The Impacts on Education of Legalizing Same-Sex Marriage

and Lessons from Abortion Jurisprudence

by Lynn D. Wardle

I. Introduction: The Elephant in the Room

One of the most contentious issues to arise in the public policy debates concerning the legalization of same-sex marriage is whether legalizing same-sex marriage has had or will have a significant detrimental impact upon education, particularly public education. Opponents of same-sex marriage have asserted that legalizing same-sex marriage and civil unions legally equivalent to marriage (hereinafter jointly called “same-sex marriage”), has had and/or will have a profoundly detrimental impact upon educational curriculum, students, administration, employees, parents’ rights, and religions. Supporters of legalizing same-sex marriage (and

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2 The primary focus of this paper is public education because it is the major form of education in the United States, especially for grade-school and high school education. The potential implications for private school education may be even more fascinating, as the availability of non-public education (private and home schools, for example) is one significant justification for the adoption of some controversial public school policies. If private education alternatives were not available for those who oppose the controversial public school policies (because of imposition of mandatory curriculum policies on private and home schools, for example) that not only would raise profound constitutional law issues not necessarily implicated by policies applicable solely to public schools, but it also might impact upon (undermine) the validity of such policies in the public schools.

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

4 See infra, Part ___.
equivalent civil unions) reject that claim and argue that legalizing same-sex marriage will have no significant impact upon public education, or, on balance, a positive, desirable impact. 5

However, most of the debate about the issue has been at the level of political discourse. While some of that has been potentially helpful commentary by some courageous, informed professionals and citizens, there also has been some heated, angry political rhetoric. On the other hand, scholarly and professional consideration of the impact of legalizing same-sex marriage on education is very scarce. It is a classic example of “the-elephant-in-the-room” in the academic and professional worlds: Although it is a matter of great social significance, professional relevance, and scholarly interest to several academic and professional disciplines, almost no scholar or professional educator dares to speak about it -- except those who support the most fashionable position at the moment (those who assert that legalizing same-sex marriage will have no significantly detrimental impact on education). It seems that discussion of the other side of the subject is taboo among academics and professionals. This remarkable silence may (among groups of educated individuals who celebrate diversity, academic freedom, and professional independence) be due in part to the fact that the issue is so clearly controversial and politically charged. It also may be because of the heated reactions, especially against those who oppose or raise hard questions or express criticism about the potential impact same-sex marriage upon education. Serious scholarly and professional discussion has been chilled (indeed, nearly frozen), and individual scholars and professions have been intimidated by the strong backlash against the expression (especially in academia) of viewpoints critical of legalizing same-sex marriage generally. 6 Scholarly and professional expressions asserting that same-sex marriage will have

5 See infra, Part ___.

6 For a discussion of the “taboo” that existed fifteen years ago in the academy, see Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, ____ BYU L. Rev. ___, ___ (1996). The hostility
detrimental social consequences, including claims that legalizing same-sex marriage has negative impacts upon education, seem to be considered inappropriate in most of academic and professional discourse and literature. Thus, consideration of the impacts that legalization of same-sex marriage has or is likely to have on education in the United States is “the elephant in the room” in the serious academic and professional discussions.

This paper will begin, in Part II, by reviewing the evidence that legalizing same-sex marriage is having and will likely continue have a serious, profoundly controversial, and arguably detrimental impact upon public education. The evidence for that consists in large part of the evidence that already there have been numerous incidents of such controversial and potentially detrimental impact upon educational curriculum, students, administration, personnel, and parents’ rights. That evidence is reinforced by analysis that the trend of such incidents is not merely coincidental or decreasing but manifests a pattern of growth that can be expected to increase.

Parts III and IV review the existing legal protections against the detrimental impacts upon parents’ rights and family integrity interests. Part III discusses the relatively narrow and limited scope of constitutional rights of parents to compel a particular curriculum or even to opt-out of having their children exposed to controversial curriculum. Constitutional principles and precedents do provide some marginal (if ambiguous) limits on how far the state can go to standardize the education of children of dissenting parents regarding such controversial moral issues and same-sex relationships. However, this Part explains why it is unlikelihood that any existing constitutional doctrines or reasonably likely extensions of them will provide substantial protection against the controversial (and, arguably, detrimental) effects of legalizing same-sex marriage toward those expressing the unpopular viewpoint opposed to same-sex-marriage has increased markedly since then. See infra, part II.__.
marriage on education, especially upon parental authority and interests in directing the education of children.

Part IV discusses the extent of (largely the absence of) significant statutory and regulatory protection to prevent or curtail detrimental effects of legalizing same-sex marriage on education and on parental rights of objecting families is reviewed. Not only are such protections missing, for the most part, but in general advocates of same-sex marriage favor, desire, expect and promote such impacts – they consider them positive, not negative, and part and parcel of the reason for legalizing same-sex marriage.

Part V argues that there is an analogy from abortion jurisprudence that may provide some protection for parental rights to control the education of their children and protect them against some of the detrimental effects on education from legalizing same-sex marriage. Constitutional protection for parental rights is very limited in the abortion context, as they are in the homosexuality education context. The courts have been very protective of, and given expansive interpretation to, the Supreme-Court- created abortion-privacy doctrines for nearly forty years. It would not surprise me if eventually, similar court-created doctrines will be developed that provide judicial protection for educators to provide curriculum that promotes acceptance of and teaches the moral equivalence to marriage of same-sex relations and relationships.

In Part VI, in Conclusion some recommendations are made for some legal remedies and community action that may

II. Incidents, Patterns, and Trends Showing The Likelihood of Detrimental Impacts of Legalizing Same-Sex Marriage on Education
The impact of legalizing same-sex marriage upon education is no longer a matter of conjecture, hypothesis or speculation. It is a reality; it is happening. Five states and the District of Columbia already have legalized same-sex marriage, and five additional states have legalized marriage-equivalent civil unions (with all the same legal rights in state law as marriage). That trend is not yet over, but seems to be gaining momentum, despite voters in 31 states (all of the states in which the issue has come before the voters) who have resounding rejected same-sex marriage, including 63% of the voters in the 30 states who voted for state marriage amendments that prohibit same-sex marriage as a matter of state constitutional law. The movement is largely anti-populist; fueled by judicial rulings (including at least 13 US court rulings requiring states to legalize same-sex marriage, most of which have been overturned by state marriage amendments or on appeal). The judicial litigation campaign continues; this summer two federal courts
entered decisions that the federal constitutional Equal Protection Clause (and, in one case, also the Due Process Clause) required invalidation of Prop 8 (the state marriage amendment) in California, and section Two of the federal Defense of Marriage Act (forbidding recognition of same-sex marriages in federal laws and programs); if upheld, that analysis would require legalization of same-sex marriage by all states and in all federal laws, agencies, and programs.

As an aside, it is my person prediction that the current U.S. Supreme Court will not interpret the U.S. Constitution as requiring legalization of same-sex marriage (though in candor I must note that some of my well-informed law faculty colleagues, including several who have clerked for Supreme Court justices, believe the Supreme Court will mandate same-sex marriage). However, it is my opinion that eventually (possibly within the next three or four years) the Court (including the vote of “swing” Justice Kennedy) may interpret the Constitution as requiring the legalization of same-sex civil unions equivalent to marriage, which has the same legal effect as same-sex marriage, and, therefore, will have the same impact on education as same-sex marriage.

