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SAME-SEX MARRIAGE AND PUBLIC SCHOOL CURRICULA: PRESERVING PARENTAL RIGHTS TO DIRECT THE EDUCATION OF THEIR CHILDREN

Charles J. Russo[*]

Therefore a man shall leave his father and his mother and be joined to his wife, and the two shall become one flesh.[1]

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,[2] marriage has been defined as a union between one man and one woman.[3] Moreover, even though polygamy, polyandry, and open marriage have occasionally been in vogue,[4] 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 judicial[5] activists, talk of same-sex marriage has been wide-spread in recent years, especially in academic journals, the popular press, and media.

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[1] Genesis 2:24. The same quote also appears at Matthew 19:5-6, Mark 10:7-8, and Ephesians 5:3; a similar version appears at 1 Corinthians 6:16.

[2] *See e.g.* the Seventh and Tenth Commandments, respectively: "Thou shalt not commit adultery" and "[t]hou 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." Exodus 20:1-7; Deuteronomy 5:1-22.

[3] *See e.g.* Oxford English Dictionary, *Marriage*, http://dictionary.oed.com/cgi/entry/00302422?query_type= (revised March 2000) (the definition reads, "The condition of being a husband or wife; the relation between persons married to each other; matrimony.").

[4] 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 S.D. L. Rev. 1023 (2005).

[5] *See Goodridge v. Dept. 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] S.C.R.

At the outset, it is important to address four important delimitations in this essay. First, in supporting what is now euphemistically referred to as *traditional* marriage, thereby distinguishing it from unions between members of the same sex, this essay 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.[6] Rather, since there is no reason to modify marriage as it has been lived through the ages as the basis of civil society, the author respects those whose ideas differ, but disagrees with their point of view. Further, the author believes that while all persons are entitled to full respect and human dignity regardless of their sexual orientations, it is something altogether different to espouse the view that relationships between two persons of the same sex should be accorded the same legal status of marriage.

Put another way, this essay adopts a position that is consistent with the teachings of the Roman Catholic Church[7] and mainline Christian churches[8] through the centuries in accepting the Augustinian notion of "loving the sinner but hating the sin,"[9] recognizing a distinction between

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79 (finding that the federal government's proposed act to afford 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); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state statute that made it a crime for two persons of the same sex to engage in specified intimate sexual conduct as unconstitutional when applied to adult males who participated in a consensual act of sodomy in the privacy of their home); *but see Hernandez v. Robles*, 821 N.Y.S.2d 770 (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). The Roman Catholic Bishops in the United States, while seeking to be more welcoming, recently reiterated the Church's opposition to gay marriage. Manya A. Brachear, *Catholic Bishops Issue Guidelines for Ministering to Gays*, Chicago Tribune (Nov. 14, 2006) (available at 2006 WLNR 19796881).

[6] For such a radical perspective, see beyondMarriage.org, *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, http://beyondmarriage.org/full_statement.html (July 26, 2007), a statement released by "lesbian, gay, bisexual, and transgender (LGBT) and allied activists, scholars, educators, writers, artists, lawyers, journalists, and community organizers [who] seek to offer friends and colleagues everywhere a new vision for securing governmental and private institutional recognition of diverse kinds of partnerships, households, kinship relationships and families. In so doing, [they] hope to move beyond the narrow confines of marriage politics as they exist in the United States today."

[7] The Roman Catholic Bishops in the United States, while seeking to be more welcoming, recently reiterated the Church's opposition to gay marriage. Brachear, *supra* n. 65.

[8] *See* Alan Cooperman & Peter Whoriskey, *Catholic Bishops Take Stand Against Gays*, Washington Post (Nov. 15, 2006) (available at 2006 WLNR 19792593) (noting that in addition to the action of the Roman Catholic Bishops, two other Christian groups, the largest Baptist group in North Carolina and the Presbyterian Church (U.S.A.) were active in this area). The article reports that the Baptists in North Carolina "moved to expel any congregation that condones homosexuality," while the Presbyterians "will put a minister on trial for conducting a marriage ceremony for two women." *Id.*

[9] The entire quote reads:

> It is clear, then, that the man who does not live according to man but according to God must be a lover of the good and therefore a hater of evil; since no man is wicked by nature but is wicked only by some defect, a man who lives according to God owes it to the wicked men that his hatred be perfect, so that, neither hating the man because of his corruption nor loving the corruption because of the man, he

people as individuals and what they do in the privacy of their own homes. Even so, a second delimitation of this paper is that it generally does not enter into a theological discussion about the propriety of same-sex marriage, limiting itself to a review of its impact on education.

Third, this essay is aware of the judicial trend toward legalizing domestic partnerships, civil unions, or whatever they may be called, as reflected in the recent decision of the Supreme Court of New Jersey,[10] a controversy that is likely to be resolved by the Supreme Court or a federal constitutional amendment.[11] Arrangements that arguably stop short of full recognition as marriage are designed to afford homosexual (and presumably for that matter, heterosexual) couples the opportunity to form essentially contractual relationships to, for example, extend health benefits to partners and/or to pass on property via wills and other testamentary transactions.

The significance of the decision from New Jersey, insofar as the court couched its judgment in terms of equal protection under the state constitution, describing the different treatment of homosexual and heterosexual couples as a form of discrimination, is that it may open the door to eventual full judicial recognition of same-sex marriage either in that state or others. At the same time, even though some might suggest, not without reason, that permitting domestic partnerships would create a *slippery slope* that may embolden supporters of same-sex marriage to make an all out push to afford it the same legal status of *traditional* marriage and thus, entitling such partnerships to full recognition in all states under the Full Faith and Credit Clause,[12] such a discussion is beyond the scope of this essay.

Fourth, this essay does not follow the same line of inquiry as those who have written legal histories[13] and addressed related aspects in support of[14] or in opposition to[15] same-sex marriage. Instead, by touching on these

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> should hate the sin but love the sinner. For, once the corruption has been cured, then all that is left should be loved and nothing remains to be hated.

St. Augustine, *City of God* 304 (Walsh et. al. trans., Image Books 1958). The actual passage in Latin, *cum dilectione hominum et odio vitiorum*, literally translates to *With love for mankind and hatred of sins*. *See Patrologiae Latinae* vol. 33, Letter 211, at col. 962 (J.P. Migne trans., 1865). While St. Augustine's sentiment is certainly consistent with the teachings of Jesus, no such quote is in the New Testament.

