Recognition of Same Sex Marriage and Public Schools: Implications, Challenges, and Opportunities

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I. Introduction

What effect, if any, does recognition of same sex marriage have on our nation’s public schools? The question may be viewed from a variety of perspectives, social, psychological, historical, and even medical. This paper seeks to identify the ways in which the struggle regarding same sex marriage recognition has referenced or impacted public schools from a legal perspective.

One delimitation of this article is that it focuses specifically on the implications of same sex marriage – defined for the purposes of this article as the recognition of a relationship as having the legal status of marriage by a government official with authority to grant marital status – on schools. As such, the article will not address the impact of all same sex romantic relationships on U.S. public schools, as such discussion is beyond the scope of this inquiry. Same sex couples live all over our country and raise children in every state of the union. This article examines simply whether or to what extent the recognition of those couples in marriage has any impact on public schools.

The manner in which this topic reaches public schools is somewhat attenuated, but the author identified three key questions arising in the debates, cases, and literature regarding same sex marriage and schools. The following section provides for readers a brief legal history establishing some context for the debate on same sex marriage recognition. Section III addresses the broad prevalence of same sex parented families in the United States. Building on the second and third sections, Section IV addresses questions regarding whether recognition of same sex marriage would, as some campaigners have suggested, compel legally a curricular change in public schools. Section V addresses the question of whether and to what extent parents have authority to challenge curricular interventions that pertain to same sex marriage. And Section VI considers whether and to what extent the denial of gay and lesbian individuals the right to marry implicates a disability to their own parenting rights.

II. An Abbreviated History of the Legal Status of Same Sex Marriage and Relationships in the United States

In its 1985 decision in Bowers v. Hardwick, the U.S. Supreme Court considered a challenge to a Georgia law criminalizing sodomy, brought by an individual arrested after engaging the consensual sex act with another man in his own home. Relying on prior Supreme Court precedent recognizing a penumbra of privacy rights protecting individual autonomy in the

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1 This work in progress is intended to address the ways that recognition of same sex marriage does or does not relate to legal matters in U.S. public schools and was specifically crafted for the Symposium on the Impact of Same Sex Marriage and Public Education at the J. Rueben Clark Law School, Brigham Young University on October 29, 2010. The author is grateful to the organizers of the conference for their invitation of wide-ranging views on this topic and invites readers to share with her their feedback at or after the conference.

spheres of sexual activity and procreation,³ contraception,⁴ marriage between members of the opposite sex,⁵ and abortion,⁶ the plaintiff brought the claim alleging that the statute violated his rights to engage in private associational activity under the Ninth and Fourteenth Amendments to the U.S. Constitution. The Court framed the question in Bowers as considering whether the recognized Fourteenth Amendment fundamental privacy right extended to confer a “constitutional right of homosexuals to engage in acts of sodomy.”⁷ As framed, the Court held no such right existed. The right to homosexual sodomy was not implicit in the preservation of liberty or justice, nor was it “deeply rooted in the Nation’s history,” the Court found, rejecting the plaintiff’s arguments.⁸

In the decade following Bowers, two important and seemingly opposing developments arose pertaining to the basic relational human rights of gay and lesbian persons. Congress enacted the “Defense of Marriage Act” (“DOMA”), which (1) defines marriage for the purposes of federal law as the legal union of a man and a woman only⁹ and (2) provides that states and other units within the United States are not required to recognize same sex marriages joined under the laws of other states and units.¹⁰ Despite the relative longevity of the statute, litigation continues, fleshing out with some disagreement among federal courts DOMA’s breadth and the extent to which it does or does not violate the U.S. Constitution.¹¹

Additionally, in Romer v. Evans, the U.S. Supreme Court considered the contours of equal protection rights for gay and lesbian individuals. Romer was a challenge of an amendment to the Colorado Constitution that essentially nullified private and public legal protections against anti-gay sexual orientation discrimination, many of which were reflected in locality employment, housing, and human rights ordinances throughout Colorado.¹² Because it was designed to remove these protections and to expressly permit discrimination based on sexual orientation, the Court viewed it as uniquely crafted to broadly disadvantage a distinct group. This aim, accordingly, could not survive even the Court’s rational basis review, which finds that a statute passes constitutional muster where it “bears a rational relation to some legitimate end.”¹³ The court rejected the proposition that the law was designed to protect the freedom of association of those persons who disagreed with homosexuality because its means were so broad sweeping as to bear no rational relation to those aims. Accordingly, as a “status based” law designed to

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⁷ 478 U.S. at 191.
⁸ Id. at 191-92 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).
¹⁰ 28 U.S.C. §1738C.
¹¹ Cf., In re Levenson, 587 F.3d 925 (9th Cir. 2009)(application of DOMA to the Federal Employee Health Benefits Act, 5 U.S.C.S. §§ 8901-8914, was unconstitutional); Massachusetts v. United States Dep’t of Health and Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010)(finding DOMA was enacted in excess of Congressional powers and is unconstitutional); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005)(finding DOMA was enacted within the powers granted to Congress; same sex marriage is not a fundamental right).
¹³ Id. at 631.
“classif[y] persons undertaken for its own sake,” the Colorado amendment could not stand within the confines of the Equal Protection Clause of the Fourteenth Amendment.\footnote{Id. at 635-36.}

