

**Commission 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**

15. The Commission also addressed the second case of an interstate transit scenario of New Hampshire residents traveling to other States. In both cases the legal issues are complex and evolving, but the Commission recommends the following: (1) Legally married or legally recognized civil unions in foreign jurisdictions with children may be deemed co-guardians, see RSA 463:10, III; 463:30; 463:32-a and (2) NH law can't be extended outside of NH because of Federal DOMA and other legal restrictions of foreign States, but it is recommend those other States recognize contractual rights granted in NH with the assistance of The National Conference of Commissioners on Uniform State Laws.

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**II. RECOMENDATIONS**

**B RECOMMENDATION FOR A CONSTITUTIONAL AMENDMENT**

**FACTS, TESTIMONY, AND RESEARCH:**

1. The Commission finds that marriage deserves its special status in law and society in the State of New Hampshire, because marriage performs a unique and irreplaceable social function: it encourages men and women to make and rear their children together. Marriage matters for many reasons but the most important one is this: marriage aims at making the next generation, in the only context in which children can be known and loved by their own biological mother and father. The Commission recommends that a Constitutional amendment defining marriage as a union of “one man and one woman” be introduced for adding to the NH Constitution to keep its sovereignty and maintain existing law and rights that have been codified and understood for 200 years.

**I. BACKGROUND**

**A. HISTORY AND PURPOSE OF MARRIAGE**

2. Marriage is universally found in all cultures exclusively designated to be a union of male & female for both public and private celebration of heterosexual conduct and procreation. Marriage has 3 purposes: (1) Men are attracted to woman and sexual intercourse that results in babies, (2) Society needs babies to perpetuate itself, and (3) Children need a male and female for growth and maturation. The State has a legitimate interest in procreation. 60% of women’s pregnancies are unplanned. Contraceptive failure for people’s ages 15-44 is 1.8 pregnancies. Children born to male and female married couple start life with an advantage compared to other family arrangements. There is overwhelming and conclusive evidence, 1000+ studies that child born to intact male and female married environment is the best for child development from a variety of measured data: infant mortality, life expectancy, educational achievement, social skills, and criminal behavior<sup>80</sup>.

3. Marriage is unique with no parallel. It is a civil institution that was borrowed from religious roots though it has changed vastly over time. Marriage is a bundle of obligations and benefits from the State. Marriage is a private decision but a public institution that authorized by State authority. Persons pledge to be monogamous and faithful to each other until death due their part which has roots in the religion of Christianity<sup>81</sup>.

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<sup>80</sup> <http://www.marriagedebate.com/index.php> Institute for Marriage, Maggie Gallagher, **(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman**

<sup>81</sup> Expert Testimony from Professor Nancy Cott at SB 427 Hearing 9/19/05.

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4. When the American Colonies settled, marriages were authorized by secular authorities. Churches are authorized agents of the State. The history of America shows that civil authorities shaped and changed marriage. The legislatures have also changed marriage. When the American Colonies settled, marriages were authorized by secular authorities. Churches are authorized agents of the State. The history of America shows that civil authorities shaped and changed marriage.

5. In the 1800's, the marriage model was called 'marital unity', where the husband and wife are seen as one and only seen as through the husband, the term "coverture". The husband was responsible to be the provider for food, shelter, and the wife pledges her service, labor to obey. A wife could not own property, sue in court, or be charged with a crime except through her husband and was seen as service of her husband. This changed in the 1900's as laws were changed where a presumption of marriage equality was deemed necessary. This change was not complete until the 1970's. The basis of these changes was due to the cultural change from an agriculture society to an industrial one and women's suffrage and civil rights laws.

6. The second area of law involving marriage that has been changed is regarding slavery and race. Slaves could not consent as free persons and marriages were not allowed. After slavery, prohibitions on race continued in southern and western states. These laws were called anti-miscegenation where the white race did not want interracial marriages to protect the white race. However, blacks could marry Asians. The first State to strike these laws down was California in 1948 and finally by the Supreme Court in Loving v. Virginia, 388 US 1 (1967) and at time 15 states had such laws. States after the California decision attempted to write anti-miscegenation laws into their Constitution prior to Loving.

7. Finally, in the 1960's and 1970's, this concept was challenged again to adopt a "No Fault Divorce". The fault based system required the spouse to prove the other had committed a breach of duty by the State. Under no-fault, partners can proscribe reasons without proving fault. Marriage is now in hands of couple. Thus, though marriage has changed, it has fundamentally always been a heterosexual institution requiring a union of opposite genders.

**B. FOREIGN LEGAL CHALLENGES TO MARRIAGE - CANADA**

8. Just in the United State where Courts have ruled the definition of marriage as "one man and one woman" unconstitutional, other countries had similar court challenges where their Courts ruled that the definition violated their countries constitution. The most recent example was in Canada<sup>82</sup>.

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<sup>82</sup> See <http://www.buddybuddy.com/mar-cana.html>

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9. In the year 2000, the Québec Government revised several laws to give same-sex couples the same benefits and obligations as heterosexual common-law couples. However, it continued to exclude same-sex couples from legal marriage. Michael Hendricks, 57, and René Léboeuf, 43, are a gay couple who have been together since they met at a New Year's Eve party in the 1970s. Hendricks is a well known gay activist in Montreal, Québec. Three years into their relationship, they bought a house together.

10. By 1998, the Québec government had neither recognized common-law marriages between same-sex couples, nor enacted legislation making it easier for gays and lesbians to give medical consent, to obtain guardianship of children, to receive inheritances upon their partner's death, or to do many things that opposite-sex couples are automatically able to do simply by going through a marriage ceremony. Hendricks and Léboeuf decided to force Québec's hand with a lawsuit.

11. It soon became obvious that they would have to go it alone. The main national gay and lesbian advocacy group, *Equality for Gays and Lesbians Everywhere* (EGALE) was not interested in pursuing same-sex marriage at that time. But there were encouraging signs in Québec. Hendricks wrote: "...the polls were running higher in our favor than anywhere else in Canada, the religious opposition was scattered and insignificant, TV stars invited us on their shows to promote it, even the Québec Liberal Party supported gay marriage." The couple and their lawyer went through the motions of requesting a license from the license bureau. They gave media interviews at the courthouse, and kissed for the cameras. With their lawyer, Stephane Gendron, they asked an assistant clerk of the *Québec Superior Court* for a marriage license. The clerk read out the section of the *Québec Civil Code* that defines a marriage as being between a man and a woman only. Their application was formally rejected. Gendron immediately filed a request to challenge the law in the courts. The couple is challenging three government statutes as unconstitutional:

1. **Art. 365** of the *Quebec Civil Code*, which contains an opposite-sex definition of marriage.
2. **Federal Bill S-4**, which affirms the opposite-sex definition of marriage, and applies only in Québec.
3. **S. 1.1** of the *Modernization of Benefits and Obligations Act*.

12. On November 14, 2001, Robert Reynolds, a lawyer representing various conservative religious groups, made a case against same-sex marriage. In conclusion, Reynolds explained how his clients had sincere, profound, convictions against SSM and feared being targeted by the State if gays and lesbians were allowed to marry. SSM would take all the meaning out of marriage. Marriage as an institution could not continue. He attempted to prove that the meaning of the term "marriage" was frozen in the Constitution of 1867 and cannot be changed, except by constitutional amendment. A modern-day law cannot change the 19th century meaning of the word "marriage."

