Examining Context in the Conflict over Same-Sex Marriage and Education: The Relevance of Substance, Process and the People Involved

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I. INTRODUCTION

During the 2008 campaign in California over Proposition 8, the relationship between same-sex marriage and education became a flash-point for conflict between proponents and opponents of the measure. Television ads produced by opponents of same-sex marriage warned voters that the failure to pass proposition 8 would have a significant impact on education, while opponents of the measure protested with their own television ads that such claims were false and that to involve children in the contest was dishonest. In this paper I contend that dismantling the traditional meaning of marriage as between one man and one woman, as well as efforts to effectuate that purpose, will have a profound impact on public education and the children who are served by this essential social institution.

Cutting through the sound-bites of political posturing, this paper addresses the relationship between education and same-sex marriage in context, looking at the various people and organizations whose motives, intent, and conduct play a

* Richard Peterson is Assistant Professor of Law at Pepperdine University where he teaches Dispute Resolution in Education, Special Education Law, Disability Law and is Director of the Pepperdine Law School Special Education Advocacy Clinic.

significant role in determining the nature and extent of this impact. California Law and the contest over Proposition 8 will provide a case study for this analysis. As a backdrop for this discussion, a historical overview regarding the establishment, purposes, and evolution of education as a social institution in America is provided. It is appropriate, if not essential to start with this historical review in that through its lens we are able to see, amidst shifting social and political values, the interplay between the purported purposes of education, the ongoing struggle over how such purposes are determined and who has the power to decide them. Further, we see in history a number of examples where social, educational, or political groups have sought to use public schools to orchestrate social change consistent with their view of the ideal society.

For purposes of this analysis “education” refers to Pre-K through Grade 12 public schools, and examines the impact of same-sex marriage in terms of curriculum, formal and informal instruction, and the relationship between administrators, teachers, parents, children, government, and the community. Importantly, in the context of this discussion, “same-sex marriage” includes not only the establishment of marriage between partners of the same sex, but also efforts and activities undertaken to establish or oppose its legality through advocacy in legislation, the courts, and in society generally.

II. HISTORICAL OVERVIEW

A. The Establishment of Universal Education in America

It was not until well after the Revolutionary War that the idea of universal education was seriously promoted in America. Education was not a priority in the formation of our government. In fact, according to the convention debates leading to the drafting of our Constitution, education was mentioned only once, and that involved a question as to authority under the proposed Constitution for the establishment of a national university in proximity to the new government’s capitol.2 Ultimately, education was not a right

2. ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES, A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 52-53 (1920).
provided for in the national Constitution, responsibility and jurisdiction therefore was left to the States pursuant to the tenth amendment. The States were also slow to address this issue. By 1800, all sixteen states that formed the Union had adopted state constitutions except Rhode Island and Connecticut, with nine of them making no mention of education. Nevertheless, while most of the states did not provide for education in their original Constitutions, such was added in subsequent amendments as societal priorities shifted away from war and survival to sustaining government and improving the quality of life in communities, new and old.

Although not a primary political concern at the time, the founding fathers did perceive that a system of common education for the masses would be necessary to sustain the health and well-being of the newly formed government. Thomas Jefferson, writing to James Madison from Paris in 1796 said, “Above all things, I hope the education of the common people will be attended to; convinced that on this good sense we may rely with the most security for the preservation of a due degree of liberty.” Later in 1822, Jefferson wrote to Cornelius Camden Blatchly on this topic, “I look to the diffusion of light and education as the resource most to be relied on for ameliorating the conditions, promoting the virtue and advancing the happiness of man.” George Washington in his farewell address to the American people wrote in 1796, “Promote then, as an object of primary importance, institutions for the general diffusion of knowledge . . . .” And James Madison wrote,

A satisfactory plan for primary education is certainly a vital desideratum in our republics. A popular government without popular information or the means to acquire it is but a prologue to a farce or a tragedy, or, perhaps, both. Knowledge will forever govern ignorance; and . . . people who mean to be

3. Id. at 61.
4. Id.
5. Rhode Island and Connecticut believed that their colonial charters were adequate at that time. See id.
6. Id.
their own governors must arm themselves with the power which knowledge gives . . . .10

It is perhaps fitting that the seeds planted for universal education realized their first harvest in Massachusetts through the work of Horace Mann, widely recognized as founder of the American "common school."11 By the end of the nineteenth century Horace Mann was universally recognized as educator of the century.12 In that regard, a popular biography of his life proclaimed, "People in school and out know that Washington is the father of his country, Lincoln the savior of the Union, Franklin the revealer of electricity, Webster the orator, and Horace Mann the educator."13 On May 27, 1837, the Governor of Massachusetts appointed Mann, along with seven other men as the Board of Education.14 He was soon thereafter elected Secretary of that body. Leaving behind politics and the practice of law, Horace Mann enthusiastically accepted this assignment and immediately embarked on what he perceived to be a sacred call to serve the future interests of mankind. He believed that all children should receive an education designed to prepare them to be responsible and productive citizens of society. The following year after the Board and the legislature voted to establish the first three "common schools" in Massachusetts Mann wrote exuberantly,

The common school is the institution which can receive and train up children in the elements of all good knowledge and of virtue before they are subjected to the alienating conceptions of life. This institution is the greatest discovery ever made by man . . . . Other social organizations are curative and remedial; this is a preventive and an antidote. They come to heal diseases and wounds; this, to make the physical and moral frame invulnerable to them. Let the common school be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine-tenths of the crimes in the penal code will become obsolete; the long catalogue of human ills will be abridged; men will walk more safely by day; every pillow will be more inviolable by night;

10. JAMES MADISON, JAMES MADISON WRITINGS 790 (1999).
12. WINSHOP, supra note 11, at 1.
13. Id.
14. Id. at 17.
property, life and character will be held by a stronger tenure; all rational hopes respecting the future will be brightened.  

B. The Purposes of Universal Education

The concept of the "common school" spread throughout the states so that by 1890 nearly 95 percent of all children ages 5 through 13 attended school for part of the year. This movement not only established the concept of universal education, it also laid the foundation for its local control and administration. Education was not organized on a national basis, but rather thousands of school districts were established under the jurisdiction of local school boards headed by lay leadership. Nevertheless, in spite of local control, the goals of the "common schools" were similar; children were to be taught the basics of reading, writing, and arithmetic along with the values of their parents and the community, including honesty, patriotism, responsibility, respect for adults, and courtesy. The fundamental purpose of the "common school" became well established: "to promote sufficient learning and self-discipline so that people in a democratic society could be good citizens, read newspapers, get a job, make their way in an individualistic and competitive society, and contribute to their community's well-being."

Considered in the context of the vision of our founding fathers, the professed purposes of the "common school" to prepare children to become productive and well-adjusted citizens in their communities seems reasonable enough. This is especially so when considering that the values and norms initially espoused for these schools were those generally common to the community and of local control. However,

15. _Id._ at 38.
17. _Id._
18. _Id._ at 21.
19. _Id._ at 25.
20. For example, while Thomas Jefferson wrote of the importance of expanded educational opportunities for the masses, he envisioned a system anchored by local implementation and control. PAUL MONROE, A BRIEF COURSE IN THE HISTORY OF EDUCATION 374–75 (1914).
21. See, e.g., RAVITCH, supra note 16, at 20. Education has been deeply rooted in the concept of local control. For example, Jefferson's view of common education
throughout the history of universal education as an American
social institution, the anchoring values of society have eroded
leading to conflict over their identity and definition, and the
source for that information. In 1914 Paul Monroe, Professor of
the History of Education at Teacher's College, Columbia
University, wrote of the increasing dilemma faced by educators
with their perceived mandate to teach children morality and
values in public schools:

The complete secularization of schools has led to the complete
exclusion of religious elements in public education and the
very general exclusion of the study or even the use of the
Bible and of religious literature. Thus the material that a few
generations ago furnished the sole content of elementary
education is now entirely excluded and the problem of
religious education is presented. Little attempt at solution is
being made and little interest seems to be aroused. The
problem for the public school teacher comes to be quite
similar to that presented by the Greek philosophers, to
produce character through an education that is dominantly
rational and that excludes the use of the supernatural or
religious element. For our schools we have definitely rejected
revealed religion as a basis for morality and seek to find a
sufficient basis in the development of rationality in the child.
Thus one most important phase of education is left to the
Church and the home neither of which is doing much to meet
the demand.22

Along with secularization of the schools came the
emergence of the American high school. Although universal
education became available for younger children, by the end of
the nineteenth century less than 5% of older children went to
high school and even fewer to college.23 That would soon
change. As the economy evolved from agrarian to industrial

envisioned a system tied to local self-government and control. See, e.g., PAUL MONROE,
supra note 20, at 374–75, 390–92. Further, as to the nature and source of information
children were to be taught in connection with values and morality, John Adams
delineated the Christian basis for the instruction he anticipated for preparing students
to be productive citizens: “The instruction of the people in every kind of knowledge that
can be of use to them in the practice of their moral duties as men, citizens, and
Christians, and of their political and civil duties as members of society and
freemen . . . ,” CUBBERLEY, supra note 2, at 58.

22. MONROE, supra note 20, at 374.
there arose a need for more education. During the first quarter of the twentieth century, the establishment of high schools proliferated, as did their enrollment, and as did conflicts over their funding, purpose, curriculum, and necessity.

C. The Progressive Education Movement and Social Engineering

While high schools were multiplying, enrollment soaring, and the schooling of America's children becoming compulsory, the first years of the twentieth century witnessed the emergence of educational policy makers pushing a so-called progressive agenda to bring about vast changes in the substance and processes of education. Indeed, many issues were debated during that time, however, the concept of primary importance for purposes of this paper is that associated with education's purported role as an agent for social transformation. One of the early twentieth century leaders of the movement to reform education, John Dewey agitated for this educational mission writing:

"It is the business of the school environment to eliminate, so far as possible, the unworthy features of the existing environment from influence upon mental habitudes.... Every society gets encumbered with what is trivial, with dead wood from the past, and with what is positively perverse. The school has the duty of omitting such things from the environment which it supplies, and thereby doing what it can to counteract their influence in the ordinary social environment. By selecting the best for its exclusive use, it strives to reinforce the power of this best. As a society becomes more enlightened, it realizes that it is responsible not to transmit and conserve the whole of its existing achievements, but only such as make for a better future"

24. Id. at 25–26.
25. Id.
26. Progressive education involved competing principles during the first half of the twentieth century. It began as a child centered movement with an emphasis on individual responsibility and self-discipline but was challenged during the thirties by educators who promoted life adjustment theories of education aligned with social reconstruction political ideals. The major thrust of the movement involved "social engineering" based on the belief that the key to improving society was utilizing public education to promote a healthy but ever evolving social environment. C.A. Bowers, The Ideologies of Progressive Education, 7 HIST. EDUC. Q. 452, 468–471 (1967).
society. The school is its chief agency for the accomplishment of this end. 27

Over time, individuals and groups have competed for control of public education to influence society's perceptions of morality and what children should be taught to prepare them for citizenship. For example, during the early 1930s a movement in the United States to establish a socialist economy patterned after Russia gained momentum. This was a time of great economic and political turmoil which threatened the very survival of our country. The sacrifices associated with the efforts of World War I, and the depression that followed years later introduced wide spread suffering across the country. In the wake of these events prominent educators arose proclaiming that our capitalist form of government was a failure necessitating a vast social transformation. 28 Not surprisingly, these individuals conceived that the "common schools" were the vehicle by which new norms and values would be inculcated in children, believing this would lead to a cure of serious societal defects as they perceived them to be. 29

In terms of justifying the use of schools to promote the improvement of society through social engineering, during the first quarter of the twentieth century progressive educators thought it necessary that children be taught to question the status quo using child-centered educational strategies whereby students would be taught to think critically for themselves. 30 This represented the early ideals of the progressive education movement. 31 However, these objectives eventually came into conflict with life adjustment education, framed by the idea that

27. JOHN DEWEY, DEMOCRACY AND EDUCATION, AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 24 (Paul Monroe ed., 1916).
29. See, e.g., RAVITCH, supra note 16, at 216 (citing George S. Counts, Dare Progressive Education Be Progressive?, 9 PROGRESSIVE EDUCATION 258–59 (1912)). In the cited passage, George Counts writes:
If Progressive Education is to be genuinely progressive, it must emancipate itself from the influence of this class, face squarely and courageously every social issue, come to grips with life in all of its stark reality, establish an organic relation with the community, develop a realistic and comprehensive theory of welfare, fashion a compelling and challenging vision of human destiny, and become somewhat less frightened than it is today at the bogey's of imposition and indoctrination. In a word, Progressive Education cannot build its program out of the interests of the children; it cannot place its trust in a child-centered school.
31. Id. at 458–59.
“the purpose of the school [was] to reform society in a particular direction.”32 Children were not to learn to think for themselves in evaluating alternative values, rather they were to be subject to partisan political life-adjustment educators whom, “possessed of a deep sense of mission,”33 would be compelled to “shape the character and personality of their students in accordance with their own vision of the good society.”34 As Bowers wrote:

It was as though the depression cut off spiritually the social reconstructionist from the humanism of Jefferson, Emerson, and Thoreau . . . . The teacher, now called a “social engineer,” was told that the “democratic ideal imposes a public dimension on all problems regardless of their origin or degree of apparent privateness.” The older progressive values of self-discipline and responsibility were accordingly redefined . . . responsibility “has no meaning outside a social context.”35

George Counts,36 faculty member of the Teacher’s College at Columbia University and a central figure in this radical movement, served from 1931–1934 as research director of a major study sponsored by the American Historical Society. The purpose of the study was to analyze the place of history and other social sciences in public schools. Launched in 1926, the study lost its focus by the time Counts became involved. In 1929, the group was renamed the Commission on Social Studies, and when its report was issued in 1934 it had little to do with its original mission. Ravitch points to the “fiery rhetoric” of George Counts in referring to the report’s most famous statement, “In the United States as in other countries, the age of individualism and laissez faire in economy and government is closing and . . . a new age of collectivism is emerging.”37 For Counts, and others like him, public education was the vehicle by which society was to be transformed.