Perhaps unsurprisingly after the Court’s decision in \textit{Romer}, the \textit{Bowers} legacy was short lived. Less than two decades after the \textit{Bowers} decision, in \textit{Lawrence v. Texas},\footnote{539 U.S. 558 (2003).} the Court reconsidered the constitutionality of a state statute criminalizing sexual conduct between two consenting adults of the same sex. Framing the question in those terms, the Court re-explored its prior decisions regarding sexual and reproductive rights, including the case law recognizing a Fourteenth Amendment substantive due process right to sexual autonomy in marriage and heterosexual relationships.\footnote{Carey \textit{v. Population Services Int'l}, 431 U.S. 678 (1977); \textit{Roe v. Wade}, 410 U.S. 113 (1973); \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972); \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965).} Uniquely, the Supreme Court overturned its relatively recent opinion in \textit{Bowers}, explaining that the prior opinion “fail[ed] to appreciate the extent of the liberty at stake.”\footnote{530 U.S. at 566.} Refuting historical characterizations and other elements in \textit{Bowers}, the court observed its own “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” and for “protection to personal decisions relating to marriage” and other private personal relationships.\footnote{Id. at 573-74.} Given the prominence of these rights and because the holding in \textit{Bowers} “demean[ed] the existence of homosexual persons,” the Court found that state laws criminalizing sexual activity between individuals of the same sex violate the fundamental liberty and privacy interests protected by the substantive due process clause of the Fourteenth Amendment.\footnote{538 U.S. at 578-79.}

And so explicitly overturning its prior decision in \textit{Bowers}, the U.S. Supreme Court in \textit{Lawrence} recognized that the Fourteenth Amendment protects unequivocally the fundamental rights of individuals to engage in private romantic relationships, including those occurring between two consenting adults of the same sex. In a scathing dissent, Justice Scalia remarked that the majority and concurring opinions “le[ft] on pretty shaky grounds state laws limiting marriage to opposite-sex couples.”\footnote{539 U.S. at 601 (J.J. Scalia, dissenting.).}

In recent years, courts, legislatures, and voters have grappled with whether the state must, should, or should not recognize marriage between individuals of the same sex. Perhaps the most famous battle over recognition of marriage of same sex couples has emerged in California. In 2008, the California Supreme Court found in \textit{In re Marriage Cases}\footnote{183 P.3d 384 (2008).} that state statutes limiting marriage recognition to only heterosexual couples violated the individual right to marry and the equal protection guarantee of California’s state constitution. Within the year, however, by a relatively narrow margin of 52 percent to 48 percent, California voters enacted Proposition 8, a constitutional amendment stating “[o]nly marriage between a man and a woman is valid or recognized in California.”\footnote{Cal Const, Art. I § 7.5 (2010).} After challenges to Proposition 8 were rejected by California state courts, challengers brought their claims to federal court. In \textit{Perry v. Schwarzenegger}, plaintiffs alleged that Proposition 8 violated their federal constitutional rights to marry. The district court
agreed, finding that the California constitutional amendment violated the Equal Protection Clause and the substantive due process protections of the Fourteenth Amendment to the U.S. Constitution because the exclusion of gay and lesbian individuals from the institution of marriage bore no rational relationship to a legitimate state interest. Just days after the Perry decision was decided, the U.S. Court of Appeals for the Ninth Circuit granted a stay halting injunctive enforcement of the District Court’s Perry decision until the appeal could be heard. The result is that marriages between same sex couples legally recognized in the period between Marriage Cases and Proposition 8 are valid, but same sex couples cannot currently be newly married in California.

And so although the U.S. Constitution protects from criminalization the rights of individuals to engage in private sexual and romantic relationships with another person of their choosing, marital recognition of those consenting relationships exists only in an evolving and devolving patchwork of state-specific laws across the country. Six states and districts currently recognize marriage between individuals of the same sex: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia. Nine states recognize domestic unions or civil partnerships in some form. Six states recognize out of state marriages between individuals of the same sex, a benefit they do not by law have to provide under DOMA. Thirty states have constitutional amendments either banning marriage between individuals of the same sex or empowering the legislature to do so. The remaining states statutes either permit recognition of only those marriages between opposite sex spouses or are interpreted as such.

III. The Broad Prevalence of Same Sex Parented Families

Estimates of the prevalence of gay and lesbian parented families vary somewhat, perhaps relating in part to historical gaps in census data collection, reluctance of gay and lesbian individuals publicly to identify as such prior to the Supreme Court’s decision in Lawrence, similar fears about private discrimination, and perhaps other factors. However, some valuable data about same sex parented families can be gleaned from the U.S. Census and other authorities.

Nearly one-quarter of same sex couples in America are raising children. And these families live in every state and in an estimated 96% to 99% of the counties in the United States.

26 Varnum v. Brien, 763 N.W.2d 862 (Ia. 2009)(denial of marriage benefit to homosexual couples did not comport with the equal protection clause of the Iowa constitution).
27 Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003)(refusal to grant marriage licenses to same sex couples violated the liberty and equality requirements of the Massachusetts constitution).
28 RSA 457:46 (2010).
29 15 V.S.A. §8 (2010).
33 Id.; Tavia Simmons & Martin O’Connell, Married Couple and Unmarried Partner Households, Census 2000 Special Reports, U.S. Census Bureau (2003); David M. Smith & Gary J. Gates, Gay and Lesbian Families in the
As of the year 2000, it was estimated that one sixth of gay men had fathered a child and more than one-third of lesbians had given birth to a child.\(^4\) And another study estimated that approximately one fifth of gay males and one third of lesbians were raising children in the home.\(^5\) More recent studies estimate that approximately one-fifth of same-sex couples are raising children in the household.\(^6\) Of course, these figures reflect only those families with two unmarried adults of the same sex raising children. They omit figures regarding gay and lesbian single parents raising children, and so the actual figures regarding children being parented by gay and lesbian parents may likely be even greater.

Additionally, gay and lesbian parents are parenting or otherwise caring for tens of thousands of American children through adoption and foster care each year. It is estimated that approximately 65,000 (or 4\% of) adopted children were living with gay or lesbian parents as of 2000. And approximately 14,000 (or 3\% of) foster children were being cared for in foster homes by gay and lesbian foster parents.\(^7\)

What this data reveals is that gay and lesbian parented families in the United States are a social fact. These families are not, as some would suggest, relegated to certain “gay friendly” communities. Rather, they are raising children in virtually every locale in the United States.