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13. He argued that the freedom of religion and conscience enjoyed by many Canadians would be attacked if SSM is legalized. His heterosexual clients would no longer be able to marry. That is because, to them, marriage is a heterosexual institution. Marriage would not be an option for them if same-sex married couples existed. He noted that Article 27 of the *Charter of Rights and Freedoms* supports multiculturalism, which includes support of the diversity of religious belief.

14. The final day of the trial was November 16, 2001. The representative of the *Attorney General of Canada* explained that Parliament has balanced divergent interests. They, not the courts, have responsibility for "*social engineering*." The representative of various conservative religious groups spoke next. He expressed concern if any major change was made to the institution of marriage. It has served society well in its present form. Allowing SSM could have serious consequences. SSM would impose on believers and the rest of society a new institution that is fundamentally contrary to traditional religious faith. Allowing SSM would be an attack on the freedom of religion. If the court grants gays and lesbians the choice to marry, then the court also would take away choice from religious folk who believe that marriage should remain between one man and one woman.

15. In 2002-MAR, the Government of Québec announced that legislation would shortly be introduced to create Vermont-style civil unions in the province. Hendricks and Léboeuf personally rejected the proposed law, because it would not carry the same weight as marriage. It would not be recognized throughout Canada. On 2002-MAR-22, Hendricks said: "*We will get married, if we can win this case... "Marriage is marriage. It's the gold standard in social acceptance, and it's mobile."*

16. On 2002-SEP-6, the *Québec Superior Court* declared that the denial of marriage to same sex couples violated their rights. The court gave the federal government two years in which to modify the federal marriage act to allow gays and lesbians to marry. The ruling stated that a system of national civil unions or other alternatives to marriage would not be acceptable. Since equality is the issue, marriage is the only solution.

16. Judge Lemelin quoted extensively from a letter written by Nathalie Ricard, a Québec nurse. She explained that being refused permission to marry isolated gay and lesbian couples and their children from the main stream of Canadian life. She wrote that same-sex couples are infantilized by that discrimination. The defendants did not have long to wait for reaction from the federal government. Six days later, on 2002-SEP-9 the government announced that they would appeal the *Québec Superior Court* ruling to the *Québec Court of Appeal*.

17. Faced with a number of court decisions which found the marriage act unconstitutional, and paralyzed with fear at loss of votes if they carried out the wishes of the courts and the majority of Canadians, the federal government took the only option open to it: a delaying tactic. They formed a parliamentary committee to travel throughout Canada and give the public a chance to speak. Two days have been set aside for the appeal, starting on 2003-SEP-25.

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18. On 2003-JUN-10, the *Ontario Court of Appeal* handed down its ruling. They agreed with the senior provincial courts in British Columbia and Québec. All three courts delivered the same messages to the federal governments -- That: The existing marriage act is unconstitutional because it not allows gays and lesbians to marry and National civil union legislation is not an acceptable alternative to marriage.

19. However, the Ontario court went further. It announced that the *Government of Ontario* must start issuing marriage licenses immediately to gay and lesbian couples. The British Columbia court followed suit on 2003-JUL-8. The ruling Liberal party finally caved in. Gays and lesbians were routinely getting married. Courts in provinces containing 80% of the Canadian population were of the same mind. The government apparently realized that they would eventually have to overhaul the marriage act. The longer that they dragged their feet, the more of a laughing stock they became to the public, and the more they looked like ineffective politicians. On 2003-JUL-17, Justice Minister Martin Cauchon announced that the government would change the definition of marriage to "*the lawful union of two persons to the exclusion of all others.*" The only restrictions would be that the spouses would have to be at least 16 years of age, not too closely related genetically, and unmarried. The draft legislation would be sent as a "*reference*" to the Supreme Court who would then be asked to rule on its constitutionality

20. The federal government abandoned its appeal of the *Québec Superior Court* ruling. The appeal continued, but with only the group of religious conservatives opposing the plaintiffs. On 2004-MAR-20, by a vote of five to zero, the *Québec Court of Appeal* unanimously rejected the *Catholic Civil Rights League's* appeal. The *League* had requested that the court overturn the *Quebec Superior Court's* decision in the Hendricks case. There is a certain irony that a "*Civil Rights*" agency had the goal of limiting the civil rights of same-sex couples. The justices ruled that *Canada's Charter of Rights and Freedom* does not permit discrimination in marriage. Same-sex marriages are now legal in the province. Hendricks and Leboeuf plan to get married in April, about six years after having first launched their court case.

21. A bill granting full marriage equality to same-sex couples in Canada became law on July 20, 2005. Marriage licenses are now available to same-sex couples nationwide. Since marriage laws in Canada do not have residency requirements, same-sex couples who travel from the United States to Canada could also get married there. In British Columbia, Newfoundland & Labrador, Nova Scotia, Ontario and Yukon Territory, applicants for a marriage license must be 19 or older. In Alberta, Manitoba, New Brunswick, Prince Edward Island, Quebec and Saskatchewan, they must be 18 or older. In Manitoba, Saskatchewan and Yukon Territory, there is a mandatory 24-hour waiting period between when the marriage license is issued and when the ceremony can be performed. Quebec has a 20-day waiting period, while Nova Scotia has a five-day waiting period. Newfoundland & Labrador have a four-day waiting period between the application and the issuance of the license and an additional four-day waiting period between the issuance of the license and the marriage.

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22. In summary, Canada faced judicial activism regarding legal challenges to its ban on SSM and lost. The Commission finds the Canadian experience with SSM is not an isolated event, nor an event that can be considered insignificant. Instead, the Commission finds the Canadian experience similar to the challenges pending in the US where a small but powerful minority seeks to rewrite the definition of marriage via litigation and that threatens liberties of the separation of powers of the three branches of government and silence the people's voice on this sociological debate.

**C. SURVEY OF GROUPS SEEKING SAME SEX MARRIAGE RIGHTS**

23. A review of current court cases pending in other States and review of advocacy groups mission statements show that same sex marriage is being attempted to be imposed upon States under a variety of legal theories: (a) States marriage laws are non specific that require interpretation to determine if same sex couples are excluded, (b) The statutory language for marriage defined violates the State's constitution where "no rational basis" exists for same sex marriage exclusion, and (c) The State's laws for a Defense of Marriage Act (DOMA) violates the State or Federal Constitution under a variety of clauses.

24. In addition, the legal advocacy of same sex marriage is not just a random occurrence but is a highly well financed and politically organized attempt to bypass the legislative process. The most active same sex advocacy groups are (a) The Human Rights Commission (HRC), (b) The Lambda Legal Defense Fund, (c) Gay & Lesbian Advocates & Defenders (GLAD), and (d) The American Civil Liberties Union (ACLU). A summary of the history of each advocacy group is as follows:

**a. The Human Rights Commission (HRC), (www. HRC. Org):**

The Human Rights Campaign, the largest national gay, lesbian, bisexual and transgender advocacy organization, envisions an America where GLBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has 600,000 members - all committed to making this vision of equality a reality. Founded in 1980, HRC effectively lobbies Congress, provides campaign support to fair-minded candidates, and works to educate the public on a wide array of topics affecting GLBT Americans, including workplace, family, and discrimination and health issues. The HRC Foundation, an HRC-affiliated organization, engages in extensive research and provides education and programming.

