

## FINAL MAJORITY REPORT

### V. FINDINGS

#### A. **THAT GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH, 440 MASS. 309, 798 N.E.2D 941 (2003) WAS INCORRECTLY DECIDED BECAUSE THE DECISION GOES BEYOND THE PROPER SCOPE OF JUDICIAL DECISION MAKING AND ENCROACHES ON POLICY AREAS PROPERLY RESERVED FOR THE LEGISLATURE.**

In the United States only one state, Massachusetts, has gone so far as to rule that same sex couples are entitled to the exact rights and privileges as heterosexual marriage. The recent judicial decisions that mandate same sex marriage provide a stark contrast to the established legal history in the United States where the promotion of marriage has been recognized consistently as a valid governmental interest. The legislative branch has long regulated and promoted the benefits and rights that derive from the institution of marriage. Courts have consistently and routinely recognized the appropriate exercise of legislative power and regulation.

As an important social institution, marriage serves a number of interconnected purposes including the procreation and protection of children. “The reason marriage was singled out for special legal attention is that it is the only human relationship that can both (a) produce the next generation of babies and (b) connect those babies to their mother and father.”<sup>15</sup> A recent report on family law set out the purposes of marriage this way:

Marriage serves a number of critical purposes in human culture. It addresses the fact of sexual difference between men and women, including the unique vulnerabilities that women face in pregnancy and childbirth. It promotes a public form of life and culture that integrates the goods of sexual attraction, interpersonal love and commitment, childbirth, child care and socialization, and mutual economic and psychological assistance. It provides a social frame for procreativity. It fosters and maintains connections between children and their natural parents. It sustains a complex form of social interdependency between men and women. It supports an integrated form of parenthood, uniting the biological (or adoptive), gestational, and social roles that parents play.<sup>16</sup>

In this view, marriage is not merely a private commitment of two people, but a complex web of relationships and principles that bring a man and a woman together for the purpose of creating and raising children.

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<sup>15</sup> Maggie Gallagher, “(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman,” 2 U. of St. Thomas L.J. 33, 44 (2004).

<sup>16</sup> Daniel Cere, “The Future of Family Law – Law and the Marriage Crisis in North America” (2005) p.20.

**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**

Does the definition of marriage make a difference? The Commission agrees with Daniel Cere that “[m]eaning matters, and the institutions that bear it serve to structure our experiences and to steer them in a particular direction.”<sup>17</sup> Changing the meaning of marriage erodes the strength and integrity of the institution. You change the institution itself. Many supporters of gay marriage recognize that re-engineering the meaning of marriage involves a profound shift in our understanding of the institution. As Ladelle McWhorter acknowledged:

[Heterosexuals] are right, for example, that if same-sex couples can get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well.<sup>18</sup>

Of all the family structures that have been well-studied, using large, representative databases, families with a married father and mother and their children outperform all other families studied, including single parents, stepfamilies, unmarried biological parents, and cohabiting families.<sup>19</sup> The family with a married biological mother and father leaves the rest behind in terms of psychological development, self-esteem, academic performance, and engagement in risk behaviors such as drugs or early sex.<sup>20</sup> The research confirming the importance of married biological parents is extensive.<sup>21</sup> The scholarly consensus on family structures is summed up as follows:

[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.<sup>22</sup>

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<sup>17</sup> Daniel Cere, *War of the Ring*, in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* 9, 15 (Daniel Cere & Douglas Farrow eds., McGill-Queen's U. Press 2004). See also *infra* note 25.

<sup>18</sup> Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (Indiana U. Press 1999).

<sup>19</sup> Moreover, the State has a legitimate interest in procreation. 60% of women's pregnancies are unplanned. Contraceptive failure for women aged 15-44 is 1.8 pregnancies. Testimony before the Commission of Maggie Gallagher.

<sup>20</sup> “Under every standard – educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings – children of intact marriages have fewer problems than children of broken families. . . . Not only do children need two parents; it also seems that ideally a child should have both a mother and a father.” George W. Dent, 15 *Journal of Law & Politics* at 594-95 (1999). Children recognize the difference between maleness and femaleness as early as 14 months. Young boys settle on their physical and gender role identity between 18 and 36 months of age.

<sup>21</sup> Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (Doubleday 2000); Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 *Margins* 161 (2004).

<sup>22</sup> Krisin Anderson Moor et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, <http://www.childtrends.org/files/marriageRB602.pdf> (June 2002).

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
Thereof, Whether Referred to as Civil Unions, Domestic Partnerships,  
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Despite the strong evidence of the superiority of intact marriages in outcomes for children, the Commission frequently heard that same sex parenting studies purport to find that children raised by gay or lesbian couples do as well as other children. The primary reason is that most such studies compare children of lesbian mothers to those with single heterosexual mothers because those are thought to be the most relevant comparisons. As a result, these studies compare gay parenting not to the gold standard of an intact marriage of the biological mother and father, but to one of the other groups of single parents or step-parent families that score dramatically less on the outcomes that matter. There may be further reason to question these studies because they are so small and unrepresentative.<sup>23</sup>

Thus, marriage matters to children, their parents and society. The Goodridge plurality, however, overlooked or avoided much of this evidence. We take this opportunity to highlight three failures of the plurality in Goodridge.