Access to information about potentially detrimental impacts is difficult to ascertain for at many reasons. For example, the incidents often are embarrassing to the victims, who (like rape victims) often prefer to suffer in silence rather than complain. Also, many of those who complain choose to do so in private using private channels but do not file any public objections, such as a lawsuit, or a formal complaint with the school system; also, when issues are formally raised, the processes are often confidential, to protect the privacy of the individuals. Also, fear of public

reaction (because of reports of intimidating incidents in the past) chill the reporting of some incidents. Also, the success rate of formal, legal objections revealing detrimental consequences in education of legalizing same-sex marriage is low, and that has a daunting effect. Also, the while journalists are generally drawn to most, controversies, mainstream public media today generally is not sympathetic to or interested in reporting incidents of detrimental impact upon education relating to the legalization of same-sex marriage, and that limits access to the information (thank heavens for the internet which provides alternative sources of information).

Despite these obstacles to gathering information supporting the claim that legalizing same-sex marriage will have detrimental impacts upon education, a brief survey of available reports of problematic educational incidents confirms the that legalizing same-sex marriage or unions does generate detrimental and troubling impacts upon education in nearly every state (and nation) where such unions have been legalized, and many other states. Some of those incidents are described below in five categories: (1) ideological indoctrination of students through curriculum and teaching; (2) suppressing dissenting viewpoints, speech, and expressions by students, teachers, guest lecturers, school administrators, and educational organizations; (3) discriminatory hiring, disciplining, firing, grading, preferring personnel and students; (4) ignoring and undermining parental rights and family interests in the moral education of their children; and (5) detrimental impacts upon religions, religious beliefs, religious speech, private religious schools, and religions interaction with education.

In compiling this list, I have not used what is perhaps the most comprehensive list of examples of
B. Incidents Regarding Education in Nations with Same-Sex Marriage and Civil Unions

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

1. Canada

In 1999, the major legal and financial benefits of marriage were extended to same-sex couples in Canada by a decision of the Supreme Court of Canada. Six years later, Canada’s parliament legalized same-sex marriage nationally in 2005.

In 2002, Dr. Chris Kempling, a public high school teacher and counselor in the Quesnel School District in British Columbia was found guilty of conduct unbecoming at teacher and

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1 Clausen, infra note __, at 448. Canada may have “the most extensive legal regime against speech critical of homosexuality.” Id. at 452. In 2003 the Canadian parliament passed a bill (R.S.C. 1985, c. C-46, s. 318) amending the nation's criminal hate-speech law, and adding “sexual orientation” to the list of groups protected against “hate speech” by punishments up to five years imprisonment. Another law bans “hate speech” against homosexuals over telephone lines and computer networks. (The Canadian Human Rights Act, R.S.C., ch. H-6, § 1 et seq. (1985)). Another law forbids “hate speech” in broadcasting. (Broadcasting Act, ch. 11, 1991 S.C. (Can.)) Importation of material deemed to be hate propaganda is prohibited. (Customs Tariff Act, R.S.C., ch. 41, § 114 (1985) (Can.)). The government may prohibit mail delivery when the mails are used to commit an offense. (Canada Post Corporation Act, R.S.C., ch. C-10, § 1 et seq. (1985).) Additionally “all the provinces provide an additional layer of legal protection to homosexuals against such speech, and at least three provinces have shown particular zeal in prohibiting “hate speech” directed against homosexuals.” Clausen, supra at 452-53.


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

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


\[\text{\textsuperscript{15}}\text{Id. See generally Hans C. Clausen, The “Privilege of Speech” in a “Pleasantly Authoritarian Country”: How Canada’s Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty, 38 Vand. J. Transnat’l L. 443, 446-47 (2005). The initial suspension was reduced to one-month suspension, and it was upheld by the British Columbia Supreme court on appeal. \textit{Id.} \]

\[\text{\textsuperscript{16}}\text{Id. at 447.}\]
2008, after receiving further citations from the BC College of Teachers, Dr. Kempling resigned his position with the Quesnel School District and took a job with a private school.17

Also in British Columbia, the government-accrediting agency withdrawal of accreditation to the Teacher Training Program at Trinity Western University, sponsored by the Evangelical Free Church of Canada, because the school requires students to sign an honor code manifesting their belief in Bible verses that condemn homosexual relations as immoral, and the provincial supreme court affirmed that action in 2001.18 To the school accrediting officials and court, that belief requirement showed that the school would unable to inculcate the proper respect for diverse sexual practices that it was the policy of the school authorities to foster.

The next year, the Supreme Court of Canada overruled a local British Columbia school board that had voted to disallow a teacher of kindergarten and first-grade students from using books that promoted the normalization of same-sex relationships.19

The presiding trial judge in the case found that the Board reached its decision out of a concern that parents would object to the presentation of such materials to their young children. Overturning the school board's decision and requiring the inclusion of such books in the curriculum, the Supreme Court of Canada stated that “[t]he Board's concern with age appropriateness was . . . misplaced.”20


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


20 Clausen, supra note __, at 499.
In 2006, the British Columbia Ministry of Education agreed in litigation to adopt and enforce a policy barring parents from opting their children out of discussion of GLBT issues in the schools.21

In Alberta, Pastor Stephen Boissoin wrote a letter to the editor criticizing the promotion of homosexuality in the school system.22 A gay activist, Dr. Darren Lund, filed a complaint of discrimination that resulted in a decision against the pastor by the Alberta Human Rights Commission ordering him to pay $7,000 in damages to the activist, to publish a personal apology in the newspaper, and to cease his anti-homosexual public expressions. In 2008, the Court of Queen’s Bench overturned the Commission’s rulings, but the gay activist filed an appeal.

School Boards in many provinces (notably Ontario, Quebec and British Columbia) require homosexual education in the school system.23 Schools are required to provide resources to adopt a broader, educative approach to deal with . . . issues of . . . homophobia.”24

In January 2010 the Ministry of Education in Ontario, Canada (where same-sex marriage is legal) revealed its new Health and Physical Education curriculum for grades 1 to 8.25 It was announced that it would be mandatory for all publicly-funded schools starting in September 2010.

I read one summary of some provisions:

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21 * (BC memo) (Correns Agreement).

22 Patrick B. Craine, Homosexual Activists Appeals Exoneration of Canadian Pastor Boissoin, id.

23 * (BC memo)

24 * (BC memo)

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

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

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

. . .

Grade 7s are expected to be taught about “using condoms consistently if and when a person becomes sexually active.” A response from the twelve-year-old states that “People who think they will be having sex sometime soon should keep a condom with them so they will have it when they need it.” . . .

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

The public reaction to the Ontario curriculum was so negative that in April, Ontario Premier withdrew the proposed new curriculum, admitting that it was “obvious” that it needed “a serious re-think.”

Moreover, it was reported that under Canadian law: “There is no opportunity for parents to withdraw their children if they disagree with this indoctrination.”

Religious minorities and their schools have been particularly vulnerable. In 2007 it was reported that:

A community of a dozen Mennonite families in Quebec is ready to leave the province rather than succumb to provincial government demands that would require their children to be taught evolution and homosexuality. While the


28 C. Gwendolyn Landolt *Same Sex Marriage has Changed Canada* available at: http://www.realwomenca.com/page/pubanalys9.html (seen 26 Oct. 2010). Id. (“Such programs do not provide balanced instruction on the issue, and the medical, psychological and legal impact of homosexuality are not mentioned.”).
government sees its actions as nothing more than enforcing technical regulations, many view the case as intolerance of Christian faith.29

*United Kingdom*

The British government forced a Catholic school to retain a principal who openly celebrated a same-sex civil union in violation of basic Catholic moral doctrines.30

Spain

The leader of the Russian Orthodox Church in Moscow recently “has decried gay relationship ‘propaganda’ in Spanish secondary school textbooks.”31 Spain, which legalized same-sex marriage in 2005, “has seen a wave of criticism from parents whose children had to use books that teach pupils about gay relationships.”32 The Catholic News Agency reports that a

29 *__ (Forman Charter School memo).