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**HRC's Federal Advocacy on Marriage**

*Protecting GLBT Families and Advocating for Equal Marriage Rights.* As the national debate over marriage unfolds in this country, HRC is engaged in advocating for equal marriage rights and stopping any anti-GLBT constitutional amendment by commissioning independent polling and research, working with and informing elected officials, activating grassroots support for marriage equality and fighting attempts at the state and federal levels to deny equal treatment for GLBT families<sup>83</sup>. For years, HRC has been working for equal treatment in areas such as taxation, domestic partnerships, and Social Security and inheritance laws. In addition, HRC works with state GLBT organizations as well as legal and child welfare organizations to ensure adoption and foster-parenting decisions are made in the best interest of the child.

**HRC & the Media**

*Commissioning Independent Polling Research.* HRC sponsors nationwide independent polling research to demonstrate popular support for GLBT equal rights. What HRC learns from these surveys helps the organization communicate more effectively and increase public understanding of GLBT concerns in the context of America's commitment to basic fairness.

*Advocating on America's Airwaves.* HRC has produced a number of groundbreaking advertisements for print and television reaching millions of readers and viewers. Public service announcements include ads featuring Judy and Dennis Shepard, parents of slain University of Wyoming student Matthew Shepard and Betty DeGeneres, mother of actress Ellen DeGeneres. To educate on the issue of marriage equality, HRC developed an ad series featuring real families hurt by the denial of marriage rights and an ad series focusing on the anti-GLBT constitutional amendment pending in Congress. HRC has also produced television ads in support of hate crimes laws and employment protections.

**b. Lambda Legal Defense Fund, (www.lambdalegal.org):**

**Mission Statement:** Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education, and public policy work.

**What Does Making It Mean to You?**

Whether it's making a future with your partner or making the grade at school, Lambda Legal leads the fight so all of us can live our lives and pursue our dreams without having to face barriers because we're gay, lesbian, bisexual, transgendered, or have HIV or AIDS.

Lambda Legal carries out its legal work principally through test cases selected for the likelihood of their success in establishing positive legal precedents that will affect lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS. From our offices in New York, Los Angeles, Chicago, Atlanta, and Dallas, Lambda Legal staff of attorneys works on a wide range of cases, with our docket averaging over 50 cases at any given time.

Lambda Legal also maintains a national network of volunteer Cooperating Attorneys, which widens the scope of our legal work and allows attorneys, legal workers, and law students to become involved in our program by working with our legal staff.

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[http://www.hrc.org/Template.cfm?Section=About\\_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821](http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821)

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**We pursue groundbreaking litigation**

Lambda Legal pursues litigation in all parts of the country, in every area of the law that affects communities we represent, such as discrimination in employment, housing, public accommodations, and the military; HIV/AIDS-related discrimination and public policy issues; parenting and relationship issues; equal marriage rights; equal employment and domestic partnership benefits; "sodomy" law challenges; immigration issues; anti-gay initiatives; and free speech and equal protection rights.

Lambda Legal work ultimately benefits all people, for it helps to fashion a society that is truly diverse and tolerant. Our overall mission to combat sexual orientation discrimination in this country has become an intrinsic part of the struggle for civil rights.

**c. Gay & Lesbian Advocates & Defenders ([www.glad.org](http://www.glad.org))**

Since 1978, GLAD has been pursuing equal justice under law throughout New England, with enormous success. Our legal victories have changed the landscape of the law regarding sexual orientation, HIV status, and gender identity and expression. But more importantly, they have made a difference in the day-to-day lives of countless individuals.

New England has been fertile territory for the recognition of lgbt equality, yielding successes in every area of importance to our communities. To name just a few, we now have marriage in Massachusetts and civil unions in Vermont; second-parent adoptions in Massachusetts, Connecticut and Vermont; and recognition of non-biological parents as de facto parents in Rhode Island, Massachusetts, and New Hampshire. Out of Maine came a decision that every person with HIV is protected from discrimination under the Americans with Disabilities Act, and the decision was affirmed by the U.S. Supreme Court. Sodomy laws have been abolished or de-clawed in every state in New England. Lgbt students have had their rights to be safe and to meet together affirmed in Maine, Rhode Island, New Hampshire, and Massachusetts. Non-discrimination laws cover sexual orientation in 5 of the 6 New England states, and in Rhode Island, Connecticut and Massachusetts protect transgender individuals.

These incredible gains have been possible because GLAD has been there to speak on behalf of the community in your name. We have grown and thrived and made enormous progress in advancing the rights and protections of the lgbt community and people living with HIV and AIDS. And GLAD is – when all is said and done – nothing more and nothing less than the handiwork of a community of dedicated individuals – board, donors, staff, volunteers and allies – with a vision of equality and justice.

**d. The American Civil Liberties Union (ACLU), [www.aclu.org](http://www.aclu.org):**

**The Lesbian & Gay Rights Project and AIDS Project** Founded in 1986, the Lesbian & Gay Rights Project and AIDS Project are a special division of the American Civil Liberties Union. The combined Project staffs are experts in constitutional law and civil rights, specializing in sexual orientation, gender identity, and HIV.

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**What We Do**

The Project brings "impact" lawsuits in state and federal courts throughout the country -- cases designed to have a significant effect on the lives of LGBT people and those with HIV/AIDS. In coalition with other civil rights groups, we also lobby in Congress and support grassroots advocacy -- from local school boards to state legislatures. The Projects' legal strategies are built on the idea that fighting for civil rights means not just persuading judges but ultimately changing the way people think. As we litigate for change, we implement targeted media, online and outreach campaigns to change public attitudes through education and to give people on the frontlines the tools they need to act.

**Issues We Care About**

**Families**

Protecting the rights of LGBT parents and their children is central to achieving equality for all LGBT people. We work to remove all discriminatory restrictions on parenting -- by challenging laws that ban LGBT people from adopting or becoming foster parents, and fighting the penalties that gay parents face in child custody and visitation. Our work shows how limits on LGBT parenting hurt kids, and debunks myths about same-sex couples raising children -- while making the diversity of our families more visible.

**Relationships**

The ACLU works for full legal recognition of LGBT relationships through domestic partnerships, civil unions, and ultimately, marriage. Our cases show that same-sex couples are hurt in very real ways when their relationships are not protected in the way that marriage protects heterosexual couples. All couples should be able to access the benefits and responsibilities of legally recognized relationships -- health insurance, unemployment compensation, immigration status, family leave, inheritance, hospital visitation, and many more.

**Youth and Schools**

Our "Every Student, Every School" program is a special initiative on LGBT youth and schools. Through this program we're working to make schools safe and bias-free for LGBT kids and teachers. For students, this includes the right to free expression, to establish gay/straight alliance clubs, to bring a same-sex date to the prom, and to be taught in an environment respectful of their sexual orientation or gender identity.

