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**Same-Sex Marriage and Public School Curricula:
Reflections on Preserving the Rights of Parents
to Direct the Education of their Children**

Charles J. Russo¹

“Therefore a man shall leave his father and his mother and
be joined to his wife, and the two shall become one flesh.”²

As reflected in the preceding passage from the Bible, since the earliest days of the Judaeo-Christian era, with Judaism leading the way as the first major religion to include monogamy as part of its fundamental tenets,³ marriage has traditionally been defined as a union between one man and one woman.⁴ Moreover, even though such practices as polygamy, polyandry, and open marriage have occasionally been in vogue,⁵ until recently, there has been little serious discussion of the possibility of marriage between two members of the same sex, commonly referred to as same-sex marriage. Yet, spurred by social and judicial⁶ activists, talk of “same-sex marriage” has been wide-spread in recent years, especially in academic journals, the popular press, and media.

At the outset, it is important to address two delimitations. First, in supporting what is now euphemistically referred to as “traditional” marriage, thereby distinguishing it from unions between members of the same sex, this paper is not intended as a personal criticism of those who support the adoption of, or practice, the radical societal transformation referred to as “same-sex marriage.” Rather, since this paper sees no reason to modify marriage as it has been practiced through the ages as the basis of civil society, the author respects those whose positions differ, but disagrees with their point-of-view. Further, the author certainly believes that while all persons are entitled to basic respect

and dignity regardless of their sexual orientations, it is something altogether different to espouse the view that a relationship between two persons of the same sex be accorded the legal status of marriage. Second, this paper does not follow the same line of inquiry of other academicians who have written legal histories⁷ and addressed related aspects in support of⁸ or who question the validity of same-sex marriage.⁹ Instead, in touching on these discussions only as they impact on its major themes, this paper focuses primarily on the effect that gay-friendly curricular changes in public schools, meant to include instruction on same-sex marriage, might have on the education of children.

This paper offers its support to couples who live in traditional marriages by advocating that the legal and educational systems safeguard their long-recognized parental right to direct the education of their children.¹⁰ This paper supports the rights of parents in response to educators in public schools who over-step their authority by all but unilaterally attempting to implement major social transformation through the introduction of teaching on the acceptability of same-sex marriage, as part of a larger gay-friendly agenda, to unsuspecting, impressionable children. Additionally, in defending the right of parents to object to curricular initiatives in public schools with which they disagree, the author expresses his serious concern about the two-pronged approach that proponents of single-sex marriage have adopted in attempting to enact a radical metamorphosis of the institution of marriage that, however imperfect, has stood the test of time. It should be troubling to all that proponents of same-sex marriage have relied on “the least democratic of the branches,”¹¹ the courts, albeit with mixed results,¹² to accomplish goals that they could not achieve through the political process.

As reflected in litigation in Massachusetts,¹³ the only jurisdiction to recognize same-sex marriage, the inability of advocates of same-sex marriage to rely on political, rather than judicial,¹⁴ activism is clear in the fact that at least forty-five states restrict marriage to a relationship between one man and one woman.¹⁵ Of the states that have rejected calls to treat same-sex living arrangements as marriages, nineteen have adopted constitutional amendments while the remaining twenty-six have enacted statutes restricting marriage to one man and woman.¹⁶

In a related concern, one can only wonder why many supporters of same-sex marriage simultaneously demonstrate overt hostility to all things Christian. The hostility of many proponents of same-sex marriage may aptly be referred to as Christophobia,¹⁷ at least to the extent that many of its supporters seek to remove references to Christianity and its underlying values, including marriage, from the public marketplace of ideas, clearly revealing an attitude that “bristles with hostility to all things religious in public life.”¹⁸ Many of these activists rely on essentially anti-Christian, if not bigoted,¹⁹ sentiment in wishing to impose their world-view on society writ large due in substantial part to their bias against, and perhaps even hatred toward, the underlying values that Christianity represents in many areas, not the least of which is marriage.

The remainder of this paper primarily reflects on the right of parents to direct the education of their children as part of a panel on “Fostering Virtue, Morality, Democracy, and Religious Liberty.” The first part briefly highlights the ways in which marriage uniquely benefits society with an eye toward school-aged children since education serves as the focus of the second section of the paper. Undoubtedly, supporters of same-sex marriage are likely to respond that concerns over reconceptualizing marriage are specious

in the face of the apparent breakdown in traditional marriage as witnessed by increased divorce rates,²⁰ the growing rate number of shared living arrangements,²¹ and the dramatic rise in single-parent families, most of which are headed by women.²² The paper parries objections of proponents of same-sex marriage by pointing out that as regrettable as developments with regard to marriage and alternative living arrangements are, they are still, by-and-large, taking place within the context of heterosexual, rather than homosexual liaisons. The second part of the paper examines ways in which the benefits that marriage offers to society can be harmed by a shift to permitting unchallenged instruction on same-sex marriages in public school by impacting on the right of parents to direct the educational upbringing of their children.

The paper rounds out with a brief reflection on where this debate on same-sex marriage may be headed in the near future. While respectfully disagreeing with proponents of same-sex marriage, the paper concludes that insofar as words have meaning, calling a relationship between two members of the same sex does not make it a one because a marriage is, and should retain its original meaning as, a union between one man and a woman. At the same time, it is important to note that although this paper describes marriage as a word, the author fully recognizes that marriage is a concept or a vocation, a state in life between one man and a woman that is meant to be permanent.

Beneficial Effects of Marriage

Over the millennia, marriage has helped to preserve the moral and social order through ensuring a stable environment within which children can grow, defining and promoting legitimacy (if this has not already been rendered, in effect, an archaic concept

in light of the growth of out-of wedlock births in the United States), and providing a form of population control by placing limits on the ability of some to procreate without consequence. More specifically, in the face of a plethora of research that reviews these points in detail,²³ this section briefly reflects on one major point that most directly impact the right of parents to direct the education of their children.

