

Fall 3-2-2011

The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence

Lynn D. Wardle

Follow this and additional works at: <http://digitalcommons.law.byu.edu/elj>



Part of the [Education Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Lynn D. Wardle, *The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence*, 2011 BYU Educ. & L.J. 593 (2011)

Available at: <http://digitalcommons.law.byu.edu/elj/vol2011/iss2/17>

.

THE IMPACTS ON EDUCATION OF LEGALIZING SAME-SEX MARRIAGE AND LESSONS FROM ABORTION JURISPRUDENCE

Lynn D. Wardle*

I. INTRODUCTION: THE ELEPHANT IN THE ROOM

One of the most contentious issues to arise in public policy debates concerning the legalization of same-sex marriage is whether legalizing same-sex marriage or marriage-equivalent “civil unions” (herein jointly called “same-sex marriage”),¹ has had or will have a significant detrimental impact upon education, particularly public education. For example, in the 2008 California election campaign, supporters of Proposition 8, which barred and had the effect of overturning the judicial legalization of same-sex marriage, asserted that legalizing same-sex marriage has had and/or would have a profoundly detrimental impact upon public education,² while supporters of same-sex marriage vigorously denied those claims.³

* Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University. The valuable assistance of Bradley Carmack, Alyssa Munguia, Curtis Thomas, and Robert Selfaison is gratefully acknowledged.

1. The term “civil unions” can refer to many different kinds of relationships. As used herein, “civil unions” refers to legal relationships (however labeled) that are accorded all or substantially all of the same legal rights, benefits, privileges and duties as marriages, but which are not called “marriages.” Because legally they are substantially or fully equivalent to marriage (in some states as equal as state law can make them), they are grouped herein with same-sex marriages because their legal effects (including upon education) are legally the same as marriages.

2. For some summaries of the controversy that criticize the claim that legalizing same-sex marriage will impact education, see Angela Chrysler, Note, *Proposition 8 and the Need for California Constitutional Amendment Initiative Reform: Tolerance Requires Time and Deliberation*, 37 HASTINGS CONST. L.Q. 591, 607–08 (2010); Danielle Dubé, Note, King and King: *Learning to Treat Others Royally Through Diversity Education*, 31 U. LA. VERNE L. REV. 109, 115–17 (2009); William N. Eskridge, Foreword: *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1831–32 (2009); Allison Fetter-Harrott symposium piece; Joyce H. Hahn, Note, *Proposition 8 and Education: Teaching Our Children to be Gay?*, 19 S. CAL. REV. L. & SOC. JUST. 149, 157–69 (2010). See

While some of the discussion of the impact of legalizing same-sex marriage on education has been potentially helpful commentary by some courageous, informed scholars, professionals and citizens, most of the discourse has been heated political rhetoric.⁴ Legal scholarly and professional consideration of the impact of legalizing same-sex marriage on education is very scarce and the legal literature is very one-sided.⁵ It is a classic example of “the-elephant-in-the-room” in academic and professional publications and discussions. Although it is a matter of great public significance, professional relevance, and scholarly interest, almost no scholar or professional educator dares to openly express criticisms or reservations about the effects of legalizing same-sex marriage on education; that is *taboo* in academic and professional publications and circles.⁶ This remarkable silencing, by and of

further Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 761–71 (2010) (discussing the powerful impact the Parker and Wirthlin families had upon the outcome of the California Prop 8 campaign because of their unsuccessful suit seeking redress for their Massachusetts elementary school providing same-sex relationship normalizing materials to their kindergarten and first grade children). Not surprisingly, most of the legal literature rejects the claim that legalizing same-sex marriage will have any significant negative impact on public school education. For a sobering, contrasting perspective, see Richard Peterson symposium piece.

3. See sources cited *supra*, note 2. For example, “California State Board of Education president, Ted Mitchell, responded by saying the ads [asserting that homosexual relations would be taught in public schools in California if Prop 8 did not pass] were untruthful and that *Prop 8 had nothing to do with the public school curriculum.*” *State Education Officials Slam New Ads for Prop 8*, CBSNEWS.COM (Oct. 21, 2008) (cited in Dubé, *supra* note 2, at 117 (emphasis added)).

4. See generally Peterson, *supra* note 2 (describing harassment and attacks by gay activists upon him in Prop 8 campaign). See also Ana Lopez, *Boston College Professor’s Appearance in Pro-Gay Marriage Ad Sparks Outrage*, FOXNEWS.COM (Sept. 26, 2009), <http://www.foxnews.com/us/2009/09/26/boston-college-professors-appearance-pro-gay-marriage-ad-sparks-outrage/>; Elie Mystal, *Boston College Law Professor In Anti-Gay Marriage Ad*, ABOVE THE LAW (Sept. 16, 2009), <http://abovethelaw.com/2009/09/boston-college-law-professor-in-anti-gay-marriage-ad/> (nasty attacks on Professor FitzGibbon in Maine Question One campaign).

5. The legal profession values differing viewpoints to the extent that, on many issues, if you have four lawyers in a room, you can expect to hear at least five different opinions expressed. Yet on this and other issues regarding legal policy concerning same-sex relationships the taboo in the law against expression of views critical of such relations is extraordinary.

6. For a discussion of the “taboo” against expressing views opposing legal support of same-sex marriage that existed fifteen years ago in the academy, see Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18–23 (1996). The hostility toward those expressing the unpopular viewpoint opposed to same-sex marriage has increased markedly since then. See *supra* note 4; *infra*, Part III.

professionals who celebrate diversity, academic freedom, tolerance, and professional independence, has chilled serious scholarly discussion; individual scholars and professionals have been intimidated by the practice and threat of strong retaliation against the expression (especially in academia) of viewpoints critical of legalizing same-sex marriage generally. It is time to address “the elephant in the room” in serious academic and professional discussions.

This article begins, in part II, by reviewing the evidence that legalizing same-sex marriage has had and appears likely to continue to have a serious, profoundly controversial, and arguably detrimental impact upon public education in the real world. Already there have been numerous incidents of controversial and potentially detrimental impact regarding not only educational curriculum, but also concerning students, administration, employees, and parents’ rights. However, this part also notes that causation is not absolute, and that not all of the impacts of legalizing same-sex marriage upon education are (or are viewed by all as) negative.

Part III explains why legalization of same-sex marriage must, as a matter of law, have some impact upon educational curriculum. As a matter of elementary legal analysis, if the meaning of marriage changes, education laws and policies that require or allow teaching about marriage, family life, and marital sexuality compel that the curriculum change also. Just as Physics curriculum must change if the number of planets changes (poor Pluto!), or Chemistry teaching must change if the number of chemical elements in the periodic table increases, when the meaning of marriage changes it must be reflected in the curriculum that covers that subject.

Part IV reviews the existing constitutional protections against the detrimental impacts upon parents’ rights and family integrity interests of legalizing same-sex marriage. The scope of *constitutional* protection for the rights of parents is narrow and limited. Constitutional precedents do provide some marginal (if ambiguous) limits on how far the state can go to standardize the education of children of dissenting parents regarding such controversial moral issues and same-sex relationships, but the latitude given educators is very wide. There is little constitutional protection for parents to compel a particular curriculum be taught to their children, or even to opt-out of having their children exposed to controversial

curriculum. It is likely that existing constitutional doctrines or reasonably likely extensions of them will provide only limited protection against most of the controversial effects of legalizing same-sex marriage on education, especially upon parental authority and interests in directing the education of children.

Part V presents an analogy from abortion jurisprudence that may provide some protection for parental rights to control the education of their children and protect them against some of the detrimental effects on education from legalizing same-sex marriage. Constitutional protection for parental rights is also very limited in the abortion context; courts have been very protective of, and have given expansive interpretation to, the Supreme-Court-created abortion-privacy doctrines for nearly forty years. Yet legislation protecting parental rights to counsel and advise their children prior to abortion has been consistently upheld. That legislation suggests that statutory protection for parents' concerns about exposure of their children to curriculum promoting the acceptance and normalization of homosexual relations may well be upheld.

In conclusion, part VI, includes some recommendations for some legal remedies and community action that may address the concerns of the educational impact of legalizing same-sex marriage.

II. INCIDENTS, PATTERNS, AND TRENDS SHOWING THE LIKELIHOOD OF DETRIMENTAL IMPACTS OF LEGALIZING SAME- SEX MARRIAGE ON EDUCATION

The impact of legalizing same-sex marriage upon education is no longer a matter of conjecture, hypothesis or speculation. It is a reality; it is happening. Seven states and the District of Columbia have already legalized same-sex marriage,⁷ and five

7. N.H. REV. STAT. ANN. § 457:1-A (2009); VT. STAT. ANN. tit. 15, § 8 (2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 943 (Mass. 2003); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, NYTIMES.COM (June 24, 2011), <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html> (last visited July 2, 2011). See also D.C. CODE § 46-401(A) (2010). Same-sex marriage was also legalized in California by judicial decree for about four-and-one-half months, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), before the people of California passed Proposition 8 to amend the state constitution to ban same-sex marriage and overturn the judicial ruling. CAL. CONST. art. I, § 7.5 (2008). The legislature of Maine also passed a law to allow same-sex marriage in 2009, An Act to End Discrimination in

additional states have legalized marriage-equivalent civil unions (with all the same legal rights in state law as marriage).⁸ That trend is not over, but seems to be gaining momentum, despite objections of voters in thirty-one states—all of the states in which the issue has come before the voters. The voters in these states have resoundingly rejected same-sex marriage, including 63% of the voters in the thirty states who voted for state marriage amendments that prohibit same-sex marriage as a matter of state constitutional law.⁹ The movement for same-sex marriage is largely anti-populist, fueled by over a dozen judicial rulings, including at least thirteen American court rulings requiring states to legalize same-sex marriage, most of which have been overturned by state marriage amendments or on appeal.¹⁰ The judicial

Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws 82, but before it took effect the voters in Maine vetoed the law on November 3, 2009. *Maine Same-Sex Marriage People's Veto, Question 1 (2009)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Maine_SameSex_Marriage_People's_Veto_Question_1\(2009\)](http://ballotpedia.org/wiki/index.php/Maine_SameSex_Marriage_People's_Veto_Question_1(2009)) (last visited Dec. 13, 2010). See 2009 *ballot measures*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/2009_ballot_measures#Maine (last visited Dec. 13, 2010).

8. CAL. FAM. CODE § 297 (West 2005); NEV. REV. STAT. §§ 122A.010–122A.510 (2009); N.J. STAT. ANN. § 37:1–28 (West 2007); OR. REV. STAT. §§ 106.300–106.340 (2008); WASH. REV. CODE § 26.60.010 (2007). In 2011, three other states (Illinois, Hawaii, and Delaware) legalized same-sex civil unions. 78 Del. Laws 22 (2011), available at <http://legis.delaware.gov/LIS/1.LS146.nsf/2bede841c6272c888025698400433a04/916160214dbb1927852578540067cc78?OpenDocument> (effective Jan. 1, 2012); 2011 Haw. Sess. Laws 232, available at http://www.capitol.hawaii.gov/session2011/lists/measure_indiv.aspx?billtype=SB&billnumber=232 (effective Jan. 1, 2012); 2010 Ill. Laws 1513 (2010), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=096-1513&GA=96&SessionId=76&DocTypeId=SB&DocNum=1716&GAID=10&Session=> (effective June 1, 2011).