First, the Goodridge plurality minimized the role of procreation in marriage by pointing out that not all heterosexual couples intend to or are capable of bearing children. This misses the mark. Not all heterosexual couples may be capable of bearing children, but privacy concerns provide good reasons for the government to avoid intrusive inquiries about the child-bearing intentions of couples. Moreover, many couples who do not intend to bear children do still bear them. Indeed, many couples thought to be infertile prove otherwise. Marriage is designed to deal with these unexpected results. In stark contrast, homosexual couples never generate such surprises. Same sex partners never give birth unexpectedly to their own children. Thus, marriage would play a different role with same sex partners. The deep logic of marriage defines one purpose of marriage as: “to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion’s consequences (children) begin and continue life with adequate private welfare.”<sup>24</sup> The Commission views society as the ultimate beneficiary of marriage in light of this purpose. The Goodridge plurality simply avoided this understanding of the purpose of marriage.

The Goodridge plurality also erred in failing to respond to the state’s argument that a married mother and father is the optimal child-rearing mode. Ignoring the health of the institution that is the consensus outperformer for children, the plurality instead focused exclusively on the children of existing gay couples and said there was inadequate reason for depriving their family unit of the status of state recognized marriage. There is, however, little evidence that the children of gay couples will benefit from the term of marriage simply because what they will have is not the same thing as marriage. The scholarly consensus remains that the gold standard for child-rearing outcomes is a biological father and a mother in an intact marriage. Regardless of whether or not some form of legal recognition is extended to a homosexual couple, children with gay parents will yet be deprived of either their biological mother or father or both. They will not

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<sup>23</sup> Reviewers have also questioned the objectivity of those researchers conducting the studies. See supra note 8.

<sup>24</sup> Monte Neil Stewart, “*Judicial Redefinition of Marriage*,” 21 Canadian Journal of Family Law (2004) 11, 45.

**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**

receive the acknowledged best.<sup>25</sup> Moreover, heterosexual couples will also no longer have marriage as it has been known; instead, they will have the different, and we believe much reduced, institution of genderless marriage. This new marriage will be devoid of much of the meaning that has given marriage its vitality over the centuries.

Finally, we believe that the Goodridge plurality erred in finding that “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”<sup>26</sup> Here, the court improperly adopts a new and competing social theory of marriage (as a close personal relationship) without adequate justification. Defining what marriage is and what its purposes are is inherently a legislative task. We believe that the view of marriage adopted by the Goodridge plurality presents an impoverished view of an important institution.

In contrast to the court in Goodridge, the State Supreme Courts of Oregon and New Jersey in recent court decisions involving challenges to federal DOMA law have ruled that marriage regulation falls within the power of the legislature and such legislative determinations should be given deference by the courts rather than be replaced by judicial policy determinations.

The Commission is aware of the Vermont case of Baker v. State, (1999) that triggered Goodridge v. Department of Public Health, 440 Mass. 309 (2003). The Commission made inquiries to Commissioner Bud Fitch regarding the cases of Baker v. State (1999) and Goodridge v. Department of Public Health (2003) for a comparison of both to the New Hampshire Constitution. Commissioner Fitch noted that in the case of Baker v. State (1999) the Court ruled that Vermont’s prohibitions against same sex couples could not withstand a challenge under the Common Benefits Clause of the Vermont Constitution. Commissioner Fitch noted that although there are similarities between the Vermont and New Hampshire Constitutions, New Hampshire does not have a Common Benefits Clause.

Commissioner Fitch noted that in the case of Goodridge v. Department of Public Health, 440 Mass. 309 (2003) the Court ruled that a ban on same sex marriage did not meet the rational basis test for either due process or equal protection. The Massachusetts decision was not reached on whether banning same sex marriage should be reviewed under the standard of “strict scrutiny.” Commissioner Fitch noted that although there are similarities between the Massachusetts and New Hampshire Constitutions, they are not identical. The Goodridge decision was a 4-3 decision with very strong disagreement about whether the Court had the authority to redefine marriage where marriage regulation belongs to the legislature.

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<sup>25</sup> The problem with the desire to call a same sex partner a spouse is analogous to Abraham Lincoln’s comment when a delegation came to the White House to urge his support for something he opposed. He asked the members of the delegation, “How many legs will a sheep have if you call the tail a leg?” They answered, “Five.” “You are mistaken,” Lincoln said, “for calling a tail a leg don’t make it so.” In the same way, calling the union of two men or two women a “marriage” will not make it so.

<sup>26</sup> Goodridge v. Department of Public Health, 440 Mass 309, 798 NE2d 941 (2003) 332.

**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**

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**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus

**B. REJECT THE NOTION THAT SAME-SEX MARRIAGE  
CONSTITUTES A DENIAL OF CIVIL RIGHTS COMPARABLE  
WITH LOVING V. VIRGINIA, 388 U.S. 1 (1967).**

Many advocates of same sex marriage claim that the denial of same sex marriage parallels the history of civil rights of African-Americans in Loving v. Virginia, 388 U.S. 1 (1967). The Commission rejects this comparison for the following reasons:

Same-sex marriage cases are based on rational basis and anti-miscegenation laws were grounded on prejudicial intent struck down under the strict scrutiny standard of the 14<sup>th</sup> Amendment of the U.S. Constitution. Same sex marriage has never been considered either a fundamental right or an essential element of society's fabric so as to constitute an essential liberty in New Hampshire history. The Commission made an inquiry to Commissioner Bud Fitch of the AG's Office regarding the cases of (a) Baker vs. State (1999) and Goodridge vs. Department of Public Health, 440 Mass. 309 (2003) requesting a comparison to New Hampshire's Constitution. Commissioner Fitch produced a memo on these topics for the Commission and noted that same sex marriage has never been a fundamental right under the definition of ordered liberty by the Supreme Court and recent State and Federal Courts involving challenges to bans on same sex marriage."