30 *__ <get direct cite>. See generally Maggie Gallagher, Redefining Religious Liberty: Gay Marriage and the Conflict Between Church and State, NAT’L REV. ONLINE, May 27, 2009, available at http://article.nationalreview.com/?q=MDQwMGU5ZjgwNmFiODcxZDgyNTAxYjVmYzY2ZjVjO1TY=.


32 Id.
Spanish government school course teaches that sex can be practiced with “a girl, a boy or an animal.”\(^{33}\)

In Australia, education regulations were proposed in 2008 that would have banned the use of the terms “husband” and “wife” in school curriculum.\(^{34}\)

**B. American Incidents Regarding Education in States with Same-Sex Marriage or Civil Unions**

A brief survey of incidents regarding education relating to same-sex issues shows incidents in nearly state where same-sex marriage or civil unions exist.\(^{35}\)

*California.*

In 2008, Professor June Sheldon was fired from her position at San Jose City College for noting in a Human Heredity class she taught that some research had found a correlation between maternal stress during pregnancy and later homosexual behavior in males.\(^{36}\)

Jonathan Lopez, a student in a Speech 101 class at Los Angeles Community College was shouted down by his professor who called him a “fascist bastard” while giving a speech about his

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\(^{33}\) *See Spanish government course teaches sex can be practices with ‘ girl, boy, or animal,’ Catholic News Agency (3 Feb. 2010), available at http://www.catholicnewsagency.com/news/spanish_government_course_teaches_sex_can_be_practiced_with_girl_boy_or_animal/ (seen 26 Oct. 2010).*

\(^{34}\) Forman Notes. (The regulations were later withdrawn due to parental protests)

\(^{35}\) "Put Incidents into 5 Categories!!!"

Christian faith in which he read the dictionary definition of marriage and cited two Bible verses. The professor refused to give him a grade and told him to “ask God what your grade is.” Lopez; suit against the college speech code was dismissed and that ruling was affirmed on appeal.

Famously,

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

When the teacher of a Fifth-grader did not give her medical treatment after she fell down during recess, her lesbian parents complained and a group of gay activists picketed the school. The district investigated and found that “the allegations were unfounded.” The message of retaliation for denial of special treatment was sent.

Maine.


38 Id.


In Maine the legislature passed a bill legalizing same-sex marriage, but because of citizen petitions, it could not take effect until a popular vote on the subject. A public school counselor who made an ad supporting “Question One” the “peoples’ veto” of the same-sex marriage bill had a complaint filed against him to have his license revoked on grounds that by opposing same-sex marriage, he advocated discrimination contrary to standards applicable to the professionals.\(^{41}\) Ironically, he only acted after another teacher had appeared in a television ad in favor of same-sex marriage and opposing passage of “Question One;”\(^{42}\) yet no complaint was filed against the teacher who supported same-sex marriage, but only against the employee who expressed opposition to same-sex marriage. The complaint ultimately was dismissed, but only after a full investigation and disciplinary hearing, in which the school counselor’s livelihood was at stake.\(^{43}\) The chilling effect of the proceeding and message to all teachers and school employees was clear: if you speak in opposition to same-sex marriage, you risk professional investigation, and your job may be endangered.

In Massachusetts, where state law requires schools to give prior notice to parents and right to opt-out before giving exposing students to material that “primarily involves human sexual education or human sexuality issues,”\(^{44}\) parents in two families filed suit in federal court when books designed to teach acceptance of same-sex relationships and families were given or read to their kindergarten and first-grade children, with no prior notice or opportunity to opt-

\(^{41}\) Top6 cites; BC memo cites

\(^{42}\) Top6 cites; BC memo cites

\(^{43}\) Top6 cites; BC memo cites

out. (At least one of the families was Mormon, and both families asserted the sincerity and centrality of their religious beliefs about the sanctity of dual-gender marriage to their families.) The federal court rejected their claims, finding the law did not apply because the material was not really sex-ed material, but, rather, “[b]oth books were part of the Lexington school system’s effort to educate its students to understand and respect gays, lesbians, and the families they sometimes form in Massachusetts, which recognizes same-sex marriage.” The court also rejected the plaintiff parents’ claims of constitutional protection. Clearly, the legalization of same-sex marriage was a critical legal factor cited in and supporting that judicial opinion.

Controversy has erupted in Massachusetts over the denial of admission of a lesbian couple’s son to a parochial school. The pressure on private, including religiously-based schools to erase values and standards that deem homosexual relations immoral is increasing and may impact hiring and firing decisions.

Scott FitzGibbon has summarized some impacts in Massachusetts public schools, including the memorandum of the Superintendent of the Boston Public Schools celebrating the


46 Id. at 263. See generally Jennifer Gerarda Brown, Peacemaking in the Culture Wars Between Gay Rights and Religious Liberty, 95 Iowa L. Rev. 747, 761-772 (2010).


48 Scott FitzGibbon, Some Observations on Same-Sex Marriage and Its Recognition, May 2009 (copy in author’s possession).
Goodridge decision, and making the chilling declaration that speech that results or bias against gays and lesbians in discrimination (presumably by anyone) will not be tolerated.

It is well-known that David Parker, a Massachusetts’ father whose five-year-old was given a book promoting acceptance of same-sex lifestyles, was arrested for refusing to leave the school when administrators refused to agree not to give such material to his son in the future.49

The Governor of Massachusetts Weld approved a Board of Education measure requiring schools to assist in the formation of Gay/Straight Alliance student groups.50

New Jersey

In New Jersey, an elementary school teacher required all students, including young boys to dress as women for a fashion show during Women’s History Month.51 The Maple Shade Township School Superintendent said it was a misunderstanding and cancelled the event after parents complained.

New York

New York City created and funded the first (but not the only) public high school for GLBT students.52 Separate but equal never worked previously in education,53 and this raises a host of issues about special preferences for (or against) students with same-sex attraction.

49 Id. **

50 * (BC memo).


The spill-over effect in states that have not legalized same-sex marriage or unions is profound. For example, in July 2010 a federal court upheld the decision of Eastern Michigan University to dismiss Julea Ward from its graduate counseling program because she refused to counsel homosexual clients on grounds of her religious beliefs.\(^5^4\) Likewise, in Georgia, Jennifer Keeton, a master’s degree student in the Counselor Education program filed suit asserting First Amendment speech and free exercise claims after she was ordered to complete a diversity sensitivity workshop when faculty members learned of her Christian beliefs in opposition to same-sex relations;\(^5^5\) in August 2010, her motion for preliminary injunction was denied, the court holding that there was not a substantial likelihood that she could succeed on the merits of her claims.\(^5^6\) In Illinois, Ken Howells, a Catholic teacher of Introduction to Catholicism and Modern Catholic Thought was dismissed for giving his students a three-page summary of and lecture about the Catholic Natural Law argument that homosexuality is immoral.\(^5^7\) He was rehired by another department after public uproar. “In 2005 Missouri State University filed a grievance against counseling student Emily Brooker for refusing to complete an assignment to write and sign a letter to the Missouri legislature advocating for homosexual adoption.”\(^5^8\)


\(^5^5\) Id. (Universities demand).


\(^5^7\) Meghan Duke, Can a Catholic professor speak about homosexuality without risking his job? Available at http://www.firstthings.com/article/2010/09/fired-in-a-crowded-theater. When the Alliance Defense Fund threatened to sue the university, and in the face of a lot of public criticism, the university offered Howell a position in another department teaching Introduction to Catholic Thought. Id.