From the point of view of those who are interested in education, item 4 in the Princeton Principles, that “[m]arriage protects and promotes the well-being of children,”²⁴ is an excellent departure point from which to consider the impact that curricular changes to include gay-friendly instruction on same-sex marriage might have on public school curricula, not to mention families. As discussed in greater deal in the following section of this paper, the Supreme Court, in *Pierce v. Society of Sisters*,²⁵ recognized the right of parents to direct the education of their children. Yet, a tension has arisen as courts have increasingly stood *Pierce*’s notion that the “the child is not the mere creature of the state”²⁶ on its head in granting school officials too much authority when conflicts arise with parents. Thus, there can be no doubt that “education is perhaps the most important function of state and local governments,”²⁷ and that states have plenary power, that they delegate to local school boards, to set curricular content and a host of other educational matters. The authority of states aside, significant disagreements emerge when school officials overstep their boundaries by intruding on parental prerogatives over values formation by implementing curricula that instruct children about same-sex marriage from a gay-friendly perspective. Insofar as parents have the solemn duty to ensure that their children are educated, a task that is of even greater significance than ever before in an increasingly technological, information-aged based society, the next part of

the paper addresses issues related to control over the vehicle of instruction, public school curricula.

Potential Harm to Society In Light of Same-Sex Marriage:

Same-Sex Marriage and School Curricula

In discussing the potential deleterious ramifications of same-sex marriage on families and the schooling of young children, this paper concomitantly examines legal developments dealing with sexuality education and gay-friendly initiatives in pre-K-12 schools because of the symbiotic relationship that these political agendas share. This review is limited to an analysis of the impact of curricular developments in pre-K-12 schooling, rather than higher education, since state laws require children to attend schools, typically between the ages of six and seventeen or eighteen.²⁸ As such, this paper, in part, discusses whether permitting teachers, often spurred on by their unions,²⁹ and educational administrators to serve as the vanguard of “[s]ocial experiments on other people’s children”³⁰ is ultimately a form of *ultra vires* when they exceed the boundaries of their legitimate authority.

Educators act as purported harbingers of radical social change when teaching impressionable young minds, essentially a captive audience, due to compulsory attendance laws, the often unchallenged proposition that same-sex marriage is an acceptable alternative lifestyle. The paper does not examine developments in higher education because, as the courts have recognized, students in colleges and universities are free not to attend either classes or graduation ceremonies at which prayer might occur; additionally, since students in higher education should have the intellectual and emotional

maturity to make their own judgments about controversial topics of the day, they should not be as subject to professorial and peer pressure as young children.³¹

At the heart of debate over who should control the content of curricula in public schools is the tension of how a democratic society can safeguard the rights of both the majority and minority. In other words, consistent with Justice O'Connor's salient observation that "we do not count heads before enforcing [constitutional rights],"³² it is imperative to balance the interests of the minority who advocate same-sex marriage as a right, a proposition that most jurisdictions have refused to endorse, and the rights of parents (and others) who do not wish their children, especially during their tender years, to be subject involuntarily to concepts about family and human sexuality at the hands of public school officials.

Tensions flare as a small number of activists wish to change the nature and meaning of marriage along with how a captive audience of children is forcibly taught about same-sex marriage in public schools. Unfortunately, in addressing the rights of increasingly vocal proponents of same-sex marriage, the judiciary has not steered a clear path in avoiding what can best be described as the tyranny of the minority which, led by various public interest groups, seek to impose a kind of "heckler's veto."³³ The author is concerned that due to the lack of judicial clarity, small groups of activists can, in effect, drown out the wishes of the majority, even as he certainly believes that personal freedom neither is, nor should be, subject to a majority vote.

Aware of unresolved tensions over the control of public school curricula, should proponents of same-sex marriage succeed in implementing their radical agenda, then pre-K-12 curricula in public schools will probably have to undergo significant modifications.

Curricular changes in this arena have already led angry parents to initiate litigation³⁴ and are likely to leave children confused, especially as some advocates of same sex-marriage wish to begin programming for children as young as in pre-schools, at a time when human sexuality is most certainly well beyond their developmental needs or grasp.³⁵

Young children who are exposed to state-mandated teaching that essentially legitimizes same-sex marriage by presenting it as one of an array of familial alternatives will probably suffer from confusion to the extent that they may well be exposed to ideas in school that they cannot fully comprehend. Further, ideas that children are exposed to in schools about same-sex marriage may well conflict with the values that they are learning at home, especially at a time when they are beginning to explore their own nascent sexuality. Of course, the author is not advocating that all revolutionary or unpopular ideas be presented in class. Rather, as discussed further below, while believing that the better course of events is for educators to think about deferring to reasonable parental requests on sensitive issues, school officials should develop responsible programs that take parental input into consideration.

To date, the judiciary has refused to permit school official to invite individuals to pray prior to the start of a graduation ceremony³⁶ or a teacher to read privately, and silently, a Bible in class while students were doing their own work for fear of exerting undue influence in shaping the ideas of children.³⁷ Due to purported judicial concerns over permitting educators to influence children unduly, one can only wonder why school officials should be regarded as any less capable of shaping the attitudes of students when providing unchallenged gay-friendly instruction on same-sex marriage to impressionable

young children who may not even grasp the import, or impact, of what they are being taught.

When reviewing the role of educators who expose children to ideas and material that might be considered controversial, both they and the courts have adopted an uneven approach. For example, the Supreme Court prohibited prayer at public school graduation ceremonies insofar as the state, through school officials, played a pervasive role in the process not only by selecting who would pray but also by directing the content of prayer; the Court also feared that such governmental activity could result in psychological coercion of students where the students were a captive audience who may have been forced, against their own wishes, to participate in ceremonies that they were not genuinely free to be excused from attending.³⁸ If the courts are truly concerned about the coercive authority of school officials, it is unclear why they would permit educators to create school environments that leave children susceptible to the same kinds of peer pressure from students who adopt contrary perspectives and who, since they may be in the “in crowd,” are capable of ostracizing those with whom they disagree with regard to same-sex marriage. Similarly, while admittedly dealing with religion rather than marriage and human sexuality, in *Engel v. Vitale*, its first ever prayer case, the Supreme Court reasoned that even absent overt pressure, placing the power, privilege, and support of the government *qua* school public systems behind particular points of view ran the risk of asserting indirect coercion on those who refuse to conform to the official position.³⁹ Given the Court’s purported concern that the state not be viewed as promoting a particular point of view, there should be no less reason to believe that fears about subtly

influencing, if not coercing, young children to adopt a particular perspective on same sex-marriage is any less warranted in the present day.

Any discussion over who should control the curriculum must begin⁴⁰ with *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary (Pierce)*,⁴¹ In *Pierce*, the Supreme Court struck down a compulsory attendance law from Oregon which would have required parents to compel their children, other than those needing what today would be described as special education, between the ages of eight and sixteen, to attend public schools. *Pierce* was filed by officials in two non-public schools, one religiously-affiliated and the other a non-sectarian military academy, who sought to avoid having their institutions forced out of business by asserting their property rights under the Fourteenth Amendment.