Race is considered a suspect class under constitutional law in light of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments of the U.S. Constitution. Same gender adult sexual relations have never been a fundamental right and neither has same gender marriage under the U.S. Constitution or the Constitutions of the several States.

Race is an immutable and an innate characteristic and not something that is acquired and is changeable. Sexual orientation, on the other hand, may not be immutable or innate. Sexual orientation involves both a broad criteria and is not always intrinsically related to a specific sexual behavior or expression.

The Commission further finds that the discrimination built into the very definition of marriage is justified by the qualitative differences between same sex couples and man/woman couples. Four such differences are discussed below.

First, same sex relationships are not similar to opposite-sex couples in respect of procreation. Every same sex couple is sterile as a couple.<sup>27</sup> There are no exceptions. Same sex couples must "borrow" from someone outside their relationship to have or adopt a child. This "borrowing" necessarily makes the family headed by homosexual parents a more fluid "family of choice".

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<sup>27</sup> Advocates of gay marriage frequently challenge the procreative purpose of marriage by noting that not all heterosexual marriages are fertile or are intended for procreation. That misses the point. One purpose of marriage is to ensure that unintended children are cared for within the optimal environment. Even couples who do not intend children, often bear them. In contrast, homosexual couples never give birth to unintended children. Thus, the same societal concerns do not arise. Moreover, even sterile heterosexual couples are of the type that can bear children and are thus consistent with the optimal model of child-rearing for our children. Though childless these couples, nonetheless, reinforce the normative ideal of marriage as being between a man and a woman.

**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**

Advocates of same sex marriage recognize that their families will necessarily be different:

One feature of our experience has been an emphasis on “families we choose” anthropologist Kath Weston’s felicitous phrase. Such families are fluid alliances independent of the ties imposed by blood and by law. Often estranged from blood kin, openly gay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. Include children in this fluid network and the complexity becomes more pronounced. Because same sex couples cannot have children through their own efforts, a third party must be involved: a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption. The family of choice can and often does include a relationship with this third party.<sup>28</sup>

Second, same sex couples are different in terms of historical status. No great civilization has afforded same sex couples legal recognition equivalent to marriage.<sup>29</sup> Only primitive or declining cultures make the list of those that have supposedly accepted same sex relationships. The lack of historical precedent should not be considered fatal to the case for same sex marriage, but it does underscore that what same sex couples are seeking is not so much to enter into marriage as to radically redefine it.

Third, same sex couples are fundamentally different from opposite sex couples in their ability to raise children as we have already discussed. The outcomes for both children and society are likely to be different.<sup>30</sup>

Fourth, that same sex couples are fundamentally different from their opposite sex peers is highlighted by differences in such important relational characteristics as fidelity and stability. Generally, same sex relationships are not based upon the same concepts of stability and fidelity as marriage. Long before America developed civil laws to govern marriage, men and women committed to each other for life and overwhelmingly they remained faithful to each other. Despite the increase in divorce in recent decades, most married couples remain faithful. And those relationships are long-lasting.<sup>31</sup> The contrast with fidelity among homosexual men is striking.<sup>32</sup> Although disputed, we received

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<sup>28</sup> William Eskridge, Jr., *The Case for Same-Sex Marriage* 81 (1996) (footnote omitted). To identify this difference is not to suggest that gay parents are inadequate, or even that they should not be permitted to adopt and raise children.

<sup>29</sup> Peter Lubin and Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-Sex Marriage*, 47 *Cath. U.L. Rev.* 1271, 1324 (1998)(critiquing *The Case for Same-Sex Marriage* by William Eskridge); William Eskridge, Jr., *The Case for Same-Sex Marriage* 15-50 (1996).

<sup>30</sup> See supra notes 20-22 and accompanying text. See also Judith Stacey and Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter? *American Sociological Review* 66 (2001): 159-183, 159.

<sup>31</sup> Nearly 60% of first marriages are expected to last a lifetime. David Popenoe and Barbara Dafore Whitehead, *The State of Our Unions: The Social Health of Marriage in America 2000*, at 27, The National Marriage Project at Rutgers (2000). [Available at <http://marriage.rutgers.edu/NMPAR2000.pdf>.]

<sup>32</sup> According to one survey, 66 percent of male couples had sex outside the relationship in the first year and nearly 90% did if the relationship endured over five years. Joseph Harry, *Gay Couples* 116 (1984). A more recent study of gay relationships in the Netherlands found that men with steady partners have on average 8 casual sex partners each year. Maria Xiridou, et al., *The Contribution of Steady and Casual*

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
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testimony and submissions that gay relationships are briefer and less likely to be monogamous. Gays tend to be measurably more promiscuous than their straight counterparts.<sup>33</sup> Indeed, some gays have advocated that concepts of fidelity and monogamy may have to be modified to fit within the gay culture.<sup>34</sup>

Will marriage change either the length or the nature of the homosexual relationship? Will it help same sex partners to be more committed? Will marriage vows transform two men into two husbands? That seems unlikely. Some homosexual advocates themselves state that homosexual relationships are inherently non-monogamous.<sup>35</sup> Evidence from countries that offer marriage or marriage-equivalents to same sex couples suggest that relatively few same sex couples make use of these laws and those that do are unusually prone to dissolution.<sup>36</sup>

The Commission's majority clearly finds that (a) same-sex marriage cases are based on rational basis and anti-miscegenation laws were grounded on prejudicial intent and (b) same sex marriage has never been considered either a fundamental right or an essential element of society's fabric so as to constitute an essential liberty in New Hampshire history.