IV. Same Sex Marriage and Schools: Red Herring or Imminent Curricular Shift?

In the American education system, general powers of school governance rest with state government. Typically, states manage their curricular powers by enacting broad statutes establishing threshold curricular requirements, recommendations, or prohibitions and by delegating other curricular powers to state boards and departments of education.\(^8\)

So how do public schools find themselves thrown into the debate over whether to recognize marriage rights of adult same sex couples? Schools offer particularly fertile soil for the so-called “culture wars.” Schools were and are important territory in the civil rights struggle for desegregation, racial equity, and gender equity. And those who advocate for inclusion of sexual orientation into diversity curricula, as well as those who oppose it, recognize that schools offer a unique and valuable field of battle.\(^9\) This happens for many reasons. Concepts like fairness and intolerance take on deeper hues when projected on the education and treatment of

\(^4\) Gary G. Gates, M.V. Lee Badgett, Jennifer Ehrle Macomber, Kate Chambers, Adoption and Foster Care by Gay and Lesbian Parents in the United States, The Urban Institute (March 2007).

\(^5\) Simmons & O’Connell at Table 4.


\(^7\) Gary G. Gates, M.V. Lee Badgett, Jennifer Ehrle Macomber, Kate Chambers, Adoption and Foster Care by Gay and Lesbian Parents in the United States, The Urban Institute (March 2007).

\(^8\) Carolyn Depoian, Comment: Homosexuality, the Public School Curriculum and the First Amendment: Issues of Religion and Speech, 18 Law & Sex. 163, 169-70 (2009).

children. From a practical perspective, advocates recognize what the courts have long appreciated, that we look to schools to reproduce our civic virtues and values. Because public schools provide most children with their first and most enduring experience with government, advocates see schools as a place where culture is made and remade.

Accordingly, some might view the debate about same sex marriage as perhaps in that way no different from prior civil rights battles. Some have additionally, however, alleged that opponents of equal rights for gay and lesbian individuals have often placed children at the center of the debate to foster unfounded fears or prejudice. These scholars and commentators have opined that discourse critical of homosexuality has often in its conceptualization of homosexual persons focused singularly on sexual behavior. That framing tends to provide an over-sexualized conception of gay men and women, goes this argument, a conception that paints them as threat to children, intentionally playing on fear to breed discriminatory contempt.

Much of the most recent public discussion surrounding the recognition of marriage between members of the same sex and public schools arose in the context of the debate leading up to enactment of California’s Proposition 8. Proposition 8 advocates through a series of public advertisements and advocacy alleged that recognition of same sex marriage would require schools to “teach gay marriage,” even to very young students. Proponents for Proposition 8 advanced a ballot argument to voters asserting that the measure “protect[ed] children from being taught in public schools that ‘same sex marriage’ is the same as traditional marriage . . . If the gay marriage ruling [of the California Supreme Court in Marriage Cases] is not overturned, TEACHERS COULD BE REQUIRED to teach young children that there is no difference between gay marriage and traditional marriage . . . We should not accept a court decision that may result in public schools teaching our own kids that gay marriage is ok.”

Additionally, some Proposition 8 supporters advanced television commercials that linked ominously the recognition of same sex marriage and schools. For example, one commercial advertisement depicts a young girl declaring to her mother that she learned in school about a king who married another king and that, as a result, she believed she could marry a princess. A narrator steps into the frame, stating: “Think it can’t happen?” referring to the scene between her girl and her mother. “It’s already happening,” he continued. “When Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry boys. The courts ruled parents had no right to object.” Another narrator’s voice then continued, “Under California law, public schools instruct kids about marriage. Teaching kids about gay marriage will happen here

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41 NeJaime, 32 Harv. J.L. & Gender at 332.
unless we pass Proposition 8.” Implied in the advertisements is not just that children would be exposed to same sex marriage as a social occurrence, but that if gay marriage continued lawfully, schools would be legally compelled to *indoctrinate* students, teaching them that gay marriage was morally right. Those who advocate against recognition of same sex marriage have advanced similar arguments in political contests over the individual right to marry in other states like Connecticut, Maine, and Rhode Island.

Many attribute the focus on schools with the success of anti-same sex marriage measures in California and Maine, for example. Given that and the nature of this conference, discussion is warranted as to whether – as suggested by some campaigners – the recognition of same sex marriage equality rights would incur some legally compelled curricular shift in public schools. To do so, it is relevant to consider the curricular schemes of the states in which lobbyists have launched this argument and the impact, if any, that recognition of same sex marriage might work on those schemes.

*California.* The Proposition 8 advertisement discussed above cited California Education Code § 51933 for the proposition that without the intervention of a ban on recognition of marriage between same sex couples, California schools were in danger of having to “teach gay marriage.” But the cited provision, found in California’s Comprehensive Sexual Health and HIV/AIDS Prevention Education Act – quoted only in a highly selective part in the commercial – actually requires schools provide age appropriate, medically accurate, and objective instruction that “teach respect for marriage and committed relationships.” The statute references a respect for marriage, which some commentators have noted does not require any instruction with respect to same sex marriage specifically and may simply imply respect from the perspective of appreciation of diversity without instruction as to moral rightness. But the statute does not just reference instruction of respect for marriage. It also references the importance of teaching respect for committed relationships, which certainly include same sex relationships, including and especially those in which partners join together with the hope of marrying and to raise children. Accordingly, given that same sex couples’ relationships are already fit within the class of relationships which students should learn to respect under the relevant curriculum statute, the assertion is entirely without basis that recognition of an inalienable right to marry the person of one’s choice – including a person of the same sex – might somehow compel a curricular change on public school children.