These educational leaders believed that they understood

32. Id. at 469–70.
33. Id. at 470.
34. Id.
35. Id. at 469.
36. George S. Counts became a member of the faculty of Teacher’s College, Columbia University, New York in 1927 and joined with other prominent faculty members to promote a radical agenda for the progressive education movement. Ravitch, supra, note 16, at 210.
37. Ravitch, supra note 16, at 228.
better than parents, government leaders, religious teachers, and others, what values should be inculcated in children to remedy the ills of society and make the world a better place to live. In 1932, Counts delivered a stirring address to the conference of the Progressive Education Association (PEA) titled, *Dare Progressive Education Be Progressive?*, which was printed in the April 1932 edition of their journal. In his speech, Counts challenged educators to accept and embrace their role in reforming society through radical social engineering:

> But, you will say, is this not leading us out upon very dangerous ground? Is it not taking us rather far from the familiar landmarks bounding the fields that teachers are wont to cultivate? My answer is, of course, in the affirmative. This, however, does not, in my judgment, constitute a serious objection to what I propose. If we are content to remain where all is safe and quiet and serene, we shall dedicate ourselves, as teachers have commonly done in the past, to a role of relatively complete futility, if not of positive social reaction. Neutrality with respect to the great issues that agitate society, while perhaps theoretically possible, is practically tantamount to giving support to the most powerful forces engaged in the contest.

You will say, no doubt, that I am flirting with the idea of indoctrination. And my answer is again in the affirmative. Or, at least, I should say that the word does not frighten me. We may all rest assured that the younger generation in any society will be thoroughly imposed upon by its elders and by the culture into which it is born. For the school to work in a somewhat different direction with all the power at its disposal could do no great harm. At the most, unless the superiority of its outlook is unquestioned, it can serve as a counterpoise to check and challenge the power of less enlightened or more selfish purposes.\(^{38}\)

Using the education of children to effectuate social change was not a new concept in America when the idea caught traction among radical progressives during the first half of the twentieth century. From the days of Horace Mann, and throughout the nineteenth and twentieth centuries others have

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perceived the advantage of using education to promote various social agendas. 39 For example, following the civil war, members of the National Education Association heard a speech by J.P. Wickersham who proclaimed, “There is no agency the Government can use, so well calculated to reconcile the diverse interests of the country, to unite its different parts, to make us one people, as a well devised system of education.” 40 Following the labor conflicts of the 1870's, the President of the National Education Association said that it “was the good sense of an immense majority of working people, created, fostered, and developed by public education, that has saved us from the terrors of the French Commune.” 41

Ultimately, the social transformation sought by Counts, and other educators like him at the time failed to take root and died out. A number of factors combined to obstruct this effort, none the least of which included purges in the Soviet Union of scientists, artists, professionals and every educational innovator admired by their U.S. counterparts. 42 This became more than a little embarrassing to them. Further, these radical reformers failed to gain widespread support beyond their own institutions, as most Americans supported traditional values, believed that Roosevelt’s New Deal economic plan would succeed, and did not want schools to reform society. 43 In fact, it may be argued that the social engineering attempted by radical and extreme members of the educational community during the second quarter of the twentieth century failed in large part because those agitating for this cause were unable to achieve buy-in from those members of their community most essential in carrying out their agenda, the teachers. 44

During the second half of the twentieth century, education was again caught in the crossfire between competing groups agitating for broad social change while seeking to use public education in promoting their causes. The civil rights struggle
associated with racial inequality is one example. The anti-war and anti-establishment movements of the 1960s and 1970s, which were frequently associated with violent demonstrations or deadly confrontation, are further examples. Often extremists associated with such causes engaged in criminal conduct, both in promoting or opposing particular agendas for social change. Those who lived through these years remember the many demonstrations opposing society’s social institutions of government, marriage, family, and economy. Society’s sexual norms and values relative to moral discipline came under attack in the name of “free love,” while promoting the use of illicit drugs, communal living, and alienation from established communities were manifestations of group dissatisfaction, rebellion, and conflict, both culturally and generationally. 45

Following the end of the Vietnam War, social advocacy issues trended toward gender equality, protecting the environment, animal rights, and promoting a social institutional agenda furthering greater individualist paradigms over collective ones. From this post World War II history the courage and contribution of great men and women such as Martin Luther King, Jr. 46 and Rosa Parks 47 are celebrated, while the violent and horrific actions of others like Charles Manson and his “family,” 48 or members of the Symbionese Liberation Army 49 are still disturbing to our memory.

Throughout history, some social movements advancing societal change through student indoctrination have been accepted and generally perceived as good for students and the community; some have been initially resisted only to be embraced as our social institutions evolved; and yet others have been strenuously resisted, and although able to sputter along for prolonged periods of time while igniting conflict and provoking confrontation between antagonists, have ultimately been defeated and relegated to the graveyard of ill conceived

47. See, e.g., DOUGLAS BRINKLEY, ROSA PARKS (2000).
ideas challenging long held societal norms.

The primary importance of this historical recitation lies in the questions of who should decide how morality is defined in our society as well as the values and norms to be instilled in children through public education. How should conflicts be resolved when disputes arise over these questions? What are the rights and responsibilities of parents, teachers, administrators, and students in this context? It is in these questions that the roots of social conflict arising out of the relationship between same-sex marriage and education are discovered. With the roots exposed, the branches of this struggle are better visualized in context and in hope of producing constructive conversation between those with differing opinions on the issues. The answers to these questions are complex and involve legal, political, social, and religious components that often intersect in ways that create tension and obscure common interests. The following discussion will move from historical context to present paradigms, illuminating how governmental, political, educational, and social structures intersect in the ongoing conflict over same-sex marriage and its relationship to public education in California.

III. PUBLIC EDUCATION IN CALIFORNIA

A. The Structure of Public Education in California

As mentioned previously, primary responsibility for public education was left to the States pursuant to the Tenth Amendment. Thus, power for creating, organizing and operating public schools is derived from state constitutions. Such has been the case in California since its first constitution was adopted in 1849.50

California's current constitution was adopted in 1879 and provides a general structure for the State public educational system. Article 9, Section 1, proclaims: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual,

scientific, moral, and agricultural improvement." Section 5 directs the legislature to provide for a system of free "common schools," to be available for at least six months of every year. Article 9, Section 7 provides for the appointment or election of a State Board of Education (SBE). Thus, the legislature created a 10 member board appointed by the governor, with advice and consent of the senate. Article 9, Section 2 provides for a non-partisan elected State Superintendent of Public Instruction (SPI). The legislature has delegated responsibility to the SPI to act as Secretary and Executive Officer of the State Board of Education with responsibility for executing its policies. Education laws are administered by the California Department of Education (CDE) which is overseen by the SBE and directed by the SPI. The structure for state administration is similar in the state's fifty-eight counties, with a county board of education and a superintendent who serves as liaison between the state and each school district within the county.

Article 9, Section 14 empowers the legislature to provide for the incorporation and organization of school districts also known as local educational agencies, delegating to their governing boards authority to "initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established."

The constitutional grant of power over public education to

52. CAL. EDUC. CODE § 33000 (West 2010).
53. Id. §§ 33111, 33301–05.
54. Id. §§ 33000–33596.
55. CAL. CONST. art. IX, §§ 3–3.3 (county superintendent of schools); CAL. CONST. art. IX, § 7 (state and county boards of education); CAL. EDUC. CODE §§ 1000–1986 (county boards of education); CAL. EDUC. CODE § 1200 (West 2010) (county superintendents of schools). See also infra note 58.
56. The California State Constitution contains a number of provisions relating to education. However, for purposes of this paper, the important point is that power and authority over education in the State is delegated by the constitution to the legislature; and through the legislature, such authority is shared with local educational agencies (county or districts), while power remains in the hands of the legislature. See, e.g., CAL. CONST. art. IX, § 14 (which not only gives the legislature authority to create school districts, but also to "authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.").
the state legislature has been described by California courts "as exclusive, plenary, absolute, entire and comprehensive, subject only to constitutional restraints." Illustration 1.1 generally shows this educational line of authority in California. It is important to note however, that while a chain of linear authority exists pursuant to the State constitution, local educational agencies have been delegated areas of autonomy where decisions may properly be made pursuant to local policies. This is especially important in analyzing the issues raised in this paper in that for example, while instructional materials associated with the core curriculum are subject to policies and decisions considered at the state level, local education agencies have considerable discretion and flexibility with respect to the selection and use of supplemental instructional materials. These items find their way into school libraries and classrooms, and may then be utilized to promote social change through formal or informal instruction of children. Indeed, when considering the influence of public


58. For simplicity in this illustration, county departments of education are not shown but are an important part of the state educational system. County departments of education have both a direct connection with school districts in their county and the state department of education. County departments of education provide services to school districts in a number of areas, including special education; alternative and correctional education; regional occupational programs; teacher credentialing; accounting, business, and information technology; child care services; student programs; and outdoor science schools. See, e.g., Mission & Values, ORANGE COUNTY DEPARTMENT OF EDUCATION, http://www.ocde.us/mission_values.asp (Inst visited Jan. 7, 2011). "County Superintendents of Schools serve as intermediaries between the California Department of Education and local school districts. They also work with the U.S. Department of Education to provide services and resources to school districts, students and families." Superintendent's Welcome, RIVERSIDE COUNTY OFFICE OF EDUCATION, http://www.rcoe.k12.ca.us/superintendent/index.html (last visited Jan. 7, 2011). See also supra note 55.

59. See, e.g., CAL. EDUC. CODE §§ 35160-35160.1.

60. See, CAL. CONST. art. IX, § 7.5; CAL. EDUC. CODE §§ 60200-06 (West 2010) (regarding selection and adoption of instructional materials by the State Board of Education for use in grades 1–8, inclusive, for language arts, mathematics, science, social science, bilingual or bicultural subjects, and any other subject, discipline, or interdisciplinary areas for which the state board determines the adoption on instructional materials to be necessary or desirable).

61. For example, relative to the adoption and selection of instructional materials, see CAL. EDUC. CODE § 60000(b) (West 2010), which notes the need for broad minimum standards, but nevertheless provides "that because of economic, geographic, physical, political, educational, and social diversity, specific choices about instructional materials need to be made at the local level." Id. See also CAL. EDUC. CODE § 60000(c) (West 2010), which recognizes "that the governing boards of school districts have the
education in effectuating change in society's social institutions it is important to analyze the various aspects of the educational system, both formal and informal to ascertain this potential impact.

ILLUSTRATION 1.1 - EDUCATIONAL LINE OF AUTHORITY

The systemic structure of public education in California, as in many other states, creates an environment ripe for conflict over power to direct education within the state. For example, while the State Superintendent of Public Instruction (SPI) is a statewide non-partisan elected office, the governor, who appoints members of the State Board of Education (SBE), is not. The governor and/or the State Board of Education may not share the vision or judgment of the SPI, yet the SPI is the SBE's Secretary and Executive Director. While the governor has no direct authority to force his or her educational agenda upon the SPI, indirectly the governor retains substantial influence with the power to veto legislation and/or make budgetary decisions substantially impacting the state educational system and its various departments, including that of the SPI. Further, while the legislature has no power to remove the SPI, it may increase or decrease the duties, tasks, and/or authority of the office. At the local level, parents elect

responsibility to establish courses of study and that they must have the ability to choose instructional materials that are appropriate to their courses of study." Id.

62. CAL. CONST. art. IX, § 2 (County Superintendent of Instruction); CAL. CONST. art. IX, § 7 (State and County Boards of Education).