**Discrimination**

We're working for the day when the right to be free from discrimination based on sexual orientation and gender identity is part of what people say are civil rights in this country.

The Project's anti-discrimination work ranges from employment, to housing and public accommodations, to criminal justice reform, and the abolition of biased laws and regulations. We've fought for years to bring down state sodomy laws, we advocate for local and federal non-discrimination laws, and we insist that religious beliefs cannot be used to justify bias. Ensuring basic civil rights is at the heart of everything we do.

In summary, the Commission finds that advocates for same sex marriage (SSM) are highly visible, organized, political, and economically active in their communities including many in the Fortune 500 companies, with sufficient payrolls for legal staffs to bring a legal challenge to the State of New Hampshire. Thus, law that has existed for 200 years is all of sudden is being declared unconstitutional. Hence, the people of New Hampshire are entitled to have voice on this debate and to retain their sovereignty.

## **II. SURVEY OF OTHER STATES AND PAST/PENDING LITIGATION**

25. Many advocates for recognition of same sex marriage are using the Courts to establish recognition of same sex marriage under a variety of legal theories: (a) States marriage laws are non specific that require interpretation to determine if same sex couples are excluded, (b) The statutory language for marriage defined violates the State's constitution where "no rational basis" exists for same sex marriage exclusion, and (c) The State's laws for a Defense of Marriage Act (DOMA) violates the State or Federal Constitution under a variety of clauses. A summary of the history of current cases pending is presented as follows from the (1) Human Rights Commission, [www.hrc.org](http://www.hrc.org), (2) Lambda Legal Defense Fund at [www.lambdalegal.org](http://www.lambdalegal.org), and (3) Partners Task Force for Gay & Lesbian Couples at [www.buddybuddy.com](http://www.buddybuddy.com).

### **A. HAWAII - BAEHR V. ANDERSON (was BAEHR v. LEVIN, then BAEHR v. MIIKE)**<sup>84</sup>

26. The Hawaii State Supreme Court ruled in 1993 that not allowing same-sex couples the right to marry is unconstitutional based on sex discrimination (the Hawaii Constitution included a provision outlawing sex discrimination). However, the State Supreme Court remanded the case back to a lower Circuit Court for trial and stayed the effects of the decision. Baehr v. Miike, in which the court ruled that the ban against granting same-sex couples a marriage license appeared to be unconstitutional, according to the state's equal protection clause, and required the state to prove that it had a "compelling state interest" in keeping the ban in place.

27. The 1993 Hawaii ruling, argued by Lambda Legal, was different on both counts: A gay marriage case had finally reached a state's high court, and its preliminary ruling gave reason for enormous hope. Three years later when, Kevin Chang, the trial court judge charged with hearing the state's defense, ruled that it had failed to prove a compelling legal interest for banning same-sex marriage. Chang thereby declared the ban on gay and lesbian marriage invalid and ordered that the state begin granting marriage licenses to same-sex couples.

28. The State tried to show that same-sex marriage should not be allowed for the following reasons: children are better off being raised in a single home by their parents, or at least by a married male and female; same-sex marriage would place a financial burden on Hawaii from same-sex couples who wanted the same benefits as opposite-sex married couples; and Hawaii citizens would be harmed because of the refusal of other states to recognize Hawaii's same-sex marriages. Below is a summary of Judge Chang's decision:

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<sup>84</sup> See <http://www.buddybuddy.com/finding1.html>

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**On Raising Children:**

- 1) The State did not prove its major contention that, all things being equal, a child is best raised by his/her biological parents or a married man and woman.
- 2) Nor did the state prove that same-sex marriages would adversely affect the development of children.
- 3) Rather, the most important factor for child development is the nurturing relationship between a parent and a child.
- 4) Sexual orientation of parents is not an indication of parental fitness.
- 5) Gays and lesbians, as well as opposite sex couples, can be fit and loving parents.

**On The State's Compelling Interest:**

- 1) The state also failed to prove its two other points: that same-sex marriage would harm state financial resources and that its citizens would be harmed because of the refusal of other states to recognize Hawaii's same-sex marriages.
- 2) Because the state cannot provide a "compelling state interest" to justify the ban on same-sex marriages, the prohibition violates the equal protection clause of the state Constitution.
- 3) The state Department of Health cannot deny a marriage application simply because applicants are of the same sex.

29. The state immediately appealed and the court order to begin granting marriage licenses was stayed, pending the appeal to the Hawaii Supreme Court. Opponents of gay marriage, however, had begun to fight back in the political arena. With support from conservative religious political groups, they advocated for an amendment to the state constitution that would restrict marriage to heterosexual couples. In November 1998, it was put before voters and approved, and in 1999 the State Supreme Court ruled that both of these measures made the 1993 ruling moot. A year later, the Hawaii Supreme Court ruled that the original case, Baehr v. Miike, was moot because of the state constitutional amendment.

**B. ALASKA - Brause v. Alaska (1998 WL 88743 (Alaska Super.))**<sup>85</sup>

30. The Alaska State Superior Court (a step below the State Supreme Court) ruled that not granting same-sex couples the right to marry was unconstitutional. The decision was not binding, but it did rule that "marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right." The ruling did not legalize same-sex unions in Alaska, but would have forced the state to prove a compelling reason why such unions should be illegal.

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<sup>85</sup> See <http://www.buddybuddy.com/finding2.html>

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31. To get around it going to the Supreme Court, the legislature approved a constitutional amendment referendum to be sent to voters that amended the constitution that defined marriage as between a man and a woman. This made the issue moot in Alaska when voters approved the measure. However, the Court made important statements in the decision that are relevant to testimony of the Commission concerning legal challenges and Constitutional law:

**A. Right to Privacy**

“Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy. Failure of the state to provide public recognition of that private choice, whether it is the choice of a life partner of the opposite sex or of the same sex, is analogous to the unwillingness of the school in *Breese* to allow the presence of a student who made a personal choice to wear long hair. “

“Government intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual. This the Constitution does not allow unless the state can show a compelling interest necessitating the abridgment of the ... constitutionally protected right.” *Breese* at 501 P.2d at 170.”

**B. Equal Protection**

**1. The Fundamental Right to Choose One’s Life Partner**

The court thus recognizes that procreation has been an important part of the U.S. Supreme Court’s decisions that have found the right to marry fundamental. However, just as the “decision to marry and raise a child in a traditional family setting” is constitutionally protected as a fundamental right, so too should the decision to choose one’s life partner and have a recognized nontraditional family be constitutionally protected. It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice Brause and Dugan seek to have recognized. The same constitution protects both.

Thus, today’s decision finds a person’s choice of life partner to be a fundamental right. The consequence of this decision is that any limitations on this right are subject to the strict scrutiny standard established by the Alaska Supreme Court.

**2. Classification Based on Sex**

The court, having found the decision to choose one’s life partner to be a fundamental right, has concluded that the strict scrutiny test applicable to fundamental rights applies to its review of the State’s prohibition of same-sex marriages.

