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RECOGNITION OF SAME-SEX MARRIAGE AND PUBLIC SCHOOLS: IMPLICATIONS, CHALLENGES, AND OPPORTUNITIES

*Allison Fetter-Harrott**

I. INTRODUCTION

What effect, if any, does recognition of same-sex marriage have on public schools? This question may be viewed from a variety of perspectives—social, psychological, historical, and others. This paper seeks to identify from a legal perspective the ways in which the struggle regarding governmental recognition of same-sex marriage relates to public schools.

The connection between same-sex marriage and public schools may seem attenuated, but a study of debates, cases, and literature surrounding the controversy reveal three prevailing issues: 1) whether or not recognition of same-sex marriage would, as some campaigners have suggested, legally compel a curricular change in public schools; 2) whether parents have authority to challenge curricular interventions that pertain to same-sex marriage; and 3) whether, and to what extent, denying same-sex couples the right to marry works in some jurisdictions an infirmity of those individuals' parenting rights or has another negative effect, such as creating greater uncertainty for children and schools. Before a discussion of these three questions, to set the backdrop for the discussion, Section II of this paper will provide a brief legal history establishing context for the debate on same-sex marriage recognition, and Section III will address the prevalence of same-sex parented families in the United States.

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II. AN ABBREVIATED HISTORY OF THE U.S. LEGAL STATUS OF SAME-SEX MARRIAGE AND RELATIONSHIPS

Before considering what effect, if any, legal recognition of same-sex marriage might have on public schools, it is helpful first to identify briefly the legal context in which the same-sex marriage debate arises. In its 1985 decision in *Bowers v. Hardwick*,¹ the U.S. Supreme Court considered a challenge to a Georgia law criminalizing sodomy, brought by an individual arrested after engaging in a consensual sexual act with another man in his own home. Relying on prior Supreme Court precedent recognizing a field of privacy rights protecting individual autonomy in the sphere of sexual activity, procreation,² contraception,³ interracial marriage between members of the opposite sex,⁴ and abortion,⁵ the plaintiff brought a claim alleging that the statute violated his rights to engage in private associational activity under the Ninth and Fourteenth Amendments to the U.S. Constitution. The Court framed the question in *Bowers* as considering whether the Fourteenth Amendment's fundamental right to privacy extended to confer a "constitutional right of homosexuals to engage in acts of sodomy."⁶ As framed, the Court held no such right existed, as—in the Court's judgment—it was neither implicit in the preservation of liberty or justice, nor was it "deeply rooted in th[e] Nation's history."⁷

In the decade following *Bowers*, two important and seemingly opposing developments arose pertaining to the basic relational human rights of gay and lesbian persons. Congress enacted the Defense of Marriage Act (DOMA), which defines marriage as the legal union of a man and a woman under federal law⁸ and provides that U.S. states and other units are not required to recognize same-sex marriages joined under the

1. 478 U.S. 186 (1985).

2. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (dealing with sterilization and equal protection).

3. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

4. *Loving v. Virginia*, 388 U.S. 1 (1967).

5. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

6. *Bowers*, 478 U.S. at 191.

7. *Id.* at 192 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977)).

8. 1 U.S.C. § 7 (2006).

laws of other states and units.⁹ Despite the relative longevity of the statute, litigation continues, with disagreement among courts as to DOMA's breadth and the extent to which it complies with the Constitution.¹⁰

Additionally, in *Romer v. Evans*, the U.S. Supreme Court considered the contours of equal protection rights for gay and lesbian individuals under the Fourteenth Amendment to the U.S. Constitution.¹¹ *Romer* was a challenge of an amendment to the Colorado Constitution that nullified private and public legal protections against anti-gay sexual orientation discrimination, many of which were reflected in employment, housing, and human rights ordinances throughout Colorado.¹² Because it was designed to remove these protections and to expressly permit discrimination based on sexual orientation, the Court viewed the amendment as crafted to broadly disadvantage a distinct group.¹³ This aim could not survive even the Court's rational basis review, wherein a statute passes constitutional muster where it "bears a rational relation to some legitimate end."¹⁴ The Court rejected the proposition that the law was designed to protect the freedom of association of those who disagreed with homosexuality; its means were so sweeping as to bear no rational relation to those aims.¹⁵ Accordingly, as a "status based" law designed to "classif[y] persons undertaken for its own sake," the Colorado amendment did not comport with the Equal Protection Clause of the Fourteenth Amendment.¹⁶

Perhaps unsurprisingly, the *Bowers* legacy was short-lived after *Romer*. In *Lawrence v. Texas*,¹⁷ the Court reconsidered the constitutionality of a statute criminalizing sexual conduct between two adults of the same sex. Framing the question in

9. 28 U.S.C. § 1738C (2006).

10. *Cf. In re Levenson*, 587 F.3d 925 (9th Cir. 2009) (holding that the application of DOMA to the Federal Employee Health Benefits Act was unconstitutional); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (finding DOMA unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (same). *But see Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (finding DOMA enacted within Congress's powers).

11. 517 U.S. 620 (1996).

12. *Id.* at 623.

13. *Id.* at 635.

14. *Id.* at 631.

15. *Id.* at 635.

16. *Id.* at 624, 635.

17. 539 U.S. 558 (2003).

those terms, the Court re-explored its prior decisions regarding sexual and reproductive rights and overturned *Bowers*, explaining that the prior opinion “fail[ed] to appreciate the extent of the liberty at stake.”¹⁸ Undoing *Bowers*, the Court observed its own “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” and for “protection to personal decisions relating to marriage” and other private personal relationships.¹⁹ Given the prominence of these rights and because the *Bowers* holding “demean[ed] the lives of homosexual persons,” the Court found that state laws criminalizing sexual activity between two consenting adults violate fundamental liberty and privacy interests protected by the substantive Due Process Clause of the Fourteenth Amendment.²⁰ In a scathing dissent, Justice Scalia remarked that the majority and concurring opinions “le[ft] on pretty shaky grounds state laws limiting marriage to opposite-sex couples.”²¹

In recent years, courts, legislatures, and voters have grappled with whether a state must, should, or should not recognize same-sex marriage. Perhaps the most famous battle over recognition of marriage of same-sex couples emerged in California. In 2008, the California Supreme Court found in *In re Marriage Cases*²² that state statutes limiting marriage recognition to only heterosexual couples violated California’s state constitution. Shortly thereafter, however, California voters enacted Proposition 8, a constitutional amendment stating “[o]nly marriage between a man and a woman is valid or recognized in California.”²³ After challenges to Proposition 8 were rejected by California state courts, challengers brought their claims to federal court. In *Perry v. Schwarzenegger*, plaintiffs alleged that Proposition 8 violated the U.S. Constitution.²⁴ The district court agreed, finding that the amendment violated the Equal Protection Clause and the substantive due process protections of the Fourteenth

18. *Id.* at 567.