9. See generally Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 1003, App. 1 (2010).

10. See *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010); Brause v. Bureau of Vital Statistics, No. 3AN-956562 CI, 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998), *rev'd by constitutional amendment*, ALASKA CONST. art. 1, § 25 (1999); *In re* Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Mar. 14, 2005), *aff'd. In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), overturned by Prop 8, November 4, 2008; Baehr v. Miicke, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *on remand from* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), *rev'd by constitutional amendment*, HAW. CONST. art. I, § 23 (1998); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, Conaway v. Deane 932 A.2d 571 (Md. 2007); *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 569–71 (Mass. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003); Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y. App. Div. 2005), *rev'd*, Hernandez v. Robles 855 N.E.2d 1 (N.Y. 2006); Li v. State, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004), *rev'd*, 110 P.3d 91 (Or. 2005); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *11 (Wash. Super. Sept. 7, 2004), *rev'd*, Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006); Andersen v. King Cnty., No. 04-2-04964-4-SEA, 2004 WL

litigation campaign continues. In the summer of 2010 two federal courts entered decisions that the federal constitutional Equal Protection Clause, and, in one case, also the Due Process Clause, required invalidation of the state marriage amendment in California¹¹ and section three of the federal Defense of Marriage Act, which forbids the recognition of same-sex marriages in federal laws and programs.¹² If upheld, that analysis would require legalization of same-sex marriage by *all* states and in *all* federal laws, agencies, and programs.

Information about potentially detrimental impacts of legalizing same-sex marriage on education is difficult to ascertain for many reasons. For example, some victims of harassment or abuse in education are embarrassed and prefer to suffer in silence rather than complain; reports of intimidation of victims chill the reporting of some incidents; some who complain choose to do so using private channels and do not file any public complaints. Often when complaints are formally raised, the processes are confidential, and the low success rate of formal objections has a daunting effect.¹³

Despite these obstacles, a brief survey of available reports of problematic educational incidents confirms that legalizing same-sex marriage or unions does generate detrimental and troubling impacts upon education in nearly every state and nation where such unions have been legalized. The impacts faced in the areas can be placed into four categories: (1) *ideological indoctrination* of students through curriculum and teaching, policies and programs that favor homosexual relations; (2) *suppressing dissenting viewpoints*, speech, and expressions by students, teachers, guest lecturers, school administrators, and educational organizations, including employment discrimination in hiring, disciplining, firing,

1738447 at *3, *4, *11 (Wash. Super. Aug. 4, 2004). See also *Gill v. Off. Person. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (holding the DOMA § 2 refusal to recognize same-sex marriage violates the Equal Protection Clause). This does not count rulings mandating legalization of civil unions.

11. *Perry*, 702 F. Supp. 2d at 1132.

12. *Gill*, 699 F. Supp. 2d at 374.

13. A similar point has been made, as well, by gay activists regarding underreporting of bullying of GLBT youth. See Carlos Maza & Jeff Krehely, *How to Improve Mental Health Care for LGBT Youth*, CENTER FOR AMERICAN PROGRESS (Dec. 9, 2010), http://www.americanprogress.org/issues/2010/12/mental_health_lgbt_youth.html. Fortunately, the internet provides alternative sources of information about educational problems for both groups of victims.

grading personnel and students including bullying, retaliation, discrimination and intimidation; (3) *disregarding and undermining parental rights* and family interests in the moral education of their children; and (4) *detrimental impacts upon religions*, religious beliefs, religious speech, religious believers, religious schools, and religions interaction with education.

A. *Indoctrination, Policies and Programs Favoring
Homosexual Relations*

Revising school curriculum to present material favoring acceptance of homosexual relations, and adopting programs and policies to promote acceptance of or experience with homosexual relations is a major area of developing conflict in education. Perhaps the most famous example, typical of many, is the set of events in an elementary school in Massachusetts that led to the seminal federal court decisions in *Parker v. Hurley*.¹⁴ In that case, books designed to teach acceptance of same-sex relationships and families were given or read to their kindergarten and first-grade children in a Massachusetts elementary school, with no prior notice given to parents, even though Massachusetts education law expressly requires prior notification to parents and opportunity for parents to “opt-out”—withdraw their children before the instruction, exposure, or event.¹⁵ The school district was unapologetic and uncompromising in their stand that the school had the right to expose children to such ideas and indoctrination without concern for and regardless of family values or parental objection. The parents sued asserting claims under the state education law and under federal constitutional law. The federal court rejected their claims on both grounds, finding the law did not apply because the material was not really sex-ed material, but rather, “[b]oth books were part of the Lexington school system’s effort to educate its students to understand and respect gays, lesbians, and the families they sometimes form in Massachusetts, which recognizes same-sex marriage.”¹⁶

14. 474 F. Supp. 2d 261 (D. Mass. 2007), *aff’d*, 514 F.3d 87 (1st Cir. 2008).

15. MASS. GEN. LAWS ch. 71, § 32A (2007) (giving right to opt out of exposure to sexuality curriculum), cited in *Parker*, 474 F. Supp. 2d at 266.

16. *Parker*, 474 F. Supp. 2d at 263. See generally Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 761–72 (2010). The court also rejected the plaintiff parents’ claims of constitutional protection.

Clearly, in the court's view, the legalization of same-sex marriage was a critical legal factor justifying this curriculum. The Governor of Massachusetts and State Department of Education require schools to assist in the formation of Gay/Straight Alliance student groups.¹⁷ In New Jersey, an elementary school teacher required all students, including young boys, to dress as women for a fashion show during Women's History Month.¹⁸ The Maple Shade Township School superintendent said it was a misunderstanding and cancelled the event after parents complained. However, such events, not "mistakes," have been common across the nation. Similar events have been scheduled at schools in many other states as well,¹⁹ apparently encouraged nationally by "the Gay, Lesbian and Straight Education Network, which has promoted a school lesson plan for teaching boys and girls to cross-dress."²⁰

Adams Middle School in Brentwood [California] encouraged students to cross-dress—boys wearing girls' clothing, girls wearing boys' clothing—on the last day of 'Spirit Week,' Friday, Nov. 2. Parents were given little notice of the event, said the Pacific Justice Institute, and only found out about it after flyers were posted at the school.²¹

17. See THE GOVERNOR'S COMMISSION ON GAY AND LESBIAN YOUTH, MASS. DEP'T OF EDUC., OUTRIGHT. YOUR RIGHT TO BE (undated), available at <http://www.doc.mass.edu/cnp/GSA/outright.pdf> (last viewed July 6, 2011); GLAD, RIGHTS OF LGBT PUB. SCH. STUDENTS (MASS.) (October 2010), available at <http://www.glad.org/uploads/docs/publications/ma-rights-of-lgbt-students.pdf>.

18. Joshua Rhett Miller, *N.J. Elementary School Cancels "Cross-Dressing" Fashion Show After Complaints*, FOXNEWS.COM (Apr. 13, 2010), <http://www.foxnews.com/us/2010/04/13/nj-school-cancels-cross-dressing-fashion-complaints/>.

19. See generally FAMILY RESEARCH COUNCIL, HOMOSEXUALITY IN YOUR CHILD'S SCHOOL 8 (2006), available at <http://downloads.frc.org/EF/EF06K26.pdf> (incidents in Illinois, Texas, and Massachusetts); Peter LaBarbera, *Cross-Dressing Day*, ACCURACY IN ACADEMIA, Nov. 10, 2004, <http://www.academia.org/cross-dressing-day/> (Illinois incident); Bobby Ross Jr., *Texas School District Nixes 'Cross-Dressing Day'*, STAR CHRON., Nov. 16, 2004, <http://www.chron.com/disp/story.mpl/front/2904409.html>; *School's Cross-Dress Day Gets Angry Reactions*, WAYODD, <http://www.wayodd.com/schools-cross-dress-day-gets-angry-reactions/v/9123/> (last viewed July 6, 2011). See also Bill O'Reilly, *California Schools Showing Students Video About Cross-Dressing*, FOXNEWS.COM, Oct. 2, 2009, <http://www.foxnews.com/story/0,2933,559283,00.html>.

20. Bob Unruh, *Cross-dressing Day Sparks School Exodus*, WORLD NET DAILY, Nov. 28, 2007, <http://www.wnd.com/?pageId=44773>.

21. *Middle School Cancels "Gender-Switch" Day After Parents Object*, CATHOLIC NEWS AGENCY, Nov. 2, 2008, http://www.catholicnewsagency.com/news/middle_school_cancels_genderswitch_day_after_parents_object/. The school cancelled the event in the face of parental reaction. *Id.*

After such an event was scheduled at East High School in Iowa, “[s]chool officials in Des Moines confirmed . . . that at least 80 children whose parents were alarmed by the ‘Gender-Bender Day’ during homecoming week . . . [were removed from public schools and] moved . . . into homeschooling plans.”²² In Massachusetts, a judge ordered a school to allow a boy to wear girl’s clothing to classes.²³

Nationally, the annual “Day of Silence” turns public schools into culture war zones and uses the power of intimidation in a way that is disruptive of the education of all students.²⁴ In the summer of 2010, the nationally influential Sexuality Information and Education Council of the United States (SIECUS) issued a report hailing “the fundamental paradigm shift in Washington, DC and in states and communities across the country” and urging the “need to continue to push the boundaries and break new ground” in sex-education in America.²⁵

There are indications that the use of public schools and school policies to promote indoctrination favoring acceptance of homosexual relations and lifestyles will continue, if not increase. Gay tolerance materials were mailed several years ago to 15,000 school districts. The concerns that the indoctrination of students that homosexual behavior is proper and morally acceptable by teachers and teaching materials are not unfounded.²⁶ The American Civil Liberties Union (ACLU)

22. Unruh, *supra* note 20 (some parents said the total number of families who withdrew their children “could be in the hundreds”).

23. See *Destabilizing the Categories of Sex and Gender: The Case of the Transgendered Student*, NARTH.COM, <http://www.narth.com/docs/transgendered.html> (last visited July 6, 2011) (reporting and commenting on judge’s ruling in Massachusetts); Amy Contrada, *The Coming Nightmare of a “Transsexual Rights and Hate Crimes” Law in Massachusetts, Part 4: Public Schools and Charter Schools*, MASSRESISTANCE, http://www.massresistance.org/docs/govt08/tran_law_study/part4.html (last visited July 6, 2011) (Massachusetts Judge orders school to let boy wear girls clothes at school).

24. See generally Chris Hampton, *Four Things You Should Know about Student Rights and Day of Silence (2010)*, DAY OF SILENCE BLOG (Apr. 9, 2010, 4:15 PM), blog.dayofsilence.org/2010/04/four-things-you-should-know-about.html.

25. *Administration Ushers in “New Era in Sex Ed.”*, CITIZENLINK (July 16, 2010), <http://www.citizenlink.com/2010/07/administration-ushers-in-new-era-in-sex-ed/> (SIECUS seeks to eliminate abstinence-until-marriage education programs in public schools).

26. See, Bob Unruh, *Judge Orders ‘Gay’ Agenda Taught to Christian Children*, WORLDNETDAILY, Feb. 24, 2007, http://www.wnd.com/news/article.asp?ARTICLE_ID=54420 (last visited July 6, 2011). See also FAMILY RESEARCH COUNCIL, *supra* note 19.

recently boasted that “[t]here’s a ton of information about schools issues for lesbian, gay, bisexual, and transgender youth . . . on the ACLU’s website and elsewhere on the web”²⁷ The Williams Institute at UCLA Law School has published and is promoting “The Right to Be Out: Sexual Orientation and Gender Identity in America’s Public Schools,” and also promotes “Safe at School: New Policy and Legislation Recommendations Addressing LGBT Safety in Schools.”²⁸

An oft repeated anecdote on the subject noted that

[i]n the same week that the No on 8 campaign launched an ad that labeled as “lies” claims that same-sex marriage would be taught in schools to young children, a first grade class took a school-sponsored trip to a gay wedding. Eighteen first graders traveled to San Francisco City Hall Friday for the wedding of their teacher and her lesbian partner, The San Francisco Chronicle reported. The school sponsored the trip for the students, ages 5 and 6, taking them away from their studies for the same-sex wedding.²⁹

This field trip took time away from an appropriate curricular focus, and exposed them to their teacher’s lifestyle choices.

In South Carolina, Irmo High School principal resigned in 2008 after being required to recognize a gay club for students. He explained “we do not have other clubs at Irmo High School based on sexual orientation, sexual preference, or sexual activity,” and he believed that recognizing the club would endorse students “choos[ing] to engage in sexual activity”³⁰

Similar phenomena occur in other countries that have legalized same-sex unions. Canada is a little further ahead of most American states in using public school curriculum to

27. *Library: LGBT Youth and Schools Resources and Links*, ACLU, http://www.aclu.org/lgbt-rights_hiv-aids/library (last visited Oct. 26, 2010).