Were the right to choose one’s life partner not fundamental, the court would need to determine whether the Code raised classification issues. Were this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution’s prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications. That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code’s requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.

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C. VERMONT, ‘BAKER V. STATE’<sup>86</sup>

32. In December 1999, a unanimous Vermont Supreme Court ruled that same-sex couples must be given the full and equal protections, benefits, and responsibilities accorded married couples under state law. The Court instructed the legislature to decide how to achieve that equality in a “reasonable” period of time. One Justice found this ruling insufficient, and wrote that she would have ordered an immediate end to discrimination in civil marriage itself.

33. The Court repudiated all the standard arguments made against allowing same-sex couples to wed, and strongly affirmed that same-sex couples had a right to access the legal structures of civil marriage, were fit as parents, and had, like opposite-sex couples, a “common humanity.” It rejected the claims that seeking the freedom to marry was asking for “special rights,” and pointed out that given how the denial of civil marriage harms the children of same-sex couples, anyone committed to family values would support the freedom to marry.

34. However, rather than offer legal marriage — the same procedure to protect families as is offered to opposite-sex couples — the Vermont legislature created a new law labeled “Civil Union”. Thus, the Court made important statements in the decision that are relevant to testimony of the Commission concerning Constitutional law for the possible extension of rights to same sex couples and/or legal challenges to existing New Hampshire law that bans same sex marriage (SSM)<sup>87</sup>:

Plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel “domestic partnership” system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Therefore, to the extent that the State’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently.

The State asserts that a number of additional rationales could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. Among these are the State's purported interests in "promoting child rearing in a setting that provides both male and female role models," minimizing the legal complications of surrogacy contracts and sperm donors, "bridging differences" between the sexes, discouraging marriages of convenience for tax, housing or other benefits,

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<sup>86</sup> See <http://www.buddybuddy.com/finding3.html>, Stan Baker, et al. v. State of Vermont, et al

<sup>87</sup> See <http://www.qrd.org/qrd/usa/legal/vermont/baker-v-state>, Baker v. State.

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maintaining uniformity with marriage laws in other states, and generally protecting marriage from "destabilizing changes." The most substantive of the State's remaining claims relates to the issue of childrearing. It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that child-development experts disagree and the answer is decidedly uncertain.

D. MASSACHUSETTS, 'GOODRIDGE V. DEPT. OF HEALTH'<sup>88</sup>

35. On November 18, 2003, the Massachusetts Supreme Court ruled that same-sex couples are legally entitled to civil marriage under the Massachusetts Constitution. The 4-3 ruling did not order licenses to be issued to the couples who challenged the law. Instead, the court ordered the Legislature to change the civil marriage statutes within 180 days. Thus, the Court made important statements in the decision that are relevant to testimony of the Commission concerning Constitutional law for the possible extension of rights to same sex couples and/or legal challenges to existing New Hampshire law that bans same sex marriage (SSM).

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do — to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.

Given this history and the current state of public opinion, as reflected in the actions of the people's elected representatives, it cannot be said that "a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither ... [is] a right to same-sex marriage ... implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." Baehr v. Lewin, 74 Haw. 530, 556-557 (1993)

The marriage statute, in limiting marriage to heterosexual couples, does not constitute discrimination on the basis of sex in violation of the Equal Rights Amendment to the Massachusetts Constitution. In his concurrence, Justice Greaney contends that the marriage statute constitutes discrimination on the basis of sex in violation of art. 1 of the Declaration of Rights as amended by art. 106 of the Amendments to the Constitution of the Commonwealth, the Equal Rights Amendment (ERA). Such a conclusion is analytically unsound and inconsistent with the legislative history of the ERA.

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<sup>88</sup> See <http://www.buddybuddy.com/mar-mass.html>

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E. STATES WITH DOMA AND CONSTITUTIONAL AMENDMENTS.

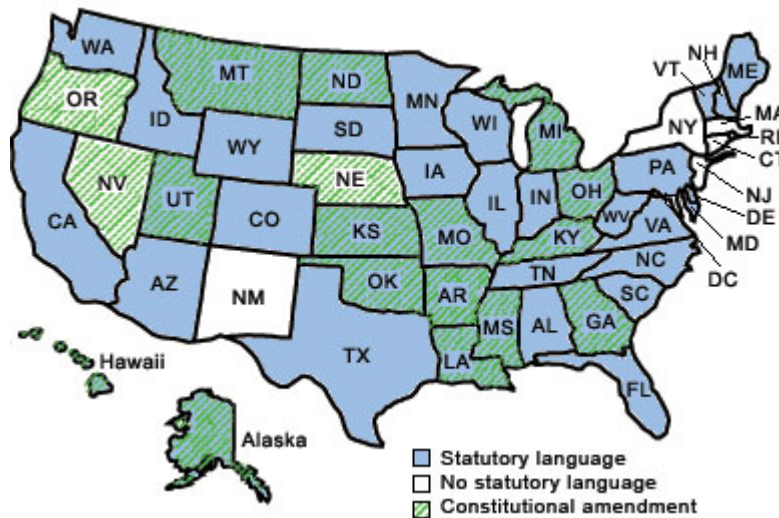
36. The Commission finds judicial activism has occurred on the issue of same sex marriage dating back to 1996 with Alaska and Hawaii and continues presently. Both states passed constitutional amendments to maintain marriage be defined as “union of one man and one woman”. In 1999, Vermont was ordered by its court to either allow same sex marriage or equivalent civil unions. In 2003, Massachusetts was ordered by its court to allow same sex marriage. In 2004, Washington State, California, and New York have faced similar challenge. In 2004, States of New Jersey and Arizona turned back same sex challenges under their state constitution.

37. In response to these legal challenges, 39 States have passed Defense of Marriage Acts (DOMA’s) and 19 States have added Constitutional amendments defining marriage as “union of one man and one woman”. Forty-four states now have statutory and/or constitutional language protecting traditional marriage. States are concerned that their laws may not stand up to legal challenge before activist judges, so they are taking action to protect marriage. In the wake of the legalization of same-sex marriage in Massachusetts, 13 states had a constitutional amendment preserving traditional marriage on a ballot during the Fall of 2004. All 13 ballot measures passed by considerable majorities, even in Oregon, a state where same-sex marriage proponents thought such a measure could successfully be defeated.<sup>89</sup>

VOTES 2004<sup>90</sup>  
AMENDMENTS

Arkansas	75%
Georgia	77%
Kentucky	75%
Louisiana	78%
Michigan	59%
Mississippi	86%
Missouri	71%
Montana	66%
North Dakota	73%
Ohio	62%
Oklahoma	76%
Oregon	58%
Utah	66%

STATES WITH DOMAS AND CONSTITUTIONAL



<sup>89</sup> See <http://www.heritage.org/Research/Family/Marriage50States.cfm>

<sup>90</sup> See <http://www.washingtonpost.com/wp-srv/elections/2004/stateinitiatives/>

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**🔒 States that Protect Traditional Marriage**

In the State Constitution	18*
In Statutory Language	43
TOTAL	44**

\* LA passed a constitutional amendment in September 2004, but it is being challenged in the state court system. The State Supreme Court is expected to rule on the matter in December 2004. Similar lawsuits have also been filed in a few other states.