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Partnerships to the Incidence of HIV Infection among Homosexual Men in Amsterdam, 17 AIDS 1029, 1031, Table 1 (2003).

<sup>33</sup> In concluding that claims of homosexual hyper-promiscuity were exaggerated, Eugene Volokh nonetheless estimated that the average American gay has twice as many lifetime sexual partners as does the average straight male. "Now it does appear that a significant minority of American gay males do have lots of sexual partners. Moreover, the median American gay male does have somewhat more sexual partners than the median straight male (likely ten to twenty lifetime partners for gays as opposed to five to ten for straights . . .). Quoted by Jonathan Rauch, *Gay Marriage* (Holt 2004) 143.

<sup>34</sup> "[A]mong gay men a long-lasting *monogamous* relationship is almost unknown. Indeed both gay women and gay men tend to be involved in what might be called multiple relationships. . . ." Dennis Altman, *The Homosexualization of America* 187 (1982) (emphasis in the original). Two homosexual authors reached the conclusion in their study that to be homosexual is to be non-monogamous. David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252-262 (1984). According to them, monogamy is unnatural for homosexuals and only results because of internalized homophobia. Thus, when someone learns to accept his homosexuality, he also sheds his monogamy. *Id.* In light of these statements of homosexuals, it is difficult to be optimistic about the impact of marriage upon the fidelity of homosexuals.

<sup>35</sup> See *supra* note 34. Another objection that could be made to this analysis is the absence of information on lesbian relationships. The contrast in terms of fidelity is starker for gay male couples than for lesbian couples. We note that we have heard from a number of long-lasting, committed gay and lesbian couples. These limited examples should serve to remind us that generalizations do not apply to all members of the group being described and that no generalization should be the basis for drawing conclusions about an individual relationship's characteristics such as fidelity. In other words, the fact that the vast majority of gay relationships appear to be non-monogamous provides no basis for jumping to any conclusion with respect to a specific gay couple's fidelity.

<sup>36</sup> Gunnar Andersson, et al., 2004. "Divorce-Risk Patterns in Same-Sex 'Marriages' in Norway and Sweden," paper presented at the 2004 Annual Meeting of the Population Association of America (April 3, 2004), available at <http://paa2004.princeton.edu/download.asp?submissionId=40208> (showing that gay male couples were 1.5 times as likely to divorce as opposite sex married couples, while lesbian couples were 2.67 times as likely to divorce as opposite sex married couples).

**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**

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**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

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**C. NATURE v. NURTURE CONCLUSIONS.**

The Majority of the Commission in reviewing the legal and policy implications of extending some or all of the rights and responsibilities of marriage to same sex couples, encountered frequent debate on whether homosexuality is innate or a matter of choice. This seemed relevant to some commissioners because if homosexuality were considered a choice then the argument that it was a civil right would be substantially weaker. The Commission received much correspondence from the public and also substantial research from Commissioners dealing with whether to characterize homosexuality as intrinsic and genetic.

The issues concerning sexual orientation, nature versus nurture, and research from the scientific fields may be relevant to the debate about whether to extend legal recognition to same sex unions. The Commission notes that much research has been done on these subjects by experts on both sides and that significant uncertainty persists. Within the medical and legal debate, it is challenging to find consensus on topics of nature versus nature, sexual orientation versus behavior, psychiatry and mental health, public health issues and disease.

The issue of “nature vs. nurture” came to the fore when experts disputed the relevancy of homosexuality as natural, and the health risks involved in homosexual acts. The Commission heard testimony from Professor Dennis Bobilya, at the Expert Public hearing 9/19/05 who stated he does not think there is a single gay gene, but does believe that some people are predisposed.

The Commission also received research regarding recently published data by the U.S. CDC regarding sexual orientation and sexual behaviors and also the U.S. Census that further supported the claim the population for persons that are gay or lesbian and exclusively homosexual range from 1.5-3%.<sup>37</sup>

Furthermore, the Commission heard testimony from Dr. John Diggs, MD at the Expert Public hearing 9/12/05. Dr. Diggs was specifically asked about whether he thought there was a “gay gene” and replied there is none. Dr. Diggs further presented evidence that homosexual acts are prone to transmitting disease and are biologically unnatural. The medical professional groups that have endorsed same sex marriage have taken the position after some controversy that homosexuality is not a mental health disorder based upon the absence of “impairment in judgment, stability, reliability, or general social or vocational capabilities.” This narrow statement is not inconsistent with Dr. Diggs’ view that homosexuality is unhealthy and tends to transmit disease.

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<sup>37</sup> An early estimate that homosexuals constituted 10% of the population has been discredited, these inaccurate figures appear to persist in the public consciousness over more recent and reliable figures of 3% or less.

**Commission to Study All Aspects of Same Sex Civil Marriage and the Legal Equivalents  
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Furthermore, the Commission heard from several “ex-gays” who left homosexuality and do not believe that they were born gay.

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or Otherwise SB 427, Chapter 100:2, Laws of 2004**

**D. RESEARCH ON CHILDREN.**

During the Commission's study of granting legal status to same gender couples, concerns about the best interest of children arose. The Commission finds that an intact family including both the biological mother and father is the optimal vehicle for raising children. This conclusion appears beyond reasonable dispute.<sup>38</sup> The limited studies that have been conducted on children being raised by homosexual single parents or same sex couples typically compare the results of those children to divorced single mothers or step families because those are thought to be the most direct comparisons. Even if the gay parents compare favorably with such suboptimal groups, those results would not support the proposition that gay parents are as effective as parents that are willing to give their children their biological mother and father.