19. *Id.* at 572–74.

20. *Id.* at 575.

21. *Id.* at 601.

22. 183 P.3d 384 (Cal. 2008).

23. CAL. CONST. art. 1, § 7.5.

24. 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

Amendment because the exclusion of gay and lesbian individuals from the institution of marriage bore no rational relationship to any legitimate state interest.²⁵ Just days after the *Perry* decision was decided, the U.S. Court of Appeals for the Ninth Circuit granted a stay halting enforcement of the decision pending appeal.²⁶ The result is that marriages between same-sex couples legally recognized in the period between *Marriage Cases* and Proposition 8 are valid, but same-sex couples cannot currently be newly married in California.

So although the U.S. Constitution protects the rights of individuals to engage in private sexual and romantic relationships with another adult of their choosing free from criminalization, marital recognition of those consenting relationships exists only in an evolving and devolving patchwork of state-specific laws across the country. As of July 2010, six jurisdictions recognized marriage between individuals of the same sex: Connecticut,²⁷ Iowa,²⁸ Massachusetts,²⁹ New Hampshire,³⁰ Vermont,³¹ and the District of Columbia.³² Nine states recognized domestic unions or civil partnerships in some form.³³ Seven states recognized out of state marriages between same-sex couples.³⁴ Twenty-nine states had constitutional amendments either banning marriage between individuals of the same sex or empowering the legislature to do so.³⁵ The remaining states' statutes permitted in language or interpretation recognition of only those marriages between

25. *Id.* at 1003.

26. *See Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (N.D. Cal. Aug. 16, 2010).

27. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that the statute limiting marriage as between only opposite-sex couples violated the Connecticut constitution).

28. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding denial of marriage benefit to homosexual couples did not comport with the equal protection clause of the Iowa constitution).

29. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding refusal to grant marriage licenses to same-sex couples violated the liberty and equality requirements of the Massachusetts constitution).

30. N.H. REV. STAT. ANN. § 457:46 (2010).

31. VT. STAT ANN. tit 15, § 8 (2010).

32. D.C. CODE § 46-401 (2010).

33. *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last visited Feb. 12, 2011).

34. *Id.*

35. *Id.*

opposite-sex spouses.³⁶ And undoubtedly, as judicial and political challenges abound, the vitality of governmental recognition of same sex marriage likely will continue to change in coming years.

III. THE PREVALENCE OF SAME-SEX PARENTED FAMILIES

Estimates of the prevalence of same-sex parented families vary somewhat, perhaps relating to historical gaps in census data, reluctance of gay and lesbian individuals publicly to identify as such given fear of discrimination, and other factors. However, some valuable data about same-sex parented families has been identified.

Nearly one-quarter of same-sex couples in America are raising a child.³⁷ These families live in every state³⁸ and in an estimated 96% to 99% of the counties in the United States.³⁹ As of the year 2000, it was estimated that one-sixth of gay men had fathered or adopted a child and more than one-third of lesbians had given birth to a child.⁴⁰ Another study estimated that one-fifth of gay men and one-third of lesbians were raising children in the home.⁴¹ More recent studies estimate that approximately one-fifth of same-sex couples are raising children in the household.⁴² Additionally, gay and lesbian parents are parenting or otherwise caring for tens of thousands of American children through adoption and foster care each

36. *Id.*

37. Gary J. Gates, *Census 2000, GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER CULTURE* (2004), http://www.glbtc.com/social-sciences/census_2000.html.

38. *Id.*; TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 (2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

39. DAVID M. SMITH & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS (2001), *available at* http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

40. GARY J. GATES ET AL., URBAN INSTITUTE, ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5 (2007), *available at* <http://www2.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf>.

41. SIMMONS & O'CONNELL, *supra* note 38, at 10.

42. MARTIN O'CONNELL ET AL., U.S. CENSUS BUREAU, NEW ESTIMATES OF SAME-SEX COUPLE HOUSEHOLDS FROM THE AMERICAN COMMUNITY SURVEY Table 7 (2010), *available at* http://www.census.gov/population/www/socdemo/hh-fam/SS_new-estimates.pdf.

year.⁴³ It is estimated that approximately 65,000 (or 4% of) adopted children were living with gay or lesbian parents as of 2000.⁴⁴ And approximately 14,000 (or 3% of) foster children were being cared for in foster homes by gay and lesbian foster parents.⁴⁵

This data reveals that gay and lesbian parented families in the United States are a social fact in communities across our country. These families are not, as some would suggest, relegated to a small number of certain communities. Rather, they are raising children in virtually every locale in the United States.

IV. SAME-SEX MARRIAGE AND SCHOOLS: POLITICAL STRATEGY OR IMMINENT CURRICULAR SHIFT?

In the American education system, general powers of school governance rest with state governments. Typically, states manage their curricular powers by enacting broad statutes establishing threshold curricular requirements, recommendations, or prohibitions and by delegating powers to state boards and departments of education.⁴⁶

So how do public schools find themselves thrown into the debate over whether to recognize marriage of adult same-sex couples? Schools, important territory in U.S. civil rights struggles, offer particularly fertile soil for the so-called “culture wars.” Concepts like fairness and intolerance take on deeper hues when reflected in the education of children.⁴⁷ And from a practical perspective, advocates recognize what the courts have long appreciated: we look to schools to reproduce our civic

43. GATES ET AL., *supra* note 40, at 7–8, 15.

44. *Id.* at 7.

45. *Id.* at 15.

46. See, e.g., Carolyn Depoian, *Homosexuality, the Public School Curriculum and the First Amendment: Issues of Religion and Speech*, 18 L. & SEXUALITY 163, 169–70 (2009); Laura A. Jeltama, *Legislators in the Classroom: Why State Legislators Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 223–24 (2004). See also STEPHEN B. THOMAS ET AL., *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 2–6 (6th ed. 2009).

47. Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & EDUC. 1, 26 (2009); Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 310–11, 328 (2009).

virtues.⁴⁸ Because public schools provide most children with their first and most enduring experience with government, many advocates on a host of issues see schools as a place where culture is made and remade.⁴⁹

Accordingly, some on both sides might view the debate about same-sex marriage as perhaps no different from other civil rights battles. Some claim that, embodying principles of equality, schools should acknowledge same-sex couples to reduce discrimination. Others worry that discussion of sexual orientation in schools will undermine the roles of disapproving parents' in their children's religious upbringing.⁵⁰ Some have additionally alleged, however, that opponents of equal rights for same-sex couples place children at the center of the debate to foster unfounded fears.⁵¹ These scholars have opined that discourse critical of homosexuality has often in its conceptualization of homosexual persons focused singularly on sexual behavior.⁵² That framing tends to provide an over-sexualized conception of gay men and women, the argument goes, a conception that paints them unfairly as a threat, playing on fear.⁵³

Much recent public discussion about the recognition of same-sex marriage and public schools surrounded the debate leading up to enactment of California's Proposition 8. Proposition 8 proponents through public advocacy alleged that recognition of same-sex marriage would require schools to "teach gay marriage," even to very young students.⁵⁴ For

48. See e.g., *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society.").

49. *Id.* See also NeJaime, *supra* note 47, at 332.

50. See, e.g., Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children*, 32 DAYTON L. REV. 361, 364 (2007). Of course, where the debate is as to the extent to which schools should discuss sexual orientation—and not just marriage—this debate will continue regardless of same-sex marriage recognition.

51. See, e.g., NeJaime, *supra* note 47, at 373; Joyce H. Hahn, Note, *Proposition 8 and Education: Teaching Our Children to Be Gay?* 19 S. CAL. REV. L. & SOC. JUST. 149, 151 (2010); Ruth Butterfield Isaacson, Comment, "Teachable Moments": *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121 (2010). See also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

52. NeJaime, *supra* note 47, at 370–71.

53. See *id.*

54. Tamara Audi, Justin Scheek & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J., Nov. 5, 2008, <http://online.wsj.com/article/SB122586056759900673.html>.

example, the Proposition 8 ballot argument to voters asserted that it:

[P]rotects our children from being taught in public schools that “same-sex marriage” is the same as traditional marriage

. . . .

. . . If the gay marriage ruling [of the California Supreme] is not overturned, TEACHERS COULD BE REQUIRED to teach young children that there is *no difference* between gay marriage and traditional marriage. We should not accept a court decision that may result in public schools teaching our own kids that gay marriage is ok.⁵⁵

Additionally, some Proposition 8 supporters advanced ads that linked the recognition of same-sex marriage and schools. One commercial advertisement depicted a young girl declaring to her mother that she learned in school about a king who married another king and, as a result, she believed she could marry a princess.⁵⁶ A law professor narrator stepped into the frame, stating: “Think it can’t happen?” referring to the scene. “It’s already happened,” he continued. “When Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry boys. The courts ruled parents had no right to object.” Another narrator continues while a legal citation appears, “Under California law, public schools instruct kids about marriage. Teaching children about gay marriage will happen here unless we pass Proposition 8.”⁵⁷ The advertisements imply not just that children would be exposed to same-sex marriage as a social occurrence, but that if gay marriage continued lawfully, schools would be legally compelled to indoctrinate them as to the moral rightness of same-sex marriage.⁵⁸ Those who advocate against recognition

55. *Perry*, 704 F. Supp. 2d at 930 (quoting the California Voter Information Guide for the Nov. 4, 2008 California General Election. Proposition 8 Arguments—Voter Information Guide 2008, <http://www.voterguide.sos.ca.gov/past/2008/general/> (follow “Proposition 8” hyperlink; then follow “Arguments and Rebuttals” hyperlink)).

56. *See* Yes on 8 TV Ad: It’s Already Happened, available at <http://www.youtube.com/watch?v=0PgcgqfYYP4> (last visited Nov. 12, 2010).

57. *See id.*

58. Hahn, *supra* note 51, at 160.

of same-sex marriage have advanced similar arguments in political contests over the right to marry in other states.⁵⁹

Many attribute the focus on schools with the success of anti-same-sex marriage measures. Given these recent campaigns, discussion is warranted as to whether the recognition of same-sex marriage equality would incur some legally compelled curricular shift in public schools. To do so, it is relevant to consider the curricular schemes of some of the states in which lobbyists have recently launched this argument and, using these case studies, to consider the impact, if any, that recognition of same-sex marriage might work on those schemes.

A. California

The Proposition 8 advertisement discussed above cited California Education Code § 51933 for the assertion that without the intervention of a ban on recognition of marriage between same-sex couples, California schools were in danger of being legally compelled to “teach gay marriage.”⁶⁰ But the cited provision, found in California’s Comprehensive Sexual Health and HIV/AIDS Prevention Education Act—quoted only in highly selective part in the commercial—actually requires schools to provide age appropriate, medically accurate, and objective instruction that “teach[es] respect for marriage *and committed relationships*.”⁶¹ The statute requires that a school electing to provide a curriculum relating to sexual health and relationships “be appropriate for pupils of all races, genders, *sexual orientations*, ethnic and cultural backgrounds, and pupils with disabilities.”⁶² The requirement that the curriculum be appropriate for students of varying sexual

59. Sue Ellin Browder, *Teaching Same-Sex “Marriage,”* NAT’L CATH. REG., March 2009, available at <http://www.ncregister.com/site/article/17432>; Katherine Gregg, *Opponents of Same-Sex Marriage File Suit to Allow Unlimited Campaign Spending in Rhode Island*, PROJO.COM, Sept. 28, 2010, http://www.projo.com/news/content/same_sex_marriage_lawsuit_09-28-10_KGK3KOD_v26.2308df0.html; Eric Russell, *Question 1 TV Ad Sparks Charges of “Blatant Misinformation,”* BANGOR DAILY NEWS, Oct. 2, 2009, <http://new.bangordailynews.com/2009/10/02/news/question-1-tv-ad-sparks-charges-of-lsquotblatant-misinformationrsquo>.

