

# MINORITY REPORT

For the Commission established by  
**SB 427**

to Study Same Sex Marriage  
and its Legal Equivalents

Submitted Wednesday, November 30, 2005

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## I. INTRODUCTION.

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

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

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

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

100:4 Duties. The commission shall examine all aspects of same sex civil marriage and the legal equivalent thereof, whether referred to as civil unions, domestic partnerships, or otherwise. The commission’s study shall include, but shall not be limited to:

I. All the legal and policy implications of extending some or all of the rights and responsibilities of marriage to same sex couples.

II. Examination of all issues of civil rights, responsibilities, laws, and legal obligations related to same sex unions, including the applicability of the laws of other states to New Hampshire.

See SB427.

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

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

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

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

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

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

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

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

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

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The other citizen commissioners in the Majority are also ideologically opposed to extending rights to gay and lesbian couples. Commissioner Scott Earnshaw heads New Hampshire's Traditional Marriage and Family Institute (TMFI) which has circulated a petition urging New Hampshire's citizens to oppose any form of legal recognition for same-sex couples. See Beverly Wang, "Some wonder if gay marriage commission will find its feet," Associated Press, May 8, 2005; TMFI petition available at: [http://www.nhcornerstone.org/downloads/Marriage\\_petition-102105%20\\_2\\_.pdf](http://www.nhcornerstone.org/downloads/Marriage_petition-102105%20_2_.pdf). Commissioner Jack Fredyma filed an amicus brief to the Massachusetts Supreme Judicial Court in *GLAD v. Attorney General*, 436 Mass. 132 (2002), arguing that consensual conduct in private between adults of the same sex should be a "crime against nature." Moreover, in March 2004, Commissioner Fredyma wrote a letter to the editor in support of the passage of SB427 that eerily forecasts many of the exact findings now embraced by the Majority. See Jack Fredyma, *Portsmouth Herald* (April 16, 2004), available at [http://www.seacoastonline.com/2004news/04162004/letter\\_t/10920.htm](http://www.seacoastonline.com/2004news/04162004/letter_t/10920.htm).

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

<sup>7</sup> See *Lawmakers want civil union panel to get to work*, Associated Press, February 2005.

spurring the Commission into action, the conservative majority continued to define and direct the proceedings.<sup>8</sup>

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

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

<sup>9</sup> Compare Majority Report V(C) with Testimony of Dennis Bobilya on September 12, 2005.

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

<sup>11</sup> Compare Majority Report VI(B)(G) with Testimony of Nancy Cott on September 19, 2005.

<sup>12</sup> See Majority Report V(D).

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

Areas selected do not involve areas of regulation that are complex, require large-scale legislative review, and require overhaul of existing public systems.

...

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

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

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

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

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

## II. COMMON GROUND

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

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

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

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

<sup>15</sup> See Section II (A).

<sup>16</sup> See Majority Report, VI (B).

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

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

#### **A. Equal Liberty.**

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

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

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<sup>18</sup> See Section II (B).

<sup>19</sup> State v. LaFrance, 124 N.H. 171, 176 (1983).

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

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

## 1. The State Constitution.

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

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

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

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

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

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

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

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

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

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

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

## **2. The Federal Constitution.**

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

### **a. Romer v. Evans.**

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

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<sup>22</sup> Romer v. Evans, 517 U.S. 620 (1996).

<sup>23</sup> Romer, 517 U.S. at 624.

<sup>24</sup> Romer, 517 U.S. at 635.

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

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

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

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

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

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<sup>25</sup> Romer, 517 U.S. at 623.

<sup>26</sup> Romer, 517 U.S. at 631.

<sup>27</sup> Romer, 517 U.S. at 630.

<sup>28</sup> Romer, 517 U.S. at 634.

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

Without a legitimate purpose, the Colorado amendment, like the amendment proposed by the Majority, “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”<sup>29</sup>

**b. Lawrence v. Texas.**

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

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

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

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<sup>29</sup> Romer, 517 U.S. at 635.

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

<sup>31</sup> Lawrence, 539 U.S. at 567.

<sup>32</sup> Bowers v. Hardwick, 478 U.S. 186 (1986).

<sup>33</sup> Lawrence, 539 U.S. at 578.

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

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

[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

‘These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.’

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.<sup>38</sup>

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<sup>34</sup> Lawrence, 539 U.S. at 567.

<sup>35</sup> Lawrence, 539 U.S. at 578.

<sup>36</sup> Lawrence, 539 U.S. at 567, 578.

<sup>37</sup> Lawrence, 539 U.S. at 590, 601 (Scalia, J., dissenting).

<sup>38</sup> Lawrence, 539 U.S. at 574 (internal citations and quotations omitted)(emphasis added).

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

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

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

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

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

<sup>40</sup> State v. Pelletier, 149 N.H. 243, 247 ( 2003).

<sup>41</sup> See Section II (B)(1).

<sup>42</sup> See Section II (B)(2).

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

## 1. Civil Marriage.

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

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

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

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

<sup>44</sup> See Section II (B)(3).

<sup>45</sup> See Section II (B)(4).

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

<sup>47</sup> Testimony of Professor Nancy Cott on September 19, 2005.

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

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

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

### **a. Women's Status within Marriage.**

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

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

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

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

proper role of men and women in society.

During the Industrial Revolution in,

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

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

### **b. Racial Regulation.**

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

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

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

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

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

society.”<sup>50</sup>

### **c. Divorce Regulation.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>53</sup> See Majority Report, V (B).

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