\(^5^8\) Id. (Meghan Duke).
Nationally, the annual “Day of Silence” turns public schools into culture war zones and uses the power of intimidation in a way that is disruptive of the education of all students. In the summer of 2010, the nationally influential Sexuality Information and Education Council of the United States (SIECUS) issued a report hailing “the fundamental paradigm shift in Washington, DC and in states and communities across the country;” and urging the “need to continue to push the boundaries and break new ground” in sex-education in America.

There are indications that the use of public schools and school policies to promote indoctrination favoring acceptance of homosexual relations and lifestyles will continue, if not increase. Gay tolerance materials were mailed several years ago to 15,000 school districts. Concerns about indoctrination of students that homosexual behavior is proper, morally acceptable by teachers and teaching materials is not unfounded. The ACLU recently boasted that “[t]here’s a ton of information about schools issues for lesbian, gay, bisexual, and transgender youth … on the ACLU’s website and elsewhere on the web . . . .” The Williams Institute at UCLA Law School has published and is promoting “The Right to Be Out: Sexual Orientation and Gender Identity in America’s Public Schools, and also promotes “Safe at School: New Policy and Legislation Recommendations Addressing LGBT Safety in Schools.”

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61 (Forman Charter memo) (020530 Haywood School Encourages Gay Teacher Proselytng)

62 (Forman Charter memo) (991123 Gay tolerance booklet sent to 15,000 school systems)


64 Press Release from The Williams Institute, 20Sep. 2010 (copy in author’s possession).
In South Carolina, Irmo High School Principal resigned in 2008 after being required to recognize a gay club for students; he explained “we do not have other clubs at Irmo High School based on sexual orientation, sexual preference, or sexual activity,” and he believed that recognizing the club would endorse students “choos[ing] to engage in sexual activity . . . .”

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

Similar events have been scheduled at schools in many other states as well, apparently encouraged nationally by “the Gay, Lesbian and Straight Education Network, which has promoted a school lesson plan for teaching boys and girls to cross-dress.” After such an event was scheduled at East High School in Nebraska, “[s]chool officials in Des Moines confirmed . . . that at least 80 children whose parents were alarmed by the “Gender-Bender Day” during homecoming week . . . [were removed from public schools and] moved . . . into homeschooling plans.”

In Massachusetts, a judge ordered a school to allow a boy to wear girl’s clothing to classes.

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67 See Forman Memo (070223 Montgomery County Gender-bending Sex Ed); NJ (INSERT); **


69 Id. (some parents said the total number of families who withdrew their children “could be in the hundreds”).

70 * (Forman Charter memo) (001014 Mass Lesbian Judge Orders School Let Boy Wear Girls Clothes at School)
In California, when a transfer high school student who was Mormon was asked by a student if her parents were polygamists; she responded “that’s so gay!” which resulted in a letter of reprimand being placed in her file, but not in the file of the student who has asked her the religiously insulting question in the first place.71  While most such incidents will not become matters of public knowledge, there are news reports of other incidents of harassment by other students of students who express or are known to hold beliefs that homosexuality is immoral.72

Religiously-affiliated universities (including Catholic and Jewish) have been forced to recognize and provide funding for gay clubs on their campuses, and to provide married student housing to same-sex couples.73  Just this summer the Supreme Court of the United States upheld (5-4) a state-funded law school’s (Hastings College of Law in San Francisco) application of its non-discrimination policy to deny Registered Student Organization recognition to a student chapter of the Christian Legal Society, a nationwide association of Christian lawyers and law students dedicated to integrating their faith with their profession, because the CLS requires its members and leaders to adhere to a statement of faith including abstaining from homosexual behavior.74

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71 * (Forman Charter School memo).

72 * (Forman Charter School memo) (Class humiliates students with religious beliefs against homosexuality)

73 * Forman Charter Memo (Yeshiva University student housing; Georgetown University Gay club recognition & funding)

74 Christian Legal Society v. Martinez, ___ U.S. ___ (June 28, 2010).
This list just scratches the surface of the reported troubling effects of legalizing same-sex marriage on education.75

*** ADD examples from FRC cited prior note ***
*** Create appendix ??

The issue is not gays versus others, or students versus teachers, but school officials versus parents to determine who will control the moral education of their children concerning homosexual relations and relationships. As Thomas Sowell of the Hoover Institution at Stanford put it in a column, “High Ideals and No Principles” (October 8, 2008):76

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

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

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

Two countervailing perspectives must be considered: causation and positive consequences. First, causation is always subject to question. The troubling influences of homosexuality in the schools and the negative impacts described above undoubtedly are the result of many factors (social, legal, cultural, political, economic, etc.). This paper does not claim that those detrimental impacts are due solely to the legalization of same-sex marriage. (Indeed, the legalization of same-sex marriage itself is due to many social factors.) Rather, giving the highly preferred, legally privileged status of marriage to same-sex couples, or creating in law an equivalent civil unions status with equal legal benefits for them) exemplifies the legal preference for and social acceptance of the equivalence of same-sex unions as of equal value to individuals and society as dual-gender marriage. The legalization of same-sex marriage is the ultimate expression of legal acceptance of and privilege for same-sex relationships, so it is a good symbol for all of the influences. Moreover, since marriage is such a ubiquitous legal institution, tied to so many important legal benefits, privileges and rights (over 1100 federal statutes and typically several hundred state statutes use marital terms like spouse, marriage, etc.), the legalization of same-sex marriage is a powerful stimulus for and reinforcement of the other social influences. Finally, the ripple-effects of legalizing same-sex marriage in one state are not confined to that jurisdiction. Revolutionary family law developments in some states have profound spill-over effects in other states, as research about the effects of legalization of no-fault

77 * (from L Rev)
divorce forty years ago have shown. The impacts on social values and public policies in other states from such developments in one state occurred then and occur now even before the laws in the others states change.

Second, while the focus of this paper is on the actual and potential detrimental impacts of legalizing same-sex marriage on education, and legal protections and remedies, it must be noted that many of the impacts identified as negative in the preceding sections are not considered negative by some advocates of same-sex marriage. Indoctrination of children and reduction of parental rights to interfere with such indoctrination may be viewed as positive by some GLBT advocates. Moreover, some impacts would be deemed positive by many other people as well.

Many gay activists view existing (and historical) sexual norms (essentially the Abrahamic religion sexual values – Christian, Jewish and Muslim) as hostile to them. They believe that legalization of homosexual relations with the highly preferred and highly privileged status society of marriage (or equivalent to it) is necessary to reform society, to overcome and replace existing heterosexist and fidelity norms with rules and expectations that are equally or more accepting of homosexual relations and other minority forms of sexuality. Some view the preference of sexual liberty over other liberties, including religious liberties, which have had powerful influence historically in inserting and protecting in law the sexual values of the Abrahamic (religions) as overdue, and necessary to fully protect and establish the sexual norms

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79 * * *(Top6 News; LRevs)
and practices of GLBT and other sexual minorities.\textsuperscript{80} Of course, whether homosexual relationships are good or bad and the normalization and social acceptance of homosexual relationships are profound moral issues and the answer will depend largely upon which set of moral values is used as the standard of reference. (Of course, the indoctrination of students to promote their individual and social acceptance of same-sex relationships is normal and moral involves not only the basic moral issue, but other issues as well, concerning the proper role of schools, the limits of government powers, individual liberty, and family autonomy, church-state separation, etc.) Thus, from some normative paradigms, the indoctrination of students about the good or social acceptance of homosexual relations, as equivalent to dual-gender marriage, the suppression of opposing views and proponents, and the reduction of the authority and influence of institutions (families and churches, in particular) which assert objecting perspectives may not be considered negative but may be deemed at least a necessary expedient, if not a positive, celebratory effect of the legalizing same-sex marriage and civil unions.