Ruling in favor of the non-public schools in the primary issue in *Pierce*, the Court held that the statute violated their due process rights by, in effect, trying to force them out of business. In addition, and more importantly for the focus of this paper, the Court found that since parents had the right to direct the upbringing of their children, state officials could not “unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁴² In determining that parents could satisfy the compulsory attendance law by sending their offspring to the non-public schools of their choice, the court unequivocally declared that “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.”⁴³

Unfortunately, since neither *Pierce* nor later case law on parental rights created a bright-line test that the judiciary or school officials could use when evaluating when, or

how-seriously, parental concerns should be weighed in curricular challenges, both have adopted what can be best described as an almost ad hoc “I know it when I see it”⁴⁴ approach. Further, it may be that setting a mechanistic standard in this challenging area could create more problems than it would solve for schools officials and the courts. Put another way, complications could arise as some parents might object to inappropriate material such as teaching young children about same-sex marriage while others might criticize instruction that does not comply with their potentially politically correct positions on topics such as environmental policy, politics, and history, especially as how it depicts war. The difficulty with creating such a standard notwithstanding, school officials should respectfully consider reasonable parental concerns, especially when they involve potential conflicts involving matters that have traditionally been left to the realm of child-rearing, while the courts should seek to create meaningful guidelines for educators.

Pierce takes on heightened significance in light of nascent conflicts that are being engendered as parents who do not support same-sex marriage and overly explicit teaching about human sexuality raise legitimate objections over having their children exposed to curricular materials on this topic that are not consistent with the values that are held in their homes. Of course, some educators and proponents of same-sex marriage might argue that in the state’s role as *parens patriae*, literally “father of the country,” under which legislatures have the plenary authority to enact reasonable laws for the welfare of their residents, school officials have the sole duty to direct the curriculum, refusing to consider, let alone defer, to parental wishes. However, almost fifty years after *Pierce*, in *Wisconsin v. Yoder*,⁴⁵ the Supreme Court decided that Amish parents were free not to

send their children to public schools beyond eighth grade because they would learn all that they needed in their home communities. In so ruling, the Court rejected the applicability of *parens patriae* to compulsory attendance even as it upheld the general principle that the state has the authority to regulate education.

One of the concerns about having same-sex marriage taught in public schools is that including such material in school curricula may tear at the fabric of society by causing inter-generational rifts as children are indoctrinated on points-of-view that are not consonant with the values of their parents. One of the most dramatic examples of inter-generational change, if not potential conflict, is reflected in some of the types of reading materials that young children are exposed to in schools.

Initially published in 1990, *Heather Has Two Mommies*,⁴⁶ and the discussion of how the birth mother was artificially inseminated by an anonymous donor in its original edition, has engendered both controversy and a spate of similar works.⁴⁷ Two other gay-friendly books, *Daddy's Roommate*,⁴⁸ which depicts gay relationships, and *King & King*,⁴⁹ which tells the story about the marriage of two princes, have also fostered significant controversy in their portrayals of gay, lesbian, bi-sexual, and transgendered (LGBT) lifestyles. In fact, after school officials in Massachusetts continued to use *King & King* in classes, parents of second grade⁵⁰ and kindergarten-aged⁵¹ children filed suit because they objected to their doing so. The suit was filed in the federal trial court in Massachusetts on April 27, 2006, and is making its way through the pre-trial process.⁵² It almost goes without saying that the outcome in this case may be a bellwether in future litigation over the use of such gay-friendly material in the face of parental concerns.

As well-intentioned authors of books such as *Heather Has Two Mommies* and proponents of same-sex marriage and LGBT lifestyles may be, since these activists are presenting issues on diversity of living arrangements for children, one can only imagine the confusion that runs through the minds of children. The confusion in the minds of children in pre-schools and early primary grades may be most troubling because they are being exposed to materials that discuss as intimate, and possibly medically complicated, a topic as artificial insemination, let alone sexual intercourse, often times without parental consent or input. In fact, since it is virtually inconceivable that young students can comprehend the process of artificial insemination, one can only wonder why educators, in their quest to impose their values on a captive audience, cannot recognize that parents might have legitimate concerns about the types of issues that their children are being taught in public schools.

Heather Has Two Mommies, *Daddy's Roommate*, and *King & King* could not be more different than the idyllic, if unrealistic and uncomplicated depiction of marriage and family life that many baby-boomers experienced in their formative years in the *Dick and Jane*⁵³ series readers. As conflict has arisen over the appropriate parameters that should be placed on sexuality education in public schools, the courts have aided educators in giving a radical new meaning to the common law concept *in loco parentis*, “literally, in place of the parent,” a legal construct that is based on presumed voluntary parental consent.⁵⁴ These conflicts have been heightened by judicial deference to school officials in the face of overly explicit, if not inappropriate, sexuality instruction⁵⁵ and surveys⁵⁶ in public schools, even when educators failed to comply with applicable statutory notice requirements before providing instruction of this nature.⁵⁷

In debates over the place, if any, of religion in public school curricula, courts have prohibited public readings from the Bible,⁵⁸ reached mixed results in disputes over elective courses on the Bible,⁵⁹ allowed students to organize religious clubs,⁶⁰ and prohibited prayer at graduation⁶¹ and extra-curricular activities.⁶² In these cases, critics often claim that religion has no place in a public school curricula or activities because it involves not only alleged violations of the Establishment Clause but also often because it might include teaching of (Christian) values whether directly or indirectly. Yet, nothing in the American legal tradition prohibits the teaching about religion,⁶³ or for that matter, by extension, religious values as long as the instruction is an objective presentation “about” rather than subjective inculcation “of” particular religious points of view.⁶⁴

Considering the content of books such as *Heather Has Two Mommies*, it is disingenuous at best to claim that they are value-free. If anything, the subject-matter of such gay-friendly books is every bit as value-laden as teaching that “Jesus Loves You.” Clearly, the debate is not so much about challenges to the teaching of values as it is over whose values should prevail, those of parents or activist groups. Moreover, an argument can be made that the use of books such as *Heather Has Two Mommies* is truly insidious because they seek to exert subtle influences over unsuspecting children, often without parental knowledge or consent, while purportedly acting under the guise of teaching about diversity and openness, even though many proponents of same-sex marriage demonstrate anything but when dealing with individuals and religious groups such as the Catholic Church⁶⁵ with which they disagree.