Moreover, the long term effects of children raised by same gender parents have not been studied well enough to justify changing policies to allow joint parent adoption for non married persons other than husband and wife.

The major studies on this topic are encouraging, but questions remain and studies on existing same gender parenting remain in their infancy. Thus, State institutions for adoption and guardian policies need further research before recommending that sexual orientation or lack of gender be considered irrelevant for child development or child placement when no biological relationship exists between the prospective adoptive child and applicants.

Being denied joint parental rights and responsibility is alleged to harm the environment for children. Public testimony from gays and lesbians stated the process of adoption and guardianship currently in place are inadequate and that same sex marriage is the best way to fix this problem. However, the Commission also understands that adoption and guardianship are a state interest that cannot be taken lightly under the duties of the Commission.

The Commission notes there are generally two scenarios in which children may be involved in adoption and/or guardianship by a same sex couple. The first is a case where one partner has a child from a previous heterosexual relationship or has conceived a child through artificial reproductive technology. The second is where a childless same sex partner and/or couple is petitioning or want to co-petition for adoption or guardianship of a child that is not biologically related to either applicant. Thus, here the State is making a judgment for the best interest of the child for selecting a possible home.

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<sup>38</sup> See supra notes 20-22 and accompanying text.

**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**

To support our findings, Dr. Ellen Perrin, MD at the Expert Public hearing on 9/12/05 stated studies on children and same sex parenting are still lacking in rigor and reliability. The Commission also received testimony from Maggie Gallagher at the Expert Public Hearing 9/12/05 that reaffirmed the weakness of current research on same sex parenting. Maggie Gallagher stated there is overwhelming and conclusive evidence, 1000+ studies that children born to a married mother and father is in the best environment for child development. Same sex marriage is not well studied as compared to the male female intact married structure, which is the gold standard.

The Commission is also aware that the Courts have ruled that the regulation of adoption and the best or optimum environment for children is clearly within the powers of the legislature. The Courts agreed with the State of Florida in upholding its ban on adoption by homosexual couples in the case of Lofton vs. Secretary of the Department of Children and Family Services, D. C. Docket No. 99-10058-CV-JLK for the U.S. Court of Appeals of the 11<sup>th</sup> Circuit (2004).

The Commission received testimony from Steve Varnum, Children's Alliance of NH at the Expert Public hearing on 9/12/05. Mr. Varnum addressed the needs of children regarding same sex parenting situations, but also noted that the number of children in same sex adult cohabitating environments was relatively small. Thus, research on same gender parenting will be difficult to accomplish because the pool of potential participants remains small.

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**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

**E. CASCADE EFFECT OF LEGAL RECOGNITION OF SAME SEX MARRIAGE.**

Opponents of gay marriage raised legitimate concerns regarding the potentially unintended side-effects or cascade effects of adopting gay marriage on religious freedoms, parental rights and public education, private groups and public access, and medical issues involving public health.

The Commission also received expert testimony from a variety of sources, particularly those from the States of Massachusetts and Vermont that reaffirmed many of the public's concerns about cascade effects resulting from the granting of legal status to same sex marriage. The Commission also received a variety of correspondence from the public and research from individual Commissioners regarding cascade effects in both other States and foreign jurisdictions.

The Commission received a variety of testimony, research, and data to support a major concern the public has regarding the introduction of teaching of homosexuality in the public schools without parental oversight or consent. The Commission also heard from David Parker of Lexington, Massachusetts, a father in Massachusetts at the Nashua Public Meeting on 8/29/05. He was arrested when he objected to a school's handouts on diversity and sexual orientation given to his kindergarten-aged son. Teachers and schools may use legalized same sex marriage as a defense to supersede parental rights in schools. National Public Radio reported that public school teachers in Massachusetts are now more emboldened to speak out on homosexuality and include gay friendly elements in the curriculum. One such teacher said: "In my mind, I know that, 'OK, this is legal now.' If someone wants to challenge me, I'll say, 'Give me a break. It's legal now.'"

The Commission is also aware of these issues being raised in Canada. In Canada, a lawsuit or complaint has been filed requiring inclusion of homosexuality in classroom educational material. The schools cannot ban books with gay-friendly themes from kindergarten classes, said Canada's Supreme Court in a December 2002 ruling. The ruling was the result of a lawsuit brought by a gay kindergarten teacher who wanted to introduce a book entitled "One Dad, Two Dads, Brown Dads, Blue Dads" to kindergarten and first-grade students.

The Commission's study of granting legal status to same gender couples and concerns about legal policies concerning the same sex couple extends both to public policies and the effects on the private and public institutions such as employers or employees, private groups, commerce, religion, and government. The issue of cascade effects is not to be dismissed, especially when it involves other constitutionally protected rights. Thus, a legitimate concern is raised when persons have objected to homosexuality from the confines of their own homes and outside of their employers and have lost their jobs when exercising either free speech or religious beliefs.

**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**

This section was accepted by the Commission 7-5 on October 31, 2005 by roll call vote as follows:

**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

**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**

**F. INTERSTATE COMMERCE EFFECT OF SAME SEX COUPLES.**

The Commission recognizes that SB 427 does not recognize the legal rights of the adults of the same gender to be considered “spouses” under the law. However, NH law does not deny rights to gays or lesbians as a class and in many cases grants protections for sexual orientation (RSA 354-A:8). Child adoption or guardianship are not barred under New Hampshire laws RSA 170-B:4 and RSA 463:10.

The Commission’s study of granting legal marriage to same gender couples and concerns about legal policies concerning the same sex couples extends across state borders in both directions. An interstate transit scenario such as where a Massachusetts homosexual couple is going to Canada, Vermont, or Maine raises the question of what rights does New Hampshire recognize for such a couple?