46 See id.


52 Id.
And, as other commentators have observed, the provision regarding teaching respect for marriage is, in fact, optional for schools. It additionally emphasizes the importance of allowing parents to opt their children out of sexuality education, of providing parents wide ranging access to materials, encouraging students to consult with parents and guardians regarding sexuality, and recognizing parents as the primary teachers of sexuality information.\textsuperscript{53}

Similarly, California’s diversity curriculum statutes emphasize the importance of providing each student a safe and secure learning environment regardless of her or his sexual orientation. But the statutes regarding diversity do not require any specific teaching about the propriety of same sex marriage. In fact, they do not address marriage at all, and so there is no evidence that the recognition of same sex unions as marriage dictates any change in the diversity curriculum either.\textsuperscript{54}

\textit{Maine.} As in California, opponents of the recognition of same sex marriage in Maine also have supported ballot initiatives with arguments linking the recognition of marriage rights with an at least implied legal compulsion of “teaching gay marriage” in public schools.\textsuperscript{55} In 2009, Maine’s voters passed Question 1, a ballot initiative invalidating a previously enacted law recognizing same sex marriage.\textsuperscript{56} In commercials supporting the measure, a proponent stated that Question 1 “[had] everything to do with schools,” and implored viewers to “vote Yes on Question 1 to prevent homosexual marriage from being taught in Maine schools.”\textsuperscript{57}

These arguments beg the question of whether, as suggested, recognition of same sex marriage rights in Maine indeed would work some legally compelled curricular shift. Maine’s statutes require that children in grades kindergarten through grade 12 receive what is known as “Comprehensive Family Life Education,” including instruction on “human development and sexuality, including education on family planning and sexually transmitted diseases.”\textsuperscript{58} The statute on this curriculum requires as well that lessons be accurate and age appropriate and that they reflect community standards, emphasize the importance of parental involvement in the development of attitudes, build individual decision-making skills, and emphasize abstinence.\textsuperscript{59} And parents have the opportunity to remove their children from such lessons if delivered in public schools.\textsuperscript{60} The Guiding Principles for the Learning Results require that Maine’s students

\textsuperscript{54} Hahn at 166-68, citing Cal. Ed. Code §§ 200-01, 232. See also Health Education Content Standards for California Public schools. Kindergarten through Grade Twelve, Adopted by the California State Board of Education March 2008, \url{http://www.cde.ca.gov/be/st/ss/documents/healthstandmar08.pdf} (last visited October 24, 2010).
\textsuperscript{56} Specifically, Question 1 was curiously titled “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom” and stated: “Do you want to reject the new law that lets same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages?” See Bureau of Corporations, Elections, and Commissions, State of Maine, November 3, 2009 General Election Tabulations, \url{http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html} (last visited October 26, 2010).
\textsuperscript{57} Id.
\textsuperscript{58} 22 M.R.S. § 1902.
\textsuperscript{59} Id.
\textsuperscript{60} 22 M.R.S. § 1911.
responsible and involved citizens able to understand the “diverse nature of society.”61 Maine’s Learning Results, the set of general overarching standards for the state’s public schools, nowhere require explicit teaching about marriage or sexual orientation. And so the implication that same sex marriage recognition would lead to a compelled curricular shift is, again, without a basis in the operative legal authorities governing Maine’s curricula.

**Connecticut.** Like in Maine and California, anti-same sex marriage commentators have urged the public to concern over the link between recognition of marriage rights and public school curriculum.62 In Connecticut, state law compels the state board of education to create guides to assist school districts in composing curriculum on family health, including but not limited to topics such as “family planning, human sexuality, parenting, nutrition and the emotional, physical, psychological, hygienic, economic and social aspects of family life.”63 But exactly how to compose curriculum for such initiatives, or even to teach them at all, is still specifically reserved to local school boards,64 zones in which parents’ and community views carry significant weight. Nor are students required to take part in such programs, if offered.65 Connecticut state law prohibits discrimination based on sexual orientation.66 While not requiring any specific instruction, Connecticut’s early learning standards contemplated well before the Connecticut Supreme Court’s 2008 Kerrigan67 case that sexual orientation and family are components of even young children’s culture. And Connecticut’s state standards contemplated for at least a decade before Kerrigan that schools would teach students to demonstrate respect for others without regard to sexual orientation and other characteristics.68 The Connecticut standards do not require specifically public schools to teach anything about marriage in school and already championed efforts to dispel sexual orientation discrimination well before the Connecticut Supreme Court’s decision in Kerrigan. As such, the claim that same sex marriage would compel schools to “teach gay marriage” is, as in Maine and California, unfounded.

**Rhode Island.** Relatively recent controversy has raised the same curricular debate in Rhode Island.69 Rhode Island statutes mandate that schools teach a health curriculum.70 This includes a mandatory health and family life courses and HIV and AIDS education programs that involve accurate information on pregnancy and transmission and prevention of sexually transmitted infections, with a preference for abstinence.71 Parents may elect to remove their

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64 Conn. Gen. Stat. §10-16d.
67 *See* supra note.
children from these courses. And the Rhode Island standards governing sexuality education, while contemplating that schools will teach students about marriage, also contemplates that students will learn age appropriate lessons about dating and “sexuality and sexual orientation” as well. The latter necessarily contemplates that students will learn about same sex couples. And there is no evidence in Rhode Island’s statutes or standards that recognition of marriage equality for same sex couples necessarily would work a curricular change on the state’s school children.

So a survey of the states in which the “teaching gay marriage” argument has been recently put forth reveals that the argument itself has no teeth. Certainly, given the broad national prevalence of same sex parented families, which live in every state and nearly every county of the United States, schools in other states that teach children about family structure or committed adult relationships by implication should already be acknowledging the presence of those families, regardless of the legal status of the parents’ relationship. And it is difficult to see how this issue is any different than teachings that acknowledge families with divorced or heterosexual unmarried parents, both circumstances conflicting with at least some religions’ views, and yet lawful.

Perhaps most striking about the tenuous connection between political argument regarding same sex marriage laws and school curricular shifts is that same sex marriage laws or opinions themselves do not specifically mention education. Additionally, this researcher found no case or other evidence compelling public schools to teach students any differently as a result of recognition of basic human rights of gay and lesbian persons in either the U.S. Supreme Court’s 1996 decision in Romer v. Evans or in its 2003 decision in Lawrence v. Texas. In fact, recognition of same sex marriages would not require the kind of morally indoctrinating “teaching gay marriage” against which same sex marriage opponents warn, just as failure to recognize gay marriage does not prohibit a curriculum that permits schools to instill in students respect for diversity of families and beliefs, including those relating to same sex relationships and parenting.