\*\* CT, MA, NJ, NM, NY, RI do not have statutory or constitutional language preserving the traditional understanding of marriage. MA has legalized same-sex marriage; MA does have a pending constitutional amendment to preserve traditional marriage.

STATES MOVING TO STRENGTHEN LAWS PROTECTING MARRIAGE THROUGH CONSTITUTIONAL AMENDMENT
20^^

\* MA, WI – a constitutional amendment has been approved by the state legislature, but it must be approved in the next legislature before it appears on the ballot in November 2006.

^ In AZ and FL, citizens are collecting signatures to place an initiative on the 2006 ballot. In AL, SD, TN amendments will be on the ballot in 2006, and CA, DE, IL, IN, IA, MN, NJ, NM, NC, SC, TX, VA, and WA all have amendments pending in earlier stages. Texas voters will vote on an amendment banning same-sex marriage in November 2005. Alabama lawmakers approved putting an amendment on the ballot in June 2006, and voters in South Carolina, South Dakota and Tennessee will decide the issue in November 2006<sup>91</sup>.

38. In summary, the Commission finds that many States recognizes that legal challenges exists to their laws defining marriage by same sex marriage advocates and an active judiciary that is applying a reinterpretation of the definition of marriage.

**F. STATES WITH PENDING CHALLENGES AND DP & CIVIL UNIONS: CT, CA, AND NJ**

39. The Commission finds that though some States has passed either civil unions or domestic partnerships for same-sex unions with some having rights the same as married couples under State law, this has not slowed or stopped legal challenged to require States to accept same sex marriages (SSM). Most disturbing in 2005, a California court ruled that denial of same sex marriage violated the State’s constitution, though California has both a voter passed Defense of Marriage Act and a Domestic Partnership registry with Vermont style civil unions benefits for same sex couples.

<sup>91</sup> See <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695>

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**1. CALIFORNIA**

On March 14, 2005, in a ruling on several pending cases related to same-sex marriage, San Francisco County Superior Court Judge Richard Kramer said that withholding marriage licenses from same-sex couples was unconstitutional. "It appears that no rational purpose exists for limiting marriage in this state to opposite-sex partners," Kramer said in the ruling.

On March 30, however, Kramer announced that the ruling would be stayed for at least one year — meaning that no same-sex couples could be married in California during that time. California Attorney General Bill Lockyer has announced that the state will appeal the ruling. Two anti-gay organizations, the Campaign for California Families and the Proposition 22 Legal Defense and Education, have also said they will appeal. The National Center for Lesbian Rights, Lambda Legal, and the American Civil Liberties Union filed a lawsuit March 12, 2004, in state court, Woo v. Lockyer. The suit, filed on behalf of 10 same-sex couples along with the San Francisco-based Our Family Coalition and Equality California, a state GLBT-rights group, challenges Proposition 22.

**2. CONNECTICUT**

A lawsuit was filed in August 2004, in New Haven Superior Court arguing that denying same-sex couples of marriage rights deprives them of the protections and benefits they need to live securely as families. The suit was filed by Gay & Lesbian Advocates & Defenders (GLAD) on behalf of seven same-sex couples who had been refused marriage licenses in Madison, Conn.

The case, Kerrigan & Mock et al v. Connecticut Department of Public Health, asks the court to declare void any law banning marriage rights for same-sex couples in Connecticut. It argues that the state constitution guarantees equality to all state residents, and that refusing marriage licenses to same-sex couples violates that provision. The defendants in the suit are the Department of Public Health, which supervises the registration of marriages, and the Madison town registrar, who had refused to give marriage licenses to the plaintiffs.

According to GLAD, it may be up to three years before a final verdict is reached in the case. Although the suit was filed before Connecticut passed legislation creating civil unions in April 2005, GLAD has said they intend to proceed forward with the case in an attempt to achieve full marriage equality for Connecticut's GLBT community. The case may ultimately be decided by the Connecticut Supreme Court.

Connecticut has passed a bill for civil unions for same sex couples that went in effect October 1, 2005. The case of Kerrigan & Mock et al v. Connecticut Department of Public Health by GLAD is still pending before the Connecticut State Supreme Court.

**3. NEW JERSEY**

The decision in Lewis v. Harris, Appellate Division for New Jersey Superior Court, (2005) makes reference to New Jersey's Domestic Partnership Act for same sex couples that was passed in 2004. The case, Lewis v. Harris, (2005), involves "Does a State have to recognize same sex couples as having a right to get married though they have rights under State created domestic partnership law?" The Court ruled 'no' where gays and lesbians do not have a fundamental right to marry. Fundamental rights are those that have strong history and essential to the nation's heritage and tradition. Homosexuality has not been recognized, as a 'fundamental right' though 'Lawrence v. Texas', 539 U.S. 558 (2003) declared that criminal statutes against homosexuality were unconstitutional under the due process clause for 'privacy'. The case is on appeal currently.

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G. STATES WITH PENDING CHALLENGES: NY, WA, NE, ETC.

40. The Commission finds that judicial activism is occurring on the issue of same sex marriage (SSM) over a dozen States regarding challenges to States ban on same SSM:

INDIANA:

Three same-sex couples filed a lawsuit seeking the right to marry Aug. 22, 2002, in Marion County Superior Court. The three couples had all entered into [civil unions](#) in Vermont, which weren't recognized by the state of Indiana. They then applied for marriage licenses in Indiana and were denied. The case, *Morrison v. O'Bannon*, was argued by the [Indiana Civil Liberties Union](#). The ICLU argued that denying same-sex couples the right to marriage violated the provision in the state constitution guaranteeing Indiana residents the right to life, liberty and the pursuit of happiness.

A Marion County Superior Court judge dismissed the case in May 2003, citing that the state's exclusive recognition of marriage between opposite-sex couples was justifiable because it "promote[d] the state's interest in encouraging procreation to occur in a context where both biological parents are present to raise the child." The ACLU appealed, and the Indiana Court of Appeals heard arguments in the case in January 2004. The case is still under consideration. Indiana is one of 40 states with laws that explicitly define marriage as the union of a man and a woman.

MARYLAND:

In July 2004, the [ACLU](#) and [Equality Maryland](#) filed a lawsuit in Baltimore City Circuit Court, alleging that Maryland's ban on marriage between same-sex couples violates the state constitution. The suit was filed on behalf of nine same-sex couples who were denied marriage licenses and a man whose partner had recently died.

The Maryland Constitution guarantees that residents will not be discriminated against based on their sex or sexual orientation. The suit, *Dean and Polyak v. Conaway*, challenges a provision of the Maryland Statutory Code which reads, "Only a marriage between a man and a woman is valid in this state."

NEW YORK:

On Feb. 4, 2005, the New York state Supreme Court ruled that under the state constitution, same-sex couples could not be denied the right to marry. The case was brought by [Lambda Legal](#) on behalf of five same-sex couples seeking marriage licenses in New York City. According to Justice Doris [Ling-Cohan](#)'s ruling, "Similar to opposite-sex couples, same-sex couples are entitled to the same fundamental right to follow their hearts and publicly commit to a lifetime partnership with the person of their choosing. The recognition that this fundamental right applies equally to same-sex couples cannot legitimately be said to harm anyone." The decision was set to go into effect in New York City 30 days later. Soon after the ruling, however, Mayor Michael Bloomberg announced that the city would appeal the case to a higher state court. New York does not have a law explicitly defining marriage as between a man and a woman.