[10] *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

[11] For a discussion of the status of proposed constitutional amendments on marriage, see *infra* note 105.

[12] According to U.S. Const. art. IV, § 1, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

[13] For histories and the background on same-sex marriage, see 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).

[14] *See* 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. Policy. 215 (1995).

topics only as they impact its major theme, this essay 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 rights of parents to direct the educational upbringing of their children.

This essay supports traditional marriage in defending the long-recognized parental right to direct the education of their children.[16] This essay defends the rights of parents, partially in response to educators in public schools who, spurred on by activists, over-step their authority. Many educators have engaged in what might essentially be described as *ultra vires* activity by attempting to implement major social transformation through the introduction of teaching that borders on proselytizing in support of the acceptability of same-sex marriage, as part of a larger gay-friendly agenda, to unsuspecting, impressionable children. Additionally, in seeking to safeguard the right of parents to object to curricular initiatives in public schools with which they disagree, the author expresses his serious concern about the approach that proponents of same-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. In this regard, it should be troubling to all that proponents of same-sex marriage have relied on "the least democratic of the branches"[17]—the courts—albeit with mixed results,[18] to accomplish goals that they could not otherwise have achieved through the political process.

As reflected in litigation in Massachusetts[19] and New Jersey, the inability of its advocates to rely on political, rather than judicial,[20] activism

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[15] *See* Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe?"* 10 Notre Dame J. L. Ethics & Pub. Policy 587 (1996); Gerald V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 Notre Dame J. L. Ethics & Pub. Policy 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. Policy 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).

[16] The seminal case in this area is *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925). For a more detailed discussion of *Pierce*, see *infra* note 59 and accompanying text.

[17] In Federalist No. 78, 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 . . . . " Alexander Hamilton, *Federalist No. 78*, in *The Federalist Papers* 465 (Clinton Rossiter, ed., 1962). 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., Yale Univ. Press 1986).

[18] Compare, for example, the recent results from Massachusetts with those from New York and Georgia discussed *supra* note 5.

[19] *Goodridge*, 798 N.E.2d at 941. In July 2006, the lead couple in this suit announced that they had separated. Elizabeth Mehren, *Couple in Massachusetts Gay Marriage Case Split Up*, L.A. Times (July 21, 2006) (available at 2006 WLNR 12584995).

[20] 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*, 71 Sch. Bus. Affairs 47, 47-50 (Oct. 2005).

is clear in the fact that through mid-2006, at least 45 states restricted marriage to a relationship between one man and one woman.[21] Massachusetts is the only jurisdiction to recognize same-sex marriage, albeit via judicial fiat, coupled with subsequent legislative refusal to act on a proposed constitutional amendment,[22] and in New Jersey,[23] appointed judges stopped just short of a similar dictate in ordering elected legislators to re-write the state's marriage laws within 180 days to either legalize same-sex marriage or approve of civil unions that bestow all of the rights and benefits of marriage between heterosexuals on homosexual couples. Of the states that rejected calls to treat same-sex living arrangements as marriages, 19 adopted constitutional amendments while the remaining 26 enacted statutes restricting marriage to one man and one woman.[24]

In a related concern, one can only wonder why many supporters of same-sex marriage simultaneously demonstrate overt hostility to all things Christian. This antipathy of proponents of same-sex marriage may aptly be referred to as Christophobia,[25] 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. Such behavior by proponents of same-sex marriage clearly reveals an attitude that "bristles with hostility to all things religious in public life."[26] These activists

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[21] Massachusetts is the only jurisdiction that grants marriage licenses to same-sex couples. New Jersey (subject to *Lewis v. Harris*), 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* 2, http://hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm (updated Nov. 2006).

[22] Despite the fact that over 170,000 people signed a petition in support of placing a constitutional amendment that would define marriage as a union between one man and one woman on the ballot, the legislature again refused to vote on the matter, meaning that it is unlikely to get on the ballot in 2008. Andrea Estes & Scott Helman, *Legislature Again Blocks Bid to Ban Gay Marriage: Lawmakers Recess Without Voting on Constitutional Amendment*, Boston Globe 1A (Nov. 10, 2006) (available at 2006 WLNR 19567249). Interestingly, out-going Governor Mitt Romney declared that since he lacked the authority to call the Legislature back into session, he would ask the Supreme Judicial Court of Massachusetts to bypass the Legislature, which he described as "usurp[ing] the [Massachusetts] Constitution" by refusing to follow its mandate of acting on a qualified petition that is before it, and allow voters to decide on whether to enact the proposed constitutional amendment on marriage. Scott Allen, *Romney Seeks to Force Gay Marriage Vote: Rips Lawmakers, Eyes Bid in SJC*, Boston Globe 1A (Nov. 20, 2006) (available at 2006 WLNR 20131498). Following a lengthy fight, the Legislature finally agreed to permit a public vote on the amendment in the waning hours of its session. Ben Arnold, *Bay State Moves Closer to Gay-Marriage Challenge: Massachusetts Lawmakers approved a Measure Tuesday that's Needed to put a Proposed Ban on the Ballot in 2008*, Christian Science Monitor 2 (Jan. 4, 2007).

[23] *Lewis*, 908 A.2d at 220.

[24] *Id.* This map reflects the fact that Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin enacted such amendments in the November 2006 elections. *Id.* Only Arizona defeated such a proposed amendment. *See* John Holusha, *Voters in 7 States Back Bans on Gay Marriage*, Intl. Herald Trib. 6 (Nov. 9, 2006) (available at 2006 WLNR 19468638); *More States Join in on Gay Marriage Ban*, Kansas City Star A15 (Nov. 8, 2006) (available at 2006 WLNR 19376845).

[25] For a discussion of Christophobia, see George Weigel, *The Cube and the Cathedral: Europe, America, and Politics without God* 19, 72-77 (Basic Books 2005).

[26] *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).

rely on essentially anti-Christian, if not bigoted,[27] sentiment in wishing to impose their world-view on society writ large. Their sentiment is due in substantial part to their bias against, and perhaps even hatred toward, the underlying values that Christianity generally, and Roman Catholicism,[28] in particular, represents in many areas, not the least of which is marriage.