28. Press Release, The Williams Institute, *Safe at School: New Policy and Legislation Recommendations Addressing LGBT Safety in Schools* (Sept. 20, 2010), available at <http://www3.law.ucla.edu/williamsinstitute/programs/NEASept30.html> (last viewed July 6, 2011).

29. *First Graders Taken to San Francisco City Hall for Gay Wedding*, CHRISTIANNEWSWIRE, Oct. 11, 2002 <http://www.christiannewswire.com/news/873908223.html>.

30. *Irmo High Principal Announces Resignation over Gay-Straight Alliance*, 10WISTV.COM, May 20, 2008, <http://www.wistv.com/Global/story.asp?S=8356379>.

promote acceptance of homosexual relations. In 1999, the major legal and financial benefits of marriage were extended to same-sex couples in Canada by a decision of the Supreme Court of Canada.³¹ After several provincial court decisions for same-sex marriage, Canada's parliament legalized same-sex marriage nationally in 2005.³² In 2002, the Supreme Court of Canada overruled a local British Columbia school board that had voted to disallow a teacher of kindergarten and first-grade students from using books that promoted the normalization of same-sex relationships.³³

The presiding trial judge in the case found that the Board reached its decision out of a concern that parents would object to the presentation of such materials to their young children. Overturning the school board's decision and requiring the inclusion of such books in the curriculum, the Supreme Court of Canada stated that "[t]he Board's concern with age appropriateness was . . . misplaced."³⁴

In 2006, the British Columbia Ministry of Education agreed in litigation to adopt and enforce a policy barring parents from opting their children out of discussion of GLBT(Gay, Lesbian, Bisexual, and Transgender) issues in the schools.³⁵ School Boards in many provinces (notably Ontario, Quebec, and British Columbia) require homosexual education in the school system.³⁶ Schools are required to provide "resources to adopt a

31. *M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

32. Civil Marriage Act, S.C. 2005, c. 33 (Can.). Many of the provinces had legalized same-sex marriage locally before the 2005 national legislation. *See, e.g.*, *Halpern v. Canada (Att'y Gen.)* (2002), 60 O.R. 3d 321, 379 (Can. Ont. Sup. Ct. J.); *EGALE Canada Inc. v. Canada (Att'y Gen.)*, 2003 B.C.C.A. 406 (CanLII) (Can. B.C. C.A.).

33. *Chamberlain v. Surrey Dist. Sch. Bd. No. 36*, [2002] 4 S.C.R. 710 (Can.).

34. Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 *VAND. J. TRANSNAT'L L.* 443, 499 (2005).

35. *The Corren Agreement*, TAKE BACK OUR SCHOOLS, <http://www.takebackourschools.org/resources/the-corren-agreement/> (last viewed July 6, 2011). *See also Peter and Murray Corren*, WIKIPEDIA, http://en.wikipedia.org/wiki/Peter_and_Murray_Corren (last visited July 6, 2011) (Corren Agreement).

36. *See generally Life Views: Exposing and Opposing the Pro-Homosexuality Agenda*, BRITISH COLUMBIA PARENTS AND TEACHERS FOR LIFE, <http://www.bcptl.org/gay.htm> (last visited July 6, 2011) (numerous articles about Toronto, BC, and other Canadian schools); C. Gwendolyn Landolt, *Same-sex Marriage Has Changed Canada*, DEFEND TRADITIONAL MARRIAGE AND FAMILY (July 4, 2006), <http://www.defendmarriagekw.org/changedcanada.html>; John-Henry Western, *Explosive Revelations about Homosexual Teachers in Canadian Catholic Schools*,

broader, educative approach to deal with . . . issues of . . . homophobia.”³⁷

In January 2010 the Ministry of Education in Ontario, Canada (where same-sex marriage is legal) revealed its new Health and Physical Education curriculum for grades one to eight.³⁸ It was announced that it would be mandatory for all publicly funded schools starting in September 2010.

Students begin to explore “sexual orientation” and “gender identity” in grade 3, as part of an expectation to appreciate “invisible differences” in others. A desired response has the eight-year-old student recognizing that “some [families] have two mothers or two fathers.”

In grade 5, a student is expected to recognize that “things I cannot control include . . . personal characteristics such as . . . my gender identity [and] sexual orientation.”

[Sixth graders learn] “that masturbation ‘is common and is not harmful and is one way of learning about your body,’” [and], a grade 6 student response suggests . . . that students use the word “partner” rather than “husband” or “wife” to avoid the assumption that all couples are of opposite sexes.

. . .

In grade 8, the use of contraception is a key component of the curriculum, and [a] grade 8 student response states it is important to have “all gender identities and sexual orientations portrayed positively in the media, in literature, and in materials we use at school.”³⁹

LIFESITENEWS.COM, Mar. 28, 2007, <http://www.lifesitenews.com/news/archive/ldn/2007/mar/07032803>.

37. Sch. Dist. No. 44 (N. Vancouver) v. Jubran, 2005 B.C.C.A. 201, ¶ 96 (B.C. C.A.) available at <http://www.courts.gov.bc.ca/jdb-txt/ca/05/02/previous%20judgment/2005bcca0201err1.htm>. See also Rebecca Millette, *BC Public School Board Considering “Homophobia/Heterosexism” Policy*, LIFESITENEWS.COM, April 14, 2011, <http://www.lifesitenews.com/news/bc-public-school-board-considering-homophobia-heterosexism-policy>.

38. THE ONTARIO CURRICULUM, GRADES 1–8, HEALTH AND PHYSICAL EDUCATION, (Interim Edition 2010) (new version), available at <http://www.edu.gov.on.ca/eng/curriculum/elementary/healthcurr18.pdf>.

39. Patrick B. Craine, *Mandatory Curriculum for Ontario Schools Promotes Homosexuality, Masturbation*, LIFESITENEWS, Mar. 1, 2010, <http://www.lifesitenews.com/ldn/2010/mar/10030216.html>. The public reaction to the Ontario curriculum was so negative that in April, Ontario Premier withdrew the proposed new curriculum, admitting that it was “obvious” that it needed “a serious re-think.” *Sex-ed Change Needs ‘Rethink’* Ont. Premier, CBCNEWS, Apr. 22, 2010, <http://www.cbc.ca/canada/>

In other nations, the same trend in curriculum is evident. In Spain, which legalized same-sex marriage in 2005, there has been “a wave of criticism from parents whose children had to use books that teach pupils about gay relationships.”⁴⁰ One news source reports that a Spanish government school course teaches that sex can be practiced with “a girl, a boy or an animal.”⁴¹ In Australia, education regulations were proposed in 2008 that would have banned the use of the terms “husband” and “wife” in school curriculum.⁴²

Advocates of same-sex marriage generally have denied having an intent to use public schools to indoctrinate youth into homosexual ways. However, in a remarkably candid essay, gay writer Daniel Villareal challenged the gay public position of “‘We’re not gonna make kids learn about homosexuality, we swear! It’s not like we’re trying to recruit your children or anything.’ But let’s face it—that’s a lie. We want educators to teach future generations of children to accept queer sexuality. In fact, our very future depends on it.”⁴³ Villareal added: “Why would we push . . . social studies classes that teach kids about the historical contributions of famous queers unless we wanted to deliberately educate children to accept queer sexuality as

toronto/story/2010/04/22/sex-ed.html; Dalton McGinty Revises Sex Education Curriculum, TOPNEWS, Apr. 28, 2010, http://www.lfpress.com/news/london/2010/04/23/13690986.html#; news/london/2010/04/22/pf-13682606.html (blaming religious groups); John Corlett, *Opinion, Ontario’s Children Lose Out in Sex-ed Furor*, TORONTO STAR, Apr. 27, 2010, <http://www.thestar.com/opinion/editorialopinion/article/800748--opinion-ontario-s-children-lose-out-in-sex-ed-furor> (defending the new curriculum); Jennifer O’Brien & Randy Richmond, *McGinty Scraps Sex Ed*, THE LONDON FREE PRESS, Apr. 23, 2010, http://www.lfpress.com/news/london/2010/04/23/13690986.html#; news/london/2010/04/22/pf-13682606.html (McGinty admits the proposed curriculum needed “a serious re-think” and had been drafted without adequate consultation or parental preparation).

40. *Russian Patriarch Slams Spanish Gay Marriage “Propaganda,”* RIANOVOSTI, Oct. 13, 2010, <http://en.rian.ru/world/20101013/160940012.html> (curriculum called “gay relationship ‘propaganda’”).

41. See *Spanish Government Course Teaches Sex Can be Practiced with “Girl, Boy, or Animal,”* CATHOLIC NEWS AGENCY, Feb. 3, 2010, http://www.catholicnewsagency.com/news/spanish_government_course_teaches_sex_can_be_practiced_with_girl_boy_or_animal/.

42. See Bruce McDougall, *Gay Concern Bans Mum and Dad in Classroom,* THE TELEGRAPH, April 17, 2008, <http://www.dailytelegraph.com.au/news/sydney-nsw/schools-ban-mum-and-dad/story-e6freuzi-111116081314> (Australia) (the regulations were later withdrawn due to parental protests).

43. Daniel Villarreal, *Can We Please Just Start Admitting that We Do Actually Want to Indoctrinate Kids,* QUEERTY (May 12, 2011), <http://www.queerty.com/can-we-please-just-start-admitting-that-we-do-actually-want-to-indoctrinate-kids-20110512/>.

normal?”⁴⁴ He concluded: “I and a lot of other people want to indoctrinate, recruit, teach, and expose children to queer sexuality”⁴⁵

Thus, concerns that school curriculum and programs will be used to promote and teach acceptance of homosexual relations are well founded.⁴⁶ Anecdotally, there is a lot of evidence that it is already happening and that many abuses have already occurred. Some governmental responses are beginning to be seen.⁴⁷

B. Suppressing, Discriminating Against Views Opposing Homosexual Relations, Including Employment Discrimination

Discipline against teachers, students, and others for expressions critical of homosexual behavior is becoming more common in many jurisdictions as “a strong trend has recently emerged among Western nations toward proscribing speech critical of homosexuality—either through the law or other indirect means.”⁴⁸

44. *Id.* (“I for one certainly want tons of school children to learn that it’s OK to be gay, that people of the same sex should be allowed to legally marry each other we do our opponents an even greater service when we trip all over ourselves promising not to mention queers in front of the kids when in fact we’d love to. And because we hide from this very basic fact and treat it like something to be ashamed of, we end up with watered-down unemotional pleas for equality . . .”).

45. *Id.* (“That would at least be honest and a heck of a lot more compelling than this fearful mincing we’re doing to the tune and delight of our foes.”).

46. See generally Jill Tucker, *Oakland School’s Lessons in Gender Diversity*, S.F. CHRON., May 24, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/05/23/BAI51JJQ35.DTL#ixzz1NK3MBSsv>. See also Julie Bolcer, *Teachers Union for N.Y. Marriage Equality*, ADVOCATE.COM, June 1, 2011, http://advocate.com/News/Daily_News/2011/06/01/Teachers_Union_for_NY_Marriage_Equality/ (“The United Federation of Teachers, which claims more than 200,000 members, is calling for the passage of [same-sex] marriage equality legislation before the [New York] legislative session ends in the next few weeks.”)

47. See, e.g., Arthur S. Leonard, *LGBT Legislative Update for May 2011*, LEONARD LINK (June 1, 2011), <http://newyorklawschool.typepad.com/leonardlink/2011/06/lgbt-legislative-update-for-may-2011.html> (“Tennessee HB 600, a bill that would prohibit elementary and middle school teachers from discussing homosexuality with their students was on track for passage in the state Senate during May, but consideration in the House was put off until the next session due to the timing of introduction of the measure.”); *id.* (in Louisiana an anti-bullying bill was defeated in part because of concerns about putting pro-homosexual “books in elementary schools”); Elizabeth Dunbar, *Some Teachers Conflicted over Anoka-Hennepin’s Sexual Orientation Policy*, MPRNEWS, June 10, 2011, <http://minnesota.publicradio.org/display/web/2011/06/10/anoka-hennepin-sexual-orientation-policy/> (about policy barring teaching about being gay).