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72 Id.
74 In addition to the state curricular schemes discussed above, consider additionally Ohio, a state with a constitutional amendment prohibiting same sex marriage. The Ohio Revised Code requires schools to offer courses in health education, including what Ohio terms “venereal disease education.” O.R.C. Ann. § 3313.60(A)(5)(c)(2010). This curriculum must stress an abstinence only approach to sexuality education, including emphasizing the risks of sexually transmitted infections that accompany sexual activity, the side effects of sexual activity outside of marriage, and recommending that students abstain from extra-marital sexual activity. O.R.C. Ann. §§ 3313.6011(C)(1)-(7)(2010),3301-80-01 (2010). Despite the refusal to recognize same sex marriages, however, Ohio’s education scheme necessarily contemplates the consideration of same sex parented families in age appropriate ways in the public school curriculum. For example, the Ohio Department of Education’s early learning standards contemplate young children sharing their personal family stories and traditions, acts that necessarily will include at least some classes acknowledging children who hail from same sex parented families. They provide that children should learn about social units, like families, as well as differences in the structures and habits of those units. In fact, the early learning content standards advance the quotation, “When all families are valued by society, all of society benefits.” Perhaps most directly dealing with the question of whether to acknowledge same sex parented families in schools, the list of books recommended to fulfill these standards includes the book Heather Has Two Mommies, by L. Newman and Is Your Family Like Mine? by L. Abramchik and B. Cavallo. See http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=1698&ContentID=1629&Content=83592 (last visited October 23, 2010).
But this discussion would be incomplete if simply concluding that curricular change is not legally required by recognition of same sex marriage. We live in a time when anti-gay discrimination and harassment is rampant in our public schools. Devastating enough is verbal harassment, but many instances of sexual orientation-based harassment (including harassment based only on perceived sexual orientation) escalate to even greater public ridicule and violence.\textsuperscript{75} And recent weeks have brought an unbearable rash of suicides of gay and lesbian youth relating to instances of bullying and harassment.\textsuperscript{76} In the debate regarding what schools must, should, or should not teach with respect to same sex marriage and relationships, we must not forget our duty to keep all students safe from victimization and the potential benefits of curricular interventions designed to foster peaceful appreciation of students’ families and identities.

Additionally, even if the campaign rhetoric presented a real connection between curriculum and recognition of same sex marriage – which it does not – those concerned about such curricular measures have other avenues to pursue in advancing their agenda. Given that curricular choices are often a matter of state-, district-, or school-level decision-making, same sex marriage opponents may petition for curricular changes.\textsuperscript{77} And allotting this process to play out is far more just and democratic than denying a class of people basic marriage rights, and the many personal, economic, and political rights and benefits that accompany marriage, to guard against unfounded fears by some that doing otherwise would work a curricular shift in public schools.

V. Parental School Choice, Curricular Control, and “Opting Out”

But it seems that no matter the efforts made to unite disagreeing factions in the debate over the recognition of same sex marriage, some parents will object to curricular interventions relating to same sex marriage and relationships. This controversy has arisen in states with and without same sex marriage equality rights. Accordingly, the discussion now turns to examine the features of parental rights relating to such objections. While these features are somewhat unresolved under current law, some distillable principles can be gleaned from recent court opinions.

Federal courts have long been trying to determine the contours of parents’ rights to opt their children out of school measures with which they disagree. The most relied upon early cases arose in the early twentieth century, largely in response to compulsory school measures designed to inculcate general civic values on all children, especially immigrant children.\textsuperscript{78} In \textit{Meyer v. Nebraska}, the U.S. Supreme Court found invalid a private school teacher’s conviction under a criminal law prohibiting non-English instruction of students in schools. The liberty rights guaranteed to all by the Constitution, the Court explained, protected the teacher’s rights to teach and the parents’ rights to enlist foreign language teaching for their children’s education.\textsuperscript{79}

\textsuperscript{77} Parker v. Hurley, 514 F.3d 87, 107 (2008).
\textsuperscript{78} See \textit{Meyer v. Neb.}, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters 268 U.S. 510 (1925)
\textsuperscript{79} \textit{Meyer}, 262 U.S. at 399-401.
Similarly, in *Pierce v. Society of Sisters*, the Court struck down a compulsory attendance statute requiring without exception that children between the ages of eight and sixteen attend public schools. The requirement, the *Pierce* Court explained, imposed on parents the untenable infringement of their rights to direct their children’s upbringing, by prohibiting that they send their children to private religious schools. Nearly half a century later, the Court again revisited another challenge regarding parent efforts to remove children from an educational setting. In *Wisconsin v. Yoder*, the Court considered whether compulsory education statutes violated the constitutional rights of Amish parents. The Court found Amish children could not be made to attend secondary school without directly impeding their religious practice – by requiring them to pursue courses of study and social pursuits that conflicted directly with their beliefs and by literally delaying their development in the labor of the Amish life. The Court found that the state could not produce interests in the compulsory education statutes that outweighed the Amish parents’ right to exercise their religion by raising their children in the insular Amish religious tradition.

More modern decisions have grappled with questions of what precisely these cases teach regarding parental autonomy to direct their children’s education, and the U.S. Supreme Court has given little guidance. What seems clear is that these cases stand for the proposition that parents may remove their children from public schools where such schools’ teachings and practices directly impact their exercise of basic liberties, such as choosing one’s familiar language and religious practice. At the same time, however, the cases do not interrupt the historical observation of deference to the state in delineating the features of public school instruction.