The remainder of this essay primarily reflects on the right of parents to direct the education of their children. The first part briefly highlights the ways in which marriage, as it has been traditionally practiced, uniquely benefits society, especially with regard to school-aged children since education serves as the focus of the second, and lengthier, section of the essay. Undoubtedly, supporters of same-sex marriage are likely to respond that marriage needs to be reconceptualized in the face of the apparent breakdown in traditional marriage as witnessed by increased divorce rates,[29] the growing rate of shared living arrangements,[30] and the dramatic rise in single-parent families, most of which are headed by women.[31] This essay

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[27] 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" 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 Trib. 1 (Mar. 15, 1993) (available at 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 B3 (Mar. 16, 1992) (available at 1992 WLNR 3351573); Sam Roberts, *One More Time, With Turmoil: True to Tradition, St. Patrick's Marchers Face Controversy*, N.Y. Times B1 (Mar. 17, 1993) (available at 1993 WLNR 3367862). Situations such as these bring to mind the notion that anti-Catholicism, or if modified to fit today's circumstances to include anti-Christianity, is the anti-Semitism of the intellectuals. The original quote is: "Catholic-baiting is the anti-Semitism of the liberals." Peter Viereck, *Shame and Glory of the Intellectuals* 45 (Capricorn Books 1965). Although Viereck is misquoted regularly, the spirit of his comment remains true.

[28] Viereck, *supra* n. 27, at 45; *see also* J. Gregory Sidak, *True God of the Next Justice*, 18 Const. Commentary 9, 9-10 (2001) (highlighting inappropriate questions that were directed toward Justice Thomas about his Roman Catholic faith during his confirmation process). One can only imagine what the reaction might have been had such questions been directed to a nominee of a different faith.

[29] 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," the data are revealing. Mark Twain, *Mark Twain's Autobiography* vol. 1, 246 (1st ed., Harper & Bros. 1924). After increasing rapidly during the 1970s and 1980s, the rate of divorce in the United States stabilized in the 1990s but remains at roughly 50%. Jason Fields, *Current Population Reports* 5, 10 tbl. 5 (U.S. Census Bureau Nov. 2004) (available at http://www.divorcereform.org/rates.html); *see also* Ctrs. for Disease Control & Prevention, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2003*, 52 Natl. Vital Statistics Reports 1 tbl. A (June 10, 2004) (available at 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 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 that relies on data from 1995, see Ctrs. for Disease Control & Prevention, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, 23 Natl. Vital Statistics Reports 1, 22 (July 2002) (available at http://purl.access.gpo.gov/GPO/LPS22381).

[30] The federal government has made data available on cohabitation since 1995 and in its statistical tables since 1996. Fields, *supra* n. 29, at 12.

[31] *Id.* 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).

parries these objections 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 this essay, which is divided into four sections, examines ways in which permitting unchallenged instruction, if not proselytizing, on same-sex marriages in public school could harm the societal benefits of marriage. More specifically, this essay suggests that allowing educators to introduce a regimen of unfettered instruction supporting a gay rights agenda and same-sex marriage, offering these as fully-equal alternative lifestyles, can have a profoundly negative impact on the right of parents to direct the educational upbringing of their children by exposing them to ideas that are best discussed at home.

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

I. BACKGROUND

A. Beneficial Effects of Marriage

Over the millennia, marriage has helped to preserve the moral and social order through ensuring a stable societal environment within which children can flourish, 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. In the face of a plethora of research that reviews these points in detail,[32] this section briefly reflects on one major point that most directly impacts the right of parents to direct the education of their children.

From the perspective of those who are interested in education, item

[32] *See e.g.* Wardle, *supra* n. 15; Teresa Stanton Collett, *Civil Unions in Vermont: Where to Go From Here?* 11 Widener J. Pub. L. 379 (2002); Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (June 2006) (available at www.princetonprinciples.org) (this study, also known as the Princeton Report, is the result of scholarly discussions initiated by the Witherspoon Institute in 2004); *see also* Randy Lee, *Finding Marriage Amidst a Sea of Confusion: A Precursor to Considering the Public Purposes of Marriage*, 43 Catholic Law. 339 (2004).

four in the

Princeton Principles, that "[m]arriage protects and promotes the well-being of children,"[33] 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 schools, let alone families. As discussed in greater detail in the following section, the Supreme Court, in *Pierce v. Society of Sisters*,[34] recognized the right of parents to direct the education of their children. Yet, tension has arisen as courts have increasingly stood *Pierce's* notion that the "child is not the mere creature of the state"[35] on its head by granting school officials almost unfettered curricular discretion when conflicts arise with parents over teaching about same-sex marriage and gay-friendly initiatives.

There can be no doubt that "education is perhaps the most important function of state and local governments,"[36] and that states have plenary power, that they delegate to local school boards and their appointed officials such as superintendents and principals, to set curricular content and a host of other educational matters.[37] Even so, despite this authority, significant disagreements emerge when school officials overstep their boundaries and intrude on parental prerogatives by implementing curricula that instruct children about same-sex marriage from a gay-friendly perspective. Insofar as parents have the 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 essay addresses issues related to control over the vehicle of instruction: public school curricula.

B. The Impact of Same-Sex Marriage on School Curricula Prolegomena

In discussing the potentially deleterious ramifications of same-sex marriage on families and the schooling of young children, this essay concomitantly examines legal developments pertaining to sexuality education and gay-friendly initiatives in pre-K-12 schools because of the symbiotic relationship that these political agendas share. Further, this essay focuses on parental concerns rather than the few disputes that have arisen when students protested gay friendly initiatives in their schools. Reflecting a lack of judicial clarity, a federal trial court in Minnesota,[38] joined by a trial

[33] Witherspoon Institute, *supra* n. 32, at 12.

[34] 268 U.S. 510. For a more detailed discussion of *Pierce*, see *infra* note 59 and accompanying text.

[35] *Pierce*, 268 U.S. at 535.

[36] *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (striking down racial segregation in public education).

[37] For a discussion of the powers of state and local school boards, see Charles J. Russo, *Reutter's The Law of Public Education* chs. 3-4 (6th ed., Foundation Press 2006).