48. Clausen, *supra* note 34, at 448. Canada may have “the most extensive legal regime against speech critical of homosexuality.” *Id.* at 452. In 2003 the Canadian

After the *Goodridge* decision legalizing same-sex marriage in Massachusetts, the superintendent of the Boston Public Schools issued a memorandum celebrating the *Goodridge* decision, and making the chilling declaration that speech that results in bias against gays and lesbians or discrimination (presumably by anyone) will not be tolerated.⁴⁹ The superintendent did not merely ban speech that itself is biased, but also banned any unbiased expression that could contribute to produce bias in any hearer.

The spillover effect of same-sex marriage on education in other jurisdictions is common. In July 2010, a federal court upheld the decision of Eastern Michigan University to dismiss Julea Ward from its graduate counseling program because she refused to counsel homosexual clients on grounds of her religious beliefs.⁵⁰ Likewise, in Georgia, Jennifer Keeton, a master's degree student in the Counselor Education program, filed suit asserting First Amendment speech and free exercise claims after she was ordered to complete a diversity sensitivity workshop when faculty members learned of her Christian beliefs in opposition to same-sex relations.⁵¹ In August 2010, her motion for preliminary injunction was denied because the court held that there was not a substantial likelihood that she

parliament passed a bill (Canada Criminal Code, R.S.C. 1985, c. C-46, § 318) amending the nation's criminal hate-speech law, and adding "sexual orientation" to the list of groups protected against "hate speech" by punishments up to five years imprisonment. Another law bans "hate speech" against homosexuals over telephone lines and computer networks. (Canadian Human Rights Act, R.S.C., c. H-6). Another law forbids "hate speech" in broadcasting. (Broadcasting Act, S.C. 1991, c. 11 (Can.)). Importation of material deemed to be hate propaganda is prohibited. (Customs Tariff Act, S.C. 1997, c. 36 (Can.)). The government may prohibit mail delivery when the mails are used to commit an offense. (Canada Post Corporation Act, S.C. 1985, c. C-10.) Additionally, "all the provinces provide an additional layer of legal protection to homosexuals against such speech, and at least three provinces have shown particular zeal in prohibiting 'hate speech' directed against homosexuals." Clausen, *supra* note 34, at 43.

49. Scott FitzGibbon, *Some Observations on Same-Sex Marriage and Its Recognition* (May 2009) (unpublished paper) (on file with author).

50. *Ward v. Wilbanks*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010). See Plaintiff's Motion for Summary Judgment, *Ward v. Wilbanks*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), available at <http://oldsite.alliancedefensefund.org/userdocs/WardMSJ.pdf>; *Universities Demand Christian Students to Accept Homosexuality*, CHRISTIAN L.J. (undated), <http://www.christianlawjournal.com/law-students-law-schools/universities-demand-christian-students-to-accept-homosexuality/>.

51. *Universities Demand Christian Students to Accept Homosexuality*, *supra* note 50.

could succeed on the merits of her claims.⁵² “In 2005, Missouri State University filed a grievance against counseling student Emily Brooker for refusing to complete an assignment to write and sign a letter to the Missouri legislature advocating for homosexual adoption.”⁵³

Jonathan Lopez, a student in a Speech 101 class at Los Angeles Community College, was shouted down by his professor who called him a “fascist bastard” while Lopez was giving a speech about his Christian faith, in which he read the dictionary definition of marriage and cited two Bible verses.⁵⁴ The professor refused to give him a grade and told him to “ask God what [his] grade [was].”⁵⁵ Lopez’s suit against the college and speech code led to a preliminary injunction of the sexual harassment policy that censored speech considered offensive to gays,⁵⁶ but the Ninth Circuit reversed and dismissed the case.⁵⁷

In Michigan, a high school teacher kicked a boy out of class for saying that he did not “accept gays.”⁵⁸ In California, when a student asked a transfer high school student who was Mormon if her parents were polygamists; she responded, “that’s so

52. *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368 (S.D. Ga. 2010). The case is now before the U.S. Court of Appeals for the Sixth Circuit on appeal. See *Julea Ward Case Information re: American Counseling Association Code of Ethics*, EASTERN MICHIGAN UNIVERSITY, http://www.emich.edu/aca_case/ (last visited June 13, 2011) (university press releases and documents).

53. Meghan Duke, *Fired, in a Crowded Theater: Can a Catholic Professor Speak About Homosexuality Without Risking His Job?*, FIRSTTHINGS.COM, Oct. 2010, <http://www.firstthings.com/article/2010/09/fired-in-a-crowded-theater>.

54. *College Sued over Speech Against Gay Marriage*, MSNBC.COM, Feb. 16, 2009, http://www.msnbc.msn.com/id/29223269/ns/us_news-education/t/college-sued-over-speech-against-gay-marriage/ (California Professor to student: “Ask God what your grade is.”); *Los Angeles City College Is Sued over Alleged Bias Against Christian Student*, CHRON. HIGHER EDUC., Feb. 13, 2009, <http://chronicle.com/article/Los-Angeles-City-College-Is/42414/>; Josh Keller, *U.S. Appeals Court Throws Out Suit Over Religious Speech*, CHRON. HIGHER EDUC., Sept. 19, 2010, <http://chronicle.com/article/U-S-Appeals-Court-Throws-Out/124545/>.

55. *Los Angeles City College Is Sued Over Alleged Bias Against Christian Student*, *supra* note 54.

56. *Id.* See also Drew Zahn, *Homosexclamation! Christian Student Fights Prof, Wins Big*, WORLDNETDAILY, July 14, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=103998>.

57. Josh Keller, *supra* note 54.

58. *Michigan Teacher Suspended over Anti-gay Punishment*, USA TODAY, Nov. 16, 2010, http://www.usatoday.com/news/nation/2010-11-16-michigan-teacher-suspended-gay_N.htm. When the teacher, subsequently, was suspended temporarily for violating the student’s free speech rights, it sparked widespread controversy and a viral video of a 14-year-old student defending the teacher’s action. *Id.*

gay!”⁵⁹ This resulted in a letter of reprimand being placed in her file, but not in the file of the student who has asked her the religiously insulting mock-question in the first place.⁶⁰ While not matters of public knowledge, there are reports of incidents of student harassment by teachers and peers of students who express or are known to hold beliefs that homosexuality is immoral.⁶¹

New York City created and funded the first, but not the only, public high school for LGBT students.⁶² Separate but equal did not work previously in racial education,⁶³ and this raises a host of issues about special preferences for and favoring students with same-sex attraction.

Teachers as well as students have encountered discrimination because of their expression of views not accepting same-sex relationships. For example, in 2008, California Professor June Sheldon was fired from her position at San Jose City College for noting in a Human Heredity class she taught that some research had found a correlation between maternal stress during pregnancy and later homosexual behavior in males.⁶⁴ In Illinois, Ken Howells, a Catholic

59. See Guy Murray, *That's So Ridiculous aka That's So GAY*, LATTER DAY SAINTS' MESSENGER & ADVOC. (March 3, 2007, 7:20 PM), <http://messengerandadvocate.wordpress.com/2007/03/03/thats-so-ridiculous-aka-thats-so-gay/>. The family sued but the state court rejected their claim, saying the Mormon-ridicule was the sort of thing all students must endure. Lori A. Carter, *Judge Rejects "So Gay" Lawsuit*, THE PRESS DEMOCRAT, May 16, 2007, <http://www.pressdemocrat.com/apps/pbcs.dll/article?AID=/20070516/NEWS/7051603393/1033/NEWS0>.

60. Carter, *supra* note 59.

61. See, e.g., Timothy Dailey, *The Other Side of Tolerance*, AWAKENMANHATTAN.COM, <http://www.awakenmanhattan.com/articles/the-other-side-of-tolerance> (last visited June 13, 2011) (“Those who oppose the normalization of homosexuality have been presented as backwoods, antiquated, and dangerous people . . .”); *id.* (“A student at the University of North Carolina at Chapel Hill was verbally harassed by an instructor for voicing his moral opposition to homosexuality.” Later the instructor emailed class participants and railed against the student by name.); *id.* (“At Pioneer High School in Ann Arbor, Michigan, a student was forbidden to offer a traditional viewpoint on homosexuality during a panel addressing ‘Homosexuality and Religion.’”).

62. Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays' Schools?: The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183 (2004).

63. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

64. *San Jose Professor Fired for Answering Student's Genetics Question*, ALLIANCE DEFENSE FUND, undated, <http://www.alliancedefensefund.org/Home/ADFContent?cid=4612>; *Calif. Professor Fired for Homosexual Comments Wins \$1000 Settlement*, LIFESITENEWS.COM, July 22, 2010, <http://www.lifesitenews.com/ldn/2010/jul/10072604.html>. She sued and eventually the school settled, paying her

teacher at the University of Illinois, was dismissed for giving the students in his “Introduction to Catholicism and Modern Catholic Thought” class a three-page summary of and lecture about the Catholic Natural Law argument that homosexuality is immoral.⁶⁵

In Maine, during the election campaign over whether the “People’s Veto” of same-sex marriage should be passed, a public school counselor made an ad supporting “Question One” of the “peoples’ veto” of the same-sex marriage bill and had a complaint filed against him to have his license revoked on grounds that by opposing same-sex marriage, he advocated discrimination contrary to standards applicable to the profession.⁶⁶ Ironically, this school counselor only acted after another teacher had appeared in a television ad in favor of same-sex marriage, and in opposition to the passage of “Question One.”⁶⁷ However, no complaint was filed against the teacher who supported same-sex marriage, but only against the employee who expressed opposition to same-sex marriage.⁶⁸ The complaint ultimately was dismissed, but only after a full investigation and disciplinary hearing in which the school counselor’s livelihood was at stake.⁶⁹ The chilling effect of the proceeding and message to all teachers and school employees

\$100,000 for lost work and removing the termination from her records. Jake Jones, *San Jose City College Settles Case for Firing Professor over Homosexual Comments*, EVANGELICAL EXAMINER, July 26, 2010, <http://www.examiner.com/evangelical-national/san-jose-city-college-settles-case-for-firing-professor-over-homosexual-comments>.

65. Duke, *supra* note 53. When the Alliance Defense Fund threatened to sue the university, and in the face of a lot of public criticism, the university offered Howell a position in another department teaching Introduction to Catholic Thought. *Id.* He was rehired by another department after public uproar. *Id.*

66. See *School Counselor Targeted for Supporting Maine’s Pro-Marriage Question 1*, CATHOLIC NEWS AGENCY, Nov. 3, 2009, http://www.catholicnewsagency.com/news/school_counselor_targeted_for_supporting_maines_promarriage_question_1/; *Counselor Wants Gay Marriage Complaint Thrown Out*, BANGOR DAILY NEWS, Nov. 23, 2009, <http://bangordailynews.com/2009/11/23/politics/counselor-wants-gay-marriage-complaint-thrown-out/>.

67. See generally News Release, Alliance Defense Fund, Maine Counselor’s Career Threatened for Support of Marriage (Oct. 30, 2009), available at <http://www.adfmedia.org/News/PRDetail/3330#20100412>.

68. *Id.* See generally Scott Monroe, *Nokomis Employees Land in the Spotlight with Ads on Question 1*, THE PORTLAND PRESS HERALD, Mar. 4, 2010, <http://www.pressherald.com/archive/nokomis-employees-land-in-the-spotlight-with-ads-on-question-1-2009-10-25.html>.

69. See generally News Release, Alliance Defense Fund, Complaints Dismissed Against Maine Counselor Who Supported Marriage (April 12, 2010), available at <http://www.adfmedia.org/News/PRDetail/3330>.

was clear: if you speak in opposition to same-sex marriage, you risk professional investigation, and your job may be endangered.