60. See Yes on 8 TV Ad, *supra* note 56. See also Hahn, *supra* note 51, at 161–69.

61. CAL. EDUC. CODE § 51933 (West 2009) (emphasis added). See also CAL. DEP’T OF EDUC., HEALTH EDUCATION CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS, KINDERGARTEN THROUGH GRADE TWELVE (2008), available at <http://www.cde.ca.gov/be/st/ss/documents/healthstandmar08.pdf>.

62. CAL. EDUC. CODE § 51933 (emphasis added).

orientations, plural, already contemplates discussion of same-sex relationships. And the provision of the California Education Code prohibiting sexual orientation discrimination likewise contemplates generally more egalitarian handling of the topic.⁶³ The statute references a “respect” for marriage, which some commentators have observed may imply, not instruction regarding the rightness of same-sex marriage, but rather respect in the form of appreciation of diversity.⁶⁴ But the statute does not just reference instruction about respect for marriage. It references the importance of teaching respect for committed relationships,⁶⁵ which certainly includes same-sex romantic relationships. Accordingly, same-sex couples’ relationships already fit within the class of relationships which students should learn to respect under the relevant curriculum statute. And, as other commentators have observed, the provision regarding teaching respect for marriage is optional, emphasizes the importance of allowing parents to opt their children out of sexuality education, provides parents wide ranging access to materials, encourages students to consult with parents and guardians regarding sexuality, and recognizes parents as the primary teachers of sexuality information.⁶⁶ Accordingly, when placed in context, arguments or implications made politically the recognition of an inalienable right to marry the adult of one’s choice would compel a curricular change on public school children appears, at best, exceedingly weak.

B. *Maine*

As in California, some opponents of the recognition of same-sex marriage in Maine have additionally supported ballot initiatives with arguments linking the recognition of marriage rights with at least an implied legal compulsion of “teaching gay marriage” in public schools.⁶⁷ In 2009, Maine’s voters passed Question 1, a ballot initiative invalidating a previously enacted law recognizing same-sex marriage.⁶⁸ In commercials

63. *Id.* §§ 200, 212.6, 220.

64. Hahn, *supra* note 51, at 161–68.

65. *Id.*

66. *See id.* at 162, summarizing CAL. EDUC. CODE §§ 51933–34, 51937–39.

67. *See Russell, supra* note 59.

68. Question 1 was titled “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom” and stated, “Do you want to reject the new law that lets

supporting the measure, a proponent stated that Question 1 “[had] everything to do with schools,” and implored viewers to “vote Yes on Question 1 to prevent homosexual marriage from being taught in Maine schools.”⁶⁹

These arguments beg the question of whether, as suggested, recognition of same-sex marriage rights in Maine indeed would work some legally compelled curricular shift. Maine’s statutes require that children in grades Kindergarten through grade 12 receive what is known as “Comprehensive Family Life Education,” including instruction on “human development and sexuality, including education on family planning and sexually transmitted diseases.”⁷⁰ The statute on this curriculum also requires that lessons be “accurate and age appropriate,” that they reflect community standards, emphasize the importance of parental involvement in the development of attitudes, build individual decision-making skills, and emphasize abstinence.⁷¹ And parents have the opportunity to remove their children from such lessons if delivered in public schools.⁷² The Guiding Principles for the Learning Results require that Maine’s students learn to be responsible and involved citizens able to understand the “diverse nature of society.”⁷³ Maine’s Learning Results, the set of general overarching standards for the state’s public schools, do not require explicit teaching of marriage or sexual orientation. And so the implication that same-sex marriage recognition would lead to a legally compelled curricular shift is not supported in the legal authorities governing Maine’s curricula.

C. Connecticut

In Connecticut, some anti-same-sex marriage commentators, too, encouraged public concern over the link between recognition of marriage rights and public school

same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages?” See Bureau of Corporations, Elections, 2009 Referendum Tabulation, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html>.

69. See Russell, *supra* note 59.

70. ME. REV. STAT. tit 22, § 1902 (2004).

71. *Id.*

72. *Id.* § 1911.

73. ME. DEPT OF EDUC., GUIDING PRINCIPLES (1997), available at <http://www.maine.gov/education/lres/gp.pdf>.

curricula.⁷⁴ Connecticut state law compels the state board of education to create guides to assist school districts in composing curriculum on family health, including but not limited to topics such as “family planning, human sexuality, parenting, nutrition and the emotional, physical, psychological, hygienic, economic and social aspects of family life.”⁷⁵ But exactly how to compose curriculum for such initiatives, or even to teach them at all, is still reserved to local school boards,⁷⁶ zones in which parents’ and community members’ views carry significant weight. Nor are students required to take part in such programs, if offered.⁷⁷

Connecticut state law prohibits discrimination based on sexual orientation.⁷⁸ And Connecticut’s state standards before the Connecticut Supreme Court’s ruling in *Kerrigan* that schools would teach students to demonstrate respect for others without regard to sexual orientation and other characteristics.⁷⁹ The Connecticut standards do not specifically require public schools to teach anything about marriage in school and already championed efforts to dispel sexual orientation discrimination well before the decision in *Kerrigan*. As such, the claim that same-sex marriage would legally compel schools to “teach gay marriage” is not supported by governing authority.

D. Rhode Island

Relatively recent controversy has raised the same curricular debate in Rhode Island.⁸⁰ Rhode Island statutes mandate that schools teach a health curriculum.⁸¹ This includes mandatory health and family life courses and HIV and AIDS education programs that involve accurate information on pregnancy and transmission and prevention of sexually

74. See Browder, *supra* note 59.

75. CONN. GEN. STAT. § 10-16c (West 2010).

76. *Id.* § 10-16d.

77. *Id.* § 10-16e.

78. *Id.* § 10-15c.

79. See CONN. STATE DEPT OF EDUC., THE CONNECTICUT FRAMEWORK: K-12 CURRICULAR GOALS AND STANDARDS (1998), available at http://www.sde.ct.gov/sde/lib/sde/PDF/Curriculum/Curriculum_Root_Web_Folder/ctframe.pdf.