A. Parent Control of the Curriculum

Perhaps the most noted case regarding parent challenges to the curriculum is the First Circuit’s opinion in *Brown v. Hot, Sexy, and Safer Productions*. In *Brown*, the court considered a parent challenge to a racy school assembly regarding a plethora of sexuality issues, including issues relating to homosexuality and others. Parents and students angered at the school’s decision to put on the assembly alleging that the display violated a variety of their legal rights, including their Fourteenth Amendment right to parent and under the First Amendment’s Free Exercise Clause. *Brown* is less clear as to whether the parents were challenging the constitutionality of the inclusion of the curriculum generally or the school’s failure to notify them of the upcoming assembly and to give them an opportunity to opt out their students, or both. What is clear is that the court received the Brown challenge as parent efforts to dictate the high school curriculum, and it gave that challenge a chilly reception at best. The court explained:

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80 268 U.S. 510.
81 Id. at 573-74.
82 406 U.S. 205 (1972).
83 Id. at 215-16.
84 See, e.g., Charles J. Russo, Same Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children, 32 Dayton L. Rev. 361, 362 (2007)(“In refusing to apply parens patriae to compulsory attendance [in Wisconsin v. Yoder], the Court did uphold the general principle that the state has the authority to regulate education.”).
85 68 F.3d 525 (1st Cir. 2005), overruled on other grounds, Martinez v. Hongyi Cui, 608 F.3d 54, 2010 U.S. App. LEXIS 12454 (1st Cir. Mass. 2010).
We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools.86

B. Parent Notice and Opt Out Requirements

Several courts have held that the Fourteenth Amendment familial right to control one’s children generally does not provide the parent authority selectively to opt a child out of classes or other generally applicable school rules that the parent simply opposes, but some ambiguity regarding the parental opt out rights linger.87 For example, in its 2005 decision in Fields v. Palmdale School District, the U.S. Court of Appeals for the Ninth Circuit found that the Fourteenth Amendment parental right did not grant “parents []a right to prevent a school from providing any kind of information – sexual or otherwise – to its students.”88 Rather, the court explained, while Myers, Pierce, and Yoder demonstrated that parents have considerable authority regarding the choice of whether to send their children to public school, that right “does not extend beyond the threshold of the school door.”89 There has been considerably more controversy, however, regarding the contours of a parent’s right to opt a child out of a school curriculum, such as a curriculum relating in some way to marriage of same sex individuals, to which she or he objects.

The paradigm case in this sphere is Parker v. Hurley.90 In Parker, two sets of parents brought claims alleging that by exposing their elementary school children to books that depicted same sex couples the school violated their Fourteenth Amendment familial right to raise their children as well as their First Amendment Free Exercise rights to practice their religion.91

The two plaintiff families in Parker rested their claims in their asserted right to notice and opt out of public school curriculum referencing the existence of same sex partnerships. The Parkers alleged that the district violated their parental rights by refusing to give them notice and the opportunity to opt out regarding a book sent home with their child in a “diversity book bag.” The book was entitled, “Who’s in a Family?” It depicted various kinds of families, including families with same sex parent couples, and stated that a family is composed of those who love

86 68 F.3d at 533-34.
87 See Parker v. Hurley, 524 F.3d 87, 102 (1st Cir. 2008)(collecting cases); Leebaert v. Harrington, 332 F.,3d 134, 139-42 (2d Cir. 2003).
88 427 F.3d 1197, 1206 (9th Cir. 2009).
89 Id. at 1207.
90 514 F.3d 87 (1st Cir. 2008).
91 Id. at 90.
one another most. The Parkers demanded that "no teacher or adult expose [their child] to any materials or discussions featuring sexual orientation, same-sex unions, or homosexuality without notification to the Parkers and the right to 'opt out.'" Apparently, the combination of "Who’s in a Family?" and the school’s refusal to provide notice and an opt out opportunity at the mere mention of the existence of sexual orientation or same sex-parented families so angered Mr. Parker that he refused to leave the school and asserted his demand to the point of his arrest. The family later asserted their objections when the child’s first grade classroom contained two books that referenced families with same sex parents as well. The second set of parents alleged that their family’s parental and free exercise rights had been violated when a teacher read to their son’s second grade class a book entitled “King and King” about a prince who marries another prince, without further discussion.

Parker left unresolved numerous aspects of free exercise jurisprudence as applied to public school curricular notice and parental opt outs. First, the court declined to identify specifically a test that applied to such claims. The court considered carefully several tests articulated by the U.S. Supreme Court, including the Court’s decision in Employment Division v. Smith, which held that neutral and generally applicable statutes that have an incidental benefit on religious practice need not be supported by a compelling state interest but instead must simply be supported by a rational basis to comport with the Free Exercise Clause. The court rejected the Smith case to Parker because the families were not suggesting that they had been punished for violating some general rule, nor was there even a specific rule requiring the introduction of the disputed books into the curriculum. The court likewise considered and rejected the Supreme Court test in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, which found invalid any statute targeting a specific religious group. The Parker court additionally considered but did not specifically apply the Supreme Court’s reasoning in Sherbert v. Verner, which held that in individual benefit determinations, the government may not substantially interfere with an individual’s central religious belief or practice unless doing so is justified by a compelling state interest. Likewise, joining the Second Circuit in its 2003 decision in Leebaert v. Harrington, the court rejected an allusion to a hybrid rights standard articulated in Smith’s dicta that some have suggested prohibits the state from burdening a religious parental exercise unless for a compelling state interest.

92 Id. at 92-93.
93 Id. at 93.
94 Id.
95 Id.
96 494 U.S. 872 (1990). Applying Smith to a free exercise challenge of a school assembly covering topics of sexuality and sexual health in Brown, the U.S. Court of Appeals for the First Circuit found that the racy assembly did not violate parents Free Exercise rights because its imposition was neutral, generally applicable. See 68 F.3d at 538-39.
98 Parker, 514 F.3d at 96.
100 As the First Circuit noted in Parker, the lasting impact of Sherbert is unclear, as at least one Supreme Court case has referred to its rationale as having been rejected in Smith. See 514 F.3d at 96 n.7 (quoting Gonzales v. O Centro Espirita Beneficentu Uniao do Vegetal, 546 U.S. 418, 424 (2006)).
101 332 F.2d 143-44.
102 Id. at. 98-99.
Identifying the appropriate test was unnecessary, the court explained, because each test required some showing that the complained of actions burdened the plaintiffs’ religious practice in some way, and in *Parker*, the First Circuit explained, the plaintiffs failed to show any “constitutionally significant burden” on their rights. The Court distinguished the claims from Supreme Court’s opinion in *Yoder*, noting that the plaintiffs in *Parker* seemed to be asking for the opposite of what the Amish parents sought in *Yoder*. Whereas the *Yoder* plaintiffs sought the opportunity to retreat from public education because any such schooling would unilaterally and undeniably interfere with their religiously-determined way of life, the *Parker* plaintiffs sought to engage their children in the public school but to be free of those aspects of the curriculum even referencing social phenomenon denounced by their religion. The free exercise right, the court explained, simply did not require public schools to “shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them.”

