Senator Martha Fuller Clark
Representative James McKay
Representative Steve Vaillancourt
Governor's Appointee and Former Representative Ray Buckley
Public Appointee, by Former House Speaker Chandler, Ed Butler

[213] See Majority Report, VI (C) (making clear that enforcement of non-discrimination laws with respect to race and national origin are not within "the right of religious liberty for public employees" but that exemptions for religious liberty would need to be made if same-sex couples are granted "any legal status" by the state).

[214] See Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) (recognizing that a government may not, in creating an exemption, foster religion through its own activities and influence); Walz v. Tax Commission, 397 U.S. 664, 668 (1970) (explaining that establishment is caused by "sponsorship, financial support, and active involvement of the sovereign in religious activity").