The second interstate transit scenario would involve 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 cannot extend outside of NH because of Federal DOMA, but mutual recognition might be sought through developing uniform laws such as through The National Conference of Commissioners on Uniform State Laws.

Even if the New Hampshire legislature wanted to pass legislation to grant same sex couples the same rights as heterosexual married couples, or civil unions or domestic partnerships, they would not be recognized under the Federal Defense of Marriage Act of 1996 (DOMA) and/or the 44 individual States that have statutory and/or constitutional language. Furthermore, a supermajority of the States ban same sex marriages and eighteen ban any legal recognition of same gender relationship whether civil unions or domestic partnerships.

The Commission in the present situation can only suggest that rights that are contractual in nature be explored individually. To do so need not require that same gender sexual relations be recognized. Examples of the previous section discussing “joint guardianship” are examples of rights that can be incorporated under State laws for possible reciprocal recognition by foreign States but not trigger a state DOMA.

This section was accepted by the Commission 7-5 on October 31, 2005 by roll call vote as follows:

**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Odell, MacKay.

**ABSTAINING** – Fitch.

**ABSENT** – Dupee, Gallus.

## VI. RECOMMENDATIONS

### A. ANY CHANGE IN THE PUBLIC POLICY REGARDING MARRIAGE MUST BE MADE BY ELECTED REPRESENTATIVES OF THE PEOPLE AND THE PEOPLE OF NEW HAMPSHIRE.

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 create and rear their children together. Marriage matters for many reasons but the most important one is this: marriage aims at creating the next generation and is the only context in which children can be known and loved by their own biological mother and father.

The Commission notes that there are various legal advocacy groups attempting to redefine marriage via legal challenges through the Courts. These challenges have been a 30 year effort to change social policies incrementally. They are designed to achieve acceptance and legal protections for gay and lesbians. More recently, in lawsuits in Hawaii (1993), Alaska (1996), Vermont (1999), and finally Massachusetts (2003), courts have been asked to rule that marriage defined as a heterosexual only institution is unconstitutional. The most significant case has been the recent Massachusetts case in Goodridge vs. Department of Public Health, 440 Mass. 309 (2003). Finally, over a dozen lawsuits attempting to redefine marriage are pending in the United States, including in the states of California, New York, Connecticut, New Jersey, Nebraska, Oregon and Washington.

Attempts to redefine marriage have not been limited to the United States. In 2003, Canada's Supreme Court ruled that marriage defined as a man and woman was unconstitutional. As result, Canada now has same sex marriage as result of judicial decision and not the vote of the people. A survey of other countries finds similar patterns of attempts to change marriage by judicial fiat instead of representative democratic process.

The Commission notes that the Massachusetts experience of Goodridge vs. Department of Public Health, 440 Mass. 309 (2003) reflects the attempt to use judicial mandate as a replacement for representative government. The Commission received testimony from Rep. Philip Travis, Massachusetts State Representative at the Expert Public Hearing on 9/19/05. The history of the Massachusetts Marriage Amendment goes back 3 ½ years when in 2002, over 130,000 persons signed a ballot initiative to define marriage as union of one man and one woman. The Senate President in the State's Constitutional Convention adjourned the session without a vote. In this vote, 53 voted not to go into recess. A lawsuit was filed and the Massachusetts Supreme Judicial Court ruled that the legislature violated the law but offered no remedy where the legislative period had ended.

**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**

The Massachusetts Supreme Judicial Court ruled in Goodridge that there was no rational basis to deny marriage to two persons of the same gender who are sexually intimate. The Goodridge decision was made by a 4-3 vote and included several dissents that the Commission finds persuasive. Such judicial activism strikes at the heart of a democratic republic where the system of government rests upon three equal branches with checks and balances of each under the Constitution.

**ANALYSIS AND CONCLUSIONS**

The Commission finds that the definition of marriage, particularly whether marriage should be redefined as genderless, is the kind of policy decision which should be decided by the legislature and not by the courts. The Commission trusts that the excesses of the court in Goodridge are evident enough to discourage other courts from such unwarranted judicial activism.

This section was accepted by the Commission 7-4 on October 5, 2005.

**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**

**B. CONSTITUTIONAL AMENDMENT DEFINING MARRIAGE AS  
BETWEEN ‘ONE MAN AND ONE WOMAN’**

Marriage is universally found in all cultures and is exclusively designated to be a union of male and female. The Commission feels strongly that not only does this universal institution of marriage matter, but that the legislature and ultimately the people should have the final say as to how it should be structured and defined. Unfortunately, activist courts in other states have usurped the authority of the legislature with respect to the definition of marriage. In Vermont in 2000 and again in Massachusetts in 2003, the relevant state Supreme Court declare unconstitutional the definition of marriage as being the union of one man and one woman. Other countries have experienced similar court challenges and judicial results. The most recent example is Canada where the Canadian court held that the ban on same sex marriage was unconstitutional. These repeated legal challenges<sup>39</sup>, especially in light of recent holdings in favor of same sex marriage, suggest that such challenges are likely to continue and will likely occur in New Hampshire as well.<sup>40</sup> Should such a lawsuit be resolved here as it has been in Vermont or Massachusetts, the law that has existed in New Hampshire for 200 years may be declared unconstitutional. The only way to ensure the people of New Hampshire retain the power to which we believe they are entitled in this matter is to pass a constitutional amendment defining marriage in New Hampshire as the union of a man and a woman.