The same trend exists in other nations that support same-sex relationships. In 2002, Dr. Chris Kempling, a public high school teacher and counselor in the Quesnel School District in British Columbia, was found guilty of conduct unbecoming a teacher and unprepared to abide by the educational system's "core values" including "recognizing homosexuals' right to equality, dignity, and respect."⁷⁰ Dr. Kempling was

suspended from his job for five months without pay by the province's educational accreditation board for writing letters to the editor—printed in the local newspaper, but never introduced into any public school or classroom—that argued, on the basis of scientific and scholarly research, that homosexual relationships are unstable and gay sex risky. He also criticized what he viewed as the pro-gay stance of the public education system.⁷¹

Kempling had begun writing letters to the editor when his complaint to his teachers union and educational leaders were ignored "after being asked by presenters at a government-sponsored workshop to distribute copies of a gay-and-lesbian newspaper—which included advertisements for gay bathhouses, pornographic personal ads, and information about joining casual-sex and masturbation clubs—to students at his school."⁷² In 2005, Dr. Kempling appeared before the Parliamentary Committee in Ottawa and testified against the proposed bill to legalize same-sex marriage (later enacted).⁷³ That resulted in another suspension from the B.C. College of Teachers (accrediting agency).⁷⁴ Later that year he was notified that he was being investigated again for his public expressions,

70. *Kempling v. British Columbia Coll. of Teachers*, 2004 B.C.S.C. 133 (Can. B.C. S.C.), available at <http://www.courts.gov.bc.ca/Jdb-txt/SC/04/01/2004BCSC0133.htm>, *aff'd*, *Kempling v. British Columbia Coll. of Teachers*, 2005 B.C.C.A. 327 (Can. B.C. C.A.).

71. *Id.* See generally Clausen, *supra* note 34, at 446–47. The initial suspension was reduced to a one-month suspension, and it was upheld by the British Columbia Supreme Court on appeal. *Id.*

72. Clausen, *supra* note 34, at 446–47.

73. Dr. Chris Kempling, Address at the Dr. Chris Kempling Appreciation Dinner put on by British Columbia Parents and Teachers for Life (Oct. 20, 2007), available at <http://www.bcptl.org/rights.htm#1984>.

74. *Id.*

as a member of a political party, against homosexuality.⁷⁵ In 2008, after receiving further citations from the BC College of Teachers, Dr. Kempling resigned his position with the Quesnel School District and took a job with a private school.⁷⁶

Even without any formal clearinghouse for or registry of incidents of suppression of and punishment for expressions opposing same-sex relationships, there are abundant reports of such discrimination. This is a cause for very real concern for civil liberties and academic integrity.

C. *Disregarding/Undermining Parental Rights to Control Children's Education*

Massachusetts education law requires schools to give prior notice to parents, and gives parents a right to opt their children out of class sessions which would expose students to material that "primarily involves human sexual education or human sexuality issues."⁷⁷ In *Parker*, the school teachers declined to notify the parents of the teaching material normalizing same-sex relations and denied the parents their right to protect their kindergartner and first grader from exposure to practices and relationships that were fundamentally contrary to the families' moral values.⁷⁸ Not only did the school administrators subsequently fail to acknowledge the error, they defended the no-prior-notice practice. Furthermore, the federal courts gave a strained and distorted interpretation to the law as not applying because the material was about same-sex families and relationships rather than the details of sexuality and sexual relations.

Similarly, cross-dressing days have been held at schools with little or no notice to parents.⁷⁹ This is part of the reason that scores of parents in Des Moines have removed their

75. *Dr. Chris Kempling is Leaving the Public School System*, "LIVE VIEWS" BRITISH COLUMBIA PARENTS AND TEACHERS FOR LIFE WEBSITE (May–June 2008), <http://www.bcptl.org/rights.htm#Kemplingbulletin>.

76. *Id.*

77. MASS. GEN. LAWS ch. 71, § 32A (2007) (giving right to opt out of exposure to sexuality curriculum), cited in *Parker v. Hurley*, 474 F. Supp. 2d 261, 266 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008).

78. *Parker*, 474 F. Supp. 2d at 266–67.

79. See *Middle School Cancels "Gender-switch" Day after Parents Object*, *supra* note 21; Unruh, *supra* note 20.

children from public schools after a school-sponsored cross-dressing day.⁸⁰

It is reported that under Canadian law generally: “[t]here is no opportunity for parents to withdraw their children if they disagree with this indoctrination.”⁸¹ By stipulation, that is the express and binding policy of the British Columbia Ministry of Education.⁸² Thus, parental rights are diminished in conflict over controlling exposure of children to popular, educator-preferred values and teachings.

The core issue in many ways is the conflict between school officials and parents to determine who will control the moral education of schoolchildren concerning homosexual relations and relationships. As Thomas Sowell of the Hoover Institution at Stanford University put it:

What is called “sex education,” [or I would add sexual diversity public school curriculum] whether for kindergartners or older children, is not education about biology but indoctrination in values that go against the traditional values that children learn in their families and in their communities.

Obviously, the earlier this indoctrination begins, the better its chances of overriding traditional values. The question is not how urgently children in kindergarten need to be taught about sex [or gay families] but how important it is for indoctrinators to get an early start.⁸³

D. Detrimental Impact on Religions, Religious Schools, Beliefs, and Believers

One reason that Massachusetts education law requires schools to give prior notice to parents and protect the right of parents to opt-out their children before exposing them to human sexuality material is to respect the moral values and religious beliefs of the family.⁸⁴ In *Parker*, both families were

80. Unruh, *supra* note 20.

81. Landolt, *supra* note 36 (“Such programs do not provide balanced instruction on the issue, and the medical, psychological and legal impact of homosexuality are not mentioned.”).

82. *See id.*

83. Thomas Sowell, *High Ideals and No Principles*, NAT’L REV. ONLINE, Oct. 8, 2008, <http://www.nationalreview.com/articles/225927/high-ideals-and-no-principles/thomas-sowell?page=2>.

84. MASS. GEN. LAWS ch. 71, § 32A (2007) (giving right to opt out of exposure to

religious, and asserted the sincerity and centrality of their religious beliefs about the sanctity of dual-gender marriage to their families.⁸⁵ Yet respect for their religious values was brushed aside in the school's determination to indoctrinate the young schoolchildren in the preferred values of the school's teachers and administrators.

In the United States, religiously affiliated universities (including Catholic and Jewish) have been forced to recognize and provide funding for gay clubs on their campuses, and to provide married student housing to same-sex couples.⁸⁶ During the summer of 2010 the Supreme Court of the United States upheld (5–4) a state-funded law school's application of its non-discrimination policy to deny Registered Student Organization recognition to a student chapter of the Christian Legal Society (CLS). Hastings denied recognition to CLS, a nationwide association of Christian lawyers and law students dedicated to integrating their faith with their profession, because the CLS requires its members and leaders to adhere to a statement of faith including abstaining from homosexual behavior.⁸⁷

In British Columbia, the government-accrediting agency withdrew accreditation from the Teacher Training Program at Trinity Western University, sponsored by the Evangelical Free Church of Canada, because the school requires students to sign an honor code manifesting their belief in Bible verses that condemn homosexual relations as immoral. The provincial supreme court affirmed that action in 2001.⁸⁸ The school accrediting officials and court held that the faith-belief requirement showed that the school would be unable to inculcate the proper respect for diverse sexual practices that it was the policy of the school authorities to foster.

sexuality curriculum), cited in *Parker*, 474 F. Supp. 2d at 266.

85. *Parker*, 474 F. Supp. 2d at 263.

86. *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099, 1101 (Ct. App. NY 2001); William H. Honan, *A.C.L.U. Sues Yeshiva U. On Housing for Gay Couples*, N.Y. TIMES, June 25, 1996, <http://www.nytimes.com/1998/06/25/nyregion/aclu-sues-yeshiva-u-on-housing-for-gay-couples.html>; Julie Wiener, *Yeshiva U. Back in Court Soon for Appeal on Gay Housing Case*, JEWISH WORLD VIEW, April 18, 2001, <http://www.jewishworldreview.com/0401/yy.gays.asp>. See generally Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, 12 J. L. & FAM. STUD. 315, 336–47 (2010) (describing numerous incidents involving religious institutions and individuals).

87. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

88. *Trinity W. Univ. v. Coll. of Teachers*, [2001] 1 S.C.R. 772 (Can.).

In Alberta, Pastor Stephen Boissoin wrote a letter to the editor criticizing the promotion of homosexuality in the school system.⁸⁹ A gay activist, Dr. Darren Lund, filed a complaint of discrimination that resulted in a decision against the pastor by the Alberta Human Rights Commission ordering him to pay \$7,000 in damages to the activist, to publish a personal apology in the newspaper, and to cease his anti-homosexual public expressions. In December 2009, the Court of Queen's Bench overturned the Commission's rulings.⁹⁰ However, the gay activist reportedly has filed an appeal.⁹¹

Religious minorities and their schools have been particularly vulnerable in Canada and the U.K. (and are increasingly vulnerable in the United States). In 2007 it was reported that

[a] community of a dozen Mennonite families in Quebec is ready to leave the province rather than succumb to provincial government demands that would require their children to be taught evolution and homosexuality. While the government sees its actions as nothing more than enforcing technical regulations, many view the case as intolerance of Christian faith.⁹²

In the United Kingdom, the British government forced a Catholic school to retain a principal who openly celebrated a same-sex civil union in violation of basic Catholic moral doctrines.⁹³

89. Patrick B. Craine, *Homosexual Activists Appeals Exoneration of Canadian Pastor Boissoin*, LIFESITENEWS.COM, March 30, 2010, <http://www.lifesitenews.com/news/archive/ldn/2010/mar/10033008>.

90. *Boissoin v. Lund*, [2009] A.B.Q.B. 592 (Can. Alb. Q.B.), available at <http://www.albertacourts.ab.ca/jdb%5C2003-%5Cqb%5Ccivil%5C2009%5C2009abqb0592.pdf>.

91. See generally Craine, *supra* note 89; Ken Dickerson, *The Issues in Boissoin v. Lund: Expression and Discrimination under Alberta Human Rights Law*, CTR. CONSTITUTION. STUD., Sept. 17, 2009, http://www.law.ualberta.ca/centres/ccs/issues/Boissoin_v._Lund.php; Lee Duigon, *Pastor's "Human Rights" Ordeal to Continue*, CHALCEDON (undated), <http://chalcedon.edu/research/articles/pastors-human-rights-ordeal-to-continue/>. See also *Lund v. Boissoin*, WIKIPEDIA, http://en.wikipedia.org/wiki/Stephen_Boissoin (last visited June 2, 2011).

92. See John-Henry Westen & Elizabeth O'Brien, *Forced Education in Homosexuality and Evolution Leads to Exodus of Mennonites from Quebec*, LIFESITENEWS.COM, Aug. 17, 2007, <http://www.lifesitenews.com/news/archive/ldn/2007/aug/07081701>. See also Patrick B. Craine, *Quebec Considers Proposal to Take Even Greater Control of Private Schools*, LIFESITENEWS.COM, Oct. 27, 2009, <http://www.lifesitenews.com/news/archive/ldn/2009/oct/09102710>.

93. See generally Maggie Gallagher, *Redefining Religious Liberty: Gay Marriage and the Conflict Between Church and State*, NAT'L REV. ONLINE, May 27, 2009,

These are just a few of the reported incidents of harm to education, students, educators, and families resulting from the legalization of or trend toward same-sex unions.⁹⁴ Thus, in both domestic and comparative reports, there is significant evidence of profound and disturbing, indeed problematic, impacts on educational curriculum, programs, policies, students, teachers, other employees, parents, religions and believers resulting from the legalization of same-sex marriage, and generally associated with the trend toward legal acceptance of same-sex relationships.