At least one commentator has opined that challenges like *Parker*, those which allege that the “mere exposure” of one’s children to the existence of family structures or relationships of which their religions disapprove inherently and unresovely at odds with the concept of pluralism and tolerance underlying American civic exchange and education. And the view that the Free Exercise Clause does not require schools to avoid mere exposure of students to ideas objectionable to their and their parents’ religions is reflected in the Sixth Circuit’s 1987 decision in *Mozert v. Hawkins County Board of Education*, in which the court rejected parent claims that the subjection of their children to reading materials they believed included concepts antithetical to Christianity violated their free exercise rights.

This view is also in line with the practical implications of modern U.S. public school classrooms. Imagine, for example, a teacher leading a class discussion on family and community, common in various states as referenced in curricula above. While addressing the concept of family is relevant to student development, each student brings with her varying family stories. And many of those stories, not just those of children with same sex parents, will implicate some kind of activity that may not be blessed by the religion of every child in the room, such as children whose parents had them when unmarried, who are divorced, who are remarried after a divorce. Imagine the practical impossibility of acknowledging those varying family structures and providing the parents of each student whose religion may object to them with notice and the opportunity to remove their children. The practical effect of such a duty, given the plurality of religious beliefs among U.S. public school children, would be to make it virtually impossible for a teacher to address those aspects of families and communities. Perhaps that is, at least in part, some of the intent behind such broad sweeping opt out requests. And though the contours of a free exercise duty to opt out a child may be less clear, courts have

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103 Id. at 99.
104 Id.
105 Id. at 106-07.
106 NeJaime 32 Harv. J.L. & Gender at 362-64; See also Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
107 Id. at 1063-64, 1067.
consistently held that parent attempts to dictate the curriculum’s conformity with personal religious beliefs is not within the ambit of personal rights guaranteed by the U.S. Constitution. 108

Parker did not, as some would suggest, foreclose entirely a parent or child’s free exercise right to opt out of a curricular intervention when it comes to discussion of marriage between individuals of the same sex. And while some, as in the advertisements for Proposition 8, decry the case as requiring children to be subject to school lessons in which teachers “teach gay marriage,” 109 a more balanced view of the case reveals the best estimation of the circumstances under which a parent or student’s opt out request may carry constitutional weight. Significantly, the Parker court rejected the proposition that Brown v. Hot Sexy and Safer Productions applied on the grounds that the age differences between the two groups of children warranted greater parental deference, implicating a stronger interest in notice and opt out opportunities for younger children given the influential role that elementary teachers carry in the lives of children. 110

108 Parker, 524 F.3d at 102 (collecting cases).
110 Id. at 100. A related point worth discussion in the context of the conference is that some chafe at the courts’ reluctance to impose on schools the duty to inform parents each and every time the curriculum references marriage of people of the same sex. Holders of this view remark at a perceived unfairness when the courts find constitutionally infirm religiously-tinged public school ceremonies or teachings but do not limit school lessons that, in their views, conflict with religious teachings to which they adhere. For example, in many cases challenging public schools’ observance of religious teachings or practices, the U.S. Supreme Court has found such practices unconstitutional, often on the grounds that a school-sponsored religious exercise has a powerful and even coercive effect on students, given the role that the public school plays in the lives of students. See generally, Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1984); School District of Abington Township v. Shempp 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). This doctrine, to some, smacks of inconsistency when compared with courts’ reluctance to prohibit schools from teaching messages that they find conflict with their own religious views, which they then view as antireligious, as in Parker, 514 F.3d at 87 or Brown, 68 F.3d 525 (1st Cir. 2005).

The distinction in treatment between the two kinds of teaching, however, is borne out of the unique respect in our nation’s constitutional jurisprudence for the preservation of religion and its independence from government control or intrusion, embodied substantially in the Establishment Clause of the First Amendment. In its 1963 opinion in Engel v. Vitale, the Court explained at length why it is so important to guard jealously Establishment Clause principles. The Court observed that the “first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.” Id. (emphasis added). Accordingly, “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief,” the Court explained, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” Id. at 431. To avoid the religious persecution and corruption that pervaded the English system from which the Framers broke away, the Court observed, the Establishment Clause endures.

Perhaps anticipating misunderstanding of their opinion in Engel, the majority dismissed claims that the prohibition against school-led prayer was antireligious. “It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer,” the Court observed. “Nothing, of course, could be more wrong. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.” Id. at 434-35. Engel remains a reminder of how the Establishment Clause aims to preserve the sanctity and independence of religion as much as the integrity of government. Accordingly, the complained of different treatment is granted precisely because of the sacred place in our jurisprudence for religious freedom.
Additionally, the court pointed specifically to the kinds of interference with religious beliefs that—unlike mere exposure—might trigger a child or parent’s free exercise rights. “[T]he government may not,” the court explained, “(1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma.” 111 Additionally, while careful to avoid identifying exactly what actions would amount to a free exercise violation, the court noted with emphasis that the boys were not forced to read a “constant stream” of books affirmatively advancing marriage between same sex partners. 112 The Parker court’s conception was reflected as well in the Sixth Circuit’s Mozert decision, which by negative implication also shed light on the kinds of activities that might trigger an opt out requirement under the Free Exercise Clause: forcing the student to engage in an act that violated her or his religion, to “affirm or deny a religious belief,” or to “engage in performance or non-performance of a religious exercise or practice.” 113