Litigation over the rights of parents has addressed whether limits should be placed on public school officials in their capacity to act *in loco parentis* or whether they have

used their authority to usurp parental authority, imposing their collective wills on children and their families. These disputes also give rise to concerns about the continuing viability of *in loco parentis* in light of compulsory attendance laws which require parents to send their children to school at the risk of punishment for noncompliance.⁶⁶ However, rather than engage in a discussion about the viability of *in loco parentis*, suffice it to say that this is a question in need of discussion at another time. Even so, when school officials implement highly sensitive material, they ought to take parental perspectives into consideration.

In implementing curricular changes on sensitive topics such as same-sex marriage, since they need to be mindful of respecting the parental right to direct the upbringing of their children, educators may wish to consider the following points.⁶⁷

First, school officials should resist pressure from political action groups that are not part of school communities. Put another way, insofar as outside groups lack what can be described as analogous to the legal concept of standing to the extent that they neither have children in nor are taxpayers in local school systems, educational leaders should focus on input from their real stakeholders, parents and community residents.

Second, in recognizing the paramount stake that parents have in the education of their children, school officials should engage in some form of consultation with them whether individually or through parent-teacher organizations in order to afford them the opportunity to express their opinions. This is a particularly significant point because at a time when educators often decry the lack of parental involvement in the education of their children, when it comes to the topic of human sexuality, these same officials suddenly seem to take an approach that parental input is at best superfluous. While

certainly not suggesting that parents should have the final say over the content of school curricula, one wonders how much educators can hope to accomplish if they ignore legitimate parental concerns about the nature and content of the instruction that their children receive about same-sex marriage and other sensitive topics.

Third, even in conceding that material about artificial insemination was removed from the second edition of *Heather Has Two Mommies*, educators that are determined to proceed with instruction on same-sex marriage should develop materials that are age-appropriate. While some discussion of same-sex marriage is undoubtedly inevitable, and perhaps even desirable, in courses on human sexuality, inappropriate discussions may cause more harm than good, especially if they lead to misperceptions about sexuality in the minds of young, impressionable students. In addition, considering that young children, especially those in pre-schools and early primary grades, may not understand material about same sex-marriage and human sexuality, prudence dictates that educators present them with subject matter that they can comprehend and in a manner that respects legitimate parental concerns.

Fourth, educators should consider permitting parents to opt-out based on religious, and perhaps other, grounds. Alternatively, officials that are determined to proceed with instruction in the face of opposition to teaching about same-sex-marriage might offer programs that covering the material in a less controversial format or that permits other perspectives to be voiced. Treating parents as partners may not only generate additional support for the aims of public schools but may also translate into increased student achievement by ensuring that parents are more actively involved in the education of their children. While readily conceding that decision-making must remain in

the hands of educational leaders, and that there is no guarantee that they will eliminate all risk of controversy with parents, it would be a significant step in the direction of conflict avoidance if educators responded appropriately to legitimate parental concerns.

In the midst of controversy over what can, or should, be taught in classes on sexuality education, including subject matter on same-sex marriage, parents may well be “talking with their feet,” placing their children in educational environments that are consonant with their beliefs. This movement is reflected in significant growth of Christian schools, which, as part of the non-public school network in the United States, has outpaced enrollment gains in public schools since 1989⁶⁸ and is expected to continue to do so through 2014;⁶⁹ this same report does not take into account the more than one million children who are home schooled, often due to parental concerns over the treatment of religion and issues and associated with values formation in public schools.⁷⁰ The large growth of Christian, mostly Evangelical, schools is replenishing, if not replacing, the strong, albeit diminished, presence of Roman Catholic schools in the religiously-affiliated non-public school community.⁷¹

As a sign of the growing tension and dissatisfaction with the direction of public education, some Evangelical Christian leaders are encouraging parents to remove their children from public schools over a number of issues including the use of gay-friendly curricular materials.⁷² Considering how long and well public education has served the United States, reports of this type, coupled with the national data that were reviewed in the previous paragraph, should give educational leaders, policy makers, and politicians reason to pause in recognition of the fact that many parents are both vocally expressing

their dissatisfaction with curricular modifications that support gay-friendly programming and same-sex marriage while also taking steps to act on the courage of their convictions..

In a final point in the discussion over curricular control and same-sex marriage, perhaps the most highly visible example of how proponents of GLBT lifestyles are seeking to influence the education of children,⁷³ admittedly this time through the legislative rather than judicial process, played itself out in California late in the summer of 2007. After amending an earlier version of a controversial bill that would have required public school curricula to reflect the contributions that gays and lesbians had made to American society despite significant opposition and the threat of a gubernatorial veto,⁷⁴ a later version of the bill,⁷⁵ which forbade discrimination that might have adversely reflected on people because of their sexual orientation, passed both chambers of the California legislature.⁷⁶ Following Governor Arnold Schwarzenegger's making good on his promise to veto the bill, because it "attempt[ed] to offer vague protection when current law already provides clear protection against discrimination in our schools based on sexual orientation),"⁷⁷ it will be interesting to observe whether its sponsor acts on her promise of pursuing future legislative action.

Conclusion

While it is not yet inevitable, it appears that in the face of current trends, absent swift legislative action, coupled with voter initiatives, to blunt an expected onslaught of judicial activism, same-sex marriage may soon become a reality. It is one thing to share in the American belief that all persons are entitled to basic respect and dignity as persons regardless of their sexual orientations. However, it is something altogether different to

espouse the view that a relationship between two persons of the same sex be accorded the same legal status of marriage.

When debating the propriety of recognizing same sex unions as marriages, a story attributed to President Lincoln over the fact that words have meaning is instructive. Amid debate, and his own concerns over his authority to emancipate slaves under the War power, “he used to liken the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied ‘five,’ to which the prompt response was made that calling the tail a leg would not make it a leg.”⁷⁸ Analogously, while advocates may wish to describe gay unions as marriage, since they do not fit the traditional definition as a union between one man and a woman calling such arrangements marriages simply should not make them so.