Apart from the GLBT moral perspective, there also will be some impacts from legalizing same-sex marriage which many other people would agree are positive. (Several experts were invited to present such papers at this symposium, and at least one paper has been submitted, by Professor Mark Strasser, taking this approach.) Such impacts include the reduction of persecution of sexual minorities in schools. School children can be cruel, especially to other children who are different, and there is evidence that children with same-sex attractions (or even with heterosexual attractions, but boys who appear effeminate or girls who act “butch”) have been bullied, harassed, and persecuted in schools when they presented no threat to themselves or

\textsuperscript{80} Chai Feldblum, \textit{Moral Conflicts and Conflicting Liberties}, in Same-Sex Marriage and Religious Liberty 123, \_ (Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, 2008); Roger Severino, \textit{For Richer of Poorer} in What’s the Harm? \_ (Lynn D. Wardle, ed. 2008).
others or education.\textsuperscript{81} Persecution of such children even by teachers and school officials also reportedly has occurred in some cases presenting no risk to themselves or others or education.\textsuperscript{82} There are reports of suppression of legitimate expression, association, and disregard of parental and familial rights of gays and lesbian parents and children, for example.\textsuperscript{83} Many people, including many who oppose same-sex marriage and consider homosexual relationships to be immoral, oppose and are appalled by such bullying, harassment, persecution, oppression and disregard of parental rights. While transitional reporting of such persecutorial incidents is likely to increase in the transitional period (as awareness and popularity grow), it is reasonable to expect that legalizing same-sex marriage will result in less social tolerance for such negative behaviors in the school setting, and that will be generally understood to be a positive impact on education (at least a silver-lining) of legalizing same-sex marriage.

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III. Constitutional Protection of Parental Control of Education of Their Children Against The Detrimental Impacts of Legalizing Same-Sex Marriage on Education

The provision of information or materials about the morality of same-sex relations implicates three sets of interests that have both potential constitutional and ordinary policy implications. First, a long line of Supreme Court cases recognize the right of parents to control the education their children as an aspect of the fundamental constitutional right of parents to raise their children (protected by the notion of parental autonomy – a branch of the right of

\textsuperscript{81} *\_\_.

\textsuperscript{82} *\_\_.

\textsuperscript{83} *\_\_ Gay-Straight Alliance suits.
Second, some cases suggest, and many advocates of same-sex relations and relationships argue, that some constitutional doctrine (particularly privacy) protects the right of minors to receive such information or materials without parental impediment or obstruction. Third, another well-settled line of cases recognizes the state’s interest in and sovereign authority to insure, require, and generally control the basic education of children.

Ironically, some language in the privacy line of decisions of the U.S. Supreme Court support certain claims of both parental rights and minors' rights regarding provision of information and material about same-sex relations, creating an interesting conceptual conflict. However, the actual holdings of the Supreme Court on both branches of the privacy doctrine (parent’s rights and children’s autonomy) have been relatively narrow. To date, the question about the respective rights and roles of parents and children regarding the provision to minors of information and material about same-sex relations has avoided "constitutionalization." That means that the dispositive locus for resolution of the matter about provision of information and materials same-sex relations to children is at the level of the state’s public interest, and the constitutional test is whether the public policy appropriately connected (usually “rationally related”) to legitimate state interests. A brief review of the major cases and their main holdings follows.

A. Parents’ Right to Control the Education of Their Children

The Supreme Court has long recognized that parents are entitled to very broad latitude in

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84 See infra Part __.

85 See infra Part __.

86 See infra Part __.
raising their children. More than sixty years ago, in Meyer v. Nebraska, the Supreme Court of the United States held that the authority of parents to rear their children free of coercive state supervision is one of the unwritten "liberties" protected by the due process clause of the fourteenth amendment. The case involved a 1919 Nebraska law prohibiting any person from teaching any subject in any language other than English or teaching any other modern language than English to students who had not passed the eighth grade. Meyer, a teacher in a school run by the Zion Evangelical Lutheran Congregation, was convicted of violating the law by teaching German (using Bible stories) to a ten year old boy who had not passed the eighth grade. The U.S. Supreme Court reversed the conviction. The opinion of the Court declared that "[w]ithout doubt" among the undefined "liberties" protected by the fourteenth amendment are the rights "to marry, to establish a home and bring up children. . . ." Corresponding to this right of control, "it is the natural duty of the parent to give his children education suitable to their station in life." While Plato and others throughout history have advocated that the state should assume the responsibility of raising children, rather than parents, the Court concluded: "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; . . ." and it could not be doubted "that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the

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87 262 U.S. 390 (1923)
88 Today the fact that he taught from the Bible would be more disturbing to some.
89 Id. at 399.
90 Id. at 400.
Constitution.91

Two years later, in Pierce v. Society of Sisters,92 the Supreme Court again underscored constitutional protection for parental rights when it affirmed that an Oregon law requiring parents of children between the ages of eight and sixteen to send their children to public school for instruction was unconstitutional. A private military academy and a religious order which operated an orphanage and private school successfully challenged the law in federal court. Justice McReynolds, again writing for the Court, reemphasized the rights of parents in vindicating the position of the private schools.

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.93

The next major case was decided in 1944. In Prince v. Massachusetts,94 the Court upheld the conviction under Massachusetts child labor laws of a woman who allowed her nine year old niece and legal ward to join her in selling religious tracts on public sidewalks. Justice Rutlege

91 Id. at 402.
92 268 U.S. 510 (1925),
93 Id. at 534-35.
writing for the Court emphasized family privacy, stating:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that [Meyer and Pierce] have respected the private realm of family life which the state cannot enter.95

"But," the Court further said, "the family itself is not beyond regulation in the public interest. . . ."96 Finding that there were substantial risks of physical and other harm to children from selling religious tracts on busy public streets the Court upheld the conviction.

In 1972 the Supreme Court reaffirmed the principle of parental freedom from state compulsion in deciding matters involving the education and religion of older adolescents in Wisconsin v. Yoder.97 Three Amish parents who refused to send their fourteen and fifteen year old children to school after they graduated from the eighth grade were were convicted of violating Wisconsin's compulsory education which required parents to keep children in school until the age of 16. Attendance at high school was contrary to Amish beliefs and to the Amish way of life. The Wisconsin Supreme Court reversed the convictions holding that they violated the first amendment (freedom of religion), and the U.S. Supreme Court agreed, emphasizing parents' rights as well as freedom of religion. Chief Justice Burger, writing for the Court explained:

> There is no doubt as to the power of a State, having a high responsibility for

95 Id. at 166.
96 Id.
education of its citizens, to impose reasonable regulations for the control and
duration of basic education. . . . [Likewise,] the values of parental direction of the
religious upbringing and education of their children in their early and formative
years have a high place in our society. . . . Thus, a State's interest in universal
education, however highly we rank it, is not totally free from a balancing process
when it impinges on other fundamental rights and interest such as . . . the
traditional interest of parents with respect to the religious upbringing of their
children so long as they, in the words of Pierce, "prepare [them] for additional
obligations."98

The Court found that the effect of two additional years of schooling would contravene the
freedom of religion of both the Amish parents and their children "by exposing Amish children to
worldly influences in terms of attitudes, goals, and values contrary to beliefs, . . . at the crucial
adolescent stage of development,"99 and that additional years of education would not
substantially further any legitimate state interest, then emphasized:

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

. . . To be sure, the power of the parent, even which linked to a free exercise

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98 Id. at 213, 214.

99 Id. at 218.
claim, may be subject to limitation under Prince if it appears that parental
decisions will jeopardize the health or safety of the child, or have a potential for
significant social burdens. But in this case [they do not].