[38] *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (holding that officials could not deny a high school student the opportunity to wear a sweatshirt expressing the message "Straight Pride" in partial protest to the actions of administrators who displayed posters on tolerance and organized a list of "safe staff" members who were willing to discuss issues of sexuality and provide sources of information on related matters, since the behavior was not likely to cause a substantial disruption).

court in Ohio,[39] ruled in favor of students who voiced their opposition to homosexuality while the Ninth Circuit[40] reached the opposite result by upholding the actions of school officials who stifled a student's protest.[41]

This review is also limited to an analysis of the impact of curricular developments in pre-K-12 schooling, rather than higher education, since state laws typically require children between the ages of six and 17 or 18 to attend school.[42] As such, this essay, in part, discusses whether teachers, often spurred on by their unions,[43] and educational administrators should serve as the vanguard of "social experiments on other people's children"[44] or whether it is ultimately a form of *ultra vires* when they exceed the boundaries of their authority.

C. *Educators and Social Change*

Educators act as purported change agents when they instruct impressionable young minds in pre-K-12 settings who, due to compulsory

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[39] *Nixon v. N. Loc. Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005) (concluding that officials could not prohibit a middle school student from wearing a t-shirt to school that expressed his religious conviction in messages reading "Homosexuality is a sin," "Islam is a lie," and "Abortion is murder." When the student refused to follow orders from educators to either remove the shirt or turn it inside out, his father picked him up and the two left school. The court decided that officials acted improperly in ordering him not to wear the shirt because they were unable to demonstrate either that it caused or would have caused a material disruption at school or that it invaded the rights of others).

[40] Based on the fact that the Ninth Circuit "has developed a reputation for being wrong more often than any other federal appeals court," it will be interesting to observe what will occur if the Supreme Court agrees to hear an appeal in this dispute. Adam Liptak, *Court That Ruled on Pledge Often Runs Afoul of Justices*, N.Y. Times 1 (June 30, 2002) (available at 2002 WLNR 4099690).

[41] *Harper v. Poway Unified Sch. Dist.*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006), *rehearing en banc denied*, 455 F.3d 1052, 1171 (9th Cir. 2006), *petition for cert. filed*, (9th Cir. Oct 26, 2006) (suspending a student for wearing a t-shirt displaying the handwritten message "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front and the statement that "HOMOSEXUALITY IS SHAMEFUL Romans 1:27" on the back during a "Day of Silence" observance organized by a student group, the Gay-Straight Alliance. A day later, the student wore the same shirt to school except that the message on the front was changed to "Be Ashamed, Our School Has Embraced What God Has Condemned"). The 9th Circuit maintained that educators could restrict student speech that impinges on the rights of other students or collides with the rights of other students "to be secure and to be let alone." *Id.* at 1177 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

[42] *See e.g.* Ala. Code § 16-28-7 (2006); Cal. Educ. Code Ann. § 48200 (West 2006); Del. Code Ann. tit. 14, § 2702 (2006); Ga. Code Ann. § 20-2-690.1 (2006); 105 Ill. Comp. Stat. Ann. 5/26–1 (West 2006); Ky. Rev. Stat. Ann. § 159.010 (Lexis 2006); Md. Educ. Code Ann. § 7-301 (2006); Mass. Gen. Laws ch. 76, § 1 (2006); N.J. Stat. Ann. § 18A:38-25 (2006); N.Y. Educ. Law § 3205 (McKinney 2006); Ohio Rev. Code Ann. § 3321.01 (West 2006); Okla. Stat. Ann. tit. 70, § 10-105 (West 2006); 24 Pa. Consol. Stat. Ann. § 13-1327 (West 2006); Tex. Educ. Code Ann. § 25.085 (2006); Wis. Stat. Ann. § 118.15 (West 2006).

[43] Despite some differences of 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 13A (Aug. 11, 2006) (available at 2006 WLNR 14045762) (noting that the Oklahoma Education Association ("OEA") / NEA "back[ed] off endorsing same sex marriage at its July convention in Orlando, Fla[sic]. 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 (Tenn.) A1 (July 15, 2006), (reporting that "The NEA said in a statement that it 'has no plans to endorse same sex marriage and never did'").

[44] *Grutter v. Bollinger*, 539 U.S. 206, 372 (2003) (Thomas, J., dissenting) (upholding racial preferences in law school admissions).

attendance laws, essentially constitute a captive audience barraged with the unchallenged proposition that same-sex marriage is an acceptable alternative lifestyle. This essay does not examine developments in higher education because, as the courts have recognized,[45] students in colleges and universities are free not to attend classes, graduation ceremonies, or other activities where they might encounter persons who express ideas with which they may have significant differences of opinion. Insofar as students in higher education should have the intellectual and emotional maturity to make their own judgments on controversial topics, even in the midst of fears of political correctness that many individual faculty members and administrators have imposed on campuses in higher education,[46] they should not be as easily swayed by professorial and peer pressure as young children.

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],"[47] it is imperative to balance the interests of the minority who advocate same-sex marriage as a right with the rights of parents (and others) who do not wish their children, especially during their tender years, to be involuntarily subjected to concepts about family and human sexuality at the hands of public school officials.

Tensions have flared as a result of a small number of activists attempting to change the nature and meaning of marriage while their supporters in the educational establishment subject a captive audience of children to be taught forcibly 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."[48] The lack of judicial clarity can permit small groups of activists to, in effect,

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[45] The courts have expressly recognized distinctions in maturity levels 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 by selecting who would pray and by directing the content of prayer) *with Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997); *Chaudhuri v. 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).

[46] For an interesting examination of selected faculty members and administrators over the extent to which political correctness has overtaken many campuses, see David Horowitz, *The Professors: The 100 Most Dangerous Academics in America* (Rehnery Pub. 2006).

[47] *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 884 (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*." *Id.*

[48] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (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 group's religious activity can be proscribed on the basis of what . . . members of the audience might misperceive." *Id.*

drown out the wishes of the majority, even as one keeps in mind that constitutional rights and personal freedom neither are, nor should be, subject to a majority vote.