Notes

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1. B.A., 1972, St. John's University; M. Div., 1978, Seminary of the Immaculate Conception; J.D., 1983, St. John's University; Ed.D., 1989, St. John's University. Panzer Chair in Education and Adjunct Professor of Law, University of Dayton. The author would like to express his thanks to Drs. David Dolph, (Rev.) Joseph Massucci, and A. William Place at the University of Dayton, Dr. Ralph Sharp at East Central (OK) University, (Rev.) Dr. Paul Babie at the University of Adelaide, Australia, and Mr. William E. Thro, Solicitor General, Commonwealth of Virginia for the useful and insightful comments on drafts of this manuscript.
 2. Genesis 2.24. The same quote also appears at Matthew 19.5-6, Mark 10.7-8, and Ephesians 5.31. A similar version can be found at 1 Cor. 6.16.
 3. *See, e.g.*, the Seventh and Ten Commandments, respectively: “Thou shalt not commit adultery.” “Thou shalt not covet thy neighbor’s house, thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbor’s.”
 4. *See, e.g.*, the OXFORD ENGLISH DICTIONARY where sample use 1.a. reads: “The condition of being a husband or wife; the relation between persons married to each other; matrimony.” www.oed.com
 5. For a discussion of some of these issues, *see, e.g.*, Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221 (2002); Judith E. Koons, “*Just Married?: Same-Sex Marriage and a History of Family Plurality*,” 12 MICH. J. GENDER & L. 1 (2005); Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005).
 6. *See, e.g.*, *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that limiting the protections, benefits, and obligations of marriage to individuals of opposite sexes lacked a rational basis in violation of the commonwealth’s equal protection principles); *In Re Same-Sex Marriage*, 2004 WL 2749380 (Canada 2004), 2004 SCC 79, [2005] (finding that the federal government’s proposed act to accord same-sex couples the ability to marry was both within Parliament’s exclusive legislative competence and consistent with the Canadian Charter of Rights and Freedoms). *See also Lawrence v. Texas*, 539 U.S. 558 (2003) (interpreting a statute that made it a crime for two persons of the same sex to engage in specified intimate sexual conduct as unconstitutional as applied to adult males who participated in a consensual act of sodomy in the privacy of their home).
But see Hernandez v. Robles, 2006 WL 1835429 (N.Y. 2006) (rejecting arguments from gay and lesbian plaintiffs that their inability to obtain marriage licenses violated their rights); *Perdue v. O’Kelley*, 632 S.E.2d 110 (Ga. 2006) (ruling that a state constitutional amendment adopted by voters, barring the

-
- recognition of same-sex marriages, did not violate the constitutional prohibition of multiple subjects in proposed constitutional amendments submitted to voters).
- 7 For histories and the background on same-sex marriage, *see, e.g.*, Katherine M. Franke, *The Politics of Same-Sex Marriage*, 15 COLUM. J. GENDER & L. 236 (2006); Charles P. Kindregan, *Same-Sex Marriage: The Cultural Wars and Lessons of Legal History*, 38 FAM. L. Q. 427 (2004); William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993);
 - 8 *See, e.g.*, Jeremiah H. Russell, *The Religious Liberty Argument for Same-Sex Marriage and its Effects Upon Legal Recognition*, 7 RUTGERS J. L. & RELIGION 4 (2005); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995).
 - 9 *See, e.g.*, Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe?"* 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587 (1996); Gerald V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729 (2000); Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001); Kevin J. Worthen, *Who Decides and What Difference Does it Make: Defining Marriage in "Our Democratic Federal Republic,"* 18 BYU J. PUB. L. 273 (2004); Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569 (2004).
 - 10 The seminal case in this area is *Pierce v. Society of Sisters (Pierce)*, 268 U.S. 510 (1925). For a more detailed discussion of *Pierce*, *see* note 41 *infra* and accompanying text.
 - 11 In FEDERALIST NO. 78, at 465 (Clinton Rossiter, ed., 1962), Alexander Hamilton wrote that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure . . . because it has neither FORCE NOR WILL [sic] but merely judgment" He added that "there is no liberty if the power of judging be not separated from the legislative and executive powers" *Id.* at 466. Yet, over the past century, the Supreme Court has fit anything but these descriptions.
For a discussion of the role of the court as the least democratic branch, *see* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed 1986).
 - 12 Compare the results from Massachusetts with those from New York and Georgia, *supra* note 6.
 - 13 *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

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- 14 For a brief discussion of judicial activism generally, especially as it relates to education, *see* Charles J. Russo, *In the Eye of the Beholder: The Supreme Court, Judicial Activism, and Judicial Restraint*. SCHOOL BUSINESS AFFAIRS, October 2005, at 47-50.
- 15 Massachusetts is the only jurisdiction that grants marriage licenses to same-sex couples. Four other states, New Jersey, New Mexico, New York, and Rhode Island, as well as the District of Columbia, have no explicit laws prohibiting same sex marriages.
Human Rights Campaign, Statewide Marriage Laws,
[http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm &ContentID=19449](http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449) This web-site has not required an update since July 2006.
- 16 Human Rights Campaign, Statewide Marriage Laws,
[http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm &ContentID=19449](http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449)
- 17 For a discussion of Christophobia, *see* GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* (2006, paperback edition), at 19, 72-77.
18. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (striking down student-led prayer prior to the start of a high school football game).
- 19 In a particularly egregious example of antipathy for Christian, specifically Roman Catholic, beliefs and sensitivities, on December. 10, 1989, members of the radical gay group ACT-UP chained themselves to pews in St. Patrick's Cathedral and shouted down Cardinal O'Connor at a Sunday Mass before others "received" the Eucharist but spat it out and desecrated the Sacrament by stepping on the hosts. One can only wonder what kind of outrage this behavior might have stirred had it occurred in a house of worship of some other faith. *See* Mike Dorning, *Animosity Over Gays Threatens St. Pat Parade: New York's Irish March will go on, But Sexual Minority Plans a Protest*, CHICAGO TRIBUNE, March 15, 1993, at 1, 1993 WLNR 4062014. Interestingly, the purported "newspaper of record" in New York City, the *Times*, did not report on this highly insensitive incident. *See, e.g.*, Bruce Weber, *Tangle of Issues in St. Patrick's Brouhaha*, N.Y. TIMES, March 16, 1992, at B3, 1992 WLNR 3351573; Sam Roberts, *One More Time, With Turmoil: True to Tradition. St. Patrick's Marchers Face Controversy*, N.Y. TIMES, March 17, 1993, at B1, 1993 WLNR 3367862.
- 20 Keeping in mind the dicta from Mark Twain, who was quoting Benjamin Disraeli, that "there are three kinds of lies: lies, damned lies, and statistics," Mark Twain's