63. CAL. EDUC. CODE §§ 33111, 33301–05 (West 2010).

64. CAL. CONST. art. IV, § 10.

members of the school board who are then responsible for overseeing the local educational agency (LEA or District) administration.

All of this illustrates the complex nature of the California educational system and the ways by which power and authority may be exercised or contested. When conflicts arise, the courts have also had an impact upon the educational system by their decisions and judgments.\textsuperscript{66} Finally, the voters of the state and local communities hold a substantial reservoir of potential power with the ability to reject those who hold elected office when their decisions and policies are not consistent with the will of the people. I qualify this power as "potential" in that for the power to be actuated and effective, the people must take responsibility for becoming informed and knowledgeable about the people and issues for which they are called upon to cast their ballot, and of course must take the initiative to do so. This fact illuminates another group of people holding potential power in this context, those who seek to influence and persuade others to accept their perceptions and opinions regarding important educational policy and administrative issues.

It is in the context of the educational system that the struggle for power is analyzed in connection with determining how children receive instruction in school on topics such as same-sex marriage. In that regard, this analysis looks at strategies employed by LGBT\textsuperscript{67} advocates in order to accumulate power and authority sufficient to inject LGBT-friendly curriculum and instruction in California public schools, and how these materials are used to effectuate social change by inculcating students with values and ideals consistent with their agenda. While those opposed to such changes also endeavor to accumulate power and exercise authority over curriculum and instruction in order to obstruct such efforts, the focus here is on LGBT strategies in that they are employed for purposes of effectuating change in our social

\textsuperscript{66} See, e.g., Mendoza v. State, 57 Cal. Rptr. 3d 505 (Cal. Ct. App. 2007); Honig, 16 Cal. Rptr. 2d at 756.

\textsuperscript{67} LGBT or GLBT is an acronym referring to lesbian, gay, bisexual, and transgender persons collectively and was developed to demonstrate the inclusive nature of those in the group and their solidarity in connection with advocating for their rights.
institutions through social engineering.

Conflict has been defined as a "perceived divergence of interest" such that the aspirations of individuals or groups are believed to be at such odds that they cannot be achieved simultaneously.\(^68\) It has been said that throughout history the quest for power to satisfy individual or group aspirations is that which most provokes destructive conflict among people, and which most tears at the social fabric of communities.\(^69\) In that regard, power is often seen as an essential ingredient for implementing strategies to effectuate social change in societies, and the most direct route to accomplishing such objectives. Further, in the struggle for power, ends are often perceived to justify any means necessary to achieve success.

Unfortunately, it has been shown that contending for power so as to impose a resolution of conflict upon others frequently kindles a conflict spiral, fueling escalation of adversarial engagement until one side or the other prevails or a stalemate is recognized by the parties.\(^70\) As the embers of a conflict spiral eventually burn out, immense social carnage may be seen in its ashes, leaving both sides to ponder what suffering could have been avoided if antagonists had adopted more effective means of addressing their opposing interest.\(^71\)

The conflict over same-sex marriage is an example of this paradigm, and has placed children in the middle of a monumental struggle between antagonists vying for power to define our social institutions and the values and morals children are to be taught in public schools.\(^72\) There should be no misunderstanding regarding the high stakes associated with this dispute, nor the extent to which people and groups with different viewpoints will battle in order to prevail. With power to define the values and morals associated with essential social development.

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\(^70\) Rubin et al., supra note 68, at 98–116.

\(^71\) Id. at 150–195.

\(^72\) The California legislature has specifically provided that instructional materials selected and adopted by the State "be designed to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, and to instruct them in manners and morals and the principles of a free government." Cal. Educ. Code § 60200.5 (West 2010).
issues comes the power to influence change in our society's social institutions. In essence, it is the power to implement social engineering consistent with the world view held by those in control. Of course having power is not alone sufficient. In order to initiate and sustain social engineering, those in power must be able to utilize their control in ways that influence the social changes desired.73

B. Elements Impacting Influence over Education

Regarding the impact of same-sex marriage on education, I believe there are four primary elements which combine to impact the potential power for influencing or obstructing social change through our public schools. These include: people, educational processes, advocacy processes, and substantive topics in education that are used by people in those processes. It is through people who are motivated to initiate or oppose social change that the other domains are activated. People formulate ideas, organize into groups, evolve leadership, create agendas and undertake strategic action through a variety of educational and advocacy processes relative to various substantive educational topics as discussed below.

1. People

The people in this model74 are the stakeholders who play various roles related to the conflict, either actively or passively. They include not only those who are the targets of influence, but also the antagonists in the dispute.75 In education, the primary targets of influence are children. The antagonists may include parents, teachers, administrators, members of advocacy groups supporting or opposing same-sex marriage, religious leaders and members of various faith traditions, politicians and judges. Some of the people mentioned above may not be aligned

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74. "Models are representations of selected aspects of social reality, the purpose of which is to facilitate understanding of the structures and dynamics of the phenomena they represent." DAVID G. GIL, UNRAVELING SOCIAL POLICY 20 (6th ed. 1992). A model may be useful in analyzing or predicting conduct or events and more than one model may be developed based upon different facts, ideas, or opinions to explain phenomena in different ways.

75. Antagonists may be individuals, groups, or both.
with antagonists, but rather may be additional targets of influence; or they may otherwise be considered stakeholders in that, while they do not harbor strong opinions on the subject themselves, they are affected by the advocacy efforts of the antagonists. In this role they may feel social or political pressure to support one side or the other, even if that position is contrary to their personally held convictions. For example, a teacher at a school where the overwhelming majority of educators support and advocate for the legalization of same-sex marriage may feel coerced into publicly supporting such a view, or at least in not opposing it, even if he is privately opposed to the position held by colleagues, or a politician in a jurisdiction overwhelmingly opposing same sex marriage may feel pressure to oppose same-sex marriage, or at least feel restrained from publicly supporting the movement with the fear that a failure to do so would impact her career.

The issue of conflict here is the question of whether marriage should be defined as a union between one man and one woman, or whether it should be defined as a union between any two people regardless of gender. Depending upon his or her individual opinions relative to this topic, any of the people listed above may be aligned with one side or the other, and depending upon where they live may find themselves in the majority or minority. For example, in San Francisco there may be a greater number of parents and teachers aligned in favor of legalizing same-sex marriage, while the opposite may be true in various parts of Orange County in Southern California.

People with similar viewpoints or aspirations often form into groups and may experience a bonding resulting from their common group membership. Where members believe their group has been subjected to deprivation or discrimination, such bonding frequently results in the development of a “struggle group” with individuals coming together for a common cause.

76. There are many perspectives related to this issue and reference to “one side or the other” is not meant to dismiss the complexity of this conflict or the diversity of opinions held by various stakeholders. The conflict is usually framed as a struggle between the rights of same-sex couples and religious liberty; however, there are those who are opposed to same-sex marriage based on adopted values and morals not based on religious faith or doctrine. Nevertheless, in this context reference to “one side or the other” is used to simplify illustration of the concept of people in this model and the role they play in the ongoing struggle.

77. ROBIN ET AL., supra note 68, at 16–18.
On either side of this issue, groups of people have come together, implementing strategies pushing or opposing social change by engaging educational and advocacy processes in order to influence students through public schools.

2. Educational processes

_Educational processes_ are one of the elements utilized by people described above in their efforts to effectuate social change through the education of children in public schools. These educational processes may be formal or informal. They may include instruction in the core curriculum, the teacher's use of supplemental materials from a school library, or even teaching tools brought into the classroom from an educator's own sources. They may arise in the context of planned instruction or in casual discussions during non-structured teaching moments. They may occur in the classroom or in the environment of a field trip, during social skills training, or connection with some other extra-curricular activity. _Educational processes_ are closely related to the _substantive topics_ discussed in subparagraph 4, in that it is expected that the social transformation sought will be effectuated as these topics are integrated into teaching opportunities, formal or informal.

During the Proposition 8 campaign much of the debate over the alleged relationship between same-sex marriage and education revolved around teaching of the core curriculum, including basic instructional materials. However, in the

78. California Education Code § 51933(a) provides that, "School districts _may_ provide comprehensive sexual health education, consisting of age-appropriate instruction, in any kindergarten to grade 12, inclusive, using instructors trained in the appropriate courses." CAL. EDUC. CODE § 51933(a) (West 2010) (emphasis added). Further, subparagraph (b) (7) provides that, "Instruction and materials shall teach respect for marriage and committed relationships." Id. § 51993(b). Opponents of Proposition 8 complained that since the teaching of this subject was not mandatory (in that school districts "may" provide such instruction) it was speculative as to whether comprehensive sexual health education would actually be taught in California public schools. However, according to the California Department of Education, 96% of California school districts have elected to provide comprehensive sex education in accordance with § 51933. See Frequently Asked Questions, CALIFORNIA DEPARTMENT OF EDUCATION, http://www.cde.ca.gov/ls/hl/se/faq.asp (last visited Dec. 17, 2010). Opponents of Proposition 8 also argued that Proposition 8 proponents' allegations that children would receive such instruction was untrue in that, unlike Massachusetts, California provides liberal "opt out" rights to parents to exempt their children from such instruction. While it is true that California does provide parents "opt out" rights
television commercial about the book, *King and King*, the educational processes implicated more likely relate to educator use of supplemental instructional materials (such as library books) as a means to influence children during structured or non-structured teaching moments.\(^7^9\) In that regard, it is
to exclude their children from "comprehensive sex education," it does not follow that such will not be taught in California public schools, neither does it follow that children whose parents do exercise opt out rights will not be impacted. The Supreme Court has recognized the concept of psychological or indirect coercion in a case where prayer was to be offered at a public school graduation. Even though students were not forced to participate or even attend the ceremonies, it was held unreasonable to expect students not to attend such an important event, and in attending they were a captive audience. In that regard, the Court said,

> Prayer exercises in elementary and secondary schools carry a particular risk of *indirect coercion*. . . . A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the State may not place the student dissenter in the dilemma of participating or protesting . . . .

*Lee v. Weisman*, 505 U.S. 577, 578 (1992). *See also* *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 292 (2000); *Engel v. Vitale*, 370 U.S. 421, 430–31 (1962). Professor Charles Russo wrote on this issue, and his point is instructive with respect to Lee's application to the issue here:

If courts are genuinely concerned about the coercive authority of school officials, it is unclear why they would permit educators to create learning environments that leave children susceptible to the same kinds of peer pressure from students who adopt contrary perspectives and who are capable of ostracizing those with whom they disagree with regard to same-sex marriage.


79. The school director who approved the first grade field trip to the lesbian wedding of their teacher in San Francisco said of the event, "It really is what we call a teachable moment," Jaroff said, noting the historic significance of same-sex marriage and related civil rights issues. "I think I'm well within the parameters," Jill Tucker, *Class Surprises Lesbian Teacher on Wedding Day*, SFgate.COM (Oct. 11, 2008), http://articles.sfgate.com/2008-10-11/news/17134486_1_field-trip-same-sex-marriage-

public-school. Ruth Isaacson takes from this field trip the theme for her article titled "Teachable Moments": *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121 (2010). Her article specifically addresses two issues that arose during the Proposition 8 campaign, one as mentioned, involving the first grade field trip to the wedding of their lesbian teacher, and the other a pro Proposition 8 television commercial featuring a little girl enthusiastically coming into her kitchen upon arriving home from school and announcing to her mother that she learned that day that a prince can marry a princess and that she can marry a princess. *Id.* Labeling the young child's demeanor as "confused," Isaacson says, "The girl's confusion however, is exactly what made the moment teachable." *Id.* at 157. While I generally agree with Isaacson's statement, "In truth, the debate over same-sex marriage that has recently occupied courtrooms and ballots throughout the nation has presented a series of teachable moments, with each legal decision and state initiative offering a glimpse into the spectrum of contemporary attitudes toward marriage." I do not agree with the pejorative framing of the intent of the pro Proposition 8 television commercial as "exploiting the girl's confused look as evidence that same-sex marriage is unnatural." *Id.* I also disagree to the extent the article infers that the pro Proposition 8
important to note that teachers may supplement basic instructional materials with resources from their school libraries when teaching the core curriculum, even though such items may not be part of the basic instructional materials subjected to a comprehensive adoption process.\textsuperscript{80}