More recently, *** [INSERT case summaries]

The line of cases emphasizing parents’ rights outside of the educational setting is equally
long and clear. They include Moore v. City of East Cleveland, Santosky v. Kramer, Caban
v. Mohammed, etc. *** [INSERT case summaries]

**B. Constitutional Rights of Minors to Receive Information About Same-Sex
Relations**

The notion that minors have "constitutional rights" is of even more recent vintage than the
concept that parents have constitutional rights. "The idea of children having rights is, in many

100 Id. at 223, 234.

101 431 U.S. 494 (1977). Id. at 499 (“[a] host of cases . . . have consistently
acknowledged a 'private realm of family life which the state cannot enter.' . . . Of course, the
family is not beyond regulation. . . . But when the government intrudes on choices concerning
family living arrangements this Court must examine carefully the importance of the
governmental interests advanced and the extent to which they are served by the challenged
regulations.”)

102 455 U.S. 745 (1982) (adherence to the "clear and convincing" standard of proof to
terminate parental rights).

103 441 U.S. 380 (1978) (hearing needed before terminating the rights of the father of
an illegitimate child who had lived with and raised the child); see further, Quillon v. Walcott,
ways, a revolutionary one.\textsuperscript{104} Previously, children were entitled to special state "protections" instead of "rights."\textsuperscript{105} The modern era in which the Supreme Court has applied "constitutional rights" analysis to minors is generally said to have begun with the 1967 decision of the Supreme Court, in In re Gault.\textsuperscript{106} In 1969 the Supreme Court declared in Tinker v. Des Moines School District, that children (actually students) "are 'persons' under our Constitution. They are possessed of fundamental rights of which the State must respect."\textsuperscript{107} However, the state has constitutional authority to regulate children’s behavior in their own best interests. Michael M. v. Superior Court.\textsuperscript{108}

In recent decades, the Court has frequently wrestled with the question of the constitutionality of laws providing disparate treatment for children born out of wedlock or their

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\textsuperscript{104} Wald, supra note _____, at 256.
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The demand for children's rights calls into question basic beliefs of our society. Implementation of many of the rights being claimed for children could involve substantially altering the role of the state toward parents and children and the role of parents toward children.

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\textsuperscript{105} Wald, supra note _____, at 256, 260; Horowitz, supra note _____, at 2.
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\textsuperscript{106} 387 U.S. 1 (1967).
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\textsuperscript{107} 393 U.S. 503, 511 (1969).
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\textsuperscript{108} 450 U.S. 458 (1981) (states constitutionally have the authority to criminally prohibit sexual intercourse among teenagers).
\end{flushright}
parents.  

Many of the recent cases have involved school rules and disciplinary proceedings. For instance, in West Virginia State Board of Education v. Barnette, the Court invalidated a state statute which required all school children to salute the flag, including Jehovah's Witnesses whose church doctrine holds that flag saluting is idolatrous; the Court concluded: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment of our Constitution to reserve from all official control." In Tinker, the Court found that the First "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." See also


110 319 U.S. 624 (1943).

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

112 Id. at 511.
Goss v. Lopez,\textsuperscript{113} Bethel School District No. 403 v. Fraser,\textsuperscript{114} see also Ginsburg v. New York.\textsuperscript{115}

\textsuperscript{113} 419 U.S. 565 (1975).
\textsuperscript{114} 106 S. Ct. 3159 (1986).
\textsuperscript{115} 390 U.S. at 639. However, in New Jersey v. T.C.O., 469 U.S. 325 (1985), the Court limited the parental delegation doctrine. In T.C.O. a 14-year-old girl had been found by a teacher smoking in a restroom at school. She was taken to the Principal's office where she denied using cigarettes at all. Over her objections her purse was taken and searched by an Assistant Vice Principal. In addition to cigarettes, the purse contained a quantity of marihuana, a pipe, plastic bags, many one dollar bills, a list of students who owed her money, and two incriminating letters. This evidence was admitted in a juvenile court delinquency proceeding against her. The New Jersey Supreme Court reversed her adjudication as a delinquent because the search of her purse violated the fourth amendment. The U.S. Supreme Court reversed and held that the probable cause requirements of the fourth amendment do not apply as strictly to children at school as in other contexts. But the Court flatly rejected the school's sweeping argument that the Fourth Amendment did not apply at all because the school officials were merely acting as agents of parents.

Public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parent's immunity from the strictures of the Fourth Amendment.
A line of juvenile court cases holds that minors are entitled to basic procedural protections against deprivations of their life, liberty and property by judicial or quasi-judicial state tribunals. See In re Gault, In re Winship, Breed v. Jones, albeit not the same procedural or substantive rights as adults. Ingraham v. Wright, New Jersey v. T.C.O., Prince v. Massachusetts. There the Court noted:

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. . . . What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.

We think that with reference to the public proclaiming of religion, upon

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117 387 U.S. 1 (1967).


122 See generally

123 Prince v. Massachusetts, 321 U.S. at 168.
the street and in other similar public places, the power of the state to control the
conduct of children reaches beyond the scope of its authority over adults, as is
ture in the case of other freedoms, and the rightful boundary of its power has not
been crossed in this case.124

Despite general deference to parental authority in parent-child disputes, the Supreme Court
has recognized the constitutional right of minors to make at least one specific, profoundly
important decision over parental objection and against parental opposition -- the abortion
decision.125 A reasonable person might assume that abortion is sui generis; the public health
policy concerns that have been asserted to justify the “mature minor” or “best interests”
exceptions to parental involvement, and to allow minors to get abortions in rare situations
without parental notice or consent have no credible extension to provision of information to
minors about same-sex relationships. (Indeed, public health and the mental health of adolescents
would seem to support shielding youth from much information and material about same-sex
relationships, given the serious potential physical and mental health consequences of adolescents

124 Id. at 169-70.

S.Ct. 479 (1987); Hodgson v. Lawson, __*, etc. See also Eisenstadt v. Baird, 405 U.S. 438
(1972) (contraception); Carey v. Populations Services Int’l, 431 U.S. 684 (1977) (contraception
to minors).
experimentation with homosexual relations.)\textsuperscript{126} However, GLBT activists have asserted and it must be assumed that some courts will be persuaded in some cases, that provision of such information (much like provision of contraceptive information and products to minors) is appropriate, if not necessary, to protect sexual-experiment-prone adolescents from “unprotected” and “unsafe” homosexual experimentation practices.

\textbf{C. Constitutional Rights of Parents –vs- Constitutional Rights of Their Children}

Very few cases have come before the Supreme Court of the United States involving direct conflicts between the rights of parents, as parents to raise their children, and children, as individuals, to be free of parental control. But as a general rule the Court has recognized parental authority even when it conflicts with the opposing desires of their children. For instance, in \textit{Ginsberg v. New York},\textsuperscript{127} the Supreme Court upheld the conviction of a magazine seller for violating a state statute prohibiting the sale of "girlie" magazines to minors under seventeen years of age, even though the magazines were not technically obscene, and adults could buy them. While the legal dispute was between the police and a seller of sexually explicit magazines, obviously the minor purchasers wanted to be able to buy the magazines without parental permission; presumably the parents were opposed. The Court suggested that the state could ban the sale because the state was, in a sense, acting as the agent of parents.

\textit{[C]}onstitutional interpretation has consistently recognized that parents' claims to authority in

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\item \textsuperscript{126} **
\item \textsuperscript{127} 310 U.S. 629 (1968).
\end{itemize}
their households to direct the rearing of their children is basic in the structure of our society. . . .

The legislature could properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.128

The Court also acknowledged that adequate parental supervision cannot always be provided and that "[t]he state also has an independent interest in the well-being of its youth."129

Four years later, when the issue of the separate wishes of minors was raised in Wisconsin v. Yoder, the Court brushed it aside as inconsequential. Justice Douglas, in a separate opinion, dissenting in part, argued that if the Amish youngsters wanted to go to school beyond the eighth grade and their parents were keeping them home against their will, the parents could be convicted of violating the compulsory school attendance law. While the majority did not think it necessary to decide that question, the Court was clearly unwilling to endorse the idea that children could be freed from parental direction in matters of education or religion.