E. The Other Side: Causation Issues, and the Positive Impacts on Education From Legalizing Same-Sex Marriage

Two countervailing perspectives must be considered: causation and positive consequences. First, causation is always subject to question. The troubling influences of homosexuality in the schools and the negative impacts described above undoubtedly are the result of many factors (social, legal, cultural, political, economic, etc.). This article does *not* claim that those detrimental impacts are due solely to the legalization of same-sex marriage. Indeed, the legalization of same-sex marriage itself is due to many social factors. Rather, giving the highly preferred, legally privileged status of marriage to same-sex couples, or creating civil unions with equal legal benefits, exemplifies the legal preference for and social acceptance of the equivalence of same-sex unions as of equal value to individuals and society as dual-gender marriage. The legalization of same-sex marriage is the ultimate expression of legal acceptance of and privilege for same-sex relationships, so it is a good symbol for all of the influences. Moreover, marriage is a ubiquitous legal institution, tied to so many important legal benefits, privileges, and rights. At least 1138 federal statutes and typically several hundred state statutes use marital terms like spouse and marriage.⁹⁵ As

<http://article.nationalreview.com/?q=MDQwMGU5ZjgwNmFiODcxZDgyNTAxYjVmYzY2ZjViOTY=>.

94. This report does not include most of the dozens of additional incidents detailed in PETER SPRIGG, *HOMOSEXUALITY IN YOUR CHILD'S SCHOOL* (FAMILY RES. COUNCIL 2006), available at <http://downloads.frc.org/EF/EF06K26.pdf>.

95. See U.S. Gen. Accounting Office, GAO04-353R *Defense of Marriage Act* (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (updating U.S. Gen. Accounting Office, GAO/OGC-97-16 *Defense of Marriage Act* (1997), available at <http://>

marriage is a fundamental legal institution, the legalization of same-sex marriage is a powerful stimulus for, and reinforcement of, the other social influences. Also, the ripple-effects of legalizing same-sex marriage in one state are not confined to that jurisdiction. Revolutionary family law developments in some states have profound spillover effects in other states, as research about the effects of legalization of no-fault divorce forty years ago have shown.⁹⁶ The impacts on social values and public policies in other states from such developments in one state occur even before the laws in the others states change.

Second, while the focus of this paper is on the actual and potential detrimental impacts of legalizing same-sex marriage on education, and legal protections and remedies, it must be noted that some advocates of same-sex marriage do not consider many of the impacts identified as negative in the preceding sections negative. Indoctrination of children and reduction of parental rights to interfere with such indoctrination may be viewed as positive by some LGBT advocates and others.⁹⁷

Many gay activists view existing and historical sexual norms, essentially the Abrahamic religion sexual values—Christian, Jewish, and Muslim—as hostile to them. They believe that legalization of homosexual relations, with the highly preferred and highly privileged status society of marriage (or equivalent to it) is necessary to reform society, to overcome and replace existing heterosexist and fidelity norms with rules and expectations that are equally or more accepting of homosexual relations and other minority forms of sexuality.⁹⁸ Some view the preference of sexual liberty over

www.gao.gov/archive/1997/og97016.pdf).

96. See generally LYNN D. WARDLE AND LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 655–56 (2d ed. 2006); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 116–19 (1991).

97. See Villarreal, *supra* note 43 (Villarreal column celebrates GLBT “indoctrination” of youth in schools).

98. See generally Felicia Kornbluh, *Queer Legal History: A Field Grows Up and Comes Out*, 36 LAW & SOC. INQUIRY 537, 545–57 (2011); Carlo A. Piedrioli, *Lifting the Pall or Orthodoxy: The Need for Hearing a Multitude of Tongues in and Beyond the Sexual Education Curricula at Public High Schools*, 13 U.C.L.A. WOMEN’S L.J. 209, 226 n.89 (2005); Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215, 224–25 (2009); Emily L. Stark, *Get A Room: Sexual Device Statues and the Legal Closeting of Sexual Identity*, 20 GEO. MASON U. CIV. RTS. L.J. 315, 317 n.4 (2010). See also Suzanne A. Kim, *Skeptical Marriage Equality*, 34

other liberties, including religious liberties, which have had powerful influence historically in inserting and protecting in law the sexual values of the Abrahamic religions as overdue, and necessary to fully protect and establish the sexual norms and practices of LGBT and other sexual minorities.⁹⁹ Of course, the normalization and social acceptance of homosexual relationships, and whether homosexual relationships are good or bad, are moral issues and the answer will depend upon which set of moral values is used as the standard of reference.¹⁰⁰ Thus, from some normative paradigms, the indoctrination of students about the morality or social acceptance of homosexual relations as equivalent to dual-gender marriage, the suppression of opposing views and proponents, and the reduction of the authority and influence of institutions (families and churches, in particular), which assert objecting perspectives may not be considered negative but may be deemed at least a necessary, expedient, if not a positive, celebratory effect of the legalizing same-sex marriage and civil unions.

Apart from the GLBT moral perspective, there also will be some impacts from legalizing same-sex marriage that many other people, including the author, would agree are positive.¹⁰¹ Such impacts include the reduction of persecution of sexual minorities in schools. Schoolchildren can be cruel, especially to other children who are different, and there is evidence that children with same-sex attractions (or even with heterosexual attractions, but boys who appear effeminate or girls who act “butch”) have been bullied, harassed, and persecuted in schools by students, and even teachers, when they presented no threat to themselves, others, or education.¹⁰² There have been reports

HARV. J. L. & GENDER 37, 79 (2011) (same-sex marriage is chance to challenge heteronormativity).

99. Chai R. Feldblum, *Moral Conflicts and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 123 (Douglas Laycock et al. eds., 2008); Roger Severino, *For Richer or Poorer*, in WHAT'S THE HARM? 325 (Lynn D. Wardle ed., 2008).

100. Of course, the indoctrination of students to promote their individual and social acceptance of same-sex relationships is normal and implicates not only moral issues, but other issues concerning the proper role of schools, the limits of government powers, individual liberty, and family autonomy, church-state separation, etc.

101. Several experts who were unable to participate were invited to present such papers at this symposium, and at least one paper taking this approach has been submitted by Professor Mark Strasser. See Mark Strasser symposium piece.

102. See generally Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity*, 86 IND. L.J. 827 (2011); Jessica P. Meredith, Note, *Combating*

of suppression of legitimate expression, association, and disregard of parental and familial rights of gay and lesbian parents and children, for example.¹⁰³ Many people, including those who oppose same-sex marriage and consider homosexual relationships to be immoral, oppose and are appalled by such bullying, harassment, persecution, oppression, and disregard of parental rights. It is reasonable to expect that legalizing same-sex marriage will result in less social tolerance for such hostile, negative behaviors in the school setting, and that will be a positive impact on education, or least a silver-lining, of the movement toward legalizing same-sex unions.

III. WHY LEGALIZATION OF SAME-SEX MARRIAGE UNAVOIDABLY IMPACTS EDUCATION

While social science causation between legalization of same-sex marriage and impacts on education is unavoidably difficult to establish, legal causation as a matter of legal analysis and logic is clear. Where education laws and policies require or allow teaching about marriage, family life, and marital sexuality, a substantial change in the meaning and definition of marriage must, as a matter of law, affect the educational curriculum. If the meaning or definition of marriage changes, it is indisputable that the parts of the curriculum that cover and address marriage, marital family life, and marital sexuality must and will change. Just as United States History and Government curriculum changed when new states were added to the union, if the meaning of marriage substantially changes, the relevant curriculum must also change to reflect that.

Ironically, in the two states where the impact on education of legalizing same-sex marriage has been most hotly contested (California, in the 2008 ballot contest over Proposition 8, and Maine, in the 2009 ballot contest over Question 1), provisions of the state education law make it clear that a legal redefinition of marriage would legally require some adjustment of the educational curriculum. California education law sets guidelines for optional “comprehensive health education

Cyberbullying: Emphasizing Education Over Criminalization, 63 FED. COMM. L.J. 311 (2010).

103. *See supra*, Part II.

programs.”¹⁰⁴ If a school district adopts such a program, it is required to include the subject of “[f]amily health and child development, including the legal and financial aspects and *responsibilities of marriage* and parenthood.”¹⁰⁵ Another provision mandates that

(b) A school district that elects to offer comprehensive sexual health education pursuant to subdivision (a), whether taught by school district personnel or outside consultants, *shall satisfy all of the following criteria:*

...

(7) *Instruction and materials shall teach respect for marriage and committed relationships.*¹⁰⁶

If the definition, meaning, and composition of marriage changes by legalization of same-sex marriage, not only would it be permissible for that to impact this part of the curriculum, because the verb is “*shall teach*,” it would be legally impossible for that change not to impact this part of the curriculum, short of eliminating this subject from the curriculum entirely.¹⁰⁷

Similarly, Maine education law requires the state Commissioner of Education to “undertake initiatives to implement effective, comprehensive *family life* education services.”¹⁰⁸ By law, such initiatives are to include teacher training on “the development and implementation of comprehensive *family life* curriculum.”¹⁰⁹ This is not quite as open-and-shut as the California law which uses the specific term “marriage,” but if “family life” includes marital family life (a proposition no sober person could dispute), then the resulting impact on the educational curriculum from legalization of same-sex marriage would be the same (and equally indisputable).

Connecticut, another state that has legalized same-sex marriage by judicial decree, also has an education statute requiring its State Board of Education to “develop curriculum

104. CAL. EDUC. CODE § 51890 (West 2010).

105. *Id.* (emphasis added).

106. CAL. EDUC. CODE § 51933 (West 2010).

107. *See generally* William N. Eskridge, *supra* note 2, at 1831–32. If the term “committed relationships” were to be redefined to include the relationship between humans and their pets, the curriculum would have to be changed, also.

108. ME. REV. STAT. ANN. tit. 22, § 1910 (2010) (emphasis added).

109. *Id.* (emphasis added).

guides to aid local and regional boards of education in developing *family life education* programs within the public schools.”¹¹⁰ Since the critical language used, “family life,” is the same as used in the Maine education statute, the analysis and result, the unavoidable “impact” on education curriculum from legalization of same-sex marriage, are identical.

Provisions in American state education laws requiring, allowing or describing “family life” education are not uncommon.¹¹¹ Since family life includes *marital* family life, changing the legal meaning, definition, and composition of marriage in these states would necessarily impact the family life education curriculum, as well.

Additionally, some states have in their education law provisions governing or describing permitted or required family support services and programs.¹¹² The legal redefinition of marriage would justify, if not require, some alteration of those programs and educational support services.

But the largest category of state education laws through which legalization of same-sex marriage could directly impact the curriculum are provisions governing sex, sexuality, family planning, or health education.¹¹³ Over half of the states have provisions in the state education laws regulating such curriculum or programs.¹¹⁴ Since marriage is a principal, and generally the preferred, context for activities of sex, sexuality, family planning, and sexual health, redefinition of the meaning and relationship of marriage would create a practical and legally permissible, if not legally compelled, impact upon this part of the school curriculum.

110. CONN. GEN. STAT. § 10-16c (2010) (The guides “shall include,” among other things, “family planning, . . . [and] economic and social aspects of family life.” However, the guides “shall not include information pertaining to abortion as an alternative to family planning”).

111. *See, e.g.*, COLO. REV. STAT. § 22-28-111.5 (2010); IDAHO CODE ANN. § 33-1608 (2010); ILL. COMP. STAT. ANN. 5/27-9.2 (2010); R.I. GEN. LAWS § 16-22-18 (2010); TENN. CODE ANN. § 49-6-1301 (2010); VA. CODE ANN. § 22.1-207.1 (2010); WASH. REV. CODE § 28A.300.185 (2010).

112. *See, e.g.*, COLO. REV. STAT. § 22-28-111.5 (2010); CONN. GEN. STAT. § 10-16f (2010); FLA. STAT. § 1002.23 (2010); IOWA CODE § 256A.4 (2010).

113. *See, e.g.*, IDAHO CODE ANN. § 33-1608 (2010); IND. CODE ANN. § 30-33-5-13 (2010); MASS. GEN. LAWS. ch. 69, § 1L (2010); MICH. COMP. LAWS § 388.1766 (2010); R.I. GEN. LAWS § 16-22-18 (2010).