To do so would be consistent with the actions of many other states. In response to the legal challenges discussed previously, thirty-nine states have passed Defense of Marriage Acts (DOMA’s) and nineteen 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. Nonetheless, states are concerned that their laws may not stand up to legal challenge before activist judges, so they are taking further constitutional action to protect marriage. In the wake of the legalization of same-sex marriage in Massachusetts, thirteen states had a constitutional amendment preserving traditional marriage on the ballot during the fall of 2004. All thirteen ballot measures passed by considerable majorities, even in Oregon.<sup>41</sup>

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<sup>39</sup> A review of current court cases pending in other States and review of advocacy groups mission statements show that several legal theories are being used in attempts to impose same sex marriage upon the states: (a) State’s marriage laws are non specific and require interpretation to determine if same sex couples are excluded, (b) The statutory language for the definition of marriage excluding same sex couples is not supported by a “rational basis” and thus violates the State’s constitution, and (c) The State’s laws under Defense of Marriage Act (DOMA) violates the State or Federal Constitution under a variety of clauses.

<sup>40</sup> The legal advocacy of same sex marriage is not just a random occurrence but is a 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).

<sup>41</sup> See <http://www.heritage.org/Research/Family/Marriage50States.cfm>

**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**

The Commission notes that several states have pending ballot initiatives to define marriage as “a union of one man and one woman” for their state constitutions. Texas voters voted to ban same-sex marriage in November 2005. Alabama lawmakers approved putting an amendment on the ballot in June 2006, and voters will be permitted to vote on this issue next year in South Carolina (November 2006), South Dakota (November 2006) and Tennessee (November 2006).

The Commission took approximately 16 hours of expert testimony and 16 hours of public testimony from April 2005 to September 2005. The Commission found testimony from the following person credible to support a recommendation to support a constitutional amendment to define marriage as “union of one man and one woman” and not allow marriage to include same gender persons.

A. PROFESSOR HESSE – 9/12/05

Testified that New Hampshire cannot deny same sex marriage. Testified that individual rights under NH Constitution in the substantive due process clause are greater than the Federal Constitution. The State also cannot deny same sex marriage under equal protection where sex or gender is a suspect class that requires strict scrutiny. Hence, NH’s Constitution has greater protections than the Federal Constitution regarding same sex marriage. First, Article I, Part 2 includes an equal protection clause that includes “gender” based upon the 1974 amendment that was modeled after the Equal Right Amendment. New Hampshire needs to justify ban on same sex marriage. Even assuming that strict scrutiny does not apply, the State’s ban on same sex marriage fails the rational basis test. Religious arguments in this debate cannot be given any weight for a State purpose. State cannot base legality on procreation.

B. GLEN LAVY – 8/29/05

Glen Lavy at Nashua Public Hearing 8/29/05 and written testimony submitted 9/1/05. Marriage was not created by the State, but existed before government. Marriage is related to procreation and connecting children to their natural parents. No culture recognizes same sex marriage. There are two opposing models of marriage. First is the commitment model of any two persons adopted by the court in Goodridge. This model raises questions of why other definitions of marriage such as polygamy are not possible based upon interests of the individuals. Second is the model based upon procreation and linking children to their biological parents.

C. MAGGIE GALLAGHER - 9/12/05

Maggie Gallagher testimony at hearing 9/12/05; PRESCOTT: What do you mean by the State should take steps for maximum protection of marriage? ANSWER: The State should pass a constitutional amendment to define marriage as only a union of one man and one woman. 19 States have passed such an amendment and also 100 countries have marriage in the national constitution. PRESCOTT: Why do we need a constitutional amendment for marriage? ANSWER: I have been involved in marriage litigation for

**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**

many years. There are powers that want to overturn definition of marriage. This area should be left to the people and not judges.

D. DWIGHT DUNCAN – 9/19/05

Testimony Professor Dwight Duncan, Esq. in response to written questions from Commissioner Fredyma, 9/19/05. “If a state chooses to recognize a relationship which is not modeled on marriage, and does not simply give that relationship the legal incidents of marriage, then the state would be on safer, more constitutionally defensible ground”. “They could indeed treat same-sex relationships not as marriage but as part of a larger category like “reciprocal beneficiary,” which in both the Hawaii and Oregon bills is not limited to same-sex couples but allows siblings and other blood relatives to qualify (although they would obviously not qualify to enter marriage or a marriage-like relationship). To the extent that the legislature models such relationships on marriage, however, then it will be increasingly more difficult to maintain the state’s law that marriage is only between a man and a woman.”

E. CRAIG BENSEN – 9/12/05

Craig Bensen testimony at hearing 9/12/05 and SB 427 Minutes. Recommends that if you have choices as a legislature, make the choices to prevent the Courts from deciding for you.

F. PHILIP TRAVIS – 9/19/05

Rep. Philip Travis, Massachusetts State Representative, testimony at hearing 9/19/05. I believe that a case for a legal challenge of ban on same sex marriage will be coming to NH. Thus, I am here today to give you some insight and information from this debate on same sex marriage. Same sex marriage is a new form of marriage that has never been recognized in our history. If marriage is redefined, society will be redefined. Schools will introduce homosexual themes and sex ed in schools K-12.

G. PROFESSOR NANCY COTT – 9/19/05

Professor Nancy Cott is a Harvard professor specializing in American history, testimony at hearing 9/19/05. Marriage until now has always been between a man and a woman. (1) Marriage is unique with no parallel, (2) Civil institution and not religious, and (3) Has changed vastly over time. Marriage is a bundle of obligations and benefits from the State. No exact parallel with contract where social status is also assigned. Marriage is a private decision but a public institution that is authorized by State authority. Persons pledge to be monogamous and faithful to each other until death do them part (which has roots in Christianity).