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion

128 Id. at 639.

129 Id. at 640.
by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters...\(^{130}\)

Likewise the Supreme Court unequivocally decided a case involving a clear conflict of parents' and minors' choices when it reversed a federal district court which had ruled that parents could not commit their children to state mental health facilities for treatment without an adversarial hearing before a formal tribunal. In Parham v. J.R.,\(^{131}\) the Court held that ordinary commitment procedures in which a doctor must approve the parental decision to commit the child are constitutionally sufficient. The Court underscored the general priority of parents' rights when it acknowledged that some minors may object to being committed by their parents for mental treatment, and further admitted that such commitment could detrimentally stigmatize the children. Yet the Court affirmed parental rights in this clear and unavoidable clash of potential interests. Chief Justice Burger's opinion for the Court explained why.

Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course... Surely, this includes a "high duty" to recognize symptoms of illness and seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their

\(^{130}\) Id. at 231.

\(^{131}\) 442 U.S. 584 (1979).
That some parents "may at times be acting against the interests of their child" creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.132

Rejecting the distinction that the earlier Supreme Court parents' rights decisions had involved state-parent conflicts only, and not parent-child conflicts, the Parham Court declared:

We cannot assume that the result in Meyer v. Nebraska, supra and Pierce v. Society of Sisters, supra would have been any different if the children there had announced a preference to learn only English or a preference to go to a public rather than a church school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.133

Justice Stewart's concurring opinion summarized the basic rule succinctly: "For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it."134

Parental authority over minor children is not absolute, however. Children enjoy some

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132 Id. at 602.
133 Id. at 603-04.
134 442 U.S. 621
substantive rights or interests which they may assert even against their parents and over parental objection. The categorical right or interest which children may be asserted against their parents is the right to be free from substantial and immediate risk to their lives or health. In Prince v. Massachusetts, while giving a ringing endorsement of parental rights, the Court upheld the conviction of a woman for violation of child labor laws in allowing her nine year old niece to sell unpopular religious tracts on public street corners. The Court explained: "It is in the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."135 "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."136 In Wisconsin v. Yoder the Court declared: "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."137 In Parham v. J.R. the Supreme Court noted that past decisions had frequently "recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized. . . ."138 Thus, minors have a right to life and health

135 321 U.S. at 165.

136 Id. at 170.

137 406 U.S. at 223, 234. (Quere--Might not some people view parental refusal to allow a sexually active child to be provided with condoms or other contraceptives while a teenager to "have a potential for significant social burdens")

138 442 U.S. at 603.
which may be asserted by or for them against and over the opposition of their parents. But
presumably the state could act to protect the life or health of a minor even if she and her parents
objected. These Supreme Court cases do not confer on minors a general right to choose to
behave contrary to parental supervision. Rather, they protect the minors' potential to become
independent, mature, and competent enough to exercise judgment, choice, preference and free
will, even when parental oppose that.

The only other significant limitation on the constitutional rights of parents to supervise
their minor children has been in the abortion cases. While conceptually those cases could
provide the foundation for far-reaching reformulation of the balance of constitutional rights of
parents and minors because they involve the potentially expansive right of privacy, the Supreme
Court has deliberately narrowed the holdings in the abortion cases, treating the abortion decision
as a unique exception to the general rule of parental authority.139

D. Balancing the Constitutional Claims

Parental rights advocates are undoubtedly correct in their assertion that providing same-sex
relations information, curriculum, materials, products, or services to a minor is precisely the kind
of a decision that comes within the constitutionally protected right of parents to supervise. It is
fraught with enormous moral, religious, health, and education significance. And it is the kind of
practical and personal decision for which immediate, personal, parental direction is especially
appropriate during "the crucial adolescent stage of development,"140 and for which the past


139 See infra notes ____ through ____ and accompanying text.

140 Yoder, 406 U.S. at 218.
teaching of abstract principles alone may not provide sufficient guidance.¹⁴¹

The primary flaw with application of "parental rights" analysis to resolve disputes regarding the provision of homosexual relations materials to minors is that the Constitution only secures rights of individuals against significant government intrusion. First, the Constitution secures few, if any, rights against private invasion.¹⁴² Moreover, even when the state is involved in the provision of such material or information to minors, the manner and degree of state involvement is of enormous significance to the constitutional analysis. If the state requires or prohibits the provision to minors of homosexual relations information or products, infringement of the constitutional protection of parental authority is direct and unavoidable. Then, the state action could only be sustained if it was necessary to effectuate a compelling state interest.

Although the state has legitimate interests in preparing youth for citizenship, for a vocation, and for a satisfactory personal life, the potential for indoctrination of children in the public schools in values which conflict with those of their parents necessitates limitations on the power of the state to require instruction. Such potential indoctrination conflicts with the First Amendment's protection of freedom of speech, its implicit protection of freedom of thought and the "marketplace of ideas," and the general principle that our government is a

¹⁴¹ See, Doe v. Irwin, 441 F. Supp. at 1253.

¹⁴² Arguably, the Thirteenth Amendment (abolition of slavery) and the Eighteenth Amendment (prohibition of manufacture, sale or commerce of intoxicating liquors) could reach even private conduct. But the Eighteenth Amendment was repealed, and the Thirteenth Amendment has had very little adjudicatory history.
government by consent of the governed. To avoid possible indoctrinative effects, parents must have a constitutionally protected right to excuse their children from instruction which conflicts with the parents' values.\textsuperscript{143}

The Constitution does not provide the answers to all important questions. Just because the issue is of compelling importance does not necessarily mean that the Constitution compels any particular resolution of the controversy. The fact that some resolutions would violate the Constitution if such material and information were provided by the state in some situations (e.g., if only to black teenagers but not to white teenagers, or if the state mandated the provision of such information, or products to all students including private/home-schooled students), or just because it would not violate the Constitution for the state to mandate the inclusion of age-appropriate information in some curriculum contexts, does not mean that the Constitution mandates a specific resolution to the policy issue.

IV. There is Very Little State (and Even Less Federal) Statutory and Regulatory Protection Addressing The Harmful Impacts on Education of Same-Sex Marriage

My research assistant (Alyssa Munguia) and I have found almost no federal statutes and regulations that provide protection against these harmful impacts. Education continues to be primarily regulated by state and local governments.

The federal government can use grants and financial incentives to promote local protection against the harmful impacts on education associated with same-sex marriage. However, there is very little state or federal statutory or regulatory protection specifically addressing these impacts.

\textsuperscript{143} Hirschoff, Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction, 50 So. Cal. L. Rev. 870, 957 (1977); id. at 909, 920-24; see also, George Dent, Religious Children, Secular Schools, 61 So. Cal. L. Rev. 864 (1988).
educational policies. Given political trends nationally, the personnel and policies of the current executive branch, and recognizing that each administration can and usually does try to promote its policy preferences, I suspect that most of the regulatory initiatives on this subject that may come from the federal government will be to encourage, support, or require schools in America to promote acceptance of same-sex relationships and to undermine heteronormativity. I would predict few, if any, efforts to protect against the impacts described above.

Likewise, there are almost no federal laws or regulations that encourage, support, or require schools in America to protect or respect parental authority in this area of education generally, or parental values that oppose indoctrination of children, in particular.