114. Kevin Rogers & Richard Fossey symposium piece (listing and citing laws in at least twenty-seven states with such provisions).

These are the most obvious subjects in public school curriculum in which a substantial change in the legal meaning or definition of marriage (such as legalization of same-sex marriage) would clearly impact what is taught, presented, and provided to students, but not the only subjects. In many other subjects, from psychology to politics, inter-personal relations to domestic violence, etc., the curriculum also would be impacted indirectly but clearly. Moreover, the school environment, from hiring to firing, from speech restrictions to clubs and co-curricular activities, from class discussions to field trips, from assemblies to administration, from student harassment to discipline, may also be impacted by a legal change in the definition of marriage because it would impact who will be able to speak for the child, who may control certain decisions affecting the child, what can be discussed and how, eligibility for activities and supervision, standards applicable to dress and behavior, etc.

IV. CONSTITUTIONAL PROTECTION OF PARENTAL CONTROL OF EDUCATION OF THEIR CHILDREN AGAINST THE DETRIMENTAL IMPACTS OF LEGALIZING SAME-SEX MARRIAGE ON EDUCATION

A long line of Supreme Court cases recognize the right of parents to control the education of their children as an aspect of the fundamental constitutional right of parents to raise their children.¹¹⁵ However, the actual holdings of the Supreme Court on both branches of the privacy doctrine, parents' rights and children's autonomy, have been relatively narrow. The question about the roles of parents regarding the provision to minors of information and material about same-sex relations has escaped "constitutionalization." That means that the dispositive locus for resolution of the matter about provision of information and materials same-sex relations to children is not in the courts, but at the level of the state's public interest, and the constitutional test is whether the public policy appropriately

115. This is included in the concept of the "parental autonomy," which is protected by the constitutional right of privacy. See generally Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773 (2008); William Duncan, *The Constitutional Protection of Parental Rights*, in PARENTHOOD IN MODERN SOCIETY 431 (John M. Eekelaar & Petar Sarcevic eds., 1993); Stephanie M. Tabone, Note, *Home-Schooling in Pennsylvania: A Prayer for Parental Autonomy in Education*, 21 ST. JOHN'S J. LEG. COMMENT. 371 (2006).

connected, usually “rationally related,” to legitimate state interests.

The Supreme Court has long recognized that parents are entitled to very broad latitude in raising their children. More than sixty years ago, in *Meyer v. Nebraska*, the Supreme Court of the United States held that the authority of parents to rear their children free of coercive state supervision is one of the unwritten “liberties” protected by the due process clause of the fourteenth amendment.¹¹⁶ The United States Supreme Court reversed the conviction of a private school teacher for violating a law forbidding the teaching of German to students before the ninth grade.¹¹⁷ The opinion of the Court declared that “[w]ithout doubt” among the undefined “liberties” protected by the fourteenth amendment are the rights “to marry, to establish a home and bring up children. . . .”¹¹⁸ Corresponding to this right of control, “it is the natural duty of the parent to give his children education suitable to their station in life.”¹¹⁹ While Plato and others throughout history have advocated that the state should assume the responsibility of raising children, rather than parents, the Court concluded: “[a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; . . .” and it could not be doubted “that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”¹²⁰ *Meyer* clearly prevents a state from prohibiting children in private schools from being taught and indoctrinated in conformity with parental desires in matters of culture. If language education was covered, a good case exists that parental control of marriage meaning and sexual relations would also be protected.

Two years later, in *Pierce v. Society of Sisters*,¹²¹ the Supreme Court again underscored constitutional protection for parental rights when it held that an Oregon law requiring parents of children between the ages of eight and sixteen to

116. 262 U.S. 390 (1923).

117. *Id.*

118. *Id.* at 399.

119. *Id.* at 400.

120. *Id.* at 402.

121. 268 U.S. 510 (1925).

send their children to public school for instruction was unconstitutional. Justice McReynolds, again writing for the Court, reemphasized the rights of parents in vindicating the position of the private schools:

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹²²

Pierce suggests again the constitutional protection of parental control of education for their children in private schools.

The next major case was decided in 1944. In *Prince v. Massachusetts*,¹²³ the Court upheld the conviction under Massachusetts's child labor laws of a woman who allowed her nine-year-old niece and legal ward to join her in selling religious tracts on public sidewalks. Writing for the Court, Justice Rutledge emphasized family privacy, stating:

It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.¹²⁴

“But,” the Court further said, “the family itself is not beyond regulation in the public interest. . . .”¹²⁵ Finding that there were substantial risks of physical and other harm to children from selling religious tracts on busy public streets, the Court upheld the conviction.¹²⁶ While not an education case, *Prince* underscores that public/social interests can trump parental interests when necessary to protect the well-being of the child from clear and present dangers.

122. *Id.* at 534–35.

123. 321 U.S. 158 (1944).

124. *Id.* at 166.

125. *Id.*

126. *Id.*

In 1972, the Supreme Court reaffirmed the principle of parental freedom from state compulsion in deciding matters involving the education and religion of older adolescents in *Wisconsin v. Yoder*.¹²⁷ Three Amish parents who refused to send their fourteen and fifteen year old children to school after they graduated from the eighth grade were convicted of violating Wisconsin's compulsory education law, which required parents to keep children in school until the age of sixteen.¹²⁸ Attendance at high school was contrary to Amish beliefs and to the Amish way of life.¹²⁹ The Wisconsin Supreme Court reversed the convictions, holding that they violated the First Amendment (freedom of religion), and the United States Supreme Court agreed, emphasizing parents' rights as well as freedom of religion.¹³⁰ Chief Justice Burger, writing for the Court, explained:

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. . . . [Likewise,] the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. . . . Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interest such as . . . the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations."¹³¹

The Court found that the effect of two additional years of schooling would contravene the freedom of religion of both the Amish parents and their children "by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs . . . at the crucial adolescent stage of development."¹³² The Court then emphasized that additional years of education would not substantially further any legitimate state interest:

127. 406 U.S. 205 (1972).

128. *Id.* at 207.

129. *Id.* at 209.

130. *Id.* at 207.

131. *Id.* at 213, 214.

132. *Id.* at 218.

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

...

To be sure, the power of the parent, even which linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case [they do not].¹³³

More recently, cases have confirmed the broad control that parents have in the private school setting. In *Vernonia School District 47J v. Acton*, the Court emphasized: "[w]hen parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."¹³⁴ The right of parents generally to control the upbringing of their children was emphasized in *Boy Scouts of America v. Dale*, when the Court was careful to point out, "the right of a natural parent or one *in loco parentis* to direct the education and upbringing of a child under his control is hereby affirmed."¹³⁵ The line of cases emphasizing parents' rights outside of the educational setting is equally long and clear. They include *Moore v. City of East Cleveland*,¹³⁶ *Santosky v. Kramer*,¹³⁷ and *Caban v. Mohammed*.¹³⁸ In *Troxel v. Granville*, the Court emphasized

133. *Id.* at 223, 234.

134. 515 U.S. 646 (1995).

135. 530 U.S. 640 (2000).

136. 431 U.S. 494 (1977). "A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.' . . . Of course, the family is not beyond regulation. . . . But when the government intrudes on choices concerning family living arrangements this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations." *Id.* at 499.

137. 455 U.S. 745 (1982) (adhering to the "clear and convincing" standard of proof to terminate parental rights).

138. 441 U.S. 380 (1978) (hearing needed before terminating the rights of the father of an illegitimate child who had lived with and raised the child). *See also* *Quillion v. Walcott*, 434 U.S. 246 (1978).

parental rights in a affirming the lower court who struck down a grandparent visitation order.” The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹³⁹

On the other hand, several cases emphasized that students independently possess constitutional rights that they may assert without parental control. For example, in 1969 the Supreme Court declared in *Tinker v. Des Moines School District* that children, actually students, “are ‘persons’ under our Constitution. They are possessed of fundamental rights of which the State must respect.”¹⁴⁰ However, the state has constitutional authority to regulate children’s behavior in their own best interests.¹⁴¹ For instance, in *West Virginia State Board of Education v. Barnette*,¹⁴² the Court invalidated a state statute, which required all school children to salute the flag, including Jehovah’s Witnesses, whose church doctrine holds that flag saluting is idolatrous. The Court concluded: “[w]e think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment of our Constitution to reserve from all official control.”¹⁴³ In *Tinker*, the Court found that, “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”¹⁴⁴ The Court has affirmed that in other cases such as *Goss v. Lopez*,¹⁴⁵ *Bethel School District No. 403 v. Fraser*,¹⁴⁶ and *Ginsburg v. New York*.¹⁴⁷

139. 530 U.S. 57 (2000).

140. 393 U.S. 503, 511 (1969).

141. *Michael M. v. Super. Ct.*, 450 U.S. 464 (1981) (states constitutionally have the authority to criminally prohibit sexual intercourse among teenagers).

142. 319 U.S. 624 (1943).

143. *Id.* at 642. Note, however, that the Court did not in this case specify *whose* “sphere of intellect and spirit” were protected by the First Amendment. Because minor students were the direct objects of the flag salute law, it is obvious to assume that the Court had them in mind. But it is also possible that the Court had in mind the parents and their liberty to raise their children and control their religious observances.

144. *Id.* at 511.

145. 419 U.S. 565 (1975).

146. 478 U.S. 675 (1986).

147. 390 U.S. 629, 639. However, in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court limited the parental delegation doctrine:

Parental rights advocates are undoubtedly correct in their assertion that providing same-sex relations information, curriculum, materials, products, or services to a minor is precisely the kind of a decision that comes within the constitutionally protected right of parents to supervise. It is fraught with enormous moral, religious, health, and education significance. In addition, it is the kind of practical and personal decision for which immediate, personal, parental direction is especially appropriate during “the crucial adolescent stage of development,”¹⁴⁸ and for which the past teaching of abstract principles alone may not provide sufficient guidance.¹⁴⁹

The primary flaw with application of “parental rights” analysis to resolve disputes regarding the provision of homosexual relations materials to minors is that even when the state is involved in the provision of such material or information to minors, the manner and degree of state involvement is of enormous significance to the constitutional analysis. If the state requires or prohibits the provision to minors of homosexual relations information or products, infringement of the constitutional protection of parental authority is direct and unavoidable. Then, the state action could only be sustained if it was *necessary* to effect a *compelling* state interest:

Although the state has legitimate interests in preparing youth for citizenship, for a vocation, and for a satisfactory personal life, the potential for indoctrination of children in the public schools in values which conflict with those of their parents necessitates limitations on the power of the state to require instruction. Such potential indoctrination conflicts with the First Amendment’s protection of freedom of speech, its implicit protection of freedom of thought and the “marketplace of ideas,” and the general principle that our government is a government by consent of the governed. To avoid possible indoctrinative effects, parents must have a

[P]ublic school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parent’s immunity from the strictures of the Fourth Amendment.

Id. at 336–37.

148. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

149. *See Doe v. Irwin*, 441 F. Supp. 1247, 1253 (W.D. Mich. 1977).

constitutionally protected right to excuse their children from instruction which conflicts with the parents' values.¹⁵⁰

The Constitution does not provide the answers to all-important questions. Just because the issue is of compelling importance does not necessarily mean that the Constitution compels any particular resolution of the controversy. The fact that some educational policy requirements or curriculum mandates could violate the Constitution, or that others would not violate the Constitution, does not mean that the Constitution mandates a specific resolution to the policy issue regarding education concerning same-sex relationships. The balance to be struck, if not arbitrary and unreasonable, is one that normally will be within the authority of the politically responsive branches of the government to decide. In other words, the solution to concerns about protection of parental rights and interests regarding their children in public schools receiving unwanted exposure to materials promoting or normalizing same-sex relations is to enact appropriate legislation protecting the parental interests.