There is an unresolved tension over the control of public school curricula. If proponents of same-sex marriage succeed in implementing their radical agenda, then pre-K-12 curricula will undoubtedly undergo significant modifications. Curricular changes in this arena have already led angry parents to initiate litigation.[49] These changes are likely to leave children confused and emotionally affected, especially as some advocates of same sex-marriage wish to begin presenting gay-friendly programming for children in pre-schools at a time when instruction about human sexuality and sexual practices is most certainly well beyond their developmental needs or grasp.[50]

Young children who are exposed to state-mandated, gay-friendly teaching that essentially legitimizes same-sex marriage by presenting it as one of an array of familial alternatives may suffer from confusion to the extent that they may be exposed to ideas in school that they cannot fully comprehend. Further, ideas that children encounter in schools about same-sex marriage may well conflict with the values that they are taught at home, especially at a time when they are beginning to explore their own nascent sexuality and personal freedoms. Of course, the author is not advocating that all revolutionary or unpopular ideas be presented or ignored in classes. Rather, as discussed in greater detail 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 concerns into consideration.

Purportedly for fear of permitting adults to exert undue influence in shaping the minds of children, the judiciary has refused to permit school officials to invite a rabbi to pray at a graduation ceremony[51] or a teacher to read privately, and silently, a Bible in class while students were doing their own work.[52] If courts are genuinely concerned about the potential for unduly influencing children, then 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

[49] Jeff Vaznis, *Lawsuit Invokes Religious Freedom: Parents Say Beliefs Ignored by School*, Boston Globe 1 (May 4, 2006) (available at 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).

[50] Ethan Jacobs, *Show and Tell: Educators Say the Pre-School Set Needs Straight Talk on Gay Issues*, Bay Windows (New England) (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%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=BDF1272D78F344BE8CD79B483A72D327).

[51] *Lee*, 505 U.S. at 590.

[52] *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

to impressionable young minds which 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 that might be considered controversial, such educators, as well as the courts, have adopted an uneven approach. For example, in *Lee v. Weisman*,[53] the Supreme Court prohibited prayer at public school graduation ceremonies insofar as the state, through school officials, played a pervasive role in the process by not only selecting who would offer the prayer but also by directing the content of prayer. Writing for the majority, Justice Kennedy feared that governmental activity could have resulted in psychological coercion of students where individuals constituted members of a captive audience that may have been forced, against their own wishes, to participate in ceremonies that they were not genuinely free to be excused from attending.[54]

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. 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 that might have been presented in prayer ran the risk of asserting indirect coercion on those who refused to conform to the official position.[55] Given the Court's espoused 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 or indoctrinating, if not

[53] 505 U.S. at 593 (maintaining that "[r]esearch in psychology supports the common assumption that adolescents are more susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention" (internal citations omitted)).

[54] Justice Kennedy's reliance on psychology led to a stinging dissent from Justice Scalia:

> I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary." But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

Lee, 505 U.S. at 636 (Scalia, J., dissenting) (internal citations omitted).

[55] 370 U.S. 421, 431 (1962) (striking down prayer at the start of the school day). The Court stated: "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." *Id.*

coercing, young children to adopt a particular perspective on same sex-marriage is any less warranted in the present day. However, as discussed below,[56] in many instances it appears that courts have chosen sides in the culture war, siding with those who would seek to transform marriage and society by judicial fiat.[57]

Any discussion over who should direct the education of children and the related topic of curricular control must begin[58] with *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary.*[59] 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. Both schools 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, the Court in *Pierce* 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 essay, the Court found that since parents had the right to decide where their children would attend school, state officials could not "unreasonably

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[56] *See infra* notes 74-76 and accompanying text.

[57] *See Lawrence*, 539 U.S. at 602-03 (Scalia, J., dissenting). Justice Scalia stated:

> It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture were not obviously "mainstream."

Id.

[58] Two years earlier, in *Meyer v. Neb.*, 262 U.S. 390 (1923), the Supreme Court invalidated a prohibition against teaching a foreign language in grades lower than 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 pointing out 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. *Id.* 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. *Id.* Even though it did not directly address 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. *Id.*

[59] 268 U.S. 510.

interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[60] In determining that parents could satisfy the compulsory attendance law by enrolling their children in the non-public schools of their choice, the Court unequivocally declared that "[t]he 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."[61]

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 best be described as an almost ad hoc "I know it when I see it"[62] approach. At the same time, setting a mechanistic standard in this challenging area could create more problems than it would solve. Put another way, unforeseen complications could arise as some parents might object to inappropriate material such as teaching young children about same-sex marriage, while other parents might criticize instruction that does not comply with their politically correct positions on topics including environmental policy, politics, and history, especially as teachers depict war.[63] The difficulty with creating a one-size-fits-all judicial standard notwithstanding, courts should provide sufficiently clear guidelines that will afford school officials the opportunity to respectfully consider reasonable parental concerns, especially when they involve potential conflicts involving matters that have traditionally been left to the realm of the family.

Pierce takes on heightened significance in light of nascent conflicts as parents who do not support both same-sex marriage and overly explicit teaching about human sexuality raise legitimate objections when their children are exposed to curricular materials that are not consistent with the values that are held dearly in their homes. Of course, some educators and proponents of same-sex marriage might argue that in the state's role as *parens patria*, 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, and may refuse to consider, let alone defer, to parental wishes. However, almost

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[60] *Id.* at 534-35.

[61] *Id.* at 535.

[62] In *Jacobellis v. 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."

[63] For such an example, see Jill Tucker, *School Board Decides to Dump JROTC Program*, San Francisco Chronicle B1 (Nov. 15, 2006) (available at 2006 WLNR 19806104) (reporting that one opponent to permitting the school board in San Francisco to offer Junior ROTC, a self-described former teacher, did so on the basis that "[w]e need to teach a curriculum of peace."). For more discussion on this incident, see *infra* note 103 and accompanying text.

50 years after *Pierce*, in *Wisconsin v. Yoder*,[64] the Supreme Court rejected *parens patriae* in deciding 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 refusing to apply *parens patriae* to compulsory attendance, the Court did uphold 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 the idea that including material on it in 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 potential inter-generational change, if not conflict, is reflected in the types of reading materials that children are forcibly exposed to in schools.

Initially published in 1990, *Heather Has Two Mommies*,[65] including its discussion of how the birth mother was artificially inseminated by an anonymous donor in its original edition, has engendered both controversy and similar works.[66] Two other gay-friendly books, *Daddy's Roommate*,[67] which depicts gay relationships, and *King & King*,[68] which tells the story about the marriage of two princes, also fostered significant controversy in their portrayals of gay, lesbian, bi-sexual, and transgendered ("GLBT") lifestyles.[69] In fact, after school officials in Massachusetts continued to use *King & King* in classes, parents of second grade[70] and kindergarten-aged[71]

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[64] 406 U.S. 205 (1972).