Since state and local governments are more responsive to grassroots concerns and interests, one might expect to find some significant state and local laws, regulations, policies or ordinances that ***

Likewise, ***

As the research of Professor Fossey and Dr. Rogers clearly shows, nearly all of the existing protection for parental control in state education statutes (required prior notice and/or “opt-out/in” provisions) address sex education or health education. As the *Parker* case illustrates, such statutes can be (and in that case were) creatively construed narrowly so as not to apply to provide such protections to parents regarding homosexual relations curriculum, materials, and instruction.

V The Analogy from Abortion Jurisprudence for Protection of Parental Notice and Involvement
There is an analogy from abortion jurisprudence that may provide some protection for parental rights to control the education of their children and protect them against some of the detrimental effects on education from legalizing same-sex marriage. Constitutional protection for parental rights is very limited in the abortion context, as they are in the homosexuality education context. The courts have been very protective of, and given expansive interpretation to, the Supreme-Court-created abortion-privacy doctrines for nearly forty years. It would not surprise me if eventually, similar court-created doctrines will be developed that provide judicial protection for educators to provide curriculum that promotes acceptance of and teaches the moral equivalence to marriage of same-sex relations and relationships. Yet the Court has upheld state laws that require parental notification of, and protect the opportunity for parental participation in, the decision of a child to have an abortion, and have even upheld mandatory parental consent to abortion requirements, subject to narrowly-described exceptions (albeit very liberally applied by most judges) for “mature minors” and “best interests of the minor” (such as where there is risk of parental abuse).

In 1976, just three years after Roe v. Wade was decided, the Supreme Court addressed the issues of parental consent to abortion. In Planned Parenthood v. Danforth,144 Missouri's comprehensive abortion regulation act was declared to be unconstitutional, for the most part. Justice Blackmun (the author of Roe v. Wade) wrote the opinion for the Court. A requirement of parental consent before an abortion could be performed upon an unmarried minor was declared unconstitutional as inconsistent with the privacy right of pregnant minors.

144 428 U.S. 52 (1976).
Three years later, in *Bellotti v. Baird (II)*, the Supreme Court invalidated a Massachusetts statute which provided that a minor seeking an abortion had to try to obtain the consent of her parents; if they would not give consent, she could get an abortion by obtaining an approval of a state court judge upon showing that the abortion would be in her best interests. Justice Powell announced the decision of the Court and rendered a plurality opinion for four justices which emphasized that the defect of the Massachusetts law was the requirement that minors notify their parents in all cases; provision for *ex parte* proceedings in which a minor might have the opportunity to convince a court to allow her to get an abortion without parental consent because of her maturity or that it was in her “best interests” to have abortion without parental knowledge was emphasized by this faction of the Court. Four other justices, however, took the position that the defect in the Massachusetts scheme was the requirement of third party consent (either parental or judicial) in all cases.

In 1981, in *H. L. v. Matheson*, the Supreme Court upheld a Utah law that required doctors performing an abortion upon an unmarried minor to notify her parents "if possible" prior to the performance of an abortion. Chief Justice Burger, writing for the Court, rejected the challenge of an unmarried, 15 year old minor living at home with and dependent upon her parents who challenged the statute as violative of her constitutional right of privacy. The Court emphasized that the Utah Statute did not authorize parental veto, merely parental notification of the minor's desire for abortion. The Court further noted that the statute was reasonably flexible (the "if possible" language), and did not preclude the possibility that "mature minors" might obtain abortions without parental notification upon a showing of their emancipation.

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In 1983 the Court decided *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court by voted of 6-3 invalidated, *inter alia*, a provision of an Akron, Ohio ordinance requiring all minors under the age of 15 to obtain parental or judicial consent for abortion. The Court emphasized that the city could not presume that all minors under the age of 15 are too immature to make an abortion decision or that abortion may never be in their best interests without parental approval. (Justice Sandra Day O'Connor, however, authored a powerful dissenting opinion, joined by Justices White and Rehnquist, criticizing Roe's trimester doctrine as being "on a collision course with itself" and as embodying "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.")

The same day, the Court announced its decision in *Planned Parenthood Association of Kansas, Missouri, Inc. v. Ashcroft*, 462 U.S. 476 (1983), in which it upheld a Missouri statute requiring that minors secure either parental consent or judicial consent (based on a finding of maturity or best interests) before obtaining abortions. The majority noted that parental participation in abortions decisions of their minor children was an important interest, and the Missouri statute accommodated exceptional cases by providing an alternative judicial bypass procedure whereby a pregnant minor could avoid seeking parental consent if she could prove to the court that she was sufficiently mature to make the decision to have an abortion on her own or that the abortion would be in her best interests.

In *Akron II* the Court upheld, by a vote of 6-3, an Ohio law generally requiring that a (one) parent be notified 24-hours before an abortion is performed on a minor child, unless a court order (judicial bypass) was obtained. The Court distinguished parental notification from parental consent and upheld the former without need for judicial bypass. In *Hodgson*, however, the Court struck down a two-parent notification requirement without a judicial bypass provision, but upheld the same requirement with a judicial bypass provision. Four justices in *Hodgson* indicated that a two-parent notification requirement would be upheld with or without judicial bypass on the ground that parental notification is distinguishable from and less burdensome than a parental consent requirement. Four other justices indicated that two-parent notification is so irrational (because of so many divorced, separated and other single-parent families) that it would be unconstitutional even with judicial bypass. One justice (O'Connor) held that with judicial bypass a two-parent requirement is constitutional; without judicial bypass, it is unconstitutional. (The Court had no occasion to consider whether a one-parent notification requirement without judicial bypass is constitutional.)

In 1992, in *Planned Parenthood v. Casey*, the Supreme Court decisively upheld a Pennsylvania's parental consent provision (with judicial bypass for exceptional cases) was upheld by a vote of 8-1 (4+3+1-1). The numerous past decisions holding that parental participation furthers the important governmental interest in the welfare of minors were cited in all three of the opinions for the eight justices that sustained the one-parent parental consent provision. Justice Blackmun, alone, dissented, arguing that the statute was unconstitutional under strict scrutiny because it could delay abortions for minors.

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

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

In the abortion context, the imputed requirement of exceptions for mature minors and for the exceptional cases in best interests of the minor have been justified because of the present, urgent medical situation of a pregnant minor and the short window of time in which an abortion procedure may be provided with minimally acceptable risks to the physical health of the pregnant minor. Those urgent conditions and immediacy of present existing medical condition and evaporating opportunity for the desired medical procedure do not exist in the case of presentation of sex education and homosexuality-acceptance curriculum and materials to
students in public schools. Thus, any imputed constitutional requirement of judicial bypass exception to parental notification or parental consent would be significantly narrower in the context of laws requiring parental notification or consent before. It is likely to be required only when consent of notification of both parents is required, or

** List/summarize cases

VI. Conclusion.

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

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

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

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

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

Fifth, it is time to begin the process of enacting well-drafted state and local laws protecting
parental notice, requiring parental consent, and providing parental and student opt-out protections and procedures. That will not be easy. As the remarks of Professors Peterson and FitzGibbons revealed, even law professors who dare to express concern that legalizing same-sex marriage will harmfully impact education of children are subject to extreme retaliation, vindictive retaliation, ridicule, and hostile harassment (including death threats). That means it is time that Civic and Educational Heroes are needed. In order to get such laws passed, a lot of citizens and school personnel must stand up and speak up and get involved in civic, school, school board, school district, board or education and state legislative processes, and in the elections for such officials. These kinds of protections will not pass themselves, but such proposals will face a lot of social, cultural, political, and professional institutional-establishment opposition, and it will take a lot of hard, patient, determined effort to get them enacted. A lot of grassroots leadership in the community and within the educational organizations, a lot of ordinary moms and dads and teachers and administrators, supporting parental notice, consent, and opt-out provisions will be needed to get such protections enacted.

THANK YOU.