3. Advocacy processes

Advocacy processes refer to activities undertaken by groups or individuals operating within existing social institutions pursuant to strategically planned agendas or spontaneously made calls to action using social media, with the expectation that such activities will lead to social change consistent with commercials unfairly exploited a message of fear with respect to the issue of same-sex marriage and education. \textit{Id.} at 155. With respect to the television commercial featuring the little girl telling her mother about the \textit{King and King} book, I was accused by Proposition 8 opponents on a radio program of trying to frighten voters by untruthfully suggesting that teachers would read to their students the book, \textit{King and King}, or that they would even talk about the topic of same-sex marriage with their classes. Opponents of Proposition 8 vehemently argued that this would not happen and that to say it would was not only untrue, but a shameful effort to scare voters. The very nature of this accusation, however, presupposes that if the thing alleged to be a lie was in fact true, voters would be justified in being afraid. Caught in a dilemma of contradictions, opponents could only reframe the “thing” to mean something different than providing instruction to young children on topics inappropriate for their age and development. Now the “thing” is not, as Proposition 8 opponents would attempt to frame it, same-sex couples or GLBT persons. The “thing” refers to the nature, scope, and age appropriateness of what children are going to be taught, and parents’ rights associated with autonomy in determining what values and morals their children will learn at school. What fuels that fear is the dilemma mentioned by Isaacson when she says, A diversity of viewpoints within the community of No on 8 organizers likely existed, with some advocating a more traditional marriage institution that simply includes same-sex couples and others promoting a more robust vision of marriage that represents the full panoply of lifestyles embraced within their community. Still other advocates might not have revered marriage at all, but became involved in the No on 8 Campaign to fight for LGBT acceptance and equality . . . . The No on 8 Campaign might also have feared association with polygamist causes, since its members advocated a progressive marital right that included a broader spectrum of nontraditional relationships. The alleged connection between homosexuality and polygamy is often cited by opponents of same-sex lifestyles as a reason to limit recognition of same-sex behavior and relationships. The LGBT community has worked hard to shed its ties to polygamy, and the No on 8 Campaign might have feared that proposing a more inclusive and tolerant marriage right would compromise the progress which same-sex marriage advocates have fought for years to achieve. \textit{Id.} at 156. The real fear for many parents arises because of the attitudes and efforts of some extremists who seek to implement an aggressive social engineering agenda through public education and then are unwilling to be transparent with the about it. \textit{Id.}

\textsuperscript{80} A further discussion of this fact is provided in paragraph III, subparagraph c, herein.
that group's values and ideas. Advocacy processes also involve similar activities undertaken by groups or individuals opposing social change advocated by others.

With respect to the relationship between same-sex marriage and education, such advocacy processes may include activities such as promoting or opposing LGBT friendly curriculum through the public education system, use of the media, community activism, legislative lobbying, political involvement, or judicial intervention. These processes are not always utilized in isolation and often overlap. For example, groups advocating for legalizing same-sex marriage have initiated court actions contesting ballot initiatives,81 lobbied for legislative action,82 engaged media through public relations strategies,83 and have promoted the use of books such as King and King and other materials by teachers in public elementary and secondary schools.84 Similar advocacy processes have also been utilized by individuals and groups opposing same-sex marriage.85

In Massachusetts, the courts were accessed by parents who objected to the use of instructional materials such as those referenced above,86 and when the conflict became public, the media became another resource for the disputing parties seeking to advance their viewpoint. Following passage of Proposition 8 opponents took to the streets and other public and private venues to demonstrate their displeasure with the California electorate who voted it into law, as well as individuals or groups that worked for its success. Of course, the media covered many of these activities, an intended purpose of the outcry in the first place. Following the election, Proposition 8 was immediately challenged by its opponents in the State's

83. See, e.g., SODOMY LAWS, supra note 82.
86. Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).
highest court and that action failing.\textsuperscript{87} Proposition 8 was contested in federal court where the matter is currently working its way through the federal appellate court system and is ultimately predicted by many to reach the docket of the U.S. Supreme Court.\textsuperscript{88}

4. \textit{Substantive topics}

\textit{Substantive topics} refer to themes, subject matter, or other areas of inquiry involved in education. In addition to the core curriculum subjects of English/Language Arts, Math, Science, and History/Social Studies there are numerous other \textit{substantive topics} that provide instructional opportunities for an educator motivated to advance a social agenda. Such topics may be separate from the core curriculum or incorporated within existing strands. Examples of such topics include civil rights, discrimination, bullying, communities, conflict, anger, history, diversity, health and sex education, gender roles, sexual orientation, and same-sex marriage.

It is important to note that while some topics explicitly identify controversial themes that have proven likely to provoke conflict, others do not. In fact, most of the general themes associated with education that are referred to above represent values shared by the vast majority of people in our society regardless of their position regarding same-sex marriage. We honor the civil rights movement of the second half of the twentieth century, decry discrimination, abhor bullying, teach tolerance for diverse populations, and embrace building communities. Some of these values we profess to embrace for all people based on the dignity and respect they deserve as members of the human race, although we are often not very good at supporting them for people with whom we disagree.

Still other topics mentioned above provoke controversy and conflict by the very nature of their titles and themes. Among these include for example, health and sex education, sexual orientation, and same-sex marriage. That is not to say that because these topics spark conflict they are inherently bad or

\textsuperscript{87} Strauss v. Horton, 207 P.3d 48 (Cal. 2009).
inappropriate subjects for instruction in public schools. Tension lies on a continuum considering the content and manner of proposed instruction, age appropriateness of intended targets, level of transparency, and opportunity for parental input associated with the deliberative and decision process. When curriculum and materials are openly considered for use in public schools there is greater expectation that stakeholders, including parents, will have an opportunity to be involved in the discussion, even though lacking direct power over the decision-making process and the ultimate outcome of those deliberations. This process is more likely to result in a consensus decision if the process is deemed inclusive and fair. Of course there are extremists on both sides of the issue that will predictably continue to push for highly partisan positions.

C. The Elements of Influence over Education at Work in California Schools

The following discussion will illustrate how the elements of influence described above are employed in California, and in other states, in connection with efforts to effectuate social change through public education. This discussion specifically relates to the primary issue of this paper, the impact of same-sex marriage on education. In that regard, it is important to note that it is beyond the scope of this paper to address all of the potential people, processes, or topics related to this issue, rather, the purpose here is to provide an example supporting the underlying thesis. Further, this paper does not purport to judge whether the strategies and advocacy efforts of any individual or group are appropriate or inappropriate. It is the function of this paper to objectively identify what is with respect to these issues rather than what ought to be.


90. This statement may seem disingenuous to some without further explanation. It should be known that I appeared in television commercials supporting Proposition 8, including the commercial discussed in this paper. It is true that I am opposed to same-sex marriage, but not for the reasons assumed by many. I am not against people who are among the LGBT community. I recognize that such individuals have been subjected to egregious oppression and discrimination for many years and embrace appropriate efforts to safeguard their rights, protect their safety, and ensure they are treated with the dignity and respect deserving of every person regardless of their sexual orientation. Further, I recognize much good has come out of advocacy efforts and the work of organizations that have strived to eradicate the demeaning attitudes and oppressive conduct that has targeted marginalized populations and caused significant suffering.
In the campaign over proposition 8, a television advertisement aired featuring the book, *King and King*. The commercial began with a young elementary school child bounding into the kitchen after arriving home from school. Asking her mother to guess what she learned at school that day, the little girl handed her mother the book *King and King*, and answering her own question said, "I learned how a prince married a prince and I can marry a princess!" As her mother glanced down at the book, a look of concern swept over her face. The commercial then shifted to the experience of the Parker family in Massachusetts. In that case the parents of a young elementary student were blocked by the courts from removing their child from instruction using *King and King* and similar books with that theme.\(^1\) Lastly, the commercial's message transitioned to an assertion that under California law, public schools instruct children about marriage. As a volume of the California Education Code was opened to paragraph 7 of Section 51933,\(^2\) the narrator concluded, "Teaching children about gay marriage will happen here unless we pass proposition 8..."

This commercial contained three separate although related messages. The first involved a dramatization of a young child introduced at school to the book, *King and King*, along with its message about same gender sexual attraction and same-sex marriage. Secondly, the commercial provided an example of how the use of this book played out in public schools in Massachusetts where same-sex marriage was made legal by judicial intervention. Lastly, the commercial cited an excerpt from the California Education Code referencing one example of how marriage is a topic for instruction in the curriculum of California public schools.

The first message of this television commercial is both

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\(^1\) Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).

\(^2\) See supra note 78 for a discussion about CAL. EDUC. CODE § 51933 and Proposition 8.
relevant and important to the assessment of social engineering in public schools in connection with efforts to legalize same-sex marriage. To understand why that is so, it is helpful to analyze the message through the lens of the four elements of influence referred to above. This exercise will demonstrate how supplemental instructional materials, or other resources already available to teachers in their school libraries, are used in conjunction with otherwise approved curriculum, as well as how such materials may elide any official review process.

The first task in this analysis is to identify people, if any, who have engaged public education as a means of influencing social thinking supportive of same-sex marriage. One way of approaching this issue is to ascertain whether or not the book, *King and King*, has actually been brought into any of California’s public schools. The answer to this query is yes, in that the book *King and King* is on the library shelves of numerous elementary schools in California. In the San Francisco Unified School District alone there are more than sixty copies of this book, with at least one volume in more than forty elementary schools.93

The placement of books such as *King and King* in elementary schools is consistent with strategies recommended by LGBT advocates. National organizations and online resources are available to assist supporters in their efforts to place these materials in elementary schools, and directions are provided as to how they may be used in teaching children. *Welcomingschools.org* is one such organization. Their website defines *welcoming schools* as a “LGBT-inclusive approach to addressing family diversity, gender stereotyping and name-calling in K-5 learning environments.”94

In California there are many within the education system that advocate and support the idea of utilizing public education to transform societal attitudes about same-sex marriage, and they have been active in political issues and other activities on

93. *Alice Fong Yu Alt Sch Library, San Francisco Unified School District*, http://follett.sfusd.edu/cataloging/servlet/presenttitledetailform.do?bibID=352818&site =2728&siteTypeID=2&viewType=2&walkerID=1288328691193&includeMedia=false&mediaSiteID=&includeLibrary=true (last visited Nov. 2, 2010).

this topic. For example, The California Teachers Association donated $1,250,000.00 to the campaign opposing proposition 8.\textsuperscript{95} The California Superintendent of Public Instruction appeared in a television commercial opposing proposition 8.\textsuperscript{96} And in 2008 a school director arranged a field trip for a class of first graders to attend the same-sex wedding of their teacher, which was presided over by the Mayor of San Francisco.\textsuperscript{97} While not all teachers supported the position taken by their union leaders, and in fact there were many who did not,\textsuperscript{98} it is clear that there is a substantial force within the California educational system eager to advance the interests of LGBT advocates.

Although not associated with social engineering for purposes of effectuating change in society’s social institutions, it is important to recognize that those who oppose same-sex marriage and LGBT related issues also have an interest in promoting their world view as to the values children should be taught in school. For example, I could find no copies of \textit{King and King} in geographical areas where communities predominantly oppose same-sex marriage. Further, I could find no other books or materials discussing the diversity of families that exist in our communities, including same-sex couples, in those areas. People and groups will exercise power to influence decisions about these types of materials, and those on either

\textsuperscript{95} See Campaign Finance, CALIFORNIA SECRETARY OF STATE, http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1045710&session=2007&view=contributions (last visited on Dec. 19, 2010) (noting donations made by California Teachers Association (CTA) regarding Proposition 8). As of 7/17/08, donations made are: No on Proposition 8, $250,000.00; as of 10/13/08, donations made are: No on Proposition 8—Equality for all, $1,000,000.00. \textit{Id.}

\textsuperscript{96} Prop 8 Does Not Affect School Kids!, YOUTUBE.COM, http://www.youtube.com/watch?v=90vYqQT8YE (last visited Dec. 27, 2010).

\textsuperscript{97} See Tucker, supra note 79.

\textsuperscript{98} An investigation by NPR revealed that teacher donations supporting proposition 8 were about two to one in favor of the proposition. In that regard the report said:

As California’s legal and cultural conflict over same-sex marriage played out this fall, the state’s teachers union put up $1.25 million to advocate against the gay marriage ban. But at the same time, individual public school teachers in the state were giving more money to enact the ban than to defeat it, according to an NPR analysis of Proposition 8 contribution data recently released by the California secretary of state. Teachers, aides and counselors in California public school systems gave about $2 to support the marriage ban for every $1 they gave to oppose it.

side of the issue may feel oppressed depending upon how their views align (or contrast) with the attitudes of the majority in their school districts.

The second task in this analysis involves determining educational processes, advocacy processes, and topics intended to be used by people to advance this purpose. Welcomingschools.org provides a good illustration as to how these elements come together to create the outcome illustrated in the proposition 8 television commercial's first message. On their web site under the tab Resources, educators are taught how LGBT materials may be integrated into the K–12 core curriculum with themes such as, "What is a family?" It is important to note that these materials are not identified as part of the basic instructional materials for the core curriculum, but supplementary to it. The idea is to integrate teaching about topics such as "gender identity and stereotyping" into already approved components of the core curriculum. The following is a list of typical K–3 curriculum framework standards for social studies in the United States identified by WelcomingSchools.org where these LGBT friendly materials may be integrated.101

Reading: Identify characters, settings, and key events in a story

Writing: Use a combination of drawing, dictating, and writing


100. Id. There are a number of topics which Welcoming Schools urges children be taught in connection with the core curriculum that are generally accepted as positive and would likely be embraced by most people such as the importance of respecting diversity, and the necessity of preventing bullying. The concern arises when the subject matter of what is being taught gravitates from such values to other subjects such as gender identity and sexual orientation in a way that is inappropriate for the age and maturity of those young children. Nevertheless, welcoming schools.org should also be viewed in the context of legitimate interests and concerns related to bullying, violence, discrimination all of which have egregiously targeted members of the LGBT community.