80. Gregg, *supra* note 59.

81. R.I. GEN. LAWS § 16-1-5 (2010).

transmitted infections, with a preference for abstinence.⁸² Parents may elect to remove their children from these courses.⁸³ And the Rhode Island standards governing sexuality education, while contemplating that schools will teach students about marriage, additionally provides that students will learn age appropriate lessons⁸⁴ about dating, sexuality, and sexual orientation as well.⁸⁵ The latter necessarily contemplates that students will learn about same-sex couples. And so, as in other states, there is little, if any, legal evidence that recognition of marriage equality for same-sex couples necessarily would itself legally work a curricular change on the state's schools.

E. Political Strategy or Curricular Shift?

This non-exhaustive survey of states in which the “teaching gay marriage” legal argument has been recently put forth reveals its substantial weaknesses. Certainly, given the broad national prevalence of same-sex parented families, who live in every state and nearly every county of the United States, schools in other states that teach children about family structure or committed adult relationships by implication should already be acknowledging the presence of those families, regardless of the legal status of the parents' relationships. And it is difficult to see how this issue is any different than teachings that acknowledge families with divorced or heterosexual unmarried parents, which are lawful even though they conflict with some religious views. Typically, and logically, same-sex marriage laws themselves do not specifically mention education. In fact, recognition of same-sex marriages would likely not require the kind of morally indoctrinating “teaching gay marriage” against which same-sex marriage opponents warn, just as failure to recognize gay marriage does not prohibit a curriculum that permits schools to instill in students respect for diversity of families and beliefs, including those relating to same-sex relationships and parenting.⁸⁶

82. *Id.* §§ 16-22-17, 16-22-18 (2001).

83. *Id.*

84. R.I. DEP'T OF HEALTH, RULES AND REGULATIONS FOR SCHOOL HEALTH PROGRAMS 10, 12 (2009), available at <http://sos.ri.gov/documents/archives/regdocs/released/pdf/DOH/5471.pdf>.

85. *Id.* at 12.

86. Consider Ohio, a state with a constitutional amendment prohibiting same-sex

Even if in some states the curricular scheme is such that campaign rhetoric like that discussed above presents a real connection between curriculum and recognition of same-sex marriage, those concerned about such curricular measures have other avenues for advancing their agenda. Given that curricular choices are often a matter of state-, district-, or school-level decision-making, same-sex marriage opponents may petition for curricular changes.⁸⁷ And if same-sex couples are entitled to the fundamental right to join in marriage, allowing the curricular lobbying process to play out is far more just and democratic than denying an entire class of people marriage rights—and the many personal, economic, familial, and political rights and benefits that accompany marriage—to

marriage. The Ohio Revised Code requires schools to offer courses in health education, including what Ohio terms “[v]enerereal disease education.” OHIO REV. CODE ANN. § 3313.60(A)(5)(c) (LexisNexis 2009). This curriculum must stress an abstinence-only approach to sexuality education, including emphasizing the risks of sexually transmitted infections that accompany sexual activity, the side effects of sexual activity outside of marriage, and recommending that students abstain from extra-marital sexual activity. *Id.* § 3313.6011(C)(1)-(7) (LexisNexis Supp. 2009). Despite the refusal to recognize same-sex marriages, Ohio’s education scheme necessarily contemplates the consideration of same-sex parented families in age appropriate ways in the public school curriculum. For example, the Ohio Department of Education’s early learning standards contemplate young children sharing their personal family stories and traditions, which necessarily will include at least some classes acknowledging children who hail from same-sex parented families. OHIO DEP’T OF EDUC., EARLY LEARNING CONTENT STANDARDS 45 (2006), <http://education.ohio.gov/GD/Templates/Pages/ODE/ODEDetail.aspx?Page=3&TopicRelationID=1389&ContentID=1629&Content=83592> (follow “Early Learning Content Standards” hyperlink). They provide that children should learn about social units, like families, as well as differences in the structures and habits of those units. *Id.* at 44. The early learning content standards advance the quotation, “When all families are valued by society, all of society benefits.” *Id.* at 48. Perhaps most directly dealing with these questions, the list of books recommended to fulfill these standards includes the book *Heather Has Two Mommies*, by Leslea Newman and *Is Your Family Like Mine?* by Lois Abramchik and Barbara Cavallo. OHIO DEP’T OF EDUC., EARLY LEARNING—PRIMARY CONTENT STANDARDS FOR SOCIAL STUDIES 62–63 (2008), <http://education.ohio.gov/GD/Templates/Pages/ODE/ODEDetail.aspx?Page=3&TopicRelationID=1389&ContentID=1629&Content=83592> (follow “Early Learning—Primary Content Standards for Social Studies” hyperlink). Additionally, the First Circuit has noted that a state in which same-sex marriage is recognized might have a rational reason to teach about legal status of such relationships. *Parker v. Hurley*, 514 F.3d 87, 95 (1st Cir. 2008). The court’s statement did not, however, hold that the legal recognition of same-sex marriage required schools to engage in such teaching. *Id.* at 96.

87. See *Parker*, 514 F.3d at 107; Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Expression*, 38 J.L. & EDUC. 409, 422–24 (2009) (but students and parents “have no right to refuse or modify a curriculum with which they disagree.”); Christopher M. Morrison, *High Stakes Tests and Students with Disabilities*, 41 B.C. L. REV. 1139, 1148 (2000) (states control education policy decisions).

guard against fears by some that doing otherwise would legally work a curricular shift in public schools. Of course, this is not to say that curricular initiatives identifying the diversity of healthy families thriving in our communities, including same-sex parented and married families, are inappropriate in schools. In analyzing the existence of a relationship between U.S. public schools and our nation's debate regarding governmental recognition of same sex marriage, it is appropriate to identify the extent to which legal and political arguments made are based in legal doctrine, statutory language, and curricular policy.

But this discussion would be incomplete if simply challenging the campaign assertion that curricular change is not legally required by recognition of same-sex marriage. We live in a time when anti-gay discrimination and harassment is rampant in our public schools, often with unacceptably disastrous circumstances for young people.⁸⁸ In the debate regarding what schools must, should, or should not teach with respect to same-sex marriage and relationships, we must not forget our duty to keep all students safe from victimization and the potential benefits of curricular interventions designed to foster peaceful appreciation of students' families and identities.