Additionally, though not addressing Free Exercise claims, the District of Maryland’s 2005 decision in Citizens for a Responsible Curriculum v. Montgomery County Public Schools 114 identified aspects of a curriculum relating to sexuality that, the court’s measure, ran afoul of the constitution. Where the revised curriculum, which the plaintiffs challenged on the grounds that it was overly supportive of homosexuality, refuted religious beliefs regarding the moral rightness of homosexuality, indicated a preference for religions that viewed homosexuality in a more welcoming manner, and expressed contempt for religious sects that condemned homosexuality, the court explained, the curriculum did not comport with the most basic tenets of the Establishment Clause of the First Amendment to the U.S. Constitution. 115

So some distillable principles governing parental rights to notice and the opportunity to opt out of education programs that might advance favorably education regarding same sex marriage—which as explored in the prior section is likely not required by the recognition of this right—are identifiable. Certainly, parents have the right to remove their children from the public school sphere. And some commentators have alleged that a religious world view that cannot withstand even the mention of the existence of contrary views and practices may not, in fact, be practically consistent with public school attendance. 116

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111 Parker, 514 F.3d at 103 (quoting Smith, 494 U.S. at 877).
112 Id. at 106-07.
113 827 F.2d at 1067.
115 Id. The court in Citizens additionally opined that the school’s curriculum, which advanced a decidedly accepting curriculum relating to homosexuality, additionally violated the First Amendment’s prohibition on viewpoint discrimination, indicating that the failure to provide a balanced range of views on homosexuality violated the First Amendment. Id. at 32-35. While the court’s Establishment Clause reasoning is cogent, the weight of the court’s free speech reasoning is less certain. The U.S. Supreme Court has held that schools may limit school sponsored speech for legitimate pedagogical reasons. Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988). The First Circuit recognized that encouragement of acceptance for diversity, including diversity based on sexual orientation, is indeed a significant interest for a public school. And in Mozert, the Sixth Circuit rejected the theory that schools must be made to provide balanced information regarding sexuality, noting that balance in religious terms was impossibly subjective and that efforts to seek religious balance might tread impermissibly into the territory of actions aimed at or with the primary effect of advancing religion or of excessive entanglement. 827 F.2d at 1064-65.
116 NeJaime at 362-64.
VI. Same Sex Marriage and Greater Certainty for Schools and Parents?

As discussed at length above, the legal recognition of the rights of same sex couples to wed would not likely compel schools to “teach gay marriage,” as same sex marriage opponents have suggested. The recognition might nonetheless have some positive implications for schools, however.

In those locales where same sex parents are prohibited from marrying, some same sex partners raising children are – in contrast to their heterosexual counterparts – prohibited from becoming a legal parent to the children in whose upbringing they share.\(^{117}\) A significant percentage – some estimate up to two-thirds – of children being raised in households by gay and lesbian couples live in areas where at least one of their parents cannot form a legal relationship to them due to marriage and adoption inequality statutes.\(^{118}\) Children denied the right to a legal relationship with one of their parents are denied the security that comes with that relationship, such as the right to financial support in the event that the parents separate, health insurance benefits through the parent’s workplace, survivor benefits if the unrecognized parent dies, and others.\(^{119}\) This reduced certainty and security worked upon children likely carries with it a variety of implications for schools. And so recognition of same sex marital relationships may affect schools in that recognition of committed loving same sex relationships between adults caring for school children might very well bring to those children greater certainty and security.\(^{120}\) Many view efforts that provide greater security for children as having a positive impact on schools.

From the perspective of school laws that recognize school-related parental rights, a same sex partner caring for a child as if her or his natural child might experience some obstacles to exercising parental rights regarding the child, but in intact relationships these obstacles can be ameliorated. For example, the Family Education Rights and Privacy Act (“FERPA”) grants parents the right to access their children’s education records, to opt out of directory listings, to challenge the content of student records, to release the records to others, to receive notice if the records are subject to a subpoena, and others.\(^{121}\) The statute defines a “parent” as a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.\(^{122}\) While perhaps more cumbersome and less certain than the rights enjoyed by a married heterosexual parent, conceivably, a school could release student records to a non-parent same sex partner caregiver either with the parent partner’s permission or by treating that person as an “individual acting as a parent” within the meaning of the regulations. Similar concerns apply to


\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) 20 U.S.C. § 1232g et seq.

\(^{122}\) 34 C.F.R. § 99.3.
same sex partner caregivers to children eligible for services under the Individuals with Disabilities Education Act. But the matter of records access and parental decision-making intensifies if such relationships sever or in the event of the loss of the legally recognized parent, potentially leaving one partner with little or no rights to a child for whom she or he has acted as a parent. Additionally, matters of custody might be more complicated for schools, such as when there are disputes between same sex parents, or when the legal parent is unable to care for the child. By recognizing as marital partners same sex parent couples who wish to enter the institution, states could ameliorate or remove entirely this uncertainty, which creates unnecessary ambiguity for families and schools alike.

VII. Conclusion

If in coming years curricular shifts are observed relating to the acknowledgment of same sex relationships and reduction of sexual orientation discrimination, those trends likely will be due more to social transformation than to any legal change recognizing the right to marry for same sex couples. And those who wish to remove their children from school programming relating to the topic may have options for doing so where their desire is consistent with the pluralist nature of American public schools. But the debate about same sex marriage and public schools contemplates parental rights in other ways as well, and refusal to recognize marriage relationships, when combined with adoption laws, may in limited circumstances deny same sex partner parents and their children certain benefits enjoyed by families headed by married heterosexuals.

123 See 20 U.S.C. § 1401 (2010)(The term parent includes a natural or adoptive parent, foster parent, guardian, an individual acting in the place of a parent with whom the child lives or an individual legally responsible for the child’s welfare).