101. An effort is underway to align curriculum content standards so that they are consistent in each state. The National Governors Association Center for Best Practices has coordinated the development of proposed national content standards through the Common Core State Standards Initiative. About the Standards, COMMON CORE STATE STANDARDS INITIATIVE, http://www.corestandards.org/about-the-standards (last visited Dec. 7, 2010).
to compose opinions

Speaking and Listening: Describe familiar people, places, things, and events with relevant details, expressing ideas and feelings

Speaking and Listening: Summarize the key ideas and supporting details presented graphically, visually, orally, or multimodally

Provide for the study of culture and cultural diversity

Study people, places and environments

Study individual development and identity

Study of interactions among individuals, groups and institutions.102

To better understand how the strategy of integrating materials into core curriculum works, it is helpful to briefly discuss the concept of curriculum standards and frameworks as used in California. California, like other states, develops curriculum content standards in an effort to encourage high academic achievement for all students. These standards define "the knowledge, concepts, and skills that students should acquire at each grade level."103 Building upon the content standards, curriculum frameworks are constructed in order to "align curriculum, assessment, instruction, and organization to provide a comprehensive, coherent structure" for "teaching and learning."104 Both the content standards and frameworks are generated under the direction of the State Board of Education.105 Publishers of basic instructional materials106 are then required to assure that text books for the core curriculum are aligned with the curriculum standards and frameworks if

105. CAL. EDUC. CODE § 60005 (West 2010).
106. Basic Instructional Materials are defined in the California Education Code as follows: "Basic instructional materials" means instructional materials that are designed for use by pupils as a principal learning resource and that meet in organization and content the basic requirements of the intended course. Id. § 60060(a).
they hope to have their products adopted to be used in public school classrooms.

An in depth explanation of how instructional materials are adopted in California is beyond the scope of this paper, however it is important to distinguish between the different types of instructional materials and also identify the principle laws and policies that impact how they find their way into public school classrooms. Basic instructional materials are the bedrock of public school curriculum and are defined as those materials "designed for use by pupils as a principal learning resource and that meet in organization and content the basic requirements of the intended course." School Districts select basic instructional materials from among those adopted by the State Board of Education for grades K–8. It is not difficult for parents to be aware of the basic instructional materials adopted for their children in grades K–8 as this information is subject to an extensive and transparent process that also provides for public input, inspection, and review.

The breakdown in oversight and parent awareness arises in connection with an educator's use of supplemental instructional materials or other items from their school libraries. These materials may or may not have been

107. Id.
108. Id. § 60200.
110. Supplementary instructional materials are defined as "instructional materials designed to serve, but not be limited to, one or more of the following purposes, for a given subject, at a given grade level: (1) To provide more complete coverage of a subject or subjects included in a given course. (2) To provide for meeting the various learning ability levels of pupils in a given age group or grade level. (3) To provide for meeting the diverse educational needs of pupils with a language disability in a given age group or grade level. (4) To provide for meeting the diverse educational needs of pupils reflective of a condition of cultural pluralism." CAL. EDUC. CODE § 60060(1).
111. School libraries are generally established and maintained by the governing board of the school district. Id. § 18101. The governing boards of school districts "may make all necessary rules or regulations not provided for by the State Board of Education or Superintendent of Public Instruction, and not inconsistent therewith." Id. § 18121. The school librarian has primary responsibility for acquiring and maintaining books and other materials for the school library. See Model School Library Standards—Information Flyer, CALIFORNIA STATE BOARD OF EDUCATION (Sep. 16, 2010), available at http://www.cde.ca.gov/cier/lib/. However, there are limits even with respect to a school board, relative to removing books from school libraries when they disagree with the content. In that regard the Supreme Court has said, "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" Bd. of Educ., Island
purchased by the local educational agency. Less oversight exists with respect to supplemental instructional materials that are donated by others, or acquired directly by the teacher. While some supplemental teaching materials are prohibited by statute, these items generally refer to materials that have either been disapproved by the local educational agency,\textsuperscript{112} “promote a discriminatory bias,”\textsuperscript{113} or which contain “any matter reflecting adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry.”\textsuperscript{114}

The California Board of Education adopted Standards for Evaluating Instructional Materials for Social Content in 2000\textsuperscript{115} and is still used today. The purpose of the social content standards is to assure that “instructional materials portray accurately and equitably the cultural and racial diversity of American society; the male and female roles; and the contributions of minority groups and males and females to the development of California and the United States.”\textsuperscript{116} Nevertheless, the discretion allowed those who review materials for appropriateness of social content is sufficient for books such as \textit{King and King} to get by instructional material gatekeepers if there is a desire on the part of educators to use such items in their schools. Additionally, at another level, supplemental instructional materials are often used by teachers which have not been reviewed by anyone other than the teacher. In fact, local educational agencies may encourage teachers to supplement basic instructional materials with other resources they find so as to enrich the learning experience of their students. A board policy of the Capistrano Unified School District provides such an example:\textsuperscript{117}

The Governing Board encourages teachers to use supplementary materials which are relevant to curriculum

\textsuperscript{112} CAL. EDUC. CODE \S 51510 (West 2010).
\textsuperscript{113} Id. \S 51500.
\textsuperscript{114} Id. \S 51501.
\textsuperscript{116} Id.
\textsuperscript{117} Use of this example is not necessarily meant to be a criticism of the board policy or the practice.
objectives and appropriate for students' ages and abilities. By using such materials, teachers can introduce content and instructional strategies that enrich the curriculum, enhance learning, help students make critical judgments, and stimulate their intellectual growth. When selecting supplementary materials for classroom use, teachers should carefully review them and provide appropriate introductory and follow-up activities. Supplementary materials should not supplant the use of basic texts or teaching activities. Films must be used within legal copyright limits.\textsuperscript{118}

Of course such items are expected to be in accordance with state and district policies, but depending upon the topic or nature of the materials being considered, a good deal of subjective judgment is involved on the part of the teacher selecting and using the materials, or others who may be called upon the exercise judgment upon them.

In summary, all of the discussion regarding curriculum and instructional materials boils down to this fact: if teachers want to use books such as \textit{King and King} to supplement basic instructional materials in California public schools they will have little trouble doing so, provided their administrators and local educational agency governing boards are not opposed to, or even aware of such use. On the other hand, if teachers and educators want to exclude materials or instruction they will likely be able to do so where the social, political, and cultural values geographically are opposed to them. In this context it is shown that depending upon the prevailing attitudes in a particular area, educators may become empowered to influence social change, or oppose it, through public education.

In those environments where teachers do have access to LGBT friendly materials and desire to use them in connection with their instruction of students (formal or informal), a variety of \textit{educational processes} may be used for that purpose. Educators may supplement parts of the core curriculum, or read books to children during informal instruction. Teachers may utilize a field trip or even involve a guest speaker. The educational process used will depend upon the topic and the

\textsuperscript{118} \textit{Article 6: Instruction, Capistrano Unified School District}, http://capousd.ca.schoolloop.com/cms/page_view?d=x&pid=&vpid=1232963501598 (follow "Supplementary Instructional Materials 6161.11" hyperlink) (last visited Dec. 7, 2010).
environment for instruction.

Welcomingschools.org provides educators with advice as to how to orchestrate this endeavor. Lesson plans, implementation strategies, and bibliographies are readily available and are free. Teachers are encouraged to read LGBT friendly materials to their students and recommendations are given as to books available for all elementary school grade levels. The book King and King is among the books recommended by this organization. Of particular interest is the resource called, Using LGBT-Inclusive Books and Looking at Gender Through Books, where teachers are given the following advice:

Think about whether or not reading the book is the place to start in developing a welcoming school or do you need to lay more groundwork in your school community; Consider whether you will have support from your school’s administration if parental concerns arise regarding LGBT topics or gender roles; Prepare yourself to answer students’ questions and discuss families with LGBT parents in the context of the range of family diversity that exists in our schools and communities; Look at how reading the book fits into your curriculum; See how the book can help meet social and emotional goals you have for your classroom; Attend or hold a professional development workshop on LGBT topics or gender in elementary school; If there are students with LGBT parents/guardians in your class or in your school, find out the language that they use to refer to their families to help answer other student’s questions that may arise; If there is a student in your class that presents their gender in a different way than their biological sex or who strongly prefers toys and activities typically associated with the other gender, discuss with their parents/guardians how they talk about it with their child and with other children or adults; To prepare for discussions on gender, look at some of the books on Gender and Children in the Bibliography for Educators and Parents/Guardians or check out some of the articles and resources on gender identity; If there is only one student with LGBT parents/guardians in your school, be careful not to

119. Resources, supra note 84.
120. Books for Students Inclusive of GLBT Family Members and Characters, Pre-K through Grade 2 are found at Bibliographies, WELCOMING SCHOOLS, http://www.welcomingschools.org/bibliographies/ (last visited Dec. 7, 2010).
continually single him or her out as an example.\textsuperscript{121}

For any parent who may object to their child in grades Pre-K–2\textsuperscript{122} being read the book, \textit{King and King}, or similar materials, one part of the advice referenced above is particularly relevant and in fact is the only one that addresses parent concerns about the appropriateness of such instruction: "Consider whether you will have support from your school’s administration if parental concerns arise regarding LGBT topics or gender roles." No where amongst the advice given is the teacher encouraged to speak with, or consider the concerns parents may have with respect to this instruction. In essence, the advice directs teachers to make sure their administrators will back them up if parents object. This leads to the question of what power and authority, if any, parents have to object to instruction and materials public schools use in teaching their children.

I believe most California voters concerned about the impact of same-sex marriage on education were worried more about the example portrayed in the first message of the proposition 8 commercial than the issue of whether or not marriage would be taught in connection with officially prescribed instructional materials in sex-education.\textsuperscript{123} This point is very important when considering the issues of this paper relative to social engineering. John Dewey, one of the principle leaders of the social engineering movement of the first half of the twentieth century explained why it was necessary to reach young children in their education in order to further a social agenda: "Men are cast-iron; but children are wax. Strength expended upon the latter may be effectual, which would make no impression upon the former."\textsuperscript{124}

Parents do not have the direct\textsuperscript{125} right to determine the


\textsuperscript{122} Grades Pre-K-2 is referenced in that the book \textit{King and King} is written for children within that age range.

\textsuperscript{123} However, that does not mean this was not a credible issue. \textit{See, e.g., supra } note 78.

\textsuperscript{124} \textit{Dewey, supra } note 27, at 20.

\textsuperscript{125} They have a limited indirect right to participate in the determination of such
curriculum or instruction used in public schools to teach their children. Further, their right to object to such matters is limited to those situations where constitutional rights are implicated. This is based on firmly established doctrines that have evolved over many years regarding the universal and compulsory nature of public education, its purpose in preparing children for citizenship in a diverse society, and judicial deference to educator’s professional expertise which the courts have consistently perceived as essential in making such decisions. It is true that in 1925 the United States Supreme Court confirmed the constitutionally guaranteed liberty interest of parents to direct the upbringing and education of their children. Relying on the doctrine of Meyer v. Nebraska the Court held that compulsory education statutes did not preclude parents from enrolling their children in private parochial schools instead of those operated by the state. In that regard the Court held, “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.” “There is a long line of precedents indicating that the government may not unreasonably interfere with . . . [the right to] raise one’s children as one wishes.” In Yoder, the U.S. Supreme Court reiterated the fact that, “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.”

The 1923 Meyer decision referenced the supreme

issues by participating in the democratic process of electing members of the school board and other political officials involved in the management of public education on the state and local level.