V. THE ANALOGY FROM ABORTION JURISPRUDENCE FOR PROTECTION OF PARENTAL NOTICE AND INVOLVEMENT

An analogy from abortion jurisprudence may provide a means of obtaining some legal protection for parental rights to control the education of their children and protect them against some of the detrimental effects on education from legalizing same-sex marriage. Constitutional protection for parental rights is very limited in the abortion context, as they are in the homosexuality education context. The courts have been very protective of, and given expansive interpretation to, the Supreme-Court-created abortion-privacy doctrines for nearly forty years. Similar court-created doctrines may be developed to provide judicial protection for educators to create curriculum that promotes acceptance of and teaches the moral equivalence to marriage of same-sex relations and relationships. Yet despite that ideological tilt, the Supreme Court has upheld

150. Mary-Michelle Upson Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction*, 50 S. CAL. L. REV. 871, 957 (1977). See also George Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864 (1988).

state laws that require parental notification of, and protect the opportunity for parental participation in, the decision of a child to have an abortion, and have even upheld mandatory parental consent to abortion requirements, subject to narrowly-described exceptions (albeit very liberally applied by most judges) for “mature minors” and “best interests of the minor” (such as where there is risk of parental abuse).

In *Planned Parenthood v. Danforth*,¹⁵¹ Missouri’s comprehensive abortion regulation act was declared unconstitutional, for the most part. Justice Blackmun (the author of *Roe v. Wade*) wrote the opinion for the Court. A requirement of parental consent before an abortion could be performed upon an unmarried minor was declared unconstitutional as inconsistent with the privacy right of pregnant minors.¹⁵² Three years later, in *Bellotti v. Baird (II)*,¹⁵³ the Supreme Court invalidated a Massachusetts statute which provided that a minor seeking an abortion had to try to obtain the consent of her parents; if they would not give consent, she could get an abortion by obtaining an approval of a state court judge upon showing that the abortion would be in her best interests. Justice Powell announced the decision of the Court and rendered a plurality opinion for four justices, which emphasized that the defect of the Massachusetts law was the requirement that minors notify their parents in *all* cases; provision for *ex parte* proceedings in which a minor might have the opportunity to convince a court to allow her to get an abortion without parental consent because of her maturity or that it was in her “best interests” to have abortion without parental knowledge, was emphasized by this faction of the Court.¹⁵⁴ Four other justices, however, took the position that the defect in the Massachusetts scheme was the requirement of third party *consent* (either parental or judicial) in *all* cases.¹⁵⁵ Therefore, the early indications were that legislation protecting parental interests would not be upheld.

Then, in 1981, in *H. L. v. Matheson*,¹⁵⁶ the Supreme Court upheld a Utah law that required doctors performing an

151. 428 U.S. 52 (1976).

152. *Id.* at 74–75.

153. 443 U.S. 622 (1979).

154. *Id.* at 643.

155. *Id.* at 653–55.

156. 450 U.S. 398 (1981).

abortion upon an unmarried minor to notify her parents “if possible” prior to the performance of an abortion. The Court emphasized that the Utah Statute did not authorize parental veto, merely parental notification of the minor’s desire for abortion.¹⁵⁷ The Court further noted that the statute was reasonably flexible (the “if possible” language), and did not preclude the possibility that “mature minors” might obtain abortions without parental notification upon a showing of their emancipation.¹⁵⁸

In 1983 the Court decided *City of Akron v. Akron Center for Reproductive Health, Inc.*¹⁵⁹ By a vote of 6–3, the Court invalidated, *inter alia*, a provision of an Akron, Ohio ordinance requiring all minors under the age of fifteen to obtain parental or judicial consent for abortion.¹⁶⁰ The Court emphasized that the city could not presume that all minors under the age of fifteen are too immature to make an abortion decision or that abortion may never be in their best interests without parental approval.¹⁶¹ The same day, the Court announced its decision in *Planned Parenthood Association of Kansas, Missouri, Inc. v. Ashcroft*,¹⁶² in which it upheld a Missouri statute requiring that minors secure either parental consent or judicial consent (based on a finding of maturity or best interests) before obtaining abortions. The majority noted that parental participation in abortions decisions of their minor children was an important interest, and the Missouri statute accommodated exceptional cases by providing an alternative judicial bypass procedure whereby a pregnant minor could avoid seeking parental consent if she could prove to the court that she was sufficiently mature to make the decision to have an abortion on her own or that the abortion would be in her best interests.¹⁶³

157. *Id.* at 409.

158. *Id.* at 420 (Powell, J., concurring).

159. 462 U.S. 416 (1983).

160. *Id.*

161. *Id.* at 440. Justice Sandra Day O’Connor, however, authored a powerful dissenting opinion, joined by Justices White and Rehnquist, criticizing *Roe*’s trimester doctrine as being “on a collision course with itself” and as embodying “a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.” *Id.* at 454, 458 (O’Connor, J., dissenting).

162. 462 U.S. 476 (1983).

163. *Id.* at 491.

In 1990, the Supreme Court upheld parental notice and parental consent prior to abortions on minors in two cases, *Hodgson v. Minnesota*,¹⁶⁴ and *Ohio v. Akron Center for Reproductive Health, Inc.* (“*Akron II*”).¹⁶⁵ In *Akron II*, the Court upheld, by a vote of 6–3, an Ohio law generally requiring that a (one) parent be notified twenty-four hours before an abortion is performed on a minor child, unless a court order (judicial bypass) was obtained. The Court distinguished parental notification from parental consent and upheld the former without need for judicial bypass. In *Hodgson*, however, the Court struck down a two-parent notification requirement without a judicial bypass provision, but upheld the same requirement with a judicial bypass provision.¹⁶⁶ Four justices in *Hodgson* indicated that a two-parent notification requirement would be upheld with or without judicial bypass on the ground that parental notification is distinguishable from and less burdensome than a parental consent requirement.¹⁶⁷ Four other justices indicated that two-parent notification is so irrational (because of so many divorced, separated and other single-parent families) that it would be unconstitutional even with judicial bypass.¹⁶⁸ One justice (O’Connor) held that with judicial bypass, a two-parent requirement is constitutional; without judicial bypass, it is unconstitutional.¹⁶⁹ (The Court had no occasion to consider whether a *one*-parent notification requirement *without* judicial bypass is constitutional.)

In 1992, in *Planned Parenthood v. Casey*,¹⁷⁰ the Supreme Court decisively upheld Pennsylvania’s parental consent provision (with judicial bypass for exceptional cases) by a vote of 8–1 (4+3+1–1). The numerous past decisions holding that parental participation furthers the important governmental interest in the welfare of minors were cited in all three of the

164. 497 U.S. 417 (1990).

165. 497 U.S. 502 (1990).

166. 497 U.S. at 423, 455.

167. *Id.* at 479 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 480 (Kennedy, J. concurring in the judgment in part and dissenting in part). *See also id.* at 458, 460 (O’Connor, J., concurring in part and concurring in the judgment).

168. *Id.* at 455 (Stevens, J., dissenting in part); *id.* at 461 (Marshall, dissenting in part).

169. *Id.* at 458, 460 (O’Connor, J., concurring in part and concurring in the judgment).

170. 505 U.S. 833 (1992).

opinions for the eight justices that sustained the one-parent parental consent provision.¹⁷¹ Justice Blackmun alone dissented, arguing that the statute was unconstitutional under strict scrutiny because it could delay abortions for minors.¹⁷²

The Supreme Court cases about state and local laws requiring parental participation before providing abortions to minors now are settled. Laws requiring mandatory parental notification of one parent (who, of course, can inform and involve the other parent) before providing an abortion to minors are constitutional, with or without a judicial bypass procedure. On the other hand, laws requiring mandatory parental consent, or mandatory notification of *both* parents prior to performing an abortion on a minor will only be upheld if they contain a judicial bypass procedure, allowing the minor the opportunity to convince a court that it should allow her to have an abortion without parental notification because it is in her best interests or she is a mature minor.

Note, however, that the parental involvement is not constitutionally required. The abortion cases involved positive laws (statutes and ordinances) requiring parental consent or notification before abortion. The Court upheld such public policy enactments by the local lawmakers. The Court did not hold or imply that the Constitution compelled states to require parental participation, or that parents had a free-standing, independent constitutional right to be notified or to be asked for consent. Rather, the Court held that the Constitution allowed states or local lawmakers to require parental notification or consent, in carefully drafted laws, if they chose to enact such requirements.

Thus, legislation protecting reasonable parental participation in, notification of, or right to prevent exposure of children to material presenting homosexual relations as moral, acceptable and proper, or that equate such relations to marriage, would appear to be permissible. But that legislation must be drafted and enacted, then defended against certain litigation challenges.

171. *Id.* at 899–900 (plurality); *id.* at 944–47, 970–71 (Rehnquist, J., concurring in the judgment in part and dissenting in part); *id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part).

172. *Id.* at 938–39 (Blackmun, J., dissenting).

As the research of Professor Fossey and Dr. Rogers shows, nearly all of the existing protections for parental control in state education statutes (required prior notice and/or “opt-out/in” provisions) address sex education or health education.¹⁷³ It must be expanded to cover education regarding homosexual relations and same-sex relationships and the institution of marriage. As the *Parker* case illustrates, such statutes can be (and in that case were) creatively construed narrowly so as not to apply to provide such protections to parents regarding homosexual relations curriculum, materials, and instruction.¹⁷⁴ Great care in drafting is very important. But such legislation is the most promising (if imperfect) avenue of protection for parental rights (as well as of for students, faculty and staff against harassment and discrimination).

VI. CONCLUSION

This review of the reports of educational developments and the relevant cases and statutes leads to five conclusions.

First, the impacts of legalizing same-sex marriage on education are significant and serious. The issue of parental notification of the provision of information and materials to their children in schools is of profound importance to our country, its future, its families, and its teenagers.

Second, the Constitution protects parental rights to control the education of their children generally, but not very specifically. Parental involvement in the non-coercive provision of instruction or materials to public school students in most cases is neither mandated nor prohibited by the Constitution.

Third, today statutory and regulatory protections for parental rights and interests regarding homosexual relations education or materials are very inadequate (almost non-existent).

Fourth, as the abortion cases concerning parental notification, consent, and judicial bypass illustrate, the Constitution does allow state and local government and agencies to enact laws such as protecting parental notice, consent, and opt-out.

173. Rogers & Fossey, *supra* note 114.

174. *See supra* note 15 and accompanying text.

Fifth, it is past time to begin the process of enacting well-drafted state and local laws protecting parental notice, requiring parental consent, and providing parental and student opt-out protections and procedures. (Indeed, as this symposium issue goes to press, both houses of the California legislature have passed a bill that will require all public schools to teach “gay history” to students—a pretty clear evidence that the same-sex marriage movement is having a profound impact upon education—at least in California.)¹⁷⁵ Adopting effective and reasonable protection for parents and families will not be easy in the current hostile political environment. As the remarks of Professors Peterson and FitzGibbon revealed in this symposium, even law professors who dare to express concern that legalizing same-sex marriage will harmfully affect education of children are subject to extreme retaliation, vindictive retaliation, ridicule, and hostile harassment (including death threats). That means that Civic and Educational Heroes are needed. In order to get such laws passed, a lot of citizens and school personnel must stand up, speak up, and get involved in civic, school, school board, school district, board or education and state legislative processes, and in the elections for such officials. These kinds of protections will not pass themselves, but such proposals will face a lot of social, cultural, political, and professional institutional-establishment opposition, and it will take a lot of hard, patient, determined effort to get them enacted. A lot of grassroots leadership in the community and within the educational organizations, a lot of ordinary moms, dads, teachers, and administrators who support parental notice, consent, and opt-out provisions will be needed to get such protections enacted.

175. See Leidhra Johnson, *California Lawmakers Pass Bill to Teach Gay History*, REUTERS, July 5, 2011, available at <http://news.yahoo.com/california-lawmakers-pass-bill-teach-gay-history-012938470.html>; Judy Lin, *Landmark Gay History Bill Goes to Calif. Governor*, S.F. CHRON., July 5, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2011/07/05/national/a152810D51.D?TL>.