[65] Lesla 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) (available at 1992 WLNR 3292103) (reporting 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) (available at 1992 WLNR 3296006) (detailing how one local board in New York City refused to allow gay and lesbian relationships to be discussed in classes).

[66] 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 the 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).

[67] Michael Willhite, *Daddy's Roommate* (Alyson Wonderland 1990).

[68] Linda De Hann, *King & King* (Tricycle Press 2002). This book led to a sequel, Linda De Hann & Stern Mijland, *King & King & Family* (Tricycle Press 2004).

[69] *See also* Peter Parnell & Justin Richardson, *And Tango Makes Three* (Simon & Schuster Books for Young Readers 2005) (recounting the story of how two male penguins in New York City's Central Park Zoo hatched and raised a female chick). This book is getting a chilly reception in at least one school and several libraries. *See* Jim Shur, *Parents Want Gay Penguins Book Blocked*, Associated Press (Nov. 16, 2006) (available at http://www.foxnews.com/printer_friendly_wires/2006Nov16/0,4675,GayPenguinsBookFlap,00.html).

[70] Tracy Jan, *Parents Rip School Over Gay Storybook*, Boston Globe B1 (April 20, 2006) (available at 2006 WLNR 6606392) (reporting that parents of a second-grade child protested after his teacher read a fairy tale about gay marriage to the class without giving them advanced notice); *see also Boy Allegedly*

children challenged their doing so. However, the federal trial court in Massachusetts dismissed the parents' claim without prejudice, leaving them free to file suit in a commonwealth court.[72] The Court held that school officials did not violate the rights of the parents or their children in the free exercise of religion and it also rejected their claim to dictate what the public schools can teach. Since this case may yet be appealed or subject to further litigation, it goes without saying that the outcome in this case may be a bellwether in future litigation over the use of gay-friendly material in the face of parental objections.

As well-intentioned as the authors of books such as *Heather Has Two Mommies, Daddy's Roommate,* and *King & King* and proponents of same-sex marriage and GLBT lifestyles may be, since these activists are presenting issues on diversity of living arrangements, one can only imagine the confusion that runs through the minds of young children. Children in pre-schools and early primary grades are likely to be most susceptible to confusion 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, even in acknowledging that it was omitted from the second edition of *Heather Has Two Mommies*, one must 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 exposed to in public schools.

Heather Has Two Mommies, *Daddy's Roommate*, and *King & King* could not be more different than the idyllic, if perhaps unrealistic and uncomplicated, depiction of marriage and family life that many baby-boomers experienced in their formative years through the *Dick and Jane*[73] series readers. As conflict arises over parameters that should be placed on sexuality education in public schools, the courts have aided educators by giving a radical new meaning to the common law concept *in loco parentis*,

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Beaten Over Gay Rights Issue, Boston Globe B2 (June 15, 2006) (available at 2006 WLNR 10303728) (reporting that one of the parents who filed a federal suit against his local public school over classes in which homosexuality was discussed claimed that his first-grade son was beaten up during recess by a group of eight to ten 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 B2 (June 20, 2006) (available at 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).

[71] *NEWS in Brief; Dad Dodges School Rap in Flap Over Gay Topic*, Boston Globe 14 (Oct. 21, 2005) (available at 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).

[72] *Parker v. Hurley*, 2007 U.S. Dist. LEXIS 12751 (D. Mass. Feb. 27, 2007).

[73] For representative discussions of this series, see Allan Luke, *Making Dick and Jane: Historical Genesis of the Modern Basal Readers*, 89 Teachers College Rec. 91, 91-116 (1987); Richard L. Mandel, *Children's Books: Mirrors of Social Development*, 64 Elementary Sch. J. 190, 190-99 (1964).

literally, *in place of the parent*, a legal construct that is based on presumed voluntary parental consent.[74] These conflicts have been heightened by judicial deference to school officials in the face of overly explicit, if not inappropriate, sexuality instruction[75] and surveys[76] in public schools, even when educators failed to comply with applicable school policy requiring written parental consent before students could be exposed to explicit sexual material.[77]

In debates over the place of religion in public school curricula, courts have prohibited public readings from the Bible,[78] reached mixed results in disputes over elective courses on the Bible,[79] allowed students to

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[74] *State ex rel. Burpee v. Burton*, 45 Wis. 150 (1878); *but see* W. Va. Code § 18(A)(5)(1) (2006): "(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 . . . . "

[75] *Brown v. Hot, Sexy & Safer Prods.*, 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 as shocking to the conscience even where a school policy required written parental consent for their children to receive such instruction and they 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; 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.").

[76] *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1202 n. 3 (9th Cir. 2005), *petition for cert. denied*, 127 S. Ct. 725 (Dec. 4, 2006) (parents unsuccessfully challenged educators who distributed surveys to first, third, and fifth grade students which included such questions 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"; *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 168-69 (3d Cir. 2005) (parents unsuccessfully challenged questionnaires that were distributed to their children in grades seven through twelve that contained items 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.'"

[77] *Brown*, 68 F.3d at 529.

[78] *See e.g. Sch. Dist. of Abington Township v. Schempp*, 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 Madigan*, 921 F.2d at 1055.

[79] *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 Sch. 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 Sch. 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 51 year practice of permitting students from a local Christian college to teach weekly religion classes that presented the Christian Bible as religious truth during the regular school day violated the Establishment Clause).

organize religious clubs,[80] and prohibited prayer at graduation[81] and extra-curricular activities.[82] In these cases, critics typically claim that religion has no place in a public school curricula or activities because it involves both alleged violations of the Establishment Clause and might include teaching of (Christian) values either directly or indirectly. Yet, nothing in the American legal tradition prohibits teaching about religion[83]—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.[84]

Considering the content of books such as *Heather Has Two Mommies*, *Daddy's Roommate*, and *King & King*, 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 Me, The Bible Tells Me So."[85] 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*, *Daddy's Roommate*, and *King & King* 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 that when dealing with individuals and religious groups such as the Catholic Church[86] with which they disagree.