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- Autobiography 246 (1924), the data are revealing. After increasingly rapidly during the 1970s and 1980s the rate of divorce in the United States stabilized in the 1990s but remains at roughly 50% BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 5, 10 (2004). For links to these statistical reports and other sources, see <http://www.divorcereform.org/rates.html> See also U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORTS, Vol. 52, No. 22 (June 10, 2004), http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf. (reporting that since the marriage rate in 2003 was 7.5 per 1,000 and the divorce rate was 3.8 per 1,000, there was almost one divorce for every two as marriages in the United States; this is consistent with the two previous years, 2001 and 2002, which reported the marriage and divorce rates as 7.8 and 8.2 marriages and 4.0 and 4.0 divorces respectively). For a comprehensive report on this topic, relying on data from 1995, see U.S. DEP'T OF HEALTH & HUMAN SERV., COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES, VITAL AND HEALTH STATISTICS, July 2002, at 1, 22, available at <http://purl.access.gpo.gov/GPO/LPS22381>.
- 21 The federal government has made data available on cohabitation since 1995 and in its statistical tables since 1996. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003 at 12 (2004).
- 22 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003 at 7 (noting that the number of single-mother families increased from 3,000,000 in 1970 to 10,000,000 in 2003 while the number of families headed by single fathers in the same time frame increased from less than a half of a million to 2,000,000).
- 23 See, e.g., Wardle, *supra* note 9; Teresa Stanton Collett, *Civil Unions in Vermont: Where to go from Here? A Symposium Addressing the Impact of Civil Unions*, 11 WIDENER J. PUB. L. 379 (2002); MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006). This report, also known as the Princeton Report, the result of scholarly discussions initiated by the Witherspoon Institute in 2004. Available on line at www.princetonprinciples.org
- 24 MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006) at 12.
- 25 268 U.S. 510 (1925). For a more detailed discussion of *Pierce*, see note 41 *infra* and accompanying text.
- 26 *Id.* at 535.
- 27 *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (striking down racial segregation in public education).

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- 28 *See, e.g.*, ALA. CODE ANN. § 16–28–7; CAL. EDUC. CODE § 48200; DEL. CODE ANN. tit. 14 § 2702; GA. CODE ANN. § 20–2–690.1; 105 ILL. COMP. STAT. ANN. 5/26–1; KY. REV. STAT. ANN. § 159.010; MD. CODE ANN., EDUC. § 7–301; MASS. GEN. LAWS ch. 76, § 1; N.J. STAT. ANN. § 18A:38–25; N.Y. EDUC. LAW § 3205; OHIO REV. CODE ANN. § 3321.01; OKLA. STAT. ANN. tit. 70, § 10–105; 24 PA. CONSOL. STAT. ANN. § 13–1327; TEX. EDUC. CODE ANN. § 25.085; WIS. STAT. ANN. § 118.15.
- 29 Despite some differences as opinion as to why, the National Education Association (NEA), the largest union of public school teachers in the United States, did not endorse same-sex marriage. *See* Ginger Tinney, *Teachers union fails members*, OKLAHOMAN, Aug. 11, 2006, at 13A, 2006 WLNR 14045762 (noting that the NEA “back[ed] off endorsing same sex marriage at its July convention in Orlando, Fla. However, a resolution did encourage tolerance of homosexual lifestyles in civil unions and marriages (in states that have approved it). The intent is clear. OEA/ NEA focuses on spreading gay marriage instead of finding ways to improve our schools.”). *But see* John W. Sparks, *Teachers group offers faith help for classroom*, Memphis Commercial Appeal (TN), July 15, 2006, at A1, 2006 WLNR 12306518 (reporting that “The NEA said in a statement that it “has no plans to endorse same sex marriage and never did.”).
- 30 *Grutter v. Bollinger*, 539 U.S. 206, 372 (2003) (Thomas, J., dissenting) (upholding racial preferences in law school admissions).
- 31 The courts have recognized distinctions between students in pre-K-12 and higher education. *Compare Lee v. Weisman*, 505 U.S. 577 (1992) (striking down prayer at graduation since the state, through school officials, played a major role in the by selecting who would pray and by directing the content of prayer; adding the fear that governmental activity could result in psychological coercion of students who the Justices viewed as members of a captive audience that may have been forced, against their wishes, to participate in ceremonies that they were not genuinely free to be excused from attending). *with Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997); *Chaudhuri v. State of Tenn.*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (upholding graduation prayers at universities because they did not involve young students and attendance in higher education is voluntary).
32. *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 125 S. Ct. 2722, 2747 (2005) (striking down a public display of the Ten Commandments at a courthouse) (O’Connor, J., concurring). The full quote reads “we do not count heads before enforcing the First Amendment.”
- 33 In *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (Thomas, J., dissenting) (permitting a religious group to use public school facilities), Justice Thomas made this point in warning that the Court is unwilling “. . . to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a

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- group's religious activity can be proscribed on the basis of what . . . members of the audience might misperceive.”).
- 34 Jeff Vaznis, *Lawsuit Invokes Religious Freedom: Parents Say Beliefs Ignored by School*, BOSTON GLOBE, May 4, 2006, at 1, 2006 WLNR 7704418 (reporting that parents sued the school system alleging that including discussions about homosexuality violated their religious beliefs that homosexual behavior is immoral).
- 35 *Educators say the pre-school set needs straight talk on gay issues*. BAY WINDOWS, NEW ENGLAND'S LARGEST LGBT NEWSPAPER. June 22, 2006 (calling for the creation of age and developmentally appropriate instruction on gay, lesbian, bi-sexual, and transgendered issues. Available at <http://www.baywindows.com/ME2/dirmod.asp?sid=&nm=&type=Publishing&mod=Publications::Article&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=BDF1272D78F344BE8CD79B483A72D327>
- 36 *Lee v. Weisman*, 505 U.S. 577 (1992).
- 37 *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir.1990), *cert. denied*, 505 U.S. 1218 (1992).
- 38 In *Lee v. Weisman*, 505 U.S. 577, 593 (1992), the Court maintained that: “Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.” (internal citations omitted).
- 39 *See Engel v. Vitale*, 370 U.S. 421, 431 (1962) (striking down prayer at the start of the school day) (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.”).
- 40 Two years earlier, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court invalidated a prohibition against teaching a foreign language in grades lower than the ninth under which a teacher in a non-public school was convicted of teaching German. The Court rejected the statute's purported goal of promoting civic development by “inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and ‘that the English language should be and become the mother tongue of all children reared in this state.’” *Id.* at 401. In maintaining that the statute limited the rights of modern language teachers to teach, of students to gain knowledge, and of parents to control the education of their children, the Court emphasized that there was no showing of harm that the state had the right to prevent. The Court added that no emergency had arisen that rendered the knowledge of a language other than English to be so clearly harmful as to warrant its prohibition. While not