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WASHINGTON STATE

After six same-sex couples requested and were denied marriage licenses in Seattle March 8, 2004, [Lambda Legal](#) and the [Northwest Women's Law Center](#) filed a lawsuit on the couples' behalf in King County Superior Court. The suit argued that by refusing marriage rights to same-sex couples, the county was violating the state Constitution's guarantee of equality, liberty and privacy for all state residents.

The case, [Anderson et. al. v. Sims et. al.](#), seeks to strike down Washington's 1998 so-called Defense of Marriage Act, which defines marriage as a union between a man and a woman. In August 2004, the King County Superior Court ruled in favor of marriage equality, saying the state law limiting marriage to opposite-sex couples was unconstitutional. The case will now go to the state Supreme Court for a final ruling. The American Civil Liberties Union of Washington also filed a separate [suit](#) against the state in April 2004 on behalf of 11 same-sex couples in Thurston County Superior Court.

NEBRASKA:

A ruling is pending to strike down an amendment to the Nebraska Constitution that bans any kind of legal recognition of same-sex relationships – and blocks lesbian and gay people from advocating for even the most basic protections for their families. Lambda Legal and the ACLU jointly filed a federal lawsuit in 2003 on behalf of three Nebraska civil rights groups challenging the law.

The three groups all have lesbian and gay members and argue that the voter-passed constitutional amendment (Section 29) essentially bars them from participating in the democratic process. Attempts by lesbian and gay Nebraskans to engage in the legislative process to protect their families have been and will continue to be rejected because of Section 29, since its scope is so broad.

On May 13, 2005, the Nebraska's ban on gay marriage was struck down by a federal judge who ruled the measure interferes with the rights of gay couples and people in a host of other living arrangements, including foster parents and adopted children. The constitutional amendment, which defined marriage as a union between a man and a woman, was passed overwhelmingly by 70% of the voters in November 2000. The case is currently on appeal.

H. STATES WITH PENDING VOTES ON AMENDMENTS: TX, AL, SC, SD, TN, ETC.

41. The Commission notes that several States have pending ballot initiatives to define marriage as “a union of one man and one woman” for the State Constitutions. Texas voters will vote on an amendment banning same-sex marriage in November 2005. Alabama lawmakers approved putting an amendment on the ballot in June 2006, and voters in South Carolina (November 2006), South Dakota (November 2006) and Tennessee (November 2006).

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TEXAS BALLOT LANGUAGE<sup>92</sup>: (PASSED 11/8/05)

*"The constitutional amendment providing that marriage in this state consists only of the union of one man and one woman and prohibiting this state or a political subdivision of this state from creating or recognizing any legal status identical or similar to marriage."*

ALABAMA BALLOT LANGUAGE<sup>93</sup>

*"Proposing an amendment to the Constitution of Alabama of 1901, to provide that a legal marriage shall only exist between a man and a woman, that no marriage license shall be issued in Alabama to parties of the same sex, and that the state shall not recognize a marriage of parties of the same sex that occurred as a result of the law of any other jurisdiction."*

SOUTH CAROLINA BALLOT LANGUAGE<sup>94</sup>

*"A marriage between one man and one woman is the only lawful domestic union that shall be recognized in this State. This State shall and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union. This State shall and its political subdivisions shall not recognize or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments"*

SOUTH DAKOTA<sup>95</sup>

The state legislature passed an amendment earlier this year, sending it to citizens for a November 2006 vote. It passed the state House 55-14 and the Senate 20-14. The amendment bans "gay marriage", Vermont-style civil unions and California-style domestic partnerships.

That Article XXI of the Constitution of the State of South Dakota be amended by adding thereto a NEW SECTION to read as follows:

*§ 9. Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.*<sup>96</sup>

TENNESSEE

Citizens in the Volunteer State will vote on a marriage amendment in November 2006. The amendment passed the state House this year, 88-7, and the Senate, 29-3. The amendment bans "gay marriage" but apparently does not ban civil unions, although that would be up to judicial interpretation. The ACLU has filed a lawsuit trying to keep it off the ballot.

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<sup>92</sup> See <http://www.sos.state.tx.us/elections/voter/2005novconsamend.shtml>

<sup>93</sup> See <http://alisd.b.legislature.state.al.us/acas/searchableinstruments/2005rs/bills/sb4.htm>

<sup>94</sup> See <http://www.scequality.org/legislature/amendment.pdf>

<sup>95</sup> See <http://www.sbcaptistpress.org/bpnews.asp?ID=21853>

<sup>96</sup> See <http://marriagelaw.cua.edu/Law/states/SD.cfm>

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*"The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation ,purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state"*<sup>97</sup>

ARIZONA

The pro-family organization Protect Marriage Arizona ([www.protectmarriageaz.com](http://www.protectmarriageaz.com)) is gathering signatures with the goal of placing an amendment before voters in November 2006. Approximately 183,000 valid signatures must be gathered by July 6. The amendment bans "gay marriage" and any "legal status ... similar to that of marriage."

*"TO PRESERVE AND PROTECT MARRIAGE IN THIS STATE, ONLY A UNION BETWEEN ONE MAN ND ONE WOMAN SHALL BE VALID OR RECOGNIZED AS A MARRIAGE BY THIS STATE OR ITS POLITICAL SUBDIVISIONS AND NO LEGAL STATUS FOR UNMARRIED PERSONS SHALL BE CREATED OR RECOGNIZED BY THIS STATE OR ITS POLITICAL SUBDIVISIONS THAT IS SIMILAR TO THAT OF MARRIAGE."*<sup>98</sup>

FLORIDA

The conservative group Florida4Marriage.org must collect 611,000 valid signatures by Feb. 1 in order to qualify its amendment for the November 2006 ballot. The amendment bans "gay marriage" and any "union that is treated as marriage or the substantial equivalent thereof." The American Civil Liberties Union has filed suit to try and keep the amendment off the ballot.

*"In as much as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."*<sup>99</sup>

ILLINOIS

A conservative group, Protect Marriage Illinois, must collect 283,000 valid signatures by April in order to place a referendum on the November 2006 ballot. The referendum itself would not amend the constitution but instead would call on Illinois legislators to do so. (According to Illinois law, amendments must be initiated by the legislature, which thus far has been cool to the idea.) Conservatives hope a successful signature drive and referendum will put heat on politicians. The group has launched a website: [www.protectmarriageillinois.org](http://www.protectmarriageillinois.org).