## **ANALYSIS AND CONCLUSIONS**

Marriage across essentially all societies and history has been defined as the union of a man and a woman. Though marriage has changed in both the United States and in western society with respect to such issues as rights of women, property rights, divorce and annulment, and race of applicants, marriage is still 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.

First, the sociological and legal arguments that gender is irrelevant to marriage and claims that two men or two women are equal in terms of children rearing to the marriage of the biological father and mother is not supported by the medical research or sociological models. The numbers demonstrate that marriage makes a difference for children. The scholarly consensus is that an intact marriage of a biological mother and a father is demonstrably better than any other family. Moreover, same gender couples never have children without the assistance of heterosexual procreation, artificial medical reproductive technology, or children born out of wedlock to single women. None of these methods will bring children to the homosexual union without forethought and consideration. Hence, there is a reduced need to regulate the homosexual partnership.

Second, the Courts' interpretation that marriage can be genderless is flawed. Once gender is removed from the equation of a marriage, marriage as an institution will be dramatically different. Moreover, 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 by means of legal recognition will make it more difficult, if not impossible, for someone to object to homosexuality in the public school curriculum or elsewhere in the public square. If same sex marriage is mandated by the courts under a civil rights analysis, then homosexuals would become a protected class and significant further accommodations would become necessary. The Commission finds such changes would not be in the best interests of society and are not desired by the public.

Third, the Commission finds that comparisons to the denial of same sex marriage to an earlier ban on interracial marriage are not justified. See our earlier discussion of why this is not a civil rights issue.

The Commission further notes that the passage by some states of civil unions or domestic partnerships for same-sex partners has not slowed or stopped legal challenges to require States to accept same sex marriages. Perhaps, the most blatant circumvention of the voice of the people occurred earlier this year in California. A court there ruled that denial of same sex marriage violated the State's constitution, even though California voters had passed a Defense of Marriage Act and a domestic partnership registry with Vermont-style civil unions benefits for same sex couples.

**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**

Legal experts also testified of the risk that a court might mandate gay marriage in New Hampshire. In particular, Professor Hesse, emeritus professor of Franklin Pierce Law Center and constitutional law expert, testified that the current prohibition of gay marriage already was invalid under the state constitution. In order to avoid the uncertainties and confusion and, in our view, poor policy making that results from court-mandated same sex marriage, we recommend that the New Hampshire legislature adopt a constitutional amendment defining marriage in New Hampshire as the union of a man and a woman.

This section was accepted by the Commission 7-4 on October 5, 2005 by roll call vote as follows:

**YEAS** – Brassard, Prescott, Fredyma, Mooney, Barnes, Earnshaw, Soltani.

**NAYS** – MacKay, Butler, Fuller-Clark, Buckley.

**ABSTAINING** - Dupee, Fitch.

**ABSENT** – Odell, Gallus.

**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**

**C. RELIGIOUS FREEDOM BEING AN ESSENTIAL RIGHT IN NEW HAMPSHIRE, NO PERSON SHOULD BE REQUIRED TO PERFORM ANY MARRIAGE WHICH WOULD OTHERWISE OFFEND HIS OR HER CONSCIENCE.**

The Commission observes where same sex partners are granted legal recognition, conflict has arisen with respect to public officials who are required to perform such ceremonies. The states of Vermont and Connecticut provide contrasting approaches to this problem. Both have civil unions but Vermont does not permit public official an opportunity to object to performing such ceremonies for religious reasons or reasons of conscience. In contrast, Connecticut allows an exemption for public officials who have religious or conscientious objections from performing ceremonies for same sex couples.

**ANALYSIS AND CONCLUSIONS**

In New Hampshire, this issue is not addressed currently in the statutory code because no legal recognition has been extended to same sex partners (gays or lesbians) judicially or legislatively. However, the issues of religious freedom are very well defined under the New Hampshire Constitution which gives legal protections for religious freedoms in Part I, Article 4, 5, and 6:

**[Art.] 4. [Rights of Conscience Unalienable.]** Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience. *June 2, 1784*

**[Art.] 5. [Religious Freedom Recognized.]** Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship. *June 2, 1784*

**[Art.] 6. [Morality and Piety.]** As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies, corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established. *June 2, 1784 Amended 1968 to remove obsolete sectarian references.*

The Commission finds that persons who may be involved in the process of performing marriages do not lose their constitutional rights of religious freedom and rights of conscience just because they are a public employee that may be involved in overseeing marriage in the performance as a justice of the peace. The Commission finds that the Vermont model is inappropriate to protect religious freedom for public employees who oversee the solemnizing of civil unions. The Commission recommends that if any legal status is given to same sex couples (gays or lesbians) by the state, then the protections of religious liberty for public employees should be kept consistent with the New Hampshire Constitution for Part I, Article 4, 5, and 6.

**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**

The Commission notes that the right to religious liberty for public employees is not a license to engage in other type of discrimination such as on the basis of race or natural origin that are both protected under Federal law and also New Hampshire statutes RSA 354-A:13.

This section was accepted by the Commission 7-4 on October 24, 2005 by roll call vote as follows:

**YEAS** - Barnes, Brassard, Earnshaw, Fredyma, Mooney, Prescott, Soltani.

**NAYS** - Buckley, Butler, Fuller-Clark, Vaillancourt.

**ABSTAINING** – Fitch, Dupee.

**ABSENT** – Odell, Gallus, MacKay.