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- directly addressing the rights of parents to direct the educational upbringing of their children, the Court conceded that it did not question the state's power over the curriculum in public schools, focusing instead on the teacher's constitutional right to pursue an occupation not contrary to the public interest.
- 41 268 U.S. 510 (1925).
- 42 *Id.*, at 534-535.
- 43 *Id.* at 535.
- 44 In *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), a case dealing with hard-core-pornography, Justice Potter Stewart wrote: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."
- 45 406 U.S. 205 (1972).
- 46 LESLEA NEWMAN, *HEATHER HAS TWO MOMMIES* (1990) (telling the story of a pre-school child with two "mothers" who discovers that some of her friends have different sorts of families). *See also Editorial, Teaching About Gays and Tolerance*, N.Y. TIMES, Sept. 27 1992, 1992 WLNR 3292103 (noting that *Heather Has Two Mommies* was included in the curriculum for first graders in New York City's public schools).
For a more detailed account of the controversy in New York City, *see* Josh Barbanel, *Under 'Rainbow,' a War: When Politics, Morals and Learning Mix*, N.Y. TIMES, Dec. 27, 1992, 1992 WLNR 3296006 (detailing how one local board in New York City refused to allow gay and lesbian relationships to be discussed in classes).
- 47 For the only reported case involving a challenge to *Heather Has Two Mommies* and *Daddy's Roommate* in a public library, albeit in a non-school context, *see Sund v. City of Wichita Falls, Tex.*, 121 F. Supp.2d 530 (N.D. Tex. 2000) (enjoining enforcement of a city resolution that granted card holders of a public library the right to have these books moved from children's area to the adult section on the basis that it violated patrons' First Amendment rights to receive information, the library was a "limited public forum," the resolution was an improper delegation of governmental authority to private citizens under state law, and the patrons' First Amendment right to receive information would have been irreparably injured if they were denied the permanent injunction).
- 48 MICHAEL WILLHOITE, *DADDY'S ROOMMATE* (1990) (depicting a gay relationship).

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- 49 KING & KING, LINDA DE HAAN & STERN NIJLAND (2002) (depicting the marriage of two princes). This book led to a sequel, KING & KING & FAMILY, LINDA DE HAAN, STERN MIJLAND, & STERN NIJLAND (2004)
- 50 Tracy Jan, *Parents Rip School Over Gay Storybook*, BOSTON GLOBE, April 20, 2006, at B1, 2006 WLNR 6606392 (reporting that parents of a second-grade child protested after the son's teacher read a fairy tale about gay marriage to the class without giving them advanced notice). *See also Boy Allegedly Beaten Over Gay Rights Issue*, BOSTON GLOBE, June 15, 2006, at B2, 2006 WLNR 10303728 (reporting that the one of the parents who filed a federal suit against his local public schools over classes in which homosexuality was discussed claimed that his first-grade son was beaten up during recess by a group of eight to 10 pupils on the second anniversary of the legalization of same-sex marriages in Massachusetts). *But see* Maria Sacchetti, *Official Says Father's View of Gays Didn't Spark Fight*, BOSTON GLOBE, June 20, 2006, at B 2, 2006 WLNR 10665659 (reporting that school officials denied assertions that the child was beaten because of his father's views, claiming that it was over where students would sit in the school's cafeteria).
- 51 *NEWS in Brief; Dad dodges school rap in flap over gay topic*. BOSTON GLOBE, Oct. 21, 2005, at 14, available on line, 2005 WLNR 17089605 (reporting that prosecutors agreed to drop the charges against a father who refused to leave school after demanding that officials notify him before any discussion of homosexuality in his son's kindergarten class).
- 52 *Parker v. Hurley*, 1:06-CV-10751 (current through Aug. 25, 2006).
- 53 For representative discussions of this series, *see, e.g.*, Allan Luke, *Making Dick and Jane: Historical Genesis of the Modern Basal Readers*, 89 TEACHERS COLLEGE RECORD 91-116 (1987); Richard L. Mandel, *Children's Books: Mirrors of Social Development*, 64 ELEMENTARY SCH. J. 190-199 (1964).
- 54 *State ex rel. Burpee v. Burton*, 45 Wis. 150 (Wis.1878). *But see* W.Va. Code § 18A-5-1
“(a) The teacher shall stand in the place of the parent(s), guardian(s) or custodian(s) in exercising authority over the school and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes”
- 55 *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 529 (1st Cir.1995), *cert. denied*, 516 U.S. 1159 (1996) (refusing to prohibit a highly explicit program in a high school even where parents alleged that the presenter “1) told the students that they were going to have a ‘group sexual experience, with audience participation,’ 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex;

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- 4) simulated masturbation; 5) characterized the loose pants worn by one minor as "erection wear"; 6) referred to being in "deep sh--" after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his "orgasm face" with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a "nice butt"; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.)
- 56 *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1202, n. 3 (9th Cir. 2005), cert. Petition filed, No. 06–300 (Aug 28, 2006) (parents unsuccessfully challenged educators who distributed surveys to first, third, and fifth grade students which asked questions such as “8. Touching my private parts too much; 17. Thinking about having sex; 22. Thinking about touching other people's private parts; 23. Thinking about sex when I don't want to; 44. Having sex feelings in my body; 47. Can't stop thinking about sex 54. Getting upset when people talk about sex.” *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 168-169 (3d Cir. 2005) (parents unsuccessfully challenged questionnaires that were distributed to their children in grades seven through twelve that contained questions related to sex, including “have you ever had sexual intercourse (‘gone all the way,’ ‘made love’),” . . . and “when you have sex, how often do you and/or your partner use a birth control method such as birth control pills, a condom (rubber), foam, diaphragm, or IUD.”
- 57 *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir.1995), cert. denied, 516 U.S. 1159 (1996).
- 58 See, e.g., *School District of Abington Township (Abington) v. Schempp and Murray v. Curlett*, 374 U.S. 203 (1963) (striking down reading verses from the Bible prior to the start of class on the basis that doing so lacked a secular legislative purpose and a primary effect that advanced religion). See also *Roberts v. Madigan*, 921 F.2d 1047, 1049 (10th Cir.1990), cert. denied, 505 U.S. 1218 (1992) (preventing a teacher from silently reading a Bible during class time).
- 59 See, e.g., *Doe v. Human*, 725 F. Supp. 1503 (W.D. Ark.1989), aff'd, 923 F.2d 857 (8th Cir.1990), cert. denied, 499 U.S. 922 (1991) (affirming the unconstitutionality of a program that permitted students to leave their regular classrooms to learn about the Bible in voluntary sessions that took place during regular school hours); *Herdahl v. Pontotoc County School Dist.*, 933 F. Supp. 582 (N.D. Miss.1996) (prohibiting a school board from offering a Bible-study course that was taught in a rotation with music, physical education, and library classes); *Gibson v. Lee County School Bd.*, 1 F. Supp.2d 1426 (M.D. Fla. 1998) (permitting a board to offer a class on the Old Testament but enjoining one on the New Testament based on its belief that the plaintiffs were likely to prevail on the merits of their claim that it violated the Establishment Clause); *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004) (affirming that a school board’s fifty-one year practice of permitting students from a local Christian college to teach weekly religion classes