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<sup>97</sup> See

<http://www.hrc.org/Template.cfm?Section=Tennessee1&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=TN&LawFlag=0&StatusInd=ballotcurrent>

<sup>98</sup> See [http://www.protectmarriageaz.com/pages/the\\_amendment.php](http://www.protectmarriageaz.com/pages/the_amendment.php)

<sup>99</sup> See <http://florida4marriage.org/faqs.html>

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*"Shall the Illinois General Assembly submit an amendment to Article IX of the Illinois State Constitution to the voters of the State of Illinois at large at the next General Election stating as follows: To secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man and a woman is the only legal union that shall be valid or recognized in this State?"<sup>100</sup>*

**INDIANA**

The Indiana legislature passed a marriage amendment earlier this year, completing the first step of a lengthy three-step process. It must pass again during the next elected legislature before going to voters, which would be 2008 at the earliest. The House passed the amendment this year, 76-23, the Senate, 42-8. The amendment bans "gay marriage" and prevents the "legal incidents" of marriage from being given to unmarried couples.

*"Section 38. (a) Marriage in Indiana consists only of the union of one man and one woman. (b) This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."<sup>101</sup>*

**VIRGINIA**

The Virginia legislature passed an amendment in February, and must pass it again during the next session if it is to appear on the November 2006 ballot. It passed the House of Delegates 79-17 and the Senate 30-10. The amendment would ban "gay marriage," civil unions and domestic partnerships.

*"That in this Commonwealth, a marriage shall consist exclusively of the union of one man and one woman as husband and wife. This Commonwealth shall not recognize or create another union to which is assigned the rights, benefits, obligations, or status of marriage. This provision is fully applicable to all political subdivisions of the Commonwealth."<sup>102</sup>*

**WISCONSIN**

An amendment passed the Wisconsin legislature in 2004 and must pass again in order to appear on the ballot in November 2006. It passed the Senate 20-13 and the Assembly 68-27. It bans "gay marriage" and "any legal status identical to or substantially similar to" marriage..

*Section 13. Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."<sup>103</sup>*

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<sup>100</sup> See <http://www.illinoisfamily.org/news/contentview.asp?c=26442>

<sup>101</sup> See [http://www.incoalition.org/indiana\\_marriage\\_amendments\\_comparisons.php](http://www.incoalition.org/indiana_marriage_amendments_comparisons.php)

<sup>102</sup> HOUSE JOINT RESOLUTION NO. 615, Offered January 12, 2005, Prefiled January 7, 2005, <http://leg1.state.va.us/cgi-bin/legp504.exe?051+fuh+HJ615+508333>

<sup>103</sup> See <http://www.centeradvocates.org/bandetails/whatisit.asp>

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42. In summary, the Commission finds that a supermajority of States has passed Defense of Marriage Acts and 19 States have Constitutional amendments defining marriage and banning SSM. At least 5 States have votes scheduled for 2005 and 2006 to place the definition of marriage in their Constitutions, and possibly 6 more States in 2006-2008. Thus, by 2008 there may be 25 States with constitutional amendments defining marriage and banning SSM.

**ANALYSIS AND CONCLUSIONS:**

**A. MARRIAGE CANNOT BE REDEFINED TO BE GENDERLESS**

43. Marriage across essentially all societies and modern history has been always defined as union of man and woman. Though issues of rights of women, property rights, divorce & annulment, and race of applicants have changed marriage in both U.S. history and western society, but marriage is about the joining of the genders where a State or society has a vested interest that responsible procreation exists for its continuation. Marriage models both natural human sexuality and reproduction that commits to the health, safety, and welfare of both the individual and the community.

44. The sociological and legal arguments that gender is irrelevant to marriage and claims that 2 men or 2 woman are equal to children rearing for the best interest of the child is not supported in the medical research or sociological models. The core fact remains that by their definition, same gender couples NEVER have children except without the fruits of other heterosexual procreation, artificial medical reproduction technology, or children born out of wedlock to single women. Hence, all these methods to which children are raised by same gender couples requires State resources or police powers of the State to regulate. Thus, the Courts interpretation that marriage can be genderless is flawed. Once gender is removed from the equation of a marriage, it is not hard to image that the number of persons allowed into a marriage could also be legally challenged. The social implications of allowing same sex marriage to be implemented under soft powers of the State will send the legal arm of the law to require that homosexuality is necessary for the society and society has a vested interest to perpetuate homosexuality. The Commission finds that the public and the State are not ready or want such a social policy.

**B. EXISTING LAW IS BEING CHANGED BY AN ACTIVIST JUDICIARY**

45. It is uncontested that legal attempts by various advocacy groups for SSM are well funded and are media savvy in portraying denial of SSM is a violation of civil rights as compared to race in the Supreme Court case of Loving v. Virginia (1967). It is also uncontested that this legal strategy is not limited to the US, where Canada has been forced to recognize SSM as a fundamental right due to litigation.

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46. It is uncontested that currently over a dozen States have litigation involving SSM where legal challenges are being made to rule that a denial of SSM violates the States Constitution for (a) Equal Protection, (b) Due Process, (c) Privacy, and (d) Sex Classification. It is uncontested that the Commission received credible testimony that that (a) NH Constitution can be challenged for its ban on SSM and (b) The States argument for its ban on SSM cannot be proven in Court due to the current past Court cases from Vermont, Massachusetts, and others that are pending. Thus, the argument that NH law is adequate and that no legal challenges are pending is shortsighted and simply wrong based upon the evidence.

**C. DENIAL OF MARRIAGE TO SAME GENDER COUPLES IS NOT  
DISCRIMINATORY**

47. The Commission finds that comparisons to the denial of SSM to race are not equivalent. First, the issue of opposite genders, socialization of the genders, natural procreation, and the obvious differences between the sociology of 2 men or 2 women being the same cannot be ignored. Second, as stated earlier, marriage pre-existed this Country and this State. Marriage is traditional because it works. There is no recorded history or proof that same gender unions can perpetuate beyond their first generation.

48. Third, comparing race, which is an immutable characteristic to either sexual orientation or homosexual behavior, is not proven either. The Commission finds that sexual orientation is not immutable as compared to race as found from its public and expert testimony. Thus, denial of SSM is not the same as race that is often asserted by SSM advocates. Finally, several courts have reached the same conclusion in recent legal challenges to both a State Constitution ban on SSM and also a challenge to the Federal Defense of Marriage Act that SSM has not roots in Constitutional law as a protected liberty. See Standhardt v. Superior Court of the State of Arizona (2003), In Re Kandu, 315 B.R. 123 (2004), and Smelt v. Orange County (2005).

**D. EXTENSION OF MARRIAGE-LIKE BENEFITS TO SAME GENDER COUPLES  
WILL PROVOKE LEGAL CHALLENGE TO EXISTING LAWS**

49. It is uncontested that extension of various legal rights to same sex couples has been used by the Courts to interpret that ban on SSM fails the rational basis test when legal challenged on Constitutional grounds. In Vermont, Baker v. State, the Court ruled that when sodomy laws were removed, anti-discrimination laws were passed, barriers to adoption by gays or lesbians removed, the ban on SSM failed under the State's argument for a rational basis of procreation for marriage as defined for heterosexual only.

50. It is uncontested that several States have passed either civil unions or domestic partnerships for same gender couples, but SSM legal advocacy group have sought challenges that separate but equal is unconstitutional. In California, the court in a district level has agreed with this position. In States of Connecticut and New Jersey, these cases have ruled the opposite way, but have not reached their State Supreme Courts yet.