V. PARENTAL SCHOOL CHOICE, CURRICULAR CONTROL, AND "OPTING OUT"

No matter the efforts made to unite factions in the debate over the recognition of same-sex marriage, some will object to curricular references relating to same-sex marriage and relationships. This controversy has arisen in states with and without same-sex marriage equality rights.⁸⁹ Accordingly, this discussion examines the features of parental curricular objection rights relating to such objections. While these

88. HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 1–3 (2001), available at <http://www.prideagenda.org/portals/0/pdfs/Youth%20-%20Hatred%20in%20the%20Hallways.pdf>. See also Jeremy Hubbard, *Fifth Gay Teen Suicide Sparks Debate*, ABC NEWS, Oct. 3, 2010, <http://abcnews.go.com/US/gay-teen-suicide-sparks-debate/story?id=11788128>.

89. Discussion of opt-outs and marriage recognition should acknowledge that even absent same-sex marriage rights, questions of sexual orientation and the curriculum will endure, as same-sex couples are part of society, even where their marriages are unrecognized.

features are somewhat ambiguous under current law, recent opinions offer some guidance.

Federal courts have long been trying to determine the contours of parents' rights to opt their children out of school measures with which they disagree. The most relied upon cases arose in the early twentieth century.⁹⁰ In *Meyer v. Nebraska*, the U.S. Supreme Court found that a state law prohibiting non-English school instruction ran afoul of the liberty rights guaranteed to all by the Constitution.⁹¹ In *Pierce v. Society of Sisters*, the Court struck down a compulsory attendance statute as an infringement of parents' rights to direct their children's upbringing.⁹²

Nearly half a century later, in *Wisconsin v. Yoder*, the Court considered whether compulsory education statutes violated the constitutional rights of Amish parents.⁹³ The Court found Amish children could not be made to attend secondary school without directly impeding their religious practice—by requiring them to pursue courses of study and social pursuits that conflicted with their beliefs and by literally delaying their development in the labor of the Amish life.⁹⁴ The Court found that the state could not produce interests in the statutes that outweighed the parents' right to exercise their religion by raising their children in the insular Amish tradition.⁹⁵

Modern decisions have grappled with questions of what these cases teach regarding the exact contours of parental autonomy to direct their children's education. What seems clear is that parents may remove their children from public schools where such schools' teachings and practices directly impact their exercise of basic liberties. But the cases do not interrupt the historical observation of deference to the state in delineating the features of public school instruction.⁹⁶

90. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

91. *Meyer*, 262 U.S. at 399–401.

92. *Pierce*, 268 U.S. at 518–19.

93. 406 U.S. 205, 207 (1972).

94. *Id.* at 215–18.

95. *Id.* at 221–29.

96. See, e.g., Russo, *supra* note 50, at 375 (“In refusing to apply *parens patriae* to compulsory attendance [in *Wisconsin v. Yoder*], the Court did uphold the general principle that the state has the authority to regulate education.”).

A. *Parent Control of the Curriculum*

A widely publicized decision regarding parent challenges to school curriculum was issued by the First Circuit in *Brown v. Hot, Sexy and Safer Productions*.⁹⁷ Here, parents alleged that a school assembly regarding sexuality-related topics, including homosexuality, violated their children's privacy rights, including their right to direct the upbringing of their children.⁹⁸ The court received *Brown* as parental effort to dictate the high school curriculum, and it gave that challenge a chilly reception at best.⁹⁹ The court explained:

We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.¹⁰⁰

B. *Parent Notice and Opt-Out*

Several courts have held that the Fourteenth Amendment familial right to control one's children generally does not provide the parent authority selectively to opt a child out of classes or other generally applicable school rules that the parent simply opposes, but some ambiguity lingers.¹⁰¹ For example, in its 2005 decision in *Fields v. Palmdale School*

97. 68 F.3d 525 (1st Cir. 1995), *overruled on other grounds by* *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010).

98. *Id.* at 529.

99. *Id.* at 534.

100. *Id.* at 533–34.

101. See *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (citing cases); *Leebaert v. Harrington*, 332 F.3d 134, 139–42 (2d Cir. 2003).

District, the U.S. Court of Appeals for the Ninth Circuit found that the Fourteenth Amendment parental right did not grant parents “a right to prevent a school from providing any kind of information—sexual or otherwise—to its students.”¹⁰² Rather, the court explained, while *Myers*, *Pierce*, and *Yoder* demonstrated that parents have considerable authority regarding the choice of whether to send their children to public school, that right “does not extend beyond the threshold of the school door.”¹⁰³ There has been more controversy, however, regarding the contours of a parent’s right to opt a child out of a school curriculum to which the parent objects.

A paradigm case in this sphere is *Parker v. Hurley*.¹⁰⁴ In *Parker*, two sets of parents brought claims alleging that by exposing their elementary school children to books that depicted same-sex couples, the school violated their Fourteenth Amendment familial right to raise their children and their First Amendment Free Exercise rights to practice their religion.¹⁰⁵ The plaintiffs in *Parker* rested their claims in their asserted right to notice and opt out of public school curriculum referencing the existence of same-sex partnerships.¹⁰⁶ One family alleged that the district violated their parental rights by refusing to give them notice and the opportunity to opt out regarding a book sent home with their child in a “diversity book bag.”¹⁰⁷ The book was entitled, *Who’s in a Family?* It depicted various kinds of families, including families with same-sex parent couples, and stated that a family is composed of those who love one another most.¹⁰⁸ The family demanded that “no teacher or adult expose [their child] to any materials or discussions featuring sexual orientation, same-sex unions, or homosexuality without notification to the Parkers and the right to ‘opt out.’”¹⁰⁹ The family later asserted their objections when the child’s first-grade classroom contained two books that referenced same-sex parented families.¹¹⁰ Other parents

102. 427 F.3d 1197, 1206 (9th Cir. 2009).

103. *Id.* at 1207.

104. 514 F.3d 87 (1st Cir. 2008).

105. *Id.* at 90.

106. *Id.*

107. *Id.* at 92.

108. *Id.* at 92–93.

109. *Id.* at 93.