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- that presented the Christian Bible as religious truth during the regular school day violated the Establishment Clause).
- 60 *See, e.g., Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (upholding the constitutionality of the Equal Access Act, a federal statute that permits student organized prayer and Bible study clubs to meet in public schools during non-instructional time).
- 61 *Lee v. Weisman*, 505 U.S. 577 (1992).
- 62 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
- 63 For an interesting discussion of the intersection between law and religion, *see* HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993).
- 64 *See Abington*, 374 U.S. 203, 225 (1963):
“It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”
See also id. at 300, adding that “[t]he holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history” (Brennan J., concurring).
- 65 *See* note 19 *supra*.
- 66 *See, e.g., Eukers v. State*, 728 N.E.2d 219 (Ind. Ct. App. 2000) (upholding the conviction of a mother for violating a compulsory attendance law where her child exceeded the limit of absences at school).
- 67 Points two through four in this discussion are adapted from Charles J. Russo & William E. Thro (2006). *Parents, Educators, and the Courts: Who Directs the Education of Students?* *SCHOOL BUSINESS AFFAIRS*, Aug. 2006, 39-41 (discussing the cases cited in notes 55-57, *supra*).
- 68 *The Condition of Education 2006, Indicator 4, Trends in Private School Enrollment*. NATIONAL CENTER FOR EDUCATION STATISTICS, 2006. Also available at http://nces.ed.gov/programs/coe/2006/pdf/04_2006.pdf
- 69 *Projections of Education Statistics to 2014. Appendix A: Projection Methodology: Enrollment*. NATIONAL CENTER FOR EDUCATION STATISTICS 2006.
http://nces.ed.gov/programs/projections/app_a1.asp
See also <http://nces.ed.gov/fastfacts/display.asp?id=65> (“Public secondary enrollment is projected to rise through 2007, and then decline. Overall, school enrollment is projected to set new records every year from 2006 until at least 2014, the last year for which NCES has projected school enrollment.”)

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- 70 *The Condition of Education 2006, Indicator 4, Trends in Private School Enrollment.* NATIONAL CENTER FOR EDUCATION STATISTICS 2006. Also available at http://nces.ed.gov/programs/coe/2005/pdf/03_2005.pdf
- 71 *Private School Enrollment: Percentage distribution of private school students in kindergarten through grade 12, by school type: 1989–90 and 2003–04,* NATIONAL CENTER FOR EDUCATION STATISTICS 2006
<http://nces.ed.gov/programs/coe/2006/charts/chart04.asp?popup=true>
- 72 David Crary, *Public Schools take heat*, DESERET NEWS, Sept. 5, 2006, at CO2, 2006 WLNR 15373867.
- 73 *See, e.g., Wyatt Buchanan, Bill would include gays in public school tests: Plan will reignite debate over who controls curricula.* SAN FRANCISCO CHRONICLE (CA), April 16, 2006, at B1, 2006 WLNR 637270.
- 74 *See, e.g., Jim Sanders, Kuehl guts her gay education bill: Veto threat forced an overhaul, but senator sees progress on rights.* SACRAMENTO BEE (CA), Aug. 8, 2006, at A3, 2006 WLNR 1374512. Andy Furillo & Judy Lin, *Gay school bill in trouble: Spokesman says the governor plans to veto curriculum measure, but Kuehl insists it can still pass,* SACRAMENTO BEE (CA), May 25, 2006, at A3, 2006 WLNR 9047698.
- 75 2005 Cal. S.B. 1437; 2005 Cal. A.B. 606.
- 76 The Assembly approved the bill by a 47 to 31 vote on August 21, 2006 while the Senate did the same, by a margin of 22 to 15 on August 29, 2006. 2005 AS S.B. 1437 (NS). Jim Sanders, *Controversial gay-rights bill OK'd: Measure would ban demeaning actions in public schools,* SACRAMENTO BEE (CA), Aug. 22, 2006, at A3, 2006 WLNR 14555020; Mike Zapler, *Bill banning anti-gay speech in schools advances Assembly, unsure of Schwarzenegger's stance on measure, shows approval with 46-31 vote along partisan lines,* CONTRA COSTA TIMES (WALNUT CREEK, CA), Aug. 22, 2006, at F4, 2006 WLNR 14507103; Judy Lin, *Gay equality bill advances,* SACRAMENTO BEE (CA), Aug. 30, 2006, page unavailable on-line, 2006 WLNR 15039852.
- 77 Judy Lin, *The governor says current law prohibits bias based on sexual orientation, but the bill's author says the battle's not over: School measure on gays vetoed.* SACRAMENTO BEE (CA), Sept. 7, 2006, at A3, 2006 WLNR 15555087. *See also* Greg Lucas, *Sacramento: Governor vetoes gay teaching measure He says current laws guard against discrimination,* SAN FRANCISCO CHRONICLE (CA), Sept. 7, 2006, at B4, 2006 WLNR 15481301).
- 78 COL. ALEXANDER K. MCCLURE, LINCOLN'S YARNS AND STORIES (1980) at 323. Another version of this story has Lincoln speaking about a dog rather than a calf. *See, e.g.,* John Thorn, <http://thornpricks.blogspot.com/> Dec. 2, 2005 "What's in a Name?"