126. “Of course, courts should not ‘intervene in the resolution of conflicts which arise in the daily operations of school systems’ unless ‘basic constitutional values’ are ‘directly and sharply implicated’ in those conflicts.” Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982).
127. Id. at 864.
131. Pierce, 268 U.S. at 535.
importance to society of educating children. Quoting the
Ordinance of 1787 the Court said, “Religion, morality and
knowledge being necessary to good government and the
happiness of mankind, schools and the means of education
shall be forever encouraged.” 134 However, in referring to the
“natural duty of parents to give . . . children education suitable
to their station in life,” the Court linked this duty with the
direct responsibility of government to implement the mandate.
In doing so, the Court said, “nearly all of the states, including
Nebraska, enforce this obligation by compulsory laws . . .” and
that “education of the young is only possible in schools
conducted by especially qualified persons who devote
themselves thereto.” 135 Educators have been given significant
discretion and control over curriculum, instruction, school
publications, and other activities that are determined to be
“reasonably related to legitimate pedagogical concerns.” 136 The
role of parents in educational decision making has been
increasingly marginalized, and religion as a source for
determining moral standards has been replaced by secular
relativism. 137 Indeed, in this paradigm the ongoing struggle
over who decides principles of morality and the substance of
knowledge to be inculcated in children is still raging. However,
while the U.S. Supreme Court has continued to uphold
constitutional restraints upon educators in the exercise of
discretion requisite for the daily operation of public schools,

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134. Meyer, 262 U.S. at 400. It should also be noted that from the beginning of
compulsory public education there has been an unrelenting effort to remove all things
religious from public schools. Initially this endeavor arose because of significant
conflict and contention between religious sects as to what brand of religious instruction
should be taught in the schools. However, this evolved into removing religion entirely
as a source for moral guidance. An example of this can be seen in the legislative
deliberations over the 1879 California Constitution. On October 14, 1878, during the
California constitutional convention, amendment 191 relative to the source of moral
teaching in public education was referred to the Committee on Education. It read: “The
standard of moral instruction in our public schools shall be that set forth in the Bible,
preferring sectarianism.” 1878-79 California Constitutional Convention Working
Papers, Proposed Amendments and Articles, California Secretary of State
Archives, http://www.sos.ca.gov/archives/collections/1879/archive/P3856-110.pdf (last
visited Jan. 22, 2011). On December 13, 1878, minutes of the proceeding indicate that
the amendment was replaced by another amendment. The Bible was not adopted as
the standard for moral instruction in California public schools. Id.

135. Meyer, 262 U.S. at 400.


137. See, e.g., Frederick Mark Gedicks, The Rhetoric of Church and State: A
environments where such constitutional intrusions have been found have been significantly narrowed, with the protection of religious liberty virtually pushed to the margin.138

Neither Meyer nor Pierce involved facts where parents sought to restrict the content of curriculum or the instruction of their children in public schools. In fact, Meyer involved the expansion of knowledge by upholding a parent's right to have their child taught the German language by arranging for instruction from a teacher for that purpose. Pierce enlarged opportunities for education by confirming a parent's right to enroll their children in private religious schools. However, parents generally have not fared well in cases where they have sought on constitutional grounds to constrict curriculum or prevent other instructional materials from being used in teaching their children.

Over the years the courts have favored expanding information and resisting efforts to constrict knowledge in public schools.139 In 1987, the U.S. Sixth Circuit Court of Appeals found against parents who alleged that the local school board violated the Free Exercise Clause of the First Amendment by prescribing as part of their curriculum various reading textbooks they believed inculcated values in their children opposed by their religious beliefs. In 1994, the U.S. Ninth Circuit Court of Appeals rejected a claim by parents under the federal Establishment Clause and the California Constitution that a California school district caused children to

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The effect of selective post-modernism is to allow secular ideologies to use political muscle to advance their causes, including using the public schools to inculcate their ideals, without even the psychological constraint of liberal neutrality, but at the same time to preserve liberal formalism in court to ensure that religion is not included in the public dialogue. Thus, in New York City the children are read Heather Has Two Mommies in the first grade and given information on anal intercourse in the sixth; but, as the Tenth Circuit recently held, The Bible in Pictures must be removed from the shelf of the fifth grade classroom library. Id. at 188. See also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318–326 (2000) (Rehnquist, C.J., dissenting); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 308–319 (1963) (Stewart, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting).

practice the religion of witchcraft by requiring them to read from curriculum titled, Impressions, consisting of 59 books and approximately 10,000 literary selections. Specifically, the parents challenged 32 selections which they alleged promoted a religion called "Wicca." In denying the parent’s claim the court noted,

"People may take offense at all manner of religious as well as nonreligious messages."... If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a "curriculum review committee" unto himself or herself... 140

And in 1998, the Ninth Circuit ruled against parents who objected to their children being forced to read literary works containing racially derogative words and themes. While acknowledging that the books in question indeed did contain language some would find offensive and racist, the court identified several reasons why the use of the materials was nevertheless justified:

First, the fact that a student is required to read a book does not mean that he is being asked to agree with what is in it. It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas—without that ability one can do little to respond to them. Second, it is important for young people to learn about the past—and to discover both the good and the bad in our history. Third, if all books with messages that might be deemed harmful were removed, the number of 'acceptable' works might be highly limited. 141

As can be seen from this discussion, schools have substantial power and discretion over decisions related to instruction and instructional materials when it can be shown that such decisions are based upon pedagogical purposes.

141. Monteiro v. The Tempe Union High Sch. Dist., 158 F.3d 1022, 1031 (9th Cir. 1998).
EXAMINING CONTEXT

IV. THE DILEMMA

As stated at the outset, same-sex marriage, as well as efforts to legalize its practice will have a profound impact on public education, and in fact already has. The conflict over same sex-marriage has served to polarize people and extend unwarranted attention to the extreme positions and conduct of some people and groups. This has been exacerbated by a lack of civility and militant attitude exhibited by those who share different world views. Further, the level of toxic discourse has risen to a height inconsistent with the respect our society has historically and rightfully demonstrated for the rule of law,\textsuperscript{142} a respect which has sustained our country and distinguished our nation from others in the world. The consequences of this paradigm have been the stifling of conversation, obstruction of understanding, spewing of depreciatory labels, and never ending demonization of those who disagree with another's point of view.

As antagonists are dehumanized in this cycle of escalating conflict, it is children who are caught in the crossfire. For example, one group of parents, fearing that educators will attempt to indoctrinate students with GLBT friendly curriculum, which they perceive will confuse their children's

\textsuperscript{142} The phrase "rule of law" has been used in many ways throughout history, and in legal theory and scholarship has been defined as including several essential components. For example, Robert Stein provided the following definition at a Rule of Law symposium in 2008, indicating that the term as it has become known, incorporates the following characteristics of a society governed by the rule of law:

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power. 2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily. 3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors. 4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession. 5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.

Robert Stein, Rule of Law: What Does It Mean?, 18 MINN. J. INT'L. L. 293, 302 (2009). It is the first element of this definition to which I refer in this statement. As Thomas Paine declared in his tract, Common Sense, "so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is Law, so in free Countries the Law ought to be King; and there ought to be no other." THOMAS Paine, COMMON SENSE 19 (1776).
development, marginalize their religious beliefs, and obstruct their autonomy to determine values and morals children should be taught in school, preemptively instruct their children about their views on homosexuality. Another group of parents, fearing that those who oppose same-sex marriage will promote religious doctrine in a way that dehumanizes their family and subjects their children to bullying, oppression, harassment and discrimination, seek to assure their viewpoint on the subject is taught in school, regardless of any parental objections. As events unfold, the media captures the words and actions of the most extreme examples on both ends of the issue, causing each side to assume the worst about the other’s intentions. This fuels the conflict, intensifies the toxicity of discourse, and increases the use of pejorative labels when opponents refer to those with whom they disagree. Thus, in this paradigm it is inevitable that children receive mixed messages, confusing them as they attempt to make sense of the conflicting information being taught by influential adults in their lives. A proverb of the Kikuyu tribe in Kenya teaches that, “When elephants fight, it is the grass that suffers.” In the matter before us, children are the grass, and it is they who stand to suffer most as they witness the reckless acrimony marking the dysfunctional engagement between those who are also the most significant authorities in their lives.

Adding to the challenges facing any effort to resolve these issues is the fact the conflict is framed in reference to each party’s positions. This narrow focus blinds adversaries from discovering the deeper meaning behind each side’s positions and thus creates a dilemma. Positions represent rigid and concrete declarations of what a person or group wants in a conflict. Positions often assume an orientation of either or with respect to a dispute, and leave little room for creative problem solving. Such is the case here where one side takes a position advocating for the legalization of same-sex marriage and the other side’s advocacy is directed toward preventing that from happening. It is ultimately a yes/no or win/lose proposition.

145. See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING
The means to better understand this conflict and its dilemma is found in defining the interests underlying positions taken by the parties. Interests are what drive positions. They represent the underlying needs that seemingly compel a party to take a position. Further, when each side undertakes such an analysis, in good faith, the parties are better able to understand the conflict in a way that serves to humanize adversaries and transform the paradigm of conflict into one of constructive conversation and collaboration. Good faith requires more than a casual pause or a shallow cliché; it requires the effort and commitment necessary to embrace the idea that people may disagree without compromising moral principles. Respecting a person’s right to think differently does not mean that you have to respect the substance of that person’s thought. That distinction is often lost in the conflict.

Admittedly, this may at first appear an insurmountable task and perhaps an extremely naïve suggestion considering the history of past engagements, and the wealth of scholarship that has been generated on the topic. Further, suggestions for reducing the level of acrimony in the conflict have been proposed before. Nevertheless, examining the interests of the parties in this dispute uncovers a dilemma, the nature of which should cause all parties to pause and realize that there cannot be a satisfactory resolution of this conflict for anyone with an either or result. At least there cannot be such a resolution without escalating the conflict in a way that is destructive to our social institutions, including education. This dilemma results from the fact that the positions taken by opposing parties are rooted in convictions and beliefs deeply planted in the hearts and minds of people holding vastly different world views as to how we came to be, our life’s purpose, and our eternal destiny. It goes to the very heart of our identity as human beings and our connection to the world around us. While it may be possible to compel people to act in certain ways by force, or by law, no one can compel another to alter what they believe in good faith to be true, and that is especially so when the substance of those beliefs are rooted in answers to

Agreement Without Giving In (Bruce Patton ed., 2d ed. 1991). The concept of interest-based vs. positional based conflict resolution is presented, explained, and analyzed in this excellent and foundational book on the topic of principled negotiation.

146. Id. at 41.
life's most important questions. Importantly, it applies to those who either oppose or support same-sex marriage. We must learn that it is possible to treat others with civility without compromising our core beliefs.

Only parties may fully articulate their interests in a conflict, although others may listen, ponder, research, and hypothesize as to what they may be. When done in earnest, such a process encourages mutual understanding, and creative problem solving.\textsuperscript{147} So, what are the interests of the parties in this dispute?

With respect to the LGBT community, history reflects a people who have been dehumanized, demonized, and oppressed by heterosexual counterparts throughout most of history. They have experienced bullying in school, at work, and in the community. They have endured verbal taunts and brutal physical violence. They have been labeled evil and even referred to by some as agents of Satan. They have been excluded, segregated, ridiculed, avoided, and feared. They have been the object of sarcastic and demeaning humor as well as irrational and cruel anger. Over time they have been compelled to hide their identity, or live their lives rejected by friends and family. While that is certainly not the case with all people identified within that community, as a group these statements ring true.

Therefore, it is not difficult to articulate some of the primary interests underlying efforts of those seeking to legalize same-sex marriage. One such interest is the desire to be treated by society with dignity and respect. The argument follows that when a same-sex couple is denied a marriage license by the State, that couple's relationship in comparison to a heterosexual couple receiving such a license is perceived by others as abnormal and thus considered by others as less than those who are deemed normal. Thus, those who are considered abnormal, or less than, are not treated with the dignity and respect deserving of all human beings.

Being accepted and having a sense of belonging is one of the most basic psychological needs of all people.\textsuperscript{148} This is

\textsuperscript{147} See Morton, supra note 144, at 377–78.

\textsuperscript{148} Abraham H. Maslow, Toward a Psychology of Being 5 (3d ed. 1998).
especially so when belonging is directly related to ones place in society. However, the quest for recognition and acceptance is sometimes based on a perverted paradigm of normalcy. According to this view, normalcy is equated with wholeness, and those whose characteristics, whether physical or mental that are not within a subjective range of being are considered abnormal. Abnormality is thus translated into being less than others. Those who are considered less than others then become targets for oppression and discrimination. Because the consequence of being labeled abnormal drives rejection by others, as well as self degradation in too many cases, those tagged with such labels often feel the need to be become normal, or to be accepted as normal in their perceived abnormal state. While this is the case for many, it is not for all, as repeated rejection, oppression, and discrimination will cause some to disengage from society and live their lives in isolation and pain, or sadly in some cases, take their own lives. For those who oppose same-sex marriage it is important to recognize the interests of many who in good faith seek its legalization.

I contend that the underlying interests discussed above of those seeking to legalize same-sex marriage is credible, but assert that the means selected to address those interests in pursuing the transformation of marriage as a social institution, is a misguided enterprise that only serves to promote and expand the perverted paradigm of normalcy and reinforce the negative social perceptions they are trying to change.