II. RECOMMENDATIONS FOR EDUCATORS

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 positions 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

[80] *Bd. of Educ. of Westside Community Schs. 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).

[81] *Lee*, 505 U.S. at 508.

[82] *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318.

[83] For an interesting discussion of the intersection between law and religion, see Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Scholars Press 1993).

[84] *See Abington*, 374 U.S. at 225 (noting: "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). Justice Brennan wrote in his concurrence 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." *Id.* at 300.

[85] *See e.g.* Cyber Hymnal, http://www.cyberhymnal.org/htm/j/e/jesuslme.htm (updated Mar. 3, 2007) (providing background on the song, *Jesus Loves Me*).

[86] Dorning, *supra* n. 27.

noncompliance.[87] 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 four points.[88]

First, school officials should resist pressure from political action groups that support same-sex marriage and gay-friendly initiatives 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 and boards should focus on input from their real stakeholders—parents and community members. Of course, members of local communities who support the inclusion of teaching on same-sex marriage and related topics are entitled to have as much of a say as other residents in school systems.

Second, in recognizing the paramount stake that parents have in the education of their children, school officials should engage in some form of consultation, whether individually or through parent-teacher organizations, in order to afford concerned parents the opportunity to express their opinions. This is a particularly significant point because it occurs at a time when educators and researchers often decry the lack of parental involvement in the education of their children.[89] Yet, when it comes to the topic of human sexuality, these same officials suddenly seem to take the inexplicable 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 considerable 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

[87] *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).

[88] Points two through four in this discussion are adapted from Charles J. Russo & William E. Thro, *Parents, Educators, and the Courts: Who Directs the Education of Students?* School Business Affairs 39-41 (Aug. 2006) (discussing the cases cited in *supra* notes 74-76).

[89] *See e.g.* Angela Calabrese Barton et al., *Ecologies of Parental Engagement in Urban Education*, 33 Educ. Researcher, issue 4, 3-12 (2004); A.Y. "Fred" Ramirez, *"Parental Involvement is Like Apple Pie" A Look At Parental Involvement in Two States*, 85 High Sch. J., no. 1, 1-9 (2001); Kevin Brain & Ivan Reid, *Constructing Parental Involvement in an Education Action Zone*, 29 Educ. Studies, issue 2/3, 291-305 (2003); Dory Lightfoot, *"Some Parents Just Don't Care" Decoding the Meanings of Parental Involvement in Urban Schools*, 39 Urban Educ., 1, 91-107 (2004).

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, some 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 children, especially those in pre-school 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 as well as in a manner that respects legitimate parental concerns.

Fourth, educators should consider permitting parents to opt-out based on religious,[90] and perhaps other, grounds such as cultural differences. Alternatively, officials who are committed to proceeding with instruction about same-sex-marriage and gay-friendly initiatives in the face of opposition might consider offering programs that cover the material in a less controversial format or that permit a diversity of perspectives to be represented. In one such case, parents, joined by a high school student, successfully sued school officials in Michigan who refused to permit her to participate in a panel discussion on diversity.[91] Educators denied the student the opportunity to take part in the discussion, involving clergy and religious leaders on homosexuality and religion, because they disagreed with her message and sought to insure that only one point-of-view was presented. The court found that school officials violated: the student's right to free speech both by denying representation of her viewpoint and censoring speech; the Establishment Clause by failing all three parts of the *Lemon* test;[92] and her right to Equal Protection.

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[90] *See Ware v. Valley Stream High Sch. Dist.*, 551 N.Y.S.2d 167 (N.Y. 1989) (affirming the denial of a board's motion for summary judgment where genuine issues of material fact existed over the burden that exposure to an AIDS curriculum would have had on the religious beliefs of students and their parents); *but see Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491 (D.Conn. 2002) (finding that school officials did not violate the Free Exercise Clause by rejecting a father's request that his son be excused from a mandatory health education course and by assigning him a failing grade when he refused to do so).

[91] *Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, 782-83 (E.D. Mich. 2003). The court presciently began its opinion with the observation that:

> This case presents the ironic, and unfortunate, paradox of a public high school celebrating "diversity" by refusing to permit the presentation to students of an "unwelcomed" viewpoint on the topic of homosexuality and religion, while actively promoting the competing view. This practice of "one-way diversity," unsettling in itself, was rendered more troubling—both constitutionally and ethically—by the fact that the approved viewpoint was, in one manifestation, presented to students as religious doctrine by six clerics (some in full garb) quoting from religious scripture.

Id.

[92] Under the seemingly ubiquitous tripartite test that the Supreme Court enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (internal citations omitted), every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its

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.

A. Parental Responses to Teaching About Same-Sex Marriage

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 the 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 1989[93] and is expected to continue to do so through 2014.[94] This growth does not take into account the more than 1 million children who are home schooled, often due to parental concerns over the treatment of religion and issues associated with values formation in public schools.[95] The large increase 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.[96]

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.[97]

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principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

[93] U.S. Dept. of Educ., Natl. Ctr. for Educ. Statistics, *The Condition of Education 2006, Indicator 4, Trends in Private School Enrollment* (U.S. Govt. Printing Off. 2006) (available at http://nces.ed.gov/programs/coe/ 2006/pdf/04_2006.pdf).

[94] U.S. Dept. of Educ., Natl. Ctr. for Educ. Statistics, *Projections of Education Statistics to 2014. Appendix A: Projection Methodology: Enrollment* (U.S. Govt. Printing Off. 2006) (available at http://nces.ed.gov/pubsearch/ pubsinfo.asp?pubid=2005074); *see also* IES, *Natl. Ctr. for Educ. Statistics*, http://nces.ed.gov/fastfacts/display.asp?id=65 (accessed Apr. 12, 2007) ("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.")

[95] U.S. Dept. of Educ., Natl. Ctr. for Educ. Statistics, *The Condition of Education 2005, Indicator 4, Trends in Private School Enrollment* (U.S. Govt. Printing Off. 2005) (available at http://nces.ed.gov/programs/ coe/2005/pdf/03_2005.pdf).

[96] U.S. Dept. of Edu., Natl. Ctr. for Educ. Statistics, *Private School Enrollment: Percentage Distribution of Private School Students in Kindergarten Through Grade 12, by School Type: 1989–90 and 2003–04* (U.S. Govt. Printing Off. 2006) (available at http://nces.ed.gov/programs/coe/2006/charts/ chart04.asp?popup=true).