110. *Id.*

alleged that their family's parental and free exercise rights were violated when a teacher read to their son's second grade class a book entitled *King and King* about a prince who marries another prince.¹¹¹

Parker left unresolved numerous aspects of free exercise jurisprudence as applied to public school curricular notice and parental opt-outs. The court declined to identify a specific test that applied to such claims. It considered carefully several tests articulated by the U.S. Supreme Court, including the test established in *Employment Division v. Smith*, which required that neutral and generally applicable statutes incidentally benefitting religious practice need only be supported by a rational basis, as opposed to a compelling state interest, to comport with the Free Exercise Clause.¹¹² The court rejected the application of this standard in *Smith* to *Parker* because the case did not call into question punishment for violation of a rule.¹¹³ The court likewise rejected the test in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹¹⁴ which found invalid any statute targeting a specific religious group.¹¹⁵ The *Parker* court considered, but did not address, the Supreme Court's reasoning in *Sherbert v. Verner*,¹¹⁶ which held that in individual benefit determinations, the government may not substantially interfere with an individual's central religious belief or practice unless justified by a compelling state interest.¹¹⁷ Joining the Second Circuit, the court rejected a hybrid rights standard articulated in *Smith's* dicta referencing application of strict scrutiny to state-imposed limits on religious parental exercise.¹¹⁸

Identifying the appropriate test in *Parker* was unnecessary, the court explained, because each test required some showing

111. *Id.*

112. 494 U.S. 872, 879 (1990). See also *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 538–39 (1st Cir. 1995), where the First Circuit found that the racy assembly did not violate parents' Free Exercise rights because its imposition was neutral and generally applicable.

113. *Parker*, 514 F.3d at 95.

114. 508 U.S. 520, 531–32 (1993).

115. *Parker*, 514 F.3d at 96.

116. 374 U.S. 398 (1963).

117. *Parker*, 514 F.3d at 96. As the First Circuit noted in *Parker*, the lasting impact of *Sherbert* is unclear, as at least one Supreme Court case has referred to its rationale as having been rejected in *Smith*. See *Id.* at 96 n.7 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao Vegetal*, 546 U.S. 418, 424 (2006)).

118. *Id.* at 98 (citing *Leebaert v. Harrington*, 332 F.3d 134, 143–44 (2d Cir. 2003)).

that the actions complained of burdened the plaintiffs' religious practice in some way.¹¹⁹ The plaintiffs in *Parker*, the First Circuit explained, failed to show any "constitutionally significant burden" on their rights.¹²⁰ The Court distinguished the claims from the Supreme Court's opinion in *Yoder*: whereas the *Yoder* plaintiffs sought the opportunity to retreat from public education because it would interfere with their religion, the *Parker* plaintiffs sought to engage their children in the public school but to be free of those aspects of the curriculum referencing phenomenon denounced by their religion.¹²¹ Free exercise, the court explained, did not require public schools to "shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."¹²²

At least one commentator has opined that challenges like *Parker*, which allege that the "mere exposure" of one's children to the existence of family structures or relationships of which their religions disapprove, inherently are at odds with the concept of pluralism and tolerance underlying American education.¹²³ This view is also in line with the practical implications of modern U.S. public school classrooms. Imagine, for example, a teacher leading a class discussion on family and community, common in various states as referenced in curricula above. While addressing the concept of family is relevant to student development, each student brings varying family stories. Many of those stories, not just those of children with same-sex parents, will implicate some kind of activity that may not be blessed by the religion of every child in the room. Imagine the practical impossibility of acknowledging those varying family structures and providing the parents of each student whose religion may object to them with notice and the opportunity to opt out. The effect of such a duty, given the plurality of religious beliefs among public school children, would be to make it virtually impossible for a teacher to address those aspects of families. And though the contours of a

119. *Id.* at 98–99.

120. *Id.* at 99.

121. *Id.* at 99–100.

122. *Id.* at 106.

123. NeJaime, *supra* note 47, at 362–64. See also *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

free exercise duty to opt-out a child may be less clear, courts have consistently held that parent attempts to dictate the curriculum's conformity with personal religious beliefs is not within the ambit of personal rights guaranteed by the U.S. Constitution.¹²⁴

Yet *Parker* did not foreclose entirely a parent or child's free exercise right to opt out of a curricular intervention relating to same-sex marriage. Significantly, the *Parker* court rejected the proposition that *Brown v. Hot, Sexy and Safer Productions* applied on the grounds that the age differences between the two groups of children warranted greater parental deference, implicating a stronger interest in notice and opt-out opportunities for younger children.¹²⁵ Additionally, the court pointed specifically to the kinds of interference with religious beliefs that—unlike mere exposure—might trigger a child or parent's free exercise rights.¹²⁶ “[T]he government may not,” the court explained, “(1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the

124. *Parker*, 514 F.3d at 102 (citing cases).

125. *Id.* at 100–01. A related point worth discussion is that in many cases challenging public schools' observance of religious teachings or practices, the U.S. Supreme Court has found such practices unconstitutional on the grounds that a school-sponsored religious exercise has a powerful and even coercive effect on students, given the role that the public school plays in the lives of students. *See generally*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Some argue that this doctrine smacks of inconsistency when compared with courts' reluctance to prohibit schools from teaching messages that they find conflict with their own religious views, which they then view as antireligious. The distinction, however, is borne out of the unique respect in our nation's constitutional jurisprudence for the preservation of religion and its independence from government control or intrusion, embodied substantially in the Establishment Clause of the First Amendment. In *Engle*, the Court observed that the “first and most immediate purpose [of the Establishment Clause] rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion.” 370 U.S. at 431. Accordingly, “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief,” the Court explained, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Id.* *Engel* remains a reminder of how the Establishment Clause aims to preserve the sanctity and independence of religion as much as the integrity of government. Accordingly, the complained of different treatment is granted precisely because of the sacred place in our jurisprudence for religious freedom.

126. *Parker*, 514 F.3d at 103.

other in controversies over religious authorities or dogma.”¹²⁷ Additionally, while careful to avoid identifying exactly what actions would amount to a violation, the court noted that the boys were not forced to read a “constant stream” of books affirmatively advancing marriage between same-sex partners.¹²⁸ The *Parker* court’s conception was reflected as well in the Sixth Circuit’s *Mozert* decision, which by negative implication also shed light on the kinds of activities that might trigger an opt-out requirement under the Free Exercise Clause: forcing the student to engage in an act that violated her or his religion, the “affirmation or denial of a religious belief,” or to engage in “performance or non-performance of a religious exercise or practice.”¹²⁹

VI. SAME-SEX MARRIAGE AND GREATER CERTAINTY FOR SCHOOLS AND PARENTS?

The connection between recognition of same-sex marriage and public schools is, as explained above, attenuated. However, discussions regarding alleged negative implications beg the question of whether there are positive implications. This is admittedly a point for further exploration, but some discussion of this topic is warranted here.