Focusing on a normalcy paradigm is a trap that shifts attention away from recognition that difference is an important reality in life, and that being different does not constitute being less than another. Having the label of marriage attached to the union of same-sex couples will not suddenly transform society's perception of the LGBT community's identity from different to same in comparison to hetero-sexual couples any more than such a label would transform the identity of any other combination of relationships constituting families in our society. Neither should it, as dignity and respect come from society's recognition of difference, not burying it under a label. The more difference attempts to appear as same, the further society moves away from acknowledging the diversity. Dignity and respect flow from acknowledging the right of people to think differently. We must acknowledge the dignity, and show
respect for each individual’s moral agency, not the substance of those beliefs, or how that agency is ultimately exercised.

However, the idea of dignity and respect becomes more problematic when considering the fact that difference in this paradigm is directly related to the religious and moral beliefs of others. Proponents of same-sex marriage have responded to such religious values and teachings by mocking the beliefs of those who defend traditional marriage, and those opposing same-sex marriage have reacted with concern that any accommodation to people living in same-sex relationships will compromise efforts to maintain the social institution of marriage defined as a union between one man and one woman, and constitute an inappropriate appeasement of moral standards inconsistent with their sense of civic and religious duty. In that regard it is important to realize that according dignity and respect to people living in same-sex relationships, as human beings, does not in and of itself constitute acceptance of the substantive values and conduct of the LGBT community, neither should it compromise one’s own moral convictions. Rather, it means that we treat all people with kindness and civility.

Another important interest of those seeking to legalize same-sex marriage is based on constitutional principles of equal protection under the law. Same-sex marriage couples believe they are denied equal rights when their relationship is not sanctioned by law as marriage. Whether same-sex couple’s perception of being treated differently constitutes a denial of equal protection is an issue that must be analyzed in context of the purposes of marriage, without obfuscation of the issue by focusing on normalcy and sameness. A full discussion of this issue is beyond the scope of this paper.

The interests of those opposed to same-sex marriage should also be understood, and done so in a way that recognizes underlying concerns that are not driven by bigotry, hatred, or discrimination. There are unquestionably some among those who oppose same-sex marriage holding such sentiments, but it is imperative to avoid stereotyping and extending such pejorative labels to a everyone who opposes same-sex marriage, when attitudes motivated by bigotry are primarily harbored by a minority of people whose extreme views and conduct are damaging to the interests of all parties, and should be
condemned by everyone.

Amongst those who oppose the legalization of same-sex marriage are many who are concerned about the breadth of objectives being sought by LGBT advocates, and how their goals, if achieved, will impact and infringe upon their religious liberty. LGBT advocacy objectives may be viewed on a continuum, with the neutral interest of being free from discrimination, oppression, and violence on one end, and efforts to force individuals to interact within environments promoting LGBT interests on the other. Douglas Laylock wrote the following in the Afterword to *Same-Sex Marriage and Religious Liberty, Emerging Conflicts*:

Supporters of same-sex marriage demand not just tolerance from the private sector, but recognition and affirmative support from the public and private sector alike . . . . Some of them seek far more. They seek to suppress all public expression of disagreement or disapproval, or at least all such expression for which they have any plausible legal theory for suppression.

Eugene Volokh, another scholar on this topic and proponent of same-sex marriage has written:

The gay rights movement has long involved three related goals. One has to do with liberty from government repression—freedom from sodomy prosecution and from police harassment, and the like. A second has to do with equal treatment by the government: The movement to recognize same-sex marriage is the most prominent recent example. A third has to do with delegitimizing and legally punishing private behavior that discriminates against or condemns homosexuals.

Other LGBT advocates have expressed the intent to "discredit and force to the margin religious practices that honor traditional marriage." I believe significant resistance to LGBT issues escalate in response to the objectives cited in the

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examples above, while many of the people generally support neutral goals that seek to prevent discrimination, oppression, bullying, and other demeaning and injurious conduct. Chai Feldblum, a long time supporter of same-sex marriage referenced this issue when she wrote, "intellectual coherence and ethical integrity demand that we acknowledge that civil rights laws can burden an individual's belief liberty interest when the conduct demanded by these laws burdens an individual's core beliefs, whether such beliefs are religiously or secularly based."152 I disagree with Professor Feldblum's suggestion that the constitutional protection of religious liberty under the Free Exercise Clause of the First Amendment should be diluted by a concept combining religious and secular beliefs into a belief liberty under the Fifth and Fourteenth amendments. In fact, it is the continual erosion of religious protection under the constitution, and the marginalization of religion's importance in society that heightens the concern of those opposed to same-sex marriage. A basis for this worry can be seen in Professor Feldblum's contention that the rights of people who oppose same-sex marriage under her concept of belief liberty should not prevail over the alleged civil rights of same-sex couples.153 Nevertheless, Feldblum's comment that, "this conflict needs to be acknowledged in a respectful manner by both sides, and then addressed through the legislative processes of our democratic system" is important advice for all who have an interest in this issue.154


153. Professor Feldblum writes:

It may be cold comfort to those with strongly held beliefs regarding the immorality and sinfulness of homosexuality that I argue the burden on their belief liberty should be acknowledged. After all, as I noted in the beginning of this chapter and as I hope to make clear in this section, I believe it will rarely be the case that the court should use the Due Process Clause to insert an exemption to an LGBT equality law in order to accommodate a belief liberty of those who are regulated by the law.

Id. at 149–50. Professor Feldblum does concede that under her idea of belief liberty that if any equality law "regulated belief directly" it should be invalidated under the First Amendment. Id. at 280 n.118. However, Feldblum comes to the conclusion that, "Under this approach, I find it difficult to envision any circumstance in which a court could legitimately conclude that a legislature that has passed a LGBT equality law, with no exceptions for individual religious people based on belief liberty, has acted arbitrarily or pointlessly." Id. at 150.

154. Id. at 125.
There is also a threat to parental autonomy in defining the values and morals their children are to be taught in school. Individuals and groups opposed to same-sex marriage are concerned that LGBT advocates will ignore their concerns, and make every effort to undermine anything parents teach their children that is perceived to be inconsistent with the LGBT world view. Is there any basis for these concerns? The answer to this question is yes.¹⁵⁵ The example from Massachusetts illustrates how LGBT advocates have promoted their educational agenda for all children, regardless of whether or not parents objected, and more importantly regardless of the reasons parents gave for objecting.¹⁵⁶

History teaches us that religion is one of the most powerful causes in motivating people to action,¹⁵⁷ and this is especially true when people perceive that their belief system is under attack. It is extremely unreasonable, as well as unrealistic to expect that people may be persuaded or coerced into abandoning deep rooted religious beliefs, sitting by passively while their children are indoctrinated with ideas and perceptions that mock their faith and seek to emasculate their spiritual foundations. The predictable consequence of implementing such strategies is to further the polarization of positions and escalate adversarial engagement in partisan battles, thus pushing the ideological divide ever wider.

¹⁵⁵ Some LGBT advocates openly promote efforts to obstruct parent “opt out” rights. Additionally, in order to avoid “opt out” policies or laws where they do exist, some LGBT advocates promote strategies infusing LGBT friendly instructional materials and curriculum under topics such as “diversity.” See, e.g., Danielle Dubé, King and King: Learning to Treat Others Royally Through Diversity Education, 31 U. LA. VERNE L. REV. 109 (2009).

¹⁵⁶ This information is not new to those engaged in the conflict over same-sex marriage.

¹⁵⁷ Society too often overemphasizes the negative and destructive events associated with religious history rather than the essential good and overwhelmingly positive contributions religion has made to the prosperity, peace, and happiness of mankind. For example, it must be acknowledged that at times when catastrophic disasters strike around the world, people of faith through religious organizations contribute critical materials and human resources necessary to ease the suffering of those afflicted.
One of the most significant and too often unacknowledged issues associated with the conflict over legalizing same-sex marriage relates more to defining its purpose than excluding people from its process. There are two distinctly different ways of defining the primary purposes of marriage, and these differences constitute the vast ocean separating those who defend traditional marriage as constituting a union between one man and one woman, against those who desire to replace its meaning and purposes so as to accommodate the relationship and desires of any two people regardless of gender.

The view of marriage as an institution embraced by those who oppose same-sex marriage is inexorably linked to procreation and the rearing of children, looking not only at the consequences of forming such relationships today, but also how its structure and purposes protect society by attending to the well-being of future generations. It has been called "conjugal marriage" and described as, "the principal social institution designed to channel human sexual expression into responsible, socially constructive outlets . . ." In 2006, a report authored by nationally distinguished scholars associated with some of the nation's most respected universities, from History, Economics, Psychiatry, Law, Sociology and Philosophy, titled, *Marriage and The Public Good: Ten Principles* was published by the Witherspoon Institute. This document describes the purposes of conjugal marriage:

Marriage—considered as a legally sanctioned union of one man and one woman—plays a vital role in preserving the common good and promoting the welfare of children. In virtually every known human society, the institution of marriage provides order and meaning to adult sexual relationships and, more fundamentally, furnishes the ideal context for the bearing and rearing of the young. The health of marriage is particularly important in a free society such as our own, which depends upon citizens to govern their private

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158. Viewing marriage as an institution is an important distinction as opposed to analyzing or comparing the nature of individual marriages or other individual forms of relationships.


160. Id. at 13.

161. The Witherspoon Institute is an independent research center located in Princeton, New Jersey.
lives and rear their children responsibly, so as to limit the scope, size, and power of the state. Marriage is also an important source of social, human, and financial capital for children, especially for children growing up in poor, disadvantaged communities who do not have ready access to other sources of such capital. Thus, from the point of view of spouses, children, society, and the polity, marriage advances the public interest. 162

Along with those elements discussed above, conjugal marriage recognizes the "birthright of children to be connected to their [biological] mothers and fathers,"163 and the unique benefits children receive by having both a mother and a father in the home.164 This statement is not meant to suggest that other family structures are not important or even necessary in society, neither that single parents, grandparents, or other parenting arrangements have not been successful in raising children. Further, contrary to the allegations of many same-sex marriage proponents, advocates of conjugal marriage do not assert that children are the sole focus of marriage, neither do they disregard the importance of the relationship between marital partners and the benefits that accrue to them through matrimony. Nevertheless, it is important to stress what research and experience has undeniably demonstrated over the years: children should be raised by their biological mother and father in the context of marriage, with exceptions only in the best interest of the children. 165 Professor Wardle addressed this issue when he wrote,

We do not wish to denigrate the multitude of single parents or unmarried couples in society who have raised or are raising children successfully. Nevertheless, we cannot ignore the existence of studies and scholarly commentary indicating that the increase in out-of-wedlock births, and we are talking here specifically about children resulting from opposite-sex

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164. THE WITHERSPOON INSTITUTE, supra note 162, at 15–19.
intercourse, has resulted in higher instances of physical and sexual child abuse, educational failure, and poverty, among other things.\textsuperscript{166}

The other view of marriage promoted by advocates of same-sex marriage is in reality \textit{genderless marriage},\textsuperscript{167} in that it provides for matrimony between any two persons regardless of gender.\textsuperscript{168} It is also known as the \textit{close personal relationship model of marriage},\textsuperscript{169} in that it is “seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it...”\textsuperscript{170} Thus, genderless marriage “is about the couple. If children arise from the union, that may be nice, but marriage and children are not really connected.”\textsuperscript{171} This was the holding of the Massachusetts Supreme Court holding in \textit{Goodbridge}, wherein the Court said, “While it is certainly true that many, perhaps most, married couples have children together... it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”\textsuperscript{172} Also, when the Hawaii Supreme Court ruled in favor of legalizing same-sex marriage,\textsuperscript{173} it compared marriage to a “partnership” between two people who “bring their financial resources as well as their individual energies and efforts.”\textsuperscript{174}

Advocates for same sex-marriage assert that with significant numbers of children in need of parents, they are able to provide nurturing family environments.\textsuperscript{175} Further,
such advocates argue that they are just as capable as their heterosexual counterparts to provide a healthy stable family environment for their children,\textsuperscript{176} and considering the reality that such families are already constituted in our society, they and their children need the same benefits and goods of marriage that their opponents seek to protect.\textsuperscript{177}

The above discussion regarding opposing views of marriage and their purposes is not meant to be exhaustive or to advance one position over the other. Rather it is briefly provided to underscore the seemingly intractable nature of the conflict, and how these differing ways of perceiving marriage are upheld by deep rooted beliefs and convictions. Further, it is important to recognize that that many of those engaged in efforts to maintain the man/woman view of marriage are not motivated by homophobia. In fact, I believe there are many amongst that group who are sympathetic to the historical burdens of oppression and discrimination experienced by the LGBT community. Nevertheless, as the battle over defining marriage rages on, it is unlikely that those fighting to preserve the definition of marriage, as between one man and one woman, will retreat or lessen their efforts to stand firm; not because they are bigots or lack tolerance, but rather because their conscience compels them to protect what they perceive to be an essential social institution, and a cornerstone of their faith. Further, as this battle rages on, the perceptions of bigotry and intolerance will only increase, further separating those in the middle and exacerbating the impact of the conflict on children, especially in the context of public education.