[97] David Crary, *Public Schools Take Heat*, Desert News (Salt Lake City, Utah) CO2 (Sept. 5, 2006) (available at 2006 WLNR 15373867).

Considering how long and well public education has served the United States, developments 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. These leaders should consider the wisdom of making such wholesale changes in curricular content on same-sex marriage and gay-friendly initiatives since many parents are both vocally expressing their dissatisfaction while taking steps to act on the courage of their convictions by enrolling their children in schools where the curricula are consistent with their values.

B. Postscript

Two recent events from California illustrate the extent to which debates about same-sex marriage and gay-friendly initiatives are already impacting public schooling. Perhaps the most highly visible example of how proponents of GLBT lifestyles seek to influence the education of children,[98] admittedly through the legislative rather than judicial process, was played out in California late in the summer of 2006. After amending an earlier version of a bill that would have required public school curricula to reflect the contributions that gays and lesbians made to American society in the face of significant opposition and the threat of a gubernatorial veto,[99] a later version of the bill,[100] which forbade discrimination that might have adversely reflected on people because of their sexual orientation, passed both chambers of the California legislature.[101] It will be interesting to observe whether its sponsor acts on her plan to pursue future legislative action 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,"[102]

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[98] Wyatt Buchanan, *Bill Would Include Gays in Public School Tests: Plan Will Reignite Debate Over Who Controls Curricula*, San Francisco Chronicle B1 (Apr. 16, 2006) (available at 2006 WLNR 637270).

[99] Jim Sanders, *Kuehl Guts Her Gay Education Bill: Veto Threat Forced an Overhaul, but Senator Sees Progress on Rights*, Sacramento Bee A3 (Aug. 8, 2006) (available at 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 A3 (May 25, 2006) (available at 2006 WLNR 9047698).

[100] Cal. Sen. 1437, 2005-2006 Reg. Sess. (Feb. 22, 2006).

[101] The Assembly approved the bill by a 47 to 31 vote, Cal. St. Leg., *Assembly Floor Vote Information*, http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1401-1450/sb_1437_vote_20060821_0358PM_asm_floor.html (Aug. 21, 2006), while the Senate did the same by a margin of 22 to 16, Cal. St. Leg., *Senate Floor Vote Information*, http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1401-1450/sb_1437_vote_20060829_0244PM_sen_floor.html (Aug. 29, 2006); Jim Sanders, *Controversial Gay-Rights Bill OK'd: Measure Would Ban Demeaning Actions in Public Schools*, Sacramento Bee A3 (Aug. 22, 2006) (available at 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, Cal) F4 (Aug. 22, 2006) (available at 2006 WLNR 14507103); Judy Lin, *Gay Equality Bill Advances*, Sacramento Bee (Aug. 30, 2006) (available at 2006 WLNR 15039852).

[102] 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 A3 (Sept. 7, 2006)

The second event arose in San Francisco, exemplifying the gay-friendly attitude of many school officials in that state. The board of education voted, 4-2, to a two-year phase out of the 90 year-old junior ROTC program that enrolled 1,600 students in city schools.[103] The board eliminated the ROTC program insofar as it did not think that what the majority described as the military's discriminatory stance on gays, evidenced by its "don't ask, don't tell" policy, belonged in schools.

III. CONCLUSION

While it may not yet be inevitable, it appears that in the face of current trends, absent swift legislative action and/or constitutional amendments at both the state[104] and federal[105] levels 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 ideal 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 legal status of marriage.

When deliberating about 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,

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(available at 2006 WLNR 15555087); *see also* Greg Lucas, *Sacramento: Governor Vetoes Gay Teaching Measure He Says Current Laws Guard Against Discrimination*, San Francisco Chronicle B4 (Sept. 7, 2006) (available at 2006 WLNR15481301).

[103] Jill Tucker, *School Board Decides to Dump JROTC Program*, San Francisco Chronicle B1 (Nov. 15, 2006) (available at 2006 WLNR 19806104); *FOX: Special Report*, "Political Headlines—Part 1" (Fox Broad. Co. Nov. 14, 2006) (TV broadcast, transcr. available at 2006 WLNR 19787663).

[104] *See supra* nn. 21-22 and accompanying text.

[105] A proposed federal marriage amendment was initially introduced in 2003 in both the House, H.R. Jt. Res. 56, 108th Cong. (May 21, 2003), and Senate, Sen. Jt. Res. 26, 108th Cong. (Nov. 25, 2003). The proposal, which needed approval by a two-thirds majority in each house, was defeated by a 227-186-20 margin on July 18, 2004 in the House and 48-50-2 on September 30, 2004 in the Senate. *See* Human Rights Campaign, *Federal Marriage Amendment Vote*, http://hrc.org/Template.cfm?Section=Home&CONTENTID=34218&TEMPLATE=/ContentManagement/ContentDisplay.cfm (Sept. 30, 2004). According to the most recent joint proposed resolution in support of a federal constitutional marriage amendment:

> SECTION 1. This article may be cited as the "Marriage Protection Amendment."
> SECTION 2. Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Sen. Jt. Res. 1, 109th Cong. (Jan. 24, 2005) (as introduced); H.R. Jt. 88, 109th Cong. (June 6, 2006) (as introduced). The Senate resolution was defeated on June 7, 2006 by a vote of 49-48-3. Sen. Jt. Res. 1, 109th Cong. The House resolution was defeated on July 18, 2006 by a vote of 236-187-1. H.R. Jt. 88, 109th Cong. For good discussions of the need for such an amendment, see Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 Yale J.L & Feminism 221 (2005); Teresa Stanton Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, 2 U. St. Thomas L.J. 95 (2004). For another source of useful information about the proposed amendment, same sex marriage, and related issues, see *Annotated Legal Bibliography on Gender*, 12 Cardozo J. L. & Gender 1033, 1063-64 (2006).

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."[106] 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 one woman, calling such arrangements marriages simply does not make them so.

[106] Col. Alexander K. McClure, *Lincoln's Yarns and Stores* 323 (Bengal Press 1980). Another version of this story has Lincoln speaking about a dog rather than a calf. John Thorn, *Thorn Pricks: What's in a Name?* http://thornpricks.blogspot.com/ (Dec. 2, 2005).