127. *Id.*

128. *Id.* at 106–07.

129. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987). Additionally, though not addressing Free Exercise claims, the District of Maryland’s 2005 decision in *Citizens for a Responsible Curriculum v. Montgomery County Public Schools* identified aspects of a curriculum that ran afoul of the Constitution. No. AW-05-1194, 2005 U.S. Dist. LEXIS 8130, at *28–*32 (D. Md. May 5, 2005). Where the curriculum refuted religious beliefs regarding the moral rightness of homosexuality, preferred religions that viewed homosexuality favorably, and criticized religions that condemned homosexuality, the curriculum did not comport with the tenets of the Establishment Clause, the court explained. *Id.* The court additionally opined that the school’s curriculum violated the First Amendment’s prohibition on viewpoint discrimination, indicating that the failure to provide a balanced range of views on homosexuality violated the First Amendment. *Id.* at *32–*35. While the court’s Establishment Clause reasoning is cogent, the weight of the court’s free speech reasoning is less certain. The Supreme Court has held that schools may limit school sponsored speech for legitimate pedagogical reasons. *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The First Circuit recognized that encouragement of acceptance for diversity, including diversity based on sexual orientation, is a significant interest for a public school. And in *Mozert*, the Sixth Circuit rejected the theory that schools must be made to provide balanced information regarding sexuality, noting that balance in religious terms was impossibly subjective and that efforts to seek religious balance might tread impermissibly into the territory of actions aimed at or with the primary effect of advancing religion or of excessive entanglement. 827 F.2d at 1064–65.

Where same-sex parents are prohibited from marrying, some same-sex partners raising children are—unlike heterosexual couples—prohibited from becoming a legal parent to the children whose upbringing they share.¹³⁰ A significant group—some estimate up to two-thirds—of children being raised in households by same-sex couples live in areas where one of their parents cannot form a legal relationship to them due to marriage or adoption inequality.¹³¹ Children denied the rights to a legal relationship with one of their parents are also denied the security that comes with that relationship, including the right of support after parental separation, benefitting from employer-provided health benefits, survivor benefits, and others.¹³² Recognition of same-sex marital relationships between adults caring for school children might very well bring those children greater certainty and security.¹³³

From the perspective of school-related parental rights, a same-sex partner caring for a child might experience obstacles to exercising parental rights regarding the child if unable to become the child's legal parent due to marriage inequality. For example, the Family Education Rights and Privacy Act (FERPA) grants parents the right to access their children's education records, to challenge the content of student records, and to release the records, among other rights.¹³⁴ The statute defines a "parent" as a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a

130. Many states permit the adoption of children by same-sex couples, but in some states, refusal to recognize same-sex marriage creates barriers to legal parenthood. For example, North Carolina does not permit same-sex marriage. N.C. GEN. STAT. § 51-1.2 (2009). And if an adoption petitioner is unmarried, no other person may join the adoption petition. *Id.* § 48-2-301(c). A step-parent may adopt a step-child. *Id.* § 48-4-101 (2010). And a child born of artificial insemination is the legal child of the husband and wife employing such technique. *Id.* § 49A-1 (2009). Additionally, Utah's constitution bans same-sex marriage, and its adoption statutes prohibit adoption of a child by any adult cohabitating in a relationship outside of marriage. UTAH CONST. art. I, § 29; UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2010). Oklahoma's Constitution prohibits same-sex marriage, and its statutes permit adoption by single adults and married couples only. OKLA. CONST. art. II, § 35(A)-(B); OKLA. STAT. tit.10, § 7503-1.1 (2009). Accordingly, in some states, marriage provides parental rights unavailable to same-sex partners raising children.

131. LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUNDATION, THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS 7 (2004), available at <http://www.hrc.org/documents/costkids.pdf>.

132. *Id.* at 8–12.

133. *Id.* at 13.

134. 20 U.S.C. § 1232g (2006).

guardian.¹³⁵ A school could conceivably release student records to a non-legal parent same-sex partner caregiver by treating that person as an “individual acting as a parent” within the meaning of the regulations, but the ambiguity of the phrase and the recognition of the parental relationship might likely create unwanted uncertainty for parents and schools.¹³⁶ Similar concerns apply to same-sex partner caregivers to children eligible for services under the Individuals with Disabilities Education Act.¹³⁷ In intact relationships, these obstacles can often be ameliorated by legal parent authorization, but the matter of records access and parental decision-making intensifies in emergencies, if such relationships sever, or in the event of the loss of the legally recognized parent. Additionally, matters of custody might be more complicated for schools, such as when there are disputes between same-sex parents or when the legal parent is unable to care for the child. By recognizing as marital partners same-sex parent couples who wish to enter the institution, states could ameliorate this uncertainty, which creates unnecessary ambiguity for families and schools alike.

VII. CONCLUSION

If in coming years curricular shifts are observed relating to the acknowledgment of same-sex relationships and reduction of sexual orientation discrimination, those trends will likely be due more to social transformation than to any legal change recognizing the right to marry for same-sex couples. Those who wish to remove their children from classes relating to the topic may have options for doing so where their desire is consistent with the pluralist nature of American public schools. However, the debate surrounding same-sex marriage and public schools implicates parental rights in other ways as well. Refusal to recognize marriage relationships, when combined with

135. 34 C.F.R. § 99.3 (2010).

136. *Id.*

137. See 20 U.S.C. § 1401(23) (2006) (“The term ‘parent’ includes— (A) a natural, adoptive, or foster parent (unless a foster parent is prohibited by State law from serving as a parent); (B) a guardian (but not the State if the child is a ward of the State); (C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual legally responsible for the child’s welfare . . .”).

adoption laws, may in some jurisdictions deny same-sex parents and their children benefits enjoyed by families parented by married heterosexuals.