The context of education is of primary importance because it is there that the battle will be fought over efforts to effectuate societal change through social engineering as discussed earlier. While there are many who see the benefits of injecting LGBT materials into public school curriculum as a means to push society toward acceptance of LGBT objectives, they significantly underestimate the magnitude and power of the resistance they face. Moreover, there will surely be an


increased polarization of positions that will continue to fracture communities, undermine public education, and injure efforts to decrease hostility and discrimination of those whom they seek to protect.

ILLUSTRATION 1.2

Another reality of this conflict in its present paradigm is the fact that those on both sides of the issue will experience discrimination and oppression depending upon how power is distributed across political, judicial, educational, and community boundaries. Illustration 1.2 helps visualize the exposure of children as they are situated in the middle of the conflict, and thus most vulnerable to the tension of competing values in public educational settings.

Oppression and discrimination is most likely to occur in one direction or the other when the power balance of educators, parents, legislature and judiciary are aligned heavily on one side, whether favoring religious liberty or LGBT rights. For example, if a state, county, school district, and community of parents heavily favor the viewpoint of LGBT advocates it may be predicted that parents pursuing religious liberty in the context of their children’s education will find themselves swimming upstream as they encounter curriculum and instructional materials, both formal and informal, infused with LGBT themed content. Parents will have few options, either to block such instruction or have their children opt out when they believe the content invades their core beliefs and values. This is so because opt out policies are usually determined by the
state legislature or administrative agencies.\textsuperscript{178} Courts weigh in when parents challenge policies they believe impinge upon their autonomy, however the trend of court decisions have not fared well for parents in this context.\textsuperscript{179} Take for example the placement of the book, \textit{King and King} on the shelves of elementary schools in the San Francisco Unified School District. Educators and parents are more aligned with LGBT advocates and thus little difficulty is encountered in placing the books in the school libraries. While statewide policies provide parents the right to opt out their children from instruction associated with sex-education, such rights do not exist in the context of core curriculum.\textsuperscript{180}

While discrimination against one side or the other is most likely to occur when power is broadly situated on one side or the other, this power distribution may be seen on a continuum. As power is more evenly distributed between the parties, the ability to discriminate is lessened while the magnitude of animosity in the conflict proportionately increases. The application of this model is of course subject to a number of variables including for example, the resources available to either side, individual or group disposition to engage in conflict, and the relative strength of the convictions held by individuals and group members as to the values and norms implicated in the dispute. Nevertheless, one consequence of this paradigm is likely to occur in any case, and that is the suffering of children caught in the middle of a battle sustained by the most influential adults in their lives.

V. CONCLUSION—CONVICTED CIVILITY

During the 2008 fall campaign season I was a guest on a radio talk show originating out of San Diego. At one point during the discussion the host asked me something to the effect, "Professor, you believe in the Bible, why don't we just tell it the way it is, that these people are living in sin." I was grateful for the question because it addressed an issue I thought tremendously important, although I am quite sure my

\textsuperscript{178} See, e.g., Kevin Rogers & Richard Fossey symposium piece.

\textsuperscript{179} See \textit{supra} notes 126–11 and accompanying text.

\textsuperscript{180} Except where there has been a specific opt out policy articulated and adopted.
answer was not the one expected by the host. It is neither my responsibility nor my right to judge another person’s standing before God. On the contrary, I believe the Bible teaches me that it is my responsibility to be compassionate, kind, and respectful to everyone, regardless of their opinions, values, or particular world view. There are no exceptions. Additionally, I believe I cannot hide behind the worn out phrase, “I hate the sin, but love the sinner,” and simultaneously launch individually condemning statements that cannot possibly separate the act from the person. I have known and interacted with many gay and lesbian people over the years and have never had the occasion or felt the inclination to treat them differently than anyone else. If a gay or lesbian couple lived next door to my family they would not encounter a lack of friendliness or treatment different from that expected of good neighbors.

There are perhaps many who would consider such acceptance as an abandonment of values in the face of society’s deteriorating standards of morality. Such perceptions often arise because people believe strongly that homosexual behavior is immoral and cannot reconcile those religious convictions with other religious principles such as love, compassion, and charity, which feel incongruent when applied in this context.

Those who worked for passage of Proposition 8 may also be inclined to pause at the idea of demonstrating kindness and compassion in light of the treatment they encountered during the campaign, and after the election. While there was no doubt incidences of incivility on both sides, evidence overwhelmingly demonstrates the lopsided amount and severity of such conduct by those opposed to Proposition 8. As an example of this paradigm I offer my own experience. As many who read this article will already be aware, I appeared in two television commercials in support of Proposition 8. Prior to this moment I had not been involved in the campaign, nor had I been active in any other political or social movement associated with LGBT issues. Within moments of the airing of the first commercial I was thrust into a political and social storm the likes of which I could only have imagined. Space will not permit me to elaborate fully the events and lessons learned from that experience.

There is however one aspect of this journey important to the present discussion. That component relates to the
immediate onslaught of personal attacks directed toward me and my family in order to intimidate and stop me from speaking out on the issue. Simultaneously, my email and voice mail was jammed with a variety of angry communications laced with profanity and personal attacks which persisted throughout the campaign, and after to the present. Internet blogs and social media published my telephone and email information urging others to join in. My email was ceased upon with unwelcome and unsolicited subscriptions to numerous gay and lesbian web sites, publications, and advocacy groups, including a subscription to the official campaign against Proposition 8.\footnote{In describing the unsolicited subscription of my email to the official campaign opposing Proposition 8, I do not have any knowledge or information that such acts were committed by anyone officially representing that organization and do not intend to make such an allegation or inference in describing this event.}

My voice mail was filled with messages, many of which consisted of prolonged ranting and name calling, including pejorative labels often used to insult members of the LGBT and disability populations. Additionally, I was called fat, ugly and bald, (perhaps the only true statements among the litany of those launched against me). One caller repeatedly left messages on my voice mail asking if I wouldn’t just die. Another asked if I could get cancer and die. Another simply said I was going to die. Some callers perseverated on this topic with repeated telephone messages. More than one described various gay sexual acts and inquired as to whether or not I had ever experienced any of them. Still others asked if members of my family had experienced them. While many messages went on and on, some of those calling were polite enough to limit their message to a couple words, one usually profane but nevertheless appreciated for its brevity.

Some who were aware of my work in special education took the occasion to link name calling with the theme of disability, calling me a “retard.” One woman called and accused me of being a pedophile. I was uninvited to speak on a panel at a national autism conference. In that regard I was told that one of the members of the panel with whom I was to present was uncomfortable with my participation because of my support for Proposition 8.\footnote{I was not uninvited by the conference organizers themselves, but by other} The conference was out of state and neither

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181. In describing the unsolicited subscription of my email to the official campaign opposing Proposition 8, I do not have any knowledge or information that such acts were committed by anyone officially representing that organization and do not intend to make such an allegation or inference in describing this event.

182. I was not uninvited by the conference organizers themselves, but by other
the presentation nor conference had anything to do with LGBT issues in general, or Proposition 8 in particular.

Occasionally I received communications from people who, while opposing my views and disagreeing with my judgment, were respectful in the nature of their discourse. Some sincerely invited dialogue and of those who did, I was able to engage in mutually respectful conversation, even if the other person did not agree with my viewpoint, or I theirs. But overall these communications were the exception.

The experience of numerous others have been chronicled, including people whose cars were keyed because they displayed a Yes on 8 sticker, personal property and homes were defaced while Yes on 8 signs were either destroyed or removed from the yard, profanity and slurs were launched at families including children who held Yes on 8 banners in public places. Those who donated money to support the campaign, even relatively modest sums, had their names posted on the internet under titles such as, Wall of Shame. Other supporters of Proposition 8 experienced an onslaught of calls threatening to boycott their employers if they were not fired. Personal information regarding supporters was often posted on the internet. Following the election, disgruntled opponents of Proposition 8 organized demonstrations and marches against churches and religious organizations whose leaders and members supported Proposition 8, with some of the churches defaced or damaged. Referring to graffiti spray painted on the wall of one church, Robin Tyler, a plaintiff in the lawsuit heard by the California Supreme Court over Proposition 22 justified the attacks against Proposition 8 supporters saying, “Get over it . . . It’s easier to wash a paint stain off a church than to take off the stain they left on the California Constitution.”183 The article further reported that, “Tyler, a longtime activist for lesbian rights, argued that same-sex marriage opponents have no right to complain about any physical and verbal attacks they’ve encountered since election day.”184

My point in mentioning these examples is not to provoke

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184. Id.
another dispute by attempting to measure the relative wrongs people with one viewpoint initiated versus those of another. Nor should the experience of Proposition 8 be the sole event defining the context for this conflict. A premise of this paper recognizes the discrimination and oppression experienced by members of the LGBT community. My point is that there needs to be a move toward civility between those engaged in this conflict and who are heavily invested in its outcome. In that regard Richard Mouw has provided a procedural framework useful for that purpose. In his book, Uncommon Decency, Christian Civility in an Uncivil World, Mouw constructs an approach to communication on issues such as those involved in this paper based on a statement he heard years earlier by the Christian philosopher Martin Marty.

As Marty Martin has observed, one of the real problems in modern life is that the people who are good at being civil often lack strong convictions, and people who have strong convictions often lack civility. I like that way of stating the issue. We need to find a way of combining a civil outlook with ‘passionate intensity’ about our convictions. The real challenge is to come up with a convicted civility.

Civility in this context is more than an “outward show of politeness” that often “mask ... hostile feelings with polite words and grudging accommodation.” True civility, with its rich historical tradition, incorporates an inner feeling of genuine care and concern for the larger society, and includes promoting the welfare of people who think and believe differently than ourselves. As an example of this principle, Mouw referred to the courageous story of a Dutch Christian family, the ten Booms, who risked their lives to conceal Jews and other refugees from the Nazis during World War II by creating a “hiding place” in their home. One day a Christian pastor from a neighboring village who was a family friend

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185. Richard Mouw is President and Professor of Christian Philosophy at the Fuller Theological Seminary in Pasadena, California.
187. Id.
188. Id.
189. Id.
190. Id. at 12–13.
entered their small watch shop. Corrie ten Boom asked the Pastor if they would help conceal a desperate Jewish family in urgent need of help. Hoping to soften the heart of this Christian man, Corrie displayed a baby, the youngest member of this Jewish family. Still unmoved, the Pastor replied, “Definitely not! We could lose our lives for that Jewish child!” At that moment Corrie’s father stepped forward, and taking the baby in his arms said, “You say we could lose our lives for this child. I would consider that the greatest honor that could come to my family.” Ultimately after assisting scores of people the ten Boom family was arrested, and although Corrie survived the war, her father, the man who proclaimed it an honor to die for the sake of aiding a Jewish baby, died within ten days.191 In describing the nexus between the actions of the ten Boom family and convicted civility, Mouw writes, “They had a deep and costly inner commitment to those God had identified as their neighbors, even though these neighbors represented a different culture and religious ethos. Their civility was hardly an ‘empty shell.’”192

On August 28, 1963 Martin Luther King led a march to the steps of the Lincoln Memorial in Washington D.C. and delivered his now famous, I Have a Dream speech.193 However, perhaps the message given by Dr. King that best illustrates convicted civility is that which he delivered a few weeks later. On September 18, 1963 King stood at the gravesite of four young girls who were killed a few days earlier while attending Sunday school at a church bombed by white racists. In eulogizing these children he said,

The innocent blood of these little girls may serve as a redemptive force . . . that will bring new light to this dark city . . . . The death of these little children may lead our whole Southland . . . from the low road of man’s inhumanity to man to the high road of peace and brotherhood . . . . The spilled blood of these innocent girls may cause the whole citizenry of Birmingham . . . to transform the negative extremes of a dark past into the positive extremes of a bright future . . . .194

191. Id.
192. Id.
194. Martin Luther King, Jr., Eulogy for the Martyred Children (Sept. 18, 1963),
If ever there was a time when people were justified in harboring feelings of indignation, hopelessness and a need to exact revenge it was at the burial of these innocent children. Nevertheless, in the shadow of that moment that Dr. King reminded those present,

And so I stand here to say this afternoon to all assembled here that in spite of the darkness of this hour, (Well) we must not despair. (Well) We must not become bitter, (Yeah. That's right) nor must we harbor the desire to retaliate with violence. (Mmm) No, we must not lose faith in our white brothers. (Yeah) Somehow we must believe that the most misguided among them can learn to respect the dignity and the worth of all human personality.195

The impact of same-sex marriage on education provides ample reason for those involved in this conflict to come together with convicted civility in an effort to move forward on a new path out of the conflict bearing down upon all who have an interest in the institution of education and children served by its functions.

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195. Id.